BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

VALARIE WYO BADIA JOE, Claimant, vs. O'REILLY AUTO ENTERPRISES, d/b/a OZARK AUTOMOTIVE DIST., Employer, SAFETY NATIONAL CASUALTY, CO., Insurance Carrier, Defendants.	File No. 5059272 ARBITRATION DECISION Head Note Nos.: 1402.30, 1802, 1803, 2501, 2907, 4000.2

STATEMENT OF THE CASE

Valarie Wyo Badia Joe, claimant, filed a petition for arbitration against O'Reilly Auto Enterprises, d/b/a Ozark Automotive Distributing (hereinafter referred to as "O'Reilly"), as the employer and Safety National Casualty Company as the insurance carrier. An in-person hearing occurred in Des Moines on July 10, 2018.

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

The evidentiary record includes Joint Exhibits 1 through 5, Claimant's Exhibits 1-9 and 11, as well as Defendants' Exhibits A through G. All exhibits were received without objection.

Claimant testified on her own behalf and offered rebuttal testimony. Defendants called Kelli Howard, Nathan McAliley and Julie Akers to testify. The evidentiary record was suspended at the conclusion of the live evidentiary hearing pending further review and analysis by counsel pertaining to medical bills. Claimant's counsel sent e-mail correspondence to the undersigned and opposing counsel on July 11, 2018, noting that claimant withdrew any claim for medical charges incurred on July 3, 2018 through Holley A. Bermel, D.O. The evidentiary record automatically closed after the allotted two-week period after the evidentiary hearing.

However, counsel for the parties requested the opportunity to file post-hearing briefs. Their request was granted. The case was deemed fully submitted upon the simultaneous filing of the post-hearing briefs by the parties on August 10, 2018.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained an injury that arouse out of and in the course of her employment with O'Reilly on May 10, 2017.

2. Whether the alleged injury caused a period of temporary disability and, if so, the extent of claimant's entitlement to temporary disability, or healing period, benefits.

3. Whether the alleged injury caused permanent disability and, if so, the extent of claimant's entitlement to permanent disability benefits.

4. The proper commencement date for permanent disability benefits, if permanent disability is awarded.

5. Whether claimant is entitled to an order directing defendants to pay claimant's past medical expenses, reimburse any out-of-pocket expenses, or otherwise hold claimant harmless for past medical expenses.

6. Whether penalty benefits should be assessed against the defendants for an alleged failure to investigate and/or an alleged unreasonable denial of benefits in this case.

7. Whether costs should be assessed against any party and, if so, the extent to which costs should be assessed.

FINDINGS OF FACT

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

Valarie Wyo Badia Joe was 46 years of age on May 10, 2017. She alleges that she sustained a chest and right shoulder injury as a result of her work activities on that date. Claimant concedes that her chest injury has resolved, but asserts that she sustained permanent disability as a result of the right shoulder injury.

Specifically, claimant testified that she was carrying some empty totes, struck the corner of some shelving, fell back into another shelving unit, and ultimately fell to the ground. She testified she experienced immediate symptoms, remained on the floor for a few minutes, then reported her injury and was sent home by her supervisor.

Defendants deny that the alleged injury occurred. Defendants assert that there is no written documentation of the injury, that the two witnesses claimant allegedly reported her injury to have no recollection of such events or specifically deny those events transpired.

Having viewed the witnesses, compared their testimony to the contemporaneous medical records and other evidence in this record, I ultimately find Ms. Badia Joe's testimony about how she was injured to be accurate. I am not prepared to find and do not find that Ms. Badia Joe necessarily reported her injury in the manner she testified to or that she was specifically instructed to leave work early. Time records from other employees suggest claimant left at an anticipated time upon completing her shift. Nevertheless, I found Ms. Badia Joe's explanation of how she hit the corner of shelving and ultimately fell to the ground to be credible.

Claimant performed the vast majority of her shift on May 10, 2017. She demonstrated no obvious injuries or inability during that shift. Her description of the injury was sufficiently detailed that I believe her description is how she was injured and that she sustained a right shoulder injury. All physicians that have opined on the issue have opined that the May 10, 2017 events caused claimant's right shoulder condition. I accept those unrebutted causation opinions. Therefore, I find that Ms. Badia Joe has proven by a preponderance of the evidence that she sustained an injury to her right shoulder that arose out of and in the course of her employment with O'Reilly's on May 10, 2017.

In making this finding, I acknowledge the defendants' argument that claimant sought medical evaluations with an occupational medicine physician for a subsequent chemical burn at work, as well as two evaluations with her personal physician in which she made no reference to right shoulder pain. It is certainly odd that claimant was sent by the employer to an occupational medicine physician for the second alleged injury and she did not mention her right shoulder injury or symptoms.

It is even more suspect that she sought care with her personal physician twice after the right shoulder injury without any reference to the right shoulder injury. One would certainly think that an injured person would seek evaluation and care for a right shoulder injury when already at their personal physician's office for some other condition. Defendants forcefully made this argument and it is a difficult question to resolve.

In this case, I ultimately determined that there are some language barriers. I accept the claimant's version of the injury as credible. Therefore, in spite of the contrary evidence suggesting the injury did not occur, I find that claimant has proven by a preponderance of the evidence that she sustained a right shoulder injury at work on May 10, 2017.

In spite of this right shoulder injury, Ms. Badia Joe reported to work the next day for her regularly scheduled shift. She continued to work full-duty and without restriction until terminated on June 16, 2017. Ms. Badia Joe was never under work restrictions and remained medically capable of performing her job at O'Reilly's until May 1, 2018.

Ms. Badia Joe was apparently not working on May 1, 2018, when she was evaluated by Dr. Bermel. (Joint Ex. 2, p. 9). However, by June 26, 2018, claimant clearly was working as a hairdresser in a new job. (Joint Ex. 2, p. 13) Unfortunately, it is not apparent when, after May 1, 2018, she began working as a hairdresser. I also have no evidence of specific earnings during any week. I am unable to determine when claimant started working after May 1, 2018 or the amounts she earned, including whether the earnings were less during any specific week than her gross average weekly earnings in this case. The only date that I can state with certainty that she was not working and under restrictions was May 1, 2018. Even that was potentially debatable since there are two patient status reports, one that imposed restrictions and the other that permitted release without restrictions and both were dated May 1, 2018. I find that claimant had restrictions on May 1, 2018, was not at maximum medical improvement by that date and was not capable of substantially similar employment on May 1, 2018.

I accepted Dr. Cook's opinion that claimant achieved maximum medical improvement on June 26, 2018. (Joint Ex. 2, p. 13) Dr. Bansal proposed a date for maximum medical improvement in December 2017. Realistically, claimant continued to seek treatment through June 2018. Dr. Cook had more opportunity to evaluate claimant and his opinion as to maximum medical improvement is accepted.

Only Dr. Bansal offered a permanent impairment rating. (Claimant's Ex. 1, p. 10) Therefore, I accept the unrebutted impairment rating and find that claimant has proven she sustained a four percent permanent impairment of the whole person as a result of the May 10, 2017 work injury.

With respect to work restrictions, I find the opinions of claimant's treating orthopaedic surgeon, Shane Cook, M.D., to be most persuasive. He released claimant to return to work without restrictions. (Joint Ex. 2, pp. 13, 15) Claimant selected this physician via a referral from her family physician. Defendants did not select any of the physicians offering opinions. I find Dr. Cook's opinion to be most credible as the treating orthopaedic surgeon.

Claimant urged the restrictions offered by Dr. Bansal. I find the restrictions recommended by Dr. Bansal to be unrealistically low. Claimant clearly performed her job duties after the May 10, 2017 injury and performed at a level that was significantly more than the restrictions now recommended by Dr. Bansal. Claimant attended physical therapy and received benefit from therapy. Claimant's symptoms and function were better after physical therapy than they were while continuing to perform her duties at O'Reilly's. Dr. Cook temporarily placed claimant on a limited lift but again returned her to unrestricted employment at the time of maximum medical improvement. It is not credible or realistic to now impose lifting of no more than 10 pounds on an occasional

basis when claimant clearly did more than that after the date of injury. I find Dr. Cook's restrictions (or lack thereof) to be the most credible and convincing evidence in this record.

Therefore, I find that claimant has not proven she has any permanent work restrictions as a result of this right shoulder injury. Nevertheless, she has functional range of motion deficits, as identified and rated by Dr. Bansal. These functional deficits demonstrate some level of permanent disability. Claimant has proven she sustained minor permanent disability as a result of the May 10, 2017 work injury.

Ms. Badia Joe was born in the Ivory Coast. Her native language is French. She has taken English classes since being in the United States. She has a goal, or plan, to pursue training and certification as an interpreter. However, her English skills are not yet fully developed. She requested and testified with the use of an interpreter at hearing.

Claimant graduated from high school in the Ivory Coast. She attended approximately two years of college in the Ivory Coast, though she did not obtain a degree. Ms. Badia Joe has worked in an electronics position while in the Ivory Coast. She left the Ivory Coast and came to the United States when her sister fell ill and required her assistance.

While living in Florida and caring for her sister, claimant performed work as a hair dresser. She subsequently got married and moved to Iowa.

Since living in Iowa, claimant has worked as a cashier for Wal-Mart, earning $11.50 per hour. She left Wal-Mart and began employment as an outbound materials handler for O'Reilly in January 2017. This is the job she was performing when injured on May 10, 2017.

As a materials handler, claimant was required to lift up to 60 pounds and perform repetitive hand actions such as firm grasping, reaching, pushing, pulling, and other physical work. (Claimant's Ex. 7, p. 3) Again, claimant returned to this same position and performed all of these job duties after the May 10, 2017 injury until terminated in mid-June 2017. She earned $12.25 per hour, or approximately $1,700.00 per month, as a materials handler for O'Reilly on May 10, 2017.

Claimant testified that she made job searches while claiming unemployment benefits. Claimant's efforts to secure alternate employment did not appear to be terribly motivated, other than to maintain her unemployment benefits. Regardless, claimant is motivated enough that she now has alternate employment.

At the time of hearing, claimant worked as a hair dresser out of her home. She testified that she is working approximately 20 hours per week. She estimated that she was earning between $1,000.00 and $1,400.00 per month as a hair dresser at the time of hearing. Claimant has proven an actual reduction in her earnings of somewhere between approximately 17 and 41 percent. However, claimant also works fewer hours

now and could elect to find alternate employment or another part-time job to supplement her hours and earnings.

Considering claimant's age, educational background, employment history, the situs of her injury, her permanent impairment rating, lack of any permanent restrictions, motivation level, as well as all other factors of industrial disability identified by the Iowa Supreme Court, I find that claimant has proven she sustained a relatively minor permanent disability. Specifically, I find that claimant has proven she sustained a 15 percent loss of future earning capacity as a result of the May 10, 2017 work injury.

Ms. Badia Joe submitted past medical expenses, requesting award of those benefits. The parties stipulated at the time of trial that the expenses contained in Joint Exhibit 5 are not causally related to the alleged work injury. In an e-mail sent by claimant's counsel on July 11, 2018, claimant withdrew any claim for payment of medical expenses dated July 3, 2017 with Dr. Bermel.

I find the remainder of the medical expenses contained in Claimant's Exhibit 5 are causally related to the May 10, 2017 work injury. Similarly, the medical mileage, as detailed in Claimant's Exhibit 6 are found to be causally related to the May 10, 2017 work injury, except as may be for dates of services stipulated to as not related in Joint Exhibit 5 or claimant counsel's stipulation as to the July 3, 2017 treatment with Dr. Bermel.

With respect to claimant's penalty benefit claim, I find that the employer did perform a reasonable investigation. The employer, including its counsel, interviewed relevant individuals that would or should have information about claimant's injury. Those individuals, two of whom claimant identified as having received her verbal notice, denied any knowledge of such an injury or receiving notice. Defendants were reasonable in relying upon the statements of these individuals, even though their statements contradicted claimant's version of events. I find that defendants contemporaneously conveyed the basis for their denial and that the basis for their denial was based upon their investigation.

Claimant's version of events was contradicted by witnesses to whom Ms. Badia Joe claimed she reported her shoulder injury. Claimant attended two medical appointments with her personal physician in which there is no mention of right shoulder symptoms after the alleged date of injury. The ultimate determination of liability in this case was not a certainty. Reasonable minds could differ with the outcome in this case. Although I ultimately found Ms. Badia Joe proved she sustained an injury that arose out of and in the course of her employment on May 10, 2017, there existed contradictory evidence in this record upon which I could have found against claimant. I find the defendants' denial of benefits in this case to be fairly debatable and reasonable.

CONCLUSIONS OF LAW

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial

Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

In this case, I found that claimant proved by a preponderance of the evidence that she sustained a right shoulder injury as a result of an accident occurring at work on May 10, 2017. Therefore, I conclude that claimant has carried her burden of proof to establish she sustained an injury that arose out of and in the course of her employment on May 10, 2017. Claimant is entitled to benefits in some amount.

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli,

312N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

The healing period terminates upon the earlies of the three factors identified in Iowa Code section 85.34(1). Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360 (Iowa 2016).

In this case, I found that claimant was terminated from her employment on June 16, 2017. Claimant asserts this should start the running of her healing period. Yet, as of June 16, 2017, claimant was under no work restrictions for her right shoulder and had returned to work and was performing her full work duties. I found that claimant did not have work restrictions for her right shoulder until May 1, 2018. I conclude that healing period benefits should have commenced on May 1, 2018. Iowa Code section 85.34(1).

Defendants did not offer claimant suitable work between May 1, 2018 and June 26, 2018, and I found that claimant was not capable of performing substantially similar employment between May 1, 2018 and June 26, 2018. However, I could not discern from the record when claimant began working her new job as a hairdresser or her specific earnings to permit me to determine the amount of healing period or temporary partial disability claimant was entitled to receive during this period of time. The only date that I can tell from this evidentiary record that she did not work was on her evaluation date of May 1, 2018. I found that on some unspecified date after May 1, 2018 and before June 26, 2018, claimant began working as a hairdresser.

Having found that claimant received a full duty release and remained capable of performing substantially similar employment after June 26, 2018, I conclude that claimant did not establish entitlement to healing period benefits after June 26, 2018. Therefore, I conclude that claimant failed to prove entitlement to healing period benefits other than for May 1, 2018. Claimant will be awarded one day of healing period benefits for May 1, 2018.

Ms. Badia Joe next asserts a claim for permanent disability benefits. Having found that claimant proved she sustained permanent disability as a result of the right shoulder injury on May 10, 2017, I conclude that claimant has established entitlement to an award of permanent disability benefits.

Permanent disability benefits commence at the earliest occurrence of one of the factors outlined in Iowa Code section 85.34(1). In this instance, claimant returned to work the day after her injury. Therefore, I conclude that permanent disability benefits in this case commence on May 11, 2017. Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360 (Iowa 2016).

The parties dispute whether claimant's injury should be compensated as a scheduled member injury or with industrial disability. (Hearing Report) There is little dispute that the alleged injury involves claimant's right shoulder. I found that claimant proved permanent disability resulting from the right shoulder injury on May 10, 2017. When disability is found in the shoulder, a body as a whole situation may exist. Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949). In Nazarenus v. Oscar

Mayer & Co., II Iowa Industrial Commissioner Report 281 (App. 1982), a torn rotator cuff was found to cause disability to the body as a whole.

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.

Having considered all of the industrial disability factors outlined by the Iowa Supreme Court and having found that claimant proved a 15 percent loss of future earning capacity, I conclude that claimant has proven a 15 percent industrial disability. This entitles claimant to an award of 75 weeks of permanent partial disability benefits against the employer. Iowa Code section 85.34(2)(u).

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 submitted past medical expenses and medical mileage at Claimant's Exhibits 5 and 6. I found those medical expenses causally related with the exception of those dates listed on Joint Exhibit 5 and in claimant counsel's e-mail pertaining to the July 3, 2017 treatment with Dr. Bermel. Having found those medical expenses and medical mileage to be causally related, I note that the parties have stipulated as to the reasonableness and necessity of the treatment and medical expenses. (Hearing Report) Therefore, I conclude the medical expenses and medical mileage contained in Claimant's Exhibit 5 and 6 are compensable and should be paid, reimbursed, or otherwise satisfied by defendants with the exceptions of those dates identified in Joint

Exhibit 5 and claimant counsel's e-mail pertaining to the July 3, 2017 service date with Dr. Bermel.

Ms. Badia Joe asserts that defendants failed to conduct a reasonable investigation and unreasonably denied her weekly benefits in this case. Claimant asserts that defendants should be ordered to pay penalty benefits 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).

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

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

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

In this case, claimant contends that the employer failed to conduct a reasonable investigation because it had no medical evidence to dispute causal connection between the injury and claimant's work activities. Claimant further contends that the investigation was not sufficient to constitute a reasonable basis for disputing the injury.

Defendants contend that they investigated the claim and the lack of any evidence of an injury on the date and at the time alleged by claimant is a reasonable dispute. The Iowa Supreme Court has held that a dispute as to whether the injury actually occurred as alleged is a sufficient basis upon which an employer may dispute a claim. City of Madrid v. Blasnitz, 742 N.W.2d 77 (Iowa 2007). The employer is not required to accept the claimant's version of events, if contrary evidence exists. Id. at 803; Belleville v. Farm Bureau Mutual Ins. Co., 702 N.W.2d 468 (Iowa 2005).

I found that claimant has clearly proven a delay in weekly benefits in this case. Therefore, the burden of proof shifted to the defendants to establish the requirements of Iowa Code section 86.13(4)(c). Having found that the employer conducted a reasonable investigation and having found that the employer had a reasonable basis for disputing the alleged injury and contemporaneously conveyed that basis to the employee, I conclude that the employer carried its burden of proof to establish a reasonable basis for denial. I conclude that penalty benefits should not be awarded in this case.

Finally, claimant seeks an award of costs. Costs are awarded at the discretion of this agency. Iowa Code section 86.40. In this case, claimant has prevailed. I conclude that it is appropriate to assess costs in some amount against the employer and insurance carrier.

Claimant's Exhibit 11 contains claimant's requested costs. The initial request is for reimbursement of claimant's filing fee. This is appropriate and is assessed pursuant to 876 IAC 4.33(7).

Claimant also seeks assessment of a charge from Dr. Bermel. Review of the statement contained at Claimant's Exhibit 11, page 2 demonstrates that Dr. Bermel charged $180.00 for review of records, opinion, and preparation of a report. In addition, she charged $120.00 for a conference with claimant's counsel. The specific charge for drafting a report is not set forth in the invoice. Costs associated with a conference or review of records are not taxable costs. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015). I am not inclined to speculate or try to apportion some portion of Dr. Bermel's charges as related to drafting a report. Therefore, I conclude it would be inappropriate under the circumstances of this case to tax any of Dr. Bermel charges as costs.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant healing period benefits for May 1, 2018.

Defendants shall pay claimant seventy-five (75) weeks of permanent partial disability benefits commencing on May 11, 2017.

All weekly benefits shall be paid at the stipulated rate of two hundred eighty-four and 59/100 dollars ($284.59).

Defendants employer and insurance carrier 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. Apr. 24, 2018).

Defendants shall pay medical providers directly for any outstanding medical expenses, reimburse claimant for any out-of-pocket expenses paid, and otherwise hold claimant harmless for all medical expenses and medical mileage contained in Claimant's Exhibits 5 and 6 with the exception of the dates of services contained in Joint Exhibit 5 and the July 3, 2017 service date with Dr. Bermel, as stipulated as not related by claimant's counsel in e-mail to the undersigned dated July 11, 2018.

Defendants employer and insurance carrier shall reimburse claimant's costs in the amount of one hundred dollars ($100.00).

Defendants employer and insurance carrier 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 10th day of December, 2018.

WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.