

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

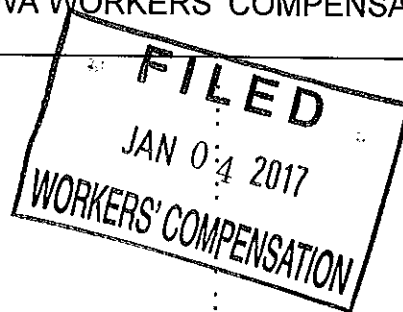
RAFAEL BANDERAS,

Claimant,

vs.

OBRECHT INDUSTRIES, INC.,

Employer,  
Uninsured,  
Defendant.



File No. 5042057

ARBITRATION

DECISION

Head Note No.: 4000.2

STATEMENT OF THE CASE

Rafael Banderas, claimant, filed a petition for arbitration against Obrecht Industries, Inc., as the uninsured employer. Claimant's current petition seeks post-hearing penalty benefits for defendant's alleged unreasonable delay in payment of benefits.

The undersigned previously heard the underlying merits of this case and entered an arbitration decision, which was filed on October 14, 2013. No appeal was taken from the undersigned's proposed decision and the October 14, 2013 arbitration decision became final agency action pursuant to Iowa Code section 17A.15(3).

Claimant filed this post-hearing penalty petition on June 17, 2014. Claimant demonstrated proper service upon defendant via personal service. Defendant has not filed an answer or otherwise appeared in this post-hearing penalty action.

On June 16, 2016, claimant moved for entry of default against the defendant. On July 7, 2016, the undersigned entered a ruling finding defendant to be in default and scheduling the case for a default hearing on damages. After two short continuances were granted, this case proceeded to a telephonic hearing on October 31, 2016.

Claimant's counsel appeared for the default hearing, but claimant was not available for the hearing. Claimant's counsel moved to submit the case on a written record. Given the nature of the default, the undersigned granted the request to submit the case on a written record and ordered that any written evidence be filed with the agency on or before November 14, 2016. The undersigned permitted documents to be mailed and served on or before November 14, 2016 to be considered timely.

Claimant mailed his proposed hearing exhibits on November 14, 2016 and the exhibits were received and stamped as filed with this agency on November 16, 2016. Claimant's written exhibit submissions are in conformity with the undersigned's October 31, 2016 ruling and are accepted. The evidentiary record includes claimant's exhibits 1 and 2. The evidentiary record closed upon receipt of claimant's written exhibits.

### ISSUES

Claimant submitted the following disputed issues for resolution:

1. Whether defendant has unreasonably delayed or denied payment of weekly workers' compensation benefits.
2. If an unreasonable delay or denial has occurred, the extent of claimant's entitlement to penalty benefits pursuant to Iowa Code section 86.13.

### FINDINGS OF FACTS

The undersigned, having considered the evidentiary record as submitted, finds:

In the October 14, 2013 arbitration decision, defendant was ordered to pay 47.857 weeks of healing period benefits from June 22, 2012 through May 22, 2013. Defendant was also ordered to pay 30.8 weeks of permanent partial disability benefits commencing on May 23, 2013. (Arbitration Decision, page 15) All of the weekly benefits ordered in the arbitration decision accrued and were payable before the October 31, 2016 default hearing on claimant's request for penalty benefits.

Claimant testified via affidavit that he has not received any payment of workers' compensation benefits from the defendant. (Exhibit 1) Similarly, claimant's counsel of record provided an affidavit stating that she has not received any payment of workers' compensation benefits from Obrecht Industries, Inc., on behalf of Rafael Banderas since the issuance of the October 14, 2013 arbitration decision. (Ex. 2)

No contrary evidence exists in this evidentiary record. I find that Obrecht Industries, Inc., has not issued payment of any weekly benefits to claimant since the issuance of the October 14, 2013 arbitration decision. I find that claimant has established a delay in payment or a denial of benefits owed.

Defendant did not appear in this post-hearing penalty contested case proceeding. Defendant is in default. The defendant offered no evidence to establish that it had a reasonable or probable cause or excuse for its denial or delay in payment of benefits owed to claimant. Given that this agency issued a formal arbitration decision on October 14, 2013 and given that the decision was not appealed, I find that there cannot be a reasonable or probable basis or excuse for defendant's delay in payment of benefits after the arbitration decision became final agency action. Similarly, defendant offered no proof that it contemporaneously conveyed its basis for denial to claimant.

Defendant is an uninsured employer. The employer has not appeared or attempted to offer any excuse or justification for not paying Mr. Banderas the benefits he is owed. Considering the length of delay or denial of benefits, the lack of any justification for the delay or denial of benefits, and the purposes of Iowa Code section 86.13, I find that a maximum penalty of 50 percent is appropriate in this case.

#### CONCLUSIONS OF LAW

The undersigned issued an October 14, 2013 arbitration decision. No appeal was taken from the proposed decision. The October 14, 2013 arbitration decision became final agency action when no appeal was taken. Iowa Code section 17A.15(3).

Claimant seeks an award of penalty benefits pursuant to Iowa Code section 86.13 for an alleged unreasonable denial or delay in payment of healing period and permanent disability benefits ordered in the October 14, 2013 arbitration decision.

Iowa Code section 86.13(4) 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.

In Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996), and Robbenolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996), the supreme court said:

Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. 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.

The Supreme Court has stated:

(1) If the employer has a reason for the delay and conveys that reason to the employee contemporaneously with the beginning of the delay, no penalty will be imposed if the reason is of such character that a reasonable fact-finder could conclude that it is a "reasonable or probable cause or excuse" under Iowa Code section 86.13. In that case, we will defer to the decision of the commissioner. See Christensen, 554 N.W.2d at 260 (substantial evidence found to support commissioner's finding of legitimate reason for delay pending receipt of medical report); Robbennolt, 555 N.W.2d at 236.

(2) If no reason is given for the delay or if the "reason" is not one that a reasonable fact-finder could accept, we will hold that no such cause or excuse exists and remand to the commissioner for the sole purpose of assessing penalties under section 86.13. See Christensen, 554 N.W.2d at 261.

(3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City Meats, Inc., 528 N.W.2d at 109, 111 (Iowa 1995); or (b) the employer had a reasonable basis to contest the claim—the "fairly debatable" basis for delay. See Christensen, 554 N.W.2d at 260 (holding two-month delay to obtain employer's own medical report reasonable under the circumstances).

(4) For the purpose of applying section 86.13, the benefits that are underpaid as well as late-paid benefits are subject to penalties, unless the employer establishes reasonable and probable cause or excuse. Robbennolt, 555 N.W.2d at 237 (underpayment resulting from application of wrong wage base; in absence of excuse, commissioner required to apply penalty).

If we were to construe [section 86.13] to permit the avoidance of penalty if any amount of compensation benefits are paid, the purpose of the penalty statute would be frustrated. For these reasons, we conclude section 86.13 is applicable when payment of compensation is not timely . . . or when the full amount of compensation is not paid.

Id.

(5) For purposes of determining whether there has been a delay, payments are "made" when (a) the check addressed to a claimant is mailed (Robbennolt, 555 N.W.2d at 236; Kiesecker, 528 N.W.2d at 112), or (b) the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 235.

(6) 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. Robbennolt, 555 N.W.2d at 238.

(7) An employer's bare assertion that a claim is "fairly debatable" does not make it so. A fair reading of Christensen and Robbennolt, makes it clear that the employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." See Christensen, 554 N.W.2d at 260.

Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

Weekly compensation payments are due at the end of the compensation week. Robbennolt, 555 N.W.2d 229, 235.

Penalty is not imposed for delayed interest payments. Davidson v. Bruce, 593 N.W.2d 833, 840 (Iowa App. 1999). Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 338 (Iowa 2008).

In this case, I found that claimant proved an obvious and lengthy delay in payment or denial of benefits clearly owed under the terms of the October 14, 2013 arbitration decision. I also found that defendant did not offer a reasonable excuse for the denial or delay in payment of benefits. Iowa Code section 86.13(4)(b)(2).

Defendant did not establish that the employer contemporaneously conveyed its basis for denial or delay of benefits to claimant. Iowa Code section 86.13(4)(c)(3). Defendant bore the burden to establish a reasonable basis, or excuse, and to prove the contemporaneous conveyance of that basis to the claimant. Defendant failed to carry its burden of proof on the penalty issues, and a penalty award is appropriate. Iowa Code section 86.13.

The purpose of Iowa Code section 86.13 is both punishment for unreasonable conduct but also deterrence for future cases. Robbennolt, 555 N.W.2d at 237. In this regard, the Commission is given discretion to determine the amount of the penalty imposed with a maximum penalty of 50 percent of the amount of the delayed, or denied, benefits. Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 261 (Iowa 1996).

In exercising its discretion, the agency must consider factors such as the length of the delays, 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. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996).

In this case, defendant made no effort to justify its delay or denial in payment of benefits. In fact, defendant was in default and never appeared to defend itself. Benefits were clearly owed once the October 14, 2013 arbitration decision became final agency action. Defendant had no basis for delay or denial of benefits after the arbitration decision became final agency action.

Having considered the facts of this case and the purposes of penalty benefits pursuant to Iowa Code section 86.13, I found that a maximum penalty of 50 percent is warranted in this case.

Defendant owes claimant 78.657 weeks of benefits at the rate of \$440.57 per week. All benefits have accrued. Claimant is owed \$34,653.91 in past due weekly benefits, plus statutory interest on the accrued benefits pursuant to Iowa Code section 85.30.

A 50 percent penalty of the benefits owed totals \$17,326.95 and is appropriate under the circumstances of this case. Iowa Code section 86.13.

ORDER

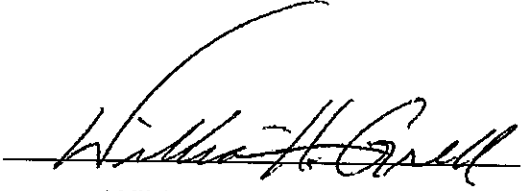
THEREFORE, IT IS ORDERED:

Defendant shall pay claimant penalty benefits totaling seventeen thousand three hundred twenty-six and 95/100 dollars (\$17,326.95).

Defendant shall reimburse claimant's filing fee totaling one hundred dollars (\$100.00).

Defendant 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 4<sup>th</sup> day of January, 2017.

  
WILLIAM H. GRELL  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

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WHG/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.