BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CARLOS VASQUEZ, Claimant, vs. MANNY VICTOR MENDOZA, Employer, Defendant.	:	File No. 5067663 A R B I T R A T I O N D E C I S I O N Head Note Nos.: 1802, 1803, 2501, 2502, 3003, 4000.2

STATEMENT OF THE CASE

Claimant, Carlos Vasquez filed a petition in arbitration seeking workers' compensation benefits from Victor Manny Mendoza (Mendoza), uninsured defendant.

On July 24, 2019, claimant filed an application for entry of default against defendant, based on defendant's failure to file a timely answer to the petition. On August 5, 2019, the undersigned entered a default against defendant and scheduled a hearing to take place on August 27, 2019 by telephone for consideration of an award of such relief as may be warranted by the evidence. The hearing took place on August 27, 2019. The proceeding was recorded digitally and constitutes the official record of the proceeding. The record in this case consists of claimant's exhibits 1 through 5, and the testimony of claimant. Serving as interpreter for the hearing was Karla Alvarez.

At hearing, claimant's counsel moved to amend the petition to show a date of injury of February 23, 2018. The motion was granted and the petition was amended to reflect an injury date of February 23, 2018.

ISSUES

1. Whether claimant's injury resulted in a temporary disability.
2. Whether claimant's injury resulted in a permanent disability; and if so,
3. The extent of claimant's entitlement to permanent partial disability benefits.
4. Rate.
5. Whether there is a causal connection between the injury and the claimed medical expenses.

6. Whether claimant is entitled to alternate medical care.

7. Whether defendant is liable for a penalty under Iowa Code section 86.13.

FINDINGS OF FACT

Claimant was 38 years old at the time of hearing. Claimant is from El Salvador. Claimant went up to the fifth grade in El Salvador. Claimant does not read, write, or speak English.

Claimant worked as a roofer for Mendoza. On February 23, 2018, claimant fell off a roof while at work. Claimant testified he believed he fell approximately three floors from the roof to the ground.

An ambulance report for February 23, 2018 indicates claimant fell approximately 16 feet from a roof. Claimant had left hip pain. Claimant was taken to Mercy Medical Center in Dubuque, Iowa. (Exhibit 1)

Claimant was evaluated at Mercy Medical Center on February 23, 2018. Claimant fell approximately 16 feet from a roof. Claimant had no loss of consciousness. Claimant had left hip pain. Claimant was assessed as having a left femoral neck fracture. Given the nature of the fracture, claimant was transported by ambulance to the University of Iowa Hospitals and Clinics (UIHC). (Ex. 2)

Claimant was evaluated at the UIHC as having a left femoral neck fracture. Claimant underwent surgery on February 24, 2018 consisting of stabilization of the left femoral fracture with a dynamic hip screw. (Ex. 3, pp. 9, 16-22, 30-34)

Claimant returned to the UIHC to have hardware removed from the left hip. The fracture had failed fixation. X-rays showed increased displacement of the femoral neck with bone deterioration. A left hip arthroplasty was discussed and chosen as a treatment option. (Ex. 3, p. 83)

On December 19, 2018, claimant underwent surgery consisting of removal of hardware and a left total hip arthroplasty. (Ex. 3, pp. 103-104, 115, 124-125)

Claimant returned to the UIHC on January 28, 2019. Claimant was doing well following a total hip replacement. Claimant walked with a limp and was walking with an assistive device. Claimant was allowed to return to normal activities, but cautioned to use common sense with activity. (Ex. 3, pp 130-133)

Claimant testified he was released from care from UIHC on January 20, 2019.

Exhibit 4 is a list of medical charges regarding claimant's medical care. Medical bills from Mercy Medical Center indicate claimant was billed $144,475.26 in medical charges. Claimant was billed $144,777.26 in medical charges from the UIHC. Iowa

Department of Human Services documents indicate claimant has an outstanding Medicaid lien of $15,340.47. (Ex. 4)

Claimant testified he worked approximately 20 days for Mendoza. Claimant was paid $300.00 each day he worked.

Claimant testified he still has problems with walking. Claimant has continued hip pain. Claimant said he has been looking for work since being released from care. Claimant said he is unable to find work, in part, because of his injury.

Claimant testified that because he is unable to earn wages, he has had difficulty paying rent and providing food for his family. Claimant testified he is able to feed his family, in part, due to help from public assistance programs.

In a professional statement, claimant's counsel indicated he performed a search regarding claimant's employer, Manny Mendoza. Claimant's counsel indicated his search indicated Mr. Mendoza did not have workers' compensation insurance at the time of claimant's injury.

CONCLUSIONS OF LAW

As a result of the default, claimant has established that there was an employee-employer relationship between claimant and the employer; and that the employee sustained an injury that arose out of and in the course of employment on February 23, 2018 with defendant employer.

The first issue to be determined is the injury of February 23, 2018 was a cause of temporary disability.

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).

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

Records indicate claimant was injured and unable to work beginning on February 23, 2018, the day claimant fell at work. Claimant was found to be at maximum medical improvement (MMI) on January 28, 2019. Given this record, claimant is due healing period benefits from February 24, 2018 through January 28, 2019.

The next issue to be determined is whether the injury is a cause of permanent disability.

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).

Claimant fell approximately 16 feet from a roof while working for Mendoza. Claimant fractured his hip as a result of the fall. Claimant underwent two surgeries, including a left total hip replacement. Claimant's credible testimony is that, over one and one-half years after the date of injury, he continues to have hip pain, he limps, and has limitations regarding his hip. Given this record, claimant has carried his burden of proof that his injury resulted in a permanent disability.

The next issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits.

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 the 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.

Claimant was 38 years old at the time of hearing. Claimant went up to the fifth grade in El Salvador. Claimant does not speak, write, or read English. Claimant had two surgeries, including a left total hip replacement. Claimant has looked for work, but has been unable to find employment. Claimant was not given permanent restrictions, but instructed to monitor his activity given his left total hip replacement. Claimant's unrebutted testimony is that he has continued hip pain and walks with a limp. Claimant testified he has difficulty finding work as a roofer due to his injury. Based on these facts, it is found that claimant has a 50 percent industrial disability of loss of earning capacity. Claimant was released to return to work on January 28, 2019. Permanent partial disability benefits shall commence as of January 29, 2019.

The next issue to determine is rate.

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).

Under section 85.36(7), the gross weekly earnings of an employee who has worked for the employer for less than the full 13 calendar weeks immediately preceding the injury are determined by looking at the earnings of other similarly situated employees employed over that full period, but if earnings of similar employees cannot be determined, by averaging the employee's weekly earnings computed for the number of weeks that the employee has been in the employ of the employer.

The record indicates claimant did not work for 13 weeks before the work injury. Claimant testified he worked a total of 20 days for Mendoza. He testified he was paid $300.00 at the end of each work day. Claimant was single with four exemptions. Claimant believes his average weekly wage was $500.00 per week. Given this record, claimant's weekly rate is $348.18 per week.

The next issue to be determined is whether there is a causal connection between the injury and the claimed medical expenses.

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).

Claimant received medical care for his February of 2018 work injury. The medical expenses for this care are found at Exhibit 4. There is no evidence that expenses detailed in Exhibit 4 are not related to treatment claimant received for his February of 2018 work injury. There is no evidence in the record that charges made by providers were not fair and reasonable. Defendants are liable for the claimed medical expenses.

The next issue to be determined is if claimant is entitled to alternate medical care.

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).

Defendant has not communicated with claimant or his attorney regarding claimant's medical care. Defendant did not participate in this hearing. Based on this, it is found defendant has abandoned claimant's care. Claimant seeks treatment that is appropriate for this injury. Claimant's request for alternate medical care consisting of treatment for his hip condition is granted.

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

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

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

Claimant is due healing period benefits from February 24, 2018 through January 28, 2019. Defendant gave no reason why these benefits were not paid. A penalty of 50 percent is appropriate. The period of time between February 24, 2018 through January 28, 2019 is approximately 48 weeks. A penalty of $8,356.32 is appropriate. (48 weeks x $348.18 x 50 percent).

Claimant is due 250 weeks of permanent partial disability benefits. At the time of hearing, claimant was due approximately 30 weeks of permanent partial disability benefits. (January 29, 2019 through August 27, 2019). Defendant gave no reason why these benefits were not paid. A penalty of 50 percent is appropriate. Defendant is liable for penalty of $5,222.70 for failure to pay permanent partial disability benefits. (30 weeks x $348.18 x 50 percent).

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:

That defendant shall pay claimant healing period benefits from February 24, 2018 through January 28, 2019 at the rate of three hundred forty-eight and 18/100 dollars ($348.18) per week.

That defendant shall pay claimant two hundred fifty (250) weeks of permanent partial disability benefits at the rate of three hundred forty-eight and 18/100 dollars ($348.18) commencing on January 29, 2019.

That defendant shall pay claimant's medical expenses as detailed above and as shown in Exhibit 4.

That defendant shall provide alternate medical care for further care of claimant's hip condition.

That defendant shall pay eight thousand three hundred fifty-six and 32/100 dollars ($8,356.32) in penalty for failure to pay healing period benefits.

That defendant shall pay five thousand two hundred twenty-two and 70/100 dollars ($5,222.70) for failure to pay permanent partial disability benefits.

That defendant shall pay costs.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. April 24, 2018).

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

Signed and filed this 19th day of September, 2019.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Andrew W. Bribriesco (via WCES)

Manny Victor Mendoza (via certified and regular mail)
701 Cedar Cross Road
Ace Mobile Home Park, #19
Dubuque, IA 52003

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.