BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

VICTOR ANTONIO MORENO CERVANTES,	:	
Claimant,	:	File No. 5059690
vs.	:	ARBITRATION DECISION
JESUS RODRIGUEZ, d/b/a RODRIGUEZ CONSTRUCTION,	:	
Employer,	:	Headnotes: 1402.30, 1402.40, 1402.60,
Defendant.	:	1802, 1803, 2001, 2002, 2501

Claimant Victor Antonio Moreno Cervantes ("Moreno Cervantes") filed a petition in arbitration on September 25, 2017, alleging he sustained injuries to his right foot and right lower extremity while working for the defendant, Jesus Rodriguez, d/b/a Rodriguez Construction ("Rodriguez"), on December 6, 2016. Rodriguez filed an answer on November 3, 2017, denying Moreno Cervantes was an employee of Rodriguez. On July 11, 2018, Moreno Cervantes filed a motion to amend petition, alleging he sustained injuries to his right foot, right lower extremity, neck, and cervical spine while working for Rodriguez. The motion was granted.

An arbitration hearing was held on January 25, 2019, at the Division of Workers' Compensation. Attorney Greg Egbers represented Moreno Cervantes. Moreno Cervantes appeared and testified. Michael Russell, Jamie Moreno Cervantes, and Lorenzo Ignacio Moreno Cervantes ("Lorenzo") testified on behalf of Moreno Cervantes. Attorney Joseph Bertogli represented Rodriguez. Rodriguez appeared and testified. Joseph Lamb testified on behalf of Rodriguez. Ernest Niño-Murcia provided Spanish interpretation services during the hearing. Exhibits 1 through 6 and A through D were admitted into the record. Moreno Cervantes provided a hearing brief. The record was held open through February 22, 2019, for the receipt of a post-hearing brief from Rodriguez. The brief was received and the record was closed.

Before the hearing the parties prepared a hearing report, listing stipulations and issues to be decided. Rodriguez waived all affirmative defenses.

STIPULATIONS

1. If the injury is found to be the cause of disability, the disability is a scheduled member disability to the right lower extremity.

2. If the injury is found to be the cause of permanent disability, the commencement date for permanent partial disability benefits is June 1, 2017.

3. Costs have been paid.

ISSUES

1. Whether an employer-employee relationship existed between Rodriguez and Moreno Cervantes at the time of the alleged injury

2. Did Moreno Cervantes sustain an injury on December 6, 2016, which arose out of and in the course of his employment with Rodriguez?

3. Is the alleged injury a cause of temporary disability during a period of recovery?

4. Is Moreno Cervantes entitled to temporary benefits from December 6, 2016 through June 1, 2017?

5. Is the alleged injury a cause of permanent disability?

6. What is the extent of disability?

7. What is the rate?

8. Is Moreno Cervantes entitled to recover medical expenses?

9. Should penalty benefits be awarded to Moreno Cervantes?

10. Should costs be assessed against either party?

FINDINGS OF FACT

Moreno Cervantes was born in Mexico. (Transcript, page 13) Moreno Cervantes has moved back and forth between Mexico and the United States since 1994. (Tr., p. 13) At the time of the hearing Moreno Cervantes was forty-four. (Tr., p. 12) Moreno Cervantes has experience cleaning offices and working in construction. (Tr., p. 13)

Moreno Cervantes testified Rodrigo Mena, a friend of his brother, Lorenzo, informed him of a job opportunity with Rodriguez on December 5, 2016. (Tr., pp. 14-15, 30) Lorenzo testified he has known Mena for five or six years. (Tr., p. 46) Mena told

Moreno Cervantes he worked for Rodriguez and Mena would speak to Rodriguez about having Moreno Cervantes work for Rodriguez and he told Moreno Cervantes to show up the next morning, December 6, 2016, to work. (Tr., pp. 15, 33) Moreno Cervantes relayed he understood he was going to be paid $15.00 per hour "more or less," and that he would be working forty hours per week. (Tr., pp. 15-16) Moreno Cervantes testified he did not discuss his hourly rate or the number of hours he would work with Rodriguez before he was injured on December 6, 2016. (Tr., p. 16)

Rodriguez is the manager and owner of Rodriguez Construction, a limited liability company. (Tr., pp. 48, 61) Rodriguez testified he paid Mena $17.00 per hour at the time of the accident. (Tr., p. 57) Rodriguez did not pay Mena by the project or job. (Tr., p. 76) Rodriguez did not have an employment contract with Mena or employment contracts with any individuals he worked with in 2016. (Tr., p. 77)

Rodriguez reported on December 6, 2016, he was working on a siding project at the Meadow Chase Apartments for Joe Lamb. (Tr., pp. 49, 56-57) Rodriguez did not have a written contract with Lamb, but he had worked with Lamb for a long time. (Tr., pp. 57-58) Rodriguez testified Lamb has contacted him about projects in the past; he would look at each project with Lamb, and Rodriguez would negotiate a price for the project with Lamb. (Tr., p. 74) If Rodriguez accepted the project, he would send Lamb an invoice to be paid for the work. (Tr., p. 58)

Lamb is a general contractor who has been self-employed for twenty-two years. (Tr., pp. 79-80) Lamb operates Rightway Contractors, a sole proprietorship. (Tr., p. 80) Lamb testified he started roofing with Rodriguez when he worked for his uncle between 1996 and 1998. (Tr., p. 81) Rodriguez and Lamb were both employees of his uncle at that time. (Tr., pp. 81-82)

Lamb testified in 2016 he was working on a siding job for Meadow Chase Apartments and a house addition. (Tr., p. 83) Lamb did not have time to do both projects, so he hired Rodriguez to do the siding job at Meadow Chase Apartments. (Tr., p. 83) Lamb contracted with SFT Enterprises for the siding job and he sent invoices to SFT Enterprises for payment on a monthly basis. (Tr., pp. 84-85)

Lamb testified Rodriguez has provided him with a daily rate for each project, and after receiving the proposed daily rate, Lamb would decide whether he would pay the prearranged daily rate for the work for the duration of the project. (Tr., p. 87) Lamb denied Rodriguez gave him invoices for projects, and stated he paid Rodriguez a daily rate. (Tr., p. 87) Lamb reported Rodriguez's daily rate differed for each project, depending on how many workers were working with Rodriguez on a given project. (Tr., pp. 87, 90) At the end of each year Lamb sends Rodriguez a 1099 form. (Tr., pp. 88-89) Lamb denied seeing Moreno Cervantes before the hearing. (Tr., p. 88)

Lamb testified SFT Enterprises provided the siding that was delivered to the job site at the Meadow Chase Apartment. (Tr., p. 93) Lamb reported Rodriguez provided his own ladders and there was scaffolding at the job site. (Tr., p. 93) Lamb testified

Rodriguez would have provided the nail guns, hammers, and nails. (Tr., p. 93) Lamb reported SFT Enterprises only supplied the siding. (Tr., pp. 93-94)

Rodriguez paid the individuals who worked with him directly, and he did not pay employment taxes for the individuals who worked with him, including Mena. (Tr., pp. 62-63) At the end of the year Rodriguez's accountant sent the individuals he worked with 1099 forms. (Tr., p. 63)

Rodriguez had been working at the Meadow Chase Apartments for Lamb for a month or two before Moreno Cervantes's accident. (Tr., p. 57) Rodriguez testified,

> [t]hat complex right there is about eight or seven buildings, and Joe, the guy that give me the work, he said it was a fence and the lower part that needs to be removed. So when we got there – as I got there and parked the van, I went – I went and looked at the fence that Joe mentioned, so when I went over there, I believe – and I believe Rodrigo mentioned about Victor. He mentioned him before. He didn't say his name, but he mentioned about somebody for work, and I told him, as all of you here probably know, that in the winter for all of us in construction, the job goes down. And matter of fact there's probably no more holes being digging [*sic*] right now for new houses or whatever, so it was, like, five or six of us and we end up only me and Rodrigo.

(Tr., p. 50)

Rodriguez testified Mena told him he knew of another person who could help out in the project. (Tr., p. 66) Rodriguez relayed he told Mena there was not enough work for another person during the cold season. (Tr., p. 66) Rodriguez denied authorizing Mena to bring Moreno Cervantes to the job site. (Tr., pp. 66-67)

Moreno Cervantes reported on December 6, 2016, his brother drove him to Mena's home and Mena drove to him to Rodriguez's home. (Tr., pp. 17, 30-31, 35-36) Moreno Cervantes testified Rodriguez had a work van with tools in it. (Tr., pp. 31, 36) Moreno Cervantes relayed Rodriguez drove the men to the job site at the Meadow Chase Apartments. (Tr., pp. 17, 36)

Rodriguez denied he drove Mena and Moreno Cervantes to the job site, and testified he met them at the job site in his van. (Tr., p. 51) Rodriguez said that Moreno Cervantes lied when he said Rodriguez drove Moreno Cervantes and Mena to the job site. (Tr., p. 65) Rodriguez reported when he arrived at the job site no one was there yet. (Tr., p. 65) Rodriguez testified, "I met them at the job site." (Tr., p. 51)

Moreno Cervantes testified during the drive to the job site, Rodriguez told him if the weather was good they would work all week, but he did not discuss how much he was going to pay him. (Tr., p. 34) Moreno Cervantes testified the men took the tools out of Rodriguez's van, set up the ladders, he asked Rodriguez if there was scaffolding,

and Rodriguez replied Rodriguez would climb the ladders, Mena and Moreno Cervantes would pass him the material, and Rodriguez would put the material on the wall. (Tr., pp. 18-19) Moreno Cervantes testified,

> [w]hen he had finished putting the material on as far as he could go, Jesus and Rodrigo went up the ladder to get the hooks from the board, and I was on the ladder holding it as they were going up. And then it had to be done again. He said we needed to do one more, and so they went up and I went up as well, and that's when the ladder fell over – tipped over and I fell.

(Tr., p. 19) Moreno Cervantes testified Mena and Rodriguez picked him up because he could not get up on his own and took him to Iowa Lutheran Hospital. (Tr., p. 22)

Rodriguez denied Moreno Cervantes was his employee on December 6, 2016. (Tr., p. 49) Rodriguez reported that on December 6, 2016, Rodriguez was working on a fence that needed to be removed and Mena and Moreno Cervantes were working "over there" doing siding, and when Rodriguez arrived at the scene, Moreno Cervantes was "laying on the ground, so I assume, yeah, they were on the ladder." (Tr., pp. 50-51, 56-57) Rodriguez denied he was working on the siding with Moreno Cervantes and Mena and testified he first saw Moreno Cervantes when he was lying on the ground after he fell from the ladder. (Tr., pp. 51, 64) Rodriguez stated he drove Moreno Cervantes to the hospital in his van. (Tr., pp. 52, 57)

Moreno Cervantes testified he did not own any of the tools or equipment he used at the job site on December 6, 2016, and he did not know who owned the tools and equipment. (Tr., p. 37) Rodriguez testified Mena and workers had a pouch with a square hammer, a pocket knife, and a tool to pull out nails that they used for work, and the company that contracted with Lamb provided the siding and nails. (Tr., pp. 72, 76) Rodriguez relayed that one of the ladders used on December 6, 2016, belonged to him, and the other ladder was already at the job site. (Tr., p. 75) Rodriguez agreed he supplied a nail gun.

Moreno Cervantes testified on the way to the hospital Rodriguez and Mena told him they were going to say Moreno Cervantes had fallen installing some lights so Rodriguez's insurance would not go up, and Rodriguez told Moreno Cervantes he should say he fell putting up some lights. (Tr., pp. 23, 35) Moreno Cervantes relayed at the hospital Rodriguez told the hospital staff Moreno Cervantes had been installing some lights when he fell. (Tr., pp. 23-24) Moreno Cervantes testified Rodriguez told him he was going to take responsibility for his medical bills and not to worry. (Tr., pp. 25, 35)

At the hospital, Moreno Cervantes reported he had fallen from a ladder about six feet and he complained of right ankle pain. (Exhibit 1, p. 6) Luke Lowry, M.D. examined Moreno Cervantes and ordered x-rays of his right lower extremity. (Ex. 1, pp. 6-10) The reviewing radiologist listed an impression of a nondisplaced oblique fracture

through the medial malleolus on the right and a comminuted fracture through the midportion of the calcaneus. (Ex. 1, pp. 10-12) Moreno Cervantes also underwent a computerized tomography scan of his right lower extremity. (Ex. 1, p. 26) The reviewing radiologist listed an impression of a highly comminuted depressed calcaneal body fracture with components extending through the posterior and middle subtalar facets. (Ex. 1, p. 26) Moreno Cervantes later complained of right hand pain. (Ex. 1, pp. 13, 15) An x-ray of his wrist revealed no acute fracture. (Ex. 1, p. 13) Moreno Cervantes was admitted to Iowa Lutheran Hospital for treatment. (Ex. 1, pp. 1-2)

Mena called Moreno Cervantes's brother, Lorenzo, and told him Moreno Cervantes had an accident and he was at the hospital. (Tr., p. 44) Lorenzo and Moreno Cervantes's daughter, Jamie, went to the hospital. (Tr., pp. 24, 40, 44) Moreno Cervantes reported Rodriguez spoke with Lorenzo and Jamie and informed them everything would be okay and there was no problem. (Tr., p. 24)

Lorenzo testified, Rodriguez "said that he had already talked to the people at the hospital, and that he had said that he had fallen at home installing lights there where he lived, and that he would be responsible for it and for us not to say anything." (Tr., p. 45) Lorenzo reported Rodriguez told him Rodriguez stated he would be responsible for Moreno Cervantes's medical bills. (Tr., p. 45)

Rodriguez testified on the way to the hospital, "I kinda mentioned to him that I was going to help him, just because I feel bad, because I got family, too, you know. I got five kids." (Tr., p. 53) Rodriguez denied telling Moreno Cervantes, Mena, and Lorenzo that he told Moreno Cervantes to say he had injured himself hanging lights. (Tr., p. 53)

During the hearing Rodriguez was questioned about Moreno Cervantes's medical care and bills, and he responded:

> Q. Did you have any conversation with Victor's brother Lorenzo about taking care of the medical bills?
>
> A. Again, I was going to help him, if I could, just because I feel bad, but really Rodrigo Mena should have been in my place. He's the one that brought him to the job.

(Tr., pp. 53-54) Rodriguez admitted Mena performed work for him reflected on his income tax return. (Tr., p. 54)

Eric Temple, D.P.M., examined Moreno Cervantes, repaired a laceration on his right lower extremity, and diagnosed Moreno Cervantes with a displaced fracture of the right calcaneus, and a laceration of his right foot. (Ex. 1, pp. 1-2, 15) Moreno Cervantes was discharged on December 7, 2016, nonweightbearing, with crutches. (Ex. 1, pp. 1, 3-4)

Moreno Cervantes sought follow-up care through Broadlawns Medical Center ("Broadlawns"). (Ex. 2) During an appointment on December 14, 2016, Moreno Cervantes complained of right ankle and foot pain. (Ex. 2, p. 3) Ronald Belin, D.P.M., examined Moreno Cervantes, ordered additional x-rays, assessed him with a closed displaced fracture of the body of the right calcaneus, placed his right lower extremity in a cast, and ordered strict nonweightbearing. (Ex. 2, pp. 1-4)

On December 28, 2016, Moreno Cervantes returned to Dr. Belin. (Ex. 2, p. 6) Dr. Belin documented Moreno Cervantes relayed he was doing much better and he did not have any pain. (Ex. 2, p. 6) Dr. Belin assessed Moreno Cervantes with a right calcaneal fracture and applied a new cast. (Ex. 2, pp. 6-8)

During an appointment on February 7, 2017, at Broadlawns, Moreno Cervantes reported he was having mild pain and staying off his right lower extremity. (Ex. 2, p. 9) Blake Hines, D.P.M., examined Moreno Cervantes, placed Moreno Cervantes in a CAM boot, discussed with Moreno Cervantes that he would likely develop post-traumatic arthritis, and ordered Moreno Cervantes remain nonweightbearing for two weeks, followed by partial weightbearing for two weeks. (Ex. 2, pp. 9-11)

On March 7, 2017, Moreno Cervantes returned to Dr. Belin, complaining of mild pain in his right lower extremity. (Ex. 2, p. 13) Dr. Belin examined Moreno Cervantes, noted he was progressing very well, ordered him to use a CAM boot with weightbearing, and to transition to regular shoes, as tolerated. (Ex. 2, p. 13)

Moreno Cervantes did not work after the accident until May 2017, when he was hired to work as a painter. (Tr., p. 28) Lorenzo testified after the December 6, 2016 accident, Moreno Cervantes was living at his home and he was off work five or six months. (Tr., pp. 45-46)

Moreno Cervantes reported that before the December 6, 2016, accident, he did not have any problems with his right lower extremity. (Tr., p. 38) Moreno Cervantes testified since the accident he has pain in his right foot, which is worse in the cold, and his right lower extremity swells when he walks a lot. (Tr., pp. 27, 38) Moreno Cervantes now walks with a limp and he tries to avoid using ladders. (Tr., p. 28) Jamie testified that since the accident her father's foot swells up a lot and it hurts him to walk. (Tr., p. 41)

Lorenzo testified Moreno Cervantes walks with a limp, his foot hurts, and he cannot carry things and help around the house. (Tr., p. 46) Lorenzo is a painter. (Tr., p. 43) Lorenzo reported he cannot take Moreno Cervantes to work because he cannot go up ladders. (Tr., p

Russell is a handyman. (Tr., pp. 7-8) Russell works with and is a friend of Lorenzo. (Tr., p. 8) Moreno Cervantes has assisted Russell with remodeling at his home on a few occasions and reported Moreno Cervantes has stamina issues with his foot, he walks with a limp, and he has had to take off his shoe a few times because his

foot swells. (Tr., p. 9) Russell reported that before his injury, Moreno Cervantes did not have any problems with his foot. (Tr., p. 8)

CONCLUSIONS OF LAW

I. Applicable Law

This case involves several issues, including entitlement to temporary benefits, entitlement to permanent benefits, extent of disability, recovery of medical bills, and interest under Iowa Code sections 85.27, 85.33, 85.34, and 535.3. In March 2017, the legislature enacted changes (hereinafter "Act") relating to workers' compensation in Iowa. 2017 Iowa Acts chapter 23 (amending Iowa Code sections 85.16, 85.18, 85.23, 85.26, 85.33, 85.34, 85.39, 85.45, 85.70, 85.71, 86.26, 86.39, 86.42, and 535.3). The Iowa Legislature did not amend Iowa Code section 85.27. Under 2017 Iowa Acts chapter 23 section 24, the changes to Iowa Code sections 85.33 and 85.34 apply to injuries occurring on or after the effective date of the Act. This case involves an injury occurring before July 1, 2017. Therefore, the provisions of the new statute involving entitlement to temporary partial, temporary total, and healing period benefits and permanent benefits under Iowa Code sections 85.33 and 85.34 do not apply to this case.

The calculation of interest is governed by Gamble v. AG Leader Tech., File No. 5054686 (App. Apr. 24, 2018). (Interest for all weekly benefits payable and not paid when due which accrued before July 1, 2017, is payable at the rate of ten percent; all interest on past due weekly compensation benefits accruing on or after July 1, 2017, is 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). Under Gamble, the interest rate changed for benefits accruing on or after July 1, 2017.

II. Arising Out of and in the Course of Employment

Iowa Code chapter 85 governs workers' compensation in Iowa. To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, the employee's injuries arose out of and in the course of the employee's employment with the employer. Iowa Code § 85.3(1); 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats v. Ciha, 552 N.W.2d 143, 151 (Iowa 1996). The injury must be a rational consequence of a hazard connected with the employment, and not merely incidental to the employment. Koehler Elec. v. Willis, 608 N.W.2d 1, 3 (Iowa 2000). The Iowa Supreme Court has held, an injury occurs "in the course of employment" when:

> it is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the

> course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. *An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of the employer.*

Farmers Elevator Co. v. Manning, 286 N.W.2d 174, 177 (Iowa 1979) (emphasis in original).

Moreno Cervantes avers he was an employee of Rodriguez at the time of his alleged injury. Rodriguez rejects his assertion and contends he was never an employee. Moreno Cervantes bears the burden of establishing the existence of an employer-employee relationship at the time of the alleged injuries. D & C Express, Inc. v. Sperry, 450 N.W.2d 842, 844 (Iowa 1990).

The workers' compensation statute defines an employee as "a person who has entered into the employment of, or works under contract for service, express or implied, or apprenticeship for an employer . . . ." Iowa Code § 85.61(11) (2016). The statute provides certain persons "shall not be deemed 'workers' or 'employees,'" including independent contractors. Id. The statute does not define the term "independent contractor." The Iowa Supreme Court has held the term "'independent contractor' does, despite the liberal interpretations of the act, retain its common-law meaning, and is still to be given the meaning that courts have always given the term." Mallinger v. Webster City Oil Co., 211 Iowa 847, 234 N.W. 254, 256 (1931).

The Iowa courts have adopted a multifactor test for determining whether an individual is an employee or an independent contractor. Nelson v. Cities Serv. Oil Co., 259 Iowa 1209, 1215, 146 N.W.2d 261, 264-65 (1966). Factors consistent with an independent contractor relationship include: (1) a contract for the performance of a certain piece or kind of work at a fixed price; (2) the "independent nature of [the person's] business or of his [or her] distinct calling;" (3) the right to employ assistants with the right to supervise the assistants' activities; (4) the requirement to furnish necessary materials, supplies, and tools; (5) the "right to control the progress of the work, except as to final results;" (6) "the time for which the work[er] is employed;" (7) whether the method of payment is by time or by the job; and (8) whether the work is part of the employer's regular business. Id. Factors used to determine whether an employer-employee relationship exists include:

> (1) [t]he right to selection, or to employ at will; (2) responsibility for the payment of wages by the employer; (3) the right to discharge or terminate the relationship; (4) the right to control the work; and (5) is the party

> sought to be held as the employer the responsible authority in charge of the work or for whose benefit the work is performed.

Id. at 1216, 265. While no factor is controlling, "the right to control the physical conduct of the person giving service" is the most important consideration. Id. "If the right to control, the right to determine, the mode and manner of accomplishing a particular result is vested in the [individual] giving [the] service [the individual] is an independent contractor, if it is vested in the employer, [the individual] is an employee." Id.

The evidence presented at hearing supports Mena and Moreno Cervantes were both employees of Rodriguez at the time of Moreno Cervantes's accident. During the hearing I assessed the credibility of Rodriguez and Moreno Cervantes by considering whether their testimony was reasonable and consistent with other evidence I believe, whether they had made inconsistent statements, their "appearance, conduct, memory and knowledge of the facts," and their interest in the case. State v. Frake, 450 N.W.2d 817, 819 (Iowa 1990). I do not find Rodriguez's testimony reasonable or consistent with the other evidence I believe; I do not find his testimony credible. I do find Moreno Cervantes's testimony that he was an employee of Rodriguez credible.

Mena had informed Rodriguez he wanted to bring another worker to the job site before December 6, 2016. Moreno Cervantes went to the job site with Mena. Rodriguez did not have a contract with Mena or Moreno Cervantes for a certain piece or kind of work at a fixed price. Rodriguez denied knowing Mena was bringing Moreno Cervantes to work, yet he also testified he met Mena and Moreno Cervantes at the job site. (Tr., p. 51)

Rodriguez is in the construction business. The siding job at the Meadow Chase Apartments was part of Rodriguez's regular business. Mena and Moreno Cervantes did not have separate businesses, or perform distinct trades, they were both installing siding for Rodriguez. Mena and Moreno Cervantes did not have the right to employ, supervise, or terminate assistants working at the job site. Rodriguez retained the right to control the progress of the work and paid Mena and other workers by the hour, as opposed to the job or project.

The evidence presented at hearing supports Rodriguez provided the tools and some of the supplies for the job. SFT Enterprises provided the siding. Rodriguez admitted he supplied a ladder and nail gun. He testified Moreno Cervantes was responsible for supplying a pouch with tools. Lamb testified Rodriguez was responsible for supplying the nails, ladders, hammers, and nail guns for the project. There is no evidence Moreno Cervantes supplied any materials, supplies, tools, or equipment for the work other than Rodriguez's testimony, which I find not credible. Lamb testified Rodriguez supplied the workers for the project, he paid Rodriguez a daily rate, and the daily rate differed based on the number of workers used for a given project. Rodriguez did not pay Mena or any other workers a daily rate or by the project. He paid workers who performed services for him an hourly rate, consistent with an employer-employee relationship.

Rodriguez's representations on the way to the hospital and at the hospital also support the existence of an employer-employee relationship. If Rodriguez believed Moreno Cervantes was a mere trespasser or an employee of Mena at the job site and not an employee of Rodriguez, he would not have offered to take care of Moreno Cervantes's medical bills. I find Moreno Cervantes was an employee of Rodriguez at the time of the December 6, 2016 accident.

Rodriguez has denied Moreno Cervantes sustained both a temporary and permanent disability caused by his employment. The claimant bears the burden of proving the claimant's work-related injury is a proximate cause of the claimant's disability and need for medical care. Ayers v. D & N Fence Co., Inc., 731 N.W.2d 11, 17 (Iowa 2007); George A. Hormel & Co. v. Jordan, 569 N.W.2d 148, 153 (Iowa 1997). "In order for a cause to be proximate, it must be a 'substantial factor.'" Ayers, 731 N.W.2d at 17. A probability of causation must exist, a mere possibility of causation is insufficient. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997). The cause does not need to be the only cause, "[i]t only needs to be one cause." Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60, 64 (Iowa 1981).

The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The deputy commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye, 569 N.W.2d at 156. When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

No experts were retained to provide causation opinions in this case. The evidence supports Moreno Cervantes fell from a ladder, injuring his right lower extremity while he was working for Rodriguez. Medical records from Iowa Lutheran Hospital and Broadlawns and testimony from witnesses document Moreno Cervantes has experienced ongoing problems with his right lower extremity caused by the work injury. Moreno Cervantes has established he sustained both a temporary and permanent impairment caused by the work injury.

III. Rate

Moreno Cervantes alleges he was single and entitled to three exemptions based on gross weekly earnings of $750.00 per week, for a weekly rate of $480.82. Rodriguez rejects his rate calculation.

Iowa Code sections 85.34 and 85.37 provide the weekly benefit amount or weekly rate paid to an injured employee is based on eighty percent of the employee's

average spendable weekly earnings. The term "spendable weekly earnings" is defined as the "amount remaining after payroll taxes are deducted from gross weekly earnings." Id. 85.61(9) Under Iowa Code section 85.61(6), the Workers' Compensation Commissioner is charged with adopting payroll tax tables, equal to the sum of the following:

> a. An amount equal to the amount which would be withheld pursuant to withholding tables in effect on July 1 preceding the injury under the Internal Revenue Code, and regulations pursuant thereto, as amended, as though the employee had elected to claim the maximum number of exemptions for actual dependency, blindness, and old age to which the employee is entitled on the date on which the employee was injured.
>
> b. An amount equal to the amount which would be withheld pursuant to withholding tables in effect on July 1 preceding the injury under chapter 422, and any rules pursuant thereto, as though the employee had elected to claim the maximum number of exemptions for actual dependency, blindness, and old age to which the employee is entitled on the date on which the employee was injured.
>
> c. An amount equal to the amount required on July 1 preceding the injury by the Social Security Act of 1935 as amended, to be deducted or withheld from the amount of earnings of the employee at the time of the injury as if the earnings were earned at the beginning of the calendar year in which the employee was injured.

Hence, the injured employee's rate is determined using "the maximum number of exemptions for actual dependency, . . . to which the employee is entitled on the date on which the employee was injured." Iowa Code § 85.61(6)(a)-(b); 876 IAC 8.8; 2016-2017 Ratebook, https://www.iowaworkcomp.gov/sites/authoring.iowadivisionofworkcomp.gov/files/Ratebook%20Cover%202016-2017.pdf. Typically, the number of exemptions an employee is entitled to is the same as the employee's exemptions for income tax. The exemptions an employee claims on an income tax return are inferred to be correct in absence of evidence to the contrary. Webber v. West Side Transport, File No. 1278549 (App. Dec. 20, 2002).

Moreno Cervantes testified that at the time of his work injury he was single and he had two daughters who were fifteen and seventeen. (Tr., p. 12) He did not testify his daughters were dependents of him at the time of his work injury, or indicate whether their mother or mothers was or were still living and responsible for their care at the time of the work injury. Moreno Cervantes did not produce any income tax returns or other documents showing his daughters were his dependents on December 6, 2016.

Moreno Cervantes testified he had just returned to Iowa from Mexico three days before his work injury. (Tr., p. 29) He did not testify that he returned to Iowa from Mexico with his daughters. He also testified that after his work injury Broadlawns

"would charge for me to get into the doctor and my daughter had to work to pay for that." (Tr., p. 28) Moreno Cervantes's testimony does not support his daughters were dependents of him at the time of his work injury. The evidence supports Moreno Cervantes was single and entitled to one exemption at the time of the work injury.

Compensation is based on the injured employees "weekly earnings" at the time of the injury. Iowa Code § 85.36. "Weekly earnings means gross salary, wages, or earnings" the employee would have been entitled to if the employee worked the employee's "customary hours for the full pay period in which the employee was injured," determined by the manner in which the employee is paid as set forth in the statute, "rounded to the nearest dollar." Id.

Moreno Cervantes alleges he was paid by the hour. Under Iowa Code section 85.36(6), the deputy workers' compensation commissioner determines the weekly earnings of an hourly employee by adding the thirteen consecutive weeks immediately preceding the injury, and dividing the sum by thirteen. Moreno Cervantes's injury occurred the first day of his employment with Rodriguez, and thus, at the time of the work injury Moreno Cervantes had not been in the employ of Rodriguez for thirteen weeks. Iowa Code section 85.36(7) provides:

> [i]n the case of an employee who has been in the employ of the employer less than thirteen calendar weeks immediately preceding the injury, the employee's weekly earnings shall be computed under subsection 6, taking the earnings, including shift differential pay but not including overtime or premium pay, for such purpose to be the amount the employee would have earned had the employee been so employed by the employer the full thirteen calendar weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation. If the earnings of other employees cannot be determined, the employee's weekly earnings shall be the average computed for the number of weeks the employee has been in the employ of the employer.

Rodriguez testified Mena was paid $17.00 per hour at the time of the December 6, 2016 accident. Moreno Cervantes testified Mena told him Rodriguez would pay him $15.00 per hour and he would work forty hours per week. This is $2.00 less per hour than Rodriguez paid Mena at the time of Moreno Cervantes's work injury. No evidence was presented that this is not the usual and customary rate for individuals who performed services for Rodriguez, or that the individuals who performed services for Rodriguez worked less than forty hours per week. I find $15.00 to be Moreno Cervantes's hourly pay, and that it was anticipated he would work forty hours per week. The evidence supports Rodriguez had gross earnings of $600.00 per week. Based on the Ratebook in effect at the time of Moreno Cervantes's work injury, I find Moreno Cervantes's rate to be $373.76, because he was single and entitled to one exemption at the time of his work injury.

IV. Extent of Disability

Permanent partial disabilities are divided into scheduled and unscheduled losses. Iowa Code § 85.34(2) (2016). If the claimant's injury is listed in the specific losses found in Iowa Code section 85.34(2)(a)-(t), the injury is a scheduled injury and is compensated by the number of weeks provided for the injury in the statute. Second Injury Fund v. Bergeson, 526 N.W.2d 543, 547 (Iowa 1995).

Before the hearing Moreno Cervantes alleged he sustained an injury to his right foot, right lower extremity, neck, and cervical spine. At hearing the parties stipulated if the injury is found to be the cause of disability, the disability is a scheduled member disability to the right lower extremity. No evidence was presented at hearing Moreno Cervantes sustained a temporary to permanent impairment to his neck or cervical spine. As discussed above, he has established he sustained temporary and permanent impairments to his right lower extremity, a scheduled injury.

"The compensation allowed for a scheduled injury 'is definitely fixed according to the loss of use of the particular member.'" Id. (quoting Graves v. Eagle Iron Works, 331 N.W.2d 116, 118 (Iowa 1983)). If the claimant's injury is not listed in the specific losses in the statute, compensation is paid in relation to 500 weeks as the disability bears to the body as a whole. Id.; Iowa Code § 85.34(2)(u). "Functional disability is used to determine a specific scheduled disability; industrial disability is used to determine an unscheduled injury." Bergeson, 526 N.W.2d at 547.

The schedule provides a maximum award of 220 weeks of permanent partial disability benefits for an injury to the lower extremity. Iowa Code § 85.34(2)(*o*). No physician provided an impairment rating under the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001). The evidence presented at hearing, including lay testimony, supports Moreno Cervantes now walks with a limp, he experiences pain and swelling in his right lower extremity caused by the work injury, which impedes his ability to use ladders. I find Moreno Cervantes has sustained a ten percent permanent impairment to his right lower extremity. Under the schedule, I find Moreno Cervantes is entitled twenty-two weeks of permanent partial disability benefits.

The evidence presented at hearing supports Moreno Cervantes did not work from the date of the injury until May 2017. Neither party established the day Moreno Cervantes returned to work. I find Moreno Cervantes returned to work May 1, 2017. There was no evidence presented at hearing Moreno Cervantes had reached maximum medical improvement before May 1, 2017. In the case of Evenson v. Winnebago Indus., Inc., 881 N.W.2d 360, 372-74 (Iowa 2016), the Iowa Supreme Court held that the healing period set forth in the statute lasts until the claimant has returned to work, has reached maximum medical improvement, or until the claimant is medically capable of returning to substantially similar employment, "whichever occurs first." Under

Evenson, the commencement date for permanency is May 1, 2017, the day Moreno Cervantes returned to work.

The parties stipulated the commencement date for permanency is June 1, 2017. This is a legal error under Evenson. I reject the parties' stipulation as to the law. Freeman v. Earnst & Young, 541 N.W.2d 890, 893-94 (Iowa 1995) (quotingState v. Aumann, 236 N.W.2d 320, 322 (Iowa 1975) ("stipulations as to the law do not settle for the court what the law is, and consequently are of no validity"); Polk Cty. Bd. of Supervisors v. Polk Commonwealth Charter Comm'n, 522 N.W.2d 783, 791 (Iowa 1994) (the court is not bound by stipulations as to the law); State v. Mary, 368 N.W.2d 166, 170 (Iowa 1985) ("stipulation of litigants cannot be invoked to bind or circumscribe a court in its determination of questions of law"). Moreno Cervantes is awarded twenty-two weeks of permanent partial disability benefits commencing on May 1, 2017, payable at the weekly rate of $373.76.

V. Temporary Benefits

Moreno Cervantes seeks temporary disability benefits from December 6, 2016 through June 1, 2017. Rodriguez contends Moreno Cervantes is not entitled to temporary disability benefits. Iowa Code section 85.33 governs temporary disability benefits, and Iowa Code section 85.34 governs healing period and permanent disability benefits. Dunlap v. Action Warehouse, 824 N.W.2d 545, 556 (Iowa Ct. App. 2012).

An employee has a temporary partial disability when because of the employee's medical condition, "it is medically indicated that the employee is not capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, but is able to perform other work consistent with the employee's disability." Iowa Code § 85.33(2). Temporary partial disability benefits are payable, in lieu of temporary total disability and healing period benefits, due to the reduction in earning ability as a result of the employee's temporary partial disability, and "shall not be considered benefits payable to an employee, upon termination of temporary partial or temporary total disability, the healing period, or permanent partial disability, because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of injury." Id.

As a general rule, "temporary total disability compensation benefits and healing-period compensation benefits refer to the same condition." Clark v. Vicorp Rest., Inc., 696 N.W.2d 596, 604 (Iowa 2005). The purpose of temporary total disability benefits and healing period benefits is to "partially reimburse the employee for the loss of earnings" during a period of recovery from the condition. Id. The appropriate type of benefit depends on whether or not the employee has a permanent disability. Dunlap, 824 N.W.2d at 556. I concluded Moreno Cervantes has sustained a permanent impairment as a result of the work injury, therefore, if he is entitled to temporary benefits, he is entitled to healing period benefits.

The evidence presented at hearing supports Moreno Cervantes was off work from December 6, 2016 until he returned to work on May 1, 2017. Moreno Cervantes is entitled to healing period benefits from December 6, 2016 through April 30, 2017, payable at the weekly rate of $373.76.

VI. Medical Bills

Rodriguez has not paid for any of Moreno Cervantes's medical care, asserting Moreno Cervantes was not an employee at the time of his work injury. Moreno Cervantes seeks to recover medical bills set forth in Exhibits 4 and 5. Moreno Cervantes testified none of his medical bills, set forth in Exhibits 4 and 5 have been paid. (Tr., pp. 27-28)

An employer is required to furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, hospital services and supplies, and transportation expenses for all conditions compensable under the workers' compensation law. Iowa Code § 85.27(1). The employer has the right to choose the provider of care, except when the employer has denied liability for the injury. Id. "The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee." Id. § 85.27(4). If the employee is dissatisfied with the care, the employee should communicate the basis for the dissatisfaction to the employer. Id. If the employer and employee cannot agree on alternate care, the commissioner "may, upon application and reasonable proofs of the necessity therefor, allow and order other care." Id. The statute requires the employer to furnish reasonable medical care. Id. § 85.27(4); Long v. Roberts Dairy Co., 528 N.W.2d 122, 124 (Iowa 1995) (noting "[t]he employer's obligation under the statute turns on the question of reasonable necessity, not desirability"). The Iowa Supreme Court has held the employer has the right to choose the provider of care, except when the employer has denied liability for the injury, or has abandoned care. Iowa Code § 85.27(4); Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 204 (Iowa 2010).

This is a denied claim. Rodriguez transported Moreno Cervantes to the hospital, and he has not paid for any of Moreno Cervantes's medical care. The bills contained in Exhibits 4 and 5 are for medical care Moreno Cervantes received as a result of the work injury. I conclude the care he received was reasonable and necessary. Rodriguez is responsible for the medical bills set forth in Exhibits 4 and 5 and for all causally related medical bills for treatment of the work injury.

VII. Penalty

Moreno Cervantes seeks an award of penalty benefits. Iowa Code section 86.13 governs compensation payments. Under the statute's plain language, if there is a delay in payment absent "a reasonable or probable cause or excuse," the employee is entitled to penalty benefits, of up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse. Iowa Code § 86.13(4); see also Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 260 (Iowa

1996) (citing earlier version of the statute). "The application of the penalty provision does not turn on the length of the delay in making the correct compensation payment." Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229, 236 (Iowa 1996). If a delay occurs without a reasonable excuse, the commissioner is required to award penalty benefits in some amount to the employee. Id.

The statute requires the employer or insurance company to conduct a "reasonable investigation and evaluation" into whether benefits are owed to the employee, the results of the investigation and evaluation must be the "actual basis" relied on by the employer or insurance company to deny, delay, or terminate benefits, and the employer or insurance company must contemporaneously convey the basis for the denial, delay, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits. Iowa Code § 86.13(4). An employer may establish a "reasonable cause or excuse" if "the delay was necessary for the insurer to investigate the claim," or if "the employer had a reasonable basis to contest the employee's entitlement to benefits." Christensen, 554 N.W.2d at 260. "A 'reasonable basis' for denial of the claim exists if the claim is 'fairly debatable.'" Burton v. Hilltop Care Ctr., 813 N.W.2d 250, 267 (Iowa 2012). "Whether a claim is 'fairly debatable' can generally be determined by the court as a matter of law." Id. The issue is whether the employer had a reasonable basis to believe no benefits were owed to the claimant. Id. "If there was no reasonable basis for the employer to have denied the employee's benefits, then the court must 'determine if the defendant knew, or should have known, that the basis for denying the employee's claim was unreasonable.'" Id.

Benefits must be paid beginning on the eleventh day after the injury, and "each week thereafter during the period for which compensation is payable, and if not paid when due," interest will be imposed. Iowa Code § 85.30. In Robbennolt, the Iowa Supreme Court noted, "[i]f the required weekly compensation is timely paid at the end of the compensation week, no interest will be imposed . . . . As an example, if Monday is the first day of the compensation week, full payment of the weekly compensation is due the following Monday." Robbennolt, 555 N.W.2d at 235. A payment is "made" when the check addressed to the claimant is mailed, or personally delivered to the claimant. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996) (abrogated by Keystone Nursing Care Ctr. v. Craddock, 705 N.W.2d 299 (Iowa 2005) (concluding the employer's failure to explain to the claimant why it would not pay permanent benefits upon the termination of healing period benefits did not support the commissioner's award of penalty benefits)).

Moreno Cervantes contends he is entitled to an award of penalty benefits because Rodriguez failed to timely pay benefits and failed to convey the reason for the refusal to pay benefits. Rodriguez did not believe Moreno Cervantes was an employee at the time of the work injury. He did not contemporaneously convey the reason for his failure to pay benefits to Moreno Cervantes. I find imposition of a $500.00 penalty is appropriate to deter Rodriguez and other employers and insurance carriers from engaging in similar conduct in the future.

VIII. Costs

Moreno Cervantes seeks to recover the $100.00 filing fee. (Ex. 6) Iowa Code section 86.40, provides, "[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Rule 876 IAC 4.33(6), provides

> [c]osts taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and
>
> practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes.

The administrative rule allows for the recovery of the filing fee. Moreno Cervantes is entitled to recover the cost of the filing fee.

ORDER

IT IS THEREFORE ORDERED, THAT:

Defendant shall pay the claimant healing period benefits from December 6, 2016 through April 30, 2017, payable at the weekly rate of three hundred seventy-three and 76/100 dollars ($373.76).

Defendant shall pay the claimant twenty-two (22) weeks of permanent partial disability benefits, of three hundred seventy-three and 76/100 dollars ($373.76), commencing on May 1, 2017.

Defendant 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 Tech., File No. 5054686 (App. Apr. 24, 2018).

Defendant is responsible for all causally connected medical bills as set forth in this decision.

Defendant shall pay the claimant five hundred and 00/100 dollars ($500.00) in penalty benefits.

Defendant shall pay the claimant one hundred and 00/100 dollars ($100.00) for the filing fee.

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

A copy of this decision is being provided to the Workers' Compensation Commissioner to determine whether further action should take place under Iowa Code section 87.19 for failure to have workers' compensation insurance.

Signed and filed this 5th day of March, 2019.

HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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HLP/sam

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.