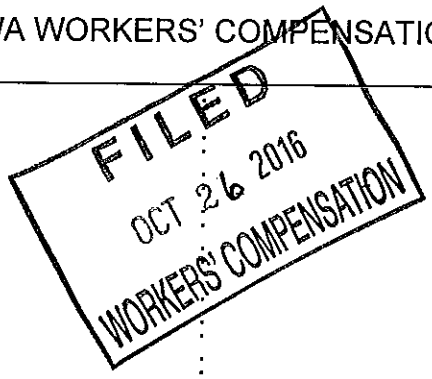
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



WAYNE HEDBERG,

Claimant,

vs.

JBS SWIFT & COMPANY,

Employer,

and

ZURICH NORTH AMERICAN INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5036162

PENALTY BENEFITS

DECISION

Head Note Nos.: 4400.1, 4000.2

STATEMENT OF THE CASE

Claimant, Wayne Hedberg, has filed a petition and seeks workers' compensation penalty benefits from JBS Swift & Company (Swift), employer, and Zurich North American Insurance Company[1] (Zurich), defendants.

The parties submitted the matter on a stipulated record and filed briefs. Joint Exhibits 1 through 9 were admitted into the record.

ISSUE

The parties have submitted the following issue for determination:

Whether claimant is entitled to penalty benefits pursuant to Iowa Code section 86.13.

FINDINGS OF FACT

[1] The caption of the exhibits and the parties' briefs list Swift as self-insured. However, the final decision in this case included Zurich as the insurance carrier. The list of self-insured employers maintained by the Iowa Insurance Commission does not list Swift as self- insured. Zurich shall remain as a defendant in this claim.

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

Wayne Hedberg, claimant filed a petition in arbitration on February 11, 2011 seeking benefits from the defendants alleging an injury date of May 7, 2010.

This claim came for a hearing and a deputy workers' compensation commissioner issued an arbitration decision on October 10, 2012 finding that claimant had proven an 80 percent industrial disability and awarding 400 weeks of permanent partial disability (PPD) benefits. (Joint Exhibit 1, page 11) This decision was appealed to the commissioner. By order of delegation, a commissioner's decision was issued on July 29, 2013. This decision found claimant to be permanently and totally disabled. (Ex. 2, p. 18)

This decision was appealed to the Iowa District Court. On March 4, 2014 the Iowa District Court affirmed the decision of the commissioner. (Ex. 3, p. 11) A request for reconsideration or enlargement of the decision was filed by the defendants. This request was denied on March 20, 2014. (Ex. 4, p. 33)

The case was appealed to the Iowa Supreme Court, who assigned the case to the Iowa Court of Appeals. On January 14, 2015 the Court of Appeals issued a decision which reversed and remanded the case to this agency for additional consideration of the record. JBS Swift & Co. v. Hedberg, 873 N.W.2d 276, (Iowa Ct. App. 2015). (See also Ex. 5)

The court stated,

> Swift contends this case does not present a routine question of substantial evidence review. Instead, Swift argues the agency failed to consider a relevant and important matter; took action that was unreasonable, arbitrary, capricious, or an abuse of discretion; and reached a decision that is a product of illogical reasoning. *See* Iowa Code § 17A.19(10)(f), (i), (j), (m), & (n). Specifically, Swift asserts the agency failed to consider and/or explicitly misstated record evidence; failed to consider Hedberg's refusal of full-time work within his permanent work restrictions; and failed to consider Hedberg voluntarily left his employment for reasons unrelated to his work injury. Swift has the better of the argument.

JBS Swift & Co. Id. p. 280

The court went on to hold,

> The deference afforded the agency on substantial evidence review is predicated on the assumption the agency reviewed and considered the evidence in reaching its decision. Where the record affirmatively discloses the agency did not review and consider the evidence, as is the case here, then substantial evidence review is inapplicable. The agency is entitled to

> reconcile competing evidence, not ignore competing evidence. We thus conclude the commissioner's designee's action is unreasonable, arbitrary, capricious, an abuse of discretion, and the product of illogical reasoning. *See* Iowa Code § 17A.19(10)(i), (j), (m), & (n)(citations omitted)

JBS Swift & Co. Id. p. 280, 281

The court remanded the case back to this agency requiring a review of all the evidence.

> When the commissioner fails to consider all the evidence, the appropriate remedy is "remand for the purpose of allowing the agency to re-evaluate the evidence" unless the facts are established as a matter of law. *Armstrong,* 382 N.W.2d at 165; *see also Meyer,* 710 N.W.2d at 225 (stating the remedy for failure to consider all evidence "is to remand the case for a decision by the commissioner on the existing record"); *Rizvic,* 2011 WL 3688976, at *6 (affirming district court's remand to agency). Here, we cannot conclude the relevant facts are established as a matter of law. Accordingly, this matter shall be remanded for the purpose of allowing the agency to make a decision based on the existing record.
>
> For the foregoing reasons, we reverse the decision of the district court and remand this case to the agency for a decision based on the totality of the existing record.

JBS Swift & Co. Id. p. 281

Further review was sought of the Court of Appeals decision, but was denied by the Iowa Supreme Court on October 13, 2015. (Ex. 6, p. 46)

On January 8, 2016 the commissioner issued a remand decision. (Ex. 6) The commissioner framed the issue to be considered on remand as,

> Pursuant to the Iowa Court of Appeals' directive this agency is charged on remand with again reviewing the existing evidentiary record, considering the evidence the Court of Appeals determined was overlooked, and entering a new decision based on the totality of the existing record. (Iowa Court of Appeals' Decision, p. 10)

(Ex. 6, p. 46)

The commissioner found that the work injury of May 2010 did not make claimant unemployable or permanently and totally disabled. The commissioner found claimant sustained an 80 percent loss of future earning capacity as a result of his May 7, 2010

work injury. (Ex. 6, pp. 53, 54, 55) The commissioner's remand decision was appealed and affirmed by the Iowa District Court on July 14, 2016[2].

On January 19, 2015 defendants stopped paying claimant permanent partial disability benefits. (Def. Brief, p. 3) A payment log shows that the last payment was issued to claimant on January 16, 2015 for the week ending January 18, 2015. (Ex. 8, p. 63)

The record shows that on January 19, 2015 claimant's counsel emailed defendants' counsel at 9:33 a.m. In this email claimant's counsel inquired whether claimant's benefits would continue pending a [settlement] demand being made. (Ex. 7, p. 62) Defendants' counsel responded at 2:26 p.m. and wrote:

> I expect the employer and carrier to cease any additional weekly PPD payments. I am attaching a payment log evidencing some 200 weeks of PPD that has been paid which should satisfy any good faith requirements pursuant to the ratings, especially considering the reversal of the award by the Iowa Court of Appeals.

(Ex. 7, p. 62) At 3:16 p.m. claimant's counsel emailed defendants' counsel objecting to the termination of benefits and inquiring if an Auxier notice was being sent or if benefits were being sent or if benefits were stopping immediately. (Ex. 7, p. 60) Defendants' response to that email at 3:20 p.m. said, "Let me know if your client is working now." (Ex. 7, p. 60) There is no evidence that claimant was working.

On January 30, 2015 the claimant filed a petition for penalty benefits. On February 3, 2015 defendants provided notice that benefits were being canceled. The notice stated,

> Your client will soon be receiving a check representative of six weeks and three days of PPD benefits, representative of payment through March 4, 2015. The permanency benefits will be paid in a lump sum for the period of January 19 through March 4. There will be no further weekly benefits volunteered at this time. Please consider this as notice pursuant to Auxier.

(Ex. 7, p. 59) Claimant's benefits were being reinstated as of January 19, 2015 to be terminated as of March 4, 2015.

I find that defendants terminated permanent partial disability benefits January 19, 2015 and did not provide legally sufficient notice until February 3, 2015.

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[2] Official notice was taken of the decision. See Iowa Rule of Civil Procedure 1.442(6) and Iowa Code17A.14(4).

After the commissioner issued his Remand Decision on January 8, 2016 defendants paid claimant with a check dated January 20, 2016 for $22,399.70. (Ex. 9, p. 69) This payment represented the period of March 5, 2015 through January 19, 2016. (Def. Brief, p. 4) At the time of the payment on January 20, 2016 the defendants paid 252 weeks of benefits, 200 when terminated on January 19, 2015. Counting the Auxier benefits and the payment on January 20, 2016 the defendants paid an additional 52 weeks. This is slightly more than a payment of a 50 percent industrial disability—50.4%.

REASONING AND CONCLUSIONS OF LAW

The issue is whether claimant is entitled to additional penalty benefits.

The relevant portions of section 86.13 provide:

> 2. If an employer or insurance carrier fails to file the notice required by this section, the failure stops the running of the time periods in section 85.26 as of the date of the first payment. If commenced, the payments shall be terminated only when the employee has returned to work, or upon thirty days' notice stating the reason for the termination and advising the employee of the right to file a claim with the workers' compensation commissioner.
>
> . . . .
>
> 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.
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> 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.

Once the employee demonstrates a denial or termination of benefits, as is the case here, it is the defendants' responsibility to prove it had a reasonable or probable cause or excuse for the denial and/or termination of benefits. Further, that denial must be contemporaneously communicated to the claimant. See Pettengill v. American Blue Ribbon Holdings, LLC, 875 N.W. 2d 740, 747 (Iowa Ct. App. 2014).

The Iowa Supreme Court has also required pre-termination notice under the due process clause in the case of Auxier v. Woodward State Hosp.-Sch. 266 N.W.2d 139 (Iowa 1978).

The court held,

We hold, on the basis of fundamental fairness, due process demands that, prior to termination of workers compensation benefits, except where the claimant has demonstrated recovery by returning to work, he or she is entitled to a notice which, as a minimum, requires the following:

[1] the contemplated termination,

[2] that the termination of benefits was to occur at a specified time not less than 30 days after notice,

[3] the reason or reasons for the termination,

[4] that the recipient had the opportunity to submit any evidence or documents disputing or contradicting the reasons given for termination, and, if such evidence or documents are submitted, to be advised whether termination is still contemplated,

[5] that the recipient had the right to petition for review-reopening under § 86.34.

Auxier, Id pp. 142, 143

Defendants did not provide an Auxier notice to the claimant until February 3, 2015. No 30-day notice was provided under Iowa Code 86.13(2) until February 3, 2015. No explanation was given as to why an Auxier and/or 86.13(2) 30-day notice was not given has been presented by the defendants. The evidence shows defendants knew that they need to provide notice but did not do so until a petition for penalty benefits was filed. Considering the clear violation of the law, the maximum penalty is appropriate. I find that claimant is entitled to a 50 percent penalty for improper cut-off of benefits for the 15 days of January 19, 2015 through February 2, 2015. Claimant's weekly rate is $430.27. His daily amount is $61.467 [$430.27 ÷ 7 = $61.467]. I find defendants shall pay a penalty $461.00 [61.467 x 15 = $922.00 | $922.00 x 50% = $461.00].

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).

Penalty is not imposed for delayed interest payments. Davidson v. Bruce, 593 N.W.2d 833, 840 (Iowa 1999).

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).

Claimant has shown a termination of benefits. It is then the defendants' obligation to have reasonable cause or excuse not to pay benefits and to timely convey the information to the claimant. As I held above, defendants initially failed to provide timely notice.

At the time defendants decided to stop paying benefits, the best decision defendants received from this agency, the October 10, 2012 decision, was an 80 percent award. That was twice what it paid when it stopped benefits on January 19, 2015. What is important to note is the decision of the deputy commissioner of October 10, 2012 did consider the defendants' vocational testimony, that claimant had moved and the availability of work with Swift. (Ex. 1 pp. 10, 11) The decision considered the factors cited by the Court of Appeals. That award was 80 percent. Defendants perhaps in good faith could have argued that claimant was 70 or 65 percent, but the stopping of payments at 40 percent was unreasonable given the agency decisions made in this case. Defendants did not have a reasonable or probable cause or excuse for stopping payment at 40 percent, when the agency had awarded 80 percent when it considered the evidence that the Court of Appeals relied upon to remand the case.

The record was clear that claimant had substantial impairments and that while Swift had accommodated him; his ability to work in his labor market was substantially compromised. Claimant clearly had more than a 40 percent industrial loss. Certainly he had more than a 50.4 percent industrial disability during the time defendants failed to pay benefits. The failure to pay benefits from March 5, 2015 through January 21, 2016 was unreasonable.

When considering an award of penalty benefits, the commissioner considers "the length of the delay, the number of delays, and 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. Robbennolt, 555 N.W.2d at 237.

The delayed payments were $22,399.70. It appears some of that payment was interest. (Def. Brief. p. 4) Based upon Exhibit 9 it appears that $19,792.42 was indemnity benefits. In considering the length of delay and information available to employer, the conduct of the employer and need to prevent future occurrences, I find that a penalty of approximately 50 percent is appropriate. I award claimant a penalty of $9,850.00 for the late payments of benefits from March 5, 2015 through January 19, 2016.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay a penalty of four hundred sixty-one and 00/100 dollars ($461.00) for failing to provide thirty (30) day notice of termination.

Defendants shall pay a penalty of nine thousand eight hundred fifty and 00/100 dollars ($9,850.00) for failure to pay benefits from March 5, 2015 through January 19, 2016.

Defendants shall pay the award in a lump sum.

Each party is responsible for their own costs.

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

Signed and filed this 26th day of October, 2016.

JAMES F. ELLIOTT
DEPUTY WORKERS'
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JFE/sam

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.