BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MUNEVERA SULJEVIC,	:	
Claimant,	:	File No. 5059061
vs.	:	ARBITRATION DECISION
TYSON FOODS, INC.,	:	
Employer,	:	
Self-Insured,	:	
Defendant.	:	Head Notes: 1803

STATEMENT OF THE CASE

Munevera Suljevic, claimant, filed a petition in arbitration seeking workers' compensation benefits from her employer, Tyson Foods, Inc., the self-insured employer.

This matter proceeded to hearing on August 29, 2018. The parties submitted post-hearing briefs on November 26, 2018, after the record was held open for 30 days to allow for Sunil Bansal, M.D.'s deposition. The matter was considered fully submitted on November 26, 2018.

The evidentiary record includes: Joint Exhibits JE1 through JE9; Claimant's exhibits 1 through 47; and, Defendant's Exhibits A through D. At hearing, claimant provided testimony. Claimant's primary language is Bosnian and the hearing was interpreted by Ms. Ljupka Poleksic.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether the stipulated work injury caused permanent disability, and if so, the extent thereof.

2. Whether defendant is entitled to a credit against any award of industrial disability from File No. 5017829, which awarded claimant 30 percent industrial disability on March 27, 2008.

3. Costs.

FINDINGS OF FACT

After a review of the evidence presented, I find as follows:

Munevera Suljevic, claimant, was 55 years old at the time of the hearing. (Transcript page 15) She graduated from high school in Bosnia and has no additional formal education. (Tr. p. 15; Ex. 24) She is right-hand dominant. (Ex. JE9-112)

Claimant came to the United States in February 2000 and speaks little English. (Tr. pp. 15-16)

Claimant began working for the defendant employer, Tyson Foods on May 23, 2000. (Tr. p. 16; Exhibit 25) She has worked on different production lines. (Ex. 25) She has worked on the Pick Lean Line from 2005 through the present. (Ex. 25) She continued to work on this same production line at the time of the hearing.

Prior Workers' Compensation Injuries/Claims

On August 4, 2004, claimant asserted an injury to her right thumb, hand, wrist, arm and shoulder. (Ex. JE 2, p. 9) On appeal the commissioner found that claimant sustained industrial disability and she was awarded 30 percent, or 150 weeks of benefits. (Ex. JE2, pp. 14; Tr. p. 18) At that time, claimant had pain in the right upper extremity with reduced range of motion in the right thumb, wrist and shoulder. (Ex. JE2-12) Farid Manshadi, M.D., assigned 10 percent impairment to the right upper extremity and Kenneth Pollack, M.D. assigned permanent restrictions of avoiding repetitive wrist flexion and extension and avoiding lifting above shoulder level. (Ex. JE2-12) It was after this injury that claimant was placed on the Pick Lean job because it was a lighter job. The appeal decision noted that "there is little doubt that her current restrictions has [sic] significantly reduced her access to the manual labor jobs, the jobs for which she is best suited given her limited education, work experience and lack of English skills." (Ex. JE2-15) Claimant was paid 30 percent industrial disability by the employer. (Ex. D)

There was no evidence presented that claimant's income decreased after this initial injury to her right shoulder. This point is conceded by claimant in her post-hearing brief. (Claimant's Post-Hearing Brief, p. 19)

Claimant later filed multiple petitions alleging other work injuries including her right hand and left shoulder. Her various petitions were combined and proceeded to hearing together on May 8, 2012. (Ex. JE3-20) The claims included an alleged left shoulder injury occurring on September 8, 2009. (Ex. JE3-28; Tr. pp. 23-24) The deputy determined that, at best, claimant had a longstanding history of bilateral

shoulder problems predating the alleged date of injury to the left shoulder. (Ex. JE3-29) It was determined that claimant failed to carry her burden of proof and she was awarded nothing. (Ex. JE3, pp. 29-30) In support of this finding, the deputy noted that claimant reported her pain began in "August 2004 and has continued generally unabated since that time." (Ex. JE3-24) Also, a left shoulder MRI demonstrated degenerative changes, which could be associated with pain, but lacked any evidence of a rotator cuff injury. (Ex. JE3-26)

Concerning this alleged left shoulder injury of September 8, 2009, I also note that on April 9, 2010, Kenneth McMains, M.D. opined that claimant reached maximum medical improvement (MMI) and sustained zero permanent impairment. (Ex. JE3-26) Gregory Clem, M.D., found claimant's pain was primarily on the left, but then switched back to the right side. (Ex. JE3-26) On May 10, 2011, Dr. Clem placed claimant at MMI, and assigned no restrictions for her left shoulder, although he noted restricted range of motion with abduction. (Ex. JE3-27) On March 5, 2012, Stanley Mathew, M.D., conducted an IME and opined that claimant had right upper extremity CRPS, left shoulder rotator cuff tendonitis, bilateral carpal tunnel syndrome, and chronic myofascial pain. (Ex. JE3-27) In the end, the hearing deputy found that "[c]laimant is a poor historian and an even poorer witness," and awarded her nothing. (Ex. JE3-29)

The Injury and Subsequent Medical Treatment

The claim at bar concerns injuries occurring on February 20, 2017, to claimant's bilateral shoulders and low back.

On February 20, 2017, claimant tripped/slipped on stairs at work, reached out and grabbed the hand rails. She felt a pull on her shoulders and fell down about three steps, striking her back. (Ex. 27-57; Ex. 45-77; Tr. pp. 27-28)

Claimant was seen at Tyson Medical Services by Carole Lindecrantz, R.N., on February 20, 2017. She reported that she fell down three steps and then went back to her normal job on Pick Lean. She had "slight pain in the left shoulder and upper back immediately after the fall but is 'doing okay now'." (Ex. 45-77) There were no abnormal findings and she had full active range of motion of the left arm, shoulder and back. (Ex. 45-77)

On March 14, 2017, claimant returned to Tyson Medical Services reporting bilateral shoulder pain, worse on the left. On March 17, 2017, she again sought treatment and requested to see a doctor.

Claimant was sent to Robert Gordon, M.D. who sent claimant for an MRI of both shoulders and her lumbar spine. (Ex. JE5) Based on the MRIs, Dr. Gordon recommended physical therapy and orthopedic consultation for her bilateral shoulders.

Claimant attended physical therapy from April 20, 2017 through July 20, 2017. (Ex. JE7) On April 28, 2017 claimant continued "to have inconsistent movement during

PT as she will report left shoulder pain at 30 degrees of flexion and then at 95 degrees of flexion." (Ex. JE7-69) On May 25, 2017, the therapist noted that claimant exhibited "[p]oor effort" during her exercises. (Ex. JE7-83) She also demonstrated "low tolerance of any stretching or strengthening exercises," with "continuous guarding," and she had "low compliance of progression of exercises to improve ROM and flexibility." (Ex. JE7-85) Claimant was discharged from physical therapy on July 20, 2017. The therapist stated claimant's rehabilitation potential is poor, and she did not demonstrate progression secondary to not performing exercises to maintain gains, and therefore, "she would not be a good candidate to continue with treatment." (Ex. JE7-107)

Claimant continued working full duty on the Pick Lean job throughout the relevant time frame. She did not miss any work following the incident on February 20, 2017. (Ex. JE4-39; Tr. p. 60)

On May 3, 2017, claimant went on her own to her primary care physician, Lydia Mustafic, M.D. (Ex. 46) Dr. Mustafic's impression was bilateral shoulder tendinopathy and acute low back pain with bilateral sciatica. (Ex. 46-81) Dr. Mustafic prescribed naproxen sodium for her shoulder and back pain and noted that claimant would "continue to be treated by the company doctor." (Ex. 46-83) However, Dr. Mustafic also stated "[s]he is very disabled from chronic injuries due to her work. I feel terrible for this person." (Ex. 46-83) This statement does not identify any particular part of the body. Also, given the statement of "chronic injuries," it does not seem likely that this would relate to the February 20, 2017 incident which occurred only about 10 weeks earlier. Dr. Mustafic did not identify an injury date. It is also unclear what is meant by "very disabled," given the fact that claimant did not miss any time from work following the February 20, 2017 incident.

On May 4, 2017, claimant was seen by Thomas Gorsche, M.D., whose impression was: adhesive capsulitis of the left shoulder and right shoulder pain. (Ex. JE6-57) He recommended an injection for the left shoulder and if that helped, then he would consider injecting the right also, but he did not recommend any surgical intervention. He noted that claimant would be returning to physical therapy and she could continue to do her regular Pick Lean job.

I note that Dr. Gorsche had seen claimant in 2011 for bilateral upper extremity pain and was aware that she had been to the pain clinic as well. Dr. Gorsche understood that claimant had prior permanent restrictions, but also stated that claimant's shoulders over the past couple of years "have been feeling pretty good." (Ex. JE6-56)

On May 16, 2017, Dr. Gordon saw claimant for her lumbar spine and his impression was "[l]umbosacral strain, overall doing well." (Ex. JE4-40) She was discharged from care with no permanent impairment concerning her lumbar region. (Ex. JE4-40)

On May 18, 2017, claimant was seen by Dr. Gorsche and reported that the left shoulder was bothering her more than the right. (Ex. JE6-59) She had limited internal and external rotation on the left, but her range of motion was much better on the right. (Ex. JE6-59)

On May 31, 2017, Dr. Gorsche responded to a letter from the claims examiner. Dr. Gorsche responded by hand writing answers and filling in the blanks in the letter stating his opinions. He opined that claimant reached maximum medical improvement (MMI) on May 18, 2017 and that she sustained 14 percent permanent disability of the left upper extremity, based on the AMA Guides, fifth edition. The claims examiner mistakenly used the term "Tables" rather than "Figures" in the letter. However, it is clear to the undersigned that Dr. Gorsche relied on Figures 16-40, 16-43 and 16-46 of the AMA Guides in his assessment. (Ex. JE6, p. 60)

On June 6, 2017, defendants paid claimant permanent partial disability of 14 percent to the left upper extremity, which was converted to 8 percent of the whole person, or 40 weeks at the stipulated rate identified in the Hearing Report. (Ex. B-16; Hearing Report, p. 1)

Claimant had follow-up care for her bilateral shoulders with Dr. Gordon, who noted that "she may have an element of adhesive capsulitis on the left." (Ex. JE4-42)

On June 8, 2017, claimant was seen by Frank Hawkins, M.D., of UnityPoint Health for pain management for her left shoulder. (Ex. JE9-112) Dr. Hawkins' impression was left shoulder pain with possible capsulitis and acromioclavicular arthropathy. (Ex. JE9-113) Dr. Hawkins provided an injection into claimant's left shoulder. (Ex. JE9-113)

On July 25, 2017, Dr. Gordon placed claimant at MMI for the right shoulder. (Ex. JE4-45)

On August 22, 2017, Dr. Gordon noted that claimant had subjective left shoulder pain and agreed with Dr. Gorsche that no surgical treatment was needed. Dr. Gordon discharged claimant and confirmed that she could continue to work full duty.

Claimant agreed that she last saw Dr. Gordon in August 2017 and that she had no treatment with Dr. Gordon or Dr. Gorsche in 2018. (Tr. p. 58)

Claimant also agreed that she had not returned to Tyson Medical Services since August 2017. (Tr. p. 59)

On October 2, 2017, claimant was seen by Dr. Bansal, at the direction of claimant's counsel. He reviewed records from April 4, 2017 forward and conducted an examination noting restrictions in range of motion and opining that the bilateral shoulder and back injuries and subsequent frozen shoulder on her left side were causally related to the February 20, 2017 work injury. (Ex. 5, pp. 9-10) He placed her at MMI for the back and right shoulder as of May 18, 2017, and suggested that she needs additional

treatment for the left shoulder, absent which, she would also be at MMI on the left shoulder as of May 18, 2017. (Ex. 5-17) Dr. Bansal then assigned permanent impairment of: 5 percent to the whole person for the back; 2 percent to the whole person for the right shoulder; and, 5 percent to the whole person for the left shoulder. (Ex. 5-18) He assigned permanent restrictions of no lifting over 20 pounds occasionally and no lifting over 10 pounds frequently, no frequent bending or twisting, no standing or walking more than 60 minutes and avoid above shoulder level reaching or lifting. (Ex. 5-19)

At the beginning of his report, described above, Dr. Bansal stated that "[i]f I review additional information, I reserve the right to amend this report." (Ex. 5-7)

On August 16, 2018, Dr. Bansal issued an amended report after he reviewed additional information. (Ex. A) In his amended report, Dr. Bansal noted that he reviewed records dating back to 2003. He then concluded he could no longer opine to a reasonable degree of medical certainty that the February 20, 2017 injury led to any functional loss, thereby negating his prior opinions above. (Ex. A, p. 14)

Claimant deposed Dr. Bansal who stated in essence that after reviewing the additional information, in view of claimant's medical history the baseline of her left shoulder and back condition prior to the February 20, 2017 incident was questionable, and therefore any change in her condition is speculation. He is therefore unable to conclude to a reasonable degree of medical certainty that claimant sustained any permanent change in condition as a result of the February 20, 2017 incident. (Ex. 47, pp. 50-54, 59, 60, 67)

Claimant testified that after February 20, 2017, she has experienced increased pain in her shoulders and low back and reduced motion in her shoulders/arms. (Tr. pp. 26-27)

At the time of the hearing, claimant testified that she was taking over-the-counter Aleve for pain. (Tr. pp. 59-60)

Additional Findings

The parties stipulated that claimant sustained an injury arising out of and in the course of her employment on February 20, 2017. They further stipulated that any permanent impairment would be an industrial disability. (Hearing Report p. 1)

Prior to the hearing, defendants paid claimant 40 weeks of permanent partial disability benefits based on the 8 percent permanent partial disability rating assigned by Dr. Gorsche. (Ex. B) Dr. Gorsche treated claimant following the February 20, 2017 injury and he was also aware of her past complaints. In addition, he was aware of claimant's previous work restrictions and noted that her shoulders had been feeling pretty good in the years prior to the February 20, 2017 work injury. Claimant's IME physician, Dr. Bansal, initially assigned permanent impairment for both shoulders and

the low back and then rescinded his opinion stating that he cannot say to a reasonable degree of medical certainty that claimant sustained any permanent impairment.

Weighing claimant's medical history, her testimony and the expert opinions, I give greater weight to Dr. Gorsche's opinion and I disregard Dr. Bansal's initial opinions, which he retracted after reviewing additional information. I also note that Dr. Gorsche has seen claimant over a period of years on multiple occasions and is in a better position to understand claimant's baseline condition prior to this injury and therefore assess her current permanent impairment as a result of the February 20, 2017 work injury.

I find claimant sustained 14 percent permanent partial disability to the left upper extremity, which converts to 8 percent of the whole person, as a result of the February 20, 2017 work injury as stated by the treating physician, Dr. Gorsche.

I further find that claimant has failed to carry her burden of proof that she sustained any permanent disability to the right shoulder or low back as a result of the February 20, 2017 work injury.

In assessing industrial disability, I must consider the combined effect of the August 4, 2004 work injury discussed in the appeal decision issued March 27, 2008, and the present injury of February 20, 2017. (Ex. JE2)

I note that the August 4, 2004 injury resulted in 30 percent industrial disability. Thereafter, claimant continued working for the same employer in the same job capacity with permanent restrictions of avoiding repetitive wrist flexion and extension and avoiding lifting above shoulder level. (Ex. JE2-12) Since the February 20, 2017 injury, claimant has no lost wages, she has missed no time from work, she has no additional permanent restrictions from this injury, and she remains employed in the same position, with the same employer. However, claimant has also sustained a functional loss of 8 percent to the whole person, she was 55 years old at the time of the hearing, she has very limited ability to communicate in English, as well as limited education and work experience.

In view of the above and all other appropriate factors for the consideration of industrial disability, I find claimant has sustained 40 percent combined industrial disability.

CONCLUSIONS OF LAW

1. Whether the stipulated work injury caused permanent disability, and if so, the extent thereof.

The parties have stipulated that the disability is an industrial disability.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219

Iowa 587, 593; 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man." Functional impairment is an element to be considered in determining industrial disability, which is the reduction of earning capacity. However, consideration must also be given to the injured worker's medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured workers' qualifications intellectually, emotionally and physically; the worker's earning before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of the injury to engage in employment for which the worker is best fitted. Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616 (Iowa 1995); McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

There are no weighting guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience as well as general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 529 (App. March 26, 1985); Peterson v. Truck Haven Cafe, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 654 (App. February 28, 1985).

Assessments of industrial disability involve a viewing of loss of earning capacity in terms of the injured workers' present ability to earn in the competitive labor market without regard to any accommodation furnished by one's present employer. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 158 (Iowa 1996); Thilges v. Snap-On Tools Corp., 528 N.W.2d 614 (Iowa 1995).

A showing that claimant had no loss of his job or actual earnings does not preclude a finding of industrial disability. Loss of access to the labor market is often of paramount importance in determining loss of earning capacity, although income from continued employment should not be overlooked in assessing overall disability. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Bearce v. FMC Corp., 465 N.W.2d 531 (Iowa 1991); Collier v. Sioux City Community School District, File No. 953453 (App. February 25, 1994); Michael v. Harrison County, Thirty-fourth Biennial Rep. of the Industrial Comm'r, 218, 220 (App. January 30, 1979).

I have found above that claimant sustained 8 percent permanent partial disability to the body as a whole. Also, as stated above and for the reasons there given, I have

determined that claimant has sustained a combined 40 percent industrial disability, which is 200 weeks considering both the August 4, 2004 injury and the current February 20, 2017 injury.

2. Whether defendants are entitled to a credit against any award of industrial disability from File No. 5017829, which awarded claimant 30 percent industrial disability on March 27, 2008.

Iowa Code section 85.34(7) requires the following inquiry for successive disabilities:

> 7. Successive disabilities.
>
> a. An employer is fully liable for compensating all of an employee's disability that arises out of and in the course of the employee's employment with the employer. An employer is not liable for compensating an employee's preexisting disability that arose out of and in the course of employment with a different employer or from causes unrelated to employment.
>
> b. (1) If an injured employee has a preexisting disability that was caused by a prior injury arising out of and in the course of employment with the same employer, and the preexisting disability was compensable under the same paragraph of subsection 2 as the employee's present injury, the employer is liable for the combined disability that is caused by the injuries, measured in relation to the employee's condition immediately prior to the first injury. In this instance, the employer's liability for the combined disability shall be considered to be already partially satisfied to the extent of the percentage of disability for which the employee was previously compensated by the employer.
>
> (2) If, however, an employer is liable to an employee for a combined disability that is payable under subsection 2, paragraph "u", and the employee has a preexisting disability that causes the employee's earnings to be less at the time of the present injury than if the prior injury had not occurred, the employer's liability for the combined disability shall be considered to be already partially satisfied to the extent of the percentage of disability for which the employee was previously compensated by the employer minus the percentage that the employee's earnings are less at the time of the present injury than if the prior injury had not occurred.

In the case at bar, I have found above that there was no evidence presented that claimant had reduced income following the August 4, 2004, work injury. Further, claimant concedes this point in her brief. (Claimant's Post-Hearing Brief, p. 19) Therefore, section 85.34(7)(b)(1) applies and section 85.34(7)(b)(2) does not. I note that both claimant and defendant appear to agree that defendants are entitled to a credit

of 30 percent industrial disability for the August 4, 2004 injury. (Claimant's Post-Hearing Brief, pp. 16-19; Defendant's Post-Hearing Brief, p. 16)

I conclude that concerning the August 4, 2004 work injury, defendants are entitled to a credit of 30 percent industrial disability, which is 150 weeks.

3. Costs.

The final issue is costs. Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33. I conclude that claimant was generally successful in this claim and therefore exercise my discretion and assess costs against the defendants in this matter.

I note that contained within the statement of costs attached to the hearing report, are expenses related to Dr. Bansal's IME. However, reimbursement under Iowa Code section 85.39 was not identified as an issue in the Hearing Report. Therefore, Dr. Bansal's IME expense will not be considered under Iowa Code section 85.39, and will only be addressed as a cost.

Defendant shall pay costs for the filing fee of $100.00, the cost of Dr. Bansal's report, signed January 12, 2018 in the amount of $2,309.00, and the addendum thereto in the amount of $956.00, which are attached to the Hearing Report. Claimant is entitled only to the expense associated with Dr. Bansal's report and addendum when the same are considered as a cost, not the expense of the physical examination pursuant to Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 846-847 (Iowa 2015). Defendant shall pay costs in a total amount of $3,365.00.

ORDER

IT IS THEREFORE ORDERED:

Defendant shall pay claimant industrial disability benefits of two hundred (200) weeks, beginning on the stipulated commencement date of May 19, 2017, until all benefits are paid in full, less the stipulated credit of forty (40) weeks in the case at bar, and a credit for an additional one hundred fifty (150) weeks for the August 4, 2004 work injury. Defendant's total credit shall be one hundred ninety (190) weeks.

All weekly benefits shall be paid at the stipulated rate of four hundred eighty-seven and 09/100 dollars ($487.09) per week.

All accrued benefits shall be paid in a lump sum.

Defendant shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-

year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent, See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

Defendant shall pay costs as set forth above in the total amount of three thousand three hundred sixty-five and 00/100 dollars ($3,365.00).

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

Signed and filed this 20th day of February, 2019.

TOBY J. GORDON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.