BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

PENELOPE STONE, Claimant, vs. SECOND INJURY FUND OF IOWA, Defendant.	FILED JUL 12 2018 WORKERS' COMPENSATION	File No. 5058326 ARBITRATION DECISION Head Note Nos.: 1803; 3001; 3002

Claimant Penelope Stone filed a petition in arbitration on February 21, 2017, alleging she sustained injuries to her left hand, left wrist, left elbow, left shoulder, and neck while working for the defendant, Van Ert Electric Co., Inc. ("Van Ert"), on October 14, 2016, and also naming the Second Injury Fund of Iowa ("the Fund") as a defendant. Van Ert and its insurer, the defendant, Travelers, filed an answer on February 16, 2017. The Fund filed an answer on March 10, 2017. Stone later filed an amended petition, alleging she sustained injuries to her left hand, left wrist, and left elbow only, while working for Van Ert. Stone entered into an agreement for settlement with Van Ert and Travelers, which was approved by the Workers' Compensation Commissioner on April 3, 2018.

An arbitration hearing was held on March 29, 2018, at the Division of Workers' Compensation in Des Moines, Iowa. Attorney Randall Schueller represented Stone. Stone appeared and testified. Assistant Attorney General Amanda Rutherford represented the Fund. Joint Exhibits ("JE") 1 through 17, Exhibits 1 through 4, and Exhibits AA through GG were admitted into the record. The record was held open through May 18, 2018, for the receipt of post-hearing briefs and Exhibit 5. Exhibit 5 and the briefs were received and the record was closed.

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

STIPULATIONS

1. An employer-employee relationship existed between Stone and Van Ert at the time of the alleged injury.

2. Stone sustained an injury on October 14, 2016, which arose out of and in the course of her employment with Van Ert.

3. The alleged injury is a cause of temporary disability during a period of recovery.

4. Temporary benefits are no longer in dispute.

5. If Stone has sustained a permanent, industrial disability, the commencement date for permanent partial disability benefits, if any are awarded, is May 31, 2017.

6. At the time of the alleged injury Stone was single and entitled to one exemption.

7. Medical benefits are no longer in dispute.

8. The Fund is entitled to a credit of 19.4 weeks.

Issues

1. Has Stone sustained a first qualifying injury to the right knee?

2. Has Stone sustained a permanent impairment as a result of the October 14, 2016 date of injury?

3. If Stone has sustained a permanent impairment as a result of the October 14, 2016 date of injury, what is the extent of disability?

4. Has Stone sustained an industrial disability?

5. If Stone has sustained an industrial disability, what is the extent of disability?

6. Is Stone entitled to benefits from the Fund?

7. What is Stone's rate?

FINDINGS OF FACT

Stone lives on a farm in Warner, Oklahoma. (Transcript, page 8) Stone's adult son and granddaughters live with her. (Tr., p. 66) Warner is a small town. (Tr., p. 9) Muskogee, the closest metro city, is thirty minutes away from Warner and has a population of 20,000 to 30,000 people. (Tr., p. 9) Stone reported the job market is "practically nonexistent" in the area where she lives, so she drives ninety minutes one way to Tulsa for work. (Tr., pp. 9-10, 65) Stone is right-hand dominant. (Tr., p. 58) At the time of the hearing she was forty-seven. (Tr., p. 8)

As a child Stone started working, helping her father roof homes, chop wood, and remove rocks from pastures. (Tr., p. 13) Stone graduated from high school in Oklahoma in 1988. (Ex. AA, p. 3; Tr., pp. 10, 12) Stone was a poor student, earning C

and D grades. (Tr., p. 10) Stone worked as a dishwasher while she was in high school. (Tr., p. 13) After high school Stone worked as a waitress, vegetable sorter and cleaner, airplane part builder, washer of processed chickens, dough packer, and job coach for persons with disabilities. (Ex. 1, pp. 5-6; Tr., pp. 13-21)

After high school Stone attended several post-secondary institutions. (Ex. AA, p. 3) Stone attended Northeastern Oklahoma A&M, from 1990 to 1992, and Oklahoma University in 1992, but she did not graduate from either institution. (Ex. AA, p. 3) From 1993 through 1995, Stone attended Rogers State University, and she earned an associate of liberal arts degree. (Ex. AA, p. 3) From 1995 to 1996, Stone attended Northeast State University, studying basic studies, but she did not graduate. (Ex. AA, p. 3) Stone was a poor student in college and she struggled until she enrolled in an electrical program. (Tr., pp. 11-12)

In 1997 Stone enrolled in an electrical program through Northeast Area Voc-Tech. (Ex. AA, p. 3; Tr., p. 12) Stone testified she found her niche and she graduated with honors in 1999. (Ex. AA, p. 3; Tr., p. 12)

After graduating from the electrical program, Stone enrolled in a joint apprenticeship training program with the International Brotherhood of Electrical Workers Local Union 584 ("IBEW") in Tulsa, Oklahoma, from 1999 through 2003. (Ex. AA, p. 3) At the time of the hearing Stone was still a member of the IBEW. (Ex. 1, p. 4) Stone worked as an electrician apprentice for the IBEW from 1999 through 2009. (Ex. 1) From 2010 through 2011 she worked as a maintenance electrician for Georgia Pacific in Muskogee, Oklahoma, and she returned to the IBEW as a journeyman electrician in 2011. (Ex. 1, p. 6)

Stone is an industrial electrician, which typically pays double the hourly rate of a residential electrician. (Tr., pp. 10, 59) Stone typically works at the refineries in Tulsa as an industrial electrician. (Tr., p. 10) Stone has only worked as an electrician since 1999. (Tr., pp. 22, 75)

As an electrician, Stone reported,

> I could be inside or outside. I could be in a nice office like this, but usually I'm in an industrial facility, gas, a glass plant, cement plant. I could be in a ditch or 400 feet in the air, running conduit. Conduit is – it's a type of pipe, if you don't' know, and that's what we pull wire in. We have to set supports for it in a ditch, so that it stays tied down and doesn't float up, whether it's raining or snowing or in the middle of summer, and it can get 115 degrees down there.

(Tr., p. 23)

Stone enjoys working as an electrician. (Tr., p. 23) Stone works in all types of terrain and in high traffic areas. (Tr., p. 24) Stone regularly performs preventative

maintenance at factories, checking equipment to see if there is any burning wire that could be detrimental in the future. (Tr., p. 24) Stone's hours vary. (Tr., pp. 24-25) At times she works seven days per week and twelve hours per day, sometimes more, and sometimes less. (Tr., p. 25)

The IBEW maintains a book for electrical work. (Tr., p. 26) The members are ranked in order, and the IBEW goes through the book until a person who is qualified for the job takes the job. (Tr., p. 26) Members of the IBEW may work for the same job for a day or up to several years. (Tr., pp. 26-27) It is common in Stone's industry for electricians to work many different jobs. (Tr., p. 27)

In October 2016, Stone was working for Van Ert, as an electrician, in Marshalltown, Iowa. (Tr., p. 33) Stone worked six to seven days per week and she received her hourly pay, plus a $50.00 per diem. (Tr., p. 61)

Stone testified on October 14, 2016, she was pulling in a cable with two other journeymen at the Alliant power house in Marshalltown. (Tr., p. 30) Stone was eighteen feet up in the air on a lift, one journeyman was spotting her on the ground, and another journeyman was in the control room, which is located in a small building inside the power house. (Tr., pp. 30, 32) Stone reported the person in the control room was feeding cable "really fast" and she asked the spotter to go in and tell him to slow down so the cable did not catch on the lift and so she did not smash her fingers if he pulled the cable too quickly causing it to pass her hand. (Tr., pp. 30-31) The spotter went inside, the cable coiled around the ladder of the lift, and Stone reported,

> I'm eighteen foot up, so I have to kind of whip the cable so that it comes unhinged from the ladder, but when I stuck my arm out like that (indicating), it went ahead and came undone. So there wasn't any resistance when I was already full motion pulling it back, and I struck my hand against the edge of the lift.

(Tr., p. 32) Stone relayed she hit her wrist against the edge of the lift and she felt pain right away. (Tr., p. 32)

At the time of her work injury Stone had been working for Van Ert for four months. (Ex. 4, p. 24) Stone reported her injury to her manager, and she was examined by the Alliant nurses and the nurses iced her wrist. (Tr., p. 33) Stone later received treatment at the Marshalltown Hospital. (Tr., p. 34)

Stone has a prior history of lupus, back pain, neck pain, right arm tennis elbow, and occasional numbness in her fingers. (JE 1, p. 1; JE 2, p. 11; Ex. CC, p. 6; Tr., p. 99) Stone has been treated for anxiety, depression, attention deficit disorder, memory loss, and posttraumatic stress disorder, unrelated to her work injury at Van Ert. (JE 14; JE 2, p. 12; Tr., pp. 100-03) Stone's anxiety and depression worsened following the death of her husband three years ago. (JE 14, p. 80; Tr., p. 101)

Stone seeks benefits from the Fund, alleging she sustained a first qualifying injury to her right knee in 2015. In March 2015, Stone was helping a friend tag a newborn calf, when a cow ran over her. (Tr., p. 28) Stone testified she felt her right knee snap. (Tr., p. 28) Stone received medical treatment from Sarah Hutcherson, ARNP, and Hutcherson documented Stone reported when she tried to walk "its like her knee is sliding from side to side and has no stability." (JE 2, p. 9) Hutcherson diagnosed Stone with a right knee injury, and ordered right knee magnetic resonance imaging, right knee bracing, and use of ice. (JE 2, p. 11) Stone underwent the imaging and the reviewing radiologist listed an impression of:

1. Full-thickness anterior cruciate ligament tear.

2. Strain of the posterior cruciate ligament.

3. High-grade strain/partial thickness tears of both the medial and lateral collateral ligaments.

4. Horizontal tear of the lateral meniscus was associated complete or partial detachment of the posterior root attachment.

5. Focal cortical indentations and contusions involving the lateral femoral condyle and lateral facet of the tibial plateau posteriorly.

6. Large joint effusion/hemarthrosis.

7. Popliteus muscle strain.

(JE 3, p. 19)

On April 7, 2015, Stone attended an appointment with Paul Peterson, M.D., an orthopedic surgeon. (JE 4, p. 20) Dr. Peterson examined Stone and reviewed her imaging. (JE 4, p. 20) Dr. Peterson assessed Stone with an anterior cruciate ligament tear and lateral meniscus tear of the right knee, ordered her to wear a knee brace and ice her knee, and recommended an arthroscopic evaluation of her right knee and anterior cruciate ligament reconstruction using an allograft and lateral meniscus repair or resection followed by physical therapy. (JE 4, pp. 21-22)

Dr. Peterson performed surgery on Stone's right knee on April 16, 2015. (JE 4, p. 23) Following surgery Dr. Peterson diagnosed Stone with an anterior cruciate ligament tear, right knee with instability with root horn tear of the lateral meniscus and grade 2-3 chondromalacia of the medial femoral condyle. (JE 4, p. 23) Dr. Peterson prescribed a brace and therapy. (JE 4, pp. 28, 31; JE 5)

After her work injury at Van Ert, Stone received treatment for her left wrist from Dr. Vazquez in Marshalltown. (Tr., p. 35) Dr. Vazquez ordered therapy. (Tr., p. 35) Stone received occupational therapy for her left upper extremity from November 1, 2016 through December 28, 2016. (JE 6; Tr., p. 35)

Stone developed cellulitis in her left upper extremity and she was hospitalized. Ravi Vemuri, M.D., an infectious disease specialist, later opined Stone's cellulitis was causally related to the work injury, but found she had no active infection or work restrictions from an infectious disease standpoint. (JE 7, pp. 44-45)

On November 22, 2016, Stone attended an appointment with Warren Poag, M.D., with the McFarland Clinic, complaining of left ulnar wrist pain radiating from her ulnar wrist to the elbow and shoulder. (JE 8, p. 49) Dr. Poag diagnosed Stone with pain in wrist, unspecified, laterally, and ordered magnetic resonance imaging. (JE 8, p. 52) Stone underwent left wrist magnetic resonance imaging on December 6, 2016. (JE 9) The reviewing radiologist listed an impression of "[s]ignificant tear of the ulnar aspect of the triangular fibrocartilage complex" and "[u]lnar-sided ECU subsheath tear causing ulnar subluxation of the ECU tendon." (JE 9, p. 61)

On December 14, 2016, Stone attended a follow-up appointment with Dr. Poag. (JE 8, p. 58) Dr. Poag examined Stone, assessed her with a triangular fibrocartilage complex tear and extensor carpi ulnaris subluxation, administered a steroid shot, prescribed a sugar long splint, imposed a lifting restriction of ten pounds with her left hand and arm, and recommended she be examined by a hand surgeon. (JE 8, pp. 58-59)

Benjamin Paulson, M.D., an orthopedic surgeon, conducted an independent medical examination records review only for Van Ert and Travelers on January 10, 2017. (JE 10) Dr. Paulson diagnosed Stone with a contusion of the left wrist, cellulitis of the left wrist, "a central perforation of the lunotriquetral ligament, a significant tear [of] the ulnar aspect of the TFCC, an ulnar-sided extensor carpi ulnaris subsheath tear with resultant ulnar subluxation of the ECU tendon." (JE 10, p. 62) Dr. Paulson opined the findings on Stone's left arm imaging were idiopathic in nature and her left arm conditions and cellulitis were not causally related to the work injury. (JE 10, p. 62)

Stone testified Van Ert terminated her employment on January 24, 2017, because she had a ten pound lifting restriction and there was no light-duty work available. (Exs. 1, pp. 6, 9; BB, p. 5; Tr., p. 41) The last day Stone worked was October 18, 2016, when she was admitted to the hospital with cellulitis. (Ex. BB, p. 5; Tr., pp. 35, 42) At the time of her termination, Stone earned $28.73 per hour. (Ex. 1, p. 6)

On February 10, 2017, Stone returned to Dr. Peterson in Oklahoma, complaining of discomfort in her right knee while carrying heavy loads with her tool belt and low back pain. (JE 4, p. 32) Dr. Peterson examined Stone and assessed her with pain and swelling of the right knee, status post root horn meniscus repair and anterior cruciate ligament reconstruction using hamstring allograft tendons. (JE 4, p. 34) Dr. Peterson ordered magnetic resonance imaging. (JE 4, p. 34) Stone underwent right knee magnetic resonance imaging and the reviewing radiologist issued the following conclusions:

1. Findings in the body and posterior horn of medial meniscus which may represent partial meniscetomy changes. In the absence of prior surgery in these regions, this is consistent with partial tearing.

2. Postoperative changes of ACL reconstruction. The ACL graft is intact. There is a moderate sized region of tumefactive arthrofibrosis associated with the ACL.

3. Old grade 2 sprains of the superficial MCL and the deep medial meniscofemoral ligament.

4. Tricompartmental chondromalacia.

(JE 11, p. 65)

During a follow-up appointment to Dr. Peterson, Stone reported she had injured her left wrist and forearm while working in Iowa, and Dr. Peterson referred her to Jessica Childe, D.O. (JE 4, p. 34) During an appointment on April 3, 2017, Dr. Childe examined Stone and reviewed her imaging, and found she had

> extreme stiffness of the wrist with about 10 degrees of flexion and 10 degrees of extension as well as about 15 degrees of supination and full pronation. She has good digital range of motion. She does have tenderness over the focal area of the ulna. Her DRUJ is stable in neutral pronation and supination. I do not feel any ECU snapping on pronation and supination of the wrist. She has no tenderness over the SL interval and no tenderness on the radial aspect of the wrist.

(JE 12, pp. 66-68) Dr. Childe assessed Stone with a left triangular fibrocartilage complex tear, left extensor carpi ulnaris, subluxation/dislocation, and left wrist cellulitis, administered a steroid injection, and ordered occupational therapy. (JE 12, p. 68)

During a follow-up appointment on May 22, 2017, Dr. Childe noted Stone had improved range of motion, and Stone had inquired about returning to work. (JE 12, p. 69) Dr. Childe ordered additional occupational therapy. (JE 12, pp. 70-71; JE 13)

On July 17, 2017, Stone returned to Dr. Childe. (JE 12, p. 72) Dr. Childe found Stone's range of motion was equal to her other side and she had very minimal ulnar sided foveal tenderness. (JE 12, p. 73) Dr. Childe discontinued Stone's occupational therapy, did not recommend surgery, and agreed Stone could work on strengthening to lift fifty pounds at the gym. (JE 12, p. 74)

Stone attended an appointment with Dr. Childe on September 25, 2017, reporting she was able to lift up to thirty pounds with triceps curls, and ten to fifteen pounds on lateral pulls, and she was wearing a brace occasionally. (JE 12, p. 75) Dr. Childe discussed permanent restrictions with Stone. (JE 12, p. 76) Stone stated she did not

want permanent restrictions for future work, and Dr. Childe released her to return to work without restrictions and to wear a brace with heavy lifting. (JE 12, p. 76)

After Dr. Childe released Stone to return to work Stone called the IBEW to see if any work was available. (Tr., p. 45) In October 2017, Stone worked one day for Oklahoma Electric Supply Company as a journeyman electrician for ten to twelve hours, and four days for Brent Electric Company, Inc., as a journeyman electrician, ten to twelve hours per day. (Ex. 1, p. 6; Tr., p. 43) Neither position was long-term. (Tr., pp. 45-47) Stone did not receive any accommodations for either position and performed her normal duties. Stone was unemployed in November and December 2017 because there were no jobs available she was qualified for. (Tr., p. 47) Some of the positions required instrumentation training she does not possess, or the business had a "call-by-name," which is a request for a particular person for a job. (Tr., pp. 47-48)

In January 2018, Stone attended a functional capacity evaluation ordered by Dr. Childe. (JE 16) The physical therapist found Stone could occasionally lift up to fifty pounds, lift thirty pounds floor to waist, carry up to fifty pounds waist to shoulder, push 58.2 pounds of force, and pull 105.03 pounds of force. (JE 16, p. 89) The physical therapist further found Stone was capable of engaging in work in the medium physical demand level, and reported the results of the evaluation appeared to be an accurate representation of Stone's functional abilities. (JE 16, p. 89)

From January 11, 2018 through January 31, 2018, Stone worked for Oklahoma Electric Supply Company, as a journeyman electrician, approximately twelve hours per day, and earned $30.05 per hour. (Ex. 1, p. 7) Stone did not receive any accommodations while working for Oklahoma Electric Supply Company. Stone testified because she was not at 100 percent according to the functional capacity evaluation, Oklahoma Electric Supply Company let her go. (Tr., pp. 48-49) Since that time she has been calling the IBEW looking for work. (Tr., p. 49) Stone relayed Oklahoma Electric Supply Company has had sixteen call backs, but Oklahoma Electric Supply Company will not allow her to work because "[t]hey said that I have to have a hundred percent release from my doctor, and I don't have that. I'm in the medium capacity due to this fit test, and they have the paperwork of the fit test." (Tr., pp. 49-50) Stone reported Allison-Smith also had work, "but they required a fit test, and I've never seen that before." (Tr., p. 52)

Sunil Bansal, M.D., conducted an independent medical examination for Stone on February 22, 2018. (JE 17) Dr. Bansal reviewed Stone's medical records and examined her. (JE 17) Dr. Bansal diagnosed Stone with left wrist triangular fibrocartilage complex tear, left extensor carpi ulnaris subsheath tear, and status post right knee anterior cruciate ligament reconstruction and lateral meniscus repair. (JE 17, pp. 114-15) Dr. Bansal opined the injuries to Stone's left wrist were caused by the October 14, 2016 work injury. (JE 17, p. 115)

With respect to Stone's left wrist and hand, and using Figures 16-28, 16-31, and 16-37 of the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Bansal opined:

> he *[sic]* qualifies for the following impairment values based on her range of motion deficits.
>
> | | Range of Motion | %UE Impairment |
> |---|---|---|
> | Flexion: | 55 degrees | 1 |
> | Extension: | 49 degrees | 2 |
> | Radial Deviation: | 15 degrees | 1 |
> | Ulnar Deviation: | 20 degrees | 2 |
>
> Wrist related upper extremity impairment: 6% upper extremity impairment, which equals a 4% impairment of the body as a whole.

(JE 17, p. 115) With respect to Stone's right knee, using Table 17-33 of the AMA Guides, Dr. Bansal assigned a two percent lower extremity impairment for Stone's lateral meniscectomy. (JE 17, p. 115) Dr. Bansal relayed that he agreed with the restrictions assigned by the functional capacity evaluation. (JE 17, p. 116)

Stone told Dr. Bansal she could not walk on a treadmill because she would fall off. (Tr., p. 97) Stone acknowledged during cross-examination, she successfully performed a treadmill test during her functional capacity evaluation and she was able to stand continuously for sixty minutes. (Tr., p. 98) The functional capacity evaluation did not recommend any restrictions for her right leg. (Tr., p. 98)

The Workers' Compensation Commissioner approved an agreement for settlement between Stone, Van Ert, and Travelers on April 3, 2018. (Ex. 5) Stone, Van Ert, and Travelers agreed Stone was entitled to one exemption, her gross weekly earnings were $2,170.34, and her weekly rate was $1,153.89. (Ex. 5, p. 28) Stone, Van Ert, and Travelers further agreed Stone sustained a permanent partial disability of six percent to the left upper extremity, resulting in fifteen weeks of compensation under Iowa Code section 85.34(2)(m), commencing on February 16, 2017. (Ex 5, p. 28)

At hearing Stone testified she does not have any restrictions for her right knee, but her right knee pops and locks into place, it locks out of place whether she is doing something strenuous or sleeping. (Tr., pp. 29-30, 54-55, 75-76) Stone relayed she wakes up at night and her knee is locked and it takes a while to straighten out. (Tr., pp. 30, 55) Stone testified at work she often walks on uneven terrain and she has difficulty

with her balance when her knee locks, which causes her to trip, and to have pain. (Tr., p. 54) Stone reported she falls a couple of times per week. (Tr., pp. 54-55)

Stone testified she has problems opening bottles and jars with her left wrist and hand. (Tr., p. 55) Stone reported she once threw cereal on her granddaughters by accident when trying to open the cereal box, she has thrown knives and pans by accident when trying to grasp the objects, and she has to concentrate to avoid dropping milk bottles. (Tr., pp. 55-56)

While Stone is right-hand dominant, she reported she needs both hands to perform her job functions. (Tr., p. 58) Stone reported she works with a power pony that weighs twenty pounds, which she threads with the end of a pipe and a band saw weighing fifteen pounds, and she has to have both hands on it to operate it to cut different types of metal. (Tr., p. 58) Stone also works with hogsheads, which are threading machines that weigh between fifty and 100 pounds. (Tr., pp. 58-59) Stone testified she has lost tools off towers because she cannot hold onto the tools, which may drop thirty feet. (Tr., p. 58)

Stone lives on a farm. (Tr., p. 67) Stone grows grass on her farm and she has six horses. (Tr., p. 67) Stone leases a portion of her property to her neighbor for cattle. (Tr., p. 67) Stone has ridden horses most of her life. (Tr., p. 109)

When her son is around Stone has him unload grain and hay for the horses. (Tr., p. 68) Stone has fallen and hit her knee requiring stitches when feeding the horses because the horses are food aggressive. (Tr., p. 68) Stone feeds the horses daily with her son's assistance. (Tr., p. 68) Stone rides the horses, but reported "[g]etting the saddles up there takes some maneuvering." (Tr., p. 68) Stone is able to ride for approximately one mile, and "[t]hat's about all I can handle" because her knee becomes sore. (Tr., pp. 69, 108-09)

Stone and her son mow her yard with a zero-turn mower. (Tr., p. 69) The area that is mowed is about a quarter of an acre. (Tr., p. 69)

Stone testified she has contacted the IBEW every day to see if there is work available she is qualified for. (Tr., p. 44) Stone reported she works under a collective bargaining agreement, which precludes her from accepting non-union work. (Tr., pp. 44-45) Stone acknowledged the collective bargaining agreement does not preclude her from applying for work outside of the electrical field. (Tr., p. 72) Stone testified all industrial electrician jobs require the ability to lift more than fifty pounds. (Tr., p. 113) The job analysis for the Van Ert position provides an electrician must be able to occasionally lift up to seventy pounds. (Ex. 3, p. 10)

Stone testified she has looked for work outside of the electrician positions, including a nursing home in town, which requires lifting of "around 50 pounds" to move patients. (Tr., p. 73) Stone also looked for work at the bank, which also requires lifting

of heavy currency, and the casino, which requires lifting up to fifty pound change bags. (Tr., pp. 73-74) Stone has not applied for work at any factories. (Tr., p. 73)

In 2015 when Stone injured her right knee, Stone worked for Oklahoma Electric Supply Company helping with payroll. (Tr., p. 77) Stone assisted with the payroll for approximately one year and she was paid her regular journeyman's wage. (Tr., pp. 77-78) Oklahoma Electric Supply Company also had Stone perform safety work, which "was mingled in the with payroll" for about one year where she checked equipment to make sure the equipment was working properly. (Tr., p. 78) Stone later returned to the field, bending conduit, working in ditches, and working on a sixty foot cooling tower. (Tr., p. 79) Stone's position required her to climb stairs, ladders, and use a harness where she could rest on landings. (Tr., p. 80)

CONCLUSIONS OF LAW

I. The Fund's Liability

Stone seeks benefits through the Fund. The Fund contends it has no liability in this case. 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 Qualifying Loss

Stone contends she sustained a first qualifying loss to her right knee. In March 2015, Stone injured her right knee while she was helping a friend tag a newborn calf,

when a cow ran over her. (Tr., p. 28) Dr. Peterson performed surgery on Stone's right knee on April 16, 2015. (JE 4, p. 23) Following surgery Dr. Peterson diagnosed Stone with an anterior cruciate ligament tear, right knee with instability with root horn tear of the lateral meniscus and grade 2-3 chondromalacia of the medial femoral condyle. (JE 4, p. 23) Dr. Peterson prescribed a brace and therapy. (JE 4, pp. 28, 31; JE 5)

In 2015 when Stone injured her right knee, Stone worked for Oklahoma Electric Supply Company helping with payroll. (Tr., p. 77) Stone assisted with the payroll for approximately one year and she was paid her regular journeyman's wage. (Tr., pp. 77-28) Oklahoma Electric Supply Company also had her perform safety work, which "was mingled in with the payroll" for about one year where she checked equipment to make sure the equipment was working properly. (Tr., p. 78) Stone later returned to the field, bending conduit, working in ditches, and working on a sixty foot cooling tower. (Tr., p. 79) Stone's position required her to climb stairs, ladders, and use a harness where she can rest on landings. (Tr., p. 80) Stone did not receive any accommodations for her right knee and returned to her normal duties after receiving treatment for her right knee injury.

On February 10, 2017, Stone returned to Dr. Peterson in Oklahoma, complaining of discomfort in her right knee while carrying heavy loads with her tool belt and low back pain. (JE 4, p. 32) Dr. Peterson examined Stone and assessed her with pain and swelling of the right knee, status post root horn meniscus repair and anterior cruciate ligament reconstruction using hamstring allograft tendons. (JE 4, p. 34) Dr. Peterson ordered magnetic resonance imaging. (JE 4, p. 34) Stone underwent right knee magnetic resonance imaging and the reviewing radiologist issued the following conclusions:

1. Findings in the body and posterior horn of medial meniscus which may represent partial meniscectomy changes. In the absence of prior surgery in these regions, this is consistent with partial tearing.

2. Postoperative changes of ACL reconstruction. The ACL graft is intact. There is a moderate sized region of tumefactive arthrofibrosis associated with the ACL.

3. Old grade 2 sprains of the superficial MCL and the deep medial meniscofemoral ligament.

4. Tricompartmental chondromalacia.

(JE 11, p. 65) The reviewing radiologist from the imaging performed before her right knee surgery, listed a prior impression of:

1. Full-thickness anterior cruciate ligament tear.

2. Strain of the posterior cruciate ligament.

3. High-grade strain/partial thickness tears of both the medial and lateral collateral ligaments.

4. Horizontal tear of the lateral meniscus was associated complete or partial detachment of the posterior root attachment.

5. Focal cortical indentations and contusions involving the lateral femoral condyle and lateral facet of the tibial plateau posteriorly.

6. Large joint effusion/hemarthrosis.

7. Popliteus muscle strain.

(JE 3, p. 19) Stone has not received additional treatment for her right knee. No additional surgery has been recommended.

At hearing Stone testified she does not have any restrictions for her right knee, but her right knee pops and locks into place, it locks out of place whether she is doing something strenuous or sleeping. (Tr., pp. 29-30, 54-55, 75-76) Stone relayed she wakes up at night and her knee is locked and it takes a while to straighten out. (Tr., pp. 30, 55) Stone testified at work she often walks on uneven terrain and she has difficulty with her balance when her knee locks, which causes her to trip, and to have pain. (Tr., p. 54) Stone reported she falls a couple of times per week. (Tr., pp. 54-55)

Dr. Bansal diagnosed Stone with status post right knee anterior cruciate ligament reconstruction and lateral meniscus repair. (JE 17, p. 115) Stone told Dr. Bansal she could not walk on a treadmill because she would fall off. (Tr., p. 97) This information is incorrect. Stone acknowledged during cross-examination, she successfully performed a treadmill test during her functional capacity evaluation and she was able to stand continuously for sixty minutes. (Tr., p. 98) The functional capacity evaluation did not recommend any restrictions for her right leg. (Tr., p. 98)

Dr. Bansal assigned a two percent lower extremity impairment for Stone's lateral meniscectomy. (JE 17, p. 115) Consistent with the functional capacity evaluation, Dr. Bansal did not recommend any permanent restrictions for Stone's right knee. (JE 17)

Dr. Bansal is the only physician who has provided an opinion concerning Stone's right leg. The Fund did not seek an opinion regarding Stone's right leg from any physician. Dr. Bansal's opinion is unrebutted.

Stone testified she has ongoing difficulties with her right knee. Stone was the sole witness at hearing. During the hearing I assessed her credibility by considering whether her testimony was reasonable and consistent with other evidence I believe, whether Stone had made inconsistent statements, her "appearance, conduct, memory and knowledge of the facts," and her interest in the case. State v. Frake, 450 N.W.2d 817, 819 (Iowa 1990). Stone has an obvious interest in the outcome of this case.

Stone has had difficulty with her memory in the past and struggles with depression, anxiety, and lupus, in addition to other conditions unrelated to the work injury. Stone provided incorrect information to Dr. Bansal concerning her walking ability. However, Dr. Bansal also had access to and reviewed the results of the functional capacity evaluation.

I had the opportunity to observe Stone testify under oath. During her testimony, Stone engaged in direct eye contact, her rate of speech was appropriate, and she did not make any furtive movements. Her testimony was consistent throughout the hearing, and I find it reasonable and consistent with the other evidence I believe, even considering the incorrect information she provided to Dr. Bansal concerning her walking ability. Based on my personal observations at hearing, I found Stone to be is a credible witness. While Stone's injury to her right knee has resulted in a slight impairment, it has resulted in an impairment, nonetheless. The record supports Stone sustained a first qualifying loss to her right knee.

B. Second Qualifying Loss

Stone contends she sustained a second qualifying loss to her left upper extremity. The Fund rejects Stone's assertion.

To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, the employee's injuries arose out of an in the course of the employee's employment with the employer. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats v. Ciha, 552 N.W.2d 143, 151 (Iowa 1996). The injury must be a rational consequence of a hazard connected with the employment, and not merely incidental to the employment. Koehler Elec. v. Willis, 608 N.W.2d 1, 3 (Iowa 2000). The Iowa Supreme Court has held, an injury occurs "in the course of employment" when:

> it is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. *An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of the employer.*

Farmers Elevator Co. v. Manning, 286 N.W.2d 174, 177 (Iowa 1979).

The claimant bears the burden of proving the claimant's work-related injury is a proximate cause of the claimant's disability and need for medical care. Ayers v. D & N Fence Co., Inc., 731 N.W.2d 11, 17 (Iowa 2007); George A. Hormel & Co. v. Jordan, 569 N.W.2d 148, 153 (Iowa 1997). "In order for a cause to be proximate, it must be a 'substantial factor.'" Ayers, 731 N.W.2d at 17. A probability of causation must exist, a mere possibility of causation is insufficient. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997).

The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The deputy commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. 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).

Two physicians have provided expert opinions in this case, Dr. Paulson, an orthopedic surgeon retained by Van Ert and Travelers to conduct an independent medical examination records review only in January 2017, and Dr. Bansal, an occupational medicine physician, who performed an independent medical examination for Stone in late February 2018. (JE 17) Dr. Bansal examined Stone and reviewed her medical records. (JE 17) I find the opinion of Dr. Bansal most persuasive.

Dr. Paulson diagnosed Stone with a contusion of the left wrist, cellulitis of the left wrist, "a central perforation of the lunotriquetral ligament, a significant tear [of] the ulnar aspect of the TFCC, an ulnar-sided extensor carpi ulnaris subsheath tear with resultant ulnar subluxation of the ECU tendon." (JE 10, p. 62) Dr. Paulson opined the findings on Stone's left arm imaging were idiopathic in nature and her left arm condition was not causally related to the work injury. (JE 10, p. 62)

Dr. Bansal diagnosed Stone with left wrist triangular fibrocartilage complex tear, and left extensor carpi ulnaris subsheath tear. (JE 17, pp. 114-15) Dr. Bansal opined the injuries to Stone's left wrist were caused by the October 14, 2016 work injury, and he assigned a six percent upper extremity impairment, which equals a four percent impairment of the body as a whole. (JE 17, p. 115)

Dr. Paulson performed a records review only in this case. After his records review Stone received additional treatment from Dr. Childe, including injections and occupational therapy. Dr. Paulson never personally examined Stone, and he did not conduct a second records review after she received additional treatment from Dr. Childe. Stone did not have problems with her left wrist prior to the work injury. After the

work injury Stone developed problems in her left wrist, and at the time of the hearing she continued to have problems with her left wrist.

Dr. Childe ordered a functional capacity evaluation. (JE 16) The physical therapist who performed the evaluation found Stone could occasionally lift up to fifty pounds, lift thirty pounds floor to waist, carry up to fifty pounds waist to shoulder, push 58.2 pounds of force, and pull 105.03 pounds of force. (JE 16, p. 89) The physical therapist further found Stone was capable of engaging in work in the medium physical demand level, and reported the results of the evaluation appeared to be an accurate representation of Stone's functional abilities. (JE 16, p. 89) Dr. Bansal found the evaluation was valid and adopted the restrictions set forth by the physical therapist in the report. (JE 17, p. 116) While Stone requested Dr. Childe not impose any permanent restrictions, after Oklahoma Electric Supply Company received a copy of Stone's functional capacity evaluation, Oklahoma Electric Supply Company informed Stone she could not work until she was at 100 percent and terminated her employment. (Tr., pp. 49-50).

Van Ert also terminated Stone's employment on January 24, 2017, because Stone had a ten pound lifting restriction and there was no light-duty work available. (Exs. 1, pp. 6, 9; BB, p. 5; Tr., p. 41) The job analysis for the Van Ert position provides an electrician must be able to occasionally lift up to seventy pounds. (Ex. 3, p. 10) This requirement exceeds the restrictions adopted by Dr. Bansal from the functional capacity evaluation. Stone has established she sustained a permanent impairment to her left upper extremity, a second qualifying loss.

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).

Stone was off work for many months following her work injury. In October 2017, she worked briefly for two jobs through the IBEW at Oklahoma Electric Supply Company and Brent Electric Company. (Ex. 1, p. 6; Tr., p. 43) Neither position was long term. (Tr., pp. 45-47) Stone did not receive any accommodations and performed her normal duties.

Stone returned to Oklahoma Electric Supply Company from January 11, 2018 through January 31, 2018. (Ex. 1, p. 7) After receiving the results of the functional capacity evaluation, Oklahoma Electric Supply Company informed Stone she could not work for the company until she was fully released to 100 percent. Stone has worked for Oklahoma Electric Supply Company off and on for many years throughout her career as an electrician. Stone can no longer work for this company given the results of the functional capacity evaluation adopted by Dr. Bansal. Moreover, the job analysis for the Van Ert position provides an electrician must be able to occasionally lift up to seventy pounds. (Ex. 3, p. 10) The position with Van Ert does not fall within Stone's restrictions.

At the time of the hearing Stone was forty-seven. (Tr., p. 8) Stone graduated from high school in 1988. (Ex. AA, p. 3; Tr., pp. 10, 12) She attended several colleges and struggled with academics until she enrolled in an electrical program and found her niche. (Ex. AA, p. 3; Tr., pp. 11-12) Stone has worked as an electrician since 1999. (Tr., pp. 22, 75) At her last placement in January 2018, Stone earned $30.05 per hour. (Ex. 1, p. 7)

Prior to her work as an electrician, Stone worked as a dishwasher, waitress, vegetable sorter and cleaner, airplane part builder, washer of processed chickens, dough packer, and job coach for persons with disabilities. (Ex. 1, pp. 5-6; Tr., pp. 13-21) None of these positions pay a similar hourly rate to that of an electrician.

After her right knee injury, Oklahoma Electric Supply Company had Stone assist with payroll and performing safety work for one year, and paid her the regular journeyman's wage. (Tr., pp. 77-78) Stone developed additional skills with payroll that would be transferable to other employment. She also has experience working as a job coach for persons with disabilities. While Stone has had memory problems in the past, I found her to be articulate at hearing. Given her age, experience, impairment ratings, restrictions, functional limitations and residual capacities, I find Stone has sustained a sixty percent industrial disability, which entitles her to 300 weeks of permanent partial disability benefits.

The Fund is responsible only for the amount of the industrial disability from which the employee suffers, reduced by the compensable value of the first and second injuries. Second Injury Fund v. Nelson, 544 N.W.2d 258, 269 (Iowa 1995). In the event the credits due to the Fund exceed the industrial disability resulting from the qualifying injuries, the fund has no liability. Crudo v. Second Injury Fund of Iowa, Case No. 98-828 (Iowa App. July 23, 1999).

The two scheduled amounts for Stone's first and second qualifying injuries must be subtracted from 300 weeks. The two percent impairment to the right lower extremity results in 4.4 weeks of permanent partial disability benefits. Iowa Code § 85.34(2)(o) (2015) (allowing a maximum of 220 weeks). The six percent impairment to the left upper extremity results in fifteen weeks of permanent partial disability benefits. Id. § 85.34(2)(m) (allowing a maximum of 250 weeks). The first and second qualifying injuries total 19.4 weeks. The Fund is entitled to a credit of 19.4 weeks. Stone is awarded 280.6 weeks of permanent partial disability benefits from the Fund.

II. Rate

In the agreement for settlement, Van Ert, Travelers, and Stone agreed Stone's rate was $1,153.89 per week. Stone testified at hearing she received $50.00 a day per diem from Van Ert for each day she actually showed up on the job site. (Tr., p. 61) Stone received payment for the per diem amounts separately from her paycheck that was direct deposited with her bank. (Tr., pp. 62-63) Van Ert did not require Stone to provide receipts from meal or lodging expenses while she was working in Iowa. (Tr., pp. 62-63)

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 term "weekly earnings" is defined in Iowa Code section 85.36 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.

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(3).

Stone received $50.00 per diem for each day she worked for Van Ert. Stone avers the per diem should be included in calculating her weekly rate. The Fund avers Iowa Code section 85.61(3) precludes the inclusion of the per diem payments for determining Stone's weekly rate.

In the case of Premium Transp. Staffing, Inc. v. Bowers, No. 15-0378, 2015 WL 5968868 (Iowa Ct. App. Oct. 14, 2015), the claimant received $52.00 per diem as compensation. The claimant testified at hearing he spent only $12.00 per day for food and expenses, and kept the remainder of his per diem. The deputy commissioner

concluded the claimant showed by a preponderance of the evidence only a portion of his per diem was reimbursement for expenses, and the employer did not carry its burden of proof to show otherwise. The deputy commissioner found $12.00 of the per diem payment was an expense allowance under Iowa Code section 85.61(3), and included the remaining $40.00 of the per diem in calculating the weekly rate. The workers' compensation commissioner affirmed the deputy's inclusion of the $40.00 per diem in calculating the rate, which was affirmed by the Iowa Court of Appeals.

At hearing Stone did not present any evidence of the actual cost of her living expenses while she was in Iowa working for Van Ert. Given there was no evidence presented at hearing concerning the actual cost of Stone's living expenses, Stone has not established her daily living expenses were lower than the $50.00 per diem amount. Therefore, her request for inclusion of the $50.00 per diem is denied. See Tammen v. Echo Powerline Leasing, LLC, File No. 5053791 (Arb. Dec. 7, 2017) (determining the claimant presented scant evidence the claimant's expenses were lower than the $20.00 per diem allotment and denying the request to include the per diem pay in calculating the weekly rate).

Iowa Code section 85.36 sets forth several methods for determining an injured employee's compensation or rate. Mercy Med. Ctr. v. Healy, 801 N.W.2d 865, 870 (Iowa Ct. App. 2011). Under Iowa Code section 85.36(6),

> [i]n the case of an employee who is paid on a daily or hourly basis, or by the output of the employee, the weekly earnings 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.

At all times material to the rate calculation, Stone was paid $34.03 per hour. (Ex. FF, p. 9) In calculating Stone's rate, the Fund found the weeks of October 8, 2016, September 23, 2016, and July 2, 2016, were not representative weeks of employment given the overtime Stone regularly worked. (Ex. FF, p. 9) I adopt the Fund's determination of the representative weeks. The Fund totaled the representative weeks, and found Stone received earnings of $25,267.29 per week, divided by thirteen, which results in an average weekly wage of $1,943.65 per week. The parties stipulated Stone

was single and entitled to one exemption at the time of the work injury. Under the 2016-2017 Ratebook, Stone's weekly rate is $1,049.24.[1]

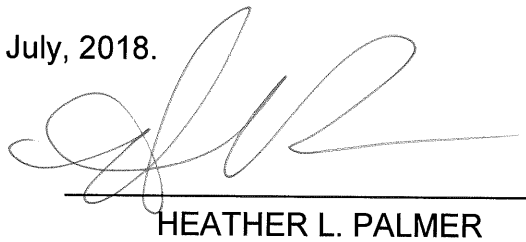
ORDER

IT IS THEREFORE ORDERED, THAT:

The Fund shall pay Stone two hundred eighty point six (280.6) weeks of permanent disability benefits, at the rate of one thousand forty-nine and 24/100 dollars ($1,049.24) per week, commencing after all benefits have been paid by Van Ert and Travelers.

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

Signed and filed this 12th day of July, 2018.



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[1] https://www.iowaworkcomp.gov/pdfs?title=ratebook.

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.