

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BRIAN WILLIAMS,

File No. 19001029.01

Claimant,

A P P E A L

vs.

D E C I S I O N

SECOND INJURY FUND OF IOWA,

Defendant.

Head Notes: 1402.20; 1402.40; 1803;
1803.1; 3202; 3203

Claimant Brian Williams appeals from an arbitration decision filed on February 21, 2023. Defendant Second Injury Fund of Iowa (the Fund) responds to the appeal. The case was heard on October 14, 2022, and it was considered fully submitted in front of the deputy workers' compensation commissioner on January 13, 2023.

In the arbitration decision, the deputy commissioner found the Division of Workers' Compensation has subject matter jurisdiction over this case because the alleged injury to claimant's left lower extremity arose from a separate and distinct incident, and/or cumulative trauma from his discrimination claims filed with the Iowa Civil Rights Commission. The deputy commissioner found claimant failed to meet his burden of proof to establish he sustained a first qualifying loss entitling him to benefits from the Fund because the deputy commissioner found the first injury was to claimant's brain and not to a hand, arm, foot, leg, or eye, and the deputy commissioner found the remaining issues are moot.

On appeal, claimant asserts the deputy commissioner erred in finding claimant failed to prove he sustained a first qualifying loss to his right leg. Claimant asserts the deputy commissioner erred in relying on an internet web page that was not introduced into evidence at hearing. Claimant asserts he proved he sustained a first qualifying loss to his right leg and a second qualifying loss to his left leg, entitling him to industrial disability benefits from the Fund, at the rate of \$1,140.68 per week.

The Fund asserts on appeal that the arbitration decision should be affirmed in its entirety.

Those portions of the proposed arbitration decision pertaining to issues not raised on appeal are adopted as part of this appeal decision.

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 17A.15 and 86.24 (2019), the arbitration decision filed on February 21, 2023, is affirmed in part, and is reversed in part with my additional and substituted analysis.

Without additional analysis, I affirm the deputy commissioner's finding that the Division of Workers' Compensation has subject matter jurisdiction over this case because the alleged injury to claimant's left lower extremity arose from a separate and distinct incident, and/or cumulative trauma from his discrimination claims filed with the Iowa Civil Rights Commission.

With the following additional and substituted analysis, I reverse the deputy commissioner's finding that claimant failed to prove he sustained a first qualifying loss. I find claimant proved he sustained a first qualifying loss and a second qualifying loss entitling him to Fund benefits.

Claimant filed a petition against Westside Auto Pros, defendant-employer, and its insurer, defendant Federated Insurance, alleging claimant sustained a cumulative injury to his left lower extremity while working for Westside Auto Pros, which manifested on February 4, 2019. Claimant also alleged he was entitled to benefits from the Fund for a first qualifying injury to his right leg on March 31, 1963, from cerebral palsy, and the second qualifying work-related injury to his left lower extremity on February 4, 2019.

Westside Auto Pros, Federated Insurance, and claimant entered into a full commutation which was approved by the Workers' Compensation Commissioner on August 24, 2022. (Ex. 3) Westside Auto Pros and Federated Insurance and claimant agreed claimant sustained seven percent permanent partial disability of his left lower extremity as a result of the February 4, 2019, work injury, which entitles claimant to receive 15.4 weeks of permanent partial disability benefits. (Exhibit 3, p. 1) Claimant's claim against the Fund proceeded to hearing.

Under Iowa Code section 85.64:

If an employee who has previously lost, or lost the use of, one hand, one arm, one foot, one leg, or one eye, becomes permanently disabled by a compensable injury which has resulted in the loss of or loss of use of another such member or organ, the employer shall be liable only for the degree of disability which would have resulted from the latter injury if there had been no preexisting disability. In addition to such compensation, and after the expiration of the full period provided by law for the payments thereof by the employer, the employee shall be paid out of the "Second Injury Fund" created by this division the remainder of such compensation as would be payable for the degree of permanent disability involved after first deducting from such remainder the compensable value of the previously lost member or organ.

Thus, an employee is entitled to Fund benefits if the employee establishes: (1) the employee sustained a permanent disability to a hand, arm, foot, leg, or eye, a first qualifying injury; (2) the employee subsequently sustained a permanent disability to another hand, arm, foot, leg, or eye, through a work-related injury, a second qualifying injury; and (3) the employee has sustained a permanent disability resulting from the first and second qualifying injuries exceeding the compensable value of the "previously lost member." Gregory v. Second Injury Fund of Iowa, 777 N.W.2d 395, 398-99 (Iowa 2010).

The parties submitted scant evidence at hearing regarding claimant's alleged injuries. Claimant submitted the report of J. Joe Hawk, M.D., into evidence. The Fund submitted no medical evidence at hearing.

Claimant testified he was born prematurely and developed cerebral palsy. (Hearing Transcript p. 15) As a result of his premature birth, claimant had to wear braces on his legs until he was in the third or fourth grade. (Tr. pp. 15-16) Claimant stated he has difficulties with balance and flexibility in his legs, but he has not had any other problems anywhere else in his body as a result of his cerebral palsy. (Tr. pp. 15-16, 38) Claimant explained the tendons and ligaments in his legs were not fully developed, so he went to Easter Seals for stretching to try to get his legs to bend. (Tr. pp. 15-16)

Claimant testified he sustained an injury to his left lower extremity while working for Westside Auto Pros, which became worse over time. (Tr. pp. 17-18) Claimant sought treatment from Dr. Hawk, and Dr. Hawk referred claimant to Eric Barp, D.P.M., a foot and ankle specialist. (Tr. p. 18) Claimant stated Dr. Barp performed an ankle fusion, which has affected the balance on claimant's left side. (Tr. pp. 18-19) Claimant stated he has difficulty standing since his ankle fusion. (Tr. p. 21) Due to a lack of flexibility, it is very hard for him to squat or do anything where he has to get on his knees. (Id.)

Dr. Hawk performed an independent medical examination ("IME") for claimant on September 12, 2022, opining claimant sustained a cumulative injury to his left lower extremity on February 4, 2019, and he assigned seven percent permanent partial impairment under the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"). (Ex. 1, p. 1)

With respect to claimant's right lower extremity, Dr. Hawk opined:

Mr. Williams has also been diagnosed with Cerebral Palsy. . . . Regarding his Cerebral Palsy I would calculate his PPI using the [AMA Guides]. For his right ankle, I referred to Table 17-11 Ankle Motion Impairment Estimates on page 537. Plantar flexion of 25 degrees although somewhat decreased does not qualify him for a rating. Dorsiflexion of 12 degrees would also not qualify for a rating. Using table 17-12 on p537; Inversion of 15 degrees would given him 2% LE impairment, Eversion of 12 degrees would not qualify for an impairment. Using Table 17-10 Knee impairment on p. 537: Flexion of 102 degrees would be a mild 10% LE impairment, Extension lacking 4 degrees would not qualify for a rating. Adding his value of 2% for the right ankle with 10% for the right knee would be 12% of the right lower extremity. Using Table 17-3 Whole Person Impairment Values Calculated From Lower Extremity Impairment on p527 would convert to 12% Lower Extremity to a 5% Whole Person Permanent Partial Impairment rating.

(Id.)

Dr. Hawk recommended permanent restrictions of no walking on uneven ground, no climbing ladders, no bending or squatting, no standing for more than 15 minutes every 60 minutes, and no lifting, pushing, or pulling over 20 pounds. (Ex. 1, p. 1)

The deputy commissioner found claimant failed to prove he sustained a first qualifying loss to his right lower extremity, finding claimant's injury results from an injury to the brain, which is not a scheduled member, relying on a web page from the Centers for Disease Control and Prevention. Claimant asserts the deputy commissioner improperly relied on evidence outside the record in reaching his conclusion. The Fund asserts the deputy commissioner properly relied on the reference, noting the Iowa courts have recognized the use of a dictionary to define terms in cases.

Under Iowa Code section 17A.12(6), the record in a contested case includes:

- a. All pleadings, motions, and intermediate rulings.
- b. All evidence received or considered and all other submissions.
- c. A statement of all matters officially noticed.
- d. All questions and offers of proof, objections, and rulings thereon.
- e. All proposed findings and exceptions.
- f. Any decision, opinion, or report by the officer presiding at the hearing.

The parties did not enter the webpage into evidence at the hearing. The deputy commissioner did not provide the parties with notice he was going to rely on the webpage before issuing the arbitration decision.

The Iowa Supreme Court has recognized when the legislature has not defined a term in a statute, the court may consider the term in the context in which it appears and applies in the ordinary and common meaning of the term. Rameriz-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 769 (Iowa 2016). The deputy commissioner conducted research on his own not to determine the plain and ordinary meaning of a term in a statute, but rather to secure a medical opinion defining what is cerebral palsy consistent with the Fund's argument. I find the deputy commissioner erred in conducting his own research to find a medical opinion outside of the record established at hearing.

Dr. Hawk assigned 12 percent permanent partial impairment of claimant's right lower extremity. The Fund did not secure an opinion from any expert supporting its assertion claimant's injury is to the brain and body as a whole. I find claimant met his burden of proof to establish he sustained a first qualifying injury to his right lower extremity.

Dr. Hawk also assigned seven percent permanent impairment of claimant's left lower extremity for the February 4, 2019, work injury. His opinion is supported by the July 27, 2022, opinion from Vaun DeJong, D.O., which is attached to the full commutation between claimant, Westside Auto Pros, Inc. and Federated Insurance, for the February 4, 2019, work injury. (Ex. 3, p. 4) The opinions of Dr. Hawk and Dr. DeJong are unrebutted. I find claimant has met his burden of proof to establish he sustained a second qualifying injury to his left lower extremity. I also find the restrictions assigned by Dr. Hawk are claimant's permanent restrictions.

Under the schedule, the total loss of a leg is 220 weeks of permanent partial disability (PPD) benefits. Id. § 85.34(2)(p). 12 percent of 220 weeks is 26.4 weeks. Seven percent of 220 weeks is 15.4 weeks. The first and second qualifying losses total 41.8 weeks of PPD benefits. Because claimant has sustained a first qualifying loss and a second qualifying loss, it is necessary to determine claimant's extent of industrial disability.

"Industrial disability is determined by an evaluation of the employee's earning capacity." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 852 (Iowa 2011). In considering the employee's earning capacity, the deputy commissioner evaluates several factors, including "consideration of not only the claimant's functional disability, but also [his] age, education, qualifications, experience, and ability to engage in similar employment." Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 137-38 (Iowa 2010). The inquiry focuses on the injured employee's "ability to be gainfully employed." Id. at 138.

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Compensation for permanent partial disability shall begin at the termination of the healing period. Iowa Code § 85.34(2). Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(v). When considering the extent of disability, the deputy commissioner considers all evidence, both medical and nonmedical. Evenson v. Winnebago Indus., Inc., 881 N.W.2d 360, 370 (Iowa 2016).

At the time of the hearing claimant was 59 years old. (Tr. p. 9) Claimant graduated from high school and later obtained an associate degree in business administration in 1986. (Tr. pp. 9, 39; Ex. AA p. 3) Claimant successfully completed an associate degree after graduating from high school. Although claimant is an older worker, I find he is capable of retraining.

Early in his career, claimant worked as a stocker and as a cashier in a grocery store and in a department store. (Tr. p. 10; Ex. AA p. 4) He also has experience working in shipping and as a promotions manager. (Tr. pp. 10-12; Ex. AA p. 4) From 2008 through 2019, claimant worked for Westside Auto Pros as a motor service manager changing tires, replacing batteries, stocking batteries in the warehouse, and supervising the tow truck drivers and mobile service technicians. (Tr. p. 11-12; Ex. AA p. 4) His position required him to stand on concrete and hard roadways, to enter and exit a service van, and to lift batteries. (Tr. p. 12) Claimant reported his position required a lot of standing on his feet, physical activity, and getting in and out of a work

van. (Id.) Claimant worked for Westside Auto Pros until February 4, 2019, when he was terminated. (Tr. p. 11)

Dr. Hawk assigned claimant 12 percent permanent impairment of his right lower extremity and seven percent permanent impairment of his left lower extremity. Dr. Hawk also assigned claimant permanent restrictions of no walking on uneven ground, no climbing ladders, no bending or squatting, no standing for more than 15 minutes every 60 minutes, and no lifting, pushing, or pulling over 20 pounds. (Ex. 1 p. 1) Claimant testified he is unable to return to his past employment due to his restrictions.

Following his termination, claimant applied for positions in sales and with TMC Trucking. (Tr. pp. 26, 39) Claimant testified he took one class with Iowa Workforce Development to try to find work. (Tr. p. 26) At the time of the hearing claimant was not working. Claimant reported he had not engaged in much of a job search because his mother underwent cancer treatment and she has developed Alzheimer's disease, his stepson passed away, and his father has also had health problems. (Tr. pp. 26-27) I find claimant is not motivated to work.

As noted above, I find claimant is capable of retraining. I also find he has transferable skills he can use from his prior employment which he could use to secure full-time employment consistent with his restrictions. Considering all the factors of industrial disability, including claimant's lack of motivation to work, I find claimant has sustained 30 percent industrial disability. 30 percent of 500 weeks is 150 weeks.

The Fund is responsible only for the amount of the industrial disability from which the employee suffers, reduced by the compensable value of the first and second injuries. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258, 269 (Iowa 1995). In the event the credits due the Fund exceed the industrial disability resulting from the qualifying injuries, the fund has no liability. Crudo v. Second Injury Fund of Iowa, Case No. 98-828 (Iowa App. July 23, 1999). As discussed above, I found the total combined disability of the first and second qualifying losses is 41.8 weeks. 150 weeks minus 41.8 weeks is 108.20 weeks.

The parties disagree on the rate. Claimant is single and he has no dependents. (Tr. p. 28) Claimant did not produce any payroll information or check stubs from Westside Auto Pros at hearing. Claimant did not produce a W2 or income tax return from the time he worked for Westside Auto Pros.

In his answers to interrogatories, claimant asserted he earned between \$75,000.00 and \$110,000.00 per year when he worked for Westside Auto Pros. (Ex. AA p. 4) In the Complainant Questions for the Iowa Civil Rights Commission investigation, claimant reported the "demotion" he experienced at work "took my annual salary from \$109,000 a year to \$75,000." (Ex. BB, p. 52) During the investigation he also reported "[i]n 2017 I made \$109,000. After the demotion I was kept on at \$75,000 a year." (Ex. BB p. 61) At hearing claimant admitted he did not receive any commissions after Westside Auto Pros reduced his annual salary to \$75,000. I find at the time of the work injury claimant's annual salary was \$75,000. Dividing \$75,000 by 52 weeks, results in an average weekly wage of \$1,442.31. Under the 2018-2019 Iowa Workers'

Compensation Ratebook, claimant's weekly rate based on single with one exemption is \$838.60. <https://www.iowaworkcomp.gov/pdfs>.

Dr. JeJong found claimant reached maximum medical improvement for the February 4, 2019, work injury on July 27, 2022. (Ex. 3, p. 4) In the full commutation, claimant, Westside Auto Pros, and Federated Insurance agreed permanent partial disability benefits commenced on the date Dr. DeJong found claimant reached maximum medical improvement, July 27, 2022. (Ex. 3, p. 2) Permanent partial disability benefits from the Fund commence following expiration of Westside Auto Pros' and Federate Insurance's liability for the 15.4 weeks of permanent partial disability benefits.

ORDER

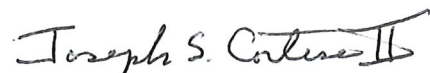
IT IS THEREFORE ORDERED that the arbitration decision filed on February 21, 2023, is affirmed in part and is reversed in part with my additional and substituted analysis.

Defendant shall pay claimant 108.20 weeks of permanent partial disability benefits at the weekly rate of eight hundred thirty-eight and 60/100 dollars (\$838.60), commencing following expiration of Westside Auto Pros and Federated Insurance's liability for the 15.4 weeks of permanent partial disability benefits.

Defendant shall pay interest on all accrued weekly benefits pursuant to Iowa Code section 85.30. Interest accrues on unpaid Second Injury Fund benefits from the date of this decision. Second Injury Fund of Iowa v. Braden, 459 N.W.2d 467 (Iowa 1990).

Pursuant to rule 876 IAC 3.1(2), the Fund shall file subsequent reports of injury as required by this agency.

Signed and filed on this 20th day of July, 2023.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

David Scieszinski (via WCES)

Meredith Cooney (via WCES)