IN THE IOWA DISTRICT COURT FOR POLK COUNTY

DAVID LOWELL EVENSON, **Petitioner,** **v.** **WINNEBAGO INDUSTRIES, INC., and SENTRY INSURANCE COMPANY,** **Respondents.**	**Case No. CVCV053692** **RULING ON JUDICIAL REVIEW**

Petitioner David Evenson (claimant) filed a petition for judicial review from a decision of the Iowa Workers' Compensation Commissioner (the commissioner). He claims that the commissioner erred when denying penalty benefits following a remand from a decision of the Iowa Supreme Court. Respondents Winnebago Industries, Inc. and Sentry Insurance Company (jointly referred to as "the employer") resisted. The parties filed briefs as required by the court's scheduling order. The matter came on for hearing on August 18, 2018. Mark Soldat represented claimant. Kate Johnson represented the employer.

BACKGROUND FACTS AND PROCEEDINGS

Proceedings before the commissioner: Claimant made a workers' compensation claim against his employer, Winnebago, following a workplace injury to his left elbow. The case proceeded to a contested case hearing on July 6, 2012. The deputy industrial commissioner (deputy) issued a decision finding that claimant was entitled to: 1) fifty weeks of permanent partial disability (PPD) beginning on November 30, 2011; 2) healing benefits from April 14, 2011 through June 14, 2011; and 3) temporary partial disability (TPD) for several time periods.[1] Claimant had also sought healing period benefits from September 3, 2010 through October 4, 2010. The deputy found claimant was entitled to such benefits beginning on September 7

[1] The deputy made other findings that are not pertinent to this appeal.

through September 19, 2010, but he was paid by the employer during this period so no further award was granted. (August 21, 2012, Arbitration decision).

The deputy awarded penalty benefits pursuant to Iowa Code section 86.13 as to some claims. The penalty provision allows the commissioner to impose a penalty of up to fifty percent if an employer denies or delays the payment of benefits "without reasonable or probable cause[.]" The deputy found that claimant was timely paid for the first healing period (September of 2010), but not the second (April-June of 2011). The deputy also found that claimant was not timely paid for all TPD benefits. He imposed a penalty of twenty-five percent for the April-June of 2011 healing period and TPD benefits he found were paid late. The deputy did not assess a penalty as to PPD benefits. (August 21, 2012, Arbitration decision).

Appellate proceedings: The deputy's decision was affirmed by the commissioner and the district court, and appeal was taken to the Iowa Supreme Court. *Evenson v. Winnebago Industries, Inc.*, 881 N.W.2d 360 (Iowa 2016). The court reversed the agency decision in two respects. As to the first healing period from September 7, 2010 to September 19, 2010, the court found that substantial evidence did not support the commissioner's decision as to the start date. *Id.* at 371. It remanded the issue to the commissioner to determine if the healing period began on September 3, 2010, as argued by claimant. The court also found that PPD benefits should have commenced at the termination of the first healing period (that is, on September 20, 2010), as opposed to the end of the second healing period (that is, on June 15, 2011). *Id.* at 374.

The court also considered the agency's decision to impose a penalty. The court found that the penalty amount was properly determined by the agency. *Id.* at 375. The court then remanded the issue to the agency to recalculate the penalty based on its decision as to healing period and PPD benefits owed. *Id.* Specifically, the court stated:

> because we remand for a recalculation of the healing period and PPD benefits owed, we also remand for a recalculation of the amount of the penalty and interest owed based on the new healing period and PPD dates.

Id. The court did not make a specific finding that the employer had denied or delayed benefits without reasonable or probable cause.

The court concluded its decision by providing the following directions to the commissioner (via remand to the district court):

> We remand this case to the district court with the following instructions: . . . to remand the case to the commissioner for a redetermination of the date when healing period benefits commenced in September 2010, for a redetermination of the date when healing period benefits ended and PPD benefits commenced, and for a recalculation of penalty and interest benefits based on the above dates.

Id. at 375.

Justice Mansfield wrote a dissenting opinion as to the issue when PPD should start. At the end of his opinion, he commented on whether a penalty should apply to of the PPD benefits. The dissent stated:

> The court's opinion is not clear, but to the extent the court is indicating that penalty benefits could be awarded on any of the PPD benefits, I also disagree with that conclusion. Having modified the law as to when PPD benefits commence, it would be unfair for the court to subject the employer to a penalty for its lack of clairvoyance regarding the court's own modification of the law. *See* Iowa Code § 86.13(4) (authorizing a penalty when there was a denial or a delay of payment "without reasonable or probable cause or excuse"). The commissioner did not award any penalty on the PPD benefits, but the court today upholds a penalty on "the delayed and underpaid benefits" and remands for "a recalculation of the amount of the penalty and interest owed based on the new healing period and PPD dates."

Id. at 380 (Mansfield, J., dissenting).

Decision on remand: On remand, the commissioner found that claimant's first healing period began on September 3, 2010, as he claimed. He only awarded benefits from September 3 through September 6, 2010, because the employer had already paid benefits from September 7 through September 19, 2010. The commissioner also changed the start point for PPD to September 20, 2010, although the total amount of benefits remained set at fifty weeks. (February 3, 2017, Remand decision).

The commissioner then considered the penalty period issue. He found that the employer was not liable for a penalty as to the additional healing period benefits between September 3 and September 6, 2010. He noted that employer's position was adopted in earlier decisions by the agency and district court, thus supporting the reasonableness of the position. He also noted that the employer had timely paid healing period benefits beginning on September 7, 2010, and the supreme court did not overrule that decision. The commissioner found that the employer had a reasonable basis not to pay benefits from September 3 through September 6, 2010. (February 3, 2017, Remand decision).

The commissioner came to the same result as to a penalty on PPD benefits. He stated that the agency did not enter any "finding of fact or conclusion of law that [PPD] benefits were unreasonably delayed or denied" in the initial case. He noted that the supreme court decision "gives no remand instructions for penalty on [PDD] benefits." Therefore, he found that a penalty as to PPD benefits was not appropriate. (February 3, 2017, Remand decision).

Claimant filed an application for rehearing before the commissioner. On March 6, 2017, the commissioner issued a decision on the application. He again denied imposing a penalty as to the PPD benefits, noting that there had never been a finding that the employer unreasonably delayed or denied PPD benefits, including in the supreme court's decision. He repeated that the

employer's position was reasonably taken, as reflected by favorably rulings at the deputy, commissioner, and district court level. The commissioner also denied imposing a penalty as to the September 3-6, 2010 healing period benefits for essentially the same reasons. (March 6, 2017, Ruling on application for rehearing).

Claimant filed the present action for judicial review following the commissioner's decision on rehearing. Claimant essentially argued that the supreme court's decision speaks for itself, and that the court expressly directed the commissioner, through the district court, to recalculate penalty benefits to include the first healing period and PPD benefits. The employer argued that the supreme court decision cannot be interpreted that broadly, and that it did not intend to impose a penalty as to benefits that the agency did not find were unreasonably delayed or unpaid.

CONCLUSIONS OF LAW

This case boils down to trying to determine what the supreme court's ruling means. On first blush, claimant's argument seems persuasive. The court specifically directed the district court and commissioner to recalculate the penalty benefits based on the court's decision to reverse the findings as to the first healing period and the start date of PPD. Standing alone, that language would appear to direct the lower tribunals to calculate and impose a penalty. However, in considering the case in context of the procedural history and the court's decision, the undersigned judge does not believe that to be the intent.

This was a complicated case that involved several categories of benefits. The agency initially found that claimant was entitled to benefits as to fifty weeks of PPD, several time periods of TPD benefits, and two benefits for healing period. The agency imposed a penalty, but only as to two categories of benefits: TPD benefits and the second healing period benefits. The

supreme court reversed the agency as to two different categories of benefits: the start date of TPD benefits and the start date of the first healing period. The supreme court also reviewed and affirmed the decision to set the penalty at twenty-five percent. However, the court never discussed the substance of the agency's decision to deny imposition of a penalty as to the first healing period and PPD benefits. It did not expressly reverse the agency decision as to those findings. Likewise, the court did not make its own finding that the employer unreasonably delayed or failed to pay benefits for PPD or the first healing period. When reviewing the decision as a whole, it appears unlikely that the court intended to make a one-liner directive to the agency to impose penalties as to the two categories of benefits that were subject to its reversal.

There are two other alternatives. First, because the court reversed the agency as to the start date of benefits for PPD and the first healing period, it had to remand the case to recalculate those benefits. Accordingly, the court may have simply been covering its bases to ensure that the agency also calculated any penalty that may be affected by its decision. However, this alternative does not seem likely because the reversal did not affect one of the categories of benefits which the agency had imposed a penalty. The court understood that the agency had imposed penalties as to some benefits and not others. There would be no reason for the court to throw in some blanket recalculation language when it knew that the agency had not imposed penalties as to the two categories of benefits impacted by its ruling.

Second, and more likely, the court may have been directing the agency to consider whether to impose a penalty as it recalculated benefits for PPD and the first healing period. This option is consistent with basic principles of judicial review for courts to only consider matters that have been decided by the agency. *See Keokuk Cty. v. H.B.*, 593 N.W.2d 118, 123 (Iowa

1999) (holding that the principle of exhaustion of administrative remedies serves several purposes including honoring agency expertise, handling matters within an agency and not in the courts, and preserving judicial resources). While this is not an exhaustion case, the same principles would apply, that is, the commissioner should be given the first opportunity to decide whether to impose a penalty.

On the application for rehearing after the remand, the commissioner did just this. The commissioner entered a decision denying penalty benefits as to both of claimant's claims. The commissioner found that the employer had a reasonable basis for delaying or denying payment of benefits.

When a party challenges the ultimate conclusion reached by the agency, then the challenge is to the agency's application of the law to the facts. In that event, the question on review is whether the agency abused its discretion by, for example, employing wholly irrational reasoning or ignoring important and relevant evidence. *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 219 (Iowa 2006). The court will only reverse the agency's application of law to the facts if it is irrational, illogical, or wholly unjustifiable. *Neal v. Annett Holdings, Inc.*, 814 N.W.2d 512, 518 (Iowa 2012).

The commissioner shall not impose a penalty if the employer proves that it had a "reasonable or probable cause or excuse" to delay or deny paying benefits. Iowa Code § 86.13(4)(b)(2). A reasonable basis exists if the claim is "fairly debatable" whether the debate concerns a matter of fact or law.[2] *Christensen v. Snap-On Tools Corp.*, 554 N.W.2d 254, 260 (Iowa 1996); *City of Davenport v. Newcomb*, 820 N.W.2d 882, 894 (Iowa App. 2012). "A claim is 'fairly debatable' when it is open to dispute on any logical basis." *Rodda v. Vermeer Mfg.*,

[2] The "fairly debatable" standard derives from an older line of cases, but continues to be used after section 86.13 was amended in 2009. *See City of Davenport*, 820 N.W.2d at 894; *Podgorniak v. Asplundh Tree Expert Co.*, 828 N.W.2d 632, *2 (Iowa App. 2013) (Table).

734 N.W.2d 480, 483 (Iowa 2007) (cite omitted).

The commissioner found that the employer had reasonable cause to deny the two categories of claims at issue in this case, in part, because the employer's arguments were accepted at three levels at independent review. The deputy who heard the original contested case found in favor of the employer on both issues. That decision was affirmed by the commissioner and the district court. The decision was reversed by the supreme court, but even then, two justices dissented. The commissioner's reasoning is rational, not only based on the very fact that the employer's argument was accepted at multiple levels, but also based on the reasoning within those decisions. There is no question that the employer's argument at least cleared the hurdle of being "fairly debatable."

The problem is that the statute requires the employer to meet additional criteria set forth in section 86.13(4)(c) to show reasonable cause. Those criteria include showing that: 1) the employer undertook a "reasonable investigation" to determine what benefits it owed the employee; 2) the employer "contemporaneously relied" on the results of that investigation as the "actual basis" for its underpayments; and 3) the employer must have "contemporaneously conveyed the basis for the denial [ ] of benefits to the employee at the time of the denial...." Iowa Code § 86.13(4)(c); *Vitzthum v. KLM Acquisition Corp.*, 856 N.W.2d 383 (Iowa App. 2014) (Table). If these requirements are applicable, the commission must make sufficient findings of fact to support them. *Vitzthum*, 856 N.W.2d at 383. If not, the court may remand the case to the agency for further proceedings. *Id.*

There is always a benefit to finality and the court does not want to unnecessarily prolong this case, which has been pending for more than five years. But, in this instance, a remand is necessary to make a factual determination whether the employer complied with the provisions in

Iowa Code section 86.13(4)(c). The court recognizes that the deputy who originally heard the case cited to section 86.13(4)(c) in his decision, but only as to the categories of benefits to which he imposed a penalty. That makes sense, because there would be no reason to go through the analysis as to benefits he found were timely paid. However, now that the supreme court has remanded the case to the agency to determine a penalty, the agency must conduct the analysis in section 86.13(4)(c) before concluding that no penalty is owed.

RULING AND ORDER

This case is remanded to the commissioner to make findings whether the employer complied with Iowa Code section 86.13(4)(c).

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
CVCV053692	DAVID LOWELL EVENSON VS WINNEBAGO INDUSTRIES ET AL

So Ordered

Jeffrey Farrell, District Court Judge,
Fifth Judicial District of Iowa