BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JASON DAVIS, Claimant, vs. LENNOX INDUSTRIES, INC., Employer, and INDEMNITY INS. CO. OF N. AMERICA, Insurance Carrier, Defendants.	File No. 5063703 A P P E A L D E C I S I O N Head Notes: 1803; 3002; 5-9999

Defendants Lennox Industries, Inc., employer, and its insurer, Indemnity Insurance Company of North America, appeal from an arbitration decision filed on August 14, 2019. Claimant Jason Davis responds to the appeal. The case was heard on February 28, 2019, and it was deemed fully submitted in front of the deputy workers' compensation commissioner on April 1, 2019.

The deputy commissioner found claimant sustained 20 percent industrial disability as a result of the work injury, which occurred on June 17, 2016. The deputy commissioner found claimant's average weekly wage was $843.00, resulting in a weekly compensation benefit rate of $512.70 based on claimant's status as single with one exemption. The deputy commissioner awarded claimant costs in the amount of $722.00.

On appeal, defendants assert the deputy commissioner's industrial disability award is excessive. Defendants also assert the deputy commissioner erroneously included premium pay in calculating claimant's weekly benefit rate.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 86.24 and 17A.15, the arbitration decision filed on August 14, 2019, is affirmed in its entirety with some additional findings, conclusions, and analysis as it relates to claimant's weekly benefit rate.

I affirm the deputy commissioner's finding that claimant sustained 20 percent industrial disability as a result of his work injury. I affirm the deputy commissioner's findings, conclusions, and analysis regarding this issue in its entirety.

With the additional findings, conclusions, and analysis that follow, I affirm the deputy commissioner's weekly benefit rate calculation. More specifically, I affirm the deputy commissioner's finding that claimant's vacation pay is not premium pay and should therefore be included in its entirety in claimant's gross earnings.

The parties in this case agree claimant's rate should be determined by using the last thirteen consecutive calendar weeks immediately preceding the injury under Iowa Code section 85.36(6). That section provides:

> The basis of compensation shall be the weekly earnings of the injured employee at the time of the injury. Weekly earnings means gross salary, wages, or earnings of an employee to which such employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured, as regularly required by the employee's employer for the work or employment for which the employee was employed, computed or determined as follows and then rounded to the nearest dollar:
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> . . .
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> 6. In the case of an employee who is paid on a daily or hourly basis, or by the output of the employee, the weekly earnings shall be computed by dividing by thirteen the earnings, <u>including shift differential pay but not including overtime or premium pay</u>, of the employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury . . .
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> Iowa Code section 85.36(6) (emphasis added).

Gross earnings is later defined in the statute as "recurring payments by the employer to the employee for employment, before any authorized or lawfully required deduction or withholding of funds by the employer, excluding irregular bonuses, retroactive pay, overtime, penalty pay, reimbursement of expenses, expense allowances, and the employer's contribution for welfare benefits." Iowa Code section 85.61 (3).

In this case, claimant receives a higher hourly base rate of pay for vacation hours than regular hours worked. (Hearing Transcript, p. 61) This higher hourly base rate of pay for vacation hours is calculated based on claimant's earnings from the prior year. (Tr., pp. 61-62) Defendants argue this inflated base rate of pay for vacation hours constitutes premium pay and should therefore not be included in the rate calculation. Defendants assert claimant's rate calculation should only include his regular hourly base rate of pay for any vacation hours taken.

Claimant, however, testified that his earnings are made up of several different types of pay in addition to his base hourly rate. These include incentive pay, production pay, and side pay. (Tr., p. 63; Claimant's Exhibit 4) Claimant testified he is not entitled to these additional types of pay when he takes vacation. (Tr., p. 63) As a result, it was negotiated with the union that claimant's vacation base hourly rate would be higher to make up for the loss of additional types of pay. (Tr., pp. 63-64)

A review of claimant's paystubs supports his testimony with respect to side pay and production pay, but not incentive pay. Claimant received the same incentive pay irrespective of whether he took vacation. (See Ex. 4, pp. 23-24, 27-28, 31-32) However, as he testified, claimant did receive less in side pay and production pay during weeks in which he took vacation. (See Ex. 4, pp. 23-24, 27-28, 31-32)

Defendants did not call anyone to testify to rebut claimant's explanation regarding why he receives an inflated base hourly rate for vacation hours.

In Iowa Code section 85.36, overtime and premium pay are lumped together. Iowa Code section 85.36(6) (excluding "overtime or premium pay"). Premium pay is not defined by statute, nor is it sufficiently defined in case law. Though similarly not defined, it is commonly understood that overtime pay rewards employees with an inflated rate for hours worked in excess of their normally scheduled hours.

In the same vein, the ordinary meaning of "premium" is "a reward or recompense for a particular act" and "a sum over and above a regular price paid chiefly as an inducement or incentive." "Premium," Merriam-Webster.com, http://www.merriam-webster.com (May 6, 2019) (emphasis added); see Evenson v. Winnebago Indus., Inc., 881 N.W.2d 360, 367 (Iowa 2016) (citations omitted) ("We give words their ordinary and common meaning by considering the context within which they are used, absent a statutory definition or an established meaning in the law."). The ordinary definition of "premium" is consistent with the common understanding of overtime pay, which rewards claimants with an inflated rate for hours worked in excess of their normally scheduled hours. Thus, I find both premium pay and overtime pay are an incentive or reward for work performed.

Claimant's inflated base rate of pay for vacation hours in this case is not consistent with this ordinary definition of premium pay or overtime. While premium pay and overtime are an incentive or reward to perform work, claimant's inflated base rate of pay for vacation hours is intended to roughly replace claimant's earnings. In other words, the inflated base rate of pay for vacation hours is not intended as an inducement or incentive for claimant to take vacation, but instead to replace claimant's regular earnings. Thus, although this inflated base rate of pay for vacation hours may result in higher gross earnings during weeks in which claimant takes vacation, I find claimant's vacation pay does not constitute premium pay under the statute.

With the above additional findings, conclusions, and analysis, the deputy commissioner's finding that claimant's vacation pay is not premium pay is therefore affirmed, as is the deputy commissioner's weekly benefit rate calculation.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on August 14, 2019, is affirmed in its entirety with the additional findings, conclusions, and analysis set forth above.

Defendants shall pay claimant one hundred (100) weeks of permanent partial disability benefits at the weekly rate of five hundred twelve and 70/100 dollars ($512.70) commencing August 29, 2016.

Defendants shall pay claimant the underpayment identified in the arbitration decision.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding in the amount of seven hundred twenty-two and no/100 dollars ($722.00), and defendants shall pay the costs of the appeal, including the cost of the hearing transcript.

Pursuant to rule 876 IAC 3.1(2), defendants shall file subsequent reports of injury as required by this agency.

Signed and filed on this 8th day of May, 2020.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

James M. Ballard Via WCES

Gregory M. Taylor Via WCES