BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

STACY REICHERT, Claimant, vs. JOHN DEERE WATERLOO WORKS, Employer, Self-Insured, and SECOND INJURY FUND OF IOWA, Defendants.	:	File No. 21700341.01 ARBITRATION DECISION Head Note Nos.: 1108, 1700, 1803, 2502, 2602, 3000, 3200, 3202

STATEMENT OF THE CASE

Claimant, Stacy Reichert, has filed a petition for arbitration seeking worker's compensation benefits against John Deere Waterloo Works, self-insured employer, and the Second Injury Fund of Iowa, both as defendants.

In accordance with agency scheduling procedures and pursuant to the Order of the Commissioner in the matter of the Coronavirus/COVID-19 Impact on Hearings, the hearing was held on August 3, 2022, via Zoom. The record was held open until September 3, 2022, to allow defendant employer additional time to present evidence on the penalty issue. case was considered fully submitted on October 21, 2022, upon the simultaneous filing of briefs.

The record consists of Joint Exhibits 1-5, claimant's 1-11, Defendants' Exhibits A-G, Fund Exhibits AA-BB, along with the testimony of claimant.

ISSUES

1. Whether claimant is entitled to benefits from Second Injury Fund of Iowa.
2. Extent of permanent partial disability.
3. Commencement date of permanent partial disability;
4. Appropriate rate;
5. Penalty;
6. Whether defendant employer is entitled to a credit of $38.95 against any award of permanent partial disability;

7. Costs.

STIPULATIONS

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

The parties stipulate claimant sustained an injury on August 8, 2019, arising out of and in the course of employment with defendant employer. They agree that the injury was the cause of both temporary and permanent disability and that the permanent disability is a scheduled member disability to the right hand. Defendants have waived all affirmative defenses.

While the parties cannot come to an agreement on the issue of gross weekly wages, they do stipulate that at all times material hereto, claimant was married and entitled to four exemptions.

Prior to the hearing, claimant was paid 5 weeks of permanent partial disability at the rate of $650.06 per week.

FINDINGS OF FACT

Claimant, Stacy Reichert, is a 46-year-old person at the time of the hearing. Her educational background includes graduation from high school in 1996 followed by CNA training from Hawkeye Community College. She obtained her CNA certificate and worked as a CNA from approximately 1996-2002. (Ex. 3:11) In 2001, Claimant received an associate's degree in CNC science from Hawkeye Community College.

Claimant's past work history incudes delivery of newspapers and work as a CNA. Since 2002, claimant has been a laborer for defendant employer. Prior to her non assembly machining position, claimant worked as a welder, forklift driver and in assembly. She testified that she did not believe that she would be able to return to these positions. Assembly line would require a faster pace that she is not capable of as she needs breaks when her hand tires. Welding would be a challenge as she needs to maintain a steady hand to create a successful bond. Operating a forklift might need some accommodation as she has to rest her hands after driving her personal vehicle for long periods of time. She currently earns a higher wage than she did at the time of her injury. (Ex. G-1) According to her wage records from Deere, Reichert's base pay at the time of her right-hand injury in August 2019 was $21.205/hour. (Ex. G1) As of December 2021, Reichert's base pay is $24.895/hour. (Ex. G-1) She has received a bonus every year since her injury. Defendant employer has not expressed any dissatisfaction with her work.

Claimant testified that her CIPP profit sharing award is lower than anyone else's at the company but that she is meeting the production expectations. There is no documentation of this although there are pay stubs for 2019 for thirteen plus weeks preceding the date of the injury. (CE 5)

Upon her hire, she underwent a pre-employment physical. Charles Buck, M.D., assigned a permanent restriction of no repetitive use of vibratory tools due to a bilateral Raynaud's Syndrome. (JE 1:1, 4) Claimant testified that this syndrome would affect the grip strength in her left hand and that cold temperatures worsened the symptoms even sometimes affecting her feet. (Transcript)

On or about August 8, 2019, claimant suffered a puncture injury when her hand was caught in the machine she was operating causing a spindle to puncture the palm of the hand proximal to the index and middle fingers. (JE 2:6, Ex 2:8-9) Claimant is right-hand dominant. On the same date, claimant was seen at the emergency room by Joseph J. Kwofie, D.O. (JE 2:6) Dr. Kwofie stitched the wound closed. (JE 2:8) Claimant was splinted and directed to follow up with orthopedics. (JE 2:9)

On August 9, 2019, claimant was seen by Lisa Quigley, ARNP, at the company nursing station. Ms. Quigley noted claimant was able to perform full active range of motion with fist closure and normal strength. (JE 3: 10) Claimant was given IV medications and a tetanus shot along with a prescription for Cipro 500 and Ibuprofen. (Id.)

On August 12, 2019, claimant was seen by Thomas S. Gorsche, M.D., for evaluation of the right-hand injury. (JE 4:14) Claimant complained of tingling on the ulnar aspect of the index finger. (JE 4:14) On examination, she had some swelling of the long and index finger, with some ecchymosis present. (Id.) There was decreased sensation in the ulnar aspect of the index finger and she was unable to make a complete fist. (JE 4:15-16) Dr. Gorsche allowed claimant to return to work with no use of the right hand. (JE 4:16)

On September 26, 2019, claimant was seen at occupational therapy for treatment to her right hand. (JE 5:25) She continued to undergo therapy through December 18, 2019. (JE 5:29)

She was rechecked by Dr. Gorsche on October 22, 2019, with reports that she could not do the work because of the required lifting. (JE 4:17) There was no restricted work for her to perform. (Id.) During the examination, she exhibited swelling in the second and third webspace but it was less than the previous visit and she had more range of motion. (JE 4:18) Dr. Gorsche recommended continued occupational therapy and no use of the right hand at work. (Id.)

On December 17, 2019, claimant returned to Dr. Gorsche's office. (JE 4:19) She expressed that she felt like she could return to work. (JE 4:19) There was still some swelling in the second webspace dorsally on the right hand along with some discomfort

plantarly volarly and decreased sensation in the ulnar half of the right index finger. (JE 4:21) Dr. Gorsche released claimant to return to work starting January 2, 2020, for regular duty with the use of a padded glove. (Id.)

On December 20, 2019, claimant was evaluated by Maggie Austin, NP, for follow up. (JE 3:12) Claimant had full range of motion in her hand and fingers, no loss of sensation but tenderness with palpation. (Id.) Claimant was allowed to return to work with the use of a padded glove for the right hand, effective January 2, 2020. (Id.)

In a letter dated December 30, 2019, Dr. Gorsche affirmed that claimant sustained a crush injury with a puncture wound in the area of the second webspace. (JE 4:24) After a period of treatment and recovery, claimant sustained a 2 percent loss to the right upper extremity for sensory deficits in the ulnar palmar at the index finger. (JE 4:24) Dr. Gorsche opined claimant could return to regular duty work with the use of a padded glove. (DE C:1) The maximum medical improvement ("MMI") date was December 17, 2019. (Id.) Dr. Gorsche assigned a 50 percent sensory loss due to the injury and based on Table 16-10 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, calculated the loss to be 2 percent of the right upper extremity. (Id.)

On April 21, 2020, claimant underwent an independent medical examination ("IME") with Farid Manshadi, D.O. (CE 1) During the evaluation, claimant exhibited decreased grip strength, mild swelling at the 2nd and 3rd digits and reduced sensation. (CE 1:1) Based on Table 16-7 and Table 16-15 of the AMA Guides to Evaluation of Permanent Impairment, Fifth Edition, Dr. Manshadi assigned a 1 percent upper extremity impairment due to sensory deficits to the right upper extremity and 2 percent for the left upper extremity due to claimant's history of mild Raynaud's Phenomenon. (CE 1:2) Dr. Manshadi documented a positive Allen's test bilaterally. (Id.)

Dr. Manshadi also opined that the MMI date was April 21, 2020, the date of his examination. (CE 1:3)

On July 5, 2022, Dr. Manshadi wrote a reply to the counsel for the claimant stating,

> Specifically in regard to the Raynaud's Syndrome involving the left upper extremity, please let it be known that the Raynaud's Disease or Syndrome is as a result of spasms of the arteries upon exposure to cold or stress. As such, the origin of these arteries are all proximal to the wrist where the arteries enter the hand and then the digits.

(CE 1:4)

At hearing, claimant testified that she continues to experience intermittent pain in her right hand from the tip of her pointer finger down into the palm near the right wrist that is worse with use. (Tr. p. 25:9-24). The pain is made worse by gripping and lifting.

(Tr. p. 26:11-19). The pain averages 5/10 and can be as high as 8/10. (Tr. p. 26:1-8). Claimant further testified that she continues to experience constant decreased sensation and tingling in the side of her pointer finger. (Tr. p. 27:8-20).

Claimant was issued payment in the amount of $3,215.85 with $4.50 of interest on February 4, 2020. (DE F:1)

On April 16, 2020, counsel for claimant wrote to defendants alerting them that they had been calculating claimant's exemption status incorrectly, using a Married + 3 exemption status rather than the proper Married +4 exemptions status. (CE 4:13) Counsel for claimant wrote again on October 8, 2020, over the issue of the incorrect benefit rate. (CE 4:14) On May 17, 2022, defendants issued an additional amount of $202.54 for rate shortage due to missing a second dependent child. (DE F:3; CE 4:15)

Claimant has returned to the same machining position she held at the time of her injury. (Tr. p. 28:6-9). This machine requires claimant to run a lathe that whittles away at a part for a tractor. Once the part is machined, she then hoists it into a container. When the tractor part needs changing, claimant will have to change the tool. Claimant testified that her position has grown increasingly difficult. She drops things while doing her work and her hand gets more sore as her work day goes on, requiring increased rest breaks. (Tr. pp. 29:13-30:7) Claimant has been able to keep up with her work as she is not part of the assembly line, however, because she is not producing as many parts, her incentive pay is lower. Defendant employer has made accommodations for her reduced grip strength. She has a "tool holder" at the machine.

At home she is unable to open jars but laundry and things like that no longer bother her.

Claimant asserts that the rate is either based on an average weekly wage $1,118.84 for a benefit rate of $736.86 or $1,229.61 for a benefit rate of $802.39 with profit sharing per week calculated by multiplying the hours worked each week by the hourly rate of pay shown on the 2019 profit sharing award letter and the profit-sharing percentage. (CE 5, 6) Claimant was paid $4,095.58 in profit sharing for the year of 2019. (CE 6:56) Profit sharing has been paid out to employees every year but 2001. (CE 8:59)

Defendant's summary sheet shows 8 hours of hourly pay for the week of April 22, 2019. (DE A:3) The pay stubs show that claimant was laid off for this period of time. (CE 5:47). She was paid 36 hours of regular pay and 4 hours at a premium rate. (Id.) Her gross total earnings for that pay period was $877.89[1]. (Id.) The pay stubs are the more reliable piece of evidence and are given greater weight than defendants' spreadsheet in Exhibit A.

[1] These figures do not include a calculation for weekly CIPP.

The previous week claimant was paid 34 hours with 8 hours of vacation time. (CE 5: 49) That week, she was paid $1,037.00. (Id.) Her customary wages and earnings were represented by around 40 hours or more of work. (CE 5 et seq)

The Collective Bargaining Agreement ("CBA") between John Deere and the union for the period covering her work injury is in evidence. (CE 9) Section 6 of the CBA governs the Continuous Improvement Pay System. The CBA provides that the Continuous Improvement Pay Plans ("CIPP") reward employee teams "for helping achieve continuous improvement of the operations to which they are assigned," and allows employees to "both increase their earnings by sharing in these improvements and maintain a consistent weekly pay level." (Ex. 9:65)

Under Section 6-A of the CBA,

> (1) A Continuous Improvement Pay Plan provides incentive compensation to a team of employees for achieving continuous improvement on a weekly basis above the Base performance metric(s).
>
> (2) Weekly Plan Performance is a team's calculated weekly earnings level expressed as a percent. It is determined by increasing (or decreasing) the 115% weekly pay level for the team for the week by 67% of the percentage change in weekly results achieved compared to each Base performance metric(s). When multiple metrics (e.g., quality, productivity, schedule performance, etc.) are used, each metric will be assigned a percentage weighting factor with the sum of the weighting factors equaling 100%. A Weekly Plan Performance is calculated for each metric as described above and then multiplied by its respective metric weighting factor. These individual metric calculations are then added together to arrive at the total Weekly Plan Performance.
>
> (3) Pay for an employee's attendance hours while participating in a CIPP application (input hours) within a given week is computed by multiplying the employee's wage rate(s) times the Weekly Pay Level for the week. Weekly Pay Level for each CIPP application will be determined as follows:
>
> a. The maximum Weekly Pay Level for a CIPP application is 115%. Weekly hours earned in excess of 115% will be allocated to the CIPP application's Reserve Fund.
>
> b. When Weekly Plan Performance for a CIPP application is between 100% and 115%, the hours required to build-up earnings to the maximum Weekly Pay Level for the plan's participants will be provided equally from the CIPP application's Reserve Fund Hours and the Company, if hours are available in the Reserve Fund.

> c. When a CIPP application's Weekly Plan Performance provides an earnings level that is less than 100% of an employee's input hours times their base rate(s), the Company will provide build-up hours to a weekly pay level of 100% of their wage rate(s) for a plan participant's input hours in the plan. Weekly earnings will be built-up further to the maximum Weekly Pay Level according to Section 6-A-(3)-b.

(Ex. 9:66)

Under the CBA, the maximum weekly pay level is 115 percent. The reserve fund contains the funds from the weeks when the team's productivity exceeds 115 percent. If claimant's team's productivity is less than 115 percent for any given week, the team receives pay exceeding 100 percent up to 115 percent from the CIPP reserve fund. In addition, at the end of each 13-week period, any remaining reserve funds that were not used to reach the maximum weekly pay level of 115 percent are paid out to the team members in a lump sum. (Ex. 9:66)

On July 12, 2017, the Workers' Compensation Commissioner issued the CIPP Declaratory Order following the filing of a Petition for Declaratory Order by John Deere Des Moines Works, John Deere Davenport Works, John Deere Dubuque Works, John Deere Ottumwa Works, John Deere Waterloo Works, and John Deere Foundry ("John Deere Entities"). https://www.iowaworkcomp.gov/orders. The Workers' Compensation Commissioner sent a Notice of Filing of Petition for Declaratory Order to the interested parties, including the Iowa Association of Justice. The CIPP Declaratory Order addressed the profit-sharing bonus and CIPP payments.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3).

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The

expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

Because claimant's work injury is a scheduled member loss, impairments is determined by the AMA Guides.

> x. In all cases of permanent partial disability described in paragraphs "a" through "u", or paragraph "v" when determining functional disability and not loss of earning capacity, 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. Lay testimony or agency expertise shall not be utilized in determining loss or percentage of permanent impairment pursuant to paragraphs "a" through "u", or paragraph "v" when determining functional disability and not loss of earning capacity.

Iowa Code § 85.34(x) (2017)

Dr. Manshadi assigned a 1 percent impairment upper extremity impairment due to sensory deficits to the right upper extremity. Dr. Gorsche assigned a 50 percent sensory loss due to the injury, and based on Table 16-10 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, calculated the loss to be 2 percent of the right upper extremity. Dr. Gorsche's impairment rating is adopted herein as it more accurately utilizes the AMA Guidelines by including a measurement of the sensory loss, the injury, and a consideration of claimant's current impairments in terms of loss of strength, requirement to use a padded glove, her workplace accommodation of a "tool holder" and mild swelling. This loss has been satisfied by defendants. (See DE F)

Claimant also seeks a finding that she is entitled to benefits from the Second Injury Fund of Iowa.

Section 85.64 governs Second Injury Fund liability. Before liability of the Fund is triggered, three requirements must be met. First, the employee must have lost or lost the use of a hand, arm, foot, leg, or eye. Second, the employee must sustain a loss or loss of use of another specified member or organ through a compensable injury. Third, permanent disability must exist as to both the initial injury and the second injury.

The Second Injury Fund Act exists to encourage the hiring of handicapped persons by making a current employer responsible only for the amount of disability related to an injury occurring while that employer employed the handicapped individual as if the individual had had no preexisting disability. See Anderson v. Second Injury

Fund, 262 N.W.2d 789 (Iowa 1978);Iowa Practice, Workers' Compensation, Lawyer and Higgs, section 17-1 (2006).

The Fund is responsible for the industrial disability present after the second injury that exceeds the disability attributable to the first and second injuries. Section 85.64. Second Injury Fund of Iowa v. Braden, 459 N.W.2d 467 (Iowa 1990); Second Injury Fund v. Neelans, 436 N.W.2d 335 (Iowa 1989); Second Injury Fund v. Mich. Coal Co., 274 N.W.2d 300 (Iowa 1970).

Claimant asserts that her first qualifying loss is the Raynaud's disease in the left arm and hand. The Fund argues that Raynaud's disease is a circulatory disease and thus a disease of the whole body rather than to a scheduled, qualifying injury. Fund also argues in the alternative that the Raynaud's disease affects bilateral upper extremities as well as her feet.

In a 1993 decision, the Commissioner found the claimant's Raynaud's Syndrome was limited to the arm and not into the body as a whole despite occasional shoulder pain. Turner v. Louis Rich Co., File No. 860345 (App. April 30, 1993) No physician or medical expert opined that the shoulder was part of the injury. Id. Ultimately, the bilateral arm symptoms were treated as two upper extremity impairments stemming from a single accident. Id. at *5. The Commissioner noted that "we do not find a body as a whole injury in carpal tunnel syndrome simply because it involves an entrapment of a nerve of the nervous system." Id.

Dr. Manshadi opined that the situs of Raynaud's disease is "the wrist where the arteries enter the hand and then the digits." (Ex. 1, p. 4). There was no rebutting medical opinion.

Defendant Fund argues that conditions such as vascular issues such as thrombophlebitis and deep vein thrombosis were deemed body as a whole conditions. See, e.g., Blacksmith v. All American, Inc., 290 N.W.2d 348 (Iowa 1980) and Briggs v. Second Injury Fund, File No. 5024615 (App., December 4, 2009). The Blacksmith case does not directly address whether thrombophlebitis is a whole body impairment. Id. at 349. Instead, the Supreme Court of Iowa upheld the original arbitration decision that awarded no permanent partial disability benefits. Id. The Commissioner viewed this ruling as a "strong indication that the court considered the claimant's lower extremity, vascular injury to be to the body as a whole rather than to a scheduled member." Donald Towers, Claimant, No. File No. 5033125, 2013 WL 604204, at *7 (Feb. 14, 2013).

The Towers case is different from the case at bar in two ways. First, there is long-standing precedent that DVT is a systemic disease which impacts the whole body, similar to regional sympathetic dystrophy (RSD) or complex regional pain syndrome (CRPS) which is compensated industrially, even if the symptoms or harmful effects of the disease are limited to a leg. Andrade v. IBP, Inc., File No. 5013872 (App. August 29, 2006)." Donald Towers, Claimant, No. File No. 5033125, 2013 WL 604204, at *7 (Feb.

14, 2013) Second, factually, the vascular surgeon in Towers implanted a "blood filter in claimant's abdomen to block any clot from entering the heart or lung is obvious evidence that claimant's particular clots could reasonably travel to his heart and his lungs. The fact that permanent activity restrictions were imposed to prevent blood flow in claimant's groin and avoid increased abdomen pressure is convincing evidence that the injury is not limited to the leg, but rather does include the core of claimant's body. In addition, there is substantial evidence that the clotting actually extended beyond the leg and into the pelvic region — which discredits the reviewing physicians' opinions." Id. at 7.

In the case at bar, the only medical evidence regarding Raynaud's disease comes from Dr. Buck who performed the pre-employment physical for defendant employer in 2001 and the opinion of Dr. Manshadi in 2021. In 2001, Dr. Buck diagnosed claimant with Raynaud's Syndrome and as a result assigned a permanent restriction of no repetitive use of vibratory tools. There were no restrictions for claimant's feet or any other part of her body. Dr. Manshadi opined that "the Raynaud's Disease or Syndrome is as a result of spasms of the arteries upon exposure to cold or stress. As such, the origin of these arteries are all proximal to the wrist where the arteries enter the hand and then the digits." In other words, the arteries at the hand and then the digits are the parts of the body that are affected in this case, not the whole of the arterial system. This supports a finding that Raynaud's Disease, as previously held by the agency, is a scheduled member loss rather than an industrial loss.

Claimant's Raynaud's Disease does not disqualify her Fund benefits.

The second argument of defendant Fund is that because claimant has a bilateral loss, she does not qualify for Fund benefits. A bilateral loss does not disqualify an injured worker from Fund benefits pursuant to the Supreme Court of Iowa decision in Second Injury Fund of Iowa v. George, 737 N.W.2d 141 (Iowa 2007). In George, the injured worker sustained in injury to her left leg in 1996. Id. at 144. The worker sustained a bilateral loss to the legs in 2000. Id. The Supreme Court determined that the "loss of or loss of use of another such member" meant that there must be at least two enumerated members in successive injuries. Id. at 147. This was reaffirmed in Gregory v. Second Injury Fund of Iowa, 777 N.W.2d 395, 396 (Iowa 2010) In Gregory, the claimant sustained a loss to her left hand and a bilateral upper extremity dysfunction in 2000. Gregory v. Second Injury Fund of Iowa, 777 N.W.2d 395, 396 (Iowa 2010) She then sustained an injury to her right foot in 2002. Id. The Gregory court found that it would be "senselessly inconsistent" to conclude that a first qualify injury could not occur simultaneously with an injury to another member. Id. at 400.

Thus, the fact that claimant had a bilateral loss to the upper extremity is not disqualifying but rather, so as to avoid being senselessly inconsistent, it is found that claimant's Raynaud's condition in claimant's left upper extremity, which resulted in a permanent restriction, is a first qualifying loss. Her second qualifying loss is the injury to her hand from the August 8, 2019, work injury. Claimant is entitled to recovery from the Fund.

Industrial disability was defined in Diederich v. Tri-City Ry. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the Legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Claimant has returned to work at the same position as she was working prior to the injury. Her wages are higher than they were at the time of the injury. She is restricted from repetitive use of vibratory tools as a result of her Raynaud's disease and has a work place accommodation in form of the tool holder and a padded glove as well as self-limited by taking breaks when her hands are sore or tired. She drops things at work. Sometimes the pain in her hand can be as high as eight although it averages a five on a ten scale. Prior to her current position, Stacy held positions at John Deere welding, operating a forklift, and assembly but testified she would have limitations in performing those duties currently.

Dr. Manshadi, claimant's IME doctor, opined that claimant sustained a 1 percent impairment to her upper extremity due to sensory deficits to the right upper extremity and 2 percent for the left upper extremity due to Raynaud's Phenomenon.

Based on the fact that claimant has returned to her pre-employment position, meets her quota, is making more money than she was at the time of injury, her age, her ability to retrain, her past work experience in driving a forklift balanced against her pain, loss of strength, fatigue in the use of her hands, it is determined claimant has sustained a 5 percent industrial loss for the combined injuries of her right and left upper extremity.

Claimant argues that the commencement date for permanency benefits is January 3, 2020, while defendant employer asserts that permanency benefits did not commence until April 21, 2020.

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar

employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, Iowa App 312 N.W.2d 60 (1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

Dr. Gorsche returned claimant to regular duty with a padded glove as of January 2, 2020. (JE 4:23) However, Dr. Gorsche set the MMI date as of December 17, 2019. While Dr. Manshadi opined the MMI date was April 21, 2020, the date of his examination, there was no treatment for claimant between her release from Dr. Gorsche in December 17, 2019. Claimant argues that there was some reasonable anticipation of improvement expected by Dr. Gorsche by setting her return to work on January 2, 2020. It may be that there was a holiday claimant was taking over that two week period of time, but that is not part of the record. Instead, the record supports that Dr. Gorsche released claimant on December 17, 2019, to return to full duty work with a padded glove as of January 2, 2020. There is no specific evidence provided by Dr. Manshadi that would place the MMI date later as of April 21, 2020.

Thus, the appropriate commencement date for permanency benefits is January 3, 2020.

The Fund's liability commences "after the expiration of the full period provided by law for the payments" of permanency disability by the employer. Iowa Code section 85.64(1). The Fund is liable for the remaining amount of disability after deducting the compensable value of the prior disability and the employer's payments. Defendant employer has paid 2 percent upper extremity loss or five weeks. Thus the Fund's responsibility is 20 weeks of permanent partial disability.

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which injured as the employer regularly required for the work or employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. In calculating gross weekly earnings over the previous 13 weeks, weeks should be excluded from the calculations which are not representative of hours typically or customarily worked during a typical or customary full week of work, not whether a particular absence from work was anticipated. Jacobson Transp. Co. v. Harris, 778 N.W.2d 192 (Iowa 2010). Griffin Pipe Products Co. v. Guarino, 663 N.W.2d 862 (Iowa 2003). Statutes for computation of wage base are to be applied, not mechanically nor technically but flexibly, with a view toward achieving the ultimate objective of reflecting fairly the claimant's probable future earning loss. Hanigan v. Hedstrom Concrete Products, Inc., 524 N.W.2d 158 (Iowa 1994).

As noted in the findings of fact, claimant's customary wages were approximately 40 or more hours a week. The week of April 22, 2019, is discarded as not representative. The week of July 8, 2019, is excluded as claimant was paid solely for vacation time. The weeks of July 29, 2019, and June 17, 2019, were excluded as claimant earned truncated hourly wages and lay off pay. The week of July 1, 2019, was discarded as claimant was paid only $203.80 in holiday pay. (CE 6:55) The weeks in Exhibit 6 of the claimant's exhibits are adopted as representative weeks for the purpose of claimant's rate calculation as those weeks most accurately represent claimant's customary hours for the full pay period at the time of her injury.

The next factor is determining the impact of the CIPP benefits. The Commissioner has determined that "weekly CIPP earnings should not be included in gross earnings and the quarterly CIPP payments should be included in gross earnings when determining an employee's weekly rate for workers' compensation benefits." The order also provides that the "most recent quarterly CIPP payment should be used in calculating the employee's gross earnings when determining the rate." Ramsey v. John Deere Dubuque Works, File No. 5056671, (App. October 22, 2018).

Claimant's argument that the Declaratory Judgment should not be applied because the Commissioner was not provided with the relevant provisions of the collective bargaining agreement is not adopted herein. The Commissioner issued the declaratory judgment and affirmed that judgment in a later workers' compensation decision. See infra Ramsey v. John Deere Dubuque Works, File No. 5056671 (App. October 22, 2018). Adopting claimant's argument would require ignoring the Commissioner's directives, and I decline to do so. The Commissioner also declined to include profit sharing in the wage calculation

Using the claimant's representative weeks without the weekly CIPP but including the quarterly CIPP itemized in Exhibit A, claimant's wages for the 13 representative weeks preceding the injury date of August 8, 2019, was $14,338.05. The average weekly wage is therefore $1,102.93. (See CE 6:55 for representative weeks and DE A:1 for the CIPP payment) Claimant is married with two exemptions. Therefore the weekly benefit rate is $1,102.93.

Claimant argues that she is entitled to a penalty award for the two-year delay in correcting the underpayment. On April 16, 2020, claimant wrote to counsel for defendant enclosing a copy of claimant's 2019 1040, which showed claimant was entitled to four exemptions at the time of her injury. Another letter was sent to defendant on October 8, 2020, requesting revision of the benefit payment. Defendant took no action until May 17, 2022, when it finally paid $202.54 to remedy the underpayment on temporary and permanent disability benefits previously paid.

Defendant employer argues that claimant should be precluded from presenting this penalty claim as the answers to interrogatories identified only one issue of late permanent partial disability payment after the issuance of the rating. The defendants were allowed 30 days after the hearing to submit other evidence in regard to the penalty

issue. No additional exhibits were provided including the answers to interrogatories referenced by the counsel for defendant employer during the hearing. In the letters sent by claimant's counsel requesting the defendants take note of the underpayment, the claimant's counsel wrote "I anticipate that penalty will be awarded if we do not receive a response on this in the near future." The petition filed on April 8, 2021, identified issues in dispute as "extent of temporary and permanent disability; penalty; rate; medical benefits; Iowa Code section 85.34(2)(x)."

It is unclear when the original draft of the hearing report was exchanged between the parties, but the hearing assignment order sets forth the deadline for the submission of the hearing report at least 14 days prior to the hearing. The purpose of this is so that the parties can be made aware of the issues that will be raised at the hearing. Penalty was raised in the hearing report. Defendant did not file any objection to the hearing report nor did they object to the inclusion of claimant's exhibit 4 which contains the evidentiary basis for the penalty claim. There is little support in the record that defendant employer was surprised or unduly prejudiced by the claim of underpayment of benefits due to the incorrect rate.

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

A two-year delay in correcting the underpayment is not reasonable. Defendant employer argued that as soon as defendant employer was notified of the erroneous rate calculation, it rectified the error. However, the evidence shows that defendants were notified of the mistake in the dependents on April 16, 2020, along with a tax document to prove the status of claimant's dependents. It is confusing to the undersigned that defendants characterize issuance of the underpayment two years later "as soon as possible." (See Defendant's Brief). Two-year delay is not as soon as possible. It is late and it is unreasonably late. Defendants have made no showing of a reasonable cause or excuse for the delay.

Claimant also requests defendant employer be assessed a penalty for its delay in commencing permanency. Dr. Gorsche opined on December 30, 2019 that claimant had sustained a 2 percent right upper extremity permanent impairment and defendant employer did not make any payment of permanency until over a month later on February 4, 2020. Again, there was no showing as to why defendant employer waited over a month to issue permanency benefits. Defendants argue in the brief that it takes time to request a draft and issue a draft and send it in the mail. However, this is all argument with no basis of evidence in the record. There was no testimony from any defendant's representative about the length of time it takes to request a draft and issue a payment. The record is devoid of any testimony or written evidence to support defendants' arguments even though defendants were allotted additional time in which to provide any evidence regarding the penalty issue. The delay in the commencement of permanency benefits is found to be unreasonable.

Claimant points out defendant has been described as a "slow learner" by the Agency in the past. Fernandez v. John Deere Harvester Works, File No. 5042151 (Arb. February 6, 2014). This trend continues and Deere remains a habitual offender, as shown by the list of cases in which penalty was awarded against Deere. Because defendant is a habitual offender and provided no excuse as to why the benefits were paid late or underpaid, a 50 percent penalty of the late paid permanent partial disability benefits from December 20, 2019, to February 4, 2020 is imposed, as well as a 50 percent of the underpayment of $202.54 shall be imposed for a total penalty benefit of $1,385.81.

Claimant seeks reimbursement for Dr. Manshadi's IME charge ($2,000.00) under Iowa Code section 85.39.

Section 85.39(1) states in pertinent part:

> 1. After an injury, the employee, *if requested by the employer,* shall submit for examination at some reasonable time and place and as often as reasonably requested, to a physician or physicians authorized to practice under the laws of this state or another state, without cost to the employee; but if the employee requests, the employee, at the employee's own cost, is entitled to have a physician or physicians *of the employee's own selection* present to participate in the examination. . . .
>
> 2. If an evaluation of permanent disability has been made by a physician *retained by the employer* and the employee believes this evaluation to be 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,* and reasonably necessary transportation expenses incurred for the examination. . . .

Id. § 85.39 (emphasis added).

Dr. Gorsche completed an impairment rating at defendant employer's request on December 30, 2019. This triggered claimant's right to an IME which was obtained on April 21, 2020. Defendant employer argues that Dr. Manshadi spent at least half his time on the issue of claimant's Raynaud's symptoms. Further, Dr. Manshadi's impairment rating was lower than that of Dr. Gorsche.

As to the second argument, there is no language in 85.39 that allows reimbursement only when the impairment rating issued by the claimant's chosen expert is higher than that of the impairment rating issued by the physician retained by defendants. Iowa Code section 85.39 requires only that an impairment rating issued by the physician retained by defendants is "believed" too low by the injured worker. See

Iowa Code section 85.39. See also IBP, Inc. v. Harker, 633 N.W.2d 322, 326 (Iowa 2001).

As to the first argument, while Dr. Manshadi did take time to address the Raynaud's symptoms, a historical review of the medical records would have been important to address claimant's current condition and the extent of the disability, if any, she sustained from the work injury. Only one paragraph of the opinion section of the May 5, 2020, opinion pertains to Raynaud's. The second report of July 5, 2022, obtained by the claimant which specifically addresses the situs of the Raynaud's symptoms would not be re-imbursable under Iowa Code section 85.39. Subject to DART v. Young, defendant employer is responsible for the $400.00 examination under Iowa Code section 85.39. Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 846–47 (Iowa 2015) The $1,200.00 report is reimbursable under 876 IAC 4.33 which allows the agency discretion in assessing costs including reports of medical providers as it is a cost incurred in the hearing and used in lieu of a doctor's testimony. Id. at 846-47. Defendants have paid $1,000.00 toward the overall report and examination. Thus, only $600.00 remains outstanding to be paid for the report.

Defendant employer is also responsible for the filing fee ($103.00) and the cost of the transcript which has already been paid by defendants. Rule 876 IAC 4.33(2).

Defendant seeks a credit of $38.95 of additional permanent partial disability which represents the additional amount owed to claimant under the revised rate. However as defendant employer has been found to fully satisfy their obligation to claimant, no additional credit is awarded herein.

ORDER

THEREFORE IT IS ORDERED:

The defendant Second Injury Fund is to pay unto claimant twenty (20) weeks of permanent partial disability benefits at the rate of one thousand one hundred two and 93/100 dollars ($1,102.93) per week from January 3, 2020.

That defendant employer is to pay penalty benefits in the amount of one thousand three hundred eighty-five and 81/100 dollars ($1,385.81).

That defendants employer and Fund shall pay accrued weekly benefits in a lump sum.

That defendants employer and Fund shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendant employer shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

That defendant employer shall pay the costs of this matter pursuant to rule 876 IAC 4.33 including the report fee of Dr. Manshadi at six hundred and no/100 dollars ($600.00) and the Filing fee of one hundred three and no/100 dollars ($103.00). Defendants have already paid the transcript cost.

Signed and filed this 19th day of December, 2022.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Benjamin Roth (via WCES)

Coreen Sweeney (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.