BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SHAWN GIBBS, Claimant, vs. JOHN DEERE DES MOINES WORKS, Employer, Self-Insured, Defendant.	FILED FEB 14 2019 WORKERS COMPENSATION	File No. 5059971 ARBITRATION DECISION Head Note Nos.: 1802, 1803, 1803.1, 3001

STATEMENT OF THE CASE

Shawn Gibbs, claimant, filed a petition for arbitration against John Deere Des Moines Works, as the self-insured employer. This contested case proceeded to an in-person hearing in Des Moines on November 1, 2018.

The parties filed a hearing report at the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 10, Claimant's Medical Exhibit 1, Claimant's Non-Medical Exhibits 1 and 2, and Defendants' Exhibits A through I. All exhibits were received without objection.

Claimant testified on his own behalf. No other witnesses testified live at the time of hearing. The evidentiary record closed at the conclusion of the arbitration hearing.

However, counsel for the parties requested the opportunity to file post-hearing briefs. Their request was granted. The parties filed post-hearing briefs on December 10, 2018, at which time the case was fully submitted to the undersigned.

ISSUES

The parties submitted the following disputed issues for resolution:

1. The extent of claimant's entitlement to healing period benefits.

2. Whether claimant sustained a scheduled member injury to the arm or an injury that involves unscheduled injuries and industrial disability.

3. The extent of claimant's entitlement to permanent disability benefits.

4. Claimant's average gross weekly earnings on the date of injury and the corresponding weekly compensation rate at which benefits should be paid.

FINDINGS OF FACT

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

Shawn Gibbs began working as an inspector for John Deere Des Moines Works (hereinafter referred to as "Deere") in 2010. On August 25, 2014, while performing his typical job duties at Deere, Mr. Gibbs sustained a very significant injury. A large steel frame weighing nearly 500 pounds fell and struck a glancing blow to the back of his head and crushed his left arm. Mr. Gibbs' left arm was pinned under the steel frame until he could extricate himself. His left arm had obvious deformity after the injury and claimant was transported to the emergency room. (Claimant's testimony)

Head and neck CT scans at the emergency room on the date of injury were both negative. However, Christopher D. Nelson, M.D., an orthopaedic surgeon, took claimant to surgery on the date of injury as a result of the crushed left forearm. Dr. Nelson performed an open reduction and internal fixation of both bones in Mr. Gibbs' left forearm. (Joint Exhibit 1, pages 9-11)

Although the healing process took approximately one year, Mr. Gibbs' left arm healed relatively uneventfully with physical therapy and post-operative care through Dr. Nelson. Dr. Nelson ultimately declared maximum medical improvement for the left arm and recommended no further treatment as of August 26, 2015. (Joint Ex. 2, p. 22) Dr. Nelson ordered and later adopted recommendations from a functional capacity evaluation (FCE). The FCE was performed on August 18, 2015. (Joint Ex. 10) The FCE was considered valid and demonstrated that claimant has residual ability to function in the heavy work category. The FCE recommended lifting restrictions of 76 pounds up to waist on an occasional basis. Again, Dr. Nelson adopted the FCE recommendations. (Joint Ex. 2, p. 23)

Dr. Nelson also offered an opinion about permanent impairment of claimant's left arm. Dr. Nelson opined that claimant sustained a 15 percent permanent impairment due to loss of range of motion in the left shoulder, 6 percent impairment of the left arm as a result of limitations in the left elbow, 5 percent impairment due to the left wrist, 10 percent permanent impairment of the left arm due to decreased grip strength and an additional 20 percent of the left arm as a result of decreased pinch strength. (Joint Ex. 2, p. 24, 25)

Defendant apparently questioned the treating surgeon's impairment rating and obtained an independent medical evaluation performed by Joshua D. Kimelman, D.O., on August 22, 2016. Dr. Kimelman concurred with the crush injury diagnoses and

concurred that claimant was at maximum medical improvement. However, Dr. Kimelman offered a significantly different permanent impairment rating. (Defendant's Ex. A)

Dr. Kimelman opined that claimant sustained 1 percent impairment for sensory loss in his left forearm and an additional 5 percent of the left arm due to loss of motor function in the left forearm. Dr. Kimelman also adopted the FCE recommendations for permanent work restrictions. (Defendant's Ex. A, p. 4)

Claimant also sought an independent medical evaluation performed by John D. Kuhnlein, D.O., on March 9, 2017. (Claimant's Medical Exhibit 1) Dr. Kuhnlein performed a physical examination that demonstrated very slight loss of range of motion in the left shoulder. However, his examination also showed some loss of range of motion of the right shoulder. (Claimant's Medical Ex. 1, p 5) Dr. Kuhnlein's examination also demonstrated better range of motion in the left elbow and left wrist than were documented by Dr. Nelson. (Joint Ex. 2, p. 24; Claimant's Medical Ex. 1, p. 6) Dr. Kuhnlein also tested claimant's grip strength. (Claimant's Medical Ex. 1, p. 6)

Dr. Kuhnlein diagnosed claimant with a crush injury of the left forearm with residual neuropathic pain in the left forearm. Dr. Kuhnlein concurred that Mr. Gibbs achieved maximum medical improvement for his left forearm injury on August 26, 2015. However, he disagreed with Dr. Nelson's impairment rating. (Claimant's Medical Ex. 1, p. 7)

Dr. Kuhnlein opined that claimant sustained only a 1 percent impairment of the left arm for loss of range of motion at the left elbow. He assigned no impairment for loss of range of motion of the left wrist. Dr. Kuhnlein opined that claimant had normal motor strength and no permanent impairment for loss of strength. (Claimant's Medical Ex. 1, p. 7)

Dr. Kuhnlein assigned a 2 percent impairment of the left arm for hypersensitivity of the surgical scar on claimant's left forearm. He also assigned a 2 percent impairment of the left arm for sensory deficit in the posterior antebrachial cutaneous nerve. In total, Dr. Kuhnlein assigned a 24 percent permanent impairment of the left upper extremity as a result of the effects of the August 25, 2014 work injury. Dr. Kuhnlein assigned work restrictions similar to those in the FCE, including the 75-pound occasional lift restriction. (Claimant's Medical Ex. 1, p. 8)

After claimant obtained his evaluation with Dr. Kuhnlein, defendant sought a return evaluation by Dr. Kimelman. Dr. Kimelman re-evaluated claimant on August 27, 2018. In his second report, Dr. Kimelman opines that claimant would have a 20 percent impairment of the left arm. (Defendant's Ex. A, p. 8) Dr. Kimelman offers no explanation of his revised impairment rating or explanation why the impairment worsened between his first and second evaluations.

Considering the left arm injury in isolation, I find the opinions of Dr. Kuhnlein to be most persuasive. Dr. Kuhnlein documents significant improvements in claimant's function between the final evaluation by Dr. Nelson and his own evaluation. Dr. Kuhnlein's evaluation and analysis using the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, is thorough and understandable.

Dr. Nelson's impairment rating makes sense. However, two subsequent evaluators identified significant improvement in claimant's ranges of motion and other measures. For this reason, I cannot accept Dr. Nelson's impairment rating. Rather, it appears that claimant experienced significant improvements in range of motion and sensory issues after Dr. Nelson last evaluated him. Moreover, defendant puts forth evidence demonstrating that claimant has significant residual use of his left arm, including the ability to work and the ability to perform mechanic or bodywork on motorcycles and automobiles through his own business started after the injury. Claimant's residual capabilities suggest that Dr. Nelson's impairment rating is excessive and not representative of claimant's actual functional abilities.

As for Dr. Kimelman's impairment rating for the left forearm, I have a hard time accepting the opinion given the significant change in his impairment rating between August 2016 and August 2018. Claimant's range of motion and other measures appear to have worsened according to Dr. Kimelman's impairment rating over this two-year period. No explanation is provided for this change and, although it ultimately agrees with Dr. Kuhnlein's impairment rating, it is found not credible as to the left forearm.

Therefore, I find Dr. Kuhnlein's left forearm impairment rating to be most convincing and credible in this evidentiary record. I accept that impairment rating as accurate and find that claimant has proven he sustained a 20 percent permanent impairment of the left arm.

Mr. Gibbs also asserts that he sustained permanent injury and disability as a result of an injury to the head, neck, or left shoulder as a result of the August 25, 2014 work injury. The initial medical records document objective evidence that claimant was struck on the head and neck. I find that claimant has proven he sustained an injury to his head and neck as a result of the frame falling onto him on August 25, 2014.

However, I also find that claimant did not prove he sustained permanent injuries to the head, neck, or left shoulder as a result of the August 25, 2014 work injury. Dr. Nelson offers a permanent impairment rating for loss of range of motion of the left shoulder. (Joint Ex. 2, pp. 24-25) However, Dr. Kuhnlein makes no diagnosis of the left shoulder and offers no permanent impairment for the left shoulder. (Claimant's Medical Ex. 1, pp. 7-8) Dr. Kimelman specifically opines that claimant did not sustain an injury or permanent impairment of the left shoulder. (Defendant's Ex. A, p. 4)

As noted above, I found the later impairment rating offered by Dr. Kuhnlein to be more credible, as claimant's left arm condition, range of motion, strength, and sensory deficit apparently improved after Dr. Nelson last evaluated claimant. Once again, I find

the later evaluator's opinions to be more credible. Dr. Kuhnlein implicitly finds no injury or impairment of the left shoulder. Dr. Kimelman specifically finds no left shoulder injury. I find that claimant failed to prove a left shoulder injury.

Claimant also failed to prove a head injury. Although there is some evidence in this record about memory issues and a head CT being conducted, there are no medical diagnoses of ongoing or permanent head injury symptoms or deficits. Therefore, I find that claimant failed to prove he sustained a permanent head injury or that he suffered any permanent disability as a result of a head injury.

Finally, claimant asserts that he sustained a neck injury as a result of the August 25, 2014 work injury. There is objective evidence that claimant sustained some injury to the neck as a result of the accident. However, after the initial emergency room visit, claimant did not raise complaints or express symptoms about his neck until December 2014.

Certainly, it is feasible and possible that claimant had neck symptoms and an ongoing injury in his neck, but that he was more focused upon treatment of his left forearm crush injuries. As the left forearm symptoms subsided and healing occurred, it is feasible that claimant recognized and sought treatment for the neck symptoms. Dr. Kuhnlein offered this theory and opinion while causally connecting claimant's neck symptoms to the August 25, 2014 work injury. (Claimant's Medical Ex. 1, p. 7)

While feasible and explained quite reasonably by Dr. Kuhnlein, I have a hard time accepting his opinion in this case. Review of Dr. Kuhnlein's report suggests that he may not have been provided all of the relevant medical records and evidence. Dr. Kuhnlein does not refer to physical therapy records that suggest claimant's neck symptoms were resolving or resolved. For instance, on January 19, 2015, claimant's therapist noted that he no longer had constant symptoms in his neck and that he perceived himself to be 95 percent improved. He reported zero out of ten pain at the time of the evaluation. (Joint Ex. 3, p. 53) That same therapy note indicates, "Patient has achieved all functional goals. Is now able to perform activities of daily living without cervical spine symptoms/restrictions/limitations." (Joint Ex. 3, p. 55)

A pain drawing prepared for the physical therapist on September 15, 2014, notes left arm pain but no neck pain. (Joint Ex. 3, p. 42) A similar pain drawing for a different facility on March 12, 2015 demonstrates left arm pain and again no reference to neck symptoms. (Joint Ex. 6, p. 70) Dr. Kuhnlein references neither of these pain drawings in his report.

Dr. Kuhnlein also does not appear to have been provided or reviewed a medical record from David T. Berg, D.O., dated May 9, 2017. In that medical record, Dr. Berg notes that claimant "really had no complaints until just last fall with pain in his cervical area." (Joint Ex. 5, p. 68) This would place the onset of neck symptoms in the fall of 2016, two years after the injury date. Dr. Berg opined, "His complaints at the current time are not related to his injury in 2014." (Joint Ex. 5, p. 68)

After Dr. Berg found no causation, claimant sought treatment with Amber Hemphill, PA-C[1] at Dr. Nelson's office. Ms. Hemphill evaluated claimant on May 25, 2017 and diagnosed claimant with myofascial neck pain, but noted his radiographs were benign and indicated that she thought claimant's symptoms would improve with time and conservative treatment. (Joint Ex. 2, p. 28) Ms. Hemphill also documented that claimant's symptoms worsened after he returned to work in March 2017. (Joint Ex. 2, p. 26)

On October 2, 2017, Ms. Hemphill authored a report in which she stated, "I believe that his work injury was a substantial factor in aggravating the underlying cervical condition." (Joint Ex. 2, p. 34) She also opined that she believed permanent impairment and restrictions were likely necessary. (Joint Ex. 2, p. 34)

Defendant deposed Ms. Hemphill in September 2018. Ms. Hemphill acknowledged during her deposition that she did not have many of the relevant medical records pertaining to claimant's neck condition. She acknowledged that she did not have the physical therapy records mentioned above or the pain drawings mentioned above. Ultimately, Ms. Hemphill acknowledged that her causation opinion might have changed if she had received the full medical history pertaining to claimant's neck condition. (Defendant's Ex. I)

After referral to a pain clinic, claimant reported in February 2018 that he experienced an increase in symptoms in the spring of 2017. (Joint Ex. 7, p. 87) Mr. Gibbs also went for extended periods of time without medical treatment or symptoms in his neck.

On the other hand, Dr. Kimelman was provided copies of the referenced medical records that potentially would change Ms. Hemphill's causation opinion. After review of those records, Dr. Kimelman opined, "His neck symptoms apparently resolved at least in referring to the physical therapy notes that were written contemporaneously with this treatment at that time. His MRI and x-rays demonstrate some facet arthritis at 5-6, which is very common in asymptomatic people and according to the twin study, degenerative arthritis of the spine seen on x-ray and MRI seems to be more congenital than a result of trauma." (Defendant's Ex. A, p. 10)

Instead, Dr. Kimelman opines that claimant sustained a neck injury, referring to it as a type of "whiplash or soft-tissue injury." However, Dr. Kimelman opines that none of claimant's current neck symptoms or impairment is causally related to the August 25, 2014 work injury. (Defendant's Ex. A, p. 10)

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[1] Ms. Hemphill was married subsequent to her treatment of Mr. Gibbs but prior to her deposition in this case. Her maiden name was Amber Buyck, which is the name under which she is referenced in claimant's medical records.

As I consider the competing medical opinions relative to the neck, I note that Dr. Berg and Dr. Kimelman offer a very similar explanation and conclusion regarding causation of the neck. Dr. Kuhnlein offers a contrary opinion but does not appear to have all the relevant medical records. Similarly, Ms. Hemphill offered a causation opinion contrary to those offered by Dr. Berg and Dr. Kimelman. However, she acknowledges that review of the additional medical records may have changed her opinion. Presumably, if those records were relevant and important, Dr. Kuhnlein would also like to review those records before having to offer a causation opinion.

Under these circumstances, I find the physicians with the greater quantity of information to be most credible. Therefore, I accept the causation opinions of Dr. Berg and Dr. Kimelman and find that claimant did not prove he sustained a permanent neck injury as a result of the August 25, 2014 work injury. I note the increase in symptoms reported in the spring of 2017. Claimant testified he was off work from June 2, 2017 through May 18, 2018 as a result of his neck condition. I find that the claimant's period of time off work between June 2, 2017 and May 18, 2018 was not the result of his injury at work on August 25, 2014.

The parties also have a dispute about claimant's gross average weekly earnings at the time of his injury. Review of the parties' arguments demonstrates that there is no factual dispute about what weeks should be included. The sole dispute is whether the profit sharing bonus paid by Deere should be considered a regular, or irregular, bonus.

With respect to the issue of the profit sharing bonus, I find that Deere filed a Petition for Declaratory Order on March 15, 2017. In support of that petition, Deere submitted an affidavit from Kevin Zimmerman, its Senior Manager of Labor Relations. In paragraph 15 of his affidavit, Mr. Zimmerman stated that Deere had not paid a profit sharing bonus to its employees in two of the past seventeen years and specifically referenced 1999 and 2001. Mr. Zimmerman's initial affidavit was inaccurate in this regard.

The Iowa Workers' Compensation Commissioner issued a Declaratory Order on July 12, 2017. The Commissioner concluded that the profit sharing bonus paid by Deere is an irregular bonus and should not be included within the calculation of gross weekly earnings for purposes of calculating the weekly rate for Deere employees. Mr. Gibbs was not a participant in the petition for declaratory order proceedings and now challenges the accuracy of the facts upon which the Commissioner based his Declaratory Order.

Mr. Zimmerman has now submitted an affidavit correcting and clarifying his prior affidavit. He now acknowledges that Deere did pay a small profit sharing bonus to its employees in 1999. That bonus was only an average of $23.00 per employee. Nevertheless, this revised fact demonstrates that Deere has paid profit sharing bonuses to its employees in 17 of the 18 years considered in the declaratory order proceedings.

Since Mr. Gibbs commenced employment with Deere, he has received a profit-sharing bonus each of the years of his employment. Since his employment commenced in 2010, the profit sharing bonuses have ranged from an average of $2,334.50 to $7,628.59 per year and, in my judgment, appear to be a significant and relevant part of a Deere employee's compensation paid regularly since Mr. Gibbs has been employed at Deere.

CONCLUSIONS OF LAW

The initial dispute submitted for resolution is whether Mr. Gibbs sustained an injury to his left arm or if the injury sustained on August 25, 2014 extends beyond the scheduled member and into an unscheduled member. Claimant specifically asserts that he sustained a head and neck injury that has resulted in permanent disability. Defendants contend that the injury is limited to left arm.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u).

In this case, defendant concedes that Mr. Gibbs sustained permanent disability as a result of his left arm injury on August 25, 2014. However, defendant disputes whether claimant sustained a permanent head or neck injury. I found that Mr. Gibbs failed to prove by a preponderance of the evidence that he sustained a permanent shoulder, neck, or head injury as a result of the August 25, 2014 work injury. Therefore, I conclude that claimant's injury should be compensated as a scheduled member injury to the left arm pursuant to Iowa Code section 85.34(2)(m).

The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). The fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

Having found that claimant proved he sustained 20 percent permanent impairment of the left arm, I must determine the number of weeks of permanent partial disability benefits to which claimant is entitled. Iowa Code section 85.34(2)(m) provides that an arm injury should be compensated based upon a 250-week schedule of benefits. Iowa Code section 85.34(2)(v) provides that permanent disability should be awarded proportional to the maximum scheduled compensation. Blizek v. Eagle Signal Co., 164 N.W.2d 84, 87 (Iowa 1969). Twenty percent of 250 weeks totals 50 weeks. Therefore, claimant has established entitlement to an award of 50 weeks of permanent partial disability benefits against John Deere. Iowa Code section 85.34(2)(m), (v).

Claimant also asserted a claim for additional healing period benefits from June 2, 2017 through May 18, 2018. He testified that he was off work for his neck condition during this claimed healing period. Defendants denied liability for the neck condition and any claim for healing period during this time period. Having found that the neck condition was not proven to be permanent or the cause of claimant's problems from June 2, 2017 through May 18, 2018, I conclude that claimant has not proven entitlement to healing period benefits for this period of time.

The final dispute submitted by the parties for resolution is the proper weekly rate at which benefits should be paid. The dispute between the parties is whether certain bonus payments made to claimant should be included in the gross average weekly wages in calculating the applicable weekly rate.

The final dispute between the parties is the applicable gross average weekly earnings and corresponding weekly rate at which benefits should be paid. The only

dispute between the parties is whether the profit-sharing bonus paid to claimant should be included as part of his earnings. Claimant contends that the profit-sharing bonus is regular and should be included in calculation of claimant's gross average weekly earnings. Defendants contend that the bonus should be excluded based upon a Declaratory Order issued by the Iowa Workers' Compensation Commissioner on July 12, 2017.

Mr. Gibbs raises some interesting and potentially valid challenges to the Declaratory Order. First, he contends that the Declaratory Order was based upon erroneous facts. Specifically, claimant points out that the Commissioner apparently relied upon the erroneous factual statement by Mr. Zimmerman about Deere's failure to pay a profit-sharing bonus in 1999. Indeed, review of the Declaratory Order demonstrates that the Commissioner made findings that included non-payment of the profit-sharing bonus in two of the years considered. Deere now concedes the affidavit and factual assertion to be inaccurate.

The Commissioner's unknowingly based his finding of fact upon clearly erroneous information in the Declaratory Order proceedings. Claimant, therefore, argues that the Declaratory Petition and subsequent proceedings are invalid and should not be considered binding by the undersigned. It is not clear to the undersigned whether the payment of a minor bonus in 1999 would make significant changes to the Commissioner's factual findings about whether the profit-sharing bonus is "regular." While I found that profit-sharing bonuses of relatively large amounts have been paid each of the years of claimant's employment, this is a factual issue and change in the Declaratory Order that is best addressed by the Commissioner. The undersigned is not at liberty to reverse the Commissioner's factual findings or conclusions of law in the Declaratory Order.

Claimant also contends that he was not included as an interested party in the declaratory petition proceedings. Indeed, there is no evidence that claimant was given notice of the proceedings or that he had any meaningful opportunity to participate in the declaratory petition proceedings. Therefore, claimant contends that he is not bound by the Declaratory Order issued by the Commissioner in July 2017. Again, it is relatively apparent that claimant was not a participant in the declaratory petition proceedings and did not have the opportunity to present the arguments he now presents. The effect of these new arguments are best considered by the Commissioner. While the undersigned acknowledges that claimant has identified an error in the facts presented by Deere and that the claimant has only now had an opportunity to fully litigate this issue, the undersigned is not at liberty to overrule agency level precedent or ignore the holding of the Commissioner's Declaratory Order.

Mr. Gibbs also asserts that the Declaratory Order is invalid because Deere failed to disclose and the Commissioner did not cite prior binding agency-level precedent. Specifically, claimant cites Spaete v. John Deere Davenport Works, File No. 5031216 (Appeal June 2012) (affirming the Arbitration Decision conclusion that Deere's profit sharing bonus was regular and should be included in the calculation of average weekly

wages). Review of the Petition for Declaratory Order confirms that Deere did not disclose the Spaete decision to the Commissioner. Whether the Commissioner reviewed and considered this prior agency appellate decision when issuing the Declaratory Order is unknown to the undersigned. The Declaratory Order does not cite or discuss the Spaete decision. It would be quite appropriate for the Commissioner to review the Declaratory Order again in light of the prior agency precedent now cited by claimant.

In Spaete, the Commissioner fully affirmed an arbitration decision that found Deere's profit-sharing bonus to be regular and concluded it should be calculated into the average weekly wage of a Deere employee. Spaete v. John Deere Davenport Works, File No. 5031216 (Appeal June 2012). In that arbitration decision, the deputy commissioner held that it does not matter "whether an annual bonus payment is discretionary or varies in amount, it is viewed as a regular bonus and included in the rate calculation if it is regularly paid over a number of years." Spaete v. John Deere Davenport Works, File No. 5031216 (Arbitration May 2011). In this case, the profit-sharing bonus was demonstrated to have been paid in 17 of 18 years, in varying amounts. It was paid every year that claimant was employed by Deere.

Claimant contends that the fact that a prior agency level appellate decision existed renders Deere's Petition for Declaratory Order invalid. Mr. Gibbs contends that agency rule 876 IAC 5.9(1)(8) prohibits the issuance of a declaratory order on this issue because there was already an agency-level decision on the issue. Agency rule 876 IAC 5.9(1)(8) provides:

> The workers' compensation commissioner shall not issue a declaratory order where prohibited by Iowa Code section 17A.9(1), and may refuse to issue a declaratory order on some or all questions raised for the following reasons:
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> ....
>
> (8) The petition is not based upon facts calculated to aid in the planning of future conduct but is, instead, based solely upon prior conduct in an effort to establish the effect of that conduct or to challenge an agency decision already made.

I do not concur with the claimant's assertion that the agency rule cited prohibits the Commissioner's issuance of his July 2017 Declaratory Order. Agency rule 876 IAC 5.9(1)(8) indicates that the Commissioner "may refuse to issue a declaratory order" if the issue is a challenge of a prior agency decision already made. The rule leaves the Commissioner discretion as to whether to entertain the petition for declaratory order and whether to issue the order. Whether the Commissioner would have exercised his discretion to either issue or refuse to issue the Declaratory Order if the Spaete decision had been brought to his attention is unknown to the undersigned. However, I conclude that the Commissioner had authority and discretion to issue the Declaratory Order.

Therefore, I conclude that claimant's challenge, asserting the Declaratory Order is a nullity, is not legally accurate. Instead, I conclude that the Commissioner had discretion and authority to issue the Declaratory Order.

Mr. Gibbs final challenge to the Declaratory Order is to argue that, if binding and validly issued, the Order was wrongly decided as a matter of both law and fact. Whether the change in facts now known will have any effect on the Commissioner's reasoning or ultimate conclusion is not known by the undersigned. Whether the fact that there was in existence prior agency-level precedent would have any effect on the Commissioner's analysis is also unknown to the undersigned. While claimant raises some interesting facts that may change the Commissioner's analysis of this issue, including a prior agency-level appellate decision and a revision of the facts relied upon by the Commissioner, the undersigned is not at liberty to ignore or overrule a Declaratory Order issued by the Commissioner.

Claimant is certainly free and is encouraged to challenge the Declaratory Order on appeal to the Commissioner. However, the undersigned is bound by the Commissioner's Declaratory Order. Therefore, I conclude that Deere's argument must prevail at the arbitration level. Relying upon the July 2017 Declaratory Order, I specifically conclude that the claimant's gross average weekly wage should not include the profit-sharing bonus. Therefore, I conclude that the claimant's gross average weekly wage at the time of his injury was $1,053.37. The corresponding weekly benefit rate is $681.17. Iowa Code section 85.36; Iowa Workers' Compensation Manual (rate book) effective July 1, 2014 through June 30, 2015.

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall pay claimant fifty (50) weeks of permanent partial disability benefits commencing on September 21, 2015.

All weekly benefits shall be paid at the rate of six hundred eighty-one and 17/100 dollars ($681.17) per week.

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

Defendant shall receive credit for all weekly benefits paid to date, including overpayment of the weekly rate for any weekly benefits.

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

All parties shall bear their own costs.

Signed and filed this 14th day of February, 2019.

WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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WHG/kjw

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.