

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

YUSUF SHARIFF,

Claimant,

vs.

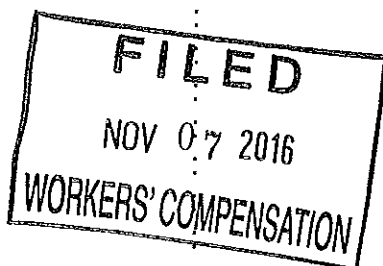
KRAFT FOODS, INC.,

Employer,

and

INDEMNITY INS., CO., N.A.,

Insurance Carrier,  
Defendants.



File No. 5037146

ARBITRATION

DECISION

Head Note No.: 4000.2

STATEMENT OF THE CASE

Yusuf Shariff, claimant, filed a petition in arbitration seeking post-hearing penalty benefits from defendants, Kraft Foods, Inc., the employer and Indemnity Insurance Company, the insurance carrier. The hearing was held on June 23, 2016. The parties submitted post-hearing briefs and the matter was considered fully submitted on July 29, 2016.

No testimony was provided at hearing. Exhibits were offered and received into evidence, consisting of claimant's exhibits 1 through 13 and defendants' exhibits A through L. In addition, the undersigned takes administrative notice of the underlying administrative file at the request of the parties.

At the time of the hearing, the parties completed a hearing report, which contains numerous stipulations. The parties' stipulations are accepted by the undersigned without additional factual findings or conclusions of law concerning the same.

ISSUES

The parties have submitted the following issue for determination:

1. Whether the claimant is entitled to post-hearing penalty benefits under Iowa Code section 86.13.

## FINDINGS OF FACT

The undersigned, having considered all of the evidence hereby finds:

Claimant was involved in a stipulated work injury while employed at Kraft Foods, Inc., on February 23, 2011. Claimant was working as a unit safety director and was transporting a co-worker for medical treatment in a company vehicle when it was rear-ended while sitting at a red light. (Arb. July 31, 2013, page 4) Claimant filed a petition seeking workers' compensation benefits, which proceeded to hearing on February 13, 2012. On July 31, 2013, the deputy issued an arbitration decision, finding that claimant failed to meet his burden of proof concerning causation of his ongoing complaints and was not entitled to temporary or permanent disability benefits as a result of the work injury. (Arb. July 31, 2013, p. 34) Claimant took nothing from the proceeding. (Arb. July 31, 2013, p. 36)

In the arbitration decision, the deputy found Rick Garrels, M.D., an authorized provider, to be credible. (Arb. July 31, 2013, p. 32) The deputy also found that the "claimant provided knowledgeable testimony, delivered in a clear manner," and his "physical presentation was consistent with his reported ongoing complaints. However, upon review of the remainder of the evidentiary record," the deputy "is given some pause" as to the weight to be given to "claimant's testimony and subjective reports of pain." (Arb. July 31, 2013, pp. 32-33) The deputy then concluded that claimant's testimony was not credible. (Arb. July 31, 2013, p. 33)

Claimant appealed the arbitration decision. On April 30, 2014, Commissioner Godfrey reversed the deputy's decision, ordering a running ward of temporary total disability. (Ex. 8, p. 44)

In the appeal decision, the commissioner stated that the deputy did not determine the claimant was not credible, based upon her personal observations of his testimony or presentation at hearing, but rather on a review of the medical records. (Ex. 8, p. 38) The commissioner, upon a review of the medical records, did not adopt the deputy's finding concerning credibility of the claimant. (Ex. 8, p. 38-39) Also, the commissioner found "the views and testimony of Dr. Garrels are not found to be objective and are therefore not found persuasive on appeal." (Ex. 8, p. 39) "Likewise, Dr. Hussain's deference to Dr. Garrels and his view that claimant reached a figurative baseline for the same condition that preceded the injury are not persuasive." (Id.) The commissioner concluded that, in addition to other grounds for rejecting Dr. Garrels opinions and Dr. Hussain's opinion concerning causation, that "[n]either Dr. Garrels nor Dr. Hussain has explained satisfactorily how they arrived at the opinion that this ongoing and chronic pain somehow was transformed into a non-work related condition shortly after Dr. Hussain recommended surgery for what he termed as an exacerbation of claimant's prior shoulder condition." (Ex. 8, p. 39) In addition, the commissioner noted:

[F]our other board certified physicians, Drs. Field, Milas, Boulden, and Epp, sufficiently agree that the motor vehicle accident caused claimant's current pain. These physicians simply disagree as to [the] course of future treatment options. Even Dr. Hussain continues to believe the pain warrants surgery, he merely defers to Dr. Garrels as to the cause of the ongoing pain.

(Ex. 8, p. 39)

The defendants argued in their post-hearing penalty brief, that "[t]he crux of defendants' petition for judicial review and subsequent appeal involved this interplay of conflicting determinations between the Deputy and Commissioner and its effect on substantial evidence review." (Def. Brief, p. 14)

Defendants sought judicial review of the commissioner's decision. (Ex. C) While the judicial review was pending, defendants' filed an application for leave to present additional evidence, which was denied by the district court. The additional evidence that defendants wanted to introduce is contained in defendants' exhibit A in the present matter. Defendants' exhibit A is two Davenport Police videos depicting the same incident from two different police car dash cameras, which are dated April 17, 2012, (about two months after the arbitration hearing, and about two years before the commissioner's appeal decision was issued) which shows claimant was involved in an altercation with law enforcement officers. Defendants argue that the physical actions of the claimant shown on the videos form a reasonable basis for defendants to conclude that claimant had recovered from his injuries and was no longer temporarily totally disabled. (Def. Brief, p. 16-17) The undersigned's review of both videos reveals that claimant was involved in a single car, motor vehicle accident. The claimant exited from the passenger side of the mini-van that he was driving and is instructed by law enforcement to stop and put his hands up. The claimant can be heard yelling "don't shoot" several times. The officer gives additional instruction and responds, "I'm not going to shoot you." (Ex. A) The claimant is shown on his knees in the street with his hands above his head and an officer standing behind him. The officer places his hands on the claimant, and the claimant stands up, without being instructed to do so. The officer attempts to place claimant in a headlock, which claimant slipped out of. Claimant then turned and faced the officer and a brief struggle ensued in which it appears that claimant takes a swing at the officer before he is tackled by two officers and taken to the ground. The time from which claimant began to stand from a kneeling position, until he is on the ground with officers on top of him is about 9 seconds. At some point during the struggle, an officer can be heard saying, "he has a knife," which is later described as the knife of one of the officers. An officer reports sustaining a cut to his hand during the incident. It is not clear from the video when this occurred. A knife is not specifically identifiable by the undersigned in the video. Many officers arrived at the scene and claimant remained on the ground, not moving until he was removed from the camera's view on a back board with his head immobilized.

Defendants argue that the videos provide an:

[O]bjectively reasonable basis to deny or delay benefits **pending investigation**, and gave Defendants the right to delay or terminate payment of benefits after the decision was made not to file any further appeals. Therefore, the timeframe for the relevance of these videos is subsequent to March 15, 2016, the date through which a lump sum check was issued in compliance with the Commissioner's appeal decision once affirmed by the Court of Appeals.

(Def. Brief, p. 17) (emphasis added)

There was no evidence presented as to any investigation that occurred as a result of, or in conjunction with the police videos. There was no evidence that the above described videos were shown to any physician or medical provider. There are no medical opinions in the record concerning whether or not the video supports defendants' position that it is reasonable evidence from which temporary total benefits should be denied. The video represents a brief, likely adrenaline flooded, moment in time. There is no medical opinion in the record as to whether or not the video can be relied upon as anything more than that, let alone a general statement of claimant's physical healing or abilities. Further, defendants state that the relevance of the videos are subsequent to defendants issuance of payment on March 15, 2016, and apparently, in the eyes of defendants, not relevant to any investigation that could have occurred, but did not following the receipt of the videos and/or after the commissioner's appeal decision ordering temporary disability benefits.

Rather, defendants argued that their primary basis for their denial had "nothing to do with these videos" and remained the question of the deputy's credibility findings compared to the commissioner's findings and the impact of the differing conclusions on the substantial evidence review standard. (Def. Brief p. 16)

On January 20, 2015, the district court issued its ruling on defendants' petition for judicial review, which affirmed the commissioner's award of running temporary total disability benefits. (Ex. D)

On February 17, 2015, defendants filed their notice of appeal of the ruling on judicial review. (Ex. E)

On February 26, 2015, defendants filed a supersedeas bond with the Polk County District Court. (Ex. F)

On April 2, 2015, the claimant filed his post-hearing penalty petition.

On April 13, 2015, the defendant filed a motion to dismiss the petition for post-hearing penalty benefits. Defendants argued that the case was on appeal to the Iowa Supreme Court, and as a result there was no final ruling, which made the petition for

post-hearing penalty benefits premature. Defendants also argued that because defendants won the case at the arbitration level, as a matter of law, claimant cannot prove defendants unreasonably delayed or denied benefits. Claimant resisted the motion to dismiss stating that the commissioner's decision represents final agency action and that this case does not represent a unique question of law, but rather a decision resting in a determination of facts applied to existing law, which is an appeal review standard of substantial evidence, which provides a narrow path of escape for defendants. On April 21, 2015, the deputy issued a ruling denying defendants' motion to dismiss. The deputy noted that a post-hearing penalty claim is "a well-established potential remedy a claimant may seek if defendants unreasonably delay or deny benefits after this agency awards benefits," citing Simonson v. Snap-On Tools Corp., 588 N.W.2d 430 (Iowa 1999). (Ruling on Def. Motion to Dismiss Penalty Petition, April 21, 2015, p. 2). The undersigned agrees.

On April 28, 2015, the Polk County District Court issued a Notice of Stay of Execution of Judgment. (Ex. G)

The appeal was heard by the Iowa Court of Appeals, which issued a decision on February 24, 2016, affirming the judicial review decision and the commissioner's decision to grant temporary disability benefits. (Ex. H)

The deadline to file for further review with the Iowa Supreme Court was March 15, 2016. Defendants did not file for further review. (Def Brief, p. 2)

On March 15, 2016, defendants mailed payment of temporary total disability benefits in the amount of \$155,883.60 to claimant's counsel. (Ex. B, p. 1) Defendants' exhibit shows the service date for this payment as March 9, 2016, presumably the date through which payment was made. This understanding is bolstered by the fact that the next temporary benefit payment paid by defendants began with the period commencing March 10, 2016. (Ex. 7)

On April 4, 2016 and again on April 12, 2016, claimant's counsel sent letters to defense counsel inquiring as to the status of the ongoing weekly temporary benefits ordered by the commissioner, which were no longer subject to appeal, but had not yet been paid, i.e. the weekly benefits accruing after March 9, 2016. (Ex. 3 and 6)

On May 4, 2016, defendants issued payment for temporary total disability benefits for the period of March 10, 2016 through May 4, 2016. (Ex. 7)

Defendants do not argue that any portion of the temporary total disability award as ordered by the commissioner was paid prior to March 15, 2016.

The stipulated rate of weekly workers' compensation benefits in this case is \$504.17. (Hearing Report, p.1)

I find the claimant has established a delay in payment of temporary total disability benefits. Defendants do not argue this point, but rather argue that the delay was reasonable. (Def. Brief, p. 6)

Claimant argues that defendants failed to introduce any evidence at hearing that defendants evaluated or re-evaluated the decision to deny temporary total disability benefits after the commissioner's appeal decision was issued on April 30, 2014. (Cl. Brief, p. 6-7)

Claimant argues that defendants have an obligation to re-evaluate the decision to deny payment of temporary total disability benefits while the matter is pending on judicial review or further appeal. (Cl. Brief, p. 9)

Claimant further argues that defendants failed to contemporaneously alert claimant of the basis for the continued denial of payment after the commissioner's appeal decision. (Cl. Brief, p. 16)

Claimant also argues that defendants unreasonably delayed payment of weekly benefits for the period of March 10, 2016 through May 4, 2016. (Cl. Brief, p. 18)

Defendants argue that they "had ample reasons to deny benefits at all stages of the proceedings." (Def. Brief, p. 6) In support thereof, defendants note that the arbitration decision reveals the differing "expert opinions and factual issues underpinning Defendants' denial of benefits." (Def. Brief, p. 6) They argue that these factual disputes were determined in defendants favor in the arbitration decision, and did not evaporate because the commissioner reversed the deputy's decision on appeal. Defendants then boldly state that:

[F]or purposes of this penalty claim, the analysis stops right there. There can be no penalty benefits where the Defendants had an objectively reasonable basis to deny the claim. All that matters is there was evidence that existed that justified the denial of the claim. Considering Defendants won at the arbitration level, this conclusion is unavoidable.

(Def. Brief, p. 6) This is essentially the same argument put forward by defendants in their motion to dismiss claimant's penalty petition, which was denied. In the motion to dismiss and in the present matter, defendants argued that they should be able to rely on the fact that the employer won at the arbitration hearing and this alone creates a reasonable basis for denial. Defendants argued in their motion that, "Defendants won this case at the arbitration level. Therefore, and as a matter of law, Claimant cannot prove Defendants unreasonably denied or delayed any benefits he seeks." (Def. Motion to Dismiss Penalty Petition, p. 2) However, this is not an accurate statement of the law. For example, in an attempt to undercut the decision in Delire v. Key City Transport, File No. 5038022, which is cited favorably by claimants, defendants cite decisions such as Clements v. Warren Packaging, File No. 1168855 (App. July 19, 2002) for the contention that an arbitration decision, once it is appealed, becomes a nullity and has

no further force or effect, and it is the workers' compensation commissioner that decides the case de novo. This clearly cuts against defendants position, that they should be allowed to stand on findings in an arbitration decision, which by their own argument, became a nullity and ineffectual upon appeal.

Defendants next argue that pursuing an appeal is not automatically unreasonable simply because the review standard to be applied is substantial evidence. Defendants argue similar to their previous position, that neither the commissioner's decision nor the review standard of substantial evidence eliminated the facts presented at arbitration and defendants reliance on them. Defendants bind their argument to the notion that the complaint about their behavior in this case, is the mere pursuance of judicial review and further appeal. That is not the case. What defendants neglect to consider is whether or not there was a reasonable investigation that followed the commissioner's decision. In other words, did the defendants reevaluate their denial of benefits following the new information received in the form of the commissioner's award of benefits.

Defendants then argue that this case is different from an ordinary substantial evidence review appeal because the commissioner, in his de novo review of the deputy's decision, made conclusions concerning witness credibility that were contrary to the credibility determinations made by the deputy. The defendants argue that "the crux of Defendants' petition for judicial review and subsequent appeal involved this interplay of conflicting credibility determinations between the Deputy and Commissioner and its effect on substantial evidence review." (Def. Brief, p. 14) However, substantial evidence remained the appropriate standard of review for findings of fact, including credibility determinations.

Defendants also argue that claimant's assertion at hearing that he was not provided notice of the basis for the continued denial of benefits is incorrect and the "reasons for Defendants' continued denial were made clear from the evidence admitted in the arbitration hearing, the arbitration decision itself, and the briefs and oral arguments submitted at every stage of these proceedings." (Def. Brief, p. 16) The undersigned is not convinced that defending a case at hearing and responding to and/or pursuing appeals meets the requirements of Iowa Code section 86.13(4)(c)(3) in which the defendant is required to contemporaneously convey the basis of the denial at the time of the denial.

The police video is the only evidence presented by the defendants which could be understood to relate to an investigation, although it is clear from the evidence presented that no particular investigation occurred following receipt of the video.

### CONCLUSIONS OF LAW

The conclusion of temporary total disability occurs when "the employee has returned to work or is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first." Iowa Code section 85.33(1)

Iowa Code section 86.13(4) provides that:

(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, of chapter 85, 84A, 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 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.

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. Weekly compensation payments are due at the end of the compensation week. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229, 235 (Iowa 1996).

It is not disputed that temporary disability benefits as ordered by the commissioner were delayed until payment was issued on March 15, 2016. On that date, payment was issued for the period up to and including March 9, 2016. (Ex. B, p.1) It is also not disputed that defendants then delayed additional weekly payments thereafter until payment was issued on May 4, 2016 for the period of March 10, 2016 through May 4, 2016. Therefore, I conclude that claimant has shown the delay in

temporary benefits has occurred. As a result, the burden shifts to the defendant to show a reasonable or probable excuse for the delay in payment.

It 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).

In this case, the defendants' denial of liability at the time of the arbitration hearing was fairly debatable and remained so after the deputy issued the arbitration decision until the commissioner issued his appeal decision on April 30, 2014. Therefore, the claimant is not entitled to penalty benefits during the period of time of the inter-agency appeal.

However, after the appeal decision was issued by the commissioner, following his de novo review, the defendants were obligated to reevaluate the denial. A denial of benefits may be reasonable when the initial decision is made, but lack a reasonable basis when subsequent information becomes available. Squealer Feeds v. Pickering, 530 N.W.2d 678, 683 (Iowa 1995). A defendant has an ongoing obligation to reevaluate a claim when new information becomes available. "Further, each time period (prehearing and posthearing) requires scrutiny." Weitz Co. v. Johnson, 779 N.W.2d 494, \*6 (Table) 2010 WL 200042 (Iowa Ct. App.), citing Squealer Feeds v. Pickering, 530 N.W.2d 678, 683 (Iowa 1995). Pursuing an appeal does not, by itself, create a safe harbor for defendants to avoid their obligation to re-evaluate their decision to refuse payment. Simonson v. Snap-on Tools Corp., No 00-199, 2002 WL 31113546, \*4 (Iowa Ct. App., Sep. 25, 2002).

Defendants argue that the credibility determinations made by the deputy and the commissioner were contradictory, and that this has an effect on the substantial evidence review standard that allows the defendant to stand on its original denial throughout the pendency of judicial review and further appeal. (Def. Brief, p. 11) This argument is not convincing. The Iowa Supreme Court has considered the issue of witness credibility and its effect on the substantial review standard and has stated in Arndt v. City of Le Claire, 728 N.W.2d 389, 394-395 (Iowa 2007):

Making a determination as to whether evidence "trumps" other evidence or whether one piece of evidence is "qualitatively weaker" than another piece of evidence is not an assessment for the district court or the court of appeals to make when it conducts a substantial evidence review of an agency decision. See Tim O'Neill Chevrolet, Inc. v. Forristall, 551 N.W.2d 611, 614 (Iowa 1996) (stating under a substantial evidence

review it is not the task of the reviewing court "to weigh the evidence or the credibility of the witnesses"). It is the commissioner's duty as the trier of fact to determine the credibility of the witnesses, weigh the evidence, and decide the facts in issue. See Dunlavey, 526 N.W.2d at 853 (stating in deciding whether to accept the opinion of an expert witness "[t]he commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence, together with the other disclosed facts and circumstances, and then to accept or reject the opinion"). The reviewing court only determines whether substantial evidence supports a finding "*according to those witnesses whom the [commissioner] believed.*" Tim O'Neill Chevrolet, Inc., 551 N.W.2d at 614 (emphasis added).

Arndt v. City of LeClaire, 728 N.W.2d 389, 394-395 (Iowa 2007).

The commissioner issued his appeal decision on April 30, 2014, granting a running award of temporary benefits. (Ex. 8, p. 44-45) The undersigned is not persuaded by defendants argument that the commissioner's credibility determination made the substantial evidence review standard different than would otherwise be applied for other factual determinations. The Iowa Court of Appeals has recently stated that "[a] case reversing final agency action on the ground the agency's action is unsupported by substantial evidence or is irrational, illogical, or wholly unjustifiable is the Bigfoot of the legal community – an urban legend, rumored to exist but never confirmed." McComas-Lacina Const. v. Drake, No. 15-0922, 2016 WL 2744948 (Iowa App. Ct. May 11, 2016).

The defendants have failed to show that any investigation or reevaluation occurred after the commissioner's appeal decision. Although defendants came into possession of a police video, they did not present any evidence that an investigation related to the video occurred. As discussed above, there was no evidence that any medical opinion was sought or obtained to support their present argument that the video showed claimant was no longer in a healing period. Certainly, the video did not show claimant "had returned to work," or that he was "medically capable of returning to employment substantially similar to the employment in which employee was engaged at the time of the injury," which is required to bring about an end to temporary total disability benefits. Iowa Code section 85.33(1) Also, defendants do not make an attempt to articulate that any specific movements of the claimant in the video showed that he had recovered from his injuries. In short, the evidence shows that there was no reasonable investigation or reevaluation conducted by defendants after the commissioner's appeal decision was issued.

On April 28, 2015, the Polk County Clerk of Court issued a Notice of Stay. (Ex. G) On May 4, 2015, the deputy that heard defendant's motion to dismiss the pending post-hearing penalty petition and application for rehearing thereon, notes that "[c]ertainly, the fact that defendants currently have a stay of the proceedings may be a

valid argument upon which to defend a post-hearing penalty claim.” (Ruling on Def.’s Application for Rehearing on Motion to Dismiss, p. 1) The undersigned agrees.

The Notice of Stay issued by the Polk County Clerk of Court on April 28, 2015, states as follows:

YOU ARE HEREBY NOTIFIED that in this case a notice of appeal has been given and sufficient bond has been posted pursuant to Iowa Rules of Appellate Procedure 6.601(1) and (4). As a result, execution of judgment is stayed in this matter until ordered otherwise by the court.

(Ex. G, p.1) Iowa Rule of Appellate Procedure, 6.601(1) sets forth the requirements of the bond, which was filed by defendants on February 26, 2015. (Ex. F, p.1) Iowa Rule of Appellate Procedure 6.601(4) provides that an appeal does not affect a judgement or order, but “the clerk shall issue a written order requiring the appellee and all others to stay proceedings under it or such part of it as has been appealed from, when bond is filed and approved.”

The undersigned determines that for the period from April 30, 2014, the date of the commissioner’s appeal decision, through April 27, 2015, the day before the stay was issued by the district court, benefits were delayed and defendants have failed to carry their burden of proving a reasonable basis for the delay. This is a period of 51.857 weeks. Fifty-one point eight five seven (51.857) weeks multiplied by the stipulated rate of \$504.17, produces a total of \$26,144.74.

On April 28, 2015, the “appellee and all others” were required to stay proceedings concerning the judicial review decision. (Iowa R. App. P. 6.601(4)) At that point, claimant was unable to enforce the district court judgment and collect payment of the temporary disability benefits. Defendant was further ordered to halt proceedings under the judgment pending the outcome of the appeal. This stay effectively stopped action on the matter, including the claimant’s ability to collect and defendants’ obligation to pay. The undersigned notes that there is no evidence in the record before the undersigned that the stay was appealed by claimant. It seems illogical to the undersigned that defendants should now be penalized for not paying an obligation, which the district court declared need not be paid at that time based on the stay.

The deadline to file an application for further review of the Iowa Court of Appeals decision was March 15, 2016. (Ex. H; Def. Brief p. 2) The defendants let that date expire and chose instead to pay the benefits ordered by the commissioner. (Def. Brief, p. 2) The Iowa Supreme Court entered a procedendo on March 24, 2016. (Ex. I) The stay issued by the district court was in effect until “otherwise ordered by the court.” (Ex. G, p. 1) The procedendo on March 24, 2016, terminated the stay. Therefore, the undersigned concludes that for the period of April 28, 2015, the date the stay was issued, until March 23, 2016, the day before the procedendo was issued, that defendants had a reasonable basis to avoid payment.

Defendants made payment of benefits by a check issued March 15, 2016, after they decided not to seek further review to the Iowa Supreme Court, but prior to the issuance of the procedendo on March 24, 2016. (Ex. B, p. 1) The next payment issued by defendants was on May 4, 2016, which was received by claimant's counsel on May 9, 2016. (Ex. 7) Defendants offered no additional argument for the delay in payment from March 24, 2016 through May 4, 2016. The undersigned determines for the same reasons and on the same grounds discussed above, that this period of time from March 24, 2016 through May 4, 2016, was delayed and defendants have failed to carry their burden of showing that the delay was reasonable. This additional period of delay is six weeks. Six weeks multiplied by the stipulated rate of \$504.17, produces a total of \$3,025.02

If the employer fails to show reasonable cause or excuse for the delay or denial, the commission must 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.

Based upon the factors identified in Robbennolt for determining the amount of penalty the undersigned concludes that penalty in the range of 40 percent is appropriate. This takes into consideration, not only the significant length of the delay, defendants' failure to reevaluate, but also the lack of any evidence concerning the employer/insurance carrier's past record of penalties. The total amount of benefits unreasonably delayed is \$29,169.76. \$26,144.74 (April 30, 2014 - April 27, 2015) plus \$3,025.02 (March 24, 2016 through May 4, 2016) = \$29,169.76. Approximately 40 percent of the total amount is \$11,500.00.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant the sum of eleven thousand five hundred and no/100 dollars (\$11,500.00) as a penalty for their unreasonable delay in payment of weekly benefits, representing a penalty in the range of forty (40) percent.

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 7<sup>th</sup> day of November, 2016.



TOBY J. GORDON  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

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TJG/kjw

**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.