

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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WILLIAM BURGIN,

Claimant,

vs.

SECOND INJURY FUND OF IOWA,

Defendant.

**FILED**

NOV 30 2015

WORKERS COMPENSATION

File No. 5047452

ARBITRATION

DECISION

Head Note No.: 3200

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STATEMENT OF THE CASE

William Burgin, claimant, filed a petition in arbitration seeking workers' compensation benefits from the Second Injury Fund of Iowa. The matter was heard in Des Moines, Iowa by Deputy Workers' Compensation Commissioner Stan McElderry.

ISSUE

The parties presented the following issue for resolution in the case:

1. Whether claimant is entitled to benefits from the Second Injury Fund of Iowa.

FINDINGS OF FACT

The deputy workers' compensation commissioner, having heard the testimony of the witness and considered the evidence in the record, finds that:

The claimant was 48 years old at the time of the hearing. Claimant is a high school graduate. He has an Automotive Technology certificate he earned from Hawkeye Community College in 1995. His previous work history includes painting damaged autos, brick layer assistant, and truck driver. He has had a commercial driver's license (CDL) since about 1990.

On April 27, 2010, the claimant injured his left leg/knee when a large hog hit him while being loaded in a trailer. He was subsequently diagnosed with a medial meniscus tear. Thomas Gorsche, M.D., performed an arthroscopic left knee medial meniscetomy to repair the tear. (Exhibit 1, page 5) Sunil Bansal, M.D., performed an independent medical evaluation on the claimant on October 17, 2014. (Ex. 1) Dr. Bansal opined that the left knee injury resulted in a permanent impairment to the left lower extremity of 2 percent. (Ex. 1, p. 13) Dr. Bansal also opined that the claimant should avoid standing

or walking for more than 60 minutes at a time, and should avoid multiple steps/stairs. (Ex. 1, p. 13)

The Second Injury Fund (SIF) asserts that this injury does not qualify for SIF purposes. The 2010 injury caused impairment and is a qualifying first injury for SIF purposes.

On October 12, 2012, the claimant injured his left wrist while unloading hogs on a dock in Florida while working for Lembke (trucking company). The diagnosis was a left wrist fracture. After casting and conservative care (including physical therapy) the claimant was released without restrictions on January 13, 2013. (Ex. 1, p. 4) The claimant returned to Scott Bohner, D.O., on November 18, 2013 complaining of left wrist pain. Dr. Bohner referred the claimant to Peter Pardubsky, M.D., an orthopedist. On April 13, 2013, Dr. Pardubsky opined a 12 percent impairment to the left upper extremity from the left wrist injury. (Ex. 1, p. 7) Dr. Bansal opined a 13 percent loss to the upper left extremity. (Ex. 1, p. 13) Dr. Bansal also opined restrictions of restricting lifting with the left hand to 10 pounds on an occasional basis and 5 pounds frequently. (Ex. 1, p. 14) The employer settled the case with a payment of 32.5 weeks (13 percent of an upper extremity).

Claimant was 48 years old at the time of the hearing. The claimant's restrictions to his left arm and left leg make work in his prior positions difficult. He currently has a job making good money, but it is an accommodated position with a friend. His efforts to find work in the competitive work place were unsuccessful. It is also not certain the claimant will be able to retain his CDL at his next required Department of Transportation (DOT) physical. After considering all of these factors, it is concluded claimant has established he sustained a 40 percent loss of industrial earning capacity.

#### REASONING AND CONCLUSIONS OF LAW

The issue to be resolved is whether claimant is entitled to benefits from the Second Injury Fund of Iowa.

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.

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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 had no preexisting disability. See Anderson v. Second Injury Fund, 262 N.W.2d 789 (Iowa 1978); Iowa Practice, Workers' Compensation, Lawyer and Higgs, section 17-1 (2006).

The Fund is responsible 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).

The Second Injury Fund of Iowa first contends that it has no liability in this case because claimant did not have a qualifying loss to a specified member as it relates to the 2010 injury, contending that the injury did not result in any loss of his leg. However, it is concluded that the 2010 injury did result in an impairment rating being offered to claimant's lower right extremity. Those impairments are permanent and disabling. Further, as it relates to the 2012 upper extremities, there are impairment ratings and disability. Therefore, it is concluded that claimant has met the requirements of Iowa Code section 85.64 and the next determination to be made is the extent of claimant's industrial disability based on these injuries.

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 and inability to engage in employment for which the employee is fitted. 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).

A finding of impairment to the body as a whole found by a medical evaluator does not equate to industrial disability. Impairment and disability are not synonymous. The degree of industrial disability can be much different than the degree of impairment because industrial disability references to loss of earning capacity and impairment references to anatomical or functional abnormality or loss. Although loss of function is to be considered and disability can rarely be found without it, it is not so that a degree of industrial disability is proportionally related to a degree of impairment of bodily function.

Factors to be considered in determining industrial disability include the employee's medical condition prior to the injury, immediately after the injury, and presently; the situs of the injury, its severity, and the length of the healing period; the work experience of the employee prior to the injury and after the injury and the potential for rehabilitation; the employee's qualifications intellectually, emotionally, and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in

employment for which the employee is fitted. Loss of earnings caused by a job transfer for reasons related to the injury is also relevant. Likewise, an employer's refusal to give any sort of work to an impaired employee may justify an award of disability.

McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980). These are matters which the finder of fact considers collectively in arriving at the determination of the degree of industrial disability.

There are no weighting guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability.

It therefore becomes necessary for the deputy or commissioner to draw upon prior experience as well as general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., Vol. 1 No. 3 State of Iowa Industrial Commissioner Decisions, 529 (App. March 26, 1985); Peterson v. Truck Haven Cafe, Inc., Vol. 1 No. 3 State of Iowa Industrial Commissioner Decisions, 654 (App. February 28, 1985).

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.

Based on the finding that the claimant has suffered a 40 percent loss of earning capacity he has sustained a 40 percent permanent industrial disability entitling him to 200 weeks of permanent disability benefits, less credits to the SIF.

The Second Injury Fund of Iowa is entitled to a credit pursuant to Iowa Code section 85.64. The credit it will receive will be 4.4 weeks for the 2010 injury to the right leg. That credit is as follows: right lower extremity – 2 percent times 220 weeks equals 4.4 weeks. The credit it will receive will be 32.5 weeks for the April 27, 2012 injury to the left upper extremity. That credit is the greater of: 13 percent times 250 weeks equals 32.5 weeks, or the 32.5 weeks actually paid by the employer. Total credit for the SIF is 36.9 weeks (32.5 plus 4.4).

#### ORDER

#### THEREFORE, IT IS ORDERED:

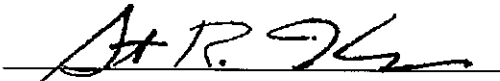
That the Second Injury Fund of Iowa pay claimant one hundred sixty-three point one (163.1) weeks of permanent partial disability commencing thirty-two point five (32.5) weeks following September 18, 2013, at the weekly rate of seven hundred twelve and 82/100 dollars (\$712.82).

That all accrued benefits shall be paid in a lump sum.

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

That defendant shall file subsequent reports of injury as required by the agency.

Signed and filed this 30<sup>th</sup> day of November, 2015.

  
STAN MCELDERRY  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

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SRM/srs

**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 in writing and received by the commissioner's office 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 a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.