

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KEVIN CARTE,
Claimant,

File No. 1656980.01

vs.

WHIRLPOOL CORPORATION,
Employer,

RULING ON APPLICATION
FOR REHEARING

and

OLD REPUBLIC INSURANCE CO.,
Insurance Carrier,

SECOND INJURY FUND OF IOWA,
Defendants.

An arbitration decision was filed in this consolidated matter on January 25, 2022. This file involves a left shoulder injury and was combined with File No. 1643167.01 (a left shoulder claim) and File No. 19700417.01 (a tinnitus claim). On January 26, 2022, claimant filed an application for rehearing seeking rehearing on the issue of penalty on this file only.

I have reviewed the motion thoroughly, along with the hearing report and relevant portions of the hearing transcript. I agree with claimant that page 12 of the decision contains an error. "Claimant originally alleged penalty claims on all three files, however, in his brief withdrew the penalty claims on each shoulder injury." (Arbitration Decision, page 12) After reviewing the above information, it is apparent that claimant only withdrew the penalty claim on File. No. 1643167.01. (Hearing Report, par. 10; Claimant's Brief, p. 12) He did not withdraw his penalty claim for this file. (Tr., pp. 10-11; Cl. Brief, pp. 20) As a result of this error, I omitted claimant's penalty claim on this file altogether and performed no penalty analysis for this file in the arbitration decision. Consequently, I have reexamined all of the evidence in the record related to penalty for this file number, including the relevant hearing testimony and exhibits. I have also reviewed the arguments by the parties related to penalty as set forth in their respective briefs.

Upon review of this matter, the January 25, 2022, arbitration decision is amended to include the following analysis of penalty and Order for File No. 1656980.01:

Claimant also seeks an award of penalty benefits pursuant to Iowa Code section 86.13. Iowa Code section 86.13(4) provides:

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

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

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

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

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.

Claimant asserts several theories for penalty in his brief. First, claimant asserts that benefits were paid at an incorrect rate of compensation. Second, the claimant asserts that the defendants unreasonably delayed the payment of Dr. Bollier's impairment rating. And finally, the claimant contends that Dr. Bollier's impairment rating is unreasonable as a matter of law because he refused to include a rating for the distal clavicle excision. (Cl. Brief, p. 20)

At the time of hearing, defendants had still not fully paid Dr. Bollier's impairment rating, rather at the commencement of hearing defendants agreed they would pay the additional 14 weeks owed. (Tr., pp. 9-10) There is no question these 14 weeks are late. Dr. Bollier issued his rating for this injury in March 2019. (Jt. Ex. 7, p. 80) The defendants have not offered a reasonable explanation for the delay. A penalty is mandatory. I find that a penalty of \$3,500.00 is appropriate to deter defendants from making this type of claims adjusting mistake in the future.

AMENDED ORDER (File No. 1656980.01)

Defendants shall pay a penalty of three thousand five hundred dollars (\$3,500.00).

Signed and filed this 7th day of February 2022.



JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Gary Nelson (via WCES)

Steven Durick (via WCES)

Kayli Paul (via WCES)

Jonathan Bergman (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.