

IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

**KAS INVESTMENT CO. INC. dba  
SWANSON GLASS, INC., and SFM  
MUTUAL INSURANCE COMPANY,**

Petitioners,

**STEVEN R. ALMENDINGER,**

Respondent.

Case No. **CVCV058953**

**ORDER ON JUDICIAL REVIEW**

This is a petition for judicial review from a final decision of the Iowa Workers' Compensation Commission. An unreported hearing was held in this matter on January 31, 2020. Petitioners KAS Investment Co., Inc. d/b/a Swanson Glass Inc., and SFM Mutual Insurance Company (collectively, "KAS") appeared through attorney Tyler Smith. Respondent Steven R. Almendinger ("Almendinger") appeared through attorney Thomas Wertz. After hearing the arguments of counsel, reviewing the court file, the administrative record, and being otherwise advised in the premises, the court enters the following ruling:

**I. PROCEDURAL POSTURE AND FACTUAL BACKGROUND.**

The facts relating to this petition for judicial review, including the nature and extent of the petitioner's injury and course of treatment, are undisputed. On October 20, 2014, Almendinger injured his left knee. (Tr. 32-33). The parties stipulated that the October 20, 2014, injury arose out of and in the course of his employment with KAS. Almendinger underwent three knee surgeries because of his knee injury. (Id.) In January 2016, Almendinger injured his left shoulder. (Tr. 33-34). Again, the parties stipulated that Almendinger's left shoulder injury arose out of and in the course of his employment with

KAS. (Id.) The parties further stipulated that Almendinger suffered a whole-body injury resulting in an industrial impairment. (Hearing Report).

Almendinger filed an arbitration petition, and his case came before the Deputy Workers' Compensation Commissioner on September 20, 2017, for Arbitration Hearing. The Deputy Commissioner ruled that Almendinger suffered a 40% industrial disability because of the work-related injuries. (Arb. Dec.). The Deputy Commissioner further found that Almendinger was entitled to two hundred (200) weeks of permanent partial disability payments at a weekly workers' compensation rate of \$902.78. (Arb. Dec.). Both KAS and Almendinger appealed the Deputy Commissioner's decision.

On August 23, 2019, Deputy Commissioner William Grell<sup>1</sup> issued an Appeal Decision. Deputy Commissioner Grell upheld the Arbitration Decision as it related to the amount of industrial disability and the weekly workers' compensation rate that applied. (App. Dec.) The Deputy Commissioner further found that pursuant to Iowa Code Section 86.13, KAS had underpaid benefits to Almendinger and ordered penalty benefits to be paid. (App. Dec.).

KAS appeals both the calculation of the weekly workers' compensation rate and the order of penalty benefits. KAS asks this Court to reverse and remand this matter to the agency to recalculate the weekly workers' compensation rate and remove the order of penalty benefits, giving KAS credit for any overpayment of benefits to date.

Additional facts will be discussed below.

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<sup>1</sup> / Deputy Commissioner Grell handled the cross-appeals pursuant to a June 11, 2019, Order of Delegation.

## II. ANALYSIS AND CONCLUSIONS OF LAW.

### A. Standard.

Chapter 17A of the Iowa Code governs judicial review of administrative agency action. The district court acts in an appellate capacity to correct errors of law on the part of the agency. Meyer v. IBP, Inc., 710 N.W.2d 213, 219 (Iowa 2006). Relief is appropriate where “substantial rights of a party have been prejudiced because the agency action [...] is unsupported by substantial evidence, is unreasonable, arbitrary, or capricious, or is affected by other error of law.” Dico, Inc. v. Iowa Emp’t Appeal Bd., 576 N.W.2d 352, 354 (Iowa 1998). The standard of review on appeal depends on whether the basis for the petition involves an issue of finding of fact, interpretation of law, or application of law to fact. Meyer, 710 N.W.2d at 218-19.

When a party claims that an agency erred in statutory interpretation, the court looks “to see if the legislature has clearly vested the authority to interpret the law with the agency.” City of Davenport v. Newcomb, 820 N.W.2d 882, 887 (Iowa Ct. App. 2012)(citing Xenia Rural Water Dist. v. Vegors, 786 N.W.2d 250, 252-53 (Iowa 2010)). If the agency has been vested with the authority, the decision will be reversed only if “irrational, illogical, or wholly unjustifiable. Id. If the legislature has not vested the agency with the authority to interpret the statute, the court accords “no deference to the interpretation of the commissioner and [is] free to substitute [its] own judgment for the agency’s interpretation if [it] conclude[s] the agency made an error of law.” Newcomb, 820 N.W.2d at 887 (internal citations omitted). The agency is not vested with the authority to interpret Iowa Code §§ 85.13 or 85.36. Burton v. Hilltop Care Ctr., 813 N.W.2d 250, 261 (Iowa 2012); Pettengill v. Am. Blue Ribbon Holdings, LLC, 875 N.W.2d 740, 745 (Iowa App. 2015), as amended

(Feb. 16, 2016). With regard to issues of statutory interpretation, appropriate review is therefore for correction of errors at law. Burton, 813 N.W.2d at 261; Pettengill, 875 N.W.2d at 745.

To the extent the Court reviews applications of law to fact, Iowa Code section 17A.19(10)(m) provides for reversal of decisions that are irrational, illogical, or wholly unjustifiable.

## **B. Analysis**

KAS argues that Deputy Commissioner Grell erred in finding Almendinger's weekly workers' compensation rate was \$902.78 and in ordering penalty benefits be paid. Almendinger resists any modification to the Appeal Decision.

### **1. Weekly Workers' Compensation Rate.**

The fighting issue between the parties is Deputy Commissioner Grell's finding regarding Almendinger's weekly workers' compensation rate. When an employee sustains a workplace injury, Iowa Code Chapter 85 mandates "[t]he basis of compensation shall be the weekly earnings of the injured employee at the time of the injury." Iowa Code § 85.36 (2019). Section 85.36 also sets forth how an employee's weekly earnings are calculated. It provides in relevant part:

In the case of an employee who is paid on a daily or hourly basis...the weekly earnings shall be computed by dividing by thirteen the earnings, including shift differential pay but not including overtime or premium pay, of the employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury.

Iowa Code § 85.36(6) (2019). “Weekly earnings means gross salary, wages, or earnings of an employee to which such employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured, as regularly required by the employee's employer for the work or employment for which the employee was employed, computed or determined...” Iowa Code § 85.36 (2019). “Weekly earnings” do not include overtime or premium pay. Iowa Code §85.36(6) (2019).

Almendinger began working for KAS in 2013. (Tr. 69). At that time, Almendinger earned \$23.00 per hour. (Tr. 75). Almendinger received raises, and during the time period relevant to this lawsuit, generally earned \$28.00 per hour for his work. (Cl. Ex. 4). Between March and September 2014, however, Almendinger worked a job in Madison, Wisconsin. (Tr. 80). The prevailing wage for this job was \$47.45 per hour. (Tr. 77). This wage consisted of a \$36.23 per hour base wage, and an additional \$11.22 for benefits, as required by the terms of the Wisconsin project. (Tr. 76-77). Because KAS provided some benefits to Almendinger, they were able to reduce his hourly rate from \$47.45 to \$46.90. (Tr. 77-78).

KAS asserts that Almendinger’s wages should be calculated at the \$28.00 per hour rate he typically earned while working for KAS. In the alternative, KAS argues that Almendinger’s wages should be calculated at \$36.23 per hour for the eight weeks he worked on the Wisconsin job, and \$28.00 per hour for the remaining weeks. Deputy Commissioner Christensen and Deputy Commissioner Grell found Almendinger’s wages were properly calculated using \$46.90 per hour for the period Almendinger worked on the Wisconsin project. (Arb. Dec., p. 11). KAS argues that this calculation method improperly includes premium pay under Iowa Code §85.36.

The court finds the Deputy Commissioners' decisions as to Almendinger's weekly benefit rate were not based on an erroneous interpretation and/or application of Iowa Code section 85.36. KAS was required to pay Almendinger \$46.90 per hour due to a municipal, state or federal requirement for payment of this prevailing wage. (Tr. 76-78). KAS would not have paid Almendinger this wage absent the Wisconsin prevailing wage requirement. Almendinger received 100% of the prevailing wage, less taxes, as his pay during the time he worked on the Wisconsin project. The Deputy Commissioner's reference to Smith v. Cedar Valley Asphalt Co., File No. 879898 (April 15, 1991), was appropriate.

The court further finds KAS's reliance on Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360 (Iowa 2016) to be misplaced. The Evenson court determined that an employer's matching contributions to an employee's 401k plan are not properly included in weekly earnings. In so holding, the court noted that an employer's matching contribution to a 401k was not dependent upon the number of hours an employee worked, but instead on the amount the employee contributes. Evenson, 881 N.W.2d at 368. The court further explained that employer's matching contributions are made in addition to employee's wages and that they are not subject to payroll taxes. Id. An employer's matching 401k contribution is unlike the prevailing wage at issue in this case. Unlike the 401k contribution, the amount of the prevailing wage earned is dependent upon the number of hours Almendinger worked. The prevailing wage is paid as wages, is immediately available for Almendinger to spend and is subject to payroll tax. Accordingly, the court finds that the prevailing wage is not comparable to the 401k contributions and is properly considered as gross wages.

## 2. Penalty Benefits.

Iowa Code §86.13(4) governs the assessment of penalty benefits. It provides in relevant part:

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.

Iowa Code § 86.13(4)(a) (2019). A denial of payment under §86.13 includes underpayment of workers' compensation benefits. Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229, 237 (Iowa 1996) (holding, "we conclude section 86.13 is applicable when payment of compensation is not timely made or when the full amount of compensation is not paid.")

"When the text of a statute is plain and its meaning clear, the court should not search for a meaning beyond the express terms of the statute or resort to rules of construction. Based on the plain language of section 86.13...an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse." Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 260 (Iowa 1996) (internal citations omitted). "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. "An employer's bare assertion that a claim is 'fairly debatable' does not make it so...[T]he 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, 505 (Iowa 1996), as amended on denial of reh’g (Jan. 23, 1997), and abrogated on other grounds by Keystone Nursing Care Ctr. v. Craddock, 705 N.W.2d 299 (Iowa 2005).

In this case, KAS paid temporary benefits at a weekly rate of \$700.98. (Cl. Exs. 3; 4). KAS arrived at this rate by taking Almendinger’s earnings for the previous twelve months and dividing the total by 52 weeks. (Cl. Ex. 3). Both parties concede this calculation was inconsistent with Iowa Code §85.36(6). There is no dispute that Almendinger was paid on an hourly basis and that his benefits were to be calculated consistent with Iowa Code section 85.36. (Tr. 76-78). In August 2016, Almendinger’s counsel disputed the weekly benefit rate with KAS. Upon demand, KAS began paying Almendinger \$902.78 as a weekly benefit rate. (Cl. Ex. 4).

Iowa Code section 86.13 requires the assessment of penalty benefits if the underpayment was made without reasonable cause or excuse. Here, Deputy Commissioner Grell found all benefits from the date of Almendinger’s injury through August 2016 were underpaid without reasonable cause or excuse. KAS asserts this finding was in error. In arguing it had a reasonable cause or excuse for the underpayment, KAS points to the dispute over Almendinger’s appropriate weekly workers’ compensation rate.

The court, however, finds no error in Deputy Commissioner Grell’s findings. Although, KAS now asserts that its weekly rate calculation excluded what it believed to be premium pay, or payment akin to fringe benefits, KAS did not introduce any evidence in the arbitration hearing to support this assertion. KAS also offered no evidence to show



they had conducted a reasonable investigation of the appropriate rate. At the hearing, KAS, through Kevin Swanson, provided testimony regarding the prevailing wage for the Wisconsin project. (Tr. 75-79). Mr. Swanson testified that Almendinger's base rate of pay for the Wisconsin project was \$36.23; the remaining amount of the prevailing pay was payment in lieu of fringe benefits. (Tr. 75-79). If KAS had relied on this calculation when determining Almendinger's weekly benefit rate, and KAS had contemporaneously communicated it to him, KAS may have had a "fairly debatable" claim that would exempt it from an award of penalty benefits. There is no evidence, however, that KAS investigated the prevailing pay issue when making the initial determination of Almendinger's weekly benefit rate. Instead, in its discovery responses, KAS indicated the only document that it relied upon to determine Almendinger's weekly rate was the twelve-month wage calculation. (Cl. Ex. 3). This calculation did not include the \$36.23 per hour for the Wisconsin project; it included only the \$28.00/\$25.00 per hour KAS regularly paid Almendinger. (Id.).

Because KAS failed to meet its burden to show reasonable cause or excuse, the statute mandates that penalty benefits be applied to each underpayment. To find that KAS can avoid assessment of the penalty by retroactively investigating and creating a "fairly debatable" issue, would, in effect, allow employers to unreasonably underpay benefits without consequence as long as the investigation was completed by the time of the hearing.<sup>2</sup> This is inconsistent with the purpose of the statute.

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<sup>2</sup> / The court also finds no error in Deputy Commissioner Grell's determination of the amount of penalty benefits. Deputy Commissioner Grell considered the appropriate factors and appropriately applied the facts to those factors. His application of facts to the law were not illogical, irrational or wholly unjustifiable.

**Order**

IT IS HEREBY ORDERED that the decision of the Worker's Compensation Commission is AFFIRMED. Costs are assessed to the petitioner.



State of Iowa Courts

**Type:** OTHER ORDER

**Case Number** CVCV058953  
**Case Title** KAS INVESTMENT CO AND SFM INSURANCE V STEVEN R ALMENDINGER

So Ordered

A handwritten signature in black ink, appearing to read 'Heather Lauber', written in a cursive style.

Heather Lauber, District Judge,  
Fifth Judicial District of Iowa