

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JELISA ROSS,

Claimant,

vs.

EATON CORPORATION,

Employer,

and

OLD REPUBLIC INSURANCE CO.

Insurance Carrier,

and

SECOND INJURY FUND OF IOWA,

Defendants.

FILED

MAR 21 2019

WORKERS' COMPENSATION

File Nos. 5050197, 5059360

ARBITRATION

DECISION

Head Notes: 1100, 1801, 1803, 3200

STATEMENT OF THE CASE

Jelisa Ross, claimant, filed two petitions in arbitration seeking workers' compensation benefits from her employer, Eaton Corporation and Old Republic Insurance Company, the insurance carrier and the Second Injury Fund of Iowa. The matter proceeded to hearing on October 26, 2018. The parties submitted post-hearing briefs and the matter was considered fully submitted on December 7, 2018.

The evidentiary record includes: Joint Exhibits JE1 through JE18; Claimant's Exhibits 1 through 6; Defendants' Exhibits A through E; and, Second Injury Fund Exhibits AA through BB. Claimant provided testimony at hearing.

The parties filed two hearing reports at the commencement of the arbitration hearing. On the hearing reports, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

ISSUES

I) Concerning File No. 5050197, Date of Injury, August 11, 2011, the parties submitted the following disputed issues for resolution:

1. The extent of permanent partial disability to claimant's right arm.
2. Costs.

II) Concerning File no. 5059360, Alleged Date of Injury, October 15, 2015, the parties submitted the following disputed issues for resolution:

1. Whether claimant sustained an injury to her left arm that arose out of and in the course of her employment on October 15, 2015.
2. Whether the alleged injury was the cause of temporary disability, and if so, the extent thereof.
3. Whether the alleged injury was the cause of permanent disability and if so, the extent and commencement thereof.
4. Whether claimant is entitled to Second Injury Fund benefits.

FINDINGS OF FACT

After a review of the evidence presented, I find as follows:

Jelisa Ross, claimant, was 47 years old at the time of the hearing. (Transcript page 13) She graduated from high school in 1991. (Tr. p. 14) She is left-handed and denied any injuries to her hands or arms before 2011. (Tr. p. 14)

Work History

Before working for the defendant employer, claimant worked at Pamida, Kum & Go and Pizza Hut. (Tr. p. 14) She worked as a cashier, a salesclerk, in customer service, and as a waitress. (Tr. p. 15)

Claimant was a stay-at-home mother of her three children for about one and one half to two years. (Tr. p. 18)

In 2002, claimant began working for the defendant employer, Eaton Corporation. (Tr. p. 14) She worked full-time. (Tr. p. 19) Eaton Corporation is a manufacturing facility that builds heavy-duty transmissions for semi-trucks. (Tr. p. 19) Eaton Corporation closed the department in which claimant worked in April, 2016. (Tr. p. 19) She has not worked since. (Exhibit JE18-132)

While at Eaton Corporation, claimant worked primarily building "mains" in the assembly area. (Tr. p. 20) This job involved assembling the main shaft, five gears, washers and the sliding clutches. This required claimant to pull parts out of totes and carry them to a table, assemble them and then push them down the line. (Tr. p. 20; Ex. 1-1) Claimant described assembling "140 units times 5." (Tr. p. 20) This is understood to be 140 per shift, five days per week. (Ex. 1-1) Claimant described the work as heavy and repetitive. The gears weighed between 8 and 14 pounds. (Tr. pp. 20-21) The job required frequent grasping and pinching. (Ex. 1-1)

File No. 5050197: The Injury and Subsequent Medical Treatment

Concerning File No. 5050197, claimant developed numbness in the right elbow and right hand in 2011. At that time, she was building "mains." (Tr. p. 23) She reported the injury to her employer and was sent to Mercy Occupational Medicine in Council Bluffs on August 11, 2011. (Tr. p. 23; Ex. JE1-1)

Claimant was seen at Mercy Occupational Health and placed in an elbow sling. (Ex. JE1-2) Claimant received conservative care from August, 11, 2011 through September 22, 2011. (Ex. JE1-1; Je JE1-7) An MRI of the right shoulder with arthrogram was negative. (Ex. JE1-7; Ex. JE2-9, 10) Claimant was referred to an orthopedist for further evaluation and treatment. (Ex. JE1-7)

Claimant was seen by Nicholas Bruggeman, M.D. at Nebraska Orthopaedic Associates on September 23, 2011. (Ex. JE1-11) Dr. Bruggeman administered a corticosteroid injection into claimant's right shoulder. On November 14, 2011, claimant reported her right shoulder pain had resolved and she was returned to work with no restrictions. (Ex. JE1-13)

Claimant had additional complaints with her right arm, but her right shoulder symptoms resolved. At hearing, claimant testified "I have no complaints with my right shoulder." (Tr. p. 62)

The parties stipulated that claimant sustained an injury to her right arm on August 11, 2011. (Hearing Report, p. 1, File No. 5050197) The Second Injury Fund, in File No. 5059360 does not argue that this alleged first injury to the right arm invades the body as a whole.

Claimant's right arm pain continued and on October 16, 2012, Dr. Bruggeman diagnosed claimant with right ulnar nerve neuritis. (Ex. JE3-16)

On January 14, 2013, Dr. Bruggeman performed an ulnar nerve decompression on claimant's right arm. (Ex. JE8-59) On April 4, 2013 claimant was reportedly doing well. (Ex. JE1-24)

On April 16, 2013, Dr. Bruggeman assigned 5 percent permanent impairment to claimant's right hand. He did not discuss the physiological basis for this rating nor reference the American Medical Association Guides to the Evaluation of Permanent

Impairment (AMA Guides), or any other framework from which the disability rating was derived.

Claimant continued to have arm pain and continued to receive treatment. On July 15, 2013, claimant underwent a second surgery with Dr. Bruggeman. (Ex. JE8-61) The surgery involved an open release of the right lateral extensor tendon for epicondylitis and debridement of soft tissue. The diagnosis at that time was lateral humeral epicondylitis. (Ex. JE8-61)

On November 7, 2013, claimant completed a functional capacity evaluation (FCE), which was deemed valid. (Ex. JE7-52)

On December 19, 2013, Dr. Bruggeman assigned 3 percent permanent partial disability for the right upper extremity after consideration of the FCE. (Ex. JE3-40) Again, there is no discussion of the AMA Guides or how the rating is derived.

On January 9, 2014, Dr. Bruggeman modified his opinion of impairment and assigned 5 percent permanent partial disability. (Ex. JE1-66) Dr. Bruggeman still does not provide any discussion of the data relied upon to arrive at the impairment rating or reference any assessment tool he may have used.

On February 6, 2014, Dr. Bruggeman authored a letter stating that the 5 percent impairment rating he assigned for claimant's right upper extremity is not in addition to the previous impairment. Dr. Bruggeman stated that this 5 percent is based on 3 percent for the lateral aspect of the elbow and 2 percent of the medial aspect of the elbow. He also opined that claimant was at maximum medical improvement (MMI) as of October 18, 2013 and that she should have no restrictions. (Ex. JE9-67) He still makes no reference the AMA Guides or any other assessment tool he might have relied upon.

On June 24, 2014, claimant had an independent medical evaluation (IME) with Sunil Bansal, M.D. at the request of claimant's counsel. (Ex. 2-1) Dr. Bansal opined that concerning claimant's right upper extremity, she sustained 11 percent permanent partial disability to her right upper extremity based on sensory deficits to the median and ulnar nerves. (Ex. 2-11, 12) Dr. Bansal noted a "loss of two point sensory discrimination over the right ring and small fingers measuring 8 mm." (Ex. 2-10) Dr. Bansal relied upon Tables 16-10, 16-11, and 16-15 of the AMA Guides. (Ex. 2-11)

On December 3, 2014, claimant who had continued to see Dr. Bruggeman, reported pain in her right elbow, numbness and tingling of the thumb, index and middle fingers. "She has numbness at night and with activities during the day." (Ex. JE9-71)

On January 19, 2015, claimant had a third surgery with Dr. Bruggeman involving an open medial nerve decompression of the right carpal tunnel and right percutaneous tenotomy of the lateral epicondylitis using ultrasound. (Ex. JE8-63) The diagnosis at that time was right carpal tunnel syndrome and right lateral humeral epicondylitis.

After surgery, claimant returned to work on or about March 9, 2015, in a different job than she had before. She was placed in the job of building slave cylinders, which she described as lighter, but not any less repetitive. Although she stated that she had been released to use her right arm, she also testified that she mostly used her left arm in this job. (Tr. pp. 50-52) She worked in this job until late April, 2015.

From April 27, 2015 through October 12, 2015, claimant was in a light duty job carrying a clipboard and checking the operators to be sure they were cleaning their machines on the prescribed schedule. (Tr. pp. 52-53) She was also assigned tasks of placing stickers on shelves, printing stickers and stapling papers for the human resources department. (Tr. pp. 53-54)

On June 23, 2015, claimant underwent an IME with Ian Crabb, M.D. at the request of defendants' counsel. (Ex. B-2, 24) Dr. Crabb opined claimant suffered from: lateral epicondylitis – treated; medial epicondylitis/ulnar nerve inflammation – treated; carpal tunnel – treated; and possible radial nerve entrapment. (Ex. B-9) Dr. Crabb stated that the “condition of lateral epicondylitis, medial epicondylitis and ulnar nerve entrapment have all been treated and are at MMI.” (Ex. B-9) Dr. Crabb then confusingly stated that “[t]he patient has not met maximum medical improvement.” (Ex. B-9) He then suggested an EMG and stated that “[i]f the EMG is normal, the patient would be considered at maximum medical improvement for all elbow diagnoses.” (Ex. B-10) Dr. Crabb does not provide a consistent opinion of MMI nor a clear opinion of permanent impairment and I therefore give his opinion on these matters little weight.

On September 11, 2015, claimant underwent a second FCE at the request of the treating physician, Dr. Bruggeman. The test was deemed invalid and it was stated that “[a]ccurate functional restrictions cannot be outlined based on an invalid” evaluation. (Ex. JE7-56) The determination that the evaluation was invalid was based on perceived inconsistent efforts during testing and claimant being “unwilling to perform any significant lifting with use of her right upper extremity,” and the conclusion that claimant’s “subjective complaints of pain appear out of proportion with her objective findings of dysfunction.” (Ex. JE7-56)

Claimant testified that she was released to return to work with no restrictions by Dr. Bruggeman in October, 2015. (Tr. pp. 33-34)

On October 12, 2015, claimant was moved from the light duty position described above that she had been in since April 27, 2015, to her prior job of building slave cylinders. (Tr. pp. 54-55) She was in this job until April, 2016 when the plant closed. (Tr. p. 55)

On November 11, 2015, Dr. Bruggeman stated that claimant “has been given a three percent (3%) impairment of the right upper extremity rating previously. There is no further impairment concerning the right upper extremity.” (Ex. JE9-80) There is no explanation given why Dr. Bruggeman reached back to his original opinion issued on December 19, 2013, rather than his more recent opinion of 5 percent impairment issued

on February 6, 2014. (Ex. JE3-40; Ex. JE9-67) He also confirmed that claimant had been released to return to work with no restrictions following the invalid FCE. (Ex. JE9-80; Tr. p. 33)

On January 5, 2016, Dr. Crabb issued another report following an EMG. (Ex. B-11) Dr. Crabb is asked several questions about the shoulder, which is not at issue in this file. He does not address MMI regarding the right elbow or right arm. However, he states "I agree with Dr. Bruggeman's assessment, the patient has had a 3% impairment to the right upper extremity." (Ex. B-13-14) Dr. Crabb provides no discussion or basis for his opinion. Nor does he address the confusion between the 3 percent and 5 percent ratings assigned by Bruggeman.

I note that defendants admit that claimant sustained 5 percent permanent impairment to the right upper extremity. (Ex. 3-2)

Having considered the evidence and weighing the expert opinions and other evidence provided, I note that Dr. Bruggeman and Dr. Crabb offered opinions that are conclusory and with little or no supporting discussion of claimant's physiological conditions upon which the rating is based. Further, there is no mention of the AMA Guides or any other evaluation tool that might have been utilized. On the other hand, Dr. Bansal offered an opinion that appears well-reasoned, but it was provided prior to the third and final surgery. Further, his opinion is based on claimant's sensory deficits, and claimant testified that she no longer had any numbness in her left arm following her third surgery. This severely undercuts Dr. Bansal's opinion. (Tr. p. 43) Claimant testified that her current symptoms in her right hand and arm included limited range of motion and pain in her right elbow and minimal grip strength in her right hand. (Tr. p. 43) I agree that claimant has some level of permanent impairment, but I cannot rely on Dr. Bansal's opinion of 11 percent when claimant had an intervening surgery and testified that the numbness she was reporting in the weeks prior to her final surgery has resolved post-surgery. (Ex. JE9-71; Tr. p. 43)

I find claimant sustained 5 percent permanent partial disability to her right upper extremity based on the opinion of the treating surgeon, Dr. Bruggeman, and supported by defendant's admission. I find that 5 percent of the upper extremity is 12.5 weeks.

I find that claimant has no ongoing formal restrictions on the right upper extremity.

Claimant testified that her current right arm symptoms involve reduced range of motion and pain in her right elbow. She has no numbness in her right upper extremity. She has no issues with her right shoulder or wrist. (Tr. p. 43)

The parties stipulated that claimant was paid 19 weeks of permanent partial disability benefits prior to the hearing at the stipulated rate of \$555.94. (Hearing Report, p. 2, File no. 5059360)

File No. 5059360: The Injury and Subsequent Medical Treatment

This file involves an alleged separate injury to claimant's left arm, occurring on October 15, 2015. This is not alleged by claimant to be a sequela of the August 11, 2011 injury.

On October 15, 2015, claimant was seen by ART, a chiropractic service located on-site at the employer's place of business. (Tr. p. 34; Ex. JE13-88) At that time, claimant complained of "left sided elbow pain in [the] lateral aspect that started to get worse in the last three days." (Ex. JE13-88)

Claimant continued to work in her job building slave cylinders from October 2015 until the plant closed in April, 2016. (Tr. p. 54) Therefore, claimant returned to work on October 16, 2015, the day after the injury was reported. (Ex. C-41)

On November 10, 2015, claimant was seen at St. Francis Orthopedic & Sports Medicine, by Thomas DiStefano, M.D. (Ex. JE12-84) He requested an EMG to assist with determination of causation, but stated based on the information available to him at that time, "the left lateral epicondylitis is due to overuse of the left upper extremity and therefore related to the injury sustained on August 11, 2011. (Ex. JE12-85) Again, this injury is not alleged by claimant to be a sequela to the August 11, 2011 injury.

On January 5, 2016, claimant underwent an IME with Dr. Crabb. (Ex. B-11) At that time she complained of numbness and burning in her left arm and elbow. Dr. Crabb reviewed medical records and conducted a physical examination of claimant. Dr. Crabb stated the diagnoses as: complaints of left hand – potentially caused by carpal tunnel syndrome; and, mild tendinitis symptoms over medial and lateral epicondyle. (Ex. B-14) Concerning causation, Dr. Crabb stated that "it is possible her job activities have exacerbated her condition." (Ex. B-14)(emphasis added) When asked whether claimant's condition was aggravated due to overuse. He responded that he rejected this explanation because claimant was released to return to work without restrictions concerning her right upper extremity. (Ex. B-15)

On January 25, 2016, Dr. Crabb signed and dated a letter prepared by defense counsel stating that although claimant's work duties "possibly" aggravated her underlying condition, that it is "more likely than not that Claimant's left upper extremity symptoms that she reported on October 15, 2015 are not causally related to her work activities." (Ex. B-16) There is no further discussion or explanation given.

On February 29, 2016, the claims examiner for the third party administrator for the workers' compensation insurance carrier sent a letter to claimant's counsel denying the left upper extremity and any treatment for the left upper extremity based on Dr. Crabb's IME report and supplemental opinion.

On April 13, 2016, Dr. DiStefano responded to a letter written by defense counsel by placing a check mark next to "agree" and signing and dating the letter. (Ex. JE12-87)

Dr. DiStefano marked “agree” that he does not believe, based on the amount of time claimant worked in 2015 that her left upper extremity symptoms were caused by her work activities, or that her work materially and permanently aggravated, accelerated or lit up her left upper extremity condition, or that her left arm complaints are attributable to overuse. Defendant advised Dr. DiStefano in the letter that claimant was off work from “January 19, 2015 to March 6, 2015 and April 23, 2015 until October 12, 2015. Claimant returned to work on October 13, 2015 and reported left upper extremity symptoms to her employer on October 15, 2015.” (Ex. JE12-86) These off work periods appear to be supported by the time records in Exhibit C. However, they are contradicted by the testimony of claimant that she was working from April, 2015 through October 12, 2015 in a light-duty position. (Tr. pp. 52-53) There was no evidence provided by testimony or otherwise explaining the meaning of defendants’ Exhibit C, and I therefore give greater weight to claimant’s testimony at hearing that was subject to cross examination.

I note claimant’s complaint of left arm pain was described on October 15, 2016, as getting “worse in the last three days,” which is consistent with her return to regular work from a light-duty position and having worked October 13, 14, and 15, 2016. (Ex. JE13-88)

On April 26, 2016, following the denial of the claim by the insurance carrier, claimant sought out medical care on her own with Caliste Hsu, M.D. regarding her left elbow and left hand pain. (Ex. JE14, p. 91) Claimant was diagnosed with left lateral epicondylitis and left carpal tunnel syndrome. (Ex. JE 14, p. 91)

In April 2016, the defendant employer closed the plant or the department that claimant worked in and claimant was laid off. (Tr. pp. 37, 54) Claimant has not worked since losing her job. (Ex. JE18-139) She was working in her regular job of building slave cylinders when she was laid off. (Tr. p. 54)

After being laid off, the employer provided vocational rehabilitation opportunities to the affected workers. Claimant chose not to participate in vocational rehabilitation because she stated that the gabapentin medication she was on caused severe anxiety, and she “couldn’t handle being around people,” and her depression would cause “crying fits.” (Tr. p. 46)

On May 2, 2016, claimant underwent surgery with Dr. Hsu, involving: left endoscopic carpal tunnel release with volar forearm fasciotomy; endoscopic cubital tunnel release; lateral elbow tenotomy with epicondyle drilling; and, radial tunnel decompression. (Ex. JE16-124)

On May 11, 2016, claimant reported that her pain was significantly better than before surgery. (Ex. JE14-93)

On June 29, 2016, Dr. Hsu wrote a letter to claimant’s attorney opining that claimant’s diagnoses included: left carpal tunnel syndrome; left cubital tunnel syndrome;

left lateral epicondylitis; and, left radial tunnel syndrome. Dr. Hsu opined that claimant's condition was "a result of her work duties related to her employment at Eaton Transmission." (Ex. JE14-97) Dr. Hsu further opined that claimant's condition developed while recovering from right arm surgery, due to increased lifting, pushing, pulling and grasping with her right arm/hand. Dr. Hsu stated that the May 2, 2016 surgery was "causally related to her work injury and her work activities at Eaton Transmission," and claimant would have been off work from May 2, 2016 to May 11, 2016 following the surgery. (Ex. JE14-97) He also stated that claimant had not yet reached MMI. Dr. Hsu provided another letter to claimant's counsel on November 30, 2016, confirming that she would have been returned to work with restrictions after May 11, 2016 and confirming that she was still not at MMI. (Ex. JE14-103)

On May 3, 2017, Dr. Hsu opined that claimant had reached MMI. (Ex. JE14-104) Dr. Hsu reported claimant's current symptoms included: some weakness in her left hand; numbness in her small finger and the ulnar half of her hand; and difficulty opening jars or gripping with her left hand. His examination showed loss of sensation of greater than 15mm in 2-point discrimination regarding her ulnar and radial aspect of the left small finger and 8mm 2-point discrimination on the ulnar aspect of her ring finger. She also had minimal grip strength and difficulty abducting her small finger, along with muscle atrophy in the dorsal interosseous muscle area and hypothenar area. (Ex. JE14-104)

Claimant has not looked for any work since being placed at MMI by Dr. Hsu. (Tr. p. 41) Claimant stated the reason she has not looked for work is because "I am left-handed, and with three-fourths of my hand and arm being numb on the left side, I can't feel a lot of things, whether I'm holding things, whether they're hot, whether they're cold." (Tr. p. 41)

Claimant testified that she did not believe she could return to the work she had been doing for the defendant employer because of the numbness in her left hand and elbow and because "I drop everything." (Tr. pp. 46-47) She also believed her right elbow would affect her ability to work because "I can't extend repetitively without severe pain." (Tr. p. 47). She did not believe she could return to any of her previous jobs for the same reasons. (Tr. p. 47)

On May 18, 2018, claimant underwent an IME with Dr. Bansal. (Ex. JE18-132) Following a review of medical records and a physical examination, he agreed with Dr. Hsu that the May 2, 2016 surgery was caused by repetitive work at the defendant employer "coming forward to October 15, 2015." (Ex. JE18-140) I note that Dr. Bansal found that claimant had full range of motion of her left elbow and left wrist and hand. (Ex. JE18-139) He opined that claimant's final diagnoses included: left lateral epicondylitis; left cubital tunnel syndrome; left carpal tunnel syndrome; and status post left endoscopic carpal tunnel release with volar forearm fasciotomy endoscopic cubital tunnel release, lateral elbow tenotomy with epicondyle drilling and radial tunnel decompression. (Ex. JE18-141) Dr. Bansal agreed with Dr. Hsu, that claimant reached MMI on May 3, 2017. He then assigned 14 percent permanent partial disability

to the left upper extremity based on loss of sensation and relying on tables 16-10, 16-11, and 16-15 of the AMA Guides. (Ex. JE18-142) Dr. Bansal assigned restrictions of lifting 10 pounds occasionally and 5 pounds frequently, along with avoiding repetitive or sustained flexion and frequent turning or twisting with her left arm. (Ex. JE18-142)

Claimant testified that her left hand is “three-fourths of the way numb” and she has “Nerve pains radiat[ing] from the tip of my fingers, the ones I can feel, anyway, up into above my elbow,” along with some form of spasms. (Tr. p. 44)

Considering the evidence and weighing the expert opinions concerning causation, I accept the opinions of the treating surgeon, Dr. Hsu, which is supported by Dr. Bansal that claimant’s diagnoses of: left carpal tunnel syndrome; left cubital tunnel syndrome; left lateral epicondylitis; and, left radial tunnel syndrome are “a result of her work duties related to her employment at Eaton Transmission.” (Ex. JE14-97) This conclusion represents the opinion of the treating physician who was in a unique position to see claimant over a period of time on multiple occasions and who actually performed the surgery on her arm.

I give little weight to the opinion of Dr. Crabb who initially stated the causation was “possible,” and only upon further consideration modified/clarified his opinion, but without discussion of any additional evidence he may have reviewed or any other basis for this modification/explanation of his prior opinion.

Dr. DiStefano initially stated in a letter he wrote, that claimant’s left arm injury was due to overuse following the right arm injury that occurred on August 11, 2011. He later changed his opinion by virtue of a “check here” letter provided by defendants and concluded that it was not work related, based on claimant being off work for several months in 2015 and her return to work three days prior to reporting the left arm symptoms. (Ex. JE12-85, 86, 87) Dr. DiStefano indicated in the “check the box” letter that he does not believe, based on the amount of time claimant worked in 2015 that: her left upper extremity symptoms were caused by her work activities at the defendant employer; or that her work materially and permanently aggravated, accelerated or lit up her left upper extremity condition; or, that claimant’s left arm complaints are attributable to overuse given the short time frame. However, I note that I have found above that claimant did work from April, 2015 through October 12, 2015, albeit on light duty, based on her testimony at hearing. Therefore, I find that Dr. DiStefano’s understanding of claimant being “off work” from April 2015 through October 12, 2015 is inaccurate.

Further, Dr. DiStefano does not address with any discussion or explanation why the October 15, 2015 injury is not in the nature of an aggravation of an underlying condition, particularly given claimant’s initial report of the injury that she “has left sided elbow pain in [the] lateral aspect that started to get worse in the last three days.” (Ex. JE13-88) This is consistent with claimant’s return to her regular work three days earlier. I give little weight to Dr. DiStefano’s opinion based on his misunderstanding of claimant’s work history and the nature of his reversal of opinion and lack of explanation or discussion.

I find the opinions of Dr. Hsu and Dr. Bansal to be more clearly stated and supported by the medical records and other evidence. I find that claimant sustained injury to her left arm that arose out of and in the course of her employment with defendant on October 15, 2015. I note that the employer and Second Injury Fund agreed at hearing that if liability was found that October 15, 2015 is the appropriate manifestation date for the injury. (Tr. p. 6)

I further accept the opinion of Dr. Bansal concerning functional impairment, which is the only assessment of functional impairment in evidence for the left arm. I find claimant sustained 14 percent permanent partial disability to the left upper extremity, which is 35 weeks.

Considering permanent restrictions, I note that claimant had been returned to work with no restrictions for the right arm, and the treating surgeon assigned restrictions of light use of the left arm. Dr. Bansal assigned more severe restrictions that do not comport with claimant's demonstrated ability of continuing in her slave cylinder assembly job for many months following the reported injury and before the benefit of surgery. Therefore, I reject the restrictions assigned by Dr. Bansal. I acknowledge the ongoing restriction of light use of the left arm assigned by Dr. Hsu, but note that Dr. Hsu was never asked to revisit this, and claimant had improvement following surgery, suggesting that increased use after MMI would be appropriate.

Concerning temporary disability, claimant asserts entitlement to the period of May 2, 2016 (date of surgery) to May 3, 2017 (Date of MMI per Dr. Hsu and Dr. Bansal). (Hearing Report, p. 1, File No. 5050197) The parties stipulated that claimant was off work during this period. (Hearing Report, p. 1, File No. 5050197) Claimant lost her job due to lay-off in April, 2016 and had no job to return to at the employer thereafter. (Tr. p. 19) Dr. Hsu stated that if claimant had been employed at the time of her surgery on May 2, 2016, she would have been taken off work until her follow-up appointment on May 11, 2016, when she would have been returned to work with restrictions. (Ex. JE14-103) There is no contradictory evidence on this period of time. Therefore, I find that claimant is clearly entitled to temporary benefits from May 2, 2016 through May 11, 2016.

On May 11, 2016, claimant's work activity was limited by Dr. Hsu to "[l]ight use of [her] left hand." (Ex. JE14-93) This restriction does not appear to have been lifted prior to May 3, 2017, when claimant was placed at MMI. Claimant's job duties of building slave cylinders was repetitive. (Tr. p. 51) Claimant used both her left and right arm to do the job, but she was able to use mostly her left arm, until she was released to use her right arm following her previous right arm surgeries. (Tr. p. 52) Therefore, it would appear that the job could be done favoring one arm and perhaps fitting within the restriction of "light use of [her] left hand." (Ex. JE14-93) But, historically, we know that doing so caused additional problems leading to surgery in the overused arm. Therefore, I find that given the restriction of "light use of [her] left hand" claimant was not medically capable of returning to substantially similar employment in which she was engaged at the time of the injury. In support of this conclusion, I note that defendant

employer agrees in their brief that if liability is found, claimant is entitled to healing period benefits past May 11, 2016. (Defendants Eaton Corporation and Old Republic Insurance Company's Post-Hearing Brief, p. 15)

I therefore, find that the first triggering event to end temporary benefits under Iowa Code section 85.34(1) occurred when claimant was placed at MMI on May 3, 2017, and claimant is entitled to healing period benefits from May 2, 2016 through May 3, 2017.

After the reported date of injury of October 15, 2015, claimant returned to work on October 16, 2015. I therefore, find that the appropriate commencement date for payment of permanent partial disability benefits is the date that claimant returned to work following the injury on October 16, 2015.

Second Injury Fund Claim

I find that claimant's first injury on August 11, 2011 to her right arm and her second injury on October 15, 2015 to her left arm invoke a consideration of Second Injury Fund Benefits.

I find that claimant continued to have symptoms in both arms that caused pain, numbness or discomfort that impaired the way that she worked and used her arms.

I note that claimant has sustained 5 percent impairment to the right arm and 14 percent impairment to the left arm. I find that these ratings represent 12.5 and 35 weeks respectively. However, when considering an industrial disability, I convert the ratings first to the whole person using Table 16-3, page 439 of the AMA Guides, fifth edition and arrive at ratings of 3 and 8 percent to the whole person, respectively. I then turn to the combined values chart on page 604 of the AMA Guides, fifth edition and arrive at a combined whole person rating of 11 percent.

Considering claimant's industrial disability, I note that claimant's functional impairment of 11 percent of the whole person, combined with her age of 47 years old, her limited education of a high school diploma and her limited work experience would tend to support a higher industrial disability amount. However, her lack of any permanent restrictions on the right arm and her less than firmly stated ongoing restrictions on the left arm post-MMI, combined with her absolute lack of any effort whatsoever to seek out employment lean toward a lower industrial disability award.

Based on the above and all other appropriate factors for the assessment of industrial disability, I find that claimant has sustained 20 percent industrial disability.

CONCLUSIONS OF LAW

File No. 5050197, Right Arm, Date of Injury, August 11, 2011:

1. Extent of permanent partial disability to claimant's right arm.

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). The fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

I have found above for the reasons there stated that claimant sustained 5 percent permanent partial disability to the right arm. Five percent of the arm is 12.5 weeks of permanent partial disability benefits. Claimant had been paid 19 weeks prior to the hearing. (Hearing Report, p. 2, File no. 5059360)

2. Costs

Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33. I conclude that in this file, each party shall pay their own costs.

File No. 5059360, Left Arm, Date of Injury, October 15, 2015:

1. Whether claimant sustained an injury to her left arm that arose out of and in the course of her employment on October 15, 2015.

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavy v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical

testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

I have found above for the reasons there stated that claimant sustained an injury to her left arm that arose out of and in the course of her employment on October 15, 2015.

2. Whether the alleged injury was the cause of temporary disability, and if so, the extent thereof.

Healing period benefits are payable to an employee who has sustained a permanent partial disability "beginning on the first day of disability after the injury, and until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first." Iowa Code section 85.34(1)

In this case, claimant was laid-off by her employer in April, 2016. She had been working full-time, with no restrictions at that time. Claimant had surgery on her right arm on May 2, 2016 and the treating surgeon, Dr. Hsu stated that claimant would have been off work through May 11, 2016, which was her next follow-up visit. At that time, claimant was placed on the restriction of light use of her left hand. This restriction remained in place through the time that claimant was placed at MMI on May 3, 2017. Dr. Bansal agreed with Dr. Hsu's date for MMI. Claimant did not return to work from May 2, 2016 through May 3, 2017, and placement at MMI was the first triggering event to cause an end to healing period under Iowa Code section 85.34(1).

Claimant is entitled to healing period benefits from May 2, 2017 through May 3, 2017, at the stipulated rate of \$555.22. (Hearing Report, p. 1, File No. 5050197)

3. Whether the alleged injury was the cause of permanent disability and if so, the extent and commencement thereof.

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). The fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

When an expert opinion is based upon an incomplete history, the opinion is not necessarily binding upon the commissioner. The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence, together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavey v. Economy Fire & Casualty Co., 526 N.W.2d 845 (Iowa 1995).

In this case, Dr. Bansal was the only physician to provide an opinion assessing the extent of permanent partial disability. I have found above for the reasons there stated that claimant sustained 14 percent permanent partial disability of her left arm.

Considering the appropriate commencement date for PPD benefits, the determination in Evenson v. Winnebago Industries, Inc., No. 14-2097 (Iowa 2016) concluded that the claimant's return to work established the commencement of PPD benefits, which was not precluded by the fact that claimant was later entitled to additional TPD benefits when he was assigned restrictions that prevented claimant from working his regular hours. Evenson v. Winnebago Ind., Inc., No. 14-2097, at 22 (Iowa 2016).

I have found above that claimant returned to work on October 16, 2015, the day after the work injury. Applying Evenson, October 16, 2015 is the appropriate date for commencement of PPD benefits.

4. Whether claimant is entitled to Second Injury Fund benefits.

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.

I have found above that claimant sustained 5 percent permanent partial disability to her right arm from the stipulated August 11, 2011 injury and an additional 14 percent permanent partial disability to her left arm on October 15, 2015, and that claimant had ongoing symptoms in both arms that affected her work and the use of her arms, thereby triggering consideration of Second Injury 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 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 (2014-2015).

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 355 (Iowa 1989); Second Injury Fund v. Mich. Coal Co., 274 N.W.2d 300 (Iowa 1970).

I have found above that claimant is entitled to 12.5 weeks of permanent partial disability benefits for the August 11, 2011 injury and 35 weeks of permanent partial disability benefits for the October 15, 2015 injury. These combine for a total credit to the Second Injury Fund of 47.5 weeks.

Considering industrial disability, I have found above for the reasons there stated that claimant has sustained 20 percent industrial disability, which is 100 weeks of benefits. Less the above credit of 47.5 weeks, the Second Injury Fund is responsible for payment of 52.5 weeks of benefits.

I found above that claimant's entitlement to permanent partial disability benefits begins on October 16, 2015. Therefore, the Second Injury Fund's obligation to commence payment of permanent partial disability benefits begins 35 weeks after October 16, 2015, which is June 18, 2016.

Interest on accrued benefits owed by the Second Injury Fund do not begin until the date of the commissioner's order. Second Injury Fund of Iowa v. Braden, 459 N.W.2d 467, 473 (Iowa 1990).

Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33. I conclude that claimant was generally successful in this claim and therefore exercise my discretion and assess costs against the defendant employer in this matter.

The defendant employer shall pay costs for the filing fee: \$100.00 and the deposition transcript cost of \$98.20. (Ex. 6-1) No costs are assessed against the Second Injury Fund.

ORDER

IT IS THEREFORE ORDERED:

File No. 5050197, Date of Injury, August 11, 2011:

1) Defendants are obligated to pay claimant twelve and one half (12.5) weeks of permanent partial disability benefits at the stipulated rate of five hundred fifty-five and 94/100 dollars (\$555.94), however, the parties stipulated that claimant was previously paid nineteen (19) weeks of permanent partial disability benefits prior to the hearing at the stipulated rate. Therefore, claimant shall take nothing further in this file.

2) Each party shall pay their own costs in this file.

File No. 5059360, Date of Injury, October 15, 2015:

1) Defendant Employer and their Workers' Compensation Insurance Carrier shall pay claimant healing period benefits from May 2, 2016 through May 3, 2017 at the stipulated rate of five hundred forty-four and 22/100 dollars (\$544.22).

2) Defendant Employer and their Insurance Carrier shall pay claimant permanent partial disability benefits of thirty-five (35) weeks, beginning on October 16, 2015 until all benefits are paid in full.

3) Defendants shall be entitled to credit for all weekly benefits paid to date.

4) Defendant Employer and their insurance carrier shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent, See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

5) Defendant Second Injury Fund shall pay claimant fifty-two and one half (52.5) weeks of industrial disability benefits (100 weeks less a credit of 47.5 weeks) commencing on June 18, 2016, until paid in full.

6) Interest on accrued benefits owed by the Second Injury Fund do not begin until the date of the commissioner's order. Second Injury Fund of Iowa v. Braden, 459 N.W.2d 467, 473 (Iowa 1990).

7) Accrued benefits shall be paid in a lump sum.

8) Defendant Employer and their insurance carrier shall pay costs in the amount of one hundred ninety-eight and 20/100 dollars (\$198.20) as set out above.

9) Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 21st day of March, 2019.


TOBY J. GORDON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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TJG/sam

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.