BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ALAN BOWERS, Claimant, vs. PREMIUM TRANSPORTATION STAFFING, INC., Employer, and DALLAS NATIONAL INSURANCE CO., Insurance Carrier, Defendants.	FILED MAY 1 2018 WORKERS' COMPENSATION File No. 5040646 APPEAL DECISION Head Note No: 3300

Defendants Premium Transportation Staffing, Inc., employer, and its insurer, Dallas National Insurance Co., appeal from an arbitration decision on the issue of penalty only, filed on July 15, 2016. Claimant Alan Bowers responds to the appeal. The matter was submitted on the exhibits, existing record, and by briefs, without hearing, to the deputy workers' compensation commissioner on June 1, 2016.

The deputy commissioner found, "[t]he argument that an employer has no responsibility to pay a penalty has no merit," and ordered defendants to pay claimant $50,000.00 in penalty benefits. On appeal, defendant-employer asserts the deputy commissioner erred in imposing the penalty because Iowa Code section 515B.2 prohibits claimant from recovering penalty benefits from defendant-employer, defendant- employer provided defendant insurer with sufficient funds to pay claimant's claim, and the appeal of the agency decision filed by defendants was in good faith. Claimant rejects defendant-employer's assertions and contends claimant's claim is outside the coverage of the policy, and defendant-employer has not proven a reasonable or probable cause or excuse for the denial or delay exists.

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, I modify the deputy commissioner's decision with the following additional analysis:

FINDINGS OF FACT

Claimant sustained a work injury while working for defendant-employer on October 17, 2011. (Exhibit 1, page 2) Claimant received medical treatment and later filed a petition in arbitration seeking workers' compensation benefits. The matter proceeded to hearing before a deputy workers' compensation commissioner June 11, 2013. The deputy commissioner issued a decision on November 5, 2013, finding the work injury "caused claimant's current low back and coccyx pain, and resulted in permanent impairment," and awarded claimant permanent total disability benefits at the rate of $607.86 per week, commencing August 27, 2012, and during the time claimant remains permanently and totally disabled. (Ex. 1, pp. 7, 9, 16)

During the June 11, 2013 hearing, claimant sought an award of penalty benefits. (Ex. 1, p. 16) The deputy commissioner rejected claimant's request, as follows:

> Claimant seeks penalty benefits for defendants failing to pay the proper rate. Although claimant's rate has shown to be the correct one, defendants were entitled to assert the per diem should not be included in the calculation of rate. That argument did not prevail, but it was not unreasonable to make that argument. Claimant's rate was fairly debatable and penalty benefits will not be awarded for underpayment of rate.
>
> Claimant also seeks penalty benefits for defendants failing to pay an appropriate amount of industrial disability benefits while this case was pending.
>
> Claimant was found to be at MMI on August 27, 2012, by Dr. Sedlacek. Defendants paid claimant only ten weeks of permanency benefits, or about five percent industrial disability, through November 3, 2012. (Ex. 9, p. 14)
>
> Defendants relied on the opinion of Dr. Broghammer, who found claimant not to have any permanent disability. Again, although Dr. Sedlacek's and Dr. Mathew's opinions have been adopted in this decision over that of Dr. Broghammer, nevertheless defendants were entitled to rely on Dr. Broghammer's opinion. Penalty benefits are not appropriate.

(Ex. 1, p. 16)

Defendants appealed to the workers' compensation commissioner. (Ex. 1, p. 18) The commissioner affirmed the deputy commissioner's award of permanent total disability benefits in June 2014. (Ex. 1, pp. 18-21)

Defendant-insurer experienced financial difficulties and filed a bankruptcy petition. Claimant's counsel sent a letter to counsel for defendants on June 23, 2014, noting the receiver in the bankruptcy matter involving defendant-insurer had made a determination that workers' compensation indemnity and medical payments should

continue to be made during the rehabilitation period and until further notice and asking defendants to pay the accrued benefits outlined in the arbitration decision and affirmed on appeal by the workers' compensation commissioner. (Ex. 4, p. 1) Claimant's counsel noted, "[f]ailure to pay the accrued amount will result not only in interest being due on the entire judgment, but will necessitate my filing a penalty claim. Please contact me directly to discuss this situation." (Ex. 4, p. 1) Defendants' counsel responded the same date, stating her clients had decided to move forward with a petition for judicial review, noting her clients had determined a good faith basis exists for appeal and would not make any voluntary payments. (Ex. 4, p. 2)

Claimant's counsel sent a reply to defendants' counsel, noting defendants had not paid any benefits or compensation to claimant since November 3, 2012, which placed a hardship on claimant, and defendants' counsel was making the same argument that had been rejected twice in front of the agency. (Ex. 4, pp. 3-4) Claimant's counsel again requested defendants pay the accrued benefits or he would proceed with a claim for penalty benefits and/or bad faith. (Ex. 4, p. 4)

Defendants filed a petition for judicial review. (Ex. 1, p. 26) Defendants requested a stay of proceedings pursuant to a State of Delaware court of chancery order for rehabilitation of defendant-insurer's entity in the Iowa District Court for Polk County in August 2014. (Ex. 1, p. 22) The court denied the request for stay. (Ex. 1, pp. 22-23)

After reviewing the denial of motion for stay, claimant's counsel sent a letter to defendants' counsel on August 4, 2014, asking whether defendants would consider paying the accrued benefits owed to claimant. (Ex. 4, p. 5)

On September 25, 2014, the general counsel for the Iowa Insurance Guaranty Association sent a letter to claimant's counsel and a copy to defendants' counsel, noting based upon information provided by the liquidator of defendant insurer:

> . . . it does appear that Premium Transportation Staffing's workers' compensation insurance policy with Freestone Insurance Company (f/k/a Dallas National Insurance Company) had a $1,000,000.00 per claim deductible. As a consequence, the provisions of the Iowa Insurance Guaranty Association will not be triggered.
>
> Chapter 515B of the Code of Iowa governs the rights and responsibilities of the Iowa Insurance Guaranty Association. In the event of the insolvency of a licensed insurer, the Iowa Insurance Guaranty Association will pay "covered claims" as that term is defined in Iowa Code Section 515B.2. That provision provides in relevant part as follows:
>
> > *"Covered claim" does not include any amount as follows: . . .(h) that constitutes a claim under a policy issued by an insolvent insurer with a deductible or*

> *self-insured retention of two hundred thousand dollars or more.*
>
> Iowa Code § 515b.2(4)(b)(1).

Inasmuch as the applicable workers' compensation policy incorporated a $1,000,000 deductible, the provisions of the Iowa Insurance Guaranty Association will not be triggered with respect to [claimant's] claim.

(Exs. 5, pp. 1-2; E, pp. 1-2)

Claimant moved for judgment, asking the district court to enter judgment on the workers' compensation commissioner's decision in the amount of $63,798.01, plus interest and costs. (Ex. 1, p. 24) On February 11, 2015, the district court affirmed the decision of the workers' compensation commissioner. (Ex. 1, p. 37) The district court granted the motion for judgment, plus interest and costs on March 16, 2015. (Ex. 1, p. 39) Defendants appealed to the Iowa Court of Appeals. (Ex. 1, p. 42)

Claimant's counsel sent defendants' counsel a letter on April 2, 2015, asking defendants to pay the accrued benefits to claimant. (Ex. 4, p. 6) Claimant's counsel notified defendants' counsel if she did not pay benefits or at least post a supersedeas bond, he would file a claim for penalty benefits and a motion with the court of appeals requiring defendants to post a supersedeas bond. (Ex. 4, pp. 6-7) Defendants' counsel sent a response letter on April 3, 2015, stating defendants would not agree to pay indemnity benefits during the appeal process, and reported defendants were preparing the documentation for posting a bond. (Exs. 4, pp. 8-9; F, pp. 3-4) Defendants did not post a bond. (Ex. 4, p. 12)

The court of appeals affirmed the district court on October 14, 2015, finding:

> On appeal, the employer and its insurer raise the same arguments to us as proffered to the district court. We have carefully reviewed the record, the briefs of the parties, and the district court's thorough and well-reasoned ruling. The district court's ruling identifies and considers all the issued presented. In applying the above standard-of-review precepts, and in giving the due deference we are statutorily obligated to afford the commissioner's findings of fact, we approve of the reasons and conclusions in the district court's ruling. Further discussion of the issues would be of no value. *See* Iowa Ct. R. 21.26(1)(b), (d), and (e). Accordingly, we affirm the district court's decision affirming the Iowa Workers' Compensation Commissioner's decision.

(Ex. 1, p. 46) That day Claimant's counsel sent an electronic message to defendants' counsel, asking if defendants would pay the accrued benefits given the court of appeals' decision. (Ex. 4, p. 13)

Defendants did not pay the $63,798.01 judgment, plus interest and costs awarded by the district court and affirmed by the court of appeals. (Ex. 1, p. 48) The district court granted a second motion for judgment for $35,863.74 in accrued benefits from October 14, 2014 to December 5, 2015, plus interest. (Ex. 1, pp. 51-54) The total amount of the accrued unpaid benefits was $99,661.75.

When defendants refused to voluntarily pay benefits, claimant had to pursue the judgment in Ohio. Claimant filed a notice of filing of foreign judgment in Ohio, demanding judgment against defendant employer, in the amount of $63,798.01 with post-judgment interest and costs, in December 2015. (Ex. 1, p. 48)

On February 15, 2016, counsel for the Iowa Insurance Guaranty Association sent an electronic message to claimant's counsel notifying him he had called defendants' counsel, as follows:

> I called her back and left her a voicemail message.
>
> I read the case she sent over and it really did not apply to this situation at all. It was a case dealing with an alleged failure to exhaust other insurance. Although we have that provision in our statute, it has nothing to do with Mr. Bowers' claim or the reason for the denial of coverage under Chapter 515B.
>
> I invited her to call me to discuss but I have not heard anything further at this point.

(Ex. 5, p. 3)

Defendant employer issued a check to claimant on February 24, 2016, in the amount of $63,798.01 noted to be "FINAL JUDGMENT-16." (Ex. 3, p. 1) There was no evidence presented to the deputy workers' compensation commissioner in 2016 that the Defendant employer paid the judgment of $35,863.74 in benefits, plus interest. Nor is there any evidence defendants have paid interest and costs mandated by the district court.

Exhibit A is a copy of the policy in effect at the time of the work injury, covering defendant-employer in multiple states. The indemnity and medical deductible amount for workers' compensation cases in Iowa is listed as $1,000,000. (Ex. A, p. 34) The policy contains a benefits deductible endorsement, which provides, in part, "Part One (Workers Compensation Insurance) applies only to benefits in excess of the deductible amount shown in the Schedule below" and the deductible applies separately to each claim for bodily injury by accident or disease. (Ex. A, p. 34)

The deputy commissioner issued an arbitration decision on July 15, 2016, with the following analysis:

The argument that an employer has no responsibility to pay a penalty has no merit. Particularly in this case where the very large deductible was not met and the benefits were always the employer's money. Defendants choose to lose guaranty fund protection with a large deductible. The defendants' conduct of delaying payment 5 months from the Court of Appeals decision is enough to merit a large penalty. There is no need to regurgitate the facts found above. A penalty in the range of 50 percent is not only proper here, it is necessary. Defendants shall pay a penalty of $50,000.00 which is 50 percent rounded down to the nearest thousand dollar mark.

CONCLUSIONS OF LAW

I. Iowa Code Chapter 515B Generally

Iowa Code chapter 515B governs the Iowa insurance guaranty association ("Association") in Iowa. All insurance companies who transact business in Iowa are required to be members of the Association. Iowa Code § 515B.3.

The purpose of Iowa Code chapter 515 is to avoid financial losses by insured and claimants caused by an insurer's insolvency. Kroblin Refrigerated Xpress, Inc. v. Iowa Ins. Guar. Ass'n, 461 N.W.2d 175, 179 (Iowa 1990) (citing Osborne v. Edison, 211 N.W.2d 696, 696-97 (Iowa 1973)). "When a member of the Association becomes insolvent, the Association is supposed to pay claims against the insolvent member by assessing other member insurers the amounts necessary for payments." Iowa Contractors Workers' Comp. Group v. Iowa Ins. Guar. Ass'n, 437 N.W.2d 909, 913 (Iowa 1989)

Iowa Code section 515B.2 defines a "covered claim" as:

> . . . an unpaid claim, including one for unearned premiums, which arises out of and is within the coverage and is subject to the applicable limits of an insurance policy to which this chapter applies issued by an insurer, if such insurer becomes an insolvent insurer after July 1, 1970, and one of the following conditions exists:
>
> (1) The claimant or insured is a resident of this state at the time of the insured event. Other than an individual, the residence of the claimant or insured is the state in which its principal place of business is located.
>
> (2) The claim is a first party claim by an insured for damage to property permanently located in this state.

The statute provides the term "covered claim" does not include any amount "[t]hat includes the portion of a claim that is within the insured's deductible or self-insured retention," or "[t]hat is a fine, penalty, interest, or punitive or exemplary damages," or "[t]hat constitutes a claim under a policy issued by an insolvent insurer

with a deductible or self-insured retention of two hundred thousand dollars or more." Id. § 515B.2(4)*b*(1)(b), (h).

Defendants assert Iowa Code section 515B.2 expressly prohibits claimant from recovering penalty benefits against an insured-employer of an insolvent insurance company. Claimant rejects the assertion. Defendants' argument raises an issue of statutory interpretation.

II. Principals of Statutory Interpretation

Iowa Code chapter 4 governs the construction of statutes, and sets forth principles of statutory construction and interpretation. The goal of statutory interpretation is "to determine and effectuate the legislature's intent." Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 769 (Iowa 2016) (citing United Fire & Cas. Co. v. St. Paul Fire Marine Ins. Co, 677 N.W.2d 755, 759 (Iowa 2004)). Workers' compensation statutes are interpreted liberally in favor of the injured worker. Denison Mun. Util. v. Iowa Workers' Comp. Comm'r, 857 N.W.2d 230, 237 (Iowa 2014); Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 206 (Iowa 2010); Jacobson Transp. Co. v. Harris, 778 N.W.2d 192, 198 (Iowa 2010); Stone Container Corp. v. Castle, 657 N.W.2d 485, 489 (Iowa 2003); Danker v. Wilimek, 577 N.W.2d 634, 636 (Iowa 1998)

When interpreting a statute, the court begins with the wording of the statute. Myria Holdings, Inc. v. Iowa Dep't of Rev., 892 N.W.2d 343, 349 (Iowa 2017). When determining legislative intent, the court looks at the express language of the statute, and "not what the legislature might have said." Id. (citing Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 337 (Iowa 2008)). If the express language is ambiguous, then the court looks to the legislative intent behind the statute. Sanford v. Fillenwarth, 863 N.W.2d 286, 289 (Iowa 2015) (citing Kay-Decker v. Iowa State Bd. of Tax Review, 857 N.W.2d 216, 223 (Iowa 2014)). A statute is ambiguous when reasonable persons could disagree as to the statute's meaning. Ramirez-Trujillo, 878 N.W.2d at 769 (citing Holstein Elect. v. Brefogle, 756 N.W.2d 812, 815 (Iowa 2008)). An ambiguity may arise when the meaning of particular words is uncertain or when considering the statute's provisions in context. Id.

III. Application of Iowa Code Chapter 515B

The accrued benefits at issue in this case total $99,661.75. Under the workers' compensation policy in effect at the time of claimant's work injury, defendant employer agreed to a $1,000,000 deductible for each workers' compensation claim. (Ex. A, p. 34)

Defendant-employer has not argued Iowa Code chapter 515B is ambiguous. Looking to the plain language of the statute, an insured's deductible is not a covered claim under Iowa Code section 515B.2b(1)(b). Nor is a claim under a policy issued by an insolvent insurer with a deductible of $200,000 or more a covered claim under Iowa Code § 515B.2b(1)(h). The statute is not ambiguous. Given the benefits at issue do

not fall within a covered claim under the statute, there is no coverage afforded under Iowa Code chapter 515B to defendant-employer and, thus, Iowa Code chapter 515B does not afford defendant employer relief from penalty claims.

IV. Penalty

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)(a). 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 eleventh 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 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. Robbennolt, 555 N.W.2d at 237.

The Iowa Court of Appeals issued a decision on October 14, 2015, finding:

> On appeal, the employer and its insurer raise the same arguments to us as proffered to the district court. We have carefully reviewed the record, the briefs of the parties, and the district court's thorough and well-reasoned ruling. The district court's ruling identifies and considers all the issued presented. In applying the above standard-of-review precepts, and in giving the due deference we are statutorily obligated to afford the commissioner's findings of fact, we approve of the reasons and conclusions in the district court's ruling. Further discussion of the issues would be of no value. *See* Iowa Ct. R. 21.26(1)(b), (d), and (e). Accordingly, we affirm the district court's decision affirming the Iowa Workers' Compensation Commissioner's decision.

(Ex. 1, p. 46)

After receiving the decision, defendants did not pay the accrued benefits totaling $63,798.01. Claimant was forced to transfer the judgment to Ohio to collect the accrued benefits. Defendant employer did not issue a check to claimant for $63,798.01 until February 24, 2016. (Ex. 3, p. 1) Defendant employer noted the amount was the "FINAL JUDGMENT-16." (Ex. 3, p. 1) There was no evidence presented to the deputy workers' compensation commissioner in 2016 that the Defendant employer paid the judgment of $35,863.74 in accrued benefits. Upon de novo review I find defendants did not have a reasonable excuse for refusing to pay the accrued benefits after receiving the decision of the Iowa Court of Appeals. The claim was not fairly debatable. Claimant's counsel contacted defendants' counsel throughout the appeal process and following the appeal process, requesting defendants pay the accrued benefits. The Association's counsel also spoke with defendants' counsel and informed defendants' counsel the basis for the denial of coverage under Iowa Code chapter 515B was flawed and the case law defendants were relying on did not apply to the situation "at all." (Ex. 5, p. 3) The evidence establishes defendants knew or should have known defendants' basis for refusing to pay the accrued benefits was unreasonable.

Defendants contend defendant-employer should not be assessed penalty benefits because defendant-employer provided defendant-insurer with sufficient funds to pay claimant's claim. Defendants have cited to no authority supporting this argument. Iowa Code chapters 85 and 86 do not afford defendants any relief based on this argument. The argument has no basis in Iowa law.

Defendants' conduct in this case warrants the maximum penalty to deter defendants and other employers and insurance carriers from engaging in similar conduct in the future. The statute's plain language affords a maximum penalty of fifty percent, or $49,830.87.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on July 15, 2016, is modified.

Defendants shall pay claimant forty-nine thousand eight hundred thirty and 87/100 dollars ($49,830.87) in penalty benefits.

Costs on appeal are taxed to the defendants.

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

Signed and filed on this 1st day of May, 2018.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

Copies To:

Matthew D. Dake
Attorney at Law
PO Box 849
Cedar Rapids, IA 52406-0849
mdake@wertzlaw.com

Sasha Monthei
Attorney at Law
PO Box 36
Cedar Rapids, IA 52406
smonthei@scheldruplaw.com