BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

STEVEN R. ALMENDINGER, Claimant, vs. KAS INVESTMENT COMPANY, INC., d/b/a SWANSON GLASS, INC., Employer, and SFM MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5062518.01 ARBITRATION DECISION Head Note Nos.: 4000, 4000.1, 4000.2

STATEMENT OF THE CASE

The claimant, Steve Almendinger, filed a petition for arbitration seeking workers' compensation benefits from employer KAS Investment Company, Inc., and its insurer SFM Mutual Insurance Company. Tom Wertz argued on behalf of the claimant. Lee Hook argued on behalf of the defendants.

The matter was set for hearing on September 16, 2021, before Deputy Workers' Compensation Commissioner Andrew M. Phillips. The parties reached out to the undersigned prior to the hearing and agreed to submit the matter with briefing only. The briefs were due on October 19, 2021, and the record closed at that time.

The record in this case consists of Claimant's Exhibit 1-5, and Defendant's Exhibits A-C. The exhibits were admitted into the record with no objection.

The parties filed a hearing report, despite there being no hearing, in which they entered into various stipulations. All of those stipulations are accepted and hereby incorporated into this arbitration decision. 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.

ISSUE

The parties submitted the following issue for determination:

1. Whether a penalty should be assessed against the defendants.

FINDINGS OF FACT

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

Steven Almendinger, the claimant, filed a petition in arbitration on or about September 29, 2016. (Claimant's Brief, p. 1). The claimant sought industrial disability benefits for injuries to his left leg, left shoulder, mental health, and body as a whole due to an injury on October 20, 2014. (Claimant's Brief, pg. 1; Defendants' Exhibit C). On September 20, 2017, an arbitration hearing was held. (DE C). The proper rate of compensation was an issue in the arbitration hearing. (DE C:2, 6, 10-11).

On October 4, 2017, counsel for the defendants wrote a letter to claimant's counsel. (DE A:1). The defendants indicated that Mr. Almendinger was entitled to 70 weeks of benefits pursuant to Dr. Bollier's impairment rating. (DE A:1). The defendants indicated that they would commence payment of benefits, which would continue through November 7, 2017, at which time they asserted that no additional benefits were due. (DE A:1). The defendants asserted a credit for "any overpayment of benefits based upon inclusion of premium pay in the average weekly wage calculation." (DE A:1). The defendants included language indicating that they would review any additional information should it become available and also advised claimant's counsel of their right to file a claim with this Agency. (DE A:1).

An arbitration decision was issued on January 30, 2018, by another deputy workers' compensation commissioner. (DE C). Based upon the evidence in the record, the deputy commissioner determined that the claimant's compensation rate was nine hundred two and 78/100 dollars ($902.78) per week. (DE C:11). The deputy commissioner also determined that imposition of a penalty was not appropriate. (DE C:14-15). The defendants chose not to pay the ordered amount of nine hundred two and 78/100 dollars ($902.78), and instead chose to pay sixty-four thousand twenty-four and 55/100 dollars ($64,024.55) representing 101 weeks at a rate of six hundred eighteen and 59/100 dollars ($618.59) per week. (Claimant's Brief, pg. 2; CE 2:11; CE 4:59).

The defendants appealed the deputy commissioner's decision. (DE C:16-45). In their appeal, the defendants asserted that the deputy commissioner erroneously included premium pay in the calculation of the claimant's average weekly wage, and that the deputy commissioner's award of 40 percent industrial disability was too high. (DE C:16-45). The claimant filed a cross-appeal asserting that the deputy commissioner erred in admitting certain testimony, failing to find that the claimant's mental health conditions were permanent, failing to award alternate medical care for the mental health conditions, not awarding sufficient industrial disability benefits, and failing to award penalty benefits. (DE C: 46-47).

The commissioner delegated the appeal decision to a deputy commissioner. (DE C:46). The appeal decision affirmed the arbitration decision on several issues on

August 23, 2019. (DE C:54). With regard to the rate dispute, the appeal decision noted:

> The presiding deputy commissioner identified and cited a prior decision of the agency holding that prevailing wages paid pursuant to federal statute do not constitute "premium pay." See Smith v. Cedar Valley Asphalt Co., File No. 879898 (Arbitration April 1991). The presiding deputy commissioner noted that claimant worked in Wisconsin at the higher hourly prevailing rate from March 2014 until September 2014. I concur with this finding of fact.
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> I concur with the deputy that wages earned in such an employment arrangement constitute gross earnings pursuant to Iowa Code 85.61(3) and Iowa Code section 85.36(6). The presiding deputy commissioner provided a cogent analysis of this issue. I concur with the presiding deputy commissioner's findings of fact and conclusions of law. I conclude that the weekly worker's [*sic*] compensation rate in the arbitration decision should be affirmed.

(DE C:48). The appeal decision reversed the arbitration decision with regard to imposition of a penalty. (DE C:50-53). The appeal decision noted:

> Defendants significantly underpaid the weekly benefit rate to claimant until claimant's counsel challenged the weekly rate and demanded payment at a higher weekly rate. Defendants did not introduce evidence to establish that they conducted a reasonable investigation of the weekly rate issue or that their initial weekly rate constituted a reasonable conclusion resulting from that investigation. Defendants introduced no evidence to establish that they contemporaneously conveyed the basis for the delay or denial of benefits to the claimant at the time of the delay or denial.
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> I find that defendants did not offer evidence of a reasonable investigation or provide a reasonable excuse for the delay in payment of benefits. Iowa Code section 86.13(4)(c)(1)-(2). I find that defendants did not contemporaneously convey their bases for delay of benefits. Iowa Code section 86.13(4)(c)(3). Defendants bore the burden to establish a reasonable basis, or excuse, and to prove the contemporaneous conveyance of those bases to the claimant. Defendants failed to carry their burden of proof on the penalty issues, and a penalty award is appropriate. Iowa Code section 86.13.
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> ….
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> There is no evidence of prior penalty on behalf of the employer or insurance carrier and their conduct in this situation is not egregious. However, the total underpayment of weekly benefits was approximately $15,000.00. Having considered the relevant factors and the purposes of

> the penalty statute, I conclude that a section 86.13 penalty in the amount of $3,000.00 is appropriate in this case. Such an amount is appropriate to punish the employer for delays in payment of benefits under these facts and should serve as a deterrent against future conduct. However, the facts of this case are not of such an egregious nature that an additional penalty is warranted.

(DE C:52-53).

On September 20, 2019, the defendants filed a petition for judicial review in the Iowa District Court for Polk County. (DE C:55-56). The defendants asserted that the appeal decision erred in calculating the weekly workers' compensation benefit rate, in refusing to give the defendants a credit for weekly benefits volunteered at a higher rate, and in awarding penalty benefits. (DE C:55).

Counsel for the defendants wrote a letter to counsel for the claimant on September 26, 2019. (CE 2:17-19). In the letter, counsel for the defendants indicates that the appeal decision was in error in "several respects" with regard to the average weekly rate calculation, and award of benefits. (CE 2:17). Counsel for defendants opined that his client agreed to pay the 40 percent industrial disability award at a rate of seven hundred seventy-three and 25/100 dollars ($773.25). (CE 2:17). Counsel for defendants stated, "[t]his rate includes prevailing wages less benefits not appropriately included in the average weekly wage calculation." (CE 2:17). Defendants' counsel then engaged in an exercise to calculate the amount of benefits that they would pay based upon their own rate, rather than that provided in the arbitration decision and affirmed by the appeal decision. (CE 2:17-18).

Counsel for the defendants reiterated the seven hundred seventy-three and 25/100 dollars ($773.25) rate in a letter dated October 24, 2019. (CE 3:43). Counsel admitted that the defendants were not entitled to an overpayment credit of nine thousand one hundred ninety-six and 63/100 dollars ($9,196.63). (CE 3:43).

On October 25, 2019, counsel for the claimant replied to the letter from the defendants indicating that the claimant's position was that another sixteen thousand four hundred thirty-four and 13/100 dollars ($16,434.13) was owed by the defendants. (CE 3:46).

On November 12, 2019, counsel for the defendants e-mailed counsel for the claimant indicating that SFM was "doing an audit of the file to confirm the amount owing." (CE 3:45).

Claimant's counsel expressed his concerns regarding the ongoing rate issue in a letter to defendants' counsel on December 19, 2019. (CE 3:47-48). Claimant's counsel told defendants' counsel that he did not agree with their calculations of the rate paid at the time. (CE 3:47). Claimant's counsel pointed out that the defendants paid 71 weeks of benefits at the rate of nine hundred two and 78/100 dollars ($902.78), and that the defendants conceded that they could not take credit for the permanency benefits

previously paid. (CE 3:47). Claimant's counsel asserted that the claimant continued to be owed seventeen thousand five hundred twenty and 34/100 dollars ($17,520.34). (CE 3:48). Claimant's counsel followed up with defendants' counsel on January 6, 2020, and January 13, 2020, via e-mail, requesting a response to his benefit calculations. (CE 3:49-50).

On February 18, 2020, Judge Heather Lauber issued an order on judicial review. (DE C:81-91). Judge Lauber found that the reliance on Smith v. Cedar Valley Asphalt Co., File No. 879898 (April 15, 1991), was appropriate in determining the weekly compensation benefit rate. (DE C:86). The district court concluded "[t]he prevailing wage is paid as wages, is immediately available for Almendinger to spend and is subject to payroll tax. Accordingly, the court finds that the prevailing wage in [*sic*] not comparable to the 401k contributions and is properly considered as gross wages." (DE C:86). The district court further concluded that the defendants failed to meet their burden to show reasonable cause or excuse for their underpayment. (DE C:89). As such, the court concluded that Iowa Code section 86.13 mandated imposition of penalty benefits for each underpayment. (DE C:89). The court continued, "[t]o find that KAS can avoid assessment of the penalty by retroactively investigating and creating a "fairly debatable" issue, would, in effect, allow employers to unreasonably underpay benefits without consequence as long as the investigation was completed by the time of the hearing. This is inconsistent with the purpose of the statute." (DE C:89).

On February 21, 2020, the defendants adjusted their rate to seven hundred seventy-three and 25/100 dollars ($773.25) per week. (CE 2:11). They also paid the claimant eight thousand one hundred fourteen and 60/100 dollars ($8,114.60) on February 21, 2020, representing an underpayment. (CE 2:11).

On February 25, 2020, defendants' counsel sent a letter to claimant's counsel with the results of the audit undertaken by SFM. (CE 3:51-52). Based upon the audit results, the defendants determined that the claimant was entitled to accrued benefits as of February 3, 2020, which amounts to an additional eight thousand forty-one and 67/100 dollars ($8,041.67). (CE 3:51). The defendants also indicated that they would pay seven hundred seventy-three and 25/100 dollars ($773.25) commencing February 4, 2020, through April 29, 2020. (CE 3:51-52).

Claimant's counsel sent a letter to defendants' counsel indicating that the claimant continued to dispute the rate used by the defendants in issuing a lump sum payment to the claimant. (CE 3:53). Claimant's counsel also indicated that the amount issued for the underpayment, even using the defendants' proposed rate, should be ten thousand seven hundred ninety-seven and 76/100 dollars ($10,797.76) rather than the amount paid in the lump sum. (CE 3:53).

On April 6, 2020, claimant's counsel sent a letter to defendants' counsel indicating that the defendants had paid one hundred fifty thousand six hundred eighteen and 55/100 dollars ($150,618.55) as of April 6, 2020. (CE 3:54). Based upon the rate in the arbitration decision, affirmed in the appeal decision and by judicial review, claimant's counsel alleged that the defendants owed an additional twenty-nine thousand

nine hundred thirty-seven and 45/100 dollars ($29,937.45) to satisfy the 200 week indemnity award. (CE 3:54).

Claimant's counsel sent an e-mail and letter to defendants' counsel on April 21, 2020, indicating that weekly indemnity checks ceased on April 6, 2020. (CE 3:56).

The defendants subsequently appealed to the Supreme Court of Iowa on April 29, 2020. (DE C:92). On the same day, the defendants' counsel e-mailed claimant's counsel indicating that a check was issued on April 23, 2020, for the outstanding permanent impairment rating. (CE 3:58). Defendants' counsel opined that they owed an additional one thousand seven hundred eleven and 70/100 dollars ($1,711.70) based upon their rate calculation. (CE 3:58). The defendants eventually determined that continuing their appeal was "not cost effective." (Defendants' Brief, pg. 2). They dismissed their appeal on June 17, 2020. (DE C:94-95).

The claimant filed an original notice and petition seeking penalty benefits on November 10, 2020. In responding to requests for admissions, the defendants admitted that the appeal decision "says what it say" and admitted that they "pursued additional investigation specifically considering the Appeal Decision." (CE 2:12). The defendants admitted to making payments on October 21, 2019, for a rate of seven hundred seventy-three and 24/100 dollars ($773.24). (CE 2:13). The defendants contend that no additional benefits were due or owed during the pendency of their appeal. (CE 2:14). The defendants allege that they continued to investigate the claim and the application of Iowa Code section 85.36. (CE 2:14).

The defendants responded to an interrogatory in which they outline their investigation into the matter after the final agency decision in August of 2019. The defendants responded:

> Following the final Agency Decision on August 23, 2019, SFM adjuster Joanne Connolly reviewed the Decision and consulted with legal counsel and conducted a further reasonable investigation of the weekly rate issue. Defendants specifically noted that the Agency relied upon a 1991 Arbitration Decision, Smith v. Cedar Valley Asphalt Co., File No. 879898 (Arbitration April 1991). Defendants reviewed Iowa Code Section 85.36(6), specifically identifying "premium pay" as an item to be excluded from the average weekly wage calculation. In this case substantial factual evidence supported the legal conclusion Claimant's prevailing wage pay was premium pay. Defendants presented evidence how the prevailing wage premium was calculated including payments for health insurance and other benefits not appropriately included in the average weekly wage calculation if otherwise provided by the employer. The Defendants also considered the fact Claimant's typical representative wage was $23.00 per hour and that he received previously wage premium pay on only one job during his entire tenure with the company. Further, the Legislature did not vest the Agency with the authority to interpret Iowa Code Section 85.36 and the Defendants considered that Courts accord no deference to the

> interpretation of Iowa Code Section 85.36 by the Agency. SFM decided to pay the entirety of the 40% permanency award and also decided to volunteer that award at the weekly rate of $773.24. See letter dated 9/26/2019 as well as additional correspondence included in the exhibits and concerning the calculation of the appropriate credit amount and auditing of the file to determine the correct amount owing at the $773.24 rate. Also see the Decision for Judicial Review Decision. Defendants continued their investigation and after reviewing this Decision on Judicial Review determined that further appeal to the Iowa Supreme Court was not cost effective. …

(CE 2:42).

It is also important to note that SFM insurance has had a penalty imposed upon them in two prior reported arbitration decisions besides the instant matter. (CE 5:89).

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3).

Penalty

Iowa Code 86.13(4) provides the basis for awarding penalties against an employer. Iowa Code 86.13(4) states:

> (a) If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.
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> (b) The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
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> (1) The employee has demonstrated a denial, delay in payment, or termination of benefits.
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> (2) The employer has failed to provide 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 of 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, Iowa Code 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229 (Iowa 1996). Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It is also 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 an employer fails to show reasonable cause or excuse for the delay or denial, the commissioner shall impose a penalty in an amount up to 50 percent of the amount unreasonably delayed or denied. Christensen v. Snap-On Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include: the length of the delay, the number of delays, the information available to the employer, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

For purposes of determining whether an employer has delayed in making payments, payments are considered "made" either (a) when the check addressed to a claimant is mailed, or (b) when the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 235-236; Kiesecker, 528 N.W.2d at 112).

Penalty is not imposed for delayed interest payments. Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 338 (Iowa 2008); Davidson v. Bruce, 594 N.W.2d 833, 840 (Iowa 1999).

The claimant alleges that penalty should be imposed for five separate reasons: 1. Defendants' failure to pay the ordered rate of nine hundred two and 78/100 dollars ($902.78) per week in benefits following the final Agency decision; 2. Defendants' failure to pay seven hundred seventy-three and 25/100 dollars ($773.25) per week in benefits and instead asserting a credit; 3. Defendants' delay in paying the appropriate amount of benefits owed following the decision to drop their appeal; 4. Defendants' continued failure to pay weekly benefits on a timely basis; and 5. Defendants' failure to provide statutory notice of benefit termination. I will address each of these issues individually.

Defendants' Failure to Pay the Ordered Rate

The claimant argues that a penalty should be imposed because the defendants failed to pay the ordered rate of nine hundred two and 78/100 dollars ($902.78) per week following the final Agency action. The defendants argue that they continued to pursue appeal avenues as the underlying decision on the weekly rate of compensation was based upon a non-binding agency decision in Smith v. Cedar Valley Asphalt Co., File No. 879898 (Arb. April 1991), and thus were not required to pay benefits as they pursued their appeal.

There are a number of cases in which the agency or Iowa courts have declined to assess penalties. In Rucker v. West Side Transport, Inc., the employer denied jurisdiction based upon an argument that the injury occurred outside of the state of Iowa, that the claimant lived outside of Iowa, and that the claimant worked extensively outside of Iowa. Rucker v. West Side Transport, Inc., 2006 WL 1910828 (Iowa Workers' Compensation Commission 2006). The commissioner determined that, based upon the facts, the employer acted reasonably in denying jurisdiction, and thus imposition of a penalty was inappropriate. Id. In another case, an employer denied a claimant's workers' compensation claim based upon the assertion that the claimant was not an employee of the employer. Donovan v. Les Davis Enterprises, 2008 WL 3165865 (Iowa Workers' Compensation Commissioner 2008). The deputy commissioner assessed a penalty against the employer after finding that the claimant met the requisite qualifications to be considered an employee. Id. The deputy commissioner indicated that the question as to whether or not the claimant was an employee was "not a close one in this case." Id. The Commissioner disagreed, and determined that the facts indicated that the employer had a reasonable basis to deny payment of benefits as the claim was "fairly debatable." Id.

In another case, a decision awarding compensatory benefits was issued on July 16, 1999. Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 335 (Iowa 2008). The claimant sent a letter to the employer on August 9, 1999, with calculations of what the employer owed, and gave the employer until August 18, 1999, to make a decision to appeal or pay the amount owed. Id. During the time between the decision and the agreement to pay benefits, the employer was determining whether to appeal or pay the

award. Id. Eventually, the employer agreed to pay benefits, and paid them on August 25, 1999. Id. The court agreed that the delay in payment was reasonable, as the parties were communicating regarding the amount owed. Id. at 335-36. The court determined that payments made after August 25, 1999, were unreasonably delayed, and thus a penalty was appropriate. Id.

In Millenkamp v. Millenkamp Cattle Co., a deputy commissioner issued an arbitration decision on February 28, 2005. 2009 WL 2170177 (Iowa Ct. App. 2008). The commissioner affirmed and adopted the deputy's arbitration decision on March 15, 2006. Id. The employer paid the award to the claimant on March 22, 2006, and subsequently paid accrued interest. Id. The claimant sought post-arbitration penalty benefits due to the delay in payment while the matter proceeded on intra-agency appeal. Id. In Millenkamp, the employer relied upon doctors' opinions that a work injury did not cause or aggravate a medical condition. Id. The court noted that "[t]he reasonableness of the employer's actions 'does not turn on whether the employer was right. The issue is whether there was a reasonable basis for the employer's position that no benefits were owing.'" Id. (citing Keystone Nursing Care Ctr. v. Craddock, 705 N.W.2d 299, 307-08 (Iowa 2005)). The court of appeals agreed that there was a genuine dispute with respect to the cause of the claimant's mental condition due to the differing medical opinions. Id.

In Wilian Holdings Const. Products, Inc. v. Rice, the employer appealed an award of penalty benefits. 2009 WL 3051722 (Iowa Ct. App. 2009). In Wilian, the employer did not pay benefits until after all appeals were resolved. Id. The claimant sought penalty benefits alleging that the delayed payments of benefits were unreasonable. Id. The deputy commissioner awarded penalty benefits, which was affirmed by the commissioner, and the district court. Id. The employer appealed. Id. The court of appeals determined that the evidence in the underlying action was "close" on issues of causation and industrial disability, and thus the issues were "fairly debatable as a matter of law." Id. The court reversed and remanded with instructions to the district court to reverse the commissioner's award of penalty benefits. Id.

In contrast, penalties were upheld following a review-reopening decision in Winn v. Pella Corporation. 2016 WL 6142847, File No. 5027519 (App. October 19, 2016). The deputy commissioner and commissioner provided penalty benefits due to the defendant's failure to pay weekly benefits during a period of time. Id. The only notice that the defendant provided to the claimant as grounds for not paying weekly benefits following a court of appeals affirmation of the underlying arbitration decision was a disagreement with a 1983 decision of the Iowa Supreme Court. Id. (citing Beier Glass Co. v. Brundige, 329 N.W.2d 280 (Iowa 1983)). The deputy commissioner noted their inability to overrule supreme court precedent. Id. In affirming the imposition of a penalty, the commissioner noted, "[e]mployers are certainly free to argue the impropriety of long-standing legal precedent in hopes of changing that precedent, but they cannot withhold benefits from an otherwise deserving injured worker while doing so." Id.

The question is whether there is a good faith issue of law or fact that make the defendants' liability fairly debatable. As noted above, an issue is fairly debatable when viable arguments exist in favor of each party, or substantial evidence exits which supports a finding favorable to the employer. The instant case is similar to a number of the above cited cases. This matter is distinguishable from the case in Winn because the defendants in the instant case argued that the rate provided in the underlying arbitration and appeal decisions were incorrect based upon reliance on a non-binding precedent from an arbitration decision issued in 1991. In Winn, the defendants argued against a supreme court precedent. The question of the proper rate in the underlying and appeal decisions is one that was fairly debatable considering the underlying decisions in this matter relied upon a non-binding arbitration decision in Smith v. Cedar Valley Asphalt Co. This case is like Wilian and Millenkamp in that the defendants pursued an appeal over an issue that is fairly debatable and upon which both parties had viable arguments. While I agree with the claimant that the defendants should not be allowed to continually delay payment as ordered by this Agency, the defendants should be allowed to pursue their appeal on a fairly debatable issue. Additionally, the defendants, like those in Schadendorf communicated their disagreement with the arbitration and appeal decisions to the claimant and outlined the rate at which they would pay during the pendency of the appeal. I decline to award penalty benefits based upon the payment of the originally awarded rate during the pendency of the defendants' appeals.

Defendants' Improper Assertion of a Credit

Next, the claimant argues that imposition of a penalty is appropriate due to the defendants' failure to pay seven hundred seventy-three and 25/100 dollars ($773.25) per week in benefits and instead asserting a credit due to a previously alleged overpayment. The defendants eventually admitted that they were not entitled to this credit and began paying at the correct rate. This issue is not one that was fairly debatable. The defendants should have paid benefits at least at the promised seven hundred seventy-three and 25/100 dollars ($773.25) per week in benefits.

This is an underpayment of one hundred fifty-four and 66/100 dollars ($154.66) per week in benefits. The underpayment occurred from October 22, 2019, through February 17, 2020. This is 17 weeks according to the information in the record. As such the result is an underpayment of two thousand six hundred twenty-nine and 22/100 dollars ($2,629.22). Based upon the factors considered in a penalty benefit analysis, I award the claimant 25 percent of these benefits, which is six hundred fifty-seven and 31/100 dollars ($657.31).

Defendants' Delay in Paying Benefits Owed Following the Decision to Drop Their Appeal

The defendants filed a notice of appeal with the Supreme Court of Iowa on April 29, 2020. The defendants eventually determined that continuing their appeal was "not cost effective." They dismissed their appeal on June 17, 2020. It was not until June 29, 2020, that a check for the disputed benefits was issued. The check was then mailed on

June 30, 2020. (CE 4:88). The amount of the check for the scheduled PPD, and adjusted amount of PPD was thirty one thousand nine hundred thirty-four and 98/100 dollars ($31,934.98).

The defendants offer no reasonable explanation for the delayed payment in benefits after their decision to drop their appeal. Logically, the defendants were in control of whether they maintained their appeal with the supreme court. They would be in the best position to know when they would be filing a dismissal of the appeal, and thus when they should be prepared to issue a payment for the previously ordered benefits. Yet, the defendants took an additional 12 days from the time that they filed their dismissal to issue the lump sum payment for the underpaid benefits. A 35 percent penalty on these benefits is appropriate. This equates to eleven thousand one hundred seventy-seven and 24/100 dollars ($11,177.24) in penalty (35 percent x $31,934.98 = $11,177.24).

Defendants' Failure to Pay Weekly Benefits on a Timely Basis

The claimant argues that penalty benefits are appropriate based upon the defendants' failure to pay benefits on time, and that defendants' continually paid benefits one day late. The defendants argue that the record is unclear as to whether the benefits were late, and whether these allegedly late benefits were paid prior to April 19, 2019. The defendants further argue that the claimant waived any entitlement to penalty benefits owed prior to April 19, 2019. I agree with the defendants that the claimant has waived any entitlement to penalty benefits prior to April 19, 2019.

It appears that benefit payments were issued on the date that they were due, but then mailed the next day. This is a delay; however, the delay was minimal and the checks were issued at the appropriate time. Therefore, I impose a penalty of 1 percent on the delayed benefit payments. I find a total of fifty-four thousand five hundred and ninety-three and 42/100 dollars ($54,593.42) in benefits that were delayed by one day. (CE 1:4). A one percent penalty on these benefits is five hundred forty-five and 93/100 dollars ($545.93).

Defendants' Failure to Provide Statutory Notice of Benefit Termination

Iowa Code section 86.13 codified portions of the ruling in Auxier v. Woodward State Hospital-School, 266 N.W.2d 139 (Iowa 1978). Payments may only be terminated when the employee has returned to work, or the employer has provided 30 days' notice to the employee. See Iowa Code section 86.13. The notice should state the reason for the termination, and advise the employee of the right to file a claim with the workers' compensation commissioner. Id. According to the Iowa Supreme Court in Auxier, the employer should also have the opportunity to provide any evidence or documents contradicting the reasons for termination. Auxier, 266 N.W.2d at 143.

On October 4, 2017, counsel for the defendants wrote a letter to claimant's counsel. The defendants indicated that Mr. Almendinger was entitled to 70 weeks of benefits pursuant to Dr. Bollier's impairment rating. The defendants indicated that they

would commence payment of benefits, which would continue through November 7, 2017, at which time they asserted that no additional benefits were due. The defendants asserted a credit for "any overpayment of benefits based upon inclusion of premium pay in the average weekly wage calculation." The defendants included language indicating that they would review any additional information should it become available and also advised claimant's counsel of their right to file a claim with this Agency. Based upon the information in the record, there is not sufficient evidence that the defendants failed to provide statutory notice of a termination of benefits.

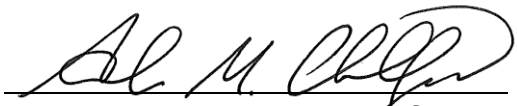
ORDER

THEREFORE, IT IS ORDERED:

The defendants shall pay the claimant a penalty of twelve thousand three hundred eighty and 48/100 dollars ($12,380.48).

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

Signed and filed this 13th day of December, 2021.



ANDREW M. PHILLIPS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Thomas Wertz (via WCES)

Lee Hook (via WCES)

Nick Cooling (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.