IN THE IOWA DISTRICT COURT FOR POLK COUNTY

DEBRA HOPPE, **Petitioner,** **vs.** **MENARD, INC.,** **Employer,** **And** **XL INSURANCE AMERICA, INC.,** **Insurance Carrier,** **Respondents.**	**Case No. CVCV064000** **RULING ON MOTION TO DISMISS AND PETITION FOR JUDICIAL REVIEW**

On December 16, 2022, the above captioned matter came before the Court for hearing. The petitioner was represented by attorney Joseph G. Lyons, and respondents were represented by attorney Kent Smith. Having entertained the arguments of counsel, having reviewed the court file, and being otherwise fully advised in the premises, the Court now enters the following ruling.

I. BACKGROUND FACTS AND PROCEEDINGS.

Petitioner Debra Hoppe (hereinafter "Hoppe" or "petitioner") began working at Menards part-time in March, 2015. This job required Hoppe to unload pallets and stock shelves. *Hoppe v. Menard*, NO. CVCV064000, Certified Record Part 1 of 2, *93, 95 (Polk Cnty. Dist. Ct., Aug. 12, 2022). On February 17, 2017, Hoppe tripped over a pallet and landed on her left knee. *Id*. at *97. Hoppe suffered a torn medial meniscus on the left knee, and underwent a partial medial meniscectomy in July, 2017. *Id.* at *98. Hoppe did not return to work after the surgery until September 5, 2017, and was found to be at maximum medical improvement on September 13, 2017. *Id.* at *99, 177. Hoppe was also found to have a two percent left lower extremity impairment. *Id.* at 177.

After returning to work at full duty, the knee continued to worsen. In response to this deterioration, Hoppe visited Dr. Gorsche on November 13, 2017. *Id.* at *115. Dr. Gorsche administered an injection and limited Hoppe's use of ladders or climbing. *Id.* In March 2018, after the knee did not improve, Dr. Gorsche recommended a total knee replacement. *Id.* at *99, 190-91. Respondent, Menards, did not immediately authorize the surgery; rather, it requested that Hoppe get an IME which she did on June 8, 2018. Certified R., *211-18. In an August 2018 report, Dr. Tearse, opined that Hoppe's medial meniscectomy was causally connected to her work injury in February 2017, and her need for a total knee replacement was connected to the work injury. *Id.* at 211-18. Hoppe received the knee replacement on October 12, 2018, *Id.* at *101. she did not return to work until February 4, 2019. *Id.* at 199. Hoppe began to work two hours a day with no use of a ladder. *Id.* at *199.

On May, 6, 2019, Hoppe was allowed to return to four-hour long work shifts. *Id.* at 204. However, Hoppe struggled to attain full range of motion in her left knee, so she underwent treatment to increase the range of motion. Cert. R., *201. By October 8, 2019, although Hoppe had improved range of motion but not complete range of motion, it was found that she was at her maximum medical improvement. *Id.* at *117; 210. Her doctor's report on October 11, 2019 stated that Hoppe had a fifty percent permanent impairment to the knee. Cert. R., *210. Following an additional IME in February 2020, Dr. Sunil Bansal, M.D. gave his opinion that Hoppe had a fifty percent permanent impairment to the left knee and restricted her from kneeling, squatting, use of ladders, and lifting objects over twenty pounds. He further restricted Hoppe from walking or standing for more than thirty minutes at a time. *Hoppe v. Menard*, NO. CVCV064000, Resp't Br. *3 (Polk Cnty. Dist. Ct., Nov. 23, 2022). Hoppe was terminated from Menards on July 24, 2020, because Menards could not accommodate those restrictions. Certified R., *113.

Hoppe filed a petition for arbitration before the Iowa Workers' Compensation Commissioner. The decision was heard on September 3, 2021. *Hoppe v. Menard*, NO. CVCV064000, Pet'rs Ex. A Arbitration Decision, *1 (Polk Cnty. Dist. Ct., July 13, 2022). At issue was when the permanent partial disability benefits commenced, the rate for the worker's compensation, and whether the defendants were liable for a penalty under Iowa Code section 86.13. *Id.* at *8-9. The arbitration order found that there were two periods of permanent partial disability benefits. *Id.* at 11. The first pertained to the left knee meniscectomy and the second pertained to the total knee replacement.

The parties agreed the permanent partial disability benefits rate was $213.78 a week. Pet'rs Ex. A Arbitration Decision, *11. The deputy commissioner found that the temporary benefit rate was calculated under Iowa Code section 85.36(6), which put the rate at $179.37 per week. *Id.* at 11-12. He also found that Hoppe was owed 4.4 weeks of Partial Permanent Disability (PPD), commencing on September 5, 2017, for the first knee surgery and that there was a second period for PPD benefits commencing on October 11, 2019, for the total knee replacement. *Id.* at *11. The deputy commissioner found that the respondents owed Hoppe 105.6 weeks of PPD benefits for this period. *Id.* Finally, the deputy commissioner found that the respondents were liable for a total penalty of $2477.84 for the delayed payment of temporary benefits, temporary partial disability benefits, permanent partial disability benefits, and for the underpayment of permanent partial disability benefits. *Id.* at *16. The deputy worker's commissioner's arbitration order was filed on February 4, 2022. Hoppe filed an appeal on February 9, 2022.

Hoppe argued in her appeal that the deputy commissioner erred when he found that the commencement date for the PPD for the total knee replacement was October 11, 2019, rather than on September 5, 2017. Pet'rs Ex. A Arbitration Decision, *5. According to Hoppe, the benefits

owed for the total knee replacement began to accrue on September 5, 2017, which was a full year before the surgery took place. *Id.* Further, Hoppe asserted that the weekly benefit rate for the temporary benefits should be $213.78, not the $179.37, and that the penalty payment should be increased to $13,701.29. *Id.* The workers' compensation commissioner affirmed the deputy commissioner's arbitration order on all counts on June 9, 2022. *Id*. at *5.

Hoppe filed a petition through Iowa EDMS on July 9, 2022, which was a Saturday, with the Polk County District Court. Hoppe argues that she has been detrimentally affected by Iowa Workers' Commission because:

1. The agency's erroneous interpretation of Iowa Code section 17A.19(10)(c).
2. The agency's action is not supported by the substantial evidence in the record.
3. The agency action is an action other than a rule that is inconsistent with the agency's prior practice or precedents.
4. The agency's action is the product of decision-making process in which the agency did not consider a relevant and important matter.
5. The agency action is based on irrational, illogical, or wholly unjustifiable interpretation of a provision of law.
6. The agency action is based on irrational, illogical, or wholly unjustifiable application of the law to fact.
7. The agency's action was otherwise unreasonable, arbitrary, capricious, or an abuse of discretion pursuant to Iowa Code section 17A.19(n).

Hoppe v. Menard, NO. CVCV064000, Pet'rs Pet. For Judicial Review, *1-2 (Polk Cnty. Dist. Ct., July 13, 2022).

A hearing was scheduled for December 16, 2022, along with a briefing schedule. Prior to the hearing, the respondents filed a motion to dismiss for Hoppe failing to timely file her petition for judicial review under Iowa Code section 17A.19(3).[1] On July 13, 2022, this court, following Iowa Code section 16.308(2), returned the petition for failure to file attachments to the filing and for failing to pay the filing fee. *Hoppe v. Menard*, NO. CVCV064000, Pet'rs Resistance to Mot. to Dismiss, *1 ¶ 4 (Polk Cnty. Dist. Ct., Nov. 30, 2022). The petitioner promptly refiled the petition with the attachments separate and paid the filing fee two hours later on July 13, 2022. *Id.* at *1 ¶ 5. The petition was accepted July 19, 2022. *Id.* Hoppe resisted the motion on November 30, 2022. On December 16, 2022, this court heard the oral arguments on the petition for judicial review and the motion to dismiss.

II. STANDARD OF REVIEW.

The Iowa Administrative Procedure Act, Iowa Code chapter 17A, governs the scope of the Court's review in workers' compensation cases. Iowa Code § 86.26 (2011); *Meyer v. IBP, Inc*., 710 N.W.2d 213, 218 (Iowa 2006). "Under the Act, we may only interfere with the commissioner's decision if it is erroneous under one of the grounds enumerated in the statute, and a party's substantial rights have been prejudiced." *Meyer*, 710 N.W.2d at 218. A party challenging agency action bears the burden of demonstrating the action's invalidity and resulting prejudice. Iowa Code § 17A.19(8)(a). This can be shown in a number of ways, including proof the action was ultra vires, legally erroneous, unsupported by substantial evidence in the record when that record is viewed as a whole, or otherwise unreasonable, arbitrary, capricious, or an abuse of discretion. *See id*. § 17A.19(10). The district court acts in an appellate capacity to correct errors of law on the part of the agency. *Grundmeyer v. Weyerhaeuser Co*., 649 N.W.2d 744, 748 (Iowa 2002).

[1] According to Iowa Code section 4.1(34) the deadline is extended to the following Monday when the deadline lands on the weekend.

"If the claim of error lies with the agency's findings of fact, the proper question on review is whether substantial evidence supports those findings of fact" when the record is viewed as a whole. *Meyer*, 710 N.W.2d at 219. Factual findings regarding an award of workers' compensation benefits are within the commissioner's discretion, so the court is bound by the commissioner's findings of fact if they are supported by substantial evidence. *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 464-65 (Iowa 2004). Substantial evidence is defined as evidence of the quality and quantity "that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance." Iowa Code § 17A.19(10)(f)(1); *Mycogen*, 686 N.W.2d at 464. The application of workers' compensation laws to the facts as found by the commissioner is vested in the commissioner. *Midwest Ambulance Service v. Ruud*, 754 N.W.2d 860, 864 (Iowa 2008). District courts sitting in judicial review may only reverse the commissioner's application of the law to the facts if it is "irrational, illogical, or wholly unjustifiable" Iowa Code § 17A.19(10)(m). Finally, the interpretation of workers' compensation statutes and case law is not vested with the agency; therefore, this court is free to substitute its judgment de novo for the agency's interpretation of the law. *Midwest Ambulance Service*, 754 N.W.2d at 864 *citing Finch v. Schneider Specialized Carriers, Inc.*, 700 N.W.2d 328, 330 (Iowa 2005).

III. MERITS.

There are three issues before the court in this case. The first is a jurisdictional question regarding whether the petitioner filed a timely petition for judicial review, the second is whether the commissioner erred as a matter of law when he determined that there were two separate start dates for the partial permanent disability, and the third is whether Hoppe is owed penalty payments

for the alleged late PPD payments. Since the outcome to the motion to dismiss will determine whether the court can address the second issue, we will address it first.

A. Motion to Dismiss

"A timely petition for judicial review to the district court is a jurisdictional prerequisite for review of final agency action." *Sharp v. Iowa Dep't of Job Serv.*, 492 N.W.2d 668, 669 (Iowa 1992). There are two issues that need to be addressed in this motion to dismiss. The first issue is whether submitting the petition on July 9, 2022 through EDMS constitutes filing for the purposes of Iowa Code § 17A.19(3), and the second is whether Hoppe's resubmission can relate back to the original filing date. Iowa Code § 17A.19(3) states that "the petition for review must be filed within thirty days after the issuance of the agency's final decision in that contested case." Hoppe appealed after her initial application was denied by the Iowa Workers' Compensation Commissioner. The commissioner granted the appeal and issued his final decision on June 9, 2022. The respondents' motion states that Hoppe filed her petition on July 13, 2022. *Hoppe v. Menard*, NO. CVCV064000, Resp't's Mot. to Dismiss, *1 ¶ 1 (Polk Cnty. Dist. Ct., Nov. 22, 2022). This is after the thirty-day deadline on July 11.[2] However, Hoppe properly filed her petition on July 9, 2022, and sent a copy of the petition and civil original notice to respondents' counsel via email the same day. Pet'rs Resistance to Mot. to Dismiss, *1 ¶ 2. It was not until July 13, that the petition was first reviewed by the Polk County District Court. *Id.* *1 ¶ 4. The petition was returned to Hoppe at 12:10 P.M. because the supporting documents needed to be filed as attachments and the filing fee had not been paid. *Id.* Hoppe filed the new petition and documents as attachments along with the filing fee at

[2] July 9, 2022, was a Saturday. According to Iowa Code section 4.1 (34), when computing time for filing, if the deadline falls on a day where the office of the clerk is closed then the time shall be extended to include the next day the office of the clerk is open to receive the filing.

2:18 P.M. that day. *Id.* at *1 ¶ 5. The new petition was not accepted until Tuesday, July 19, 2022. *Id.*

Iowa courts have held that filing is accomplished when the document is delivered to the proper officer. *Miller v. Civil Constructors*, 373 N.W.2d 115, 117 (Iowa 1985) *citing Mills v. board of Supervisors of Monona County*, 227 Iowa 1141, 1143, 290 N.W. 50, 51 (1940). Furthermore, the definition section of the Iowa Rules of Electronic Procedure defines electronic filing as when the Electronic Document Management System (EDMS) receives a document submitted to EDMS for filing. Iowa R. Elec. P. 16.201(8). When filers receive postings of "received", "awaiting approval", or "filed" status from the EDMS account, this is a confirmation that the EDMS system received the filer's documents. Iowa R. Elec. P. 16.201(8). Additionally, the Iowa Rules of Electronic Procedure require all attorneys authorized to practice in Iowa, all pro hac vice attorneys, and all pro se persons to register on EDMS and file all documents with the court through EDMS unless an exception applies or the court provides otherwise. Iowa R. Elec. P. § 16.302(1). Nearly all documents filed in the Iowa court system are filed electronically according to the Iowa Rules of Electronic Procedure. Finally, there is no indication in the language of the Iowa Rules of Electronic Procedure to suggest that payment of a filing fee is required for a petition to be considered filed in Iowa. *See* Iowa R. Elec. P. Nor do the Iowa Rules of Civil Procedure explicitly require a filing fee must be paid in order for a petition for judicial review to considered filed. *See* Iowa Rules of Civil Procedure. Hoppe received a notification from the EDMS system that it had received her petition on July 9, 2022. For these reasons, this court concludes that Hoppe originally filed her petition on July 9, 2022.

The next issue is whether the resubmission of her corrected petition may relate back to the original filing date. Under the Iowa Rules for Electronic Procedure 16.308(2)(d), the clerk of court

at his/her discretion may notify a filer of an error in the filing or docketing of a document and advise the filer of what action needs to be taken, if any, to address the error. Following this process, the clerk may return the submission to the filer and it is the filer's responsibility to keep a record of the original EDMS notice generated to verify the day and time of the original submission. Iowa R. Elec. P. 16.308(2)(d)(2). The Iowa Supreme Court interpreted this clause from interim rule 16.308(2)(d)(2) in *Jacobs v. Iowa Dept of Transp., Motor Vehicle Div.,* 887 N.W.2d 590, 596 (Iowa 2016).[3] The court held that this language indicates that the original date of the submission must have legal significance in some circumstances. *Id.* Otherwise, the language would be superfluous. The court concluded that this language allowed the resubmitted filings to relate back to the original submission date for appeal deadlines in limited circumstances. *Id.* at 599. The circumstances for this were three-fold: 1) the party submitted the electronic document to EDMS prior to the deadline with only minor mistakes; 2) the filing was returned to the filer after the deadline because of said minor errors; and 3) the party promptly resubmitted the filing after correcting the errors.

The Iowa Supreme Court has generally held that a mistake is not minor if it prevents the clerk of court from internally filing or docketing of the documents. In *Jacobs v. Iowa Dept of Transp., Motor Vehicle Div.*, the Iowa Supreme Court found that the mistakes made by the petitioner were minor. In this case, Jacobs' petition did not contain any errors; rather, the cover sheet for the filing was only missing the client address. 887 N.W.2d at 597-98. The Iowa Supreme Court in *Toney v. Parker*, 958 N.W.2d 202 (Iowa 2021), held that mistakes in the appendix, failure to use the caption "Statement of Facts", and omitting one hundred and fifty (150) pages of documents supporting Toney's resistance were all minor mistakes. *Toney*, 958 N.W.2d at 209 (The

[3] This case was interpreting the interim electronic procedure rule 16.309(3)(c), but the language in the interim procedural rule is the same as the language in the current rules.

mistake in the appendix was that Toney forgot to redact his social security number). In contrast, *Carlson v. Second Succession, LLC*, 971 N.W.2d 522 (Iowa 2022), is a case where the court held there were not minor mistakes in the petition. In that case, Carlson failed to provide identification information upon filing a petition. This missing information was required for internal filing and docketing of the documents. The court held that because these mistakes prevented the clerk of court from properly filing and docketing the documents internally, the mistake was not minor. *Id.* at 527.

In our case, Hoppe failed to pay a filing fee and did not file her brief in support of her petition as an attachment. First and as stated above, failure to pay a filing fee does not prevent a document from being considered filed nor does it make it impossible for the clerk of court to internally file or docket the documents. Second, failing to file the brief in resistance as an attachment does not prevent the clerk of court from ensuring the documents are filed on the proper docket. For this reason, the court concludes these mistakes were minor.

Reviewing the rest of the facts in this case, we hold that Hoppe properly filed her petition prior to the deadline and that the resubmission of the filings may relate back to the original filing date. First, Hoppe originally filed her documents within the deadline, second, the clerk of court returned the documents after the deadline, and third, Hoppe promptly refiled the proper documents within two hours after receiving the rejected filings. For these reasons, this court finds that the resubmitted documents may refer back to the original filing date. This means the original filing was within the deadline and the resubmission of the petition and other documents may relate back to this original deadline.

B. Commencement of PPD benefits

Hoppe's contention is that the commissioner erred when he concluded there were two periods of permanent partial disability. The deputy commissioner found that Hoppe was owed 4.4 weeks of permanent partial disability benefits commencing on September 5, 2017, and that Hoppe was due 105.6 weeks of PPD benefits commencing on October 11, 2019. On appeal, the commissioner affirmed this conclusion. Hoppe contends that all PPD benefits commenced on September 5, 2017, and, therefore, there was no factual or legal basis for the commissioner to conclude there was a second PPD period that commenced on October 11, 2019. Due to this error, Hoppe contends that she is owed further penalty payments because the PPD benefits accrued by October 12, 2018, the day of the full knee replacement surgery. Therefore, she was owed a lump sum payment on October 12, 2018, and the delayed payment for the PPD benefits was unjustified under Iowa Code § 86.13(4).

In this case there is no issue regarding the underlying facts of the case. The issue is the application of the law to the facts. As stated above, applying workers' compensation law to the facts is vested in the commissioner. *Midwest Ambulance Service*, 754 N.W.2d at 864. This court may only reverse the commissioner if the application of the law to the facts is irrational, illogical, or wholly unjustifiable. Iowa Code § 17A.19(10)(m). Before we examine Hoppe's argument and the deputy commissioner's application of the law to the facts, we need to distinguish between temporary benefits, healing period benefits, and permanent partial benefits because these distinctions are necessary for understanding the case and the law.

Iowa Code section 85.33 defines what qualifies as a temporary benefit. Temporary benefits are meant to compensate injured employees when they experience temporary total or partial loss of actual earnings (Iowa Code §85.33 (1)) or when they cannot return to work substantially similar

to the job performed at the time of the injury but can do other work consistent with the injury. Iowa Code §85.33(2). While named differently, healing period benefits also qualify as temporary disability benefits. *Bell Bros. Heating and Air Conditioning v. Gwinn*, 779 N.W.2d 193, 200 (Iowa 2010) *citing Clark v. Vicorp Rests., Inc.*, 696 N.W.2d 596, 604-05 (Iowa 2005). Healing period benefits are meant to compensate for when an employee cannot be at work due to an injury that creates a permanent partial disability. Iowa Code § 85.34(1). If a PPD results due to an accident then the benefits paid out prior to the award of permanent partial disability are categorized as healing-period benefits. *Bell Bros. Heating and Air Conditioning*, 779 N.W.2d at 200. If a PPD is not found then the same benefits are categorized as total temporary disability benefits. *Id.*

There are three categories of PPD: 1) injury that causes a permanent partial loss of bodily function of scheduled member that is compensated under Iowa Code §85.34(2)(a)-(t); 2) body as a whole injuries that result in a reduced earning capacity, which is compensated under section 85.34(2)(u); and 3) when an employee suffers permanent total loss of earning capacity under 85.34(3).

Hoppe argues that there can only be one commencement date for PPD; she bases this argument largely on the following two cases: *Evenson v. Winnebago Industries, Inc.*, 881 N.W.2d 360 (Iowa 2016) and *Teel v. McCord*, 394 N.W.2d 405 (Iowa 1986). Hoppe interprets the holding in *Evenson* to require that PPD accrues indefinitely once it commences. *Hoppe v. Menard*, NO. CVCV064000, Pet'rs Judicial Review Br, *7-8 (Polk Cnty. Dist. Ct., Nov. 4, 2022). This misinterprets what *Evenson* and *Teel* are actually doing. When *Evenson* discusses PPD and TPD benefits, the court is concerned about whether the TPD benefits must end before PPD benefits may begin.

The Court found that Evenson's PPD benefits commenced in September, 2010, although he was eligible for TPD benefits at the time because he was medically restricted from working his regular hours. *Id.* at 372. The court in *Evenson* contrasts this with another case, *Preshus v. Barco, Inc.*, 531 N.W.2d 476, (Iowa Ct. App. 1995). In that case, the commissioner held that the PPD benefits commenced after the short period of TPD, and the Iowa Court of Appeals affirmed the order holding that Preshus could not "receive temporary partial and permanent partial benefits for same injury at the same time." *Id.* at 480. The *Evenson* court makes it clear that an injured employee can receive both benefits at the same time because they are compensating different losses and, therefore, *Preshus* was wrongly decided. *Evenson*, 881 N.W.2d at 374. The focus of *Evenson* is that commissioners cannot delay PPD benefits until after TPD benefits are terminated under the plain meaning of Iowa Code section 85.34. *Id.* The holding does not support finding that PPD accrues indefinitely.

Furthermore, Hoppe construes Justice Mansfied's Concurrence in part and Dissent in part incorrectly. Hoppe stated that Justice Mansfield characterized the Majority as holding that PPD accrues continuously. *Hoppe v. Menard*, Pet'rs Judicial Review Br, at *7. Mansfield disagreed with the majority's interpretation of the definition of healing period, temporary disability benefits, and permanent disability benefits. *Evenson*, 881 N.W.2d at 376-77. He argues that, prior to the majority's opinion, the law was that a claimant received temporary benefits or healing period benefits until reaching MMI and it was only after reaching MMI that benefits became permanent partial or permanent total benefits. *Id.* He argues that the majority's opinion allowed for double payment and that the cases heavily relied upon were distinguishable from the present case. *Id.* at 377-79. Mansfield's statement, "[t]oday, by contrast, the court decides that PPD should be paid

continuously once the first healing period ends," is juxtaposed with a description of the facts of *Teel*.

In *Teel v. McCord*, 394 N.W.2d 405 (Iowa 1986), the court is concerned about when the commencement of PPD begins as it relates to the accrual of interest until the payments are made. *Teel*, 394 N.W.2d at 406. In that case, Teel was first injured in February, 1974, but did not return to work for good until February, 1981. Until then, Teel intermittently went through healing periods and temporary disability. In 1982, a deputy commissioner awarded Teel one hundred and 150 weeks of PPD with interest. Another deputy commissioner found that the interest started to accrue on September 30, 1982, but the district court reversed this ruling, holding that interest accrued starting on May 7, 1974, the day Teel returned to work. *Id.* The Iowa Supreme Court affirmed the district court, concluding that interest on PPD became due when Teel returned to work on May 7, 1974. *Id.* at 407.

Mansfield is highlighting the fact that in *Teel,* there were no temporary partial disability benefits. Rather, there was a series of healing periods and PPD interest payments were suspended during each of the healing periods. The point was not that PPD benefits accrued indefinitely so when they are rewarded they are due in a lump sum. Mansfield was arguing against the double payments of TPD and PPD that the majority opinion allowed for by finding the PPD commenced at the earliest date in Iowa Code section 85.34(1) rather than after the claimant attains MMI. The concern is about when courts look back over the facts and award PPD benefits for a number of weeks that overlap with temporary benefits, not whether PPD continuously accrues.

Hoppe takes the commencement language and argues that it must mean PPD benefits accrue continuously into perpetuity. However, even Mansfield's statement that PPD would be paid continuously does not support finding that PPD accrues continuously. Payment and accrual are

different. As Hoppe notes in her reply brief, "accrue" means "1. To come into existence as an enforceable claim or right; to arise; 2. To accumulate periodically." *Hoppe v. Menard*, NO. CVCV064000, Pet. Reply Br., *4 (Polk Cnty. Dist. Ct., Nov. 4, 2022) *citing* Accrue Black's Law Dictionary 21 (7th ed. 1999). Continuous accrual of PPD benefits would mean that the right to PPD benefits came into existence and that this right accumulates periodically. Continuous payment is not the periodic accrual; it is the discharge of the claim or right in this case. Furthermore, this court has not found any Iowa case law that discusses the accrual of PPD, when it starts or whether it is continuous.

Additionally, the contention that PPD benefits accrue indefinitely for all subsequent PPDs from the same injury is undermined by the nature of PPD. PPD is "permanent and cannot form the sole basis for a second [PPD] claim for benefits." *Warren Properties v. Stewart*, 864 N.W.2d 307, 320 (Iowa 2015) *citing Yeager v. Firestone Tire & Rubber Co.*, 112 N.W.2d 299, 302 (Iowa 1961). If an injured employee is going to receive an additional PPD award, there must be a new or additional permanent impairment. *Id.* Hoppe sustained only one injury, but received two major treatments for it. The first was a medial meniscectomy which resulted in a two percent PPD. The second was the total knee replacement which resulted in the fifty percent PPD. Although both PPDs arose from the same injury, they are distinct from one another. The second PPD of fifty percent is a separate PPD that could only be sustained if the knee replacement resulted in an aggravated condition to the knee. *Warren Properties v. Stewart*, 864 N.W.2d 307, 320 (Iowa 2015) *citing Yeager v. Firestone Tire & Rubber Co.*, 253 Iowa 369, 374-75, 112 N.W.2d 299, 302 (Iowa 1961). The separate nature of multiple PPDs supports two separate commencement dates for each PPD award. In our case, this would mean that, had the total knee replacement caused less than two percent partial permanent impairment, Hoppe would not have been entitled to the second PPD

benefits award. Since the benefits were separate from one another, the separate commencement dates are not illogical. The deputy commissioner correctly applied the law to the facts.

C. Penalties

Hoppe's argument for penalties was based solely upon the deputy commissioner's alleged error that there were two commencement dates for the PPD. Hoppe argues that the liability for the PPD benefits commenced on September 5, 2017, when she first returned to work. According this argument, said commencement also marked the date of accrual for all subsequent PPD benefits arising out of this injury. This meant that by the time Hoppe received her total knee replacement, the 104.6 weeks had been fully accrued so she should have received a lump sum rather than weekly payments. Hoppe contends that Menards had no reasonable excuse to send her delayed payments between October 12, 2018, and December 10, 2019; therefore, she is owed penalty payments for the delayed payments.

Second, Hoppe argues that the date the lump sum payment for the knee replacement was on October 12, 2018, the day of the surgery rather than October 11, 2019, when the doctor declared Hoppe had reached MMI. Hoppe contends that the total knee replacement is a diagnosis based rating according to the AMA. While Hoppe is correct that a minimum rating is assigned to total knee replacements, the date PPD payments become due under Iowa Code Section 85.34(2) is when it is "medically indicated that the maximum medical improvement from the injury has been reach *AND* that the extent of loss or percentage of permanent impairment can be determined by the use of the guides. . ." (emphasis added). The use of the conjunctive "and" requires that both the permanent impairment be known, and that maximum medical improvement has been found. While a permanent impairment may be found on the date of the total knee replacement, the MMI was not found until October, 2019. Since the commissioner's application of the law to the facts was not

illogical and because the MMI and the total permanent impairment were not both indicated until October, 2019, we find that Hoppe is not owed any additional penalty payments.

IV. CONCLUSION AND DISPOSITION.

For all the reasons set forth above, the Court concludes that none of the commissioner's application of the law to the factual findings was irrational, illogical, wholly unjustifiable. Accordingly, the commissioner's order is **AFFIRMED.** Costs are taxed to petitioner.

State of Iowa Courts

Case Number	**Case Title**
CVCV064000	DEBRA HOPPE VS MENARD INC ET AL
Type:	ORDER FOR JUDGMENT

So Ordered

Robert B. Hanson, District Court Judge,
Fifth Judicial District of Iowa

Electronically signed on 2023-03-09 14:48:55