BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MICHAEL BOWSER, Claimant, vs. NESTLE USA, INC., Employer, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Insurance Carrier, Defendants.	:	File No. 5066232 A R B I T R A T I O N D E C I S I O N Head Notes: 1108.50, 1402.50, 1403.30 1801, 2803, 2907, 4000.2

STATEMENT OF THE CASE

Michael Bowser, claimant, filed a petition in arbitration seeking workers' compensation benefits from Nestle USA, Inc., employer and Indemnity Insurance Company of North America, insurance carrier as defendants. Hearing was held on September 17, 2019 in Waterloo, Iowa.

It should be noted that on September 4, 2019, the undersigned issued a ruling on claimant's motion to bifurcate. The ruling stated that issue of permanent partial disability and the extent of claimant's permanent disabilities would not be ripe for determination at the September 17, 2019 hearing and therefore were bifurcated and would be heard at a later date.

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.

Michael Bowser and James Payne were the only witnesses to testify live at trial. The evidentiary record also includes joint exhibits 1-5, claimant's exhibits 1-11, and defendants' exhibits A-E. Because exhibit A is a First Report of Injury it is admitted for the limited purposes allowed under section 86.11, Code of Iowa. All exhibits were

received without objection. However, it should be noted that claimant's exhibit 6, a report from Dr. Naylor, was served late. Prior to the hearing, the parties reached an agreement that if claimant's exhibit 6 was entered into evidence then the defendants would be allowed to have a reasonable amount of time to obtain an independent medical examination (IME). The undersigned accepted the parties' agreement. The evidentiary record was left open for the defendants to obtain the IME report. The report was filed on October 15, 2019 and marked as Exhibit E; this exhibit was also accepted into the record.

The parties submitted post-hearing briefs on November 18, 2019, at which time the case was fully submitted to the undersigned.

ISSUES

The parties submitted the following issues for resolution:

1. Whether claimant sustained an injury which arose out of and in the course of employment on July 28, 2017.

2. Whether claimant's claim is barred by operation of section 85.23, Code of Iowa for failure to provide timely notice of his injury.

3. Whether claimant is entitled to temporary disability benefits as a result of the alleged July 28, 2017 work injury.

4. Whether claimant is entitled to payment of past medical expenses under section 85.27, Code of Iowa.

5. Whether claimant is entitled to payment of alternate medical care under section 85.27, Code of Iowa.

6. Whether penalty benefits are appropriate.

7. Assessment of costs.

FINDINGS OF FACT

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

Claimant, Michael Bowser ("Bowser"), was 60 years old at the time of hearing. He asserts that he sustained a work injury to his right shoulder on Friday, July 28, 2017 while working for Nestle, USA, Inc. ("Nestle"). At the time of the alleged injury Bowser was working as a bag filling operator. Bowser typically worked the third shift; however, on the date of the alleged injury Bowser was working the day shift. During the second part of Bowser's shift, he needed to perform a major cleanup on the line. He needed to clean the sifter, which is a large steel bowl. While he was cleaning the sifter, Bowser's

brush caught on something in the sifter which caused his right arm to turn in the opposite direction. He heard a pop and instantly felt a paralyzing pain in his right arm and shoulder. He was eventually able to free his shoulder and continue working. He saw the supervisor Jim Payne ("Payne") before he went home and told him about the injury and that he felt something pop in his shoulder. Payne advised him to tell Jim Wilson ("Wilson"), the third shift supervisor about the injury the following week. (Testimony)

Bowser returned to work, on the third shift, the following week and reported the injury to Wilson right away. Bowser notified Wilson that his shoulder was still bothering him and that he could not do things like he did before. Wilson said he would discuss the matter with Chris Martin, the safety director at Nestle, and get back to Bowser. When Bowser did not hear back from Wilson, he kept periodically reminding Wilson of his injury because he wanted treatment. Wilson finally got back to Bowser and told him there was a physical therapy appointment for him; his first therapy appointment was on September 19, 2017. (Testimony)

On September 19, 2017, Bowser went to therapy at Rock Valley. He reported he injured his right shoulder at Nestle while cleaning a machine with a brush. He was unable to remember the exact date, but knew it occurred on a Friday. (Joint Exhibit 4, pp. 1-7)

Bowser believes that Nestle paid for the physical therapy because he never received any type of bill for the therapy. There are also copies of payments from Nestle to Rock Valley Physical Therapy Center in evidence. (Testimony; JE4, pp. 1-7; Claimant's Exhibit 11)

At the hearing, Payne testified on behalf of Nestle. Payne is a packaging supervisor for the day shift. According to Payne, if an employee is hurt on the job, the employee is required to report the injury in a timely fashion. The supervisor then records any injuries in an injury log that is kept in the supervisor's office. Payne does not recall Bowser reporting a right shoulder injury to him on July 28, 2017. However, he concedes that just because he does not remember Bowser reporting the injury, that does not mean that Bowser did not report the injury. According to Bowser, Nestle does not pay for someone's medical treat if it is not for a work-related injury. (Testimony)

Bowser's testimony that Nestle arranged for and paid for his physical therapy in September of 2019 is unrebutted. Payne testified that Nestle does not pay for someone's medical treatment if it is not for a work-related injury. I find that Nestle arranged for and paid for his physical therapy in September of 2019. Thus, I find that by at least September 19, 2017, Nestle had notice of Bowser's July 29, 2017 work injury.

Bowser continued physical therapy with Rock Valley. On September 27, 2017 Bowser reported that he felt a little better. The note stated: "I remembered just today when this happened. It was July 28, 2017. I set camper up for this coming weekend." (JE4, p. 10) At hearing, Bowser explained that the week before this September 27

appointment, he went into Nestle Human Resources and had them look up the last week that he worked days. He knew his injury had occurred on a Friday, so that is how he surmised that the date of injury was July 28, 2017. (JE4) In their post-hearing brief defendants refer to a camper incident in September of 2017. However, I do not interpret the September 2017 therapy note to demonstrate that there was any sort of an injury or incident surrounding a camper in 2017.

Bowser continued with his therapy until January 4, 2018. At that time, he reported that he had been off of work for three weeks. His shoulder had plenty of rest and was not bothering him. (JE4, pp. 25-26)

On March 26, 2018, Bowser returned to Rock Valley for additional physical therapy for his shoulder injury that happened at work the prior year. He attended therapy until April 11, 2018. (JE4, pp. 27-38)

Unfortunately, the therapy Bowser received was not helpful. After Bowser started his therapy he bumped into Martin at work and told him he was still having problems with his shoulder and a lot of pain. He also told Martin that he thought the therapy was aggravating his shoulder and that he wanted to see a doctor. Martin just gave him a mad look and walked away. (Testimony)

Bowser eventually sought treatment with his primary care physician's office where he saw Randy Wirtz, ARNP. On August 1, 2018, Bowser went in for a diabetic check and reported that he had injured his right shoulder a year ago at work. Nestle sent him to physical therapy, but his shoulder was still giving him some pain. (JE2, pp. 1-3)

Bowser returned to Randy L. Wirtz, ARNP on September 12, 2018 with neck pain. (JE2, pp. 4-6)

On May 2, 2019, Bowser saw Randy L. Wirtz, ARNP. He reported that he was still having pain in his right shoulder and difficulty raising it above his head. When he did raise his arm above his head, his right shoulder pops and the pain increases. He reported that he had injured his shoulder July 28, 2017 at work. He has continued to have pain in the right shoulder since the injury and has had difficulty raising his right arm above his head. Randy L. Wirtz, ARNP recommended an MRI of the shoulder. (JE2, pp. 7-9)

A right shoulder MRI was performed on May 9, 2019. The impression from the MRI report states:

1. [r]etracted full-thickness tears of the supraspinatus and subscapularis tendons. Pronounced fatty atrophy of the subscapularis muscle.
2. Thinning of the infraspinatus tendon, with articular surface partial-thickness tearing.
3. Long head biceps tendon rupture.

4. 5.5 cm fat signal intensity mass within the deltoid muscle compatible with a lipoma.
5. Severe osteoarthritis of the acromioclavicular joint.

(JE3, pp. 1-2)

On June 12, 2019, Bowser saw Richard W. Naylor, D.O. for right shoulder pain. He told Dr. Naylor about the work injury. Dr. Naylor noted that he did undergo therapy with no relief of his symptoms, but he continued to work through the pain. Dr. Naylor noted the MRI results from May 9, 2019. It was decided that they would proceed with surgical care. (JE1, pp. 1-3)

On July 10, 2019, Dr. Naylor performed arthroscopic surgery on Bowser's right shoulder. The post-operative diagnoses were right shoulder impingement with biceps stump symptomatic, rotator cuff tear full-thickness, SLAP tear, moderate to severe degenerative changes acromioclavicular joint. (JE1, pp. 4-5)

Bowser returned to see Dr. Naylor on July 23, 2019; he was doing well at that time. Dr. Naylor kept him off work. He indicated that Bowser would not be able to return to full duty until 9 months after the July 10, 2019 surgery. (JE1, pp. 7-9)

It is noted that Bowser did have some conservative treatment for his right shoulder prior to the July 29, 2017 injury. In August of 2003 he reported some right shoulder pain. He was instructed to take ibuprofen and given a handout with some shoulder exercise. In December of 2005 he received a steroid injection for deltoid bursitis shoulder pain. In April of 2009 he reported shoulder pain of a one-month duration. He was given Nabumetone and told to return if he did not improve. (JE5)

On April 30, 2019, at the request of his attorney, Bowser saw F. Manshadi, M.D. for an IME. Dr. Manshadi noted, "on July 28, 2017 he had a work injury at Nestle. At the time he was cleaning a sifter and was reaching with his right arm all the way down to the bottom of it when he heard a pop and also had severe pain in his right shoulder." (Cl. Ex. 4, p. 1) Dr. Manshadi opined that Bowser's right shoulder injury was causally related to his job activities at Nestle. He felt that the job activities were a substantial contributing factor to the development of the right shoulder injury. Dr. Manshadi opined that Bowser was not at MMI. He recommended additional treatment including diagnostic studies including an MRI of the right shoulder and then subsequent treatment. Dr. Manshadi recommended he avoid any activity which requires shoulder height or overhead activities, and no lifting over 20 to 30 pounds with the right upper extremity. (Cl. Ex. 4)

On August 26, 2019, Dr. Naylor opined that Bowser's preexisting right shoulder issues were materially exacerbated by the July 28, 2017 work injury when he heard a pop. (Cl. Ex. 6)

On October 8, 2019, Theron Q. Jameson, D.O. signed a letter, which was written by the attorney for the defendants, indicating he agreed with the statements in the letter. Dr. Jameson reviewed records dated from December of 1980 through July 23, 2019, but did not examine Bowser. Dr. Jameson did not find any evidence of any injury to Bowser's shoulder joint as he alleged occurred on July 29, 2017. Dr. Jameson felt it was possible that Bowser sustained a bicep injury on July 29, 2017, but that was not typically surgically repaired and did not result in any permanent impairment under The Guides. (Def. Ex. E)

The first issue to be addressed is causation. There are several physicians who have rendered their opinions in this case. Claimant relies on the opinions of Dr. Manshadi and Dr. Naylor, while defendants rely on the opinion of Dr. Jameson.

Defendants argue that Dr. Manshadi only provided his opinion related to a cumulative injury. However, I do not find this argument to be persuasive. In his report, Dr. Manshadi noted the specific job activities that Bowser was engaged in on July 28, 2017. He then opined that it was Bowser's job activities that were a substantial contributing factor to the development of his right shoulder injury. Defendants' interpretation of Dr. Manshadi's opinion is too narrow. I find that Dr. Manshadi causally connected Bowser's right shoulder injury to his July 28, 2017 work activities.

Defendants contend Dr. Naylor's opinion is flawed because he does not address what defendants characterize as inconsistencies in the medical records. I do not find this argument to be persuasive. In their post-hearing brief defendants refer to a camper incident in September of 2017. However, I do not interpret the September 2017 therapy note to demonstrate that there was any sort of an injury or incident surrounding a camper in 2017.

Defendants rely on the opinion of Dr. Jameson who was not provided the opportunity to interview or examine Bowser. It is unknown whether Dr. Jameson had a complete history or not. Exhibit E merely states Dr. Jameson reviewed some medical records dated between December 1980 and July 23, 2019; there is no indication what facilities those records came from or how many records there were. Furthermore, Dr. Jameson does not provide any rationale for the basis of his opinions. I do not find the opinions of Dr. Jameson to be persuasive.

Prior to the July 28, 2017 work injury, Bowser did have some problems with his right shoulder. However, he had not sought any treatment for his right shoulder since 2009. On July 28, 2017, he was performing his work duties when he heard a pop and instantly felt a paralyzing pain in his right arm and shoulder. He testified that he has had problems with his right shoulder since the injury. Based on the record as a whole and the opinions of Dr. Manshadi and Dr. Naylor, I find that Bowser's right shoulder injury and subsequent treatment, including the surgery, is causally connected to the July 28, 2017 injury.

Bowser seeks payment of past medical expenses as set forth in claimant's exhibit 3. The requested expenses were not authorized by the defendants, as this was a denied claim. Defendants contend that the requested expenses and mileage are not causally connected to the work injury. I found that Bowser's right shoulder injury is causally connected to the July 28, 2017 work injury. I find that the medical expenses and medical mileage sought by claimant were necessitated by the work injury. Thus, I find defendants are responsible for the medical expenses set forth in claimant's exhibit 3 and medical mileage set forth in claimant's exhibit 2.

Claimant indicates he is seeking ongoing medical care for his work injury. The issue of permanency was bifurcated because the parties indicated to the undersigned that the claimant was not anticipated to be at MMI at the time of the arbitration hearing. As noted above, I found Bowser has not reached MMI. Claimant has demonstrated that his ongoing right shoulder problems are causally connected to the July 28, 2017 work injury. Therefore, I find defendants are responsible for ongoing medical treatment consistent with section 85.27, Code of Iowa.

Claimant argues that penalty benefits are appropriate in this case because defendants failed to demonstrate any reasonable basis for the denial of the claim. Claimant contends that Nestle unreasonably denied that the injury was reported in a timely fashion and unreasonably denied that the injury arose out of Bowser's employment. In this case, defendants denied that Bowser sustained an injury that arose out of and in the course of his employment and raised the notice defense. Defendants denied payment of any weekly benefits. Claimant has established that there has been a denial of benefits. Defendants argue that the denial was reasonable and the basis was conveyed to the claimant via letters from defendants. (Def. Exs. B-C) Defendants presented evidence from Payne that he does not recall receiving notice of the injury from the claimant and there was no record of the injury in the supervisor's log. There is conflicting information in the file regarding when Nestle had notice of the injury. Therefore, I conclude that defendants had a reasonable basis for the denial, and penalty benefits are not appropriate.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6)(e).

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).

Based on the above findings of fact, I conclude Bowser's right injury arose out of and in the course of his employment on July 28, 2017. Prior to the July 28, 2017 work injury, Bowser did have some intermittent problems with his right shoulder. However, he had not sought any treatment for his right shoulder for years. On the date of the injury, he was performing his work duties when he heard a pop and instantly felt a paralyzing pain in his right arm and shoulder. The evidence demonstrates he has had problems with his right shoulder since the injury. I conclude Bowser's right shoulder injury and subsequent treatment, including the surgery, is causally connected to the July 28, 2017 injury

Iowa Code section 85.23 requires an employee to give notice of the occurrence of an injury to the employer within 90 days from the date of the occurrence, unless the employer has actual knowledge of the occurrence of the injury.

The purpose of the 90-day notice or actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. The actual knowledge alternative to notice is met when the employer, as a reasonably conscientious manager, is alerted to the possibility of a potential compensation claim through information which makes the employer aware that the injury occurred and that it may be work related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

Failure to give notice is an affirmative defense which the employer must prove by a preponderance of the evidence. DeLong v. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940).

Based on the above findings of fact, I concluded that defendants failed to prove by a preponderance of the evidence, that Bowser did not provide Nestle with notice of his injury within 90 days of July 28, 2017. Thus, claimant's claim is not barred by operation of section 85.23, Code of Iowa.

Bowser is seeking weekly workers' compensation benefits for the time that he has been off of 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).

Bowser is seeking benefits from July 10, 2019 through the present. The parties agree that Bowser has been off work since July 10, 2019 and that if the defendants are liable for the alleged injury, Bowser is entitled to benefits for this period of time. Because I found defendants liable for the July 28, 2019 injury, defendants are liable for weekly benefits during this timeframe. Because the issue of permanency is not yet ripe for determination, the benefits will be classified as temporary total disability benefits until such time as claimant demonstrates entitlement to healing period benefits.

Bowser is seeking payment of past medical expenses and medical mileage. 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).

I conclude claimant carried his burden of proof to demonstrate by a preponderance of the evidence that I find that the medical expenses and medical mileage sought by claimant were necessitated by the work injury. Thus, I find defendants are responsible for the medical expenses set forth in claimant's exhibit 3 and medical mileage set forth in claimant's exhibit 2.

Likewise, I conclude defendants shall furnish reasonable medical services and supplies for Bowser's July 28, 2017 work injury. Defendants shall also be responsible for reasonable and necessary transportation expenses incurred for those services.

Claimant also asserts a claim for penalty benefits. Claimant asserts that the employer unreasonably denied payment of weekly benefits and that penalty benefits should be assessed pursuant to Iowa Code section 86.13.

Iowa Code section 86.13(4) provides:

> a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall

> award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.
>
> b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
>
> (1) The employee has demonstrated a denial, delay in payment, or termination in benefits.
>
> (2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

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

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

The supreme court has stated:

> (1) If the employer has a reason for the delay and conveys that reason to the employee contemporaneously with the beginning of the delay, no penalty will be imposed if the reason is of such character that a reasonable fact-finder could conclude that it is a "reasonable or probable cause or excuse" under Iowa Code section 86.13. In that case, we will defer to the decision of the commissioner. See Christensen, 554 N.W.2d at 260 (substantial evidence found to support commissioner's finding of legitimate reason for delay pending receipt of medical report); Robbennolt, 555 N.W.2d at 236.
>
> (2) If no reason is given for the delay or if the "reason" is not one that a reasonable fact-finder could accept, we will hold that no such cause or excuse exists and remand to the commissioner for the sole purpose of assessing penalties under section 86.13. See Christensen, 554 N.W.2d at 261.

(3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City 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).

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, claimant established that the employer paid no weekly workers' compensation benefits to claimant after the date of injury. Claimant established a denial of weekly benefits. Therefore, claimant established a prima facie case for penalty benefits.

Defendants denied payment of any weekly benefits. Claimant has established that there has been a denial of benefits. Defendants argue that the denial was reasonable and the basis was conveyed to the claimant via letters from defendants. (Def. Exs. B-C) Defendants presented evidence from Payne that he does not recall receiving notice of the injury from the claimant and there was no record of the injury in the supervisor's log. There is conflicting information in the file regarding when Nestle had notice of the injury. Therefore, I conclude that defendants had a reasonable basis for the denial, and penalty benefits are not appropriate.

Finally, claimant is seeking an assessment of costs as set out in claimant's exhibit 1. I find claimant was generally successful in his claim and therefore it is appropriate to assess costs against the defendants. I find that the $100.00 filing fee is an appropriate cost. I find the fees for obtaining medical records and bills are not appropriate costs under 876 IAC 4.33. I find that the costs of the reports from Dr. Manshadi and Dr. Naylor are appropriate costs under 876 IAC 4.33(6). However, Dr. Manshadi's bill does not provide a breakdown of how much of his bill is for the examination and how much is for the report. Therefore, I find that it is not appropriate to award any of the expense of Dr. Manshadi as a cost. I do not see a bill for just a report from Dr. Naylor. Therefore, I exercise my discretion and do not award that as a cost. Thus, defendants are assessed costs totaling one hundred and no/100 dollars ($100.00).

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the stipulated rate of five hundred eighty-nine and 69/100 dollars ($589.69).

Defendants shall pay temporary total benefits commencing on July 10, 2019 and continuing through the present and into the future until the first factor set forth in Iowa Code section 85.33(1) is established to have occurred.

Defendants shall be entitled to credit under Iowa Code section 85.38(2) as set forth in the hearing report.

Defendants 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.

Defendants are responsible for past medical expenses and medical mileage as set forth above.

Defendants shall reimburse claimant costs as set forth above.

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

Signed and filed this 7th day of February, 2020.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Timothy Wegman (via WCES)
Joshua Moon (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.