

Recent Penalty Decisions

Sandberg v. Croell Redi-Mix, Inc., File No. 5060861 (Feb. 21, 2019). (Deputy Copley)

- In this case, defendants paid claimant at a lower weekly rate than that stipulated to at hearing. The stipulated rate was \$715.73 and defendants paid 20 weeks of benefits at \$470.16. This resulted in an underpayment of \$245.57 per week, totaling approximately \$5,000 of unpaid benefits during these 20 weeks.
- Defendants also overpaid benefits for 5.714 weeks (the rate paid at was not disclosed).
- Ultimately: defendants ended up overpaying benefits by \$715.73.
- **The deputy held that:** defendants offered no reasonable basis for paying at the significantly lower rate, and although defendants ultimately overpaid benefits in total, penalty was warranted based on this underpayment for 20 weeks. The deputy held significant penalty was warranted and assessed \$2,000 in penalty benefits, or 40% penalty based on the underpayment of approximately \$5,000.

Azbill v. Linn-Mar Comm. Sch. Dist., File No. 506094 (Feb. 14, 2019). (Deputy Pals)

- Claimant sought penalty benefits for an unreasonable denial of permanency benefits.
- Defendants asserted that because claimant was released to work with no restrictions, this meant that claimant suffered 0% permanent impairment.
- However, an authorized treating physician had opined that claimant would reach MMI after therapy ended and that claimant demonstrated objective evidence of loss of grip strength.
- Defendants never sought an impairment rating from claimant's treating physician or any other physician.
- **The deputy held that:** defendants did not establish a reasonable investigation or reasonable basis for denial of PPD benefits, given that a physician had opined claimant demonstrated objective evidence of loss of grip strength. Defendants had denied \$23,526 in PPD benefits and the deputy awarded \$6,600 in penalty benefits, or 28% penalty.

Byers v. Guardsmark, LLC, File No. 5055931 (Jan. 17, 2019). (Commissioner Cortese)

- Defendants used two two-week period in calculating rate in which claimant only worked 30 & 48 weeks; whereas the next lowest hours in a two-week period were 65.75 hours and all others were over 70 hours.
- **The Commissioner held that:** it was not fairly debatable on whether to include these weeks with 30 & 48 hours, despite defendants argument that it was fairly debatable because the deputy rejected both parties' rate calculations. Such a significant difference

in hours was not fairly debatable. Defendants underpaid more than \$4,000 and the deputy awarded \$1,000 in penalty benefits, or 25% penalty.

Werner v. NCI Building Systems, File No. 5044478 (Jan. 16, 2019). (Deputy Pals)

- Defendants paid approximately 31% industrial disability on an ultimate award of permanent total disability.
- There were multiple injuries asserted and defendants had admitted claimant suffered a pelvic/hip injury. Defendants paid out 31% industrial disability based on their physician's opinion that claimant suffered 30% whole person impairment for his pelvic fracture and claimant's first FCE finding that claimant could work in the medium vocational category.
- **The deputy held that:** a rating of functional impairment does not directly correlate to a degree of industrial disability to the body as a whole, and what defendants paid was reasonable in light of their physician's opinion and FCE results. While the deputy disagreed with defendants assessment of industrial disability, the deputy reasoned that because there are no clear guidelines on determining industrial disability, defendants conduct was not unreasonable in paying 31% industrial disability. No penalty was assessed.

Bigley v. Donaldson Co., Inc., File No. 5061014 (Jan. 15, 2019). (Deputy Walsh)

- Claimant sought penalty benefits for: failure to pay PPD, failure to contemporaneously investigate a right shoulder injury, underpayment of benefits, and late payments
- A physician opined claimant reached MMI on 5/2/14 and defendants did not request an impairment rating until 8/11/14. Defendants paid 10 weeks of PPD benefits on 11/4/14 for their own physician's rating of 4% impairment to the right arm.
- **The deputy held that:** penalty is mandatory in this situation because defendants provided no reason for their 3 month delay in requesting an impairment rating after claimant reached MMI.
- Next, when claimant was placed at MMI on 5/2/14, he was actively treating for a right shoulder condition. However, defendants instructed their IME physician on 8/11/14 to only address claimant's right wrist/arm condition.
- However, claimant obtained an opinion from Dr. Delbridge on 1/4/16 that claimant had functional impairment of his right shoulder as a result of his work injury and this opinion was forwarded to defendants. Defendants did not attempt to get a causation opinion with regard to claimant's right shoulder condition until 6/23/16 – nearly 2 years after requesting an impairment rating for claimant's right arm/wrist condition.

- **The deputy held that:** defendants did not timely investigate the compensability of claimant's right shoulder condition because they waited nearly 2 years after claimant was placed at MMI and evaluated for permanent impairment, while actively treating for his right shoulder condition. The deputy further held that defendants' physician's opinion that claimant's right shoulder condition was not work-related because claimant did not mention shoulder issues until 2 weeks after the injury was not reasonable.
- Finally, the deputy minimally address claimant's claim for penalty for late payments and underpayment of rate, holding this was subsumed into the other claims for penalty.
- **The deputy awarded:** \$7,500 in penalty benefits based on Dr. Delbridge's assignment of 7% whole body impairment for the right shoulder, totaling \$17,191.65 in benefits owed and not paid, or 43% penalty.

Marrs v. Regional Care Hosp., File No. 5052161 (Dec. 21, 2018). (Commissioner Cortese)

- Claimant sought penalty for defendants denial of liability and termination of benefits.
- Defendants argued that they should not be assessed benefits because they relied upon the opinion of Dr. Abernathey in denying and terminating benefits, and that the reason for their denial was appropriately communicated to claimant in April 2015.
- **The Commissioner held that:** there were two problems with defendants' arguments:
 - (1) defendants terminated benefits in October 2014, which was 4 months before asking Dr. Abernathey to evaluate claimant, and therefore, Dr. Abernathey's opinion could not have been the actual basis upon which defendants relied to terminate benefits
 - (2) defendants offered no evidence to support their assertion that they properly communicated their denial of liability and termination of benefits to claimant in April 2015. Defendants argued that they sent their denial to claimant's prior attorney, so it was his fault that claimant never received notice. However, defendants did not object to testimony on direct examination of claimant regarding assertions to the contrary, nor did defendants cross examine claimant about these facts. Also, defendants did not produce the letter they alleged was sent to claimant's prior attorney until the appeal process, which was too late. The deputy held that even if defendants did convey their denial of liability and termination of benefits in April 2015, this was still 6 months after benefits were terminated.
- **Penalty:** the deputy awarded 50% penalty, totaling \$39,000.

Netolicky v. Babcock & Wilcox Construction Co., File No. 5058144 (Dec. 17, 2018). (Deputy Pals)

- Claimant's asserted that defendants did not have a reasonable basis to deny claimant's claim and that penalty should be awarded. Claimant's reasoned that claimant's supervisor did not report claimant's injury to his superiors, nor was an internal accident report or First Report of Injury completed.
- Claimant did not have any lost time as a result of the work injury, and therefore, no first report of injury was required to be filed at that time. Additionally, there was significant inconsistent statements and evidence regarding whether claimant's alleged injury was in fact work-related.
- **The deputy held that:** there was a factual dispute regarding whether claimant sustained any permanency as a result of his right shoulder condition. Due to conflicting medical opinions, the deputy reasoned defendants' denial was not unreasonable; however, the defendants did not convey the basis of their denial until May 22, 2017, which was untimely and not contemporaneously with their obtaining of evidence to justify denial. \$5,000 in penalty was awarded, and the deputy noted the facts were not of such an egregious nature that additional penalty was warranted. The total award of PPD was \$52,784.50, equivalent to 10% penalty.

Ponce v. Brand Services, Inc., File No. 5058013 (Dec. 17, 2018). (Deputy Pals)

- Claimant was seeking penalty benefits for denied healing period benefits; defendants' denial of claimant's back claim; and defendants' failure to schedule medical appointments.
- **The deputy held that:** claimant failed to prove entitlement to healing period benefits; failed to carry his burden of proof in proving a back injury; and that there is no legal authority providing for penalty benefits to be awarded when medical benefits are not provided by defendants. The deputy noted that filing a Petition for Alternate Medical Care is the appropriate action when seeking medical treatment; there is no penalty for failure to provide medical benefits.

Badia Joe v. O'Reilly Auto Enterprises, File No. 5059272 (Dec. 10, 2018). (Deputy Grell)

- Claimant was seeking penalty benefits based on defendants alleged failure to perform a reasonable investigation and/or their unreasonable denial of liability
- **The deputy held that:** the employer interviewed relevant individuals that would or should have had information about claimant's injury. Those individuals, including two people who claimant stated she provided verbal notice of her injury to, denied any knowledge of the alleged injury. The deputy held that defendant were reasonable in relying on these statements even though they contradicted claimant's version of the

events. Finally, the deputy held the defendants contemporaneously conveyed the basis for their denial and that the basis was based upon their investigation.

- Additionally, there were medical records with no mention of right shoulder symptoms after the alleged injury date. The deputy reasoned that the ultimate determination of liability was not certain, and that although claimant was ultimately found to have sustained a work-related injury to the right shoulder, there was satisfactory contradictory evidence that defendants reasonably relied upon and their denial was fairly debatable, resulting in no penalty award.

Howard Grey v. AMN Healthcare, Inc., File No. 5063050 (Nov. 30, 2018). (Deputy McGovern)

- Claimant was working at the University of Iowa Hospitals and Clinics under a 13-week contract at the time of his injury and resides in Georgia. Claimant was seeing penalty benefits for alleged unreasonable delay or denial of temporary benefits.
- Claimant returned to Georgia after his final visit with Dr. Milani in April 2016, wherein claimant was to continue with work restrictions. Defendants did not offer claimant any work within his restrictions and did not pay TTD/healing period benefits until November 22, 2016, to cover benefits from September 6, 2016. Defendants then paid benefits through May 24, 2017.
- Defendants argued that claimant resigned from employment and that no TTD/healing period benefits were owed; however, the deputy disagreed because claimant considered himself to still be employed as he continues to maintain contact with them about potential jobs.
- Claimant's attorney contacted defendants in July 2016, September 2016, and December 2016 regarding non-payment of TTD benefits; however, no benefits were ever paid for the period of April 21, 2016 through September 5, 2016, and defendants offered no explanation for why they did not pay TTD/healing period during that time.
- There was no evidence that claimant refused offers of accommodated work during this time in which he was under work restrictions from three different doctors.
- **The deputy held that:** defendants' non-payment of benefits without reasonable excuse caused financial hardship and penalty should be awarded at 50%, equivalent to \$6,000.