

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DAVID DINATALLI,

Claimant,

vs.

SEDONA STAFFING,

Employer,

and

ACE AMERICAN INSURANCE
COMPANY,

Insurance Carrier,

and

SECOND INJURY FUND OF IOWA,

Defendants.

FILED

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WORKERS' COMPENSATION

File No. 5062834

ARBITRATION DECISION

Head Note Nos.: 1402.40, 1802, 1803,
1804, 2209, 2907

Claimant David Dinatalli filed a petition in arbitration on December 2, 2016, alleging he sustained a cumulative injury to his bilateral hands and arms while working for the defendant, Sedona Staffing Services ("Sedona") on April 26, 2015. Dinatalli also seeks benefits from the Second Injury Fund of Iowa ("the Fund"). Sedona and its insurer, the defendant, Ace American Insurance Company ("Ace"), filed an answer on December 19, 2016. The Fund also filed an answer on December 19, 2016.

An arbitration hearing was held on July 20, 2018, at the Division of Workers' Compensation, in Des Moines, Iowa. Attorney James Neal represented Dinatalli. Dinatalli appeared and testified. Attorney Peter Thill represented Sedona and Ace. Trisha Kaiser appeared and testified on behalf of Sedona and Ace. Assistant Attorney General Tonya Oetken represented the Fund. Joint Exhibits ("JE") 1 through 8, and Exhibits 1 through 10, A through F, and AA through EE were admitted into the record. The record was held open for the receipt of additional exhibits and post-hearing briefs, until August 31, 2018. JE 9 and Exhibits 11 and 12 were received and admitted into the record. The briefs were received and the record was closed.

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

STIPULATIONS

1. An employer-employee relationship existed between Sedona and Dinatalli at the time of the alleged injury.
2. Dinatalli sustained an injury on April 26, 2015, which arose out of and in the course of his employment with Sedona.
3. The alleged injury is a cause of temporary disability during a period of recovery.
4. The alleged injury is a cause of permanent disability.
5. If the injury is found to be a cause of permanent disability, the disability is a scheduled member disability to the bilateral arms.
6. At the time of the alleged injury, Dinatalli's gross earnings were \$490.42 per week, he was single and entitled to two exemptions, and the parties believe his weekly rate is \$321.74.
7. Prior to the hearing Dinatalli was paid the benefits set forth in Exhibit 9.
8. Costs have been paid.

ISSUES

1. Is Dinatalli entitled to temporary benefits?
2. What is the extent of disability?
3. Is Dinatalli permanently and totally disabled under Iowa Code section 85.34(2)(s)?
4. Has Dinatalli sustained an industrial disability with respect to his claim against the Fund?
5. Is Dinatalli entitled to benefits from the Fund?
6. What is the commencement date for permanent partial disability benefits?
7. Is Dinatalli entitled to payment of an independent medical examination?
8. Are Sedona and Ace entitled to a credit for all benefits set forth in Exhibit 9?

9. Should costs be assessed against either party?

FINDINGS OF FACT

Dinatalli is single and lives alone in Oelwein, which is forty-five miles from Waterloo, Iowa. (Transcript, pages 14-15, 98) Dinatalli is a smoker. (JE 5, p. 31) Dinatalli is right-hand dominant. (Tr., pp. 16, 113) At the time of the hearing he was thirty-four. (Exhibit 3, p. 26; Tr., p. 14)

Dinatalli is a high school graduate. (Ex. A, pp. 1, 28; Tr., pp. 14, 95) Dinatalli was enrolled in ROTC for four years during high school, but he did not enlist in the military after high school. (Tr., p. 95) After high school Dinatalli enrolled in criminal justice classes through Hamilton College for one year, but he did not obtain a degree. (Exs. 3, pp. 27-28; CC, p. 37; Tr., pp. 14-15) After leaving school Dinatalli worked for a number of temporary agencies, performing assembly work, production work, and warehouse work. (Ex. 3, p. 27; Tr., p. 73) Dinatalli has experienced operating a fork truck. (Tr. pp. 71-72)

Dinatalli is able to type 96 or 97 words per minute and he is able to use a computer. (Tr., p. 142) Dinatalli is able to reformat computers and use programs, including Excel. (Tr., p. 142; Ex. CC, p. 37)

Dinatalli has sustained a number of preexisting injuries. He sustained a cervical spine injury following a motor vehicle accident in September 2000, and burns to his abdomen and legs after he was hit by a car and drug through his father's yard in 2003. (Tr., pp. 99-100)

In June 2009 Dinatalli underwent right foot bunion surgery. (Ex. 4, p. 33) Dinatalli testified at hearing his foot swells, becomes red, throbs and aches when he stands on it or walks for a long time. (Ex. 4, p. 33; Tr., pp. 13, 60-61) Dinatalli walks on the outside of his right foot to help, and reported his foot symptoms are worse when he wears steel-toed boots. (Tr., p. 62)

In February 2012, Dinatalli was in a motor vehicle accident where his car rolled and went into the ditch outside of work. (Tr., p. 102) Dinatalli sustained a concussion, with ringing in his ears, dizziness, blurred vision, and headaches. (Tr., pp. 102-03) Dinatalli was off work for three months. (Tr., p. 102) Dinatalli testified his employer, Ferguson Enterprises, let him go because of the concussion. (Tr., pp. 143-44) Prior to his motor vehicle accident Dinatalli was able to perform his work at Ferguson Enterprises despite his right foot injury. (Tr., p. 144) At the time of the termination, Dinatalli was earning \$15.65 per hour. (Tr., pp. 71-72)

In September 2013, Dinatalli sustained an injury to his right thumb while working for Manpower at Target Distribution Center as a warehouse worker. (Ex. 4, p. 33; Tr., pp. 69, 103) When Dinatalli was working in the warehouse, several microwaves fell

from the back of a semitrailer and hit his right thumb, bending it down. (JE 5, p. 22; Tr., pp. 28, 68-69)

Richard Naylor, D.O., an orthopedic surgeon, examined Dinatalli. (JE 5, pp. 22-24) Dinatalli underwent magnetic resonance imaging, and the reviewing radiologist listed an impression of "a complete tear of the ulnar collateral ligament which appears to be associated with the avulsion bone fragment and these findings appear to be displaced outside of the abductor pollicis aponeurosis." (JE 4, p. 21) Dr. Naylor performed surgery to repair Dinatalli's right thumb avulsion fracture. (JE 5, p. 25)

Dinatalli received occupational therapy and temporary restrictions of no lifting over five pounds, and no gripping, twisting, or use of his right upper extremity more than thirty repetitions per hour. (JE 5, p. 35-36) During an appointment on February 5, 2014, Dr. Naylor noted Dinatalli

has good range of motion of the thumb, has normal extension, although he has 30 degrees of hyperextension of his other thumb. He does have decreased extension in comparison, but it is still within the normal range. His pinch strength is decreased by 20% to his thumb. Otherwise, he has good range of motion, good strength in all other planes.

(JE 5, p. 38) Dr. Naylor released Dinatalli to full duty without restrictions. (JE 5, pp. 38-39) Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Naylor opined:

[h]e had a previous ulnar collateral ligament of his right thumb at the metacarpal phalangeal joint done. On his last visit, he had normal range of this thumb, he had decreased grip strength by 20%. According to AMA Guidelines, 10-30%, that is one-third, this gives him a 3% upper extremity impairment, a 3% upper extremity impairment equals a 3% hand impairment, a 3% hand impairment equals a 7% thumb impairment.

(JE 5, p. 39) Dinatalli received a workers' compensation settlement for his injury at Target from Manpower. (Tr., p. 29) Manpower did not send Dinatalli back to Target after his work injury. (Tr., p. 104)

On December 10, 2014, Dinatalli applied for a position with Sedona, a temporary employment agency. (Ex. A, pp. 1-4; Tr., pp. 16, 18, 103-04) On his application Dinatalli stated he was willing to drive up to fifty miles and work seven days per week. (Tr., pp. 105, 156) The application asked Dinatalli whether he had any restrictions with bending, twisting, reaching, or lifting. (Tr., p. 156) Dinatalli did not report he had any physical restrictions or problems with his right thumb or foot, and only reported he had a heart condition. (Tr., p. 156)

Sedona placed Dinatalli at Premier Castings on the first shift. (Tr., pp. 18-19) Sedona paid Dinatalli \$9.00 per hour, and he received a raise to \$10.00 per hour within a few months. (Tr., p. 19) Dinatalli testified he had the potential to earn more than \$10.00 per hour based on productivity. (Tr., p. 19)

Dinatalli was assigned to chipping, and after approximately two months he was moved to grinding. (Tr., p. 20) With chipping, Dinatalli chipped parts out of cast iron to remove metal burrs to smooth the parts for tractors. (Tr., p. 20) With grinding, Dinatalli held a thirty to forty-five pound air powered grinder with an eight-inch wheel with both hands and ground off cast iron pieces on the surface of parts. (Tr., pp. 21-26) Dinatalli reported the grinding created a lot of vibration, and a few times he lost his grip with his left hand and the wheel spun and hit his skin. (Tr., pp. 26-27) Dinatalli testified he had some problems gripping with his right hand at Sedona, so he held the tool differently, gripping it with his fingers without using his thumb. (Tr., pp. 31, 150) Dinatalli reported he would put more weight on his left leg while standing and stand on the outer side of his right foot due to foot pain. (Tr., p. 150)

Dinatalli testified in April 2015, he reported he was having problems with his bilateral arms and hands to Kaiser with Sedona. (Tr., p. 33) Kaiser arranged for an appointment for Dinatalli with Dr. Broghammer at Allen Occupational Health in Waterloo. (Tr., pp. 34, 108)

In May 2015, Dinatalli underwent electromyography with Ivo Bekavac, M.D., Ph.D., a neurologist. (JE 6, pp. 110-14) Dr. Bekavac listed an impression of "[b]ilateral carpal tunnel syndrome mild to moderate in degree electrically bilaterally as well as bilateral ulnar neuropathy probably distal to the elbow mild to moderate in degree electrically on the left side and mild on the right side." (JE 6, p. 114) Dinatalli received braces and physical therapy, which he reported did not help. (Tr., p. 34)

In June 2015, Dinatalli's care was transferred to Dr. Naylor. (JE 5, p. 40) Dr. Naylor diagnosed Dinatalli with bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome, and recommended surgery. (JE 5, pp. 41)

On August 18, 2015, Dr. Naylor performed a right carpal tunnel release and a right cubital tunnel release with anterior subcutaneous nerve transposition to the ulnar nerve. (JE 5, pp. 44-45) Following surgery Dinatalli was restricted from working with his right arm. (JE 5, p. 49) Dr. Naylor also imposed left upper extremity restrictions. (JE 5, p. 54) On November 17, 2015, Dr. Naylor performed a left carpal tunnel release and a right cubital tunnel release on Dinatalli. (JE 5, pp. 60-61)

During a follow-up appointment on December 1, 2015, Dr. Naylor noted Dinatalli had returned to full duty with respect to his right elbow, Dinatalli's grip strength was decreased, but less than ten percent, and noted Dinatalli had full range of motion and full strength in his right upper extremity. (JE 5, p. 63) Dr. Naylor found Dinatalli was at maximum medical improvement with respect to his right upper extremity and imposed a

restriction of no work with the left arm. (JE 5, pp. 63-64) On January 14, 2016, Dr. Naylor prescribed physical therapy for range of motion and strengthening of the left upper extremity, and imposed a lifting restriction of five pounds occasionally with the left upper extremity, and restrictions of gripping, twisting, and use of the left upper extremity a maximum of twenty repetitions per hour. (JE 5, pp. 66-67)

Dinatalli performed light duty work at Premier Castings, until Premier Castings ended its contract with Sedona. (Tr., p. 43) After the contract ended, Dinatalli performed light duty work for Sedona in the office. (Tr., p. 43) Dinatalli testified he worked for Sedona through December 2015. (Tr., pp. 17, 44)

Dr. Naylor released Dinatalli to full duty without restrictions and found he was at maximum medical improvement on February 11, 2016. (JE 5, p. 69) After Dr. Naylor released Dinatalli to full duty he contacted Sedona to inquire whether Sedona had any employment and Sedona staff informed him Sedona did not have any work for him. (Tr., p. 112)

On March 11, 2016, Dinatalli attended an appointment with Dr. Naylor complaining of numbness and tingling in the fourth and fifth digits of his left hand. (JE 5, p. 69) Dr. Naylor noted Dinatalli had normal grip strength on the right and his grip strength had decreased ten to fifteen percent on the left, opined Dinatalli had reached maximum medical improvement, and released Dinatalli to full-duty without restrictions. (JE 5, p. 69)

In March 2016, Dinatalli accepted a full-time position with Bertch Cabinets, as a saw operator. (Tr., pp. 73-74, 112-13) Dinatalli ran a digit saw using blueprints in a computer and loaded wood for the saw. (Tr., p. 74) Dinatalli grabbed the wood and stacked the wood on a cart, using both of his arms. (Tr., pp. 74, 113) Dinatalli relayed he did not have difficulty performing his work for Bertch Cabinets, but he noticed a little discomfort in his elbows. (Tr., p. 75)

On May 3, 2016, Dinatalli returned to Dr. Naylor regarding right thumb pain. (JE 5, pp. 70-71; Tr., p. 114) Dinatalli relayed he was having problems with grabbing, gripping, and pain. (Tr., p. 114)

Dinatalli performed full duty work at Bertch Cabinets for approximately two months. (Tr., p. 74) Dinatalli quit working for Bertch Cabinets in May 2016 because he was assigned to the third shift, which did not work with his family's schedule. (Tr., p. 75; Ex. CC, p. 27)

After his employment ended with Bertch Cabinets, Dinatalli applied for work with LaborReady, a temporary employment agency. (Tr., p. 76) LaborReady has operated under various names, including LaborReady, PeopleReady, and TrueBlue. (Tr., p. 115) Dinatalli performed random jobs for LaborReady. (Tr., p. 75) Dinatalli received text messages and he could accept individual jobs, including construction cleanup, secret

shopper, and driving passengers to a construction site in Cedar Rapids. (Tr., p. 76) Dinatalli testified he did not have any difficulty performing his jobs at LaborReady. (Tr., p. 77) Dinatalli performed full duty work for LaborReady.

During an appointment on May 24, 2016, Dr. Naylor documented Dinatalli was complaining of left elbow pain when putting his arm certain positions and bilateral decreased grip strength. (JE 5, p. 75) Dr. Naylor noted Dinatalli's grip strength had decreased by twenty percent on the left, but he had good range of motion and strength, and he kept Dinatalli on full duty. (JE 5, p. 75)

On June 27, 2016, Dinatalli returned to Dr. Naylor complaining of pain when grasping with his right thumb, discoloration, and swelling. (JE 5, p. 76) Dr. Naylor assessed Dinatalli with a questionable re-injury to his Gamekeeper's ulnar collateral ligament, placed Dinatalli on full-duty status, and ordered magnetic resonance imaging. (JE 5, p. 77)

Dinatalli testified LaborReady sent him to work for Windows by Pella ("Pella"). (Tr., p. 77) The record reflects Dinatalli was working for Manpower. (Ex. EE) Pella hired Dinatalli as a regular, full-time employee in August 2016. (Tr., pp. 77, 116; Exs. 8, p. 72; CC, p. 27) As part of his hiring at Pella, Dinatalli underwent a physical, which he passed. (Tr., p. 117) Dinatalli did not receive any accommodations for his right foot, right thumb, wrists, or elbows while working for Pella. (Tr., pp. 117-18) Pella paid Dinatalli \$12.00 per hour and assigned Dinatalli to work in the warehouse in shipping and receiving, loading and unloading trucks, and assisting with window deliveries and installations. (Tr., pp. 78-79, 82)

Dinatalli testified some of the windows were fairly long and he had to grab and hold fifty to sixty windows, and carry them up onto a truck. (Tr., p. 79) Dinatalli relayed, "[d]oing that repetitious stuff is when I realized, you know, with my elbows, there was something wrong. So that's when I brought to your attention about getting medical – I guess assistance or whatever." (Tr., p. 79) Dinatalli's job description provided he must be able to "lift a minimum of 100 [pounds]," in addition to other requirements (Ex. E, p. 48) Pella required Dinatalli to have a chauffeur's license to drive the trucks. (Tr., pp. 82, 118) Dinatalli passed a DOT physical to obtain his license and at the time of the hearing his chauffeur's license was still valid. (Tr., pp. 82, 118)

August 2, 2016, Dinatalli sustained an injury to his right shoulder while unloading a truck. (Tr., p. 80) Dinatalli received medical treatment and performed light-duty work for Pella for a few weeks. (Tr., p. 80) Dinatalli received a cortisone shot and was released to full duty without restrictions. (Tr., p. 81)

Dinatalli attended an appointment with Dr. Naylor on August 3, 2016. (JE 5, p. 80) Dr. Naylor found Dinatalli was at maximum medical improvement with respect to his right elbow and wrist, noting he had full range of motion and full strength, and ordered electromyography for the left upper extremity, noting he had decreased grip strength by

about ten to fifteen percent on the left, but otherwise he had full range of motion and strength. (JE 5, p. 80)

On August 15, 2016, Dr. Bekavac performed nerve conduction studies on Dinatalli and sent a letter to Dr. Naylor, listing an impression of:

1. Left carpal tunnel syndrome mild to moderate in degree electrically, in comparison to previous study that has been improvement electrodiagnostically.
2. Left ulnar neuropathy, chronic, probably at the elbow mild in degree electrically, in comparison to previous study there has been improvement.

(JE 5, p. 84)

Dinatalli attended a follow-up appointment with Dr. Naylor on September 15, 2016. (JE 5, p. 86) Dr. Naylor examined Dinatalli, and found Dinatalli has "weakness on the right side but decreased by less than 10%. Left side is decreased by about 20%," opined Dinatalli had reached maximum medical improvement, and released him to full duty without restrictions. (JE 5, p. 86) At the time he was released to full duty Dinatalli was employed by Pella. (Tr., p. 118)

Dr. Naylor issued an impairment rating on September 21, 2016, as follows:

[h]is last clinic visit was on 09/15/2016. He presented for followup of his bilateral upper extremities. EMG showed increasing function of his nerves. He is status post bilateral carpal tunnel release, bilateral cubital tunnel release. Otherwise, his right side has decreased grip strength but less than 10%, which is a 0% impairment rating. The left side has a decreased grip strength which is about 20%, which is 10-30 is a 10% upper extremity impairment, since this is half, we will give him a 5% upper extremity impairment to his left upper extremity for decreased grip strength of 20%. Otherwise, he is to return to full duty status without restrictions. Made at maximum medical improvement on that date of 09/15/2016.

(JE 5, p. 89)

During a follow-up appointment with Dr. Naylor on September 26, 2016, concerning his right thumb pain, Dr. Naylor reviewed Dinatalli's magnetic resonance imaging which showed no evidence of a tear with some cystic changes at the base of the first proximal phalanx. (JE 5, p. 93) Dr. Naylor found Dinatalli could perform full duty work and stated that if he had continued problems he would refer him to a hand surgeon for a second opinion. (JE 5, p. 93)

Dinatalli sought workers' compensation benefits from Manpower for his shoulder strain while he was working at Pella. (Ex. EE) On November 30, 2016, the Workers'

Compensation Commissioner approved a compromise settlement agreement between Manpower and Dinatalli where Manpower agreed to pay Dinatalli \$8,500.00. (Ex. EE, p. 63)

Dinatalli continued to complain of left wrist pain, a tender and aching feeling, and right elbow pain with aching and throbbing. (JE 5, p. 95) Dr. Naylor ordered electromyography for both upper extremities. (JE 5, p. 96) During an appointment on January 18, 2017, Dr. Naylor documented electromyography showed mild findings, but Dinatalli complained of having a snapping nerve over the medial aspect of the right elbow. (JE 5, p. 98) Dr. Naylor recommended a referral to an upper extremity specialist, and released Dinatalli to full duty work. (JE 5, p. 98)

Dinatalli continued to work for Pella until February 3, 2017. (Ex. 8, p. 72) Dinatalli testified at hearing his employment with Pella ended because "of not being able to full-on perform the duties. I complained or mentioned to my supervisor at the time, and also my father was pretty sick. He was in and out of the hospital quite frequently. So the hiring manager, the boss, didn't like the fact, you know, that I would leave early on certain days or whatnot. That was out of my control" (Tr., pp. 81, 120) During his deposition Dinatalli testified he left Pella because he had to miss work or leave early due to his father's illness because he needed to take him to appointments and to the hospital, and his boss told him Pella needed a more reliable employee. (Ex. CC, p. 27) During his employment with Pella, Dinatalli's only work restrictions were for his shoulder injury. (Tr., p. 119)

After leaving Pella Dinatalli rejoined LaborReady in March or April 2017, and performed odd jobs. (Tr., pp. 83-84, 120) Dinatalli worked for Pete's Construction doing cleanup and sweeping of job sites and other construction-related activities. (Tr., pp. 120-21) While working for Pete's Construction Dinatalli was not under any work restrictions. (Tr., p. 121)

Dinatalli posted an advertisement on Craigslist, "looking for random miscellaneous work, whether it be yardwork, mechanic work, whatnot." (Tr., p. 88) Dinatalli reported a man living in Cedar Falls contacted him and he performed "cleanup work, yardwork, painting, whatnot," twenty-five to thirty hours per week prior to his surgeries with Dr. Paulson. (Tr., pp. 88-89) Dinatalli relayed his brother took over the work when he underwent surgery in June 2017. (Tr., pp. 88-89) Dinatalli testified he did not have any problems performing the work for the man in Cedar Falls until the man had him trenching in the yard for landscaping, and his brother finished the work. (Tr., pp. 89, 134)

In March 2017, Benjamin Paulson, M.D., an orthopedic surgeon specializing in the hand and upper extremity, examined Dinatalli and diagnosed him with bilateral carpal tunnel syndrome, status post bilateral carpal tunnel releases, cubital tunnel syndrome, status post bilateral cubital tunnel releases, and bilateral ulnar nerve

subluxation with left wrist pain. (JE 8, p. 135) With respect to future treatment, Dr. Paulson opined:

[d]ue to the fact that Mr. Dinatalli has subluxing nerves at bilateral elbows, this is usually a fairly painful condition that causes elbow pain and can also cause numbness and tingling in the ulnar nerve distribution. The subluxation of the ulnar nerve developed independent of his current employment or his shoulder injury. The only adequate treatment for subluxing ulnar nerve is an anterior transposition, and securing the nerve in place. I realize that it appears that an ulnar nerve was transposed before, but unfortunately, sometimes these do break down and start subluxing postoperatively. I believe his ulnar nerve subluxing is a direct result of a complication from his surgery. The nerve conduction studies are improved in general from his preoperative nerve conduction study, and I do believe the nerves were adequately released. I do not see needing to any further surgical releases of nerves. He does have some left wrist pain, but I cannot pinpoint the cause of this and have no further treatment to offer him for his left wrist pain. Of course, Mr. Dinatalli could refuse to have surgery and just leave the nerves subluxing as they are. He would probably continue to be symptomatic in his current state if he does not have further treatment.

(JE 8, p. 135) Dr. Paulson opined Dinatalli had not reached maximum medical improvement and he would likely benefit from additional surgery, but if he refused surgery, he would be at maximum medical improvement. (JE 8, p. 135) Dinatalli wanted surgery, and Dr. Paulson released him to return to work without restrictions. (JE 8, p. 146) Dr. Naylor agreed with Dr. Paulson's recommendation of additional surgery. (JE 5, p. 102)

On June 9, 2017, Dr. Paulson performed a left cubital tunnel release with anterior transposition of the ulnar nerve. (JE 8, p. 148) Dr. Paulson imposed a restriction of no use of the left hand for four to six weeks following surgery. (JE 8, p. 149) During a follow-up appointment on June 23, 2017, Dr. Paulson imposed a lifting restriction of five pounds with the left upper extremity. (JE 8, pp. 151-52) Dinatalli continued to complain of stiffness and sensitivity following surgery. (JE 8, p. 154) Dr. Paulson encouraged Dinatalli to use ice and massage, ordered occupational therapy, and imposed a twenty-five pound lifting restriction with the left upper extremity, and discussed possible treatment for the right upper extremity. (JE 8, p. 154)

During an appointment on September 8, 2017, Dr. Paulson diagnosed Dinatalli with right cubital tunnel syndrome with subluxing nerve, discussed treatment options, including surgery, and released Dinatalli without restrictions. (JE 8, p. 156) Dinatalli elected to proceed with surgery. (JE 8, p. 156)

On October 2, 2017, Dinatalli attended an appointment with Dr. Paulson, complaining of “gradually worsening pain shooting from left elbow to left thumb with certain movements.” (JE 8, p. 158) Dr. Paulson noted, “I do not have an exact cause of this new pain, but likely due to scar or adhesions with left elbow. Will restart therapy to specific work on scar massage/heat/massage,” and imposed no work restrictions. (JE 8, pp. 158-59)

Dr. Paulson performed a right cubital tunnel release with anterior transposition of the ulnar near on October 13, 2017. (JE 8, p. 160) Following surgery Dr. Paulson imposed a restriction of no use of the right hand. (JE 8, p. 161)

Dinatalli continued to complain of left elbow pain. (JE 8, p. 163) Dr. Paulson noted he no longer had a subluxing nerve, but complained of occasional shooting pain with the left, imposed a thirty pound lifting restriction with his bilateral upper extremities, and stopped therapy because it was aggravating his condition. (JE 8, pp. 163-64)

Dr. Bekavac performed electromyography on Dinatalli’s left upper extremity on November 30, 2017. (JE 8, p. 165) Dr. Bekavac listed an impression of:

1. Median neuropathy at or distal to the wrist consistent with carpal tunnel syndrome mild in degree electrically. In comparison to previous study there has been worsening.

2. Ulnar neuropathy probably distal to the elbow mild in degree electrically. In comparison to previous study there has been worsening.

(JE 8, p. 165) During a follow up appointment on December 8, 2017, Dr. Paulson noted the nerve conduction studies showed some mild slowing of the ulnar and median nerves, he ordered magnetic resonance imaging of the left elbow, and he imposed a lifting restriction of forty pounds with bilateral arms. (JE 8, pp. 168-69)

After receiving the imaging, Dr. Paulson recommended additional surgery. (JE 8, pp. 171-72) Dr. Paulson diagnosed Dinatalli with a lesion of the ulnar nerve at the left elbow and he performed a left cubital tunnel release with exploration of the ulnar nerve at the left elbow and lysis of adhesions on January 26, 2018. (JE 8, p. 176) Following surgery Dr. Paulson ordered no use of the left arm. (JE 8, p. 177) On February 12, 2018, Dr. Paulson imposed a lifting restriction of five pounds with the left arm. (JE 8, pp. 179-80)

Following surgery Dinatalli complained of a burning sensation when touching his left elbow, extending up to his wrist. (JE 8, p. 181) Dr. Paulson encouraged use of heat and massage, ordered occupational therapy, and imposed no restrictions. (JE 8, pp. 182-83)

In March 2018, Dinatalli performed light duty work for Sedona. (Tr., pp. 17-18, 129; Ex. B, p. 9) Dinatalli worked for Sedona in the office and at the food pantry in

Independence. (Tr., p. 87; Exs. 7, p. 71; 9, p. 73) Dinatalli assisted customers, and performed filing and data entry. (Tr., p. 91)

On April 19, 2018, Dinatalli returned to Dr. Paulson complaining his elbow pain became worse during physical therapy. (JE 8, p. 184) Dr. Paulson noted he had nothing further to offer Dinatalli, found he was at maximum medical improvement, released him with no restrictions, and encouraged Dinatalli to use heat and massage. (JE 8, pp. 186-87) Dinatalli testified Sedona did not offer him any additional work after Dr. Paulson released him without restrictions. (Tr., p. 91)

Dinatalli testified he performed odd jobs for People Ready in the spring of 2018 until May 2018. (Tr., p. 87) Dinatalli's counsel inquired at hearing, and he responded:

Q. And is there any reason why you haven't worked for them since May of 2018?

A. Financial situation. Like I said, living in Oelwein and they're located in the Cedar Falls area. I just couldn't afford driving, you know, all the way to the Waterloo area.

(Tr., pp. 87-88)

On April 16, 2018, Dr. Paulson issued an impairment rating using the AMA Guides, as follows:

[u]sing figure 16-28 on page 467, and figure 16-31 on page 469, he has normal range of motion of the wrist so he gets no impairment due to loss of range of motion of the wrist. He also has normal range of motion of the elbow using figure 16-34 on page 472, as well as, using figure 16-37 on page 474. Therefore he has 0% impairment on both the right and left upper extremities due to loss of range of motion. The patient still has some numbness and tingling but it is more pronounced in the ulnar nerve distribution. Using table 16-15 on page 492, the ulnar nerve has a maximum of 7% for sensory deficit for pain. Using table 16-10 section A on page 482, with the right side I would estimate that he is at category III for the right. I estimate he is at a 30% sensory deficit but approximately a 50% deficit for the left. Multiplying 30% x 7 would round to a 2% impairment for the right upper extremity due to the ulna nerve and multiplying 50% by 7 would round to a 4% of the ulna nerve for the left. Therefore he gets a 2% impairment for numbness and tingling of the right ulna nerve and a 4% impairment of the left upper extremity due to numbness and tingling of the left ulna nerve.

With a section on carpal tunnel syndrome on page 495, I would put him in a category II and estimate that he [sic] at a 1% for both the right

and the left due to residual minimal symptoms. Combining the 2 with the 1 on the right, and the 4 and 1 on the left, total is a final impairment of 3% of the right upper extremity and a 5% of the left upper extremity.

Therefore the patient's final impairment is 3% of the right upper extremity and 5% of the left upper extremity. In addition, he has no permanent restrictions, and he is released to full duty. I also anticipate no further need for treatment.

(JE 8, p. 189) Under Table 16-3, page 439 of the AMA Guides, Dinatalli's bilateral upper extremity impairment converts to a five percent whole person impairment.

Farid Manshadi, M.D., a physiatrist, conducted an independent medical examination for Dinatalli on June 11, 2018. (Ex. 1) Dr. Manshadi reviewed Dinatalli's medical records and examined him. (Ex. 1) Using the AMA Guides, Dr. Manshadi opined:

[s]pecifically, for the right median nerve using Table 16-11, Mr. Dinatalli falls under Grade 4 and as such, I assign twenty-five (25) percent motor deficit. The maximum motor deficit for the right median nerve below the mid-forearm is at 10 and as such I assign three (3) percent impairment of the right upper extremity.

In regard to the right median nerve sensory, I used Table 16-10 and I assign twenty (20) percent sensory deficit, and the maximum sensory deficit for the median nerve below the forearm is at thirty-nine (39) and as such, I assign eight (8) percent impairment of the right upper extremity.

Then using the Combined Values Chart, Page 604 the total impairment for the right upper extremity as a result of the median nerve neuropathy or carpal tunnel syndrome will be eleven (11) percent impairment of the right upper extremity.

In regard to the right ulnar nerve, I assign twenty (20) percent motor deficit. The maximum ulnar nerve below the mid-forearm is at thirty-five (35) and as such, I assign seven (7) percent impairment of the right upper extremity.

In regard to the sensory for the ulnar nerve on the right side, I assign thirty (30) percent sensory deficit using Grade 3. The maximum sensory deficit for the ulnar nerve below the mid-forearm is at seven (7), and as such, I assign two (2) percent impairment of the right upper extremity.

Then using the Combined Values Chart, the total impairment for the right upper extremity due to ulnar nerve injury at the cubital tunnel would be ten (10) percent.

Then using the combined Values Chart, Page 604 the total impairment as a result of the right median and ulnar nerve injuries would be at twenty (20) percent.

On the left side, for the median nerve motor deficit, Mr. Dinatalli falls under Grade 4 and I assign fifteen (15) percent motor deficit on Table 16-11. The maximum median nerve below the mid-forearm is ten (10) and as such, I assign two (2) percent impairment of the left upper extremity for median motor.

For the left median sensory deficit, Mr. Dinatalli falls under Grade 4 and I assign twenty (20) percent impairment for sensory deficit. The maximum sensory deficit below the mid-forearm is thirty-nine (39), and as such I assign eight (8) percent impairment of the left upper extremity.

Then using the Combined Values Chart, Page 604 the total impairment for the left upper extremity as a result of the median nerve neuropathy is ten (10) percent.

In regard to the left upper extremity ulnar nerve injury impairment, for the motor, I assign the same as for the right upper extremity, which is seven (7) percent impairment of the left upper extremity.

For sensory for the left ulnar nerve, I assign forty (40) percent deficit or three (3) percent impairment of the left upper extremity.

Again using the Combined Values Chart, the total impairment as a result of the left ulnar nerve motor and sensory deficit would be ten (10) percent. Then using the Combined Values Chart, Page 604, the total impairment as a result of the left median and ulnar nerve injuries would be at nineteen (19) percent.

(Ex. 1, pp. 4-6) Dr. Manshadi recommended restrictions of avoiding repetitious gripping activities with either hand, to avoid use of any vibratory tools, and avoid repetitious flexion and extension of the elbows. (Ex. 1, p. 6)

With respect to Dinatalli's claim against the Fund, Dr. Manshadi assigned a seven percent impairment of the right thumb or three percent impairment of the right hand under Table 16-1, or a three percent impairment of the right upper extremity. (Ex. 1, p. 6) Dr. Manshadi also assigned five percent impairment to the right lower extremity related to right bunion surgery with a reduced range of motion in the right big toe. (Ex. 1, p. 6)

Sedona and Ace sent a copy of Dr. Manshadi's independent medical examination to Dr. Paulson, and asked him to respond. (JE 8, p. 190) Dr. Paulson

issued a letter on July 11, 2018, noting he and Dr. Manshadi had slight differences in range of motion, noting:

...I found the patient had 140 or greater of elbow flexion bilaterally, and Dr. Manshadi found there is less than this and he gave him an impairment due to loss of elbow flexion.

3. The biggest difference appears to be in the nerve findings beginning with the median nerve based off the nerve conduction study on November 30, 2017. Of note, during this nerve study he was found to have mild findings for carpal and cubital tunnel syndrome. This showed a decrease in speed of the nerves, but it was found to have both median and ulnar nerves had normal amplitude. Please also note that the EMG results were negative for any muscle findings. Because the EMG findings were normal, I would have to argue that the nerves are still instructing muscles to fire well. Therefore, I think it is completely inappropriate to give any loss of strength due to nerve findings with a normal EMG. This is also based off of my physical exam with the patient that he has good strength bilaterally. In addition with the carpal tunnel, Dr. Manshadi based his findings different than mine. Please reference the section on carpal tunnel syndrome on page 495. I placed Mr. Dinatalli in category [sic] due to the fact that he had some mild findings on nerve conduction study. I still believe this is completely appropriate. Unfortunately Dr. Manshadi put the patient in category 1. I disagree with that due to the fact that he had a normal EMG and only mild findings on the nerve conduction study. Also the patient has normal sensation with the median nerve distribution. Therefore, I think it is more appropriate with my impairment rating placing Mr. Dinatalli in category 2 and gave him a 1% impairment of both the right and the left for his carpal tunnel syndrome. Again this is due to the fact he has minimal symptoms from his carpal tunnel.

Also with the ulnar nerve I greatly disagree with Dr. Manshadi. Again Dr. Manshadi he gave a large impairment due to muscle findings. Again with a normal EMG I believe this is completely appropriate, and with no motor findings on EMG I think it is more appropriate to give a 0% impairment. I though do somewhat agree with Dr. Manshadi's sensory agreement and the fact that Mr. Dinatalli does have loss of sensation partially in the ulnar nerve distribution. We did both give similar impairments for loss of pain and sensation in bilateral ulnar nerve distributions which is a maximum of 7% for both the right and the left upper extremities. Again I gave the patient a 4% impairment of the left for the ulnar nerve and a 2% impairment of the right ulnar nerve.

Please note the patient only needed a repeat nerve conduction study on the left in November 2017 and was not required to be repeated on the

right. Please also reference his nerve conduction study on January 12, 2017, which found minimal findings on the right and a normal EMG exam as well.

(JE 8, pp. 190-91) Dr. Paulson noted he had nothing further to offer Dinatalli, but he thought it would be reasonable for Dinatalli to see another physician regarding his complaints of ongoing pain, and recommended he see Dr. Han. (JE 8, p. 191)

Dr. Paulson opined Dr. Manshadi's restrictions of avoiding repetitive gripping activities with either hand, avoiding the use of vibratory tools, avoiding repetitive flexion and extension of the elbows, and to avoid any strong or sustained pinching with the right do "not appear to be backed up by any objective findings on the IME . . . [and seem] to be only based off the subjective statements that Mr. Dinatalli provided to Dr. Manshadi." (JE 8, p. 191) Dr. Paulson reconfirmed he imposed no restrictions based on his observations. (JE 8, p. 191)

Dr. Manshadi issued a rebuttal report on August 1, 2018, stating there had been a worsening in Dinatalli's median and ulnar neuropathy noted in electromyography performed on November 30, 2017, and he disagreed with Dr. Paulson's methodology and lack of weakness findings on examination. (Ex. 11, p. 85)

Before his evaluation with Dr. Manshadi in May 2018, Dinatalli had not received any permanent work restrictions for his right foot. (Tr., p. 138) Dinatalli has not received any treatment for his right foot for some time. (Tr., p. 139) After he received surgery on his right foot, Dinatalli continued to work at a number of different jobs. (Tr., p. 139) Dinatalli was able to perform his duties for Sedona at the time of his bilateral upper extremity injury despite his prior right foot injury and surgery. (Tr., p. 14)

After his September 2013 right thumb injury Dinatalli continued to work after recovering from surgery. (Tr., p. 139) Dr. Naylor released him to return to work without restrictions on February 5, 2014. (Tr., p. 139) Dinatalli was able to do his job at Sedona at the time of his bilateral upper extremity injury despite his prior right thumb injury and surgery. (Tr., p. 140) No physician gave Dinatalli any permanent restrictions for his right thumb until Dr. Manshadi examined him in 2018. (Tr., p. 140)

Dinatalli testified while working and performing his job duties, over time he noticed "certain amount of pressure on that part of the foot would cause, you know, such discomfort and a way to adapt to reduce the pressure on my right foot. Same with my thumb and gripping and grabbing." (Tr., p. 140) In May 2016, Dinatalli returned to Dr. Naylor because he was experiencing symptoms in his right thumb. (Tr., p. 141) Dinatalli told Dr. Naylor his symptoms had increased in his thumb. (Tr., p. 141) Dinatalli believed his work at Sedona of gripping and holding was making his thumb condition worse. (Tr., p. 141)

Dinatalli testified the surgeries performed by Dr. Paulson did not help his condition. (Tr., p. 36) Dinatalli relayed his left arm is very sensitive and if he touches the area he experiences a shooting and burning sensation in his elbow that goes down to his wrist and sometimes across the top of his left forearm. (Tr., p. 37) Dinatalli reported he also has similar sensations on the right side, but his right side is not as sensitive as the left side. (Tr., p. 37) Dinatalli relayed it is difficult for him to reach in front of himself or up, and he feels a pulling sensation into his armpits, and if he holds his arms up for a certain amount of time his arms “get the sensation of falling asleep or no circulation. And that’s even out or even straight out.” (Tr., p. 38) Dinatalli reported:

[s]o I just usually – if I want to grab this box of napkins here, I’ll grab it with my arm bent as opposed to, you know, a full extension of grabbing because a full extension will make – make that pain worse in both arms, and it eventually goes numb here, but in the left arm it makes almost the whole thing go – go numb.

So I just try to work with the injury by grabbing things with bent arms as opposed to full extending them in any direction.

(Tr., p. 39) Dinatalli relayed he experiences numbness in his right pinkie and right ring fingers most of the time, which is worse with extension. (Tr., p. 39)

Dinatalli testified when he holds the steering wheel while driving both of his hands go numb and he cannot feel them, so he adjusts and holds the steering wheel at the bottom with his thumb, index, and middle finger and rests his arm on his knee, and alternates his arms while he drives. (Tr., pp. 39-40, 149)

On his left side, Dinatalli has a bulge where he received surgery and he reported:

the bulge in this is causing that shooting pain down to my wrist and formed some kind of lump here in the wrist, and then that affects my thumb.

It will go numb here in the tip and the side of my middle finger on the left hand and then the tip of my right index finger. And that’s initially where it starts before it all ends up going numb.

(Tr., p. 40) Dinatalli reported he has had the sensations in his arms since Dr. Paulson performed the first round of surgeries on his right and left arms. (Tr., p. 41)

Dinatalli testified the sensitivity in his bilateral upper extremities affects his ability to sleep because the throbbing in both elbows wakes him up at night. (Tr., p. 64) Dinatalli relayed the throbbing extends from the incision and feels “like it wants to explode kind of from the inside out.” (Tr., p. 64) Dinatalli reported “[s]o I’m constantly moving and adjusting, you know, at a comfortable position to rest my arms to be able to sleep because as sensitive – and the left arm is more sensitive than the right elbow. Because with this, you barely touch it, so I would have to find a spot where I can rest it

where nothing is touching the region of my elbow at all at a comfortable position to be able to sleep.” (Tr., pp. 64-65)

Dinatalli testified he has difficulty grabbing, lifting, and carrying things with both of his arms. (Tr., p. 67) Before his work injury Dinatalli enjoyed playing the guitar, which he cannot tolerate because of the pain in his wrist and numbness in his thumb, index, and ring finger. (Tr., p. 67) Dinatalli relayed repetitious grabbing, gripping, and pinching cause pain and swelling into the joint of his right thumb. (Tr., p. 59) At hearing Dinatalli testified he is able to play his PlayStation for a couple of hours at a time with his sons, primarily using his thumbs. (Tr., pp. 142-43)

Dinatalli reported at hearing he was not taking any medication for his bilateral arm pain. (Tr., p. 65) To bring his symptoms under control he tries to rest his arms in his lap or on his leg. (Tr., pp. 65-66)

Dinatalli was not working at the time of the hearing. (Tr., p. 92) Dinatalli testified since employment ended with Sedona, he has applied for work with Remedy Staffing in Waterloo, O'Reilly Auto Parts, a music station, Dollar General, McDonald's, and Casey's in Oelwein. (Tr., p. 92) Dinatalli has contacted Iowa Vocational Rehabilitation Services, but he cancelled his appointment the day before the hearing. (Tr., p. 93)

Two expert vocational witnesses have provided vocational opinions in this case, Carma Mitchell, C.D.M.S., C.R.C. and Rene Haigh, M.S., C.R.C. Mitchell interviewed Dinatalli and opined Dinatalli has lost access to 91.63 percent of all occupations he had prior to his work injury. (Ex. 2) Haigh did not interview Dinatalli and opined he has sustained no loss of access to occupations. (Ex. AA) I do not find either opinion helpful or persuasive.

CONCLUSIONS OF LAW

I. Applicable Law

This case involves several issues, including the issues of entitlement to temporary benefits, refusal of suitable work, extent of disability, credits, recovery of the cost of an independent medical examination, and interest under Iowa Code sections 85.33, 85.34, 85.39, and 535.3. In March 2017, the legislature enacted changes (hereinafter “Act”) relating to workers’ compensation in Iowa. 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 85.33, 85.34, and 85.39 apply to injuries occurring on or after the effective date of the Act. This case involves an injury occurring before July 1, 2017. Therefore, the provisions of the new statute involving entitlement to temporary partial, temporary total, and healing period benefits, refusal of suitable work under Iowa Code sections 85.33 and 85.34, extent of disability under Iowa Code section 85.34, credits under Iowa Code section 85.34, and recovery of the cost of an

independent medical examination under Iowa Code section 85.39 do not apply to this case. The calculation of interest is governed by Gamble v. AG Leader Tech., File No. 5054686 (App. Apr. 24, 2018). (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. Commencement Date for Permanency

Dinatalli contends the commencement date for permanency is May 31, 2018. Defendants did not address the issue of commencement for permanency in the defendants' post-hearing briefs.

At the time of Dinatalli's work injury, Iowa Code section 85.34(2) (2015) provided:

1. *Healing period.* If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the first day of disability after the injury, and until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

2. *Permanent partial disabilities.* Compensation for permanent partial disability shall begin at the termination of the healing period provided in subsection 1. . . .

In Evenson v. Winnebago Indus., Inc., 818 N.W.2d, 360, 372-74 (Iowa 2016), the Iowa Supreme Court held the healing period set forth in the statute lasts until the claimant has returned to work, has reached maximum medical improvement, or until the claimant is medically capable of returning to substantially similar employment, "whichever occurs first."

The parties stipulated Dinatalli sustained a work injury on April 26, 2015, which arose out of and in the course of his employment with Sedona. Exhibit 7 is the employee check history for Dinatalli's employment with Sedona. The record supports Dinatalli returned to work the week ending Sunday, May 10, 2015, and he worked twelve hours. (Ex. 7, p. 70) Under Evenson, when Dinatalli returned to work, permanency commenced. The record supports Dinatalli returned to work by at least

May 10, 2015. (Ex. 7, p. 70) Under Evenson, I find the commencement date for permanency is May 10, 2015.

III. Extent of Disability – Bilateral Upper Extremities

The parties stipulated Dinatalli sustained an injury on April 26, 2015, which arose out of and in the course of his employment with Sedona, and that the injury caused a temporary and permanent disability to his bilateral arms. Dinatalli contends he is permanently and totally disabled under Iowa Code section 85.34(2)(s). Sedona and Ace reject his assertion.

Permanent partial disabilities are divided into scheduled and unscheduled losses. Iowa Code § 85.34(2) (2015). If the claimant's injury is listed in the specific losses found in Iowa Code section 85.34(2)(a)-(t), the injury is a scheduled injury and is compensated by the number of weeks provided for the injury in the statute. Second Injury Fund v. Bergeson, 526 N.W.2d 543, 547 (Iowa 1995). "The compensation allowed for a scheduled injury 'is definitely fixed according to the loss of use of the particular member.'" Id. (quoting Graves v. Eagle Iron Works, 331 N.W.2d 116, 118 (Iowa 1983)). If the claimant's injury is not listed in the specific losses in the statute, compensation is paid in relation to 500 weeks as the disability bears to the body as a whole. Id.; Iowa Code § 85.34(2)(u). "Functional disability is used to determine a specific scheduled disability; industrial disability is used to determine an unscheduled injury." Bergeson, 526 N.W.2d at 547.

This case involves an injury to Dinatalli's bilateral upper extremities. The schedule provides a maximum award of 500 weeks for an injury to both arms, both hands, both feet, both legs, or both eyes as the result of a single accident, unless the employee is permanently and totally disabled under Iowa Code section 85.34(3). Iowa Code § 85.34(2)(s); Simbro v. Delong's Sportswear, 332 N.W.2d 886, 889 (Iowa 1983). Thus, it is first necessary to first determine the degree of functional loss. Simbro, 332 N.W.2d at 889. If simultaneous injuries cause a total loss of earning capacity, then the claimant is entitled to an award of permanent total disability benefits. Iowa Code § 85.34(2)(s). If the loss of earning capacity is less than total, then the extent of permanent disability is measured functionally as a percentage of loss of use for each extremity, after being converted to a percentage of the whole person and combined. Riley v. Eaton Corp., File Nos. 5037054, 5037055 (Arb. April 27, 2012).

When considering the extent of disability for a scheduled member, the trier of fact may consider medical and nonmedical evidence. Sherman v. Pella Corp., 576 N.W.2d 312, 322 (Iowa 1998). Therefore, lay testimony may be used to buttress medical testimony when determining the extent of an employee's injuries. Id.

It is necessary to consider Dinatalli's functional impairment, as addressed by the expert witnesses in this case, Drs. Naylor, Paulson, and Manshadi. The commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses."

Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (1997). 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).

Dr. Naylor, an orthopedic surgeon, provided treatment, including surgery on Dinatalli over an extended period of time from June 2015 through September 2016. (JE 5) Dr. Naylor performed bilateral carpal tunnel and cubital tunnel releases on Dinatalli in August and November 2015. (JE 5, pp. 44-61) Dr. Naylor issued an impairment rating on September 21, 2016, finding Dinatalli reached maximum medical improvement on September 15, 2016, assigning a zero percent impairment rating to the right, and a five percent permanent partial impairment rating to the left upper extremity, and releasing Dinatalli to return to work without restrictions. (JE, p. 89) Dr. Naylor did not examine Dinatalli after May 1, 2017, when he agreed with Dr. Paulson's recommended treatment.

Dr. Paulson, an orthopedic surgeon specializing in hand and upper extremity conditions, also provided treatment to Dinatalli, including surgery over an extended period of time from March 2017 through April 2018. (JE 8) Dr. Paulson performed a left cubital tunnel release with anterior transposition of the ulnar nerve on June 9, 2017, and a right cubital tunnel release with anterior transposition of the ulnar nerve on October 13, 2017. (JE 8, pp. 148, 160) Dr. Paulson performed a left cubital tunnel release and exploration of the ulnar nerve at the left elbow and lysis of adhesions on January 26, 2018. (JE 8, p. 176) Using the AMA Guides, on April 16, 2018, Dr. Paulson assigned three percent impairment rating to the right upper extremity, and a five percent impairment rating to the left upper extremity. (JE 8, p. 189) This results in a five percent whole person impairment under page 439 of the AMA Guides.

Dr. Manshadi, a physiatrist retained to conduct an independent medical examination of Dinatalli only, assigned a twenty percent impairment to the right upper extremity, and a nineteen percent impairment to the left upper extremity using the AMA Guides. (Ex. 1, pp. 3-4)

I find the opinion of Dr. Paulson to be the most persuasive. Dr. Paulson is a treating orthopedic surgeon specializing in hand and upper extremity conditions. Dr. Manshadi is a physiatrist retained by Dinatalli to conduct an independent medical examination only. Dr. Paulson's training is superior to Dr. Manshadi's training. Dr. Paulson treated Dinatalli over a period of time, and he performed multiple surgeries on Dinatalli. Dr. Manshadi has not treated Dinatalli and examined him on one occasion for purposes of an independent medical examination.

Dr. Manshadi challenges Dr. Paulson's findings, relying on electromyography results from November 30, 2017. Dr. Paulson noted while the November 30, 2017 study showed mild findings for carpal and cubital tunnel syndrome, and a decrease in speed of the nerves, "both the median and ulnar nerves had normal amplitude" and the "results were negative for any muscle findings," it was inappropriate to give any loss of strength, noting his examination showed Dinatalli had good strength bilaterally. (JE 8, p. 190) Moreover, as noted by Dr. Paulson Dinatalli only underwent left upper extremity electromyography in November 2017. During Dinatalli's appointment on January 18, 2017, Dr. Naylor noted electromyography for the bilateral upper extremities ordered in November 2016, "still show just mild findings. At this time, they are not worse. They may be a little better." (JE 5, p. 98)

After his work injury at Sedona Dinatalli worked for LaborReady, Bertch Cabinets, Manpower, Pella, and as a hired hand performing yardwork and mechanic work for an individual without restrictions. Dinatalli's position at Pella required him to lift up to 100 pounds. Dinatalli ended his employment with Bertch Cabinets and Pella because of circumstances related to his family and unrelated to his work injury with Sedona. I do not find Dinatalli has established he has sustained a total loss of earning capacity as a result of the injury to his bilateral arms.

Dinatalli avers he is entitled to an award greater than that provided by the schedule. The record does not support a deviation from the schedule. Considering all of the evidence, lay and medical, the record establishes Dinatalli has sustained a five percent impairment of the whole person as a result of his work injury at Sedona. Dinatalli is entitled to twenty-five weeks of permanent partial disability benefits from Sedona and Ace. The record reflects Sedona and Ace paid Dinatalli forty-four weeks of permanent partial disability benefits. (Ex. 9) Dinatalli is not entitled to any additional permanent partial disability benefits from Sedona and Ace. The exclusive remedy available to Sedona and Ace for the overpaid permanent partial disability benefits is through Iowa Code section 85.34(5). Swiss Colony v. Deutmeyer, 789 N.W.2d 129, 136 (Iowa 2010).

IV. Temporary Disability Benefits

Iowa Code section 85.33 (2015) governs temporary disability benefits, and Iowa Code section 85.34 governs healing period and permanent disability benefits. Dunlap v. Action Warehouse, 824 N.W.2d 545, 556 (Iowa Ct. App. 2012).

An employee has a temporary partial disability when because of the employee's medical condition, "it is medically indicated that the employee is not capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, but is able to perform other work consistent with the employee's disability." Iowa Code § 85.33(2). Temporary partial disability benefits are payable, in lieu of temporary total disability and healing period benefits, due to the reduction in earning ability as a result of the employee's temporary partial disability, and

“shall not be considered benefits payable to an employee, upon termination of temporary partial or temporary total disability, the healing period, or permanent partial disability, because the employee is not able to secure work paying weekly earnings equal to the employee’s weekly earnings at the time of the injury.” Id.

As a general rule, “temporary total disability compensation benefits and healing-period compensation benefits refer to the same condition.” Clark v. Vicorp Rest., Inc., 696 N.W.2d 596, 604 (Iowa 2005). The purpose of temporary total disability benefits and healing period benefits is to “partially reimburse the employee for the loss of earnings” during a period of recovery from the condition. Id. The appropriate type of benefit depends on whether or not the employee has a permanent disability. Dunlap, 824 N.W.2d at 556. In this case the parties stipulated Dinatalli has sustained a permanent disability, but he also worked for periods of time performing light-duty work.

Temporary total, temporary partial, and healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986); Stourac-Floyd v. MDF Endeavors, File No. 5053328 (App. Sept. 11, 2018); Stevens v. Eastern Star Masonic Home, File No. 5049776 (App. Dec. Mar. 14, 2018). Although permanent partial disability benefits commenced on May 10, 2015, under Evenson, Dinatalli may be entitled to payment of intermittent healing period benefits that are payable concurrently with permanent partial disability benefits. Stourac-Floyd, File No. 5053328 (App. Sept. 11, 2018).

Dinatalli requests temporary disability benefits from May 8, 2015 through February 11, 2016, June 9, 2017 through September 8, 2017, and October 13, 2017 through May 30, 2018. Sedona and Ace contend Dinatalli has been paid the benefits he is entitled to, and Dinatalli is precluded from receiving additional temporary benefits due to refusals of suitable work.

Under Iowa Code section 85.18, “[n]o contract, rule, or device whatsoever shall operate to relieve the employer, in whole or in part, from any liability created by this chapter except as herein provided.” Iowa Code section 85.33(3) provides:

[i]f an employee is temporarily, partially disabled and the employer for whom the employee was working at the time of injury offers to the employee suitable work consistent with the employee’s disability the employee shall accept the suitable work, and be compensated with temporary partial benefits. If the employee refuses to accept the suitable work with the same employer, the employee shall not be compensated with temporary partial, temporary total, or healing period benefits during the period of the refusal. If suitable work is not offered by the employer for whom the employee was working at the time of the injury and the employee who is temporarily partially disabled elects to perform work with a different employer, the employee shall be compensated with temporary partial benefits.

Thus, the statute precludes an employee who refuses suitable work offered by the employer, consistent with the employee's disability, from receiving temporary or healing period benefits during the period of refusal. Iowa Code § 85.33(3); Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 520 (Iowa 2012). The employer bears the burden of providing the affirmative defense. Schutjer v. Algona Manor Care Ctr., 780 N.W.2d 549, 559 (Iowa 2010).

The issue of whether an employer has offered suitable work is ordinarily an issue for the trier of fact. Neal, 814 N.W.2d at 518. The Iowa Supreme Court has held under the express wording of the statute, the offered work must be "'suitable' and 'consistent with the employee's disability' before the employee's refusal to accept such work will disqualify [the employee] from receiving temporary partial, temporary total, and healing period benefits." Id. at 519. Dinatalli asserts he did not receive notice of the offers of suitable work, and the work was not suitable for the offers he received because of childcare and transportation issues. I find the work offered by Sedona was within his restrictions and within the geographical area Dinatalli agreed he could work on his job application. (Tr., p. 156; Ex. A, p. 1) Dinatalli's childcare and transportation issues are further analyzed below.

A. May 8, 2015 through February 11, 2016

Dinatalli signed a letter from Sedona dated May 1, 2015, accepting a work assignment consistent with his restrictions beginning on April 1, 2015. (Ex. B, p. 5) Dinatalli worked for Sedona from May 8, 2015 through December 13, 2015. (Ex. 7) Sedona and Ace paid Dinatalli temporary partial disability benefits for the weeks ending May 10, 2015, May 17, 2015, May 24, 2015, June 14, 2015, June 21, 2015, June 28, 2015, July 5, 2015, July 12, 2015, July 19, 2015, July 26, 2015, August 2, 2015, August 9, 2015, August 16, 2015, September 6, 2015, September 13, 2015, September 27, 2015, October 4, 2015, October 11, 2015, October 18, 2015, October 25, 2015, November 1, 2015, November 8, 2015, November 15, 2015, and temporary total disability benefits for the weeks ending May 31, 2015, June 7, 2015, August 23, 2015, August 30, 2015, September 20, 2015, November 22, 2015, November 29, 2015, and December 6, 2015. (Ex. 7, pp. 70-71) From December 9, 2015, through February 11, 2016, Sedona and Ace paid Dinatalli permanent partial disability benefits. Dinatalli worked part-time the week ending December 13, 2015, and he received gross pay of \$35.00. (Ex. 7, p. 71) He did not work for Sedona after the week ending December 13, 2015 until the week ending March 4, 2018.

As noted above, under Evenson, the commencement date for permanency was May 10, 2015. However, Dinatalli is entitled to additional intermittent temporary benefits for periods when he was temporarily disabled.

Dinatalli is entitled to temporary partial disability benefits for the weeks ending May 10, 2015, May 17, 2015, May 24, 2015, June 14, 2015, June 21, 2015, June 28, 2015, July 5, 2015, July 12, 2015, July 19, 2015, July 26, 2015, August 2, 2015, August

9, 2015, August 16, 2015, September 6, 2015, September 13, 2015, September 27, 2015, October 4, 2015, October 11, 2015, October 18, 2015, October 25, 2015, November 1, 2015, November 8, 2015, and November 15, 2015. Dinatalli was also temporarily and partially disabled for the week ending December 13, 2015, and he is entitled to temporary partial disability benefits for this week.

For the weeks ending May 31, 2015, June 7, 2015, August 23, 2015, August 30, 2015, September 20, 2015, November 22, 2015, November 29, 2015, and December 6, 2015, and from December 20, 2015 through February 11, 2016, Dinatalli did not work. I find Dinatalli is entitled to intermittent healing period benefits for the weeks ending on May 31, 2015, June 7, 2015, August 23, 2015, August 30, 2015, September 20, 2015, November 22, 2015, November 29, 2015, and December 6, 2015, and from December 20, 2015 through February 11, 2016.

B. June 9, 2017 through September 8, 2017

The record reflects Sedona and Ace paid Dinatalli temporary total disability benefits from June 9, 2017 through July 6, 2017. (Ex. 9, p. 73) On July 3, 2017, Sedona sent Dinatalli an offer of light duty work starting July 5, 2017, by certified mail, to 3304 Marjorie Lane, Waterloo, Iowa. (Ex. B, p. 6) Dinatalli testified he should have been living at that address then. (Tr., p. 123) Dinatalli did not sign the offer. (Ex. B, p. 6) Dinatalli denied receiving the letter at hearing. (Tr., pp. 44-45, 123-24) Dinatalli did not start work on July 10, 2017. (Tr., p. 124)

At hearing counsel for Sedona and Ace inquired about whether Dinatalli received notice light duty work was available from his attorney starting July 5, 2017, and Dinatalli responded, as follows:

Q. Okay. Even though you don't recall seeing the letter, do you remember being told by Mr. Neal or perhaps somebody in his office there was light duty available to start July 5, 2017? Could you have received notice of that from Mr. Neal or his office?

A. Around that time?

Q. Just your best recollection.

A. I don't remember. Not around that time, I don't remember.

Q. Do you remember ever telling your attorney's office that you had arranged for day-care and would look to start work on July 10 of 2017?

A. Somewhere around there, yeah. Possibly. No. Go ahead.

(Tr., p. 124) During direct examination earlier in the hearing, counsel for Dinatalli asked about the light duty notice he sent to Dinatalli and he responded, as follows:

Q. And then you think you also received one that I would have sent to you in an e-mail?

A. Yes.

Q. Is that correct?

A. Yeah.

Q. Do you know which one that would have been? And the dates are at the top.

A. Yeah. Should have been this one here, the 11-16-2017.

(Tr., p. 45) During the hearing Dinatalli did not admit receiving notice from his attorney in July 2015 that Sedona had light duty work available.

Exhibit C contains e-mail correspondence between Dinatalli and Kaiser. Kaiser did not send any e-mail messages to Dinatalli concerning the offer of light duty work in July 2015. The evidence presented at hearing does not establish Dinatalli received notice from Sedona of the light duty work available from July 5, 2015 through September 8, 2017. Dinatalli is entitled to healing period benefits from June 9, 2017 through September 8, 2017, at the rate of \$321.74 per week.

C. October 13, 2017 through May 30, 2018

Exhibit 7 is the employee check history of Dinatalli's employment with Sedona. Exhibit 7 shows Dinatalli did not receive wages from after the week ending December 13, 2015, until the week ending March 4, 2018. (Ex. 7, p. 71) Sedona and Ace paid Dinatalli temporary total disability benefits from October 13, 2017 through October 19, 2017, permanent partial disability benefits from October 20, 2017 through January 25, 2018, and temporary total disability benefits from January 26, 2018 through February 26, 2018. (Ex. 9)

On November 16, 2017, Sedona sent Dinatalli an offer of light duty work starting November 17, 2017, by certified mail, to 3304 Marjorie Lane, Waterloo, Iowa. (Ex. B, p. 7) Dinatalli did not sign the offer. (Ex. B, p. 7) As noted above, Dinatalli admitted during direct examination he received a copy of the November 16, 2017, letter from his attorney, and he was aware Sedona had light duty work available November 17, 2017. (Tr., p. 45) Dinatalli did not report to work after receiving the offer of light duty work.

At hearing Dinatalli testified he did not report to work because of child care issues or vehicle transportation issues. (Tr., pp. 47-48) Issues Dinatalli had with child care and transportation are not the responsibility of Sedona and Ace. When he worked for Sedona before his work injury, Dinatalli was responsible for arranging for his own child care and transportation, and for reporting for work. Sedona did not offer Dinatalli

work outside of his normal work hours before his work injury. And the work offered by Sedona and Ace was within his restrictions and within the geographical area Dinatalli agreed he could work on his job application. (Tr., p. 156; Ex. A, p. 1) I find the work offered by Sedona and Ace was suitable.

Dinatalli is entitled to intermittent healing period benefits from October 13, 2017, through November 16, 2017. He is not entitled to intermittent healing period benefits from November 17, 2017 through January 25, 2018, based upon his refusal of the offer of suitable work.

Dinatalli underwent surgery with Dr. Paulson on January 26, 2018. (JE 8, p. 176) Following surgery Dinatalli ordered no use of the left arm. (JE 8, p. 177) On February 12, 2018, Dr. Paulson imposed a lifting restriction of five pounds with the left arm. (JE 8, pp. 179-80) On February 15, 2018, Sedona sent Dinatalli an offer of light duty work starting July 5, 2017, by certified mail, to 3304 Marjorie Lane, Waterloo, Iowa. (Ex. B, p. 8) Dinatalli did not sign the offer. (Ex. B, p. 9) There is no evidence presented at hearing Dinatalli received the offer. No e-mail correspondence was exchanged with Dinatalli concerning the offer, nor did Kaiser communicate the offer to Dinatalli verbally.

Sedona and Ace paid Dinatalli temporary total disability benefits from January 26, 2018 through February 26, 2018. (Ex. 9) Dinatalli is entitled to healing period benefits from January 26, 2018 through March 1, 2018. Sedona and Ace are entitled to a credit for all temporary benefits paid to Dinatalli during this period.

On March 2, 2018, Dinatalli signed an offer of light duty work to start on March 6, 2018, agreeing to accept the temporary job assignment. (Ex. B, p. 9; Tr., p. 129) Dinatalli wrote "[n]o refusal Fridays at the Sedona Staffing office could work each week if we can wiggle that in I'd greatly appreciate it." (Ex. B, p. 9) Dinatalli returned to work part-time light duty work for Sedona at Sedona and at the food pantry for Independence for the weeks ending March 4, 2018, through March 18, 2018. (Exs. 7, p. 71; 9, p. 73) Dinatalli is entitled to temporary partial disability benefits from January 26, 2018 through March 18, 2018. Sedona and Ace are entitled to a credit for all temporary benefits paid to Dinatalli during this period.

Dr. Paulson released Dinatalli to return to work without restrictions on March 19, 2018. At that time Dinatalli was medically capable of returning to substantially similar employment in which he was engaged at the time of the work injury. Thus, he is not entitled to additional temporary benefits from March 20, 2018 through May 30, 2018. Iowa Code § 85.34(1).

D. Temporary Benefits Payable and Credits

Dinatalli is entitled to temporary partial disability benefits for the weeks ending May 10, 2015, May 17, 2015, May 24, 2015, June 14, 2015, June 21, 2015, June 28, 2015, July 5, 2015, July 12, 2015, July 19, 2015, July 26, 2015, August 2, 2015, August 9, 2015, August 16, 2015, September 6, 2015, September 13, 2015, September 27, 2015, October 4, 2015, October 11, 2015, October 18, 2015, October 25, 2015, November 1, 2015, November 8, 2015, November 15, 2015, December 13, 2015, June 9, 2017 through September 8, 2017, and March 2, 2018 through March 18, 2018. Sedona and Ace are entitled to a credit for all temporary benefits paid during these periods.

Dinatalli is entitled to intermittent healing period benefits for the weeks ending May 31, 2015, June 7, 2015, August 23, 2015, August 30, 2015, September 20, 2015, November 22, 2015, November 29, 2015, and December 6, 2015, and from December 20, 2015 through February 11, 2016, October 13, 2017 through November 16, 2017, January 26, 2018 through March 1, 2018. Sedona and Ace are entitled to a credit for all temporary total disability benefits paid during these periods. Dinatalli is not entitled to intermittent healing period benefits from November 17, 2017 through January 25, 2018, based upon his refusal of suitable work.

Sedona and Ace seek a credit for all temporary benefits paid to Dinatalli set forth in Exhibit 9. At hearing Dinatalli argued Sedona and Ace are not entitled to a credit for temporary benefits paid, citing to Deutmeyer, 789 N.W.2d at 136. Dinatalli did not address this argument in his post-hearing brief. Dinatalli's argument lacks merit. Deutmeyer involves credits for overpaid permanent partial disability benefits, not temporary benefits. Sedona and Ace are entitled to a credit for all temporary benefits paid to Dinatalli. See Mollett v. W.N. Morehouse Truck Line, File No. 5048745 (Rehearing Apr. 13, 2016) (finding the defendants were entitled to a credit for overpaid temporary benefits); McBride v. Casey's Mktg. Co., File No. 5037617 (Remand Dec. Feb. 9, 2015) (allowing credit for temporary benefits paid on remand following the district court's reversal of the Commissioner's denial of a credit and finding Iowa Code section 85.34(5) and Deutmeyer did not apply to credits for temporary benefits).

V. The Fund

Dinatalli also 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

Dinatalli asserts two alternative first qualifying losses, to his right toe in 2009 and to his right thumb in 2013. After providing surgery and treatment to Dinatalli, Dr. Naylor issued the following permanent impairment rating in 2014,

[o]n his last visit, he had normal range of his thumb, he had decreased grip strength by 20%. According to AMA Guidelines, 10-30%, that is one-third, this gives him a 3% upper extremity impairment, a 3% upper extremity impairment equals a 3% hand impairment, a 3% hand impairment equals a 7% thumb impairment.

(JE 5, p. 39)

Dinatalli performed full duty for multiple employers following his 2009 and 2013 injuries at Sedona, Bertch Cabinets, LaborReady, Manpower, Pella, and as a hired hand. Dinatalli received additional treatment for Dr. Naylor for right thumb complaints in 2016 before he worked for Pella and during his employment with Pella. (JE 5, pp. 70-71, 76, 93; Tr., p. 114)

Dr. Manshadi assigned a seven percent impairment of the right thumb or three percent impairment of the right hand under Table 16-1, or a three percent impairment of the right upper extremity, which is consistent with Dr. Naylor's previous rating. (Ex. 1, p. 6) Dr. Manshadi also assigned five percent impairment to the right lower extremity related to right bunion surgery with a reduced range of motion in the right big toe. (Ex. 1, p. 6)

Dr. Manshadi's report contains an error regarding the date of Dinatalli's bunion surgery. (Ex. 1, p. 3) In addition, medical records were provided to Dr. Manshadi concerning the surgery. Dr. Manshadi examined Dinatalli, noting, "[t]here is also a 6 cm surgical incision over the right foot metatarsal of the big toe dorsally." (Ex. 1, p. 3) Dr. Manshadi did not make any findings concerning Dinatalli's observed gait, but accepted Dinatalli's statements that he walks on the lateral aspect of his right foot due to pain. (Ex. 1, p. 3) Dr. Manshadi made no findings concerning the functioning of Dinatalli's right toe or foot. I do not find Dr. Manshadi's opinion concerning the extent of disability to Dinatalli's right foot convincing. I do find his opinion concerning the extent of disability to Dinatalli's right thumb convincing.

Dr. Manshadi examined Dinatalli and provided express findings concerning the range of motion of his right thumb, noting his "range of motion actively was limited." (Ex. 1, p. 3) Dr. Manshadi is the only physician who provided an opinion concerning permanency with respect to Dinatalli's right thumb at the time of hearing. The Fund did not seek a contrary opinion. Dr. Manshadi's opinion is un rebutted.

Dinatalli testified he continued to have problems gripping with his right hand at Sedona, so he held the tool differently gripping it with his fingers without using his thumb. (Tr., pp. 31, 150) Dinatalli testified repetitious grabbing, gripping, and pinching cause pain and swelling into the joint of his right thumb. (Tr., p. 59) In its post-hearing brief the Fund did not contest the injury extended into Dinatalli's right hand for purposes of the Fund. While Dinatalli's injury to his right hand has resulted in a slight impairment, his injury resulted in an impairment, nonetheless. The record supports Dinatalli has sustained a first qualifying loss to his right hand.

B. Second Qualifying Loss

Dinatalli contends he sustained a second qualifying loss to his bilateral upper extremities. The Fund rejects his assertion, because Dinatalli does not have any permanent work restrictions. As analyzed above, Dinatalli has proven he sustained a permanent partial disability to his bilateral arms, which is a second qualifying loss.

C. Extent of Industrial Disability

"Industrial disability is determined by an evaluation of the employee's earning capacity." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 852 (Iowa 2011). In considering the employee's earning capacity, the deputy commissioner evaluates several factors, including "consideration of not only the claimant's functional disability, but also his age, education, qualifications, experience, and ability to engage in similar employment." Deutmeyer, 789 N.W.2d at 137-38. 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, 814 N.W.2d at 525. 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).

Two expert vocational witnesses have provided vocational opinions in this case, Mitchell for Dinatalli, and Haigh for the Fund. Mitchell interviewed Dinatalli and opined Dinatalli has lost access to 91.63 percent of all occupations he had prior to his work injury. (Ex. 2) Haigh did not interview Dinatalli and opined he has sustained no loss of access to occupations. (Ex. AA) As discussed above, I do not find either opinion helpful or persuasive.

At the time of the hearing Dinatalli was thirty-four. (Ex. 3, p. 26; Tr., p. 14) Dinatalli is a high school graduate, and he attended criminal justice classes for one year at Hamilton College. (Exs. A, p. 28; 3, pp. 27-38; Tr., pp. 14-15) Dinatalli has computer skills and he is able to type. Dinatalli has worked for a number of temporary employment agencies, performing assembly work, production work, and warehouse work. (Ex. 3, p. 27; Tr., p. 73) Following his work injury in this case Dinatalli worked for LaborReady, Bertch Cabinets, Manpower, Pella, and as a hired hand performing yardwork and mechanic work without restrictions. Dinatalli's position at Pella required him to lift up to 100 pounds. At Pella he earned more than his base pay at Sedona. (Tr., p. 145)

At the time of hearing Dinatalli was not working. Since his employment ended with Sedona, Dinatalli has applied for work with Remedy Staffing in Waterloo, O'Reilly Auto Parts, a music station, Dollar General, McDonald's, and Casey's in Oelwein. (Tr., p. 92) He also quit working for Bertch Cabinets and Pella for reasons related to his family and unrelated to his work injury. Dinatalli contacted Iowa Vocational Rehabilitation Services, but he cancelled his appointment the day before the hearing. (Tr., p. 93) I do not find Dinatalli is motivated to work.

Given his age, experience, impairment ratings, functional limitations and residual capacities, I find Dinatalli has sustained a ten percent industrial disability, which entitles him 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 Dinatalli's first and second injuries must be subtracted from 50 weeks. The schedule provides a maximum of 190 weeks for the loss of a hand. Iowa Code § 85.34(j). A three percent impairment to the right hand results in 5.7 weeks. Dinatalli was awarded twenty-five weeks with respect to his bilateral upper extremities. The first and second qualifying injuries total 30.7 weeks. Dinatalli is awarded 19.3 weeks of permanent partial disability benefits from the Fund.

VI. Costs

Dinatalli seeks to recover the \$100.00 filing fee, \$12.92 for service, \$2,000.00 for Dr. Manshadi's independent medical examination, and \$442.50 for Mitchell's vocational expert report. (Ex. 10)

A. Independent Medical Examination

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. Dr. Paulson issued an impairment rating on April 16, 2018. Dinatalli disagreed with Dr. Paulson's rating and retained Dr. Manshadi to conduct an independent medical examination. Dr. Manshadi conducted an independent medical examination for Dinatalli on June 11, 2018. Dinatalli complied with the requirements of Iowa Code section 85.39, and he is entitled to recover the cost of the independent medical examination.

B. Other Costs

Iowa Code section 86.40, provides, "[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Rule 876 IAC 4.33(6), provides

[c]osts taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners'

reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes.

The administrative rule expressly allows for the recovery of the costs requested by Dinatalli. Using my discretion, I find the \$100.00 filing fee, \$12.92 in service costs, and the \$422.50 cost of Mitchell's report should be assessed to Sedona and Ace. Costs cannot be assessed against the Second Injury Fund of Iowa. Hannan v. Second Injury Fund of Iowa, File No. 5052402 (App. July 28, 2018).

ORDER

IT IS THEREFORE ORDERED, THAT:

Sedona and Ace shall pay Dinatalli intermittent temporary partial disability benefits for the weeks ending May 10, 2015, May 17, 2015, May 24, 2015, June 14, 2015, June 21, 2015, June 28, 2015, July 5, 2015, July 12, 2015, July 19, 2015, July 26, 2015, August 2, 2015, August 9, 2015, August 16, 2015, September 6, 2015, September 13, 2015, September 27, 2015, October 4, 2015, October 11, 2015, October 18, 2015, October 25, 2015, November 1, 2015, November 8, 2015, November 15, 2015, December 13, 2015, June 9, 2017 through September 8, 2017, and March 2, 2018 through March 18, 2018, at the stipulated weekly rate of three hundred twenty-one and 74/100 dollars (\$321.74).

Sedona and Ace shall pay Dinatalli intermittent healing period benefits for the weeks ending May 31, 2015, June 7, 2015, August 23, 2015, August 30, 2015, September 20, 2015, November 22, 2015, November 29, 2015, and December 6, 2015, and from December 20, 2015 through February 11, 2016, October 13, 2017 through November 16, 2017, January 26, 2018 through March 1, 2018, at the stipulated weekly rate of three hundred twenty-one and 74/100 dollars (\$321.74).

Sedona and Ace are entitled to a credit for all temporary disability benefits paid to Dinatalli.

Dinatalli is not entitled to any additional permanent partial disability benefits from Sedona and Ace.

Sedona and Ace 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 Tech., File No. 5054686 (App. Apr. 24, 2018).

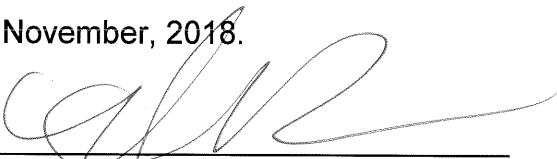
The Fund shall pay Dinatalli nineteen point three (19.3) weeks of permanent disability benefits, at the rate of three hundred twenty-one and 74/100 dollars (\$321.74) per week, commencing after all benefits have been paid by Sedona and Ace.

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

Sedona and Ace shall pay Dinatalli two thousand and 00/100 dollars (\$2,000.00) for Dr. Manshadi's independent medical examination, four hundred twenty-two and 50/100 dollars (\$422.50) for Mitchell's report, one hundred and 00/100 dollars (\$100.00) for the filing fee, and twelve and 92/100 dollars (\$12.92) for service.

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

Signed and filed this 15th day of November, 2018.



HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

James B. Neal
Attorney at Law
6611 University Ave., Ste. 200
West Des Moines, IA 50324
jneal@smalaw.net

Peter J. Thill
Attorney at Law
1900 E. 54th St.
Davenport, IA 52807
pjt@bettylawfirm.com

Tonya A. Oetken
Assistant Attorney General
Special Litigation
Hoover State Office Bldg.
Des Moines, IA 50319-0106
tonya.oetken@ag.iowa.gov

HLP/srs

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.