BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JAMES DELIRE,

Claimant,

vs.

KEY CITY TRANSPORT, INC.,

Employer,

and

GREAT WEST CASUALTY COMPANY,

Insurance Carrier,
Defendants.

File No. 5038022

DECISION ON

IOWA CODE SECTION 86.13

PENALTY BENEFITS

Head Note No.: 4000.2

STATEMENT OF THE CASE

James Delire, claimant, filed a petition in arbitration seeking workers' compensation benefits from Key City Transport, Inc., employer and Great West Casualty, insurance carrier, both as defendants. Hearing was held on January 15, 2015.

There were no witnesses at the time of hearing. Counsel made oral statements. The evidentiary record includes claimant's exhibits 1-11 and defendants' exhibits A-K. The parties submitted a hearing report at the commencement of the evidentiary hearing. On the hearing report, the parties entered into certain stipulations. Those stipulations are accepted and relied upon in this decision. No findings of fact or conclusions of law will be made with respect to the parties' stipulations.

The parties requested the opportunity for post-hearing briefs, which were submitted on February 13, 2015.

ISSUE

The parties submitted the following issue for resolution:

1. Whether claimant is entitled to penalty benefits for failure to pay weekly benefits as ordered by the arbitration decision and for failure to contemporaneously communicate to claimant the reason for not paying.

FINDINGS OF FACT

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

James Delire, claimant, filed a petition for workers' compensation benefits from defendants, Key City Transport, Inc., employer, and Great West Casualty Company, insurance carrier, alleging an injury on June 11, 2008. An arbitration hearing was held concerning that petition on April 4, 2013, before a deputy workers' compensation commissioner. An arbitration decision was issued on September 23, 2013, which ordered defendants to pay healing period benefits from June 16, 2008 to September 4, 2008 and from January 6, 2009 to July 17, 2010. The arbitration decision further ordered defendants to pay claimant a running healing period commencing on June 15, 2011.

The arbitration decision was appealed and the workers' compensation commissioner issued an appeal decision on April 17, 2014. In that decision the commissioner summarily affirmed the arbitration decision with the exception of the appropriate weekly workers' compensation rate. Defendants then sought judicial review in the Iowa District Court in and for Polk County. On October 9, 2014, Judge Michael Huppert issued a ruling on petition for judicial review in which he affirmed the commissioner's appeal decision except with regard to the weekly rate issue which he remanded back to the agency. Claimant filed an appeal to the Iowa Supreme Court from the ruling on judicial review and defendants filed a cross appeal. That appeal is currently pending before the Iowa Supreme Court as case number 14-1755. Claimant appealed as to the issue of weekly rate and defendants cross appealed regarding all other issues.

Meanwhile on June 10, 2014, claimant filed a petition in the instant case seeking post-hearing penalty benefits pursuant to Iowa Code section 86.13. Defendants have paid no weekly benefits since the time of the arbitration decision.

The records show that the defendants have been ordered to pay weekly benefits from June 16, 2008 to September 4, 2008 and from January 6, 2009 to July 17, 2010. The arbitration decision further ordered defendants to pay claimant a running healing period commencing on June 15, 2011. The payment log demonstrates that weekly benefits were paid from June 16, 2008 through September 7, 2008; January 6, 2009 through January 21, 2009; February 8, 2009 through February 28, 2009; March 1, 2009 through July 18, 2010; and September 16, 2010 through March 13, 2011. (Exhibit 3) Defendants have not made any weekly payments since March of 2011. For the time period of June 15, 2011 until the time of the penalty hearing defendants have not paid any benefits despite the fact that they were ordered to pay weekly benefits in the arbitration decision, appeal decision, and in the District Court's Ruling on the Petition for Judicial Review. The only variance in these three decisions was the rate at which claimant should be paid. The weekly benefits that were paid to claimant were paid at

the rate of $713.59. (Ex. 3) The arbitration decision awarded benefits at the rate of $820.99. The appeal decision awarded benefits at the rate of $748.78. The District Court remanded the issue of rate back to the agency.

Claimant seeks the imposition of a penalty under Iowa Code section 86.13 based on defendants' failure to pay weekly benefits as ordered in the arbitration decision during the pendency of various appeals and for defendants' failure to contemporaneously communicate to the claimant their reasons for not paying weekly benefits.

Defendants dispute claimant's entitlement to penalty benefits. Defendants' initial argument is that any claim for penalty benefits is governed by the penalty statute in existence on the date of his June 11, 2008 injury and under that statute the claimant cannot establish entitlement to penalty benefits. This argument is illogical and fails. The petition, which is the source of the current matter, was filed based on defendants' actions following the arbitration and appeal decisions which were issued in 2013 and 2014. It is illogical that a 2011 penalty law should be applied to determine if a defendant's actions beginning in 2013 should result in an award of penalty benefits.

Defendants also contend claimant cannot substantiate a claim for penalty benefits even under the present version of Iowa Code section 86.13 because they have a probable or reasonable cause or excuse to not pay or delay payment and their basis was contemporaneously conveyed to the claimant.

Additionally, defendants also argue that because claimant was not awarded penalty benefits in the original arbitration decision he should not be able to claim penalty now. This argument also fails. Claimant is currently seeking penalty benefits for the defendants' failure to pay the weekly benefits they were ordered to pay in the arbitration award. In other words, they are seeking penalty benefits for defendants' failure to pay since the time of the arbitration award thus, whether they were awarded a penalty for their actions leading up to the arbitration award is not controlling to the question at hand. A denial of benefits that is found to be reasonable at one point in time does not automatically immunize all of the accrued benefits from a claim for penalty benefits if the delay continues after that point.

Defendants also argue that penalty is not an issue that is able to be adjudicated because claimant was awarded a running award and as such the benefits are not "finalized and known." (Defendants' brief, page 19) Defendants further assert because the issue of rate has not been finalized and known, the issue of penalty cannot be adjudicated. This argument is also not persuasive. The arbitration decision ordered defendants to pay claimant a running healing period commencing on June 15, 2011. Defendants are capable of calculating how many weeks of benefits have accrued since June 15, 2011. Further, the record in this case does not demonstrate defendants have conducted any additional investigation of the claim since the issuance of the arbitration decision. There is no evidence in the record to show defendants have even attempted

to ascertain if claimant is still in a healing period status. Further, even if claimant is found to no longer be in a healing period status, the record clearly indicates that the injury was the cause of permanent disability. Thus, defendants' obligation to pay weekly benefits does not necessarily stop at the end of claimant's healing period.

With regard to the matter of rate, any concern defendants have concerning the appropriate weekly rate could be mitigated by paying the weekly rate they are asserting is correct on appeal. Based on the evidence presented, I find the rate the defendants are currently urging on appeal to the Supreme Court is $596.57. (Ex. J) However, rather than paying the weekly rate they are asserting is correct, defendants have simply refused payment of any weekly benefits to Mr. Delire since March of 2011.

Finally, defendants argue that there is a reasonable basis to contest the injured workers' entitlement to benefits. Defendants' basis for not paying the award of weekly benefits is essentially based on their belief they have a chance of obtaining a reversal or reduction of the award on appeal. Defendants' exhibits consist of their post-hearing and appeal briefs, the district court judicial review pleadings, the district court ruling, the pleadings in the appeal to the Supreme Court, and a letter from defense counsel to claimant's counsel which merely indicates they believe it is likely defendants will file a Petition for Judicial Review. As a reasonable basis for denying the claimant any weekly benefits since March of 2011 the defendants are relying on evidence and arguments already submitted to and rejected by the arbitration deputy, the workers' compensation commissioner, and by the district court judge. I find there is no evidence in the record to show that defendants have re-evaluated their continuing denial of weekly benefits since the time of the final agency action. I further find that defendants have failed to establish a reasonable or probable cause or excuse for their denial of benefits.

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 Rule of Appellate Procedure 6.14(6).

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. 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 also 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 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.

The commissioner has addressed the issue of intra-agency appeals. He stated:

> [T]he deputy's decision was only a proposed decision of a presiding officer under Iowa Code section 17A.15 as prescribed by Iowa Code section 86.17. Such a proposed decision only becomes a final agency decision when no appeal is taken to the commissioner within the statutory 20 day appeal period. After such appeal is filed and briefed, the commissioner is free to change or modify any finding of fact or conclusion of law in an appeal decision. Iowa Code section 17A.15(3), Iowa Code section 86.24(2). An enforceable judgment from the district court can only be obtained from a decision by a deputy commissioner if a timely appeal has not been taken and the decision became final by the passage of time. Iowa Code section 86.42. By agency rule, all issues presented on intra-agency appeal are reviewed by the commissioner de novo. 876 IAC 4.28(7). Consequently, there was no finality to the deputy's arbitration decision of February 28, 2005. Therefore, if defendants' denial of benefits was fairly debatable before the decision, it was almost certainly fairly debatable after the decision.

Millenkamp v. Millenkamp Cattle, Inc., File No. 5011148 (Rehearing December 10, 2007). In the present case, the defendants' denial of benefits at the time of the arbitration hearing was fairly debatable. There is nothing in the record to indicate that anything occurred during the hearing to render the denial of benefits unreasonable or to impose a duty upon defendants to re-evaluate their past denial of benefits. In the present case, defendants' denial of benefits was fairly debatable before the arbitration decision, it remained fairly debatable after the proposed agency decision issued by the deputy. Therefore, claimant is not entitled to penalty benefits during intra-agency appeal.

We now turn to the timeframe after final agency action; after the commissioner issued the appeal decision on April 17, 2014. Defendants argue that if they voluntarily pay weekly benefits based on the prior decisions and if they are successful on appeal they will not be able to recoup those benefits. Defendants essentially argue that to

require them to pay benefits during the pendency of their appeal denies them of their right of appeal. This argument has already been considered and rejected.

> A denial of benefits that is found to be reasonable at one point in time does not automatically immunize all of the accrued benefits from a claim for penalty benefits if the delay continues after that point. Simonson v. Snap-On Tools, 588 N.W.2d 430, 437 (Iowa 1999). An employer has an ongoing duty to evaluate a denial of benefits in order to determine whether a continued denial is reasonable. See, e.g., Squealer Feeds v. Pickering, 530 N.W.2d 678, 683 (Iowa 1995) (" . . . a continued delay in payment may be unreasonable even though the original denial was not.") While an employer does have the right to pursue an appeal from a decision awarding benefits, that right does not insulate the employer from a claim for penalty benefits based upon the lack of payments during the appeal period. See, e.g., Simonson v. Snap-On Tools, File No. 851960 (Remand Dec. August 25, 2003); See also, Johnson v. Weitz Company, File No. 5013215 (App. March 14, 2008); Battani v. EFCO, File No. 5010934 (Arb. Dec. June 12, 2008). In order to avoid penalty, an employer must be able to demonstrate that it re-evaluated the claim as new information (e.g. adverse rulings from the Iowa Supreme Court, the Iowa Workers' Compensation Commissioner and the Iowa Court of Appeals) became available and paid at least the minimum amount it could have reasonably anticipated being obligated to pay based upon the information available. Schemmel v. City of Dubuque, File No. 5015707 (App. July 3, 2007).

Johnson v. Heartland specialty Foods, File No. 1138968 (Arb. Dec. September 12, 2008).

In the present case, there has been no showing that defendants reevaluated the claim as additional evidence became available to them. There is no evidence that defendants re-evaluated their claim at any time after the appeal decision or even after the District Court Ruling. It is concluded that from the date of the appeal decision defendants' liability for the work injury was established. Defendants were obligated to conduct further investigation into whether or not benefits should be paid after the final agency action was issued. Defendants have failed to show they met their ongoing duty to re-evaluate their denial. Instead, defendants have merely regurgitated the same unsuccessful arguments. There is no evidence to show that defendants re-evaluated their denial in light of the adverse rulings. Defendants were not justified in failing to voluntarily pay any benefits since the time of the April 17, 2014 appeal decision.

With regard to the issue of which weekly rate is appropriate, defendants have also failed to pay the minimum amount required. Defendants have failed to offer a reasonable basis as to why they are not paying the benefits they were ordered to pay at the rate they are currently urging before the Iowa Supreme Court. Defendants have

failed to demonstrate a reasonable cause or excuse for the delay or denial in the payment of weekly benefits which they have been ordered to pay.

Because defendants have failed to demonstrate a reasonable cause or excuse for the delay or denial in the payment of weekly benefits which they have been ordered to pay the issue of whether defendants contemporaneously conveyed the basis for their denial to the claimant is moot.

As previously mentioned, there has not been an agreement in the decisions as to the appropriate weekly workers' compensation rate in this matter. At the time of the hearing before the undersigned, the claimant urged that any penalty be based on the lowest rate as that would be fair to all involved. I find that this is a reasonable approach and consistent with the language of the Schemmel decision which requires the defendants to pay at least the minimum amount it could have reasonable anticipated being obligated to pay based upon the information available. Schemmel v. City of Dubuque, File No. 5015707 (App. July 3, 2007). The rate the defendants are urging on appeal to the Supreme Court is $596.57. (Ex. J)

Defendants have not made any weekly payments in this matter since March of 2011. (Ex. 3, p. 10) Defendants have been ordered to pay weekly benefits from June 16, 2008 to September 4, 2008 and from January 6, 2009 to July 17, 2010. The arbitration decision further ordered defendants to pay claimant a running healing period commencing on June 15, 2011. Approximately 187 weeks accrued from June 15, 2011 until the time of the January 16, 2015 hearing on penalty.

Having determined that penalty benefits are due, I must consider the extent of the penalty to be imposed. The purpose of Iowa Code section 86.13 is both punishment for unreasonable conduct but also deterrence for future cases. Robbennolt, 555 N.W.2d at 237. In this regard, the commission is given discretion to determine the amount of penalty imposed with a maximum penalty of 50 percent of the amount of delayed or denied benefits. Christensen, 554 N.W.2d at 261. In exercising discretion, the agency must consider factors such as the length of the delays, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalty. Meyers, 557 N.W.2d at 505.

No evidence is contained within the record to establish any past record of penalty against this employer. However, in this case the employer's conduct was found to be unreasonable. It is also noted that there has been a substantial delay in payment of the benefits. Mr. Delire has not received any weekly workers' compensation benefits since March of 2011. Therefore, a penalty in an amount sufficient to deter future conduct is appropriate. I conclude a penalty in the amount of $50,000.00 is sufficient in this case to accomplish the goals and purposes of Iowa Code section 86.13(4).

Based on the above finding, I conclude defendants shall pay a penalty in the amount of $50,000.00 for their unreasonable denial and delay in payment of weekly benefits.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay to claimant the sum of fifty thousand and no/100 dollars ($50,000.00) as a penalty for their unreasonable denials and delays in payment of weekly benefits.

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 26th day of March, 2015.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Mark J. Sullivan
Attorney at Law
PO Box 239
Dubuque, IA 52004-0239
sullivan@rkenline.com

Stephen W. Spencer
Attorney at Law
6800 Lake Dr., Ste. 125
West Des Moines, IA 50266-2504
steve.spencer@peddicord-law.com

EQP/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.