

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BOUAPHAN SEVERIN,	:	File No. 1521101.01
	:	
Claimant,	:	R E M A N D
	:	
vs.	:	D E C I S I O N
	:	
SECOND INJURY FUND OF IOWA,	:	
	:	
Defendant.	:	Headnotes: 1402.40; 1803; 3202

This matter is before the Iowa Workers' Compensation Commissioner on remand from a decision of the Iowa District Court for Polk County dated February 14, 2023.

The initial arbitration hearing was held on May 3, 2021, and the matter was considered fully submitted in front of the deputy workers' compensation commissioner on June 1, 2021. An arbitration decision was filed on October 4, 2021.

In the arbitration decision the deputy commissioner found claimant failed to meet her burden of proof to establish she sustained a first qualifying injury for purposes of receiving benefits from defendant Second Injury Fund of Iowa (the Fund). The deputy commissioner found the remaining issues in this case are moot.

Claimant appealed the arbitration decision to the workers' compensation commissioner. On February 3, 2022, the commissioner filed an appeal decision affirming the arbitration decision in its entirety. Claimant filed a motion for rehearing. On March 11, 2022, the commissioner issued a ruling denying claimant's motion for rehearing finding claimant had failed to prove she sustained a first qualifying injury for purposes of receiving benefits from the Fund because Nate Brady, M.D., and Phitnit Phisitkul, M.D., the treating physicians, did not assign claimant permanent restrictions or find claimant sustained permanent impairment, and the commissioner did not find the opinion of Marc Hines, M.D., credible because Dr. Hines did not have any x-rays or imaging studies to arrive at his opinion that claimant sustained permanent impairment to her ankle under the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001).

Claimant filed an application for judicial review. The district court filed a ruling on the petition for judicial review reversing the agency's decision. The district court found there is no substantial evidence in the record to support the conclusion that Dr. Hines did not have the imaging available to him when he conducted his independent medical examination (IME) for claimant. The district court further found the agency did not act based solely on a foundational fact or credibility determination in rejecting Dr. Hines'

opinion, but rather relied on impermissible agency expertise prohibited by Iowa Code section 85.34(2)(x) in applying the AMA Guides to disagree with Dr. Hines' application of the AMA Guides. The district court's ruling on the application of agency expertise involving the 2017 amendments to Iowa Code section 85.34 was not appealed and is law of the case. The district court remanded the matter to the agency to reconsider the case without relying on the factual determination that Dr. Hines did not have the x-rays or imaging referenced in his opinion and to evaluate the evidence without relying on agency expertise in applying the AMA Guides.

Claimant filed a petition in arbitration on June 1, 2020, alleging she sustained an injury to her left arm while working for defendant-employer Linn-Mar Community School District on September 21, 2010. Claimant also alleged she was entitled to benefits from the Fund.

Defendant-employer and its insurer, Employers Mutual Casualty Company, entered into an agreement for settlement that the commissioner approved on May 3, 2021, agreeing claimant sustained a 6.75 percent loss of both arms, which entitles claimant to receive 33.75 weeks of permanent partial disability benefits commencing on November 15, 2010.

An arbitration hearing was held on May 3, 2021. Attorney Thomas Wertz represented claimant. Claimant appeared and testified at the hearing. Assistant Attorney General Meredith Cooney represented the Fund. Joint Exhibits (JE) 1 through 8, Exhibits 1 through 5 and AA through FF were admitted into the record.

The parties submitted a hearing report prior to the hearing identifying the parties' stipulations and the issues to be decided. The Fund waived all affirmative defenses. A hearing report order was filed by the deputy commissioner at the conclusion of the hearing accepting the parties' stipulations and issues to be decided.

STIPULATIONS

1. An employer-employee relationship existed at the time of the alleged injury.
2. Claimant sustained an injury, which arose out of and in the course of her employment with the employer on September 21, 2010.
3. Temporary benefits are no longer in dispute.
4. At the time of the alleged injury, claimant's gross earnings were \$312.30 per week, claimant was married and entitled to four exemptions, and the parties believe the weekly rate is \$226.84.
5. Medical benefits are no longer in dispute.

6. Claimant sustained a compensable loss to her left arm on September 21, 2010.

ISSUES

1. Is claimant entitled to 25 weeks of permanent partial disability benefits for a ten percent loss of the use of the left arm?
2. Is the disability a scheduled member disability to the left arm?
3. Is the disability an industrial disability?
4. Is the commencement date for permanent partial disability benefits, if any are awarded, November 15, 2010?
5. Did claimant sustain a prior qualifying loss to the right leg on May 17, 2007?
6. Is the functional loss from the prior qualifying loss 2.5 percent of the right leg?
7. Is the functional loss from the second qualifying loss ten percent to the left arm?
8. What is the commencement date for benefits through the Fund?

FINDINGS OF FACT

Claimant was born in Laos and moved to the United States in 1981. (Hearing Transcript pp. 11-12) Claimant graduated from high school. (Tr. p. 12; Ex. FF, p. 18) After high school claimant attended Southern Vermont College for two years, but left to get married without graduating. (Tr. pp. 12, 39-40; Ex. 4, p. 35) Claimant testified her grades were not good in college because of her difficulty with English. (Tr. p. 40) Claimant is right-hand dominant. (Tr. p. 19) At the time of the hearing claimant was 55 years old. (Tr. p. 11)

Claimant has experience working as a restaurant hostess, restaurant supervisor, expeditor working with computer chips, and as a retail cashier. (Tr. pp. 37-38; Ex. 4, p. 36)

On January 26, 1998, claimant commenced employment with defendant-employer as a nutrition worker for the school lunch program. (Ex. DD, p. 15) Claimant reported she had worked for defendant-employer for 22 or 23 years. (Tr. p. 13) Claimant has worked with the same co-workers for many years. (Tr. pp. 40-41) Claimant works for defendant-employer six and a half hours per day, Monday through Friday, with summers off pursuant to an annual contract. (Tr. pp. 13-14; Ex. FF, p. 18) Claimant testified she loves her job with defendant-employer and she has no plans to

quit or retire. (Tr. p. 14-15) At the time of the hearing, claimant was working for defendant-employer as a nutrition worker. (Tr. pp. 12-13; Ex. DD, p. 15)

On May 17, 2007, claimant sustained a right ankle inversion injury while working for defendant-employer. (JE 1, p. 1; Tr. pp. 31, 44) On the day of the injury defendant-employer sent claimant to Ignatius Brady, M.D., an occupational medicine physician with Work Well Solutions, for treatment. (JE 1, p. 1) Claimant informed Dr. Brady she was having difficulty with weightbearing. (Id.) Dr. Brady examined claimant, found she had tenderness over the lateral epicondyle of her right ankle with diffusion swelling and pain with inversion, eversion, dorsiflexion and plantar flexion, and noted an x-ray showed an osteochondral defect that did not look acute. (JE 1, p. 1) Dr. Brady listed an impression of a right ankle sprain, placed claimant in an Aircast, provided claimant with crutches, and imposed a restriction of seated work only. (JE 1, p. 1)

Claimant returned to Dr. Brady on August 30, 2007, reporting she was doing well during summer vacation when she was not on her feet as much, and now that she had returned to school, she was experiencing quite a bit of pain through her right ankle that worsens when performing her normal work duties preparing food. (JE 1, p. 2) Dr. Brady listed an impression of persistent right ankle pain following a sprain injury, referred claimant to a podiatrist, and released her to return to work without restrictions. (Id.)

Claimant sustained an injury to her bilateral arms on September 21, 2010. (JE 1, p. 5; Ex. FF, p. 19; Tr. p. 44) Claimant went over to the steamer to try to pull out the spaghetti and when she pulled on the pan she felt something in her bilateral arms. (Ex. FF, pp. 19-20) Claimant felt pain from her elbows down to her hands and she could not grip her hand. (Ex. FF, p. 20) Claimant reported the work injury to her supervisor. (Ex. FF, p. 19)

Claimant attended an appointment with William Manley, PA-C with Work Well on September 30, 2010. (JE 2, p. 19) Manley examined claimant, assessed claimant with a bilateral forearm strain, ordered physical therapy, and imposed restrictions of no lifting or carrying over three to five pounds, no reaching overhead or across the chest, no repetitive use of the bilateral upper extremities, no forceful grasping, pinching, pushing, or pulling. (Id.)

On October 7, 2010, claimant returned to Manley complaining of bilateral forearm pain and reporting she had not stayed within the restrictions he ordered because she did not want to put a burden on her co-workers. (JE 2, p. 20) Manley continued claimant's restrictions, instructed claimant to work within the restrictions he ordered, and continued her physical therapy. (Id.)

Claimant attended a follow-up appointment with Manley on October 21, 2010, reporting she had been swiping cards on a repetitive basis and lifting pots at work and complaining her right elbow was worse than the left. (JE 2, p. 21) Manley examined claimant, assessed her with bilateral forearm strains and bilateral lateral epicondylitis, and imposed restrictions of no lifting or carrying above five pounds, no reaching

overhead or across the chest, no repetitive use of the bilateral upper extremities, and no forceful grasping, pinching, pushing or pulling bilaterally, and Dr. Manley continued claimant's physical therapy. (Id.)

Manley referred claimant to James Johns, Jr., M.D., an orthopedic hand surgeon. (JE 4) On November 9, 2010, claimant attended an appointment with Dr. Johns complaining of diffuse lateral aspect elbow and forearm pain. (JE 4, p. 27) Dr. Johns examined claimant, diagnosed claimant with lateral epicondylitis of the elbow, recommended conservative treatment, provided instructions on forearm strap wear, wrist splint wear, lifting modifications, anti-inflammatory medication, and modalities, and imposed restrictions of no lifting over 20 pounds, to wear forearm straps, and to wear wrists splints, as needed. (JE 4, p. 27)

On December 21, 2010, claimant returned to Dr. Johns reporting she was slowly improving and therapy had provided mild relief. (Id.) Claimant reported her co-workers were helping her with heavy lifting and other activities that aggravate her symptoms and she was using her forearm counterforce straps, but she had difficulty wearing her wrists splints while at work. (Id.) Dr. Johns documented he discussed treatment options with claimant, including conservative measures or a cortisone injection, claimant elected to continue with conservative treatment, and Dr. Johns continued claimant's restrictions. (JE 4, p. 28)

Claimant returned to Dr. Johns on March 1, 2011, regarding her bilateral arm condition. (JE 4, p. 28-29) Claimant reported she was wearing her forearm straps for work and activity and while she had some residual symptoms she was feeling much better overall. (Id.) Dr. Johns documented claimant had some residual lateral epicondylitis, he reviewed treatment options, and claimant refused a cortisone injection. (Id.) Dr. Johns opined that if claimant still required light duty restrictions after one year her restrictions would be considered permanent. (Id.) Dr. Johns issued permanent work restrictions of no lifting over 20 pounds and to wear forearm straps and/or wrist splints as needed. (JE 4, pp. 29-30) Dr. Johns found claimant had reached maximum medical improvement and he assigned no permanent impairment. (Id.)

On June 17, 2013, claimant attended an appointment with Dr. Brady regarding her bilateral elbows. (JE 1, p. 3) Dr. Brady noted claimant had a long history of both medial and lateral epicondylitis for her bilateral upper extremities. (Id.) Dr. Brady documented he had referred claimant to Dr. Johns after conservative care failed and he did not find she was a surgical candidate. (Id.) Dr. Brady examined claimant, assessed her with bilateral epicondylitis, noting the left side was the worst, Dr. Brady administered an injection into claimant's left lateral epicondyle, and he recommended claimant use ice and ibuprofen for pain and wear tennis elbow straps as needed. (JE 1, pp. 3-4)

Defendant-insurer sent a letter to Dr. Brady on July 2, 2013, asking whether he believed claimant's bilateral arm condition was work-related. (JE 1, p. 5) Dr. Brady responded by saying claimant's condition was work-related. (JE 1, p. 5)

On August 9, 2013, claimant returned to Dr. Brady complaining of right ankle pain. (JE 1, p. 6) Dr. Brady documented he had seen claimant years ago for her right ankle and she had been referred to Dr. Dvorak for chronic pain in the tendons and arch, which helped, but she never had been pain free. (Id.) Claimant reported her pain was worse with activity, she was experiencing swelling in her ankle, she was having trouble with stairs, and she requested new inserts and recommendations before starting the new school year. (JE 1, pp. 6-7) Dr. Brady examined claimant, assessed her with chronic right ankle pain and recommended magnetic resonance imaging. (JE 1, p. 7)

On December 12, 2013, claimant attended an appointment for her right ankle injury with Phinit Phisitkul, M.D., who was with the University of Iowa Hospitals and Clinics (UIHC). (JE 6) Dr. Phisitkul reviewed claimant's imaging, examined claimant, assessed claimant with osteochondritis dissecans, and recommended treatment options, including surgery. (JE 6, pp. 38-39) Claimant indicated she was interested in surgery. (JE 6, p. 39)

Claimant testified she ultimately decided she was not interested in surgery on her right ankle. (Tr. p. 32) Claimant does not have any permanent restrictions for her right ankle. (Tr. p. 45)

Claimant attended a follow-up appointment with Dr. Brady for her bilateral elbow condition on March 25, 2014, reporting she had a very bad day the day before the appointment, and she showed Dr. Brady pictures of her swollen medial elbows. (JE 1, p. 8) Dr. Brady documented claimant's elbows looked abnormal in the pictures. (Id.) Claimant stated she had gone to UIHC regarding her right ankle and she was offered a bone allograft from a cadaver source, and she stated she was not ready to undergo such a large procedure for her osteochondral defect. (Id.) Dr. Brady assessed claimant with persistent bilateral medial epicondylitis resistant to bracing, arm bands, cortisone injection, and occupational therapy, and Dr. Brady referred claimant for a possible PRP injection. (JE 1, p. 9)

Claimant underwent a functional capacity evaluation (FCE) on October 3, 2014. (JE 3) The physical therapist documented the FCE was valid and found claimant was capable of performing work in the sedentary to light category of work. (JE 3, p. 22)

On December 1, 2014, claimant attended an appointment with Joseph Chen, M.D., a physiatrist who worked for UIHC, regarding her chronic bilateral elbow pain and for an impairment rating. (Ex. AA, p. 2) Dr. Chen diagnosed claimant with medial epicondylitis of the right and left elbows and noted he discussed chronic myofascial pain and the difficulties she has with ongoing pain and heavy work demands. (Ex. AA, p. 6) Dr. Chen documented he believed claimant was better suited for sedentary or light work duties, but her job required her to perform medium to light work duties. (Id.) Dr. Chen

recommended claimant continue gentle exercises, including stretching and strengthening and try to manage her pain with activity modifications, as appropriate. (Id.)

Dr. Chen placed claimant at maximum medical improvement (MMI) and recommended permanent restrictions of no lifting over 15 pounds on an occasional basis in her work and recreational activities. (Id.) Using the AMA Guides, Dr. Chen assigned claimant one percent permanent impairment of the left upper extremity and one percent permanent impairment of the right upper extremity. (Id.)

On December 2, 2014, defendant-insurer issued a check to claimant for ten weeks of permanent partial disability benefits at the weekly benefit rate of \$226.84, for her bilateral arm condition. (Ex. BB, p. 1)

Marc Hines, M.D., a neurologist, conducted an IME for claimant on August 7, 2015, and issued his report on August 12, 2015. (Ex. 2, p. 10) Dr. Hines reviewed claimant's medical records and examined her. (Ex. 2) Dr. Hines reported he had not evaluated claimant's ankle, but noted her problems still existed. (Ex. 2, p. 17) Dr. Hines listed an impression of ongoing medial and lateral epicondylitis with some posterior interosseous syndrome. (Id.)

With respect to claimant's bilateral arms, Dr. Hines opined:

It is clear that Dr. Chen intended to give this patient some impairment for the lateral epicondylitis. I am not certain what his intent was with regard to the medial epicondylitis or the posterior interosseous penetration area syndrome or whether they included this as a separate issue. What is less clear is the objective means of determining this impairment. In my view the most objective testing is not only the confirmation by all examiners of the tenderness in the specific areas that are generally felt to be consistent with these diagnoses and the abscess [sic] of other findings (which have generally been confirmed except with the absence of any EMG nerve conduction block in support of an aggravating factor with a compressive neuropathy that is an entrapment neuropathy). Is the use of Tables such as 16-31 through 16-34 to give us some objectification of the amount of impairment? When we look at females who work in a manual laboring position the major hand has a 24.2 kg average and the minor of 22 kg average.

In the age range that we are talking about we can also look at 16-32 finding that 50 to 59 is 22.3 for the major hand and 18.2 for the minor hand. Using this findings [sic] we can state that the right hand is probably reasonably within the range of normal variation for these findings if not just a little below the average on these grip strengths would be 10% below at most and therefore could slip into the [sic] Table 16-34 for a 10% upper extremity impairment as a conceptual average.

The patient's left hand on the other hand falls far below the means in any interpretation and certainly falls between 10 to 30% loss and is a 10% upper extremity impairment. I would therefore state that it would be more reasonable on the basis of these findings to suggest that the impairment that is intended here be given an objective basis for determining the percentage impairment of the upper extremity. That is not to say that we are using the grip strength as the only reason for giving the impairment. The impairment is actually based on the repeated objective findings of medial and lateral epicondylitis. The additional finding of posterior interosseous penetration area syndrome which is frequently associated with this and that the objective impairments would then be in the category of 5% for the right upper extremity and 10% for the left upper extremity using the combined values. Tables [sic] this would be 15% for the upper extremities although I have decided these should be separately converted and then 2 whole persons [sic] and then added the 10% would be 6% whole person. The 5% would be 3% whole person. We then go to the Table Combined Values chart of 604 and 10% previously given is combined with the 6% as 15%, 15% combined with 3% is 18% whole person impairment.

(Ex. 2, p. 18)

Dr. Hines recommended restrictions of no work above shoulder height for claimant's bilateral arm condition. (Ex. 2, pp. 18-19)

With respect to claimant's right leg, using the AMA Guides, Dr. Hines opined:

There is no table related impairment that can discuss this free fragment issue. The closet [sic] difficulty would be the impairments related in table 17-31 for cartilage interval impairments. The lowest of these would be 3 mm cartilage interval with a 2% whole person impairment. This difficulty would to my way of estimating it [sic] be approximately half of that impairment or an additional 1% whole person impairment which would be added to the whole person impairment previously obtained.

(Ex. 2, p. 20)

Dr. Hines received and reviewed additional medical records, but reported his original opinions were still accurate. (Ex. 2, p. 22-23)

On December 4, 2018, claimant returned to Dr. Brady regarding her bilateral elbow condition. (JE 1, p. 10) Claimant reported she hired out all outdoor chores at home such as cutting grass, raking leaves, and shoveling the driveway due to her bilateral arm condition, and she reported she is better during summer vacation each year, but the pain in her elbows persists when she does anything. (Id.) Dr. Brady assessed claimant with chronic bilateral medial and lateral epicondylitis, recommended a referral to a rehabilitation specialist for treatment, and imposed a lifting restriction of

20 pounds with continued help from claimant's co-workers with lifting objects like she had for several years. (JE 1, p. 11)

Pursuant to an inquiry from defendant-insurer, Dr. Brady issued a letter on December 4, 2018, stating he believed claimant's bilateral medial and lateral epicondylitis and tendinitis were from the same condition she had received treatment for over many years and that he considered her condition to be work-related. (JE 1, p. 13)

On November 21, 2019, claimant attended a follow-up appointment with Dr. Brady for her bilateral arm condition. (JE 1, p. 14) Claimant reported her range of motion in her elbows without pain had improved and she believed physical therapy had been helpful. (Id.) Dr. Brady assessed claimant with chronic bilateral medial and lateral epicondylitis, improved, discontinued her therapy, recommended claimant continue with home exercises, noted he believed "it is a near certainty that she will need physical therapy in the future," and "it would be reasonable for her to be periodically reassessed" in his clinic to facilitate occupational therapy during flareups, noting "she does poorly during long intervals without OT treatment." (Id.)

Claimant returned to Dr. Brady on February 21, 2020, regarding her bilateral arm condition. (JE 1, p. 15) Claimant reported she experienced good symptom relief after the last round of therapy a few months ago and that she ran out of medication and her pain then became worse. (Id.) Dr. Brady refilled claimant's amitriptyline and Mobic, imposed no work restrictions, and noted he discussed the case with the nurse case manager and he reiterated his opinion from her last visit where he noted she would need therapy and care periodically in the future. (Id.)

On August 13, 2020, claimant attended a telephone recheck with Dr. Brady, and reported she was receiving a good response from her prescriptions for amitriptyline and Mobic for her bilateral arm condition. (JE 1:16) Claimant reported the school year ended early because of the pandemic and she stated she did fairly well because she had the summer off. (Id.) Dr. Brady documented he discussed obtaining new elbow straps for claimant and he refilled claimant's amitriptyline and Mobic prescriptions. (Id.)

On February 11, 2021, claimant attended a telephone recheck with Dr. Brady regarding her bilateral arm condition. (JE 1, p. 17) Dr. Brady noted he last examined claimant a year ago when her symptoms were stable. (Id.) Claimant reported she was feeling a bit worse than before because school was fully open and there were many people out sick, so her workload was much higher. (Id.) Dr. Brady refilled claimant's medication and released her to return to full duty. (JE 1, pp. 17-18)

Dr. Brady responded to a check-the-box letter from claimant's counsel on February 11, 2021, agreeing he had treated claimant's bilateral arms since 2013 and while he had not issued permanent restrictions, claimant told him defendant-employer and her co-workers had accommodated her work, providing her with assistance, when needed. (Ex. 1, p. 1) Dr. Brady agreed if claimant lost her job with defendant-employer and/or the accommodations she was receiving she would require permanent restrictions

as a result of the September 21, 2010 work injury. (Id.) Dr. Brady recommended restrictions of no lifting over 20 pounds, avoid forceful gripping with the bilateral hands, and avoid repetitive twisting of the bilateral forearms. (Id.)

Sheila Capizzi, M.A., C.R.C. conducted a vocational evaluation for claimant and issued her report on February 21, 2021. (Ex. 3) Capizzi administered the Wide Range Achievement Test-5 to assess claimant's reading, spelling, and arithmetic ability. (Ex. 3, p. 26) Capizzi examined claimant's raw scores in relation to the standard scores and found claimant's reading is grade equivalent 3.4, her spelling is grade equivalent 3.9, and her arithmetic ability is grade equivalent 4, finding her scores ranged in the fourth-grade level or below. (Ex. 3, pp. 26-27)

Capizzi noted claimant's position with defendant-employer falls within the medium physical demand and if claimant was not receiving accommodations at work or tried to find a similar job, she would be unable to perform the job. (Ex. 3, p. 28) Capizzi opined claimant would experience a significant impairment of earning capacity if she had to try and find competitive employment and based on her academic scores and very limited transferable skills and abilities "it is not probable that she would be able to sustain competitive employment in her usual and customary occupation or in any alternative employment." (Id.)

As a nutrition worker, claimant is responsible for doing the preparation work for the meals the students eat. (Tr. p. 15) Claimant unloads boxes from the refrigerator or freezer and prepares meals with her co-workers. (Tr. pp. 16-17) At the time of the hearing claimant was preparing meals for 180 to 400 students each day. (Tr. p. 42) Before virtual learning she prepared meals for close to 1,000 students each day. (Id.)

Claimant uses a large kettle at work weighing around 50 pounds for cooking food. (Tr. pp. 18-19) Claimant stirs the food while it is cooking. (Tr. p. 18) When claimant cooks food she has to transfer or scoop the cooked food to another pan she puts into a warmer and she continues to cook new batches of food until the food is prepared. (Tr. pp. 20-21) The pans of cooked food weigh between 20 and 25 pounds. (Tr. p. 21) Before the pandemic, claimant served food to the students. (Id.) After the pandemic claimant prepares the food and puts it in bags that are set on a line for the students to take. (Tr. pp. 21-22) After serving lunch, claimant cleans up the kitchen with her co-workers. (Tr. p. 16)

Claimant testified her arms start to hurt and burn when she is working and she rests her arms. (Tr. pp. 19, 28) Claimant stated the pain starts in her elbow and creeps down her arm. (Tr. p. 19) If she is active and uses her right arm all morning the pain will come down to her fingers and she loses her grip. (Id.) Claimant testified the pain usually starts in her right arm because she is right-hand dominant. (Tr. p. 43) If she switches arms the pain will start back up in both arms. (Id.) Claimant's co-workers are able to help claimant when she needs assistance with stirring or lifting things. (Tr. p. 44)

Claimant reported she has difficulty scooping the servings of food, handling the lunch trays as they come out of the washer, scraping the pans, and cleaning the silverware. (Tr. pp. 22-24) Claimant's right arm will ache and swell, restricting her movement and she will switch duties with a coworker. (Tr. pp. 24-28) Claimant also struggles with her left arm. (Tr. pp. 26-27)

Claimant testified she is required to lift boxes weighing up to 50 pounds at work. (Tr. p. 30) Claimant reported she is only able to lift two or three boxes. (Id.)

Claimant testified she takes meloxicam and amitriptyline for her bilateral arm and ankle pain prescribed by Dr. Brady. (Tr. p. 43) After leaving work, claimant rests at home. (Tr. p. 28) Claimant testified she cannot do anything at home, except sit and take pain medication. (Tr. pp. 28-29) Claimant stated being off in the summer is very beneficial. (Tr. p. 30)

Claimant reported she has had problems with her right ankle ever since she injured it in 2007. (Tr. p. 31) Claimant testified she has a difficult time with stairs at the beginning of the day and she has problems being on her feet. (Tr. p. 31) Claimant stands on her feet for more than six hours per day at work. (Id.) To help with her condition, claimant moves and rests her ankle, and she takes walks. (Tr. p. 32)

Claimant testified her right ankle condition affects her ability to meditate because when she is sitting cross-legged, her ankle aches and pokes her while she sits on the floor, which affects her ability to concentrate. (Tr. p. 33) Claimant enjoys doing yoga and testified she cannot do poses that require one ankle or one leg to hold up her weight. (Tr. p. 34)

Claimant loves to dance, and will still dance, but she reported she pays for it later. (Id.) Claimant used to swim before the work injury, but she reported she cannot swim anymore because her arm constantly hurts when stroking the water. (Tr. pp. 35, 46-47)

Claimant testified that after working she cannot do her chores, including yard work due to her left arm. (Tr. p. 34) Claimant stated that because of her work injury to her arms she hires someone to do her yard work. (Id.) Claimant testified she has difficulty carrying a laundry basket and folding clothes due to her left arm condition. (Id.) Claimant testified she has difficulty gripping, unscrewing jars, and turning doorknobs. (Tr. p. 35) Claimant stated repetitive gripping causes her whole arm to hurt. (Id.)

Claimant stated she is able to type and use a computer, but she testified that because of her work injury she cannot type for more than 20 minutes due to the pain in her arms. (Tr. p. 36)

Claimant testified she would have a difficult time working as a hostess and as a cashier due to her ankle, because when she puts weight on her ankle it will lock up and she cannot walk sometimes. (Tr. pp. 37-39)

CONCLUSIONS OF LAW

I. Applicable Law

In 2017, the Iowa Legislature enacted numerous changes to Iowa Code chapter 85, including Iowa Code section 85.34. The changes to the statute went into effect on July 1, 2017. This case involves a work injury that occurred before July 1, 2017, therefore, the new provisions of the statute from 2017 do not apply to this case. 2017 Iowa Acts chapter 23 ("The sections of this Act amending sections 85.16, 85.18, 85.23, 85.26, 85.33, 85.34, 85.39, 85.71, 86.26, and 86.42 apply to injuries occurring on or after the effective date of this Act," or after July 1, 2017).

II. Fund Benefits

Under Iowa Code section 85.64,

If 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 this division 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).

Claimant alleges she sustained a first qualifying injury to her right ankle in 2007. The Fund disputes her contention.

Claimant sustained an injury to her right ankle in 2007 while working for defendant-employer. (JE 1, p. 1; Tr. p. 31) She complained of right ankle symptoms and sought treatment off and on over the course of several years. (JE 1; JE 6) Dr. Phisitkul at UIHC recommended surgery. (JE 6, pp. 38-39) Claimant ultimately decided not to undergo surgery, but reported ongoing problems with swelling in her ankle,

trouble going up and down stairs and with standing. (JE 1, p. 7; Tr. pp. 31, 34) No contrary evidence was presented at hearing.

Claimant underwent an IME with Dr. Hines. Dr. Hines opined claimant sustained a one percent body as a whole impairment of her right ankle, using Table 17-31 of the AMA Guides. (Ex. 2, p. 20) Chapter 17 of the AMA Guides involves the lower extremities. Table 17-31 discusses arthritis impairments based on roentgenographically determined cartilage levels. In reversing the agency decision, the district court found the agency's finding that Dr. Hines did not review claimant's imaging was not supported by substantial evidence, therefore, it is assumed Dr. Hines reviewed claimant's right lower extremity imaging to support his impairment finding.

The Fund did not retain an expert to conduct an IME or request any medical practitioner review Dr. Hines' opinion or provide an opinion regarding claimant's right lower extremity condition. Dr. Hines assigned one percent whole person impairment for claimant's right lower extremity condition. Under Table 17-3 of the AMA Guides, a one percent whole person impairment is a two percent lower extremity impairment. Dr. Hines' opinion is un rebutted. I find claimant established she sustained a first qualifying injury.

Claimant alleges she sustained a second qualifying loss to her left arm in September 2010. Two expert witnesses provided opinions on extent of disability, Dr. Chen, a physiatrist, and Dr. Hines, a neurologist. Dr. Chen assigned claimant one percent permanent impairment to each of her upper extremities. (Ex. AA, p. 6) Dr. Hines assigned claimant 18 percent whole person impairment for the injury to her bilateral upper extremities. (Ex. 2, p. 18) I find Dr. Chen's opinion more persuasive than Dr. Hines' opinion.

Dr. Chen served as one of claimant's treating physicians. At the time he provided his rating, Dr. Chen worked at UIHC, a premier medical institution. Dr. Hines examined claimant once for the purposes of an IME.

Dr. Chen documented his objective findings on examination, noting claimant exhibited normal upper extremity strength, coordination, and muscle stretch reflexes, and documented claimant had no obvious instability or laxity and no significant edema. (Ex. AA, p. 5) Dr. Chen's report is clear and concise. (Ex. AA)

Dr. Hines documented he observed claimant had normal strength in all four extremities with the exception claimant's "hand muscle function seem [sic] to be somewhat weakened," and then notes her grip strength "clearly demonstrate[s] significant deficits on the right," contrary to Dr. Chen's finding. (Ex. 2, pp. 16-17) Unlike Dr. Chen's report, Dr. Hines' report contains multiple typographical errors, it is difficult to follow, several of his statements are equivocal, and his report contains conclusory statements without factual support in the record or on exam. (Ex. 2) I do not find Dr. Hines' opinion credible or persuasive. Prior agency decisions have also questioned his causation methodologies and impairment ratings. See Perez v. West Liberty Foods,

2011 WL 4090466, File Nos. 5033695, 5033696, *4 (Iowa Workers' Comp. Comm'n Sept. 15, 2011); Brown v. Menards, Inc., 2013 WL 5972221, File No. 5040961, *8-11 (Iowa Workers' Comp. Comm'n Nov. 5, 2013); Grouette v. Gilbane Bldg. Co. 2017 WL 4246963, File No. 5044473, *2 (Iowa Workers' Comp. Comm'n Sept. 18, 2017); Franklin v. Roper Indus., Inc., 2018 WL 1081171, File No. 5062030, *11-13 (Iowa Workers' Comp. Comm'n Feb. 22, 2018); Jones v. Raining Rose, Inc., 2018 WL 936196, File No. 5048297, *9-10 (Iowa Workers' Comp. Comm'n Feb. 13, 2018). Given the confusing nature and poor quality of Dr. Hines' report and his prior history of questionable rating methods, I find his opinion regarding permanent impairment with respect to claimant's bilateral extremities not credible. I find claimant has established she sustained one percent impairment of her left upper extremity.

Dr. Chen documented he believed claimant was better suited for sedentary or light work duties, but her job requires her to perform medium to light work duties. (Ex. AA, p. 6) Dr. Chen placed claimant at MMI and recommended a permanent restriction of no lifting over 15 pounds on an occasional basis in her work and recreational activities. (Ex. AA, p. 6) I find Dr. Chen's restriction is claimant's permanent restriction.

Given claimant has sustained a first qualifying loss and a second qualifying loss, it is necessary to determine claimant's extent of 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)(v). When considering the extent of disability, the deputy commissioner considers all evidence, both medical and nonmedical. Evenson v. Winnebago Indus., Inc., 881 N.W.2d 360, 370 (Iowa 2016).

At the time of the hearing, claimant was 55 years old. (Tr. p. 11) Claimant was born in Laos and moved to the United States in 1981. (Tr. pp. 11-12) Claimant graduated from high school. (Tr. p. 12; Ex. FF, p. 18) After high school claimant attended Southern Vermont College for two years where she studied to become a medical assistant and human services worker, but left to get married without graduating. (Tr. pp. 12, 39-40; Ex. 4, p. 35) Claimant testified her grades were not good in college because of her difficulty with English. (Tr. p. 40)

Claimant has worked for defendant-employer as a nutrition worker since January 26, 1998. (Ex. DD, p. 15) Claimant also has experience working as a restaurant hostess, restaurant supervisor, expeditor working with computer chips, and as a retail cashier. (Tr. pp. 37-38; Ex. 4, p.36)

Claimant has worked with the same co-workers for many years. (Tr. pp. 40-41) Claimant works for defendant-employer six and a half hours per day, Monday through Friday, with summers off pursuant to an annual contract. (Tr. p. 13-14; Ex. FF, p. 18) Claimant's hourly rate has increased since the September 2010 work injury. (Id.; Ex. 4, p. 36) Claimant testified she loves her job with defendant-employer and she has no plans to quit or retire. (Tr. p. 14)

Claimant has a permanent 15-pound lifting restriction. (Ex. AA, p. 6) The record reflects defendant-employer and claimant's co-workers have accommodated her bilateral arm condition for many years. (Ex. AA, p. 2; JE 1, p. 11; JE 4, p. 28) Without the accommodations she receives, claimant would not be able to perform the lifting required for her job, as noted by Dr. Chen. Based on all the factors of industrial disability, I find claimant has sustained 30 percent industrial disability, entitling claimant to 150 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 of Iowa v. Nelson, 544 N.W.2d 258, 269 (Iowa 1995). In the event the credits due 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).

Under Iowa Code section 85.34(o) (2010), weekly compensation is limited to 220 weeks for the loss of a leg. Claimant sustained two percent right lower extremity impairment as a result of the 2007 injury, pursuant to Dr. Hines' opinion. Two percent times 220 weeks is 4.4 weeks. Under Iowa Code section 85.34(m), weekly compensation is limited to 250 weeks for the loss of an arm. Claimant sustained one percent left upper extremity impairment as a result of the 2010 injury, pursuant to Dr. Chen's opinion. One percent times 250 is 2.5 weeks.

The Fund is not just entitled to the scheduled loss for the two injuries, but rather the compensable value of the scheduled loss, relying on the unpublished case of Second Injury Fund v. Greenman, 2006 WL 3017955, No. 05-0855, **5-6 (Iowa Ct. App. 2006). In Greenman, the Fund alleged the commissioner erred in granting the Fund credit for the right arm based on the statutory liability when the settlement exceeded the statutory liability. The court of appeals agreed and found the commissioner should have granted the Fund credit for 14.9977 weeks because the settlement for right arm injury of \$8,980.18 divided by the agreed weekly rate of \$598.77 resulted in 14.9977 weeks.

In the agreement for settlement in this case, the parties to the settlement agreed claimant sustained a 6.75 percent whole body loss, and that claimant was entitled to 33.75 weeks of compensation, allocating 25 weeks to the left upper extremity and 8.75 weeks to the right upper extremity.

A loss to the bilateral arms is a scheduled loss, based on 500 weeks. Iowa Code § 85.34(2)(s) (2010). This case involves a second qualifying loss to the left upper extremity, not the bilateral upper extremities. The Fund asserts it is entitled to a credit for the full 33.75 weeks based on the injury to the bilateral arms. Greenman does not support the Fund's assertion. Greenman stands for the proposition that the Fund is entitled to a credit for the compensable value of the settlement "of the scheduled loss," the right upper extremity in Greenman and the left upper extremity in this case and not the combined whole person loss to the bilateral upper extremities. Under Table 16-3, an eight percent upper extremity impairment converts to a five percent whole person impairment. Eight percent of 250 weeks is 20 weeks. 20 weeks plus 4.4 weeks is 24.4 weeks. 150 weeks minus 24.4 weeks is 125.6 weeks. I find the Fund is entitled to a credit of 24.4 weeks based on the compensable value of the first and second qualifying injuries and I find claimant is entitled to 125.6 weeks of permanent partial disability benefits from the Fund at the stipulated weekly benefit rate of \$226.84.

The parties did not agree on the commencement date for permanency. Under Iowa Code section 85.34(1) (2010), compensation for permanent partial disability benefits commences when:

[T]he employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, whichever occurs first.

The parties stipulated the injury to claimant's left upper extremity occurred on September 21, 2010. Claimant returned to work with restrictions following the work injury. There is no evidence claimant missed any work. When she attended an appointment with Dr. Manley on September 30, 2010, Manley imposed temporary restrictions. (JE 2, p. 19) Claimant returned to work and during her next appointment with Dr. Manley on October 7, 2010, she reported she had not stayed within her restrictions at work because she did not want to burden her co-workers. (JE 2, p. 20) Given claimant returned to work after the work injury, I find permanent partial disability benefits with respect to defendant-employer commenced on September 22, 2010, the date claimant returned to work. Fund benefits commence following the expiration of defendant-employer's liability for the 24.4 weeks of permanent partial disability benefits for the left upper extremity.

ORDER

IT IS THEREFORE ORDERED, THAT:

The Fund shall pay claimant 125.6 weeks of permanent partial disability benefits at the stipulated weekly rate of two hundred twenty-six and 84/100 dollars (\$226.84), commencing on the expiration of defendant-employer's liability for the 24.4 weeks of permanent partial disability benefits for the left upper extremity impairment.

The Fund shall pay interest on all accrued weekly benefits pursuant to Iowa Code section 85.30. Interest accrues on unpaid Second Injury Fund benefits from the date of this decision. Second Injury Fund of Iowa v. Braden, 459 N.W.2d 467 (Iowa 1990).

Signed and filed this 24th day of May, 2023.



JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served, as follows:

Thomas Wertz (via WCES)

Meredith Cooney (via WCES)