

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ALAN BENNETT,

Claimant,

vs.

JOHN DEERE DUBQUE WORKS,
OF DEERE & COMPANY,Employer,
Defendant.

File No. 5059280.01

ARBITRATION DECISION

Head Note Nos.: 1700, 1803, 2206, 2907

Alan Bennett, claimant, filed a petition in arbitration seeking workers' compensation benefits from John Deere Dubuque Works, employer and self-insured defendant. The hearing was held on July 20, 2022. Pursuant to an order from the Iowa Workers' Compensation Commissioner, this case was heard via videoconference using Zoom with all parties and the court reporter appearing remotely.

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

Alan Bennett was the only witness to testify live at trial. The evidentiary record also includes joint exhibits 1-6, claimant's exhibits 1-6, and defendants' exhibits A-G. All exhibits were received into the record without objection.

The parties submitted post-hearing briefs on August 17, 2022, at which time the case was fully submitted to the undersigned.

ISSUES

The parties identified the following disputed issues on the hearing report:

1. The nature and extent of claimant's entitlement to permanent disability benefits.
2. Whether claimant is entitled to penalty benefits.
3. Assessment of costs.

FINDINGS OF FACT

The undersigned, having considered all the evidence and testimony in the record, finds as follows:

At the time of the hearing the claimant, Alan Bennett (hereinafter “Bennett”) was 65 years old. (Hearing Transcript, p. 9). Bennett resides in Potosi, Wisconsin with his family. (Id.). Bennett graduated from high school in 1975. (CI Ex. 1, p. 10). After high school, Bennett worked as an assistant manager at Walsh Ace Hardware Central Tractor Farm. (CI Ex. 4, p. 53). In that position Bennett ordered parts, helped customers, and ran the cash register. (Id.). He worked there until the store closed—a period of more than twenty years. (Id.). After the hardware store closed, Bennett enrolled in Fennimore Voc-Tech College. (CI Ex. 1, p. 10). In 2000, he obtained an associate degree in machine and tool operation. (Id.). He also took a course in welding. (Id.).

From 2000 to 2001, Bennett operated a stamp press at Dubuque Stamping & Manufacturing. (CI Ex. 2, p. 29). He was laid off from that position and was briefly unemployed before being hired as an automation press operator for Uelner Precision Tool & Die. (Id. at 30). Bennett worked for Uelner Precision Tool & Die for approximately three months before taking a new position at Hy-Pro operating a CNC mill and CNC lathe. (Id.). Bennett worked at Hy-Pro for a year and a half. (Id.).

In October 2003, Bennett started working for John Deere Dubuque Works (hereinafter “John Deere”). (CI Ex. 2, p. 30). His first position was in the Paint Department. (Id.). He then moved to the Fabrication Department, before transferring to an assembly position in the Backhoe Department. (Id.). In the Backhoe Department, Bennett attached fuel tanks and loader lift arms onto the back of the machines that were being constructed. (CI Ex. 4, p. 52). This is the job he was performing on December 1, 2015, the date he sustained the work-injury at issue in this case. (Tr., p. 23). At the hearing, Bennett testified as follows:

I was working on the backhoe line. I was tightening hardlines onto a machine, and we were experiencing a problem with too much paint on the nuts of the hardlines, and the wrench - - I was raise - - I had to raise my hand above my head . . . And the wrench slipped off the nut, and I overextended over the top of my head and hurt my shoulder. . . . The wrench extended my arm back over, and then I heard a pop and then I had a large amount of pain.

(Id. at 23-24). Bennett informed his supervisor of the incident and was taken to John Deere Occupational Health for an evaluation. (Id. at 24). According to the medical records, he was seen by Kimberly Deppe, NP. (JE 3, pp. 44-45). Nurse Deppe diagnosed him with right shoulder and deltoid pain. (Id.). Bennett continued to experience right shoulder pain. (See JE 3). John Deere Occupational Health ordered an x-ray of his right shoulder and an MRI. (Id.). The x-ray showed moderate AC joint

degenerative joint disease. (Id. at 43). The MRI was completed on December 4, 2015. (JE 2, p. 8). It revealed a massive rotator cuff tear involving the entire supraspinatus tendon and a majority of the infraspinatus tendon, partial undersurface tearing and severe tendinopathy in the distal subscapularis tendon, moderate tendinopathy along the intra-articular and extra-articular course of the biceps tendon, and degenerative fraying of the labrum. (Id.).

Bennett has a history of right shoulder injuries. In April 2015, he slipped and fell down some steps at his home, injuring his right shoulder. An MRI was taken days after the fall. It showed complete tears of the infraspinatus and supraspinatus tendons with retraction, a strain of the biceps tendon, and degenerative changes to the AC joint. (JE 1, p. 1). On May 12, 2015, Ryan Cloos, D.O., performed surgery—a right shoulder arthroscopy with debridement, biceps tenotomy, and subacromial decompression. (JE 2, p. 5-7). During surgery, Dr. Cloos determined that Bennett's rotator cuff tear was irreparable. (Id.). Bennett received follow-up treatment with Dr. Cloos, as well as attended physical therapy. (JE 1, p. 2-4). Bennett's last appointment with Dr. Cloos was on July 23, 2015. (Id. at 3). Dr. Cloos' treatment note indicates Bennett was still working on increasing his strength and range of motion in the right shoulder. (Id. at 4). Dr. Cloos released him to return to work at John Deere and told him to return as needed. (Id.).¹

John Deere Occupation Health compared the results of Bennett's December 2015 MRI with the one taken in April 2015. (JE 3, p. 40). The reviewing radiologist saw no changes. (Id.). Bennett was referred for physical therapy at Grant Regional Health Center. (Id.; see also JE4, p. 47). He attended physical therapy for a month, and then John Deere Occupational Health ordered a second MRI. This was taken on January 29, 2016. (JE 2, p. 9). It also showed a massive rotator cuff tear of the supraspinatus and infraspinatus tendon, degenerative fraying of the superior and inferior labrum, a possible tear of the long head of the biceps tendon, moderate arthrosis of the AC joint and mild arthrosis of the glenohumeral joint, and tendinosis of the subscapularis tendon. (Id.). Bennett was referred to Christopher Palmer, M.D., at Westside Orthopedic for an evaluation. (JE 5, pp. 48-49). Bennett saw Dr. Palmer on February 25, 2016. (Id.). Dr. Palmer diagnosed him with a right shoulder chronic rotator cuff tear. (Id. at 49). Dr. Palmer recommended an injection, which Bennett declined. (Id.). Dr. Palmer suggested a gradual return to work without restrictions and home exercises. (Id.). Bennett continued to attend physical therapy. (See, JE, pp. 30-32).

On April 26, 2016, Bennett was evaluated by James Nepola, M.D., at the University of Iowa Hospitals and Clinics. (JE 6, pp. 50-57). Dr. Nepola diagnosed him with shoulder pain and a complete tear of the right rotator cuff. (Id. at 54). Dr. Nepola indicated the rotator cuff tear was present before December 1, 2015, but the work incident exacerbated his symptoms. (Id. at 56). Dr. Nepola opined surgery was unlikely

¹ Bennett also testified he had surgery on his right knee in 1973, a surgical repair of his left rotator cuff, a left hip replacement in 2012, a right carpal tunnel release in 2013, and a spinal fusion in 2021. (Tr., pp. 27-28). He, however, does not have any permanent work restrictions from any of these surgical procedures.

to return any additional strength or range of motion to his right shoulder. (Id.). He gave Bennett a corticosteroid injection and continued his temporary work restrictions. (Id. at 54-55). Dr. Nepola also recommended Bennett continue to attend physical therapy. (See id. at 57).

Bennett continued to treat with Dr. Nepola. (See JE 6, pp. 57-95). He returned on May 24, 2016. (Id. at 57). The injection improved Bennett's shoulder pain. (Id.). Dr. Nepola gave him another subacromial injection and continued his physical therapy. (Id. at 58). On June 28, 2016, Dr. Nepola gave Bennett a third subacromial injection. (Id. at 64). In August 2016, Dr. Nepola increased his work restrictions and referred him for formal work hardening. (Id. at 73). On November 1, 2016, Dr. Nepola provided Bennett with a fourth subacromial injection. (Id. at 80). In December 2016, Bennett aggravated his right shoulder at work hardening. (Id. at 83). Dr. Nepola performed a fifth subacromial injection on December 13, 2016. (Id. at 85). On January 31, 2017, Dr. Nepola placed Bennett at maximum medical improvement (MMI) for his right shoulder. (Id. at 92). Dr. Nepola assigned him 15 percent impairment to the upper extremity or 9 percent permanent impairment to the body as a whole for loss of range of motion in the shoulder joint, citing to Figures 16-40, 16-43, and 16-46 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Id. at 96). He also provided permanent restrictions of no lifting above shoulder height with the right arm and no repetitive reaching away from the body or above chest height with the right arm.² (Id.). At the hearing, Bennett testified that he has not sought treatment for his right shoulder since his last appointment with Dr. Nepola in 2017. (Tr., p. 14). He indicated, however, that he continues to experience symptoms such as pain, loss of strength and loss of range of motion in his shoulder. (Id. At 33-34).

At the behest of his attorney, Bennett attended an independent medical exam (IME) with Richard Kreiter, M.D., on June 27, 2017. (CI Ex. 1, p. 4). Dr. Kreiter diagnosed Bennett with a massive rotator cuff tear of the right shoulder with limited range of motion weakness, degenerative changes in the AC joint, and chronic pain. (Id.). Dr. Kreiter found that his right shoulder condition was significantly aggravated and accelerated by the December 1, 2015 work incident. (Id.). He assigned Bennett 24 percent permanent impairment of the upper extremity or 14 percent permanent impairment to the body as a whole for loss of range of motion in the shoulder joint and abnormalities in the AC joint, citing to Figures 16-40, 16-43, and 16-46, as well as Table 16-18. (Id.). Dr. Kreiter's report also addresses permanent restrictions. His report states as follows:

There are permanent restrictions which should be instituted. Dr. Nepola advised a 15-pound right-handed lift with arm to the side, and 50 pounds with both hands and arms to the body. No repetitive reaching or lifting away

² At the hearing, Bennett testified Dr. Nepola did not give him a weight-lifting restriction because he "would not be able to do any . . . jobs at John Deere at all." (Tr., p. 15). This information is not found in Dr. Nepola's treatment records. His last treatment note from January 31, 2017, states "no lift restriction from floor to waist height." (JE 6, p. 93).

from the body on the right side. No overhead work can be done, and he cannot do it anyway. There was some confusion with John Deere Human Relations and Dr. Nepola on those restrictions.

(CI Ex. 1, p. 4).

Like Dr. Nepola, Dr. Kreiter assigned impairment for loss of range of motion in the shoulder joint. He, however, also assigned impairment for disorders of the joints, specifically the AC joint, citing to Table 16-18. (CI. Ex. 1, p. 4). He indicated it was warranted because there was tenderness over the AC joint and an abnormal MRI. (Id.). Section 16.7 of the AMA Guides, provides an introduction on the use of Table 16-18, titled “Maximum Impairment Values for the Digits, Hand, Wrist, Elbow and Shoulder Due to Disorders of Specific Joints or Units.” Guides, § 16.7, p. 498. That section states,

Conditions not previously described that can contribute to impairments of the hand and upper extremity include bone and joint disorders (Section 16.7a), presence of resection or implant arthroplasty (Section 16.7b), musculotendinous disorders (Section 16.7c), and tendinitis (Section 16.7d), and loss of strength (Section 16.8). The severity of impairment due to these disorders is rated separately according to Tables 16-19 through 16-30 and then multiplied by the relative maximum value of the unit involved as specified in Table 16-18. Appropriate impairment percents are combined with other impairment percents by means of the Combined Values Chart (p. 604).

Id. The Guides, further state:

Impairments from the disorders considered in this section under the category of “other disorders” are usually estimated by using other impairment evaluation criteria. *The criteria described in this section should be used only when the other criteria have not adequately encompassed the extent of impairment.* Some of the conditions described in this section can be concurrent with each other and with decreased motion because they share overlapping pathomechanics. The evaluator must have good understanding of pathomechanics of deformities and apply proper judgement to avoid duplication of impairment ratings.

Id. at 499 (emphasis in original). Dr. Kreiter does not identify which of the “other disorders” Bennett has that required use of Table 16-18, nor does he cite to the tables specifically listed in the Guides for rating those disorders. (See CI Ex. 1). Finally, his report does not provide any explanation for why the other criteria, such as loss of range of motion in the shoulder joint, would not sufficiently cover Bennett’s impairment. (Id.). For these reasons, I find Dr. Kreiter’s opinion to be less persuasive than that of Dr. Nepola. Dr. Nepola’s opinion is therefore adopted.

At the time of the hearing, Bennett was still working full time for John Deere as a parts counter in the Material Storage and Retrieval Division. (Tr., p. 10). There are four other parts counters in his department. (Id. at 11). Bennett has been in this position since 2017. (Id. at 10-11). He testified he bid into this position because he was experiencing issues with his right shoulder in his previous job. (Id. at 11). Bennett's previous position was driving a fork truck. (See id. at 26; JE 3, p. 10-11). Bennett testified he bid out of that job because he had trouble lifting and filling the truck's fuel tank, which weighed 70 pounds. (Tr., p. 26).

As a parts counter, Bennett rides a bike through the plant and takes inventory of parts. (Id. at 18). Each day, he is assigned two departments to inventory. (Id.). This requires lifting, restacking, and counting parts. (Id. at 12, 20). The parts are of varying weights and sizes, but the larger parts can weigh 30-50 pounds. (Id. at 19). Some of them, such as nuts and bolts, are weighed on digital scales and others are hand counted. (Id. at 19-21). Bennett indicated he occasionally asks a co-worker for assistance with lifting, but he is physically able to do the parts counting position, and he is doing a good job. (See id., at 22, 40-41). In his testimony, Bennett did not state whether he observes or adheres to the weight restrictions suggested by Dr. Kreiter while performing his duties.

As a parts counter, Bennett works 40 hours a week and earns \$18.90 an hour, a higher wage than he earned in December 2015. (Id. at 22, 41; Ex. F, p. 55). He, however, estimates that he lost \$15,000 a year in income by transferring to the parts counter position and his pay classification went down by one level. (Tr., p. 16; CI Ex. C, pp. 46-49). Bennett testified his assembly job also included an incentive pay program. (Id.). The more parts he produced, the higher his pay. (Id.). The parts counter job is not part of an incentive pay program. (Id.). Bennett stated he plans to keep working as a parts counter and has no plans to retire. (Tr., p. 36). However, during his deposition in April 2022, Bennett indicated he might possibly retire when he is 66 ½ —the full retirement age for social security benefits. (CI Ex. 4, p. 50).

In April 2022, Bennett obtained a vocational evaluation from Barbara Laughlin, M.S. (CI Ex. 1, pp. 8-20). Ms. Laughlin interviewed Bennett, and reviewed Dr. Nepola's treatment records and Dr. Kreiter's IME report. (Id. at 8). Bennett told Ms. Laughlin that he is not able to keep his right arm above his shoulder for more than a few seconds, had no strength in his right arm when he extends his arm or holds it above his shoulder, and can only use his right arm productively when his elbow is against his side. (Id. at 12). He also stated that he could never return to his assembly job at John Deere.³ (Id.). Utilizing the restrictions provided by both Dr. Kreiter and Dr. Nepola, Ms. Laughlin opined Bennett has a 100 percent loss of all semi-skilled and skilled occupations in the closest matched jobs, a 99.2 percent loss of all semi-skilled and skilled occupations in the good match jobs, as well as a 99.2 percent loss of all unskilled occupations. (Id. at 16).

³ At the hearing, Bennett testified he could not return to any of his past occupations because of his right shoulder limitations. (See, Tr., pp. 29-33).

I do not find Ms. Laughlin's report to be particularly helpful. She opines Bennett has a 99.2 to 100 percent occupational loss, based upon the combined "restrictions of Dr. Nepola and Dr. Kreiter." (CI Ex. 1, p. 16). However, it is clear from the medical records that Dr. Nepola and Dr. Kreiter provided different permanent restrictions. Dr. Nepola did not provide a weight-limit-lifting restriction. (JE 6, p. 96). Presumably, applying Dr. Nepola's restrictions as written would provide a different analysis. Ms. Laughlin states Bennett has an almost complete occupational loss because of his right shoulder injury. He, however, is still working full time for John Deere as a parts counter. This is not a make-work position. There are other employees at the Dubuque plant performing this same job. (Tr., p. 10). According to Bennett, these positions are coveted by employees at John Deere, and he purposely bid into the position. (*Id.* at 12). Additionally, Ms. Laughlin's report states she reviewed the job descriptions for 35 positions at John Deere and Bennett does not have the skills, abilities, or experience to perform any of them. (*Id.* at 17). Her report, however, contains no details to support this assertion. She did not include the job titles of the positions she reviewed, nor did she provide job descriptions. Ms. Laughlin's findings do not have support in the record, and they are not adopted.

In his post-hearing brief, Bennett alleges entitlement to penalty benefits for delayed payment of permanent partial disability. (See Claimant's Post-Hearing Brief). He states the defendants issued his benefit checks 3 to 10 days late without a reasonable excuse for the delay. (*Id.* at 7-8). Claimant's exhibit 5 and defendants' exhibit D both contain charts of the permanent partial disability benefits issued to Bennett by defendants. (CI Ex. 5; Ex. D). Those charts look identical, and they do appear to show that Bennett's checks were routinely issued several days after the alleged covered benefit period. For example, the first entry in both charts state that the first covered benefit period was February 27, 2017, through March 5, 2017, and the check for this period was issued on March 15, 2017—ten days later. (CI Ex. 5, p. 60; Ex. D, p. 12). The other payments listed follow a similar pattern. (CI Ex. 5; Ex. D). However, at hearing, the parties stipulated that the proper commencement date for Bennett's permanent partial disability benefits is March 15, 2017. (See Hearing Report). The agency accepted that stipulation and the parties are now bound by it. Given the parties' stipulation, Bennett's first permanent partial disability check was issued before the close of the covered benefit period. It, and the subsequently issued checks, therefore, are not late under the parties' stipulation.

CONCLUSIONS OF LAW

In 2017, the Iowa legislature amended the Iowa Workers' Compensation Act. See 2017 Iowa Acts, ch. 23. The 2017 amendments apply to cases in which the date of an alleged injury is on or after July 1, 2017. *Id.* at § 24(1); see also Iowa Code § 3.7(1). Because the injury at issue in this case occurred before July 1, 2017, the Iowa Workers' Compensation Act in effect before the 2017 amendments applies. See *Smidt v. JKB Restaurants, LC*, File No. 5067766 (App. Dec. 11, 2020); but see (holding that the 2017 amendments apply to interest accrued on or after July 1, 2017, regardless of the date of injury).

The parties agree Bennett sustained industrial disability but dispute the extent. 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 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. Iowa Code § 85.34.

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

As found above, the weight of the evidence establishes the December 1, 2015 work injury caused a permanent functional impairment of 9 percent impairment to the body as a whole. Dr. Nepola also assigned work restrictions of no lifting above shoulder height with the right arm and no repetitive reaching away from the body or above chest height with the right arm. These restrictions impact the type of work Bennett can physically perform; after the right shoulder injury Bennett was unable to return to his assembly job at John Deere.

Bennett is 65 years old. He has an associate's degree in machine and tool operation. He worked for many years as an assembler, but he also has experience as an assistant manager and can still drive a fork truck. He is still working full time for John Deere as a parts counter and earning a higher wage than he did at the time of the injury. Considering all of the relevant factors for determining the extent of lost earning capacity under the Iowa Workers' Compensation Act, Bennett has sustained an industrial disability of 40 percent. Five hundred weeks multiplied by 40 percent equals 200 weeks. Bennett is entitled to 200 weeks of permanent partial disability benefits. The parties stipulated that Bennett was already paid 75 weeks of permanent partial disability benefits prior to the hearing. Defendants are entitled to a credit for the prior

paid benefits. This means, Bennett will receive an additional 125 weeks of permanent partial disability benefits.

Bennett also asserts a claim for penalty benefits. Specifically, Bennett claims defendants repeatedly issued checks for his permanent partial disability benefits 3 to 10 days late without a reasonable excuse for the delays. Defendants counter that Bennett's argument is premised upon claimant's entitlement to permanent partial disability benefits starting prior to March 15, 2017, the commencement date stipulated to at hearing. Defendants argue that if claimant's entitlement to permanent partial disability benefits started on March 15, 2017, then his checks were in fact issued early and are not late under the statute. Defendants argue a penalty is not warranted.

Iowa Code section 86.13(4) provides:

a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.

b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:

(1) The employee has demonstrated a denial, delay in payment, or termination in benefits.

(2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

Id. The legislature established in Iowa Code section 86.13(4)(b) a burden-shifting framework for determining whether penalty benefits must be awarded in a workers' compensation case. See 2009 Iowa Acts ch. 179, § 110 (codified at Iowa Code § 86.13(4)(b)); see also Pettengill v. Am. Blue Ribbon Holdings, LLC, 875 N.W.2d 740 (Iowa App. 2015) as amended (Feb. 16, 2016) (discussing the burden-shifting required by the two-factor statutory test). The employee bears the burden to establish a prima facie case for penalty benefits by establishing a denial, delay in payment, or termination of workers' compensation benefits. Iowa Code § 86.13(4)(b)(1). If the employee fails to prove a denial, delay, or termination, there can be no award of penalty benefits and the analysis stops. See id. at § 86.13(4)(b); see also Pettengill, 875 N.W.2d at 747. However, if the employee makes the requisite showing, the burden of proof shifts to the employer. See id. at § 86.13(4)(b); see also Pettengill, 875 N.W.2d at 747.

Weekly compensation payments are due at the end of the compensation week. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996). At hearing, the parties stipulated that the proper commencement date for Bennett's permanent partial disability benefits is March 15, 2017. (See Hearing Report). The agency accepted that stipulation and the parties are now bound by it. Given the parties' stipulation, Bennett's first permanent partial disability check was issued before the close of the covered benefit period. It, and the subsequently issued checks, therefore, are not late under the parties' stipulation. Bennett has not met his burden to show he is entitled to penalty benefits.

Bennett seeks an award of the costs outlined in claimant's exhibit 6. Costs are to be assessed at the discretion of the deputy commissioner hearing the case. See 876 Iowa Administrative Rule 4.33; Iowa § Code 86.40. Administrative Rule 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, including convenience fees incurred by using the WCES payment gateway, and (8) costs of persons reviewing health service disputes.

876 IAC 4.33(6).

Bennett incurred costs for the filing fee for his petition. (CI Ex. 6, p. 62). He also seeks reimbursement for the cost of ordering a copy of his deposition transcript and for the cost of Ms. Laughlin's report. (Id. at 63-66). Bennett was successful in this action; he was awarded additional industrial disability beyond that previously volunteered by defendants. Therefore, I conclude that it is reasonable to assess claimant's filing fee pursuant to 876 IAC 4.33(7) and his deposition transcript charges pursuant to 876 IAC 4.33(2). I did not find the report or opinions of Ms. Laughlin to be insightful or helpful in this case. I conclude it would not be appropriate to assess any of her report as a cost.

Therefore, I assess costs totaling \$158.00.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay Bennett two hundred (200) weeks of permanent partial disability benefits at the stipulated rate of five hundred seventy-one and 63/100 dollars (\$571.63) per week commencing on March 15, 2017. Defendants are entitled to a

credit for the seventy-five (75) weeks of permanent partial disability benefits already paid prior to hearing.

Defendants shall pay accrued weekly benefits in a lump sum together with interest 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.

Defendants shall pay costs of one hundred and fifty-eight dollars (\$158.00).

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

Signed and filed this 20th day of December, 2022.

A handwritten signature in black ink, reading "Amanda Rutherford", written over a horizontal line.

AMANDA R. RUTHERFORD
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Thomas Wertz (via WCES)

Dirk Hamel (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.