BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
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WORKERS' COMPENSATION

BRADLEY EMMERTH, Claimant, vs. LINWELD, Employer, and NEW HAMPSHIRE INSURANCE CO., Insurance Carrier, Defendants.	File No. 5034410 POST-HEARING PENALTY DECISION Head Note No.: 4000.2

STATEMENT OF THE CASE

Bradley Emmerth filed a review-reopening petition in this case seeking penalty benefits against defendants for an alleged unreasonable delay in payment of the appeal decision's award. Defendants deny any liability for penalty benefits.

The case proceeded to a review-reopening hearing on November 20, 2017. The parties filed a hearing report at the commencement of the post-hearing penalty hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision. No factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

Counsel for all parties appeared for the hearing. Claimant offered Exhibits 1 through 5. Defendants offered Exhibits A and B. All exhibits were received into evidence without objection.

Neither party called a witness to testify live. Instead, the case was submitted on the written record. Counsel for the parties requested the opportunity to submit post-hearing briefs. Their request was granted and all parties filed post-hearing briefs on December 11, 2017, at which time the case was considered fully submitted.

ISSUE

The sole disputed issue is whether claimant is entitled to penalty benefits for an alleged unreasonable delay in payment of an award of this agency and, if so, the extent of the penalty award.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Claimant, Bradley Emmerth, sustained a work injury on June 2, 2010. His case proceeded to an arbitration hearing, which resulted in issuance of an arbitration decision on February 15, 2012. The arbitration decision awarded claimant a 30 percent industrial disability.

Claimant sought review-reopening of that arbitration award, which resulted in issuance of a review-reopening decision on February 24, 2015. The review-reopening decision awarded claimant permanent total disability. Defendants appealed the review-reopening decision.

On August 22, 2016, the Iowa Workers' Compensation Commissioner issued an appeal decision. The appeal decision modified the review-reopening decision and awarded claimant a 60 percent industrial disability. Neither party appealed the appeal decision and the judicial review deadline expired on September 21, 2016.

On September 22, 2016, defense counsel inquired, in writing, whether claimant had appealed the agency's decision. On September 23, 2016, defense counsel forwarded appropriate calculations of the appeal decision's award, including interest, to the third-party administrator's claims adjuster. On that same date, the claims adjuster submitted a request for issuance of a check to satisfy the agency's award.

However, the insurance carrier's computer system identified this claim as a large loss claim and required the claims adjuster to perform additional work, including preparation and submission of additional documentation. The adjuster completed and submitted the necessary documentation on September 23, 2016, requesting expedited issuance of the required check. The adjuster requested that the check be overnight mailed to defense counsel once issued.

For some unexplained reason, the required check was not issued until October 6, 2017. Other than a procedural delay imposed by the insurance carrier, there is no explanation for the delay from September 23, 2016 until October 6, 2017. The check was overnighted to defense counsel, who received the check and sent it via U.S. Mail to claimant's counsel on October 7, 2017.

Sixteen days passed between the expiration of the appeal deadlines and the date a check was mailed to claimant. Obviously, after the appeal deadline passed, there was not a legitimate, or reasonable, basis for delay in payment of the benefits owed claimant. Defendants did not demonstrate that they contemporaneously conveyed the basis for their delay in payment to claimant between September 21, 2017 and October 7, 2017.

In his post-hearing brief, claimant references prior decisions of this agency imposing penalty benefits against this insurance carrier. However, no evidence was

introduced at the hearing to establish this claim or to alert defendants of this assertion. Claimant's reference to prior decisions at this juncture is not convincing evidence to the undersigned. Nor has a case been identified that demonstrates similar delays to the delay in this case by this insurance carrier. On the other hand, the claimant's argument pertaining to the fact that defendants previously paid penalty benefits in this case for unreasonable delays in payment of healing period and permanent partial disability benefits is relevant and convincing evidence demonstrating that the insurance carrier is very slow in learning its duties and obligations to pay benefits promptly.

CONCLUSIONS OF LAW

Mr. Emmerth asserts that defendants unreasonably delayed and/or denied his weekly benefits in this case and that defendants should be ordered to pay penalty benefits pursuant to Iowa Code section 86.13. Specifically, claimant argues that defendants unreasonably delayed payment of permanent partial disability benefits that were due and owing as soon as the agency's appeal decision became final agency action on September 21, 2017.

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.
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> b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
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> > (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 Robbennolt 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.
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> (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.
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> (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.
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> Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

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).

When an employee's claim for benefits is fairly debatable based on a good faith dispute over the employee's factual or legal entitlement to benefits, an award of penalty benefits is not appropriate under the statute. Whether the issue was fairly debatable turns on whether there was a disputed factual dispute that, if resolved in favor of the employer, would have supported the employer's denial of compensability. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

It appears that the individuals primarily responsible for handling Mr. Emmerth's claim acted promptly and reasonably. Defense counsel was attempting to make contact with opposing counsel regarding the appeal deadlines. He made timely calculation of the amounts due under this agency's award. Defense counsel also appears to have timely ordered the necessary check and to have timely forwarded that check upon receipt.

Similarly, the adjuster handling this claim appears to have acted diligently in executing her duties. Defense counsel requested a check be issued on September 23, 2016. The adjuster testified that she processed that check request on the same date it was requested by defense counsel.

However, the insurance carrier's system determined that this was a "large loss" claim and required additional documentation be completed by the adjuster to process the required check. The claims adjuster again acted promptly and submitted the required form, information, and check request on September 23, 2016. She also

testified that she noted the request as time sensitive and requested that the check be sent via overnight mail to defense counsel. For whatever unexplained reason, the insurance carrier's procedural, technical, or internal protocols delayed issuance of the necessary check from September 23, 2016 until October 6, 2016.

Claimant bears the burden to prove a delay or denial of benefits. Iowa Code section 86.13(1). Claimant has clearly proven a delay in payment of benefits. Defendants essentially conceded the delay during the adjuster's deposition testimony.

Once claimant establishes a delay in payment of benefits, it is defendants' burden to establish that they possessed a reasonable basis, or excuse, for the delay in payment of benefits. Iowa Code section 86.13(4)(b)(2). I found that defendants did not offer a reasonable excuse for the delay in payment of benefits. Similarly, I found that defendants did not contemporaneously convey their bases for delay of benefits to claimant. Iowa Code section 86.13(4)(c)(3). Defendants bore the burden to establish a reasonable basis, or excuse, and to prove the contemporaneous conveyance of those bases to the claimant. Defendants failed to carry their 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. Id. 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 instance, the delay is only 16 days after expiration of the appeal deadline. However, the information available to the employer clearly established entitlement, and no excuse was offered for the delay, other than internal protocols of the insurance carrier.

The insurance carrier is not justified in establishing internal protocols that unnecessarily delay issuance of checks to claimants entitled to those checks. Internal procedures, requirements, and protocols are entirely governed and managed by the insurance carrier. Presumably, an insurance carrier is aware of the legal requirements for issuance of a check and the potential ramifications of delaying issuance of a check without reasonable excuse. Nevertheless, the insurance carrier established internal protocols that unnecessarily and unreasonably delayed payment to claimant for 16 days.

While the delay is not egregious or protracted, this claimant was waiting for his case to be processed. Once finalized, Mr. Emmerth was entitled to the money held by the insurance carrier. Further delay in payment of those funds became unreasonable.

The insurance carrier is encouraged to review its internal processes and protocol to ensure compliance with the requirement to promptly issue payment to an entitled injured worker to avoid future penalty awards in similar situations. A penalty sufficient to alert the insurance carrier to this problem and deter similar future conduct is warranted.

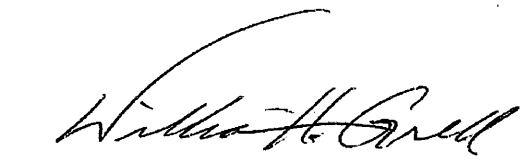
Having considered the relevant factors and the purposes of the penalty statute, I conclude that a section 86.13 penalty in the amount of $5,000.00 is appropriate to punish the employer for its delay in payment of benefits under these facts and should serve as a deterrent against future conduct. However, the facts of this case are not of such an egregious nature that an additional penalty is warranted.

ORDER

Defendants shall pay claimant penalty benefits in the amount of five thousand and 00/100 dollars ($5,000.00).

Defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Signed and filed this 8th day of January, 2018.



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WHG/sam

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.