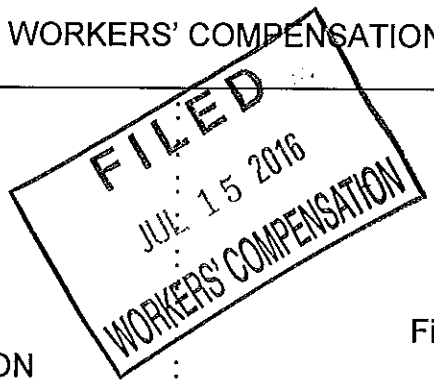
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



ALAN BOWERS,

Claimant,

vs.

PREMIUM TRANSPORTATION STAFFING, INC.,

Employer,

and

DALLAS NATIONAL INSURANCE CO.,

Insurance Carrier,
Defendants.

File No. 5040646

ARBITRATION

DECISION

Head Note No.: 3300

STATEMENT OF THE CASE

Claimant, Alan Bowers, has filed a petition in arbitration and seeks workers' compensation benefits from, Premium Transportation Staffing, Inc., employer, and Dallas National Insurance Company, insurance carrier, defendants.

The matter was submitted on the exhibits, existing record, and by briefs. Full submission date was June 1, 2016.

ISSUE

The parties have submitted the following issue for determination:

Penalty.

FINDINGS OF FACT

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

Claimant filed a petition for workers' compensation benefits on June 5, 2012 for a work injury of October 17, 2011. The hearing was held on June 11, 2013 and the arbitration decision was issued on November 5, 2013. That decision found that the claimant was permanently and totally disabled from the injury arising out of and in the

course of his employment with the employer. The decision was appealed to the Workers' Compensation Commissioner who affirmed the decision on May 23, 2014. The decision was appealed to District Court and then to the Court of Appeals. No stay on judgment was ever entered. Defendants also lost every appeal. The defendants probably had no good faith appeals basis. The Court of Appeals decision was issued October 14, 2015. Still no payment was made. Perhaps more important is defendants did not stay the final agency award that benefits were to be paid weekly beginning October 17, 2011 and continuing for all periods of disability. An order denying a stay was issued August 1, 2014. An order granting judgment was issued by the Polk County District Court on March 16, 2015. Still no payment was made. To collect in Ohio, when the defendants still did not pay, a debtor's exam was scheduled. Ohio converted the Iowa judgment into an Ohio judgment on March 16, 2016. Before payment of a judgment rendered in Ohio on March 16, 2016 the last benefit payment was made on November 3, 2012. The Ohio judgment was a Polk County, Iowa judgment that had to be transferred and collected in Ohio. The first judgment of $63,798.01 was paid. The second judgment of $37,388.79 was not paid. Claimant is again pursuing a judgment in Ohio courts in an effort to collect. So over $101,186.80 was paid late, or not at all.

Defendant insurer is insolvent. Defendant employer argues that it cannot be assessed a penalty. The employer chose Dallas National Insurance Company to be its insurer and agent for workers' compensation insurance, but with a very high retention variable of one million dollars per claim. The selection would have involved cost analysis such as cost of the insurance versus financial soundness of the insurer. The ability to have a very high retention variable was probably an important factor in the decision to go with the insurer chosen. The risk of choosing a carrier that goes insolvent does not fall on the injured worker. The employer has the obligation to pay benefits where there is no insurer or guarantee fund. The employer chose a policy with a high enough of a retention that there is no guarantee fund liability. Again, this is a business risk the employer took and cannot pass onto the injured worker. Also, the claim has still not even reached the level that insurance would matter. The $101,000.00 plus is still the employer's money, as the claim is not yet close to the deductible. The employer argues that it is not self-insured. Technically that is correct, and therefore the principles of bad that do not concern a true self-insured should be considered by the defendants.

The need for a fair and equitable system of workers' compensation evolved out of the industrial revolution. As economic and industrial activities flourished, the number of work injuries grew. The increasing use of machinery and the pressure of increased demand for production resulted in more injuries. For the most part, workers who were injured on the job had no recourse other than to sue their employers at common law, an expensive and time-consuming process. The court system was crowded, causing long delays. Compensation for injuries was usually insufficient and uncertain. The employee sometimes was forced to bear the expense of injury himself or had to throw himself on the mercy of welfare.

Europe during the 1800s took the first step, and by the turn of the century the movement had spread to the United States and Canada. Laws were enacted to provide workers injured on the job with prompt and **guaranteed** benefits. Injured workers received medical care and disability income irrespective of fault. Employers, in turn, were protected from potentially catastrophic loss by a stated amount of specific benefits for the injuries suffered by the employee. The worker was prohibited from filing suit while the employer was obligated to pay the mandated benefits.

Only a few large employers had sufficient resources to guarantee injured employees these mandated benefits without endangering solvency. Therefore, the vast majority of employers purchased insurance protection against these liabilities. Insurance was a necessity to stabilize the increasing mechanization of the business community. Insurance, as defined, is coverage by contract whereby one party undertakes to indemnify or guarantee another against loss by a specified contingency or peril.

The year 1911 is the most significant in the history of workers' compensation in America (arguably there were earlier efforts in the U.S.). The employers in Wisconsin lobbied the state legislature for what is now known as the "great trade-off." Through this legislation, the employer agreed to provide medical and indemnity (wage replacement) benefits and the injured employee agreed to give up his/her right to sue the employer. That same year ten more states enacted "workmen's" compensation laws. Four more states adopted laws in 1912, and eight more (including Iowa) passed laws in 1913. By 1948, all the states had at least some form of "workmen's" compensation in effect including Alaska and Hawaii. Although they did not acquire statehood until 1959, they had taken the step to adopt legislation in 1915 when they were territories. Today, in addition to the 50 states, workers' compensation laws are in effect in the District of Columbia, Puerto Rico, Virgin Islands, the Navajo Nation, the Dominion of Canada, and 12 Canadian Provinces. Workers' compensation has become the exclusive remedy for the injured worker. It also protects employers from damage suits filed by the injured worker as well as provides employers with a basis for calculating production costs.

Under the various workers' compensation systems, insurance is purchased or provided by employers through individual insurance companies, funds, or self insurance plans to provide the worker with the indemnity and medical benefits required by the laws or acts of the various states or provinces. The Jones Act, Harbor Worker's, Longshoremen's Act, the Federal Workers' Compensation Act, are all under governmental regulation and administration but the purpose of these laws are all the same, to compensate the injured worker for loss of wages and medical benefits.

The primary purpose of workers' compensation statute is to benefit workers and worker's dependents and is to be interpreted liberally with view toward that objective. Caterpillar Tractor Co. v. Shook, 313 N.W.2d 503 (Iowa 1981).

In cases of ambiguity or unclearness, it has long been the law of Iowa that a statutory provision in the Iowa Workers' Compensation Act should be interpreted in

favor of the injured worker. Ewing v. Allied Const. Services, 592 N.W.2d 689 (Iowa 1999); Myers v. FCE Services, Inc. 592 N.W.2d 354 (Iowa 1999); Danker v. Wilimek, 577 N.W.2d 634 (Iowa 1998); Haverly v. Union Const. Co. 18 N.W.2d 629 (Iowa 1945); Conrad v. Midwest Coal Co., 231 Iowa 53, 3 N.W.2d 511 (Iowa 1941).

Workers' compensation statutes have a humanitarian objective and must be applied broadly and liberally for the primary benefit of injured workers and their families. The fundamental reason for their enactment is to avoid litigation, lessen the expense incident thereto, minimize appeals and afford an efficient and speedy tribunal to determine and award compensation. Flint v. City of Eldon, 191 Iowa 845, 849; 183 N.W. 344, 345 (1921). The workers' compensation system is viewed as "rough justice--speedy, summary, informal, untechnical" Flint at 849. The case at bar is a prime example of what happens when the Pandora's Box is opened. Litigation in this case undoubtedly has been and will continue to be extremely time consuming and expensive for all concerned, including this agency, due in part to these very issues.

The employer would therefore be liable for payment of any claim starting at dollar one. The risk on choosing a workers' compensation policy is on the insured, and not on the worker. Penalty is a benefit pursuant to Iowa Code section 86.13

REASONING AND CONCLUSIONS OF LAW

The only issue is whether the claimant is entitled to penalty benefits. The issues of employer-employee relationship, extent of disability, and weekly benefit rate have all been well litigated. This is noted since defendants' Exhibit D seems an attempt to reargue the rate issue that the Court of Appeals has decided.

86.13 COMPENSATION PAYMENTS.

1. If an employer or insurance carrier pays weekly compensation benefits to an employee, the employer or insurance carrier shall file with the workers' compensation commissioner in the form and manner required by the workers' compensation commissioner a notice of the commencement of the payments. The payments establish conclusively that the employer and insurance carrier have notice of the injury for which benefits are claimed but the payments do not constitute an admission of liability under this chapter or chapter 85, 85A, or 85B.

2. If an employer or insurance carrier fails to file the notice required by this section, the failure stops the running of the time periods in section 85.26 as of the date of the first payment. If commenced, the payments shall be terminated only when the employee has returned to work, or upon thirty days' notice stating the reason for the termination and advising the employee of the right to file a claim with the workers' compensation commissioner.

3. This section does not prevent the parties from reaching an agreement for settlement regarding compensation. However, the agreement is valid only if signed by all parties and approved by the workers' compensation commissioner.

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.

Even previous agency adjudication of a penalty issue and prior Court of Appeals decision concerning claimant's right to benefits did not limit a claimant's right to pursue a subsequent penalty claim. Simonson v. Snap-on Tools Corp., 588 N.W.2d 430 (1999).

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.

(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).

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).

85.18 Contract to relieve not operative.

No contract, rule, or device whatsoever shall operate to relieve the employer, in whole or in part, from any liability created by this chapter except as herein provided.

87.1 Insurance of liability required.

Every employer subject to the provisions of this and chapters 85, 85A, 85B, and 86, unless relieved therefrom as hereinafter provided, shall

insure the employer's liability thereunder in some corporation, association, or organization approved by the commissioner of insurance.

. . . .

Every such employer shall exhibit, on demand of the workers' compensation commissioner, evidence of the employer's compliance with this section; and if such employer refuses, or neglects to comply with this section, the employer shall be liable in case of injury to any worker in the employer's employ under the common law as modified by statute.

87.4 Group and self-insured plans -- tax exemption -- plan approval.

For the purpose of complying with this chapter, groups of employers by themselves or in an association with any or all of their workers, may form insurance associations as hereafter provided, subject to such reasonable conditions and restrictions as may be fixed by the insurance commissioner; and membership in such mutual insurance organization as approved, together with evidence of the payment of premiums due, shall be evidence of compliance with this chapter.

A self-insurance association formed under this section and an association comprised of cities or counties, or both, or community colleges as defined in section 260C.2 or school corporations, or both, or other political subdivisions, which have entered into an agreement under chapter 28E for the purpose of establishing a self-insured program for the payment of workers' compensation benefits are exempt from taxation under section 432.1.

A plan shall be submitted to the commissioner of insurance for review and approval prior to its implementation. The commissioner shall adopt rules for the review and approval of a self-insured group plan provided under this section. The rules shall include, but are not limited to, the following:

1. Procedures for submitting a plan for approval including the establishment of a fee schedule to cover the costs of conducting the review.

2. Establishment of minimum financial standards to ensure the ability of the plan to adequately cover the reasonably anticipated expenses.

A self-insured program for the payment of workers' compensation benefits established by an association comprised of cities or counties, or both, or community colleges, as defined in section 260C.2, or other political subdivisions, which have entered into an agreement under chapter 28E, is not insurance, and is not subject to regulation under

chapters 505 through 523C. Membership in such an association together with payment of premiums due relieves the member from obtaining insurance as required in section 87.1. Such an association is not required to submit its plan or program to the commissioner of insurance for review and approval prior to its implementation and is not subject to rules or rates adopted by the commissioner relating to workers' compensation group self-insurance programs. Such a program is deemed to be in compliance with this chapter.

The workers' compensation premium written on a municipality which is a member of an insurance pool which provides workers' compensation insurance coverage to a statewide group of municipalities, as defined in section 670.1, shall not be considered in the determination of any assessments levied pursuant to an agreement established under section 515A.15.

87.8 Insolvency clause prohibited.

No policy of insurance issued under this chapter shall contain any provision relieving the insurer from payment if the insured becomes insolvent or discharged in bankruptcy during the period that the policy is in operation, or the compensation, or any part of it, is unpaid.

87.9 Policy clauses required.

Every policy shall provide that the worker shall have a first lien upon any amount becoming due on account of such policy to the insured from the insurer, and that in case of the legal incapacity, inability, or disability of the insured to receive the amount due and pay it over to the insured worker, or the worker's dependents, said insurer shall pay the same directly to such worker, the worker's agent, or to a trustee for the worker or the worker's dependents, to the extent of any obligation of the insured to said worker or the worker's dependents.

87.10 Other policy requirements.

Every policy issued by an insurance corporation, association, or organization to insure the payment of compensation shall contain a clause providing that between any employer and the insurer, notice to and knowledge of the occurrence of injury or death on the part of the insured shall be notice and knowledge on the part of the insurer; and jurisdiction of the insured shall be jurisdiction of the insurer, and the insurer shall be bound by every agreement, adjudication, award or judgment rendered against the insured.

515A.15A Deductible policies in workers' compensation.

The commissioner may enter an order under section 515A.18 to assure availability within this state of a policy under this chapter which provides as part of the policy, or as an endorsement to the policy, an option for a deductible related to benefits payable under a policy issued pursuant to this chapter. The order may make provisions for changes in experience ratings, premium surcharges, or any other modification, as a result of issuance of a policy, or of an endorsement to the policy, pursuant to the order. Under an order entered pursuant to this section, the commissioner shall provide that if the policyholder selects a deductible option, the insured employer is liable for all of the amount of the deductible for benefits paid for each compensable claim of an employee under the policy.

The argument that an employer has no responsibility to pay a penalty has no merit. Particularly in this case where the very large deductible was not met and the benefits were always the employer's money. Defendants choose to lose guaranty fund protection with a large deductible. The defendants' conduct of delaying payment 5 months from the Court of Appeals decision is enough to merit a large penalty. There is no need to regurgitate the facts found above. A penalty in the range of 50 percent is not only proper here, it is necessary. Defendants shall pay a penalty of $50,000.00 which is 50 percent rounded down to the nearest thousand dollar mark.

ORDER

Therefore it is ordered:

Defendants shall a penalty of fifty thousand and 00/100 dollars ($50,000.00), all of which is accrued.

Costs are taxed to the defendants pursuant to 876 IAC 4.33.

Accrued benefits shall be paid in lump sum together with interest pursuant to Iowa Code section 85.30 with subsequent reports of injury pursuant to rule 876 IAC 3.1.

Signed and filed this 15th day of July, 2016.

STAN MCELDERRY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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SRM/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.