

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DEBORAH RAND,

Claimant,

vs.

SECOND INJURY FUND OF IOWA,

Defendant.

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File No. 1652806.01

ARBITRATION DECISION

Head Note No.: 1803

Claimant Deborah Rand filed a petition in arbitration on December 24, 2019, alleging she sustained an injury to her right hand on August 19, 2018, while working for Defendant Riverside Casino & Golf Resort ("Riverside"). Rand also alleged she was entitled to benefits from Defendant Second Injury Fund of Iowa ("the Fund"), containing she had a prior first loss to her right foot. The Fund filed an answer on January 16, 2020. Riverside and its insurer, Defendant American Zurich Insurance Company, filed an answer on April 2, 2020.

An arbitration hearing was scheduled for February 19, 2021. Prior to the hearing, Rand settled her claim against Riverside and American Zurich Insurance Company.

An arbitration hearing was held *via* CourtCall video conference on February 19, 2021. Attorney Nate Willems represented Rand. Rand appeared and testified. Assistant Attorney General Meredith Cooney represented the Fund. Joint Exhibits ("JE") 1 through 9, and Exhibits 1 through 11 and AA were admitted into the record. The parties submitted a hearing report, listing stipulations and issues to be decided. The Fund waived all affirmative defenses.

The record was held open through April 1, 2021, for the receipt of post-hearing briefs. The briefs were received and the record was closed.

STIPULATIONS

1. An employer-employee relationship existed between Riverside and Rand at the time of the alleged injury.
2. Rand sustained an injury, which arose out of and in the course of her employment with Riverside on August 19, 2018.
3. The alleged injury is a cause of temporary disability during a period of recovery.

4. Entitlement to temporary benefits is no longer in dispute.

5. At the time of the alleged injury, Rand's gross earnings were \$863.73 per week, she was single and entitled to one exemption, and the parties believe the weekly rate is \$540.26.

ISSUES

1. Is the alleged injury a cause of permanent disability?
2. Did Rand sustain a prior qualifying loss to her right foot on March 9, 2012?
3. What is the functional loss of the right foot?
4. Did Rand sustain a compensable loss to the whole person on August 19, 2018?
5. Did Rand sustain a second qualifying loss to her right hand?
6. What is the functional loss of the right hand?
7. What is the extent of disability?
8. What is the commencement date for permanent partial disability benefits?
9. What is the credit the Fund is entitled to?
10. Is Rand entitled to payment of twenty percent of the cost of the independent medical examination from the Fund?
11. Should costs be assessed against either party?

FINDINGS OF FACT

Rand lives in Cedar Rapids. (JE 9, p. 2) At the time of the hearing she was fifty. (JE 9, p. 2)

In 1988, Rand graduated from high school in California. (Tr., p. 12; JE 9, p. 2) After graduating from high school, Rand worked odd jobs while raising a family. (Tr., p. 15; JE 9, pp. 2-3)

From 1996 through 2001, Rand attended GateWay Community College and obtained an associate's degree in nursing. (JE 9, pp. 2-3; Tr., p. 12-13) Rand worked as a registered nurse in the emergency room from 2000 through 2005. (Tr., pp. 13-14; JE 9, p. 3)

In October 2005, Rand was diagnosed with Guillain-Barre syndrome. (Tr., pp. 14-15; JE 9, p. 4) Rand became paralyzed from the feet up, she was admitted to the

hospital for six weeks, and she was placed on a ventilator. (Tr., p. 15; JE 9, p. 4) The hospital discharged Rand to a skilled nursing facility for rehabilitation. (Tr., p. 15) Rand treated for Guillain-Barre syndrome for about five years. (Tr., p. 15)

Rand could not walk from 2005 until 2007. (JE 9, pp. 5-6) Rand's condition caused by Guillain-Barre prevented her from working until approximately 2012. (Tr., p. 15) Rand reported she tried working, but she was unsuccessful because she could not sustain any period of standing or sitting and her stamina was gone. (Tr., p. 16) At the time of the hearing she was not treating for Guillain-Barre syndrome. (Tr., p. 15)

In 2012, Menards hired Rand as a part-time customer service associate in the garden department. (Tr., p. 16; JE 9, p. 5) While working for Menards Rand sustained a work injury. Employees put up a new display using cinder blocks and lumbar. (Tr., pp. 16-17) Rand walked past the display and it fell and landed on top of her foot across the middle. (Tr., pp. 17, 53) Rand denied injuring her right foot before or after the 2012 work injury. (Tr., pp 53-54)

Rand sought medical treatment for her foot injury. On March 19, 2012, Rand underwent right foot magnetic resonance imaging. (JE 1, p. 1) The reviewing radiologist listed an impression of:

1. Small bone contusion (microtrabecular injury) dorsal aspect of the medial cuneiform without evidence of a discrete fracture.
2. Soft tissue edema is noted along the dorsum of the foot. Loculated soft tissue hematoma is noted along the dorsal aspect of the forefoot.
3. Extensor tendons are intact without evidence of a tear or tendinopathy.

(JE 1, p. 1)

On May 7, 2012, Rand attended an appointment with Jody McAleer, D.P.M., reporting a piece of wood weighing seventy pounds fell on her foot at work about nine weeks before her appointment, she had been off work for about three weeks, and she still could not walk on her foot. (JE 1, p. 2) Rand described the pain as a burning sensation and sharp stabbing, located in the right midfoot and in the middle three toes, which was aggravated by physical activity, including walking, and prolonged standing, and relieved by rest. (JE 1, p. 2) Dr. McAleer assessed Rand with a soft tissue hematoma and pain in limb, ordered physical therapy, and directed Rand to avoid physical activity and to only carry out her activities of daily living. (JE 1, p. 3)

On May 29, 2012, Rand returned to Dr. McAleer reporting she could not tell any difference in her foot after attending physical therapy twice per week. (JE 1, p. 4) Dr. McAleer prescribed Lidoderm, and offered Neurontin, which Rand declined. (JE 1, p. 5)

Rand testified Menards terminated her employment. (Tr., p. 19; JE 9, p. 7) Rand applied for workers' compensation benefits and did not receive any permanent work restrictions. (JE 9, pp. 6-7)

Rand testified she has experienced lasting effects from her injury at Menards. (Tr., p. 17) Rand reported she has to make adjustments for her shoe by taping her toes, wearing an insert in her shoe, and putting padding under her toes and the ball of her foot to keep it from being hyper-extended and to provide stability under her foot. (Tr., p. 17) Rand testified she started making the adjustments shortly after her work injury. (Tr., p. 17)

After leaving Menards, Rand accepted a full-time position as a cook supervisor with the Missouri Department of Corrections, earning \$13.00 per hour. (Tr., pp. 19, 21-22; JE 9, p. 7) Rand supervised inmates while they made food and ensured the inmates cleaned the kitchen instruments. (Tr., p. 44). Rand did not do any cooking. (Tr., p. 44). During direct exam, Rand reported the position required her to walk on her feet a lot, but on cross-examination she testified the position did not require her to be on her feet quite a lot because the kitchen was a fairly small area. (Tr., pp. 19, 44-45) Rand reported, "[t]here were six of us, so we took areas of the kitchen, and I didn't do a lot of standing or walking. It was a lot of sitting." (Tr., p. 45) Rand reported she continued to make the adjustments to her shoe. (Tr., p. 19) Rand worked for the Missouri Department of Corrections from 2013 through 2016. (JE 9, p. 7)

Rand's sister was deployed by the Navy and she needed someone to watch her children and household in Virginia. (Tr., pp. 19-20; JE 9, p. 7) Rand quit her job in Missouri and moved to Virginia where she accepted a position with the Virginia Department of Corrections as a corrections officer earning \$13.00 per hour. (Tr., pp. 19-20, 22; JE 9, p. 7) Rand primarily drove a van transporting inmates to appointments and when she was not driving, she was assigned to the solitary unit, which was fairly small. (Tr., p. 45) Rand relayed the position did not require her to be on her feet a significant amount of time. (Tr., p. 45) Rand worked for the Virginia Department of Corrections for a couple of years until her sister returned at the end of 2017. (Tr., pp. 20, 22) Rand did not have any restrictions when she worked for the Department of Corrections in Missouri or the Department of Corrections in Virginia. (Tr., p. 45; JE 9, p. 7)

In early 2018, Rand moved to Iowa and accepted a position as a bus attendant with the Cedar Rapids Community School District. (Tr., pp. 20, 22-23; JE 9, p. 8) Rand earned \$13.00 per hour and she worked five hours per day. (Tr., pp. 23, 46) Rand later accepted a part-time position at the Doubletree in Cedar Rapids as a chef, earning \$16.00 per hour. (Tr., p. 23; JE 9, p. 8)

In June 2019 Rand left the Doubletree and accepted a position at Riverside Casino as the sous chef for Ruthie's Steakhouse. (Tr., p. 23; JE 9, p. 10) As a sous chef Rand was second in command and she had to be able to perform all the duties in the restaurant, including mopping the floors, cleaning the fires, inventory, ordering food,

menu preparation, menu development, and cooking. (Tr., p. 24) Ruthie's Steakhouse was only open for dinner and Rand worked between 12:00 p.m. and 1:00 p.m. and 10:00 p.m. or 11:00 p.m., depending on the day of the week. (Tr., p. 24) Rand's hourly rate was \$17.34 per hour, she worked more than forty hours per week, she received overtime compensation, and she received premium pay. (Tr., pp. 24-25)

On August 19, 2018, Rand was working at Ruthie's Steakhouse. (Tr., p. 26)
Rand reported:

[w]e had a fairly busy evening, and the head chef and one of the line cooks had taken a break. And it was just me and a junior cook on the line, and we had some orders. I had to reach for a pan that was on top of our steamer, and the steamer door came open. It had done it in the past. And as I reached over, the door came open and the steam – the oven was set to 420 degrees, and the steam came up and wrapped itself around my hand and burned my hand.

(Tr., p. 26) Rand put her hand under running water and hollered at a server to go get the head chef. (Tr., p. 26)

The paramedics arrived and transported Rand to the burn unit at the University of Iowa Hospitals and Clinics ("UIHC"). (Tr., p. 27; JE 2) Hospital staff noted Rand had a "1% 2nd degree burn to the dorsum of the right hand. Half of the dorsal surface of the hand has 2nd second degree burn and extends to the whole dorsal aspect of fingers 3, 4, and 5 with open blisters. The index finger has an intact blister that extends half of the finger." (JE 3, p. 2) Rand reported the injury was to the back of her hand and involving all four of her fingers and part of her thumb. (Tr., p. 27) UIHC staff peeled the open blisters, cleaned and dressed the wound, and prescribed pain medication for Rand, and discharged her to her home. (JE 3, p. 3) Rand continued to treat at the UIHC. (JE 3) Asgeir Masson, M.D., restricted Rand from working with her right hand from August 19, 2018 through August 23, 2018. (JE 6, p. 1)

Rand reported her hand had to be debrided daily for about a week. (Tr., p. 29) When debriding her hand, hospital staff took a dry terrycloth washcloth, wrapped it around her hand, and squeezed it to remove all of the skin and then took a long bristle brush and special soap to scrub it. (Tr., p. 29) Rand did not undergo a skin graft. (Tr., p. 29)

Rand underwent an occupational therapy evaluation on August 23, 2018. (JE 5) UIHC staff recommended Rand perform range of motion exercises and did not recommend any splinting or other occupational therapy. (JE 5, pp. 3-4) Thomas Granchi, M.D., excused Rand from work for one week. (JE 6, p. 2)

During a follow-up appointment on August 30, 2018, Rand complained of difficulty with range of motion, pruritus, and pain in her right hand, and noted she had been attending outpatient therapy. (JE 3, p. 9) UIHC staff ordered Rand to continue

with wound care, and noted she would be ready to return to work in one week. (JE 3, pp. 10, 14) Tariq Maraqa, M.D., excused Rand from work until September 7, 2018. (JE 6, p. 3)

On August 30, 2018, Rand attended an appointment with James Milani, D.O., for her right hand dorsal second-degree burn. (JE 7, p. 1) Dr. Milani examined Rand, assessed her with a second degree burn from steam to the dorsum of the right hand and dorsum of the fingers, opined she could return to work on September 7, 2018, without restrictions, and recommended she return to him if she had any additional problems. (JE 7)

Rand testified she tried to go back to work in the kitchen at Ruthie's Steakhouse,

I couldn't do it. I couldn't handle the fire baskets because my grip strength was greatly decreased, and the heat from the fire was – it felt more intense than what it really was. The grill, I couldn't do anything on the grill because that grill is 500 degrees, and my wounds were still open – bandaged, but still open – and the pain was just too intense. I couldn't run the sauté stations. The burners are 380 to 400 degrees, and there's grease splattering everywhere. And I couldn't do that. I couldn't perform any function in the kitchen.

(Tr., pp. 29-30) Rand reported she could not grip a knife to hold onto it, noting she had “to be very exact when [she was] using knife for chopping or anything” and she did not “have what it took to hold onto the knife to be exact.” (Tr., p. 30)

Rand testified she tried going back to Ruthie's Steakhouse several times and she spoke with the executive chef about her problems. (Tr., p. 30) Rand relayed the executive chef was very understanding and told her to talk to human resources and that if she needed time off he would save her spot because he wanted her back. (Tr., p. 31) Rand testified she spoke with human resources and they offered her a minimum wage door-greeter position, which she declined because she could not justify driving an hour each way to work for \$7.35 per hour, so she left her position. (Tr., p. 31)

On September 13, 2018, Rand went to the Mercy Medical Center, complaining of right foot pain for five days, which felt like she was walking on nails. (JE 8, p. 1) Kimberly Ferrante, PA-C, examined Rand, ordered x-rays, and diagnosed her with tendonitis of the foot, and prescribed nabumetone. (JE 8, pp. 4-5) Rand testified the pain was in the original location of the injury to her foot when she was working for Menards. (Tr., p. 35)

After leaving Riverside Casino Rand returned to the Cedar Rapids Community School District as a school van driver in the fall of 2018. (Tr., p. 31; JE 9, p. 14) Rand was responsible for transporting homeless students who had moved from their temporary residences in Cedar Rapids to school in Cedar Rapids, five to six hours per day, earning \$16.45 per hour. (Tr., pp. 32, 46-47, 50-51) Rand held a chauffer's

license for the position and she continued to hold a chauffeur's license at the time of the hearing. (Tr., p. 52) Rand trained thirty employees, but she was not responsible for scheduling, hiring, firing, or disciplining employees. (Tr., p. 51) Rand continued to work for the Cedar Rapids Community School District through the end of January 2020. (Tr., p. 32) Rand took leave for mental health reasons. (Tr., pp. 32, 47) When she was ready to return to work, the Cedar Rapids Community School District did not have work for her because the schools had closed due to the Pandemic. (Tr., p. 32) Rand was unemployed for many months.

From August through December 2020, Rand attended a nurse refresher course at South Dakota State University to return to nursing. (Tr., pp. 14, 33; JE 9, p. 3) At the time of the hearing Rand held an Iowa nursing license to work as a registered nurse. (Tr., p. 14) Rand testified during her deposition she intends to return to school to earn a bachelor of science degree in nursing within the next five years. (JE 9, p. 3)

On November 25, 2020, Farid Manshadi, M.D., a physiatrist, conducted an independent medical examination for Rand and reviewed her medical records. (Ex 8) Rand reported she was not able to continue working as a chef because the heat of the cooking caused her pain in her right hand and arm. (Ex. 8, p. 2) Rand relayed even cooking at home is challenging for her due to pain, stiffness, and swelling and that her daughter was helping her with chores are cooking. (Ex. 8, p. 2) Rand also reported she has difficulty standing for long periods of time due to her right foot. (Ex. 8, p. 2)

Dr. Manshadi documented,

[o]n examination of the right hand, the burned area in the right dorsal hand involves from the 2nd through 5th digits. The involvement is in the mid-dorsal hand distally to all the 3rd through 5th digits, and half of the 2nd digit proximally. There is no involvement of the palmar aspect of the right hand.

The affected areas of the right dorsal hand were extremely hypersensitive to touch in comparison to the left. Pinprick also was extremely hypersensitive. Wrist and finger range of motion were within normal limits and Ms. Rand was able to make a full and composite fist with the right hand. It was noticed after evaluation and examination that Ms. Rand's hand became erythematous and edematous.

Right hand grip using a dynamometer was 10, 10 and finally 10 kg. Left hand grip was 20, 20 and finally 20 kg.

On examination of the right foot, right 4th toe has increased swelling distally. Right 4th toe extension was at 8 degrees using a goniometer. There was a callous formation over the plantar aspect of the 3rd toe at the proximal phalanx.

(Ex. 8, p. 2) Dr. Manshadi opined Rand reached maximum medical improvement as of the date of his examination, November 25, 2020 and he did not recommend any additional treatment. (Ex. 8, p. 2)

Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Manshadi opined Rand sustained a seven percent whole person impairment for her burn injury to the right dorsal hand under Chapter 8, Table 8-2, and imposed restrictions of avoiding any activity which requires a strong right hand grip and avoiding exposure to heat. (Ex. 8, p. 3) With respect to the right fourth toe, under Chapter 17, Table 17-14, Dr. Manshadi assigned a three percent impairment of the right foot and recommended restrictions of avoiding any activity which requires prolonged standing or walking. (Ex. 8, p. 3)

On February 10, 2021, Dr. Manshadi responded to a check the box letter from Rand's counsel, which he modified, opining under the AMA Guides, the seven percent permanent partial impairment rating equates to either eleven or twelve percent of a hand. (Ex. 8, p. 15)

Approximately five weeks before the hearing Rand accepted a temporary position with CVS Pharmacy administering COVID vaccinations throughout Iowa. (Tr., pp. 33-34) Rand reported most of the time she is sitting when she administers a vaccination. (Tr., p. 34) Rand is paid \$44.00 per hour and her hours vary. The week of the hearing she worked sixty hours and the week before the hearing she worked thirty-five hours. (Tr., p. 48)

Rand has applied for emergency room nursing positions with St. Luke's in Cedar Rapids and Mercy in Iowa City. (Tr., p. 48) The position with St. Luke's pays \$28.00 per hour. (Tr., p. 49) Rand performed a job shadow with St. Luke's in January 2021, but had not heard anything from St. Luke's as of the time of the hearing. (Tr., p. 49)

In September or October 2020, Rand applied for a delivery driver position with Panera, but she did not receive the job. (Tr., p. 49) Rand reported Panera told her she was over qualified. (Tr., p. 50)

Rand testified at the time of the hearing she was experiencing pain in the ball of her foot that extends into the area where her toe meets her foot, that she has a "pretty large callus on the bottom of [her] toe that feels like stepping on a nail with every step [she] take[s]. And that pain doesn't go through like bottom to top, it goes through like front to back" (Tr., p. 36) Rand reported she continues to make the modifications to her shoe that she started making in 2012. (Tr., p. 36)

Rand testified Dr. Manshadi's restrictions to avoid prolonged standing and walking are reasonable for her injury, but not for her life because she worked in emergency medicine as a nurse in the past, which requires constant standing and "virtually no time sitting." (Tr., p. 38) Rand plans to try to return to emergency room nursing, but she does not know how successful she will be. (Tr., p. 38)

With respect to her right hand, Rand testified:

I still have trouble with my grip. I still have trouble with sensation. Being a nurse, you use your hand to see, when you feel anything on a patient. You use your hands to see where you can put an IV in. You use your hands to see lumps and bumps, and when muscles tighten up because somebody's in pain when you push, or a pleural friction rub; everything. Your hands are vital, and my hand doesn't last all day like it used to. It gets tired very quickly, and it swells, and it hurts.

(Tr., p. 39) Rand further reported her right hand is "extremely sensitive to temperature changes. Heat, cold; it doesn't have to be extreme. It just has to be – an 80-degree sunny day, that'll do it." (Tr., p. 39) Rand relayed the sensitivity is only in her hand and not in the rest of her arm. (Tr., pp. 39-40)

Rand testified some days are worse than others. (Tr., p. 54) Rand does not take any pain medication for her right hand or right foot. (Tr., p. 54) After the incident at Menards Rand did not receive a permanent rating from a physician other than Dr. Manshadi. (Tr., p. 54)

Rand has a self-propelled mower, weed trimmer, leaf blower, and a snow blower. (Tr., pp. 40-41) She uses a hair tie or hair clip to hold the lever up to the handles so she does not have to grip the whole time when using the equipment. (Tr., pp. 40-41) When blowing snow Rand layers up and uses a heat insert for her right hand. (Tr., p. 41)

Rand enjoys gardening. (Tr., p. 41) Since her work injury she has started using special gloves for individuals with arthritis who have trouble gripping. (Tr., p. 41) When using garden tools she has to take breaks and reported it takes her a long time to mow her standard-sized lawn. (Tr., p. 41) Before the work injury it took Rand twenty minutes to mow her front yard and forty minutes to mow her back yard and now it takes her two to three hours to mow her front yard and three to four hours to mow her back yard. (Tr., pp. 41-42)

Rand is able to cook, but reported if she needs to put something in or take something out of the oven she has her daughter do it for her. (Tr., p. 42) Rand can use the stovetop when she wears protective gloves. (Tr., p. 42) Rand can grab and chop food, but she has to let her hand rest while she is working. (Tr., p. 42)

Rand testified she would not have returned to nursing if she had not injured her right hand because being a chef is where her heart is and what she wants to do. (Tr., pp. 43-44) Rand reported she is terrified she will not be able to return to nursing because of having to be on her feet and having to use her right hand for twelve hour shifts. (Tr., p. 43)

CONCLUSIONS OF LAW

I. Applicable Law

This case involves several issues, including the nature and extent of disability, entitlement to benefits under the Fund, recovery of costs, and interest under Iowa Code sections 85.27, 85.34, 85.65, 86.40, and 535.3. In 2017, the Iowa Legislature enacted changes to Iowa Code chapters 85, 86, and 535 effecting workers' compensation cases. 2017 Iowa Acts chapter 23 (amending Iowa Code sections 85.16, 85.18, 85.23, 85.26, 85.33, 85.34, 85.39, 85.45, 85.70, 85.71, 86.26, 86.39, 86.42, and 535.3). Under 2017 Iowa Acts chapter 23 section 24, the changes to Iowa Code sections 85.18, 85.23, 85.26, 85.33, 85.34, 85.39, 85.71, 86.26, 86.39, and 86.42 apply to injuries occurring on or after the effective date of the Act. Rand's alleged injury occurred after July 1, 2017, therefore, the new provisions of the statute apply to this case.

The calculation of interest is governed by Sanchez v. Tyson, File No. 5052008 (Ruling on Defendant's Motion to Enlarge, Reconsider, or Amend Appeal Decision Re: Interest Rate Issue), which holds interest for all weekly benefits payable and not paid when due which accrued before July 1, 2017, is payable at the rate of ten percent; all interest on past due weekly compensation benefits accruing on or after July 1, 2017, is 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.

II. Fund Benefits

Rand seeks benefits through the Fund. The Fund contends it has no liability in this case. Under Iowa Code section 85.64,

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

Thus, an employee is entitled to Fund benefits if the employee establishes: (1) the employee sustained a permanent disability to a hand, arm, foot, leg, or eye, a first qualifying injury; (2) the employee subsequently sustained a permanent disability to another hand, arm, foot, leg, or eye, through a work-related injury, a second qualifying

injury; and (3) the employee has sustained a permanent disability resulting from the first and second qualifying injuries exceeding the compensable value of the “previously lost member.” Gregory v. Second Injury Fund of Iowa, 777 N.W.2d 395, 398-99 (Iowa 2010).

A. First Qualifying Loss

Rand alleges she sustained a first qualifying loss to her right foot. The Fund rejects her assertion alleging Rand has not sustained a first qualifying loss because Rand did not have any permanent work restrictions or a permanent impairment rating for her right foot before she saw Dr. Manshadi in 2020, and Rand did not request any accommodations for her right foot from any of her employers.

Dr. Manshadi is the only physician who has provided an opinion concerning Rand’s right foot in this case. Dr. Manshadi assigned Rand a three percent permanent impairment to her right foot. The Fund did not seek an opinion regarding Rand’s right foot from any physician. Dr. Manshadi’s opinion is unrebutted.

Rand testified she has had ongoing problems with her right foot since 2012. Rand was the sole witness at hearing. During the hearing I assessed her credibility by considering whether her testimony was reasonable and consistent with other evidence I believe, whether Rand had made inconsistent statements, her “appearance, conduct, memory and knowledge of the facts,” and her interest in the case. State v. Frake, 450 N.W.2d 817, 819 (Iowa 1990).

Rand has an obvious interest in the outcome of this case. I had the opportunity to observe Rand testify under oath. During her testimony, Rand engaged in direct eye contact, her rate of speech was appropriate, and she did not make any furtive movements. Her testimony was consistent throughout the hearing, and I found it reasonable and consistent with the other evidence I believe. Based on my personal observations at hearing, I found Rand to be a credible witness. While Rand’s injury to her right foot has resulted in a slight impairment, it has resulted in an impairment, nonetheless. The record supports Rand sustained a first qualifying loss to her right foot of three percent. I also adopt Dr. Manshadi’s permanent restrictions as Rand’s restrictions.

B. Second Qualifying Loss

Rand contends she sustained a second qualifying loss to right hand. The Fund rejects Rand’s assertion.

To receive workers’ compensation benefits, an injured employee must prove, by a preponderance of the evidence, the employee’s injuries arose out of an in the course of the employee’s employment with the employer. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats Co. v. Ciha,

552 N.W.2d 143, 151 (Iowa 1996). The injury must be a rational consequence of a hazard connected with the employment, and not merely incidental to the employment. Koehler Elec. v. Willis, 608 N.W.2d 1, 3 (Iowa 2000). The Iowa Supreme Court has held, an injury occurs “in the course of employment” when:

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

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

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

The question of medical causation is “essentially within the domain of expert testimony.” Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The deputy commissioner, as the trier of fact, must “weigh the evidence and measure the credibility of witnesses.” Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye, 569 N.W.2d at 156. When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert’s education, experience, training, and practice, and “all other factors which bear upon the weight and value” of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

The Fund avers Rand sustained an injury to her skin, which is not a scheduled member injury and does not qualify as a second qualifying loss. The injury Rand sustained was to the skin of her right hand. Workers’ Compensation Commissioner Joseph Cortese, II, has considered the Fund’s argument and rejected it. Dikutole v. Tyson Foods, Inc., 2018 WL 2383236, File No. 5054404 (Iowa Workers’ Comp. Comm’r

May 11, 2018) (the mere fact that a skin graft was taken from the left leg and placed onto the left leg did not convert the case from a scheduled to an industrial case because the injury was limited to the scheduled member and did not extend into the body as a whole).

The Fund also challenges Dr. Manshadi's opinion, relying on the AMA Guides. As noted above, this case is governed by the new provisions of the statute enacted in 2017. The loss of a hand is a scheduled injury under Iowa Code section 85.34(2)(l). Iowa Code section 85.34(2)(x) provides when determining functional disability under Iowa Code section 85.34(2)(l), "the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the guides to the evaluation of permanent impairment, published by the American medical association, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A." The Commissioner has adopted the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides 5th Edition"). 876 IAC 2.4. The Legislature has precluded the agency from using lay testimony or agency expertise when determining functional disability and not loss of earning capacity. Iowa Code § 85.34(2)(x).

Dr. Manshadi is the only physician who has provided an opinion in this case on causation and permanency. His opinion is unrebutted. Dr. Manshadi initially assigned a seven percent whole person impairment, which is the equivalent of an eleven or twelve percent permanent impairment under Table 16-3 of the AMA Guides. I am not permitted to substitute my opinion for that of Dr. Manshadi. Dr. Manshadi's opinion is consistent with the facts in this case. Rand has continued to complain of loss of strength in her right hand, in addition to other difficulties, since the work injury, which precluded her from returning to work as a chef. I find Rand has established she sustained a second qualifying impairment. I also adopt Dr. Manshadi's restrictions as Rand's permanent restrictions.

C. Industrial Disability

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

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Compensation for permanent partial disability shall begin at the termination of the healing period. Iowa Code § 85.34(2). Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(u). When considering the extent of disability, the deputy commissioner considers all evidence, both medical and

nonmedical. Evenson v. Winnebago Indus., Inc., 818 N.W.2d 360, 370 (Iowa 2016). When determining the Fund's liability, the trier of fact subtracts the two scheduled amounts for the first and second qualifying injuries from the full amount of the industrial disability. Second Injury Fund of Iowa v. Shank, 516 N.W.2d 808, 813 (Iowa 1994).

Rand quit her employment with Riverside Casino when she could not return to her chef duties and she rejected a minimum wage position. Shortly thereafter, she secured employment with the Cedar Rapids Community School District as a van driver, working five to six hours per day, and earning \$16.45 per hour. (Tr., pp. 32, 46-47, 50-51) Rand left her employment due to a personal health condition unrelated to her injuries at Riverside Casino. Unfortunately, when she was ready to return to work there was no employment to return to because the schools had closed due to the Pandemic.

Rand did not secure employment until shortly before the hearing. Rand is working in a temporary position as a registered nurse giving COVID vaccines. Rand is earning \$44.00 per hour and the evidence presented at hearing established she worked thirty-six hours the week before the hearing and sixty hours the week of the hearing. The position does not require constant standing and walking, like her former work as an emergency room nurse. As noted above, I accepted Dr. Manshadi's opinion, including his permanent restrictions, which I find to be Rand's permanent restrictions. Yet, Rand has not requested or received any accommodations with any employer. Not all nursing positions require constant standing and walking.

Rand is articulate, she has obtained an associate's degree in nursing, and she possesses a license as a registered nurse and a chauffeur's license. Based on the factors of industrial disability, I find Rand has sustained a slight industrial disability of ten percent, entitling her to fifty weeks of permanent partial disability benefits.

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

The two scheduled amounts for Rand's first and second qualifying injuries must be subtracted from fifty weeks. Dr. Manshadi found Rand reached maximum medical improvement on November 25, 2020.

The schedule provides 150 weeks for the loss of a foot. Iowa Code § 85.34(2)(o). A three percent impairment to the right foot results in 4.5 weeks of permanent partial disability benefits. The schedule provides for 190 weeks for the loss of a hand. Id. A twelve percent impairment to the right hand results in 22.8 weeks of permanent partial disability benefits. The first and second qualifying injuries total 27.3 weeks. The Fund is entitled to a credit of 27.3 weeks. The 27.3 weeks commenced on

November 25, 2020. Rand is awarded 22.7 weeks of permanent partial disability benefits from the Fund, commencing after the 27.3 weeks of credit expire.

III. Cost of the Independent Medical Examination Under Iowa Code section 85.39

Rand seeks to recover twenty percent of the cost of the independent medical examination. The Fund avers Rand is not entitled to recover any costs in this case.

After receiving an injury, the employee, if requested by the employer, is required to submit to examination at a reasonable time and place, as often as reasonably requested to a physician, without cost to the employee. Iowa Code § 85.39. If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes the evaluation is too low, the employee “shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee’s own choice” Id. There was no evidence presented at hearing any physician, other than Dr. Manshadi provided an impairment rating in this case. Under the statute, Rand is not entitled to recover the cost of the independent medical examination.

IV. Costs

Rand seeks to recover the cost of the \$100.00 filing fee and \$6.80 cost of service. Alternatively, she could have requested to recover the cost of the Dr. Manshadi’s report itself. Costs may not be assessed against the Fund. Iowa Code §§ 85.64, 85.66; Hannan v. Second Injury Fund of Iowa, 2018 WL 3648112, File No. 5052402 (Iowa Workers’ Comp. Comm’r July 25, 2018).

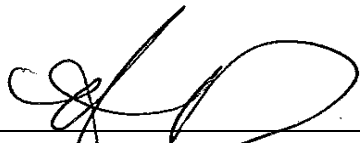
ORDER

IT IS THEREFORE ORDERED, THAT:

The Fund shall pay Rand twenty-two point seven (22.7) weeks of permanent partial disability benefits from the Fund at the stipulated rate of five hundred forty and 26/100 dollars (\$540.26) per week, commencing after the credit of twenty-seven point three (27.3) weeks in benefits due from Riverside Casino & Golf Resort and American Zurich Insurance Company.

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

Signed and filed this 24th day of May, 2021.


HEATHER L. PALMER
DEPUTY WORKERS’
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Nate Willems (via WCES)

Kathryn Johnson (via WCES)

Meredith Cooney (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.