

JUL 12 2017

PETITION BY:)
)
 JOHN DEERE DES MOINES WORKS,)
 JOHN DEERE DAVENPORT WORKS,) **Declaratory Order Regarding**
 JOHN DEERE DUBUQUE WORKS,) **Profit Sharing Bonus and**
 JOHN DEERE OTTUMWA WORKS,) **Continuous Improvement**
 JOHN DEERE WATERLOOK WORKS,) **Pay Plan**
 AND JOHN DEERE FOUNDRY.)

WORKERS' COMPENSATION

John Deere Des Moines Works, John Deere Davenport Works, John Deere Dubuque Works, John Deere Ottumwa Works, John Deere Waterloo Works, and the John Deere Foundry (collectively "John Deere") filed a petition for declaratory order, along with an affidavit from Kevin Zimmerman, the Senior Manager of Labor Relations for Deere & Company, pursuant to Iowa Code section 17A.9 and 876 Iowa Administrative Code 5.1, regarding the application of Iowa Code sections 85.36(6) and 85.61 to John Deere's compensation system for purposes of determining rate calculations in workers' compensation proceedings for employees who experience workplace injuries.

In the petition, John Deere alleges it has received inconsistent rulings from the Division of Workers' Compensation with respect to the inclusion of profit sharing bonus and continuous improvement pay plan ("CIPP") payments when determining rate calculations for workers' compensation benefits. The petition did not provide any citations. The Workers' Compensation Commissioner requested citations to the cases John Deere was referencing. John Deere provided the following citations: Cunningham v. John Deere Davenport Works, Files Nos. 5040048, 5040049, 5047427 (Arb. Apr. 29, 2016); Ardapple v. John Deere Davenport Works, File No. 5049457 (Arb. Jan. 29, 2016); Yarolem v. John Deere Dubuque Works, File No. 5043487 (Arb. June 5, 2015); Breeden v. John Deere Davenport Works, File No. 5047097 (Arb. Apr. 27, 2015); Beckmann v. John Deere Dubuque Works, File No. 5047087 (Arb. Mar. 17, 2015); Craig v. John Deere Davenport Works, File No. 5039241 (Arb. Jan. 3, 2013); Willson v. John Deere Davenport Workers, File No. 5035614 (Arb. Apr. 18, 2012).

John Deere did not send the petition to interested parties. The Commissioner sent a notice of filing of petition for declaratory order regarding Iowa Code sections 85.36(6) and 85.61 to interested parties. No person has filed a petition for intervention to date.

FACTUAL BACKGROUND

All John Deere wage employees are covered under the same Collective Bargaining Agreement ("CBA"). (Zimmerman Affidavit, paragraph 4) Pursuant to the

current CBA, effective October 2015, John Deere's wage employees are eligible for a profit sharing bonus that is paid once per year, if it is paid. (Zimmerman Affidavit, ¶ 5) Under the previous CBA, the profit sharing bonus was distributed in January, but under the current CBA, the profit sharing bonus is distributed in December. (Zimmerman Affidavit, ¶ 6)

John Deere's fiscal year runs from November 1st to October 31st. (Zimmerman Affidavit, ¶ 7) The profit sharing bonus is based on historic data from the previous fiscal year ending October 31st. (Zimmerman Affidavit, ¶ 8) In November of each year, subsequent to the close and completion of the prior fiscal year, John Deere determines whether a profit sharing bonus will be made, and if a profit sharing bonus will be made, John Deere calculates the amount of each wage employee's profit sharing bonus. (Zimmerman Affidavit, ¶ 9)

The profit sharing bonus, if it is made, is based on a calculation of the total number of hours the wage employee worked, the wage employee's average earnings (usually calculated over the one-month period in September of the fiscal year in question), and the overall profitability of the Deere North America and the Deere Worldwide operations for the prior fiscal year. (Zimmerman Affidavit, ¶ 10) To be eligible for the profit sharing bonus, a wage employee must be employed with John Deere on October 31st, the close of the fiscal year, absent certain exceptions, such as death. (Zimmerman Affidavit, ¶ 11) Given the structure of the profit sharing plan, John Deere cannot determine whether profit sharing bonus payments will be made or the amount of the payments, if they will be made, until after the close of the fiscal year. (Zimmerman Affidavit, ¶ 12) In two of the past eighteen years, 1999 and 2001, no profit sharing bonus was paid due to the overall profitability factor. (Zimmerman Affidavit, ¶ 15)

The CBA covering wage employees also provides an incentive pay program known as the CIPP, which provides an incentive payment to wage employees based on a CIPP team exceeding production goals. (Zimmerman Affidavit, ¶ 16) Wage employees are members of CIPP teams. Under the CIPP, each week in which a CIPP team exceeds its production goals, John Deere makes a positive adjustment or addition into the CIPP reserve fund for the CIPP team, and each week in which a CIPP team underperforms its production goals, John Deere makes a negative adjustment or subtraction from the CIPP reserve fund. (Zimmerman Affidavit, ¶¶ 17-18) Each week John Deere records the positive and negative adjustments to the CIPP reserve fund on each CIPP team member's weekly payroll record. (Zimmerman Affidavit, ¶ 21) At the end of the quarter, John Deere tallies the positive and negative weeks for each CIPP team member, and it makes a quarterly CIPP payment from the reserve funds to each CIPP team member. (Zimmerman Affidavit, ¶ 19)

Given the design of the CIPP, the actual CIPP payment is not made until after the week in which the CIPP benefit is earned. (Zimmerman Affidavit, ¶ 20) The CIPP payment made to each wage employee is based on the number of hours the wage employee contributes to the CIPP. (Zimmerman Affidavit, ¶ 22)

CONCLUSIONS OF LAW

I. Petition for Declaratory Order

The Division of Workers' Compensation is charged with a number of duties, including adopting and enforcing all rules necessary to implement Iowa Code chapters 85, 85A, 85B, and 87. Iowa Code § 86.8 (2015).

Under Iowa Code section 17A.9(1)(a) “[a]ny person may petition an agency for a declaratory order as to the applicability to specified circumstances of a statute, rule, or order within the primary jurisdiction of the agency.” The statute requires each agency to adopt rules governing the form, contents, and filing of petitions for declaratory orders, the procedural rights of individuals in relation to petitions, and the disposition of petitions. Iowa Code § 17A.9(2). The agency is required to give notice “to all persons to whom notice is required by any provision of law and may give notice to any other persons.” *Id.* § 17A.9(3). A person who qualifies as an intervenor and files a timely petition for intervention according to agency rules, may intervene in proceedings for declaratory orders. *Id.* § 17A.9(4). Upon receipt of a petition for a declaratory order the agency, in writing, shall: (1) issue an order declaring the applicability of the statute, rule, or order in question to the specified circumstances; (2) set the matter for specified proceedings; (3) agree to issue a declaratory order by a specified time; or (4) decline to issue the declaratory order stating the reasons for its action. *Id.* § 17A.9(5).

The Division has adopted rules governing petitions for declaratory orders at 876 Iowa Administrative Code chapter 5. Under the administrative rules, a declaratory order has the

same status and binding effect as a final order issued in a contested case proceeding. It is binding on the workers' compensation commissioner, the petitioner, and any intervenors who consent to be bound and is applicable only in circumstances where the relevant facts and the law involved are indistinguishable from those on which the order was based. As to all other persons, a declaratory order serves only as precedent and is not binding on the workers' compensation commissioner. The issuance of a declaratory order constitutes final agency action on the petition.

876 IAC 5.12.

After receiving Deere's petition for declaratory order, the Commissioner sent notice of the petition to third persons. The Division has not received a motion to intervene from any person to date.

II. Statutes Involved

Iowa Code section 85.36 sets forth the basis for determining an injured employee's compensation or rate. Mercy Med. Ctr. v. Healy, 801 N.W.2d 865, 870 (Iowa Ct. App. 2011). The statute expressly provides the determination is made using the last thirteen consecutive calendar weeks immediately preceding the injury. Iowa Code § 85.36(6). Under the statute,

The basis of compensation shall be the weekly earnings of the injured employee at the time of the injury. Weekly earnings means gross salary, wages, or earnings of an employee to which such employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured, as regularly required by the employee's employer for the work or employment for which the employee was employed, computed or determined as follows and then rounded to the nearest dollar:

* * * *

6. In the case of an employee who is paid on a daily or hourly basis, or by the output of the employee, the weekly earnings shall be computed by dividing by thirteen the earnings, 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. The statute defines "gross earnings" as "recurring payments by employer to the employee for employment, before any authorized or lawfully required deduction or withholding of funds by the employer, excluding irregular bonuses, retroactive pay, overtime, penalty pay, reimbursement of expenses, expense allowances, and the employer's contribution for welfare benefits," and "pay period" as "that period of employment for which the employer customarily or regularly makes payments to employees for work performed or services rendered." Id. § 85.61(3), (5)

III. Statutory Interpretation

The goal of statutory interpretation is "to determine and effectuate the legislature's intent." Rameriz-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 769 (Iowa 2016) (citing United Fire & Cas. Co. v. St. Paul Fire Marine Ins. Co., 677 N.W.2d 755,

759 (Iowa 2004)). The court begins with the wording of the statute. Myria Holdings, Inc. v. Iowa Dep't of Rev., 892 N.W.2d 343, 349 (Iowa 2017). When determining legislative intent, the court looks at the express language of the statute, and “not what the legislature might have said.” Id. (citing Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 337 (Iowa 2008)). If the express language is ambiguous, then the court looks to the legislative intent behind the statute. Sanford v. Fillenwarth, 863 N.W.2d 286, 289 (Iowa 2015) (citing Kay-Decker v. Iowa State Bd. of Tax Review, 857 N.W.2d 216, 223 (Iowa 2014)). A statute is ambiguous when reasonable persons could disagree as to the statute’s meaning. Rameriz-Trujillo, 878 N.W.2d at 769 (citing Holstein Elect. v. Brefogle, 756 N.W.2d 812, 815 (Iowa 2008)). An ambiguity may arise when the meaning of particular words is uncertain or when considering the statute’s provisions in context. Id.

When the legislature has not defined a term in a statute, the court considers the term in the context in which it appears and applies the ordinary and common meaning to the term. Id. (citing Rojas v. Pine Ridge Farms, L.L.C., 779 N.W.2d 223, 235 (Iowa 2010)). Courts determine the ordinary meaning of a term by examining precedent, similar statutes, the dictionary, and common usage. Sanford, 863 N.W.2d at 289.

The terms “recurring”, “irregular bonuses”, and “retroactive” contained in the definition of “gross earnings” are not defined in Iowa Code chapter 85 or in the administrative rules adopted by the Workers’ Compensation Commissioner, 876 IAC chapters 1 through 12. Therefore, the common and ordinary meaning of the words applies in the context of the statute and the statute’s history. Myria Holdings, Inc., 892 N.W.2d at 349. Webster’s New World Dictionary (3rd College Ed. 1988) defines the term “recur” as “to happen or occur again, esp. after some lapse of time; appear at intervals,” the term “irregular” as “uneven in occurrence or succession; variable or erratic,” the term “bonus” as an “extra payment over and above salary given to an employee as an incentive or award,” and the term “retroactive” as “going into effect as of a specified date in the past.”

A. Profit Sharing Bonus

John Deere asserts the profit sharing bonus should be excluded from gross earnings when determining the weekly benefit rate because it is not a recurring payment, it constitutes an irregular bonus, and it constitutes retroactive pay. The Iowa Supreme Court and Iowa Court of Appeals have issued two published cases involving the treatment of bonus income when determining an employee’s weekly benefit rate, Burton v. Hilltop Care Ctr., 813 N.W.2d 250 (Iowa 2012) and Noel v. Rolscreen Co., 475 N.W.2d 666 (Iowa Ct. App. 1991).

In Noel, Rolscreen paid a Christmas bonus to each employee based on the number of years of continuous service, and the amount of gross wages earned in the applicable fiscal year. 475 N.W.2d at 667. The bonus was not contingent upon the business showing a profit or reaching a profit margin, employees could not borrow against the bonus until the precedent conditions were met, the bonus was paid from

Rolscreen's general operating account and not an account earmarked for the employee, and the program was voluntary and could be discontinued or altered by Rolscreen or replaced with another fringe benefit at Rolscreen's discretion. Id. The court of appeals found "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," following decisions of the Colorado and Florida courts. Id. The court held "[w]e affirm on this issue" and further found the Christmas bonus was not earnings because it was not paid or received within the thirteen weeks prior to the work injury, it was not a regular bonus given it was dependent on several conditions precedent, it varied in amount, and it was not fixed in terms of entitlement or amount until late in the fiscal year. Id. at 667-68.

In Burton, the Commissioner determined Burton's annual bonus should be used in calculating Burton's rate. 813 N.W.2d at 264. The Iowa Supreme Court affirmed, finding the evidence presented at hearing established the bonus was regular, given Burton received a bonus every year she worked for Hilltop, the bonus was paid despite Burton's performance concerns, the bonus was paid to Burton for being a part of the operation, and Burton's supervisor testified Burton was entitled to the bonus. Id. at 266.

In this matter, the profit sharing bonus is an extra payment above and beyond the employee's hourly pay. (Zimmerman Affidavit, ¶ 10) John Deere provides the profit sharing bonus as an incentive or award to an employee based on the company's performance, the hours worked by the employee, and the employee's average earnings for the month of September. (Zimmerman Affidavit, ¶ 10) If the profit sharing bonus is paid, it is paid at the same time each year, now in December as set forth in the CBA. (Zimmerman Affidavit, ¶ 8)

The profit sharing bonus does not constitute retroactive pay for services rendered in the past. While it is based on the total number of hours the wage employee worked, and the wage employee's actual earnings, it is also based on the overall profitability of the Deere North America and Deere Worldwide operations for the prior fiscal year. (Zimmerman Affidavit, ¶ 10) The profit sharing bonus is an extra payment over and above salary given to an employee as an incentive or award.

The statute excludes separate categories of pay, including overtime, penalty pay, reimbursement of expenses, the employer's contribution for welfare benefits, irregular bonuses, and retroactive pay. The legislature could have excluded all bonus income, bonus income paid on an annual basis, or bonus income paid on a quarterly or monthly basis. Instead of excluding these types of bonus income, the legislature only excluded "irregular bonuses" from the definition of gross earnings. Taking John Deere's argument to its logical conclusion would preclude a finding that any bonus income based on past performance should be included in gross earnings when determining an employee's rate. This is not in accord with the express wording of the statute, and would lead to an absurd result. John Deere has not established the profit sharing bonus is retroactive pay.

The evidence establishes the profit sharing bonus is not a recurring payment, but is an irregular bonus dependent upon the overall profitability of Deere North America and Deere Worldwide for the prior fiscal year. (Zimmerman Affidavit, ¶ 10) In two of the past eighteen years, 1999 and 2001, no profit sharing bonus was paid due to the profitability factor. (Zimmerman Affidavit, ¶ 15) The profit sharing bonus is not a recurring payment; it is variable and erratic. Under the statute the profit sharing bonus should be excluded from gross earnings for purposes of determining an employee's weekly rate for workers' compensation benefits.

B. Continuous Improvement Pay Plan Payments

The CIPP provides incentive pay to wage employees based on a CIPP team exceeding production goals. (Zimmerman Affidavit, ¶ 16) Under the CIPP, each week in which a CIPP team exceeds its production goals, John Deere makes a positive adjustment or addition into the CIPP reserve fund for the CIPP team, and each week in which a CIPP team underperforms its production goals, John Deere makes a negative adjustment or subtraction from the CIPP reserve fund. (Zimmerman Affidavit, ¶¶ 17-18) Each week John Deere records the positive and negative adjustments to the CIPP reserve fund on each CIPP team member's weekly payroll record. (Zimmerman Affidavit, ¶ 21) At the end of the quarter, John Deere tallies the positive and negative weeks for each CIPP team member, and makes a quarterly CIPP payment from the reserve funds to each CIPP team member. (Zimmerman Affidavit, ¶ 19)

According to John Deere, when calculating a wage employee's rate for purposes of workers' compensation, John Deere has historically included the CIPP weekly earnings for the thirteen representative weeks prior to the work injury when determining an employee's gross earnings and it has not included the quarterly CIPP payment when determining an employee's gross earnings. John Deere asserts the CIPP weekly earnings and not the quarterly CIPP payments should be used to determine the wage employees' rates because CIPP weekly earnings are recurring, and using the quarterly CIPP payouts would require inclusion of retroactive pay given the quarterly CIPP payments represent payments for amounts previously earned. John Deere further asserts both the CIPP weekly earnings and the quarterly CIPP payments should not be included in determining an employee's gross earnings.

The quarterly CIPP payments are a bonus payment made to employees as an incentive or reward for exceeding production goals over the course of a quarter. The CIPP balance is calculated weekly, but it is paid quarterly. When calculating an employee's rate, it is improper to include both the daily CIPP balance for the thirteen representative weeks and the quarterly CIPP payments.

The record establishes the CIPP payments are paid on a quarterly basis, and are recurring. John Deere adjusts the CIPP earnings each week based on the CIPP team's performance in comparison to the CIPP team's production goals, but it makes the CIPP payments on a quarterly basis. John Deere contends the weekly CIPP balance should

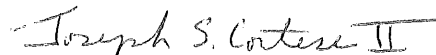
be used and not the quarterly CIPP payments when determining the rate, and argues that the quarterly CIPP payments represent retroactive pay.

The statute does not exclude all bonus income from gross earnings; it excludes “irregular bonuses.” Iowa Code § 85.61. The quarterly CIPP payments meet the definition of a bonus, which the dictionary defines as an “extra payment over and above salary given to an employee as an incentive or award.” Webster’s New World Dictionary. The legislature has not excluded all bonus income, bonus income paid on an annual basis, or bonus income paid on a quarterly or monthly basis. Instead of excluding these types of bonus income, the legislature only excluded “irregular bonuses” from the definition of gross earnings. Cf. Homan v. Branstad, 887 N.W.2d 153, 166 (Iowa 2016) (noting when determining legislative intent, the courts look to the maxim “expression unius est exclusion alterius,” meaning the “expression of one thing is the exclusion of another” and recognizing “[i]t is an established rule of statutory construction that the ‘legislative intent is expressed by omission as well as inclusion, and the express mention of one thing implies the exclusion of others not so mentioned.’”) Taking John Deere’s argument to its logical conclusion would preclude a finding that any bonus income based on past performance should be included in gross earnings when determining an employee’s rate. This is not in accord with the express wording of the statute and would lead to an absurd result. John Deere has not established the quarterly CIPP payments are retroactive pay. The most recent quarterly CIPP payment should be used in calculating the employee’s gross earnings when determining the rate.

ORDER

The weekly CIPP earnings should not be included in gross earnings and the quarterly CIPP payment should be included in gross earnings when determining an employee’s weekly rate for workers’ compensation benefits. The John Deere profit sharing bonus should be excluded from gross earnings for when determining an employee’s weekly rate for workers’ compensation benefits.

Signed and filed this 12th day of July, 2017.



JOSEPH S. CORTESE, II
WORKERS’ COMPENSATION
COMMISSIONER

Copies to:

<p>Jason Neifert Iowa Association of Justice 1441 – 29th St., Ste. 111 West Des Moines, IA 50266 jneifert@nbolawfirm.com</p>	<p>Iowa Self-Insurers Association Todd Beresford 800 Stevens Port Dr., Ste. 713 Dakota Dunes, SD 57049-5005 todd.beresford@tyson.com</p>
<p>Michael Burkert Iowa Workers' Compensation Advisory Committee, Inc. One Nationwide Gateway Dept. 5574 Des Moines, IA 50391 burkem16@nationwide.com</p>	<p>Iowa Association of Workers' Compensation Lawyers, Inc. Matthew Grotnes P.O. Box 57520 Des Moines, IA 50317 kkgilbert@gmail.com mgrotnes@hhlawpc.com</p>
<p>United Auto Workers, Region 4 Ron McInroy 680 Barclay Blvd. Lincolnshire, IL 60069 rmcinroy@uaw.net</p>	<p>Joseph A. Quinn Attorney at Law 700 Walnut, Ste. 1600 Des Moines, IA 50309-3899 iquinn@nyemaster.com</p>