

## BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ANITA GANSEN,  Claimant,  vs.  SECOND INJURY FUND OF IOWA,  Defendant.	File No. 20700877.02   ARBITRATION DECISION  Head Notes: 1803
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**I. STATEMENT OF THE CASE.**

Claimant Anita Gansen filed a petition seeking workers' compensation benefits from the defendants, employer Theisen's Supply, Inc. (Theisen's), insurance carrier Integrity Insurance Company (Integrity), and the Second Injury Fund of Iowa (Fund). Gansen agreed to settle her claims against Theisen's and Integrity, and on February 18, 2022, the parties filed notice of their agreement with the agency. On July 7, 2022, the agency approved the parties' application for commutation of benefits under Iowa Code section 85.45.

Because of the commutation, this decision addresses only the dispute between Gansen and the Fund. The undersigned presided over an arbitration hearing on July 7, 2022, between Gansen and the Fund. Gansen participated personally and through attorney Zeke McCartney. The Fund participated by and through attorney Alec R. LeSher, who later withdrew and Meredith C. Cooney appeared as counsel representing the Fund.

**II. ISSUES.**

Under rule 876 IAC 4.19(3)(f), the parties jointly submitted a hearing report defining the claims, defenses, and issues submitted to the presiding deputy commissioner. The hearing report was approved and entered into the record via an order because it is a correct representation of the disputed issues and stipulations in this case. The parties identified the following disputed issues in the hearing report:

- 1) Did Gansen sustain a first qualifying loss for purposes of Fund benefits?
- 2) If Gansen sustained a first qualifying loss for purposes of Fund benefits, what is the extent of the loss?
- 3) Did Gansen sustain a second qualifying loss for purposes of Fund benefits?

- 4) If Gansen sustained a second qualifying loss for purposes of Fund benefits, what is the extent of the loss?
- 5) What is the nature and extent of permanent disability, if any, caused by the alleged injuries?
- 6) Is the Fund entitled to a credit in the amount of fifty-three and 6/10 weeks of permanent partial disability benefits?

### **III. STIPULATIONS.**

In the hearing report, the parties entered into the following stipulations:

- 1) An employer-employee relationship existed between Gansen and Theisen's at the time of the alleged injury.
- 2) Gansen sustained an injury on December 20, 2019, which arose out of and in the course of her employment with Theisen's.
- 3) The alleged injury is a cause of temporary disability during a period of recovery, but Gansen's entitlement to temporary or healing period benefits is no longer in dispute.
- 4) The commencement date for Fund benefits, if any are awarded, is January 10, 2023.
- 5) At the time of the stipulated injury:
  - a) Gansen's gross earnings were seven hundred fifty-six and 00/100 dollars (\$756.00) per week.
  - b) Gansen was single.
  - c) Gansen was entitled to one exemption.

The parties' stipulations in the hearing report are accepted and incorporated into this arbitration decision. The parties are bound by their stipulations. This decision contains no discussion of any factual or legal issues relative to the parties' stipulations except as necessary for clarity with respect to disputed factual and legal issues.

### **IV. FINDINGS OF FACT.**

The evidentiary record in this case consists of the following:

- Joint Exhibits (Jt. Ex.) 1 through 7;
- Claimant's Exhibits (Cl. Ex.) 1 through 2; and

- Hearing testimony by Gansen.

After careful consideration of the evidence and the post-hearing briefing, the undersigned enters the following findings of fact.

Gansen was 62 years old at the time of hearing. She is right-hand dominant. Gansen graduated from Dubuque Hempstead High School in 1978 and obtained a bachelor's degree in psychology from Loras College in 1982. (Testimony)

For about three months after graduating from Loras, Gansen worked as a secretary at a milk-processing plant that was under construction. She then moved to Houston, Texas, and worked through a temporary staffing firm that placed her in a call center for an insurance company where she answered telephone calls and directed them to appropriate personnel. (Testimony)

After about six months, she moved to Dallas, where her brother lived, because she did not like the weather in Houston. (Testimony) A Godfather's Pizza restaurant in Houston hired Gansen and she worked there for five years. Gansen ultimately worked her way up to manager. Her job duties included balancing the books, stocking shelves, working at the cash register, unloading trucks, and making pizzas. (Testimony)

Gansen next worked at Stop N' Go full time in the kitchen until 1991, when she moved back to Iowa. The Des Moines Scrap Metal Company hired her to fill an office job, in which her job duties included bookkeeping, answering phones, and paperwork. Gansen worked there until a dust allergy she developed forced her to find another job. (Testimony)

Casey's hired Gansen to work in one of its convenience stores as a cashier and in the kitchen. In 2005, her mother needed help, so Gansen moved back to Dubuque. She got a job with a temporary staffing firm that placed her at Nordstrom. Her job duties at Nordstrom required her to open boxes, sort items, and hang up clothing. Gansen also worked at a Dollar General in Dubuque as a clerk. She worked the cash register, stocked shelves, and unloaded boxes of products. (Testimony)

In 2007, Gansen was placed at Theisen's. Theisen's hired her as a full-time employee after her temporary placement. She worked in warehouse receiving, using an electronic pallet or pallet jack, unloading products from boxes, scanning them, and sorting them into totes. (Testimony)

In or around 2010, a coworker asked Gansen if she was stomping her foot while walking. Gansen wore earplugs, so she took them out and this allowed her to notice her right foot was stomping. Her sister advised her to see a doctor, but Gansen thought it was just fatigue. She did not recognize that she had a diagnosable medical condition. (Testimony)

There is an area at Theisen's known as the "boot bay." The work in the boot bay is physically demanding, so Gansen's manager typically only assigned employees to

one-week stints there. The duties required opening boxes stacked about twelve-feet high on a large pallet, lifting each of the boxes from the pallet, opening them, and removing individual boxes of boots and shoes, which were tightly packed inside. In Gansen's experience, removing the individual boot and shoe boxes was the most difficult because of how they were wedged in the larger shipping box. (Testimony)

Theisen's assigned Gansen to work in the boot bay for four consecutive weeks. Near the end of her fourth week in the boot bay, Gansen's left hand was throbbing so badly she could not hold a scanner with it. She and a coworker notified a supervisor, who reassigned Gansen to work in a different area with less physically demanding duties. (Testimony)

Theisen's did not arrange care for Gansen right away. They first tried light duty. Because Gansen's condition did not resolve, Theisen's arranged care at Finley Occupational Health with Dietmar Grentz, M.D. Gansen credibly testified that she did not recall experiencing localized shoulder pain at that time or reporting such pain to Dr. Grentz. Rather, Gansen experienced and complained of pain in her left wrist area that shot up her arm to her shoulder area. (Testimony; Jt. Ex. 1, pp. 1–2) Dr. Grentz placed Gansen on light duty effective January 8, 2020. (Jt. Ex. 1, p. 4) Dr. Grentz released Gansen to work full duty on January 29, 2020, and concluded there was no additional care he could offer her on February 5, 2020. (Jt. Ex. 1, pp. 10–12)

After Dr. Grentz released Gansen from care, her symptoms did not improve. She independently set up an appointment at Grand River Medical Group for her wrist because of her ongoing symptoms and figured she would also ask about her foot because she would be seeing a doctor. She saw Mark Liaboe, M.D., for the first time on February 10, 2020. (Testimony; Jt. Ex. 2, pp. 15–16) With respect to Gansen's foot, Dr. Liaboe noted she had an "increasingly severe right foot drop" and that she was "not aware of an injury." (Testimony; Jt. Ex. 5, p. 36) Dr. Liaboe placed Gansen on light duty and referred her to Ronald Sims, M.D., for a neurological evaluation. (Jt. Ex. 2, pp. 15–16)

Dr. Sims noted the onset of her right foot drop was in or around 2013 and ordered imaging of her leg and spine. (Jt. Ex. 6, pp. 39, 43) On October 16, 2020, Dr. Sims interpreted the imaging as not showing a disorder of the spine and diagnosed Gansen with "weakness in the right leg" due to issues with "multiple muscles of the proximal and distal" lower right extremity, and recommended therapy. (Jt. Ex. 6, p. 45)

With respect to Gansen's arm pain, Dr. Sims ordered an electromyography (EMG) that showed mild carpal tunnel syndrome of the right arm and severe carpal tunnel syndrome in the left. (Jt. Ex. 3, p. 28) Dr. Sims initially recommended physical therapy, which Gansen participated in for about two months, but it was ineffective. (Jt. Ex. 4, p. 35; Jt. Ex. 7, pp. 50–57) Dr. Sims then recommended bilateral carpal tunnel release surgery and advised Gansen to return to Dr. Liaboe for a referral to an orthopedic specialist. (Jt. Ex. 3, p. 32)

Gansen attempted to schedule care with Dubuque Orthopedics but the provider refused because of the question regarding whether her injury was subject to workers' compensation. (Testimony) Ultimately, the defendants arranged for surgery with David Field, M.D., but Gansen refused to have him perform surgery on her because she had acquaintances who had Dr. Field as their surgeon and they had poor outcomes. Gansen did not undergo surgery at all and has learned to live with her symptoms. (Testimony)

Gansen continued to work at Theisen's but with limited functional ability. Because of the limitations caused by Gansen's work injury, it took her longer to perform certain job duties. Gansen got into an argument with a coworker after the coworker undid her work because she was frustrated with how long it would take to redo the work. Theisen's discharged Gansen because of the argument. (Testimony)

Walmart hired Gansen as an internet shopper. Walmart initially assigned Gansen to the freezer and then the cooler, which required her to lift heavier items, so she requested reassignment as an accommodation. At the time of hearing, her job duties were within her work restrictions. She uses a top stock cart to place items customers have returned back on the shelves and to relocate items to their proper shelf after a customer moves them and leaves them elsewhere in the store. At the time of hearing, Gansen earned seventeen dollars per hour while working about forty hours per week. (Testimony)

Claimant's counsel arranged for an independent medical examination (IME) with Robin Sassman, M.D., an occupational medicine specialist. (Testimony; Cl. Ex. 1, pp. 1–3; Cl. Ex. 2) Dr. Sassman issued an IME report based on her review of medical records relating to Gansen's alleged injuries and a physical examination of Gansen she performed on January 4, 2021. (Cl. Ex. 1, pp. 4–18) Dr. Sassman found that Gansen had not reached maximum medical improvement (MMI) because she required carpal tunnel release surgery. (Cl. Ex. 1, pp. 15–16)

However, Dr. Sassman also opined that if Gansen ultimately decides not to undergo the recommended surgery, her assessment of permanent functional impairment using the Fifth Edition of the American Medical Association (AMA) *Guides to the Evaluation of Permanent Impairment (Guides)* is:

[B]ased on Page 495 of *The Guides*, she will be assigned 5% upper extremity impairment for the left upper extremity carpal tunnel syndrome (severe). Using Table 16-3 on page 439 this is converted to 3% whole person impairment. I would also assign her 3% upper extremity impairment for the right upper extremity carpal tunnel syndrome (mild). Using Table 16-3 on page 439 this is converted to 2% whole person impairment.

(Cl. Ex. 1, p. 16) Dr. Sassman assigned Gansen work restrictions that consist of:

- Occasionally lifting, pushing, pulling, or carrying of more than fifteen pounds;
- No repetitive or forceful gripping or grasping with either hand;
- No use of vibratory tools or power tools; and
- No use of ladders. (Cl. Ex. 2, p. 23)

Dr. Sassman also used Table 17-6 on page 530 of the *Guides* to assign Gansen a thirteen percent lower extremity impairment for calf atrophy. (Cl. Ex. 1, p. 17) She then used Table 17-3 on page 527 of the *Guides* to convert that to a five percent whole person impairment. (Cl. Ex. 1, p. 17) Dr. Sassman assigned Gansen work restrictions because of her leg injury that include no working on ladders or walking on uneven surfaces. (Cl. Ex. 1, p. 17)

At the time of hearing, Gansen continued to experience symptoms in her arms. She has constant left wrist pain with regular tingling and numbness. Using devices that vibrate such as a lawnmower or leaf blower worsen her symptoms. So does repetitive motion. Gansen wore a brace on her left wrist to help mitigate her symptoms. Nonetheless, she experienced weakness in her left hand and trigger finger-like symptoms in her left hand. (Testimony)

## **V. CONCLUSIONS OF LAW.**

In 2017, the Iowa legislature amended the Iowa Workers' Compensation Act. See 2017 Iowa Acts, ch. 23. The 2017 amendments apply to cases in which the date of an alleged injury is on or after July 1, 2017. Id. at § 24(1); see also Iowa Code § 3.7(1). Because the injury at issue in this case occurred after July 1, 2017, the Iowa Workers' Compensation Act, as amended in 2017, applies. Smidt v. JKB Restaurants, LC, File No. 5067766 (App. Dec. 11, 2020).

### **A. Fund Benefits.**

The legislature created the Fund in 1945 and expanded its scope in 1951 to create an incentive for employers to hire workers with disabilities. Gregory v. Second Injury Fund, 777 N.W.2d 395, 397–98 (Iowa 2010). “Under the current version of section 85.64, the Fund is implicated in a workers' compensation claim when an employee suffers successive qualifying injuries.” Id. at 398. To establish entitlement to benefits from the Fund, an injured employee must prove by a preponderance of the evidence:

- 1) A first qualifying loss to a hand, arm, foot, leg, or eye;
- 2) A second qualifying loss to such a member in the form of a permanent disability caused by an injury compensable under the Iowa Workers' Compensation Act; and

- 3) The permanent disability resulting from the first and second injuries exceeds the compensable value of the previously lost member. Id. at 398-99 (citing Iowa Code § 85.64 and Second Injury Fund v. Shank, 516 N.W.2d 808, 812 (Iowa 1994)).

To qualify under section 85.64(1), a loss must be permanent but it “need not be a total loss or loss of use.” George, 737 N.W.2d at 146 (citing Irish v. McCreary Saw Mill, 175 N.W.2d 364, 368 (Iowa 1970)). Other than the express requirement that the second loss be the result of permanent disability caused “by a compensable injury,” the text of section 85.64(1) provides no basis from which to create different standards for what constitutes a qualifying loss to an enumerated body part based on whether it happened first or second in time. See Iowa Code § 85.64(1). Moreover, the Iowa Supreme Court held it would be “senselessly inconsistent” to apply different standards based on the order of occurrence. Gregory, 777 N.W.2d at 400. Therefore, the caselaw delineating the contours of what constitutes a qualifying loss under the statute is generally applicable regardless of when such a loss took place. See id.

### **1. First Qualifying Loss.**

Under Iowa Code section 85.64(1), an employee seeking benefits from the Fund must show the employee “previously lost, or lost the use of, one hand, one arm, one foot, one leg, or one eye.” A “first qualifying injury need not be a work-related injury.” Gregory, 777 N.W.2d at 399. Further, a first loss need not have occurred due to a traumatic incident. See Shank, 516 N.W.2d at 815–16 (affirming the Commissioner’s conclusion that a congenital vision defect constitutes a first qualifying loss under the statute). The standards for a qualifying loss discussed above also govern.

Gansen first experienced symptoms of her drop foot before injuring her upper extremities. The weight of the evidence establishes Gansen’s drop foot is not related to an injury to or other condition of her spine. And Dr. Sassman’s impairment rating of Gansen’s loss is based on calf atrophy, a condition localized in the leg.

Gansen has met her burden of proof on the disputed issue of whether she has sustained a qualifying first loss. The weight of the evidence establishes she sustained a qualifying first loss to her right lower extremity. Gansen sustained a first qualifying loss in the form of a thirteen percent impairment to her right lower extremity.

### **2. Second Qualifying Loss.**

In order for an employee to be entitled to Fund benefits, the employee must sustain permanent disability to another hand, arm, foot, leg, or eye, caused by a second injury. The second injury must result in permanent disability “compensable” under the Iowa Workers’ Compensation Act—i.e., it must arise out of and in the course of employment. The caselaw on qualifying loss discussed above applies.

The Iowa Supreme Court has made clear:

Liability of the Fund under section 85.64 expressly turns on the *part(s) of the body* permanently injured in successive injuries. The focus of our analysis must therefore be on whether [the claimant] sustained a partial permanent loss of at least two enumerated members in successive injuries.

Gregory, 777 N.W.2d at 400 (emphasis in original). In Gregory, the claimant sustained injury to the left hand and shoulders resulting in a discrete functional impairment to the hand of two percent as well as permanent disability to the body as a whole from the shoulder injuries. Id. at 400–01. Therefore, under section 85.64(1), Gregory’s hand injury qualified as a “loss” because it caused a discrete permanent impairment to the enumerated body part of the hand regardless of whether that impairment was included as part of a permanent disability to the body as a whole. Id.

Gansen has proven by a preponderance of the evidence she sustained a second qualifying loss resulting from an injury arising out of and in the course of her employment at Theisen’s. The weight of the evidence shows Gansen sustained a discrete impairment to her left upper extremity of five percent. Gansen is therefore entitled to Fund benefits.

### **3. Credit.**

Under Iowa Code section 85.64(2), an injured employee is entitled to workers’ compensation paid by the employer “for the degree of disability which would have resulted from the latter injury if there had been no preexisting disability” under section 85.34(2). In addition to the workers’ compensation the claimant receives from the employer for disability caused by the work injury that causes the second qualifying loss, the claimant is entitled to Fund benefits “for the degree of permanent disability involved after first deducting from such remainder the compensable value of the previously lost member or organ.” Iowa Code § 85.64(2). “Pursuant to this section, the Fund is responsible for the difference between the disability caused by the current employer and the total amount of the disability.” Shank, 516 N.W.2d at 812.

Here, the weight of the evidence shows Gansen’s two qualifying losses for Fund purposes were caused by injuries that arose out of and in the course of her employment with Theisen’s. Her lower extremity injury is a scheduled injury under the Iowa Workers’ Compensation Act. Her disability caused by her bilateral upper extremity injuries is compensated functionally under Iowa Code section 85.34(2)(f) based on a five-hundred week schedule unless it caused permanent total disability. Simbro v. Delong’s Sportswear, 332 N.W.2d 889, 889 (Iowa 1983). Gansen does not contend the injuries to her arms caused her permanent total disability and the evidence does not support such a conclusion.

As discussed above, Gansen’s bilateral upper extremity injuries have caused a permanent functional impairment of five percent to the whole body, which entitles her to twenty-five weeks of compensation under section 85.34(2)(f). Gansen’s lower extremity injury caused a thirteen percent impairment, which entitles her to twenty-eight and 6/10

weeks of compensation under section 85.34(2)(p). Combined, Gansen is entitled to fifty-six and six-tenths weeks of benefits for the work injuries. Therefore, in accordance with section 85.64(2), the Fund is entitled to a credit in the amount equal to fifty-three and six-tenths weeks of permanent partial disability benefits for which Theisen's was liable.

#### **4. Industrial Disability.**

The Iowa Supreme Court has held:

[W]here both injuries are scheduled, that is, neither is itself an injury to the body as a whole, the Fund is liable for the entire amount of the industrial disability minus the two scheduled amounts. Only where one of the injuries is to the body as a whole must there be an apportionment. No basis for reversing the district court appears.

Second Injury Fund of Iowa v. Braden, 459 N.W.2d 467, 471 (Iowa 1990).

Here, Gansen's first injury is confined to a scheduled member. Her second injury is not to the body as a whole because it is a bilateral injury within the purview of section 85.34(2)(t), which is part of the schedule under which permanent disability is compensated functionally. See Simbro, 332 N.W.2d at 889. "It is the *cumulative* effect of the scheduled injuries resulting in industrial disability to the body as a whole—rather than the injuries considered in isolation—that triggers the Fund's proportional liability." Braden, 459 N.W.2d at 470. "[T]he Fund is responsible for the difference between the disability caused by the current employer and the total amount of the disability." Shank, 516 N.W.2d at 812.

Industrial disability measures how the injuries have impacted Gansen's earning capacity. See Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 526 (Iowa 2012) (citing Broadlawns Med. Ctr. v. Sanders, 792 N.W.2d 302, 306 (Iowa 2010)). The assessment of a claimant's earning capacity is based on multiple factors: functional disability, age, education, qualifications, work experience, inability to engage in similar employment, earnings before and after the injury, motivation to work, personal characteristics of the claimant, the claimant's inability, because of the injury to engage in employment for which the claimant is fitted, and the employer's inability to accommodate the claimant's functional limitations. Id.; IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 632–33 (Iowa 2000); Ehlinger v. State, 237 N.W.2d 784, 792 (Iowa 1976).

Gansen was sixty-two years of age at the time of hearing. There is no indication in the record she intends to retire anytime soon. She graduated from high school and obtained a Bachelor of Arts in psychology. Nonetheless, her employment has been outside the area of the focus of her college studies and degree. Gansen has largely worked in the service industry and in warehouse jobs with some experience performing office work such as secretarial duties and bookkeeping.

The lower extremity injury caused a five percent functional impairment to the whole person. The work injury to the left upper extremity caused a three percent

impairment to the whole person. The work injury to the right upper extremity resulted in a two percent impairment to the whole person. Using the combined values chart on pages 604 and 605, Gansen's combined functional impairment to the whole body is ten percent.

The injuries have also necessitated work restrictions of:

- Occasionally lifting, pushing, pulling, or carrying of more than fifteen pounds;
- No repetitive or forceful gripping or grasping with either hand;
- No use of vibratory tools or power tools;
- No use of ladders; and
- No walking on uneven surfaces.

Consequently, it is more likely than not Gansen could not return to her work at Theisen's. She never returned to full duty prior to her discharge and her regular job duties would violate her restrictions with respect to lifting, pushing, pulling, carrying, gripping, and grasping. The same is true of her job at Nordstrom, which required moving fabrics, cutting boxes, and hanging heavy clothing repetitively. Gansen would also be unable to perform all of her duties at Godfather's, Stop N' Go, and Casey's because she had to lift heavy items and use her hands in repetitive motions.

To Gansen's credit, she has been able to secure employment. To Walmart's credit, it has worked with her to accommodate her disability. The record is unclear how many positions with similar accommodations are available in the labor market.

Gansen has met her burden of proof on the question of industrial disability. The evidence shows the permanent work restrictions necessitated by her injuries has negatively impacted her earning capacity. The evidence, combined with the factors used to measure industrial disability, establishes Gansen has sustained an industrial disability of forty percent.

Industrial disability is calculated based on five hundred weeks. Forty percent multiplied by five hundred equals two hundred. Gansen is entitled to two hundred weeks of workers' compensation for the industrial disability she has sustained subject to the credit.

#### **B. Rate.**

The parties stipulated Gansen's gross earnings on the stipulated injury date were seven hundred fifty-six and 00/100 dollars (\$756.00) per week. They also stipulated she was single and entitled to one exemption at the time. Based on the parties' stipulations, Gansen's workers' compensation rate is four hundred seventy-eight and 81/100 dollars (\$478.81) per week.

**VI. ORDER.**

Based on the above findings of fact and conclusions of law, it is ordered:

- 1) The Fund shall pay to Gansen two hundred (200) weeks of permanent partial disability benefits at the rate of four hundred seventy-eight and 81/100 dollars (\$478.81) per week from the stipulated commencement date.
- 2) The Fund shall be given the credit equal to the amount of permanent partial disability benefits paid over fifty-three and six-tenths weeks (53.6) at the rate of four hundred seventy-eight and 81/100 dollars (\$478.81) per week.
- 3) The Fund shall pay accrued weekly benefits in a lump sum.
- 4) The Fund shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Signed and filed this 20<sup>th</sup> day of January, 2023.



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BEN HUMPHREY  
Deputy Workers' Compensation Commissioner

The parties have been served, as follows:

Zeke McCartney (via WCES)

Meredith C. Cooney (via WCES)

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