

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

REGINA SMITH, surviving spouse of
MICHAEL L. SMITH,

Claimant,

vs.

MONSANTO,

Employer,

and

ACE USA,

Insurance Carrier,
Defendants.

FILED

OCT 25 2016

WORKERS COMPENSATION

File No. 1254092

FULL COMMUTATION DECISION

Head Note Nos.: 3303.10, 4000

STATEMENT OF THE CASE

Claimant, Regina Smith, surviving spouse of Michael Smith, filed a petition for full commutation of benefits owed by Monsanto, employer, and Ace USA, insurance carrier, both as defendants. Claimant, as surviving spouse of Michael Smith, was found by an appeal decision entered March 18, 2014 to be entitled to death benefits at the rate of \$265.92 per week from January 2, 2012 and continuing for the remainder of her life or until her remarriage. After seeking judicial review, the district court affirmed by a ruling issued on December 2, 2014. No further appeals were taken. Claimant also filed a petition in arbitration seeking penalty benefits as a result of delayed payment of the award of death benefits.

The case came on for hearing before Deputy Workers' Compensation Commissioner Erica J. Fitch on June 7, 2016, in Cedar Rapids, Iowa. The record consists of claimant's exhibits 1 through 6, defendants' exhibits A through K, and the testimony of the claimant. The parties filed post-hearing briefs, the matter being fully submitted on July 8, 2016.

ISSUES

The parties submitted the following issues for determination:

1. Whether claimant has established that a proposed full commutation of the previously awarded death benefits is in her best interest; and

2. Whether claimant is entitled to an award of penalty benefits under Iowa Code section 86.13 and if so, how much.

The stipulations of the parties in the hearing report are incorporated by reference in this decision.

FINDINGS OF FACT

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

Claimant's testimony was consistent with the evidentiary record and her deposition testimony. Her demeanor at evidentiary hearing was excellent, providing the undersigned no reason to doubt her veracity. She appeared fit and in generally good health. Claimant is found credible.

Claimant, Regina Smith, surviving spouse of Michael Smith, was 61 years of age on the date of evidentiary hearing. Claimant and her late husband were parents to 3 adult children; they are grandparents to 10 grandchildren. The children are financially independent. Claimant graduated high school in 1973; she has no other formal education. (Claimant's testimony; Exhibit B, page 13; Ex. G, Deposition Transcript p. 15)

Claimant resides on a 3 ½ acre property in Anamosa, Iowa. Of this property, 2 ½ acres is covered with timber, the remaining 1 acre contains claimant's house and yard. Claimant maintains the property. She estimated the value of the property as approximately \$300,000.00. (Claimant's testimony; Ex. B, p. 21)

Claimant worked for 23 years at Rockwell Collins. During this time, she performed clerical work. For the final 15 years, she was assigned solely to processing transactions for a multimillion dollar account for the Coast Guard. Claimant's duties involved managing locations of equipment and processing repair requests. She clarified her duties were logistical in nature; she did not manage bank accounts or financial investment assets. (Claimant's testimony)

Claimant's late husband, Michael Smith, passed away on January 2, 2012. Thereafter, claimant initiated a claim for workers' compensation death benefits. By an appeal decision dated March 18, 2014, the commissioner found Mr. Smith's death was causally related to his work-related pulmonary condition. As a result, claimant was awarded surviving spouse weekly death benefits from the date of his death and continuing thereafter for the remainder of her life or until her remarriage. These benefits were to be paid at a weekly rate of \$265.92. (Ex. 3, pp. 1-7) Defendants filed for judicial review. The commissioner's decision was affirmed by a district court ruling on December 2, 2014. (Ex. 3, pp. 8-20)

Defendants did not seek further review of the district court ruling. On January 16, 2015, claimant's counsel authored email correspondence inquiring as to the status of benefit payments owed as a result of the action. On January 20 and January 21, 2015, claimant's counsel again emailed defendants' counsel, asking him to advise as to the status of benefits owed. (Ex. 6, p. 1; Ex. H, pp. 57-58)

On January 21, 2015, defendants' counsel confirmed no appeal would be taken and requested claimant's counsel advise as to "the numbers you think should be issued." (Ex. 6, p. 2; Ex. H, p. 57)

On January 27, 2015, claimant's counsel authored another email to defendants' counsel inquiring as to the status of payment. Defendants' counsel responded the next day, expressing belief claimant's counsel should receive payment the following week. (Ex. 6, p. 3; Ex. H, p. 59)

Defendants' counsel emailed claimant's counsel on February 4, 2015 and inquired as to whether claimant had yet received payment. Claimant replied no benefits had been received. (Ex. 6, p. 3; Ex. H, p. 60)

On February 5, 2015, defendants' counsel authored an email to claimant's counsel setting forth his calculations regarding a number of payments which would be paid pursuant to the underlying decision. One such calculation computed the amount of weekly death benefits accrued and owing. Counsel computed this figure as 162 weeks of benefits, dating from January 2, 2012 to February 13, 2015. At the weekly rate of \$265.92, defendants' counsel computed a total owed of \$43,079.04. He also represented interest would be paid in the amount of \$6,668.95. Counsel requested claimant's counsel review and confirm the computations. (Ex. 6, p. 4; Ex. H, p. 61)

Claimant's counsel responded on February 5, 2015 and expressed one disagreement with the calculations set forth by defendants' counsel. Specifically, claimant's counsel pointed out defendants had previously paid benefits through January 8, 2012. Therefore, he noted the first date of accrual would be January 9, 2012. Counsel noted that the period of January 9, 2012 through February 13, 2015 represented 161.714 weeks, which corresponded to a total of \$43,002.99 in accrued and owing benefits. (Ex. 6, p. 5; Ex. H, p. 63)

On February 6, 2015, defendant-insurance carrier issued a check for accrued death benefits. The check document represents benefits were paid for the period of January 9, 2012 through February 8, 2015. The period was noted to correspond with 161 weeks of benefits and totaled \$42,813.12. (Ex. 5, p. 1)

Claimant now receives \$691.38 per month in workers' compensation death benefits. During the pendency of her claim for workers' compensation death benefits, claimant did not incur any additional indebtedness and was capable of meeting her monthly expenses. (Claimant's testimony; Ex. B, p. 9)

Claimant retired from Rockwell Collins in May 2015 at age 60. Although she intended to retire at age 62, once she received the lump sum award of accrued death benefits in early 2015, she was able to retire at a younger age. At the time of her retirement, claimant earned a salary of \$54,000.00 per year. Claimant receives a pension with a monthly gross of approximately \$900.00; after her health insurance premium is deducted, claimant receives \$674.31 per month. (Claimant's testimony; Ex. B, pp. 8-9; Ex. G, Depo. Tr. p. 18)

Claimant possesses retirement financial assets from her time at Rockwell Collins. For approximately one year, she has managed these assets with the assistance of Kent Streicher of Edward Jones. Claimant approximated such assets as valuing \$250,000.00; the assets include approximately \$100,000.00 in an annuity and \$150,000.00 in stocks and bonds. (Claimant's testimony; Ex. B, p. 14) As of December 31, 2015, claimant's investment account was value at \$245,272.38. (Ex. F, pp. 50-53)

Claimant also receives income from other sources. Specifically, she receives Social Security benefits in the amount of \$1,093.00. She is also a beneficiary of an aunt's estate which is based upon managed farm ground and investments. She and her sister share their late father's 20 percent share in this trust which is valued at \$2.1 million. While claimant receives twice-annual distributions, the amounts of those distributions vary. In 2015, claimant received approximately \$7,000.00 or \$8,000.00 total; as of the date of evidentiary hearing in 2016, claimant had received approximately \$4,000.00. The final distribution of the trust is predicated upon the death of her last living uncle, plus 10 years. In the recent past, claimant received approximately \$40,000.00 for her share of another liquidated farm trust. Claimant believes the majority of this money was placed into savings; she did not recall providing any funds to her children. (Claimant's testimony; Ex. B, p. 27)

Claimant's monthly expenses total approximately \$1,978.00. Nothing unusual or extravagant is noted in these expenditures. The largest expense comes in the form of her mortgage payment, \$1,274.00 per month. As of February 2016, claimant owed \$97,615.19 on her mortgage, at an interest rate of 3.375 percent. (Ex. 2, p. 1; Ex. B, p. 26; Ex. G, Depo. Tr. p. 6) Claimant acknowledged a portion of her monthly mortgage payment went into an escrow account for payment of real estate taxes; she was not immediately aware of the amount of that portion as of the date of hearing. (Claimant's testimony) Review of the evidentiary records reveals \$885.95 of the monthly payment is allocated to principal and interest on the mortgage; the remaining \$388.05 is allocated to taxes and insurance. (Ex. 2, p. 1)

Claimant testified she is able to meet her monthly expenses given her current income, with a small amount of surplus. As of the date of hearing, claimant testified she had approximately \$28,000.00 in accessible savings accounts. She owes no money on credit cards. (Claimant's testimony) Claimant owns two vehicles, without debt thereon. (Ex. B, p. 19)

When her husband passed away, claimant received proceeds from three life insurance policies. In total, claimant received approximately \$90,000.00. From these proceeds, claimant gave each of her children \$10,000.00 from one policy and \$8,000.00 from a second policy. She also refinanced her mortgage to a 15-year note in 2012 and applied the approximately \$40,000.00 remaining toward paying down the mortgage balance and covering refinancing expenses. (Claimant's testimony; Ex. B, p. 11; Ex. E, pp. 46-47; Ex. G, Depo. Tr. p. 5)

Claimant seeks a full commutation of her award of death benefits. She intends to pay attorney fees and pay off the balance of her mortgage. Claimant testified if she were to eliminate her monthly mortgage expense, she would be capable of meeting her monthly expenses based on her monthly income, even without including her workers' compensation death benefits. (Claimant's testimony)

With any funds which remain after paying attorney fees and paying off her mortgage, claimant testified she would perform minor home improvements such as required landscaping, tree removal, and septic work. She would invest the remainder with the assistance of her financial advisor, Mr. Streicher. Claimant testified she and Mr. Streicher have discussed investment strategies and she anticipates investing in conservative investments. (Claimant's testimony)

Claimant also requests a full commutation based in part upon the effects of inflation. Her weekly benefit rate was computed as of the date of her husband's original workers' compensation injury in 1997. The weekly benefit is fixed at \$265.92. At the direction of her attorney, claimant utilized a government inflation calculator and determined the value of that weekly amount would be over \$370.00 if adjusted for inflation and cost of living. (Claimant's testimony) The evidentiary record contains the calculation referred to by claimant. Per this calculation, \$265.92 in the year 1997 was the equivalent of \$392.70 in buying power in the year 2015. (Ex. 1, pp. 1-2)

Claimant testified the full commutation would allow her to eliminate stress surrounding her ability to maintain her acreage. While she has thought of selling the property to avoid the ongoing maintenance required, claimant testified her family loves the property and she desires to keep the property for that reason. (Claimant's testimony)

Defendants retained the services of financial planner, Michael Alexander, to review claimant's financial status and opine as to whether a full commutation of benefits would be in claimant's best interests. In his analysis, Mr. Alexander utilized a commuted lump sum value of \$249,076.04 and attorney fees of \$99,630.42, leaving claimant a net amount of \$149,445.84. (Ex. A, p. 1) He considered claimant's monthly income of \$2,458.69 from Social Security, workers' compensation and her pension, as well as noted she received \$8,000.00 per year in inheritance. Mr. Alexander thereby computed claimant's annual income at \$37,504.28. He computed claimant's expenses as \$1,978.00 per month or \$23,736.00 per year. On this basis, he computed a surplus

of \$1,147.35 per month or \$13,768.28 per year. (Ex. A, p. 2) Mr. Alexander also noted claimant's mortgage balance was \$97,615.19. (Ex. A, p. 1)

After analyzing claimant's financial status, Mr. Alexander recommended claimant not receive a lump sum commutation and rather, continue to receive weekly benefits. He expressed concern claimant might not be able to "properly handle" a lump sum, given a history of bankruptcy and a belief that on difference occasions, claimant did not demonstrate a "solid understanding" of financial management. (Ex. A, p. 2) Mr. Alexander highlighted a history of overdrafts despite possessing monthly income which covered her monthly expenses. He also expressed concern over claimant's withdrawal from a retirement account and her choice to gift a portion of life insurance proceeds to her children. (Ex. A, pp. 1-2) Additionally, Mr. Alexander expressed concern over scenarios wherein "people give up a steady reliable income stream for life" in order to receive a lump sum amount. He cautioned that without discipline, the lump sum amount could be exhausted quickly. (Ex. A, p. 3)

Mr. Alexander also noted claimant would receive an inheritance. He recommended claimant consider using these amounts or claimant's surplus cash flow to reduce her mortgage balance. Mr. Alexander also offered an opinion that the attorney fee to be charged to claimant was "extremely high." (Ex. A, p. 3)

Claimant described herself as a conservative person. She testified she spends a large amount of her time outside and attending her grandchildren's events. As a hobby, claimant golfs. On occasion, she will frequent a casino, but testified when she does, she will take \$100.00 and will cease gambling once that amount is lost. She denied any issues with alcohol use. (Claimant's testimony)

Claimant admitted to a history of overdrafts approximately once or twice per year. Claimant denied any overdraft activity in 2016. She explained this had occurred on occasion in the past due to issues with prearranged automatic withdrawals and direct deposits. Claimant also admitted she had her husband had once filed for bankruptcy in the 1990s. She attributed the bankruptcy to their prior farming activities; activities in which she is no longer involved. (Claimant's testimony; Ex. G, Depo. Tr. pp. 10, 13)

CONCLUSIONS OF LAW

The first issue presented for determination is whether claimant has established that a proposed full commutation of the previously awarded death benefits is in her best interest.

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).

Iowa Code section 85.45 governs commutations. The section states that "[f]uture payments of compensation may be commuted to a present worth lump sum payment" provided that: (1) the period during which compensation is payable can be definitely determined; and (2) the workers' compensation commissioner is satisfied that commutation will be in the best interests of the person or persons entitled to the compensation. Iowa Code section 85.45.

The individual or individuals seeking commutation have the burden of proving that commutation is in their best interests. The commissioner must determine the best interests question on a case-by-case basis, although the commissioner may not disregard a claimant's reasonable plans and desires merely because the plan's success cannot be assured. Diamond v. Parsons Co., 256 Iowa 915, 129 N.W.2d 608 (1964); Dameron v. Neumann Bros., Inc., 339 N.W.2d 160 (Iowa 1983). On the other hand, the commissioner cannot grant a commutation request when the potential detriments to the worker or dependents from potential ill use of any lump sum payment outweigh the asserted benefits of those funds being commuted to their present worth.

The Dameron court charged the commissioner, in determining whether to allow commutation, to examine the following factors:

1. The worker's age, education, mental and physical condition, and actual life expectancy, as contrasted from information that actuarial tables have provided.
2. The worker's family circumstances, living arrangements, and responsibilities to dependents.
3. The worker's financial condition, including all sources of income, debts, and living expenses.
4. The reasonableness of the worker's plan for investing the lump sum proceeds and the worker's ability to manage invested funds or arrange for others such as a trustee or conservator to manage the funds.

Dameron, 339 N.W.2d at 164.

When the period of future compensation to which a claimant is entitled is definitely determinable, claimant may receive a lump sum discounted payment of future benefits, provided claimant establishes that the commutation of benefits is in claimant's best interest. A claimant's preference for receiving a lump sum payment is balanced against the potential detriments that could result if the employee invests unwisely, spends foolishly or otherwise wastes the funds to the point where they no longer provide the wage substitute intended by the workers' compensation law. The Dameron court went on to state that a request for commutation should be approved unless the

potential detriments to the worker outweigh the worker's expressed preference and the demonstrated benefits of commutation. Dameron, 339 N.W.2d at 164.

In determining whether the commutation is in the best interest of claimant, this agency cannot act as a conservator and disregard claimant's desires and reasonable plans just because success of the plans is not assured. Diamond, 256 Iowa 915, 129 N.W.2d 608 (1964).

Claimant was 61 years of age at the time of evidentiary hearing. Her education is limited to high school graduation; however, she ultimately worked for Rockwell Collins for 23 years in a position involving logistics of a large account holder. Her duties as described required attention to detail and an ability to work promptly in response to stressful situations. The value of claimant's work to her employer is evidenced by her respectable salary of over \$50,000.00 per year, plus benefits which included a pension and other retirement accounts. At the time of hearing, claimant appeared competent and knowledgeable of her financial position and no reason was presented which would lead me to doubt her physical health.

Claimant lives independently and is not financially responsible for any other person. The acreage she owns is valued at approximately \$300,000.00. Her mortgage balance is less than 1/3 of the total value of the property. Her sole indebtedness is her mortgage; she owes no vehicle loans and has no credit card debt. Claimant possesses sources of income outside of her workers' compensation death benefits; she receives Social Security benefits and her pension from Rockwell Collins. These sources of income are sufficient to cover her monthly expenses, assuming her mortgage is eliminated.

Claimant has proposed an entirely reasonable plan for proceeds of the requested full commutation. Claimant filed her petition for full commutation on June 19, 2015. Per this petition, the commuted value of claimant's award of death benefits was \$249,076.04. Of this sum, claimant would owe attorney fees in the amount of \$99,630.42. Contrary to Mr. Alexander's description of this fee as "extremely high," the undersigned finds nothing unusual or excessive regarding the 40 percent fee charged given claimant's claim required legal representation through an arbitration hearing, an appeal to the commissioner, and upon further review to the district court.

Assuming *arguendo* that the figures presented in claimant's petition are accurate, claimant would receive a lump sum of approximately \$149,445.62. Claimant testified she intends to use these proceeds to pay off her mortgage, which was \$97,615.19 as of February 2016. Extinguishing this debt would be in claimant's best interest, as it eliminates claimant's largest single monthly expense. Claimant's mortgage payment accounts for approximately 45 percent (\$885.95/\$1,978.00) of her monthly expenses. If claimant were to extinguish this debt, her income from Social Security and her pension would be more than sufficient to cover her remaining monthly expenses.

After payment of attorney fees and paying off her mortgage, claimant would be left with approximately \$50,000.00. She credibly testified she intends to have some minor maintenance projects completed upon the acreage and then invest the remainder. Although claimant did not offer a written proposal with respect to investment of the remaining funds, claimant testified she had discussed investment with her financial advisor, Mr. Streicher. Mr. Streicher has managed claimant's financial portfolio for approximately one year, he is not an individual with whom she simply consulted in connection with her petition for commutation. Further, the amount to be invested with Mr. Streicher is only approximately 20 percent of the total value of claimant's commutation. As the majority of the proceeds are earmarked for other allocations, I am unconcerned that claimant failed to offer a written report from her financial advisor regarding the use of approximately 20 percent of the total lump sum. Claimant has an established and trusted relationship with Mr. Streicher, wherein the two have successfully worked together to manage claimant's existing portfolio of approximately \$250,000.00.

Defendants' expert financial advisor, Mr. Alexander, ultimately opined he would advise against claimant receiving a lump sum of benefits out of fear she would improperly handle the funds. As factors in reaching his opinion, Mr. Alexander highlighted claimant's history of bankruptcy, overdrafts, and gifts to her children. I find his concerns, although relevant, to be of minor importance in the overall picture of claimant's financial status. The bankruptcy occurred approximately 20 years ago in connection with a business activity in which claimant is no longer involved. The overdrafts, although unnecessary, occurred infrequently and were due to scheduling of automatic withdrawals and deposits. Claimant credibly testified she had not suffered an overdraft thus far in the year 2016. Claimant's choice to gift a portion of the proceeds from her husband's life insurance policies to her children is not irresponsible, odd, or otherwise troublesome. It is also noteworthy that she applied the portion she retained to her mortgage balance. Mr. Alexander also noted claimant had made a taxable withdrawal from her retirement account; however, this factor was not clearly explained in his report or the remainder of the evidentiary record and the undersigned will not "penalize" claimant for an action with which I am not fully familiar.

Finally, Mr. Alexander noted he has concerns when an individual expresses willingness to give up a steady source of income in exchange for a lump sum payment. This concern was expressed generally and not specifically in reference to claimant. Although a valid concern, certainly for a financial advisor, I believe the value of this concern is overstated in claimant's case. Claimant's weekly workers' compensation death benefit is fixed at \$265.92. This amount was calculated based upon earnings at the time of her husband's work-related injury in 1997. There is no adjustment to account for inflation or modify the sum to reflect a cost of living increase. Nearly twenty years have elapsed since the date the benefit amount was fixed. The evidence in the record reveals claimant would require \$392.70 in order to maintain the same buying power as was provided by \$265.92 in 1997. This figure will only continue to increase with time.

Defendants have raised concerns as to claimant's ability to properly manage the funds she possesses; however, the record contains no concrete evidence that claimant has significantly mismanaged monies in the past. She is not vastly indebted and she earns a stable monthly income from sources beyond workers' compensation benefits. Importantly, defendants did not voluntarily pay claimant benefits following the death of her husband in January 2012. Rather, no such benefits were paid until the conclusion of legal action in this matter three years later. During this period, claimant did not fall into debt and was capable of meeting her expenses. Given claimant was able to function for three years without such benefits, I find no reason to believe she would be incapable of functioning without these benefits into the future.

It is concluded that on balance, claimant's request for full commutation is reasonable, in the best interest of claimant, and should be granted.

The final issue for determination is whether claimant is entitled to penalty benefits under Iowa Code section 86.13 and if so, how much.

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.

Iowa Code 86.13, as amended effective July 1, 2009, states:

4. 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 of 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 was awarded workers' compensation death benefits dating to her husband's passing on January 2, 2012. No such benefits were paid until February 6, 2015. Claimant has demonstrated a delay in payment of benefits as required by section 86.13(4)(b)(1). Accordingly, the burden shifts to defendants to establish a reasonable or probable cause or excuse for the delay pursuant to section 86.13(4)(b)(2).

In order to prove a reasonable or probable cause or excuse for the delay, defendants must show the delay was preceded by a reasonable investigation, the results of the investigation were the actual basis for the delay, and the basis for the delay must have been contemporaneously conveyed to claimant. Defendants denied

claimant's claim for death benefits throughout the pendency of her claim. It is unclear based on the evidentiary record if defendants reevaluated the denial of payment of benefits at any time following final agency action which awarded claimant benefits. Agency case law indicates that a defendant's obligation to act reasonably is not suspended during the pendency of an appeal, and penalty may be awarded in circumstances where a defendant continues to pursue the right of appeal, but fails to make benefit payments. Simonson v. Snap-On Tools, Remand Dec., File 851960 (App. August 25, 2003); Schadendorf v. Snap-On Tools Corporation, Remand Dec., File No. 916731 (App. August 25, 2005).

In this instance, the delay did not merely persist throughout the pendency of the appeal process, but also unnecessarily thereafter. The district court ruling affirming the commissioner's award of benefits was issued December 2, 2014. The deadline for appeal of the ruling was January 2, 2015. As defendants did not seek further review, accrued benefits should have been paid and weekly benefits should have commenced promptly after this deadline. Defendants did not pay such benefits until February 6, 2015, 36 days later. During this period, counsel for both parties did engage in discussion regarding payment of benefits owed; however, defendants did not immediately seek to initiate payments. Rather, claimant's counsel initiated conversation seeking benefits on January 16, January 20, and January 21, 2015. Defendants' counsel responded January 21, 2015, yet no benefits were issued for another two weeks thereafter. Given that the date such benefits commenced and the weekly benefit amount were set by final agency action, I see no legitimate reason for a further delay of over 30 days following expiration of the appeal deadline. A penalty is warranted.

The evidentiary record supports a finding that defendants paid permanent total disability benefits through January 8, 2012, thus resulting in claimant's death benefits effectively commencing January 9, 2012. The period of January 9, 2012 through February 6, 2015, the date of issuance of benefits, is 160.714 weeks. At a weekly rate of \$265.92, \$42,737.07 of benefits had accrued and were owing at this date of first payment. Accordingly, a penalty of up to \$21,368.53 may be assessed. Given the ongoing litigation, length of the delay, discussion between the parties as to the amounts owed, and defendant-insurance carrier's history of penalties, a penalty award of \$4,000.00 is warranted.

ORDER

THEREFORE, IT IS ORDERED:

That claimant's request for full commutation of her weekly death benefit entitlement is granted, provided that the original notice and petition for full commutation shall be revised as appropriate to reflect remainders and commuted values at the time of the signing and filing of this decision.

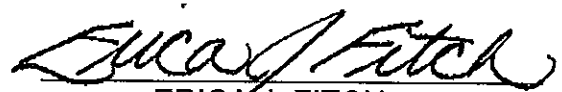
Defendants shall pay penalty benefits in the amount of four thousand and 00/100 dollars (\$4,000.00).

Defendants shall pay interest on the penalty benefits from the date of this decision. See Schadendorf v. Snap On Tools, 757 N.W.2d 330, 339 (Iowa 2008).

Defendants shall file all subsequent reports as required by rule 876 IAC 3.1(2).

Defendants shall pay the costs of this proceeding pursuant to rule 876 IAC 4.33.

Signed and filed this 25th day of October, 2016.



ERICA J. FITCH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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EJF/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.