BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DEBORAH BUYS, Claimant, vs. POLARIS INDUSTRIES, INC., Employer, Self-Insured, and SECOND INJURY FUND OF IOWA, Defendants.	:	File No. 5061187 ARBITRATION DECISION Head Note Nos.: 1803, 3203

FILED
FEB 14 2018
WORKERS' COMPENSATION

STATEMENT OF THE CASE

Claimant, Deborah Buys, filed a petition in arbitration seeking workers' compensation benefits from Polaris Industries, Inc., self-insured employer, and the Second Injury Fund of Iowa (Fund), both as defendants, as a result of an alleged injury sustained on April 15, 2015. This matter came on for hearing before Deputy Workers' Compensation Commissioner Erica J. Fitch, on May 26, 2017, in Sioux City, Iowa. The record in this case consists of joint exhibits 1 through 12, defendant-Fund's exhibits AA through GG, and the testimony of the claimant. The parties submitted post-hearing briefs, the matter being fully submitted on June 30, 2017.

ISSUES

The parties submitted the following issues for determination:

1. Whether claimant sustained an injury arising out of and in the course of employment on April 15, 2015;

2. Whether the alleged injury of April 15, 2015 is a cause of permanent disability;

3. The nature and extent of any permanent disability;

4. The commencement date for permanent partial disability benefits; and

5. Specific taxation of costs.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, 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.

FINDINGS OF FACT

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

Claimant's testimony was clear and consistent as compared to the evidentiary record. Her demeanor at the time of evidentiary hearing was excellent and gave the undersigned no reason to doubt claimant's veracity. Claimant is found credible.

Claimant was 57 years of age at the time of hearing. She resides in Westfield, Iowa. Claimant did not graduate high school, having dropped out during the 10th grade. She subsequently earned a GED. Claimant also participated in approximately two years of coursework at Westmar College; she did not earn a degree or certification. Claimant testified her computer skills are limited to internet use; she denied any knowledge of Microsoft programs. She is right-hand dominant. (Claimant's testimony; Joint Exhibit 9, page 3)

Prior to her work at defendant-employer, claimant relayed experience as a bartender, hand packager, retail store manager, assembler of semi-conductors, and a brief period of data entry. (Claimant's testimony; Ex. AA, pp. 2-3; Ex. DD, p. 26) Claimant began work at defendant-employer in November 2005. Her position was as a warehouse worker, with duties as a returns clerk and order picker. Claimant's duties involved use of a hand-held scanner to scan boxes and products. (Claimant's testimony; JE9, p. 4)

In April 2006, claimant suffered a neck injury following an equipment accident at defendant-employer. (Ex. FF, pp. 32) Claimant did not undergo surgery. The injury resulted in permanent restrictions, described by claimant as a 30-pound maximum lift and no upward looking or overhead reaching. (Claimant's testimony) A summary document describes claimant's permanent restrictions imposed by Doug Martin, M.D.: light to medium physical demand work; maximum material handling of 35 pounds occasionally, 15 pounds frequently, and 7 pounds constantly; and only occasional work overhead or with outstretched arms. Jacqueline Stoken, D.O. also recommended permanent restrictions: avoidance of prolonged looking upward or downward; and limitation of repetitive pushing, pulling, and frequent lifting over 10 pounds. (Ex. FF, p. 34) Claimant described Dr. Martin's restrictions as accurate. (Claimant's testimony)

On December 17, 2014, claimant testified she reached in and grabbed a part from a bin when she felt a ripping and stinging sensation in her left elbow. Claimant testified she reported the injury to her supervisor, Michael Carrigan, that same date. (Claimant's testimony) Michael Carrigan completed an injury incident report on December 17, 2014 at 10:35 a.m. He noted claimant reported experiencing pain in her bilateral elbows, right greater than left. The pain was described as a pulling sensation, ongoing for several days without specific incident. He indicated claimant thought perhaps the complaints represented arthritis or were tied to cold weather. Mr. Carrigan noted claimant was able to continue working. (Ex. EE, p. 30) Claimant testified she believes the contents of the report are inaccurate with respect to the bilateral nature and lack of specific incident. (Claimant's testimony)

Claimant testified she was not sent for medical evaluation and continued working. Thereafter, she was unable to lift with her left arm and she continued to feel a stinging, burning sensation in her left elbow which extended down into her hand and small finger. She changed the manner in which she performed her job duties, holding the scanner in her left hand and picking parts with the right. Approximately 4 or 5 months later, in April 2015, claimant testified she began having difficulties with her right elbow. She described the right-sided symptoms as similar to those on the left, with a ripping, stinging, and burning sensation. Claimant testified she again reported the injury to Mr. Carrigan. She was not sent for medical evaluation. (Claimant's testimony)

Claimant testified she eventually sought assistance from defendant-employer's human resources department, as her symptoms were bilateral and she required treatment. (Claimant's testimony)

Defendant-employer then referred claimant for evaluation with Rodney Cassens, M.D. of Mercy Occupational Health. At an appointment on October 22, 2015, Dr. Cassens noted claimant suffered an injury in December 2014 and complained of bilateral elbow and wrist pain due to picking up parts. (JE1, p. 1) Claimant reported the symptoms developed over the past year while performing work duties requiring repetitive material handling; claimant did not relay any specific traumatic event. (JE1, p. 2) Following examination, Dr. Cassens assessed bilateral extensor tendonitis and bilateral wrist flexor tendinitis. He recommended conservative care, including over-the-counter Aleve, stretching, application of heat and cold, and use of bilateral splints at work. Dr. Cassens released claimant to perform regular duty, without restrictions. (JE1, pp. 1-2)

Claimant returned to Dr. Cassens in follow up on November 18, 2015. Claimant reported she had been off work for two weeks, but her pain had worsened. Following examination, Dr. Cassens assessed bilateral lateral epicondylitis of the elbows, bilateral extensor tendinitis of the elbows, and bilateral de Quervain's tenosynovitis (de Quervain's). Due to lack of relief with conservative measures, Dr. Cassens issued an orthopedic referral. He imposed a 10-pound lifting restriction and a limitation to only occasional gripping, pinching, pushing, pulling and reaching. (JE1, p. 6)

That same date, defendant-employer provided Dr. Cassens with a description of the essential functions of claimant's job as a warehouse worker. The requirements included lifting, pushing, pulling, or carrying up to 35 to 45 pounds individually or 70 pounds via team lift; and use of hand(s) to grasp, manipulate, assemble, or install. (JE1, p. 3) Dr. Cassens opined claimant was unable to perform the essential functions of her position. He imposed restrictions of no repetitive grasping and/or manipulations with the hands and no lifting greater than 10 pounds. (JE1, p. 4) In December 2015, claimant applied for short term disability benefits. Dr. Cassens completed the required physician's statement and opined claimant remained totally disabled from performance of her present occupation. (JE1, p. 7)

Per Dr. Cassens' referral, on December 2, 2015, claimant presented for orthopedic evaluation by Russell DeGroote, M.D. Following examination, Dr. DeGroote diagnosed bilateral lateral epicondylitis and bilateral de Quervain's. He imposed a 10-pound lifting restriction and a limitation to only occasional gripping, pinching, pushing, pulling and above shoulder-level reaching. (JE2, p. 1) Claimant continued to follow up with Dr. DeGroote and underwent an injection of the left epicondyle on December 16, 2015. At that time, Dr. DeGroote imposed work restrictions allowing occasional bilateral gripping, pinching, pushing and pulling, and a maximum lift and carry of 2.5 pounds. (JE2, pp. 3, 5)

Claimant returned to Dr. DeGroote on December 23, 2015 and reported development of hand numbness since the epicondyle injection. Due to the new onset of tendinopathy, Dr. DeGroote recommended evaluation for rheumatoid arthritis or inflammatory arthropathy. He ordered a series of labs. (JE2, pp. 5-6) In the interim, he imposed restrictions of occasional bilateral gripping, pinching, pushing and pulling, and a maximum lift and carry of 5 pounds. (JE2, p. 4)

Claimant underwent the recommended series of laboratory tests and returned to Dr. DeGroote in follow up on January 6, 2016. At that time, Dr. DeGroote opined claimant's lab results were negative. Following examination, he left claimant's work restrictions intact and ordered EMG/nerve conduction studies (NCS) of the bilateral upper extremities. (JE2, pp. 8-9)

On January 15, 2016, Chad Stadsvold, D.O. administered the ordered bilateral upper extremity EMG/NCS. He found no evidence of bilateral upper limb focal neuropathy, peripheral neuropathy, cervical radiculopathy, or brachial plexopathy. (JE 3, pp. 1-3)

Claimant returned to Dr. DeGroote on January 19, 2016, at which time, Dr. DeGroote opined claimant's studies revealed no evidence of peripheral neuropathy or radiculopathy. (JE2, p. 11) Following examination, Dr. DeGroote opined claimant had achieved maximum medical improvement (MMI) and recommended a functional capacity evaluation (FCE). (JE2, pp. 10-13)

Pursuant to Dr. DeGroote's order, on March 29, 2016, claimant presented to Katie Adams, OTD, OTR/L, for an FCE. Ms. Adams noted a history of injury on December 17, 2014, at which time claimant reported she felt a sharp pain/tearing sensation in her left elbow while lifting a part from a bin. Claimant indicated she reported the injury to her employer. Claimant indicated she subsequently developed right elbow pain in April 2015; she reported the symptoms and requested evaluation of her bilateral elbows. In October 2015, claimant approached defendant-employer's human resources department to complain and a medical appointment was scheduled. (JE4, p. 14)

During evaluation, Ms. Adams noted claimant demonstrated consistent and maximum effort, except with respect to self-limiting behavior on waist-to-crown lifting, grip strength, and pinch strength testing. Ms. Adams noted claimant's body language and physiological responses did not correlate with her intermittent complaints of high pain. Ms. Adams opined a probability of feigned weakness, with claimant's perceived abilities below those objectively demonstrated during testing. (JE4, p. 2)

Ms. Adams ultimately determined claimant was capable of functioning in the light physical demand category, with the ability to work into the medium category so long as her maximum abilities were not exceeded. (JE4, p. 5) Claimant demonstrated the following abilities: maximum waist to floor lifting of 20 pounds rarely, 15 pounds occasionally, and 10 pounds frequently; waist to crown lifting was self-limited, with demonstrated ability to lift 10 pounds frequently and 15 pounds occasionally; front carrying of 25 pounds rarely, 20 pounds occasionally, and 15 pounds frequently; and no limitations on pushing, pulling, handling, fingering, gripping, or pinching. (JE4, pp. 6, 18)

Upon completion of the FCE, claimant returned to Dr. DeGroote on April 15, 2016. Dr. DeGroote issued final diagnoses of bilateral epicondylitis and de Quervain's. He again opined claimant had achieved MMI and released claimant to return to work under permanent restrictions as set forth in the FCE. (Ex. 2, p. 14)

In May 2016, a representative from defendant-employer advised claimant she was unable to perform the essential functions of her previous warehouse worker position within the restrictions outlined by Dr. DeGroote. (JE8, p. 4) Thereafter, claimant and defendant-employer engaged in discussions regarding claimant's return to work. (JE8, pp. 5-7) Defendant-employer was ultimately unable to accommodate claimant's permanent restrictions. Her final rate of pay was $15.14 per hour. (Claimant's testimony)

At defendant-employer's referral, claimant underwent an impairment rating evaluation with certified independent medical examiner, Bruce Elkins, M.D. (JE5, p. 3) Dr. Elkins issued a report containing his findings and opinions on May 9, 2016. As an element of his evaluation, Dr. Elkins performed a records review. He also interviewed claimant and noted a history of suffering a ripping sensation in her left elbow while retrieving a box from a bin. Dr. Elkins noted claimant reported the injury but was not

referred for evaluation. Shortly following the onset of left elbow symptoms, claimant noticed right elbow symptoms without a specific incident. She also developed bilateral wrist pain. Claimant noted little improvement in her symptoms despite being off work for six months due to restrictions. Claimant denied interest in further intervention. (JE5, p. 2) Following examination, Dr. Elkins opined claimant sustained permanent impairment of 1 percent left upper extremity due to epicondylitis and no impairment of the right upper extremity. He utilized the AMA Guides to the Evaluation of Permanent Impairment, 6th Edition, in his rating methodology. (JE5, p. 3)

Defendant-employer paid claimant healing period benefits from November 4, 2015 through December 8, 2015, December 12, 2015 through April 18, 2016, and May 3, 2016 through May 30, 2016. On June 6, 2016, defendant-employer issued permanent partial disability benefits in the amount of $871.02. (JE12)

After she was unable to return to work at defendant-employer, claimant applied for and was granted long term disability benefits, effective May 2, 2016. Such benefits were paid in a monthly amount of $1,622.65. (JE9, p. 6; JE11, p. 1) In connection with receipt of long term disability benefits, claimant worked with vocational rehabilitation coordinator, Cathy McDonald, MA, CRC. In August 2016, Ms. McDonald recommended claimant contact Iowa Vocational Rehabilitation for services, noting claimant should be evaluated for work opportunities in seated and minimal lifting jobs given restrictions of "no repetition, lifting no more than 15 pounds." She also acknowledged a need for specialized training, such as computer usage. (JE8, p. 2) At the recommendation of the long term disability provider, claimant applied for Social Security Disability benefits. (Claimant's testimony)

At the arranging of claimant's counsel, on January 27, 2017, claimant presented for independent medical examination (IME) with board certified occupational medicine physician, Sunil Bansal, M.D. Dr. Bansal issued a report containing his findings and opinions on April 5, 2017. Dr. Bansal interviewed claimant, who reported she first noticed left elbow symptoms while lifting a part, leading to pain, burning and stinging of the left elbow. Claimant indicated she reported the left-sided injury. She subsequently began to notice similar right-sided symptoms and reported a cumulative injury to her right elbow on April 15, 2015. She eventually sought assistance from defendant-employer's human resource department and was sent for medical evaluation. (JE6, pp. 3-4) Claimant reported continued use of ibuprofen, gabapentin, and a home exercise program. (JE6, p. 5) Dr. Bansal performed a records review and drafted a summary of claimant's care. (JE6, pp. 1-3) He also performed a physical examination. (JE6, pp. 6-7)

Thereafter, Dr. Bansal provided answers to questions raised by claimant's counsel. Counsel requested Dr. Bansal provide diagnoses and opinions with respect to a left elbow injury of December 17, 2014 and a cumulative right elbow injury on April 15, 2015. Dr. Bansal assessed right-sided diagnoses of right lateral epicondylitis and right wrist de Quervain's. He agreed with Dr. DeGroote's opined MMI date and issued a permanent impairment rating of 3 percent right upper extremity for decreased strength,

utilizing the AMA Guides, 5th Edition. Dr. Bansal adopted the FCE results with respect to claimant's need for permanent restrictions. (JE6, pp. 7-8) Dr. Bansal assessed left-sided diagnoses of left lateral epicondylitis and left wrist de Quervain's. He again agreed with Dr. DeGroote's MMI date and adopted the FCE results for permanent restrictions. In terms of permanent impairment, Dr. Bansal opined a 5 percent left upper extremity impairment for loss of strength. (JE6, p. 9)

On May 1, 2017, Theresa Wolford, MS, authored a vocational assessment at claimant's request. Ms. Wolford interviewed claimant and performed a records review, noting claimant's educational background. (JE7, pp. 1-7) Ms. Wolford noted claimant's pre-injury work history consisted of work at defendant-employer, with her work falling within the categories of warehouse worker and industrial truck operator. She identified the warehouse worker position as medium, unskilled work, and the industrial truck operator position as medium, semi-skilled work. (JE7, pp. 7, 11) From these positions, Ms. Wolford identified 8 transferrable skills possessed by claimant. (JE7, pp. 7-8)

Ms. Wolford reviewed claimant's FCE, noting the document limited claimant to the light category of work, with the ability to work into the medium category, should maximum abilities not be exceeded. However, Ms. Wolford opined claimant did not meet all of the lifting requirements of light work, per the Dictionary of Occupational Titles. As a result, Ms. Wolford opined claimant was limited to sedentary work. (JE7, p. 8) She further opined claimant's work history did not provide any skills transferrable to sedentary work. Ms. Wolford noted claimant's work history consisted only of unskilled to semi-skilled manual labor and claimant possessed no meaningful computer skills. Ms. Wolford opined claimant would, therefore, be limited to unskilled, entry-level sedentary work. (JE7, pp. 8-9)

Utilizing this information, Ms. Wolford performed an analysis of claimant's access to the labor market pre- and post-injury. She computed claimant's loss of access as 96 percent. Of the potential remaining sedentary positions, Ms. Wolford found a wage range of $8.88 to $14.09 per hour. She opined claimant's wage loss as approximately 30 percent. After consideration of relevant vocational factors, Ms. Wolford determined claimant suffered a 70 percent vocational loss. (JE7, p. 9)

Defendant-Fund arranged for claimant to be evaluated by vocational consultant, Jeff Johnson, MS. (Ex. BB, pp. 21-22) Claimant participated in a telephonic interview with Mr. Johnson on May 15, 2017, lasting 90 minutes. Mr. Johnson also performed a records review. Mr. Johnson noted claimant previously suffered a neck injury in 2006, resulting in permanent restrictions of a 30-pound maximum lift, no extending the neck to look upwards, and no reaching overhead. (Ex. AA, p. 1) He noted claimant reported suffering work-related injuries in December 2014 and April 2015. In December 2014, claimant reported an onset of sharp left elbow pain, and in April 2015, claimant developed right elbow pain. Mr. Johnson noted an FCE found claimant capable of working in the light physical demand category, with the ability to function into the medium category as long as her maximum capabilities were not exceeded. This FCE was adopted by Drs. DeGroote and Bansal. (Ex. AA, p. 2)

Mr. Johnson spoke with claimant regarding her work history. Claimant reported she worked for defendant-employer from November 2005 to November 2015; he described her work as that of a returns clerk, order picker, and industrial truck operator. Claimant noted she earned $15.14 per hour. Prior to her work at defendant-employer, claimant relayed experience as a bartender, hand packager, retail store manager, and assembler of semi-conductors. (Ex. AA, pp. 2-3) Mr. Johnson identified 12 transferable skills possessed by claimant by virtue of her past employment. He also noted claimant's educational history. (Ex. AA, pp. 3-4)

Mr. Johnson reviewed claimant's FCE restrictions and opined claimant was capable of performing the full range of light and sedentary work. He opined claimant's lifting capability fell short of the medium exertional level as outlined in the Dictionary of Occupational Titles. (Ex. AA, p. 5) Utilizing the OASYS vocational database and these restrictions, Mr. Johnson found claimant retained post-injury access to 189 occupations. Compared to claimant's pre-injury access to 269 occupations, Mr. Johnson identified a 15 percent loss of employment opportunities. (Ex. AA, pp. 5, 19) Mr. Johnson provided examples of suitable available occupations. He also performed a labor market survey within 30 miles of claimant's residence and identified 21 viable job postings. (Ex. AA, pp. 5-6) Mr. Johnson opined should claimant return to work, she could expect a wage range of $8.00 to $12.00 per hour; he acknowledged this range reflected a loss of earnings from claimant's $15.14 per hour wage at defendant-employer. (Ex. AA, p. 7)

Claimant testified she continues to experience symptoms of her bilateral arms, right worse than left. She described sensations of ripping, stinging, burning, and aching of her arms down into her small, ring, and middle fingers. Claimant described difficultly with activities of daily living, including housework and activities requiring extended elevation or extension of her arms. (Claimant's testimony)

Claimant has not actively sought employment nor submitted any applications for employment since the cessation of her employment at defendant-employer. Approximately one year prior to hearing, claimant contacted a local United States Postal Service office and was advised that clerks must lift up to 70 pounds. Claimant also performed an internet search regarding a housekeeping position at a local hospital, but learned such positions required lifting of up to 50 pounds. (Claimant's testimony)

CONCLUSIONS OF LAW

The first issue for determination is whether claimant sustained an injury arising out of and in the course of employment on April 15, 2015.

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 R. App. P. 6.14(6).

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial

Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

Claimant and defendant-employer stipulated a work-related injury occurred on April 15, 2015. The undersigned finds no compelling reason to reject this stipulation as between claimant and defendant-employer. However, such a stipulation is not binding upon defendant-Fund. Defendant-Fund argues claimant sustained one injury to her bilateral arms on December 17, 2014. As such, there would be no qualifying loss for purposes of the Second Injury Compensation Act. Claimant argues she sustained an injury to her left arm on December 17, 2014 and a separate cumulative injury to her right arm on April 15, 2015.

Claimant credibly testified to a specific incident occurring on December 17, 2014 and involving only her left upper extremity. She also testified she subsequently developed right sided symptoms, with an onset in April 2015. Not only is claimant's testimony credible, it is supported by the histories provided to vocational evaluator, Mr. Johnson, as well as medical providers Ms. Adams, Dr. Elkins, and Dr. Bansal. While the notations of initial provider, Dr. Cassens, generally refer to bilateral complaints and note an injury date in December 2014, this is not fatal to claimant's case. Specifically, I note Dr. Cassens' records are summary in nature and often included only on a status update sheet, and the evaluations occurred some passage of time following both injuries, during a period wherein Dr. Cassens provided treatment to both elbows at the direction of defendant-employer. Given Dr. Cassens was authorized to provide care for both elbows, it is rational his records would reflect the date of injury detailed by defendant-employer. Importantly, the limited notations do not reflect reports by claimant which are contrary to those detailed throughout the evidentiary record.

Aside from Dr. Cassens' notations, which could merely be described as omitting certain information, defendant-Fund relies upon the incident report authored by Mr. Carrigan contemporaneous to the December 17, 2014 injury. Although Mr. Carrigan's report specifically refers to a bilateral injury without specific incident, I note that the report is not signed by claimant and claimant specifically rejects the accuracy of the report. The content is also at odds with the specific and consistent reports subsequently made by claimant to medical providers and a vocational evaluator. I further question reliance upon a report authored by a representative who declined to provide medical evaluation despite multiple reports of complaints, especially given defendant-employer's human resource department authorized medical care promptly

upon notification, defendant-employer admitted the occurrence of a work injury, and defendant-employer contemporaneously paid weekly indemnity benefits from November 2015 through June 2016. The evidentiary record contains no further statements or testimony by Mr. Carrigan which would prompt me to award his initial report increased weight.

The weight of the evidence supports a finding that claimant has proven by a preponderance of the evidence that she sustained a work-related injury to her right upper extremity on April 15, 2015.

The next issue for determination is whether the alleged injury of April 15, 2015 is a cause of permanent disability.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

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); Dunlavey 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).

Claimant and defendant-employer stipulate the work injury resulted in permanent disability. The undersigned finds no compelling reason to reject this stipulation as between claimant and defendant-employer. However, such a stipulation is not binding upon defendant-Fund.

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

Defendant-Fund argues claimant sustained no permanent disability from the April 15, 2015 right upper extremity injury and as such, the April 15, 2015 injury does not qualify as a second loss under the Second Injury Compensation Act.

Claimant testified she possesses ongoing limitations with respect to her right upper extremity. Claimant underwent an FCE which determined appropriate permanent restrictions. These restrictions were adopted by Dr. DeGroote and by Dr. Bansal, who specifically noted permanent restrictions were required as a result of the right upper extremity injury. Dr. Bansal opined claimant suffered a 3 percent right upper extremity functional impairment, while Dr. Elkins opined claimant suffered no right upper extremity impairment. I award greater weight to the opinion of Dr. Bansal, as Dr. Bansal utilized the AMA Guides, 5th Edition, the edition adopted in Iowa by rule 876 IAC 2.4. Dr. Elkins utilized the AMA Guides, 6th Edition, which has not been adopted in this state.

Given claimant requires permanent restrictions and suffered permanent functional impairment as a result of the work injury of April 15, 2015, it is determined claimant has proven by a preponderance of the evidence that the work injury of April 15, 2015 is a cause of permanent disability.

The next issue for determination is the nature and extent of any permanent disability.

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).

Claimant and defendant-employer stipulate the work injury of April 15, 2015 resulted in a 2 percent impairment to claimant's right upper extremity. The undersigned finds no compelling reason to reject this stipulation as between claimant and defendant-employer. Claimant is, therefore, entitled to 5 weeks of permanent partial disability benefits from defendant-employer (2 percent x 250 weeks = 5 weeks). The parties stipulated at the time of the work injury, claimant's gross earnings were $611.25 and she was married and entitled to 2 exemptions. The proper rate of compensation is therefore, $409.26.

As claimant has proven first and second qualifying losses, Fund liability is triggered. Pursuant to the Second Injury Compensation Act, the extent of claimant's permanent disability, as against defendant-Fund, is measured industrially.

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 R. Co., 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 the 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.

Claimant was 57 years of age at the time of evidentiary hearing. She did not graduate high school, though she subsequently obtained a GED. Although claimant pursued approximately two years of college coursework, she did not earn a degree or diploma. Claimant is right-hand dominant and possesses limited computer skills. Her work history consists of unskilled to semi-skilled work as a bartender, hand packager, retail store manager, semi-conductor assembler, data entry, and as a warehouse worker for defendant-employer. With the exception of a brief period of data entry, claimant's work history has involved manual labor.

Following the April 15, 2015 work injury, Drs. Elkins and Bansal offered opinions with respect to the extent of claimant's permanent impairment. Due to his usage of the AMA Guides, 5th Edition, I adopt the functional impairment ratings authored by Dr.

Bansal. With respect to the right upper extremity, injured on April 15, 2015, Dr. Bansal opined a 3 percent upper extremity impairment.

Claimant also underwent an FCE which found claimant was capable of functioning in the light physical demand category of work, with some ability to extend into the medium category of work so long as noted maximum abilities were not exceeded. The FCE results found abilities to perform: maximum waist to floor lifting of 20 pounds rarely, 15 pounds occasionally, and 10 pounds frequently; waist to crown lifting was self-limited, with demonstrated ability to lift 10 pounds frequently and 15 pounds occasionally; front carrying of 25 pounds rarely, 20 pounds occasionally, and 15 pounds frequently; and no limitations on pushing, pulling, handling, fingering, gripping, or pinching. The FCE administrator also noted claimant's perception of her abilities was below that objective demonstrated with testing. Drs. DeGroote and Bansal adopted the results of the FCE in determination of claimant's need for permanent work restrictions.

Defendant-employer was unable to accommodate claimant in her pre-injury warehouse worker position and, despite discussions, claimant was never permitted to return to work at defendant-employer following imposition of these permanent restrictions. The work injury of April 15, 2015 resulted in restrictions which precluded claimant's return to work at defendant-employer. At the conclusion of her employment with defendant-employer, claimant earned $15.14 per hour.

Following conclusion of her employment at defendant-employer, claimant received long term disability benefits and applied for Social Security Disability benefits. Three vocational counselors evaluated or assisted claimant: Ms. McDonald, Ms. Wolford, and Mr. Johnson. None were able to return claimant to employment. However, only Ms. McDonald appears to have actively attempted to provide vocational services to claimant and appears to have done so with an inaccurate summary of claimant's permanent restrictions, specifically noted as a maximum lift of 15 pounds and no repetition. Therefore, I find little probative value in her efforts. I similarly reject the vocational opinions of Ms. Wolford, as Ms. Wolford's efforts are premised upon claimant's ability to only function in the sedentary category of work, in contradiction of the FCE results as adopted by Drs. DeGroote and Bansal. Additionally, Ms. Wolford's opinions are based upon incomplete knowledge of claimant's work history. I ultimately find the greatest probative value in the report of Mr. Johnson, as Mr. Johnson utilized claimant's FCE results and permanent restrictions as opined by the evaluating physicians. Mr. Johnson also possessed a more accurate and thorough history of claimant's work experience. He determined claimant sustained a 15 percent loss of employment opportunity and also noted remaining positions available to claimant carried wages of $8.00 to $12.00 per hour. As compared to her pre-injury wage at defendant-employer, claimant's wage loss ranges from 20 to 47 percent.

Having acknowledged claimant did suffer a loss of access to employment opportunities, I find claimant has not demonstrated motivation to continued employment. Claimant's loss of access is modest, 15 percent. While available wages are not equivalent to those previously earned by claimant, they are not insignificant. In the year

following imposition of permanent restrictions, claimant made only two inquiries into potential job postings. She has submitted no applications. Claimant believes she is significantly limited, but the objective FCE results note her perceptions are not accurate to her abilities.

Upon consideration of the above and all relevant factors of industrial disability, it is determined claimant sustained a 35 percent loss of earning capacity as a combined result of the injuries of December 17, 2014 and April 15, 2015. Such an award entitles claimant to 175 weeks of permanent partial disability benefits (35 percent x 500 weeks = 175 weeks).

The Fund is entitled to credit for disability attributable to the first and second qualifying losses. As outlined *supra*, I adopt the opinions of Dr. Bansal with respect to the extent of functional impairment suffered as a result of the left upper extremity injury of December 17, 2014 and right upper extremity injury of April 15, 2015. Dr. Bansal opined claimant sustained a permanent impairment of 5 percent left upper extremity, which entitles the Fund to a credit for 12.5 weeks. Dr. Bansal opined claimant sustained a permanent impairment of 3 percent right upper extremity, which entitles the Fund to a credit for 7.5 weeks. The total credit to the Fund is, therefore, 20 weeks.

The Fund is responsible, after application of the credit, for 155 weeks of permanent partial disability benefits. These benefits shall be paid at the weekly rate of $409.26.

The next issue for determination is the commencement date for permanent partial disability benefits.

Claimant and defendant-employer stipulated defendant-employer's obligation for permanent partial disability benefits should commence on May 31, 2016. The undersigned finds no compelling reason to reject this stipulation as between claimant and defendant-employer. Defendant-employer's obligation for permanent partial disability benefits shall commence on May 31, 2016. Defendant-Fund's obligation for permanent partial disability benefits shall commence at the conclusion of defendant-employer's payment of permanent partial disability benefits. Given defendant-employer's responsibility for five weeks of permanent partial disability benefits, the Fund's obligation should commence on July 5, 2016.

The final issue for determination is a specific taxation of costs pursuant to Iowa Code section 86.40 and rule 876 IAC 4.33 and/or reimbursement pursuant to section 85.39. Claimant requests reimbursement from defendant-employer for the cost of Dr. Bansal's IME in the amount of $2,482.00. (JE10) Defendant-employer did not contest claimant's right to reimbursement at the time of hearing and the undersigned finds claimant's right to an IME was triggered in this case. There is no evidence Dr. Bansal's fee is unreasonable. Defendant-employer shall reimburse claimant for the cost of Dr. Bansal's IME. Defendant-employer is responsible for the costs of this action; taxation of any costs against defendant-Fund is improper.

ORDER

THEREFORE, IT IS ORDERED:

The parties are ordered to comply with all stipulations that have been accepted by this agency.

Defendant-employer shall pay unto claimant five (5) weeks of permanent partial disability benefits commencing May 31, 2016 at the weekly rate of four hundred nine and 26/100 dollars ($409.26).

Defendant-employer shall receive credit for benefits paid.

Defendant-Fund shall pay unto claimant one hundred fifty-five (155) weeks of permanent partial disability benefits commencing at the conclusion of defendant-employer's obligation, on July 5, 2016. Such benefits shall also be paid at the weekly rate of four hundred nine and 26/100 dollars ($409.26).

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendant-employer shall reimburse claimant for Dr. Bansal's IME expense, as set forth in the decision.

Defendant-employer shall electronically file a first report of injury with respect to the April 15, 2015 date of injury.

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

Costs are taxed to defendant-employer pursuant to 876 IAC 4.33.

Signed and filed this 14th day of February, 2018.

ERICA J. FITCH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Al Sturgeon
Ron Pohlman
Attorneys at Law
911 Sixth St.
Sioux City, IA 51101
alsturgeon@siouxlan.net
mxjudge@gmail.com

D. Brian Scieszinski
Attorney at Law
801 Grand Ave., Ste. 3700
Des Moines, IA 50309-2727
Scieszinski.brian@bradshawlaw.com

Amanda R. Rutherford
Assistant Attorney General
Dept. Justice
Hoover State Office Bldg.
Des Moines, IA 50319
amanda.rutherford@iowa.gov

EJF/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.