

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BRIAN WILLIAMS,

Claimant,

vs.

SECOND INJURY FUND OF IOWA,

Defendant.

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File No. 19001029.01

ARBITRATION DECISION

Head Note Nos.: 1400, 3200, 3202, 3203

STATEMENT OF THE CASE

The claimant, Brian Williams, filed a petition for arbitration seeking workers' compensation benefits from the Second Injury Fund of Iowa ("the Fund"). Brian Scieszinski appeared on behalf of the claimant. Meredith Cooney appeared on behalf of the Fund.

The matter came on for hearing on October 14, 2022, before Deputy Workers' Compensation Commissioner Andrew M. Phillips. Pursuant to an order of the Iowa Workers' Compensation Commissioner, the hearing occurred electronically via Zoom. The hearing proceeded without significant difficulty.

The record in this case consists of Claimant's Exhibits 1-3, and Defendants' Exhibits AA-BB. The exhibits were received into the record without objection.

The claimant testified on his own behalf. Gina Castro was appointed the official reporter and custodian of the notes of the proceeding. The evidentiary record closed at the end of the hearing, and the matter was fully submitted on January 13, 2023, after briefing by the parties.

STIPULATIONS

The parties were unable to stipulate to any issues. They agreed that entitlement to temporary disability and/or healing period benefits is no longer in dispute. They also agreed that there is no dispute as to medical benefits or credits against any award.

The Fund waived most of their affirmative defenses, and asserted one, which will be discussed further below.

The parties are now bound by their stipulations.

ISSUES

The parties submitted the following issues for determination:

1. Whether the Commissioner and the Agency have subject matter jurisdiction over this dispute.
2. Whether there was an employer-employee relationship at the time of the alleged injury.
3. Whether the claimant sustained an injury, which arose out of and in the course of employment, on February 4, 2019.
4. Whether the alleged injury is a cause of temporary disability during a period of recovery.
5. Whether the alleged injury is a cause of permanent disability.
6. The extent of permanent disability benefits, should any be awarded.
7. Whether the disability is an industrial disability.
8. With regard to the claimant's gross earnings, whether they were two thousand ninety-six and 15/100 dollars (\$2,096.15) per week, and whether the claimant was single and entitled to one exemption at the time of the alleged injury. Accordingly, whether the rate of compensation is one thousand one hundred sixty-four and 81/100 dollars (\$1,164.81) per week.
9. With regard to the Fund benefits:
 - a. Whether the claimant sustained a prior qualifying loss to the right lower extremity on March 31, 1963.
 - b. Whether the functional loss from the prior qualifying loss is 12 percent of the right lower extremity.
 - c. Whether the claimant sustained a compensable loss to the left lower extremity on February 4, 2019.
 - d. Whether the functional loss from the alleged second qualifying loss is 7 percent to the left lower extremity.
 - e. The proper commencement date for Fund benefits, should any be awarded.
 - f. Whether the Fund is entitled to credit pursuant to Iowa Code section 85.64 for 41.8 weeks of benefits.

The Fund also asserted that the Agency lacks subject matter jurisdiction regarding this matter, as the claimant previously brought suit regarding similar issues against Westside Auto Pros.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Brian Williams, the claimant was 59 years old at the time of the hearing. (Testimony). He completed high school, and obtained an associate's degree in business administration. (Testimony).

For a time, from 1979 to 1986, he worked as a stocker and cashier at Hy-Vee. (Testimony; Defendant's Exhibit AA:4). He then worked at Younkers, a department store, performing similar work from 1986 to 1988. (Testimony; DE AA:4). He moved to the Dickey-John Corporation, where he worked in the shipping department. (Testimony). He left Dickey-John Corporation because they closed. (DE AA:4). Following his time at Dickey-John Corporation, he worked as a promotions manager at Ag Express Electronics. (Testimony). He also ran the shipping department. (Testimony). From 2003 to 2008, he worked at Garvis Honda. (Testimony).

In late 2008, he began to work at Westside Auto Pros ("Westside"). (Testimony). He managed the AAA portion of their business as a motor service manager. (Testimony). He changed tires, replaced batteries, stocked batteries in a warehouse, and supervised tow truck drivers and mobile service technicians. (Testimony). The job required him to stand on concrete or roadways, as well as enter and exit a service van. (Testimony). He also had to lift vehicle batteries. (Testimony). He worked there for about ten years. (Testimony). His last day of work was on February 4, 2019, when he was terminated. (Testimony).

Mr. Williams sued Westside Auto Pros alleging discrimination, a hostile work environment, and wrongful termination. (Testimony). Mr. Williams alleged that he was demoted or terminated due to certain whistleblower activities. (Testimony). He also alleged that he was replaced by a younger employee, who was paid considerably less. (Testimony). In December of 2019, the Iowa Civil Rights Commission administratively closed Mr. Williams' complaint. (DE BB:31). The Iowa Civil Rights Commission outlined the various legal standards and prospective bases for the claimant's discrimination claim. (DE BB:27-47). The United States EEOC issued a notice of right to sue for Mr. Williams against Westside Auto Pros. (DE BB:27). He ultimately entered into a confidential settlement agreement with Westside Auto Pros in order to resolve that matter. (Testimony).

As a part of his allegations against Westside Auto Pros, Mr. Williams alleged that his yearly earnings were decreased from over \$100,000.00 per year to about \$75,000.00. (Testimony). This was a base salary plus the opportunity to earn certain bonuses. (DE BB:37). This demotion was allegedly due to two complaints made against him for performance issues. (Testimony).

The claimant alleges a first qualifying injury to his legs, with a date of onset of March 31, 1963. (Testimony). The basis for this is that Mr. Williams was born prematurely and has cerebral palsy. (Testimony). As a result of his premature birth, Mr. Williams wore braces on his legs until he was in the third or fourth grade. (Testimony). The ligaments in his legs were not fully developed, so he also had physical therapy. (Testimony). He has issues with range of motion in his legs due to his cerebral palsy. (Testimony). He did not have any speech or cognitive issues as a result of his cerebral palsy. (Testimony).

Mr. Williams alleged that he noticed increased pain and issues in his left leg and ankle over his 10 years at Westside Auto Pros. (Testimony). He recalled one specific incident in 2016, wherein he stepped off a curb in a rainstorm and inverted his ankle. (Testimony). This caused him to suffer a ligament injury. (Testimony). He underwent physical therapy and eventually had a cortisone shot. (Testimony). He testified that he continued to have yearly cortisone injections. (Testimony). He was not provided with any permanent restrictions, nor did Westside Auto Pros pay him any permanent impairment benefits as a result of this injury. (Testimony). In addition to left leg issues, Mr. Williams also had issues with bending and squatting while working for Westside Auto Pros. (Testimony). He worked through the pain. (Testimony). He testified that he hoped that this pain would dissipate after his termination from Westside Auto Pros. (Testimony). However, it did not, so he sought medical treatment. (Testimony).

Mr. Williams treated with Eric Barp, DPM, for his foot issues. (Testimony). Eventually, after physical therapy, Mr. Williams underwent two surgeries as part of an ankle fusion to his left ankle. (Testimony). Unfortunately, the parties chose not to enter any medical records into the record, so there will be limited discussion of the claimant's medical care.

Following the left ankle fusion surgery and his treatment, Mr. Williams found that he had no range of motion in his left ankle. (Testimony). He also has swelling issues. (Testimony). He has difficulties climbing and balancing on a ladder, and walking on uneven ground. (Testimony). Standing and placing more weight on one side than the other causes him issues. (Testimony). He has no flexibility, so he has problems bending and squatting since his ankle fusion. (Testimony). He has pain in the area, as well, which doctors hoped would dissipate. (Testimony). Finally, he noted a decrease in strength in his left foot and ankle. (Testimony).

J. Joe Hawk, M.D., C.I.M.E., of the Iowa Clinic, issued a letter on September 12, 2022. (Claimant's Exhibit 1:1-2). He is a board-certified member of the American Academy of Family Physicians, and a Certified Independent Medical Examiner. (CE 2:1). Dr. Hawk noted the previous 7 percent lower extremity impairment rating of Dr. DeJong. (CE 1:1). Dr. Hawk then used the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, to provide an impairment rating to the claimant's right lower extremity based upon his cerebral palsy. (CE 1:1). He measured plantar flexion of 25 degrees, which would not entitle the claimant to any impairment pursuant to Table 17-11. (CE 1:1). He measured the claimant's dorsiflexion at 12 degrees, and opined that this would not provide the claimant with any impairment based upon Table

17-11. (CE 1:1). An inversion of 15 degrees would result in a 2 percent lower extremity impairment. (CE 1:1). An eversion of 12 degrees did not qualify the claimant for a permanent impairment. (CE 1:1). Flexion of 102 degrees qualified the claimant for a 10 percent lower extremity impairment based upon Table 17-10. (CE 1:1). Combining the two impairment values provided the claimant with a 12 percent impairment rating to the right lower extremity. (CE 1:1). He converted this to a 5 percent whole person impairment rating. (CE 1:1). He also provided permanent restrictions as follows: “[n]o walking on uneven ground. No climbing ladders. No standing for more than 15 minutes over 60 minutes. No lifting, pushing, pulling greater than 20# [sic]. No bending or squatting.” (CE 1:1).

Mr. Williams opined that he could not perform the stocker job anymore, as he would have to squat. (Testimony). He felt that he could likely perform the cashier and/or checker job, only if he had a chair in which he could sit. (Testimony). He felt that he could no longer perform the work at Dickey-John, as he would be required to be on his feet in a shipping area. (Testimony). He also expressed that he could no longer work the Garvis Honda position, as that position required him to move motorcycles in and out of a building, and also required him to be on his feet on a hard floor. (Testimony). He noted that he could likely perform a sales job wherein he sat at a desk. (Testimony). Finally, he opined that he could likely not perform his former position with Westside Auto Pros, due to his professed inability to bend or squat after his ankle fusion. (Testimony).

Mr. Williams felt that the restrictions provided by Dr. Hawk were appropriate. (Testimony). He noted that he could work with the physical limitations presented by his cerebral palsy, but that the additional issues following his ankle fusion and the lack of flexibility greatly hindered him. (Testimony).

Since his termination from Westside Auto Pros, Mr. Williams searched for employment. (Testimony). Specifically, he looked for sales positions, such as what he referred to as an “outside salesman.” (Testimony). He felt that these positions would provide him with more time in a vehicle, rather than walking around. (Testimony). In an effort to find further employment, he enrolled in a class with Iowa Workforce Development. (Testimony). Despite these efforts, he has not been offered a job that was “comparable with what [he] was doing before.” (Testimony). He also has been having personal issues that have affected his search for further employment. (Testimony).

While he has not found formal employment, Mr. Williams has found time to assist a friend on a farm outside of Creston, Iowa. (Testimony). When he helps on the farm, he works about five hours per day. (Testimony). He used a crutch and boot while he worked on the farm. (Testimony).

Mr. Williams noted that he injured his left ankle in a motorcycle accident in 1980. (DE AA:13). He claimed in his discovery responses that he achieved “[f]ull recovery” from this injury. (DE AA:13). He injured his left ankle in 1989 while playing softball.

(DE AA:13). He again claimed that he achieved “[f]ull recovery” from the injury. (DE AA:13).

On August 24, 2022, the Commissioner granted a full commutation of Mr. Williams’ claims against Westside Auto Pros and Federated Insurance related to the alleged February 4, 2019, date of injury. (CE 3:1-6). This was based upon a 7 percent impairment to the left leg. (CE 3:1). The parties used a letter from Vaun DeJong, D.O., of West Des Moines, Iowa, as support for the commutation. (CE 3:4). Dr. DeJong opined that Mr. Williams achieved maximum medical improvement, and that he sustained a cumulative injury to his leg. (CE 3:4). The cumulative injury resulted in a 7 percent functional impairment to the left lower extremity based upon the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (CE 3:4).

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.904(3).

Subject Matter Jurisdiction

Before I confront the other issues implicated in this case, I first must examine whether or not the Agency has jurisdiction to hear the disputes in this case. The Fund asserts that the Agency does not have subject matter jurisdiction over this case, as the claimant previously brought civil rights claims with the Iowa Civil Rights Commission. The claimant argues that the Agency has subject matter jurisdiction over this case.

Iowa Courts have noted that subject matter jurisdiction “is the power to hear and determine cases of the general class to which the proceedings belong.” Heartland Express v. Gardner, 675 N.W.2d 259, 262 (Iowa 2003)(citing Shirley v. Pothast, 508 N.W.2d 712, 714 (Iowa 1993)). By adopting Iowa Code chapter 85, “the legislature removed from the district court’s general, original jurisdiction, the power to hear claims involving the ‘rights and remedies of an injured employee against an employer for industrial injuries’ and placed them within the exclusive jurisdictional purview of the [commissioner].” Id.

When a workers’ compensation claim is grounded in the same facts as a discrimination claim, courts have held that the workers’ compensation claim is pre-empted by the discrimination claims. Ottumwa Housing Authority v. State Farm Fire, 495 N.W.2d 723, 729 (Iowa 1993); Delgado-Zuniga v. Dickey & Campbell Law Firm, 2017 WL 4050285 (Iowa App. 2017).

The defendant cites to five bases for the claimant’s complaint to the Iowa Civil Rights Commission, which are: 1. demotion based upon age; 2. retaliatory demotion; 3. harassment; 4. termination based upon age; and, 5. retaliatory termination. The Fund focuses on a claim that the claimant’s supervisor “took issue” with various workplace injuries sustained while working for Westside. They argue that the “acts upon which Williams’ present workers’ compensation claim is based stem from the same acts as the

basis for his ICRC claims,” and therefore the agency lacks subject matter jurisdiction. (Defendant’s Post Hearing Brief, pg. 13).

The claimant argues that the basis of his discrimination claims do not arise out of his workers’ compensation issues. He argues that he was a whistleblower in reporting allegedly racist statements made by a supervisor. He also argues that he was harassed because he reported certain behaviors. He argues that he was demoted due to his whistleblower status, and later terminated due to his age.

The claimant cites to Delgado-Zuniga to support his contention that the Agency maintains subject matter jurisdiction over this case. The claimant in Delgado-Zuniga alleged that he was discriminated against because of his national origin, filed a prior civil rights case, and his gender. Delgado-Zuniga, 2017 WL 4050285 at 1. He also worked in “horrible conditions, which led to him becoming ill and having to miss work, and when he complained to his employer about the conditions from his resulting illness, he was harassed and given poor work assignments . . . and was ultimately fired.” Id. Delgado-Zuniga is an especially helpful case, as it also discusses several other cases. The first of these cases, mentioned above, is Ottumwa Housing Authority. In that case, there was a coverage dispute between an employer and their insurer regarding a duty to defend provision of an insurance policy. Delgado-Zuniga, 2017 WL 4050285 at 2 (citing Ottumwa Housing Authority, 495 N.W.2d 723). The basis for the claimant’s cause of action in Ottumwa Housing Authority lay in allegations of sexual harassment and discrimination. Id. The second relevant case discussed is Baird v. Ottumwa Community School District, 551 N.W.2d 874 (Iowa 1996). In that case, the claimant asserted emotional or psychological injuries as a result of alleged “abusive treatment by supervisors resulting in severe depression.” Id. The claimant’s emotional or psychological injuries were the basis for a sexual discrimination claim filed with the Iowa Civil Rights Commission. Id. A third case, Suckow v. NEOWA FS, Inc., is discussed, but the facts of that case are distinct from this case, as it related to an action for gross negligence. Suckow v. NEOWA FS, Inc., 445 N.W.2d 776 (Iowa 1989).

The facts in this matter do not stem from the same acts that are the basis for Mr. Williams’ Iowa Civil Rights Commission claims. The mention of the claimant’s alleged injuries in the civil rights complaint and evidence are incidental to the other alleged civil rights violations by Westside. This case is distinguishable from Ottumwa Housing Authority and Baird, as in those cases, the alleged harassment was a cause of the injuries alleged in the workers’ compensation case. In this case, the alleged injury to the claimant’s leg arose from a separate and distinct incident, and/or cumulative trauma. Therefore, the Agency maintains subject matter jurisdiction to adjudicate the claimant’s workers’ compensation claims against the Fund.

Second Injury Fund Benefits

The claimant alleges entitlement to Fund benefits.

The Second Injury Fund Act exists to encourage the hiring of handicapped persons by making a current employer responsible only for the amount of disability

related to an injury occurring while that employer employed the handicapped individual, as if the individual had no preexisting disability. See Anderson v. Second Injury Fund, 262 N.W.2d 789 (Iowa 1978); 15 Iowa Practice, Workers' Compensation, Lawyer, Section 17:1, p. 211 (2015-2015).

Iowa Code 85.64 governs Second Injury Fund liability. Before any liability of the Fund is triggered, three requirements must be met. These requirements are: 1. The employee must have lost or lost the use of a hand, arm, foot, leg, or eye (also known as a first qualifying injury or loss); 2. The employee must sustain a loss or loss of use of another specified member or organ through a compensable injury (also known as a second qualifying injury or loss); and, 3. Permanent disability must exist as to both the initial injury and the second injury.

The first issue is whether the claimant sustained a first qualifying loss. Iowa Code section 85.64 refers specifically to an injury the hand, arm, foot, leg, or eye. Mr. Williams alleges that he has a qualifying loss to his bilateral legs due to his congenital cerebral palsy. He contends that his cerebral palsy only affects his legs and the ligaments or tendons therein. He testified that he did not have any issues to his thinking, speech, eyesight, or other body part as a result of his cerebral palsy. He also testified that, as a child, he underwent therapy at Easter Seals for his legs in an attempt to provide him with more flexibility. Finally, he testified that he wore braces on his legs until he was in third or fourth grade. Based upon these arguments, Mr. Williams contends that his congenital cerebral palsy is a first qualifying injury to his legs pursuant to Iowa Code section 85.64. He alleges that the date of the first qualifying injury or loss was the date of his birth.

Cerebral palsy is a "group of disorders that affect a person's ability to move and maintain balance and posture." What is Cerebral Palsy?, Centers for Disease Control and Prevention, ONLINE: [https://www.cdc.gov/ncbddd/cp/facts.html#:~:text=Cerebral%20palsy%20\(CP\)%20is%20a,problems%20with%20using%20the%20muscles](https://www.cdc.gov/ncbddd/cp/facts.html#:~:text=Cerebral%20palsy%20(CP)%20is%20a,problems%20with%20using%20the%20muscles). (last visited January 24, 2023). It is caused by either abnormal brain development or damage to the brain which affects a person's ability to control their muscles. Id. The CDC notes, "[c]erebral means having to do with the brain. Palsy means weakness or problems with using the muscles." Id. As noted in Bowman v. General Dynamics Info. Tech., cerebral palsy is not an injury to a scheduled member, but a "brain issue." File No. 5061908 (January 23, 2020, affirmed on Appeal August 31, 2020). Cerebral palsy results from an injury to the brain, which is not a scheduled member as provided in Iowa Code section 85.64.

While the claimant cites to Gregory v. Second Injury Fund of Iowa, 777 N.W.2d 395 (Iowa 2010), the deputy in Bowman astutely noted that the specific holdings in Gregory "do not support a finding that a nervous system injury that affects the whole body or a brain trauma injury that results in the loss of use of an arm or leg can be a qualifying injury for the Fund." Id.

Based upon the foregoing, the claimant did not sustain a first qualifying injury or loss. He is not entitled to benefits from the Fund. Considering the claimant is not entitled to benefits from the Fund, engaging in an analysis regarding the additional issues is moot.

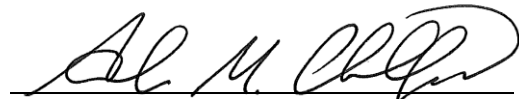
ORDER

THEREFORE, IT IS ORDERED:

That the claimant shall take nothing further.

That the defendant shall file subsequent reports of injury (SROI) as required by this agency pursuant to 876 Iowa Administrative Code 3.1(2) and 876 Iowa Administrative Code 11.7.

Signed and filed this 21st day of February, 2023.



ANDREW M. PHILLIPS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

David Scieszinski (via WCES)

Meredith Cooney (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.