BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

GARY RICHARDSON,

Claimant,

vs.

RICHARDSON ENTERPRISES,

Employer,

and

STATE FARM INSURANCE

Insurance Carrier,
Defendants.

FILED

JAN 20 2011

WORKERS COMPENSATION

File No. 5029267

ARBITRATION

DECISION

Head Note Nos.: 1100; 1801; 1801.1; 2701; 3001

## STATEMENT OF THE CASE

Gary Richardson, claimant, filed a petition in arbitration against his employer, Richardson Enterprises, and its insurance carrier, State Farm Insurance (defendants). The claimant testified at the hearing as well as his wife/employer Linda Richardson. Joint exhibits A through N were admitted into evidence. Exhibit I, page 29, was removed and is not part of the record. Claimant's exhibits 1-10 were admitted into evidence. A transcript of the hearing was provided.

## ISSUES

1. Whether the claimant's injury arose out of and in the course of employment.
2. The extent of claimant's entitlement to temporary benefits.
3. The gross earnings and average weekly rate of the claimant.
4. Payment of medical expenses and medical mileage.
5. Whether the claimant is entitled to alternate medical care.
6. Whether claimant is entitled to penalty benefits under Iowa Code section 86.13.

7. Payment of wages for claimant to attend medical appointments under 85.27(7).

8. Assessment of costs.

The stipulation of the parties in the hearing report is incorporated by reference in this decision. The parties stipulated that the medical providers would testify as to the reasonableness of their fees and treatments. The parties did not believe the issue of permanent benefits was ripe for adjudication at the time of the hearing. Therefore, no ruling on permanency will be made in this decision.

## FINDINGS OF FACT

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

The claimant, Gary Richardson, has been an electrician most of his adult life. He works for the defendant Richardson Enterprises. A company, which is owned by his wife Linda Richardson. Richardson Enterprises uses union electricians. The claimant is a union electrician. Due to a raise in the union contract, he is earning more per hour after his injury than before his injury on September 2, 2008. Much of the work that Richardson Enterprises performs is at the Louisa Generating Station, which is owned by MidAmerican Energy. Richardson Enterprises bids on work at the Louisa Generating Station when requested to by MidAmerican Energy. The claimant and Linda Richardson work together on putting bids together on jobs. MidAmerica requested Richardson Enterprises to submit a bid on providing lighting at a specific site at the Louisa Generating Station. The claimant went to the site on September 2, 2008 to review the site so his employer could submit a bid on the work to provide lighting. It was not unusual for the claimant to go to a site before normal work hours. While at the site, the claimant tripped and fell. The claimant gave two versions of how he fell. His first version was that he tripped on some metal on the ground. He latter offered a version that he may have tripped on his pant leg cuff. Thomas Thompson testified by way of deposition. (Exhibit L, pages 1-16) Mr. Thompson is an employee of MidAmerican Energy. He has worked with the claimant for a number of years. Mr. Thompson would have frequent contact with the claimant at the work site at the Louisa Generating Station. Thomas Thompson, testified he removed a piece of metal from the area where the claimant fell. (Ex. L, p. 4; Ex. p. 1) Mr. Thompson testified that the area the claimant was at when he fell was dark and there were many items someone could trip on. (Ex. L, p. 5) In his deposition, Mr. Thompson was asked what transpired on September 2, 2008 concerning the claimant. He stated:

> The – that morning, I was in the scrubber control room. That's where I usually start my morning at. I think I was going through the graphics of seeing how it went last night, the night before.

> And as there—Gary came in the side door and said that he – asked if I'd call the gate. His wife was going to pick him up. And I said, what's wrong. And he told me that he wasn't sure, but he fell. I think he tripped over some steel or something over by the transformers. And that his shoulder was really hurting him, and he was in a lot of pain. And then I asked Gary – I told—I asked him—I told him—I told Gary that I would take him to the hospital, if he wanted, but it was his call. I said I don't want you to be sitting around in pain, because it takes so long at Louisa to get assistance. And Gary agreed. He called his wife. Told her to meet him at the hospital. And I took him to the hospital and waited till his wife got there.

(Ex. L, p. 2)

Mr. Thompson testified that the claimant told him he thought he might have tripped on some steel. (Ex. L, p. 4, 7) Mr. Thompson testified Richardson Enterprises was asked to look at putting in a bid for lighting in the area that Mr. Richardson fell.

(Ex. L, p.4)

On September 3, 2008, the defendant, Richardson Enterprises, sent an email to Neal Nelson and Thomas Thompson at the Louisa Generating station. The email stated the following,

> 6 a.m. – While inspecting lighting around RAT 1 & 2 and the GSU, for the installation of new lighting, my feet came into contact with an object in the southeast corner of the catch basic for RAT I (a metal object on top of the drain), which caused me to lose my balance and I fell forward into the new blow-out wall that was installed by Seither & Cherry. As I started to fall, I put both arms out to catch myself and my left arm slid down the blow-out wall and catch basin for RAT1. This resulted in an anterior dislocated left shoulder plus scrapes and bruises to my left leg.

(Ex. L, p. 14)

The claimant testified he was initially told he was not covered for workers' compensation coverage, as he was the owner of Richardson Enterprises. In an attempt to have his health insurance carrier provide coverage for his shoulder he submitted a claim stating he never tripped over metal but tripped over a pant cuff while looking around some equipment. (Ex. I, p. 36)

The claimant has incurred medical expenses in having his shoulder treated which the defendants have not paid. The claimant has incurred $17, 648 in medical bills and 4,244 in mileage which has not been reimbursed. (Ex. 9; Ex. 10)

The Unity Hospital Emergency Room report of September 2, 2008, states he slipped and fell against a wall injuring his left shoulder. The impression was left

shoulder dislocation. (Ex. A, p. 2) Daniel Yoo, M.D., saw the claimant on September 12, 2008. Dr. Yoo's impression after examination was "Left shoulder partial thickness tear after shoulder dislocation with superior labral degeneration fraying." (Ex. B, p.1) On January 23, 2009, Dr. Yoo examined the claimant. His impression was:

> 1. Patient with history of diabetes and history of shoulder dislocation that was reduced approximately four and a half months ago. He continues to struggle along. He has pain and stiffness likely to secondary to lack of physical therapy. Previous MRI did not show a full thickness rotator cuff tear. He also has had a very slow recovery of his axillary nerve with ongoing numbness in this region.
> 2. Pain in the left elbow, medial aspect. Previous EMG nerve conduction studies showed some concern along the ulnar nerve root along the cubital tunnel.

(Ex. B, p. 6)

On January 23, 2009, Dr. Yoo also wrote a letter stating that the claimant's injuries were not within the recommended confines of his job or during work hours and as such his injury may not be covered by workers' compensation. (Ex. B, p. 7) Dr. Yoo wrote on March 25, 2010, that his record as to whether the claimant was not injured at work was incorrect. Dr. Yoo stated he remembers the claimant fell at work and a prior dictation that said the claimant injured himself at home was incorrect. (Ex. F, p. 1)

The claimant went to Rock Valley Physical Therapy. The initial evaluation note of September 16, 2008 states the claimant reported tripping over some pieces of metal at work. (Ex. G, p. 1)

The claimant saw his family doctor Linda Cooley, M.D., on January 21, 2009. Her note states the claimant tripped on a cord and fell on his shoulder. (Ex. A, p. 6) A note of April 13, 2009 by Dr. Cooley states the claimant fell in a parking lot at his place of work and was having a problem with workers' compensation. (Ex. A, p. 9)

On March 3, 2010, Mark Fish, D.O., evaluated the claimant's left shoulder. (Ex. H, pp. 1, 2) Dr. Fish's impression was "Anterior instability with high-grade rotator cuff tear, cannot rule out full thickness rotator cuff tear." (Ex. H, p. 2) Dr. Fish noted the claimant had failed conservative management and recommended surgical management. (Ex. H, p. 2)

## CONCLUSIONS OF LAW

The first issue that must be resolved is whether claimant sustained an injury on September 2, 2008 that arose out of and in the course of his employment.

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

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

The defendant correctly states it is the claimant's burden to prove by a preponderance of the evidence that his injury arose out of and in the course of his employment at Richardson Enterprises. The defendant is correct there have been inconsistent versions posited by the claimant as to how he was injured. The claimant has taken inconsistent positions in attempt to get medical coverage for his injury. The workers' compensation carrier, Travelers, denied coverage. When that happened, the claimant tried to get his health insurance company, to cover his injury. In an attempt to have his health care carrier cover his claim, the claimant asserted the injury was an idiopathic injury (tripping on his pant cuff) or happened during non-work hours and therefore was not excluded by his health insurance. There are medical records that also raise questions about how the injury occurred. The September 5, 2008 letter of Dr. Yoo states the claimant was injured in his home. (Ex. I, p. 38) Dr. Yoo wrote a letter of March 25, 2010 as a correction of his September 5, 2008 dictation. Dr. Yoo wrote he specifically remembers the claimant's injury was a result of a fall at work and his prior dictation was incorrect. (Ex. F, p.1) The records of Dr. Cooley appear to be based upon her misunderstanding what happen to the claimant. The most convincing evidence in this case is that of the testimony of Mr. Thompson. His testimony is that the claimant fell at the Louisa Generating Station when the claimant was inspecting the site

for a job bid. He did not see the fall, but did remove a piece of steel that the claimant most likely tripped over. He noted in his testimony that there were a number of items the claimant could have tripped on at the work site. The claimant very shortly after his fall told Mr. Thompson he had tripped at the work site. The email sent by Richardson Enterprises, the day after his accident, is consistent with the claimant tripping on a piece of steel at work. Alternatively, even if the piece of steel did not cause the claimant to trip, I would find the darkness and rough floor condition contributed to or aggravated the risk to the claimant, and therefore the injury would arise out of and in the course of his employment. The claimant was at the Louisa Generating Station on behalf of his employer at the time of his injury. I find the claimant has proven by a preponderance of the evidence he fell and injured his shoulder at work on September 2, 2008. The injury arose out of and in the course of his employment with Richardson Enterprises.

The next issue to decide is the claimant's gross income and weekly rate.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings that fairly represent the employee's customary earnings, however. Section 85.36(6).

In Hilltop Care Center v. Burton No. 09-1633, filed June 30, 2010 (Iowa Ct. App.) (Application for further review granted October 5, 2010) the court held in calculating the gross wages of an employee, the wages the claimant actually received, not the wages the employer meant to pay should be considered. In Hilltop, the employer asserted it made a mistake and paid the employee at a higher rate of pay for 15 months. The court rejected this argument.

The claimant is arguing that his gross wages as shown in exhibit 8 are the wages he should/could have earned. (Tr. p. 58; Ex. 8, p. 1; Ex. N, p.13). The claimant asserts that the pay records, exhibit N pages 6, 7 & 8 should not be used because they do not reflect time off for attending a funeral or vacation. Even if the claimant were correct that his gross wages should include the time he took for vacation and funeral he failed to provide enough specific information to know if the time he was absent was during the 13 weeks before his accident. The claimant failed to prove specific information about any time off in the 13 weeks leading up to his injury to calculate his gross wages other than the actual wages he was paid as shown in exhibit N pages 6, 7 and 8. Ms. Richardson testified that the wage records exhibits N, pages 6, 7, and 8 were accurate. (Ex. M, p. 8) Ms. Richardson testified after the accident there were a number of weeks the claimant did not work regular 40 hours because, the claimant could not climb. (Ex. M, p. 5) The record does not show on any type of consistent basis that the claimant customarily worked 40 hours per week. Only one exhibit shows for a month, the claimant worked 40 hours per week. (Ex., N, p. 3) The records submitted show that the claimant would work more or less than 40 hours per week, before and after his accident. (Ex. N, pp. 1 – 12) I find that the defendant's calculation of gross income [$11,705.60

÷13 = $900.43] is correct. (Ex. N, p.12) The claimant's weekly rate is therefore $571.90

The next issue is temporary benefits.

The claimant is not at MMI so no determination on permanency is being made in this decision. The claimant, in his post trial brief requests, "Healing period benefits from the date of injury to the present and ongoing." As the claimant is not at MMI healing period benefits are not available. The claimant is not clear as to whether he is requesting temporary partial or temporary total or some combination of the both. There is no finding, at this time, the claimant has a permanent partial disability. Compensation begins on the fourth day of disability after injury, unless the period of incapacity extends beyond 14 days. Iowa Code section 85.32. Iowa Code section 85.33 provides:

85.33 Temporary total and temporary partial disability.

1. Except as provided in subsection 2 of this section, the employer shall pay to an employee for injury producing temporary total disability weekly compensation benefits, as provided in section 85.32, until the employee has returned to work or is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

2. "Temporary partial disability" or "temporarily, partially disabled" means the condition of an employee for whom it is medically indicated that the employee is not capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, but is able to perform other work consistent with the employee's disability. "Temporary partial benefits" means benefits payable, in lieu of temporary total disability and healing period benefits, to an employee because of the employee's temporary partial reduction in earning ability as a result of the employee's temporary partial disability. Temporary partial benefits shall not be considered benefits payable to an employee, upon termination of temporary partial or temporary total disability, the healing period, or permanent partial disability, because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of injury.

3. If an employee is temporarily, partially disabled and the employer for whom the employee was working at the time of injury offers to the employee suitable work consistent with the employee's disability the employee shall accept the suitable work, and be compensated with temporary partial benefits. If the employee refuses to accept the suitable work with the same employer, the employee shall not be compensated with temporary partial, temporary total, or healing period benefits during

the period of the refusal. If suitable work is not offered by the employer for whom the employee was working at the time of the injury and the employee who is temporarily partially disabled elects to perform work with a different employer, the employee shall be compensated with temporary partial benefits.

4. If an employee is entitled to temporary partial benefits under subsection 3 of this section, the employer for whom the employee was working at the time of injury shall pay to the employee weekly compensation benefits, as provided in section 85.32, for and during the period of temporary partial disability. The temporary partial benefit shall be sixty-six and two-thirds percent of the difference between the employee's weekly earnings at the time of injury, computed in compliance with section 85.36, and the employee's actual gross weekly income from employment during the period of temporary partial disability. If at the time of injury an employee is paid on the basis of the output of the employee, with a minimum guarantee pursuant to a written employment agreement, the minimum guarantee shall be used as the employee's weekly earnings at the time of injury. However, the weekly compensation benefits shall not exceed the payments to which the employee would be entitled under section 85.36 or section 85.37, or under subsection 1 of this section.

5. If an employee sustains an injury arising out of and in the course of employment while receiving temporary partial disability benefits, the rate of weekly compensation benefits shall be based on the employee's weekly earnings at the time of the injury producing temporary partial disability.

6. For purposes of this section and section 85.34, subsection 1, "employment substantially similar to the employment in which the employee was engaged at the time of the injury" includes, for purposes of an individual who was injured in the course of performing as a professional athlete, any employment the individual has previously performed.

The claimant must prove his entitlement to such benefits. There is specific evidence that the claimant was not able to work because of his injury from September 2, 2008 through September 8, 2008. (Ex. M, p.16) The claimant is entitled to temporary total period benefits for September 5, 2008 through September 8, 2008, three days.

An employee is entitled to appropriate temporary partial disability benefits during those periods in which the employee is temporarily, partially disabled. An employee is temporarily, partially disabled when the employee is not capable medically of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, but is able to perform other work consistent with the employee's disability. Temporary partial benefits are not payable upon termination of temporary disability, healing period, or permanent partial disability simply because the

employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of the injury. Section 85.33(2).

When an injured worker has been unable to work during a period of recuperation from an injury that did not produce permanent disability, the worker is entitled to temporary total disability benefits during the time the worker is disabled by the injury. Those benefits are payable until the employee has returned to work, or is medically capable of returning to work substantially similar to the work performed at the time of injury. Section 85.33(1).

The claimant has not shown he is entitled to a running period of temporal total benefits. The claimant has continued to work for his employer, except for one week, since his injury. The claimant testified he is doing work, after the accident of September 2008, and being paid at the journeyman rate rather than foreman rate. The claimant has submitted a document, which it contends are the hours worked by the claimant. (Ex. 8, p. 1; Ex. N, p. 13) This exhibit is not consistent with the hours the claimant actually worked, either before or after his accident. In October 2008, the claimant worked 164 hours, in November 2008, 128 hours and in December he worked 136 hours. (Ex. N, pp. 10, 11, 12) Exhibit 8 assumes the claimant would work 40 hours per week. This assumption in not backed up by the wage records. Therefore, I cannot use exhibit 8 to determine the amount of temporary partial benefits the claimant may be entitled to receive. The records show that the number of hours worked would vary from month to month. The claimants wage rate has increased. The claimant has failed to prove by a preponderance of the evidence his entitlement to these benefits.

There is credible evidence the claimant was absent for medical treatment 19 full days (8 hours) and 6 hours on another day. (Ex. M, p. 16) Those days are September 11, 2008; September 12, 2008: September 24, 2008; October 2, 2008; October 10, 2008; October 24, 2008; October 27, 2008; October 31, 2008; November 24, 2008; December 5, 2008; December 23, 2008; December 30, 2008; December 31, 2008; January 7, 2009; January 8, 2009; January 12, 2009; January 23, 2009; February 9, 2009; February 18, 2009 and six hours on February 5, 2009. (Ex. M, p. 16). The payment of the wage equivalent to injured workers under 85.27(7) is part of the variety of medical issues addressed by 85.27. See R.R. Donnelly & Sons v. Barnett, 670 N.W.2d 195 (Iowa 2003). The payment of the equivalent wages is specifically designated as not the payments of weekly benefits. Iowa Code section 85.27(7). The payments assist claimants when they receive medical care after missing more than three days of work due to a work related injury and allow claimants to attend to medical appointments without undue inconvenience and adverse wage consequence. The claimant is entitled to payment for 158 hours [19 ¾ days] of wages at $24.80 per hour under 85.27(7).

The next issue to be resolved is whether defendants, are liable for the medical expenses claimed by claimant. 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-reopen 1975).

Evidence in administrative proceedings is governed by section 17A.14. The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence. The rules of evidence followed in the courts are not controlling. Findings are to be based upon the kind of evidence on which reasonably prudent persons customarily rely in the conduct of serious affairs. Health care is a serious affair.

Prudent persons customarily rely upon their physician's recommendation for medical care without expressly asking the physician if that care is reasonable. Proof of reasonableness and necessity of the treatment can be based on the injured person's testimony. Sister M. Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963).

It is said that "actions speak louder than words." When a licensed physician prescribes and actually provides a course of treatment, doing so manifests the physician's opinion that the treatment being provided is reasonable. A physician practices medicine under standards of professional competence and ethics. Knowingly providing unreasonable care would likely violate those standards. Actually providing care is a nonverbal manifestation that the physician considers the care actually provided to be reasonable. A verbal expression of that professional opinion is not legally mandated in a workers' compensation proceeding to support a finding that the care provided was reasonable. The success, or lack thereof, of the care provided is evidence that can be considered when deciding the issue of reasonableness of the care. A treating physician's conduct in actually providing care is a manifestation of the physician's opinion that the care provided is reasonable and creates an inference that can support a finding of reasonableness. Jones v. United Gypsum, File 1254118 (App. May 2002); Kleinman v. BMS Contract Services, Ltd., File No. 1019099 (App. September 1995); McClellon v. Iowa Southern Utilities, File No. 894090 (App. January 1992). This inference also applies to the reasonableness of the fees actually charged for that treatment.

Having concluded above that claimant sustained an injury on September 2, 2008, defendants are liable for treatment related to the injury and his ongoing treatment and it will be so ordered. The defendants are liable for the medical mileage and medical expenses the claimant has incurred as a result of his fall on September 2, 2008. Those expenses are 4,244 miles for medical treatment (Ex. 9) and $17,648.45 in medical costs. (Ex. 10) The defendants shall pay the claimant directly any out of pocket money the claimant spent on his medical care.

The claimant is entitled to alternative medical care. The defendants shall provide and pay for medical services at Central Iowa Orthopedics.

The final issue to be determined is if defendants are liable for penalty under Iowa Code section 86.13.

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).

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).

> A claimant seeking to recover under this statute must establish "a delay in the commencement of benefits or a termination of benefits.'" Keystone Nursing Care Ctr. v. Craddock, 705 N.W.2d 299, 307 (Iowa 2005). The burden then shifts to the insurer "to prove [ ] a reasonable cause or excuse" for the delay or denial. Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 260 (Iowa 1996) "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." Id.
>
> . . . .
>
> In the Christensen case, we held the "fairly debatable" standard used in the tort of bad faith denial of insurance claims should be used for purposes of section 86.13 penalty benefits in determining whether a workers' compensation insurer had a reasonable basis to deny a claimant's claim. Id.
>
> This court recently stated the following principles with respect to the reasonable-basis element of a bad-faith tort claim:
>
> > A reasonable basis exists for denial of policy benefits if the insured's claim is fairly debatable either on a matter of fact or law. A claim is "fairly debatable" when it is open to dispute on any logical basis. Stated another way, if reasonable minds can differ on the coverage-determining facts or law, then the claim is fairly debatable.
> >
> > The fact that the insurer's position is ultimately found to lack merit is not sufficient by itself to establish the first element of a bad faith claim. The focus is on the existence of a debatable issue, not on which party was correct.
> >
> > . . . .
> >
> > "'where an objectively reasonable basis for denial of a claim *actually* exists, the insurer cannot be held liable for bad faith as a matter of law.'" *As one court has explained, "[c]ourts and juries do not weigh the conflicting evidence that was before the insurer; they decide whether evidence existed to justify the denial of the claim."*
>
> Bellville v. Farm Bureau Mut. Ins. Co., 702 N.W.2d 468, 473-74 (Iowa 2005).

. . . .

But the insurer is not required to accept the evidence most favorable to the claimant and ignore contradictory evidence. See Bellville, 702 N.W.2d at 479 (stating insurer is not required to view the facts in a light most favorable to the claimant); Gilbert v. USF Holland, Inc., 637 N.W.2d 194, 200 (Iowa 2001) (stating employer could reasonably argue later inconsistent version of incident was a fabrication).

. . . .

But the fact the commissioner was not convinced by evidence supporting the insurer's denial does not negate the existence of a genuine dispute with respect to whether the claimant's January 2003 fall was the cause of her injury. Bellville, 702N.W.2d at 473 (stating the fact the insurer's position is ultimately found to lack merit will not by itself establish the insurer had no reasonable basis for its denial of benefits); Gilbert, 637 N.W.2d at 200 (same).

(Emphasis added.) (Italicized language emphasis is in the original.)

City of Madrid v. Blasnitz, 742 N.W.2d 77, 81-83 (Iowa 2007)

Claimant provided inconsistent evidence as to whether his injury was work related. Dr. Yoo did not correct his original dictation about where the claimant's injury occurred until March 2010. The claimant provided the defendants with reasonable cause not to pay benefits. The claimant, in his attempt to obtain medical coverage for his injury, asserted to his health care provider the injury was not work related. No penalty benefits can be awarded under the evidence presented in this case.

ORDER

THEREFORE IT IS ORDERED:

The defendants shall pay temporary total benefits for the period of September 5, 2008 through September 8, 2008 at the rate of five hundred seventy-one 90/100 ($571.90) dollars.

The defendants shall pay for four thousand two hundred forty-four (4,244) miles of medical treatment and ($17,648.45) in medical costs. The defendants shall pay the claimant directly any out of pocket money the claimant spent on his medical care.

The claimant is entitled to alternative medical care. The defendants shall provide and pay for medical services at Central Iowa Orthopedics.

The defendants shall pay the claimant payment for one hundred fifty-eight hours (158) [nineteen and three quarter (19 ¾) days] of wages at twenty-four 80/100 ($24.80) dollars per hour under 85.27(7).

That defendants shall pay interest on unpaid weekly benefits awarded above as set forth in Iowa Code section 85.35.

That defendants shall file subsequent reports of injury as required by this agency under rule 876 IAC 3.1(2).

That defendants shall pay the costs of this matter under rule 876 IAC 4.33.

Signed and filed this 20th day of January, 2011.

JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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