

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DONALD J. RUDEN,

Claimant,

vs.

WELLS ENTERPRISES, INC.,

Employer,  
Self-Insured,  
Defendant.

**FILED**

APR 21 2015

**WORKERS COMPENSATION**

File No. 5046180

86.13 PENALTY

DECISION

Head Note Nos.: 4000.2

STATEMENT OF THE CASE

On August 28, 2013, Donald Ruden, claimant, filed a petition in arbitration seeking workers' compensation benefits from Wells Enterprises, Inc. (hereinafter "Wells"), the self-insured employer. The underlying case proceeded to a consolidated arbitration hearing on October 4, 2013. Another deputy workers' compensation commissioner presided at that hearing and filed an arbitration decision on June 6, 2014. Defendant paid the arbitration award shortly after entry of the arbitration decision and neither party appealed the decision.

On June 20, 2014, claimant filed a second original notice and petition and now seeks an award of penalty benefits for defendant's denial of his claim through the entry of the arbitration decision. Defendant filed a motion to dismiss the penalty benefit claim on July 11, 2014. Another deputy commissioner denied the motion to dismiss, concluding that claimant was not precluded from raising the penalty issue in a second contested case proceeding even though claimant had alleged a penalty claim and did not actively pursue it in the original arbitration hearing.

Defendant filed a motion for summary judgment on December 12, 2014, asserting essentially the same claim preclusion arguments set forth in its motion to dismiss. The undersigned denied the defendant's motion for summary judgment based upon the rationale and legal conclusions in the ruling on defendant's motion to dismiss. Therefore, this case proceeded to a penalty benefit hearing before the undersigned on February 9, 2015 in Sioux City, Iowa.

Claimant testified on his own behalf and defendant called Julie Foley, an independent claims representative, to testify. Claimant offered exhibits 1 through 17. Defendant offered exhibits L through M. All exhibits were received into the evidentiary record without objection. At defendant's request, the undersigned took administrative notice of all prior exhibits, pleadings, briefs, rulings, and decisions contained within the agency's file.

The parties also submitted a hearing report, which contains stipulations. The parties' stipulations are accepted and relied upon in entering this decision. No findings or conclusions will be entered with respect to the parties' stipulations and the parties are bound by those agreements.

Counsel for the parties requested the opportunity to file post-hearing briefs. This case was considered fully submitted upon the simultaneous service of post-hearing briefs on March 16, 2015.

### ISSUE

The parties submitted the following disputed issue for resolution:

1. Whether claimant is entitled to an award of penalty benefits pursuant to Iowa Code section 86.13 for defendant's alleged unreasonable denial or delay in payment of weekly benefits.

### FINDINGS OF FACT

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

On November 26, 2006, Mr. Ruden was moving a pallet at Wells. A large drum fell off the pallet and pinned claimant against a wall. Defendant accepted the claim and authorized medical care.

Claimant lost no time from work following this injury. However, he had significant symptoms that waxed and waned as well as ongoing medical treatment from November 2006 through May 2012. The presiding deputy commissioner in the underlying case concluded:

The claimant filed his petition in arbitration within two years after he learned that his injury was likely to result in permanent disability. Since he had lost no time from work and all the treatment he had received was conservative with no indication that he was going to require surgery or sustain any permanent disability there was no reason for him to file a petition in arbitration. As far as claimant knew before June 22, 2012 his claim was not compensable for weekly benefits. Since claimant's petition was filed within five months of this date his claim is not barred by Iowa Code section 85.26.

(Arbitration Decision, page 6)

However, defendant made a reasonable and logical argument in its post-hearing brief after the initial arbitration hearing. Defendant urged findings that the injury was an acute injury, which was clearly known to claimant. Defendant noted that claimant reported "severe low back pain" throughout his treatment. (Exhibit 1, p. 7) It noted that

invasive treatment, including MRI's and epidural injections, were recommended and performed without resolution of symptoms more than two years before claimant filed his original notice and petition. (Defendant's November 26, 2013 Post-Hearing Brief, p. 4)

Defendant noted and urged a finding that claimant was unable to stand straight due to low back symptoms in April 2008. It noted that claimant "continues to complain bitterly of back problems" in May 2008. (Ex. 1, p. 16) (Defendant's November 26, 2013 Post-Hearing Brief, p. 5)

Defendant noted that within two years of his injury date, claimant submitted to five spinal injections, an MRI, physical therapy, medication management, and that his symptoms continually returned. Arguably, the extensiveness of claimant's symptoms and treatment, coupled with the referrals to specialists should have given claimant an idea that his injury was serious and may have a permanent adverse impact on his employment. While that finding was ultimately not the conclusion of the presiding deputy commissioner, defendant's contention in this respect was not unreasonable.

It is also important to note in this case the procedural history of the underlying claim. Claimant first filed an original notice and petition against defendant on November 7, 2012. In that petition, claimant alleged a June 22, 2012 date of injury. Ultimately, claimant was unable to prove a June 22, 2012 work injury and defendant's theory of defense regarding that date of injury proved accurate.

On August 23, 2013, claimant filed a second original notice and petition against defendant. In that second petition, claimant alleged the November 26, 2006 injury date. The parties proceeded to hearing on both petitions on October 4, 2013. Therefore, claimant added the November 26, 2006 injury date and that theory of his case 42 days before trial.

Defendant filed an answer shortly before the trial and a post-hearing brief after the trial as ordered by the presiding deputy commissioner. As noted, defendant's post-hearing brief urges a reasonable and logical, though unsuccessful, theory and defense. I find that defendant conducted a reasonable investigation of the claim, as it unfolded and ultimately was amended by the claimant. I find that the investigation was contemporaneous with the claimant's change in the theory of his case. I find that defendant possessed and asserted a reasonable basis for denial under its statute of limitations defense.

Given the timing of claimant's filing of the second original notice and petition only 42 days before the trial date, I find that defendant also provided contemporaneous notice of its denial via its answer and post-hearing brief. In fact, at the October 4, 2013 arbitration hearing, claimant's counsel stated to the presiding deputy commissioner, "we are only talking about one traumatic date and we have two petitions because of the statute of limitations issue." (Ex. M, p. 5)

It is clear that claimant understood the basis for defendant's denial within the 42 days between filing the second original notice and petition and the trial date. I find that defendant contemporaneously conveyed its statute of limitations basis for its denial to claimant and that the stated basis for denial was reasonable and logical. I find that based upon the evidence within the record, the defendant's theory and defense could have been accepted by the presiding deputy commissioner and, if accepted, would have resulted in a denial of all benefits.

Claimant's theory in this penalty benefit claim is that he had no reason to believe his condition was serious enough to permanently affect his employment until he was provided a permanent impairment rating. I find that this factual issue was fairly debatable prior to the filing of the arbitration decision. Claimant's argument fails to demonstrate an unreasonable denial of benefits by defendant. Claimant's contention and factual argument relies upon the fact that he received benefit from treatment and was capable of returning to his employment without restrictions. Claimant prevailed on this argument to overcome the statute of limitations defense in the underlying case.

However, claimant's factual argument ultimately collapses upon itself in the penalty benefit phase. Claimant proved at the arbitration hearing that he was not aware as a reasonably prudent person that his condition was serious enough to cause permanent adverse impact on his employment. If claimant was not able to gather that his condition was serious enough to cause a permanent adverse impact until after the issuance of the permanent impairment rating, defendant should not be held to a higher standard. Therefore, I find that defendant did not have a reasonably objective basis prior to the issuance of a permanent impairment rating to know that claimant's condition would have a permanent impact on his employment or future earning capacity.

Even after the issuance of a permanent impairment rating, Mr. Ruden was released to return to work and actually did return to work without restrictions. He continued to work for the employer with similar job duties at the time of the underlying arbitration hearing. He had an increase in actual wages between the date of injury in 2006 and the underlying arbitration hearing in 2013.

I find that defendant had a reasonable basis to challenge any claim for permanent partial disability benefits prior to issuance of the arbitration decision. Defendant paid the arbitration award within 11 days of its issuance and I find that to be a reasonable period of time to review the arbitration decision, contemplate the arbitration decision and defendant's legal options, and to issue payment. Therefore, I find no unreasonable conduct by defendant and find that the defendant contemporaneously conveyed its bases for denial to the claimant.

#### CONCLUSIONS OF LAW AND REASONING

Claimant's penalty benefit claim is based upon the statutory language contained at Iowa Code section 86.13(4), which provides:

- a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or

insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.

b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:

(1) The employee has demonstrated a denial, delay in payment, or termination in benefits.

(2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

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.

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

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

Christensen, 554 N.W.2d at 260.

The supreme court has stated:

(1) If the employer has a reason for the delay and conveys that reason to the employee contemporaneously with the beginning of the delay, no penalty will be imposed if the reason is of such character that a reasonable fact-finder could conclude that it is a "reasonable or probable cause or excuse" under Iowa Code section 86.13. In that case, we will defer to the decision of the commissioner. See Christensen, 554 N.W.2d at 260 (substantial evidence found to support commissioner's finding of legitimate reason for delay pending receipt of medical report); Robbennolt, 555 N.W.2d at 236.

(2) If no reason is given for the delay or if the "reason" is not one that a reasonable fact-finder could accept, we will hold that no such cause or excuse exists and remand to the commissioner for the sole purpose of assessing penalties under section 86.13. See Christensen, 554 N.W.2d at 261.

(3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City Meats, Inc., 528 N.W.2d at 109, 111 (Iowa 1995); or (b) the employer had a reasonable basis to contest the claim—the "fairly debatable" basis for delay. See Christensen, 554 N.W.2d at 260 (holding two-month delay to obtain employer's own medical report reasonable under the circumstances).

(4) For the purpose of applying section 86.13, the benefits that are underpaid as well as late-paid benefits are subject to penalties, unless the employer establishes reasonable and probable cause or excuse. Robbennolt, 555 N.W.2d at 237 (underpayment resulting from application of wrong wage base; in absence of excuse, commissioner required to apply penalty).

If we were to construe [section 86.13] to permit the avoidance of penalty if any amount of compensation benefits are paid, the purpose of the penalty statute would be frustrated. For these reasons, we conclude section 86.13 is applicable when payment of compensation is not timely . . . or when the full amount of compensation is not paid.

Id.

(5) For purposes of determining whether there has been a delay, payments are "made" when (a) the check addressed to a claimant is mailed (Robbennolt, 555 N.W.2d at 236; Kiesecker, 528 N.W.2d at 112),

or (b) the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 235.

(6) In determining the amount of penalty, the commissioner is to consider factors such as the length of the delay, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

(7) An employer's bare assertion that a claim is "fairly debatable" does not make it so. A fair reading of Christensen and Robbennolt, makes it clear that the employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." See Christensen, 554 N.W.2d at 260.

Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

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

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

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

In this case, another deputy commissioner found that defendant was liable for workers' compensation benefits. However, the mere fact that defendant's arguments in the underlying arbitration hearing were rejected does not end the analysis in a penalty benefit claim. Rather, the question is whether the defendant asserted a reasonable, or logical, argument upon which it would have prevailed if the defendant's theory had been accepted by the presiding deputy commissioner. Defendant is legally required to establish the basis of its denial.

Defendant asserted a statute of limitations defense. That defense involved fact specific issues, which included a determination by the presiding deputy commissioner of the date when the claimant, as a reasonable person, should have recognized the nature, seriousness, and probable compensable character of his injury. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Orr v. Lewis Central Sch. Dist., 298 N.W.2d 256 (Iowa 1980); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980). I found that defendant made a reasonable and logical argument in its November 26, 2013 post-

hearing brief why the statute of limitations had expired and why it arguably owed no weekly benefits. If defendant's argument had been accepted by the presiding deputy commissioner, defendant's statute of limitations defense would have prevailed and no benefits would have been awarded to claimant.

Similarly, I found that the defendant had a reasonable basis for disputing any claim for permanent disability benefits given claimant's return to work without medical restrictions. In fact, the Iowa Supreme Court has concluded that an employer has a reasonable basis for challenging permanent disability benefits in a similar situation. Keystone Nursing Care Center v. Craddock, 705 N.W.2d 299 (Iowa 2005). Therefore, I conclude that the defendant had a reasonable basis for challenging any claims for permanent partial disability benefits.

Having concluded that defendant asserted two reasonable and logical arguments upon which it could have prevailed in the underlying arbitration hearing, I conclude that defendant had a reasonable basis for denial of the claim through the date that the arbitration decision was entered. However, Iowa Code section 86.13(4)(c)(3) also requires that defendant contemporaneously convey the basis of its denial to the claimant for its denial to be considered reasonable.

This case has some unusual facts, including an amendment of claimant's petition, close in time to the arbitration hearing. Having found that claimant was actually aware of the basis for defendant's denial at the time of the arbitration hearing and having found that the answer as well as the arguments asserted at hearing and in defendant's post-hearing brief were "contemporaneous" notices of defendant's bases for denial, I conclude that there is no basis for award of penalty benefits. Iowa Code section 86.13(4).

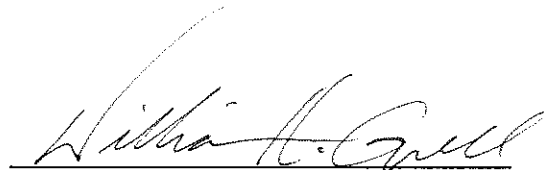
ORDER

THEREFORE, IT IS ORDERED:

Claimant's original notice and petition seeking penalty benefits is dismissed with prejudice and without award of additional benefits pursuant to Iowa Code section 86.13.

Defendant 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 21<sup>st</sup> day of April, 2015.



WILLIAM H. GRELL  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER



RUDEN V. WELLS ENTERPRISES, INC.

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Copies To:

Edward J. Keane

Attorney at Law

PO Box 1379

Sioux City, IA 51102-1379

ed.keane@siouxcityattys.com

Sarah Kleber

Attorney at Law

PO Box 3086

Sioux City, IA 51102-3086

sarah.kleber@heidmanlaw.com

WHG/srs

**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.