

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

WILLIAM HUNT,

Claimant,

vs.

SECOND INJURY FUND OF IOWA,

Defendant.

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File No. 1650632.03

ARBITRATION DECISION

STATEMENT OF THE CASE

The claimant, William Hunt, filed a petition for arbitration and seeks workers' compensation benefits from the Second Injury Fund of Iowa. The claimant was represented by Zeke McCartney. The Fund was represented by Meredith Cooney.

The matter came on for hearing on April 18, 2022, before Deputy Workers' Compensation Commissioner Joe Walsh in Des Moines, Iowa via Court Call videoconferencing system. The record in the case consists of Joint Exhibits 1 through 6; Claimant's Exhibits 1 through 2; and Fund Exhibits A through E. The claimant testified at hearing. Gina Castro served as court reporter. The matter was fully submitted on June 14, 2022.

ISSUES

The parties submitted the following issues for determination:

1. Whether the Second Injury Fund Act is applicable to this case, and if so, the nature and extent of claimant's disability.
2. If such losses were sustained, the amount of credit the Fund is entitled to.
3. The nature and extent of permanent disability.

STIPULATIONS

Through the hearing report, the parties stipulated to the following:

1. Claimant sustained an injury which arose out of and in the course of employment on June 11, 2018, which is a cause of both temporary and permanent disability in the claimant's left leg.
2. Claimant sustained a first qualifying loss to his right leg.

3. Temporary disability/healing period and medical benefits are not in dispute.
4. The Fund has not asserted any affirmative defenses.
5. The weekly rate of compensation is \$876.57.

FINDINGS OF FACT

Claimant, William Hunt, was 64 years old as of the date of hearing. He testified live and under oath at hearing. His answers were concise and consistent with other relevant portions of the record. He was a good historian. There was nothing troubling about his demeanor. I find his testimony to be highly credible.

Prior to hearing, Mr. Hunt entered into an Agreement for Settlement (AFS) with his employer, Portzen Construction, and its insurance carrier, Midwest Builders Casualty Mutual Company. (Fund Exhibit E) The AFS agreed claimant had sustained a 37 percent functional disability in his left leg as a result of his left leg injury, entitling him to a total of 81.4 weeks of compensation. (Fund Ex. E, p. 31) The parties have stipulated that Mr. Hunt did sustain this loss as a result of his June 11, 2018, work-connected injury. (Hearing Report, par. 10)

Mr. Hunt graduated from high school in 1976. After high school, he learned “start to finish” plumbing, working for a few different employers between 1976 and 1980. (Transcript, page 10) From 1980 to 2010, he worked on a family dairy, hog and cattle farm. He described these activities in detail. (Tr., pp. 14-16) He also performed some plumbing work on the side while he was farming. He ultimately left farming due to a depression in the hog market. He went back to work as a plumber in Cedar Rapids in 2010, working for several different employers. He became employed with Portzen in 2017. He received a journeyman plumber’s license. He worked full-time for Portzen earning \$32.00 per hour. Since he left farming, he has continued to perform some farm work during the planting and harvesting season for his brother. He has also performed some light carpentry work on the side as well. In summary, Mr. Hunt has spent his entire adult work performing “start to finish” plumbing work and agricultural labor, including all aspects of running a farm. I find that he is a highly motivated individual with a solid work record.

The parties have stipulated that Mr. Hunt sustained a first qualifying loss to his right leg. The difficulties with his right leg began in approximately 1995. He underwent ACL reconstruction surgery in 1996 and had additional surgery in 2001. Mr. Hunt had further difficulties with this leg over time culminating in a total knee replacement in 2020, some 25 years after his right knee problems began. The records related to this condition are in evidence. (Jt. Ex. 6, pp. 48-104) Based upon the records in evidence, Mr. Hunt never had any formal impairment rating on the right leg until April 2021. (Cl. Ex. 2)

The record also reflects that claimant had sustained an impairment rating from a work injury to his left ankle which resulted in a 5 percent permanent impairment of his

left lower extremity. (Fund Ex. A, p. 6)

The parties have further stipulated that Mr. Hunt sustained a second qualifying loss to his left leg as a result of his stipulated June 11, 2018, work injury for Portzen. On that date he stepped off a ladder, heard something pop in his left knee and immediately began to have difficulty weight-bearing. (Tr., p. 23) He immediately began a course of treatment. (Jt. Ex. 1, p. 1) He performed light-duty work at Portzen. He had surgery in September 2018. (Jt. Ex. 4, p. 14) He was off work altogether following this surgery. His symptoms, however, continued to be significantly disabling and he was referred to the University of Iowa Hospitals and Clinics in December 2018. (Jt. Ex. 5, p. 19) This ultimately resulted in a total knee replacement on May 17, 2019. (Jt. Ex. 5, p. 33) His treating physician, Nicolas Noiseux, M.D., placed him at maximum medical improvement (MMI) with no restrictions on October 11, 2019. In July 2020, Dr. Noiseux assigned a 37 percent functional impairment rating pursuant to the AMA Guidelines, Fifth Edition, but recommended no permanent restrictions. (Jt. Ex. 5, pp. 44-46) Dr. Noiseux did document Mr. Hunt's difficulties "walking on uneven ground or lots of stairs, ladders," noting that these activities caused pain in the "quad tendon insertion." (Jt. Ex. 5, p. 44) "Only limited by knee in quad tendinitis with harder work." (Jt. Ex. 5, p. 45) While he assigned no formal restrictions, he recommended that Mr. Hunt continue "all activities as tolerated" and suggested he focus on quadriceps strengthening." (Jt. Ex. 5, p. 45)

Following his June 11, 2018, work injury, Mr. Hunt never returned to full-duty work with Portzen. As set forth above, he worked light-duty up until his first surgery in September 2018. He never returned after that, testifying he was laid off. He testified specifically to the following: "I left Portzen because of the injury. And by the time the injury was where I could maybe go back, I'd already been replaced." (Tr., p. 21) He testified that even if he had not been laid off, he would not have been able to perform the physical labor associated with being a plumber. (*Id.*) He testified that he did continue to work for his brother doing some seasonal farm work (driving tractor) and occasional light carpentry work.

Mr. Hunt further testified that after he was released from his surgery, he met with his union representative and testified to the following conversation: "He asked me if I thought I could do – or do the job yet. I told him as far as climbing ladders and squatting and kneeling that I could not do that." (Tr., pp. 40-41) It is noted here that I believe Mr. Hunt thought that he could not tolerate the daily rigors of full-time start to finish plumbing work. This work involved digging ditches, significant amounts of kneeling, crawling, and climbing. Due to his work injury, I find that Mr. Hunt is no longer a good fit in the field of plumbing.

In preparation for hearing, Mr. Hunt was evaluated by Robin Sassman, M.D., a Certified Independent Medical Examiner. Dr. Sassman responded to questions posed by claimant's counsel. (Cl. Ex. 2, pp. 5-7) As it relates to the second qualifying loss, Dr. Sassman agreed with Dr. Noiseux, assigning a 37 percent impairment to his right leg. (Cl. Ex. 2, p. 20) She disagreed, however, with respect to restrictions. "For the right knee, Mr. Hunt should limit standing, walking and sitting to an occasional basis and will

need to change positions frequently due to his symptoms. He should not kneel or crawl. He should not squat. He should not work on ladders or walk on uneven surfaces.” (Cl. Ex. 2, p. 21)

With respect to the right leg condition, Dr. Sassman provided the following opinion with regard to impairment:

For the right knee, Mr. Hunt recently had a right knee replacement in July of 2020. Therefore, it would not be appropriate to use his current range of motion measurements for the Second Injury Fund claim. He stated that prior to the injury in question for the left knee on 6/11/18, the most bothersome symptoms of the right knee was [sic] the lack of range of motion. Therefore, I relied upon the documentation of range of motion in the records from prior to the date of injury in question of 6/11/18 to assign a rating for the right knee relative to the second injury fund. This documentation was from Dr. Schemmel's note of 11/18/2002 that stated the range of motion of the right knee was from 0-90 degrees. Therefore, turning to Table 17-10 on page 537, he is assigned 10% lower extremity impairment for the right knee.

(Cl. Ex. 2, p. 20)

I find the restrictions recommended by Dr. Sassman are the best reflection of Mr. Hunt's physical restrictions. Mr. Hunt is not permanently and totally disabled. He is capable of working as evidenced by his continued seasonal farm work and carpentry work. These positions are more like side jobs. At the time of hearing, he had not performed an extensive job search, in part due to the Covid-19 pandemic.

I find that Mr. Hunt has sustained a 65 percent loss of earning capacity in the competitive job market.

CONCLUSIONS OF LAW

The parties have stipulated that claimant has sustained qualifying first and second losses under the Second Injury Fund Act.

The first numbered paragraph of section 85.64 states:

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 subchapter 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.

Iowa Code section 85.64 governs Second Injury Fund liability. Before liability of the Fund is triggered, three requirements must be met. First, the employee must have lost or lost the use of a hand, arm, foot, leg, or eye. Second, the employee must sustain a loss or loss of use of another specified member or organ through a compensable injury. Third, permanent disability must exist as to both the initial injury and the second injury.

The Second Injury Fund Act exists to encourage the hiring of workers with disabilities by making a current employer responsible only for the amount of disability related to an injury occurring while that employer employed the individual as if the individual had had no preexisting disability. See Anderson v. Second Injury Fund, 262 N.W.2d 789 (Iowa 1978).

The Fund is responsible only for the industrial disability present after the second injury that exceeds the disability attributable to the first and second injuries. Section 85.64. Second Injury Fund of Iowa v. Braden, 459 N.W.2d 467 (Iowa 1990); Second Injury Fund v. Neelans, 436 N.W.2d 335 (Iowa 1989); Second Injury Fund v. Mich. Coal Co., 274 N.W.2d 300 (Iowa 1970).

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Ry. Co. of Iowa, 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the Legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Utilizing the appropriate relevant factors of industrial disability, I find that claimant has sustained a 65 percent industrial disability. This is primarily based upon the fact he is no longer well-suited for full-time work in the field of plumbing. Mr. Hunt is skilled in commercial "start to finish" plumbing which, as described at hearing, requires a great

deal of kneeling, squatting, crawling, and climbing. Even if he were able to perform some of this work on an intermittent basis, he is clearly not cut out to perform this work on a regular, full-time basis. Further, I found that the restrictions recommended by Dr. Sassman are the best reflection of his actual work limitations. He also has substantial functional disabilities in both knees and his left ankle. Even Dr. Noiseux, who technically placed no formal restrictions, suggested he only perform activities as tolerated. At 64 years old, Mr. Hunt undoubtedly has a substantial loss of earning capacity. He is, however, capable of performing gainful work.

The primary fighting issue in this case is really the amount of credit to which the Fund is entitled. The Fund contends it should receive a credit of 173.8 weeks. This amount encompasses Dr. Noiseux's rating on the second qualifying left leg loss (37 percent of 220 weeks = 81.4 weeks), a hypothetical rating on the first qualifying right leg loss (37 percent of 220 weeks = 81.4 weeks), as well as an additional 5 percent rating for the prior left ankle loss (5 percent of 220 weeks = 11 weeks).

The Fund relies upon Harrell v. Denver Findley & Sons, Inc., and Second Injury Fund, File No. 5066742 (Appeal, October 6, 2020). In that case, the Commissioner assigned a 37 percent credit, absent a specific rating from a physician, for a total knee replacement. That decision was reversed on appeal. Harrell v. Denver Findley & Sons, and Second Injury Fund of Iowa, No. 21-0827 (Iowa Court of Appeals, July 20, 2022). The Court of Appeals stopped short of declaring that the Commissioner did not have authority to assign an impairment rating in the absence of a physician, but rather left this an open question.

Having reviewed all of the evidence in the record, I find that the Fund is entitled to a credit of 114.4 weeks. At the time of hearing, the best evidence of claimant's functional disability as it relates to his right leg is 10 percent. This is based upon Dr. Sassman's opinion. While the Fund contends the disability should be rated higher under the Guides, no physician has rendered such an opinion. In this decision, I find it unnecessary to determine whether the agency has the authority to determine a rating under the Guides without a medical opinion. I simply find that the 10 percent rating is the best rating. This entitles the Fund to a credit of 22 weeks. The best evidence of claimant's functional impairment in his left leg is 37 percent. This translates to 81.4 weeks of credit. I further find that he had an additional 5 percent loss for the left ankle. Therefore, there is a credit of 92.4 weeks as it relates to the left leg. Benefits shall commence on May 3, 2021.

ORDER

THEREFORE IT IS ORDERED

The Second Injury Fund of Iowa shall pay the claimant three hundred and twenty-five (325) weeks of permanent partial disability benefits at the rate of eight hundred seventy-six and 57/100 (\$876.57) per week commencing May 3, 2021.


The Fund shall pay accrued weekly benefits in a lump sum.

The Fund shall be given credit for one hundred fourteen point four (114.4) weeks for claimant's functional losses from the first and second qualifying losses.

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

Costs are not taxable to the Fund under Iowa Code section 85.66(2) (2021).

Signed and filed this 27th day of September 2022.



JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Zeke McCartney (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.