BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ROBERT THOMAS, Claimant, vs. ARCHER DANIELS MIDLAND, CO., Employer, Self-Insured, Defendant.	:	File No. 5064599.01 A P P E A L D E C I S IO N Head Notes: 1402.20; 1402.30; 1402.40; 1402.60; 1403.10; 1403.20; 1703; 1802; 1803.1; 2204; 2501; 2502; 2907; 3001; 3002

Defendant Archer Daniels Midland, self-insured employer, appeals from an arbitration decision filed on November 2, 2021. Claimant Robert Thomas cross-appeals. The case was heard on January 15, 2021, and it was considered fully submitted in front of the deputy workers' compensation commissioner on February 26, 2021.

In the arbitration decision, the deputy commissioner found claimant met his burden of proof to establish the traumatic brain injury and fracture of his cervical spine he sustained after falling from his pontoon boat on June 30, 2018, are sequelae of the stipulated January 22, 2017, work injury to his right eye. The deputy commissioner found the weekly rate is $796.19. The deputy commissioner found claimant is entitled to receive healing period benefits from February 10, 2017, through April 15, 2018, and from July 1, 2018, through December 17, 2018. The deputy commissioner found claimant sustained 45 percent industrial disability, which entitles claimant to receive 225 weeks of permanent partial disability (PPD) benefits commencing on June 4, 2018. The deputy commissioner found defendant is responsible for the medical expenses set forth in Exhibit 5 and medical mileage. The deputy commissioner found that pursuant to Iowa Code section 85.39, claimant is entitled to reimbursement from defendant in the amount of $1,450.00 for the cost of the independent medical examination (IME) of claimant performed by David Dwyer, M.D. The deputy commissioner ordered defendant to pay claimant's costs of the arbitration proceeding in the amount of $1,013.95.

Defendant asserts on appeal that the deputy commissioner erred in finding claimant proved the injuries he sustained on June 30, 2018, falling from his pontoon boat are sequelae of the January 22, 2017, work injury to claimant's right eye. Defendant asserts because claimant failed to prove the injuries claimant sustained falling from his pontoon boat are sequelae of the work injury, the deputy commissioner erred in finding claimant is entitled to receive healing period benefits, PPD benefits, and medical expenses, including medical mileage, for the June 30, 2018, injuries.

Defendant asserts the deputy commissioner erred in finding claimant sustained industrial disability as a result of the injuries sustained on June 30, 2018. Alternatively, defendant asserts if it is found on appeal that the June 30, 2018, injuries are sequelae injuries, the award for claimant's industrial disability should be reduced to 15 to 25 percent. Defendant asserts the deputy commissioner erred in calculating claimant's weekly benefit rate for the work injury.

On cross-appeal, claimant also asserts that the deputy commissioner erred in calculating the weekly benefit rate. Claimant asserts the deputy commissioner erred in allowing a credit for benefits paid without specifying the credit applies to a future award of benefits. Claimant asserts the award for industrial disability should be increased substantially. Claimant asserts the remainder of the decision should be affirmed.

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

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 86.24 and 17A.15, the arbitration decision filed on November 2, 2021, is affirmed in part, modified in part, and reversed in part.

I affirm the deputy commissioner's finding claimant is entitled to receive healing period benefits from February 10, 2017, through April 15, 2018. I affirm the deputy commissioner's finding claimant is entitled to reimbursement from defendant for the cost of Dr. Dwyer's IME. I affirm the deputy commissioner's order that defendant pay claimant's costs of the arbitration proceeding in the amount of $1,013.95.

I reverse the deputy commissioner's finding claimant proved the injuries he sustained falling from his pontoon boat on June 30, 2018, are sequelae of the January 22, 2017, work injury to his right eye with the following additional and substituted analysis. Given this finding, I also find claimant is not entitled to receive healing period benefits from July 1, 2018, through December 16, 2018, or medical expenses, including medical mileage related to the June 30, 2018, accident. I also reverse the deputy commissioner's finding claimant sustained industrial disability and I modify the deputy commissioner's rate calculation with the following additional and substituted analysis.

Claimant lives alone on an acreage in Van Horne. (Transcript, page 18) In April 2014 he divorced. (Tr., p. 19) Claimant dropped out of high school in the tenth grade and earned a GED in 1983 or 1984. (Tr., p. 19)

Claimant commenced work with defendant in July 2014, as a utility worker. (Tr., p. 20) He moved to a maintenance technician position approximately 10 months later. (Tr., p. 20) At the time of the hearing claimant was working as a maintenance technician for defendant. (Tr., p. 20)

On January 22, 2017, claimant was sitting in the control room at work filling out safety paperwork before locking out a machine. (Tr., p. 21) A coworker was bouncing a ball against the wall and the ball hit claimant in the right eye. (Tr., p. 21) Claimant

testified the ball left a red ring around his right eye and his eye stung, but he did not think much about it. (Tr., p. 22) The coworker who threw the ball apologized several times. (Tr., p. 22) Claimant finished his day at work. (Tr., p. 22)

Claimant testified, "[a]pproximately a week, week and a half later it looked like flies on the wall, which were the floaties, and then I noticed lightning bolts I was seeing." (Tr., p. 22) Claimant called his optometrist, Molly Camerer, O.D., and made an appointment for February 9, 2017, after work. (Tr., p. 23) Dr. Camerer examined claimant's right eye and told him his retina had torn loose from the back of his eye. (Tr., pp. 23-24; JE 9) Dr. Camerer scheduled an appointment for claimant with the University of Iowa Hospitals and Clinics ("UIHC") Ophthalmology Department. (Tr., p. 24)

On February 10, 2017, claimant commenced treatment at UIHC, where he was examined by James Folk, M.D., an ophthalmologist. (JE 3, pp. 2-4) Dr. Folk assessed claimant with a phakic, macular-off retinal detachment of the right eye and retinal tear of the right eye and recommended surgery. (JE 3, p. 4)

Claimant underwent surgical repair at UIHC on February 16, 2017. (JE 3) Claimant had complications from the surgery. He underwent four surgeries on his right eye between February 16, 2017, and October 27, 2017. (JE 3) Claimant has continued to struggle with his right eye vision since the work injury. At the time of the hearing, claimant continued to treat at UIHC for his right eye injury.

On April 12, 2018, Mark Wilkinson, O.D., UIHC Rehabilitation Service Director for the Department of Ophthalmology and Visual Services, issued an impairment rating for claimant at defendant's request, finding claimant's best corrected vision was 20/200 in his right eye and his visual field was constricted to 18 degrees in his right eye. (JE 3, p. 31) Using Chapter 12 of the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Wilkinson assigned a visual impairment for the right eye only, as follows:

- Functional Acuity Score (FAS) = 50
- Acuity Related Impairment Rating = 50%

- Functional Field Score (FFS) = 41
- Visual Field Related Impairment = 59%

Functional Vision Score (FVS) = (FAS x FFS)/100 = (50 x 41)/100 = 20.5 resulting in a 79.5% Impairment Rating for the right eye only.

(JE 3, p. 31)

Claimant continued to receive treatment for his right eye condition after Dr. Wilkinson issued his impairment rating. (JE 3) At the time of the hearing claimant continued to treat at UIHC for his right eye condition. (Tr., p. 53)

Claimant owns a pontoon boat. (Tr., p. 41) On June 30, 2018, claimant took his girlfriend, her son, and his two children for a pontoon boat ride. (Tr., p. 41) Claimant testified on direct exam they were out all day and when he docked the boat he pulled it up to the staging area at the lake, he unloaded the boat, and he "missed a step and fell forward," hitting himself on the bumpers bolted to the trailer, noting he fell forward hitting his face, knocking him out, knocking the bumper board off, and causing him to fall backward on the cement where he hit his head and "laid the back of [his] skull open." (Tr., p. 42) Claimant admitted he drank a beer on the pontoon that day but reported he did not finish the beer. (Tr., p. 45)

Claimant was transported to UIHC where he was examined and treated by Joshua Radke, M.D., an emergency medicine physician. (JE 3, pp. 37-41) Claimant underwent brain computerized tomography and cervical spine scans. (JE 3, p. 38) Dr. Radke found the brain scan showed "no evidence of intracranial hemorrhage," there was evidence of dental fractures of teeth 7 through 9, and maxillary sinus fractures. (JE pp. 38-39) Dr. Radke consulted with oral surgery to discuss the sinus fractures and the oral surgeon reviewed the imaging and saw no fractures. (JE 3, p. 39) Dentistry examined claimant and they scheduled him for a follow-up regarding his dental fractures. (JE 3, p. 39) Dr. Radke irrigated and stapled claimant's scalp laceration and discharged him to the care of his girlfriend. (JE 3, p. 39)

Following the incident, claimant experienced problems with dizziness. (Tr., pp. 49-51) Claimant received physical therapy for his dizziness. (Tr., pp. 49-50) Claimant testified he did not have problems with dizziness prior to the June 30, 2018, fall. (Tr., p. 50) Claimant also received additional treatment for his teeth and later received dental implants. (Tr., pp. 51-52)

Claimant admitted on direct exam he does not have a specific recollection of the incident, noting he does not recall anything until approximately 11:00 p.m., and the accident happened at approximately 6:00 p.m. (Tr., p. 42) When asked how he knew what happened, claimant responded:

> [j]ust from what – I don't know exactly what happened, but I know that the bumper, the 2 x 4 was ripped off the trailer, my teeth were missing, and I was laying on the ground, so I'm assuming that's what happened.

(Tr., p. 42)

At the hospital, someone other than claimant reported "he was standing on the back of the pontoon in the parking lot and he fell off the back of the boat onto the concrete parking lot and a friend found him unconscious." (JE 3, p. 35) Claimant testified as far as he knows no one witnessed the accident. (Tr., p. 85)

During the hearing, defendant's counsel asked claimant about the last thing he could remember, and claimant responded, as follows:

Q. What is the last thing you remember before you fell, lost consciousness, and then came to later on? What's the last thing you remember?

A. Probably pulling the boat and the truck up onto – I guess you'd call it dry dock, the staging area to do all the work.

Q. And do you remember getting from the lot where you lost your three teeth and had the 7-centimeter injury on the back of your head, do you remember anything before you were at the emergency room?

A. Pulling the boat and the trailer up to the staging lot, and then the next thing I remember is waking up in the emergency room about 11:00.

Q. Okay. So you don't even remember getting in the ambulance?

A. Oh, no, no.

(Tr., pp. 86-87)

On direct exam, claimant's attorney asked him if he had problems with falls on his pontoon prior to the incident and he replied, "[o]h, nothing major. You know, everyone stumbles and trips," noting he is more careful now because he has had problems with depth perception since his right eye injury. (Tr., pp. 42-43) On cross-examination claimant admitted that after the January 2017 work injury, up to the June 30, 2018 accident, he had his pontoon boat out one or two other times and he did not have any falls or accidents. (Tr., p. 83) Claimant also admitted after June 30, 2018, when he fell from the pontoon boat he has not had any falls of any kind at work. (Tr., p. 91-92)

To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, the employee's injuries arose out of and in the course of the employee's employment with the employer. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 151 (Iowa 1996). The injury must be a rational consequence of a hazard connected with the employment, and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1, 3 (Iowa 2000). The Iowa Supreme Court has held, an injury occurs "in the course of employment" when:

> . . . it is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be

> required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of his employer.

Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174, 177 (Iowa 1979).

An injury to one part of the body can later cause an injury to another. Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 16-17 (Iowa 1993) (holding a psychological condition can be caused or aggravated by a scheduled injury). The claimant bears the burden of proving the claimant's work-related injury is a proximate cause of the claimant's disability and need for medical care. Ayers v. D & N Fence Co., Inc., 731 N.W.2d 11, 17 (Iowa 2007); George A. Hormel & Co. v. Jordan, 569 N.W.2d 148, 153 (Iowa 1997). "In order for a cause to be proximate, it must be a 'substantial factor.'" Ayers, 731 N.W.2d at 17. A probability of causation must exist, a mere possibility of causation is insufficient. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997).

The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997). When considering the weight of an expert opinion, the factfinder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

The deputy commissioner found claimant's injuries following the June 30, 2018, accident on his pontoon boat are sequelae of his January 2017 stipulated right eye injury because his problems with his vision caused him to fall, and the deputy commissioner awarded claimant industrial disability benefits. I respectfully reverse the deputy commissioner's findings and conclusions in that regard with the following additional and substituted analysis.

Claimant testified the last thing he remembers before his accident on June 30, 2018, is "pulling the boat and the trailer up to the staging lot, and then the next thing I remember is waking up in the emergency room about 11:00." (Tr., p. 86) There were no witnesses to the accident. There is no evidence in the record claimant's right eye vision problems caused him to fall, how he fell, or any of the circumstances leading to his fall.

Sunny Kim, M.D., a physiatrist who performed an IME for claimant noted, claimant "claims that as a direct result of loss of vision in the R eye he tripped and fell off a pontoon boat sustaining facial bone fracture, fracture of 3 teeth requiring extraction and implants, and head trauma resulting in chronic neck pain and chronic dizziness." (Ex. 2, p. 4) Dr. Kim then opined claimant "was at a greater risk of fall as a direct consequence of the loss of vision and depth perception." (Ex. 2, p. 6) Dr. Dwyer, an ophthalmologist who performed an independent medical examination for claimant opined "[i]t is conceivable that his unilateral vision loss contributed to [claimant's] fall." (Ex. 1, p. 8)

There is no evidence in the record claimant tripped and fell, contrary to the information claimant provided to Dr. Kim. Claimant testified he could not recall the circumstances leading up to the fall and there were no witnesses to the fall. Neither Dr. Kim nor Dr. Dwyer opined claimant's right eye vision problems were a substantial factor in causing the June 30, 2018, fall. No expert has opined claimant's right eye problems were a substantial factor in causing the June 30, 2018, fall. I find claimant has failed to establish the injuries he sustained on June 30, 2018, are sequelae of the stipulated January 22, 2017, injury to his right eye.

At hearing, claimant alleged he sustained a mental health sequela of the stipulated January 22, 2017, work injury to his right eye. Defendant disputed the claim. The deputy commissioner mentions claimant's treatment in the decision, but he did not make an express finding claimant sustained a mental health sequela of the stipulated January 22, 2017, work injury to his right eye. In determining extent of industrial disability, the deputy commissioner wrote,

> [i]t is noted that Mr. Thomas also suffers from depression and has continued to receive treatment for this problem through the date of the hearing. I find that his condition may not be permanent and even if it is, it has a negligible impact on his industrial disability. His own expert, Dr. Kim, deferred on this topic indicating he did not detect a permanent mental health condition. In any event, he has undoubtedly experienced some depression and anxiety as a result of the work injury. Having considered all the relevant factors for industrial disability, I find the claimant has sustained a 45 percent loss of earning capacity.

(Arb. Dec. p. 18) Claimant did not seek rehearing on the deputy commissioner's findings.

The record supports claimant treated with Nancy Vermeersch, LCSW, for a short period of time after the January 2017 work injury, for adjustment disorder with anxiety, starting on May 16, 2018, through June 14, 2018, before his fall from the boat. (JE 5) In the initial assessment, Vermeersch noted claimant's problems with anxiety were related to his eye injury and his divorce. (JE 5, p. 1) Vermeersch later received a letter from claimant's counsel regarding her opinions and she wrote she provided "short term EAP counseling" to claimant. (JE 5, p. 4) Vermeersch did not causally connect

claimant's anxiety with the work injury. She did not give an opinion he has sustained a permanent impairment.

More than a year later, on April 27, 2020, claimant attended an appointment with Jami Maxson, M.D., for evaluation of his depression. (JE 8, p. 1) Claimant relayed the onset of his symptoms started a few years ago and had gradually worsened, noting his prior work injury and divorce. (JE 8, p. 1) Dr. Maxon diagnosed claimant with a current mild episode of major depressive disorder without prior episode, and prescribed Lexapro. (JE 8, p. 3) Dr. Maxon has not opined the condition is permanent. She has not causally connected the condition with claimant's work injury.

On de novo review I find claimant established he sustained a temporary mental health condition, which resolved on June 14, 2018. I do not find claimant has established he sustained a permanent impairment to his mental health caused by the stipulated work injury.

The parties stipulated claimant sustained an injury to his right eye as a result of the stipulated January 22, 2017, work injury. Claimant does not assert he sustained an injury to his left eye caused by his employment with defendant.

Iowa Code section 85.34(2) (2016) governs compensation for permanent partial disabilities. The law distinguishes between scheduled and unscheduled disabilities. The Division of Workers Compensation evaluates disability using two methods, functional and industrial. Simbro v. Delong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983). Functional disability is assigned to scheduled disabilities enumerated in the statute. Iowa Code § 85.34(2)(a)-(r). For the loss of an eye, the schedule affords a maximum of 140 weeks of permanent partial disability benefits. Id. § 85.34(2)(p).

Two experts provided impairment ratings in this case, Dr. Wilkinson, a treating optometrist at UIHC, who is Rehabilitation Service Director for the Department of Ophthalmology and Visual Services, and Dr. Dwyer, an ophthalmologist who conducted an IME for claimant. While Dr. Dwyer's training as a medical doctor is superior to Dr. Wilkinson's training as an optometrist, Dr. Wilkinson has also treated claimant and he is the Rehabilitation Services Director of the Department of Ophthalmology, located in a premier tertiary care facility.

Using the AMA Guides, Dr. Wilkinson assigned claimant a 79.5 percent impairment rating for the right eye only. (JE 3, p. 31) Dr. Dwyer found claimant sustained a 37 percent visual impairment rating to the whole person. (Ex. 1, p. 9) In reaching his conclusion, Dr. Dwyer noted:

> [i]n April of 2018 Mark Wilkinson, OD from the University of Iowa calculated an impairment rating for the right eye only. He found acuity in the right eye was 20/200 giving a Functional Acuity Score (FAS) of 50. By the time I examined the patient on 7/29/2020 the acuity had dropped to "count fingers at 6 feet" or roughly equivalent to 20/667, giving a Functional Acuity Score of 25. With such profound loss of

> central vision, the loss of the central 10 degrees of visual field is ignored. Therefore I added 50 to the remaining field points between 10 degrees and 20 degrees to come up with a Functional Field Score (FFS) in the right eye of 60. Notice the visual field score in the left eye and bilaterally was decreased a little. This is because the patient's nose typically blocks a little of the nasal field. Normally this is offset by the temporal field in the other eye. But since Mr. Thomas's right eye has extremely constricted fields the field limitation to the right side must be considered in the patient's overall Visual Impairment Rating. Dr. Wilkinson also did not account for the extra vision difficulties from glare, light sensitivity and loss of depth perception under binocular conditions that I considered by subtracting 10 from the Functional Vision Score (FVS).

(Ex. 1, p. 10)

Defendant provided a copy of Dr. Dwyer's impairment rating to Dr. Wilkinson. On August 21, 2020, Dr. Wilkinson sent a response letter, which states in pertinent part:

> [a]s we discussed on the phone on August 17, 2020, Dr. Dwyer's review followed the AMA Guidelines for evaluating a permanent impairment. His impairment rating took into account the visual functioning of each eye separately, as well as both eyes together, as stipulated by these guidelines. However, what Dr. Dwyer did not do, as required by Iowa Law, is provide an impairment rating for the affected eye only, in this case the right eye, as I did in my impairment rating on April 12, 2018. Iowa law requires the use of the AMA Guidelines 5th edition, but varies from these guidelines for determination of impairment, when only one eye is affected. In a monocular eye situation, the impairment rating is only given for the affected eye.
>
> Dr. Dwyer mentioned that he found Mr. Thomas's vision to be reduced to counts fingers at 6'. It should be noted that when Mr. Thomas was seen at the University of Iowa on 6/3/20, his uncorrected acuity was documented as 20/250 in his affected right eye, which is almost 3x better than what Dr. Dwyer found and was similar to what I found when I evaluated Mr. Thomas on April 11, 2018.
>
> In summary, I believe Dr. Dwyer's impairment rating is reasonably accurate. That said, his rating does not look at the affected eye only, which is the standard used in Iowa.

(JE 3, p. 82)

Dr. Dwyer did not provide a separate rating for claimant's right eye, finding claimant's injury extended into his vision system, into the body as a whole. In Samaniego v. JTV Mfg., Inc. File No. 5049712, 2018 WL 3629811 (Iowa Workers' Comp. Com'n July 16, 2018), claimant's counsel argued claimant sustained a loss to his

vision system, which is outside of the schedule. The Workers' Compensation Commissioner rejected this argument, as follows:

> 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).

Dr. Dwyer did not provide a separate rating for claimant's right eye. Also, as noted by Dr. Wilkinson, when Dr. Dwyer examined claimant on July 29, 2020, he found claimant's vision to be reduced to counts fingers at six feet and when he was examined on June 3, 2020, at UIHC, his uncorrected acuity was documented as 20/250 in the right eye, almost three times better than what Dr. Dwyer found, and similar to what Dr. Wilkinson found when he examined claimant on April 11, 2018. Dr. Wilkinson's findings are also consistent with claimant's testimony at hearing. Claimant testified his right eye has not improved since he returned to work following the June 30, 2018, accident. (Tr., p. 54) Claimant relayed his vision is about the same, but he receives injections in his eye for swelling. (Tr., pp. 54-55)

For the above reasons I do not find Dr. Dwyer's opinion persuasive. I find Dr. Wilkinson's opinion to be the most persuasive. I find claimant has sustained 79.5 percent impairment of his right eye caused by the work injury, and I find claimant is entitled to receive 111.3 weeks of PPD benefits, commencing on June 4, 2018.

The parties disputed claimant's weekly rate at hearing. The deputy commissioner found claimant usually earned $28.42 per hour and his hours varied dramatically from week to week and he earned different rates of pay for different hours worked. The deputy commissioner concluded claimant averaged $1,419.00 per week, and later concluded claimant's weekly benefit rate is $796.19 per week. The deputy commissioner did not identify which weeks he found representative in reaching his conclusion or how he reached his conclusion. On appeal both parties assert the deputy commissioner erred in calculating the rate.

Iowa Code section 85.36 sets forth the basis for determining an injured employee's compensation rate. Mercy Med. Ctr. v. Healy, 801 N.W.2d 865, 870 (Iowa Ct. App. 2011). The basis of compensation shall be the "weekly earnings of the injured employee at the time of the injury." Iowa Code § 85.36. The statute defines "weekly earnings" as follows:

> gross salary, wages, or earnings of an employee to which such employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured,

> as regularly required by the employee's employer for the work or employment for which the employee was employed . . . rounded to the nearest dollar.

Id. The term "gross earnings" is defined as "recurring payments by employer to the employee for employment, before any authorized or lawfully required deduction or withholding of funds by the employer, excluding irregular bonuses, retroactive pay, overtime, penalty pay, reimbursement of expenses, expense allowances, and the employer's contribution for welfare benefits." Id. § 85.61. Weekly earnings for employees paid on an hourly basis

> shall be computed by dividing by thirteen the earnings, including shift differential pay but not including overtime or premium pay, of the employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury. If the employee was absent from employment for reasons personal to the employee during part of the thirteen calendar weeks preceding the injury, the employee's weekly earnings shall be the amount the employee would have earned had the employee worked when work was available to other employees of the employer in a similar occupation. A week which does not fairly reflect the employee's customary earnings shall be replaced by the closest previous week with earnings that fairly represent the employee's customary earnings.

Id. § 85.36(6). Thus under the statute, overtime is counted hour for hour, and shift differential, vacation, and holiday pay are also included. Irregular pay is not included.

Defendant produced claimant's wage records. (Ex. H) Claimant produced a chart. (Ex. 8) I find the actual wage records most persuasive. For the 13 weeks prior to the work injury, claimant earned regular earnings of $27.88 and $28.42. These regular earnings correspond with the holiday pay he received. He also earned special earnings exceeding the rate of the regular earnings. No testimony was provided concerning the special earnings. The special earnings are regular. Under the statute overtime is counted hour for hour, at the regular hourly rate. For purposes of the rate calculation, I find claimant earned $27.88 and $28.42 per hour.

In each of the 13 weeks prior to the work injury claimant received regular pay, special pay, and premium pay. He was paid for more than 40 hours for each of these weeks. I find the 13 weeks immediately prior to the work injury are representative, with the following regular, special, and holiday hours:

Week	Regular	Special	Holiday	Total	Wage	Earnings
1/15/17	45.1	2.55	0	47.65	$28.42	$1,354.21
1/8/17	48	4	0	52	$28.42	$1,477.84
1/1/17	32	4	8	44	$28.42	$1,250.48
12/25/16	36	6	8	50	$28.42	$1,421.00
12/18/16	40.4	.2	0	40.6	$28.42	$1,153.85
12/11/16	48	4	0	52	$28.42	$1,477.84
12/4/16	42.6	1.3	0	43.9	$28.42	$1,247.64
11/27/16	32	4	8	44	$28.42	$1,250.48
11/20/16	40	4	0	44	$28.42	$1,250.48
11/13/16	56	8	8	72	$28.42	$2,046.24
11/6/16	44	2	0	46	$28.42	$1,307.32
10/30/16	42.3	1.15	0	43.45	$27.88	$1,211.39
10/23/16	42.6	1.3	0	43.9	$27.88	$1,223.93

The sum of the earnings for the 13 weeks or $17,672.70, divided by 13 rounds to $1,359.00. I find claimant's average weekly wage is $1,359.00. Under the rate book in effect at the time of the work injury, based on single status and one exemption, claimant's weekly benefit rate is $766.87. http://www.iowaworkcomp.gov/sites/authoring.iowadivisionofworkcomp.gov/files/2016ratebook.pdf.

Exhibit I documents the benefits paid to claimant in this case. Defendant paid weekly benefits at the rate of $870.14 per week. At hearing defendant alleged it was entitled to a credit for overpaid benefits that were overpaid based on an incorrect weekly rate. Claimant disputed defendant was entitled to a credit for overpaid benefits based on an incorrect rate in this proceeding. The deputy commissioner did not address the issue in the arbitration decision.

On cross-appeal claimant asserts defendant is not entitled to a credit for overpaid temporary or permanent benefits paid against benefits he may be entitled to in this case, but only against benefits for a new injury. Defendant rejects claimant's assertion and asserts it is entitled to a credit for all overpaid benefits paid in this case, both temporary and permanent.

The governing statute in effect at the time of the work injury, Iowa Code section 85.34, provides, in part, as follows:

> 4. *Credits for excess payments.* If an employee is paid weekly compensation benefits for temporary total disability under section 85.33, subsection 1, for a healing period under section 85.34, subsection 1, or for temporary partial disability under section 85.33, subsection 2, in excess of that required by this chapter and chapters 85A, 85B, and 86, the excess shall be credited against the liability of the employer for permanent partial disability under section 85.34, subsection 2, provided that the employer or the employer's representative acted in good faith in determining and notifying an employee when the temporary total disability, healing period, or temporary partial disability benefits are terminated.
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> 5. *Recovery of employee overpayment.* If an employee is paid any weekly benefits in excess of that required by this chapter and chapters 85A, 85B, and 86, the excess paid by the employer shall be credited against the liability of the employer for any future weekly benefits due pursuant to subsection 2, for a subsequent injury to the same employee. . . .The credit shall remain available for eight years after the date the overpayment was established.

The Iowa Legislature modified the credit language in 2017, after claimant's work injury. The Iowa Legislature specified in the legislation the changes to Iowa Code section 85.34 apply to injuries occurring on or after the effective date of the act. 2017 Acts, ch. 23, §§ 6-14, 24. Therefore, credits owed to defendant in this case for an alleged overpayment are governed by the old law, given claimant's injury occurred on January 22, 2017, before the effective date of the Act.

At the time of the work injury in this case, an employer was only entitled to recover an overpayment of permanent weekly benefits against a future claim involving a new injury. However, contrary to claimant's assertion, the courts determined a defendant is entitled to a credit for overpaid temporary or healing period benefits under the statute against a current claim. McBride v. Casey's Mtkg. Co., File No. 5037617, 2015 WL 643997 (Iowa Workers' Comp. Com'n Feb. 9, 2015) (granting defendants a credit on remand against any permanent partial disability benefits for all overpayments made to claimant in the form of healing period benefits, and noting the court found the language in Iowa Code section 85.34(5) and Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129 (Iowa 2010) does not apply to the overpayment of healing period benefits, rather Iowa Code section 85.34(4) applies to the overpayment of temporary disability benefits). Thus, under the statute, as interpreted by the district court, defendant is entitled to a credit for any overpaid healing period or temporary benefits paid to claimant based on an incorrect rate against the permanency award in this case.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on November 2, 2021, is affirmed in part, modified in part, and reversed in part with the above-stated additional and substituted analysis.

Defendant shall pay claimant healing period benefits from February 10, 2017, through April 15, 2017, at the weekly rate of seven hundred sixty-six and 87/100 dollars ($766.87).

Defendant shall pay claimant 111.3 weeks of permanent partial disability benefits, at the weekly rate of seven hundred sixty-six and 87/100 dollars ($766.87), commencing on June 4, 2018.

Defendant shall receive credit for all benefits previously paid consistent with this decision.

Defendant shall pay accrued benefits in a lump sum, with interest on all accrued benefits pursuant to Iowa Code section 85.30.

Pursuant to Iowa Code section 85.39, defendant shall reimburse claimant in the amount of one thousand four hundred fifty and 00/100 dollars ($1,450.00) for the cost of Dr. Dwyer's IME.

Pursuant to rule 876 IAC 4.33, defendant shall pay claimant's costs of the arbitration proceeding in the amount of one thousand thirteen and 95/100 dollars ($1,013.95), 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), defendant shall file subsequent reports of injury as required by this agency.

Signed and filed on this 10th day of May, 2022.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Anthony Olson (via WCES)

Peter Thill (via WCES)