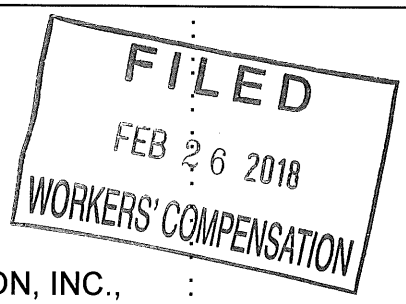
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



CONRADO GOMEZ VEGA, Claimant, vs. ABSOLUTE CONSTRUCTION, INC., Employer, and PEKIN INSURANCE, Insurance Carrier, Defendants.	:	File No. 5053969 ARBITRATION DECISION Head Note Nos.: 1803; 4000.2

STATEMENT OF THE CASE

Claimant, Conrado Gomez Vega, filed a petition in arbitration seeking workers' compensation benefits from Absolute Construction, employer, and Pekin Insurance Company, insurance carrier, both as defendants, as a result of a stipulated injury sustained on July 25, 2012. This matter came on for hearing before Deputy Workers' Compensation Commissioner Erica J. Fitch, on May 19, 2017, in Des Moines, Iowa. The record in this case consists of joint exhibits 1 through 9, claimant's exhibits 1 through 5, defendants' exhibits A through E, and the testimony of the claimant and Lynda Gomez Mitchell. The parties submitted post-hearing briefs, the matter being fully submitted on June 23, 2017.

ISSUES

The parties submitted the following issues for determination:

1. The extent of claimant's industrial disability;
2. Whether claimant is entitled to penalty benefits under Iowa Code section 86.13 and, if so, how much;
3. Whether claimant is entitled to reimbursement for an independent medical examination under Iowa Code section 85.39; and
4. Specific taxation of costs.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

FINDINGS OF FACT

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

Claimant's testimony was consistent as compared to the evidentiary record, his deposition testimony, and the testimony of the witnesses. His demeanor at the time of evidentiary hearing was appropriate and gave the undersigned no reason to doubt claimant's veracity. The undersigned observed claimant readjust the position of his back while seated during hearing. Claimant is found credible.

Claimant was 32 years of age at the time of hearing. Claimant is a native of Mexico. He attended limited schooling in Mexico and did not graduate from high school. Claimant arrived in the United States in 2003 and became a citizen in 2017. Since arriving in the United States, he has not received any formal education. (Claimant's testimony; Ex. B, pp. 5-6) While married on the date of evidentiary hearing, claimant was single on the date of injury. He and his wife share three minor children. The family resides in Milford, Iowa. (Claimant's testimony; Ex. B, p. 4) Claimant's native language is Spanish; he has learned English with the assistance of his wife. (Claimant's testimony) No language interpreter was used during evidentiary hearing.

Claimant's work history since his arrival in the United States consists of employment as a dairy laborer/milker and his employment with defendant-employer. Claimant worked as a dairy laborer until his hire by defendant-employer in approximately 2005. He thereafter worked as a construction laborer for defendant-employer; his starting wage fell in the range of $13.00 per hour. Defendant-employer constructs agricultural buildings such as hog barns, pole barns, and dairy facilities. Claimant described the work as heavy, manual labor. (Claimant's testimony; Ex. B, pp. 5-6)

Claimant suffered a stipulated work related injury on July 25, 2012. On that date, claimant was working with a crew of approximately 10 men and ascended onto a roof to finish up the days' tasks. While attempting to install windbreaks, claimant fell onto his right side onto a piece of lumber. Claimant testified he told his friends on the crew about the fall and attempted to keep working. When his pain worsened later that day, claimant telephoned Travis Dagel, the owner of defendant-employer, and informed him of the fall. Claimant testified Mr. Dagel told him to go home and rest, but if the pain did not improve, to present to a hospital. Claimant went home, but later that evening, went to the hospital in Spirit Lake, Iowa. The hospital staff transferred claimant to a specialist. (Claimant's testimony)

On July 26, 2012, claimant was transferred to Avera McKennan Hospital in Sioux Falls, South Dakota, where claimant was evaluated by Michael Person, M.D. Dr. Person opined a CT scan of claimant's abdomen/pelvis showed a grade 4 renal laceration of the right kidney. He noted a Foley catheter had been placed and recommended surgical intervention with urologist, David Arend, M.D. (JE1, pp. 1-2, 12) Later that same date, Dr. Arend performed surgery, consisting of cystourethroscopy, bilateral retrograde pyeloureterograms under fluoroscopy, and right double-J stent placement. (JE1, pp. 7-8)

Following surgery, claimant remained hospitalized and underwent periodic evaluation. On July 28, 2012, claimant underwent a repeat CT scan, read by Matthew Helgeson, M.D., as revealing: a shattered right kidney with large perinephric hematoma/urinoma; development of ascites/hemorrhage within the right upper quadrant; and development of small right and trace left pleural effusions. (JE1, pp. 10-11) Claimant was discharged from the hospital on July 31, 2012, with a noted discharge diagnosis of complete laceration through the right kidney. He was restricted from strenuous activities for one month. (JE1, pp. 12-13)

Claimant returned to Dr. Arend in follow up on October 4, 2012. Claimant underwent a follow up CT scan of his abdomen/pelvis which the radiologist noted showed development of posttraumatic scarring and total renal parenchymal loss in the range of 25 percent, as compared to the contralateral kidney. (JE2, pp. 3-4)

The medical case manager assigned by defendants attended claimant's October 4, 2012 appointment. The subsequent notes indicate Dr. Arend was pleased with claimant's healing progress, as the kidney had been torn "into four to five pieces." (JE3, p. 1) Dr. Arend placed claimant at maximum medical improvement (MMI) and released him without permanent restrictions. Dr. Arend did recommend purchase of a jacket with built-in padding to wear as a precautionary measure while roofing. (JE3, p. 1; JE4, p. 1) The case manager also noted Dr. Arend would not perform an impairment rating. (JE3, p. 1)

Claimant testified he was off work during a period of recovery and received weekly workers' compensation benefits. Following Dr. Arend's release to return to work, claimant went back to work at defendant-employer. Claimant testified he was promoted to the position of foreman. (Claimant's testimony) The job description for claimant's position as a foreman noted requirements of lifting and carrying 20 to 50 pounds, with such duties occurring "Alot [sic]." (JE9)

As Dr. Arend did not perform impairment ratings, defendants scheduled claimant for an independent medical examination (IME) with occupational and environmental medicine physician, Douglas Martin, M.D., on November 28, 2012. Dr. Martin performed a medical records review and physical examination. (JE5, pp. 1-3) He thereafter assessed a right kidney laceration, status post stent placement and subsequent removal, with normal kidney function. He described claimant's prognosis as excellent and opined claimant had achieved MMI, without a need for permanent

restrictions. With respect to any permanent impairment, Dr. Martin opined claimant demonstrated normally functioning kidneys bilaterally, but noted an imaging study revealed approximately 25 percent scarring. As claimant's injury resulted in no impact upon his activities of daily living, Dr. Martin opined claimant sustained no permanent impairment. (JE5, pp. 4-5)

Claimant testified he began to suffer with increased pain in his back, about the area of his original kidney pain, as well as blood in his urine. (Claimant's testimony) As a result, claimant returned to Dr. Arend in follow up on February 14, 2013. At that time, claimant expressed difficulty with urination, including taking up to 20 minutes to fully empty his bladder. A scope revealed significant scar tissue in the urethra, causing stricture. Dr. Arend opined the scar tissue required surgical removal, which was then scheduled for March 15, 2013. (JE3, p. 2)

On March 15, 2013, claimant underwent repeat surgery with Dr. Arend, consisting of cystourethroscopy, urethral dilation, and placement of a Foley catheter. Dr. Arend noted a post-operative diagnosis of stone stenosis and urethral stricture. (JE1, pp. 14-15) Following surgery, claimant returned to Dr. Arend on March 18, 2013. The case manager was present and noted Dr. Arend relayed the presence of scar tissue in three areas. Per Dr. Arend, scar tissue of the urethra was notorious for recurring and noted that if repeat surgery was required, it would be significantly more intensive. Dr. Arend again released claimant without permanent restrictions. (JE3, p. 3) Claimant returned to work at defendant-employer. (Claimant's testimony) Claimant returned to Dr. Arend in follow up on June 18, 2013. At that time, Dr. Arend assessed urethral stricture and resolved right renal laceration. He imposed no permanent restrictions. (JE4, pp. 2-3)

Defendants referred claimant back to Dr. Martin for a second IME on August 7, 2013. Dr. Martin reviewed claimant's intervening medical records and performed a repeat physical examination. (JE5, pp. 8-9) Thereafter, Dr. Martin added to his original diagnosis, also assessing a history of urethral stricture, status post urethral dilation procedure. Dr. Martin noted that post-procedure, claimant's condition improved and his symptoms resolved. Dr. Martin opined claimant's condition had been appropriately treated and again noted an excellent prognosis. He noted claimant's symptoms had resolved and his kidney was functioning normally. (JE5, pp. 8, 10) Dr. Martin opined claimant had achieved MMI and did not require permanent restrictions. Due to lack of impact on activities of daily living, Dr. Martin opined claimant did not sustain any permanent impairment. (JE5, p. 11)

Claimant testified he again began to suffer with back pain. (Claimant's testimony) Due to complaints of noted right flank pain, on February 5, 2014, claimant underwent a nuclear medicine study. Results demonstrated 59 percent of claimant's renal function was attributable to the left kidney and 41 percent to the right kidney. (JE6, p. 1)

Claimant underwent another procedure with Dr. Arend on March 7, 2014. This procedure consisted of: cystourethroscopy; retrograde pyeloureterogram; diagnostic right ureteroscopy; right double-J stent placement; and attempted incision of the stenotic connection between the upper and lower pole moieties. (JE1, p. 17) Dr. Arend opined claimant's recent CT scan showed a malrotated and obstructed upper pole moiety, assumed to be secondary to healing from the prior renal fracture. He further noted a nuclear medicine renal scan revealed no significant function of the upper pole moiety, but 41 percent function on the right side and 59 percent function on the left side. (JE1, p. 18) Dr. Arend noted postoperative diagnoses of: a history of right renal fracture; right flank pain; and obstructed upper pole moiety. (JE1, p. 17)

On March 26, 2014, claimant underwent a right open heminephrectomy/partial nephrectomy with Dr. Arend. (JE1, pp. 21-23) Thereafter, claimant remained hospitalized until his discharge on March 29, 2014. (JE1, pp. 25-26)

Claimant underwent an ultrasound of his right kidney on April 22, 2014. (JE6, p. 3) Claimant returned to Dr. Arend on May 12, 2014. At that time, Dr. Arend again released claimant without permanent restrictions. (JE4, p. 4) Claimant returned to work at defendant-employer. (Claimant's testimony)

Claimant testified he developed back pain in 2014, following this most recent surgery. (Claimant's testimony; Ex. D, p. 32)

As a result, on September 23, 2014, claimant presented for chiropractic evaluation by Laura Ann Ingwersen, D.C. Dr. Ingwersen noted complaints of neck and low back pain, onset "a month ago after running into beam while walking." She noted claimant struck his nose and head, but had not seen a medical provider. (JE8, p. 1) Dr. Ingwersen also noted claimant's history of partial removal of his right kidney after laceration in a fall. (JE8, p. 2) She performed a series of chiropractic adjustments. (JE8, p. 4)

For approximately six months in early-mid 2015, claimant returned to work at a dairy. He indicated a desire to see if such work was easier to physically tolerate. He worked as a milker and earned approximately $14.00 per hour. He ultimately chose to return to work at defendant-employer. (Ex. B, p. 6)

Claimant returned to Dr. Ingwersen on April 15, 2015 with complaints of low back pain and occasional mild neck pain. She noted claimant reported an onset of back pain approximately two weeks prior, without known cause. She again performed chiropractic adjustments. (JE8, pp. 6-7)

On June 28, 2016, claimant again presented to Dr. Ingwersen. On this date, she noted complaints of left sacroiliac joint pain, onset two months prior. Dr. Ingwersen performed chiropractic adjustments. (JE8, pp. 8-9)

Defendants referred claimant back to Dr. Martin for a third IME on June 28, 2016. Dr. Martin reviewed claimant's updated medical records. (JE5, pp. 12-14) He noted claimant underwent upper pole nephrectomy on March 26, 2014 and continued to self-catheterize. Dr. Martin opined claimant thereafter underwent a functional study which demonstrated 60 percent of renal function was accomplished via claimant's left kidney and 40 percent via claimant's right kidney. He noted claimant's studies showed normal function in the remainder of the urological system. (JE5, p. 14)

Dr. Martin thereafter added additional assessments to his prior diagnoses. Specifically, he also assessed a nonfunctioning right kidney upper pole, status post right partial nephrectomy, and intermittent ongoing problems with urethral stenosis. (JE5, p. 15) Dr. Martin opined claimant had achieved MMI and did not require permanent restrictions. (JE5, p. 17) He described claimant's prognosis as fair. (JE5, p. 15)

With respect to the extent of any permanent impairment, Dr. Martin noted his prior ratings were based on the premise that claimant recovered from urethral stenosis and kidney function issues. He noted that since claimant's latest procedure, that premise was no longer accurate. He explained that claimant did not demonstrate any kidney function issues aside from the differentiation between the amounts performed by the left and right kidneys. Dr. Martin explained that a person with one functioning kidney is considered to have sustained a 10 percent whole person impairment based upon the loss of an essential organ. Dr. Martin indicated this rating is designed to reflect a loss in safety, as a person can operate with one kidney, but no longer has a kidney in reserve. (JE5, p. 16) Dr. Martin noted claimant continued to demonstrate some residual function in the right kidney and as a result, opined a 3 percent whole person impairment was appropriate to quantify the loss. Dr. Martin opined claimant also sustained a permanent impairment of 5 percent whole person for urethral strictures requiring dilation. He accordingly opined claimant sustained a combined permanent impairment of 8 percent whole person. (JE5, p. 17)

At the referral of claimant's counsel, on February 17, 2017, claimant presented to board certified neurologist, Marc Hines, M.D., for IME. Dr. Hines authored a report containing his findings and opinions on March 14, 2017. (CE1, pp. 1, 12) Dr. Hines performed a medical records review and interviewed claimant. (CE1, pp. 1-6) Claimant relayed complaints of low back pain, continuing since the time of his fall and causing fatigue. Claimant's wife also attended the IME and expressed belief claimant was depressed, with a decreased ability to interact with their children, increased exhaustion and sleep, and decreased ambition and motivation. Dr. Hines also noted complaints of decreased libido. During interview, Dr. Hines indicated he evaluated claimant for symptoms of anxiety and depression. (CE1, pp. 5-6) Dr. Hines also performed a physical examination. (CE1, p. 7)

Following records review, interview and examination, Dr. Hines opined that on July 25, 2012, claimant sustained a kidney laceration resulting in decreased kidney function, a lumbosacral strain which caused long-term difficulties, and secondary depression. (CE1, p. 8) He recommended claimant continue to follow up with a

urologist, undergo psychiatric evaluation, and seek evaluation from his primary doctor with respect to treatment options for low back pain. He recommended no permanent restrictions as a result of the work injury. With respect to the extent of permanent impairment, Dr. Hines opined claimant sustained the following impairments: 10 percent whole person for depression; 5 percent for low back complaints; 10 percent whole person for renal damage equivalent to loss of function equal to 100 percent of one kidney; and 5 percent whole person for urethral conditions. In total, he opined claimant sustained a combined impairment of 27 percent whole person. (CE1, pp. 9-10)

Following receipt of Dr. Hines' IME report, claimant's counsel forwarded a copy to Dr. Arend for review. Dr. Arend agreed Dr. Hines performed a thorough evaluation of claimant's injury and medical history. He agreed with Dr. Hines' recommendation for a psychiatric referral and commented claimant should continue with at least weekly self-catheterization on an indefinite basis. However, Dr. Arend noted claimant sustained only a 20 percent unilateral, right sided loss with respect to claimant's kidneys, as opposed to a 100 percent loss, as noted by Dr. Hines. (CE2, pp. 1-2)

Following his most recent surgery, claimant continued to follow up with Dr. Arend on a semi-annual to annual basis. During this time, Dr. Arend recommended generally weekly catheterization, but imposed no permanent restrictions. (JE4, pp. 5-11) At follow up on April 24, 2017, Dr. Arend recommended continued weekly catheterization for the indefinite future. (JE4, pp. 14-15; CE2, p. 3)

Claimant continues to work for defendant-employer as a construction foreman. Claimant continues to present to work daily. Claimant testified he enjoys his work, but self-limits in his activities. Specifically, claimant testified he seeks help with any lifting over 25 to 30 pounds; he often receives help from a coworker, Jonathan Acevedo. He also is more careful in activities due to a constant presence of pain. At the end of a work day, claimant testified he is fatigued and his back is painful; he utilizes over-the-counter pain medication. Claimant has not sought work elsewhere, as he enjoys his work for defendant-employer and feels he has been treated fairly. (Claimant's testimony)

Travis Dagel, owner of defendant-employer, provided deposition testimony. Mr. Dagel described claimant as an excellent worker and excellent supervisor. (CE3, pp. 3, 7; Ex. E, pp. 3, 7) Mr. Dagel described claimant as a hard worker, one who was also not likely to complain. (CE3, p. 9; Ex. E, p. 9)

Mr. Dagel's testimony was clear and consistent with the evidentiary record. The undersigned was presented with no reason to doubt Mr. Dagel's veracity. Mr. Dagel is found credible.

Jonathan Acevedo also provided deposition testimony. Mr. Acevedo is a 12-year employee of defendant-employer, who regularly works with claimant. (CE4, pp. 2-3) Mr. Acevedo testified that claimant's pace of work has slowed as compared to pre-injury and claimant now avoids heavy lifting that he previously performed. He testified he has

visibly observed claimant in pain and has seen claimant place his hand upon his low back/kidney region. Mr. Acevedo also testified claimant has told him claimant experiences pain. (CE4, pp. 6-7)

Mr. Acevedo's testimony was clear and consistent with the evidentiary record. The undersigned was presented with no reason to doubt Mr. Acevedo's veracity. Mr. Acevedo is found credible.

By the end of a work week, claimant testified he is fatigued and unable to participate in activities with his family. Due to his symptoms, claimant testified he is limited in playing with his children. Claimant testified he is unable to mow the lawn, perform house repairs, or complete household chores. He experiences difficulty with prolonged standing or sitting and must urinate more frequently. Pursuant to Dr. Arend's order, claimant self-catheterizes once weekly. He anticipates he will do this for the remainder of his life. He also expects annual follow ups with a urologist. Claimant admitted he has been diagnosed with depression, but has not sought care and is uncertain if he wishes to pursue such care. (Claimant's testimony)

Claimant's wife, Lynda Gomez Mitchell, testified at evidentiary hearing. She testified claimant demonstrated no medical problems, including back pain, prior to the July 2012 work injury. Following the work injury, Ms. Gomez Mitchell indicated claimant required significant help from her and he was unable to even sit up in bed due to back pain. She testified much has changed in their personal lives and claimant no longer engages in activities with their children due to fatigue and back pain. She testified the children are aware of their father's limitations. Responsibility for household chores and child-rearing fall upon Ms. Gomez Mitchell. She believes claimant suffers from depression and should see a psychiatrist. (Ms. Gomez Mitchell's testimony)

Ms. Gomez Mitchell's testimony was clear and consistent with that of claimant. Her demeanor was acceptable and gave the undersigned no reason to doubt her veracity. Ms. Gomez Mitchell is found credible.

Claimant testified his wages have increased since the 2012 work injury. At the time of the work injury, claimant earned approximately $800.00 per week; he now earns approximately $1,000.00 per week. (Claimant's testimony) Review of claimant's federal tax records reveal claimant's earnings in the years 2011 through 2015. In 2011, claimant earned $19,306.00. (Ex. C, p. 1) In 2012, the year of his work-related injury, claimant earned $15,750.00. (Ex. C, p. 3) In 2013, claimant earned $29,240.00, all in the employ of defendant-employer. (Ex. C, pp. 5, 7) In 2014, claimant earned $29,260.00, all in the employ of defendant-employer. (Ex. C, pp. 8, 10) In 2015, claimant earned a total of $30,862.00; he earned $14,080.00 at defendant-employer and $16,782.24 at the dairy. (Ex. C, pp. 11, 13)

Defendants paid weekly indemnity benefits for both temporary and permanent partial disability. (Ex. A, p. 1)

CONCLUSIONS OF LAW

The first issue for determination is the extent of claimant's industrial disability.

In order to determine the extent of claimant's industrial disability, it must first be determined if claimant sustained an injury to his back as a result of the July 25, 2012 work injury. Claimant argues he sustained a low back injury at the same time as the kidney injury. Defendants dispute any injury to claimant's low back.

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 relies upon the opinion of Dr. Hines to establish claimant sustained a low back strain with ongoing symptomatology as a result of the July 25, 2012 work injury. Claimant suffered an undisputed injury to his right kidney. Pain arising from such an injury could easily be described, particularly by a non-native English speaker, as low back pain. Therefore, I find claimant's complaints of ongoing low back pain following the work injury to be credible. However, claimant's contemporaneous medical records are void of any complaints of low back pain specifically and similarly are void of any objective medical testing demonstrating an injury occurred to the musculature of claimant's low back. Based upon these facts, I am unable to award any weight to the opinion of Dr. Hines, as his opinion is premised upon layman's testimony alone, without contemporaneous medical evidence. As a result, I am unable to find claimant has carried his burden of proving he sustained an injury to the musculature of his low back as a result of the work injury of July 25, 2012.

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The parties have stipulated claimant's disability shall be evaluated industrially.

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 R. Co., 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 32 years of age on the date of evidentiary hearing. His is a native of Mexico, where he attended some formal schooling. However, claimant did not earn a high school diploma or its equivalent. He arrived in the United States in 2003 and has not taken any formal educational or vocational training. Claimant's native language is Spanish. He learned English informally, but successfully, as evidenced by his ability to participate in evidentiary hearing without the need of a language interpreter. Claimant's work history consists entirely of manual labor, as a dairy milker and construction worker for defendant-employer. Given claimant's language skills and education, he is not an ideal candidate for retraining into less physically demanding occupations.

Claimant began work as a construction laborer for defendant-employer in 2005. On July 25, 2012, claimant suffered a stipulated work-related fall. The fall resulted in a right kidney laceration which required multiple surgeries, culminating in a March 2014 partial nephrectomy due to a nonfunctioning upper pole of the right kidney. The kidney injury resulted in secondary difficulties with renal function and urethral stricture. A test of claimant's renal function demonstrated 60 percent of function was accomplished via the left kidney and 40 percent via the right kidney.

Dr. Arend opined claimant lost function equivalent to 20 percent of the right kidney, with the functional loss being unilateral only. Dr. Martin also opined claimant had lost use of a portion of the right kidney. While Dr. Hines opined claimant had lost

the equivalent of one entire kidney, I find his explanation unconvincing and an apparent misunderstanding of the allocation of renal function between two kidneys, as opposed to demonstrating a loss bilaterally. Dr. Arend is a urologist who has treated claimant over a number of years, including multiple surgeries. I find his opinion regarding loss of use to be entitled to the greatest weight. As Dr. Martin's opinions are consistent with those of Dr. Arend, I find Dr. Martin's opinions with respect to functional loss of claimant's kidneys entitled to greater weight than those of Dr. Hines. Dr. Martin opined claimant sustained permanent impairment of 3 percent whole person for loss of a portion of an essential organ.

Dr. Martin also opined claimant sustained a permanent impairment of 5 percent whole person due to urethral strictures requiring dilation, the same percentage assigned by Dr. Hines for this condition. Accordingly, I adopt the 5 percent whole person rating as accurate with respect to claimant's urethral condition.

No physician has imposed or recommended permanent work restrictions as a result of the July 25, 2012 work injury. Dr. Arend did recommend purchase of a padded jacket to wear for protection during roofing activities. Despite lack of formal permanent restrictions, claimant testified he does self-limit in his activities at work. Specifically, claimant testified he avoids lifting of over 25 to 30 pounds and exercises caution in his activities. Claimant's testimony is supported by that of coworker, Mr. Acevedo. I believe claimant does limit himself in activities as a result of the work injury, due primarily to his description of back pain. As noted by Mr. Acevedo, claimant suffers pain in his low back about the kidney region. Therefore, I relate claimant's reported complaints to the kidney injury itself. Although I believe claimant has pain and self-limits to protect against increased pain and further injury, no physician has imposed work restrictions. I am accordingly, unable to find claimant's work injury prevents him from engaging in his prior work at defendant-employer or in any other prior occupations.

Despite claimant's lack of formal restrictions, I find claimant does continue to suffer with pain related to the work injury. This pain results in fatigue and an inability to perform a number of non-work related activities. Quite notably, claimant is required to perform weekly self-catheterization and undergo annual urological follow up. I also note claimant and his wife acknowledge claimant potentially suffers with symptoms of depression. Dr. Hines opined claimant sustained permanent impairment as a result of depression and should visit a psychiatric provider. When provided Dr. Hines' report for review, Dr. Arend expressed agreement with the psychiatric referral.

Although Dr. Hines opined claimant suffered from permanent impairment due secondary depression, this diagnosis is outside of Dr. Hines' specialty as a neurologist. Claimant has not undergone any specialized mental health evaluation and indicated he was uncertain if he wished to pursue such evaluation. Claimant utilizes no psychiatric medication and it is not evident that claimant's mental health impacts his work. On these facts, I cannot provide any weight to Dr. Hines' opinion that claimant sustained a 10 percent whole person impairment as a result of secondary depression.

Despite ongoing symptoms, claimant remains employed at defendant-employer and has been promoted since the July 25, 2012 work injury. His employer described claimant as an excellent worker and supervisor. With the exception of the 6-month period in 2015 during which claimant attempted a trial of work at a dairy, claimant has not sought alternative employment. Claimant's weekly earnings at defendant-employer have increased significantly since the work injury, from $800.00 per week in 2012 to $1,000.00 per week in 2017. Claimant has demonstrated clear motivation to continued employment in the labor market generally and with defendant-employer specifically.

Upon consideration of the above and all other relevant factors of industrial disability, it is determined claimant sustained a 20 percent industrial disability as a result of the stipulated work-related injury of July 25, 2012. Such an award entitles claimant to 100 weeks of permanent partial disability benefits (20 percent x 500 weeks = 100 weeks), commencing on the stipulated date of January 14, 2015. The parties stipulated at the time of the work injury, claimant's gross weekly earnings were $800.00, and claimant was single and entitled to 3 exemptions. The proper rate of compensation is therefore, $520.00. The parties stipulated defendants previously paid 40 weeks of permanent partial disability benefits, representing Dr. Martin's rating of 8 percent whole person, at the weekly rate of $520.00.

The next issue for determination is whether claimant is entitled to penalty benefits under Iowa Code section 86.13 and, if so, how much.

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It also is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

If the employer fails to show reasonable cause or excuse for the delay or denial, the commissioner shall impose a penalty in an amount up to 50 percent of the amount unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254

(Iowa 1996). The factors to be considered in determining the amount of the penalty include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

Claimant argues permanent partial disability benefits should have been paid at some point prior to Dr. Martin's ultimate rating of 8 percent whole person, due to the severity of the injury claimant sustained. While I agree claimant sustained a significant injury, defendants behaved reasonably in reliance upon the opinions of Drs. Arend and Martin. Following each of the first two surgeries, Dr. Arend released claimant without permanent restrictions. As Dr. Arend did not perform impairment ratings, defendants promptly retained Dr. Martin on each occasion to opine as to the extent of claimant's permanent impairment. On each occasion, Dr. Martin opined claimant did not sustain permanent impairment and required no permanent work restrictions. There is nothing inherently flawed in Dr. Martin's logic and claimant offered no contemporaneous medical opinions to the contrary. Following the third surgery, Dr. Martin opined claimant sustained an 8 percent whole person impairment, the entirety of which was promptly paid by defendants. On these facts, I find the issue of the extent of claimant's industrial disability was fairly debatable and defendants behaved reasonably in investigating and paying claimant's claim. No penalty benefits are warranted.

The next issue for determination is whether claimant is entitled to reimbursement of an independent medical examination pursuant to Iowa Code section 85.39.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

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

Claimant requests reimbursement for Dr. Hines' IME in the amount of $2,483.33 and associated mileage in the amount of $222.48. (CE5, pp. 1-2) Defendants secured three opinions from Dr. Martin addressing the extent of claimant's permanent disability prior to claimant's examination with Dr. Hines. Dr. Martin's IME's triggered claimant's right to a reimbursable section 85.39 examination and I find Dr. Hines' fee reasonable. Claimant is similarly entitled to reimbursement for reasonably necessary transportation expenses, including medical mileage. The distance travelled by claimant to attend the IME with Dr. Hines is significant, but not unreasonable. Accordingly, defendants shall

reimburse claimant for Dr. Hines' IME expense in the amount of $2,483.33 and associated mileage in the amount of $222.48.

The final issue for determination is a specific taxation of costs pursuant to Iowa Code section 86.40 and rule 876 IAC 4.33. Claimant requests taxation of the costs of: $100.00 filing fee; $71.30 in transcription fees associated with claimant's deposition; and $1,000.00 practitioner's report of Dr. Arend (April 19, 2017). (CE5, pp. 1, 3-4) Defendants did not dispute taxation of these costs. These are allowable costs and are taxed to defendants.

ORDER

THEREFORE, IT IS ORDERED:

The parties are ordered to comply with all stipulations that have been accepted by this agency.

Defendants shall pay unto claimant one hundred (100) weeks of permanent partial disability benefits commencing January 14, 2015 at the weekly rate of five hundred twenty and no/100 dollars ($520.00).

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

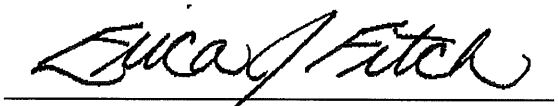
Defendants shall receive credit for benefits paid.

Defendants shall reimburse claimant for the cost of Dr. Hines' independent medical examination and the associated mileage, as set forth in the decision.

Defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Costs are taxed to defendants pursuant to 876 IAC 4.33, as set forth in the decision.

Signed and filed this 26th day of February, 2018.



ERICA J. FITCH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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EJF/kjw

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.