

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MICHELE BAILEY,

Claimant,

vs.

ALLSTEEL, INC.,

Employer,
Self-Insured,

and

SECOND INJURY FUND OF IOWA,
Defendants.

File No. 19004619.01

ARBITRATION DECISION

Headnotes: 1803, 3203

STATEMENT OF THE CASE

Bailey seeks workers' compensation benefits from the defendants, self-insured employer Allsteel, Inc., and the Second Injury Fund of Iowa (Fund). The undersigned presided over an arbitration hearing on August 17, 2021, held via internet-based video under order of the Commissioner. Bailey participated personally and through attorney Nate Willems. Allsteel participated by and through attorney Edward Rose. The Fund participated by and through attorney Amanda Rutherford.

ISSUES

Under rule 876 IAC 4.149(3)(f), the parties jointly submitted a hearing report defining the claims, defenses, and issues submitted to the presiding deputy commissioner. The hearing report was approved and entered into the record via an order because it is a correct representation of the disputed issues and stipulations in this case. The parties identified the following disputed issues in the hearing report:

- 1) What is the nature and extent of permanent disability, if any, caused by the stipulated work injury?
- 2) If Bailey is entitled to permanent partial disability benefits, what is the commencement date?
- 3) If Bailey is entitled to Fund benefits, what is the commencement date?

- 4) If Bailey is entitled to Fund benefits, is the Fund entitled to a credit for fifty-five and 4/10 (55.4) weeks?
- 5) Is Bailey entitled to recover the cost of an independent medical examination (IME) under Iowa Code section 85.39?
- 6) Is Bailey entitled to payment of the medical expenses itemized in Claimant's Exhibit 7?
- 7) Is Bailey entitled to taxation of the costs against the defendants?

STIPULATIONS

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

- 1) With respect to Bailey's claim for Fund benefits, she sustained a first qualifying loss of seven percent in functional impairment to her left lower extremity in 2003.
- 2) An employer-employee relationship existed between Bailey and Allsteel at the time of the alleged injury.
- 3) Bailey sustained an injury on June 7, 2019, which arose out of and in the course of her employment with Allsteel.
- 4) The alleged injury is a cause of temporary disability during a period of recovery, but Bailey's entitlement to temporary or healing period benefits is no longer in dispute.
- 5) At the time of the stipulated injury:
 - a) Bailey's gross earnings were seven hundred eight-eight and 3/100 dollars (\$788.03) per week.
 - b) Bailey was single.
 - c) Bailey was entitled to one exemption.
- 6) Prior to hearing, the defendants paid to Bailey sixteen (16) weeks of compensation at the rate of four hundred ninety-five and 6/100 dollars (\$495.06) per week.

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

FINDINGS OF FACT

The evidentiary record in this case consists of the following:

- Joint Exhibits (Jt. Ex.) 1 through 7;
- Claimant's Exhibits (Cl. Ex.) 1 through 8;
- Defendant's Exhibits A through B;
- The Fund's Exhibits AA through JJ; and
- Hearing testimony by Bailey.

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

Bailey was forty-five years of age at the time of hearing. (Hrg. Tr. p. 12) Bailey dropped out of high school in the eleventh grade to work. (Ex. BB, p. 5; Ex. JJ, p. 56, Depo. p. 41) She obtained her GED from Scott Community College in 1994. (Ex. BB, p. 5) In 1997, she took two semesters of business classes but did not earn a certificate or degree. (Ex. BB, p. 5; Ex. JJ, p. 50, Depo. pp. 6–7)

Bailey injured her left knee in 1990 while playing softball and again in 2003 while playing with her dogs. (Hrg. Tr. pp. 12–13) She underwent surgery after each injury. (Hrg. Tr. p. 13; Jt. Ex. 1, p. 3) Bailey's left knee has bothered her since she was a teenager. (Hrg. Tr. p. 72) She wears knee braces when she hikes and hunts for recreation and any other time she anticipates being on uneven terrain. (Hrg. Tr. p. 76) At the time of hearing, Bailey continued to experience left-knee symptoms including pain, stiffness, and muscle swelling. (Hrg. Tr. p. 13) Her symptoms flare up when she walks distances, climbs, uses stairs, or stands for a long period of time. (Hrg. Tr. p. 13)

Bailey worked multiple jobs as a bartender and server. (Hrg. Tr. p. 14; Ex. JJ, p. 55) Bailey has had jobs as an administrative assistant, store clerk, prep cook, grocery bagger, and retail associate. (Hrg. Tr. p. 14; Ex. JJ, pp. 55–56, Depo. pp. 37–41) Bailey also served as manager at a Dairy Queen. (Ex. JJ, p. 55, Depo. p. 40)

Bailey was working as a bartender at Stoeger's in 2014 when she applied to work at Allsteel. (Ex. BB, p. 6) Allsteel hired Bailey to work in the tiles department, helping to make panels for cubicles. (Hrg. Tr. p. 14) She continued to work as a bartender for Stoeger's while also employed at Allsteel. (Ex. JJ, p. 52)

In 2016, Bailey began to feel pain, numbness, and tingling from her arms into her fingers. (Hrg. Tr. pp. 16–17) She reported her symptoms and an Allsteel safety manager gave her wrist braces to use while sleeping. (Hrg. Tr. p. 17) When the braces did not help, Allsteel transferred Bailey to the further department, which specializes in office dividers. (Hrg. Tr. pp. 15, 17) Allsteel felt a change from the repetitive use of her hands would help alleviate her symptoms. (Hrg. Tr. pp. 17–18)

Bailey worked overtime hours at Allsteel. (Ex. JJ, p. 52) Working overtime made her commute to work as a bartender at Stoeger's too much. (Ex. JJ, p. 52) In February 2019, Bailey resigned from her job at Stoeger's. (Ex. JJ, p. 52)

Bailey sought care for right-leg issues in early 2019. (Jt. Ex. 5, p. 122) On March 22, 2019, Vijay Rajendran, M.D., diagnosed Bailey with chronic venous insufficiency in her right leg. (Jt. Ex. 5, p. 122) Dr. Rajendran prescribed compression stockings, and recommended a low-salt diet. (Jt. Ex. 5, p. 122)

On June 7, 2019, Bailey was earning \$16.78 per hour working in the further department at Allsteel. (Hrg. Tr. p. 59; Ex. AA, p. 2) She was using a three-and-a-half-pound mallet when she felt a sharp pain in her right shoulder. (Hrg. Tr. pp. 18–19) Bailey reported her shoulder injury to Allsteel, which provided care under Iowa Code section 85.27. (Hrg. Tr. p. 19) Bailey did not return to full-duty work for Allsteel after June 7, 2019. (Hrg. Tr. pp. 24–26; Cl. Ex. 6, p. 40)

During Bailey's first appointment with Dr. Rhea Allen on June 20, 2019, she complained of right shoulder pain, numbness in her hands, and pain in her hands that radiated into her forearms. (Jt. Ex. 2, p. 6) Dr. Allen prescribed physical therapy for Bailey's injured right shoulder. (Jt. Ex. 2, p. 8) After physical therapy did not reduce Bailey's shoulder pain, she underwent magnetic resonance imaging (MRI) on August 1, 2019, which showed a full thickness tear of her superior labrum and mild partial thickness tear of the superior rotator cuff. (Jt. Ex. 2, p. 27)

Because of Bailey's hand and forearm complaints, Dr. Allen requested electromyography (EMG) testing that showed bilateral carpal tunnel syndrome. (Jt. Ex. 2, pp. 8, 17–18, 24–25) Dr. Allen referred Bailey to Dr. Thomas Ebinger, who performed carpal tunnel release and cubital tunnel release surgery on her left arm on October 10, 2019, and on her right arm on October 29, 2019. (Jt. Ex. 4, pp. 113, 115) On November 8, 2019, Dr. Ebinger noted Bailey reported "complete resolution of the numbness and tingling in her hands." (Jt. Ex. 4, p. 104)

Dr. Allen referred Bailey to Dr. John Langland for her shoulder injury. Dr. Langland recommended more physical therapy and a subacromial injection to see if her symptoms improved. (Jt. Ex. 3, pp. 31, 35–36) Dr. Daniel Jones performed a subacromial bursa injection on October 1, 2019, but it did little to reduce Bailey's pain after a couple of days. (Jt. Ex. 3, pp. 37, 46) On December 2, 2019, Dr. Langland performed right shoulder arthroscopy with extensive debridement of Bailey's superior labral tearing, partial rotator cuff tearing, and bursitis including biceps tenotomy and acromioplasty. (Jt. Ex. 3, p. 83) Bailey followed up with Dr. Langland during her recovery from surgery. (Jt. Ex. 3, pp. 54–82) Her shoulder condition improved during her time participating in physical therapy and work hardening. (Jt. Ex. 3, pp. 54–82)

Dr. Langland saw Bailey on September 22, 2020. (Jt. Ex. 7, pp. 127–28) He examined her right shoulder and noted, "Active forward flexion 165, abduction 155, external rotation 80, internal rotation 60." (Jt. Ex. 7, p. 128) Dr. Langland also observed her range of motion was "smooth." (Jt. Ex. 7, p. 128) He opined she had reached MMI

and assigned permanent work restrictions. (Jt. Ex. 7, p. 128) Dr. Langland assigned Bailey the permanent work restriction of occasional reaching above the shoulder. (Jt. Ex. 7, p. 129)

In a letter dated September 23, 2020, Dr. Langland stated:

Michele Bailey was last seen in my clinic on 09/22/2020 at which time she was ten months status post a right shoulder arthroscopy with debridement, acromioplasty and biceps tenotomy. She was at maximum medical improvement as of that date. According to the Guides, because of some mild range of motion loss, she has a 4% upper extremity impairment which converts to a 2% whole person impairment. I have provided her some permanent work restrictions as outlined in her report to employer form.

(Jt. Ex. 3, p. 85)

Under the heading “Shoulder Motion Impairment,” the Fifth Edition of the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (Guides) state, “The shoulder has three functional units of motion, each contributing a relative value to its function.” Guides, § 16.4i, p. 474. Under the Guides, flexion (forty percent) and extension (ten percent) are one functional unit, accounting for fifty percent of shoulder function. Id. Abduction (twenty percent) and adduction (ten percent) are another unit, accounting for thirty percent of shoulder function. Id. Internal (ten percent) and external rotation (ten percent) make up the third unit, which accounts for twenty percent of shoulder function. Id. Even though the Guides state extension and adduction each account for ten percent of shoulder function, there is no indication in the medical records from Dr. Langland’s September 22, 2020 examination of Bailey that he measured Bailey’s shoulder extension or adduction at all. (Jt. Ex. 7, p. 128) It is more likely than not Dr. Langland did not measure Bailey’s extension or adduction.

The Guides instruct doctors to use a goniometer when measuring functional units of motion and record the actual goniometer readings when determining the functional impairment of a shoulder. Id. at p. 475 (“Measure the maximum active shoulder flexion and extension, and record the goniometer readings (Figure 16-38).”), 476 (“Measure the maximum active shoulder abduction and adduction, and record the *actual* goniometer readings (Figure 16-41).” (emphasis in original)), 478 (“Measure the maximum active shoulder internal and external rotation, and record the *actual* goniometer readings (Figure 16-44).” (emphasis in original)). There is no indication in the records from Dr. Langland’s September 22, 2020 examination of Bailey that he used a goniometer when measuring Bailey’s forward flexion, extension, abduction, external rotation, or internal rotation. (Jt. Ex. 7, p. 128) Bailey credibly testified Dr. Langland did not use a measuring tool during his examination of her shoulder. (Hrg. Tr. pp. 49–50) The evidence shows it is also more likely than not Dr. Langland did not use a goniometer when measuring the other aspects of Bailey’s shoulder function.

Dr. Langland states that he used the Guides when determining Bailey’s functional impairment but does not identify any tables, figures, or page numbers.

However, there is an insufficient basis in the evidence from which to conclude he measured Bailey's extension and adduction and used those measurements when determining her functional impairment rating, in accordance with the Guides. Further, it is more likely than not he did not use a goniometer when measuring the other aspects of Bailey's shoulder function, as the Guides direct. Therefore, the weight of the evidence shows Dr. Langland did not follow the Guides. This makes his opinion on functional impairment unavailing.

On December 13, 2019, Bailey followed up with Dr. Ebinger regarding her bilateral carpal tunnel and cubital tunnel release. (Jt. Ex. 4, p. 108) Bailey credibly testified Dr. Ebinger did not take any measurements with tools during the examination. (Hrg. Tr. p. 49) Dr. Ebinger noted she had full elbow motion bilaterally, full symmetric wrist flexion and extension bilaterally and full and symmetric composite flexion extension of her fingers. (Jt. Ex. 4, p. 108) He also noted she had five-millimeter two-point discrimination in all fingers, her fingers were warm and well perfused, five-out-of-five strength with thumb palmar abduction bilaterally, and five-out-of-five grip strength bilaterally. (Jt. Ex. 4, p. 108) Dr. Ebinger found Bailey to have reached maximum medical improvement (MMI), released her to return to work without restrictions. (Jt. Ex. 4, pp. 109–10, 117)

On March 3, 2020, Allsteel gave Bailey her performance evaluation for 2019. (Cl. Ex. 8, p. 65; Hrg. Tr. pp. 25–28) In a change from previous years, Allsteel's assessment of her performance included multiple areas in which she "must change." (Ex. 8, pp. 56–66; Hrg. Tr. pp. 23–28) Allsteel discharged Bailey effective June 26, 2020, because of "unforeseeable business circumstances related to COVID-19" and her "most recent performance review score." (Ex. DD, p. 15; Hrg. Tr. pp. 28–29; Ex. AA, p. 3)

Bailey testified at hearing that Allsteel laid off all six employees in her department in June of 2020. (Hrg. Tr. pp. 46–47) Bailey and two of her coworkers had made workers' compensation claims to Allsteel. (Hrg. Tr. p. 31) However, there is no direct evidence supporting a finding that Allsteel laid off workers because they made workers' compensation claims. There is an insufficient basis from which to conclude a motivating factor in Allsteel's decision to end its employment relationship with Bailey was the fact she sustained a work injury. It is more likely than not Allsteel decided to lay workers off to reduce costs because of the impact the pandemic had on its revenues.

After Allsteel discharged Bailey, she got a job with Hy-Line North America. (Hrg. Tr. p. 32) She earned \$12.75 per hour vaccinating and gender-selecting chickens. (Hrg. Tr. p. 32) Hy-Line eventually moved Bailey to the egg room for about half of her time on the job because of a staffing shortage. (Hrg. Tr. p. 33) She had difficulty physically performing her job duties in the egg room because she had to pull one-thousand-pound carts and reach for overhead racks. (Hrg. Tr. pp. 33–35) Bailey's work in the egg room bothered her knees and caused her to experience more significant issues with her hands, elbows, and shoulder. (Hrg. Tr. p. 72) She quit her job at Hy-Line because of the issues she experienced with her arms and shoulder while working in the egg room. (Hrg. Tr. p. 72)

In a letter dated November 10, 2020, Dr. Ebinger addressed the question of permanent impairment, opining, “The patient has a 0% permanent partial impairment of the bilateral hands wrists and elbows relating to these conditions according to the [Guides].” (Jt. Ex. 4, p. 117) Dr. Ebinger did not state whether he performed an examination of Bailey after December 13, 2019, or discuss the measurements on which his opinion was based. (Jt. Ex. 4, p. 117) He also did not identify what tables, figures, or pages in the Guides he consulted when making his determination of functional impairment. (Jt. Ex. 4, p. 117) For these reasons, Dr. Ebinger’s opinion on permanent disability is unpersuasive.

In February of 2021, CIVCO Solutions hired Bailey to work in the labeling and kitting department at a wage of twelve dollars per hour. (Hrg. Tr. p. 35; Ex. FF, pp. 27–28) The CIVCO job description defines “seldom/rare” as one time per hour per eight-hour shift, “occasional” as up to one-third of the workday or once every thirty minutes, “frequent” as between one-third and two-thirds of the workday or once every two minutes, and “constant” as greater than two-thirds of the workday or once every fifteen seconds. (Cl. Ex. 3, p. 35) It describes its physical requirements for Bailey’s job as follows:

Sit: Rare. Occasional. Workers may have the option to sit on certain line runs. Workers have option to sit during work breaks.

Stand/Walk: Constant. Workers stand to perform tasks through the work shift. Workers stand on level concrete floor with available anti-fatigue mats. Walking occurs in the facility on even concrete surfaces. Worker will walk between work areas, while transporting packages and moving pallets with pallet jacks. Worker will negotiate around tables and work stations. Worker also walks up to 100 yards from parking lot to their work area.

Low Level Work: Frequent. Defines as a low level work position with one’s back upright, knees and hips flexed and buttocks adjacent to heels. Workers squat when removing boxes off pallet (6 inches) for staging, when loading or unloading skids, when retrieving packages off bottom of cart at 8.5 inches or orange racks at 6 inches.

Steps: Occasional. Workers negotiate 10 inch steps on a stair step ladder to get corrugate or cases off second level of racks.

Balance: Constant. Worker must maintain balance to prevent falling when walking, standing, negotiating steps, and sitting.

Bend/Stoop: Occasional. Defined as bending body forward or laterally by bending spine at the waist, requiring use of the lower extremities and back muscles. Workers must also stoop over a 34 inch bin to remove corrugate while emptying cardboard.

Reach: Constant: Workers perform horizontal reaching up to 16 inches for work tasks. Occasional. Workers must reach horizontally 33 inches at a height of 69 inches for labels. Occasional. Tape gun and scissors require vertical reach of 59 – 69 inches. Boxes are picked from staging at heights up to 70 inches (step stool available).

Twisting: Occasional. Workers twist while picking components for boxes in labeling, sweeping floors and wiping areas down.

Handle/grasp: Constant. Handling/grasping includes, but is not limited to handling boxes, tools, piles of corrugate, cleaning equipment, product and pelican boxes.

Fine Manipulation: Constant. Pinching/fingering to handle labels, fold corrugate, cut foam and pack boxes.

Lift: Constant. Lifting of 0 – 3 lbs with handling corrugate, labels and product from a height between 6 – 60 inches. Frequent. Workers lift up to 15 – 30 lbs from a height between 6 and 60 inches and place on cart at 8.5 inches to adjustable tables. Rare. Workers lift 3rd party boxes up to 50 lbs from heights 6 – 60 inches to cart at 8.5. Workers also lift paper boxes 43 lbs from 6 – 54 inches to cart at 8.5 inches an[d] place on desk at 40 inches.

Carry: Frequent. 15 lbs cases will be lifted from height of 6 – 60 inches and carried between 5 – 10 feet. Occasional. Workers carry 23 – 30 lbs cases 5 – 10 ft. Workers have option to use cart for transfer.

Push/Pull: Frequent. Workers push/pull receiving cart with up to 7 lbs of force at waist level up to 10 feet from staging area to work station. Occasional. Workers push/pull pallet jacks with up to 25 lbs of force at waist level from warehouse to staging area up to 100 feet. Rare. Workers push/pull cardboard cart with up to 15 lbs of force up to 100 feet to cardboard shoot.

(Cl. Ex. 3, pp. 35–36)

Bailey typically lifts between three and five pounds when performing her job duties, which include packing products into small boxes for shipment to healthcare providers. (Hrg. Tr. p. 35) Bailey alternates between sitting and standing while working. (Hrg. Tr. p. 35) At the time of hearing, Bailey was earning fourteen dollars per hour at CIVCO. (Hrg. Tr. p. 35)

CIVCO gives new employees a performance review after two months on the job “to evaluate and measure [the employee’s] performance and behavior within [the employee’s] first 60 days of employment and compare how those metrics align with CIVCO’s defined metrics for [the employee’s] position.” (Ex. FF, p. 29) Using metrics

undefined by evidence in the record, CIVCO rated Bailey's performance on April 21, 2021, at one hundred thirty-one percent during her first sixty days of work versus CIVCO's seventy-five percent standard. (Ex. FF, p. 29) The defendants contend Bailey's sixty-day metrics percentage at CIVCO is evidence supporting the conclusion she does not have a disability from her work injuries on the level identified by Dr. Manshadi, but the lack of information in the record regarding what the CIVCO metrics measure or her work duties there make such a conclusion speculative in nature.

CIVCO requires employees to undergo a "fitness for duty" examination before they can receive training to work in a department other than labeling and kitting. (Hrg. Tr. p. 36) On April 29, 2021, Bailey underwent such an assessment for jobs in shipping and warehouse/receiving. (Hrg. Tr. p. 36; Jt. Ex. 6, pp. 125–26) Brittany Messer, PT, of Progressive Rehabilitation Associates performed the assessment. (Jt. Ex. 6, p. 125) The assessment found Bailey's shoulder range of motion within functional limits, but it is unclear based on the evidence what the measurements of her range of motion were or what the required range of motion was for the department or jobs at CIVCO for which she was tested. (Jt. Ex. 6, p. 125)

As part of the examination, Bailey engaged in multiple tests to determine her lifting ability. (Jt. Ex. 6, pp. 125–26) She demonstrated she could lift thirty-seven to fifty pounds from heights of four to seventeen inches to heights of six to forty-six inches. (Jt. Ex. 6, p. 125) Based on the examination, Messer concluded Bailey could meet all physical demands relating to the essential functions of work in shipping and warehouse/receiving. (Jt. Ex. 6, p. 126)

Bailey credibly testified she found the testing difficult to perform. (Hrg. Tr. p. 36) Based on Bailey's firsthand knowledge of the job duties for positions at CIVCO, she believes the examination was more physically strenuous than the job duties. (Hrg. Tr. p. 37) Bailey is physically able to perform her CIVCO job duties without issue. (Hrg. Tr. p. 37)

Claimant's counsel arranged for an independent medical examination (IME) with Dr. Manshadi on May 6, 2021. (Cl. Ex. 1) Before the IME, Claimant's counsel sent Dr. Manshadi medical records to review and a letter with a summary of her injuries and care and a series of questions. (Cl. Ex. 1, pp. 1–7) Based on a review of Bailey's medical records and examination of her, Dr. Manshadi issued an IME report dated May 17, 2021. (Cl. Ex. 1, pp. 8–12)

Dr. Manshadi is the only medical expert to opine on the question of whether Bailey has sustained a permanent impairment to her left leg. In Dr. Manshadi's IME report, he noted "mild laxity of the left ACL." (Cl. Ex. 1, p. 12) Dr. Manshadi then used Table 17-33 of the Guides to assign her a seven percent impairment of the lower left extremity. (Cl. Ex. 1, p. 12) He gave her permanent work restrictions based on her leg condition consisting of no continuous kneeling, crawling, or prolonged walking. (Cl. Ex. 1, p. 12)

Dr. Manshadi made the following measurements of Bailey's range of motion in her right shoulder using a goniometer:

- Forward flexion, 139 degrees;
- Extension, 45 degrees;
- Abduction, 105 degrees;
- External rotation, 90 degrees;
- Internal rotation, 35 degrees; and
- Adduction, 45 degrees.

(Cl. Ex. 1, p. 10)

Dr. Manshadi opined the stipulated work injury to Bailey's right shoulder caused permanent impairment. (Cl. Ex. 1, p. 11) He explained his impairment rating as follows:

I used the Guides, Chapter 16, Pages 475 – 479 and as such, I assign eleven (11) percent impairment of the right upper extremity.

Further, Ms. Bailey has weakness of the right elbow flexors and I used Table 16-35 and I assign another two (2) percent impairment of the right upper extremity. As such, the total impairment would be thirteen (13) percent impairment of the right upper extremity.

(Cl. Ex. 1, p. 12) Dr. Manshadi assigned Bailey permanent work restrictions due to her right shoulder disability that included no repetitious reaching or shoulder height activities and no lifting more than twenty pounds with the right arm. (Cl. Ex. 1, p. 12)

Unlike Dr. Langland, who did not measure Bailey's adduction or extension, Dr. Manshadi used a goniometer to measure each element the Guides identify as components of the shoulder's range of motion. Dr. Manshadi recorded each of these measurements in his report and, unlike Dr. Langland, identifies the pages of the Guides he used when determining the permanent impairment rating of Bailey's shoulder. For these reasons, Dr. Manshadi's opinion on Bailey's shoulder impairment is more persuasive than Dr. Langland's.

However, Dr. Manshadi did not explain the basis for his conclusion that the weakness he noted of Bailey's right-elbow flexors was related to the work injury to her right shoulder. Instead, Dr. Manshadi simply included this weakness when discussing Bailey's right shoulder and provided an additional impairment based on it. The failure to explain how the shoulder injury caused this weakness makes this portion of Dr. Manshadi's report unpersuasive. This part of Dr. Manshadi's opinion is not adopted.

On the question of permanent impairment to Bailey's bilateral arms after carpal tunnel and cubital tunnel release surgeries, Dr. Manshadi opined:

It is also my opinion that Ms. Bailey has partial permanent impairment as a result of her bilateral arms. I used the Guides, specifically Chapter 16, Table 16-10, Table 16-11 and Table 16-15.

In regard to the sensory, there is no impairment rating for the median nerves bilaterally.

For the motor, I assign twenty-five (25) percent motor deficit, and under Table 16-11 the maximum motor deficit for median nerve below the mid-forearm is at ten, and as such I assign three (3) percent impairment of the right upper extremity and three (3) percent impairment of the left upper extremity for the median nerves on each side.

In regard to the ulnar nerves, again there is no impairment rating for the sensory.

For the motor, she falls under Grade 4 and I assign ten (10) percent motor deficit and the maximum motor deficit for the ulnar nerve below the mid-forearm is at thirty-five (35) and as such, I assign four (4) percent impairment for the right ulnar nerve and four (4) percent impairment for the left ulnar nerve. Then using the Combined Values Chart, Page 604, the total impairment for each arm would be at seven (7) percent.

(Cl. Ex. 1, p. 11)

As found above, Dr. Ebinger's opinion lacked an explanation of the measurements on which he based it and discussion of what parts of the Guides he used when determining permanent impairment. Dr. Manshadi's opinion on permanent impairment is more persuasive because he explains the basis for his opinion and the parts of the Guides he used. Therefore, Dr. Manshadi's opinion on Bailey's functional impairment to her arms is most persuasive and is adopted.

Dr. Manshadi gave Bailey work restrictions of no activities that require sustained gripping with either hand, repetitious flexion and extension of the elbows, and no lifting over thirty pounds. (Cl. Ex. 1, p. 11) These work restrictions are reasonable except for those relating to the amount of weight Bailey may lift. Messer's examination of Bailey on April 29, 2021, established she could lift weights in excess of thirty pounds, the maximum lifting allowed under Dr. Manshadi's restrictions. Consequently, Dr. Manshadi's work restrictions relating to the amount of weight Bailey can lift are not adopted.

For the reasons discussed above, Bailey has proven by a preponderance of the evidence she has sustained a permanent functional impairment to each arm of seven percent from her bilateral arm injuries and eleven percent to her shoulder. Using Table

16-3 on page 439 of the Guides, the seven percent impairment to her right arm converts to four percent of the whole body impairment, seven percent to her right arm converts to four percent of the whole body, and eleven percent to her shoulder converts to seven percent of the whole body. Using the Combined Values Chart on pages 604 of the Guides, the four percent impairments Bailey sustained to her arms combines to equal six percent. That six percent then combines with the seven percent whole body impairment to her shoulder to equal a combined permanent impairment of the whole body of ten percent.

At the time of hearing, Bailey was working at CIVCO. (Hrg. Tr. p. 35) She averaged about fifty hours of work there per week. (Hrg. Tr. p. 55) Her hourly pay rate was \$14.00 plus overtime. (Hrg. Tr. p. 59; Ex. JJ, pp. 51–52; Ex. GG, p. 30) Bailey’s job duties require her to observe the permanent work restriction Dr. Manshadi assigned of no reaching above shoulder height. (Hrg. Tr. pp. 61–62) She will be eligible for merit-based pay raises in the future at CIVCO. (Hrg. Tr. pp. 59–60; Ex. FF, p. 27)

CONCLUSIONS OF LAW

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

1. Misjoinder.

The Fund contends rule 876 IAC 4.6 requires dismissal of Bailey’s claim because she filed only one petition for her injuries of June 7, 2019. However, a petition filed with the agency “is not a formal pleading and is not to be judged by the technical rules of pleading.” Larson Mfg. Co. Inc. v. Thorson, 763 N.W.2d 842, 853 (Iowa 2009) (quoting Univ. of Iowa Hosp. & Clinics v. Waters, 674 N.W.2d 92, 96–97 (Iowa 2004)).

“The petition for arbitration may state the claims in general terms and technical or formal rules of procedure need not be observed. The key to pleading in an administrative process is nothing more than opportunity to prepare and defend. The employer is to be afforded a substantive right to be at least generally informed as to the basic material facts upon which the employee relies as a basis for compensation.”

Id. (quoting Waters, 674 N.W.2d at 97).

Moreover, recent agency precedent holds a cumulative injury that manifested on the same date on which the claimant sustained an acute injury to another scheduled member falls under Iowa Code section 85.34(2)(v). See Anderson v. Bridgestone Americas, Inc., and Second Injury Fund of Iowa, File No. 5067475 (Arb. Sep. 2, 2021), aff’d (App. Jan. 25, 2022). Thus, it is appropriate for a claimant to plead the alleged

injuries in one petition since they have the same date of injury and fall under the same provision of the Iowa Workers' Compensation Act for purposes of determining the extent, if any, of permanent partial disability. Doing so generally informs the defendants of the facts on which the claimant is relying as the basis for compensation and the opportunity to prepare and defend the case. For these reasons, the Fund's request for dismissal is denied.

2. Permanent Partial Disability Benefits.

Iowa Code section 85.34(2)(v) governs in all cases of permanent partial disability other than those "described or referred to" elsewhere in subsection 85.34(2). Because of this, paragraph (v) "is often referred to as the 'catch-all' section" of the Iowa Workers' Compensation Act. Id. see also Carmer v. Nordstrom, Inc., File No. 1656062.01 (App. Dec. 29, 2021). In Anderson, the Commissioner affirmed and adopted the conclusion of law that a shoulder injury and arm injury in the form of carpal tunnel syndrome with the same date of injury are not described or referred to elsewhere in subsection 85.34(2) and permanent partial disability is therefore determined under paragraph (v). Id.

The claimant in Anderson alleged carpal tunnel syndrome in one arm and a shoulder injury with the same injury date. Here, Bailey was diagnosed with bilateral carpal tunnel and cubital tunnel syndrome and sustained a shoulder injury. Bailey sustaining bilateral cumulative injuries to her arms as opposed to one arm is a distinction without a difference under section 85.34(2)(v) because her injuries of bilateral carpal tunnel and cubital tunnel syndrome and to the shoulder are not "described or referred to" elsewhere in subsection 85.34(2), the same as the claimant's injuries in Anderson. Also as in Anderson, Bailey's carpal tunnel and cubital tunnel syndrome have the same date of injury as the shoulder injury even though the claimant experienced some symptoms relating to carpal tunnel and cubital tunnel syndrome before that date, which means the catch-all paragraph (v) governs on the question of permanent partial disability.

After the 2017 amendments, Iowa Code section 85.34(2)(v) allows a claimant to receive permanent partial disability benefits based only on the functional impairment caused by a work injury if the claimant returns to work with the defendant-employer at the same or higher earnings level after the injury and remains employed with the defendant-employer at the time of hearing. See Martinez v. Pavlich, Inc., File No. 5063900 (App. July 30, 2020); see also Ocampo v. New Fashion Pork, LLP, File No. 20012252.01 (Arb. March 4, 2022). The statute, as amended, imposes a mandatory bifurcated litigation process when the claimant remains employed with the defendant-employer at such an earnings level at the time of hearing. See Ocampo, File No. 20012252.01 (Arb. March 4, 2022). However, neither the statutory limitation on permanent partial disability to functional impairment nor the mandatory bifurcated litigation process applies when the defendant-employer discharges the claimant before the arbitration hearing. See id. Because Allsteel terminated Bailey's employment before the hearing, the question of permanent partial disability is not limited to functional impairment in this case; industrial disability analysis applies. See id.

Compensation for permanent partial disability under Iowa Code section 85.34(2)(v) is “paid during the number of weeks in relation to five hundred weeks as the reduction in the employee’s earning capacity caused by the disability bears in relation to the earning capacity that the employee possessed when the injury occurred.” The assessment of how disability caused by work injuries impact a claimant’s earning capacity is based on multiple factors: functional disability, age, education, qualifications, work experience, inability to engage in similar employment, earnings before and after the injury, motivation to work, personal characteristics of the claimant, the claimant’s inability because of the injury to engage in employment for which the claimant is fitted, and the employer’s inability to accommodate the claimant’s functional limitations. *Neal v. Annett Holdings, Inc.*, 814 N.W.2d 512, 526 (Iowa 2012); *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 632–33 (Iowa 2000); *Ehlinger v. State*, 237 N.W.2d 784, 792 (Iowa 1976).

Bailey was forty-five years of age at the time of hearing. She dropped out of high school before obtaining her GED. Bailey took one year of classes at a community college but has not obtained any postsecondary certificate or degree. There is an insufficient basis in the record from which to conclude that at this stage in her life she would have success doing so.

As found above, Bailey’s functional impairment rating is ten percent to the whole body. Dr. Manshadi’s work restrictions regarding the maximum amount of weight Bailey can lift are rejected. That leaves Bailey with permanent work restrictions resulting from the disability caused by the bilateral arm and shoulder injuries she sustained while working at Allsteel that include: no repetitious reaching, no repetitious shoulder-height activities, no sustained gripping activities with either hand, and no activities which require repetitious flexion and extension of the elbows.

Bailey’s work history includes working as a server at restaurants and bartending. She would be unable to return to her work at Allsteel or Hy-Line. She is physically able to perform the functions of her job at CIVCO.

Bailey has established she is motivated to work. Throughout her adult life, she has worked. Even after Allsteel hired Bailey, she worked two jobs for multiple years. Bailey promptly sought and obtained a new job after Allsteel laid her off. She did the same when her physical limitations due to the work injuries she sustained at Allsteel forced her to quit her job at Hy-Line. Her sixty-day performance review and performance as reflected by CIVCO’s metrics indicate she is a motivated employee who works hard. While Bailey is eligible to potentially receive pay increases at CIVCO, her pay at the time of hire (\$12.00 per hour) and hearing (\$14.00 per hour) was lower than what she was earning at Allsteel on the date of injury.

Bailey has met her burden of proof on the question of industrial disability. The weight of the evidence establishes she sustained an industrial disability from the injuries to her arms and shoulder of seventeen percent. Under Iowa Code section 85.34(2)(v), this entitles Bailey to permanent partial disability benefits for eighty-five weeks (seventeen percent multiplied by five hundred).

3. Fund Benefits.

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

- 1) A first qualifying loss to a hand, arm, foot, leg, or eye;
- 2) A second qualifying loss in the form of a permanent disability to such a member caused by an injury compensable under the Iowa Workers’ Compensation Act; and
- 3) The permanent disability resulting from the first and second injuries exceeds the compensable value of the previously lost member. Id. at 398–99 (citing Iowa Code § 85.64 and Second Injury Fund of Iowa v. Shank, 516 N.W.2d 808, 812 (Iowa 1994)).

Other than the express requirement that the second loss be the result of permanent disability caused “by a compensable injury,” the text of section 85.64(1) provides no basis for creating different standards for what constitutes a qualifying loss to an enumerated body part based on whether it occurred first or second in time. See Iowa Code § 85.64(1). Moreover, the Iowa Supreme Court has held it would be “senselessly inconsistent” to apply different standards based on the order of occurrence except for the language expressly requiring the second injury be work related. Gregory, 777 N.W.2d at 400. Therefore, aside from the requirement that the second loss result from a compensable injury, the caselaw delineating the contours of what constitutes a qualifying loss under the statute is generally applicable regardless of when such a loss took place. See id.

The Iowa Supreme Court has held that by creating the Fund and expanding its scope, the legislature “did not intend to disadvantage claimants with histories of more complex combinations of enumerated and unenumerated member injuries.” Gregory, 777 N.W.2d at 401. Therefore, an injury that satisfies the statute can occur to a member listed in section 85.64(1) in concert with an injury to one or more other body parts. Id. at 399–400; see also George, 737 N.W.2d at 147. This includes when an injury occurs at the point where an enumerated body part connects to an unenumerated body part so long as the resultant permanent disability was not confined to the unenumerated body part. Stumpff v. Second Injury Fund of Iowa, 543 N.W.2d 904, 907 (Iowa 1996); Gregory, 777 N.W.2d at 400–01. Further, an injury to a listed body part may constitute a qualifying loss even if the injury causes impairment to the whole body so long as the listed body part sustained some permanent impairment. Gregory, 777 N.W.2d at 400–01.

However, some histories of complex injuries do not meet the qualifying loss requirement under the Iowa Supreme Court's construction of the statute. An injury to a member not listed in section 85.64(1), such as a finger, that affects "to some extent" a listed member, such as the hand, does not constitute a qualifying loss. Stumpff, 543 N.W.2d at 906. Likewise, an injury to the whole body that merely affects an enumerated body part does not satisfy the statutory requirement for a qualifying loss. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258, 262, (Iowa 1995).

a. First Qualifying Loss.

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

In the current case, the Fund argues in its post-hearing brief that Bailey has not sustained a qualifying first loss for purposes of Fund benefits. However, in the hearing report, Bailey and the Fund stipulated that Bailey sustained a seven percent functional impairment in 2003 to her left leg that is a first qualifying loss under section 85.64(1). The Fund is bound by this stipulation notwithstanding the contents of its post-hearing brief.

Even assuming *arguendo* the Fund's stipulation in the hearing report is not binding on the agency, Bailey has met her burden. Dr. Manshadi is the only doctor to opine on the question of whether Bailey sustained a prior loss to her leg. He used the Guides to determine she sustained a functional impairment of seven percent due to ACL laxity, not her vascular condition. Therefore, Bailey has met her burden of proof on this element of her claim for Fund benefits.

b. Second Qualifying Loss.

In order for an employee to be entitled to Fund benefits, the employee must sustain permanent disability to another hand, arm, foot, leg, or eye, caused by a second injury. Iowa Code § 85.64(1). The second injury must result in permanent disability "compensable" under the Iowa Workers' Compensation Act—i.e., it must arise out of and in the course of employment. Id.; see also Gregory, 777 N.W.2d at 398-99. The caselaw on qualifying loss discussed above applies.

The Fund argues that injuries such as those Bailey has proven she sustained on June 7, 2019, while working for Allsteel are unscheduled and therefore not compensable. The Fund made a similar argument to the Iowa Supreme Court about a first qualifying loss in George and a second qualifying loss in Gregory. The court rejected the argument in both cases.

The standard that emerges from George and Gregory is that the method of compensating the injured employee for the loss under section 85.34(2) is not dispositive on whether the criteria of section 85.64 are met. As discussed above, an injury to a body part itemized in section 85.64(1) in concert with one or more other body parts may constitute a qualifying loss for purposes of Fund benefits if it results in a discrete disability to the itemized body part regardless of whether it also caused disability to one or more other body parts that caused disability to be determined outside the schedule in section 85.34(2). Gregory, 777 N.W.2d at 399–01; George, 737 N.W.2d at 147.

Such is the case here. Bailey sustained work injuries to both arms and her shoulder on June 7, 2019. Therefore, her disability for these injuries is determined under section 85.34(2)(v). Dr. Manshadi provided an individual disability rating for each body part. This allows for the finding of a second qualifying loss to an arm under section 85.64(1). Therefore, Bailey has met her burden to prove a second qualifying loss.

c. Credit.

Under Iowa Code section 85.64(2), an injured employee is entitled to workers' compensation paid by the employer "for the degree of disability which would have resulted from the latter injury if there had been no preexisting disability" under section 85.34(2). In addition to the workers' compensation the claimant receives from the employer for disability caused by the work injury that causes the second qualifying loss, the claimant is entitled to Fund benefits "for the degree of permanent disability involved after first deducting from such remainder the compensable value of the previously lost member or organ." Iowa Code § 85.64(2).

Here, Bailey's second qualifying loss was caused by work injuries on June 7, 2019, that caused an industrial disability. The Fund is liable for compensation for the disability caused by the second qualifying loss in addition to that caused by the work injury after deducting the compensable value of the previous loss to her leg. Here, there is no loss caused by her June 7, 2019 work injury in addition to that for which Allsteel is liable under section 85.34(2)(v). Bailey is consequently not entitled to Fund benefits.

4. Commencement Date.

Bailey and Allsteel agree that the proper commencement date for permanent partial disability benefits stemming from her shoulder injury is September 22, 2020. Bailey contends the proper commencement date for benefits relating to her bilateral arm injury is December 13, 2019. September 22, 2020, is the proper commencement date for the permanent partial disability benefits to which Bailey is entitled in this case because that is the date when her disability from the work injuries to her arms and shoulder of June 7, 2019, fell under the purview of section 85.34(2)(v).

5. Rate.

The parties stipulated Bailey's gross earnings on the stipulated injury date were seven hundred eighty-eight and 3/100 dollars (\$788.03) per week. They also stipulated

she was single and entitled to one exemption at the time. Based on the parties' stipulations, Bailey's workers' compensation rate is four hundred ninety-five and 6/100 dollars (\$495.06) per week.

6. IME.

Allsteel and Bailey agree Allsteel must reimburse her something for Dr. Manshadi's IME. They disagree on how much. Bailey seeks the entire amount. Allsteel believes it is only liable for the cost of the "examination" and not the report, prorated because of the Fund claim.

Agency precedent holds:

The reimbursable expenses for an independent medical examination include not only the fees for the limited time expended in physically examining claimant, but fees for the time the physician and support staff expend in reviewing or abstracting past medical reports, the costs of necessary testing, the fees for the time of the physician and staff expended in preparing a written report of actual findings and conclusions, and any other incidental charges reasonably necessary for such an examination. This has been the long-standing agency precedent. There would be little utility from Iowa Code section 85.39 if it were to only allow reimbursement for the time expended in performing a physical examination, but did not include any costs of informing a claimant of the results of that examination in a manner that would be complete and useful to claimant, defendant, this agency, and the reviewing courts should litigation occur.

Minar v. Pella Corp., File No. 5022947 (App. June 27, 2012).

An injured employee may ask the employee's chosen doctor to examine body parts for purposes of a claim under the Second Injury Fund Act in addition to those relating to those for which an employer may be liable. However, the injured employee may not seek reimbursement from the employer under Iowa Code section 85.39(2) for the expenses relating to the IME of body parts for which the Fund, and not the employer, may be liable. Keyser v. St. Gobain Corp. d/b/a Certainteed Gypsum & Ceiling Mfg., Inc., File No. 5061026 (App. Aug. 24, 2018) Such fees are unreasonable if submitted to the employer for reimbursement. Id.

Here, Bailey disagreed with the impairment ratings provided by Allsteel's chosen doctors to two arms and her shoulder. Dr. Manshadi provided an opinion of her impairments to those three body parts as well as the functional impairment to her leg. Thus, the IME covered four body parts, three of which related to Bailey's claims against Allsteel. It is therefore appropriate to reduce the amount Allsteel must reimburse Bailey by one-fourth. Bailey is entitled to reimbursement by Allsteel for Dr. Manshadi's IME in the amount of one thousand nine hundred fifty and 00/100 dollars (\$1,950.00).

7. Costs.

“All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.” Iowa Code § 86.40. “Fee-shifting statutes using ‘all costs’ language have been construed ‘to limit reimbursement for litigation expenses to those allowed as taxable court costs.’” Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 846 (Iowa 2015) (quoting City of Riverdale v. Diercks, 806 N.W.2d 643, 660 (Iowa 2011)). Statutes and administrative rules providing for recovery of costs are strictly construed. Id. (quoting Hughes v. Burlington N. R.R., 545 N.W.2d 318, 321 (Iowa 1996)).

Because Bailey prevailed on the disputed issues of entitlement to permanent partial disability benefits and IME reimbursement, the following costs are taxed against Allsteel:

- One hundred thirty-seven and 50/100 for the cost of a court reporter and transcription of an evidentiary deposition of the claimant, 876 IAC 4.33 (1), (2); and
- Thirteen and 80/100 dollars for the cost of service of the original notice, 876 IAC 4.33(3).


ORDER

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

- 1) Bailey shall take nothing from the Fund.
- 2) Allsteel shall pay to Bailey eighty-five (85) weeks of permanent partial disability benefits at the rate of four hundred ninety-five and 6/100 dollars (\$495.06) per week from the commencement date of December 13, 2019.
- 3) Allsteel shall be given the credit for benefits previously paid for the stipulated amount of sixteen (16) weeks at the rate of four hundred ninety-five and 6/100 dollars (\$495.06) per week.
- 4) Allsteel shall pay accrued weekly benefits in a lump sum.
- 5) Allsteel shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.
- 6) Allsteel shall file subsequent reports of injury as required by Rule 876 IAC 3.1(2).
- 7) Allsteel shall reimburse Bailey one thousand nine hundred fifty and 00/100 dollars (\$1,950.00) for the expenses of Dr. Manshadi's IME.
- 8) Allsteel shall pay to Bailey the following amounts for the following costs:

- a. One hundred thirty-seven and 50/100 dollars (\$137.50) for the deposition transcript; and
- b. Thirteen and 80/100 dollars (\$13.80) for the cost of service of original notice.

Signed and filed this 7th day of April, 2022.


BENJAMIN G. HUMPHREY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Nate Willems (via WCES)

Edward Rose (via WCES)

Amanda Rae Rutherford (via WCES)

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