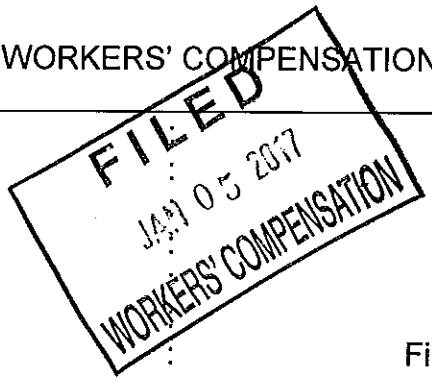
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



RENE SAMANIEGO, Claimant, vs. JTV MANUFACTURING, INC., Employer, and ACUITY, Insurance Carrier, Defendants.	File No. 5049712 A R B I T R A T I O N D E C I S I O N Head Note Nos.: 1108, 1803.1, 4000

STATEMENT OF THE CASE

Rene Samaniego filed a petition for arbitration seeking workers' compensation benefits from JTV Manufacturing, Inc. and Acuity.

The matter came on for hearing on February 26, 2016, before Deputy Workers' Compensation Commissioner Joseph L. Walsh in Des Moines, Iowa. The record in the case consists of claimant's exhibits 1 through 7; defense exhibits A through I; as well the sworn testimony of claimant, Rene Samaniego. Brittney Sposetto was appointed the official reporter and custodian of the notes of the proceeding. The parties briefed this case and the matter was fully submitted on April 15, 2016.

ISSUES & STIPULATIONS

Through the hearing report, the parties stipulated that there was an employer-employee relationship between the parties. The defendants further stipulated that the claimant sustained an injury on September 24, 2013. The defendants, however, dispute that the injury resulted in any permanent disability. Claimant makes no claim for temporary disability benefits notwithstanding the fact that it was disputed in the hearing report. The claimant alleges the permanent disability is industrial. Defendants deny any permanency, but contend if there is permanency, it is limited to the right eye. The parties have stipulated that if any permanency benefits are awarded, the commencement date is September 25, 2013. The elements comprising the rate of compensation are stipulated as outlined in the hearing order. Affirmative defenses have

been waived. Claimant seeks payment for an independent medical evaluation under section 85.39. In addition, claimant seeks penalties. Just prior to hearing, the defendants agreed to pay some unpaid medical expenses and mileage.

FINDINGS OF FACT

Rene Samaniego is a 54-year-old welder by trade. He sustained a flash burn to both eyes on September 24, 2013. This is a stipulated fact. This is a fairly common injury for welders. Claimant initially believed the burn would heal on its own. (Transcript, page 24) After a week the eye discomfort remained and claimant asked the employer for treatment. Claimant initially saw his personal eye doctor, John Michels, O.D. The diagnosis was flash burn with metal and rust lodged in the cornea. (Tr., p. 24; Defendants' Exhibit H, page 24) The treatment period was fraught with complications. A corneal fungal infection caused a cascade of negative consequences.

Claimant was eventually referred to Justin Schweitzer, O.D., who diagnosed claimant with a serious corneal infection. (Claimant's Ex. 1, p. 3; Def. Ex. E, pp. 31-35) Treatment for the infection included anti-fungal and antibiotic medication. (Tr., p. 52) After treatment, claimant was left with significant corneal scarring in the right eye. (Cl. Ex. 1, p. 5; *see also* Def. Ex. E, pp. 34-35) A full-duty release with no restrictions was issued on December 19, 2013. (Def. Ex. E, pp. 33-34) Mr. Samaniego was still having some difficulty welding, so his employer transferred him to a different department. (Tr., p. 23) Claimant would have preferred to stay in welding. Claimant returned to work at a new assignment unilaterally assigned by the employer. Claimant eventually quit, out of frustration with his new duties in January 2014. He clearly felt he had been treated unfairly. (Def. Ex. F, p. 49)

The injury resulted in permanent vision problems in the right eye with a 20/60 visual acuity with use of eyeglasses. His left eye was 20/25. The vision is theoretically correctable to 20/20 visual acuity with gas permeable contact lenses. (Cl. Ex. 1, p. 3) Claimant started using the contact lenses just prior to hearing and as such has insufficient experience to know if they work on the long term. A corneal transplant may also correct the problem. No doctor considered corneal transplant a viable option at the time of hearing. Just prior to hearing, he was fitted for the special lens. (Tr., p. 36)

As of the date of hearing, Mr. Samaniego continues to have significant symptoms that he relates to the work injury. Specifically, he has blurring, distortion, glare and halos at night in his right eye. (Tr., pp. 26-28; Cl. Ex. 3, p. 1) He continues to use Systane Gel Drops to keep his eyes moist. (Tr., p. 26) He had difficulty reading, in particular fine print. He is hypersensitive to light and sensitive to dust. He has particular difficulty with night driving because of the glare and "starbursts." (Tr., p. 32)

Dr. Schweitzer, the treating physician, opined that claimant sustained no permanent partial impairment as a result of the work injury. Dr. Schweitzer believed no impairment resulted because the vision was correctable to 20/20 visual acuity with contact lenses. (Def. Ex. E, p. 41)

Claimant sought an independent medical examination from David S. Dwyer, M.D., concerning impairment caused by the work injury. Dr. Dwyer is an ophthalmologist. He charged a modest $750.00 for the IME. Mileage for claimant's travel to the IME totaled $218.40. The treating doctor both rated impairment at zero percent and gave a full-duty release to return to work prior to claimant's request for an IME.

Dr. Dwyer opined that the injury caused a 50 percent loss of vision in the right eye. Dr. Dwyer went on to opine that claimant sustained 12 percent impairment to the whole person due to impairment of the visual system. Dr. Dwyer recommended against a corneal transplant. (Cl. Ex. 2) Dr. Dwyer was deposed on February 11, 2016. (Def. Ex. I)

I find that claimant sustained 50 percent loss of function of his right eye which is causally connected to the work injury.

The impairment rating of Dr. Schweitzer is not credible, as it correlates to a theoretical corrected vision with the use of permeable lenses. Thus, his impairment rating is in actuality not an impairment rating at all but a result-oriented prediction. Claimant, as of the date of hearing, has a significant loss of vision and a loss of use of his right eye when uncorrected. Even with practical use of eyeglasses he has actual loss of visual acuity. It is the uncorrected vision that is ratable.

The claimant incurred significant mileage expenses for treatment of the eye injury. The mileage costs total $2,036.84. (Cl. Ex. 7 p. 10) Claimant also incurred $849.00 in office visits and prescription eyeglasses. The greater weight of evidence supports a finding that these charges are related to the treatment of the flash burn injury. (Cl. Ex. 7)

CONCLUSIONS OF LAW

The first question is whether the admitted March 15, 2013, work injury is a cause of permanent disability, and if so, the nature and extent of such disability.

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

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is

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

While the expert opinions are conflicted, there is no doubt in this record that the claimant has suffered a loss of function of his right eye. I find the opinion of Dr. Dwyer to be more compelling than the opinion of Dr. Schweitzer. In fact, the reality is, Dr. Schweitzer's medical opinion supports the conclusion that claimant has permanency in his right eye. He diagnosed corneal scarring which permanently damaged claimant's right eye. (Def. Ex. E, p. 35) This is undoubtedly true. He then, however, concluded that "with the use of a contact lens does improve his vision to 20/20." (Def. Ex. E, p. 41) This was objectively incorrect at the time it was written in November 2014. It is unclear whether Dr. Schweitzer believed that claimant had obtained the lens or whether he meant that the lens could correct the vision if it was provided. At that time, however, the record is uncontroverted that claimant had no such lens and his vision was not 20/20.

Dr. Schweitzer cited the AMA Guides, 5th edition generally, but did not provide any specific citation which supported his belief that a permanent corneal scar is not ratable if it is corrected by a special lens. Having thoroughly reviewed the AMA Guides, I can find no such support. Even if it did, however, the AMA Guides, 5th edition, cannot override Iowa law. Iowa law does not measure impairment of the eye; it measures loss of use (in the case of scheduled injuries).

Dr. Schweitzer's conclusion of a zero impairment is predicated upon the fallacy that under Iowa law, a loss of function which may be temporarily corrected with a medical device is not compensable. This is not the case. For example, a worker who has suffered hearing loss is not compensated for his loss of hearing based upon his hearing when he is wearing hearing aids; he is compensated for his loss of hearing un-aided. This is true even though hearing aids are a medical device to which the worker is entitled. Similarly, a worker who loses his hand to a machine is not compensated as though he is wearing a prosthetic; he is compensated for his loss of use of his hand. For these reasons, this agency has long 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); Brink v. Farmland Foods, Inc., I-4 Iowa Indus. Comm'r Dec. 778 (1985).

I find that the claimant has undoubtedly suffered a significant loss of use of his right eye as a result of his work injury.

The bigger question in this case is whether this injury is to the schedule or the

body as a whole. The claimant alleges that his injury is to his visual system rather than the right eye, while the defendants dispute this, contending that, if there is any disability at all, it is limited to the loss of function of an eye.

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

An injury to a scheduled member may, because of after effects or compensatory change, result in permanent impairment of the body as a whole. Such impairment may in turn be the basis for a rating of industrial disability. It is the anatomical situs of the permanent injury or impairment which determines whether the schedules in section 85.34(2)(a) - (t) are applied. Lauhoff Grain v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943). Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

An injury to the eye is compensated under the schedule. Iowa Code section 85.34(p) (2015). The claimant has presented an interesting theory in an effort to have his disability compensated industrially. He has alleged that there is a difference between the loss of function on an eye and a disability to the visual system. Claimant has correctly asserted that this theory has been accepted in other areas. For example, since tinnitus is not compensable under the hearing loss statute, it is deemed to be unscheduled and compensable as an industrial disability. Ehteshamfar v. UTA Engineered Systems, 555 N.W.2d 450, 453 (Iowa 1996). Other specific diagnoses may allow a disability which appears to be to a scheduled member to become an industrial disability. Collins v. Department of Human Services, 529 N.W.2d 627 (Iowa App. 1995) (injury to sympathetic nervous system is an industrial disability).

Claimant's assertion that the disability is to the visual system is too vague, particularly in this case. The claimant's loss of function results from the diagnosis of damage from corneal scarring on his right cornea. Dr. Dwyer stated the following:

> In summary Rene Samaniego suffered a welder's flash burn in both eyes and sustained a metallic foreign body of the right cornea, both rather common work-related injuries. The corneas healed from the flash burns, but unfortunately the right eye developed a rare and very serious fungus infection. With intensive and prolonged topical anti-fungal treatment and

> frequent follow-up the patient was very fortunate to maintain the integrity of his right cornea. He did, however, develop a significant, permanent, centrally located corneal scar.
>
> At this time, I believe that Mr. Samaniego has reached maximum medical improvement. He has a permanent disability, as calculated above, due to decreased visual acuity, distorted vision, photophobia (light sensitivity), and glare in the right eye. The decreased acuity results from the decreased clarity of the cornea from the scar. The distortion is most likely due to abnormal curvatures of the corneal surface (i.e. irregular astigmatism) due to tissue contracture that is part of scar formation. The photophobia and glare result from the central nature of the scar: bright light results in pupil constriction, which causes all the light coming into the eye to travel through the scarred corneal center. I expect Mr. Samaniego's vision is much worse in his right eye under bright light conditions, such as sunny days, or when attempting to use a welder. Furthermore, having poor vision in one eye frequently causes problems with depth perception, a problem this patient has also noticed.

(Cl. Ex. 2, pp. 3-4) This is the best summary of claimant's disability anywhere in the record. It makes clear that the disability is from the scar on his right eye. I do not find a preponderance of evidence that the claimant's loss of function or functional disability extends into an independent "visual system." As such, I find that the claimant's disability is evaluated as the loss of function of his right eye under Iowa Code section 85.34(p).

The AMA Guides, 5th edition, has been adopted as a guide for determining an injured worker's extent of functional disability. 876 IAC section 2.4. In making an assessment of the loss of use of a scheduled member, however, the evaluation is not limited to the use of the AMA Guides. Lay testimony and demonstrated difficulties from claimant must be considered in determining the actual loss of use so long as loss of earning capacity is not considered. Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420, 421 (Iowa 1994); Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936). This agency has a long history of recognizing that the actual loss of use which is to be compensated is the loss of use of the body member in the activities of daily living, including activities of employment. Pain which limits use, loss of grip strength, fatigability, activity restrictions, and other pertinent factors may all be considered when determining scheduled disability. Bergmann v. Mercy Medical Center, File Nos. 5018613 & 5018614, (App. March 14, 2008); Moss v. United Parcel Service, File No. 881576 (App. September 26, 1994); Greenlee v. Cedar Falls Community Schools, File No. 934910 (App. December 27, 1993); Westcott-Riepma v. K-Products, Inc., File No. 1011173 (Arb. July 19, 1994); Bieghler v. Seneca Corp., File No. 979887 (Arb. February 8, 1994); Ruylnad v. Rose's Wood Products, File No. 937842 (Arb. February 13, 1994); Smith v. Winnebago Industries, File No. 824666 (Arb. April 2, 1991).

The only credible impairment rating in this record is from Dr. Dwyer. While Dr. Dwyer used the 4th edition of the Guides, it is still an admissible impairment rating. Moreover, Dr. Dwyer provided a legitimate explanation for his preference. He opined that the rating system in the 4th edition more accurately reflects the claimant's actual losses.

The reality is, in this agency, we often see impairment ratings which seem to bear no relationship to an injured workers' actual loss of function or loss of use. We regularly see minimalistic ratings which are pulled out of some chart which may make a great deal of sense to highly specialized disability physicians, but make little or no sense to a person who feels like they have completely lost the use of a body part. Dr. Dwyer's opinion is a thoughtful, well-reasoned and supported explanation of the claimant's actual loss of use of his right eye. He connects each of claimant's symptoms of disability to a specific medical diagnosis (corneal scarring) and, in detail, explains the loss. Whether it is based upon the AMA Guides 5th edition or some other guide, his opinion engenders my confidence that the claimant's functional disability is based upon his actual loss of function of his eye, rather than some hyper-technical medical table. Frankly, this is the most convincing rating I have seen in years.

I also note again that Dr. Dwyer's rating is the only credible rating in the record. Had the defendants presented a reasonable alternative rating which was actually based upon the AMA Guides, 5th edition, this case may be decided differently.

For these reasons, I find claimant has suffered a 50 percent loss of use of his right eye. This entitles him to 70 weeks of benefits at the stipulated rate commencing on September 25, 2013.

The next issue is whether claimant is entitled to an independent medical evaluation. By a preponderance of evidence, he is.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

The very reasonable IME expense, as well as the transportation expense to the evaluation is owed.

Next, the claimant seeks penalty.

Claimant's penalty benefit claim is based upon the statutory language contained at Iowa Code section 86.13(4), which provides:

> a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.
>
> b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
>
> (1) The employee has demonstrated a denial, delay in payment, or termination in benefits.
>
> (2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.
>
> c. In order to be considered a reasonable or probable cause or excuse under paragraph "b," an excuse shall satisfy all of the following criteria:
>
> (1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.
>
> (2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.
>
> (3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

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).

Under the current statutory framework, the burden is on the claimant to demonstrate when a payment is due and that the payment was not made on time. Once the claimant has proven the delay or denial, the burden shifts to the defendants to provide a reasonable excuse.

In this case, the employer refused to make any voluntary payment of permanent partial disability. Its refusal to pay permanent disability is based on the rating of Dr. Schweitzer. I find that it was wholly unreasonable to deny permanent partial disability benefits on the basis of Dr. Schweitzer's opinion because his opinion was based upon an incorrect and unreasonable interpretation of Iowa law. His opinion was based upon a theory that if corrected with a special lens, the claimant would have (theoretically) no loss of function. The claimant, however, had no such lens and the defendants knew this. Moreover, even if he did, such a rating is not valid under Iowa law. Considering all of the appropriate factors for the amount of the penalty, I find penalty in the amount of $7,500.00 is appropriate.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay the claimant seventy (70) weeks of permanent partial disability benefits at the rate of three hundred seventy-six and 46/100 dollars ($376.46) per week from September 25, 2013.

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

Defendants shall pay claimant an Iowa Code section 86.13 penalty in the amount of seven thousand five hundred and 00/100 dollars ($7,500.00).

Defendants shall pay Iowa Code section 85.39 independent medical examination expenses in the amount of seven hundred fifty and 00/100 dollars ($750.00) and IME transportation in the amount of two hundred eighteen and 40/100 dollars ($218.40).

Costs are taxed to defendants.

Signed and filed this 5th day of January, 2017.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.