WoCo SUMMIT

The Workers' Compensation Law Seminar

Staying Out of the Penalty Box

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What are Penalty Benefits?

- Iowa Code § 86.13(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 50 percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.
- Benefits are to be awarded, it is <u>not optional</u>, when the employee has shown a denial, delay or termination of benefits and the employer fails to establish a reasonable or probable cause or excuse

What is a Reasonable or Probable Cause or Excuse?

- All of the following must be present to prove a reasonable or probable cause or excuse:
  - (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 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 basis for the denial, delay in payment, or termination of benefits was contemporaneously conveyed to the employee at the time of the denial, delay, or termination of benefits.

“Fairly Debatable” Standard

- Used to determine whether penalty benefits are appropriate
- “The insurer is not required to accept the evidence most favorable to the claimant and ignore contrary evidence.” *City of Madrid v. Blasnitz*, 742 N.W.2d 77, 83 (Iowa 2007).
- Defendants must reevaluate their position on claims on a continuing basis. *Mc and R Pools, Inc. v. Shea*, 802 N.W.2d 237 (Iowa Ct. App. 2011).

Scenarios in Which Penalty Benefits are Awardable

- When there is a dispute between insurance carriers or employers as to who is liable for compensation – utilize § 85.21
- Failing to pay the rating provided by their physician
- Relying on a medical report knowing the foundation for the report iss inaccurate
- When no basis for a denial of benefits is conveyed
- When bi-weekly payments are made instead of weekly payments
- When defendants fail to pay benefits because claimant had similar complaints before

Scenarios in Which Penalty Benefits are not Awardable

- When a doctor's opinion places causation in question
- When there is no time loss or other occurrence to alert defendnats to the responsibility to make payments
- When there is no permanency rating or other indication of permanency
- Where claimant is paid a full salary in lieu of compensation
- During a pending inter-appeal when the facts and circumstances support the employer's denial which may be adopted by the commissioner in his de novo review

Recent Penalty Decisions

- Penalty awarded at 40% as a result of paying benefits at a lower weekly rate than stipulated for 20 weeks, overpaying for 5.7 weeks, and ultimately having an overpayment of benefits (Deputy Copley)
- Penalty awarded at 28% as a result of defendants unreasonable denial of PPD benefits when the objective evidence showed loss of grip strength, even though claimant was released to work with no restrictions by a different physician, when defendants never sought an impairment rating (Deputy Pals)
- Penalty awarded at 25% when defendants used two two-week pay periods in calculating rate which were substantially lower than claimant's other two-week pay period (Commissioner Cortese)

Recent Penalty Decisions, Cont.

- No penalty awarded when defendants paid 31% industrial disability based on their physician's opinion and FCE results, even though the ultimate result was an award of permanent total disability (Deputy Pals)
- Penalty awarded at 43% based on defendants failure to investigate claimant's right shoulder injury until 2 years after claimant was placed at MMI for a right arm/wrist condition and reliance on a physician's opinion that the injury was not work related because claimant did not complain of right shoulder issues until 2 weeks after the alleged injury date (Deputy Walsh)

Recent Penalty Decisions, Cont.

- Penalty awarded at 50% when benefits were terminated prior to obtaining a physician's opinion that claimant's injury was not work related and defendants offered no evidence of their communication of such denial (Commissioner Cortese)
- Penalty awarded at 10% when defendants denial was fairly debatable but defendants failed to timely convey the basis of their denial (Deputy Pals)
- No penalty awarded when claimant failed to prove entitlement to healing period benefits, failed to prove a work-related injury, and when medical benefits are not provided (Deputy Pals)

Recent Penalty Decisions, Cont.

- No penalty awarded when defendants interviewed relevant individuals, who denied having notice of any alleged injury, even when their statements contradicted claimant's version of events and the ultimate determination liability was not certain (Deputy Grell)
- Penalty awarded at 50% when no benefits were paid despite claimant's multiple contacts with defendants regarding non-payment, claimant was under work restrictions, defendants did not offer claimant any work, and defendants provided no explanation for why benefits were not paid (Deputy McGovern)

How to Avoid Penalty?

- Timely investigate alleged injuries
- Obtain medical opinions early
- Timely provide notice of any denial or termination of benefits
- Pay all benefits on time
- Use representative weeks in calculating rate; err on the side of caution
- Look at treating physician's opinions; not just the IME physician's opinion
- When in doubt, ask for an impairment rating

Beyond Penalty Benefits: Bad Faith

- Insurance contracts contain an implied covenant of good faith that neither party will do anything to injure the rights of the other in receiving the benefits of the agreement.
- To establish a bad-faith claim against a workers' compensation insurer, the plaintiff must show:
  - (1) that the insurer had no reasonable basis for denying benefits under the policy, and
  - (2) the insurer knew, or had reason to know, that its denial was without basis
- Applies to self-insureds, but does not apply to uninsureds
- A denial may occur when an insurer unreasonably contests a claimant's PTD status or delays delivery of necessary medical equipment.

When is Bad Faith not Available?

- When an uninsured employer fails to pay an award of workers' compensation benefits
- A claim for refusal to pay medical bills pursuant to an agreement for settlement – this is a contractual agreement
- When a party is merely dissatisfied with care

Damages in a Bad Faith Case

- Consequential damages
  - Damages that occur as an indirect result of an incident – must be foreseeable
- Emotional distress damages
  - Monetary damages designed to provide compensation for the psychological impact
- Attorney fees
  - Reasonable attorney fees
- Punitive damages: upon a showing of malice, fraud, gross negligence, or an illegal act
  - Considered punishment and awarded when the defendant's behavior is found to be especially harmful

How to Avoid a Bad Faith Claim?

- Promptly investigate all alleged injuries
- Continually and periodically review and evaluate denied claims based on newly obtained evidence
    - A denial at an early stage may be warranted, whereas a denial at a later stage may not be reasonable based on additional evidence
- Look at the grounds for a denial from the viewpoint of a deputy and ask: would a deputy likely find that this evidence justifies denial?
    - An unreasonable denial could result in significant damages and an unhappy client