BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DANIEL GILLIAM, Claimant, vs. OLSON BUILDERS, INC., Uninsured Employer, Defendant.	File No. 5062867 ARBITRATION DECISION Head Note Nos.: 1110, 1402.30, 1402.40, 1703, 1802, 1803, 2501, 2907, 4000.2

STATEMENT OF THE CASE

Daniel Gilliam, claimant, filed a petition for arbitration against Olson Builders, Inc., the uninsured employer. This case came before the undersigned for an arbitration hearing on September 25, 2019.

The evidentiary record includes Joint Exhibits 1 through 4, Claimant's Exhibits 1 through 7 and Defendant's Exhibit A. Claimant testified on his own behalf. No other witnesses were called to testify. The evidentiary record closed at the conclusion of the arbitration hearing and the case was considered fully submitted to the undersigned.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained an injury arising out of and in the course of his employment on July 24, 2016.

2. Whether the alleged injury caused temporary disability and, if so, the extent of claimant's entitlement to temporary disability, or healing period, benefits, if any.

3. Whether the alleged injury caused permanent disability and, if so, the extent of claimant's entitlement to permanent disability benefits, if any.

4. Whether claimant is entitled to payment, reimbursement, or an order requiring defendant to hold him harmless for past medical expenses.

5. The employer's entitlement to a credit for benefits paid, if any, against an award of benefits in this case.

6. Whether penalty benefits should be imposed against the employer for an unreasonable failure or delay in payment of weekly benefits.

7. Whether costs, including but not limited to the cost of the court reporter's attendance, should be taxed against either party.

FINDINGS OF FACT

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

Daniel Gilliam was an employee of Olson Builders, Inc. (hereinafter referred to as "Olson") on July 24, 2016. (Hearing Report) Claimant began working for Olson in 2012 and performed carpenter duties. Olson is a residential carpentry business, based in Boone, Iowa. However, the employer works at various sites throughout the State of Iowa, including in Okoboji, Iowa. (Claimant's testimony)

Mr. Gilliam explained that he typically worked 40 hours per week for Olson and his workdays were typically 8:00 a.m. to 5:30 p.m. On cross-examination, claimant was asked whether he was required to travel to Okoboji on July 24, 2016. Claimant testified that it was mandatory and that he did whatever his employer asked of him. No contrary evidence was introduced and it is found that it was mandatory for Mr. Gilliam to travel and report to a hotel in Okoboji on July 24, 2016.

Mr. Gilliam further testified that he was paid for his travel time either to or from a job site. In other words, he was paid to travel one-way for his work travels.

During the afternoon or evening of Sunday, July 24, 2016, Mr. Gilliam traveled from his home in Pilot Mound, Iowa, to Okoboji, Iowa, for what he testified was a "work trip." Mr. Gilliam was instructed to stay at the AmericInn hotel in Okoboji that evening. Claimant checked into the hotel for the evening and the employer, Olson, paid for the hotel charges. Claimant roomed with a co-worker the evening of July 24, 2016. (Claimant's testimony)

The intention of the employer and claimant was to begin working early the next morning at a construction site. Mr. Gilliam had stayed at the same hotel in the past for Olson when working in the Okoboji area. (Claimant's testimony)

Mr. Gilliam ate supper in Okoboji and watched TV in his hotel room. At approximately 10:00 to 10:30 p.m., Mr. Gilliam went outside the hotel to smoke a cigarette and make a call home. The grass outside was wet and claimant slipped off the parking curb. His right leg slipped out, but his left foot stayed planted in the ground and he fell down onto his left ankle. In doing so, claimant severely broke his left ankle. (Claimant's Exhibit 1, p. 4; Claimant's testimony)

After his fall, Mr. Gilliam used his cell phone to call his co-worker in the hotel room. His co-worker and the owner of Olson Builders, Inc., Tim Olson, came to his assistance. Mr. Olson transported claimant to the local hospital, Lakes Regional Healthcare, in his work truck after the fall.

X-rays taken at the hospital demonstrated the left ankle fracture. The emergency room personnel attempted to reset claimant's ankle that evening and released him from the hospital. Claimant spent the night in the hotel paid for by the employer. Claimant's co-worker transported Mr. Gilliam home the next day.

Unfortunately, claimant had no health insurance and the employer did not provide ongoing medical care for the injury. Instead, claimant qualified for Medicaid and obtained further medical care at Mary Greeley Hospital in Ames, Iowa. An orthopaedic surgeon, Sarkis Kaspar, M.D., evaluated claimant's left ankle on July 27, 2016, and recommended surgical intervention. Dr. Kaspar performed an open reduction and internal fixation on claimant's left ankle on that same date. (Joint Exhibit 2, p. 11) Claimant testified that the surgery did not improve his ongoing left ankle symptoms. Dr. Kaspar's notes indicate that there was reduction in swelling and claimant appeared for hearing without crutches, something he required prior to surgery. (Joint Ex. 2, p. 13)

Following surgery, claimant did not immediately obtain additional medical treatment. It appears he followed up with Dr. Kaspar a couple of times post-surgically, but did not receive any significant, or ongoing, medical care for the left ankle. Claimant was not able to return to work for Olson Builders, though he received wages from the employer for three weeks and unemployment benefits for approximately an additional three weeks after the injury. Claimant testified that he would not be physically capable of returning to work as a carpenter for Olson in his present condition.

Mr. Gilliam testified that he continues to have pain and swelling in his left ankle if he walks any significant distance (greater than 1-2 blocks). He testified that he continues to have tenderness around the surgical scar whenever the area is touched. Most recently, Mr. Olson sought care from a personal physician, who indicated that he might have bone chips floating in his left ankle and referred claimant for further treatment with an orthopaedic surgeon in Jefferson, Iowa. (Claimant's testimony)

At the time of hearing, claimant revealed that he had been evaluated by that surgeon and that the surgeon suggested he could undergo another surgical procedure to remove the bone chips and the hardware utilized to repair his left ankle. The surgeon hoped this would reduce claimant's left ankle symptoms, but advised if it does not work, claimant will require an ankle replacement. (Claimant's testimony)

Claimant testified that he has not worked since the date of injury. Instead, he applied for and received a Social Security disability award. He currently receives approximately $1,240.00 per month in Social Security benefits. He is no longer looking for work. (Claimant's testimony)

Following the injury on July 24, 2016, claimant received three weeks of wages from the employer. Claimant withdrew a claim for three weeks of healing period based upon this testimony and admission.

Claimant obtained an independent medical evaluation and a functional capacity evaluation (FCE). Claimant submitted to the FCE on April 18, 2017. The physical therapist performing the evaluation concluded that claimant gave consistent effort and

deemed the FCE valid. (Joint Ex. 4, p. 36) The FCE recommended claimant perform work within the sedentary work category, including no more than ten-pound occasional lifting. (Joint Ex. 4, p. 38)

Sunil Bansal, M.D., performed the independent medical evaluation upon claimant on May 12, 2017. Dr. Bansal opined that claimant's left ankle fracture was causally related to the incident occurring on July 24, 2016 in Okoboji. Dr. Bansal offered an unrebutted medical opinion that claimant achieved maximum medical improvement on the date of his evaluation, May 12, 2017. (Joint Ex. 3, p. 33) Given that there is no competing medical evidence, I find that claimant's left ankle injury is causally related to the fall on July 24, 2016 and that claimant achieved maximum medical improvement on May 12, 2017. I further find that claimant's entitlement to permanent partial disability benefits is ripe for determination at this time.

Dr. Bansal again provided the only medical opinion pertaining to permanent impairment. Dr. Bansal identified decreases in claimant's left ankle ranges of motion. He opined that claimant sustained a nine percent (9%) permanent impairment of the left lower extremity as a result of the July 24, 2016 accident. (Joint Ex. 3, p. 34) Given that this opinion is not rebutted in this evidentiary record, I find that claimant has proven a permanent functional loss as a result of the July 24, 2016 injury that has resulted in a nine percent (9%) permanent impairment of the left leg.

Mr. Gilliam also seeks an award of past medical expenses contained at Claimant's Exhibit 6. The employer disputes liability for these past medical expenses. However, at the commencement of hearing, the employer stipulated that the medical expenses and corresponding medical treatment were reasonable and necessary. (Hearing Report; Hearing Transcript) The employer also stipulated that the medical expenses were causally connected to the medical conditions upon which this claim of injury is based. (Hearing Report; Hearing Transcript) Therefore, I specifically find that the medical expenses contained in Claimant's Exhibit 6 are reasonable and necessary and that they are causally related to the July 24, 2016, left ankle fracture.

CONCLUSIONS OF LAW

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

"An injury in the course of the employment embraces all injuries received while employed in further the employer's business." Crees v. Sheldahl Tel. Co., 258 Iowa 292 298, 139 N.W.2d 190,194 (1965). "An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit of his employer." Id.

The Iowa Supreme Court recognized long ago that there is a difference between injuries that occur at an established workplace and those that occur as the result of travel associated with work. Walker v. Speeder Machinery Corp., 213 Iowa 1134, 240 N.W. 725 (1932). As the Court noted in Walker:

> Where the duties of the employee require him to travel and visit difference places in order that he may discharge the duties of his employment, his place of work is thereby enlarged or extended to include all the places to which such employee necessarily goes in discharging the duties of his employment.

Walker, 213 Iowa at 1148, 240 N.W. at 731 (quotation omitted).

The facts of the Walker case are strikingly similar to claimant's travels. In Walker, the claimant traveled to Pittsburgh, Pennsylvania on a Sunday in anticipation of beginning his work duties on Monday morning. He was injured as he traveled from his hotel to a restaurant. The Court found the injury compensable. In doing so, they noted that it is necessary for a worker during travels to rest at hotels and eat meals. Walker, 213 Iowa at 1149, 204 N.W. at 732.

In this case, the employer disputes whether the July 24, 2016 injury arose out of and in the course of employment. Certainly, the left ankle injury did not occur on a specific job site while performing a specific work task. However, I found that claimant was required to travel to Okoboji on Sunday, July 24, 2016 in anticipation of an early start to the workday the next day. Claimant stayed at the hotel, which was selected and paid for by the employer. Mr. Gilliam was attending to personal needs, involving smoking a cigarette and calling home while traveling when he was injured. Therefore, the left ankle injury occurred at a site where the employer required claimant to be in anticipation and in advancement of his employment and the employer's business interests.

In fact, this case is very similar to the facts in Walker with claimant's injury occurring on a Sunday evening before commencing work on a Monday morning. As noted by the Court in Walker, a worker sent to work at a remote location from their residence must seek rest in hotels. Mr. Gilliam's injury occurred while enjoying rest at a hotel selected and paid for by the employer. It occurred the evening before he commenced work and the travel was done at the employer's direction in anticipation of starting work in the morning. Therefore, Mr. Gilliam's travel on Sunday was for the benefit of the employer and in advancement of its interests.

In Vandarwarka v. Pro Environmental Abatement, Inc., File No. 1303751 (Appeal May 2002), the Iowa Workers' Compensation Commissioner held that "a traveling employee is considered to be in the course of their employment continuously for the duration of the travel on behalf of the employer." See also Bringman v. Cole Construction Co., File No. 5010277 (Appeal August 2006). Therefore, I conclude that Mr. Gilliam's left ankle injury on July 24, 2016, occurred in the course of his employment.

Olson also disputes whether the injury arose out of claimant's employment. Indeed, there was nothing specific about the work to be performed the following day that caused Mr. Gilliam's left ankle injury. However, that is not the legal standard to determine whether an injury arises out of employment for a traveling employee.

In Walker v. Speeder Machinery Corp., 213 Iowa 1134, 240 N.W. 725 (1932), the Iowa Supreme Court noted it was necessary for Mr. Gilliam to travel and stay in a hotel to perform his work duties. Mr. Walker "was in the city of Pittsburg solely because he had been ordered there by his employer." Walker, 213 Iowa at 1149, 240 N.W. at 732. Similarly, Mr. Gilliam was in Okoboji on July 24, 2016 because he had been ordered to be there by his employer. Surely, Mr. Gilliam would have preferred to be with his loved ones at home, rather than traveling. Yet, his job duties required him to be away from home and stay in a motel. His efforts to attend to personal needs, such as smoking a cigarette and calling home, do not convert this claim. Rather such actions are reasonable and necessary personal comforts while away from home. As the Iowa Supreme Court noted in Rish v. Iowa Portland Cement Co., 186 Iowa 443, 448, 170 N.W 532, 534 (1919), "Injuries received while the workman was engaged in ministering to himself, such as warming himself, seeking shelter, quenching his thirst, taking refreshment, food, fresh air, or resting in the shade, have been held compensable."

Walker referred to traveling employees as being in "continuous employment." 213 Iowa at 1146, 240 N.W. at 730. The Iowa Worker's Compensation Commissioner has also adopted this term and approach to determining whether traveling employees are in the course of their employment and whether their injury arose out of that employment. See Bringman v. Cole Construction Co., File No. 5010277 (Appeal August 2006) (2006 WL 2528603); Vandarwarka v. Pro Environmental Abatement, Inc., File No. 1303751 (Appeal May 2002) (2002 WL 32125297) ("a traveling employee is considered to be in the course of their employment continuously for the duration of the travel on behalf of the employer.").

Mr. Gilliam's desires for fresh air, his personal comfort of a cigarette, and a personal phone call outside the earshot of his roommate are all reasonable and necessary efforts to minister to his needs while traveling for the employer. If the employer had not ordered Mr. Gilliam to travel and stay in Okoboji, he would not have been in the hotel or parking area where he was injured. Similarly, if he was not traveling for work, he would not have been on the phone trying to make a phone call home. I conclude that Mr. Gilliam's injury arose out of his employment with Olson and is compensable.

Having concluded that claimant established his injury arose out of and in the course of his employment, I must consider his requests for award of healing period, permanent disability, and medical benefits. Mr. Gilliam's first request is for healing period benefits from July 25, 2016 through May 12, 2017. (Hearing Report)

At trial, claimant conceded the employer paid him three weeks of wages after the injury date. Therefore, I conclude that the employer is entitled to a credit of three weeks against any award of healing period. Interestingly, however, the employer stipulated that claimant was off work during the claimed healing period. (Hearing Report)

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).

In this case, Mr. Gilliam presented unrebutted medical evidence from Dr. Bansal to establish a causal connection between his fall on July 24, 2016 and his resulting left ankle fracture. Claimant carried his burden of proof to establish a causal connection between his time off work from July 25, 2016 through May 12, 2017 and the work injury to his left ankle.

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

In this instance, claimant proved he was off work, offered unrebutted testimony that he was not physically capable of returning to work as a carpenter, and that he did not achieve maximum medical improvement until May 12, 2017. Therefore, I conclude that the earliest of the factors outlined in Iowa Code section 85.34(1) is achieving maximum medical improvement. Therefore, I conclude that claimant has proven entitlement to healing period benefits from July 25, 2016 through May 12, 2017, subject to the three-week credit for wages paid by the employer as noted above.

Mr. Gilliam also claims entitlement to permanent disability benefits. He presented the only medical evidence in this record, establishing that he sustained permanent disability. Therefore, I conclude claimant is entitled to permanent disability benefits in some amount.

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).

In this case, claimant introduced the only medical opinion pertaining to permanent impairment. Dr. Bansal opined that Mr. Gilliam sustained a nine percent (9%) permanent impairment of the left lower extremity as a result of the July 24, 2016 injury. I accepted that impairment rating and found that claimant proved a nine percent (9%) permanent functional loss of the left leg as a result of the July 24, 2016 work injury.

The Iowa legislature has established a 220-week schedule for leg injuries. Iowa Code section 85.34(2)(o). Claimant is entitled to an award of permanent partial disability benefits equivalent to the proportional loss of his leg. Iowa Code section 85.34(2)(v); Blizek v. Eagle Signal Company, 164 N.W.2d 84 (Iowa 1969). Nine percent (9%) of 220 weeks equals 19.8 weeks. Claimant is, therefore, entitled to an award of 19.8 weeks of permanent partial disability benefits against the employer. Iowa Code section 85.34(2)(o), (v).

Permanent partial disability benefits commence at the termination of the healing period. Iowa Code section 85.34(1). Having concluded that the healing period ended on May 12, 2017, I conclude that the permanent partial disability benefits should commence on May 13, 2017.

Claimant also seeks an award of past medical expenses contained at Claimant's Exhibit 6. The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

The employer stipulated that the medical expenses were reasonable and necessary. The employer further stipulated that the medical expenses were causally related to the condition upon which this claim was based, namely, the left ankle. Having concluded that the injury is compensable under Iowa's worker's compensation laws, I similarly conclude that the employer is responsible for payment, reimbursement of

claimant or any third-party payer, and to hold claimant harmless for all past medical expenses contained in Claimant's Exhibit 6. Iowa Code section 85.27(4).

Mr. Gilliam also asserts a claim for penalty benefits. Claimant asserts that the employer unreasonably denied or delayed payment of weekly benefits and that penalty benefits should be assessed pursuant to Iowa Code section 86.13.

Iowa Code section 86.13(4) 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.

In Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996), and Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996), the supreme court said:

> Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."
>
> Christensen, 554 N.W.2d at 260.

The supreme court has stated:

> (1) If the employer has a reason for the delay and conveys that reason to the employee contemporaneously with the beginning of the delay, no penalty will be imposed if the reason is of such character that a

reasonable fact-finder could conclude that it is a "reasonable or probable cause or excuse" under Iowa Code section 86.13. In that case, we will defer to the decision of the commissioner. See Christensen, 554 N.W.2d at 260 (substantial evidence found to support commissioner's finding of legitimate reason for delay pending receipt of medical report); Robbennolt, 555 N.W.2d at 236.

(2) If no reason is given for the delay or if the "reason" is not one that a reasonable fact-finder could accept, we will hold that no such cause or excuse exists and remand to the commissioner for the sole purpose of assessing penalties under section 86.13. See Christensen, 554 N.W.2d at 261.

(3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City Meats, Inc., 528 N.W.2d at 109, 111 (Iowa 1995); or (b) the employer had a reasonable basis to contest the claim—the "fairly debatable" basis for delay. See Christensen, 554 N.W.2d at 260 (holding two-month delay to obtain employer's own medical report reasonable under the circumstances).

(4) For the purpose of applying section 86.13, the benefits that are underpaid as well as late-paid benefits are subject to penalties, unless the employer establishes reasonable and probable cause or excuse. Robbennolt, 555 N.W.2d at 237 (underpayment resulting from application of wrong wage base; in absence of excuse, commissioner required to apply penalty).

> If we were to construe [section 86.13] to permit the avoidance of penalty if any amount of compensation benefits are paid, the purpose of the penalty statute would be frustrated. For these reasons, we conclude section 86.13 is applicable when payment of compensation is not timely . . . or when the full amount of compensation is not paid.

Id.

(5) For purposes of determining whether there has been a delay, payments are "made" when (a) the check addressed to a claimant is mailed (Robbennolt, 555 N.W.2d at 236; Kiesecker, 528 N.W.2d at 112), or (b) the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 235.

(6) In determining the amount of penalty, the commissioner is to consider factors such as the length of the delay, the number of delays, the information available to the employer regarding the employee's injury and

wages, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

(7) An employer's bare assertion that a claim is "fairly debatable" does not make it so. A fair reading of Christensen and Robbennolt, makes it clear that the employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." See Christensen, 554 N.W.2d at 260.

Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

Weekly compensation payments are due at the end of the compensation week. Robbennolt, 555 N.W.2d 229, 235.

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

When an employee's claim for benefits is fairly debatable based on a good faith dispute over the employee's factual or legal entitlement to benefits, an award of penalty benefits is not appropriate under the statute. Whether the issue was fairly debatable turns on whether there was a disputed factual dispute that, if resolved in favor of the employer, would have supported the employer's denial of compensability. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

In this case, claimant clearly established that, other than three weeks of wages, the employer paid no additional benefits to claimant after the date of injury. Claimant clearly established a delay or denial of weekly benefits. Therefore, claimant established a prima facie case for penalty benefits.

Defendant did not offer any evidence that it conducted a contemporaneous or reasonable investigation. The employer offered no specific excuse for the delay in payment of benefits. Iowa Code section 86.13(4)(b)(2). Defendant did not prove that it contemporaneously conveyed its bases for delay of benefits to claimant. Iowa Code section 86.13(4)(c)(3). Defendant bore the burden to establish a reasonable basis, or excuse, and to prove the contemporaneous conveyance of those bases to the claimant. Defendant failed to carry its burden of proof on the penalty issues, and a penalty award is appropriate. Iowa Code section 86.13.

The purpose of Iowa Code section 86.13 is both punishment for unreasonable conduct but also deterrence for future cases. Id. at 237. In this regard, the Commission is given discretion to determine the amount of the penalty imposed with a maximum penalty of 50 percent of the amount of the delayed, or denied, benefits. Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 261 (Iowa 1996).

In exercising its discretion, the agency must consider factors such as the length of the delays, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Meyers

v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996). In this case, the employer demonstrated no evidence that it attempted to investigate this claim, analyzed the applicable law, or that it attempted to convey its basis for denial to claimant. Instead, it appears that the employer is uninsured, made no effort to pay weekly benefits to claimant outside of the three weeks of additional wages, and simply denied liability for the injury without reasonable cause or excuse.

Claimant sustained a significant injury and was unable to return to gainful employment. Claimant needed income and the employer failed to live up to its statutory obligation to provide insurance and/or pay weekly benefits during claimant's period of convalescence and for his permanent disability. I perceive no reasonable excuse for the denial of the claim.

Defendant unreasonably denied 38.571 weeks of healing period benefits. The employer denied the 19.8 weeks of permanent disability to which claimant is entitled. In total, I calculate the employer denied 58.371 weeks of benefits at the stipulated weekly rate of $419.56. In total, the employer unreasonably denied claimant $24,490.14 in weekly benefits.

The employer does not have a history of penalty benefits. On the other hand, it also did not have a worker's compensation insurance policy to protect its employees, as required by Iowa Code section 87.14A. Nor did the employer offer any basis for its denial of benefits.

Considering the relevant factors and the purposes of the penalty statute, I conclude that a section 86.13 penalty in the amount of $10,000.00 is appropriate in this case. Such an amount is appropriate to punish the employer for its unreasonable denial of benefits and should serve as a deterrent against future conduct.

As noted, the employer was uninsured for this injury. The employer filed a First Report of Injury, detailing that it did not have insurance for this injury. In its answer, the employer acknowledged and admitted that it did not have worker's compensation insurance for the alleged injury. Iowa Code section 87.14A requires that an employer obtain worker's compensation insurance before engaging in business in the State of Iowa and declares the failure to insure employees a class D felony. Given the employer's admissions, I conclude it is appropriate that this file be referred to the Iowa Workers' Compensation Commissioner for consideration of the employer's failure to insure.

Iowa Code section 87.2(1) provides:

> An employer who fails to insure the employer's liability as required by this chapter shall keep posted a sign of sufficient size and so placed as to be easily seen by the employer's employees in the immediate vicinity where working, which sign shall read as follows:

NOTICE TO EMPLOYEES

You are hereby notified that the undersigned employer has failed to insure the employer's liability to pay compensation as required by law, and that because of such failure the employer is liable to the employer's employees in damages for personal injuries sustained by the employer's employees.

The employer is required to provide his signature on the sign, which is required by Iowa Code section 87.2. The employer is also advised that failure to post and keep the above sign in the manner and form required is a simple misdemeanor. Iowa Code section 87.2(2).

Finally, claimant seeks an assessment of his costs associated with this case. Claimant prevailed on all issues. I conclude that it is appropriate to assess his costs against defendant. Iowa Code section 86.40.

Claimant seeks assessment of his filing fee and service expenses. Both are reasonable and permissible under agency rule 876 IAC 4.33. I conclude the filing fee ($100.00) and service expense ($30.50) should be assessed as costs.

Claimant also seeks assessment of the cost of procuring the services of a court reporter for the arbitration hearing. Pursuant to the hearing assignment order issued by the commissioner, the employer was obligated to procure the court reporter for the hearing. Having not done so, claimant's counsel arranged for the appearance of a certified shorthand reporter for the arbitration hearing. Having prevailed, claimant should be reimbursed the expense of the court reporter pursuant to 876 IAC 4.33(1).

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall pay claimant healing period benefits from July 25, 2016 through May 12, 2017.

Defendant is entitled to a credit against these healing period benefits for three weeks of wages paid to claimant after the injury occurred.

Defendant shall pay claimant nineteen point eight (19.8) weeks of permanent partial disability benefits commencing on May 13, 2017.

All healing period and permanent partial disability benefits shall be paid at the rate of four hundred nineteen and 56/100 dollars ($419.56) per week.

Defendant shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15

report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

Defendant shall pay any outstanding medical expenses contained in Claimant's Exhibit 6 directly to the medical providers, shall reimburse claimant or a third-party payer for all other medical expenses previously paid and documented in Claimant's Exhibit 6, and shall hold claimant harmless for all expenses outlined and contained in Claimant's Exhibit 6.

Defendant shall pay claimant ten thousand dollars ($10,000.00) in penalty benefits.

Defendant shall reimburse claimant's costs totaling one hundred thirty and 50/100 dollars ($130.50).

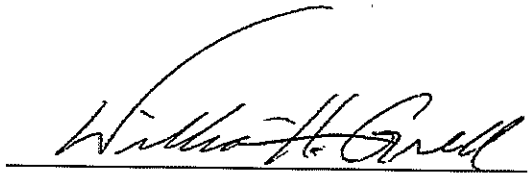
Claimant shall send a copy of the court reporter's statement, along with proof of payment to defendant within fourteen (14) days of the filing of this decision.

Defendant shall reimburse claimant for the cost of the court reporter's attendance at the arbitration hearing.

A copy of this decision shall be provided to the workers' compensation commissioner to determine whether further action should take place under Iowa Code section 87.14A for failure to have workers' compensation insurance.

The employer shall post the necessary sign, as required by Iowa Code section 87.2.

Signed and filed this 12th day of November, 2019.



WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Matthew Milligan (via WCES)

Tim Olson
Olson Builders, Inc.
PO Box 225
Clear Lake, IA 50428
Timolson1536@yahoo.com
(VIA EMAIL, U.S., AND CERTIFIED MAIL)

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.