

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JEREMY JAMES,

Claimant,

vs.

IOWA MOLD TOOLING, INC.,

Employer,

and

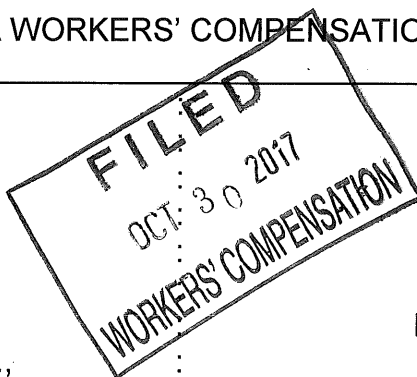
TRAVELERS INDEMNITY COMPANY  
OF CONNECTICUT,

Insurance Carrier,

and

SECOND INJURY FUND OF IOWA,

Defendants.



File No. 5048586

ARBITRATION  
DECISION

Headnotes: 1402.40, 1803, 3001  
3002, 3201, 3202

Claimant Jeremy James filed a petition in arbitration on January 29, 2016, alleging he sustained injuries to his left long finger, left ring finger, and left hand while working for the defendant, Iowa Mold Tooling Co., Inc. ("Iowa Mold"), on September 26, 2012, and stating a claim against the Second Injury Fund of Iowa ("Fund"). The Fund filed an answer on February 12, 2016. Iowa Mold and its insurer, the defendant, Travelers Indemnity Company of Connecticut ("Travelers"), filed an answer on February 19, 2016.

An arbitration hearing was held on April 19, 2016, at the Division of Workers' Compensation in Des Moines, Iowa. Attorney Jean Mauss represented James. James appeared and testified. Attorney Patrick Waldron represented Iowa Mold and Travelers. Assistant Attorney General Sarah Brandt represented the Fund. Exhibits 1 through 24, and A through D were admitted into the record. The record was left open through June 19, 2017, for the receipt of post-hearing briefs and any supplemental exhibits from Iowa Mold and Travelers concerning penalty. The parties submitted post-hearing briefs and the record was closed.

Before the hearing the parties prepared a hearing report listing stipulations and issues to be decided. Iowa Mold, Travelers, and the Fund waived all affirmative defenses.

### **STIPULATIONS**

1. An employer-employee relationship existed between Iowa Mold and James at the time of the alleged injury.
2. James sustained an injury on September 26, 2012, which arose out of and in the course of his employment with Iowa Mold.
3. The alleged injury is a cause of temporary disability during a period of recovery.
4. The alleged injury is a cause of permanent disability.
5. James is seeking temporary disability benefits from September 20, 2013 through November 16, 2015, and if the defendants are liable for the alleged injury, James is entitled to benefits for this period of time.
6. Although entitlement cannot be stipulated to, James was off work intermittently and on light duty limited to forty hours per week during this period of time.
7. With respect to the claim against Iowa Mold and Travelers, the disability is a scheduled member disability to the left hand/arm.
8. The commencement date for permanent partial disability benefits, if any are awarded, is November 17, 2015.
9. At the time of the alleged injury James was single and entitled to two exemptions.
10. The costs set forth in Exhibit 22 have been paid.

### **ISSUES**

1. What is the extent of disability?
2. What is James's rate?
3. Has James proven a claim against the Fund?
4. Are Iowa Mold and Travelers entitled to a credit for the 64.6 weeks of compensation paid to James at the rate of \$479.89 per week, totaling \$31,100.89?
5. Were temporary partial disability benefits and temporary total disability benefits underpaid due to an incorrect rate?

6. Should penalty benefits be awarded to James?
7. Is James entitled to recover the cost of an independent medical examination?
8. Should costs be assessed against either party?

### FINDINGS OF FACT

James is divorced and lives with his girlfriend in Polk City, Iowa. (Exhibits 15, page 24; 20, p. 284; D, p. 16; Transcript, p. 56) At the time of his work injury James had one dependent child. (Exs. 20, p. 286; D, p. 18) James is right-hand dominant. (Ex. 9, p. 112; Exs. 20, p. 287; D, p. 19; Tr., pp. 25, 75) At the time of the hearing he was thirty-six. (Tr., p. 24)

James graduated from St. Ansgar High School in 1999. (Exs. 15, p. 241; Exs. 20, p. 287; D, p. 19; Tr., p. 24) James earned C grades while in high school. (Exs. 20, p. 287; D, p. 19) James did not complete any training after graduating from high school. (Tr., p. 24; Exs. 20, p. 288; D, p. 20) James is able to use a computer. Exs. 20, p. 288; D, p. 20)

James has worked in meat packing and as a laborer. (Ex. 15, pp. 242, 253) When he worked in meat packing James used a knife to de-bone hogs, processed meat weighing between ten and twenty pounds, and stood eight hours during his entire shift. (Tr., pp. 25-27, 82; Exs. 20, p. 290; D, p. 22) As a laborer James installed railroad tracks using equipment weighing sixty to seventy pounds, hammered spikes, he operated a skid loader, and stood his entire eight hour shift. (Tr., pp. 27-28, 82)

On January 3, 2006, Iowa Mold hired James as a laborer and paid him \$16.44 per hour. (Ex. 15, pp. 242-43, 253; Tr., pp. 32, 75) Iowa Mold manufactures utility trucks. (Tr., p. 28) James assembled parts for the trucks, bolting together metal pieces for the frames and bodies. (Tr., p. 28) James testified that before his work injury he worked between forty and sixty hours per week depending on the workload, and reported he never worked less than thirty-five hours per week. (Tr., p. 33) While he worked for Iowa Mold James often stood for up to eight hours, and he walked quite a bit. (Tr., p. 82; Exs. 20, p. 288; D, p. 20)

When James was a freshman in high school he tore his ACL during football practice. (Exs. 15, p. 255; 20, p. 292; D, p. 24; Tr., p. 79) In October 1995, James was assessed with a left knee anterior cruciate ligament disruption, and he underwent an endoscopic semitendinosis autograft anterior cruciate ligament reconstruction. (Ex. 1, p. 1) In August 1997, James was diagnosed with chondromalacia of the left patella and he underwent a left knee diagnostic arthroscopy. (Ex. 1, pp. 3-4) James was assessed with left knee hemarthrosis in June 1998, and he was assessed with a left knee recurrent lateral patellar dislocation in October 1998. (Ex. 1, p. 4) James has not received any additional treatment for his left knee since the 1990s, and he has never

worked under any left knee restrictions for any of his employers. (Tr., p. 79; Exs. 20, p. 292; D, p. 24)

James testified on September 26, 2012,

I was cutting a two-inch suction hose with a chop saw. It's about a foot-long piece. And after you get done cutting that, there is rubber resin inside of the hose, and we have to clean it out so it don't contaminate anything, pumps, tanks, things like that. So I stuck my finger down in there with a glove on. I went to clean it out, and inside that hose there's a braided wire, and what happened, it ran – when I stuck it in there it ran into my middle finger, my second knuckle, and it was like a fishhook effect that curved and came out to the second knuckle – or the third knuckle, sorry.

(Tr., pp. 34, 35) James reported the wire was in his middle finger and it was still attached to the hose, so he pulled it out quick. (Tr., p. 35) James's hand began swelling and he reported his work injury to his supervisor. (Tr., p. 36)

James went to occupational health the day of his injury and Sherman Jew, D.O., examined him. (Ex. 2, p. 6) James relayed he was experiencing some stiffness and tingling in his left hand long finger. (Ex. 2, p. 6) Dr. Jew assessed James with a left hand, third digit, mild laceration, administered a tetanus shot, ordered James take an antibiotic and Ibuprofen, and imposed restrictions to avoid gripping, pinching and pushing with the left hand and to use a finger guard at work. (Ex. 2, p. 7) James testified that prior to his work injury he never worked under any restrictions at Iowa Mold. (Tr., p. 75)

James attended a follow-up appointment with Dr. Jew on October 3, 2012, reporting finger stiffness, numbness, tingling, and swelling. (Ex. 2, pp. 8-9) Dr. Jew prescribed Voltaren gel, and imposed restrictions of avoiding gripping and pushing with the left hand and buddy tape of the fingers for support. (Ex. 2, pp. 8-9) During James's appointment on October 8, 2012, Dr. Jew noted that an x-ray of his hand and fingers was normal. (Ex. 2, p. 12) Dr. Jew recommended James undergo a computerized tomography scan of his finger and continued his restrictions. (Ex. 2, p. 12) Stephen Holmes, M.D., reviewed the computerized tomography scan, which was normal. (Ex. 2, p. 13)

During his appointment on November 19, 2012, Dr. Jew found James could return to full duty with restrictions. (Ex. 2, pp. 17-18) James received physical therapy. (Ex. 3) On December 21, 2012, Dr. Jew assessed James with a left finger puncture wound, "[r]educed range of motion with tingling, numbness and weakness sequelae," discharged him from care, and referred him to a hand specialist. (Ex. 2, p. 20)

On December 26, 2012, James attended an appointment with Richard Rattay, M.D., an orthopedic surgeon. (Ex. 4, p. 1) Dr. Rattay noted that on the date of the

injury James was working with a heavy gauge wire tape that was approximately one-eighth inch in diameter and he sustained a puncture wound to the volar, left long finger with the metal wire tape, puncturing the volar ulnar aspect of the long finger just proximal to the proximal interphalangeal joint and the wire extended to the radial aspect under the skin, approximately four millimeters proximal to the distal interphalangeal joint, which James removed on his own. (Ex. 4, p. 1) Dr. Rattay reviewed James's imaging, and listed an impression that James had sustained a "complete laceration to the radial digital nerve at the proximal interphalangeal joint level and likely injury to the flexor digitorum superficialis (FDS) and possibly profundus tendons." (Ex. 4, p. 24) Dr. Rattay recommended a left long finger surgical exploration with repair. (Ex. 4, pp. 24-25)

James did not receive surgery. He attended an appointment with Dr. Rattay on September 13, 2013. (Ex. 4, pp. 26-27) Dr. Rattay again recommended surgery. (Ex. 4, p. 28) Dr. Rattay performed a left long finger exploration with flexor tenosynovectomy on September 20, 2013. (Ex. 4, p. 29) James received a custom hand-finger orthosis and he received instruction on active range of motion exercises. (Ex. 4, p. 32) James reported increased pain and difficulty with range of motion during his appointment on October 3, 2013. (Ex. 4, p. 37) Dr. Rattay prescribed tramadol and Keflex, continued formal and home therapy and night splinting, and released James to return to work with no use of the left hand on October 9, 2013. (Ex. 4, p. 41)

On October 29, 2013, James attended a follow-up appointment with Dr. Rattay. (Ex. 4, p. 43) Dr. Rattay documented that before the surgery James lacked full extension of his left long finger, he could not flex it without significant pain, and he noted after surgery James lacked full extension, but had regained "quite a bit of his flexion." (Ex. 4, p. 43) James reported that his finger would lock and catch when he tried to extend it, which was very painful, and noted he was working with a hand therapist, and performing light duty. (Ex. 4, p. 43) Dr. Rattay recommended exploration of the flexor sheath of the ulnar slip of the flexor digitorum superficialis, and noted that if James did not improve, he would refer him to the University of Iowa Hospitals and Clinics or the Mayo Clinic. (Ex. 4, pp. 44-45)

On December 5, 2013, James attended an appointment with Jeffrey Husband, M.D., an orthopedic surgeon in Minneapolis, upon a referral from Dr. Rattay. (Ex. 7, p. 65) Dr. Husband assessed James with persistent adhesions with flexion deformity left middle finger, performed a metacarpal block of the left middle finger, and fully extended the finger under partial anesthesia, noting there was a clicking sensation once the finger returned into flexion. (Ex. 7, p. 66) Dr. Husband recommended a repeat flexor tenosynovectomy and excision of one slip of the flexor digitorum superficialis tendon, and continued James's work restrictions. (Ex. 7, p. 66)

Dr. Husband performed a flexor tenolysis of the left middle finger, excision one slip of the FDS left middle finger, PIP joint and collateral ligament release of the left middle finger, and pinning of the PIP joint of the left middle finger on January 13, 2014. (Ex. 7, p. 70) Dr. Husband restricted James from working, and referred him for therapy.

(Ex. 7, pp. 72-74) During his appointment on January 24, 2014, Dr. Husband released James to return to work on February 4, 2014, with restrictions of no grasping, torqueing, crimping, or repetitive motion of the left hand. (Ex. 7, p. 75)

On February 6, 2014, James attended a follow-up appointment with Dr. Husband. (Ex. 7, p. 76) Dr. Husband assessed James with status post PIP contracture release of the left middle finger with persistent stiffness and dysfunction and acute left carpal tunnel syndrome secondary to swelling in the carpal tunnel. (Ex. 7, p. 76) Dr. Husband recommended an electrodiagnostic study to confirm the carpal tunnel diagnosis and a left third ray amputation and carpal tunnel release, and restricted James from working. (Ex. 7, pp. 76-79)

On April 2, 2014, Dr. Husband noted that the electrodiagnostic testing was normal and he recommended James proceed with an amputation. (Ex. 7, p. 80) Dr. Husband performed a left third ray amputation and left carpal tunnel release on James on May 16, 2014. (Ex. 7, p. 81) Following surgery James received hand therapy, a prescription compound, a TENS unit, and he was restricted from working. (Ex. 7, pp. 89-91)

During his appointment on July 30, 2014, James noted he had improved but he continued to experience unusual twitching of his left ring finger paradoxical extension when he tries to make a full fist with ongoing pain. (Ex. 7, p. 92) Dr. Husband restricted James from working for six weeks, and imposed restrictions of occasionally pinching, rarely grasping and engaging in repetitive motion, and found James should never engage in torqueing or crimping with his left hand. (Ex. 7, p. 93)

On September 11, 2014, James attended a follow-up appointment with Dr. Husband, complaining of ongoing symptoms, and Dr. Husband noted James's left ring finger tends to be held out in full extension, he is hypersensitive around the surgical scar, motion causes pain, and he feels pain in his amputated middle finger with gripping. (Ex. 7, p. 97) Dr. Husband did not recommend any additional surgery, restricted James from working, and recommended James be referred to the Mayo Clinic. (Ex. 7, pp. 98-99)

James attended an appointment with K.A., Bengtson, M.D., a physiatrist with the Mayo Clinic on November 3, 2014, for a second opinion on pain control. (Ex. 11, p. 163) Dr. Bengtson diagnosed James with left hand pain secondary to third finger ulnar digital neuroma following a third ray resection, ordered x-rays and a consultation with a hand surgeon, and certified James could return to work with use of the left hand "as helper only." (Ex. 11, pp. 164-65) During a follow-up appointment on December 9, 2014, Dr. Bengtson noted an ultrasound demonstrated a neuroma, he recommended passive range of motion exercises and possible revision of the neuroma, and imposed restrictions of no use of the left hand. (Ex. 11, pp. 166-68)

James underwent a revision of the neuroma with an end-to-end repair of the radial to ulnar digital nerve of the long finger with burying of the nerve under the

lumbrical and into the thumb adductor musculature at the Mayo Clinic on December 31, 2014. (Ex. 11, p. 170) Following surgery the physician ordered desensitization and work hardening. (Ex. 11, pp. 177-85)

On October 29 and 30, 2015, James underwent a functional capacity evaluation at the Mayo Clinic. (Ex. 12) The occupational therapist found James should never lift waist to floor, lift waist to floor fifty pounds rarely and thirty-five pounds occasionally, lift waist to overhead with handles forty pounds rarely and twenty pounds occasionally, front carry fifty pounds rarely and thirty-five pounds occasionally, right carry seventy pounds rarely, fifty pounds occasionally, and twenty pounds frequently, and left carry forty pounds rarely and twenty pounds occasionally. (Ex. 12, p. 208) The therapist also found James could engage in weighted and unweighted elevated work occasionally, never crouch, never squat, rarely crawl, and engage in left firm gripping, left light gripping, left firm pinching, left fine motor coordination, and left gross motor coordination occasionally. (Ex. 12, pp. 208-09)

Russell Gelfman, M.D., a physiatrist and neuromuscular disease specialist with the Mayo Clinic, placed James at maximum medical improvement on November 17, 2015. (Ex. 11, pp. 190-91) On December 23, 2015, Dr. Gelfman filled out a form provided by Travelers, and wrote that James achieved maximum medical improvement on November 17, 2015. (Ex. 11, p. 193. Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Gelfman assigned a permanent partial impairment rating of thirty-four percent for the hand, and adopted the restrictions set forth in the October 30, 2015 functional capacity evaluation. (Ex. 11, p. 193) Dr. Gelfman did not recommend any additional treatment. (Ex. 11, p. 193)

James retained Sunil Bansal, M.D., an occupational medicine physician, to conduct an independent medical examination on January 20, 2017. (Ex. 13, p. 210) Dr. Bansal reviewed James's medical records and examined him. (Ex. 13) Dr. Bansal agreed with Dr. Gelfman that James reached maximum medical improvement on November 17, 2015. (Ex. 13, p. 229) Using Table 16-4 of the AMA Guides, Dr. Bansal assigned an impairment of one hundred percent of the long finger, which equals a twenty percent hand impairment. (Ex. 13, p. 230) Also using Figures 16-28, 16-31, and 16-37, Dr. Bansal assigned the following impairment calculations:

SECOND DIGIT RANGE OF MOTION		%digit impairment
MP Joint:	22 to 50 degrees	22
PIP Joint:	0 to 58 degrees	24
DIP Joint:	0 to 70 degrees	0
FOURTH DIGIT RANGE OF MOTION:		
MP Joint:	18 to 60 degrees	17

PIP Joint: 0 to 40 degrees 36

DIP Joint: 0 to 70 degrees 0

FIFTH DIGIT RANGE OF MOTION:

MP Joint: 20 to 55 degrees 19

PIP Joint: 0 to 50 degrees 30

DIP Joint: 0 to 70 degrees 0

Index Finger:  $22 + 24 = 41\%$  digit impairment = 8% hand impairment.

Ring Finger:  $17 + 36 = 46\%$  digit impairment = 5% hand impairment.

Small Finger:  $19 + 30 = 43\%$  digit impairment = 4% hand impairment.

Total:  $20 + 8 + 5 + 4 = 33\%$  hand impairment = 30% upper extremity impairment.

LEFT WRIST:

Left median nerve component (carpal tunnel syndrome).

With reference to the AMA Guides of Evaluation for Permanent Impairment, Fifth Edition, specifically Tables 16-10, 16-11, and 16-15, he qualifies for the following impairment values based on his digital sensory deficits.

Severity of sensory deficit is 10% for the first and second digits.

Severity of motor deficit is 0%

Upper extremity impairment due to sensory deficit of the median nerve below the mid forearm involving the radial and ulnar palmar digital nerves of the index finger is 9%, and the thumb is 18%.

Multiplied together:  $(10\% \times 8\%) + (10\% \times 9\%) = 3\%$  upper extremity impairment.

Total is  $30 + 3 = 32\%$  upper extremity impairment.

(Ex. 13, pp. 230-31) Dr. Bansal agreed James should be assigned the restrictions set forth in his valid functional capacity examination, and specifically with the left hand, "I



would place a restriction of no lifting greater than 10 pounds occasionally, or 5 pounds frequently with the left arm. No frequent squeezing, pinching, or grasping with the left hand." (Ex. 13, p. 231)

In his opinion Dr. Bansal noted Dr. Rattay recommended exploratory surgery on the left middle finger on January 15, 2013, and the defendants' expert concurred on April 26, 2013, yet the surgery was not authorized. (Ex. 13, p. 232) Dr. Bansal noted Dr. Rattay indicated the chance of success had been markedly worsened by the delay in treatment. (Ex. 13, p. 232) Dr. Bansal agreed with Dr. Rattay's opinion, and opined that "the more delay that occurs in getting the laceration sutured will result in wound margins that become fibrotic and retracted, making it no longer feasible to have it surgically sutured." (Ex. 13, pp. 232-33)

With respect to James's left knee, using Table 17-33, Dr. Bansal assigned a seven percent permanent partial impairment to the left lower extremity "for mild ligamentous laxity secondary to his anterior cruciate ligament tear." (Ex. 13, p. 231) Dr. Bansal recommended restrictions of no frequent kneeling or squatting, no prolonged standing or walking greater than two hours at a time, and to avoid frequent stair climbing and uneven terrain. (Ex. 13, pp. 231-32)

James voluntarily resigned from his position with Iowa Mold on January 11, 2017, after he moved to Polk City due to the length of his commute. (Exs. 17, p. 270; 18, p. 273; 20, p. 285; D, p. 17; Tr., p. 56) At the time of his injury James was earning \$16.44 per hour. (Tr., p. 78) James testified that when he was on light duty he earned below \$16.00 per hour. (Tr., p. 78) At the time he resigned from Iowa Mold James was earning \$17.90 per hour. (Tr., p. 78)

In February 2017, Workforce Staffing hired James and placed him with Seneca Tank, where he works forty hours per week. (Tr., pp. 28-29, 84; Exs. 20, p. 285; D, p. 17) James builds fuel tanker trucks as a mechanic assembler for Seneca Tank. (Tr., pp. 29, 84; Exs. 20, p. 285; D, p. 17) James is responsible for fabricating trucks. (Tr., p. 29) James testified he expected to become a permanent employee of Seneca Tank in May 2017. (Tr., p. 29; Exs. 20, p. 292; D, p. 24) At the time of his hiring James was earning \$17.00 per hour, and he expects to receive an increase in his hourly wage when he becomes a permanent employee of Seneca Tank. (Tr., pp. 30, 84; Exs. 20, p. 285; D, p. 17)

James does not use any hand tools with his left hand at Seneca Tank. (Tr., p. 54) James uses air drills and power wrenches at work, but he does not use his left hand to operate the equipment. (Exs. 20, p. 290; D, p. 22) James reported that he stands five or six hours during an eight hour shift at Seneca Tank, and he squats or kneels several times per hour. (Tr., p. 85)

James testified he has phantom pain in his amputated finger, and he is unable to bend down his ring finger to make a fist. (Tr., p. 48) James noted he now has to grab things with his left hand, the most he can lift is five pounds with his left hand, and if he

tries to lift more than five pounds with his left hand his fingers give out and he is unable to pick up the item or items. (Tr., p. 51) James relayed that if he places something in his left palm he receives a shocking sensation. (Tr., p. 51) James testified he often drops things, including change and nuts and bolts at work. (Tr., pp. 52-53) James reported when he grasps and holds things with his left hand he feels "an instant shock feeling, piercing shock." (Tr., pp. 54-55)

James testified that he has a difficult time holding soap to clean the right side of his body because of the shocking sensation in his palm, he has a difficult time using a wash cloth to wipe himself, and he cannot button his clothes. (Tr., pp. 53, 56) James is able to perform household chores. (Tr., p. 57)

James testified following his functional capacity evaluation he followed the restrictions with his employer. (Tr., p. 80) During his deposition on March 20, 2017, James testified he has never discussed his left knee injury with any of his employers, and he has not missed any work due to his left knee injury. (Tr., pp. 80-81)

## **CONCLUSIONS OF LAW**

### **I. Nature and Extent of Disability**

The parties have stipulated James sustained a permanent impairment to his left upper extremity as a result of the September 26, 2012 work injury. The parties dispute the nature and extent of disability. James contends he sustained a thirty-two percent permanent impairment to his left upper extremity. Iowa Mold and Travelers contend James sustained a thirty-four percent permanent impairment to his left hand.

Dr. Gelfman, physiatrist with the Mayo Clinic, and Dr. Bansal, an occupational medicine physician, have provided permanent impairment ratings. Dr. Gelfman assigned a permanent partial impairment rating of thirty-four percent to the left hand, and adopted the restrictions set forth in the October 30, 2015 functional capacity evaluation. (Ex. 11, p. 193) Dr. Bansal assigned a thirty-two percent permanent partial impairment rating to the left upper extremity impairment, including three percent for carpal tunnel syndrome. (Ex. 13, pp. 230-31) Dr. Bansal agreed James should be assigned the restrictions set forth in his valid functional capacity examination, and noted, "I would place a restriction of no lifting greater than 10 pounds occasionally, or 5 pounds frequently with the left arm. No frequent squeezing, pinching, or grasping with the left hand." (Ex. 13, p. 231)

The deputy commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye, 569 N.W.2d at 156. When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education,

experience, training, and practice, and “all other factors which bear upon the weight and value” of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

I find Dr. Gelfman’s opinion more persuasive than Dr. Bansal’s opinion. Dr. Bansal provided a rating for carpal tunnel syndrome. Dr. Husband ordered electrodiagnostic testing to confirm the carpal tunnel diagnosis, and noted the testing was normal. (Ex. 7, pp. 76-80) After receiving the testing results, Dr. Gelfman recommended James proceed with an amputation of his left middle finger and a left carpal tunnel release. (Ex. 7, pp. 76-80) Dr. Husband performed a left third ray amputation and left carpal tunnel release related on James on May 16, 2014. (Ex. 7, p. 81) Dr. Husband has not provided an opinion relating the need for a left carpal tunnel release to the September 26, 2012 work injury. Dr. Gelfman is a recognized expert at the Mayo Clinic, the institution that provided treatment to James, including a third surgery. No physician at the Mayo Clinic has related the need for a carpal tunnel release to the work injury.

Permanent partial disabilities are divided into scheduled and unscheduled losses. Iowa Code § 85.34(2). If the claimant’s injury is listed in the specific losses found in Iowa Code section 85.34(2)(a)-(t), the injury is a scheduled injury and is compensated by the number of weeks provided for the injury in the statute. Second Injury Fund v. Bergeson, 526 N.W.2d 543, 547 (Iowa 1995). “The compensation allowed for a scheduled injury ‘is definitely fixed according to the loss of use of the particular member.’” Id. (quoting Graves v. Eagle Iron Works, 331 N.W.2d 116, 118 (Iowa 1983)). If the claimant’s injury is not listed in the specific losses in the statute, compensation is paid in relation to 500 weeks as the disability bears to the body as a whole. Id.; Iowa Code § 85.34(2)(u). “Functional disability is used to determine a specific scheduled disability; industrial disability is used to determine an unscheduled injury.” Bergeson, 526 N.W.2d at 547. The Iowa Supreme Court has held, “it is a fundamental requirement that the commissioner consider all evidence, both medical and nonmedical. Lay witness testimony is both relevant and material upon the cause and extent of injury.” Evenson v. Winnebago Indus., Inc., 881 N.W.2d 360, 369 (Iowa 2016) (quoting Gits Mfg. Co. v. Frank, 855 N.W.2d 195, 199 (Iowa 2014)).

James sustained a permanent impairment to his left hand. Dr. Gelfman assigned a permanent impairment rating of thirty-four percent. (Ex. 11, p. 193) A loss of a hand is a scheduled loss. Iowa Code § 85.34(2)(l). The schedule provides a maximum award of 190 weeks of compensation. Id. Considering expert and lay testimony, I conclude that James is entitled to 64.6 weeks of permanent partial disability benefits.

## II. Rate

The parties have stipulated that at the time of the alleged injury James was single and entitled to two exemptions, but disagree upon the rate. James avers at the time of the alleged injury his gross earnings were \$762.03 per week, and Iowa Mold and Travelers contend his gross earnings were \$713.43 per week.

Iowa Code section 85.36 sets forth the basis for determining an injured employee's compensation rate. Mercy Med. Ctr. v. Healy, 801 N.W.2d 865, 870 (Iowa Ct. App. 2011). The basis of compensation shall be the "weekly earnings of the injured employee at the time of the injury." Iowa Code § 85.36. The statute defines "weekly earnings" as

Gross salary, wages, or earnings of an employee to which such employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured, as regularly required by the employee's employer for the work or employment for which the employee was employed . . . rounded to the nearest dollar.

Id. The term "gross earnings" is defined as "recurring payments by employer to the employee for employment, before any authorized or lawfully required deduction or withholding of funds by the employer, excluding irregular bonuses, retroactive pay, overtime, penalty pay, reimbursement of expenses, expense allowances, and the employer's contribution for welfare benefits." Id. § 85.61.

Weekly earnings for employees paid on an hourly basis

shall be computed by dividing by thirteen the earnings including shift differential pay but not including overtime or premium pay, of the employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury. If the employee was absent from employment for reasons personal to the employee during part of the thirteen calendar weeks preceding the injury, the employee's weekly earnings shall be the amount the employee would have earned had the employee worked when work was available to other employees of the employer in a similar occupation. A week which does not fairly reflect the employee's customary earnings shall be replaced by the closest previous week with earnings that fairly represent the employee's customary earnings.

Id. § 85.36(6).

At the time of his work injury James earned \$16.44 per hour. James contends the weeks of September 15, 2012 and July 14, 2012, where he worked 32.40 and 30 hours should be excluded, and Iowa Mold and Travelers contend the week of September 22, 2012, where he worked 60.83 hours should be excluded.

Exhibit 19 documents James's earnings for one year prior to the work injury. The exhibit reflects for the year before his injury James worked over forty hours per week thirty-nine weeks, he worked over sixty hours one week, and he worked less than thirty-five hours three weeks. (Ex. 19, p. 277) I conclude the weeks ending September 22, 2012, September 15, 2012, and July 14, 2012, where James worked 60.83, 32.40, and 30.00 hours are nonrepresentative, and should be excluded from the rate calculation.

For the thirteen representative weeks before the work injury James received \$9,531.09 in gross earnings, divided by thirteen results in weekly gross earnings of \$733.16. James weekly rate is \$471.78.<sup>1</sup> No underpayment of temporary benefits has occurred based upon an incorrect rate.

### III. Penalty

James alleges he is entitled to penalty benefits because Iowa Mold and Travelers failed to timely pay weekly temporary benefits. Iowa Mold and Travelers reject his assertion.

Iowa Code section 86.13 governs penalty benefits. Under the statute's plain language, if there is a delay in payment absent "a reasonable or probable cause or excuse," the employee is entitled to penalty benefits, of up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse. Iowa Code § 86.13(4); see also Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 260 (Iowa 1996) (citing earlier version of the statute). "The application of the penalty provision does not turn on the length of the delay in making the correct compensation payment." Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229, 236 (Iowa 1996). If a delay occurs without a reasonable excuse, the commissioner is required to award penalty benefits in some amount to the employee. Id.

The statute requires the employer or insurance company to conduct a "reasonable investigation and evaluation" into whether benefits are owed to the employee, the results of the investigation and evaluation must be the "actual basis" relied on by the employer or insurance company to deny, delay, or terminate benefits, and the employer or insurance company must "contemporaneously convey the basis for the denial, delay, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits." Iowa Code § 86.13(4)(a). An employer may establish a "reasonable cause or excuse" if "the delay was necessary for the insurer to investigate the claim," or if "the employer had a reasonable basis to contest the employee's entitlement to benefits." Christensen, 554 N.W.2d at 260. "A 'reasonable basis' for denial of the claim exists if the claim is 'fairly debatable.'" Burton v. Hilltop Care Ctr., 813 N.W.2d 250, 267 (Iowa 2012). "Whether a claim is 'fairly debatable' can generally be determined by the court as a matter of law." Id. The issue is whether the employer had a reasonable basis to believe no benefits were owed to the claimant. Id. "If there was no reasonable basis for the employer to have denied the employee's benefits, then the court must 'determine if the defendant knew, or should have known, that the basis for denying the employee's claim was unreasonable.'" Id.

Benefits must be paid beginning on the eleventh day after the injury, and "each week thereafter during the period for which compensation is payable, and if not paid

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<sup>1</sup> <http://www.iowaworkcomp.gov/sites/authoring.iowadivisionofworkcomp.gov/files/2012ratebook.pdf>.

when due,” interest will be imposed. Iowa Code § 85.30. In Robbennolt, the Iowa Supreme Court noted, “[i]f the required weekly compensation is timely paid at the end of the compensation week, no interest will be imposed . . . . As an example, if Monday is the first day of the compensation week, full payment of the weekly compensation is due the following Monday.” Robbennolt, 555 N.W.2d at 235. A payment is “made” when the check addressed to the claimant is mailed, or personally delivered to the claimant. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996) (abrogated by Keystone Nursing Care Ctr. v. Craddock, 705 N.W.2d 299 (Iowa 2005) (concluding the employer’s failure to explain to the claimant why it would not pay permanent benefits upon the termination of healing period benefits did not support the commissioner’s award of penalty benefits)).

When considering an award of penalty benefits, the commissioner considers “the length of the delay, the number of delays, the information available to the employer regarding the employee’s injuries and wages, and the prior penalties imposed against the employer under section 86.13.” Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 336 (Iowa 2008). The purposes of the statute are to punish the employer and insurance company and to deter employers and insurance companies from delaying payments. Robbennolt, 555 N.W.2d at 237.

James contends that according to Travelers’s records, Iowa Mold and Travelers issued the following late payments to James totaling \$13,962.25:<sup>2</sup>

Pay Period	Check Amount	Benefit Type	Issue Date
10/4/13 – 10/9/13	\$287.58	TTD	10/14/13
10/9/13 – 10/19/13	\$285.78	TPD	10/29/13
10/19/13 – 10/26/13	\$192.86	TPD	10/31/13
10/26/13 – 11/9/13	\$527.13	TPD	11/15/13
11/9/13 – 11/30/13	\$400.23	TTD	12/12/13
11/9/13 – 11/30/13	\$400.23	TPD	12/12/13
11/30/13 – 12/21/13	\$573.51	TPD	1/6/14
7/13/14 – 7/27/14	\$392.53	TPD	8/19/14

<sup>2</sup> The alleged late payments total \$13,982.24.

7/27/14 – 8/10/14	\$447.74	TPD	8/19/14
8/10/14 – 8/24/14	\$506.87	TPD	9/3/14
8/24/14 – 9/7/14	\$376.48	TPD	9/23/14
9/7/14 – 9/14/14	\$376.48	TPD	9/23/14
9/7/14 – 9/21/14	\$526.00	TPD	10/17/14
9/21/14 – 10/5/14	\$353.31	TPD	10/24/14
10/5/14 – 10/19/14	\$381.31	TPD	11/25/14
10/19/14 – 11/02/14	\$392.25	TPD	11/25/14
11/2/14 – 11/16/14	\$350.08	TPD	11/25/14
11/16/14 – 11/30/14	\$214.75	TPD	12/8/14
11/30/14 – 12/14/14	\$394.41	TPD	12/22/14
12/14/14 – 12/28/14	\$721.07	TPD	1/19/15
12/28/14 – 12/31/14	\$248.63	TPD	1/19/15
1/25/15 – 2/8/15	\$297.33	TPD	2/19/15
2/8/15 – 2/22/15	\$266.17	TPD	3/11/15
2/22/15 – 3/8/15	\$375.84	TPD	3/18/15
3/8/15 – 3/22/15	\$399.08	TPD	4/3/15
3/22/15 – 4/5/15	\$243.91	TPD	4/17/15
4/5/15 – 4/19/15	\$179.25	TPD	5/6/15
4/19/14 – 5/3/15	\$415.32	TPD	5/15/15
5/3/15 – 5/17/15	\$380.60	TPD	5/26/15
5/17/15 – 5/31/15	\$389.75	TPD	6/9/15
5/31/15 – 6/14/15	\$256.76	TPD	6/24/15
6/14/15 – 6/28/15	\$256.76	TPD	7/7/15

6/28/15 – 7/12/15	\$229.34	TPD	7/21/15
7/12/15 – 7/26/15	\$275.43	TPD	8/4/15
7/26/15 – 8/9/15	\$340.76	TPD	8/19/15
8/9/15 – 8/23/15	\$331.43	TPD	9/1/15
8/23/15 – 9/6/15	\$354.76	TPD	9/16/15
9/6/15 - 9/20/15	\$324.43	TPD	9/29/15
9/20/15 - 10/4/15	\$296.10	TPD	10/14/15

(Ex. 19, pp. 283fff-283hhh, 283qqq)

Exhibit 19 documents Iowa Mold and Travelers made numerous late payments to James. There is no evidence in the record Iowa Mold and Travelers notified James of the reason or reasons for the delay in benefits. James has presented no evidence Iowa Mold and Travelers have a history of past penalties. I conclude penalty benefits of \$5,000.00 should be awarded to James.

#### **IV. Second Injury Fund**

James seeks benefits through the Fund. The Fund rejects his assertion. Under Iowa Code section 85.64,

[i]f an employee who has previously lost, or lost the use of, one hand, one arm, one foot, one leg, or one eye, becomes permanently disabled by a compensable injury which has resulted in the loss of or loss of use of another such member or organ, the employer shall be liable only for the degree of disability which would have resulted from the latter injury if there had been no preexisting disability. In addition to such compensation, and after the expiration of the full period provided by law for the payments thereof by the employer, the employee shall be paid out of the "Second Injury Fund" created by his division and the remainder of such compensation as would be payable for the degree of permanent disability involved after first deducting from such remainder the compensable value of the previously lost member or organ.

Thus, an employee is entitled to Fund benefits if the employee establishes: (1) the employee sustained a permanent disability to a hand, arm, foot, leg, or eye, a first qualifying injury; (2) the employee subsequently sustained a permanent disability to another hand, arm, foot, leg, or eye, through a work-related injury, a second qualifying injury; and (3) the employee has sustained a permanent disability resulting from the first and second qualifying injuries exceeding the compensable value of the "previously lost



member.” Gregory v. Second Injury Fund of Iowa, 777 N.W.2d 395, 398-99 (Iowa 2010).

**A. First and Second Qualifying Losses**

James asserts he sustained a first qualifying loss to his left knee. The Fund alleges James has failed to prove he sustained a first qualifying loss to his left knee. James sustained an injury to his knee when he was in high school in 1995, and underwent an endoscopic semitendinosis autograft anterior cruciate ligament reconstruction. (Ex. 1, p. 1) In August 1997, James was diagnosed with chondromalacia of the left patella and underwent a left knee diagnostic arthroscopy. (Ex. 1, pp. 3-4) James was assessed with left knee hemarthrosis in June 1998, and assessed with a left knee recurrent lateral patellar dislocation in October 1998. (Ex. 1, p. 4)

The Fund avers James has not proven a first qualifying injury because he has not received any treatment for his left knee since the late 1990s, he has worked as a laborer for nearly twenty years, he has not missed work due to his left knee, and he has not worked under any work restrictions for his left knee. James has not received any additional treatment for his left knee since the 1990s, he has not worked under any left knee restrictions for any of his employers, and he has not missed any work due to his left knee. (Tr., pp. 79-80; Exs. 20, p. 292; D, p. 24) James has not reported or requested any work restrictions for his left knee at his current placement with Seneca Tank. (Tr., pp. 80-81)

James underwent a functional capacity evaluation at the Mayo Clinic. The therapist recommended restrictions of never crouching and squatting, and rarely crawling. (Ex. 12, pp. 208-09) Dr. Bansal adopted the work restrictions recommended by the therapist at the Mayo Clinic who performed the functional evaluation. (Ex. 13) Dr. Bansal assigned a seven percent permanent partial impairment to the left “lower extremity for mild ligamentous laxity secondary to his anterior cruciate ligament tear,” and recommended restrictions of no frequent kneeling or squatting, no prolonged standing or walking greater than two hours at a time, and to avoid frequent stair climbing and uneven terrain. (Ex. 13, p. 232-33)

Dr. Bansal is the only physician who has opined James has sustained a permanent impairment to his left leg. The Fund did not seek an opinion regarding James’s alleged left leg condition from any of the treating physicians. Dr. Bansal’s opinion is un rebutted. The record supports James has sustained a permanent disability to his left leg. James has established he sustained a first qualifying injury. Based on the findings and conclusions set forth in Section I above, James has also established he sustained a second qualifying loss to his left hand.

## **B. Industrial Disability**

"Industrial disability is determined by an evaluation of the employee's earning capacity." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 852 (Iowa 2011). In considering the employee's earning capacity, the deputy commissioner evaluates several factors, including "consideration of not only the claimant's functional disability, but also [his] age, education, qualifications, experience, and ability to engage in similar employment." Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 137-38 (Iowa 2010). The inquiry focuses on the injured employee's "ability to be gainfully employed." Id. at 138.

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Compensation for permanent partial disability shall begin at the termination of the healing period. Iowa Code § 85.34(2). Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(u). When considering the extent of disability, the deputy commissioner considers all evidence, both medical and nonmedical. Evenson v. Winnebago Indus., Inc., 818 N.W.2d 360, 370 (Iowa 2016). When determining the Fund's liability, the trier of fact subtracts the two scheduled amounts for the first and second qualifying injuries from the full amount of the industrial disability. Second Injury Fund of Iowa v. Shank, 516 N.W.2d 808, 813 (Iowa 1994)

Following his work injury James returned to his position with Iowa Mold. He resigned from Iowa Mold in January 2017 to look for employment closer to his home in Polk City. In February 2017, James secured full-time employment through Workforce Staffing and he was placed with Seneca Tank. (Tr., pp. 28-29, 84; Exs. 20, p. 285; D, p. 17)

James is a young man. At the time of the hearing he was thirty-six. (Tr., p. 24) James earned C grades in high school and he graduated from high school in 1999. (Exs. 15, p. 241; Exs. 20, p. 287; D, p. 19; Tr., p. 24) He has not completed any post-secondary training. (Tr., p. 24; Exs. 20, p. 288; D, p. 20) I find given his young age and prior academic ability James is capable of retraining.

James has a long history of working as a laborer. At the time of his injury James was earning \$16.44 per hour. (Tr., p. 78) James testified that when he was on light duty he earned below \$16.00 per hour. (Tr., p. 78) When he resigned from Iowa Mold James was earning \$17.90 per hour. (Tr., p. 78) At hearing James was earning \$17.00 per hour working for Workforce Staffing, and he testified he expected to receive an increase in his hourly wage when he became a permanent employee of Seneca Tank in May 2017. (Tr., pp. 30, 84; Exs. 20, p. 285; D, p. 17)

James is right-hand dominant. (Ex. 9, p. 112; Exs. 20, p. 287; D, p. 19; Tr., pp. 25, 75) His work injury is to his left hand. James is able to use a computer, but his ability to type is impacted by the loss of his left middle finger. (Exs. 20, p. 288; D, p. 20)

Considering his work restrictions, and all of the factors of industrial disability, I conclude James has sustained a twenty-five percent industrial disability, which equals 125 weeks of permanent partial disability benefits.

The two scheduled amounts for the first and second qualifying injuries must be subtracted from 125 weeks. A thirty-four percent impairment to the left hand translates to 64.6 weeks of permanent partial disability benefits. Iowa Code § 85.34(2)(l) (allowing a maximum of 190 weeks). A seven percent impairment to the left lower extremity translates to 15.4 weeks of permanent partial disability benefits. Id. § 85.34(2)(o) (allowing a maximum of 220 weeks). The first and second qualifying injuries total eighty weeks. The Fund is entitled to a credit of eighty weeks. James is awarded forty-five weeks of permanent partial disability benefits from the Fund.

#### **V. Independent Medical Examination**

James seeks to recover the \$3,346.00 cost of Dr. Bansal's independent medical examination and report. After receiving an injury, the employee, if requested by the employer is required to submit to examination at a reasonable time and place, as often as reasonably requested to a physician, without cost to the employee. Id. § 85.39. If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes the evaluation is too low, the employee "shall, upon application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choosing." Id. Dr. Bansal's examination occurred after Dr. Gelfman provided his impairment rating, in compliance with the statute.

In the case of Des Moines Area Regional Transit Authority v. Young, the Iowa Supreme Court held:

[w]e conclude section 85.39 is the sole method for reimbursement of an examination by a physician of the employee's choosing and that the expense of the examination is not included in the cost of a report. Further, even if the examination and report were considered to be a single, indivisible fee, the commissioner erred in taxing it as a cost under administrative rule 876-4.33 because the section 86.40 discretion to tax costs is expressly limited by Iowa Code section 85.39.

867 N.W.2d 839, 846-47 (Iowa 2015). Dr. Bansal's bill from March 20, 2017 is not itemized. Under Young, James is not entitled to recover the cost of Dr. Bansal's independent medical examination and report. Id.

#### **VI. Costs**

James seeks to recover the \$100.00 filing fee for the petition, and \$46.54 in service costs. (Ex. 22) Iowa Code section 86.40, provides, "[a]ll costs incurred in the

hearing before the commissioner shall be taxed in the discretion of the commissioner.” Rule 876 IAC 4.33(6), provides

[c]osts taxed by the workers’ compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors’ and practitioners’ deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors’ or practitioners’ reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes.

Exhibit 22 documents service costs of \$39.80 for service on Iowa Mold and Travelers. Exhibit 22 does not document any additional service costs. The administrative rule expressly allows for the recovery of the costs James seeks to recover. Using my discretion, I find the \$100.00 filing fee and \$39.80 service costs should be assessed to Iowa Mold and Travelers. As discussed above, Dr. Bansal’s bill is not itemized. James is not entitled to recover the cost of Dr. Bansal’s report under 876 IAC 4.33(6).

### ORDER

IT IS THEREFORE ORDERED, THAT:

Iowa Mold and Travelers shall pay James 64.6 weeks of permanent partial disability benefits, at the rate of four hundred seventy-one and 78/100 dollars (\$471.78) per week, commencing on November 17, 2015.

Iowa Mold and Travelers shall take credit for all benefits previously paid.

Iowa Mold and Travelers shall pay accrued benefits in a lump sum with interest on all weekly benefits provided by law.

The Fund shall pay James forty-five weeks of permanent disability benefits, at the rate of four hundred seventy-one and 78/100 dollars (\$471.78) per week, commencing after all benefits have been paid by Iowa Mold and Travelers.

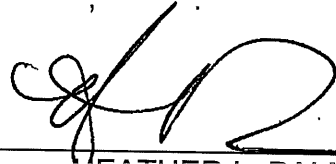
Interest accrues on unpaid Fund benefits from the date of the decision.

Iowa Mold and Travelers shall pay James five thousand and 00/100 dollars (\$5,000.00) in penalty benefits.

Iowa Mold and Travelers are assessed one hundred and 00/100 dollars (\$100.00) for the filing fee, and thirty-nine and 80/100 dollars (\$39.80) for service costs.

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

Signed and filed this 30th day of



HEATHER L. PALMER  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

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HLP/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.