BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RODNEY A. CUNNINGHAM Claimant, vs. JOHN DEERE DAVENPORT WORKS, Employer, Self-Insured, Defendant.	FILED APR 29 2016 WORKERS COMPENSATION	File Nos. 5040048; 5040049, 5047427 ARBITRATION DECISION Head Note Nos.: 1801.1; 1802; 1803; 3001; 4000

STATEMENT OF THE CASE

Claimant, Rodney Cunningham, filed a petition for arbitration seeking workers' compensation benefits from John Deere Davenport Works.

The matter came on for hearing on April 7, 2015, before deputy workers' compensation commissioner Joseph L. Walsh in Davenport, Iowa. The record in the case consists of claimant's exhibits 1 through 16; defense exhibits A through O; and the sworn testimony of claimant, Rodney Cunningham, Patty Cunningham, Kurt Ketelsen, Steven DeTombe and Brian Lovaas. The parties briefed this case and the matter was fully submitted on May 22, 2015.

ISSUES

For File No. 5047427 (Injury: July 13, 2012)

1. Whether the claimant is entitled to any healing period, temporary total and/or temporary partial disability. Claimant seeks temporary disability from November 12, 2012, through November 18, 2012, and temporary partial from July 16, 2012 through October 7, 2012 and November 19, 2012, through February 10, 2013.

2. The nature and extent of disability related to the July 13, 2012, work injury. The defendant alleges that the work injury resulted in no permanent disability.

3. The average weekly wage is disputed. The average weekly wage affects the amount of temporary partial disability and the overall rate of compensation. The difference in the rates is the exclusion of profit-sharing.

4. Claimant seeks a penalty for late and/or denied payments.

For File No. 5040048 (Injury: July 15, 2010)

1. Whether the claimant is entitled to any healing period, temporary total and/or temporary partial disability. Claimant seeks temporary disability from July 19, 2010, through July 25, 2010, and temporary partial from August 9, 2010, through October 17, 2010.

2. The nature and extent of permanent disability related to the July 15, 2010, work injury.

3. The average weekly wage is disputed. The average weekly wage affects the amount of temporary partial disability and the overall rate of compensation. The difference in the rates is the exclusion of profit-sharing.

4. Claimant seeks a penalty for late and/or denied payments.

For File No. 5040049 (Injury: June 6, 2011)

1. Whether the claimant is entitled to temporary partial disability from September 5, 2011, through October 23, 2011.

2. The nature and extent of permanent disability related to the July 15, 2010, work injury.

3. The average weekly wage is disputed. The average weekly wage affects the amount of temporary partial disability and the overall rate of compensation. The difference in the rates is the exclusion of profit-sharing.

4. Claimant seeks a penalty for late and/or denied payments.

STIPULATIONS

Through the hearing report, the parties stipulated to the following for each of the injuries:

1. The parties had an employer-employee relationship.

2. Claimant sustained work injuries to his left shoulder on July 13, 2010; June 6, 2011 and July 13, 2012.

3. If any permanent partial benefits are owed, the parties stipulate to the appropriate dates for the commencement of permanent partial disability.

4. Affirmative defenses have been waived.

5. Defendant has paid and is entitled to a credit as outlined in the hearing reports.

6. Defendant received a copy of claimant's IME report prepared by Richard Kreiter, M.D., on or about August 30, 2013.

7. Defendant received claimant's responses to Requests for Production on or about April 11, 2012, which included copies of claimant's income tax returns for 2009, 2010 and 2011 showing claimant filed a joint return with three children, claiming a total of five exemptions.

8. On April 10, 2012, claimant served Answer to Interrogatory No. 1, stating that claimant was married and had three children.

9. Defendant did not receive a tax return from claimant with respect to 2012, until the date of hearing, April 7, 2015, despite being requested in other discovery dated December 8, 2014.

10. With respect to each injury date, the only difference in the rate calculation is the difference concerning whether profit sharing is included or not in the average weekly wage.

FINDINGS OF FACT

The claimant, Rodney Cunningham lives in Cambridge, Illinois with his wife, two daughters and one stepson. Mr. Cunningham testified under oath at hearing and I find him to be credible. His testimony was straightforward and generally consistent with the history provided in the medical file. His demeanor did not cause any concern and I find no reason to disbelieve any part of his testimony.

Mr. Cunningham was 45 years old as of the date of hearing. He graduated high school in Dallas City, Illinois. He joined the United States Army right after high school and worked as a light wheel vehicle mechanic. He served in the Army from 1988 to 1992, including Operation Desert Storm. (Transcript, pages 30-31)

After being discharged from the military, he worked in a variety of manual labor positions as outlined in the record. (Claimant's Exhibit 9, p. 98) Between 1992 and 2005, he worked a variety of production jobs. After working a couple of lower wage assembly positions, he was hired by Industrial Fabrication and Tooling in 1998, as a CNC programmer and operator. In 2000, he moved to General Electric as a production assembler. He held that position until laid off in 2002. He then went to work for CMT as a CNC program operator.

January 24, 2005, Mr. Cunningham was hired by John Deere Davenport Works (hereinafter, Deere). Prior to working at Deere, he had never suffered any type of work injury. He was hired as a CNC operator, doing heavy physical work. (Tr., pp. 34-35) In April 2006, Mr. Cunningham bid into an assembly job doing counterweights in Department 884. He placed side counterweights, rear hitch and sometimes front fenders, mud flaps, and platform on utility loaders and production loaders. (Tr., pp. 33-34) The work was physical and repetitive and required lifting overhead and up to

65 pounds. (Tr., pp. 34-35)

The claimant's work injuries are stipulated. On July 15, 2010, Mr. Cunningham tripped over a pallet and fell forward. He struck a guard rail with his left shoulder approximately 2 to 3 feet high. (Tr., p. 35) He immediately felt pain right up toward the top of his left shoulder. He was placed on light-duty right away by the company physician. After a number of appropriate diagnostic tests, he was referred to an orthopedic shoulder surgeon, Tuvi Mendel, M.D. (See Cl. Ex. 5, p.16) Dr. Mendel provided appropriate orthopedic care and ultimately performed left shoulder surgery on August 17, 2010. (Cl. Ex. 6, p. 76)

Following surgery, Mr. Cunningham returned to his same assembly job. His recovery was relatively fast. After 12 weeks, Dr. Tuvi placed him at maximum medical improvement (MMI) and released him with no restrictions. (Cl. Ex. 5, p. 21) He ultimately returned to his regular job with no loss of earnings. (Tr., p. 36)

On February 11, 2011, Mr. Cunningham voluntarily transferred to Department 564. He testified that Dept. 564 was a new department which assembled tires, counterweights and plenum doors. The work was more physical. (Tr., p. 38-39) He testified he was recruited for the position. He understood Deere was recruiting its top employees for these positions with a promise of better incentives.

On June 6, 2011, Mr. Cunningham was pulling down on a large ratchet wrench when the wrench gave way, causing his shoulder to jerk forward. At the time, he was reaching overhead. (Tr., pp. 40-41) He immediately felt pain in his left shoulder and he reported a new injury. He was referred back to Dr. Mendel, who again provided appropriate orthopedic care. (Cl. Ex. 5, pp. 24-33) This care culminated in surgery. A second left shoulder surgery was performed on September 6, 2011. (Cl. Ex. 6, pp. 79-81)

Mr. Cunningham was on light-duty for a period of time while recuperating from the surgery. (Cl. Ex. 5, pp. 34-37) He testified to his opinion that the surgery did not help. Dr. Mendel provided a disability rating of 4 percent of the body as a whole from the left shoulder injury on January 13, 2012. (Cl. Ex. 5, p. 40) Mr. Cunningham ultimately returned to same work in Dept. 564. He performed the job without restrictions, but with some difficulty. His pain level was moderate but by the end of a given work day was having fairly significant symptoms. He ultimately chose to transfer back to Dept. 884 in December 2011. A former supervisor asked him to come back to the less physical work. (Tr., pp. 43-44)

The parties have stipulated Mr. Cunningham suffered a third work injury on July 13, 2012. He testified he was performing a two-person job by himself. This resulted in him extending his left arm to hold a 40 pound plate while attempting to insert bolts to fasten it. (Tr., pp. 44-45) He went on light-duty again after returning to Dr. Mendel. Before recuperating, Mr. Cunningham transferred out of Dept. 884, in part to move away from a supervisor he had difficulty with. He transferred to an assembly position in Dept. 783 assembly line. (Cl. Ex. 9, p. 105) He was on light duty when

transferred. (Tr., pp. 44-45)

When the opportunity arose, he transferred to Dept. 498 for a position operating a fork truck. He testified he did this to avoid further damage and injury to his left shoulder. Dr. Mendel performed the third surgery in November 2012. (Cl. Ex. 6, pp. 76-83) Unfortunately, once again, the surgery did not help and he found the recovery from this surgery to be the most difficult. (Tr., pp. 48-49) In February 2013, he was released to drive the fork truck with the understanding that he would stay off of the assembly line for some time. In April 2013, Dr. Mendel released Mr. Cunningham to full-duty and placed him at maximum medical improvement. (Tr., p. 49) He has not been back to Dr. Mendel since then. In May 2013, Dr. Mendel provided an overall impairment rating of 7 percent of the left upper extremity which converts to 4 percent of the body as a whole. (Cl. Ex. 5, p. 75) The transfer to the fork truck driving position resulted in a lower base pay of nearly $1.00 per hour (from $16.06 to $15.14).

Richard Kreiter, M.D., performed an independent medical evaluation in August 2013. He related Mr. Cunningham's shoulder conditions to his work injuries and provided a substantially higher impairment rating of 20 percent of the body as a whole. (Cl. Ex. 8, p. 94) He recommended lifting restrictions of 30 to 40 pounds, no lifting with outstretched arms and no overhead work. He did not recommend any significant additional treatment.

Since being released to work full-duty by Dr. Mendel, Mr. Cunningham continued taking pain medications for his left shoulder. His activities at home have changed. He does not help much with housework and his physical activities are limited. His spouse, Patty, testified under oath at hearing that since his last surgery he has continued to have significant complaints of pain and discomfort. She testified that he no longer mows the lawn on the hill and does not operate the hedge trimmer. He spends a great deal of time in the recliner and is less active. Mr. Cunningham has difficulty sleeping and their social life has changed rather significantly.

John Deere Davenport Works is party to a collective bargaining agreement (CBA) with the United Auto Workers Union (hereafter "Union"). All of the workers covered by the CBA are paid according to that agreement. In 2011, the Union filed a grievance with Deere related to incentive pay. In essence, the Union contended that Deere utilized inappropriate standards in the calculation of incentive pay. For this and other reasons, the Union alleged that workers covered by the agreement were entitled to a recalculation of their incentive pay, known as Continuous Improvement Pay Plan or "CIPP." (Cl. Ex. 11) The CBA also provides for a profit-sharing plan. (Cl. Ex. 10) Kurt Ketelsen, a union time study representative, testified on behalf of Mr. Cunningham at hearing. He is an industrial engineer. He testified that the grievance resulted in an upward adjustment of CIPP from 123 to 141 percent for the period from February 14, 2011, through April 23, 2013, in Dept. 564. (Tr., pp. 70-71) He was awarded essentially what amounts to back pay for that period of time. He further testified that the profit sharing is an integral part of the pay plan set forth in the CBA and that the amount is fixed by formula in the contract. (Tr., pp. 82-82)

Brian Lovaas, Deere's payroll manager, testified under oath at hearing as well. His testimony was generally credible. He testified regarding defendant's Exhibit O, the payroll and accounting information related to Mr. Cunningham. He testified that profit sharing is based upon three variables: (1) hours worked, (2) average earnings of the worker, and (3) company profitability. (Tr., p. 106) These factors are somewhat complex and were explained in great detail at hearing. I find that these factors ultimately measure each worker's productivity and efficiency toward the profitability of Deere. It also measures the company's overall health.

CONCLUSIONS OF LAW

Average Weekly Wage

The first issue in this case is applicable to all three files. The issue is whether the claimant's profit sharing pay and CIPP settlement should be included in his wages for the purpose of calculating his average weekly wage. This issue impacts his rate and whether he is owed temporary partial disability on each file.

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

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded, however. Section 85.36(6).

"Gross earnings" are defined as:

> [R]ecurring 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.

Iowa Code section 85.61 (2015).

The primary fighting issue in all three files is whether the claimant's profit-sharing should be included in the calculation of his average weekly wage (AWW). The secondary issue is whether a recalculation of the CIPP pay stemming from the grievance settlement outlined above, should be included. At the time of hearing, the defendant conceded that the CIPP pay must be included. The burden of proof is on the claimant to establish his gross earnings. Michalec v. Cretex, Inc., File No. 5018339

(App. March 11, 2008). A bonus that is regularly paid for an employee may be considered as a part of an employee's AWW. Menard v. Scheffert, No. 14-1029, filed December 24, 2014 (Iowa Ct. of Appeals); Pella Corp. v. Minar, No. 13-1616, filed August 13, 2014 (Iowa Ct. of Appeals). In order to be included, the bonus must be earned during the timeframe in question. Noel v. Rollscreen Company, 475 N.W.2d 666, 667-68 (Iowa 1991).

In various final arbitration decisions, this agency has held previously that both the CIPP and the profit-sharing are both to be included in gross wages. Spaete v. John Deere Davenport Works, File No. 5031216 (Arb. May 24, 2011); Davis v. John Deere Davenport Works, File No. 5039241 (Arb. January 3, 2013); and Montgomery v. John Deere Davenport Works, File No. 5035802 (Arb. November 7, 2012). In the recent case, Breeden v. John Deere Davenport Works, File No. 5047097 (Arb. April 27, 2015), the agency included the CIPP pay, but ruled that the claimant had failed to carry her burden of proof that the profit sharing should be included in the calculations.

The defendant contends that the previous cases, before Breeden, are not controlling because none of those cases included the comprehensive record and developed legal arguments on the issue as is contained herein. (Defendant's Brief, pp. 11-14) The defendant now asks the agency to narrowly interpret the definition of gross earnings (specifically focusing upon the phrases "irregular bonuses" and "retroactive pay") contained in Iowa Code section 85.61, in order to defeat the claimant's assertion that profit sharing and the CIPP settlement are required to be included in his gross earnings.

Workers' compensation statutes are to be liberally construed in favor of the worker and the worker's dependents. Caterpillar Tractor Co. v. Shook, 313 N.W.2d 503 (Iowa 1981); McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 192 (Iowa 1980). The statute's beneficent purpose is not to be defeated by reading something into the statute that is not there. Cedar Rapids Community School v. Cady, 278 N.W.2d 298 (Iowa 1979).

Speaking on behalf of the Iowa Supreme Court, Justice Lavorato stated the following in regard to interpreting the Iowa Workers' Compensation law:

> Our review of this unusual case is controlled by the principles set forth in Iowa Code sections 4.1(2), 4.2, 4.4, 4.6, and 17A.19(8), which we have applied to the workers' compensation act. Foremost is that which acknowledges the act is to be liberally construed in the employee's favor. Cf. Doerfer Division of CCA v. Nicol, 407 N.W.2d 428, 434 (Iowa 1984). *Any doubt in its construction is thus resolved in favor of the employee.* Usgaard v. Silver Crest Golf Club, 256 Iowa 453, 459, 127 N.W.2d 636, 639 (1964). (*emphasis added*)

Teel v. McCord, 394 N.W.2d 405, 406-07 (Iowa 1986).

Profit Sharing

Having reviewed the entire record, I find that profit sharing payments must be included in the calculation of Mr. Cunningham's gross wages. Based upon the plain language in the CBA, the plan is "to provide contingent benefits to employees to reflect their efforts in contributing to the profitability of the Company and to serve as an incentive for the employees further to contribute to the continued and further financial success of the Company and to its ability to provide continued employment opportunities to its employees." (Cl. Ex. 10, p. 106) In other words, it is designed to compensate the employees for working hard to make the company profitable. The CBA language is consistent with Mr. Ketelsen's testimony.

Mr. Lovaas testified that profit sharing is based upon three variables: (1) hours worked, (2) average earnings of the worker, and (3) company profitability. (Tr., p. 106) These are the factors which measure how hard the employee is working to make the company profitable as outlined in the CBA. These factors are actually somewhat more complex than they appear and Mr. Lovaas explained them in great detail at hearing. (Tr., pp. 106-113) These variables, however, basically measure each worker's productivity for a given period of time. While it is true that one of the factors is the profitability of the company, it is only one of the three factors and it is specifically defined and measureable.

Deere contends these payments amount to an "irregular bonus" under section 85.61. Unfortunately, the term "irregular bonus" is not specifically defined. Utilizing the framework set forth above for purposes of construing the statute, I interpret that phrase narrowly to be limited to bonuses which are not based upon measurements of the worker's productivity or value and are subject to the discretion or feelings of the employer. These bonuses might often be provided at irregular intervals and based upon the general health of the business or how the employer is feeling, rather than any measurable criteria assessing the worker's value to the business. An "irregular bonus" could not possibly refer to a compensation system which uses a complex formula to assess the worker's productivity paid at regular intervals. I find that the profit sharing payments are a critical portion of the agreement between the company and the union as to how the workers at Deere are to be paid under the CBA. This is exactly what section 85.36 is supposed to reflect.

Deere also argues that the profit sharing is "retroactive pay" because some of the factors it is based upon may have accrued prior to the date of the worker's injury. "For example, in the case of profit sharing paid out the week ending January 9, 2011-see Exhibit O, p. 105, it was based on hours Claimant worked, Claimant's average earnings and company profitability from November 2009 through October 2010-more than seven months before the date of injury of June 6, 2011." (Defendant's Brief, p. 12) Again, the phrase "retroactive pay" is not defined. Black's Law Dictionary, 10th Edition, defines retroactive pay as "any wages that are owing that are paid at a new rate of pay owing after the last pay agreement is over." I adopt this interpretation of the phrase "retroactive pay" and find that it is not applicable in this case.

CIPP Settlement

At this juncture, there is no question that CIPP payments are to be included in a worker's gross wages. Deere now concedes this. The issue here revolves around an incorrect CIPP payment which had to be adjusted after the fact as a result of a settlement between Deere and the Union.

Considering the entire record, I find that the back payments for CIPP awarded to Mr. Cunningham in the grievance settlement must be included in his gross wages. The defendant argues this is "retroactive pay" under section 85.61. I find it is not. As set forth above, I find retroactive pay references payments for wages that are owed at a new rate of pay after the previous agreement has ended. For example, assume an employer agrees to pay his worker $5,000.00 per month for services through July 1, 2015. The parties begin discussing a continuation of the agreement for an additional year at an increased rate of pay, but the details are not resolved before the agreement technically ends. The parties are close to an agreement and decide to continue under the old agreement while the negotiations continue. Eventually, the parties reach an agreement on August 1, 2016, to pay the worker $5,300.00 per month. As part of the agreement, the parties agree to retroactive pay for the month of August 2016, of $300.00. It is essentially a payment to compensate the worker as though he was working at the new rate of pay in the month of August. This is a standard example of retroactive pay by its common legal definition.

In this case, Mr. Cunningham essentially received a settlement of back pay because Deere paid him incorrectly under the CBA for his CIPP. The parties now agree that was the correct rate of pay that Mr. Cunningham should have received during that period of time in question. To allow Deere to avoid paying compensation because it failed to initially pay at the correct rate of pay is anathema to the workers' compensation system. There is simply nothing in the statute which allows this. Furthermore, such a ruling would unjustly reward employers who pay their workers incorrectly in the first instance.

Based upon these conclusions, I find that Mr. Cunningham's gross wages are as follows:

- For File No. 5040048, claimant's gross wages are $1,111.25 per week. (Def. Ex. L, p. 84; Def. Ex. O, p. 105; Cl. Brief, App. 1)

- For File No. 5040049, claimant's gross wages are $1,313.13 per week. (Def. Ex. M, p. 85; Def. Ex. O, p. 123; Tr., pp. 71-71; Cl. Brief, App. 2)

- For File No. 5047427, claimant's gross wages are $1,465.69 per week. (Def. Ex. N, p. 84; Def. Ex. O, p. 142; Cl. Brief, App. 3)

There do not appear to be any mathematical disputes in the file.

Rate of Compensation

The variables, other than gross pay, which comprise the rate of compensation, are stipulated. Therefore, utilizing the appropriate rate books published by the agency, the correct rate of compensation for each injury, is as follows:

- For File No. 5040048, the claimant was married with 5 exemptions, as stipulated, with gross wages of $1,111.25 per week. His rate of compensation is $725.66.

- For File No. 5040049, the claimant was married with 5 exemptions, as stipulated, with gross wages of $1,313.13 per week. His rate of compensation is $839.65.

- For File No. 5047427, the claimant was married with 5 exemptions, as stipulated, with gross earnings of $1,465.69 per week. His rate of compensation is $942.84.

Temporary Partial Disability

When an injured worker has been unable to work during a period of recuperation from an injury that did not produce permanent disability, the worker is entitled to temporary total disability benefits during the time the worker is disabled by the injury. Those benefits are payable until the employee has returned to work, or is medically capable of returning to work substantially similar to the work performed at the time of injury. Section 85.33(1).

Having found that Mr. Cunningham was on light-duty for periods of time while recuperating from each of his work injuries, I find that he is entitled to temporary partial disability payments during those periods of recovery. In fact, the claimant was paid temporary partial disability for each of these time periods; he was paid, however, using the lower average weekly earnings utilized by the defendant. I find that during these periods of time, Mr. Cunningham was not capable of substantially similar employment but he was able to perform gainful work consistent with his disability.

For File No. 5040048, I find by a preponderance of evidence that Mr. Cunningham is entitled to temporary partial disability benefits from July 19, 2010, through July 25, 2010 and August 9, 2010, through October 17, 2010. (Def. Ex. O, pp. 96-100) The defendant shall pay temporary partial disability for these periods of time, utilizing the average weekly wage of $1,111.25 per week. The defendant is entitled to the credit stipulated in the Hearing Report.

For File No. 5040049, I find by a preponderance of evidence that Mr. Cunningham is entitled to temporary partial disability benefits from September 5, 2011, through October 23, 2011. (Def. Ex. O, pp. 114-118) The defendant shall pay temporary partial disability for these periods of time, utilizing the average weekly wage of $1,313.13 per week. The defendant is entitled to the credit stipulated in the Hearing Report.

For File No. 5047427, I find by a preponderance of evidence that Mr. Cunningham is entitled to temporary partial disability benefits from July 16, 2012 through October 7, 2012, and November 19, 2012, through February 10, 2013. (Def. Ex. O, pp. 132-142) The defendant shall pay temporary partial disability for these periods of time, utilizing the average weekly wage of $1,465.69 per week. The defendant is entitled to the credit stipulated in the Hearing Report.

Healing Period

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

The claimant is entitled to, and, in fact, has been paid, healing period benefits on File No. 5047427, the July 13, 2012, work injury. He was paid for approximately 1 week of benefits at the lower rate, which used the employer's calculation of the average weekly wage. This is for the week ending November 18, 2012. (Def. Ex. O, p. 139) He is entitled to be paid at the correct rate of $942.84 for that week of compensation.

Permanent Partial Disability

The next issue is the claimant's entitlement to permanent partial disability benefits.

When disability is found in the shoulder, a body as a whole situation may exist. Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949). In Nazarenus v. Oscar Mayer & Co., II Iowa Industrial Commissioner Report 281 (App. 1982), a torn rotator cuff was found to cause disability to the body as a whole.

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

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be

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

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

The claimant suffered some minor functional disability following each of the first two injuries and the resulting surgeries. I find that the three injuries happened in rapid succession and it is difficult to determine how much, if any, industrial disability was caused by the first two injuries. The greater weight of the evidence supports a finding that the vast majority of the claimant's industrial disability was sustained from his July 13, 2012, work injury. While it is possible that there was a minor level of industrial disability following each of the first two injuries, it is impossible at this juncture to determine the precise amount of disability sustained. The majority of the claimant's industrial disability was sustained following his final July 2012, work injury which caused him to bid into a lower paying job. As a consequence, I find the July 13, 2012, injury was a substantial contributing factor in his overall industrial disability. I decline to assess any portion of his overall industrial disability to the earlier injuries.

I further find that the claimant has suffered a total industrial loss of 30 percent. The claimant was 45 years old as of the date of hearing. He is a skilled CNC operator and machine operator. His working life has been spent in medium to heavy production and assembly work. He is in his prime earning years. He is a hard-working military veteran who is bright and articulate. He is highly motivated and a desirable employee.

His disability is located in his left shoulder. The treating physician has provided an overall functional impairment rating of 4 percent of the body as a whole. (Cl. Ex. 5, p. 75) The claimant's IME physician has provided a rating of 20 percent of the body. (Cl. Ex. 8, p. 94) These are significantly different ratings. I find the truth regarding his actual functional loss is likely somewhere in between the 2 ratings. He is clearly limited in his abilities, particularly in reaching and holding heavier objects overhead or away from his body.

Patty Cunningham testified that he is unable to perform many household functions he used to do routinely such as operating hedge trimmers or mowing the lawn on a large hill. She testified he has significant difficulty sleeping and is far less active because of his shoulder.

Significantly, Dr. Kreiter recommended the following permanent restrictions.

> Permanent restrictions would include no overhead work with the left arm. Also, only occasional pull, push and polish with the left side. Lifting 30 to

> 40 pounds floor to bench with arms close to the side on an occasional basis should be allowed. No lifting with outstretched arm, such as placing a gallon of milk in the refrigerator, since this would place too much stress on the shoulder and biceps tendon.

(Cl. Ex. 8, p. 94) These limitations are most reflective of his actual abilities, although it is noted that he does not officially work under these restrictions at Deere.

Mr. Cunningham has managed his physical impairment by bidding into lighter, lower-paying work. This is the strong evidence of his industrial disability. Whereas, he has performed primarily heavier production work at a higher pay scale, he voluntarily bid to a fork truck position which pays $1.00 per hour less. The injury significantly impairs his ability to earn wages in the competitive job market.

It is noted Mr. Cunningham is highly motivated. He is a good worker as evidenced by the testimony of his supervisor, Steven DeTombe. Mr. DeTombe also testified that Mr. Cunningham does not complain about his shoulder at work.

When weighing all of the factors of industrial disability and considering all of the relevant evidence, I find that his total loss of earning capacity is 30 percent. I conclude this entitles the claimant to 150 weeks of benefits at the stipulated rate, commencing on April 3, 2013.

The final issue is whether the claimant is entitled to penalty benefits.

In Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996), and Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996), the supreme court said:

> Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."
>
> Christensen, 554 N.W.2d at 260.

The supreme court has stated:

> (1) If the employer has a reason for the delay and conveys that reason to the employee contemporaneously with the beginning of the delay, no penalty will be imposed if the reason is of such character that a reasonable fact-finder could conclude that it is a "reasonable or probable cause or excuse" under Iowa Code section 86.13. In that case, we will defer to the decision of the commissioner. See Christensen, 554 N.W.2d

at 260 (substantial evidence found to support commissioner's finding of legitimate reason for delay pending receipt of medical report); Robbennolt, 555 N.W.2d at 236.

(2) If no reason is given for the delay or if the "reason" is not one that a reasonable fact-finder could accept, we will hold that no such cause or excuse exists and remand to the commissioner for the sole purpose of assessing penalties under section 86.13. See Christensen, 554 N.W.2d at 261.

(3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City Meats, Inc., 528 N.W.2d at 109, 111 (Iowa 1995); or (b) the employer had a reasonable basis to contest the claim—the "fairly debatable" basis for delay. See Christensen, 554 N.W.2d at 260 (holding two-month delay to obtain employer's own medical report reasonable under the circumstances).

(4) For the purpose of applying section 86.13, the benefits that are underpaid as well as late-paid benefits are subject to penalties, unless the employer establishes reasonable and probable cause or excuse. Robbennolt, 555 N.W.2d at 237 (underpayment resulting from application of wrong wage base; in absence of excuse, commissioner required to apply penalty).

> If we were to construe [section 86.13] to permit the avoidance of penalty if any amount of compensation benefits are paid, the purpose of the penalty statute would be frustrated. For these reasons, we conclude section 86.13 is applicable when payment of compensation is not timely . . . or when the full amount of compensation is not paid.

Id.

(5) For purposes of determining whether there has been a delay, payments are "made" when (a) the check addressed to a claimant is mailed (Robbennolt, 555 N.W.2d at 236; Kiesecker, 528 N.W.2d at 112), or (b) the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 235.

(6) In determining the amount of penalty, the commissioner is to consider factors such as the length of the delay, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

(7) An employer's bare assertion that a claim is "fairly debatable" does not make it so. A fair reading of Christensen and Robbennolt, makes it clear that the employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." See Christensen, 554 N.W.2d at 260.

Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

Weekly compensation payments are due at the end of the compensation week. Robbennolt, 555 N.W.2d 229, 235.

Penalty is not imposed for delayed interest payments. Davidson v. Bruce, 593 N.W.2d 833, 840 (Iowa App. 1999). Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 338 (Iowa 2008).

When an employee's claim for benefits is fairly debatable based on a good faith dispute over the employee's factual or legal entitlement to benefits, an award of penalty benefits is not appropriate under the statute. Whether the issue was fairly debatable turns on whether there was a disputed factual dispute that, if resolved in favor of the employer, would have supported the employer's denial of compensability. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

The claimant has numerous penalty theories. The first theory is that Deere should be assessed a penalty for failing to include the profit sharing in the gross wages. This resulted in the underpayment of claimant's rate. The second theory is that Deere used the wrong number of exemptions to pay benefits, which resulted in a separate underpayment of the rate. The third theory is that Deere should have voluntarily paid industrial disability benefits in excess of four percent.

Average Weekly Wage

I find that Deere presented a reasonable basis for failing to use the correct average wage. It is true that Deere excluded the profit sharing from its rate calculation in spite of three previous agency arbitration decisions. Deere made new legal arguments and developed a full record in this file to defend these legal theories. While I ruled against the employer, I do find that the theories were fairly debatable, particularly in light of the recent agency decision in Breeden v. John Deere Davenport Works, File No. 5047097 (Arb. April 27, 2015). In Breeden, the agency held that the claimant failed to meet his burden to establish the bonus should be included in his average wages.

Total Exemptions

Mr. Cunningham contends that when Deere paid benefits, it calculated claimant's rate based upon being married with 2 exemptions. It is true, the parties stipulated that the defendant was informed that Mr. Cunningham has a total of 5 exemptions in April 2012 by way of discovery answers. I can find no evidence in this record, however, that Deere calculated the rate it paid at $808.70, by only using 2 exemptions. For File

No. 5040049, it is certainly true that the defendants paid permanent partial disability benefits at the rate of $808.70. (Def. Ex. I, pp. 71-72) This was based upon the employer's calculations at that time, however, those calculations do not appear to be in the record. (Def. Ex. E) It is also not clear what gross wages Deere was using in those calculations, as the benefits paid were at a higher rate for that injury than Deere now claims is owed in the Hearing Report. Scanning the appropriate rate book for his June 6, 2011, injury (July 1, 2010 through June 30, 2011), it appears Deere's previous defense attorney may have utilized an average weekly wage of $1,258.00, married with 5 exemptions. (Iowa Workers' Compensation Manual, July 1, 2010, through June 30, 2011, p. 125) I find no rate of $808.70, for any amount of wages only utilizing 2 exemptions. For this reason, I cannot award any penalty under this theory.

Failure to Assess Industrial Disability

This agency has held that the failure to investigate the extent of a claimant's industrial disability can be a basis for a penalty award. Oakview, Inc. v. Ferch, File No. 5010952 (App. April 13, 2006). Mr. Cunningham contends that Deere must be penalized for failing to pay some amount beyond the four percent impairment rating of Dr. Mendel.

In this case, Mr. Cunningham suffered three successive injuries to his right shoulder in three successive years. He barely healed from each injury before he had his next injury. In retrospect, this makes the assessment of industrial disability quite tricky. According to Dr. Mendel, the result when he reached maximum medical improvement from of all three injuries, was generally quite good. He assessed no permanent restrictions and the impairment was only four percent. While I agree that in some circumstances, the failure to pay industrial disability benefits beyond the rating can be a basis for a penalty, I do not find the claimant has met his burden in this case.

ORDER

THEREFORE IT IS ORDERED

For File No. 5040048 (July 15, 2010):

Defendant shall pay temporary partial disability from July 19, 2010, through July 25, 2010, and August 9, 2010 through October 17, 2010, utilizing gross wages of one thousand one hundred eleven and 25/100 dollars ($1,111.25).

Defendant is entitled to a credit for temporary partial disability benefits paid as stipulated in the hearing report two thousand nine hundred seventy-two and 72/100 dollars ($2,972.72).

Defendant shall pay accrued weekly benefits in a lump sum.

Defendant shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

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

Defendant shall pay costs.

For File No. 5040049 (June 6, 2011):

Defendant shall pay temporary partial disability from September 5, 2011, through October 23, 2011, utilizing gross wages of one thousand three hundred thirteen and 13/100 dollars ($1,313.13).

Defendant is entitled to a credit for temporary partial disability benefits paid as stipulated in the hearing report one thousand four hundred eleven and 04/100 dollars ($1,411.04).

Defendant shall pay accrued weekly benefits in a lump sum.

Defendant shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

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

Defendant shall pay costs.

For File No. 5047427 (July 13, 2012):

Defendant shall pay temporary partial disability from July 16, 2012 through October 7, 2012 and November 19, 2012, through February 10, 2013, utilizing gross wages of one thousand four hundred sixty-five and 69/100 dollars ($1,465.69).

Defendant is entitled to a credit for temporary partial disability benefits paid as stipulated in the hearing report eight thousand seven hundred fourteen and 66/100 dollars ($8,714.66).

Defendant shall pay healing period benefits from November 12, 2012, through November 18, 2012, at the rate of nine hundred forty-two and 84/100 dollars ($942.84).

Defendant is entitled to a credit for healing period in the amount of six hundred seventy-five and 31/100 dollars ($675.31) as stipulated.

Defendant shall pay the claimant one hundred fifty (150) weeks of permanent partial disability benefits at the rate of nine hundred forty-two and 84/100 dollars ($942.84) per week commencing on April 3, 2013.

Defendant shall pay accrued weekly benefits in a lump sum.

Defendant shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Costs are taxed to defendant.

Signed and filed this 29th day of April, 2016.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Jerry Soper
Attorney at Law
5108 Jersey Ridge Rd., Ste. C
Davenport, IA 52807-3133
jerry@soperlaw.com

Troy Howell
Attorney at Law
220 N. Main St., Ste. 600
Davenport, IA 52801-1906
thowell@l-wlaw.com

JLW/srs

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 in writing and received by the commissioner's office 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 a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.