

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RENEE M. MINAR,	FILED	
Claimant,	JAN 31 2017	File No. 5022947
vs.	WORKERS COMPENSATION	REVIEW-REOPENING
PELLA CORPORATION,		DECISION
Employer, Self-Insured, Defendant.		Head Note No.: 4000

STATEMENT OF THE CASE

Claimant, Renee Minar, filed a review-reopening petition seeking workers' compensation penalty benefits from the Pella Corporation. The petition was filed as a review-reopening petition. Defendant filed a motion to dismiss, alleging the claim was improperly filed as a review-reopening petition, rather than an arbitration decision. The motion was overruled.

The matter came on for hearing on March 15, 2016, before deputy workers' compensation commissioner, Joseph L. Walsh, in Sioux City, Iowa. The record in the case consists of Claimant's Exhibits 1 through 26; Defense Exhibits A through N; the sworn testimony of claimant, Renee Minar, as well as the defendant's representative, Lance Traster. Jami Johnson was appointed as the court reporter for the proceedings. The parties briefed this case and the matter was fully submitted on April 15, 2016.

ISSUES AND STIPULATIONS

The following issues were submitted for determination.

1. Whether penalty is owed for late payments.
2. Costs.

FINDINGS OF FACT

Renee Minar is a 48-year-old married woman with 9 children. She now works for a third party administrator paying various insurance claims or other benefits for employers.

In 2006, Ms. Minar worked for Pella Corporation (hereafter, Pella). She began working for Pella in 2000. She suffered an injury which arose out of and in the course of employment for Pella on December 1, 2006. That claim went to hearing on October 26, 2010, before Deputy Workers' Compensation Commissioner Jennifer Gerrish-Lampe. The parties had stipulated that claimant had been paid 189.714 weeks of compensation at the rate of \$441.19. (Claimant's Exhibit 3, page 2) The parties disputed the commencement date for benefits. (Cl. Ex. 3, p. 1) Deputy Gerrish-Lampe entered a decision on February 8, 2011. (Cl. Ex. 4) This decision was modified in a subsequent Nunc Pro Tunc Order. The final order held that "defendant shall pay 225 weeks of permanent disability benefits at a rate of \$491.26, commencing June 24, 2009." (Cl. Ex. 6, p. 2) In summary, she ruled claimant suffered a 45 percent disability and benefits were to commence on June 25, 2009.

The employer appealed and claimant cross-appealed. The employer's appeal was limited to the rate of compensation and payment of the independent medical examination. The issue relevant at this point is the rate issue. Defendant argued that certain bonuses should not have been calculated in the claimant's gross earnings. Specifically, the final arbitration decision had held claimant's rate was \$491.26, which included bonuses that the employer argued should not have been included. The employer had paid benefits at the rate of \$441.19.

On June 28, 2011, a senior claims administrator for Creative Risk Solutions, wrote a letter explaining benefits paid through that date.

A decision has been made to pay the permanent disability benefits that were awarded in the hearing decision issued on February 8, 2011. As you are aware there are other issues which remain outstanding on appeal.

We last paid weekly benefits through November 15, 2010. Per the award, an additional 50 weeks of benefits are payable. As of July 4, 2011, 33 of the 50 weeks will have accrued. A check in the amount of . . . \$14,980.08 has been issued and mailed to your attorney's office.

The remaining 17 weeks will be paid in the amount of \$441.19 and issued weekly, payable to you and your attorney, sent to your attorney's office. The next check is set to be mailed on Friday July 8, 2011. These weekly payments will end on October 31, 2011.

(Cl. Ex. 9, p. 1) Based upon the evidence at hearing, the intent of this letter was to pay the claimant up to date for the arbitration decision, except for the difference in the rate calculation.

The calculation letter set forth above, assumed a credit of 175 weeks for prior permanent partial disability benefits paid. The key supposition of the letter was that as "of July 4, 2011, 33 of the 50 weeks" were accrued. (Cl. Ex. 9, p. 1) The letter does not

explain how this conclusion was reached. In reality, 225 weeks of benefits were owed commencing on June 25, 2009, meaning just over 100 of the 225 weeks were accrued at that time. The \$14,980.08 check was issued by Creative Risk Solutions and accepted by the claimant and counsel. (Cl. Ex. 9, p. 2) Weekly payments were issued through October 31, 2011.

On June 27, 2012, Commissioner Godfrey issued the appeal decision in this case, affirming the arbitration decision, including the issue of rate. In May 2012, the Supreme Court decided the case Burton v. Hilltop Care Center, 813 N.W.2d 250 (Iowa 2012), which claimant alleges is controlling on the topic of bonuses.

The employer petitioned the District Court for judicial review. On June 10, 2013, the Honorable Robert Hanson affirmed the rate issue and remanded an entirely unrelated issue. (Cl. Ex. 15) Judge Hanson's decision was appealed. On August 13, 2014, the Court of Appeals affirmed the decision. Further review was denied by the Iowa Supreme Court on October 15, 2014. (Cl. Ex. 18)

No weekly payments were made to the claimant after November 1, 2011. Based upon the Arbitration decision, payments should have been made commencing June 25, 2009, for 225 weeks, or October 16, 2013. This was a calculation error made by the defendant's third party administrator, not caught by the employer or either attorney until December 16, 2014. On that date, defendant's counsel, Mr. Jenkins, discovered the mistake and alerted his client. (Def. Ex. A) On December 19, 2014, defense counsel then alerted claimant's counsel. (Def. Ex. B) At that time, he set out all of the correct calculations regarding all of the benefits owed to that date. The total principle owed for the underpayment of the rate issue was \$12,245.67. The total principle owed for the miscalculation of benefits was \$50,108.52. He also calculated interest. (Def. Ex. B, pp. 5-6) Claimant has not challenged any of the calculations of benefits owed in this letter.

Two checks were eventually issued and mailed. The first in the amount of \$18,985.75 (representing the rate underpayment plus interest) was issued on December 22, 2014, and postmarked on December 23, 2014. (Cl. Ex. 21) Claimant's counsel wrote to defense counsel on January 7, 2015, and inquired as to where the rest of the money was. (Cl. Ex. 22) On January 16, 2015, claimant's counsel received a check dated December 22, 2014, postmarked January 12, 2015, in the amount of \$60,949.28 (representing the miscalculation underpayment plus interest). (Cl. Ex. 23) There was a great deal of evidence and testimony presented about the delay in the issuance and receipt of the checks between December 19, 2014 and January 16, 2015. The employer's representative, Lance Traster, testified at hearing. He credibly explained that some mistakes were made by the employer and its third party carrier that caused this minor delay.

Between November 2011 and January 2015, the claimant and her family suffered financial hardship. Renee and her husband lost their house in LeMars and had to

downsize. They both cashed out retirement savings to survive. They ran up credit cards and received a loan from parents. They applied for and received public assistance with heating bills.

CONCLUSIONS OF LAW

All of the questions in this file revolve around the question of penalty.

Claimant's penalty benefit claim is based upon the statutory language contained at Iowa Code section 86.13(4), which provides:

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 in 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.

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.

Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

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).

If the employer fails to show reasonable cause or excuse for the delay or denial, the commissioner shall 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).

Under the current statutory framework, the burden is on the claimant to demonstrate when a payment is due and that the payment was not made on time. Once the claimant has proven the delay or denial, the burden shifts to the defendants to provide a reasonable excuse.

In this case, there are two independent penalty theories.

The first is that the defendant unreasonably delayed payments on the underpayment of the rate while the matter was appealed through the Polk County District Court and Iowa Court of Appeals. This delayed principle payments to the claimant in the amount of \$12,245.67. This was \$50.07 per week for 244.571 weeks between February 21, 2007, and October 31, 2011. The claimant argues a penalty is mandatory as outlined in established case law. Defendant argues that granting a penalty in this circumstance, particularly in light of the legal issues raised, amounts to an infringement upon the defendant's very right to appeal.

The second theory is that the defendant unreasonably delayed payment of benefits between November 1, 2011, and October 16, 2013, due to a miscalculation of benefits by an adjuster in June 2011. The claimant argues that penalty is mandatory for this mistake, while the defendant argues it was an honest mistake that the defendant caught and brought to light.

Penalty 1: Underpayment of Rate Pending Appeal (\$12,245.67)

The claimant relies upon the following language from agency precedent:

The question is, when the defendant sought review in District Court, did it become unreasonable for the defendant to continue to refuse to pay the higher rate? Pella argues that such a ruling would essentially eviscerate its appeal rights and deny a defendant due process of the law. (Def. Brief, p. 9) At some point, did it become unreasonable to continue to fight against this outcome?

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 post-hearing) 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).

Claimant argues that an agency decision is an order by a government agency under Chapter 17A.

The Workers' Compensation Act was enacted nearly a century ago to benefit workers and compensate them for industrial disabilities. Pribyl v. Standard Elec. Co., p. 246 Iowa 333, 343, 67 N.W.2d 438, 444 (1954). The process sought to establish an administrative tribunal that would provide for the prompt and efficient determination and award of compensation to injured workers. Nash v. Citizens Coal, Co., 224 Iowa 1088, 1092, 277 N.W. 728, 730 (1938). . . .

. . . .

Thus, the collection of workers' compensation benefits and the pursuit of judicial review coexist under the statute, and judicial review does not itself stay the right to collect an award unless the district court affirmatively concludes otherwise. . . .

. . . .

This change clarified two principles. First, the legislature did not want the filing of a petition for judicial review to automatically stay enforcement of a judgment in a workers' compensation proceeding. Second, a stay in a workers' compensation proceeding could only be entered under the same guidelines governing a stay of other agency action.

Grinnell College v. Osborn, 751 N.W.2d 396, 403 (Iowa 2008).

Applying the facts to the law here, I find that the payments were delayed but that

Certainly, the party who does not prevail before the agency in a workers' compensation proceeding has a statutory right to seek judicial review. That statutory right does not, however, make the refusal to pay benefits when due reasonable or justifiable. Failure to pay benefits when due is subject to penalty whenever the failure is or becomes unreasonable. The reasonableness of any failure to pay is evaluated by searching for factual or legal issues that would reasonably be expected to provide a reasonable chance of relieving the defendants from paying. Whenever the showing of reasonableness is conditioned upon appeals that would require overturning established principles of law, the burden of showing reasonableness becomes quite heavy. Defendants in this case did not meet that burden.

Watts v. Freuhauf Trailer Corp., File No. 1020231 (App. November 5, 2003).

In this case, the defendant has argued that claimant's rate was fairly debatable while the case was on appeal through the District Court and Court of Appeals because there was a good faith dispute regarding the claimant's legal entitlement to include the bonus in her gross wages. (Def. Brief, p. 5) The defendant argued that it had won the case, Noel v. Rolscreen Company, 475 N.W.2d 666 (1991) and three unpublished district court decisions on judicial review. The defendant argued that these cases involved the exact same bonus structure. The defendant believed that it had legally established that the Pella/Rolscreen bonus system was an "irregular bonus" as defined in Iowa Code section 85.61(3), which should be excluded from gross wages.

In this case, the deputy commissioner considered all of the evidence and found that claimant's bonuses were regular and should be included in her gross wages. (Cl. Ex. 4, p. 2) She essentially compared the employer's evidence of what was written about the bonus to the reality of the bonuses.

Claimant testified she qualified for and was paid a bonus every year she worked for Pella [since 2000]. The regularity of the payments, regardless of the bonus language in the handbook, are part of the earnings that the employees of the defendant expect and on which they pay income taxes. It is found claimant's profit sharing payment and service payment were regular bonuses and should be included in the calculation of her gross wages.

(Cl. Ex. 4, p. 8) The commissioner affirmed this decision with limited additional analysis, other than citing to the recent Burton v. Hilltop Care Center, Supreme Court decision. (Cl. Ex. 11, p. 1) The commissioner cited Burton for the proposition that whether "a bonus is regular or irregular is a fact question and the agency's determination should be given deference if it is not illogical, irrational, and wholly unjustified." (Cl. Ex. 11, p. 1)

the delay did not become unreasonable until further review was denied by the Court of Appeals. I find that the defendant had a valid legal issue in this case at every phase. The reality is, the employer could have won this issue at any step and their chance of success was much greater than just a puncher's chance or a hail Mary. This employer had actually won on this very issue in three district courts and on a similar issue in the Iowa Court of Appeals. This employer had invested a significant amount of legal resources into protecting its interests on this legal point and had been tremendously successful until this decision. While it may not have been a purely legal issue, it was, at minimum, a mixed issue of law and fact. Under these circumstances, I would be required to re-write history to suggest now that the determination was not fairly debatable even on appeal.

On October 15, 2014, the employer reached the end of the line. The Iowa Supreme Court denied further review. (Cl. Ex. 18) Since the case involved legitimate legal issues, the matter was fairly debatable until that date. On October 15, 2014, the matter was resolved. The employer waited until December 23, 2014, to issue the first check, which apparently included this amount plus interest. (Cl. Ex. 21) This is a delay of nine plus weeks that is not well-explained in the record. A penalty is mandatory.

Penalty 2: Miscalculation of Award Payment (\$50,108.52)

At the heart of the second penalty issue is a simple human error. The defendant's adjustor dramatically undercalculated benefits. (Cl. Ex. 9) Based upon this record it is not clear what information she was relying upon. It does not much matter. Based upon the information before the agency at this time, it is assumed that this was a mistake. The arbitration decision was filed in February 2011. (Cl. Ex. 4) On June 28, 2011, the employer's adjustor undercalculated permanent partial disability benefits by a little over 100 weeks. Based upon the arbitration award, permanent partial disability payments should have been made commencing June 25, 2009, for 225 weeks, through October 16, 2013. Instead, payments were ended on October 31, 2011.

Defendant is correct that the late payment here was a simple human error. The basis for the payments which were made were sent to claimant's counsel and he did not object. Claimant's counsel, in fact, never caught the error. The employer argues that, claimant's counsel received this letter. This letter was his notice, his opportunity to object to the calculation of benefits. Counsel should not be allowed to sandbag a penalty claim. While I agree with this to some extent, this element goes to extent of the penalty rather than whether a penalty must be assessed.

The law requires me to assess a penalty. The defendant has admitted that it made a human error that caused the mistake. It is the defendant's duty to properly calculate and pay benefits. If the defendant had lost the check, there is no doubt that a penalty would be required. If the defendant had mailed the check to the wrong address, a penalty would be mandatory. There were no other safeguards or checks in place to prevent this error until defense counsel calculated the award in December 2014. The

fact that defense counsel discovered the undercalculation and brought it to the attention of the claimant, again goes to the extent of the penalty, not whether it must be assessed. A penalty on this miscalculation is mandatory.

Amount of Each Penalty

In determining the amount of penalty, the commissioner is to consider factors such as the length of the delay, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Robbenolt, 555 N.W.2d at 238. Reading the penalty cases, I am not at all convinced that the foregoing list is an exhaustive list of factors to be considered in assessment of the amount of a penalty. Rather, they are examples.

At hearing, the defendant objected to the claimant's testimony regarding the damage caused by the delays. (Tr., pp. 33-36) Claimant wanted to testify about the loss of her house, her extensive loans from family and credit cards and cashing out her retirement savings. Defense counsel argued that none of this is relevant and it was treated as a standing objection to all of her "damage" testimony. The objection was overruled and claimant was allowed to testify on these topics. (Tr., pp. 34-35) In this ruling, I shall be clear regarding how this information is considered.

I generally agree with the defendant that the focus in a section 86.13 penalty claim is on the conduct of the defendant, not the damage to the claimant. This is not a common law tort case. An 86.13 "penalty" is not punitive damages. The purpose of the penalty is to set a penalty amount based off of the delayed payments in order to deter the defendant from engaging in this type of conduct in the future.

Having stated this, I find the claimant has a right to testify about the delay itself and this includes the effect of that delay upon the claimant and her family. I find no contrary authority. This is a classic weight versus admissibility issue in administrative law proceedings. There is absolutely no harm in allowing an injured worker to testify about the damage caused the by late payments. The maximum penalty this agency can award is still 50 percent of the principle late payment and it is still primarily based upon the conduct of the defendant. An injured worker and her children could starve to death due to an unreasonable delay, and all I can award is 50 percent of the benefits delayed. Nevertheless, the primary element of a penalty case is the delay itself. The claimant has the burden of prove the delay. It would be nonsensical and counterproductive to force a claimant to testify regarding a delay of payments to which they were entitled and simultaneously prohibit them from discussing the damage the delay caused them. There was no overkill in this case. All of the testimony was appropriate. In summary, the injured worker has a right to tell her story in these circumstances. It is her day in court where accountability and truth are sought by the parties. The evidence is admissible.

Penalty 1: Underpayment of Rate Pending Appeal (\$12,245.67)

Having found that the defendant had a reasonable basis for paying the lower rate until such time that the Iowa Supreme Court denied further review, I find that only a modest penalty is owed. The defendant received an order from the Supreme Court that further review was denied on October 15, 2014. (Cl. Ex. 18) The following day a Procedendo Order was filed. (Cl. Ex. 19) The defendant should have paid the benefits within a week or so of October 15, 2014. There is no legal explanation for why it waited until December 23, 2014. I find a penalty in the approximate amount of 20 percent is appropriate to deter the defendant from engaging in this type of delay in the future. Defendant is ordered to pay a penalty in the amount of \$2,500.00.

Penalty 2: Miscalculation of Award Payment (\$50,108.52)

Defendant seeks a minimal penalty for this human error. I agree that this was an unfortunate human error. I understand that the adjustor provided notice to claimant's counsel in order to give him an opportunity to review her calculations and draw attention to any error. I understand that it is the defendant's attorney himself who found the error, and he forthrightly and quickly brought it to light.

Unfortunately, this was a bad mistake and it caused a long delay in payments to the claimant. She was denied payments from November 2011 through October 2013. There is an exclamation point on the length of the length of this delay in that the claimant lost her house during this timeframe, was compelled to borrow money to survive and prematurely cash out retirement savings. The primary factor I am considering in setting the amount of this penalty, is the length of the delay. Because of the significant length of this delay, combined with the egregiousness of the mistake, this would ordinarily be a 50 percent penalty. I am reducing the penalty a modest amount to account for the defendant's conduct. Specifically, the defendant provided the notice letter giving the claimant an opportunity to discover the mistake. The defendant eventually found and corrected the error in a forthright manner.¹

I find a penalty of approximately 40 percent is appropriate. Defendant is ordered to pay a penalty in the amount of \$20,000.00 to deter it from engaging in such conduct in the future.

¹ Defendant asserts that a "claimant should not be permitted to lay in wait in an effort to maximize a penalty benefit claim, or overstate the otherwise absence of unreasonableness of the part of an employer, in order to enhance a claim for penalty benefits." (Def. Brief, p. 17) I agree. Nevertheless, it is the defendant's affirmative obligation to pay the benefits correctly. I find that the claimant in this case, did not, as a matter of fact, lay in wait.


ORDER

THEREFORE IT IS ORDERED

Defendant shall pay total penalties in the amount of twenty-two thousand five hundred and 00/100 dollars (\$22,500.00).

Costs are taxed to defendant.

Signed and filed this 31st day of January, 2017.



JOSEPH L. WALSH
DEPUTY WORKERS'
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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.