

## 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

APPEAL DECISION

Head Note Nos.: 4000.1, 4000.2

Defendants appeal from an arbitration decision involving penalty only filed on December 13, 2021, and a ruling on cross motions for rehearing filed on December 30, 2021. Claimant responds to the appeal. The parties submitted the case based on the record, without a hearing to the deputy workers' compensation commissioner on October 19, 2021.

On May 19, 2022, the Iowa Workers' Compensation Commissioner delegated authority to the undersigned to enter a final agency decision in this matter. Therefore, this appeal decision is entered as final agency action pursuant to Iowa Code sections 17A.15(3) and 86.24.

In the arbitration decision, the deputy commissioner found the issue of whether claimant's weekly rate was \$902.78 was fairly debatable during the pendency of the appeal and he declined to assess defendants penalty benefits. The deputy commissioner found defendants underpaid 17 weeks of benefits from October 22, 2019, through February 17, 2020, based on an improper assertion of credit totaling \$2,629.22 and assessed defendants \$657.31 in penalty benefits. The deputy commissioner found defendants offered no reasonable explanation for issuing a \$31,934.98 payment 12 days after dismissing their appeal and assessed defendants \$11,177.24 in penalty benefits. The deputy commissioner found defendants mailed weekly benefits totaling \$54,593.42 from April 19, 2019, one day late and assessed defendants \$545.93 in penalty benefits and found claimant waived any entitlement to late paid penalty benefits prior to April 19, 2019. The deputy commissioner found defendants provided sufficient

notice of termination of benefits based on Mathew Bollier, M.D.'s impairment rating and declined to assess defendants penalty benefits.

The parties filed cross motions for rehearing. In the ruling on the cross motions for rehearing, the deputy commissioner found defendants underpaid 118 weeks of benefits totaling \$18,249.88 based on an improper assertion of credit and assessed defendants \$9,124.94 in penalty benefits. The deputy commissioner found claimant did not waive the issue of whether benefits were paid late prior to April 19, 2019. The deputy commissioner found defendants paid 127.143 weekly benefits late totaling \$114,287.50 and assessed defendants \$5,714.38 in penalty benefits.

Defendants allege on appeal the deputy commissioner correctly declined to award penalty benefits during the pendency of the appeal because whether the rate was \$902.78 was fairly debatable. Defendants allege the deputy commissioner erred in finding defendants improperly asserted a credit and in assessing defendants \$9,124.94 in penalty benefits. Defendants allege the deputy commissioner erred in assessing defendants \$11,177.24 in penalty benefits for the delay in paying benefits after they dismissed the appeal. Defendants allege the deputy commissioner erred in finding defendants paid benefits late totaling \$114,287.50 and assessing defendants \$5,714.38 in penalty benefits. Defendants allege the deputy commissioner correctly declined to assess penalty benefits based on an alleged failure to provide statutory notice of benefit termination based on Dr. Bollier's impairment rating. Claimant asserts on appeal the arbitration decision should be affirmed in its entirety.

Those portions of the proposed arbitration decision pertaining to issues not raised on appeal are adopted as part of this appeal decision.

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 86.24 and 17A.15, the arbitration decision filed on December 13, 2021, is affirmed in part, modified in part, and reversed in part, with the following additional and substituted analysis.

I affirm the deputy commissioner's finding the issue of whether claimant's weekly rate was \$902.78 was fairly debatable during the pendency of the appeal and his refusal to assess defendants penalty benefits. I affirm the deputy commissioner's finding defendants provided sufficient notice of termination of benefits based on Dr. Bollier's impairment rating and his refusal to assess defendants penalty benefits. I reverse, the deputy commissioner's finding defendants should be assessed a \$9,124.94 penalty based on an improper assertion of credit. I modify the deputy commissioner's finding defendants should be assessed \$11,177.24 in penalty benefits for the delay following the dismissal of the appeal. I modify, in part, and reverse, in part, the deputy commissioner's finding defendants should be assessed \$5,714.38 in penalty benefits for paying late benefits.

Iowa Code section 86.13 governs compensation payments. Under the statute's plain language, if there is a delay in payment absent "a reasonable or probable cause or excuse," the employee is entitled to penalty benefits, of up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse. Iowa Code § 86.13(4); see also Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 260 (Iowa 1996) (citing earlier version of the statute). "The application of the penalty provision does not turn on the length of the delay in making the correct compensation payment." Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229, 236 (Iowa 1996). If a delay occurs without a reasonable excuse, the commissioner is required to award penalty benefits in some amount to the employee. Id.

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

Benefits must be paid beginning on the 11th day after the injury, and "each week thereafter during the period for which compensation is payable, and if not paid when due," interest will be imposed. Iowa Code § 85.30. In Robbennolt, the Iowa Supreme Court noted, "[i]f the required weekly compensation is timely paid at the end of the compensation week, no interest will be imposed . . . . As an example, if Monday is the first day of the compensation week, full payment of the weekly compensation is due the following Monday." Robbennolt, 555 N.W.2d at 235. A payment is "made" when the check addressed to the claimant is mailed, or personally delivered to the claimant. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996) (abrogated by Keystone Nursing Care Ctr. v. Craddock, 705 N.W.2d 299 (Iowa 2005) (concluding the employer's failure to explain to the claimant why it would not pay permanent benefits upon the termination of healing period benefits did not support the commissioner's award of penalty benefits)).

When considering an award of penalty benefits, the commissioner considers “the length of the delay, the number of the delays, the information available to the employer regarding the employee’s injuries and wages, and the prior penalties imposed against the employer under section 86.13.” Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 336 (Iowa 2008). The purposes of the statute are to punish the employer and insurance company and to deter employers and insurance companies from delaying payments. Robbenolt, 555 N.W.2d at 237.

**I. Failure to Pay the \$773.25 Rate Based on an Assertion of Credit**

The deputy commissioner found defendants agreed to pay benefits at the rate of \$773.25, but instead improperly asserted a credit, and underpaid benefits by \$154.66 per week, for 118 weeks, resulting in an underpayment of \$18,249.88 “over a period of just over two years,” and assessed defendants \$9,124.94 in penalty benefits. On appeal defendants allege they did not admit they underpaid benefits, but rather tried to limit their exposure on appeal. Defendants further allege they had a reasonable basis for determining the correct rate was \$614.50 after reviewing the August 23, 2019, appeal decision.

In the September 26, 2019, letter, defendants’ counsel agreed defendants would pay claimant weekly benefits at the rate of \$773.25. (Ex. A, pp. 3-5) Defendants claimed a credit of \$19,022.38 for the difference between the rate they paid of \$902.78 and \$773.25, for the 75 weeks and six days of healing period benefits they paid from October 30, 2014, through June 24 2016, totaling \$9,825.76, and for the 71 weeks of permanent partial disability benefits they paid from June 30, 2016, through November 8, 2017, totaling \$9,196.63. (Exs. A, pp. 3-11; C, pp. 15, 96)

On October 24, 2019, Defendants’ counsel sent another letter, stating, in part,

I reviewed your recent letter regarding appropriate credits. I believe you are correct that my client is not entitled to apply its PPD overpayment credit of \$9,196.63 against the 40% Agency award entered I [sic] this case. Therefore, rather than owing five weeks of permanency benefits at \$773.25 per week beginning October 15, 2019, I believe my client owes additional benefits for a total of 16 weeks and two days. I will advise my client to pay additional weekly benefits commencing October 15, 2019 and for 16 weeks and two days at the rate of \$773.25, ending about February 5, 2020.

(Ex. 3, p. 43)

The deputy commissioner found the issue of whether claimant’s rate was \$902.78 fairly debatable during the appeal process. Claimant did not cross-appeal the determination. The credit claimed is for the difference between the rate of \$902.78 and

the \$773.25 rate defendants agreed to pay. No penalty should be assessed to defendants for the credit claimed based on the rate dispute.

## **II. Lump Sum Payment Following Dismissal of Appeal**

Defendants dismissed their appeal to the Iowa Supreme Court on June 17, 2020. On June 29, 2020, defendants issued claimant a \$31,934.98 check and mailed the check on June 30, 2020. (Exs. 1, p. 4; 2, p. 11; 4, p. 88) The check stub indicates the check was for the adjusted higher rate of \$902.78 with interest and penalty totaling \$25,900.00, and two scheduled periods of permanent partial disability benefits totaling \$3,034.98 and \$3,000.00. (Ex. 4, p. 88) While the deputy commissioner found the rate issue fairly debatable during the pendency of the appeal, he assessed a 35 percent penalty based on a 12-day delay between the dismissal of the appeal and the issuance of the check. Defendants mailed the check 13 days after it dismissed their appeal. Based on my de novo review, I do not find the delay supports a 35 percent penalty. The delay of 13 days between the dismissal of the appeal and the payment was minimal. However, defendants offered no explanation why they did not immediately pay the outstanding benefits. Based on the history of delays and underpayments throughout the duration of the original proceeding and appeal, I find a penalty of \$1,000.00 is appropriate to deter defendants and other employers and insurance carriers from engaging in similar conduct in the future.

## **III. Other Delayed Benefits**

In the decision, the deputy commissioner found defendants paid benefits totaling \$54,593.42 one day late from April 19, 2019, finding defendants issued the benefits payments on the due date, but mailed them the next day. The deputy commissioner initially found claimant waived his claim for penalty benefits based on late paid benefits prior to April 19, 2019. The deputy commissioner assessed a one percent penalty against defendants of \$545.93.

In the ruling on the cross motions for rehearing, the deputy commissioner found the evidence presented by claimant concerning the delayed benefits was unclear. The deputy commissioner found claimant did not waive his claim for penalty benefits prior to April 19, 2019 and found claimant had established he received delayed payments totaling \$114,287.50. The deputy commissioner assessed defendants \$5,714.38 in penalty benefits, finding, "[h]owever, the benefits were not significantly delayed per week based upon the evidence in the record. Considering the clarified information, a penalty of 5 percent of delayed benefits is appropriate." (Ruling on Clmts' App for Rehearing, p. 2)

Claimant's Exhibits 1 and 3 are identical charts of the payments made by defendants, which document: (1) on October 22, 2019, defendants mailed a \$61,859.20 check to claimant for benefits from November 14, 2017 through October 14, 2019; (2) defendants mailed claimant weekly payments of \$618.59 from October 22,

2019, through February 18, 2020, and weekly payments of \$773.25 from February 24, 2020, through May 13, 2020; (3) on February 24, 2020, defendants mailed claimant a \$8,114.60 check for an underpayment; (4) and on June 30, 2020, defendants mailed claimant a \$25,900.00 check for an underpayment. The \$25,900.00 payment corresponds with the payment made by defendants for the \$902.78 rate dispute on June 30, 2020, after they dismissed their appeal.

Exhibits 1 and 3 document the compensation week started on a Tuesday. Therefore, each payment was due the following Tuesday. Robbennolt, 555 N.W.2d at 235 (“if Monday is the first day of the compensation week, full payment of the weekly compensation is due the following Monday”). Exhibits 1 and 3 document defendants mailed three payments one day late, on a Wednesday, for the compensation weeks of March 3, 2020, through March 9, 2020, April 28, 2020, through May 4, 2020, and May 5, 2020, through May 11, 2020. Id.; Bragg v. Pizza Hut, Inc., File No. 5047761, 2014 WL 6862429 (Iowa Workers’ Comp. Comm’n Nov. 18, 2014) (finding payment made on October 7, 2014, for the week ending October 5, 2014, was made one day late, defendants offered no excuse for the late payment, warranting assessment of penalty benefits). The payment made for the compensation week of April 7, 2020, through April 13, 2020, was 10 days late. Defendants agreed to pay weekly benefits at the rate of \$773.25 for these four dates and did not assert a credit. The late paid benefits total \$3,093.00.

Exhibits 1 and 3 also document defendants made a lump sum payment of \$61,859.20 for 100 weeks of benefits on October 22, 2019. The check stub indicates the check was for permanent partial disability benefits from November 14, 2017, through October 14, 2019, in the gross amount of \$77,324.00, less a reduction of \$15,464.80 for the alleged prior overpayment, for a net payment of \$61,859.20, \$1,546.76 in interest, and the \$773.24 payment for the compensation week of October 15, 2019, through October 21, 2021. (Ex. 4, p. 59)

As noted above, in a letter dated September 26, 2019, defendants agreed to benefits during the appeal at the rate of \$773.25, less alleged overpayments related to the rate dispute. (Ex. A, pp. 3-5) Defendants did not issue the payment on September 26, 2019, instead they waited until October 22, 2019 to mail the \$61,859.20 check for the benefits to claimant. (Ex. 4, p. 59) The delay in payment was not reasonable. When defendants issued the payment defendants did not convey any reason for the additional delay. I find a penalty of \$4,000.00 is appropriate to deter defendants and other employers and insurance carriers from engaging in similar conduct in the future.

#### ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on December 13, 2021, is affirmed in part, modified in part, and reversed in part, with the above-stated additional and substituted analysis.

Defendants shall pay claimant five thousand and 00/100 dollars (\$5,000.00) in penalty benefits.

Pursuant to rule 876 IAC 4.33(2), defendants shall pay the costs of the appeal, including the cost of the hearing transcript.

Pursuant to rule 876 IAC 3.1(2), defendants shall file subsequent reports of injury as required by this agency.

Signed and filed this 25<sup>th</sup> day of May, 2022.



---

HEATHER L. PALMER  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Thomas Wertz (via WCES)

Lee Hook (via WCES)

Tyler Smith (via WCES)