

IN THE COURT OF APPEALS OF IOWA

No. 8-480 / 97-1803

MIDWEST METAL INDUSTRIES, INC.

Appellant,

vs.

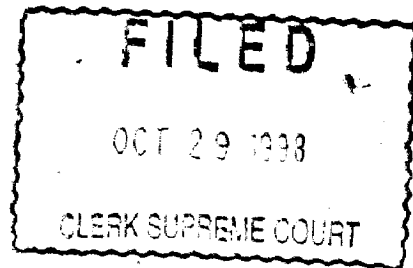
**B & R INSULATION INC., CITY OF OTTUMWA, and INTERNATIONAL
FIDELITY INSURANCE COMPANY,**

Appellees,

and

**ROTH ASBESTOS & ENVIRONMENTAL CONSULTANTS, INC., ALLEN
ROTH, and RICHARD DECHANT, JR.,**

Defendants.



Appeal from the Iowa District Court for Wapello County, Daniel P. Wilson,
Judge.

Midwest Metal Industries, Inc. appeals a district court judgment entered in its
favor on a breach of contract claim. **AFFIRMED.**

Richard C. Bauerle and Allan C. Orsborn of Orsborn, Bauerle & Milani,
L.L.P., Ottumwa, for appellant.

Thomas F. Kintigh of Griffin, Dew & Kintigh, Ottumwa, for appellee-City of
Ottumwa.

Russell W. Baker, Jr. and Eric W. Smith of Spencer, Fane, Britt, & Browne,
Kansas City, Missouri, and Timothy J. McKay of McKay, Moreland & Webber, P.C.,
Ottumwa, for appellees-B & R Insulation and International Fidelity.

Heard by Sackett, C.J., and Huitink and Vogel, JJ.

VOGEL, J.

Midwest Metal Industries, Inc. appeals a district court judgment entered in its favor on a breach of contract claim. We find substantial evidence to support the trial court's award of damages and denial of pre-filing interest. We therefore affirm.

Background facts. In 1991, the City of Ottumwa, Iowa (the City) initiated a public improvement project to demolish the buildings of a former packing plant. B&R Insulation, Inc., (B&R) was hired as the general contractor; Midwest Metal was subcontracted to do the demolition work. Demolition was scheduled under the contract to begin on July 2, 1991. However, demolition was delayed until April of 1992 because the amount of asbestos that needed to be removed prior to demolition had been underestimated and the City had failed to complete a federally-required historical study.

Midwest Metal filed suit against the City, B&R and the sureties involved in the project for breach of contract, seeking damages incurred from the delay. Following a bench trial held in June of 1997, the district court found that the City was at fault for the delay and awarded damages to Midwest Metal. Midwest Metal filed a motion to enlarge or amend, requesting that the court increase the damages and award pre-filing interest. The trial court denied the motion and Midwest Metal appeals.

Scope of review. The standard of review is on error. Iowa R. App. P. 4. *Rogers v. Webb*, 558 N.W.2d 155, 156 (Iowa 1997). The findings of fact are binding upon us if supported by substantial evidence. Iowa R. App. P. 14(f)(1). Evidence is substantial

if reasonable minds would find it adequate to reach the same conclusion, even if we might draw a contrary inference. *Frontier Properties Corp. v. Swanberg*, 488 N.W.2d 146, 147 (Iowa 1992) (citations omitted).

Damages. Midwest Metal argues that the trial court erred in failing to award three month's worth of damages for the fair rental value of their equipment.

In the absence of a "no damages" clause, a contractor has a right to recover damages resulting from a delay. See *Hallett Const. Co. v. Iowa State Highway Commission*, 261 Iowa 290, 296, 154 N.W.2d 71, 74 (1967); *Cunningham Bros., Inc. v. City of Waterloo*, 254 Iowa 659, 664, 117 N.W.2d 46, 49 (1962). The party seeking damages has the burden to prove them. *Sun Valley Iowa Lake Ass'n v. Anderson*, 551 N.W.2d 621, 641 (Iowa 1996); *Poulsen v. Russell*, 300 N.W.2d 289, 295 (Iowa 1981).

Midwest Metal asserts that they presented evidence at trial to show that they mitigated their damages by obtaining substitute work during the delay such that they were only idle for three of the nine months. Midwest Metal asserts the trial court's findings infer a total of three months delay, but only awarded damages for one month of delay.¹

In a motion to enlarge the findings of fact, Midwest Metal asserted the trial court properly calculated the cost for one month's delay but failed to multiply that amount by three months to give Midwest Metal all of its damages. In ruling on

¹ Specifically, the damage award included: (1) the fair rental value of equipment used for a one month period, or \$83,000; (2) additional mobilization expenses of \$13,993.05, and (3) additional insurance expenses of \$75,406.30, for a total amount of \$172,399.35. Midwest Metal claims the \$83,000 fair rental value should be multiplied by three.

Midwest Metal's motion to enlarge or amend, the district court denied the motion for the reasons set forth in its previous order and for the reasons set forth in the City's resistance to the motion. The City's resistance specifically referenced a letter sent by Midwest Metal on May 10, 1993, more than a year after the delay was complete and the damages were known, in which Midwest Metal asked for *one* month's worth of damages for the fair rental value of the idled equipment. In addition to this letter, the court had the opportunity to ascertain the credibility of Midwest Metal's owner, Ken Burgess. The court noted that Mr. Burgess had recently pled guilty to income tax evasion and rejected his testimony with regard to Midwest Metal's claim for extra work performed outside the scope of its contract. Furthermore, the court was confronted with numerous claims for reimbursement made by Midwest Metal prior to trial, which were inconsistent with each other and with testimony given by Mr. Burgess at trial.

Given these inconsistencies, we find substantial evidence to support the district court's decision to accept the amount of damages sought by Midwest Metal in the May 1993 letter and will not disturb the damage award on appeal.

Pre-filing interest. Midwest Metal next contends the court erred in awarding interest from the filing date, and argues that it was entitled to pre-filing interest as well.

Pre-filing interest is allowed under Iowa Code section 535.2 for breach of contract claims at a rate of 5% per annum for recoveries "when the damage is

complete at a particular time . . . although the damage has not been fixed in a specific sum.” *Lemrick v. Grinnell Mut. Reinsurance Co.*, 263 N.W.2d 714, 720 (Iowa 1978); *see also McGough v. Gabus*, 526 N.W.2d 328, 335 (Iowa 1995); *Brenton Nat. Bank of Des Moines v. Ross*, 492 N.W.2d 441, 443 (Iowa App. 1992).

Midwest Metal claims that its damages were complete as of a date certain and therefore it is entitled to pre-filing interest. However, the exhibits and testimony presented at trial were conflicting not only as to the amount of damages, but also as to the date the damages were complete. Under these circumstances, we find that pre-filing interest was not warranted. *See Brenton Nat. Bank of Des Moines v. Ross*, 492 N.W.2d 441, 443 (Iowa App. 1992) (court declined to award pre-filing interest where amount of damages were in dispute throughout trial).

Having considered all issues properly before us on appeal, we affirm the trial court’s judgment and award.

AFFIRMED.