

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MICHAEL CAIN,

Claimant,

vs.

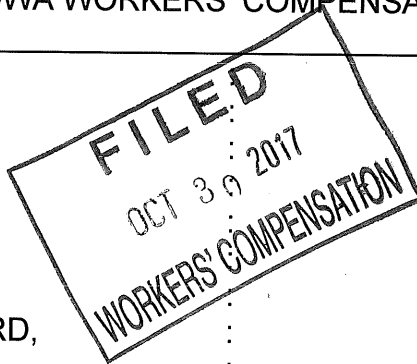
CITY OF NEW HARTFORD,

Employer,

and

IMWCA,

Insurance Carrier,
Defendants.



File No. 5048974

ARBITRATION

DECISION

Head Notes: 1803, 1803.1, 3000, 4000

STATEMENT OF THE CASE

Claimant, Michael Cain, filed a petition in arbitration seeking workers' compensation benefits from City of New Hartford, employer, and IMWCA, insurance carrier, both as defendants, as a result of a stipulated injury sustained on April 25, 2013. This matter came on for hearing before Deputy Workers' Compensation Commissioner Erica J. Fitch, on January 17, 2017, in Des Moines, Iowa. The record in this case consists of Claimant's Exhibits 1 through 9, Defendants' Exhibits A through F, and the testimony of the claimant and Chuck Williams. The parties submitted post-hearing briefs, the matter being fully submitted on February 24, 2017.

ISSUES

The parties submitted the following issues for determination:

1. Whether claimant's permanent disability is limited to the scheduled member right eye or is an industrial disability;
2. The extent of claimant's permanent disability;
3. The proper rate of compensation; and
4. Whether claimant is entitled to penalty benefits under Iowa Code section 86.13 and, if so, how much.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

FINDINGS OF FACT

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

Claimant's testimony was clear and consistent as compared to the evidentiary record and his deposition testimony. Claimant was personable, demonstrated excellent eye contact, and his demeanor at the time of evidentiary hearing gave the undersigned no reason to doubt claimant's veracity. Claimant is found credible.

Claimant was 51 years of age at the time of hearing. He resides in New Hartford, Iowa, a small town northwest of Cedar Falls, Iowa. Claimant is a high school graduate. He subsequently completed firefighter and EMS training in 1987 and has taken annual coursework through Iowa State University to remain current in his state certification. (Claimant's testimony; Exhibit 8, page 149) Claimant's work history consists of welding, automotive parts sales, and volunteer firefighter. (Ex. 8, pp. 150-151) Upon moving to New Hartford in 2012, claimant joined the volunteer fire department. Claimant also began work as a welder at Unverfurth Manufacturing (Unverfurth); his duties involved welding on grain carts. (Claimant's testimony)

On April 25, 2013, claimant was called away from his job at Unverfurth to take a fire call. As he was stretching a line, the metal discharge cap blew from the end of the hose and struck claimant on the right side of his face. Claimant demonstrated the impact site of the cap, which struck him on the right eye, with a portion of the cap striking above and below the eye. Claimant testified a fellow firefighter told him the impact sounded like a windshield being struck with a sledgehammer. (Claimant's testimony)

Claimant was treated at the scene by New Hartford EMS and then taken by ambulance to the emergency department of Sartori Memorial Hospital in Cedar Falls, Iowa. (Claimant's testimony) Gary Jennett, M.D., examined claimant for a noted right face injury. Claimant complained of pain over his right eye and cheek bone, as well as blurry vision of his right eye. Dr. Jennett noted the globe of claimant's right eye was intact, but he observed deformity and depression of the right cheek bone. (Ex. 3, p. 8) On examination, Dr. Jennett noted claimant's right cheek felt depressed and observed lacerations of the right cheek, upper eyelid, and lower eyelid. (Ex. 3, p. 9)

Dr. Jennett ordered and claimant underwent facial and cervical spine CTs. The radiologist opined the facial CT revealed comminuted fractures through the inferior and lateral right orbital wall, comminuted fractures through the anterior and lateral walls of

the maxillary sinus, and fracture of the right zygomatic arch. The radiologist found no evidence of acute fracture on the cervical CT. (Ex. 3, pp. 11-12; Ex. 4, p. 15)

Dr. Jennett assessed: fracture of the orbital floor; closed fracture of malar and/or maxillary bones; fracture of orbit; closed fracture of the zygomatic arch; reduced visual acuity; and anisocoria. (Ex. 3, pp. 9-10, 14) The decision was made to transfer claimant to the University of Iowa Hospitals & Clinics (UIHC) for further treatment. Claimant was transported to UIHC by helicopter. (Ex. 3, p. 13; Ex. 5, pp. 17-18)

Upon arrival in the UIHC Emergency Department, claimant was examined by Gregory Bell, M.D. Dr. Bell assessed multiple facial fractures, facial lacerations, and possible lacrimal duct disruption. He recommended consultation with the facial surgery and ophthalmology services. (Ex. 5, p. 23) Paul Tschetter, M.D. ordered an orthopantomogram, which the reading physician opined revealed no mandibular fractures. (Ex. 5, p. 25)

Claimant was examined by Rachel Sobel, M.D., of the ophthalmology department. Dr. Sobel assessed right ZMC fracture, eyelid lacerations, iridodialysis with a small hyphema, and commotio retinae. (Ex. 5, pp. 37-39) Dr. Sobel scheduled claimant for surgical repair of the eyelid lacerations for the following day. (Ex. 5, pp. 30-32, 37-39) Claimant was admitted to the ophthalmology service due to concern the lacerations involved the lacrimal duct. (Ex. 5, pp. 23, 30-32, 37-39)

Claimant was also examined by Sean Welander, DDS, of the UIHC Oral and Maxillofacial Surgery Department. Examination revealed edema and ecchymosis of the periorbital region, and facial lacerations, including of the upper and lower eyelids. Dr. Welander reviewed the panorex films and found no evidence of fractures. He opined claimant's maxillofacial CT revealed fracture of the zygomaticomaxillary complex (ZMC), fractures of the inferior and lateral wall orbit, and fracture of the zygomatic arch. (Ex. 5, p. 20) Dr. Welander assessed facial fractures, including the right ZMC, inferior and lateral orbit wall, and zygomatic arch, as well as facial lacerations. Dr. Welander indicated he anticipated operative treatment of the fractures, but surgery need not be performed that night. Instead, he recommended coordinating repair of the facial fracture with the ophthalmology department. (Ex. 5, p. 21)

On April 26, 2013, claimant was prepped for surgery with Dr. Sobel, but the decision was made to postpone surgery to allow for coordination with surgery on the facial fractures. (Ex. 5, pp. 35-36) Dr. Sobel discharged claimant to home, with activity restrictions, antibiotic and pain medications, and eye ointment and drops. (Ex. 5, p. 37)

On April 30, 2013, claimant returned to the UIHC dentistry and oral surgery service for reevaluation of facial fractures. Ryan Lee, DDS noted claimant and his family did not report noticeable change in claimant's facial aesthetics. Dr. Lee discussed claimant's case with Dr. Sobel, who opined floor exploration was not necessary at this time, but surgery should proceed with respect to repair of the canalicular system. Dr. Lee opined there was no indication surgical repair of the facial

fractures was necessary and claimant expressed a preference to avoid surgery. (Ex. 5, pp. 44-46)

On May 1, 2013, claimant underwent surgery with Richard Allen, M.D. and Dr. Sobel. Dr. Allen described the procedure as an orbital floor fracture repair. He issued postoperative diagnoses of canalicular laceration and full-thickness laceration of the eyelid. (Ex. 5, pp. 52-54) Following orbital fracture repair and canalicular repair, claimant was admitted to the hospital for observation. He was discharged later that date, but was removed from work, and activity restrictions were imposed. Claimant received prescriptions for Keflex, Lortab, a suture ointment, and steroid dose pack. (Ex. 5, pp. 47-48, 51)

Claimant continued to follow up periodically with the providers at UIHC. (Ex. 5, pp. 71-76) At follow up with Dr. Allen on May 21, 2013, Dr. Allen noted exposed sutures. Out of concern the sutures were causing irritation, he referred claimant to the retina service for evaluation. (Ex. 5, pp. 78-81) Claimant was then examined by Culver Boldt, M.D. of the vitreoretinal service. Dr. Boldt assessed retinal dialysis and performed laser/cryo demarcation. (Ex. 5, pp. 77, 81-84)

On May 31, 2013, claimant returned to UIHC. He was examined by Mark Greiner, M.D. of the cornea service. Dr. Greiner opined claimant did not require iridodialysis repair at that time, but was at risk for glaucoma. Accordingly, he recommended evaluation by the glaucoma service. (Ex. 5, pp. 88-91)

While claimant remained off work, defendants issued claimant weekly temporary disability benefits. Such benefits were paid from April 26, 2013 through June 30, 2013, at a weekly rate of \$684.38. (Ex. F, p. 50)

On July 26, 2013, claimant presented to the UIHC glaucoma service. John Fingert, M.D., examined claimant and recommended observation regarding the potential development of glaucoma. (Ex. 5, pp. 100-103)

On August 6, 2013, claimant underwent additional laser demarcation by Dr. Boldt. (Ex. 5, pp. 105-107)

On September 9, 2013, claimant presented to the UIHC Vision Rehabilitation Clinic and was examined by Khadija Shahid, O.D. Dr. Shahid performed a refraction vision test and found claimant's visual acuity in his right eye to be 20/50. (Ex. 5, p. 110) She issued a slight prescription for single vision reading or progressive additive lenses. (Ex. 5, pp. 111-112)

Claimant returned to UIHC on December 13, 2013. Claimant was reexamined by Drs. Boldt and Fingert. Dr. Fingert opined claimant did not demonstrate definite glaucoma, but was now at increased risk for its development. (Ex. 5, pp. 113-119) Claimant returned to Dr. Fingert six months later, on June 13, 2014. Dr. Fingert again

found no definite glaucoma and recommended continued observation. (Ex. 5, pp. 126-129)

At the arranging of defendants, on February 18, 2015, claimant presented for independent medical examination (IME) with Mark Wilkinson, O.D. Dr. Wilkinson is a board certified optometrist, who serves as director of the vision rehabilitation service in the UIHC Ophthalmology Department. (Ex. A, p. 5) Dr. Wilkinson issued a report containing his findings and opinions on February 20, 2015. Dr. Wilkinson examined claimant and performed vision testing. He opined claimant's best-corrected visual acuity in the right eye was 20/20. On visual field testing, Dr. Wilkinson opined claimant demonstrated a mild reduction of the superior and nasal visual field of the right eye. (Ex. 6, p. 131) Dr. Wilkinson opined by Chapter 12 of the AMA Guides to the Evaluation of Permanent Impairment, 6th Edition, claimant had sustained ratable permanent impairment. Dr. Wilkinson opined claimant sustained zero permanent impairment for visual acuity and 4 percent impairment of the visual field, for a total impairment of 4 percent of the right eye. (Ex. 6, pp. 131-132)

On February 27, 2015, defendants' counsel authored an email to claimant's counsel, providing a copy of Dr. Wilkinson's report and inquiring where to send claimant's indemnity checks. (Ex. E, p. 46)

Chuck Williams, senior claims examiner for defendant-insurance carrier, authored a letter to claimant dated March 5, 2015. Mr. Williams included a copy of Dr. Wilkinson's report and explained Dr. Wilkinson's impairment rating of 4 percent of the right eye entitled claimant to 5.6 weeks of permanent partial disability benefits. Mr. Williams included a check representing payment for these permanent partial disability benefits at the weekly rate of \$684.38, for a total of \$3,832.53, plus interest. (Ex. 1, p. 1; Ex. F, p. 50)

On April 22, 2015, defendants' counsel authored an email to claimant's counsel, noting defendants had recalculated claimant's rate of compensation. Counsel computed the underpayment of rate as \$3,434.61 in temporary disability benefits and \$2,040.53 in permanent partial disability benefits. Counsel also computed interest owed on these underpaid benefits in the amount of \$1,012.13. The total amount owed to claimant was identified as \$6,487.27. (Ex. 2, p. 3; Ex. E, p. 47) The following day, April 23, 2015, defendants issued claimant separate checks for the underpaid permanent disability benefits, temporary disability benefits, and interest. (Ex. 2, pp. 4-7; Ex. F, p. 50)

Chuck Williams, claims examiner with defendant-insurance carrier, testified at evidentiary hearing. Mr. Williams testified claimant's rate was adjusted following receipt of rulings in other cases which determined defendant-insurance carrier had incorrectly computed the rate of compensation for volunteer firefighters. Mr. Williams testified those cases determined volunteer firefighters are to be paid at 140 percent of the statewide gross average weekly wage, without any adjustment by the rate tables.

Following receipt of the rulings in question, defendant-insurance carrier adjusted claimant's rate of compensation. (Mr. Williams' testimony)

Mr. Williams' testimony was clear and his demeanor gave the undersigned no reason to doubt his veracity. Mr. Williams is found credible.

At the arranging of claimant's counsel, on October 23, 2015, claimant presented to board certified occupational medicine physician, Sunil Bansal, M.D. for IME. Dr. Bansal issued a report containing his findings and opinions dated November 9, 2015. Dr. Bansal interviewed claimant, at which time claimant reported he had been struck on the right side of his face by a discharge cap. He indicated the trauma resulted in injuries to his eye socket, the right side of his jaw, a torn retina, and severed nerves on the right side of his face. (Ex. 7, p. 137)

Claimant reported he lacked a "flap" to prevent liquid from moving from his nose to his eye. He complained of blind spots in the periphery of his eye, floaters, drainage, and matter of the right eye. Claimant also complained of diminished vision, causing the need to wear glasses. Additionally, claimant noted his right jaw pops when chewing, he has difficulty with night driving due to glare, and he experiences headaches twice per week, particularly with welding. Dr. Bansal also noted a barely noticeable lift in the right under eye area, caused by surgery. (Ex. 7, p. 137) Claimant denied any pre-injury problems with his face, eye or jaw; he also denied prior use of eyeglasses. (Ex. 7, p. 138)

Dr. Bansal performed a records review and noted claimant had undergone surgical repair of his tear duct and laceration, as well as two laser procedures. Dr. Bansal noted the facial fractures had been left to heal on their own, but claimant continued to receive evaluations for glaucoma and cataracts every six months. (Ex. 7, pp. 135-137) Dr. Bansal also reviewed claimant's vision testing. On physical examination, Dr. Bansal noted a 4-centimeter scar from claimant's right eyebrow down to his cheekbone and tenderness to palpation over the right temporomandibular joint, with crepitus. (Ex. 7, p. 139)

Following records review, interview and examination, Dr. Bansal issued diagnoses with respect to the April 25, 2013 work injury. He assessed: right zygomatic arch and facial lacerations, with resultant scar; right zygomaticomaxillary complex fracture; right inferior and lateral wall orbit fractures with medial canthal region and canaliculus involvement; and angle recession of the right eye, with iridodialysis of the right eye. (Ex. 7, p. 140) Dr. Bansal opined claimant sustained permanent impairment as a result of the facial fractures and scarring, as well as to his vision. Utilizing the AMA Guides, 5th Edition, Table 11-5, Dr. Bansal opined claimant sustained a class 1 impairment for multiple facial fractures and scarring, warranting a permanent impairment rating of 5 percent whole person. With respect to claimant's vision, by the AMA Guides, 5th Edition, Chapter 12, Dr. Bansal found claimant sustained a 6 percent eye impairment based on claimant's functional acuity score. (Ex. 7, p. 141) Dr. Bansal recommended restrictions with respect to claimant's eye, specifically, avoidance of

nighttime driving secondary to glare and decreased contrast sensitivity. He expressed agreement with Dr. Boldt's recommendations for further care of claimant's right eye, namely the potential use of eyeglasses, lifetime monitoring of glaucoma, and the potential for punctual plugs. (Ex. 7, p. 142)

In October 2015, Unverfurth laid claimant off due to lack of work. Claimant testified his lay off was not related to his work injury. At the time of his lay off, claimant made \$21.87 per hour. He testified he began to look for work with a comparable rate of pay, but which did not include welding because the glare caused eye irritation. Claimant explained that his right pupil does not properly constrict and allows too much light to enter the eye. As a result, he feels as if he has a flash burn of his eye when welding, leaving him with the sensation of sand in his eye and causing a headache. Claimant testified he did not experience headaches prior to the work injury, but following the injury, would suffer with headaches two to three times per week with welding. Despite this complaint, claimant testified that had he not been laid off, he would have continued working at Unverfurth as a welder. (Claimant's testimony)

Claimant collected unemployment benefits for a time, but in May 2016, began work as a cement truck driver for Benton Ready Mix. His starting wage was \$18.60 per hour, but he ultimately earned \$20.85 per hour. Claimant worked 40-plus hours per week until he was laid off in December 2016. (Claimant's testimony)

On December 2, 2016, defendants' counsel authored correspondence to Dr. Wilkinson, requesting confirmation of opinions purportedly expressed in a prior discussion. That same date, Dr. Wilkinson issued responses to the questions of counsel, with responses coming by way of a combination of check-the-box answers and handwritten insertions and statements. By the responses, Dr. Wilkinson agreed that any permanent impairment would be limited to claimant's right eye, as the left eye was unaffected by the work injury. He further indicated any permanent vision field loss would be limited to the right eye. Dr. Wilkinson opined claimant sustained a permanent impairment of 4 percent of the right eye. (Ex. A, pp. 1-2) He critiqued Dr. Bansal's rating as based upon a 21-month old prescription and opined Dr. Bansal miscalculated claimant's acuity score. Dr. Wilkinson opined claimant did not require permanent restrictions and required only periodic glaucoma evaluations. (Ex. A, pp. 2-3)

Dr. Wilkinson opined claimant's need for eyeglasses was unrelated to the work injury. He explained claimant presented with astigmatism and age-related presbyopia, neither of which were caused by the work injury. (Ex. A, p. 3) Dr. Wilkinson also opined claimant's headache history was non-specific and did not establish a cause and effect relationship between the symptom and the work injury. (Ex. A, p. 2)

On December 2, 2016, claimant returned to Dr. Bansal for another IME in connection with a claim for benefits from the Second Injury Fund of Iowa. During this IME, Dr. Bansal also updated his evaluation of claimant's eye and facial injuries. Claimant complained of constant headaches while welding due to the right eye injury, resulting in claimant's changing jobs. Claimant also indicated he felt as if his vision was

worsening, especially with driving at night or in bright sunlight. Claimant denied eye pain, but reported feeling as if his eye was dry and irritated, with a sensation of cotton on the eye. He also reported seeing floaters in his eye. In addition to eye-specific symptoms, claimant reported suffering with headaches which he believed relate to his cheek fracture. Claimant explained he rarely experienced headaches prior to the work injury, but now suffers with headaches twice per week with a severity level of 5 on a 10-point scale. (Ex. 7, pp. 145-146)

Dr. Bansal reviewed additional medical records and performed a physical examination. Dr. Bansal reviewed claimant's vision testing. On examination, Dr. Bansal noted continued tenderness to palpation over the right temporomandibular joint, with crepitus, as well as scarring from the eyebrow to cheekbone. (Ex. 7, pp. 143-146)

Following interview, records review and examination, Dr. Bansal authored an updated discussion of claimant's eye condition, dated December 16, 2016. He opined claimant's examination remained unchanged and noted claimant wore corrective lenses. Dr. Bansal indicated he reviewed Dr. Wilkinson's addendum and disagreed with Dr. Wilkinson's challenge to Dr. Bansal's computation of claimant's visual acuity. Dr. Bansal then explained the basis of his higher rating, utilizing Table 12-2 of the AMA Guides, Fifth Edition. Dr. Bansal ultimately indicated his original IME opinions remained unchanged with respect to permanent impairment and need for permanent restrictions. (Ex. 7, p. 148)

Claimant testified he still suffers with symptoms in his jaw, cheek, and eye, as well as headaches, sinus problems, and nerve damage in the right side of his face, all of which he attributes to the work injury. Claimant testified his jaw and cheek pop and crack with chewing, he suffers with headaches, and experiences difficulty with fluid backing up from his nose into his eye due to the severed tear duct. He also experiences difficulties driving in bright sunlight, as the lack of pupil contracture causes glare. Claimant similarly has difficulty with nighttime driving, as headlights and streetlights cause glare. (Claimant's testimony)

Claimant also attributes a loss of vision to the work injury. He explained that he did not wear eyeglasses prior to the work injury, but now requires them. He noted the eyeglasses were paid for by defendants. Additionally, claimant testified one of the physicians provided him with a pair of eyeglasses with a rose-colored tint over the right eye and along the temples, but no color over the left eye. He was told the eyeglasses were to provide "tint" for the right eye. (Claimant's testimony)

Claimant continues to follow up periodically with the authorized physicians at UIHC. He saw Dr. Fingert on January 9, 2017, approximately one week prior to evidentiary hearing. He was also scheduled to return to Dr. Wilkinson on January 28, 2017, approximately 10 days following hearing. Claimant testified this appointment with Dr. Wilkinson is designed to try to incorporate his prescription vision lenses with the rose-colored tint into a single pair of glasses, in hopes of avoiding his need to use two pairs. (Claimant's testimony)

As of the date of hearing, claimant had not returned to work since his lay off by Benton Ready Mix. He testified he continues to look for work with a comparable rate of pay. Claimant has not sought welding work. He has, however, taken a promotion with respect to his volunteer firefighter duties. As of January 2017, claimant began to serve as assistant chief; accordingly, his duties have now changed. (Claimant's testimony)

CONCLUSIONS OF LAW

The first issue for determination is whether claimant's permanent disability is limited to the scheduled member right eye or is an industrial disability.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

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

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

Claimant suffered a stipulated work-related injury on April 25, 2013. The underlying facts regarding claimant's diagnoses and treatment are not disputed. There is also no dispute regarding whether claimant sustained permanent disability as a result of the work injury. However, a dispute arises with respect to the situs of claimant's permanent disability, with claimant asserting the permanency extends into the body as a whole and defendants asserting the permanency is limited to the right eye. Therefore, the undersigned must determine if claimant has proven by a preponderance of the evidence that claimant's permanent disability extends beyond the right eye.

As a result of the work injury, claimant suffered with right facial fractures, including the right ZMC, inferior and lateral orbit wall, and zygomatic arch, as well as facial lacerations. Claimant underwent surgical orbital floor fracture repair and canalicular repair. He subsequently underwent two laser procedures on his right eye.

It is undisputed that claimant fractured bones in his face, including of the eye socket and cheekbone/upper jaw. Dr. Allen surgically treated claimant's eye and orbital floor; no further surgery was required with respect to the facial fractures. Although no surgery was required to fix the facial fractures, surgical intervention is not a prerequisite for permanent disability. In this case, claimant credibly testified to ongoing popping and cracking of his jaw with chewing. Dr. Bansal also noted a slight lift in the right under eye area and scarring due to the work injury and resultant surgery, as well as tenderness to palpation over the right temporomandibular joint, with crepitus. Dr. Bansal, accordingly, opined claimant sustained permanent impairment of 5 percent whole person due to facial fractures and scarring. Dr. Bansal's rating with respect to the extent, if any, of permanent impairment as a result of the facial fractures is unrebutted.

Dr. Wilkinson offered an opinion with respect to the extent of permanent impairment to claimant's right eye. He also opined claimant's permanent disability would be limited to the right eye, but did so with the notation that claimant's left eye was unaffected by the work injury. This statement infers that Dr. Wilkinson considered only the impact of the work injury upon claimant's eyes, as opposed to considering whether claimant sustained any additional disability to another part of his body as a result of the work injury. Such a limitation to the eyes would be entirely logical, given Dr. Wilkinson is an optometrist, and therefore, not likely well-suited to address any permanent impairment beyond the eyes. Furthermore, neither Dr. Wilkinson nor any other provider has specifically opined claimant did not sustain permanent impairment as a result of the facial fractures. Additionally, it is worthy of note that Dr. Wilkinson's addendum opinion is somewhat lacking in clarity, given it is largely authored by defendants' counsel, but contains handwritten edits and explanations authored by Dr. Wilkinson.

On these facts, I find Dr. Bansal's opinion to be entitled to the greatest weight. Only Dr. Bansal specifically addressed if claimant sustained permanent disability as a result of the facial fractures. He opined claimant had sustained permanent impairment and provided a clear basis for the permanent impairment rating he identified. Dr. Wilkinson's opinion does not rebut Dr. Bansal's opinion with respect to the facial fractures, as the specific question is not directly addressed. Furthermore, Dr. Bansal's expertise and training as an occupational medicine physician places him in a superior position to optometrist, Dr. Wilkinson, with respect to the permanent impairment resulting from facial fractures.

As I find Dr. Bansal's opinion entitled to greater weight, I find claimant has carried his burden and proven by a preponderance of the evidence that his permanent disability extends beyond the right eye and into the body as a whole by virtue of the facial fractures and lacerations.

The next issue for determination is the extent of claimant's permanent disability.

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). As set forth *supra*, claimant has sustained permanent disability extending into the body as a whole. The extent of claimant's disability shall, therefore, be evaluated industrially.

Claimant was 51 years of age on the date of evidentiary hearing. His formal education consists of graduation from high school and completion of annual firefighting coursework since 1987. Claimant's traditional employment history consists of welding and automotive parts sales; he has also volunteered for over 30 years in various communities as a firefighter and/or EMS provider.

As a result of the stipulated work injury, claimant sustained multiple facial fractures, damage to his eye and tear duct, and facial lacerations which resulted in scarring. Dr. Bansal opined claimant sustained permanent impairment of 5 percent whole person due to facial fractures and scarring; this opinion is un rebutted. Dr. Bansal also opined claimant sustained permanent impairment of 6 percent of the right eye due to vision impairment. Dr. Wilkinson opined claimant's vision-related impairment was only 4 percent of the right eye. Dr. Wilkinson, as an optometrist who tested claimant's vision, is better suited to opine as to the extent of permanent impairment attributable to vision decrements. However, I also note that Dr. Wilkinson utilized the AMA Guides, 6th Edition, in crafting his opinions, while this agency has adopted a preference for the AMA Guides, 5th Edition, which was used by Dr. Bansal. Nevertheless, the opinions of each provider as to the extent of claimant's visual impairment are comparable and adoption of one rating over the other would not result in significant change in an industrial disability assessment.

As a result of the work injury, Dr. Bansal recommended a permanent restriction of avoidance of nighttime driving. No other physician or provider has imposed any permanent restrictions. Dr. Bansal's recommended restriction is prudent for safety's sake and is supported by claimant's own testimony; however, there is no indication this restriction has impacted claimant's employability. Following the work injury, claimant returned to work as a welder for Unverfurth for over two years. While claimant credibly complained of symptoms related to light sensitivity in his welding duties, no provider has recommended any restrictions with respect to welding or light exposure. Claimant also testified that had he not been laid off, he intended to continue working at Unverfurth as a welder. After losing his position at Unverfurth, claimant successfully obtained work as a ready mix driver and maintained this position for approximately six months prior to layoff. There is no evidence claimant's work injury impacted claimant's duties as a ready mix driver.

Claimant is a motivated individual who has volunteered significant time to serve as a firefighter, on top of his duties in the competitive labor market. He has continued to serve as a firefighter and recently received a promotion to assistant fire chief. Following

the injury, he returned to work in his regular full duty position as a welder and following layoff, successfully obtained employment as a ready mix driver. While he was unemployed at the time of evidentiary hearing, he had only recently been laid off and there is little indication claimant would be unable to obtain subsequent employment.

Upon consideration of the above and all other relevant factors of industrial disability, it is determined claimant sustained a 10 percent industrial disability as a result of the stipulated work-related injury of April 25, 2013. Such an award entitles claimant to 50 weeks of permanent partial disability benefits (10 percent x 500 weeks = 50 weeks), commencing on the stipulated date of July 1, 2013.

The next issue for determination is the proper rate of compensation. The question for determination is the proper rate of compensation for a volunteer firefighter.

Iowa Code section 85.36(9)(a) states:

9. If an employee earns either no wages or less than the usual weekly earnings of the regular full-time adult laborer in the line of industry in which the employee is injured in that locality, the weekly earnings shall be one-fiftieth of the total earnings which the employee has earned from all employment during the twelve calendar months immediately preceding the injury.

a. In computing the compensation to be allowed a volunteer fire fighter, emergency medical care provider, reserve peace officer, or volunteer ambulance driver, the earnings as a fire fighter, emergency medical care provider, reserve peace officer, or volunteer ambulance driver shall be disregarded and the volunteer fire fighter, emergency medical care provider, reserve peace officer, or volunteer ambulance driver, shall be paid an amount equal to the compensation the volunteer fire fighter, emergency medical care provider, reserve peace officer, or volunteer ambulance driver would be paid if injured in the normal course of the volunteer fire fighter's, emergency medical care provider's, reserve peace officer's, or volunteer ambulance driver's regular employment or an amount equal to one hundred and forty percent of the statewide average weekly wage, whichever is greater.

Section 85.36(9)(a) reflects a public policy decision by the legislature to provide additional economic security to those who volunteer to serve the public in certain roles. Any application of the law that would thwart that policy, therefore, is rejected. Lafler v. City of Central City, File No. 1162201 (Appeal Dec. Jan. 28, 2003). By the plain language of the statute, claimant is to be compensated at the higher of his compensation in his regular employment or 140 percent of the statewide average weekly wage at the time of the work injury. There is no indication this figure is to be modified or adjusted based upon marital status and/or exemptions. Section 85.36(9)(a). See also Whitmore v. City of Iowa Falls, File No. 5046875 (Ruling on Motion for Summary Judgment March 25, 2015).

There is no dispute that 140 percent of the statewide average weekly wage at the time of the stipulated work injury was \$1,048.64 and also no dispute that this amount is higher than claimant's earnings in his regular employment at the time of the work injury. Accordingly, claimant's proper rate of compensation is \$1,048.64.

The final issue for determination is whether claimant is entitled to penalty benefits under Iowa Code section 86.13 and, if so, how much.

If weekly compensation benefits are not fully paid when due, 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.

Penalty is not imposed for delayed interest payments. Schadendorf v. Snap-on Tools Corp., 757 N.W.2d 330, 338 (Iowa 2008). Davidson v. Bruce, 593 N.W.2d 833, 840 (Iowa 1999).

Claimant requests penalty benefits be awarded on the amount of indemnity benefits underpaid as a result of defendants' miscalculation of claimant's rate of compensation. Review of the evidentiary record reveals the rate miscalculation resulted in underpayment to claimant in the amounts of \$3,434.61 in temporary disability benefits and \$2,040.53 in permanent partial disability benefits. Defendants, therefore, delayed

in paying claimant \$5,475.14 in indemnity benefits owed. A penalty of up to 50 percent of this amount may be assessed, for a total penalty up to \$2,737.57.

Defendants bear responsibility for properly computing claimant's rate of compensation. In this case, defendants did not properly compute claimant's rate and ignored the plain language of the statute. However, upon notification that their method of computation was incorrect in another case, defendants promptly adjusted claimant's rate of compensation and issued payment to claimant for underpaid indemnity benefits, plus interest. This attempt to right a prior wrong should be rewarded.

Accordingly, I find a penalty of 25 percent of the underpaid benefits is appropriate. Claimant is awarded penalty benefits in the amount of \$1,368.78.

ORDER

THEREFORE, IT IS ORDERED:

The parties are ordered to comply with all stipulations that have been accepted by this agency.

Defendants shall pay unto claimant fifty (50) weeks of permanent partial disability benefits commencing July 1, 2013 at the weekly rate of one thousand forty-eight and 64/100 dollars (\$1,048.64).

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendants shall receive credit for benefits paid.

Defendants shall pay penalty benefits in the amount of one thousand three hundred sixty-eight and 78/100 dollars (\$1,368.78).

Defendants shall pay interest on the penalty benefits from the date of this decision. See Schadendorf v. Snap On Tools Corp., 757 N.W.2d 330, 339 (Iowa 2008).

Defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Costs are taxed to defendants pursuant to 876 IAC 4.33.

Signed and filed this 30th day of October, 2017.



ERICA J. FITCH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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EJF/sam

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.