BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CESAR ITZEP-CHAVEZ, Claimant, vs. SCHRUNK ROOFING, LLC, Employer, and FIRST COMP INSURANCE, Insurance Carrier, Defendants.	FILED AUG 25 2017 WORKERS COMPENSATION	File No. 5052850 ARBITRATION DECISION Head Note Nos.: 1100, 1402, 1801, 1803 2001, 2800, 3001

STATEMENT OF THE CASE

Cesar Itzep-Chavez, claimant, filed a petition in arbitration seeking workers' compensation benefits from the alleged employer, Schrunk Roofing, LLC and the alleged insurance carrier, First Comp Insurance. The arbitration hearing was held on September 27, 2016, and was interpreted by Ms. Perla Alarcon-Flory. The parties filed post-hearing briefs on November 30, 2016 and the matter was considered fully submitted at that time.

The evidentiary record includes Claimant's Exhibits 1 through 8, 11 through 15 and 17, and Defendants' Exhibits A through C. The pages of claimant's exhibits are not individually numbered. Therefore, references to specific pages of claimant's exhibits are made by counting sequentially from the first page of the exhibit.

At the hearing, Cesar Itzep-Chavez, claimant, Jason Schrunk, owner of Schrunk Roofing and Luis Vega, provided testimony.

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.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether an employer-employee relationship existed at the time of the alleged injury on April 29, 2015.

2. Whether claimant sustained an injury that arose out of and in the course of his employment on April 29, 2015.

3. Whether claimant failed to provide timely notice of his injury under Iowa Code section 85.27.

4. Whether the alleged injury was the cause of temporary disability.

5. Whether the alleged injury was the cause of permanent partial disability (PPD) and if so, the extent thereof.

6. The commencement date of permanent partial disability benefits, if any.

7. The applicable rate.

8. Whether claimant is entitled to payment of medical expenses.

9. The credit applicable for prior payment of weekly benefits, if any.

10. Whether claimant is entitled to reimbursement of the cost of obtaining an impairment rating.

11. Whether claimant is entitled to penalty benefits.

FINDINGS OF FACT

After a review of the evidence presented, I find as follows:

Claimant was 61 years old at the time of the hearing. (Exhibit 13, page 3) Claimant testified that he cannot read in any language and does not speak English. (Transcript p. 76)

Claimant stated that on April 29, 2015, he fell on a roof while working with his "boss," Jason Schrunk (hereinafter, "Jason"). (Tr. pp. 74-75) Jason is the owner of Schrunk Roofing, LLC. (Ex. 18, p. 2)

Claimant stated that when he fell on the roof, he did not fall to the ground, but he fell from the top roof to a lower level roof below. (Tr. pp. 74-75; Ex. 13, unnumbered page 13) He stated that he had pain in his hand from the fall. (Tr. p. 75) He was taken to his home by Luis Vega (hereinafter, "Luis") to change out of his dirty clothes and who

then took Luis to the hospital. (Tr. p. 75; Ex. 13, p. 13) Luis worked with claimant at Schrunk Roofing job sites. (Tr. p. 48)

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Claimant considered Jason to be his boss, "because he was the one that will climb up and tell everybody what they needed to do." (Tr. p. 74)

Jason testified that he did not have any employees at Schrunk Roofing and that Schrunk Roofing has never had any employees. (Tr. pp. 27, 30) However, he relied upon a "crew" of workers to do roofing projects. (Ex. 2, pp. 4, 8) Jason, in addition to his crew, gets on the roof and he does some of the work himself. (Tr. pp. 30-31; Ex. 2, p. 3)

Jason stated in the answer to interrogatories that Schrunk Roofing subcontracted work to Luis and that claimant was hired by Luis. (Ex. 18, p. 3) Luis testified that he does not carry workers' compensation insurance. (Tr. p. 61) Jason stated that Luis is responsible for hiring additional help that he may need and he is responsible for what happens on a job site. (Tr. pp. 40, 44)

Jason said that sometimes, he does not even inspect the work at the conclusion of a job to see if it had been completed satisfactorily. (Id.) Jason said that he has been working with Luis for about two years. (Tr. p. 44)

Luis testified that he worked with claimant. (Tr. pp. 47-48) There was no evidence that Luis worked with claimant on any jobs other than Schrunk Roofing projects. He stated that claimant only worked on two or three projects before the injury occurred. (Tr. p. 48) Luis stated that he has done work for Jason off and on, and gets paid based on the size of the job. (Tr. p. 49) Luis testified that he does not get full-time work with Schrunk Roofing and he may go for a week or two with no work from Schrunk Roofing. (Tr. p. 50)

Luis did not have any documents that would support his relationship to Jason as a subcontractor, rather than an employee. (Tr. p. 51) Neither was there any documentation suggesting that claimant was a subcontractor.

Luis was asked if he received a 1099 from Jason, and he responded that "[t]his year, I thought he was going to give me one, I think. But last year, I only had three, four jobs with him so he didn't give me one." (Tr. p. 59) This does not support the contention of defendants that Luis was a subcontractor.

Contrary to Luis's testimony, claimant testified that before he fell, he had worked for Schrunk Roofing for three to five weeks. (Tr. p. 78) Claimant described his job duties, as: hauling materials up and down ladders; cleaning up the job site; and, sometimes helping out with waterproofing materials on the roof. (Ex. 13, p. 10) Jason stated in his answers to interrogatories that the duties that claimant "performed were

those of clean up and assisting in providing materials. He would not have gotten on the roof." (Ex. 18, p. 4) However, at hearing, Jason initially said, "I don't know what Cesar's duties were." (Tr. p. 33) But, he later explained what he meant by his prior answer to interrogatory and said that claimant's duties involved: tearing off the roof; shingling the roof; and, cleanup. He said that claimant "would be bringing shingles maybe to the roof, up onto the roof, nails, tools." (Tr. p. 34) When asked specifically if claimant would get up onto the roof, Jason responded at hearing, "I have no idea. I've never seen Cesar work." (Id.) Jason also stated that any job duties assigned to claimant would be assigned by Luis. (Tr. p. 42) Luis testified that claimant's job duties were to dump the garbage in the dumpster and that claimant would not get on the roof. (Tr. p. 52)

The testimony concerning how claimant was paid is also in opposition. Luis testified at hearing that claimant was only paid a total of $300.00 before the injury occurred. Defendants' answer to interrogatories also indicated that claimant was paid $300.00 prior to the injury. (Ex. 18, p. 10) Defendants assert claimant was paid by the job without regard to the hours worked, earning $150.00 per job. Contrary to Luis and defendants, claimant stated that he was paid $14.00 per hour. There is no documentation to support how claimant was paid because he was paid in cash. Claimant testified that "[w]e left [for work] at 7:30" and "got off at 6:30" provided the weather was nice. (Tr. p. 78) Claimant testified that the most he was paid was $700.00 per week. (Tr. pp. 78-79) He also stated that he earned as little as $400.00 to $500.00 per week on some weeks, and that the work was sometimes cut short due to weather conditions. (Tr. p. 79)

Claimant stated that Jason would bring the money to the job site "[w]hen the weekend came" and that he was paid every weekend. (Tr. pp. 80-81) Luis stated that Jason did not bring the cash to the job site. (Tr. p. 49)

Jason did not agree that he regularly paid Luis weekly. Jason stated that he typically would pay Luis at Jason's home or he would meet him at the mall. (Tr. p. 38)

Claimant did not speak directly with Jason because claimant did not speak English. (Tr. p. 80) Claimant stated that "the boss [Jason] will give the money to Luis and Luis will pay me because I didn't speak English to be able to talk to him." (Id.) Claimant saw Jason give the money directly to Luis, which was then paid to claimant. (Id.)

Jason testified that claimant was paid $150.00 for each project, not by the hour, and he believed claimant only worked on two or three projects before the injury occurred. (Tr. p. 31) Jason was asked:

> Q: Okay. And when you handed the money to Luis, because he spoke English, he gave it to whoever was working once he received the money from you; is that correct?

A: Yes.

(Tr. p. 35) Jason stated in his answers to interrogatories that "[f]or each project, the pay was split three ways between Luis Vega, Romero, and claimant." (Ex. 18, p. 4) At hearing, Jason testified that he only knew about the money being split one-third each because Luis told him, and he denied paying anything directly to claimant. (Tr. p. 32) Luis confirmed through his testimony that when he received cash from Jason, it was split three ways, with one-third for himself, one-third for Romero and one-third for claimant. (Tr. p. 51) Claimant testified that he worked with Luis and Romero for Schrunk Roofing. (Tr. pp. 82-83)

Luis was asked at hearing, how much claimant was paid "for working with you and Jason?" Luis stated, "[b]ecause they were just little projects, we will normally take – take off expenses, like lunches, beverages, gas and then we would divide the rest." (Tr. pp. 48-49) Luis stated that the pay would be divided equally among the people working, including himself. (Tr. p. 51) He also stated that Jason paid him in cash. (Tr. p. 49) I note that if Luis, Romero and claimant were paid at the same time, splitting the money equally between them is not necessarily contradictory to claimant being paid at the rate of $14.00 per hour.

Jason stated that the amount of money that was given to Luis was based on the size of the job and was agreed upon between Jason and Luis. (Tr. pp. 37-38) Jason said that he would pay Luis at the end of a job or "when Luis would call me and say, 'Hey, can I get some money?'" (Tr. p. 43)

I do not find the testimony of Jason or Luis convincing on the issue of how claimant was paid, whether by the job or by the hour.

I accept the testimony of claimant that he was paid $14.00 per hour. I find that claimant was paid in cash on a weekly basis when work had been available during the preceding week.

I find that Jason of Schrunk Roofing, LLC was ultimately responsible for payment of claimant's wages.

Claimant stated that Luis would contact Jason when materials were running low at the job site and the materials would be sent to the site. (Tr. pp. 88-89) Luis agreed and testified that if he was running out of materials at a job site, like shingles, metal or nails, he would call Jason to get additional materials. (Tr. p. 50) Jason also agreed that he would purchase the materials for the jobs and bring the materials to the job site. (Tr. p. 34) Luis did not acquire materials for the job.

Luis testified in response to whether it was left up to him to hire whomever he wanted, he responded: "Yes. Okay. No. He [Jason Schrunk] doesn't tell me hire this person and this person and this person. He just tells me and I am the one that call

people to come to work." (Tr. p. 63) Indicating that Jason controls the number of people in the crew for each project.

Concerning Schrunk Roofing, LLC, it is noted that the Certificate of Organization for the company filed with the Iowa Secretary of State, identifies Jason Schrunk as the registered agent and 2625 S. Cleveland, Sioux City, Iowa, as the registered office and principle place of business. (Ex. 7, p. 1) The Division of Workers' Compensation Insurance Coverage Verification document, also identifies 2625 S. Cleveland, Sioux City, Iowa, as the employer's address. However, the document filed with the Division of Workers' Compensation shows Bayleigh Schrunk as the "employer." (Ex. 7, p. 7) Bayleigh Schrunk is Jason Schrunk's 11-year-old daughter. (Tr. p. 28) Jason had no explanation for why his 11-year-old daughter would be listed as the employer and denied that he used her identification to obtain workers' compensation insurance coverage. (Tr. pp. 28-29) However, he also confirmed that no one else is involved with Schrunk Roofing. (Tr. p. 29) This raises significant concerns for the undersigned concerning Jason Schrunk's business practices and credibility.

At the outset of the hearing, Jason, through counsel, stated that Schrunk Roofing LLC did not have workers' compensation insurance coverage for the injury date alleged in this matter. (Tr. pp. 4, 22) The Workers' Compensation Insurance Verification complicates the question of whether there was or was not coverage, because the defendant insurance carrier is listed therein for the date of April 6, 2015, not April 29, 2015, and Bayleigh Schrunk (claimant's 11-year-old daughter) is listed as the employer. (Ex. 7, p. 7) No motion was made to amend the Petition or otherwise dismiss or remove the insurance carrier as a defendant. I further note that the hearing report submitted by the parties at the outset of the hearing clearly lists "First Comp Ins." as the defendant insurance company, which was signed by both counsel. The issue of whether or not defendants had workers' compensation insurance in place for the injury date alleged was not identified on the hearing report as an issue to be determined at hearing and the hearing report itself suggests that there was insurance coverage. Also, the insurance verification document suggests that there may be coverage. Whether or not there is coverage is not an issue that was presented for determination and First Comp Insurance Company remains the named defendant insurance carrier.

After the injury, claimant asked Luis for Jason's phone number, but stated that Luis got mad and would not give it to him. (Tr. p. 81) Difficulty getting information for Jason and the insurance company was corroborated in the affidavit from Esteban Martinez, a friend of claimant's. (Ex. 3, pp. 1-2)

Jason stated at hearing that he has not, at any time, filed a first report of injury regarding this matter, despite the matter having resulted in a hearing. (Tr. p. 39)

I find that claimant testified credibly including his testimony concerning the nature of his relationship with Schrunk Roofing, Jason Schrunk and Luis Vega. I find that Jason Schrunk and Luis Vega were not credible witnesses.

I find that claimant was ultimately under the direction of Jason Schrunk and Schrunk Roofing while at the job sites. Although he may have received specific direction from Luis, and Luis may have acted in some respects as a supervisor, this was in significant part due to the language barrier between claimant and Jason. I find that Jason was the person with authority at the job site to direct the work of the crew. I find that although claimant worked with Luis, the work was controlled by Jason Schrunk and claimant was not free to control his own work.

I find that claimant was directed to a particular work site, given particular duties by another person at the job site, he was told when to commence and end work for the day and was not at liberty to determine his own work schedule.

I find that there was no evidence presented that claimant provided any of his own tools to perform the work.

I find that the evidence indicates that claimant did not work with Luis on any jobs other than those job sites that were Schrunk Roofing projects.

I find that Jason and Luis agreed that Jason gave money (cash) to Luis and that the money was then split equally between Luis, Romero and claimant. I further find that claimant was paid at the rate of $14.00 per hour.

I find that claimant testified credibly that he believed Jason was the boss because he was at the job site telling Luis what needed to be done. Jason spoke to Luis and not directly to claimant, because Luis spoke English and claimant did not.

I find that there is no evidence that claimant supplied materials for the job site, nor did Luis provide materials, rather, Jason supplied the materials for the job site and also delivered materials to the job site.

I find that there was no contract or documentation to support a subcontractor relationship between Schrunk Roofing and claimant or between Schrunk Roofing and Luis Vega.

I find that Luis has not received an IRS form 1099 for his previous two years of work with Schrunk Roofing, despite having worked for Schrunk Roofing during the past two years, which cuts strongly against the notion that he is a subcontractor that independently hired claimant.

I find that there was no evidence presented to conclude that claimant engaged in roofing or roof repair work outside of his work with Schrunk Roofing. The work that claimant performed was for the furtherance of, and in the regular course of business of Schrunk Roofing.

I find that the evidence supports the conclusion that the payment to each person working for Schrunk Roofing was made in cash.

It is of significant concern that at hearing, Jason Schrunk was unable to provide any explanation why his 11-year-old daughter was listed as the employer on the Workers' Compensation Insurance Coverage Verification document.

The evidence presented leads the undersigned to find that Jason Schrunk operated Schrunk Roofing, by hiring employees, including claimant, and paying them in cash. It appears that Jason's handling of the business was at best, not in compliance with commonly accepted business practices, and at worst done with the intention of avoiding payment of workers' compensation insurance, as well as employer and employee payroll taxes and withholdings.

I find that claimant was an employee of Schrunk Roofing on April 29, 2015.

The Injury

As described above, claimant testified that he fell on April 29, 2015, on a roof while working for Schrunk Roofing. (Tr. pp. 74-75; Ex. 13, p. 13) He stated that he had pain in his hand from the fall and was taken to his home by Luis to change his clothes before Luis would take him to the hospital. (Tr. p. 75; Ex. 13, p. 13) Although the medical records indicate that claimant had his "family at bedside" at the hospital, claimant does not have any family in the area, and Luis agreed that he was the person with claimant at the hospital. (Tr. pp. 71-72, 75, 86) The medical records indicate that claimant fell in an alley behind his house. (Ex. 5, p. 13) Defendants also stated in their answers to interrogatories that claimant was drinking alcohol when he fell. (Tr. pp. 53-54; Ex. 18, pp. 10, 16)

Luis agreed that claimant did not speak any English and that claimant did not speak directly with any medical providers at the hospital, and that Luis acted as the translator for claimant. (Tr. pp. 53-54) Luis agreed that information in the medical records concerning where the accident occurred was delivered through Luis to the medical provider. In other words, claimant, because of the language barrier, could not speak directly to the medical providers and relied on Luis to translate correctly. (Tr. p. 54) Also, after Luis told the medical providers that claimant fell behind his house in an alley, it is no shock that Exhibit 5, unnumbered page 12, is marked with an "x" in the "no" box, regarding whether this was a work related injury. Claimant does not speak English and cannot read any language, the fact that his signature appears on the same page is not persuasive to the undersigned.

Luis also agreed that before going to the hospital, he "asked him [claimant] if he wanted to take a shower, [or] if he wanted to go like that." (Id.) Claimant stated that after he fell on the roof, Luis took him home and told him to change his clothes before taking him to the hospital. (Tr. pp. 75-76) I find claimant's testimony credible on this point that he was directed by Luis to change clothes and clean himself up before going to the hospital.

Claimant, due to the language barrier, was unable to speak for himself at the hospital and describe how and where he fell and was relying upon his translator, Luis. Claimant testified that Luis went to hospital and medical appointments with him about four different times. (Tr. p. 105) Luis claimed that he only went to one appointment with claimant. (Tr. p. 71)

The medical records initially indicate that claimant fell while walking behind his house. (Ex. 5, p. 13) Later, after a few visits, on June 8, 2015, the records state that "[t]here was a question of whether this happened at work or not . . ." (Ex. 5, p. 34)

Claimant testified that he was very upset when he learned that the medical records indicated that he fell behind his house. (Tr. p. 77) Claimant stated that Luis took advantage of him and his situation at the hospital because claimant does not speak English. (Id.)

Jason stated at hearing that he had no idea how claimant was injured, but that he "was told he fell in his alley by his house." (Tr. p. 39)

Luis testified that claimant did not fall on a roof while working. (Tr. pp. 52-53) Luis stated that claimant called him concerning a fall and told him that he fell behind his house. Luis stated that he then took claimant to the hospital. (Tr. p. 54) The defendants contend that claimant fell in the alley behind his home and that he was drinking alcohol when he fell. (Tr. pp. 53-54; Ex. 18, pp. 10, 16) However, Luis stated that he did not say that claimant was drunk at the time, only that he "didn't know if he was drunk or not." (Id.)

Claimant credibly testified that he has been sober for more than 20 years before this incident occurred. (Tr. p. 77) This is corroborated by the affidavit of Esteban Martinez, who indicated that claimant had not drank alcohol for years before this incident. (Ex. 3) The medical records from the initial trip to the hospital following the fall, stating that claimant had a "fall earlier this evening," do not mention any medical provider's observations of intoxication. (Ex. 5, p. 13) The medical record from the following day, on April 30, 2015, indicates that claimant "[d]oes not drink alcohol." (Ex. B, p. 1) I am unable to find any corroborating evidence in the record to support defendants' contention that claimant was drinking alcohol at the time he fell.

Esteban Martinez stated by affidavit that he has known claimant for about 4 years and believes him to be an honest man. (Ex. 3, p. 2) Mr. Martinez stated that he believed claimant had not consumed alcohol for many years before this incident occurred. (Id.) Mr. Martinez stated that claimant called him on the day of the incident and said that he had fallen at work and that "Luis did not want to bring him to the hospital when he was so dirty from work." (Ex. 3, p. 1) Mr. Martinez stated that "[f]rom the beginning, Luis would not give us the information for Jason nor for the insurance for Jason." (Ex. 3, p. 2)

It strikes the undersigned as a convenient story that claimant fell behind his house in an alley, a place where it would be unexpected to find a witness, and that an unsupported allegation of intoxication was introduced to give a reason why claimant allegedly fell.

It is also significantly concerning to the undersigned that Luis would first take claimant home to change clothes and clean up before taking him to the hospital, which suggests that defendants did not want claimant to present himself at the hospital as one who had just come from a long day of working on a roof.

As stated above, I do not find the testimony of either Jason Schrunk or Luis Vega to be credible. I accept the testimony of claimant, and find that he fell on April 29, 2015, while working on a roof for Schrunk Roofing while performing his assigned duties in the course of his employment with Schrunk Roofing, which caused the injury to his left wrist as described in the medical records.

I further find that defendants had notice of the injury on the same day that it occurred. Luis, the only English speaking worker, took claimant home to shower and put on clean clothes and then took him to the hospital. Luis was in the role of a supervisor.

Medical

When claimant was treated at the hospital, it was recorded that he fell and had a left wrist deformity with swelling and pain of 10/10. (Ex. 5, p. 1) An x-ray of the left wrist was obtained. (Ex. 5, p. 3) The injury was noted to be a comminuted fracture of the distal radius. (Ex. 5, p. 13) Claimant had a closed reduction, to place him in a more anatomical position and he was put in a sugar-tong splint. (Ex. B, p. 1)

Claimant had follow-up care at the CNOS Dunes Clinic. (Ex. 5, p. 13; Ex. B, p. 1) On April 30, 2015, he arrived in "significant distress," with pain in his wrist and some pain in his fingertips. The fracture is noted to be "quite severe" and that "he shattered his distal radius," therefore Michael Nguyen, M.D., was skeptical that conservative care would be appropriate. (Ex. B, p. 1) Dr. Nguyen discussed the benefits and risks of surgery. Dr. Nguyen noted that claimant was:

> in a tough position since he does not have any insurance and there is no way I can guarantee that he will not have significant deficits after surgery, but given how much he has destabilized in this 1 week, I can only expect that he will continue to destabilize and lose a significant amount of motion and have a significant amount of pain afterwards if he does not try to internally fixate these fragments.

(Ex. B, p. 2)

On May 7, 2015, claimant returned to see Dr. Nguyen who noted that claimant "is trying to avoid surgery if at all possible, and so we will see him back in one weeks' [*sic*] time" to reassess the stability of his fracture. (Ex. 5, p. 23)

Claimant returned to CNOS on May 8, 2015 and met with Bruce Watkins, M.D., who is a hand surgeon. (Ex. B, p. 3; Ex. 5, pp. 28, 47 & 50) Dr. Watkins discussed surgery and ordered an MRI. (Id.) The MRI was conducted on May 15, 2015, and showed: a distal radial fracture; bone contusion with possible vertical fracture of the distal ulna; and, triangular fibrocartilage tear. (Ex. 5, p. 32)

On May 15, 2017, claimant saw Dr. Nguyen, who noted following x-rays that there was a "worsening of his shattered distal radius. It looks like he has slipped back even further than the original injury, which is not unexpected given the unstable nature of his fracture." (Ex. 5, p. 25)

At some point, claimant was placed in a cast and the records indicate that claimant chose not to undergo surgical intervention. (Ex. 5, p. 36) However, claimant testified at hearing that he wanted to proceed with surgery, but had no way to pay for the procedure. (Tr. p. 85)

Claimant continued to receive treatment at CNOS through the end of July 2015. On July 27, 2017, claimant reported that his wrist was stiff, but he did not have significant pain. He was taking extra strength Tylenol as needed. (Ex. 5, p. 41) He was noted to have mild edema in the wrist, but no tenderness at the fracture site. (Ex. 5, p. 42) He was placed in a removable splint and he was to start therapy to improve his range of motion, although he never started therapy because he could not afford it. (Ex. 5, p. 42; Ex. 14, p. 2) If his difficulties persisted, a corrective osteotomy could be considered, "however, Mr. Chavez has continued to state that he really just wants to go back to work." (Ex. 5, p. 42)

I find that the medical treatment claimant received in connection with his wrist injury was reasonable and appropriate and was beneficial to him.

I find that the medical bills related to the medical treatment claimant received total $5,631.07, as supported by Claimant's Exhibit 4.

On May 12, 2016, claimant returned to Dr. Watkins for the purpose of assessing permanent impairment at the direction of claimant's counsel. (Ex. 14, p. 1) Dr. Watkins assigned an impairment rating of 25 percent of the "hand and wrist" based on the "25th Edition AMA." (Ex. 14, unnumbered p. 2) This is understood by the undersigned to be a typo concerning the edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, and is likely intended as the Fifth Edition (AMA Guides). The evaluation indicates that claimant had "tenderness along the wrist joint on both the dorsal and radial aspects but not the ulnar aspect," as well as reduced range of motion of the fingers and reduced grip and pinch strength in the left hand. (Id.) The

opinion does not provide specific references to the AMA Guides regarding tables, figures or page numbers to support the 25 percent rating, but is unrebutted by any competent medical testimony.

I accept the impairment rating of 25 percent rating as assigned by Dr. Watkins as applicable to the hand. I find that pursuant to Table 16-2, p. 439 of the AMA Guides that 25 percent impairment to the hand covers to 23 percent impairment to the upper extremity. Because of the situs of the injury in the wrist, I find that the injury involves the arm.

Claimant never returned to work for Schrunk Roofing after he fell on April 29, 2015. (Tr. p. 86) At the time of the hearing, he had been working for about a month or two doing concrete work. (Tr. pp. 86, 105) Claimant stated that he had not worked anywhere between the injury date at Schrunk Roofing and his recent concrete job. (Tr. p. 86) Claimant stated that he still has numbness and pain and that his arm did not "go back to normal." (Tr. p. 89)

I find that defendants did not conduct a reasonable investigation to support its denial and that defendants did not rely upon a reasonable investigation for their denial nor communicate the same to claimant.

REASONING AND CONCLUSIONS OF LAW

The first issue is whether claimant was an employee of Schrunk Roofing on April 29, 2015, when he was injured.

Claimant contends that he was an employee, while Schrunk Roofing argues that he was not and that Luis Vega was subcontracted to do roofing jobs and claimant was hired by Luis Vega.

Section 85.61(11) provides in relevant part:

> "Worker" or "employee" means a person who has entered into the employment of, or works under contract of service, express or implied, or apprenticeship, for an employer. . . .

It is claimant's duty to prove, by a preponderance of the evidence, that he was an employee within the meaning of the law. Where claimant establishes a prima facie case, defendants then have the burden of going forward with the evidence which rebuts claimant's case. The defendants must establish, by a preponderance of the evidence, any pleaded affirmative defense or bar to compensation. Nelson v. Cities Service Oil Co., 259 Iowa 1209, 146 N.W.2d 261 (1967).

Factors to be considered in determining whether an employer-employee relationship exists are: (1) the right of selection, or to employ at will, (2) responsibility for payment of wages by the employer, (3) the right to discharge or terminate the

relationship, (4) the right to control the work, and (5) identity of the employer as the authority in charge of the work or for whose benefit it is performed. The overriding issue is the intention of the parties. Caterpillar Tractor Co. v. Shook, 313 N.W.2d 503 (Iowa 1981); McClure v. Union et al., Counties, 188 N.W.2d 283 (Iowa 1971); Nelson, 259 Iowa 1209, 146 N.W.2d 261; Lembke v. Fritz, 223 Iowa 261, 272 N.W. 300 (1937); Funk v. Bekins Van Lines Co., I Iowa Industrial Commissioner Report 82 (App. December 1980). In Mallinger v. Webster City Oil Co., 234 N.W. 254, 211 Iowa 847 (1929), the Iowa Supreme Court outlined similar factors to determine whether a worker is an independent contractor or an employee. Specifically, the Mallinger Court identified the following factors:

> (1) The existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price; (2) independent nature of his business or his distinct calling; (3) his employment of assistants with the right to supervise their activities; (4) his obligation to furnish necessary tools, supplies, and materials; (5) his right to control the progress of the work, except as to the final results; (6) the time for which the workman is employed; (7) the method of payment, whether by time or by job; (8) whether the work is part of the regular business of the employer. If the workman is using the tools or equipment of the employer, it is understood and generally held that the one using them, especially if of substantial value, is a servant.

Mallinger, 234 N.W. at 257.

Even if both parties by agreement state they intend to form an independent contractor relationship, their stated intent is ignored if the agreement exists to avoid the workers' compensation laws. Likewise, the test of control is not the actual exercise of the power of control over the details and methods to be followed in the performance of the work, but the right to exercise such control. Also, the general belief or custom of the community that a particular kind of work is performed by employees can be considered in determining whether an employer-employee relationship exists. Caterpillar Tractor Co. v. Shook, 313 N.W.2d 503 (Iowa 1981); McClure v. Union et al., Counties, 188 N.W.2d 283 (Iowa 1971); Nelson, 259 Iowa 1209, 146 N.W.2d 261; Lembke v. Fritz, 223 Iowa 261, 272 N.W. 300 (1937); Funk v. Bekins Van Lines Co., I Iowa Industrial Commissioner Report 82 (App. December 1980).

In this case, I found that claimant proved he was a "worker" or "employee" within the definition of Iowa Code section 85.61(11). As noted in the findings, Jason Schrunk had authority to control the number of workers at each job site, Jason Schrunk was responsible for payment of wages to claimant, Jason Schrunk controlled the work and gave direction to the crew and was seen as the authority in charge at the job site. Having established his status as a presumptive employee, the burden of proof shifted to Schrunk Roofing to establish that claimant was actually an independent contractor, rather than an employee.

I found that Jason Schrunk arranged for materials to be provided at the job site and there was no evidence that claimant provided any of his own tools. I found that claimant was paid by the hour and there was no evidence that claimant or Luis had authority to hire assistants or additional employees and Luis did so only when directed by Jason. Also, claimant did not set his own schedule and was told when to begin and end the work day. In addition, there were no written documents to support the notion that claimant was a subcontractor. There were also no documents to support the idea that Luis Vega was a subcontractor who hired claimant. Typically, one would expect an arms-length negotiation and contract to be in writing in an independent contractor situation. No such contract exists in this case.

I found that claimant was not independently engaged in roofing or roofing repair and his only work in this field came from his involvement with Schrunk Roofing.

I found that the crew, which included Luis and claimant, were ultimately under the control of Jason Schrunk. He would tell the workers what to do.

I found that claimant was paid at an hourly rate of $14.00 per hour for the work that he performed. Although Jason and Luis testified that claimant only worked about two jobs before the injury occurred and was paid a flat amount of $150.00 each, I found that their testimony was not credible and I accepted the testimony of claimant regarding his longer period of employment and hourly wage.

I found that the work being performed by claimant when he was injured was within the regular course of business of the employer, Schrunk Roofing.

Under the majority of the common law indicia of an employment relationship, the claimant was an employee of Schrunk Roofing when he was injured on April 29, 2015. At the very least, claimant produced sufficient evidence to establish a prima facie case that he was an employee and Schrunk Roofing did not carry its burden of proof to establish otherwise. I also note that although Luis Vega testified at hearing, he never stated that claimant was his employee. Therefore, I conclude that claimant was an employee of Schrunk Roofing on April 29, 2015.

The second issue is whether claimant's injury arose out of and in the course of his employment on April 29, 2015.

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if

brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4)(b); Iowa Code section 85A.8; Iowa Code section 85A.14.

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 Elec. 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, defendants do not argue that the injury did not occur. Nor do they argue that claimant did not fall and injure his left wrist and receive medical care for that injury. They acknowledge that claimant injured his left wrist, but argue that the injury did not occur while claimant was working for Schrunk Roofing, but rather occurred when he fell, while drinking alcohol, in an alley behind his house.

Dr. Watkins has assigned permanent impairment based on the April 29, 2015 injury. There is no contrary medical evidence to suggest that claimant did not sustain permanent impairment from a fall that occurred on April 29, 2015. The fighting issue is whether claimant fell on a roof working for Schrunk Roofing, or did he fall in an alley behind his house. These two accounts of the injury are in opposition and I therefore, rely upon the credibility of witnesses as well as the corroborating evidence.

I have found that defendants' assertion that the injury occurred in an alley behind claimant's house is not credible. I accepted the testimony of claimant, and found that he fell on April 29, 2015, while working on a roof for Schrunk Roofing while performing his assigned duties during in the course of his employment with Schrunk Roofing, which caused the injury to his left wrist. I conclude that claimant's injury arose out of and in the course of his employment with Schrunk Roofing.

The third issue is whether claimant failed to provide timely notice under Iowa Code section 85.27.

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).

I have found that the employer had notice of the injury on the day that it occurred. I have found that the testimony of Luis and Jason concerning how and where the injury occurred is not credible. The fact that the employer engaged in activity to avoid responsibility for claimant's injury from the very beginning is strong evidence that the employer was clearly aware that the injury had occurred. I conclude that the employer

was aware of the injury on the day it occurred and obviously well within the 90 day requirement.

The fourth issue is whether the alleged injury was the cause of temporary disability.

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

Claimant was injured on April 29, 2015. He was seen by medical providers on the same day. He was placed in a splint and later a cast. The records do not indicate that claimant was ever specifically taken off work by any physician, however, he did not return to work at Schrunk Roofing or anywhere else until about a month or two prior to the hearing.

Claimant was not provided medical care by the employer and could not afford substantial medical treatment and therefore did not proceed with the recommended surgery or physical therapy.

An impairment rating concerning the work injury was issued at the request of claimant's counsel by Dr. Watkins on May 12, 2016, more than a year after the incident occurred. However, Dr. Watkins did not address the issue of maximum medical improvement (MMI) or when claimant could have returned to work similar to the work he was engaged in at the time of the injury.

It is noted that on July 27, 2015, about three months after the injury, claimant was seen by Dr. Watkins and stated that he was having stiffness, but not significant pain. At that point, he was no longer in a cast and was placed in a removable splint. It was also noted that claimant's primary concern was simply getting back to work. Dr. Watkins did not specifically address MMI or restrictions. However, the implication is that Dr. Watkins was aware that claimant wanted to return to work in the immediate future and he did not place any restrictions on claimant to prevent him from doing so.

July 27, 2015 was the last medical appointment claimant had prior to the evaluation with Dr. Watkins ten months later in May 2016, for the purpose of obtaining

an impairment rating. It is difficult for the undersigned to conceive that claimant was capable of returning to similar type work that he was doing at the time of the injury prior to July 27, 2015. Prior thereto, claimant was experiencing more significant pain and was in a cast. It is also highly unlikely that claimant could be reasonably considered to have reached MMI before July 27, 2015, and it is clear that he did not work between the date of injury and July 27, 2015. Having reported only stiffness and no significant pain, and the fact that he had no follow-up medical care after July 27, 2015, leads the undersigned to the conclusion that his last date of actual medical treatment, July 27, 2015, is the date upon which claimant could have returned to work similar to the work he was engaged in at the time of the injury.

Claimant argues that he should receive healing period benefits from the date of injury to June 29, 2016, the approximate date upon which claimant began working in the cement job that he described at hearing. However, there is no clear evidence when claimant started the cement job or that claimant was not medically capable of returning to similar work that he was engaged in at the time of the injury prior to that date.

I conclude that claimant is entitled to healing period benefits from April 29, 2015 through July 27, 2015.

The fifth issue is whether the alleged injury was the cause of permanent partial disability and if so, the extent thereof.

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). The fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

An injury to a scheduled member may, because of after effects or compensatory change, result in permanent impairment of the body as a whole. Such impairment may in turn be the basis for a rating of industrial disability. It is the anatomical situs of the permanent injury or impairment which determines whether the schedules in section 85.34(2)(a) - (t) are applied. Lauhoff Grain v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943). Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

The injury in this case occurred to claimant's left wrist.

A wrist injury is an injury to the arm, not the hand. Holstein Elec. v. Breyfogle, 756 N.W.2d 812 (Iowa 2008).

I have accepted the 25 percent impairment to the hand as assigned by Dr. Watkins and found that the same converts to 23 percent of the upper extremity. The impairment rating of Dr. Watkins is stated as "25% loss of hand and wrist." (Ex. 14, unnumbered p. 2) Claimant argues that this reference to "hand and wrist" represents two separate impairment ratings of 25 percent for the hand and 25 percent for the wrist. (Id.) I do not interpret Dr. Watkins' evaluation and conclusion as claimant suggests. Rather, I conclude that the 25 percent rating applies to the hand only.

Twenty-three percent of the arm (250 week maximum) is 57.5 weeks. I conclude that defendants are obligated to pay claimant 57.5 weeks of permanent partial disability benefits.

The sixth issue is the commencement date of permanent partial disability benefits, if any.

Iowa Code section 85.34(2) provides that: "[c]ompensation for permanent partial disability shall begin at the termination of the healing period provided in subsection 1." Healing period is discussed in Iowa Code section 85.34(1) and terminates when one of three triggers occurs: the employee returns to work; the employee reaches MMI; or the employee is medically capable of returning to substantially similar employment that he/she was engaged in at the time of the injury.

I have previously concluded that claimant was capable of returning to substantially similar employment at the time of his last visit with Dr. Watkins for medical treatment on July 27, 2015. I therefore determine that permanent partial disability benefits should commence on July 28, 2015.

The seventh issue is a determination of the correct rate.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded, however. Iowa Code section 85.36(6).

Iowa Code section 85.61 provides:

> 3. *"Gross earnings"* means recurring payments by employer to the employee for employment, before any authorized or lawfully required deduction or withholding of funds by the employer, excluding irregular bonuses, retroactive pay, overtime, penalty pay, reimbursement of expenses, expense allowances, and the employer's contribution for welfare benefits.

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

The parties stipulated in the hearing report that claimant was married and entitled to two exemptions. They disagree concerning the average weekly wage and applicable rate.

I have found above that claimant was earning $14.00 per hour. However, he was being paid in cash and there are no documents to assist in calculating his average weekly wage. Claimant also testified that he had worked for three, four or five weeks before the injury occurred and that a typical day was from 7:30 a.m. to 6:30 p.m., weather permitting. He stated that he earned as much as $700.00 per week (50 hours at $14.00 per hour, straight time) to as little as $400.00 or $500.00 per week.

There was no evidence presented of the earnings of other similarly situated employees with this employer, likely because other employees were also paid in cash. Therefore, I consider claimant's average weekly earnings during the less than 13 week period that he was employed by Schrunk Roofing.

Based on claimant's testimony, I find that claimant worked about three weeks before the injury occurred and that he had weekly earnings of approximately $700.00, $500.00 and $400.00 per week. This conclusion is supported by claimant's testimony that the work would be cut short due to weather conditions. The three week average using the above weekly earnings is $533.33. I conclude that $533.33 is claimant's average weekly wage, which with two exemptions, produces a weekly benefit rate of $361.53.

The eighth issue is whether claimant is entitled to payment of medical expenses.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Evidence in administrative proceedings is governed by section 17A.14. The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence. The rules of evidence followed in the courts are not

controlling. Findings are to be based upon the kind of evidence on which reasonably prudent persons customarily rely in the conduct of serious affairs. Health care is a serious affair.

Prudent persons customarily rely upon their physician's recommendation for medical care without expressly asking the physician if that care is reasonable. Proof of reasonableness and necessity of the treatment can be based on the injured person's testimony. Sister M. Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963).

It is said that "actions speak louder than words." When a licensed physician prescribes and actually provides a course of treatment, doing so manifests the physician's opinion that the treatment being provided is reasonable. A physician practices medicine under standards of professional competence and ethics. Knowingly providing unreasonable care would likely violate those standards. Actually providing care is a nonverbal manifestation that the physician considers the care actually provided to be reasonable. A verbal expression of that professional opinion is not legally mandated in a workers' compensation proceeding to support a finding that the care provided was reasonable. The success, or lack thereof, of the care provided is evidence that can be considered when deciding the issue of reasonableness of the care. A treating physician's conduct in actually providing care is a manifestation of the physician's opinion that the care provided is reasonable and creates an inference that can support a finding of reasonableness. Jones v. United Gypsum, File 1254118 (App. May 2002); Kleinman v. BMS Contract Services, Ltd., File No. 1019099 (App. September 1995); McClellon v. Iowa Southern Utilities, File No. 894090 (App. January 1992). This inference also applies to the reasonableness of the fees actually charged for that treatment.

The employer in this case denied liability and never authorized any medical care. Therefore, defendants do not have a lack of authorization defense to the medical reimbursement that claimant seeks.

I found above that the medical treatment claimant received in connection with his injury was reasonable and appropriate and beneficial. I also found that the medical bills related to the medical treatment claimant received total $5,631.07, as supported by Claimant's Exhibit 4. I conclude that defendants are responsible for reimbursement of these medical bills.

The ninth issue is the applicable credit for prior payment of weekly benefits, if any.

The parties take odd positions on this issue. Claimant asserts that defendants are entitled to a credit of 1.5 weeks of permanent partial disability, while defendants argue that they are entitled to no credit. Although Luis testified that he and Romero gave some money to claimant after the injury the amount is not documented and not

specifically known, such that an accurate calculation could be performed. I accept defendants' position that there is no applicable credit based on the lack of sufficient evidence available to support a finding of a credit.

I conclude that defendants are not entitled to any credit.

The tenth issue is whether claimant is entitled to a reimbursement for obtaining an impairment rating.

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

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

In this case, defendants denied liability and there was no employer retained physician who provided an opinion concerning impairment, therefore, claimant is not entitled to reimbursement under Iowa Code section 85.39.

The eleventh issue in this case is whether claimant is entitled to penalty benefits.

Iowa Code section 86.13(4) provides that:

> (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, of chapter 85, 84A, 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 of 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.

(c) In order to be considered a reasonable or probable cause or excuse under paragraph "b", an excuse shall satisfy all the following criteria:

(1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.

(2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.

(3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Weekly compensation payments are due at the end of the compensation week. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229, 235 (Iowa 1996).

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

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

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

If the employer fails to show reasonable cause or excuse for the delay or denial, the commission must impose a penalty in an amount up to fifty percent of the amount unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty

include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

In this case, the employer conducted no reasonable investigation, did not rely upon any reasonable investigation and did not communicate the same to claimant. Considering these factors and the extent of the period of delay, I conclude that claimant is entitled to penalty benefits in the range or 50 percent on all accrued weekly benefits.

Based on the healing period determined above, I calculate those weekly benefits from April 29, 2015 through July 27, 2015 to be 12 weeks and 5 days or 12.714 weeks, which multiplied by the applicable rate of $361.53 is $4,596.49. About 50 percent of this amount is $2,290.00.

I have determined above that claimant is entitled to 57.5 weeks of PPD benefits. Fifty-seven and one-half weeks of PPD benefits multiplied by the applicable rate of $361.53 is $20,787.98. About 50 percent of this amount is $10,390.00.

The total applicable penalty for both healing period and permanent partial disability benefits is $12,680.00, representing about 50 percent.

Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33.

Claimant seeks reimbursement of the cost of an interpreter used by claimant for hearing preparation, but there were no documents admitted at the hearing that had been translated by the interpreter. (Ex. 8, p. 1) This is not a cost incurred in the hearing itself and is therefore excluded under the 876 IAC 4.33

Also, I look again at the issue of the cost of obtaining an impairment rating, this time as a cost, rather than as an 85.39 reimbursement.

The Iowa Supreme Court has provided some guidance on the taxation of costs. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015). In Young, the Court stated that 4.33 allows only for the taxation of costs "incurred in the hearing." When a physician's report is used as evidence in a hearing in lieu of the doctor's testimony, the report becomes a cost incurred in a hearing. However, because the report is separate from the examination, the underlying medical expenses associated with the examination do not become costs of a report. According to the Supreme Court, rule 876-4.33 is designed, to allow for taxation of costs incurred in the hearing itself rather than reimbursement of fees and expenses incurred in an examination.

Here, claimant seeks reimbursement for the impairment rating assigned by Dr. Watkins. The invoice for both the exam and report is $500.00. (Ex. 17, p. 1) The

invoice does not distinguish the cost of the examination versus the cost that applies to the preparation of the report.

I conclude that a reasonable amount applicable to the preparation of the report is one third of the total amount, or $166.66. Thus, I assess this amount as a cost against defendants.

In my discretion I also award as a cost against defendants the filing fee of $100.00. Total costs awarded are $266.66.

Although defendant employer indicated at hearing that there was no workers' compensation insurance in place at the time of the hearing, no motion was made at any time to remove the insurance carrier as a party prior to this matter.

However, based on the employer's statement through counsel at hearing that there was no workers' compensation insurance in effect on the date of injury herein, the parties are advised that a copy of this decision is being provided to the workers' compensation commissioner to determine whether further action should be take place under Iowa Code section 87.19 for failure to have workers' compensation insurance.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant healing period benefits to claimant from April 29, 2015 through July 27, 2015.

Defendants shall pay claimant permanent partial disability benefits of fifty-seven and one-half (57.5) weeks, beginning on July 28, 2015, until all benefits are paid in full.

All weekly benefits shall be paid at the rate of three hundred sixty-one and 53/100 dollars ($361.53) per week.

All accrued benefits shall be paid in a lump sum.

Defendants shall pay interest on any accrued weekly benefits pursuant to Iowa Code section 85.30.

Defendants shall reimburse claimant for his out-of-pocket medical expenses set forth in the medical expense summary attached to the hearing report and shall pay, reimburse, and or otherwise satisfy all remaining medical expenses contained therein.

Defendants shall pay claimant penalty benefits of twelve thousand six hundred eighty and 00/100 dollars ($12,680.00).

Defendants shall pay costs in the amount of two hundred sixty-six and 66/100 dollars ($266.66).

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 25th day of August, 2017.

TOBY J. GORDON
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.