BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RICARDO FLORES, Claimant, vs. JOE COBLER d/b/a/ JC FARMS., Employer, Defendant.	File No. 5046652 A R B I T R A T I O N D E C I S I O N Head Note Nos.: 1402, 1402.10, 1803, 2700

STATEMENT OF THE CASE

This is a proceeding in arbitration. The contested case was initiated when claimant, Ricardo Flores, filed his original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on January 27, 2014. Claimant alleged he sustained a work-related injury on August 8, 2013. (Original notice and petition)

As an aside, (Exhibit 24) is a letter addressed to Former Commissioner Christopher Godfrey from Joe Cobler, owner of JC Farms. The letter is dated February 26, 2014. It states:

> Richard Flores last worked as an employee for CSI in fall of 2010. Richard Flores later came back with the understanding that he is a self-employed contractor to JC Farms and is responsible for his own decisions and any overhead paperwork, which includes filing any reports with the federal, state, and city as required by law.

(Ex. 24, p. 229)

Joe Cobler, d/b/a JC Farms, is uninsured for purposes of workers' compensation. Despite the fact he was ordered to file a First Report of Injury by the then Workers' Compensation Commissioner, Christopher J. Godfrey, Mr. Cobler refused to do so. On May 24, 2014 an Assessment Order for $1000.00 was entered against Mr. Cobler for failing to file the First Report of Injury. At the time of the hearing, neither the $1000.00 assessment had been paid nor had the First Report of Injury been filed.

On September 11, 2015, claimant filed a motion for default judgment. On October 5, 2015, Former Deputy Workers' Compensation Commissioner Stan McElderry, entered a default against defendant. On October 16, 2015, defendant filed a combined motion to

set aside the default and motion to continue the hearing on damages. Claimant filed a resistance to the motion to set aside the default and a motion to continue the hearing on damages. On October 29, 2015, Former Deputy McElderry entered a ruling. The order provided:

> The motion to set aside is granted. Defendant within ten (10) days of this order shall file the first report of injury if such has not yet occurred, and shall provide proof of insurance coverage or provide a statement that there is no insurance.

The administrative file does not reflect that defendant complied with the order Former Deputy McElderry issued on October 29, 2015.

Eventually, defendant filed an answer on November 19, 2015. Claimant denied the occurrence of the work injury. Defendant also raised the affirmative defense that claimant was not an employee of Mr. Cobler at the time of the alleged injury.

The hearing administrator scheduled the case for hearing on December 15, 2016. The hearing took place in Des Moines, Iowa at the Iowa Workforce Development Building. The undersigned appointed Ms. Janice Doud as the certified shorthand reporter. She is the official custodian of the records and notes.

Claimant testified on his own behalf. Ms. Rhonda Flores, former spouse of claimant, also testified. Defendant, Joe C. Cobler, testified on his own behalf. Justin Cobler, son of Joe Cobler, testified on behalf of defendant. The parties offered exhibits. Claimant offered exhibits marked 1 through 24. Defendant offered exhibits marked A through E.

The parties were ordered to file briefs. Defendant requested an extension to file his brief. Both parties were given until February 17, 2017, to file their briefs. Claimant filed his brief on the assigned date. Defendant did not file a brief.

The parties completed the designated hearing report. The various ISSUES are:

ISSUES

1. Whether there was an employer-employee relationship at the time of the alleged work injury;

2. Whether claimant sustained an injury on August 8, 2013 which arose out of and in the course of his employment;

3. Whether the alleged injury is a cause of temporary disability;

4. Whether the alleged injury is a cause of permanent disability;

5. Claimant alleges he is entitled to temporary benefits for the period from August 8, 2013 through September 23, 2015, but defendant specifically denies this is owed;

6. The rate of compensation is at issue;

7. Whether claimant is entitled to medical benefits pursuant to Iowa Code section 85.27;

8. Whether claimant is entitled to an independent medical examination pursuant to Iowa Code section 85.39; and

9. Whether claimant is entitled to penalty benefits pursuant to Iowa Code section 86.13.

STIPULATIONS

The stipulations presented are:

1. If permanent partial disability benefits are awarded, the commencement date is September 24, 2015;

2. The parties agree the weekly benefit rate is $200.30;

3. The parties are able to agree as to the costs paid by claimant; and

4. The parties agree defendant paid no benefits prior to the date of the hearing.

FINDINGS OF FACT

This deputy, after listening to the testimony of claimant, his spouse, defendant and his son, at hearing, after judging their credibility, and after reading the evidence, and the post-hearing briefs, makes the following findings of fact and conclusions of law:

The party who would suffer loss if an issue were not established has the burden of proving the issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6).

Claimant is 73 years old. He was divorced from his wife, but he testified he is remarried to her now. Claimant attended school until the fourth grade in Ellis, Texas. He is virtually illiterate. The remainder of the time he worked on various farms to support his family.

In 1989, claimant moved to Iowa. He has resided in Ottumwa, Iowa for 28 years. In approximately 1998, defendant hired claimant as a laborer. He was responsible for performing a variety of job tasks. Initially, claimant started at $6.50 per hour. Payroll

taxes were deducted from claimant's checks. Claimant worked for defendant for 13 years. In 2011, defendant laid off claimant. He collected unemployment insurance benefits through Iowa Department of Workforce Development. During that time frame, claimant moved back to Texas. He resided in Texas for one year.

In June of 2012, claimant returned to work for defendant. At the time, he was also receiving Social Security retirement benefits and he had Medicare but no supplemental policy. Claimant performed the same type of work he had performed during his previous employment. He was painting and blasting off paint. He worked 40 hours per week at $8.00 per hour. Claimant had no other jobs. He only worked at defendant's trucking and farming operations. Claimant considered Mr. Cobler to be "the boss". Mr. Cobler set the rate of pay. Claimant had to follow the orders and instructions prepared by Mr. Cobler. Claimant was paid by check. He was paid odd amounts on his payroll checks such as $312.35 and $286.80. (Exhibit 12, page 190) Claimant was never given a "pay-stub" with his check. Claimant thought payroll taxes were being withheld by defendant. Defendant informed claimant the business was taking care of the taxes.

On August 7, 2013, defendant told claimant to come to work on the following morning and to start painting the shop building. (Ex. 23, pp. 225-226) Mr. Cobler assigned a helper to assist claimant. However, the helper was pulled off the job and claimant was left to paint the building by himself. Claimant fell from the roof of the building and landed on the concrete floor. The fall was a distance from 15 to 25 feet. No one witnessed the fall.

Claimant was rushed by automobile to Ottumwa Regional Health Center. (Ex. 2) Alan Gravett, M.D., diagnosed claimant with: a closed head injury, fracture(s) of the pelvis, sacrum, and disk 1 of the lumbar spine, probable left wrist fracture and upper extremity fracture. (Ex. 2, p. 17) Claimant was transferred by helicopter to the University of Iowa Hospitals and Clinics.

The initial assessment was:

> Ricardo Flores is a 70-year-old gentleman who was involved in a fall from approximately 14-15 feet. He will be admitted to the General Surgery Trauma Service via the SICU status post embolization and coiling per the Endovascular Team. At this point in time, known traumatic diagnoses include hemorrhagic shock, APC (anterior posterior compression) pelvic ring injury, L1 three-column Chance fracture, left elbow laceration with negative saline load test, tuft fracture of the right thumb distal phalanx, and severe fracture dislocation of the proximal left carpal row. Following management in the operating room, the patient will be elevated for other injuries in the SICU, and will undergo splinting to the left upper extremity for the severe carpal bone injury, saline load testing to the left elbow to rule out traumatic arthrotomy with subsequent irrigation and closure, as

> well as nail bed repair and closure to the right upper extremity distal thumb. The patient will continue to undergo careful and close monitoring for development of acute medial nerve symptoms in the setting of his volarly based proximal carpal bones.

(Ex. 3, p. 29)

Claimant underwent numerous procedures. They included:

1. A saline load test of the left elbow with wound care and sutures.
2. Closed reduction attempt of the complex left proximal row fracture dislocation. However, the carpal bones could not be repositioned into their native locations. As a consequence, claimant was placed into a splint with an Ace bandage wrapped around the splint.
3. Complete dislocation of the lunate volarly.
4. Fracture dislocation of the scaphoid. The scaphoid was found 7 cm proximal to the wrist and volar musculature.
5. Complete disruption of the volar capsule ligaments.
6. A nail bed repair was performed to the right thumb.
7. A pelvic fracture fixation was performed.
8. Claimant was provided with a brace for the L1 fracture.
9. Claimant had compression fractures at T 11 and T 12.
10. Claimant experienced posterior spinal soft tissue injuries and edema in the lower dorsal and lumbar regions; and
11. Claimant developed melena and had a number of blood transfusions.

Subsequent to his release from the hospital at the University of Iowa, claimant was placed in Oakwood Nursing & Rehabilitation Center in Albia, Iowa. Claimant received rehabilitation care at the nursing home. He participated in physical therapy at SE Iowa Physical Therapy. Claimant also treated as an out-patient at the University of Iowa Hospitals and Clinics.

Claimant additionally treated at the Mercy Ottumwa Medical Clinic. (Ex. 6) He began treating for anxiety and depression. Citalopram was prescribed. (Ex. 6, p. 1) Claimant also complained of recurring fatigue. (Ex. 6, p. 170) The treating nurse

practitioner, Deborah Stephenson, ARNP, recommended claimant find some activities outside of the home to occupy his time. (Ex. 6, p. 175)

Defendant did not pay for any of the medical expenditures claimant incurred. The Iowa Department of Human Services via Medicaid, covered some of the expenditures. (Ex. 16, pp. 200-201) Medicare Advantage Plan also paid some of the expenditures. (Ex. 17, pp. 203-210) Not all of the expenses were paid by Medicaid or Medicare. (Ex. 19) Medical mileage was not paid. (Ex. 14) Other out of pocket expenses related to medical expenditures were not paid. (Ex. 15)

Claimant desired an independent medical examination and report from Sunil Bansal, M.D., M.P.H. Claimant presented to Dr. Bansal on February 5, 2016. The evaluating physician provided various permanent impairment ratings for claimant's various injuries. The ratings were as follows:

> **LEFT WRIST/HAND:**
>
> With reference to the **AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition,** specifically Figures 16-28, 16-31, and 16-37, he qualifies for the following impairment values based on his range of motion deficits.

	RANGE OF MOTION	**% UE Impairment**
Flexion:	30 degrees	5
Extension:	40 degrees	4
Radial Deviation:	10 degrees	2
Ulnar Deviation:	30 degrees	0
Pronation:	60 degrees	1
Supination:	40 degrees	2

> Wrist-related upper extremity impairment: 14% upper extremity impairment.
>
> Furthermore, per Table 16-27 he is also assigned a 12% upper extremity impairment for his proximal row carpectomy.
>
> **Total is 14 + 12 = 24% upper extremity impairment = 14% whole person impairment.**

(Ex. 1, p. 11)

PELVIS:

Mr. Flores incurred a pubic symphysis diastasis (separation).

With reference to the **AMA Guides to the Evaluation of Permanent impairment, Fifth Edition (Guides),** Table 15-19, a pubic symphysis separation is assigned a **15% whole person impairment.**

THORACIC BACK:

Thoracic compression fractures of T11 and T12.

With reference to the **AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition (Guides),** Table 15-4, he meets the criteria for a DRE Category II impairment. One compression greater than 25% is assigned a 5 to 8% rating. As he has two vertebral body fractures, he is assigned an **8% whole person rating.**

LUMBAR SPINE:

With reference to the **AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition (Guides),** Table 15-3, he meets the criteria for a DRE Category II impairment. One compression greater than 25% is assigned a 5 to 8% rating. Therefore, he is assigned a **5% whole person rating.**

(Ex. 1, p. 12)

In addition to the above, Dr. Bansal related claimant's depression and anxiety to the fall on August 8, 2013. The evaluating physician opined the left shoulder and left hip could have been related to the work injury. However, the standard for causation is probable cause or more likely than not. The "Could have been" phraseology does not pass the probable cause standard.

Dr. Bansal imposed restrictions on claimant's employment. They were:

I would place a restriction of no lifting over 10 pounds occasionally.

No frequent bending, squatting, climbing or twisting,

Sitting, standing, and walking as tolerated. Being in any one position for too long causes him discomfort. Specifically, he should avoid sitting for more than 45 minutes, no standing for more than 30 minutes, and no walking more than 30 minutes at a time with his cane.

Avoid uneven terrain.

Continue to use a cane to prevent falling.

(Ex. 1, p. 14)

Dr. Bansal also precluded claimant from returning to work at his former job. The duties were too physically demanding for claimant to perform. (Ex. 1, p. 14)

Claimant testified he cannot travel long distances without experiencing pain. He is no longer able to mow his lawn or clean the gutters. He is able to walk one block from his home, turn around and return. He is not able to help his wife with household chores such as laundry or dishes. It is difficult for claimant to sleep. He is restless; he twists and turns all night. He is unable to sleep on his side or on his back. He experiences pain throughout the night. Claimant testified his balance is disturbed. At best, he is able to lift from 10 to 15 pounds.

Claimant also testified he is unable to climb ladders. He can no longer paint. He is unable to stand for longer than 30 to 45 minutes. He is unable to drive a tractor to pick up bales of hay and move them around a farm.

Mr. Cobler testified on his own behalf. He testified claimant was a self-employed contract laborer when he returned to work in 2012. There was no written contract to establish claimant was an independent contractor. (Deposition of Defendant, page 40) Mr. Cobler testified he changed his business model from hiring employees to hiring only contract laborers. Mr. Cobler testified he had no workers' compensation insurance because he did not hire employees.

In his deposition, Mr. Cobler testified all of his business records were stolen. He stated he could not produce any evidence relative to the status of claimant as an independent contractor. Mr. Cobler testified as follows:

> Q. (By Mr. Tucker) Now, your defense at hearing will be that your records relative to this case have been stolen; correct?
>
> A. Uh-huh.
>
> Q. Yes?
>
> A. Yeah. They stole them through the trucking division, though. The records - - See, the reason is, there was a trucking business going, and the people - - there was a lot of money that needed to come into the company, and all the inputs that people owe me and all the records are gone.
>
> Q. Relative to the trucking business?
>
> A. Shop, trucking. It's all in the same place, so - -

Q. The police reports which I have been supplied indicate that 1-7 of '16 - - that's January 7th of this year - - was the last break–in that the police record of Cobler CSI Truck & Trailer. Would you agree with that?

A. There was a sheriff report, too, because sometimes the sheriff would get involved or the police report in between, and we only called the police department. That building has been broke [sic] into many times.

Q. Well, did the police get called on the many times that it was broken into?

A. Well, they would sometimes say it could be the sheriff's deal because it's the county.

Q. The only records I have that would document any sort of a break-in end on 1-7 of 2016.

A. Yeah, but that's not even with the sheriff yet. That's just on the police.

(Deposition, pp. 95-97)

During the arbitration hearing, claimant's counsel asked Mr. Cobler about claimant's wage records. Again, Mr. Cobler testified all wage records had been stolen. He did admit he supplied the tools of the trade as well as all paint supplies. From time to time, a worker would occasionally use one of his own tools. Claimant used a time card to record the hours he worked. Mr. Cobler tried to explain the idea of the time card came from claimant.

Mr. Cobler could not recall having been contacted by a field auditor from the Misclassification Unit of the Iowa Department of Workforce Development. Clearly, Exhibits 10 and 11 demonstrate claimant had been investigated by the Misclassification Unit. On November 19, 2015, a decision was rendered in the matter of Cobler Shop, Inc. and Ricardo Flores. Notification was sent to the employer on November 20, 2015. The determination stated in part:

Decision: An employer-employee relationship existed or exists between the employer listed above and Ricardo Flores.

Explanation: As a result of Misclassification investigation, it is determined that an employer-employee relationship existed or exists between the employer listed above and Ricardo Flores.

The remuneration paid by this business to Ricardo Flores, is reportable for unemployment insurance contribution purposes.

(Ex. 11, p. 188) Mr. Cobler testified he did not pay unemployment taxes.

RATIONALE AND CONCLUSIONS OF LAW

The first issue for resolution is whether claimant was an employee of Joe Cobler d/b/a JC Farms or whether claimant was an independent contractor. Firstly, the Misclassification Unit of Iowa Workforce Development determined claimant was an employee of Mr. Cobler's for purposes of unemployment taxes. While this is not binding on the undersigned, it is some evidence claimant was an employee of defendant.

Since defendant raised the affirmative defense of claimant's status as an independent contractor, defendant bears the burden of proving the issue. Daggett v. Nebraska-Eastern Express, Inc., 252 Iowa 341, 107 N.W.2d 102 (1961).

The Iowa Supreme Court developed an eight factor test to determine whether someone is an independent contractor or an employee. Iowa Mutual Ins. Co. v. McCarthy, 572 N.W.2d 537, 542-543, (Iowa 1997). The eight factors are:

(1) The existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price;

(2) Independent nature of his business or of his distinct calling;

(3) His employment of assistants, with the right to supervise their activities;

(4) His obligation to furnish necessary tools, supplies and materials;

(5) His right to control the progress of the work, except as to final results;

(6) The time for which the workman is employed;

(7) The method of payment;

(8) Whether the work is part of the regular business of the employer.

No single factor is determinative. Daggett at 107. The intentions of the parties is another factor. D & C Express, Inc. v. Sperry, 450 N.W.2d 842, 844, (Iowa 1990).

When an expert's opinion is based upon an incomplete history it is not necessarily binding on the commissioner or the court. It is then to be weighed, together with other facts and circumstances, the ultimate conclusion being for the finder of the fact. Musselman v. Central Telephone Company, 154 N.W.2d 128, 133 (Iowa 1967); Bodish v. Fischer, Inc., 257 Iowa 521, 522, 133 N.W.2d 867 (1965).

The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence. Together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavey v. Economy Fire and Casualty Co., 526 N.W.2d 845 (Iowa 1995).

Defendant was not a credible witness. He bore the burden of proof to establish claimant was an independent contractor. However, defendant did not produce one document to establish claimant was an independent contractor. There was no written contract. Defendant could not produce any 1099 Forms. He testified all of his business records had been stolen from his business location. Defendant's testimony, concerning stolen business records, appeared highly suspicious. Thieves usually are not interested in stealing mountains of paperwork. If Mr. Cobler had issued 1099 forms or had bank records, he should have produced duplicates at the hearing. He did not do so. Mr. Cobler admitted he supplied the tools and supplies. Claimant only worked for Mr. Cobler. Defendant directed all of claimant's activities. Defendant told claimant what jobs to perform. Defendant supplied any assistants on the job. Claimant completed a time card. He was paid by the hour. He was told to commence work every day at 8:00 a.m. Claimant was not an independent contractor. He was an employee of Mr. Cobler on the day of the work injury.

The next issue for resolution is whether claimant sustained a work injury on August 8, 2013 which arose out of and in the course of his employment.

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 Electric 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.

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).

There is really no argument claimant sustained a work related injury on the alleged date. He sustained a serious fall at work. He was taken by car to the hospital. The injury was in the course of claimant's employment.

The weight to be given an expert opinion may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. St. Luke's Hospital v. Gray, 604 N.W.2d 646 (Iowa 2000).

Expert testimony may be buttressed by supportive lay testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 380; 101 N.W.2d 167, 170 (1960).

Claimant is permanently and totally disabled. Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

There is no work available to claimant given his permanent impairment ratings from Dr. Bansal, claimant's work restrictions, his age, his prior work experience and his level of education. Claimant is illiterate. He has worked as a painter for most of his career. He is no longer able to perform the duties of a painter. He is 73 years old. There is no likelihood for rehabilitation. Defendant is liable for permanent total disability benefits at the stipulated benefit rate of $200.30 per week and commencing from August 8, 2013. Said benefits shall continue for the duration of claimant's permanent and total disability.

The next issue for resolution is the matter of medical benefits pursuant to Iowa Code section 85.27. 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).

Defendant is liable for claimant's medical expenses. Those include out of pocket expenses, unpaid medical mileage ($1,900.66), medical expenses paid by Medicare Advantage, medical expenses paid by Medicaid, and medical expenses incurred at other providers which have not been paid by any source. The total is summarized in Exhibit 19 and is $510,108.61.

Claimant is requesting penalty benefits pursuant to 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). 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).

Defendant has not paid any weekly benefits for nearly four years. Weekly benefits for one year equal $10,415.60. It is the determination of the undersigned defendant shall pay unto claimant, penalty benefits in the amount of $18,000.00.

With respect to the issue of the payment of Dr. Bansal's independent medical examination in the amount of $3,575.00, defendant is not liable for that cost. Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

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

Claimant is responsible for the independent medical examination since defendant did not retain a doctor for the purpose of obtaining an impairment rating at any time.

The final issue is the matter of costs. Iowa Code section 86.40 states:

> **Costs.** All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states:

> **Costs.** 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. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010) The entire reasonable costs of doctors' and practitioners' reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

Joe Cobler Deposition	$560.00
Filing Fee	$100.00
Certified Mail	$6.74

A copy of this decision is being provided to the workers' compensation commissioner to determine whether further action should take place under Iowa Code section 87.19 for failure to have workers' compensation insurance.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of

those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall pay unto claimant permanent total disability benefits for the duration of the total disability at the stipulated weekly benefit rate of two hundred and 03/100 dollars ($200.03) and payable from August 8, 2013.

Accrued benefits shall be paid in a lump sum, together with interest, as provided by law.

Defendant shall pay unto claimant, eighteen thousand and 00/100 dollars ($18,000.00) in penalty benefits pursuant to Iowa Code section 86.13.

Defendant shall pay all medical costs associated with this work injury and as detailed in Exhibit 19 and in the body of this decision.

Costs are assessed to defendant as detailed in the body of this decision.

Defendant shall file all reports as required by law, including the First Report of Injury which has not been filed to date.

Signed and filed this 18th day of October, 2017.

Michelle A. McGovern

MICHELLE A. MCGOVERN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Robert E. Tucker
Attorney at Law
2400 86th St. Ste. 35
Urbandale, IA 50322-4306
robtucker@tuckerlaw.net

Mark A. Critelli
Attorney at Law
2924 – 104th St.
Urbandale, IA 50322
mark@critellilawfirm.com

MAM/sam

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