

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RANDY SANDS,

Claimant,

vs.

CITY OF SIOUX CITY,

Employer,
Self-Insured,
Defendant.

File No. 5050047.01

PENALTY DECISION

Head Note Nos: 4000.2

STATEMENT OF THE CASE

Claimant, Randy Sands, filed a petition seeking penalty benefits from City of Sioux City, self-insured employer, as defendant, as a result of a stipulated injury sustained on October 4, 2013.¹ This matter came on for hearing before Deputy Workers' Compensation Commissioner Erica J. Fitch, on August 3, 2021, via internet-based videoconferencing, using CourtCall. The record in this case consists of joint exhibits 1 through 6, claimant's exhibits 1 through 4, defendant's exhibits A, D, and G, and the testimony of the claimant and Jennifer Albert. The parties submitted post-hearing briefs, the matter being fully submitted on September 15, 2021.

On the night prior to hearing, at 10:20 p.m. on August 2, 2021, defendant filed a motion to dismiss claimant's claim. Hearing in the underlying matter proceeded, as scheduled, on August 3, 2021. At that time, claimant was granted until August 13, 2021 to file a written response to defendant's motion to dismiss. During evidentiary hearing, the parties also offered argument regarding the motion to dismiss. At the conclusion of the arguments, I took the matter under advisement, pending receipt of claimant's written response. The parties were advised that the motion to dismiss would be addressed via separate ruling or incorporated into the underlying decision. As numerous issues raised by defendant at evidentiary hearing overlap with those raised in the motion to dismiss, I

¹ Claimant's original notice and petition filed October 16, 2020 indicated claimant sought "review-reopening" under Iowa Code section 86.14 via a check-the-box section on the petition whereby parties identify the type of claim being brought. The plain language of the remainder of the petition sought only penalty benefits. A claim for penalty benefits alone is typically raised by checking-the-box for "other." Upon review of the entirety of the file prior to hearing, the undersigned raised the question to the parties as to whether claimant's claim represented a review-reopening, seeking review or reopening of a prior award based on a change of condition, or whether the check-the-box reference to review-reopening reflected a scrivener's error, with claimant only seeking penalty benefits. Claimant responded and clarified the only subject of the petition was potential entitlement of penalty benefits. Defendant failed to respond. At the commencement of evidentiary hearing, I specifically found the subject of claimant's claim was penalty benefits only and the reference to a review-reopening claim reflected a scrivener's error.

have elected to incorporate ruling on the motion to dismiss into this decision. Accordingly, defendant's motion to dismiss is identified as the first issue for determination.

ISSUES

The parties submitted the following issues for determination:

1. Whether claimant's claim for penalty benefits should be dismissed;
2. Whether a final ruling from the commissioner exists which could be the subject of review-reopening;
3. Whether the ruling deputy possessed the authority to appoint a financial expert;
4. Whether the penalty issue is moot, as payment was made prior to an order by the agency affixing the commuted value amount;
5. Whether a penalty on delayed commuted benefits is available, when weekly indemnity benefits continued to be paid;
6. Whether the employer should be assessed a penalty for late payment of the judgment which was entered by the Woodbury District Court on August 18, 2020;
7. If a penalty is warranted, the amount of such benefits; and
8. Specific taxation of costs found in Claimant's Exhibit 3.

The parties filed a hearing report at the commencement of the hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this decision and 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.

FINDINGS OF FACT

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

Claimant's testimony was consistent as compared to the evidentiary record and his demeanor at the time of evidentiary hearing gave the undersigned no reason to doubt claimant's veracity. Claimant is found credible.

On April 28, 2014, claimant filed an original notice and petition in arbitration, seeking workers' compensation benefits as a result of an alleged work-related injury on October 4, 2013. This matter was assigned File No. 5050047. Following hearing, the undersigned issued an arbitration decision on December 20, 2016 finding, in relevant part, that claimant was entitled to permanent total disability benefits, commencing October 5, 2013 and continuing during the period claimant remained permanently and totally disabled. The arbitration decision was not appealed and represents final agency action. (Agency File No. 5050047, Arbitration Decision, December 20, 2016)

On February 23, 2017, claimant filed an original notice and petition for partial commutation in File No. 5050047, seeking to commute all but one week of the award of permanent total disability benefits. Following hearing, a distinct deputy commissioner authored a decision granting claimant's petition for partial commutation. The deputy ordered, in relevant part:

Defendants [*sic*] shall pay a lump sum of the commuted benefits for all of claimant's remaining lifetime benefits, except for the final week of her [*sic*] life expectancy, utilizing rule 876 IAC 6.3.

. . .

The parties shall cooperate to calculate the applicable value of the commuted benefits.

If the parties cannot reach an agreement on the commuted value, they should file a request for appointment of a financial expert to calculate the value of the partial commutation with the expense of that financial expert to be assessed as a cost against whichever party(ies) presented inaccurate calculations of the commuted value.

(Agency File No. 5050047, Partial Commutation Decision, August 7, 2018)

Defendant appealed the proposed partial commutation decision in File No. 5050047 to the workers' compensation commissioner. Following review, the commissioner issued an appeal decision on January 17, 2020, affirming the partial commutation decision in its entirety. The commissioner ordered, in relevant part:

Defendant shall pay claimant a lump sum payment of future weekly benefits for all of claimant's remaining life expectancy, except for the last week, utilizing rule 876 IAC 6.3, discounted to the present value based on the number of weeks to be commuted and the interest rate for determining the discount as of the date of this decision.

. . .

The parties shall cooperate to calculate the applicable value of the commuted benefits.

If the parties cannot reach an agreement on the commuted value, they should file a request for appointment of a financial expert to calculate the value of the partial commutation with the expense of that financial expert to be assessed as a cost against whoever party(ies) presented inaccurate calculations of the commuted value.

(Agency File No. 5050047, Appeal Decision, January 17, 2020)

On February 5, 2020, defendant filed a petition for judicial review of the appeal decision on File No. 5050047. (Agency File No. 5050047) On May 12, 2020, the District Court Judge authored a thorough and exhaustive ruling on the petition for judicial review. The judge affirmed the commissioner's appeal decision in its entirety, but issued the following additional order:

This matter is REMANDED to the Iowa Workers' Compensation Commissioner for computation of the precise dollar amount of the commuted lump-sum payment, either through the process established by the agency (appointment of a financial expert), or by the agency itself.

(JE1, p. 33)

Claimant's attorney directed correspondence to defendant's attorney dated June 17, 2020. Thereby, claimant's attorney indicated a determination of the commuted value of claimant's claim needed to be completed, as defendant had not appealed the ruling on petition for judicial review. Claimant enclosed a proposed calculation and indicated that in the event defendant disagreed, "we will need to request the appointment of a financial expert to determine the commuted value." Claimant's counsel offered two suggested experts to compute the award value. In the event an agreement could not be reached, counsel indicated he would petition the agency for appointment of an expert. (CE1, p. 1)

On June 22, 2020, claimant filed a request for appointment of a financial expert with the agency in File No. 5050047. Thereby, claimant's counsel indicated he had not received a response from defendant's counsel to his correspondence of June 17, 2020. Counsel further represented defendant had not, to date, provided claimant with any proposed commuted value computations. Claimant requested appointment of a financial expert, with the cost to be borne by defendant. (Agency File No. 5050047)

On July 2, 2020, Deputy Workers' Compensation Commissioner James Christenson issued an order in File No. 5050047, addressing claimant's motion for appointment of a financial expert. He noted claimant represented that efforts had been made to resolve the calculation of the commuted award; however, defendant failed to respond. Deputy Christenson noted defendant did not respond to claimant's motion or to the deputy's email and telephone inquiries of June 29, 2020, made in effort to resolve the pending motion. In consideration of the motion, Deputy Christenson noted the appeal decision of January 17, 2020 allowed a request for appointment of a financial

expert, should the parties be unable to reach an agreement on commuted value. Ultimately, Deputy Christenson ordered:

As defendant's counsel has failed to respond in any way to resolve this matter with claimant, a financial expert is appointed. The agency appoints Tim Swedean with Swedean and Company, as the financial expert. Within ten days of the date of this order, the parties shall submit documents to Mr. Swedean, at Swedean and Company, 663 North Derby Lane, North Sioux City, South Dakota, 57049, to allow him to determine the correct amount of the commuted value in this case. The parties shall accept Mr. Swedean's opinions as the value of the partial commutation. The expenses of Mr. Swedean's work shall be assessed against the party who presented inaccurate information regarding the calculation.

(JE3, pp. 38-39)

No appeal from, request for reconsideration of, or other challenge to Deputy Christenson's order was filed by defendant. (Agency File No. 5050047)

Pursuant to the July 2, 2020 order, claimant's counsel provided relevant documents to certified public accountant, Mr. Swedean, for computation of the value of claimant's commutation award via correspondence dated July 10, 2020. (CE2, pp. 20-24, 48) Mr. Swedean determined the value of claimant's award given his life expectancy, as well as interest and credit due to defendant through August 1, 2020. (CE2, p. 42)

Utilizing Mr. Swedean's computations, claimant filed a request for entry of judgment with the District Court on August 13, 2020. (CE2, pp. 15-17)

On August 18, 2020 at approximately 3:30 p.m., the District Court judge entered a judgment in claimant's favor in the amount of \$411,842.83, plus interest in the amount of \$24.47 per day from August 2, 2020, until paid. (JE4, pp. 40-41)

Approximately 8 minutes later, at 3:38 p.m. on August 18, 2020, Workers' Compensation Commissioner Joseph Cortese II, issued an order delegating the authority to Deputy Christenson to "handle issues raised" by the judicial review ruling remanding the matter to the agency. (DED, p. 1)

On September 25, 2020, defendant issued a check to claimant in the amount of \$409,726.63, representing the judgment amount plus interest, minus ongoing payments. (JE5, pp. 42-43)

On September 30, 2020, claimant filed a satisfaction of judgment with the District Court, acknowledging receipt of payment for the August 18, 2020 judgment. Therein, claimant represented payment of the judgment had been late and thus could form the basis of an award of penalty benefits pursuant to Iowa Code section 86.13. Claimant

expressly did not waive any potential claim for penalty benefits pursuant to this section. (JE6, pp. 47-48)

On October 16, 2020, claimant filed an original notice and petition seeking penalty benefits. This matter was assigned File No. 5050047.01. Defendant filed an answer on November 5, 2020. Thereby, defendant took issue with procedural aspects of File No. 5050047, including arguing the agency lacked authority to appoint a financial expert and that the deputy commissioner who appointed the financial expert did so without a delegation of authority from the commissioner. (Agency File No. 5050047.01)

On January 14, 2021, Deputy Christenson emailed the attorneys of record and inquired if the matter of the commuted amount due had been resolved. (DEG, p. 4) Claimant's counsel replied and represented that Mr. Swedean had calculated the value of the commuted award, which served as the basis for a request for entry of judgment from the District Court dated August 13, 2020. Counsel indicated a judgment was entered on August 18, 2020, which defendant paid on September 25, 2020, and a satisfaction of judgment filed. Claimant's counsel indicated claimant had since filed a petition seeking penalty for late payment of the judgment. (DEG, p. 7) Later that date, defendant's attorney replied and inquired whether or not the agency had issued a final order in the commutation proceeding following the District Court remand order. Defendant's counsel posited that such an order had not been issued, given the deputy's request for status update. Defendant's counsel also indicated there was "an issue regarding the date of delegation of authority on remand" that had been raised by defendant in its answer to the "Review/Reopening" petition. (DEG, p. 3) On February 11, 2021, defendant's attorney followed up on her January 14, 2021 email and requested "clarification of the division's position on the status of the case." (DEG, p. 2)

Deputy Christenson issued a responsive email on February 18, 2021. Thereby, Deputy Christenson highlighted the existence of two separate petitions, with File No. 5050047 concerning the partial commutation matter and File No. 5050047.01 concerning the review-reopening petition.² Deputy Christenson stated a financial expert was appointed after defendant was nonresponsive to attempts to resolve the matter. He indicated a resulting financial report would typically be returned to the agency for issuance of an order setting the amount of the commuted award; however, claimant's counsel instead sought an entry of judgment from the District Court. In any case, he considered the partial commutation matter resolved due to defendant's payment of the judgment. In terms of the penalty petition (File No. 5050047.01), Deputy Christenson noted defendant raised a number of issues in its answer, but indicated the agency would not issue a sua sponte ruling on issues raised in an answer. If defendant sought a ruling regarding those issues, Deputy Christenson indicated a motion must be filed. (DEG, p. 1)

Evidentiary hearing in the penalty matter (File No. 5050047.01) was scheduled for August 3, 2021 at 1:00 p.m. On August 2, 2021, at 10:20 p.m., defendant filed a

² While referred to as a review-reopening petition, the petition in question reflects a petition for penalty benefits only, as addressed *supra*.

motion to dismiss claimant's claim. Thereby, defendant raised a number of arguments, including: that the remand order of May 12, 2020 in File No. 5050047 was not addressed by the agency; that the appointment of a financial expert in File No. 5050047 was done without a delegation of authority from the commissioner; that no final agency order was entered affixing the amount of the commutation award in File No. 5050047 and thus, no delay in payment could be established; that penalties are not allowable on commutation awards; and generally, that an award of penalty would be inappropriate given the surrounding facts of the case.

Importantly, at no prior point did defendant file a motion to dismiss or motion for summary judgment. (Agency File No. 5050047.01)

The matter proceeded to hearing, as scheduled, with defendant's motion to dismiss taken under advisement.

Claimant was 65 years of age at the time of hearing. He resides in Sioux City, Iowa. Since his most recent hearing, claimant and his wife sold their condo and used the proceeds to purchase a home in a retirement community which supplies onsite medical care. (Claimant's testimony)

Jennifer Albert, risk manager coordinator for defendant, testified at evidentiary hearing. Her duties include payment of workers' compensation claims. Ms. Albert has been in the employ of defendant for 16 years and has been tasked with accounts payable for workers' compensation claims for the last 13 years. Ms. Albert testified that to her knowledge, all payments of benefits and lump-sum judgments require city council action. The city council of Sioux City meets weekly on Monday. However, if that date falls on a holiday or there is a fifth Monday in the month, there is no city council meeting. (Ms. Albert's testimony)

Ms. Albert testified the judgment issued by the district court on August 13, 2020 was not received with enough notice to be placed on the city council agenda for the meeting on Monday, August 24, 2020. There was no city council meeting the following Monday, August 31, 2020, as that date reflected the fifth Monday of the month. There was also no meeting the following Monday, September 7, due to the Labor Day holiday. Ms. Albert testified a closed session meeting was held the following Monday, September 14, 2020, to discuss payment. As a result of action taken at that meeting, action for full payment was placed on the agenda for the next regular city council meeting, September 21, 2020. She testified payment of the commutation judgment was authorized through city council resolution on September 21, 2020. (Ms. Albert's testimony)

Ms. Albert testified the check representing payment of the judgment was issued September 25, 2020. Once received, Ms. Albert hand-delivered the check to the office of claimant's attorney. Ms. Albert testified that once workers' compensation benefits commenced, weekly benefits continued and were not delayed, denied, or terminated until the commutation judgment was paid. (Ms. Albert's testimony)

Ms. Albert expressed belief defendant had been late in payment of workers' compensation benefits in other cases during the 13 years in her role, but she was unable to recite any specific details at the time of hearing. (Ms. Albert's testimony)

Ms. Albert's testimony was clear and her demeanor at the time of hearing gave the undersigned no reason to doubt her veracity. Ms. Albert is found credible.

Claimant continued to receive weekly indemnity benefits until defendant paid the lump sum partial commutation amount. Once begun, said indemnity benefits were not terminated, denied, or delayed, until the commutation judgment was paid. (Claimant's testimony)

Claimant invested the proceeds of the partial commutation in annuities with the assistance of a financial planner. (Claimant's testimony)

On August 9, 2021, claimant filed a resistance to defendant's motion to dismiss. Thereby, claimant set forth a number of arguments: that defendant's motion was untimely, as it was not raised pre-answer; that defendant failed to set forth any labeled affirmative defenses in its answer; that defendant's arguments were waived, due to failure to set forth case law in support of its position and/or submit a brief in support of its arguments; that case law supports awards of penalty benefits on commutation awards and judgments; and generally, that defendant did not meet the criteria to avoid imposition of a penalty.

Due to significant overlap between the issues raised in defendant's motion to dismiss and those presented for determination with respect to the petition for penalty benefits, consideration of the motion and ruling thereon is incorporated into this decision.

CONCLUSIONS OF LAW

The first issue for determination is whether claimant's claim for penalty benefits should be dismissed.

The Iowa Rules of Civil Procedure are made applicable in contested cases pursuant to rule 876 Iowa Administrative Code 4.35. Iowa Rule of Civil Procedure 1.421(1) states:

1.421(1) Every defense to a claim for relief in any pleading must be asserted in the pleading responsive thereto, or in an amendment to the answer made within 20 days after service of the answer, or if no responsive pleading is required, then at trial. The following defenses or matters may be raised by pre-answer motion:

- a. Lack of jurisdiction of the subject matter.
- b. Lack of jurisdiction over the person.
- c. Insufficiency of the original notice or its service.
- d. To recast or strike.

facts conceivable that a claimant might show a right of recovery. State ex rel. Miller v. Philip Morris, Inc., 577 N.W.2d 401, 403 (Iowa 1998).

Where a motion to dismiss tests the legal sufficiency of the petition, the allegations pled by the claimant are admitted as true and all inferences which may be drawn from those facts are construed in a light most favorable to the claimant. The motion to dismiss also waives any ambiguity or uncertainty in the petition. Leuchtenmacher v. Farm Bureau Mutual Insurance Co., 460 N.W.2d 858, 861 (Iowa 1990); Curtis v. Board of Supervisors of Clinton County, 270 N.W.2d 447, 448 (Iowa 1978). In interpreting workers' compensation provisions, the law is construed liberally in favor of the claimant. Hanson v. Reichelt, 452 N.W.2d 164, 168 (Iowa 1990); Teel v. McCord, 394 N.W.2d 405, 406-407 (Iowa 1986); Thomas v. William Knudson & Sons, Inc., 349 N.W.2d 124, 126 (Iowa 1984). The beneficial purposes of the law will not be frustrated by reading something into it which is not there or by adopting a strained or narrow construction. Thomas, 349 N.W.2d at 126.

In the instant matter, defendant asserts claimant's claims should be dismissed by asserting both challenges to the original notice and petition itself, as well as to the merits of the underlying claim based on the facts at play in File No. 5050047. Any argument which could be construed as an attack on the original notice and petition must fail, as defendant did not raise the challenge prior to answering the petition. All facts which could form the basis of an attack on the pleadings were known at the time defendant filed its answer and accordingly, any motion attacking the petition should have been served prior to responding to the pleading as required by rule 876 IAC 4.9(2). Furthermore, even if not considered waived, defendant's motion would fail, as review of the pleadings supports a claim where claimant could possibly recover. To the extent claimant's scrivener's error checking-the-box for review-reopening would be fatal to claimant's claim, the error could have been easily remedied via an amendment to the petition, had the issue been timely raised. Defendant failed to timely attack the pleading and as a result, the motion to dismiss must fail.

To the extent defendant's motion attacks the merits of claimant's underlying claim, the issues should have been raised via a motion for summary judgment. Rule 876 IAC 4.35 makes Iowa R. Civ. P. 1.981 through 1.983 applicable to motions of summary judgment before this agency. Rule 1.981(3) requires a motion for summary judgment be filed not less than 60 days prior to hearing. By filing less than 24 hours prior to hearing, defendant clearly missed this deadline. Accordingly, to the extent defendant's motion to dismiss could have been interpreted as a motion for summary judgment, the motion would also fail.

The next issue for determination is whether a final ruling from the commissioner exists which could be the subject of review-reopening. The scrivener's error reflecting reference to a review-reopening petition was corrected prior to, and confirmed during, evidentiary hearing. The face of claimant's petition sought only penalty benefits and no review or reopening of a prior award was sought. Accordingly, defendant's argument regarding the existence of a final ruling subject to review-reopening is moot.

The next issue for determination is whether the ruling deputy possessed the authority to appoint a financial expert.

Defendant argues the agency lacked authority to appoint a financial expert to affix the precise dollar amount of the commuted value of claimant's partial commutation in File No. 5050047. The argument is two-fold: (1) the agency lacked authority to appoint a financial expert; and (2) Deputy Christenson specifically lacked the authority to do so, as the file lacked a delegation of authority from the commissioner to Deputy Christenson to act on the remand order. Ultimately, both arguments fail.

Defendant is attempting to utilize the penalty petition (File No. 5050047.01) to relitigate matters at issue in the partial commutation matter (File No. 5050047). The order issued by Deputy Christenson was consistent with both the appeal decision and the ruling on judicial review. The financial expert was appointed due to lack of cooperation in determining the commuted value of claimant's award and defendant did not respond to claimant's motion or inquiry from Deputy Christenson. Once filed, defendant at no time appealed or contested the appointment of a financial expert in the proceedings relative to File No. 5050047. Therefore, the actions taken in File No. 5050047 represent the law of that case and the propriety of any such actions are not properly the subject of a "defense" to the penalty claim.

The next issue for determination is whether the penalty issue is moot, as payment was made prior to an order by the agency affixing the commuted value amount.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3).

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).

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). The factors to be considered in determining the amount of the penalty include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

Defendant argues claimant's claim for penalty benefits must fail and there can be no delay in defendant's payment of benefits because there was no final agency order in File No. 5050047 setting the precise dollar amount of claimant's commutation award. Again, defendant's argument fails. Deputy Christenson's July 2, 2020 order specifically stated the parties "shall accept Mr. Swedean's opinions as the value of the partial commutation." This language is unambiguous, as evidenced by the district court's entry of judgment in accordance with Mr. Swedean's computation. The district court's entry of

judgment was not appealed or otherwise challenged by defendant; in fact, defendant paid the judgment as ordered. Accordingly, the entry of judgment represents the law of the case.

Furthermore, section 86.13 does not require an order of the agency as a prerequisite to an award of penalty benefits. Section 86.13 allows for penalty benefits if a denial, delay in payment, or termination of benefits occurs without reasonable or probable cause or excuse known to the defendant(s) at the time of the denial, delay, or termination. These triggering events are not tied to an agency order. Quite simply, if benefits are not paid when due, penalty benefits may be triggered. The relevant question is when the benefits are due, not whether the commissioner has ordered benefits.

Defendant has again attacked the actions of the agency and district court during separate proceedings. Review of the record and agency files, however, reveals defendant took no action to contest the propriety of those actions in the relevant file, File No. 5050047. Defendant's arguments regarding the procedures followed in File No. 5050047 are moot and irrelevant to the question of penalty benefits in File No. 5050047.01.

The next issue for determination is whether a penalty on delayed commuted benefits is available, when weekly indemnity benefits continued to be paid.

Defendant asserts no penalty may be assessed on a commuted award, arguing that commuted benefits are not specifically enumerated as eligible for penalty under section 86.13 and claimant continued to receive weekly benefit checks until the commuted value was paid. Defendant, however, offers no case law in support of this argument. Claimant, on the other hand, identified a case which is directly on point. In the case Barr v. Shaw Industries, Inc., File No. 5026780 (Appeal May 15, 2012), penalty benefits were awarded on delayed payment of commutation proceeds, despite continuance of weekly indemnity checks. A partial commutation is an award of weekly benefits in a lump sum and thus, may be the subject of a claim for penalty benefits. Defendant's continued payment of weekly benefits may be a factor considered in the amount of penalty benefits due, but the continued payment does not excuse defendant from paying the commuted award.

The next issue for determination is whether the employer should be assessed a penalty for late payment of the judgment which was entered by the Woodbury District Court on August 18, 2020. In the event a penalty is warranted, the next issue for determination is the amount of such benefits.

Iowa Code 86.13, as amended effective July 1, 2009, states:

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.

The relevant facts are simple and undisputed. The judgment was issued on August 18, 2020. Defendant paid the judgment on September 25, 2020. The period between judgment and payment totaled 39 days. Claimant has established a delay in payment of benefits. The burden, therefore, shifts to defendant to establish a reasonable or probable cause or excuse for the delay. To do so, defendant must comply with the criteria of section 86.13(4)(c). In the instant matter, there is no evidence defendant contemporaneously conveyed the basis for the delay to claimant. Defendant, therefore, failed to establish a reasonable or probable excuse for the delay. Accordingly, imposition of a penalty is required.

Having determined a penalty award is required, the amount of such benefits must be determined. The district court entered a judgment in the amount of \$411,842.83; after addition of interest and credit for ongoing payments, the judgment was satisfied 39

days later by payment of \$409,726.63. Penalties up to 50 percent of this total may be awarded.

In determining the amount of penalty benefits, a number of factors are relevant. Importantly, after the original award of permanent total disability benefits in File No. 5050047, defendant never ceased payment of that award. Weekly indemnity benefits continued until final payment of the commuted award was issued. Additionally, defendant set forth procedural barriers to timely payment of the judgment, including necessary approval by the city council following determination not to pursue appeal of the judgment. Once a determination was made not to appeal, the question of payment was promptly placed up for resolution by the city council and only minor delay existed thereafter. That being said, defendant should not be rewarded for adopting a procedure which results in delays in payment to an injured worker. If delays in payment are inevitable due to defendant's procedure for approval of and issuance of payment, defendant should reconsider the timing of when and how items are entered onto an agenda for payment. Delays in defendant's payment of claims have resulted in imposition of penalties in other cases: Gilson v. City of Sioux City, Iowa, File Nos. 5042119 and 5042120 (Arb 1/8/2014); Gilson v. City of Sioux City, File Nos. 5042119 and 5042120 (Review-Reopening 6/2/17); and Boyle v. City of Sioux City, File No. 5051858 (Arb 9/26/16). Additionally, defendant was ordered to pay penalty benefits relative to its handling of claimant's claim in the underlying arbitration matter: Sands v. City of Sioux City, File No. 5050047 (Arb 12/20/16). Following consideration of the above and all other relevant factors, I find an award of \$5,000.00 in penalty benefits is warranted.

The final issue for determination is a specific taxation of costs pursuant to Iowa Code section 86.40 and rule 876 IAC 4.33. Claimant requests taxation of the costs of: filing fee and associated convenience charge (\$103.00); and service fee (\$7.05). (CE3, pp. 50-53) Claimant requests taxation of the cost of filing fee and associated convenience charge in the amount of \$103.00; however, pursuant to rule 876 IAC 4.8(2)(a), no filing fee is required for petitions seeking penalty benefits under section 86.13. As no filing fee was required, it would be inappropriate to tax this cost to defendant. However, the cost of the service fee is an allowable cost and is taxed to defendant. Accordingly, defendant is taxed with costs in the amount of \$7.05.

ORDER

THEREFORE, IT IS ORDERED:

The parties are ordered to comply with all stipulations that have been accepted by this agency.

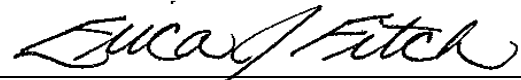
Defendant shall pay penalty benefits in the amount of five thousand dollars (\$5,000.00).

Defendant shall pay interest on the penalty benefits from the date of this decision. See Schadendorf v. Snap On Tools Corp., 757 N.W.2d 330, 339 (Iowa 2008).

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

Costs in the amount of seven and 05/100 dollars (\$7.05) are taxed to defendant pursuant to 876 IAC 4.33.

Signed and filed this 21st day of January, 2022.



ERICA J. FITCH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Dennis Mahr (via WCES)

Connie Anstey (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.