

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

 RANDALL LEE,

Claimant,

vs.

JOHN DEERE WATERLOO WORKS,

Employer,
Self-Insured,
Defendant.

File No. 21700629.01

ARBITRATION DECISION

Headnotes: 1801.1, 1802, 1803,
3001, 3002

Claimant Randall Lee filed a petition in arbitration on June 28, 2021, alleging he sustained an injury to his left thumb on July 17, 2019, while working for Defendant John Deere Waterloo Works ("John Deere"). John Deere filed an answer on July 6, 2021, admitting claimant sustained a work injury.

An arbitration hearing was held *via* Zoom video conference on June 29, 2022. Attorney Joseph Lyons represented Lee. Lee appeared and testified. Attorney James Kalkhoff represented John Deere. Joint Exhibits ("JE") 1 through 3, and Exhibits 1 through 6 and A through F were admitted into the record. The record was held open through August 5, 2022, for the receipt of post-hearing briefs. The briefs were received, and the record was closed.

Before the hearing the parties submitted a Hearing Report, listing stipulations and issues to be decided. John Deere waived all affirmative defenses. The Hearing Report Order was entered at the conclusion of the hearing adopting the parties' stipulations.

STIPULATIONS

1. An employer-employee relationship existed between John Deere and Lee.
2. Lee sustained an injury, which arose out of and in the course of his employment with John Deere on July 17, 2019.
3. If the alleged injury is found to be a cause of permanent disability, the disability is a scheduled member disability to the left thumb.
4. At the time of the alleged injury Lee was single and entitled to one exemption.
5. Medical benefits are no longer in dispute.

6. The costs set forth in Exhibit 5 have been paid.

ISSUES

1. Is the alleged injury a cause of temporary disability during a period of recovery?
2. Is Lee entitled to temporary benefits from July 17, 2019, through October 7, 2019?
3. Is the alleged injury a cause of permanent disability?
4. If the alleged injury is the cause of permanent disability, what is the extent of disability?
5. If the alleged injury is a cause of permanent disability, what is the commencement date for permanency?
6. What is the rate?
7. Should penalty benefits be assessed against John Deere?
8. Should costs be assessed against either party?

FINDINGS OF FACT

John Deere hired Lee on November 7, 2007. (Tr.:8) At the time of the hearing he was 61. (Tr.:8)

On July 17, 2019, Lee sustained a crush injury to the top of his left thumb when his thumb was smashed between a metal part and an air gun while he was working as an assembler in Department 503. (Ex. 2:8; Tr.:9-10) Lee reported the injury to his supervisor who took him to the medical clinic at John Deere. (Tr.:11) John Deere sent Lee to UnityPoint Occupational Health. (JE 2:3; Tr.:11)

At UnityPoint Occupational Health Lee underwent an x-ray of his fingers. (JE 1:1) The reviewing radiologist listed a finding of a comminuted nondisplaced fracture of the distal phalangeal tuft. (JE 1:1) The treating advanced nurse practitioner diagnosed Lee with a left thumb nondisplaced comminuted fracture of the distal phalangeal tuft and a left thumb contusion, stitched his thumbnail back onto his thumb, prescribed Keflex, ordered Lee to ice his thumb, and imposed restrictions of no use of the left upper extremity. (JE 2:6-7; Tr.:11)

Lee attended an appointment with Sarvenaz Jabbari, M.D., an occupational medicine physician working in the clinic located at John Deere on July 23, 2019. (JE 3:8) Dr. Jabbari documented Lee reported his pain had improved and he was only experiencing pain when his hand is "hung dependently or when he bumps into things," and he reported his strength is weaker in his left upper extremity. (JE 3:8) Dr. Jabbari

assessed Lee with a left thumb tuft fracture and laceration, continued his restrictions, recommended he continue to wear a tip protector, and recommended Lee ice and elevate his hand 10 minutes three times per day and perform gentle range of motion exercises of the thumb three times per day. (JE 3:9)

On July 26, 2019, Lee returned to the clinic at John Deere. (JE 3:10) Lisa Quigley, ARNP, examined Lee's thumb, removed four sutures, continued his restrictions, and ordered a repeat x-ray. (JE 3:10)

Lee reported after he returned to work following the injury John Deere returned him to the assembly line. (Tr.:15) Lee was not performing his regular job at that time. (Tr.:26, 30) John Deere assigned Lee to sweep, clean, pick up trash, and engage in other cleanup activities in his department. (Tr.:29-30) Overtime hours were available during that time, but Lee testified he did not work any overtime. (Tr.:30)

A week after the injury Lee went on a scheduled layoff at John Deere through August 19, 2019. (Tr.:13) The layoff had nothing to do with Lee's work injury. (Tr.:27) Lee testified he continued to work full time after the layoff. (Tr.:24)

Lee attended an appointment with Dr. Jabbari on August 20, 2019. (JE 3:11) Dr. Jabbari noted repeat x-rays continued to show a nondisplaced fracture of the distal tuft. (JE 3:11) Dr. Jabbari released Lee to return to work with restrictions of no repeated firm gripping or twisting of the left hand and to use a tip protector during the day, and directed Lee to perform gentle range of motion exercises of his finger three times per day. (JE 3:11)

On September 18, 2019, Lee returned to the clinic at John Deere and he was examined by Teresa Hippen, ARNP. (JE 3:12) Hippen examined Lee's thumb, noted his left thumbnail was almost falling off, and he was complaining of pain when gripping hard or when he catches his fingernail. (JE 3:12) Hippen released Lee to return to work without restrictions September 18, 2019. (JE 3:12)

Lee attended an appointment with Hippen on October 7, 2019. (JE 3:13) Hippen observed Lee's left thumbnail had fallen off, he reported some mild numbness and tingling, he had full gripping of his hand and full extension and flexion of his thumb but reported some mild discomfort when gripping. (JE 3:13) Hippen released Lee to return to work without restrictions. (JE 3:13)

On November 12, 2019, Lee returned to Dr. Jabbari for an impairment rating. (JE 3:14) Dr. Jabbari noted Lee had full range of motion to flexion and extension of his distal phalanx and Lee reported he had decreased sensation of the very tip of his thumb. (JE 3:14) Dr. Jabbari noted because one year had not elapsed since the injury, he could see improvements in sensation and with his nail, and documented Lee should return in July 2020 for an impairment rating. (JE 3:14) Lee testified during the appointment Dr. Jabbari did not use any tools to measure the range of motion in his thumb. (Tr.:16)

On July 14, 2020, attended an appointment with Rick Garrels, M.D., at the clinic at John Deere regarding his left thumb injury. (Ex. C; JE 3:15) Lee reported he was performing his regular duties and denied any functional limitations, but reported some decreased sensation in the tip of his left thumb. (Ex. C) Dr. Garrels opined Lee had no functional limitations and he assigned Lee a zero percent permanent impairment. (Ex. C) Lee reported Dr. Garrels spent between 10 to 15 minutes with him. (Tr.:16) Lee testified he told Dr. Garrels he was having issues with gripping and numbness at the end of his thumb and Dr. Garrels took out a paper clip, unfolded it and poked the end of his thumb. (Tr.:17) Lee reported he could not feel the poke and he told Dr. Garrels he could not feel the poke. (Tr.:17) Lee testified he did not remember Dr. Garrels using any tools to measure his range of motion. (Tr.:17)

Following the appointment Dr. Garrels found Lee had full range of motion in his left thumb with normal two-point discrimination in the tip, determined he had no functional limitations, found he had reached maximum medical improvement, and using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), found Lee had not sustained a permanent impairment. (JE 3:15)

Farid Manshadi, M.D., a physiatrist, performed an independent medical examination for Lee on September 11, 2020, and issued his report on October 6, 2020. (Ex. 1) Dr. Manshadi reviewed Lee's medical records and examined him. (Ex. 1) Dr. Manshadi documented,

[o]n examination of the sensation, two-point discrimination was impaired involving the left thumb from the distal IP joint dorsally as well as in the ventral aspect, and this was over 10 mm in comparison to the opposite thumb, which was at 4 mm.

Left thumb active range of motion was limited. Left thumb IP joint flexion was at 44 degrees using a goniometer. Left thumb MCP flexion was 37 degrees. On the opposite side, right thumb IP flexion was at 55 degrees and right thumb MCP flexion was 50 degrees. The rest of the left thumb range of motion was similar to the opposite side. [T]here are some arthritic changes involving both MCP joints involving the thumbs.

Using pinciometry, right pinch was 9, 9 and then 8.5 kg. Left pinch was 4.5, 5.0, and then 4.5 kg. The grip strength on the right using a dynamometer was 37, 35, and then 30 kg. Grip strength on the left was 30, 32, and then 34 kg.

(Ex. 1:2) Dr. Manshadi opined Lee sustained a comminuted fracture of the left thumb distal IP joint involving the tuft and that he continued to have reduced sensation involving the distal IP joint as well as reduced range of motion of the left thumb in comparison with the right, which is causally related to the July 17, 2019, work injury. (Ex. 1:2) Dr. Manshadi found Lee reached maximum medical improvement on September 11, 2020. (Ex. 1:2) Using the AMA Guides, using Table 16-6, Dr. Manshadi found:

Lee has transverse loss of both digital nerves involving the distal IP and as such, I assign twenty-five (25) percent impairment of the left thumb. Then referring to Table 16-5 the two-point discrimination is between 7 and 15 mm which is partial sensory loss, and this is 50% sensory quality impairment. As such, I assign thirteen (13) percent transverse loss of both digital nerves. Referring to Table 16-1, fifteen (15) percent impairment of the left thumb translates to six (6) percent impairment of the left hand, and that translates to five (5) percent impairment of the left upper extremity.

For range of motion, for IP flexion 44 degrees, I assign three (3) percent impairment of the left thumb.

For the thumb MP flexion of 37 degrees, I assign three (3) percent impairment of the left thumb.

The total impairment would be six (6) percent impairment of the left thumb or two (2) percent impairment of the left hand, or two (2) percent impairment of the left upper extremity.

Then using the Combined Values Chart, Page 604 the total impairment of the left upper extremity is eight (8) percent.

(Ex. 1:3)

Pursuant to an inquiry from Lee's counsel, Dr. Marshadi issued a letter on April 15, 2022, finding under the AMA Guides, Lee had sustained a 20 percent impairment of the left thumb. (Ex. 1:4)

Lee relayed at the time of the hearing he continued to have numbness all the time in his thumb and tingling some of the time in his thumb, which is worse with cold weather and his thumb turns a "whitish color at the end." (Tr.:19) Lee testified he is not able to bend his thumb as well as he used to or grip as well as he used to. (Tr.:19-20) Lee relayed when he uses a weed-whacker he has to take more breaks and he cannot open a tight jar with his left hand. (Tr.:22)

Lee serves as an official for softball and volleyball outside of work. (Tr.:27-28) At the time of the hearing Lee was on medical leave for a personal condition unrelated to the left thumb. (Tr.:24-25, 30) Before he went on leave for his personal condition Lee was performing assembly work at John Deere and performing all of his duties. (Tr.:28-29)

Lee testified he participates in the CIPP incentive program at John Deere where he receives extra pay based on performance that is paid out every six months. (Tr.:18) There is no guarantee Lee will receive CIPP payments because the payments are based on production. (Tr.:29)

CONCLUSIONS OF LAW

I. Permanent Impairment

To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, the employee's injuries arose out of and in the course of the employee's employment with the employer. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats v. Ciha, 552 N.W.2d 143, 151 (Iowa 1996). The injury must be a rational consequence of a hazard connected with the employment, and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1, 3 (Iowa 2000). The Iowa Supreme Court has held, an injury occurs "in the course of employment" when:

it is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of his employer.

Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174, 177 (Iowa 1979).

The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa 1997). When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

It is well-established in workers' compensation that "if a claimant had a preexisting condition or disability, aggravated, accelerated, worsened, or 'lighted up' by an injury which arose out of and in the course of employment resulting in a disability found to exist," the claimant is entitled to compensation. Iowa Dep't of Transp. v. Van Cannon, 459 N.W.2d 900, 904 (Iowa 1990). The Iowa Supreme Court has held,

a disease which under any rational work is likely to progress so as to finally disable an employee does not become a "personal injury" under our Workmen's Compensation Act merely because it reaches a point of disablement while work for an employer is being pursued. It is only when there is a direct causal connection between exertion of the employment and the injury that a compensation award can be made. The question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause.

Musselman v. Cent. Tel. Co., 261 Iowa 352, 359-60, 154 N.W.2d 128, 132 (1967).

Two physicians provided opinions on permanency, Dr. Garrels, an occupational medicine physician working in John Deere's on-site clinic who determined Lee did not sustain a permanent impairment, and Dr. Manshadi, a physiatrist who performed an independent medical examination for Lee and found he sustained a 20 percent permanent impairment to his left thumb. I find Dr. Manshadi's opinion more persuasive than Dr. Garrels' opinion.

Dr. Garrels did not provide any measurements he took in reaching his conclusions. Lee testified he did not recall Dr. Garrels using any tools other than a paperclip when examining him. Dr. Manshadi recorded objective findings he took while using a goniometer and pincimetry. Lee testified he continues to have problems with his thumb, including numbness, tingling, and problems with his grip, which are supported by Dr. Manshadi's objective findings. At hearing I found Lee's testimony reasonable and consistent with the other evidence I believe. Lee did not engage in any furtive movements and his rate of speech and eye contact were appropriate. I believe his testimony that he continues to experience problems with his thumb since the work injury.

For these reasons I find Dr. Manshadi's opinion most persuasive. I find Lee has established he sustained a 20 percent permanent impairment to his thumb caused by the work injury. Under Iowa Code section 85.34(2)(a), compensation for loss of a thumb is limited to 60 weeks. Lee is entitled to 12 weeks of permanent partial disability benefits in this case.

II. Commencement Date for Permanency

The parties disagree on the commencement date for permanency. Iowa Code section 85.34(2) provides compensation for a permanent partial disability commences "when it is medically indicated that maximum medical improvement from the injury has been reached and that the extent of loss or percentage of permanent impairment can be determined" under the AMA Guides. Dr. Garrels found Lee reached maximum medical improvement for his left thumb on July 14, 2020, and found Lee had not sustained a permanent impairment under the AMA Guides. Lee did not receive any additional treatment after this date. While Dr. Manshadi issued his opinion later in time, he did not find Lee needed any additional treatment. I find under Iowa Code section 85.34(2), the

commencement date for permanency is July 14, 2020 when Dr. Garrels determined he did not sustain a permanent impairment.

III. Rate

Iowa Code section 85.36 sets forth the basis for determining an injured employee's compensation rate. Mercy Med. Ctr. v. Healy, 801 N.W.2d 865, 870 (Iowa Ct. App. 2011). The basis of compensation shall be the "weekly earnings of the injured employee at the time of the injury." Iowa Code § 85.36. The statute defines "weekly earnings" as

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 . . . rounded to the nearest dollar.

Id. The term "gross earnings" is defined as "recurring payments by 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." Id. § 85.61. Weekly earnings for employees paid on an hourly basis

shall be computed by dividing by thirteen the earnings, including shift differential pay but not including overtime or premium pay, of the employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury. If the employee was absent from employment for reasons personal to the employee during part of the thirteen calendar weeks preceding the injury, the employee's weekly earnings shall be the amount the employee would have earned had the employee worked when work was available to other employees of the employer in a similar occupation. A week which does not fairly reflect the employee's customary earnings shall be replaced by the closest previous week with earnings that fairly represent the employee's customary earnings.

Id. § 85.36(6). Thus, under the statute, overtime is counted hour for hour, and shift differential, vacation, and holiday pay are also included. Irregular pay is not included.

At the time of the work injury Lee was single and entitled to one exemption. Lee asserts his weekly rate is \$619.56, based on an average weekly wage of \$1,004.39. John Deere alleges Lee's weekly rate is \$566.10, based on an average weekly wage of \$901.50. As noted by the parties, the rate dispute centers primarily on John Deere's exclusion of weekly earnings Lee received under the Continuous Improvement Pay Plan, which is an incentive pay program for John Deere employees. John Deere asserts only the lump sum payout and not the weekly payments should be included in

the average weekly wage calculation, relying on the July 12, 2017 Declaratory Order Regarding Profit Sharing Bonus and Continuous Improvement Pay Plan ("CIPP Declaratory Order") entered by the Workers' Compensation Commissioner. Lee contends both the weekly payments and quarterly lump sum payments should be included in the average weekly wage.

Lee is a member of the union at John Deere. Lee submitted a portion of the Collective Bargaining Agreement ("CBA") between John Deere and the union for the period covering his work injury. (Ex. 5) 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. 5:27)

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. 5:28)

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 Lee'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. 5:29-30)

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. No one intervened. The John Deere Entities did not submit a copy of the relevant CBA in effect at the time of the Petition to the Workers' Compensation Commissioner, and, instead, submitted an affidavit. The CIPP Declaratory Order addressed the profit-sharing bonus and CIPP payments.

As discussed in the CIPP Declaratory Order, Iowa Code section 85.61(3) defines "gross earnings" 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." The statute does not define the terms "recurring," "irregular bonuses," or "retroactive." The Workers' Compensation Commissioner examined the common and ordinary meaning of the words and looked to definitions in Webster's New World Dictionary (3rd College Ed. 1988). Webster's New World Dictionary defines: (1) "recur" as "to happen or occur again, esp. after some lapse of time; appear at intervals;" (2) "irregular" as "uneven in occurrence or succession; variable or erratic;" (3) "bonus"

as “an extra payment over and above salary given to an employee as an incentive or award;” and (4) “retroactive” as “going into effect as of a specified date in the past.”

In looking at the above definitions and case law, the Workers’ Compensation Commissioner determined the profit sharing bonus should be excluded from gross income because it is not a recurring payment and is an irregular bonus. In the Petition for Declaratory Order, the John Deere Entities argued “[b]ecause it is the weekly CIPP earnings that are recurring and because including the semester [quarterly or every 13 week] payouts would require inclusion of retroactive pay and double counting, the Commissioner should declare only the weekly CIPP earnings should be used in calculating a Claimant’s Average Weekly Wage and corresponding workers’ compensation rate.” (Ex. D:6)

The Workers’ Compensation Commissioner disagreed, finding:

Taking John Deere’s argument to its logical conclusion would preclude a finding that any bonus income based on past performance should be included in gross earnings when determining an employee’s rate. This is not in accord with the express wording of the statute and would lead to an absurd result. John Deere has not established the quarterly CIPP payments are retroactive pay. The most recent quarterly CIPP payment should be used in calculating the employee’s gross earnings when determining the rate.

(Ex. D:17)

The analysis of the CIPP Declaratory Order did not address the weekly payments, which the John Deere Entities agreed should be included in determining gross earnings. The Order section of the Order provided the weekly CIPP earnings should not be included in gross earnings, the quarterly CIPP payment should be included, and the profit sharing bonus should be excluded from determining the rate. The Petition for Declaratory Order and CIPP Declaratory Order do not contain a copy of the relevant CBA in effect at the time the Petition and Order were filed.

I find, based on the wording of the current CBA, which was not presented as part of Petition filed by the John Deere Entities for the issuance of the CIPP Declaratory Order, that the weekly payments are regular and recurring and should be included in determining Lee’s rate. I also find the most recent CIPP quarterly payment should also be included in Lee’s gross earnings because it is a regular, recurring payment. It is clear that the quarterly payments are paid in a lump sum from any remaining reserve funds that were not used in the weeks within the quarter to reach the maximum weekly pay level of 115 percent. (Ex. 5:29-30) There is no duplication in pay.

During the 13 weeks before the work injury Lee was partially subject to layoff where he worked less than 40 hours. (Ex. 4:13) I agree these weeks should be excluded. I also agree the week ending March 3, 2019, is not representative. I agree

Lee's average weekly wage is \$1,004.39, and his corresponding rate is \$619.56 as set forth in Exhibit 4.

IV. Temporary Benefits

On the Hearing Report Lee sought temporary benefits from July 17, 2019, through October 7, 2019. In his post-hearing brief Lee sought temporary partial disability benefits for the week of July 15, 2019 through July 21, 2019, and the three weeks between August 26, 2019 through September 15, 2019, and healing period benefits for the weeks of July 22, 2019, through August 19, 2019, during a scheduled layoff. John Deere avers Lee is not entitled to any temporary benefits in this case.

Iowa Code section 85.33 (2019) governs temporary disability benefits, and Iowa Code section 85.34 governs healing period and permanent disability benefits. Dunlap v. Action Warehouse, 824 N.W.2d 545, 556 (Iowa Ct. App. 2012).

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

As a general rule, "temporary total disability compensation benefits and healing-period compensation benefits refer to the same condition." Clark v. Vicorp Rest., Inc., 696 N.W.2d 596, 604 (Iowa 2005). The purpose of temporary total disability benefits and healing period benefits is to "partially reimburse the employee for the loss of earnings" during a period of recovery from the condition. Id. The appropriate type of benefit depends on whether or not the employee has a permanent disability. Dunlap, 824 N.W.2d at 556. In this case Lee has sustained a permanent disability. If he is entitled to any additional temporary benefits, he is entitled to healing period benefits.

"[A] claim for permanent disability benefits is not ripe until maximum medical improvement has been achieved." Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 201 (Iowa 2010). "Stabilization of the employee's condition 'is the event that allows a physician to make the determination that a particular medical condition is permanent.'" Dunlap, 824 N.W.2d at 556 (quoting Bell Bros. Heating & Air Conditioning, 779 N.W.2d at 200). If the employee has a permanent disability, then payments made prior to permanency are healing period benefits. Id. If the injury has not resulted in a permanent disability, then the employee may be awarded temporary total benefits. Id. at 556-57.

Iowa Code section 85.33(1) governs temporary total disability benefits as follows:

[e]xcept as provided in subsection 2 of this section, the employer shall pay to an employee for injury producing temporary total disability weekly compensation benefits, as provided in section 85.32, until the employee has returned to work or is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

Under Iowa Code section 85.33(6), “employment substantially similar to the employment in which the employee was engaged at the time of the injury’ includes, for purposes of an individual who was injured in the course of performing as a professional athlete, any employment the individual has previously performed.”

A. Temporary Partial Disability Benefits

Lee seeks temporary partial disability benefits for the week ending July 21, 2019, and the three weeks between August 26, 2019 through September 15, 2019. I found his average weekly wage is \$1,004.39. The benefit amount for temporary partial disability benefits is 66 and 2/3 percent or .6667 of the difference between the employee’s average gross weekly earnings and the employee’s actual earnings. Iowa Code § 85.33(4).

For the week ending July 21, 2019, Lee received wages of \$866.82. Subtracting this amount from his average weekly wage of \$1,004.39 multiplied by .6667 is \$91.71. I find Lee is entitled to temporary partial disability benefits of \$91.71 for the week ending July 21, 2019.

For the week ending September 1, 2019, Lee received wages of \$951.69. Subtracting this amount from his average weekly wage of \$1,004.39 multiplied by .6667 is \$35.13. I find Lee is entitled to temporary partial disability benefits of \$35.13 for the week ending September 1, 2019.

For the week ending September 8, 2019, Lee received wages of \$852.92. Subtracting this amount by his average weekly wage of \$1,004.39 multiplied by .6667 is \$100.98. I find Lee is entitled to temporary partial disability benefits of \$100.98 for the week ending September 8, 2019.

For the week ending September 15, 2019, Lee received wages of \$756.21. Subtracting this amount by his average weekly wage of \$1,004.39 multiplied by .6667 is \$165.46. I find Lee is entitled to temporary partial disability benefits of \$165.46 for the week ending September 15, 2019.

For the above weeks, I find Lee is entitled to a total of \$393.28 in temporary partial disability benefits.

B. Healing Period Benefits

Following the work injury Lee returned to work full-time with restrictions before the scheduled company layoff. Lee testified he was not performing his normal job duties while he was on layoff. Lee agreed John Deere is entitled to a credit for layoff benefits he received during the layoff of \$1,351.76.

In Edwards v. John Deere Davenport Works, File No. 21700093.01 (June 16, 2022), the deputy commissioner found the claimant was entitled to healing period benefits during a layoff when the claimant had returned to a light-duty position and remained under restrictions. This holding is consistent with my prior arbitration decision in Ostwinkle v. Mathy Constr. Co., 2016 WL 6838229, File Nos. 5052718, 5052719 at *14 (Iowa Workers' Comp. Comm'n Nov. 16, 2016) under an earlier version of the statute. I find Lee is entitled to temporary benefits during the layoff from July 22, 2019, through August 19, 2019. These benefits total \$2,478.24, less the \$1,351.76 credit Lee admits John Deere should receive, results in an award of \$1,126.48 in healing period benefits.

V. Penalty

Iowa Code section 86.13 governs compensation payments. Under the statute's plain language, if there is a delay in payment absent "a reasonable or probable cause or excuse," the employee is entitled to penalty benefits, of up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse. Iowa Code § 86.13(4); see also Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 260 (Iowa 1996) (citing earlier version of the statute). "The application of the penalty provision does not turn on the length of the delay in making the correct compensation payment." Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229, 236 (Iowa 1996). If a delay occurs without a reasonable excuse, the commissioner is required to award penalty benefits in some amount to the employee. Id.

The statute requires the employer or insurance company to conduct a "reasonable investigation and evaluation" into whether benefits are owed to the employee, the results of the investigation and evaluation must be the "actual basis" relied on by the employer or insurance company to deny, delay, or terminate benefits, and the employer or insurance company must contemporaneously convey the basis for the denial, delay, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits. Iowa Code § 86.13(4). An employer may establish a "reasonable cause or excuse" if "the delay was necessary for the insurer to investigate the claim," or if "the employer had a reasonable basis to contest the employee's entitlement to benefits." Christensen, 554 N.W.2d at 260. "A 'reasonable basis' for denial of the claim exists if the claim is 'fairly debatable.'" Burton v. Hilltop Care Ctr., 813 N.W.2d 250, 267 (Iowa 2012). "Whether a claim is 'fairly debatable' can generally be determined by the court as a matter of law." Id. The issue is whether the employer had a reasonable basis to believe no benefits were owed to the claimant. Id. "If there was no reasonable basis for the employer to have denied the employee's benefits, then

the court must ‘determine if the defendant knew, or should have known, that the basis for denying the employee's claim was unreasonable.’” Id.

Benefits must be paid beginning on the 11th day after the injury, and “each week thereafter during the period for which compensation is payable, and if not paid when due,” interest will be imposed. Iowa Code § 85.30. In Robbennolt, the Iowa Supreme Court noted, “[i]f the required weekly compensation is timely paid at the end of the compensation week, no interest will be imposed As an example, if Monday is the first day of the compensation week, full payment of the weekly compensation is due the following Monday.” Robbennolt, 555 N.W.2d at 235. A payment is “made” when the check addressed to the claimant is mailed, or personally delivered to the claimant. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996) (abrogated by Keystone Nursing Care Ctr. v. Craddock, 705 N.W.2d 299 (Iowa 2005) (concluding the employer’s failure to explain to the claimant why it would not pay permanent benefits upon the termination of healing period benefits did not support the commissioner’s award of penalty benefits)).

When considering an award of penalty benefits, the commissioner considers “the length of the delay, the number of the delays, the information available to the employer regarding the employee’s injuries and wages, and the prior penalties imposed against the employer under section 86.13.” Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 336 (Iowa 2008). The purposes of the statute are to punish the employer and insurance company and to deter employers and insurance companies from delaying payments. Robbennolt, 555 N.W.2d at 237.

Lee seeks to recover a full 50 percent penalty for the unpaid temporary partial disability benefits of \$393.28, or \$196.64, and penalty for failure to pay healing period benefits during the layoff. Lee relies on Edwards, an unpublished arbitration decision, to support he is entitled to an award of penalty benefits for the healing period benefits during the layoff. Lee applied for unemployment benefits during the layoff. Edwards had not been decided at the time of the layoff. There is no evidence in the record Lee requested healing period benefits during the layoff. I do not find John Deere should be assessed penalty benefits for the unpaid healing period benefits. Confusion also existed based on the CIPP Declaratory Order, constituting a reasonable excuse for failure to pay temporary partial disability benefits. I do not find John Deere should be assessed penalty benefits in this case.

VI. Costs

Lee seeks to recover the \$103.00 filing fee. (Ex. 6:40) Lee also seeks to recover \$150.00 for Dr. Manshadi’s April 15, 2022 report. (Ex. 6:41) John Deere avers Lee is not entitled to recover costs in this case.

Iowa Code section 86.40, provides, “[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.” Rule 876 Iowa Administrative Code 4.33, provides costs may be taxed by the deputy workers’ compensation commissioner for: (1) the attendance of a certificated shorthand reporter

for hearings and depositions; (2) transcription costs; (3) the cost of service of the original notice and subpoenas; (4) witness fees and expenses; (5) the cost of doctors' and practitioners' deposition testimony; (6) the reasonable cost of obtaining no more than two doctors' or practitioners' reports; (7) filing fees; and (8) the cost of persons reviewing health service disputes.

The administrative rule expressly allows for the recovery of the costs Lee seeks. I find John Deere should reimburse Lee for the \$103.00 filing fee and for the \$150.00 cost of Dr. Manshadi's report.

ORDER

IT IS THEREFORE ORDERED, THAT:

Defendant shall pay Claimant 12 weeks of permanent partial disability benefits, at the rate of six hundred nineteen and 56/100 dollars (\$619.56), commencing on July 14, 2020.

Defendant shall pay Claimant temporary partial disability benefits totaling \$393.28 for the weeks ending July 21, 2019, September 1, 2019, September 8, 2019, and September 15, 2019.

Defendant shall pay Claimant healing period benefits, less credits, for July 28, 2019, through August 18, 2019 of \$1,126.48.


Defendant is entitled to a credit for all weekly benefits previously paid.

Defendant 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.

Defendant shall reimburse Claimant one hundred three and 00/100 dollars (\$103.00) for the cost of the filing fee and one hundred fifty and 00/100 dollars (\$150.00) for the cost of Dr. Manshadi's report.

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

Signed and filed this 30th day of September, 2022.



HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Joseph Lyons (via WCES)

James Kalkhoff (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.