

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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DANIEL M. HOEFER,

Claimant,

vs.

CB RICHARD ELLIS, INC.,

Employer,

and

ZURICH AMERICAN INSURANCE  
COMPANY,

Insurance Carrier,  
Defendants.

**FILED**

OCT 27 2016

WORKERS COMPENSATION

File No. 5052635

ARBITRATION DECISION

Head Note Nos.: 1402.40, 1803.1,  
2907, 3002

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STATEMENT OF THE CASE

Claimant Daniel Hoefer ("Hoefer") filed a petition in arbitration on June 4, 2015, alleging he sustained an injury to his left eye while working for the defendant, CB Richard Ellis, Inc. ("CB Richard Ellis"), and stating a claim against the Second Injury Fund of Iowa ("Fund"). CB Richard Ellis and the defendant, Zurich American Insurance Company ("Zurich"), filed an answer on June 15, 2015. The Fund filed an answer on July 7, 2015. Hoefer later amended his petition alleging he sustained dermatitis as a sequela of his left eye injury. Hoefer resolved his claim with the Fund before the hearing.

An arbitration hearing was held on July 13, 2016, at the Division of Workers' Compensation in Des Moines. Attorney Arthur Gilloon represented Hoefer. Hoefer appeared and testified. Attorney Charles Blades represented CB Richard Ellis and Zurich. Exhibits 1 through 13 and A through P were admitted into the record. The record was left open through August 12, 2016, for the receipt of post-hearing briefs. At that time the record was closed.

Before the hearing the parties prepared a hearing report listing stipulations and issues to be decided. CB Richard Ellis and Zurich withdrew all affirmative defenses.

### STIPULATIONS

1. An employer-employee relationship existed at the time of the alleged injury.
2. Hoefer sustained an injury on June 28, 2012, which arose out of and in the course of his employment with CB Richard Ellis.
3. The alleged injury caused a temporary disability during a period of recovery.
4. Temporary benefits are no longer in dispute.
5. If Hoefer sustained a permanent disability, the commencement date for permanent partial disability benefits is August 23, 2012.
6. At the time of the work injury Hoefer was married and entitled to two exemptions.
7. Prior to the hearing Hoefer was paid 14 weeks of permanent partial disability benefits at the rate of \$640.98 per week.

### ISSUES

1. What is the nature of Hoefer's injury?
2. Did Hoefer sustain a permanent disability?
3. If Hoefer sustained a permanent disability, is the disability a scheduled member or industrial disability?
4. What is Hoefer's rate?
5. Is Hoefer entitled to additional temporary benefits because the defendants underpaid temporary benefits?
6. Is Hoefer entitled to reimbursement for an independent medical examination?
7. Should Hoefer be awarded penalty benefits?
8. Should costs be assessed against either party?

### FINDINGS OF FACT

Hoefer is married with three adult children. (Transcript, page 72; Exhibits 5, p. 59; M, page 3) Hoefer graduated from Wahlert High School in Dubuque in 1971 and at the time of the hearing he was 63. (Tr., pp. 17-18; Exs. 5, p. 60; M, p. 3)

After graduating from high school Hoefer accepted a machine operator position with John Deere Dubuque Works. (Tr., p. 18; Exs. 5, p. 60; M, pp. 4-5) Following a layoff in 1982, Hoefer accepted a maintenance/janitorial position at Wahlert High School. (Tr., p. 18; Exs. 5, p. 61; M, p. 5) In 1989 Hoefer left Wahlert High School and accepted a maintenance position with William C. Brown, a publishing company. (Tr., p. 18; Exs. 5, p. 61; M, p. 5) William C. Brown was later acquired by Times Mirror Company, which is now known as McGraw-Hill Higher Education. (Tr., p. 19; Exs. 5, p. 61; M, p. 5) In 2003, CB Richard Ellis took over control of the building where Hoefer worked, with McGraw-Hill as the primary tenant. (Tr., p. 19; Exs. 5, p. 61; M, p. 5) Hoefer has worked as a maintenance worker in the same building since 1989. (Ex. 11, p. 179)

Edward Scott, M.D., an ophthalmologist, performed cataract surgery on Hoefer's left eye in April 1995. (Tr., p. 20; Ex. 6, p. 79) Dr. Edward Scott's son, Michael Scott, M.D. ("Dr. Scott"), an ophthalmologist, is Hoefer's current ophthalmologist. (Tr., pp. 20-21) After his cataract surgery, Hoefer's vision was generally good. (Tr., p. 21) Hoefer later had cataract surgery on his right eye. (Tr., p. 21) Hoefer reported the vision in his left eye was better than the vision in his right eye. (Tr., p. 21) Hoefer also has a history of a right ankle fracture that occurred when he fell through a hole in his back yard, a left rotator cuff injury that occurred while hauling a cart up steps at work, and a right rotator cuff tear that occurred when he was hauling a pail of water at work. (Exs. A, p. 2; J; K) Hoefer received workers' compensation benefits for the injuries to his shoulders. (Tr., pp. 61-63)

On June 28, 2012, Hoefer was repairing a dock leveler at the building. (Tr., p. 22) Hoefer testified,

I was working on a dock leveler, trying to repair it. I had a tool on a pin. As I was prying it out of the arm of the dock leveler, either my hand slipped off or the tool slipped off the part I was hanging on to, and it hit me in my left safety glasses. I think what happened is that my – it knocked my safety glasses off, and they always have these side shields on the safety glasses, and I think that's what ripped across my eye. I can't say for sure that's what happened because it just kind of coldcocked me, almost knocked me out. I could not see anything out of my left eye after that occurred.

(Tr., pp. 22-23) Hoefer received medical care that day at Medical Associates Clinic in Dubuque. (Tr., p. 23)

Hoefer saw James Dixon, M.D. with Medical Associates Clinic. (Ex. 6) Dr. Dixon diagnosed Hoefer with a dislocated posterior chamber intraocular lens with dehiscence in the left eye. (Ex. 6, p. 84) Dr. Dixon released Hoefer to light duty work from July 3, 2012, until his surgery on July 9, 2012. (Ex. 6, p. 81) On July 9, 2012, Dr. Dixon performed a pars plana vitrectomy and removal of dislocated intraocular lens and placement of anterior chamber intraocular lens. (Ex. 6, p. 84) Dr. Dixon released

Hoefer to return to work on July 19, 2012, with a weight restriction of 25 pounds for one week with "NO ACTIVITY SUCH AS CLIMBING A LADDER OR FINE VISUAL TASKS FOR ONE MONTH." (Ex. 6, p. 86)

Dr. Dixon sent Zurich a letter on May 28, 2013, noting Hoefer was still treating and would need treatment in the future, as follows:

The first is residual astigmatism after the placement of an anterior chamber intraocular lens. This may require adjustments of his corneal sutures or a refractive procedure in the future to limit his astigmatism. The second problem, and the one that we are having to address first, is the chronic vitreous inflammation and subsequent cystoid macular edema that he has had since his injury. This inflammation was initially treated with topical drop medication with good efficacy, however, the cystoid macular edema inflammation did return. Since then, he has received sub-Tenon's steroid injections with partial improvement of his inflammation. In addition to the cystoid macular edema, he does have an epiretinal membrane which has formed inside of the eye.

It is difficult to say how much additional treatment Daniel will need, as it is dependent on his response to therapy. He may need repeat steroid injections or even surgery in the future to remove the epiretinal membrane or potentially reposition the lens. He may also require adjustment of his sutures or refractive procedure to try and get him his best vision following his injury.

(Ex. 6, p. 89)

Dr. Dixon diagnosed Hoefer with macular edema. (Ex. 6, p. 90) Dr. Dixon performed an intravitreal injection of Kenalog through the pars plana into Hoefer's left eye on June 3, 2013. (Ex. 6, p. 90)

Dr. Dixon referred Hoefer to Kent Baumann, M.D. On August 2, 2013, Hoefer attended an appointment with Dr. Baumann, complaining of problems with depth perception, with objects appearing larger in the left eye and smaller in the right eye. (Ex. 6, p. 91) Dr. Baumann listed an impression of "[c]orneal astigmatism post pars plana vitrectomy and lens exchange. The patient basically has a myopic right eye with an essentially almost plano left eye and he has noted depth perception issues secondary to anisometropia." (Ex. 6, p. 91) Dr. Baumann recommended Hoefer discontinue Combigan, receive new glasses, use artificial tears, and a recheck follow-up in two weeks. (Ex. 6, p. 91) Dr. Baumann opined a soft contact lens may correct Hoefer's astigmatism, but gas permeable or rigid gas permeable lenses would be more ideal to correct any astigmatic or anisometropic visual distortion, or Hoefer could consider "PRK laser" to reduce the astigmatism in the future. (Ex. 6, p. 91) Dr. Baumann noted that prior to any refractive surgical opinions, Hoefer's left eye sutures should be removed. (Ex. 6, p. 91)

Hoefer attended an appointment with Dr. Scott on August 21, 2013. (Ex. 6, p. 96) Dr. Scott noted that since his surgery, Hoefer's vision had improved, "but he has had waxing and waning episodes of cystoid macular edema in his left eye," which had been treated with topical nonsteroidals and steroids, subconjunctival steroids, and intravitreal Kenalog. (Ex. 6, p. 96) Dr. Scott examined Hoefer and noted he had a small afferent pupillary defect in his left eye, and inflammation in the anterior chamber of both eyes, with the left worse than the right. (Ex. 6, p. 96) Dr. Scott noted Hoefer has "an epiretinal membrane causing distortion of the macular architecture," large cystic spaces, and "a small intraretinal hemorrhage at 12 o'clock in the left eye, anterior to the laser retinopexy." (Ex. 6, p. 96) Dr. Scott opined the inflammation was mostly likely from his "ACIOL" and administered an intravitreal Kenalog injection in his left eye. (Ex. 6, pp. 96-97) Given his concerns about pressure in Hoefer's left eye, Dr. Scott prescribed Combigan. (Ex. 6, p. 97) Dr. Scott performed an angiogram of Hoefer's left eye, noting "there is cystic-like leakage in the macula. There is petaloid-like leakage" and assessed Hoefer with cystoid macular edema in the left eye. (Ex. 6, p. 99) Dr. Scott released Hoefer to return to work without restrictions on August 23, 2013. (Ex. 6, p. 100)

Hoefer attended an appointment with Stephen Hoy, M.D., a dermatologist, on June 23, 2014, complaining of redness and itching under his left eye for one month. (Ex. P, p. 3<sup>1</sup>) Dr. Hoy assessed Hoefer with dermatitis and prescribed Desonide and hydrocortisone creams. (Ex. P, p. 3) Hoefer reported he did not have the dermatitis condition before the June 28, 2012 work injury. (Tr., p. 35)

On August 4, 2014, Dr. Scott prescribed Pred Forte, Ilevro, and changed Hoefer's Combigan to Cosopt. (Exs. 6, p. 109; P, p. 5) Dr. Scott examined Hoefer and noted:

He has a couple of issues. First, under his left eyelid he has had some episodes of dermatitis. He has been followed by Dr. Hoy for that and treated with a STEROID cream. It has made it better. In both eyelids he has a little bit of meibomianitis. We will teach him how to do warm compresses and lid scrubs. If the rash breaks through despite this preventative measures [sic], then he can use the STEROID cream again. He is a STEROID responder so if he is on it for a while he needs to call and let us know because it could make the pressure in his eye go up.

He has recurrent cystoid macular edema in his left eye. We will restart the PRED FORTE 1 drop to the left eye 4 times a day. He will use that plus ILEVRO. We will switch the COMBIGAN to COSOPT to see if maybe he has a little ALPHAGAN component to his allergy to the left eye and see if that makes it better. We will go with COSOPT 1 drop to the left eye twice a day.

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<sup>1</sup> The first two pages of Exhibit P were not numbered. Following the hearing the deputy workers' compensation commissioner contacted the parties and informed the parties the remaining pages, consisting of medical records would be numbered as pages 3 through 22.

(Ex. 6, p. 113; P, p. 9)

Hoefer attended an appointment with Alethea Hein, M.D., an ophthalmologist in Dr. Scott's group, on August 18, 2014. (Ex. P, pp. 12-15) Dr. Hein assessed Hoefer with cystoid macular retinal degeneration, in remission in the left eye, dermatitis, and epiretinal membrane in both eyes. (Ex. P, p. 15) Dr. Hein recommended Hoefer continue with Ilevro, Cosopt, stop the lid scrubs for blepharitis, and use FML and warm compresses for his dermatitis. (Ex. P, p. 15) During a follow-up appointment on September 8, 2014, Dr. Scott discontinued Hoefer's FML. (Ex. P, p. 16)

Hoefer attended an appointment with Dr. Scott on January 20, 2015. (Ex. 6, p. 124) Dr. Scott documented that Hoefer had been seen by Dr. Hein and treated for blepharitis with topical FML. (Ex. 6, p. 124) Dr. Scott provided a refill and noted "[t]he FML hopefully will be less likely to cause elevated pressure but perhaps that is why the asymmetry [*sic*] between the 2 eyes. He dabs the ointment in the left eye more often than the right. He will continue warm compresses and lid scrubs." (Ex. 6, p. 124)

During a follow-up appointment on March 23, 2015, Dr. Scott noted Hoefer's "pressure is great he has no significant cystoid macular edema." (Ex. 6, p. 127) Dr. Scott prescribed dorzolamide-timolol and Ilevro eye drops for his left eye, and "FML S.O.P. 0.1% eye ointment, one-quarter application(s) both eye [*sic*] As Needed." (Ex. 6, pp. 126-128)

Dr. Scott issued an opinion on April 7, 2015, finding Hoefer was not at maximum medical improvement. (Exs. 6, p. 131; F, p. 1) Dr. Scott noted "[h]e gets recurrent cystoid macular edema at times. His visual acuity is probably at the best," and noted his appointments are every three to four months. (Exs. 6, p. 131; F, p. 1) Dr. Scott opined Hoefer had no permanent restrictions from the work injury. (Exs. 6, p. 132; F, p. 1)

Michael Shapiro, M.D., an ophthalmologist, conducted an independent medical examination of Hoefer on July 20, 2015. (Ex. 7, p. 155) Dr. Shapiro reviewed Hoefer's medical records and examined him. (Ex. 7, pp. 155, 157) Dr. Shapiro opined the work injury was a substantial factor in causing Hoefer's left eye chronic cystoid macular edema and ocular hypertension. (Ex. 7, p. 158) Dr. Shapiro opined it is likely Hoefer will continue to have episodes of increased swelling of the macula requiring medical treatment in the future and determined Hoefer was not at maximum medical improvement. (Ex. 7, pp. 158-159) Dr. Shapiro noted Hoefer needs to be evaluated every three to four months and may require medication adjustments, injections, and/or additional surgery if there is evidence of macular swelling. (Ex. 7, p. 159) Dr. Shapiro recommended no work restrictions. (Ex. 7, p. 159)

CB Richard Ellis sold the building where Hoefer works to Gronen Properties in 2015. (Ex. 5, p. 61) Hoefer had to apply for work with Gronen Properties and he was hired as a maintenance worker and began working for Gronen Properties on October 1, 2015, at \$24.77 per hour. (Tr., p. 51; Exs. 5, p. 61; 9, pp. 168-170) Hoefer testified he

disclosed his vision and depth perception issues to Gronen Properties before he was hired. (Tr., p. 52) Hoefer did not share his skin condition with his supervisor. (Tr., pp. 64-65) Hoefer has not missed any work from Gronen Properties because of his skin condition. (Tr., p. 65)

On December 11, 2015, Hoefer injured himself at work. (Ex. 9, p. 171) Hoefer testified,

As I was circling the shrub outside to wrap the lights around it, I was in – it was kind of a tall shrub, probably a 6- or 7-foot shrub. I got too close to a twig or branch, and I was – again, I was wearing eye protection, and I did not see this twig or branch. It was either out of my field of vision or not in my depth perception, but all of a sudden got under my glasses and poked me in the white part of my eye.

(Tr., p. 47)

Hoefer attended an independent medical examination with Robin Sassman, M.D. on March 30, 2016. (Ex. 1, p. 1) Dr. Sassman reviewed Hoefer's medical records and examined him. (Ex. 1, p. 1) Dr. Sassman diagnosed Hoefer with left eye trauma resulting in a dislocation of intraocular lens, status post pars plana vitrectomy and removal of dislocated intraocular lens and placement of anterior chamber intraocular lens, left eye ocular hypertension, chronic cystoid macular edema, epiretinal membrane, and intermittent contact dermatitis secondary to medication used as a result of the eye trauma. (Ex. 1, p. 10) Dr. Sassman noted while Hoefer had a history of left eye cataract surgery, there was no evidence he sought care for his left eye from the time of the surgery in 1995 through his June 2012 work injury. (Ex. 1, p. 10)

Dr. Sassman placed Hoefer at maximum medical improvement as of his last evaluation with Dr. Scott on January 25, 2016. (Ex. 1, p. 11) Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Sassman found,

For the left eye, turning to Chapter 12 of *The Guides*, and following the instructions on page 290 of assigning a [*sic*] acuity-based impairment rating, Mr. Hoefer is noted to have a visual acuity score of 95 on the right eye; 90 on the left eye and 95 for both eyes. According to the table, these are multiplied accordingly and this is equal to 470. This is then divided by 5, which is equal to 94. This is then noted to be the functional visual acuity score. As noted on page 297, visual acuity loss represents a significant aspect of visual improvement, but it is not the only factor that can lead to a loss of functional vision. In Mr. Hoefer's case he notes visual acuity loss; but, he also notes glare, sensitivity to light, image distortion and problems with depth perception as well as the need for ongoing medication use in the left eye for the rest of his life. It is noted on page 297 that an individual adjustment (reduction) of up to 15 points may

be given if it is thought that the acuity score does not accurately represent the impairment. I believe this to be the case with Mr. Hoefer and will reduce the impairment by 15 points (for the glare, sensitivity to light, image distortion, depth perception issues and the need for ongoing medications in the left eye). This results in a score of 79, which places him according to Table 12-4 on page 285 in a Class 2 and he will be assigned 29% visual acuity impairment.

In addition to the above, Mr. Hoefer has occasional dermatitis under the left eye associated with the medication he uses. This is a known side effect of the medication he uses for the left eye. Therefore, it is appropriate to rate this entity as well. Based on Table 8-2 on page 178, he will be placed in a Class 1 and assigned 5% impairment of the whole person for this issue.

(Ex. 1, p. 11) Dr. Sassman recommended restrictions of no walking on uneven surfaces or work at heights or on ladders due to Hoefer's difficulty with depth perception. (Ex. 1, p. 12)

On April 5, 2016, Dr. Sassman sent a letter clarifying her opinion to Hoefer's counsel. (Ex. 1, p. 16) Dr. Sassman opined, "[i]n light of Table 12-10 on page 298 of *The Guides*, it is notable that 29% visual acuity impairment is equal to 29% whole person impairment. Therefore these would be combined as follows (using the Combined Values Chart on page 604): 29% whole person impairment (for the visual acuity) is combined with 5% whole person impairment (for the dermatitis) for a total of 33% whole person impairment." (Ex. 1, p. 16)

Dr. Broghammer performed a medical records review and issued an opinion on April 20, 2016, for CB Richard Ellis and Zurich. (Ex. B, p. 1) Dr. Broghammer opined Dr. Sassman's assignment of a 29 percent whole person impairment "is excessively high" and noted the impairment would be reflective of the entire visual system, when the injury had occurred only to the left eye. (Ex. B., p. 7) Dr. Broghammer opined Section 12.1a of the Guides requires measurement of visual acuity and of the visual fields, Hoefer's visual fields in the left eye are normal, and noted while Dr. Sassman failed to measure the visual fields, Dr. Scott's notes provide Hoefer's visual fields in the left eye are normal, which "may be why it was left out of Dr. Sassman's report." (Ex. B, p. 7)

Dr. Broghammer opined Hoefer's left eye vision falls in the near normal range and under Table 12-2, finding,

The US notation of 20/32 is equivalent to a visual acuity score of 90%, which is a 10% visual acuity impairment rating. It would be more appropriate in my medical opinion to assign a 10% visual acuity impairment rating to Mr. Hoefer's left eye and ignore the right eye because it was uninvolved. This would yield a functional acuity score of 90%. This would place Mr. Hoefer into a class 2 impairment of visual acuity per Table



12-4 on page 285 of the Guides, which is entitled "Classification of Visual Acuity Impairment." This would be a 10% to 29% impairment of visual acuity. In my medical opinion, I would assign a 10% impairment of visual acuity as this is what Mr. Hoefer has based on Table 12-2.

(Ex. B, pp. 7-8) Dr. Broghammer also opined Hoefer's work injury was not a substantial factor in causing or contributing to his alleged dermatitis of the left lower eyelid because the injury was confined to his eye and there was no evidence of a primary industrial injury to his skin. (Ex. B, p. 8) Dr. Broghammer noted Dr. Scott had determined Hoefer's dermatological issue had resolved, and Dr. Sassman failed to document current evidence of a rash underneath Hoefer's left eye. (Ex. B, p. 8) Dr. Broghammer found, "I would assess Mr. Hoefer as having a history of minor intermittent left lower eyelid dermatitis possibly related to the use of medications that has completely resolved with no residual sequelae. Thus, I would not assign any impairment for Mr. Hoefer's skin condition, as there is no evidence in the medical record that this problem is ongoing, as it has not been documented since August 5, 2014." (Ex. B, p. 8)

Hoefer's attorney provided Dr. Sassman with a copy of Dr. Broghammer's report. Dr. Sassman noted that Dr. Broghammer had assigned an impairment rating based on visual acuity only and failed to take into account other issues with respect to Hoefer's left eye, including glare, sensitivity to light, image distortion, depth perception issues, and the need for ongoing medication use. (Ex. 1, p. 17) Dr. Sassman also noted Dr. Broghammer only assigned the impairment for the left eye, and under the AMA Guides, "visual impairment is always calculated using the acuity of both eyes and attempting to assign an impairment for just one eye is inconsistent with the instructions in *The Guides*." (Ex. 1, p. 18)

Dr. Sassman challenged Dr. Broghammer's opinion regarding Hoefer's dermatitis, stating, "I would direct you to Table 8-2 on page 178 of *The Guides*. I placed Mr. Hoefer in a Class 1 which is defined as 'Skin disorders signs and symptoms present or intermittently present; and no limitations to activities of daily living; exposure to certain chemical or physical agents may temporarily increase limitation; and requires no or intermittent treatment.'" (Ex. 1, p. 18) Dr. Sassman noted Hoefer's records document an intermittent issue that will continue as long as he is using prescribed medication for his left eye injury. (Ex. 1, p. 18)

During his appointment on May 11, 2016, Dr. Scott refilled Hoefer's prescription for FML ointment, dorzolamide-timolol drops, and Ilevro drops for his left eye. (Ex. 6, p. 139)

On June 6, 2016, Dr. Scott responded to a form letter from counsel for CB Richard Ellis and Zurich. (Exs. 6, p. 149; F, p. 3) Dr. Scott checked he agreed he was not recommending permanent work restrictions for Hoefer, and wrote "[i]t would depend on Employer's restrictions for his job." (Exs. 6, p. 149; F, p. 3) Dr. Scott also checked he agreed "Hoefer does not have significant ability loss in his left eye relating to the following: glare, sensitivity to light, night vision, image distortion, problems with depth

perception, diplopia.” (Exs. 6, p. 149; F, p. 3) Dr. Scott disagreed with the statement, “[t]o the extent Mr. Hoefer has ability loss in his left eye because of glare, sensitivity to light, night vision, image distortion, problems with depth perception and/or diplopia, such loss is reflected in visual acuity or visual field loss.” (Exs. 6, p. 150; F, p. 4) Dr. Scott agreed that his 16 percent disability rating includes vision disability that preexisted the work injury and includes vision disability in Hoefer’s right eye. (Exs. 6, p. 150; F, p. 4) Dr. Scott also agreed that in June 2014 Hoefer had been prescribed Ilevro and Combigan and in August 2014 Dr. Scott discontinued the Combigan. (Exs. 6, p. 150; F, p. 4) Dr. Scott noted, “Dan had an allergy to the Alphagan component of the Combigan. Dr. Scott switched to Cosopt instead.” (Exs. 6, p. 150; F, p. 4)

On June 15, 2016, Dr. Scott sent Hoefer’s attorney an opinion letter, opining “the functional impairment of the left eye as the result of an injury on June 28, 2012 is 12%” under the AMA Guides. (Ex. 6, p. 148) Dr. Scott noted under the AMA Guides, the “tables for visual assessment should be used to determine visual system and whole man impairment ratings.” (Ex. 6, p. 148)

Hoefer’s attorney sent Dr. Sassman Dr. Scott’s opinion from May 11, 2016, posing two questions, and she responded, as follows:

1. What is the definition/symptoms of blepharitis, and is it the same type of skin issue you described as the dermatitis problem for which you gave Dan a 5% whole person impairment on page 11 of your report on April 5, 2016, and on page 2 of your report of April 21, 2016?

Blepharitis is defined as inflammation of the eyelids. This is the same type of skin issue that I described as the dermatitis problem for which I gave Mr. Hoefer a 5% whole person impairment in my correspondence regarding Mr. Hoefer. Dermatitis is a general term used to describe inflammation of the skin. Dermatitis can occur anywhere on the body; however, blepharitis is a term used to describe inflammation of the skin of the eyelids in particular.

2. Dan was switched in the past by his doctors using Combigan to using Cosopt (Dorzolamid/Timolol) eye drops on a daily basis. Is blepharitis/dermatitis a known side effect of Cosopt?

Yes, blepharitis/dermatitis is a known side effect of Cosopt. In fact, the following side effects that can occur to the skin as a result of the use of Cosopt include the following: Eyelid edema (swelling), eyelid erythema (redness), eyelid pain or discomfort, and **blepharitis**. (This information can be found at <http://www.rxlist.com/cosopt>). As you can see, the term “blepharitis” is used in the side effects listing for this medication.

(Ex. 1, pp. 21-22)

CB Richard Ellis and Zurich requested Dr. Broghammer perform an independent medical examination of Hoefer in May 2016. (Ex. C, p. 1) Dr. Broghammer issued a report noting Hoefer did not attend the appointment on June 13, 2016, and CB Richard Ellis and Zurich requested Dr. Broghammer conduct a review of additional records from Dr. Scott, and Dr. Sassman's report. (Ex. C, pp. 1-2) Dr. Broghammer continued to opine that Dr. Sassman's opinion was too high, finding Hoefer has sustained a 10 percent impairment rating, which takes into account "his flashes and floaters in his vision." (Ex. C, pp. 4-5)

Dr. Broghammer noted that Dr. Scott had opined that Hoefer had sustained a 12 percent impairment to his left eye and noted "the 12% impairment to the left eye is much more reflective of Mr. Hoefer's actual left eye impairment and is not substantially different than my 10% impairment." (Ex. C, p. 4) Dr. Broghammer opined that following the re-review,

It does not appear that any of Mr. Scott's [sic] current conditions are responsible for causing the dermatitis back when he had it in 2014. It should be noted that in 2014 Mr. Hoefer had been using Combigan, which is a combination medicine of brimonidine tartrate and timolol. This was discontinued at the August 4, 2014, visit when the worker followed up with Dr. Scott. Dr. Scott switched the worker to Cosopt at this visit. It should be noted that Cosopt is a mixture of dorzolamide and timolol. According to Dr. Scott's May 11, 2016, report, Mr. Hoefer continues on this medication (i.e., Cosopt) at the present time. It is likely that the brimonidine component of the Combigan was responsible for Mr. Hoefer's brief bout of dermatitis. It is notable that Dr. Scott on August 4, 2014, switched the worker from his Combigan to Cosopt to see if Mr. Hoefer had a little Alphagan component to his allergy. Alphagan it should be noted contains brimonidine, which is one of the active ingredients in Combigan, which Dr. Scott thought Mr. Hoefer was reacting to.

In summary, Mr. Hoefer is using some of the same medications he used back when he had dermatitis in 2014; however, it appears based on the record review that the offending agent brimonidine, which is a component of the brand name eyedrop Alphagan, was the agent likely responsible for Mr. Hoefer's dermatitis and this was appropriately changed to Cosopt back on [A]ugust 4, 2014, by Dr. Scott.

(Ex. C, p. 4)

Hoefer attended an independent medical examination with Dr. Broghammer on July 11, 2016. (Ex. A, p. 1) In his July 12, 2016 report, Dr. Broghammer found no evidence of dermatitis, scarring, or skin changes above or below Hoefer's eyes. (Ex. A, p. 3) Dr. Broghammer again assigned a 10 percent impairment rating, did not assign permanent restrictions, and noted Dr. Scott found Hoefer's condition may worsen and require surgical treatment. (Ex. A, p. 4) Dr. Broghammer found that Hoefer sustained a

slight decrease in his visual acuity and noted his impairment rating adequately takes into account not only his visual impairment, but also his ongoing use of medications in the left eye and his subjective complaints. (Ex. A, p. 4)

Dr. Broghammer gave no impairment rating for dermatitis, finding the condition "resolved quite some time ago and there has not been any notation of recurrent dermatitis in the medical record nor any treatment for recurrence dermatitis noted in the medical record." (Ex. A, p. 6) Dr. Broghammer found no evidence of dermatitis and opined Hoefer does not need to be treated for dermatitis. (Ex. A, p. 6)

Hoefer testified since his work injury he has had problems with the pressure and swelling in his left eye, and he continues to receive treatment for his left eye. (Tr., pp. 23-25) Hoefer agreed he had not experienced problems with swelling and pressure in his eye for seven months prior to the hearing. (Tr., p. 60) Hoefer reported the drops control the pressure and "[i]f he takes me off them, it goes right back to being swollen up and pressure going back up, because we did try that experiment a few times and it failed. I had to be on those drops to keep it under control." (Tr., p. 60)

Hoefer does not have any work restrictions from Dr. Scott, but he does not believe his left eye visual field is within normal limits. (Tr., pp. 54-56) Hoefer reported before his work injury he did not have any problems with depth perception, glare, light sensitivity, or distortion when doing fine work or any peripheral vision problems with his left eye. (Tr., pp. 21-22, 27) Hoefer testified objects appear larger in his left eye and smaller in his right eye, which makes it difficult to screw on bottle caps, line up plumbing materials, repair door locks, and to line up the pins to replace fluorescent bulbs. (Tr., pp. 26-27, 30-31)

Hoefer used to work on door locks "once a month or as little as once every three or four months." (Tr., p. 67) In November or December 2015 Hoefer took apart a door lock and could not see the small pieces to repair the lock, so he called his supervisor for assistance, and he no longer works on door locks. (Tr., pp. 30-31) Generally Hoefer works alone, but he now has to call for assistance. (Tr., pp. 31-32)

Hoefer reported two and a half months before the hearing he was working on plumbing behind a wall in a small space. (Tr., p. 27) Hoefer went in, took everything apart, did not see a leak, and installed the wall plate. (Tr., p. 27) The next day when he arrived the floor was wet again. (Tr., p. 28) Hoefer called his supervisor and asked for help because he could not see the leak and his supervisor sent someone to assist him. (Tr., p. 28)

Hoefer reported his depth perception affects his ability to climb ladders and platforms. (Tr., p. 28) Hoefer reported he is afraid to climb ladders because he is not a good judge of where the steps are and could miss a step and hurt himself. (Tr., p. 28) Hoefer reported he does not work above four of five feet up on a six foot ladder because he is afraid he might fall and hurt himself. (Tr., pp. 28-29)

Hoefer testified he has to read work orders, blueprints, reports from the water treatment specialist, and tags on parts at work. (Tr., pp. 67-68) Hoefer noted he has a difficult time reading because his vision is blurry and the lines sometimes run together, so he tends to look out of his right eye to see print because his left eye cannot see the detail. (Tr., p. 32) Hoefer also uses a magnifying glass to help with reading. (Tr., pp. 68-69)

Hoefer reported he has problems with light sensitivity or glare when working on a computer. (Tr., p. 32) He has difficulty seeing the computer screen. (Tr., p. 32) Hoefer works on a computer approximately one hour per day. (Tr., p. 65-66)

Hoefer operates a fork truck at work and relayed that he will go to pick up a pallet and he cannot see where the forks are to get down underneath the pallet so he can lift it correctly, and it will take him three or four attempts to correctly place the prongs on the fork truck into the pallet. (Tr., p. 33) Hoefer reported that he never had problems using the fork truck before his injury. (Tr., p. 33)

Hoefer testified that he started having a problem with inflammation, irritation, redness, and itching on his left eyelid and underneath his left eye in 2014 and he continues to have problems with dermatitis. (Tr., p. 33) Hoefer testified he has an outbreak approximately once per week. (Tr., p. 44) When he is at work his eye will start itching and he will rub it to stop the itching, which causes blurriness. (Tr., p. 45) When he arrives home from work he will treat his eye with the FML ointment. (Tr., p. 45) Hoefer reported when he has a bad outbreak of dermatitis, he sees a red mark under or over the top of his eyelids, on the skin, and it is usually confined to just his eyelid. (Tr., p. 43)

Hoefer has received a raise from Gronen Properties and his current hourly rate is \$25.06. (Tr., p. 48) Hoefer is concerned a prospective employer would not want to hire him because of his vision problem. (Tr., p. 53)

Mrs. Hoefer testified that her husband has difficulty seeing and becomes frustrated with household tasks. (Tr., pp. 73, 76) Mrs. Hoefer reported when she was cleaning underneath the oven she pulled out the oven drawer and asked her husband for help putting it in and he could not line up the drawer. (Tr., p. 73) Recently Hoefer had to ask his wife for help installing a new light fixture because he could not see the wires to thread the light, which he was able to do before independently. (Tr., pp. 74-75, 79-80) Hoefer cannot see to put the ear drops into his dog's ears. (Tr., p. 76)

## CONCLUSIONS OF LAW

### I. Nature of the Injury

It is undisputed Hoefer sustained an injury to his left eye while working. Hoefer avers he sustained dermatitis as a sequela of his left eye injury. CB Richard Ellis and

Zurich contend Hoefer's alleged dermatitis is not causally related to the June 2012 work injury.

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, 569 N.W.2d at 156. When considering the weight of an expert opinion, the fact-finder 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).

In Dr. Scott released Hoefer to return to work without restrictions on August 23, 2013. (Ex. 6, p. 100) Hoefer continued to use prescription medication in his left eye. In May 2014, Hoefer complained of itching and redness under his left eye. (Ex. P, p. 3) Dr. Scott referred Hoefer to Dr. Hoy, a dermatologist. (Ex. P, p. 3) Dr. Hoy diagnosed Hoefer with dermatitis and prescribed a topical medication. (Ex. P, p. 3) When Hoefer attended his next appointment with Dr. Scott on August 4, 2014, Dr. Scott noted he had some episodes of dermatitis under his left eye and also noted he had a "little bit" of meibomiantis in both eyelids. (Exs. 6, p. 113; P, p. 9) Meibomianitis is defined as the inflammation of the meibomian glands, a group of sebaceous glands in the eyelids. Stedman's Medical Dictionary, (Marjorie Spraycar ed., Williams & Wilkins 26th ed. 1995). Dr. Scott switched Hoefer's Combigan to Cosopt "to see if maybe has a little ALPHAGAN component to his allergy to the left eye." (Exs. 6, p. 113; P, p. 9) Hoefer was also examined by Dr. Hein, and she diagnosed him with cystoid macular retinal degeneration, in remission in the left eye, dermatitis, and retinal epiretinal membrane in both eyes. (Ex. P, p. 15) Dr. Hein ordered Hoefer continue with the Cosopt, Ilevro, to "stop [the] lid scrubs for blepharitis", and prescribed FML and warm compresses for Hoefer's dermatitis. (Ex. P, p. 15) Blepharitis is defined as inflammation of the eyelids. Stedman's Medical Dictionary, (Marjorie Spraycar ed., Williams & Wilkins 26th ed. 1995).

Hoefer testified he has continued to experience dermatitis under his left eyelid since 2014. (Tr., p. 33) Hoefer testified he has an outbreak approximately once per week. (Tr., p. 44) When he is at work his eye will start itching and he will rub it to stop the itching, which causes blurriness. (Tr., p. 45) When he arrives home from work he will treat his eye with the FML ointment. (Tr., p. 45)

Dr. Broghammer has opined Hoefer's work injury was not a substantial factor in causing or contributing to the alleged dermatitis of his left lower eyelid because the injury was confined to his eye and there was no evidence of a primary industrial injury to his skin. (Ex. B, p. 8) Dr. Broghammer found that Hoefer's dermatitis was temporary and had resolved after Dr. Scott changed his prescription Combigan to Cosopt in August 2014. Dr. Sassman opined Hoefer has occasional dermatitis under his left eye associated with his medication. (Ex. 1, pp. 10-11) The record reflects Dr. Scott refilled Hoefer's prescription for FML ointment, dorzolamide-timolol drops, and Ilevro drops for his left eye on May 11, 2016. (Ex. 6, p. 139)

I find Dr. Sassman's opinion regarding Hoefer's dermatitis more persuasive than Dr. Broghammer's opinion. The record is void of evidence Hoefer was treated for dermatitis before his work injury. Drs. Hoy, Scott, and Hein diagnosed Hoefer with dermatitis. (Exs. 6, p. 113; P, pp. 3, 9, 15) Dr. Scott switched Hoefer's Combigan to Cosopt "to see if maybe has a little ALPHAGAN component to his allergy to the left eye." (Exs. 6, p. 113; P, p. 9) The record supports Hoefer developed dermatitis as a sequela of his left eye injury.

## II. Scheduled Member Versus Industrial Disability

Hoefer contends he has sustained an industrial disability of no less than 35 percent. CB Richard Ellis and Zurich aver that if Hoefer has sustained permanent disability, his disability is a scheduled member disability.

Permanent partial disabilities are divided into scheduled and unscheduled losses. Iowa Code § 85.34(2). If the claimant's injury is listed in the specific losses found in Iowa Code section 85.34(2)(a)-(t), the injury is a scheduled injury and is compensated by the number of weeks provided for the injury in the statute. Second Injury Fund v. Bergeson, 526 N.W.2d 543, 547 (Iowa 1995). "The compensation allowed for a scheduled injury 'is definitely fixed according to the loss of use of the particular member.'" Id. (quoting Graves v. Eagle Iron Works, 331 N.W.2d 116, 118 (Iowa 1983)). If the claimant's injury is not listed in the specific losses in the statute, compensation is paid in relation to 500 weeks as the disability bears to the body as a whole. Id.; Iowa Code § 85.34(2)(u). "Functional disability is used to determine a specific scheduled disability; industrial disability is used to determine an unscheduled injury." Bergeson, 526 N.W.2d at 547.

Eye impairments are included as scheduled losses. Iowa Code § 85.34(2)(p). Skin impairments are not scheduled losses. Id. § 85.34. Hoefer was first treated for dermatitis of the skin under his left eyelid in 2014. (Exs. 6, p. 113; P, pp. 3, 9, 15) On

May 11, 2016, nearly two years later, and two months before the arbitration hearing, Hoefer received a refill prescription of FML to treat his dermatitis. (Ex. 6, p. 139)

When an individual sustains a work injury to a scheduled member and to a part of the body not included in the schedule, the individual's permanent disability is compensable as an unscheduled disability. Collins v. Dep't of Human Servs., 529 N.W.2d 627, 629 (Iowa Ct. App. 1995). Hoefer's permanent disability is compensable as an industrial disability.

### III. Extent of Disability

"Industrial disability is determined by an evaluation of the employee's earning capacity." Pease, 807 N.W.2d at 852. In considering the employee's earning capacity, the deputy commissioner evaluates several factors, including "consideration of not only the claimant's functional disability, but also [his] age, education, qualifications, experience, and ability to engage in similar employment." Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 137-38 (Iowa 2010). The inquiry focuses on the injured employee's "ability to be gainfully employed." Id. at 138.

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Compensation for permanent partial disability shall begin at the termination of the healing period. Iowa Code § 85.34(2). Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(u). When considering the extent of disability, the deputy commissioner considers all evidence, both medical and nonmedical. Evenson v. Winnebago Indus., Inc., 818 N.W.2d 360, 370 (Iowa 2016).

Drs. Broghammer, Sassman, and Scott agree Hoefer has sustained a Class 2 impairment of visual acuity, which has a range of 10 percent to 29 percent. (Exs. 1, p. 11; 6, pp. 146, 148; B, p. 8) Dr. Sassman opined Hoefer has sustained a 29 percent visual acuity impairment. (Ex. 1, p. 11) Dr. Broghammer challenged Dr. Sassman's opinion, noting "[i]t would be more appropriate in my medical opinion to assign a 10% visual acuity impairment rating to Mr. Hoefer's left eye and ignore the right eye because it was uninvolved." (Ex. B, p. 8) On June 15, 2016, Dr. Scott issued an opinion under the AMA Guides, noting the "tables for visual assessment should be used to determine visual system and whole man impairment ratings" and finding Hoefer had sustained a 12 percent functional impairment to his left eye as a result of the work injury. (Ex. 6, p. 148)

Page 277 of the AMA Guides provides, "[t]he visual system is unique in that it combines the input from two separate eyes into a single visual perception." Drs. Sassman and Scott evaluated Hoefer's visual system rendering their opinions. (Exs. 1, p. 11; 6, p. 146, 148) Dr. Broghammer's opinion that the right eye should be ignored is contrary to the AMA Guides. I do not find Dr. Broghammer's opinion persuasive.



Page 282 of the AMA Guides provides that impairment ratings should be based on the best corrected visual acuity. Dr. Scott found Hoefer's best corrected vision is 20/25 for the right eye, 20/30 for the left eye, and 20/25 for both eyes. (Ex. 6, p. 146) Using Table 12-2, Dr. Scott assigned a visual acuity score of 95 for the right eye, 90 for the left eye, and a 285 visual score for both eyes (multiplying 95 by three, as set forth in Table 12-3), for a total score of 470. Dividing 470 by five, results in a functional acuity score of 94. Under Table 12-4, a functional acuity score of 94 falls under Class 2, 10 percent to 29 percent impairment of visual rating.

Where Dr. Sassman's opinion differs from Dr. Scott's opinion is with respect to factors beyond visual acuity loss. I do not find Dr. Sassman's opinion regarding Hoefer's left eye visual acuity impairment persuasive. I find the opinion of Dr. Scott, the treating physician, more persuasive. Dr. Sassman found in addition to his visual acuity impairment, Hoefer experiences problems with glare, sensitivity to light, image distortion, and depth perception, and assigned a 29 percent whole person impairment. (Ex. 1) Dr. Sassman examined Hoefer on one occasion for purposes of obtaining an expert opinion. Dr. Scott, the ophthalmologist who has treated Hoefer over the course of many years, and whose father treated Hoefer as early as 1995, opined that Hoefer does not have a significant loss of ability in his left eye relating to glare, sensitivity to light, image distortion, or problems with depth perception. (Exs. 6, p. 149; F, p. 3)

Dr. Sassman recommended restrictions of no walking on uneven surfaces or work at heights or on ladders due to Hoefer's difficulty with depth perception. (Ex. 1, p. 12) Dr. Scott did not recommend any permanent restrictions for Hoefer. The record reflects Hoefer does have visual problems that interfere with his work, including repairing door knobs and plumbing, and installing fluorescent light fixtures. As a result of his vision problems, Hoefer's new employer, Gronen Properties, accommodates him. Hoefer testified he has problems with his depth perception and poked his eye with a shrub while wearing eye protection in December 2015, causing him to miss work. (Tr., p. 47) The record reflects Hoefer will continue to require prescription eye drops to assure his pressure remains stable in his left eye and prescription FML for his dermatitis for the foreseeable future. The record establishes Hoefer has sustained a visual acuity impairment from his left eye injury and dermatitis as a sequela of his left eye injury, which require ongoing treatment. I conclude Hoefer has sustained a permanent impairment as a result of the work injury.

At the time of the hearing Hoefer was 63. (Tr., pp. 17-18) Hoefer is a high school graduate. (Tr., pp. 17-18; Ex. 5, p. 60; M, p. 3) Hoefer has worked for several employers as a maintenance man at the same commercial building for many years. CB Richard Ellis sold the building Hoefer works in to Gronen Properties in 2015, after his work injury. (Ex. 5, p. 61) Hoefer had to apply to work for Gronen Properties and was hired after disclosing he had vision and depth perception issues due to his work injury. (Tr., p. 52) Hoefer continues to work for Gronen Properties and receives accommodations to perform his duties. Based on the industrial disability factors, I conclude Hoefer has sustained a 20 percent permanent impairment.

#### IV. Rate

The parties stipulated that at the time of his injury Hoefer was married and entitled to two exemptions. At hearing, Hoefer averred his gross earnings were \$976.92 per week and his weekly rate is \$632.73. CB Richard Ellis and Zurich alleged Hoefer's gross earnings were \$962.47 per week and his weekly rate is \$632.73. In their post-hearing brief CB Richard Ellis and Zurich allege the original rate calculation was incorrect and Hoefer's gross earnings were \$971.23, and his weekly rate is \$629.25. CB Richard Ellis and Zurich contend Hoefer incorrectly used week nine, which is unrepresentative because it contains holiday pay and alters the number of hours worked.

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. "Weekly earnings means gross salary, wages, or earnings of an employee to which such employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured, as regularly required by the employee's employer for the work or employment for which the employee was employed . . . 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.

While working for CB Richard Ellis Hoefer was paid on an hourly basis and received overtime. (Ex. L) When an employee is paid on an hourly basis, the weekly earnings are computed "by dividing by thirteen the earnings, including shift differential pay but not including overtime or premium pay," the employee earned in the last 13 consecutive calendar weeks immediately preceding the injury. Id. § 85.36(6). Rule 876 Iowa Administrative Code 8.2, provides,

The word "overtime" as used in Iowa Code section 85.61 means amounts due in excess of the straight time rate for overtime hours. Such amount shall not be considered in determining weekly wages within Iowa Code section 85.36. Overtime hours at the straight time rate are included in determining gross weekly earnings.

Thus, under the administrative rule, overtime hours at the straight time rate are included in determining gross weekly earnings.

Hoefer is paid every two weeks. (Ex. L) His work injury occurred on June 28, 2012. Thus, the paychecks issued on June 22, 2012, June 8, 2012, May 25, 2012, May 11, 2012, April 27, 2012, April 13, 2012, and March 30, 2012 cover the 13 weeks before his work injury. Hoefer's paycheck for June 8, 2012 includes holiday pay.

(Ex. L, p. 6) This week is not customary of Hoefer's regular hours and pay, and should not be used in computing his gross earnings and rate. Hoefer's paycheck for March 16, 2012, does not include holiday hours and pay and is representative of his earnings.

(Ex. L, p. 4) Hoefer used 26 weeks in calculating his gross earnings. The statute expressly provides the determination is made using "the last 13 consecutive calendar weeks immediately preceding the injury." Id. § 85.36(6).

Hoefer's straight time hourly rate for the period in question was \$22.77. (Exs. L; 12, p. 204). Hoefer worked 84 hours per two-week period for six of the representative paychecks, and 85 hours for the representative paycheck of April 13, 2012, which also covered two weeks. His gross weekly earnings total \$958.09, which is rounded to \$958.00. (Exs. L; 12, p. 204) According to the 2011-2012 Ratebook, covering July 1, 2011 through June 30, 2012, Hoefer's weekly rate is \$621.59.

<http://www.iowaworkcomp.gov/sites/Authoring.iowadivisionofworkcomp.gov/files/2011ratebook.pdf>.

#### V. Penalty Benefits

Hoefer alleges he is entitled to a \$4,486.86 award of penalty benefits because CB Richard Ellis and Zurich delayed seeking information concerning his impairment and whether he was at maximum medical improvement, delayed making permanent partial disability payments, and underpaid permanent partial disability benefits. CB Richard Ellis and Zurich contend Hoefer should not be awarded penalty benefits because they did not think it was reasonable to pay permanency benefits based on Dr. Broghammer's review or until Dr. Scott rendered his opinion on May 13, 2016.

Under the statute's plain language, if there is a delay in payment absent "a reasonable or probable cause or excuse," the employee is entitled to penalty benefits, of up to 50 percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse. Iowa Code § 86.13(4); see also Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 260 (Iowa 1996) (citing earlier version of the statute). "The application of the penalty provision does not turn on the length of the delay in making the correct compensation payment." Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229, 236 (Iowa 1996). If a delay occurs without a reasonable excuse, the commissioner is required to award penalty benefits in some amount to the employee. Id.

The statute requires the employer or insurance company to conduct a "reasonable investigation and evaluation" into whether benefits are owed to the employee, the results of the investigation and evaluation must be the "actual basis" relied on by the employer or insurance company to deny, delay, or terminate benefits, and the employer or insurance company must "contemporaneously convey the basis for the denial, delay, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits." Iowa Code § 86.13(4)(a). An employer may establish a "reasonable cause or excuse" if "the delay was necessary for the insurer to investigate the claim," or if "the employer had a reasonable basis to contest the employee's

entitlement to benefits.” Christensen, 554 N.W.2d at 260. “A ‘reasonable basis’ for denial of the claim exists if the claim is ‘fairly debatable.’” Burton v. Hilltop Care Ctr., 813 N.W.2d 250, 267 (Iowa 2012). “Whether a claim is ‘fairly debatable’ can generally be determined by the court as a matter of law.” Id. The issue is whether the employer had a reasonable basis to believe no benefits were owed to the claimant. Id. “If there was no reasonable basis for the employer to have denied the employee’s benefits, then the court must ‘determine if the defendant knew, or should have known, that the basis for denying the employee’s claim was unreasonable.’” Id.

Benefits must be paid beginning on the 11th day after the injury, and “each week thereafter during the period for which compensation is payable, and if not paid when due,” interest will be imposed. Iowa Code § 85.30. In Robbennolt, the Iowa Supreme Court noted, “[i]f the required weekly compensation is timely paid at the end of the compensation week, no interest will be imposed . . . . As an example, if Monday is the first day of the compensation week, full payment of the weekly compensation is due the following Monday.” Robbennolt, 555 N.W.2d at 235. A payment is “made” when the check addressed to the claimant is mailed, or personally delivered to the claimant. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996) (abrogated by Keystone Nursing Care Ctr. v. Craddock, 705 N.W.2d 299 (Iowa 2005) (concluding the employer’s failure to explain to the claimant why it would not pay permanent benefits upon the termination of healing period benefits did not support the commissioner’s award of penalty benefits)).

When considering an award of penalty benefits, the commissioner considers “the length of the delay, the number of delays, the information available to the employer regarding the employee’s injuries and wages, and the prior penalties imposed against the employer under section 86.13.” Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 336 (Iowa 2008). The purposes of the statute are to punish the employer and insurance company and to deter employers and insurance companies from delaying payments. Robbennolt, 555 N.W.2d at 237.

Hoefer attended an independent medical examination with Dr. Shapiro on July 1, 2015. When he issued his report on July 20, 2015, Dr. Shapiro found Hoefer was not at maximum medical improvement. Hoefer contends CB Richard Ellis and Zurich should have asked Dr. Scott for an opinion on whether Hoefer had reached maximum medical improvement. The statute and case law do not impose such a requirement on CB Richard Ellis and Zurich.

CB Richard Ellis and Zurich requested an opinion from Dr. Scott on March 29, 2016. (Ex. G, p. 3) On April 15, 2016, Dr. Scott responded he needed to perform “certain well-accepted, non-invasive testing on Mr. Hoefer’s eyes” to provide the rating and Hoefer had refused to come into Dr. Scott’s office. (Ex. G, p. 4)

Hoefer attended an appointment with Dr. Sassman on March 30, 2016, and she issued her report on April 5, 2016, finding Hoefer had sustained a permanent impairment. (Ex. 1) Dr. Broghammer performed a medical records review for CB

Richard Ellis and Zurich on April 20, 2016. (Ex. B) Dr. Broghammer disagreed with Dr. Sassman's rating, and opined Hoefer had sustained a 10 percent impairment of visual acuity. (Ex. B) CB Richard Ellis and Zurich did not commence paying permanent partial disability benefits to Hoefer upon receiving Dr. Broghammer's report.

On April 26, 2016, the attorney for CB Richard Ellis and Zurich, sent Hoefer's attorney an e-mail stating "[w]ith claimant now apparently at MMI per Dr. Scott, and with Dr. Scott apparently ready to assign permanent impairment [sic], my clients are intending to make advanced weekly payments of PPD." (Ex. 8, p. 161) The attorney for CB Richard Ellis and Zurich sent a follow-up letter on May 12, 2016, stating "my clients believe it is reasonable to wait for Dr. Scott to address permanent impairment before making the assessment as to whether or not claimant is entitled to any PPD. Dr. Scott's notes to date reflect a possibility that no permanent impairment will ensue" and noting Dr. Broghammer's opinion was based on a records review only. (Ex. 8, p. 162) CB Richard Ellis and Zurich tendered payment of 10 percent permanent partial disability benefits to the eye, plus interest on May 23, 2016. (Ex. 8, p. 165-166)

CB Richard Ellis and Zurich retained Dr. Broghammer to perform a records review. After performing his review, Dr. Broghammer opined Hoefer had sustained a 10 percent impairment to his left eye on April 20, 2016. CB Richard Ellis and Zurich did not tender payment to Hoefer after receiving the opinion and delayed paying benefits for one month. Hoefer presented evidence Zurich has a past history of multiple penalty assessments. I conclude Hoefer should be awarded \$1,200.00 in penalty benefits to punish CB Richard Ellis and Zurich and to deter employers and insurance companies from delaying payments in the future.

#### VI. Reimbursement of Dr. Sassman's Independent Medical Examination and Reports

In Exhibit 13, the statement of costs, Hoefer seeks to recover the \$5,653.90 cost of Dr. Sassman's independent medical examination and reports. Exhibit 4 contains a billing statement from Dr. Sassman, which includes the \$1,794.00 cost of the independent medical examination, \$2,698.50 for generating the report, a rush fee of \$750.00, and an ankle x-ray of \$126.40. In his post-hearing brief Hoefer seeks to recover the cost of two reports by Dr. Sassman totaling \$5,082.50, and states he is not seeking reimbursement for a right ankle x-ray or time Dr. Sassman spent discussing and evaluating his right ankle for his claim against the Fund. CB Richard Ellis and Zurich contend Hoefer is not entitled to recover the cost of Dr. Sassman's examination because no physician had opined Hoefer was at maximum medical improvement or given a permanent impairment rating before Dr. Sassman conducted her exam. CB Richard Ellis and Zurich aver the only cost they can be held responsible for is the report itself, and not the examination.

Hoefer attended an independent medical examination with Robin Sassman, M.D. on March 30, 2016. (Ex. 1, p. 1) On April 7, 2015, Dr. Scott issued an opinion finding Hoefer was not at maximum medical improvement. (Exs. 6, p. 131; F, p. 1) Dr. Shapiro

conducted an independent medical examination of Hoefer on July 20, 2015. (Ex. 7, p. 155) Dr. Shapiro also determined Hoefer was not at maximum medical improvement. (Ex. 7, pp. 158-159) No physician opined Hoefer was at maximum medical improvement or provided a permanent impairment rating before Hoefer attended the independent medical examination with Dr. Sassman on March 30, 2016.

After receiving an injury, the employee, if requested by the employer is required to submit to examination at a reasonable time and place, as often as reasonably requested to a physician, without cost to the employee. Iowa Code § 85.39. If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes the evaluation is too low, the employee "shall, upon application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choosing." Id.

In the case of Des Moines Area Regional Transit Authority v. Young, the Iowa Supreme Court held:

We conclude section 85.39 is the sole method for reimbursement of an examination by a physician of the employee's choosing and that the expense of the examination is not included in the cost of a report. Further, even if the examination and report were considered to be a single, indivisible fee, the commissioner erred in taxing it as a cost under administrative rule 876-4.33 because the section 86.40 discretion to tax costs is expressly limited by Iowa Code section 85.39.

867 N.W.2d 839, 846-47 (Iowa 2015). Young does not permit the taxing of the cost of Dr. Sassman's examination pursuant to rule 876 IAC 4.33.

Dr. Sassman conducted an independent medical examination of Hoefer in March 2016. No evaluation of permanent disability had occurred prior to Dr. Sassman's examination. Hoefer is not entitled to recover the cost of Dr. Sassman's independent medical examination. See id.

Exhibit 4 contains an itemized bill from Dr. Sassman from March 30, 2016. Dr. Sassman charged \$700.00 for the first hour of her report, and \$1,998.50 for the remainder of the time she spent preparing the report. (Ex. 4, p. 51) Under rule 876 IAC 4.33(6), the cost of two reports from doctors or practitioners can be taxed as costs. The rule does not allow for the recovery of an expedited report. Dr. Sassman's report also addresses claims against CB Richard Ellis, Zurich, and the Fund. Before the hearing Hoefer settled his claim against the Fund. Two paragraphs of the 15 page report address Hoefer's claim against the Fund. I conclude Hoefer is entitled to recover \$2,500.00 for the cost of the April 5, 2016 report.

Hoefer also seeks to recover the \$190.00 cost of Dr. Sassman's April 21, 2016 letter. The rule allows for the recovery of a second report. Hoefer is awarded \$2,690.00 for Dr. Sassman's two reports.

#### VI. Costs

Hoefer seeks to recover the \$100.00 filing fee, \$175.42 in lost wages for attending the May 11, 2016 appointment with Dr. Scott, \$200.48 in lost wages for attending the appointment with Dr. Broghammer on July 11, 2016, and \$60.24 in lost wages incurred by Hoefer's wife to drive him to Dr. Broghammer's appointment. CB Richard Ellis and Zurich stipulated to the amount of lost wages only, but dispute Hoefer is entitled to recover lost wages in this case.

Rule 876 IAC 4.33 outlines the costs that can be taxed, as follows,

Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes.

The rule allows for the recovery of the filing fee.

Hoefer's claim for lost wages invokes two statutory provisions, Iowa Code sections 85.27 and 85.39. Iowa Code section 85.27(1), provides an employer shall "furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies therefor and shall allow reasonably necessary transportation expenses incurred for such services." Iowa Code section 85.39, requires an injured employee is required to submit for an examination with a physician or physicians "at some reasonable time and place and as often as reasonably requested" by the employer, "without cost to the employee." Iowa Code § 85.39. The statute further provides, "[i]f the employee is required to leave work for which the employee is being paid wages to attend the requested examination, the employee shall be compensated at the employee's regular rate for the time the employee is required to leave work" and transportation to and from the examination. Id. The statute expressly covers Hoefer's lost wages. Hoefer is entitled to recover the cost of his lost wages for attending the appointments.

Hoefer also seeks to recover \$60.24 in lost wages his spouse incurred while driving him to the July 11, 2016 appointment with Dr. Broghammer. In Mycogen Seeds

v. Sands, 686 N.W.2d 457 (Iowa 2004), the court addressed the issue of whether an employee may be reimbursed for wages lost by the employee's spouse because of the spouse's absence from working when providing the employee with transportation to obtain authorized medical treatment. The court found the employee may be reimbursed for wages lost by the employee's spouse, and adopted the procedure set out in Mills v. Walden-Sparkman, Inc., 493 So.2d 64 (Fla. Dist. Ct. App. 1986) as follows:

The claimant has to prove the "mode of transportation taken was reasonable and economical under the circumstances, taking into consideration the medical condition of the claimant." Additionally, the claimant must produce evidence regarding the cost of the chosen manner of travel compared to the cost of "other reasonably available means of transportation." At this point, the burden shifts to "the employer and carrier to supply evidence that a more reasonable and economical transportation method exists, of which the claimant could have been aware, but chose not to take advantage of." The commissioner then weighs the evidence presented and determines how much the claimant should be reimbursed.

Mycogen Seeds, 686 N.W.2d at 468 (internal citations omitted).

CB Richard Ellis and Zurich retained Dr. Broghammer to perform an independent medical examination of Hoefer. Assuming a spouse's lost wages are recoverable for an examination under Iowa Code section 85.39, Hoefer has not met his burden under Mycogen Seeds. Hoefer testified his spouse drove him to Dr. Broghammer's appointment because his eyes were dilated. He did not produce evidence regarding "other reasonably available methods of transportation" or that he even requested transportation for the appointment from CB Richard Ellis and Zurich prior to the appointment. Hoefer is not entitled to reimbursement for his spouse's lost wages of \$60.24.

#### ORDER

IT IS THEREFORE ORDERED, that:

Defendants shall pay the claimant one hundred (100) weeks of permanent partial disability benefits, commencing on August 23, 2012, at the rate of six hundred twenty-one and 59/100 dollars (\$621.59).

Defendants are entitled to a credit for benefits previously paid.

Defendants are responsible for all causally related medical bills.

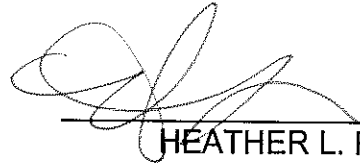
Defendants shall pay the claimant one thousand two hundred and 00/100 dollars (\$1,200.00) in penalty benefits.



Defendants shall reimburse the claimant one hundred and 00/100 dollars (\$100.00) for the filing fee, two thousand six hundred ninety and 00/100 dollars (\$2,690.00) for Dr. Sassman's reports, and three hundred seventy-five and 90/100 dollars (\$375.90) for lost wages.

Defendants shall file subsequent reports of injury as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 27<sup>th</sup> day of October, 2016.

  
HEATHER L. PALMER  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

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HLP/srs

**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.