

## BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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STACY REICHERT,	:	
	:	
Claimant,	:	File No. 21700341.01
	:	
vs.	:	A P P E A L
	:	
JOHN DEERE WATERLOO WORKS,	:	D E C I S I O N
	:	
Employer,	:	
Self-Insured,	:	
and	:	
	:	
SECOND INJURY FUND OF IOWA,	:	
	:	Head Notes: 1402.20; 1402.40; 1703; 1803;
Defendants.	:	2907; 3001; 3002; 3202; 4000.2

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Claimant Stacy Reichert appeals from an arbitration decision filed on December 19, 2022. Defendant Second Injury Fund of Iowa ("the Fund") filed a cross-appeal. Defendant-employer John Deere Waterloo Works, self-insured, also filed a cross-appeal, which it later dismissed. Defendant-employer responds to the appeal. The case was heard on August 3, 2022, and it was considered fully submitted in front of the deputy workers' compensation commissioner on October 21, 2022.

In the arbitration decision, the deputy commissioner found claimant met her burden of proof to establish she sustained two percent functional loss of her right upper extremity caused by the stipulated August 8, 2019, work injury. The deputy commissioner found the loss had already been satisfied by defendant-employer. The deputy commissioner found claimant's weekly benefit rate is \$1,102.93. The deputy commissioner found claimant proved she sustained a first qualifying loss to her left hand and arm, and a second qualifying loss to her right upper extremity, thus entitling claimant to receive benefits from the Fund pursuant to Iowa Code section 85.64. The deputy commissioner found claimant sustained five percent industrial loss from the combination of the first qualifying injury and second qualifying injury. In determining the credit to the Fund, the deputy commissioner found claimant sustained two percent functional loss of her left upper extremity and one percent functional loss of her right upper extremity, and that claimant is entitled to receive 20 weeks of permanent partial disability benefits from the Fund, commencing on January 3, 2020. The deputy commissioner found claimant is entitled to receive penalty benefits from defendant-employer in the amount of \$1,385.81 for late paid and underpaid weekly benefits. The deputy commissioner found that pursuant to rule 876 IAC 4.33, claimant is entitled to

reimbursement from defendant-employer in the amount of \$600.00 for the second report prepared by Farid Manshadi, M.D., and \$103.00 for the filing fee.

On appeal, claimant asserts the deputy commissioner erred in finding she sustained five percent industrial loss and asserts she is entitled to additional industrial disability benefits from the Fund. Claimant asserts the deputy commissioner erred in determining her weekly benefit rate and asserts the deputy commissioner should have included the weekly Continuous Pay Plans ("CIPP") payments and the profit-sharing bonus in determining claimant's average weekly earnings.

On cross-appeal, the Fund asserts the deputy commissioner erred in finding claimant sustained a first qualifying injury and asserts claimant is not entitled to industrial disability benefits from the Fund. The Fund also asserts the deputy commissioner erred in determining the credit the Fund is entitled to receive and the Fund asserts claimant has not sustained industrial disability in excess of the Fund's credits.

Defendant-employer admits the deputy commissioner erred in calculating claimant's weekly benefit rate because the deputy commissioner did not include the weekly CIPP payments under Lee v. John Deere Waterloo Works, 2022 WL 17170891, File No. 21700629.01 (Arb. Dec. Sept. 30, 2022). Defendant-employer asserts the deputy commissioner correctly excluded the profit-sharing bonus in determining the weekly benefit rate and asserts the remainder of the arbitration decision should be affirmed.

Those portions of the proposed arbitration decision pertaining to issues not raised on appeal are adopted as 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 17A.15 and 86.24, the arbitration decision filed on December 19, 2022, is affirmed in part, modified in part, and reversed in part, with my additional and substituted analysis.

Without further analysis, I affirm the deputy commissioner's finding claimant proved she sustained a first qualifying loss of her left hand and arm and a second qualifying loss of her right upper extremity thus entitling claimant to receive benefits from the Fund. I affirm the deputy commissioner's finding that the commencement date for permanent partial disability benefits is January 3, 2020. I affirm the deputy commissioner's finding defendant-employer should pay claimant \$1,385.81 in penalty benefits for late paid and underpaid weekly benefits. I affirm the deputy commissioner's finding that pursuant to rule 876 IAC 4.33, claimant is entitled to reimbursement from defendant-employer in the amount of \$600.00 for the second report prepared by Farid Manshadi, M.D., and \$103.00 for the filing fee.

With my additional and substituted analysis I modify the deputy commissioner's finding that claimant sustained a second qualifying loss of two percent of the right upper

extremity. I modify the date of maximum medical improvement as to claimant's claim against defendant-employer. I reverse the deputy commissioner's finding that claimant's average weekly earnings and the weekly benefit rate for the work injury are \$1,102.93. I modify the deputy commissioner's finding that claimant sustained five percent industrial loss entitling claimant to 20 weeks of permanent partial disability benefits from the Fund.

### **I. Extent of Functional Loss of the Right Upper Extremity**

Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5<sup>th</sup> Ed. 2001), Thomas Gorsche, M.D., the treating orthopedic surgeon, opined claimant sustained two percent functional loss of claimant's right upper extremity. Dr. Manshadi, a physiatrist, performed an IME for claimant and opined claimant sustained one percent functional loss of her right upper extremity.

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).

In the findings of fact in the arbitration decision, the deputy commissioner found the opinion of Dr. Gorsche to be more persuasive than the opinion of Dr. Manshadi on extent of functional loss to claimant's right upper extremity. In the conclusions of law the deputy commissioner adopted Dr. Gorsche's rating with respect to claimant's claim against defendant-employer, but used Dr. Manshadi's rating in determining the functional loss for the right upper extremity for claimant's claim against the Fund. The error appears to be a scrivener's error given the deputy commissioner's analysis in the findings of fact. I affirm the deputy commissioner's finding Dr. Gorsche's opinion is more persuasive than Dr. Manshadi's opinion. Weekly compensation for loss of an arm is 250 weeks. Iowa Code § 85.34(2)(m). Therefore, claimant is entitled to five weeks of permanent partial disability benefits for the injury to her right upper extremity.

The deputy commissioner found the commencement date for permanency is January 3, 2020. The statute provides "permanent partial disability benefits shall begin 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 by use of the [AMA Guides]." I find permanent partial disability benefits against the defendant-employer commence on December 30, 2019, the date Dr. Gorsche determined the extent of loss under the AMA Guides. Iowa Code § 85.34(2).

### **II. Weekly Benefit Rate**

At hearing claimant alleged she had countable earnings of \$15,984.92 for the 13 representative weeks before the work injury, for average weekly earnings of \$1,229.61

and a corresponding rate of \$802.39. Defendant-employer asserted claimant's average weekly earnings and the corresponding weekly benefit rate were lower. The deputy commissioner found for the 13 weeks preceding the work injury, claimant's wages were \$14,338.05. The deputy commissioner found claimant's average weekly wage and weekly benefit rate are \$1,102.93. Dividing \$14,338.05 results in average weekly earnings of \$1,102.93. The weekly benefit rate is determined by using the rate book in effect at the time of the injury, using the number of exemptions and the average weekly earnings. The rate is not the same as the average weekly earnings. The rate results from a calculation using the average weekly earnings.

Claimant asserts the deputy commissioner erred in calculating the weekly benefit rate because the deputy commissioner did not include the weekly CIPP payments and the profit-sharing bonus in determining claimant's average weekly earnings. Defendant-employer admits the deputy commissioner erred in calculating claimant's weekly benefit rate because the deputy commissioner did not include the weekly CIPP payments under Lee v. John Deere Waterloo Works, 2022 WL 17170891, File No. 21700629.01 (Arb. Dec. Sept. 30, 2022). Defendant-employer asserts the deputy commissioner correctly excluded the profit-sharing bonus in determining the weekly benefit rate and asserts the remainder of the arbitration decision should be affirmed.

Iowa Code section 85.36 sets forth the basis for determining an injured employee's weekly benefit 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 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." 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.

Defendant-employer has conceded the weekly CIPP payments should be included in determining claimant's average weekly earnings. I find the deputy commissioner erred in failing to include the weekly CIPP payments in determining claimant's average weekly earnings.

The deputy commissioner did not analyze whether the \$4,095.58 profit-sharing bonus for the year of 2019 should be included in determining the rate. The deputy commissioner did not include the bonus income for the year 2019 in determining claimant's average weekly earnings. I previously addressed the profit-sharing bonus in the Declaratory Order Regarding Profit Sharing Bonus and Continuous Improvement Pay Plan, <https://www.iowaworkcomp.gov/orders>. (Ex. B:10-17)

Claimant received a profit-sharing bonus of \$4,095.58 for the year of 2019. The date of injury in this case is August 8, 2019. At the time of her work injury claimant's eligibility for the bonus, the amount of the bonus, or whether there would even be a bonus, was not known. (Ex. 8, pp. 60-63) At the time of her work injury, the 2019 profit sharing bonus was neither certain nor earned. As noted in the Declaratory Order, "a bonus should not be used to determine an employee's weekly workers' compensation benefit unless the employee's right to the benefit has vested at the time of his or her injury," citing Noel v. Rolscreen, 475 N.W.2d 666 (Iowa Ct. App. 1991). Under the Declaratory Order and Noel, the profit-sharing bonus for the year 2019 should not be used in determining claimant's average weekly earnings.

Defendant-employer concedes in its brief that Exhibit 5 correctly reflects claimant's countable wages, less the profit-sharing bonus. Therefore, for the representative periods of April 1, 2019, through April 7, 2019, April 8, 2019 through April 14, 2019, April 15, 2019, through April 21, 2019, April 29, 2019, through May 5, 2019, May 6, 2019, through May 12, 2019, May 13, 2019, through May 19, 2019, May 20, 2019, through May 26, 2019, May 27, 2019, through June 2, 2019, June 3, 2019, through June 9, 2019, June 10, 2019, through June 16, 2019, June 24, 2019, through June 30, 2019, July 15, 2019, through July 21, 2019, and July 22, 2019, through July 28, 2019, claimant had total countable earnings of \$14,544.89. Dividing this sum by 13



results in an average weekly wage of \$1,118.84, which when rounded to the nearest dollar is \$1,119.00. Iowa Code § 85.36.

The parties stipulated on the Hearing Report Order that at the time of the work injury claimant was married and entitled to four exemptions. According to the rate book in effect at the time of the August 8, 2019, work injury, claimant's weekly benefit rate is \$736.86. <https://www.iowaworkcomp.gov/ratebook>.

### **III. Fund Benefits**

The Second Injury Compensation Act, found at Iowa Code sections 85.63 through 85.69, governs entitlement to claims against the Fund. Under Iowa Code section 85.64:

[i]f an employee who has previously lost, or lost the use of, one hand, one arm, one foot, one leg, or one eye, becomes permanently disabled by a compensable injury which has resulted in the loss of or loss of use of another such member or organ, the employer shall be liable only for the degree of disability which would have resulted from the latter injury if there had been no preexisting disability. In addition to such compensation, and after the expiration of the full period provided by law for the payments thereof by the employer, the employee shall be paid out of the "Second Injury Fund" created by this division and the remainder of such compensation as would be payable for the degree of permanent disability involved after first deducting from such remainder the compensable value of the previously lost member or organ.

Thus, the Second Injury Compensation Act requires a claimant to establish: (1) the claimant sustained a permanent disability to a hand, arm, foot, leg, or eye, a first qualifying injury; (2) the claimant subsequently sustained a permanent disability to another hand, arm, foot, leg, or eye, through a work-related injury, a second qualifying injury; and (3) the claimant has sustained permanent disability resulting from the first and second qualifying injuries exceeding the compensable value of the "previously lost member." Gregory v. Second Injury Fund of Iowa, 777 N.W.2d 395, 398-99 (Iowa 2010).

I affirmed the deputy commissioner's finding that claimant established she sustained a first qualifying injury and a second qualifying injury for purposes of her claim against the Fund. I also found the deputy's decision contains a scrivener's error adopting Dr. Manshadi's rating of one percent for the second qualifying loss. I find claimant's functional loss from the first qualifying injury is two percent and her functional loss from the second qualifying injury is two percent.

Benefits through the Fund are determined by examining claimant's industrial disability or industrial loss. Claimant alleges the deputy commissioner erred in finding she sustained five percent industrial disability and contends she is entitled to additional industrial disability benefits.

"Industrial disability is determined by an evaluation of the employee's earning capacity." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 852 (Iowa 2011). In considering the employee's earning capacity, the deputy commissioner evaluates several factors, including "consideration of not only the claimant's functional disability, but also [the claimant's] age, education, qualifications, experience, and ability to engage in similar employment." Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 137-38 (Iowa 2010). The inquiry focuses on the injured employee's "ability to be gainfully employed." Id. at 138.

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Compensation for permanent partial disability shall begin at the termination of the healing period. Iowa Code § 85.34(2). Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(u). When considering the extent of disability, the deputy commissioner considers all evidence, both medical and nonmedical. Evenson v. Winnebago Indus., Inc., 818 N.W.2d 360, 370 (Iowa 2016). When determining the Fund's liability, the trier of fact subtracts the two scheduled amounts for the first and second qualifying injuries from the full amount of the industrial disability. Second Injury Fund of Iowa v. Shank, 516 N.W.2d 808, 813 (Iowa 1994).

At the time of the hearing claimant was 46. Claimant graduated from high school and completed a certified nursing assistant certificate from Hawkeye Community College. Claimant also earned an associate's degree in CNC science from Hawkeye Community College in 2001.

Claimant commenced work with defendant-employer in 2002. Claimant has worked for defendant-employer for the majority of her working career. From 1996 through 2002, she worked as a certified nursing assistant.

When she was hired by defendant-employer, claimant underwent a pre-employment physical with Charles Buck, M.D. (JE 1, pp. 1, 4) Dr. Buck diagnosed claimant with bilateral Reynaud's syndrome and assigned claimant a permanent restriction of no repetitive use of vibratory tools. Defendant-employer has followed this permanent restriction. Following the August 8, 2019, work injury, Dr. Gorsche imposed a permanent restriction of using a padded glove on the right hand. (Ex. C, p. 1)

Following the August 2019 work injury, claimant returned to the same position she held with defendant-employer prior to her injury, and she has received wage increases since the work injury.

Claimant testified she continues to experience intermittent pain in her right hand from the tip of her pointer finger down into the palm near her right wrist, which is worse with use. (Tr. p. 25) The pain is made worse with gripping and lifting. (Tr. p. 26) Claimant has experienced decreased sensation and tingling on the side of her pointer finger. (Tr. p. 27) With my additional analysis, and considering all of the factors of industrial disability, including claimant's permanent restrictions, I find the industrial disability award should be modified and I find claimant has sustained ten percent industrial disability, which entitles claimant to receive 50 weeks of industrial disability benefits.

The Fund alleges it is entitled to a total credit of 20 weeks for the first and second qualifying losses. Weekly compensation for loss of an arm is 250 weeks. Iowa Code § 85.34(2)(m). A two percent loss of an arm equals 5 weeks. The Fund is entitled to a total credit of 10 weeks for the first and second qualifying injuries combined. Therefore, claimant is entitled to receive 40 weeks of permanent partial disability benefits from the Fund commencing at the conclusion of defendant-employer's liability.

#### ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on December 19, 2022, is affirmed in part, modified in part, and reversed in part, with my additional and substituted analysis.

Claimant is entitled to receive 10 weeks of permanent partial disability benefits from defendant-employer, at the weekly rate of seven hundred thirty-six and 86/100 dollars (\$736.86), commencing on December 30, 2019.

Defendant-employer shall receive credit for all benefits paid to date.

Defendant-employer 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-employer shall pay claimant one thousand three hundred eighty-five and 81/100 dollars (\$1,385.81) in penalty benefits.

The Fund shall pay claimant 40 weeks of permanent partial disability benefits at the weekly rate of seven hundred thirty-six and 86/100 dollars (\$736.86), commencing at the conclusion of defendant-employer's liability.

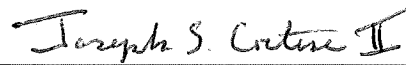
Interest accrues on unpaid Fund benefits from the date of this decision. Second Injury Fund of Iowa v. Braden, 459 N.W.2d 467 (Iowa 1990).



Pursuant to rule 876 IAC 4.33, defendant-employer shall reimburse claimant one hundred three and 00/100 dollars (\$103.00) for the cost of the filing fee and six hundred and 00/100 dollars (\$600.00) for the cost of Dr. Manshadi's second report, and defendant-employer shall pay the cost 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 19<sup>th</sup> day of April, 2023.



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JOSEPH S. CORTESE II  
WORKERS' COMPENSATION  
COMMISSIONER

The parties have been served as follows:

Benjamin Roth (via WCES)

Coreen Sweeney (via WCES)

Meredith Cooney (via WCES)