BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

VICTOR GUERRERO, Claimant, vs. FABIAN GALVAN RODRIGUEZ, Employer, Defendant.	: : : : : : : : : : :	File No. 5067259 ARBITRATION DECISION Head Notes: 1402.30, 1402.40, 1803, 1803.01, 2206, 2209

STATEMENT OF THE CASE

Victor Guerrero, claimant, filed a petition for arbitration against Fabian Galvan Rodriguez, as the employer. Mr. Rodriguez did not have worker's compensation insurance in place at the time of claimant's injury and is considered uninsured for purposes of this hearing. (Rodriguez Testimony) This case came before the undersigned for an arbitration hearing on February 7, 2020 in Davenport, Iowa.

The parties filed a hearing report in each file at the commencement of the hearing. On those hearing reports, the parties entered into numerous stipulations. Those stipulations were accepted by the hearing deputy and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

Claimant testified on his own behalf and called his girlfriend, Claudia Mendoza, to testify. Defendant, Fabian Rodriguez, testified. The parties offered Joint Exhibits 1 and 2. Mr. Guerrero offered Claimant's Exhibits 1 through 10. The employer offered Defendant's Exhibits A through E. All offered exhibits were received without objection. The evidentiary record closed at the end of the arbitration hearing and the case was considered fully submitted to the undersigned.

ISSUES

The parties submitted the following disputed issues for resolution:

1. The extent of claimant's entitlement to temporary total disability benefits.

2. Whether claimant is entitled to payment, reimbursement, or satisfaction of past medical expenses contained in Claimant's Exhibit 6.

3. Whether claimant is entitled to medical mileage reimbursement, as alleged and summarized in Claimant's Exhibit 7.

4. Whether defendant is entitled to a credit for medical expenses paid and for compensation allegedly paid to claimant after the injury date.

5. Whether claimant is entitled to an award of penalty benefits for an unreasonable delay or denial of weekly benefits.

6. 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:

Victor Guerrero sustained a left arm injury when he fell off a roof while performing roofing work for his employer, Fabian Galvan Rodriguez, on September 14, 2017. (Hearing Report) As a result of that work injury, Mr. Guerrero sustained a fractured left arm and required medical care. (Joint Exhibits 1-2) The employer paid for some of claimant's medical care. (Hearing Report)

However, the employer has not paid for the medical expenses outlined in Claimant's Exhibit 6. Those medical expenses were reasonable and necessary to treat claimant's left arm injury. (Hearing Report) I find that the medical expenses included and summarized in Claimant's Exhibit 6 are the result of claimant's work-related fall and injury on September 14, 2017. At trial, defendant conceded that the medical expenses contained in Claimant's Exhibit 6 are owed as part of this worker's compensation claim, and Mr. Rodriguez testified that he intends to pay this medical bill when he is financially able to do so.

Mr. Guerrero also incurred mileage for his transportation to and from medical appointments following his work injury. Claimant introduced Claimant's Exhibit 7, summarizing the medical mileage claim. Defendant acknowledged these are legitimate medical mileage requests. I find that the treatment received following the work injury was reasonable and necessary. Therefore, I find that claimant incurred the mileage he outlines in Claimant's Exhibit 7 and that the mileage is directly related to the September 14, 2017 work injury. I find that claimant has proven he traveled 514.50 miles for medical treatment as a result of his work injury.

Following the work injury, claimant missed work from September 14, 2017 through December 18, 2017. (Hearing Report) Defendant acknowledged the lost time from work at the commencement of trial, but the issue is noted as disputed on the hearing report. Therefore, to clarify the issue, I find that the lost time from work is the direct result of claimant's September 14, 2017 fall and fractured left arm. Claimant was under work restrictions between September 14, 2017 and December 18, 2017. Those

medical restrictions prevented Mr. Guerrero from returning to work for this employer or performing substantially similar work elsewhere.

The principal dispute in this case is about the extent of the employer's credit against any award of temporary total disability benefits. Claimant concedes that the employer paid him cash on one occasion after the date of injury. Claimant's testimony on the amount of cash received has varied slightly. In his deposition, Mr. Guerrero acknowledged that he did not recall the specific amount of the payment made by defendant. However, he testified that the one-time payment was $520.00 or $540.00. (Claimant's Exhibit, page 11) During his trial testimony, Mr. Guerrero testified it was either $450.00 or $540.00 paid to him on a one-time basis.

Claudia Mendoza testified on behalf of claimant. She testified that she recalls only one payment being made by defendant. She testified she was present for this cash exchange and that claimant never told her about another payment made by defendant.

Although Ms. Mendoza denied it is possible that defendant made a cash payment to claimant when she was not present, it is obvious that defendant could make a payment to claimant when Ms. Mendoza was not present. However, Ms. Mendoza testified that she had to work extra hours in her job and use credit cards for claimant's family to survive while he was off work between September and December 2017. This is a reasonable consequence of a loss of wages.

The employer contends that he paid claimant cash on several occasions after the date of injury. Defendant's Exhibit A purports to be payroll records for claimant. Defendant's Exhibit A documents several cash payments being made to claimant after his injury date. Claimant denies the accuracy of Defendant's Exhibit A or the employer's entitlement to credit in the amount of $6,157.00 against any award of temporary total disability benefits. (Hearing Report) The existence of payroll records documenting cash payments to claimant certainly supports and corroborates defendant's testimony about his cash payments to claimant after the work injury. Of course, the payroll records could be fabricated. Defendant offered no evidence to demonstrate who prepared or created the payroll records or how those records were reconciled with business records or accounts as to payments of cash.

Mr. Rodriguez testified that claimant came to his house every Saturday to collect his cash payment. Ms. Mendoza confirmed that she and claimant did go to Mr. Rodriguez's residence on Saturdays. Of course, this somewhat corroborates defendant's version of events. However, Ms. Mendoza testified that she and claimant went to defendant's residence to request that the defendant pay the outstanding medical bills that were being received and were outstanding.

The versions of events put forward by Mr. Guerrero and Mr. Rodriguez are contradictory, and at least one of the witnesses testifying was not telling the truth. Having observed all of the witnesses at trial and considering the substance of their

testimony, I find the testimony of Mr. Guerrero and Ms. Mendoza to be credible. Mr. Rodriguez testified that witnesses were present every time he paid cash to claimant after his work injury. Among the witnesses Mr. Rodriguez identified as having been present during the cash exchanges was his wife. Yet, defendant did not call his wife or any of the other witnesses that were supposedly present during cash transactions. Defendant would also be the only party that would possess evidence as to receipts, banking accounts, or other documentation of the business receipts and corresponding payments to claimant. Ultimately, I find the testimony of claimant and Ms. Mendoza to be more convincing than the evidence put forth by defendant. Ultimately, I find that defendant failed to prove by a preponderance of the evidence that he paid more than $540.00 to claimant after the injury date.

Finally, claimant asserts that defendant unreasonably denied or delayed payment of weekly benefits to which he was due. With respect to the penalty claim, I reiterate that I found the testimony of Mr. Guerrero and Ms. Mendoza to be more credible and convincing than the testimony of Mr. Rodriguez. Therefore, I find that claimant proved a delay or denial of weekly benefits.

The record is not clear as to when the one-time cash payment was made to claimant. Since claimant did not prove when the delay started or specifically occurred, I find that the $540.00 should be applied to the first two weeks of benefits lost by claimant.

That being said, I also find that the employer denied $4,901.17 in weekly benefits. The employer claimed that he paid benefits, but I found he did not prove those cash payments. The employer provided no basis for denial of benefits and provided no evidence that he provided notice of his basis for delay or denial of benefits to claimant. Therefore, I find that the employer failed to prove he possessed or conveyed a reasonable basis for denial or delay of weekly benefits totaling $4,901.17.

CONCLUSIONS OF LAW

The initial dispute between the parties is claimant's entitlement to temporary total disability benefits. 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. Guerrero proved a causal connection between his work-related fall on September 14, 2017 and his fractured left arm. Similarly, I found that claimant proved a causal connection between his work injury and his lost time from work.

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).

In this instance, Mr. Guerrero was on medical restrictions from September 14, 2017 through December 18, 2017. Therefore, I found that he was off work and not capable of performing substantially similar work between September 14, 2017 and December 18, 2017. I conclude claimant has proven entitlement to temporary disability benefits from September 14, 2017 through December 18, 2017. Iowa Code section 85.33(1).

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

In this case, the employer paid for some of claimant's medical care but has not paid for the expenses contained in Claimant's Exhibit 6. However, the employer conceded that he owes the outstanding medical expenses contained in Claimant's Exhibit 6 and that he intends to pay those medical expenses as soon as he is able to afford it. Given the defendant's concession and having found that the expenses contained in Claimant's Exhibit 6 were reasonable and necessary, and having also found those medical charges to be causally related to the September 14, 2017 work

injury, I conclude that defendant is obligated to pay the expenses contained in Claimant's Exhibit 6. Iowa Code section 85.27(1).

Mr. Guerrero also submits a request for reimbursement of medical mileage. Iowa Code section 85.27(1) provides that the employer "shall allow reasonable necessary transportation expenses incurred for medical services." Agency rule 876 IAC 8.1 defines transportation expenses as provided for in Iowa Code section 85.27. Rule 8.1(2) provides that claimant shall be reimbursed based upon the mileage at the prevailing IRS rate in effect on July 1 of each year.

According to the agency's Workers' Compensation Manual Information (commonly referred to as the "rate book"), the prevailing mileage reimbursement rate on the date of injury was $0.535 per mile. I found that claimant proved he traveled 514.50 miles to obtain medical treatment for his work injury. Accordingly, I conclude that claimant is entitled to mileage reimbursement in the amount of $275.26. Iowa Code section 85.27l 876 IAC 8.1(2).

Perhaps the largest or most significant disputed issue between the parties in this case is the extent of the employer's right to a credit against the award of temporary total disability benefits. The employer asserts that he paid claimant in cash periodically after the work injury. The employer asserts entitlement to a credit against the award of temporary total disability benefits in the amount of $6,157.00. Claimant concedes that he received one cash payment from the employer but disputes the claimed credit.

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).

In this instance, the employer is the party asserting the right to a credit. If the credit is not established, the employer suffers the loss. Therefore, I conclude that it is the employer's burden to establish entitlement to the credit. In essence, the employer bears the burden to establish by a preponderance of the evidence that he made periodic cash payments to claimant in the amounts alleged or asserted.

Having found the evidence offered by claimant to be more convincing than defendant's evidence, I ultimately found that defendant failed to prove he paid more than $540.00 to claimant after the date of injury. Therefore, I conclude the employer is only entitled to a credit of $540.00 against the award of temporary total disability benefits awarded.

Claimant also asserts a claim for penalty benefits. This claim is based partially on the dispute over the employer's credit, including when and in what amounts cash payments were made to claimant after the injury date. Mr. Guerrero asserts that the employer unreasonably delayed or denied weekly benefits to which he was entitled and that the employer should be penalized for this delay or denial 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.
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> b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
>
> (1) The employee has demonstrated a denial, delay in payment, or termination in benefits.
>
> (2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

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

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

Christensen, 554 N.W.2d at 260.

The supreme court has stated:

> (1) If the employer has a reason for the delay and conveys that reason to the employee contemporaneously with the beginning of the delay, no penalty will be imposed if the reason is of such character that a reasonable fact-finder could conclude that it is a "reasonable or probable cause or excuse" under Iowa Code section 86.13. In that case, we will defer to the decision of the commissioner. See Christensen, 554 N.W.2d at 260 (substantial evidence found to support commissioner's finding of legitimate reason for delay pending receipt of medical report); Robbennolt, 555 N.W.2d at 236.

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

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

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

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

Id.

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

(6) In determining the amount of penalty, the commissioner is to consider factors such as the length of the delay, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

(7) An employer's bare assertion that a claim is "fairly debatable" does not make it so. A fair reading of Christensen and Robbennolt, makes it clear that the employer must assert facts upon which the commissioner

could reasonably find that the claim was "fairly debatable." See Christensen, 554 N.W.2d at 260.

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

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

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

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

In this case, I found that claimant proved a delay or denial of weekly benefits other than the one-time payment of $540.00. Therefore, I conclude claimant satisfied his burden of proof on the Iowa Code section 86.13 penalty benefit claim. Once claimant satisfied this burden, the burden of production shifted to defendant to establish that he possessed a reasonable basis for denial and that he contemporaneously conveyed that basis for denial to claimant.

I found that defendant did not offer a reasonable excuse for the delay in payment of benefits. Iowa Code section 86.13(4)(b)(2). Defendant did not contemporaneously convey his bases for delay or denial of benefits. Iowa Code section 86.13(4)(c)(3). Again, defendant bore the burden to establish a reasonable basis, or excuse, and to prove the contemporaneous conveyance of those bases to the claimant. Defendant failed to carry his burden of proof on the penalty issues, and a penalty award is appropriate. Iowa Code section 86.13.

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

In exercising its discretion, the agency must consider factors such as the length of the delays, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996). Having considered the relevant factors and the purposes of the penalty statute, I note that the employer knew claimant's medical status and his status as off work during the period from September

14, 2017 through December 18, 2017. As an uninsured employer, defendant does not have a past record of penalties. On the other hand, the fact that defendant was uninsured suggests that a significant penalty is necessary to discourage similar future conduct. I conclude that a section 86.13 penalty in the amount of two thousand four hundred dollars ($2,400.00) is appropriate in this case.

Finally, claimant asserts a request for assessment of costs. Costs are assessed at the discretion of the agency. Iowa Code section 86.40. The employer did not voluntarily pay all medical or weekly benefits to which claimant was due. Therefore, it was necessary for claimant to file this contested case proceeding. I conclude that it is appropriate to assess costs against the employer in some amount.

Claimant includes a certification of costs as Claimant's Exhibit 9. Claimant seeks award of his filing fee ($100.00). This is a reasonable request and is awarded pursuant to 876 IAC 4.33(7). Mr. Guerrero also requests that the cost of his deposition transcript ($30.00) be assessed as a cost. Agency rule 876 IAC 4.33(2) permits the award of transcription costs when appropriate. In this instance, claimant's deposition transcript was introduced as Claimant's Exhibit 10 and was beneficial to the undersigned. Therefore, I conclude that it is appropriate to assess the cost of claimant's deposition transcript against defendant.

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall pay claimant temporary total disability benefits from September 14, 2017 through December 18, 2017.

All weekly benefits shall be paid at the stipulated rate of three hundred ninety-six and 76/100 dollars ($396.76) per week.

Defendant shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

Defendant shall pay medical providers directly, reimburse claimant for all charges paid, and otherwise hold claimant harmless for all outstanding medical charges contained in Claimant's Exhibit 6.

Defendant shall reimburse claimant's medical mileage in the sum of two hundred seventy-five and 26/100 dollars ($275.26).

Defendant shall pay claimant penalty benefits in the amount of two thousand four hundred dollars ($2,400.00).

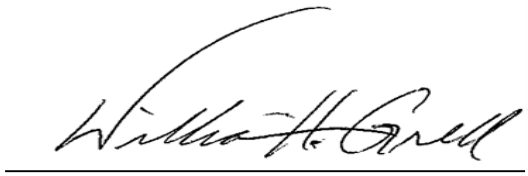
Defendant shall reimburse claimant's costs in the amount of one hundred thirty dollars ($130.00).

Defendant shall timely file all reports as required by 876 IAC 11.7.

Defendant shall post the necessary notice of failure to carry worker's compensation insurance at all work sites in an area where employees can see the notice, as required by Iowa Code section 87.2.

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

Signed and filed this 19th day of February, 2020.



WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Andrew Bribriesco (via WCES)
Bruce Walker (via WCES)

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.