BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CARLOS ALBERTO CASTRO ALCANTARA, Claimant, vs. JOSE LUIS BANEGAS d/b/a BANEGAS CONSTRUCTON, L.L.C., and BANEGAS CONSTRUCTION, L.L.C., Employer, and UNKNOWN, Insurance Carrier, Defendants.	File No. 5060808.01 DEFAULT DECISION Head Note Nos.:	1402.10, 1402.30, 1402.40, 1802, 1803, 2001, 2501, 2701, 2907, 3001, 3002, 4000.2

STATEMENT OF THE CASE

Carlos Alberto Castro Alcantara, claimant, filed a petition for arbitration on October 13, 2019, against Banegas Construction, L.L.C. Claimant filed an amended petition also naming Jose Luis Banegas d/b/a Banegas Construction, L.L.C., on May 26, 2020. The employer did not file a timely appearance or answer to either petition. Claimant gave appropriate notice of intent to seek default judgment. However, the employer again failed to respond to these notices.

Claimant initially filed a motion for default. Default was entered against Banegas Construction, L.L.C. on August 18, 2020. However, it was not apparent that service was effectuated upon Jose Luis Banegas d/b/a Banegas Construction, L.L.C., after the amended petition was filed. Therefore, claimant perfected service on August 19, 2020 and moved for default against Jose Luis Banegas d/b/a Banegas Construction, L.L.C. after notice of default was properly given. Default was entered against Jose Luis Banegas d/b/a Banegas Construction, L.L.C., on October 26, 2020. A default hearing was scheduled to occur telephonically on December 18, 2020.

Claimant filed a formal waiver of the telephonic hearing and elected to have the default claim considered based upon his affidavit and written exhibits. Mr. Alcantara filed his affidavit, a set of medical exhibits marked as Medical Exhibits 1 through 3 and Claimant's Exhibits 1 through 4. Defendants made no attempt to appear for the telephonic hearing and made no response to the claimant's offer of proof. Claimant's

affidavit is accepted in lieu of his live testimony. Medical Exhibits 1 through 3 and Claimant's Exhibits 1 through 4 are all accepted into the evidentiary record. The evidentiary record is now closed.

Claimant's counsel initially requested the opportunity to file a post-hearing brief. The undersigned granted claimant an opportunity to file said brief through January 8, 2021. Upon further reflection, claimant ultimately waived the opportunity to file a post-hearing brief and this case was considered fully submitted to the undersigned on January 8, 2021.

STATEMENT OF THE ISSUES

Claimant pled and submitted the following disputed issues for resolution:

1. Whether claimant was an employee of Jose Luis Banegas d/b/a Banegas Construction, L.L.C. and/or Banegas Construction, L.L.C. (hereinafter referred to jointly as "Banegas") on October 4, 2017.

2. Whether claimant proved he sustained an injury that arose out of and in the course of his employment with Banegas on October 4, 2017.

3. Whether claimant is entitled to temporary total disability and/or healing period benefits as a result of the alleged work injury and, if so, the extent of such entitlement.

4. Whether claimant has achieved maximum medical improvement such that a claim for permanent disability benefits is ripe for determination.

5. Whether claimant sustained permanent disability as a result of the alleged work injury and, if so, the extent of claimant's entitlement to permanent disability benefits.

6. The proper commencement date for permanent disability benefits, if any.

7. Whether claimant is entitled to payment, reimbursement, and/or an order requiring the employer to hold claimant harmless for past medical expenses allegedly related to the work injury on October 4, 2017.

8. Whether claimant is entitled to alternate medical care for future medical treatment of his alleged work injury.

9. Whether claimant is entitled to an award of penalty benefits pursuant to Iowa Code section 86.13 for unreasonable denial or delay in payment of weekly benefits.

10. Whether costs should be assessed against either party and, if so, in what amount.

FINDINGS OF FACT

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

Carlos Alberto Castro Alcantara (hereinafter referred to as "Alcantara") sustained a burst fracture at the L2 level of his low back when he fell from a height while attempting to set a truss on a house roof in Urbandale, Iowa, on October 4, 2017. (Claimant's Affidavit; Medical Exhibit 1, page 4) Mr. Alcantara began working for Jose Banegas d/b/a Banegas Construction, L.L.C. (hereinafter referred to as "Banegas") approximately two weeks before the injury occurred. Claimant did not have his own business or any employees of his own. He worked solely for Banegas for the two weeks before the injury occurred. (Claimant's Affidavit)

Claimant asserts that he worked as an employee at will for Banegas. In this regard, Mr. Alcantara asserts without contradiction that he was paid on an hourly basis by Banegas, earning $17.00 per hour, and worked 50 hours per week prior to the injury. Banegas supplied all materials and tools for the jobs claimant performed. Banegas also controlled the job sites where claimant worked, directed claimant's work, and instructed claimant and co-workers where to be, when to be there, and what work to perform on any given day. (Claimant's Affidavit)

I accept the unrebutted affidavit testimony of Mr. Alcantara. I find that Banegas controlled the claimant's work, including the date, times, locations, and logistics of work performed by claimant. Therefore, I find that claimant worked as an employee at will for Banegas on October 4, 2017.

Following claimant's fall, Banegas drove him to the emergency room. Claimant was diagnosed with an L2 burst fracture and referred for a neurosurgical evaluation. Ultimately, claimant experienced loss of strength and a giving out of his legs as a result of the injury. Claimant's neurosurgeon, Esmiralda Yeremeyeva-Henderson, M.D., recommended surgical intervention. (Medical Exhibit 1)

Dr. Yeremeyeva-Henderson performed a spinal fusion on claimant's low back from T12 through L3 on October 6, 2017. (Medical Exhibit 1, p. 25) Claimant spent several days in the hospital and was released. Dr. Yeremeyeva-Henderson recommended a return evaluation after his release from the hospital. (Medical Exhibit 1)

After being released from the hospital, Mr. Alcantara contacted Banegas and requested that the employer pay for his surgical care and provide ongoing medical care for his low back injury. However, Banegas advised claimant that the employer would not pay for the medical expenses or provide claimant with any medical care related to this injury. Claimant apparently did not have the funds to pay for further medical care. (Claimant's Affidavit) Therefore, other than a few subsequent emergency room visits for low back pain complaints on July 23, 2018, December 18, 2018, August 5, 2019,

December 24, 2019, and February 13, 2020, claimant has not received any significant additional medical care for his low back injury. (Medical Exhibits)

Mr. Alcantara continues to experience low back pain. (Claimant's Affidavit) He obtained an independent medical evaluation performed by Sunil Bansal, M.D., on September 20, 2019. (Claimant's Ex. 1) Dr. Bansal provides unrebutted opinions and diagnosed claimant with an L2 burst fracture with severe central stenosis with a resulting posterolateral fixation with arthrodesis from the T12 through L3 levels. (Claimant's Ex. 1, p. 7) Dr. Bansal opines that the fall claimant sustained on October 14, 2017 "is consistent with his L2 burst fracture, requiring surgical fixation." (Claimant's Ex. 1, p. 7)

Dr. Bansal noted that claimant is at a "very high lifetime risk for adjacent segment disease of his lumbar spine, and may need a fusion extension in the future." (Claimant's Ex. 1, p. 8) However, Dr. Bansal did not identify or recommend any immediate additional treatment for claimant's low back condition. Instead, he opined that Mr. Alcantara achieved maximum medical improvement (MMI) on April 6, 2018. (Claimant's Ex. 1, p. 7) Dr. Bansal also opined that claimant sustained permanent impairment equivalent to 22 percent of the body as a whole as a result of the October 4, 2017 injury. (Claimant's Ex. 1, p. 7)

The employer made no offer of work after the injury, though the employer did pay claimant for an additional two weeks of work after his injury. Mr. Alcantara was fortunate to find alternate employment, which he commenced on January 16, 2018 and continues to work performing framing in the construction industry for a different employer. Claimant now earns $21.00 per hour and works 40 hours per week for his new employer. (Claimant's Affidavit)

Mr. Alcantara concedes that his current employment requires physically demanding work. Although he performs that work, claimant experiences increased back pain, as well as leg pain and leg numbness when performing his work activities with his new employer. It is more difficult for claimant to perform his job duties, especially lifting heavy items. However, claimant needs to earn a living and framing is the only trade that he knows how to perform. He intends to continue framing as long as he is physically able. (Claimant's Affidavit)

Dr. Bansal opined that that claimant should not lift more than 40 pounds, should not bend or twist frequently, and that he should avoid sitting or standing for greater than two hours at a time. Dr. Bansal opined that these were permanent restrictions and were necessary for the injury as well as the future propensity towards adjacent segment disease resulting from the fusion surgery. (Claimant's Ex. 1, p. 8)

As noted, Dr. Bansal's opinions are not rebutted. They are reasonable and accepted as credible and accurate. Accordingly, I find that Mr. Alcantara has proven by a preponderance of the evidence that he sustained an L2 burst fracture as a result of the October 4, 2017 fall and that the injury required surgical fusion of his spine from the

T12 through the L3 levels. I find that claimant is at risk for future deterioration or degeneration of the spine segments on either side of the fusion.

In addition, I find that claimant sustained 22 percent permanent impairment of the whole person and requires the permanent restrictions outlined by Dr. Bansal. I also accept Dr. Bansal's opinion about MMI and find that claimant achieved MMI on April 6, 2018.

Mr. Alcantara received two weeks of wages from the employer after the injury date. However, he was off work and without wages as a result of the work injury from October 18, 2017 through January 15, 2018. During this period of time, Mr. Alcantara was under work restrictions and was not capable of returning to substantially similar employment.

At the time of his injury, Mr. Alcantara was 18 years of age. He is now 21 years of age. Claimant graduated from high school in Mexico. He has no additional education. He is able to read and write in his native Spanish language. He is also capable of speaking and understanding minimal English. However, he is not able to read or write in English. (Claimant's Affidavit)

Mr. Alcantara came to the United States approximately two years before his injury date. He has worked since that time as a framer in the construction industry. As noted, he has found alternate employment since the injury date as a framer but no longer works for the employer. Claimant earns roughly the same amount of wages he did at the time of the injury, but earns more per hour and works fewer hours per week than he did at the time of the injury. He continues to work and notes an intention to continue working as a framer. (Claimant's Affidavit) Mr. Alcantara is clearly a motivated worker.

Considering claimant's age, educational background, employment history, limited English skills, his motivation to continue working, the significant surgical spinal fusion claimant required, his permanent impairment, permanent restrictions, and ability to find alternate work, as well as his ability to retrain and his anticipated working years until retirement, I find that Mr. Alcantara has proven he sustained moderate loss of future earning capacity. Specifically, considering all of the factors of industrial disability contained in the pertinent statute and outlined by the Iowa Supreme Court, I find that Mr. Alcantara proved he sustained a 35 percent loss of future earning capacity as a result of the October 4, 2017 work injury.

In addition, Mr. Alcantara incurred significant medical bills as a result of his need for treatment after the work injury. (Claimant's Affidavit) Claimant's Exhibit 4 provides a summary and the pertinent medical bills claimant incurred after the injury. In total, claimant incurred $46,138.99 in medical expenses as a direct result of the October 4, 2017 work injury. Review of the bills discloses they are from treating medical providers and include write-offs of the medical expenses. I find that the medical expenses

presented were for reasonable and necessary medical treatment related to the work injury. I further find that the medical expenses submitted were reasonable.

Finally, claimant alleges a claim for penalty benefits. Mr. Alcantara notes that he inquired of the employer and the employer denied claimant's request for medical care. The employer appropriately paid two weeks of wages after the injury occurred. However, there is no evidence that the employer provided notice of the intention to terminate weekly benefits or wages before terminating wages on October 17, 2017.

Mr. Alcantara also produced unrebutted evidence that his time off work and his permanent disability are causally related to his work injury. He also produced evidence that the employer was denying or delaying payment of weekly benefits between October 18, 2017 and the date of the scheduled default hearing, or December 18, 2020. (Claimant's Affidavit) The employer offered no evidence to demonstrate that it gave notice of the denial, investigated the claim before denying benefits, or that the employer possessed a reasonable basis for delay or denial of weekly benefits. I find the employer's failure to pay weekly benefits between October 18, 2017 and December 18, 2020 was unreasonable.

As will be noted below, claimant has proven entitlement to healing period benefits and an unreasonable delay or denial of healing period benefits from October 18, 2017 to January 15, 2018. This is a period of 12.857 weeks. Permanent disability benefits will be ordered below to commence on April 7, 2018. Defendants unreasonably delayed benefits from April 7, 2018 through December 14, 2020, a period of 140 weeks.

CONCLUSIONS OF LAW

Section 85.61(11) provides in pertinent part:

"Worker" or "employee" means a person who has entered into employment of, or works under contract of service, express or implied, or apprenticeship, for an employer . . . .

It is claimant's duty to prove, by a preponderance of the evidence, that claimant or claimant's decedent was an employee within the meaning of the law. Where claimant establishes a prima facie case, defendants then have the burden of going forward with the evidence that rebuts claimant's case. The defendants must establish, by a preponderance of the evidence, any pleaded affirmative defense or bar to compensation. Nelson v. Cities Serv. Oil Co., 259 Iowa 1209, 146 N.W.2d 261 (1967).

Factors to be considered in determining whether an employer-employee relationship exists are: (1) the right of selection, or to employ at will, (2) responsibility for payment of wages by the employer, (3) the right to discharge or terminate the relationship, (4) the right to control the work, and (5) identity of the employer as the authority in charge of the work or for whose benefit it is performed. The overriding issue is the intention of the parties. Where both parties by agreement state they intend to form an independent contractor relationship, their stated intent is ignored if the

agreement exists to avoid the workers' compensation laws. Likewise, the test of control is not the actual exercise of the power of control over the details and methods to be followed in the performance of the work, but the right to exercise such control. Also, the general belief or custom of the community that a particular kind of work is performed by employees can be considered in determining whether an employer-employee relationship exists. Caterpillar Tractor Co. v. Shook, 313 N.W.2d 503 (Iowa 1981); McClure v. Union County, 188 N.W.2d 283 (Iowa 1971); Nelson, 259 Iowa 1209, 146 N.W.2d 261; Lembke v. Fritz, 223 Iowa 261, 272 N.W. 300 (1937); Funk v. Bekins Van Lines Co., I Iowa Industrial Commissioner Report 82 (App. December 1980).

Under all of the common law indicia of an employment relationship, the claimant was an employee of Jose Luis Banegas d/b/a Banegas Construction, L.L.C. Mr. Banegas provided the necessary tools to perform the work. Mr. Banegas selected claimant as an employee and directed when and where the worker should present for work. Mr. Banegas directed how claimant was to perform all work.

At the very least, claimant produced sufficient evidence to establish a prima facie case that he was an employee of Jose Luis Banegas d/b/a Banegas Construction, L.L.C. The purported employer presented no evidence at trial and did not carry his burden of proof to establish otherwise. Therefore, I found and now conclude that Carlos Alberto Castro Alcantara was an employee of Jose Luis Banegas d/b/a Banegas Construction, L.L.C. on October 4, 2017.

Mr. Alcantara asserts that he sustained an injury arising out of and in the course of his employment with Banegas on October 4, 2017.

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” refer 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.

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, I found that Mr. Alcantara was performing duties at a time, place, and location directed by the employer. Therefore, I conclude that claimant's injuries occurred in the course of his employment. Having also found that Mr. Alcantara sustained a significant low back injury as a direct result of a fall occurring while performing services at the direction of and under the supervision of his employer on October 4, 2017, I conclude claimant also proved his injuries arose out of his employment activities. Therefore, I conclude that Mr. Alcantara has proven a compensable work injury to his low back.

Mr. Alcantara asserts a claim for temporary total disability, or healing period, benefits.

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).

Claimant concedes that the employer paid him wages for two weeks after the injury date. An employer is permitted to pay wages in lieu of weekly benefits. 876 IAC 8.4. Therefore, Banegas fully satisfied its obligations to pay weekly benefits for the first two weeks after the injury, through October 16, 2017.

However, the employer terminated wages and paid no weekly benefits after October 16, 2017. Claimant remained off work, was under medical restrictions, and was not able to return to substantially similar work between October 17, 2017 and

January 15, 2018. Therefore, I conclude claimant proved entitlement to healing period benefits from October 17, 2017 through January 15, 2018. Iowa Code section 85.34(1). Mr. Alcantara returned to work for another employer on January 16, 2018 and is not owed healing period benefits thereafter, as he earned essentially the same amount he earned working for Banegas.

Mr. Alcantara also proved that he sustained permanent disability as a result of the work injury. His injury is to the low back and is considered an unscheduled injury that is to be compensated with industrial disability benefits. Iowa Code section 85.34(2)(v)(2017).

Claimant was never offered further employment with Banegas and was terminated from his employment after the two weeks of additional wages paid after the injury. Accordingly, it is appropriate to assess and award industrial disability benefits at this time. Iowa Code section 85.34(2)(v).

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Ry. Co. of Iowa, 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the Legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

As revised in 2017, the statute also requires consideration of the length of time before claimant retires as a factor in assessing industrial disability. Mr. Alcantara is obviously a young worker with extensive work life remaining before any contemplated retirement. Considering all of the relevant factors of industrial disability set forth in the statute and outlined by the Iowa Supreme Court, I found that Mr. Alcantara proved he sustained a 35 percent loss of future earning capacity. This is equivalent to a 35 percent industrial disability and entitles claimant to an award of 175 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(v).

Permanent partial disability benefits commence once claimant achieves MMI. In this case, I found that claimant achieved MMI on April 6, 2018. Accordingly, permanent

disability benefits commence on April 7, 2018 and are due weekly thereafter until the 175 weeks are paid in full. Iowa Code section 86.34(2)(v).

I must also consider and determine the proper weekly rate at which healing period and permanent partial disability benefits should be paid to claimant. Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

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 shall be replaced by the closest previous week with earnings that fairly represent the employee's customary earnings. Section 85.36(6).

I found that claimant earned $17.00 per hour and worked 50 hours per week for Banegas prior to the injury date. Therefore, his gross average weekly earnings prior to the date of injury were $850.00. Mr. Banegas was single with no dependents on the date of injury. Therefore, I conclude he is entitled to weekly benefits based on a single with only one exemption status.

The weekly benefit amount payable to an employee shall be based upon 80 percent of the employee's weekly spendable earnings, but shall not exceed an amount, rounded to the nearest dollar, equal to 66-2/3 percent of the statewide average weekly wage paid employees as determined by the Department of Workforce Development. Iowa Code section 85.37.

The weekly benefit amount is determined under the above Code section by referring to the Iowa Workers' Compensation Manual in effect on the applicable injury date. Having found that claimant's gross average weekly wage was $850.00, that he was single, and entitled to one exemption on the October 4, 2017 injury date, I used the Iowa Workers' Compensation Manual with effective dates of July 1, 2017 through June 30, 2018, to determine that the applicable rate for permanent partial disability benefits is $517.04 per week.

Mr. Alcantara definitively proved that he incurred medical expenses as a result of his work injury. The employer is obligated to provide medical care for claimant pursuant to Iowa Code section 85.27. In this case, the employer appropriately transported claimant to the emergency room and claimant obtained emergency medical care. Thereafter, claimant requested that the employer pay for the emergency care and ongoing medical care. The employer refused to provide medical care and effectively denied the claim. The employer had no reasonable basis for the denial. I conclude that

the employer is obligated to pay the medical providers, reimburse claimant for any expenses paid directly by claimant, and to hold claimant harmless for all medical expenses contained in Claimant's Exhibit 4, totaling $46,138.99. Iowa Code section 85.27.

Claimant also asserts a claim for alternate medical care. Specifically, claimant requests an order of this agency that requires defendant to provide future medical care through the treating neurosurgeon, Esmirelda Yeremeyeva-Henderson, M.D.

Iowa Code section 85.27(4) provides, in relevant part:

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

"Determining what care is reasonable under the statute is a question of fact." Long v. Roberts Dairy Co., 528 N.W.2d 122, 123 (Iowa 1995).

In this case, claimant has introduced unrebutted evidence from Dr. Bansal. Dr. Bansal opines that claimant achieved MMI in April 2018. Dr. Bansal notes that claimant may require additional treatment at some unspecified time in the future. However, Dr. Bansal makes no recommendations for treatment of claimant's injury at the present time. No other physician or medical provider has recommended additional care at this time.

Accordingly, I conclude that claimant has the right to future, causally related medical care. Iowa Code section 85.27(4). However, I also conclude that claimant failed to prove by a preponderance of the evidence that any treatment is currently recommended for his injury that is being denied by defendant. Therefore, I conclude claimant failed to prove defendant is currently unreasonably denying medical care for his injury. I conclude that claimant's request for alternate medical care should be denied at this time. Claimant remains entitled to future medical care and can seek an

alternate medical care order using the expedited procedures of Iowa Code section 85.27(4) if care is recommended in the future and denied by the employer.

Mr. Alcantara also pled a claim for penalty benefits pursuant to Iowa Code section 86.13(4). 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 Custom 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, 594 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 has clearly proven a delay or denial of payment of 152.857 weeks of benefits prior to the hearing. Banegas has not put forth any evidence to establish that an investigation was conducted, that notice of the basis for denial was given to claimant, or that the basis for denial was reasonable. In fact, the undisputed evidence in this case demonstrates that the denial of benefits by Banegas is unreasonable and egregious under the circumstances.

Considering the purposes of the penalty benefits statute, the employer's failure to appear for these proceedings, the lack of any evidence of an investigation or basis for denial of benefits, I conclude that a substantial penalty is necessary for both punitive purposes as well as to deter this and other employers from similar conduct in the future. Iowa Code section 86.13(4) permits a penalty up to 50 percent of the benefits unreasonably delayed or denied.

In this instance, the employer has unreasonably denied 152.857 weeks through the date of the default hearing. At the weekly rate of $517.04, this is an unreasonable denial of $79,033.18 through the date of the default hearing. Given that the employer offers no evidence or explanation for the denial of benefits, I find that a penalty totaling $39,500.00 is appropriate under these circumstances.

The final claim asserted by Mr. Alcantara is for reimbursement of his costs associated with this contested case proceeding. Costs are taxed as the discretion of the agency. Iowa Code section 86.40.

Claimant included a statement of costs as Claimant's Exhibit 3 and seeks the assessment of Dr. Bansal's independent medical evaluation costs totaling $2,692.00 as a cost of this action. Review of Dr. Bansal's invoice discloses that he charged $573.00 for his physical examination of claimant and an additional $2,119.00 to draft his IME report. Dr. Bansal's charges for his physical examination are clearly not taxable as a cost under Iowa Code section 86.40 or 876 IAC 4.33(6). Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 846-847 (Iowa 2015). Therefore, I decline to assess the $573.00 in charges for Dr. Bansal's evaluation.

However, the cost of drafting Dr. Bansal's IME report is a taxable cost. Id.; 876 IAC 4.33(6). Therefore, I conclude it is appropriate to tax claimant's costs in the amount of $2,119.00 against Banegas.

Finally, the employer has not filed a required First Report of Injury relative to this injury. There is no evidence that the employer purchased insurance in this case. Iowa Code section 87.14A. It may be appropriate for the Iowa Workers' Compensation Commissioner to investigate the status of the employer's insurance coverage further. Therefore, 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.

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall pay claimant healing period benefits from October 17, 2017 through January 15, 2018.

Defendant shall pay claimant one hundred seventy-five (175) weeks of permanent partial disability benefits commencing on April 7, 2018.

All weekly benefits shall be payable at the weekly rate of five hundred seventeen and 04/100 dollars ($517.04) per week.

Defendant shall pay accrued weekly benefits in a lump sum together with interest 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, as required by Iowa Code section 85.30.

Defendant shall satisfy, pay, or reimburse all medical expenses contained in Claimant's Exhibit 4 and shall hold claimant harmless for these medical expenses totaling forty-six thousand one hundred thirty-eight and 99/100 dollars ($46,138.99).

Claimant's request for alternate medical care is denied at this time.

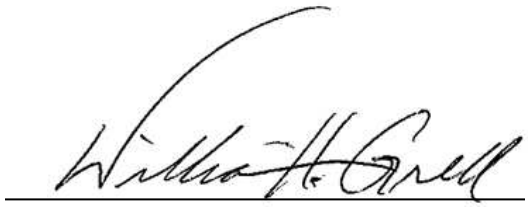
Defendant shall pay penalty benefits to claimant in the amount of thirty-nine thousand five hundred and 00/100 dollars ($39,500.00).

Defendant shall reimburse claimant's costs in the amount of two thousand one hundred nineteen and 00/100 dollars ($2,119.00).

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

This case is referred to the Iowa Workers' Compensation Commissioner for determination of whether further investigation or action is needed pursuant to Iowa Code section 87.19.

Signed and filed this _____27th___ day of April, 2021.



WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Samuel Aden (via WCES)

Banegas Construction, LLC (via regular and certified mail)
Attn: Jose Luis Banegas
3000 University Ave., #171
West Des Moines, IA 50266

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Banegas Construction, LLC (via regular and certified mail)
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Banegas Construction, LLC (via regular and certified mail)
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Urbandale, IA 50322

Joseph Cortese (via email)
Iowa Workers' Compensation Commissioner

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.