

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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MICHAEL GAMBLETON,

Claimant,

vs.

BUILDERS SAND & CEMENT,

Employer,

and

ZURICH AMERICAN INSURANCE CO.

Insurance Carrier,  
Defendants.

File No. 5056204

ARBITRATION

DECISION

Head Note No.: 4000

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**STATEMENT OF THE CASE**

Claimant, Michael Gambleton, has filed a petition for arbitration seeking penalty benefits against Builders Sand & Cement, employer, and Zurich Insurance Company, insurer carrier, both as defendants.

In accordance with agency scheduling procedures and pursuant to the Order of the Commissioner in the matter of the Coronavirus/COVID-19 Impact on Hearings, the hearing was held on January 14, 2021, via Court Call. The case was considered fully submitted on February 11, 2021, upon the simultaneous filing of briefs.

The record consists of Claimant's Exhibits 1-15 and Defendants Exhibits A-D. No testimony was offered.

**ISSUES**

Whether claimant is entitled to penalty benefits under Iowa Code section 86.13 and, if so, how much;

The assessment of costs.

**STIPULATIONS**

The only issues in this case are whether claimant is entitled to penalty benefits and the assessment of costs. The parties agree claimant was awarded benefits of 400 weeks in the amount of \$273.12 per week on October 16, 2017.

**FINDINGS OF FACT**

On October 16, 2017, the undersigned ordered the defendants to pay weekly benefits in the amount of \$273.12 per week commencing on June 30, 2016 for a total of 400 weeks. Claimant was also awarded 5 percent of the temporary benefits paid late in the form of penalty benefits.

Claimant seeks additional penalty benefits against defendants for the unreasonable delay of weekly benefits following the December 16, 2017, order. This dispute arises over whether the defendants violated Iowa Code section 86.13 for the delay of weekly benefits from 2018 through 2020 without having a reasonable excuse or basis. There are roughly 15 weeks of alleged delays.

On April 10, 2018, counsel for the claimant wrote to the defendants' counsel requesting payment of the 5 percent penalty benefits. (Ex 2:16) On April 20, 2018, counsel for the claimant wrote again to the defendants reporting that the last benefit check received in the office was dated April 5, 2018 for the weeks of March 30, 2018 through April 5, 2018. (Ex 3:17) Defendants issued a check on April 26, 2018, for the period of April 6, 2018 through April 26, 2018. (Ex. A:12)

**Thus the weeks of March 20, 2018 through April 19, 2018, were paid late. The week of April 6, 2018, to April 26, 2018, was paid timely.**

On May 14, 2018, counsel for the claimant wrote to defendants reporting that the claimant had not received a benefit check for the previous two weeks. The last check that was received was dated April 26, 2018 for the weeks of April 6, 2018 through April 26, 2018. (Ex 4:19) Defendants issued a check on May 15, 2018, for the period of April 27, 2018, to May 17, 2018. (Ex. A:12)

**Thus the weeks of April 27, 2018, to May 10, 2018, were paid late. The week of May 11, 2018, to May 17, 2018, was paid timely.**

On June 5, 2018, claimant's counsel wrote to defendants reporting failure to receive a permanent partial disability check for the last three weeks. The last benefit check received was dated May 7, 2018 for the weeks of April 27, 2018 through May 17, 2018. (Ex 5:21) Defendants issued a check on June 6, 2018, for the period of May 18, 2018 through June 7, 2018. (Ex. A:12)

**Thus the weeks of May 18, 2018, through May 31, 2018, were paid late. The week of June 1, 2018, to June 7, 2018, was paid timely.**

On June 8, 2018, counsel for defendant replied to the June 5, 2018, letter via email that she had reached out to the defendant insurer and that a response would be obtained as soon as possible to remedy the situation. (Ex C:21)

On December 13, 2018, the claimant wrote to defendants reporting non-receipt of a benefit check. The last check received was November 16, 2018 for the period of November 16, 2018, through November 22, 2018. (Ex 6:22) On December 13, 2018, counsel for the defendants wrote to counsel for the claimant with an explanation for the late payment of weekly benefits. (Ex 7:25). Defendant insurer uses an auto-pay system that requires periodic renewal. Id. The adjuster missed the removal request and weekly benefits were suspended from the auto-pay system. Id. The defendants requested that the counsel for claimant inform the defendants if the payments were not made so that non payment could be rectified. (Ex 7: 25) Defendants issued a check on December 14, 2018, for the period of November 23, 2018, to December 13, 2018. (Ex A:13)

**Thus the weeks of November 23, 2018 through December 13, 2018, were paid late.**

On February 20, 2020, counsel for claimant wrote to defendants reporting the claimant has not received a permanency check since February 6, 2020. The last check was February 3, 2020 for the period of January 24, 2020 to January 30, 2020. (Ex. 8:26)

On February 20, 2020, defendant's counsel replied stating that they were troubled that claimant's counsel waited three weeks before contacting the defendants to inform them of the late payment. (Ex C:28) Counsel for defendants checked with the insurer and determined no lapse in benefits occurred. Payment was made but the checks had not been cashed for January 31, 2020, to February 6, 2020, and February 7, 2020, to February 13, 2020. (Ex C:28; D:40) The check for the period of January 31, 2020, to February 6, 2020, had been erroneously sent to the claimant's address. (D:40)

On February 24, 2020, counsel for claimant wrote again to defendants with a clarification that the claimant did receive a permanent partial disability check on Saturday, February 15, 2020, at his home address. (Ex 9:28) Claimant's counsel reminded defendants that the checks should be sent to the office of the claimant's counsel and not to the claimant's home. (Ex 9:28) Defendant insurer had the wrong home address as well. (Ex 9:28) Claimant's counsel acknowledged receipt of the late permanent partial disability check for claimant on February 20, 2020, for the weeks of February 7, 2020, through February 13, 2020. (Ex. 9:28)

These weeks were paid four days later on February 10, 2020, and February 17, 2020, respectively.

**Thus the weeks of January 31, 2020, to February 13, 2020, were paid late with each week being paid four days late.**

On June 5, 2020, counsel for claimant sent an email informing defendants that claimant had not received his permanent partial disability check that week. (JE 10:29) The last check claimant received was issued May 21, 2020, for the period of May 15, 2020, to May 21, 2020. (Ex 10:29) Defendants issued a check on June 5, 2020, for the period of May 22, 2020, to June 4, 2020. (Ex A:13)

**Thus the weeks of May 15, 2020, to June 4, 2020, were paid late. The payment for May 29, 2020, to June 4, 2020, was one day late.**

On October 8, 2020, claimant's counsel sent an email informing defendants claimant had not received a permanent partial disability check since September 28, 2020. (Ex. 11:31) The last check received was dated September 24, 2020, for the period of September 18, 2020, to September 24, 2020. (Ex 11:31)

On October 9, 2020, counsel for defendants sent an email that the late checks have been issued on October 5 and October 7. The first check was delayed due to the adjuster's unexpected absence from the office due to illness and the second was mailed timely. (Ex 12:33; Ex D:42) Counsel for the defendant offered an automatic deposit which would alleviate delays associated with the postal services. (Ex 12:33) The check for the period of September 25, 2020, to October 2, 2020, was issued on October 5, 2020, and the check for October 3, 2020, to October 9, 2020, was issued on October 7, 2020. (Ex A:14)

**Thus the weeks of September 25, 2020, to October 2, 2020, was paid 3 days late.**

A total of 15 weeks were paid late.

### CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3).

Section 86.13(4) states:

4. a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.

b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:

(1) The employee has demonstrated a denial, delay in payment, or termination of benefits.

(2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

c. In order to be considered a reasonable or probable cause or excuse under paragraph "b", an excuse shall satisfy all of the following criteria:

(1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.

(2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.

(3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits. (emphasis added).

According to the findings of fact, 15 weeks of benefit payments over the last three years were paid late. Some were weeks late and some payments were only days late. Each time the claimant reached out to the defendants to notify them of the late payment, makeup payments were issued promptly. The question is whether the delays were unreasonable.

Some of the excuses provided by the defendants were a change in counsel, illness of an adjuster, failure to prompt recurrent payment in the insurer's system, and mailing issues. Taken alone, these do seem reasonable excuses, however, the injured worker relies on weekly benefits like they would rely on a weekly paycheck. In the brief, defendants attempt to shift the burden of timeliness on the claimant arguing that it was the claimant at fault for not contacting defendants right away if a payment went unpaid but rather waiting one or two weeks before reaching out to defendants.

It is not the claimant's responsibility to ensure timeliness of benefit payments. That is the duty and obligation of the defendants. While system failures are understandable as no system is perfect and humans are fallible, the repeated failure to make timely payments is not reasonable. The claimant should not have to be required to contact his lawyer every week to ensure the mandated benefit payment is made in a timely fashion.

Further, the defendants were assessed a penalty in the underlying arbitration decision for untimely benefits which shows a small pattern of carelessness. However, given that the defendants did quickly respond to each request for payment and the delays were small, sometimes only a matter of days, the maximum penalty benefit is not warranted. Instead a 10 percent penalty is ordered.

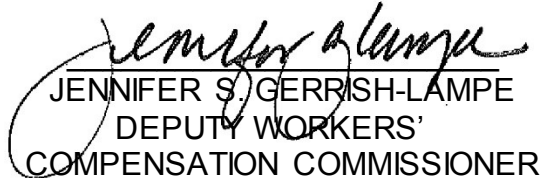
ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay ten (10) percent penalty benefit on the fifteen (15) weeks of late paid benefits.

Defendants shall be taxed costs as shown in Claimant's Exhibit 15.

Signed and filed this 16<sup>th</sup> day of June, 2021.

  
JENNIFER S. GERRISH-LAMPE  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

The parties have been served, as follows:

William Bribriesco (via WCES)

Valerie Foote (via WCES)

**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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.