BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RENE SAMANIEGO, Claimant, vs. JTV MANUFACTURING, INC., Employer, and ACUITY, Insurance Carrier, Defendants.	FILED JUL 16 2018 WORKERS' COMPENSATION File No. 5049712 APPEAL DECISION Head Note Nos: 1108, 1803.1, 4000

Defendants JTV Manufacturing, Inc., employer, and its insurer, Acuity, appeal from an arbitration decision filed on January 5, 2017. Claimant Rene Samaniego cross-appeals. The case was heard on February 26, 2016, and it was considered fully submitted in front of the deputy workers' compensation commissioner on April 15, 2016.

The deputy commissioner found claimant sustained a 50 percent loss to his right eye as a result of the stipulated injury which arose out of and in the course of claimant's employment with defendant-employer on September 24, 2013, which entitles claimant to 70 weeks of permanent partial disability (PPD) benefits commencing September 25, 2013, at the rate of $376.46. The deputy commissioner assessed penalty benefits against defendants in the amount of $7,500.00. The deputy commissioner also ordered defendants to pay claimant's independent medical examination (IME) expenses in the amount of $750.00 and IME transportation expenses in the amount of $218.40. Costs were taxed to defendants.

Defendants on appeal assert the deputy commissioner erred in finding claimant sustained any permanent disability as a result of the work injury. Defendants also assert the deputy commissioner erred in assessing penalty benefits.

Claimant asserts on cross-appeal the deputy commissioner erred in finding claimant's impairment was limited to a scheduled member.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, pursuant to Iowa Code sections 86.24 and 17A.15, I respectfully disagree with portions of the presiding deputy commissioner's findings, analysis, and conclusions. Therefore, the arbitration decision is affirmed in part with additional analysis, modified in part, and reversed in part.

FINDINGS OF FACT

Claimant sustained a stipulated work injury to his right eye on September 24, 2013, when he experienced a flash burn while welding. (Hearing Transcript page 24) When claimant's right-eye symptoms persisted several days after the injury, he presented to his personal eye doctor. (Tr. p. 24) Claimant's doctor confirmed the flash burn but also informed claimant he had a piece of metal in his eye which had begun to rust. (Tr. pp. 24) The piece of metal was removed, but claimant ultimately developed an infection. (Tr. p. 24)

Claimant was eventually referred to Vance Thompson Vision, where he was diagnosed with a corneal ulcer believed to be fungal in nature. (Exhibit E, page 31) Claimant was prescribed antibiotic drops to combat the infection. (Tr. p. 52) By claimant's December 2013 examination with Justin Schweitzer, O.D., at Vance Thompson Vision, the ulcer was "100% resolved but had left a corneal scar." (Ex. E, p. 34) Despite the scar, all medications were discontinued and claimant was released to return to work without restrictions. (Ex. E, pp. 33-34)

Although Dr. Schweitzer provided claimant with a full-duty release, claimant continued to have problems welding due to his corneal injury. (Ex. E, p. 34; Tr. p. 55) As a result, defendants moved claimant out of the welding department. (Tr. p. 55) Claimant resigned his employment with defendant-employer in January 2014 due to his belief he was treated unfairly after the work injury. (Tr. pp. 22-23, 56)

Claimant did not return to Dr. Schweitzer after the December 2013 appointment until May 16, 2014, when he again confirmed claimant's fungal ulcer had resolved, but the corneal scar remained. (Ex. E, p. 36) Claimant's right-eye vision at the May 16, 2014 appointment was 20/60 with glasses. (Ex. E, p. 35) However, Dr. Schweitzer "perform[ed] a rigid gas permeable over refraction" that improved claimant's right-eye vision to 20/20. (Ex. E, p. 36) Based on this testing, it was Dr. Schweitzer's opinion claimant's right-eye vision was "correctable to 20/20" using a specialty gas permeable lens (Ex. E, p. 35) Dr. Schweitzer later explained that claimant's vision is not correctable with glasses due to the "irregular nature of his cornea from the scarring," but a "specialty contact lens will improve his vision fairly significantly." (Ex. E, p. 39)

Notably, claimant was not in possession of the specialty contact lens at the time of the hearing, nor had he been wearing such a lens for any period of time prior to hearing. (Tr. p. 36)

In a November 2014 letter, Dr. Schweitzer opined claimant sustained permanent disability of the right eye:

> Under the AMA Guidelines Fifth Edition, there is no visual impairment that Rene has due to his injury. As I stated in my previous letter, he does have a corneal scar that with the use of a contact lens does improve his vison to 20/20. As a result of his injury he still should be able to perform his work, although he will need a contact lens to do it.

(Ex. E, p. 41)

Claimant was seen by David S. Dwyer, M.D., for an IME in April 2015. (Ex. 2) Dr. Dwyer recorded claimant's visual acuity in the right eye at 20/50 "with significant distortion and glare." (Ex. 2, p. 2) Using the 4th Edition of the AMA Guides to the Evaluation of Permanent Impairment, Dr. Dwyer assigned a total of "50% loss of visual function in the right eye," which converted to 12 percent impairment of the whole person. (Ex. 2, p. 3) This rating was based on a 15 percent impairment of claimant's central vision; an additional 20 percent impairment for claimant's complaints of glare, distortion, and loss of depth perception; and 23 percent loss of visual field. (Ex. 2, p. 3)

At the hearing, claimant testified he continued to have symptoms in the right eye including dryness, blurring, and glare, along with sensitivity to light and dust. (Tr. pp. 26-28) These symptoms impacted claimant's ability to maintain employment after his resignation from the defendant employer. He was terminated from an ethanol plant in September 2014 due to his inability to read P&IDs, which are comparable to blueprints, and he was later terminated from a cement delivery company due to problems seeing vehicles while changing lanes. (Tr. pp. 29-30, 73-76)

On appeal, defendants argue the deputy commissioner erred in awarding claimant permanency benefits because claimant's vision was correctable to 20/20 using a specialty lens. Thus, the first issue to be decided in this matter is whether to use claimant's uncorrected vision or corrected vision when determining if he sustained a permanent injury as a result of the September 24, 2013 work incident.

I find it appropriate to use claimant's uncorrected vision in determining the threshold inquiry of whether a permanent injury arising out of and in the course of employment was sustained. In the instant case, claimant wore glasses for reading prior to his work injury, but it is undisputed that claimant required a different, more powerful corrective lens in his right eye after the September 24, 2013, incident due to his corneal scarring. (Tr. pp. 21, 33; Ex. 2, p. 2) I find the work injury permanently and negatively altered claimant's uncorrected vision, forcing him to obtain a specialty lens which was previously unnecessary. The deputy commissioner's finding that claimant sustained permanent disability as a result of the September 24, 2013, injury is therefore affirmed.

Having found claimant sustained permanent disability, the next question is whether claimant's permanent disability is limited to his eye or does it extend into his body as a whole. The situs of claimant's permanent injury is the cornea of his right eye. (Ex. 2, pp. 3-4) The symptoms of that injury include decreased visual acuity, distorted vision, photophobia, and glare—all of which represent loss of function of the eye. (Ex. 2, pp. 3-4) Because there is no evidence in the record to suggest claimant's loss of function extended anywhere beyond his eye, I find claimant's injury was limited to his eye and does not extend into the body as a whole. Thus, the deputy commissioner's finding that claimant's permanent disability is limited to his eye under Iowa Code section 85.34(2)(p) is affirmed.

Having found claimant's injury is limited to his eye, the next inquiry is the extent of claimant's scheduled injury. In this case, the impairment opinions of both experts are flawed. Dr. Schweitzer, the expert relied upon by defendants, opined claimant sustained no visual impairment under the Fifth Edition of the Guides because the use of a specialized contact lens improved his right-eye vision to 20/20. (Ex. E, p. 41) There are two significant problems with Dr. Schweitzer's opinion.

First, Dr. Schweitzer's opinion that the lens corrected claimant's right-eye vision to 20/20 was based on a one-time trial. At the time of the hearing, claimant had not yet obtained the actual lens to be worn in his eye. (Tr. p. 36) While there is no evidence to suggest Dr. Schweitzer's measurements from the one-time, in-office trial were inaccurate, there is also no evidence showing the actual lens to eventually be worn by claimant would provide the same restoration of vision, particularly because the lens recommended by Dr. Schweitzer is "not as well tolerated as soft contact lenses." (Ex. I, deposition transcript p. 39)

As explained by Dr. Dwyer in his deposition, "using [claimant's] best corrective visual acuity with his glasses is a more accurate representation of [claimant's] disability than what he might see theoretically with a contact lens and the risk involved with wearing a contact lens in a diabetic with a known past fungal infection." (Ex. I, depo. tr. p. 51) Ultimately, Dr. Schweitzer's opinion was based on an assumption that claimant would tolerate the lens without issue, but that assumption had not yet become a reality at the time of the hearing.

Second, after measuring claimant's visual acuity, Dr. Schweitzer failed to address claimant's visual field, which "refers to the ability to detect objects in the periphery of the visual environment." AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, p. 280. This is significant, because under the Fifth Edition of the Guides, the visual acuity scores and visual field scores are both considered and combined to determine an overall functional vision score. Guides, Fifth Edition, pp. 279, 296. For these reasons, I find Dr. Schweitzer's opinion unconvincing.

Dr. Dwyer, on the other hand, opined that the injury caused a 50 percent loss of vision in the right eye. (Ex. 2, p. 3) At the outset, it should be noted that Dr. Dwyer's opinion was based on the 4th Edition of the Guides, and this agency has adopted the

Fifth Edition as the guide for determining permanent partial disabilities. What is more problematic, however, is the admission by Dr. Dwyer in his deposition that his rating was not in total compliance with instructions contained within the 4th Edition. Dr. Dwyer assigned 20 percent impairment for claimant's complaints of significant glare, distortion, and loss of some depth perception. (Ex. 2, p. 3) In his deposition, however, Dr. Dwyer conceded that the 4th Edition of the Guides allow up to 10 percent for glare sensitivity only when glare testing is performed. (Ex. I, depo. tr. pp. 19-20]) Dr. Dwyer acknowledged he did not perform the testing and, even if he had, he exceeded the maximum percentage allowed. (Ex. I, depo. tr. pp. 19-20])

Despite Dr. Dwyer's acknowledgment that he was not fully compliant with the 4th Edition of the Guides with respect to glare sensitivity, his opinion, which contains rationale and explanation for the impairment assigned, is found to be more convincing than the opinion of Dr. Schweitzer. Neither opinion is without its flaws, but Dr. Dwyer's opinion, unlike the opinion of Dr. Schweitzer, took into consideration the actual corrective lenses then being used by claimant, claimant's permanent corneal scar, and claimant's ongoing problems that did not exist prior to the injury, such as dryness, blurring, glare, and sensitivity to light and dust.

It appears from the record that Dr. Dwyer appropriately rated claimant's central vision using his then-corrected vision of 20/50 (for a 15 percent impairment of claimant's central vision) and the impairment to his visual field (for an additional 23 percent impairment). With respect to Dr. Dwyer's rating for claimant's central vision/visual acuity, defendants argue the 15 percent impairment is too high because claimant was subsequently found to have a best corrected visual acuity of 20/25 in a November 2015 exam with his personal eye doctor, roughly six months after the IME with Dr. Dwyer. (Ex. B, p. 10) Defendants, however, do not dispute the accuracy of Dr. Dwyer's rating using the 20/50 vision, nor did defendants provide an expert opinion using the 20/25 vision they believe to be appropriate. For these reasons, I still find Dr. Dwyer's 15 percent rating for claimant's central vision/visual acuity loss to be persuasive.

Defendants also argue the 23 percent impairment for the reduction in claimant's visual field cannot be attributed to the work injury because Dr. Dwyer, in his deposition, was unable to state within a reasonable degree of medical certainty how much of the reduction was due to claimant's scar. When asked whether he could state "to a reasonable degree of medical certainty that any of, really that any of that visual field loss is related to his injury," Dr. Dwyer responded, "I think it's very reasonable that some of it is, yes. Some, if not all." (Ex. I, depo. tr. pp. 34-35) A similar exchange occurred later in the deposition:

Q: Okay. And then we've got the loss of visual field of 23 percent. And what we know about that is that you can't say that all of that is related to this injury; correct?

A: I can't say that with 100 percent certainty, no.

Q. Or to a reasonable degree of medical certainty?

A: Well, I think it's reasonable to state that he's going to have some visual field degradation from having a central cornea scar.

Q: And I understand you think it's consistent with the injury that he would have some visual field loss.

A: Yes, yes.

. . . .

Q: So if you had to – and maybe it's just impossible to give a number. If you had to say how much of that 23 percent you think would be reasonable, 23 percent loss of visual field would be reasonably related, causally related to this scarring, how much of that would you say, or can you?

A: I don't think I can say. But I mean I think it's very possible that all of it is related to the scar on the cornea.

(Ex. I. depo. tr. pp. 39-41)

Based on this testimony and the undisputed evidence that claimant was left with a corneal scar resulting in dryness, blurring, glare and sensitivity which required a more powerful prescription lens after the September 24, 2013, work injury, I find the 23 percent impairment for the reduction in claimant's visual field is attributable to the work injury.

Combining the 15 percent impairment for claimant's central vision loss and the 23 percent impairment for the reduction in claimant's visual field, I find, using the Combined Values Chart in both the 4th Edition and Fifth Edition of the AMA Guides, claimant sustained a 35 percent impairment to his right eye. The deputy commissioner's finding with respect to the extent of claimant's permanent partial disability is thus modified.

The final issue raised in this appeal is whether claimant is entitled to penalty benefits. Defendants argue penalty benefits are inappropriate because their non-payment of PPD benefits was based on the zero percent rating from Dr. Schweitzer. Although I did not find the opinion of Dr. Schweitzer persuasive, it was not so divergent from the Fifth Edition of the Guides to make defendants' reliance upon it unreasonable. I therefore find Dr. Schweitzer's opinion created a good faith issue of fact that made defendants' liability fairly debatable and their non-payment of PPD benefits reasonable.

As explained below in more detail, I further find there was a good faith issue of law that made defendants' liability fairly debatable. The question of whether a claimant's uncorrected or corrected vision should be used when determining whether a permanent injury was sustained had not been definitively decided when defendants

made their decision to rely upon Dr. Schweitzer's zero percent rating. Due to this good faith issue of law, I find defendants' non-payment of PPD benefits was reasonable, making the assessment of penalty benefits inappropriate. Therefore, I reverse the deputy commissioner's finding that claimant is entitled to penalty benefits.

CONCLUSIONS OF LAW

The threshold inquiry in this case is whether to use a claimant's uncorrected vision or corrected vision in determining if a claimant sustained any permanent impairment to the eye. Decisions from other states are mixed. See, e.g., Workmen's Compensation: Compensation for Loss or Impairment of Eyesight, 142 A.L.R. 822 (1943 & Supp.). Generally speaking, some of these differences from state to state "are due to variation in the wording of the statutes" and others are "due to the court's interpretation of the purpose of the statute, i.e., if the purpose of the statute is to compensate in a specific amount for a specific loss, naked vision, alone, should be considered, but if the purpose of the statute is to compensate for loss of earning power, then corrected vision should be a factor." Lambert v. Indus. Comm'n, 104 N.E.2d 783, 788 (Ill. 1952).

In states that refuse to take corrected vision into account, the rationale often mirrors that of the Florida Supreme Court: "[I]t can hardly be denied that if the claimant uses the eye glasses made necessary by the accident he will always be impeded to some extent in any work that he does." See Burdine's, Inc. v. Green, 7 So. 2d 460, 461 (1942).

This agency, in deputy commissioner-level decisions, has previously held that a disability to a worker's eye is based upon the worker's uncorrected vision. Duffield v. Brand Insulation, Inc., 2 Iowa Indus. Comm'r Rep. 131 (1982) ("The undersigned cannot comprehend that the legislation intended to restrict recovery of eye injuries to corrected vision."); Brink v. Farmland Foods, Inc., I-4 Iowa Indus. Comm'r Dec. 778 (1985).

I find persuasive the rationale of jurisdictions that consider vision without the aid of corrective lenses in determining whether a permanent impairment has been sustained from an injury arising out of and in the course of claimant's employment. Using uncorrected vision is consistent with this agency's treatment of other injuries. For example, in the case of a leg amputation, a claimant would be found to have sustained a permanent injury even if his prosthetic allowed him to regain full function of his leg. Or, in the case of hearing loss, the initial inquiry of whether claimant sustained a permanent loss is based on measurements of claimant's hearing without the assistance of hearing aids.

Unlike surgery, which provides lasting relief, the use of corrective lenses provides only a temporary solution that vanishes once the lenses are removed. If corrected vision were the standard for determining whether a claimant sustained a permanent injury to the eye, a claimant could theoretically be entitled to no permanent partial disability benefits despite requiring permanent corrective lenses that were not

necessary prior to the work injury and despite reverting to the injured state any time those lenses are removed. Simply put, corrective lenses do not make the problem itself go away. For this reason, a claimant's need for corrective lenses after an injury actually serves as evidence of the permanency of that injury. See Livingston v. St. Paul Hydraulic Hoist Co., 279 N.W. 829, 831 (Minn. 1938) ("The fact that glasses are required to restore vision is evidence of the permanency of the injury and whether artificial means may partially or even wholly restore sight, it nevertheless cannot obliterate the effect of the accident causing the injury.").

It is acknowledged that the Fifth Edition of the Guides considers "best-corrected" vision when determining impairment of a claimant's visual acuity, but visual acuity is only one part of a claimant's overall visual impairment rating, and further, while the Guides are instructive, they are not the final authority in determining whether a permanent injury has been sustained. See Guides, Fifth Edition, p. 277-282; 876 IAC 2.4.

For these reasons, I conclude a claimant's uncorrected vision should be considered when determining whether a permanent injury has been sustained. Based on the above findings of fact, I found claimant's uncorrected vision worsened after the September 23, 2013, work injury. With my additional analysis, I thus affirm the deputy commissioner's conclusion that claimant sustained a permanent injury.

Having concluded claimant sustained a permanent injury, the next issue to be decided is whether claimant's permanent injury was limited to the schedule or extended into his body as a whole. 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).

Claimant argues in his cross-appeal that his injury went beyond his right eye and into his visual system. According to claimant, because the visual system is not listed in the schedule, it constitutes an unscheduled injury pursuant to Iowa Code section 85.34(2)(u).

However, as explained by the Iowa Supreme Court, "[i]f there is useful industrial vision and such vision is lost, there is a 'loss of an eye.'" Hamilton v. P.E. Johnson & Sons, 276 N.W. 841, 845 (Iowa 1937). Consistent with the Iowa Supreme Court's view, this agency has often interpreted Iowa Code section 85.34(2)(p) to include impairments to vision. See, e.g., Peeples v. The Dexter Company, File No. 5021854 (Arb. Dec. July 24, 2008); Carr v. Amana Appliances, File Nos. 5014235, 5018369, 5018370 (Arb. Dec. Sept. 29, 2006); Coffman v. Kind & Knox Gelatine, Inc., File No. 5007321 (Arb. Dec., March 18, 2004).

Claimant additionally asserts impairment to the visual system is comparable to tinnitus and should likewise be compensated industrially. In Ehteshamfar v. UTA Engineered Systems Div., 555 N.W.2d 450 (Iowa 1996), the Iowa Supreme Court

determined tinnitus should be compensated as an unscheduled injury under Iowa Code section 85.34(2)(u). The court concluded tinnitus falls outside the statutory definition of scheduled hearing loss and occupational hearing loss because it "does *not* cause a person to be unable to hear; instead tinnitus causes a person to perceive sounds that do not exist." Id. at 453.

Impairment to the visual system, however, is much more closely aligned with hearing loss than it is with tinnitus. Impairment to the visual system is measured by the inability of the eye to perceive details and the inability to detect objects in the periphery of the visual environment—i.e., the loss of the ability to see. See Guides, Fifth Edition, p. 280. In other words, an injury to the visual system causes a person to be unable to see in some degree, much like hearing loss causes a person to be unable to hear. See Ehteshamfar, 555 N.W.2d at 453. Thus, claimant's argument that his injury should be treated like tinnitus is not persuasive, and limiting his injury to the schedule is not in conflict with the court's holding in Ehteshamfar.

It is acknowledged that the Guides treat impairment to the visual system as impairment to the body as a whole, but again, the Guides are instructive, not authoritative, and it is common for this agency to convert body as a whole ratings to extremity ratings and vice versa. Unless there is evidence suggesting a loss of function that extends beyond the eye, vision loss should be treated as an eye injury under Iowa Code section 85.34(2)(p).

Ultimately, if claimant's argument were adopted and vision loss resulting from a work injury became an unscheduled injury, it would render Iowa Code section 85.34(2)(p) useless but for the loss of the actual eyeball itself. It is presumed that was not the intent of the legislature, especially in light of the fact that there have been no substantive amendments to the eye section of the schedule despite the consistent interpretation that vision loss is contemplated within "loss of an eye."

I therefore conclude an injury to the visual system is more appropriately treated as the scheduled loss of an eye pursuant to Iowa Code section 85.34(2)(p) and not an unscheduled injury under Iowa Code section 85.34(2)(u) without evidence that the injury extends beyond the function of the eye. Applied to the instant case, and based on the above findings of fact, the deputy commissioner's conclusion that claimant's injury was limited to his eye pursuant to Iowa Code section 85.34(2)(p) is thus affirmed with my additional analysis.

Having concluded claimant sustained an injury to his eye, the next issue is the extent of claimant's scheduled member disability. 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 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 Fifth Edition of the Guides has been adopted as a guide for determining an injured worker's extent of functional disability. 876 IAC 2.4 (2013). In making an assessment of the loss of use of a scheduled member, however, the evaluation is not limited to the use or technical application of the Fifth Edition of the Guides. Id. Instead, 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).

Based on the above findings of fact, particularly the portions of Dr. Dwyer's rating relating to central vision loss and visual field reduction, I conclude claimant satisfied his burden to prove that he sustained a 35 percent impairment of his right eye under Iowa Code section 85.34(2)(p). The deputy commissioner's conclusion regarding the extent of claimant's permanent partial disability is thus modified. Iowa Code section 85.34(2)(p) values the total loss of the eye at 140 weeks. Claimant is therefore entitled to 49 weeks of PPD benefits.

The last issue to be decided is whether defendants should be assessed penalty benefits for their failure to pay PPD benefits.

If weekly compensation benefits are not fully paid when due, Iowa Code section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995). It also is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

If the employer fails to show reasonable cause or excuse for the delay or denial, the commissioner shall impose a penalty in an amount up to 50 percent of the amount unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

In this case, defendants relied on the zero percent rating from Dr. Schweitzer in making their decision to deny liability for PPD benefits. Pursuant to 876 IAC 2.4, payment (or, in defendants' case, non-payment) made in reliance on the Fifth Edition of the Guides is a prima facie proof of compliance with the Iowa Workers' Compensation Act. 876 IAC 2.4. While it appears Dr. Schweitzer did not complete the full calculation for visual system impairment as instructed by the Fifth Edition Guides, I find his rating was consistent enough with the Guides to create a good faith issue of fact that made defendants' liability for PPD benefits fairly debatable.

I also find there was a good faith issue of law with respect to the use of claimant's uncorrected vs. corrected vision for purposes of determining whether a permanent injury had been sustained. As explained above, other than a handful of deputy-level decisions, this agency had not previously directly addressed this threshold question. Defendants' reliance on claimant's corrected vision was also consistent with the Fifth Edition of the Guides' instruction to use best-corrected vision for purposes of visual acuity. While I ultimately found and concluded that a claimant's uncorrected vision should be used to determine whether a permanent injury has been sustained, defendants asserted a viable legal argument in support of their position that claimant's corrected vision should be used. Thus, I conclude there was a good faith issue of law that made defendants' liability for PPD benefits fairly debatable. I therefore reverse the deputy commissioner's conclusions and analysis with respect to the assessment of penalty benefits pursuant to Iowa Code section 86.13, and I find claimant is not entitled to receive penalty benefits.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on January 5, 2017, is affirmed in part, modified in part, and reversed in part.

Defendants shall pay claimant forty-nine (49) weeks of permanent partial disability benefits, commencing on September 25, 2013 at the weekly rate of three hundred seventy-six and 46/100 dollars ($376.46) per week.

Defendants shall receive a credit for all benefits previously paid.

Defendants 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).

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding, and the parties shall split the costs 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 16th day of July, 2018.

Joseph S. Cortese II

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WORKERS' COMPENSATION
COMMISSIONER

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