

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

YONNYS AGUILAR REYES,

Claimant,

vs.

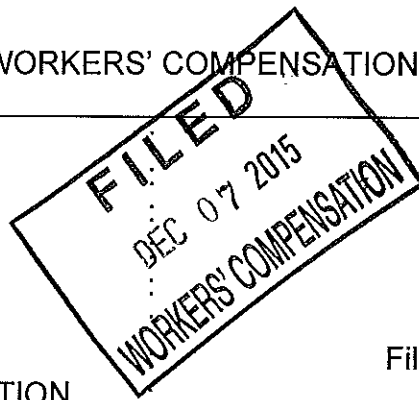
MURRAY WHITE CONSTRUCTION,
INC.,

Employer,

and

STATE FARM FIRE & CASUALTY
COMPANY,

Insurance Carrier,
Defendants.



File No. 5046502

COMMUTATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Yonnys Aguilar Reyes, claimant, has filed a petition for a partial commutation from Murray White Construction, employer and State Farm Fire & Casualty, insurance carrier, defendants.

This matter came on for hearing before Deputy Workers' Compensation Commissioner, Jon E. Heitland, on September 1, 2015 in Council Bluffs, Iowa. The record in the case consists of claimant's exhibits 1 and 2; defense exhibits A, B, C and D; as well as the testimony of the claimant, Mark Genereux, and Becky Sudik.

ISSUE

The parties presented the following issue for determination:

Whether a partial commutation is appropriate.

The parties failed to file a hearing report as required by the rules of this agency. They verbally indicated a partial commutation is the only issue. They were ordered to file a completed and signed hearing report subsequent to the hearing. They did not do so.

The attorneys for the parties are hereby ordered to file a signed and completed hearing report within 20 days of this decision or sanctions will be considered.

FINDINGS OF FACT

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

Claimant seeks a partial commutation of his prior award of permanent total disability benefits, commuting all but one week of benefits. For all practical purposes, he desires a lump sum payment of his entire award of lifetime benefits.

Claimant testified he is 29 years old. He lives in Omaha, Nebraska, with his parents, who were present at the hearing. Claimant speaks Spanish but does not speak very much English. An interpreter was required for the hearing.

On August 1, 2006, claimant was working for the employer at a construction site when he fell backward. He suffered a T2 spinal cord injury, rendering him a quadriplegic. He is in need of 24-hour care, which is provided by his parents. Without their care, he would have to be in a care facility. His mother is only paid eight hours per day, although she works many more hours. The insurer pays part of his house payment as well.

He receives a weekly check of \$274.00, which he will get the rest of his life. Claimant seeks a partial commutation so he can get a lump sum payment instead of a weekly check.

The record shows the insurer has not done well in paying for his medical supplies. Sometimes he needs supplies, and the insurer does not approve it, so claimant has to pay for them out of his pocket. For example, a couple of months ago, he needed bandages for sores on his buttock and the insurer did not approve them. Sometimes he needs medication, and the insurer delays approving those as well. One of the reasons he would like the lump sum is to meet those expenses.

Previously claimant had to fight with the insurer over a new wheelchair. Claimant got a hernia in his colostomy area, due to a problem with the chair. Claimant had to go through a hearing to get the wheelchair ordered. Claimant has to use a sip and puff device to move his wheelchair, and it was not working.

For his house, he needs a generator to make sure his medical equipment is operable. All his medical equipment, including his air mattress, his suction machine, his wheelchair, etc., are electrical. If the electricity fails, he is in trouble. Despite numerous requests, the insurer still has not addressed the generator problem.

Claimant also had trouble with the van he needs for transportation. It is a 2007 model. It is not known if the insurer will replace it.

He is worried about his ability to get to the basement in the event of a storm. The insurer has been asked to provide handicap access to the basement, but again, the insurer has not done so. He would like the commutation so he can pay for that in advance if necessary.

His mother has quit working in order to take care of him. He feels she should be better compensated.

If a commutation is granted, he has looked into investing the money. He realizes it must be available to take care of his needs for the rest of his life. He is willing to work with his attorney and an investment advisor to make sure the money is spent wisely. He understands he will no longer get the weekly check, and he feels it is in his best interests to receive a lump sum payment.

However, the claimant failed to submit into the record a written plan for the commutation, and how it will be used if granted. Normally this is a basic requirement before any commutation can be granted. Instead, claimant's attorney offers only testimony from an investment counselor and no detailed written plan for the proceeds.

On cross examination, claimant agreed a mediation was held to determine his mother's compensation. Claimant was represented by another attorney at that time. An agreement was reached as to her compensation. She has been paid since that mediation according to the agreement reached.

He also recalls the money paid to him toward his house payment was also part of that negotiation. Prior to the mediation, he was living at Quality Living Institute, a care facility, but he wanted to move home. State Farm agreed to pay \$1000.00 per month toward his home costs. State Farm pays \$1500.00 per month to First National Bank, but \$500.00 goes to his mother. Claimant is the sole owner of the home.

He understands a 25 percent attorney's fee will be taken out of the lump sum payment if a commutation is granted. He had prior attorneys, including Michael Dowd, a Mr. Karlan and a Maria Vera, who represented him for about three years. He does not recall paying Mr. Dowd anything for his legal services. He is unsure what his agreement with him was. He may have done the legal work for free. He does remember his checks were paid to Mr. Dowd, who then turned them over to claimant.

He understands a fee agreement obligates him to pay his attorney. He does not think he had a fee agreement with Michael Dowd. He does not remember if he had one with Maria Vera, but he does not think he paid her any money. For his fee agreement with Mr. Crowl, his attorney in this action, he is aware he will have to pay his attorney 25 percent of what he gets. Prior to that, he has never paid an attorney.

His weekly benefit payment is \$274.46 per week. It has been the same since benefits were begun.

Claimant recently saw his primary care physician, as well as a wound care specialist. He also sees a pulmonologist, Patrick Meyers, M.D. Claimant has a "pacer", which is a pacemaker for his diaphragm so he can be off the ventilator. He requested that procedure at age 22, not long after the injury. This procedure was not approved by the Food and Drug Administration at that time, but State Farm approved it anyway, and it was done in Cleveland, Ohio. It is now approved.

Claimant needs bandages. Dr. Rand recommended 3x3 and 4x4 bandages. Each bandage is to last two days. His supplies are delivered monthly. He is currently paying out of his pocket for wash cloths he needs for his colostomy. He has had the colostomy for four or five years.

He also needs antibiotics. He had a problem with Joseph Dumba, M.D., who did not think he should take antibiotics for the infection in his bladder. He did not think claimant needed them, and would develop a resistance to them, so he did not want to prescribe them. He recommended claimant just take a shower.

He has a one-hour battery backup on his wheelchair. He disputes there is a battery backup for his air mattress. He has a baby monitor.

He understands it takes time to make changes to his van. When the engine light came on, it was taken to his repair person, who was authorized by State Farm, but it took some time to get parts.

When the house was bought in December 2009, he was living at Quality Life Institute. Modifications needed to be made to his house before he could move home. A woman came to the house and made a list of changes, such as widening doors and installing special hinges. A lift was installed in the garage to allow him to get in and out of the house. He stated the battery backup for that did not work. Recently it did not work and neighbors had to do it manually, which takes a long time.

Inside the house, changes had to be made to his bedroom. The occupational therapist did not recommend the carpet be changed to tile, but it had to be done. The shower was also modified so he could go into it. There are shatterproof windows for the shower stall.

For the proceeds of the partial commutation, he plans to invest the proceeds and get the things he needs, like a backup generator.

He completed the 11th grade in school. He did not have any classes in finances or investment strategy. He understands a little bit about a stock market purchase, in that you buy the stock and the money grows. When asked if growth was guaranteed, he stated if he trusted in God, it would. He does not understand what a bond is. He has never had any classes on what a bond is. He has no experience with investing money. He does not know what a mutual fund is. He does not know what an annuity

investment is. He has never met with the investment expert his attorney used in this case.

He does not know what a commission structure is. He has never had tax consequences of a commutation explained to him. He has never committed to a financial plan of investment. He has no credit cards. He feels payments and paying interest are not a good idea for him.

If he is granted the commutation and the lump sum, and pays the 25 percent to his attorney, he has no backup plan if the money is all spent or if an investment fails. He has faith in God everything will turn out okay for him, and that one day God will take him out of his chair and he will get better.

He understands if the benefits are commuted, State Farm will have no further obligation to pay any money. The money he gets will have to last him the rest of his life.

On re-direct examination, claimant stated he changed attorneys because his attorneys were not helping him. He and his current attorney talk about once per week because of medical supplies problems. The antibiotics issue arose when he had infection in his urine.

Claimant testified he needed larger bandages. But when he tried to get a prescription for them, the nurse case manager, Sandy, would not approve them until she had more information. The small patches were not covering the large wound on his buttock, so he had to use several small ones. The nurse case manager was mad because he used too many of the small ones. He also needs special wash cloths, and he wears special briefs due to his colostomy, but State Farm would not provide those either. Each time he is told a medical supply is not approved, he has to contact his attorney.

He agrees he does not know anything about investments, but he is willing to work with a professional on this.

On re-cross examination, he agreed Kathy Rand prescribed bandages and creams. She prescribed 3x3 bandages. Dr. Dumba is the coordinator of his medical care.

He had never met or heard of Mark Genereux, the investment expert offered by his attorney, until the day of the hearing.

Claimant called as a witness Mark Genereux. He is the owner and founder of an investment adviser business that manages money for individuals, foundations, and others in several states. They manage over 20 million dollars for their clients. His work experience includes working for Fidelity Investments. His business has existed for 15 years and is based in Council Bluffs, Iowa.

He stated the \$274.46 claimant receives is before attorney's fees are taken out. Claimant's current age is 29. There is a discount rate that applies if a commutation is granted. He believes it is two percent, the treasury constant maturity index. He considers that a very low rate. He believes rates have been low for five years, but are expected to go up. His understanding is a future commutation action would yield a lower dollar amount for claimant because of this.

To offset the discount rate, claimant's money would be invested in accounts similar to his clients who are in their 50s and older. A mix of stocks, bonds and CDs would be used. He would recommend no more than four percent annual withdrawal rate for his clients. He would charge one percent annually for his services. The commutation would yield around \$330,000.00 after attorney's fees. If the investment performs as expected, it would be \$253.00 per week. He stated the investment could be set up quickly. He agreed a trust could be set up for additional protection. However, no trust is offered as part of claimant's evidence.

He feels it would be in claimant's best interest to have a hedge against inflation. His current fixed rate for workers' compensation benefits will never grow. The basis of \$330,000.00 will grow faster than claimant would be taking money out.

On cross examination, he agreed he had not met claimant before today. He has worked with claimant's attorney for a few years. He agreed the discount rate and figure was not his number but was given to him. He agreed sometimes his clients lose money. But in a diversified portfolio it is not frequent. He agreed any investment involves some form of risk.

He stated 6.5 percent would be the average gain from the moderate portfolios that he has managed the past few years. Exhibit 1 is a 90-year chart showing the performance of many investments. He cannot guarantee claimant will not lose money. He would not reimburse claimant those losses. He would not be able to prevent claimant from making an unwise expenditure or impulse.

He agreed he has never met claimant, or discussed his expenditures, his savings patterns, etc. He agreed he has not prepared a plan for claimant. He agreed investments like precious metals, "dotcoms", etc. were unwise, and he had not recommended them in the past, but he could not guarantee claimant would not make such an unwise investment. It would be a 50-year investment, given claimant's normal life expectancy.

He agreed both he and claimant's attorney would be taking a fee out of any proceeds. He also agreed there are trusts that would protect against unwise expenditures, and that education of the client is important.

Exhibit 2 is a chart he knows well. It is similar to Exhibit 1. It shows long-term returns over 50 years showing a snapshot of generic indexes, from 1950 to 2010. It shows average loss, average return, etc. That chart shows that investments such as

the stock market provide a profit 70 percent of the time. Thus they lose money 30 percent of the time.

He will put together a portfolio for claimant based on a four percent annual withdrawal, which would provide a hedge against inflation. This would make claimant financially better off than weekly checks. He agreed stocks would be part of the portfolio, and that stocks carry risk.

Defendants called Becky Sudik as a witness. She is a claims representative for State Farm Insurance. She is the adjuster on claimant's file, and has worked on it since mid-2008. She works on his medical records and medical bills.

His weekly benefits are \$274.46 per week for permanent total disability benefits. That rate has not changed. Originally his checks were mailed to him, then later the checks went to his attorney, Michael Dowd. There was no fee agreement; he was working pro bono. Mr. Dowd later indicated he was no longer representing claimant, and the checks should go to the claimant's home. Later Maria Vera represented claimant, but she also indicated the checks should go to claimant's home.

She was present at the October 2008 mediation. The mediator reduced the agreement that was reached to writing for approval by a court but that never occurred, perhaps due to Mr. Dowd leaving the case.

The mediation agreement contemplated claimant's family looking at houses so he could live at home. The original agreement called for \$1000.00 per month toward housing expenses. That was later changed to \$1500.00 per agreement of the parties. Exhibit B shows the payments from State Farm to the lender, First National Bank.

Dr. Dumba has been the primary treating physician and has overseen claimant's overall care. Kathy Brand was the wound care physician. The intent was that one doctor would be aware of all of claimant's medications and treatments. It was her understanding Dr. Dumba was reluctant to prescribe antibiotics claimant requested due to concern over building up resistance.

She became aware of the purchase of the home in January 2010. An occupational therapist was sent to the house to determine what needed to be modified for claimant. She has been to the home. The purchase price was around \$180,000.00. State Farm has no ownership interest in the home. She visited the home to evaluate it for purposes of safety as well as needed modifications. Safe refuge during a tornado was discussed, and it was determined the central hallway would serve that purpose. In addition, the bathroom was given a shatterproof window. These were based on the occupational therapist's recommendations. She understands there is a backup battery for his ventilator, his mattress, etc. Someone comes once per month to make sure the backup batteries and the equipment itself are working properly.

Concerning bandages, 3x3 and 4x4 bandages had been prescribed. They were expected to work two to three days. Bandages were delivered in the amount of 15 each for one month's time. Later the prescription was made for 7x7 bandages. They are not only larger but also designed for stage 3 pressure ulcers, although medical records indicated he had only a stage 2 ulcer, but claimant was requesting 7x7 bandages. Although claimant's petition mentions a deterioration of claimant's medical condition, Dr. Dumba when he last saw claimant found him to be stable.

On cross examination, she agreed it was cheaper for State Farm to have claimant at home rather than at Quality Life Institute, as well as accommodating his desire to live at home. The \$1500.00 is a stipend; she does not consider them to be medical benefits, but she does not consider them indemnity benefits either.

The mediation also contemplated claimant's mother would be paid \$500.00 per week to provide care. She does not know what 24-hour care at Quality Life Institute would cost. She does not know what the hourly rate is; it is an agreed upon amount per week. It was contemplated claimant's mother would become a licensed Certified Nurses' Aide but she did not.

Claimant was not happy with Dr. Dumba's answer on the infection, so claimant went outside the authorized care for that treatment.

Modifications were made to claimant's wheelchair, so the insurer did not authorize a new wheelchair. Again claimant "went outside the chain of referral" for a prescription for a new wheelchair. The insurer felt the modifications were adequate according to their physician.

She understands all the modifications to the home were done. She has not gone to the home to confirm the backup batteries are in place. They rely on the vendors to do the inspections. The nurse case manager deals with the vendors.

On re-direct, she stated early on at least three home nurses were assigned but were discharged by the family. The 7x7 bandages have been authorized by State Farm. The doctor at first recommended a barrier cream, but claimant's mother wanted the larger bandages instead.

On rebuttal, claimant was recalled. He disputes that all of the modifications were done. Several remain, and his attorney has sent letters to State Farm over a period of years asking they be modified.

He tells QBAS, the people who monitor the equipment, his batteries need to be changed, but the nurse case manager, Sandy, says they have not been approved, yet she is the one that needs to approve them. She argues with claimant.

His mother has not had a day off for almost six years. The nurses State Farm originally assigned did not provide proper care. His mother gives him good care 24 hours per day, and his father helps as well, and he is not paid.

CONCLUSIONS OF LAW

The sole issue in this case is whether a commutation is in claimant's best interests.

Iowa Code § 85.45 provides that a commutation may be ordered when the commutation is shown to be in the best interests of the person who is entitled to the compensation. Diamond v. Parsons Co., 256 Iowa 915, 129 N.W.2d 608 (1964). The factors relied on in determining if a commutation is in the best interests of the claimant include the following: the claimant's age, education, mental and physical condition, and actual life expectancy; the claimant's family circumstances, living arrangements and responsibilities to dependants; the claimant's financial condition, including sources of income, debts, and living expenses; and the claimant's ability to manage the funds or arrange for someone else to manage them. Dameron v. Neumann Bros., Inc., 339 N.W.2d 160 (Iowa 1983). The analysis used in the decision is whether the commutation is in the best interests of the claimant. Within that context, a benefit-detriment analysis is employed. The above recited factors, along with the claimant's preference and the benefits of the claimant receiving a lump-sum payment, are balanced against the potential detriments that could result if the claimant invests unwisely, spends foolishly, or otherwise wastes the funds to the point where they no longer provide the wage substitute intended by the workers' compensation law. Diamond, 129 N.W.2d at 617; Dameron, 339 N.W.2d at 163-164.

A petition for commutation of a prior award of benefits requires the undersigned to take into consideration the claimant's best interests. This claimant presents a particularly tragic work injury. His work injury has altered his life in the most extreme way imaginable. Yet in spite of his catastrophic injury, he impressed the undersigned with his calm courage in the face of what must be overwhelming adversity. The undersigned was also impressed by the care and love of his parents, who have obviously suffered a great deal as well. Claimant is fortunate to have two parents who are willing to devote their lives to his care. Theirs is a loving family that is facing a horrific situation with dignity and stoicism.

Having said that, however, it is not a foregone conclusion that what claimant is asking for is in his best interests. The record shows a terrible record of an employer's insurer living up to its obligations to provide appropriate medical services. Although Ms. Sudik did explain some of the complaints, overall it is clear claimant has unjustifiably had to deal with delays and unreasonable withholding of supplies from the insurer on top of his already overwhelming burden. Perhaps to a nurse case manager the fact only 4x4 bandages were prescribed and therefore the obviously needed 7x7 bandages should be withheld constitutes proper case management, but to the undersigned, it does not. Such nitpicking has real life adverse consequences for claimant, and causes him to suffer stress over what should be a minor matter. Claimant has to contact his attorney who then has to send a letter or otherwise try to get the insurer to live up to its obligations, many times without success. This is not a record of conduct in which the insurer should take any pride. Quite the opposite. Such abuse of

the insurer's obligation to provide basic medical treatment to an injured worker suggests something that has in the opinion of the undersigned long been needed: an amendment of Iowa Code section 86.13 to provide for penalty benefits when insurers unreasonably withhold medical benefits as well as indemnity benefits.

Because this abuse was clearly established in the record, the undersigned admonished Ms. Sudik in the courtroom to investigate whether the abuses described by claimant were indeed occurring, and to take steps to correct them. She promised she would.

On the other hand, recurring problems with medical benefits does not justify a commutation. Weekly benefits are what the legislature contemplated for injured workers in the workers' compensation law. A commutation of those weekly benefits into a lump sum benefit is the exception, not the rule, and will be approved only when it is in claimant's best interests. It cannot be based on simply frustration over non-payment of medical benefits. Yet claimant testified that was his main reason for seeking a commutation, to have a fund of money with which to pay for his medical needs until the insurer got around to paying them. That is an insufficient reason for a commutation.

His attorney offers as the main reason for the petition a hedge against inflation. Claimant clearly did not understand this, and in fact honestly acknowledged he knew nothing about stocks, bonds, or finances in general. In addition, his attorney failed to offer a plan of commutation, as is normally presented in such cases. Thus the undersigned has no written plan of how much is to be commuted and what will be done with the commuted funds. I have only the testimony of Mr. Genereux.

That testimony clearly established several things. First, claimant's financial corpus will be reduced by attorney's fees of 25 percent. Second, it will be further reduced by Mr. Genereux's fees. Third, the plan, only vaguely described, would include investments in the stock market, which the exhibits show is inherently risky. The undersigned did not need those exhibits to know that fact. A common knowledge of history, both recent and more distant, shows the stock market has a habit of crashing and that even without a crash, many investors lose money. None of these factors indicate a commutation is in claimant's best interests. Quite the opposite.

It is obvious that Mr. Genereux has never worked with a workers' compensation recipient as a client, let alone a quadriplegic who is totally disabled and totally dependent on the award to meet his substantial costs of full-time care. The fact Mr. Genereux never met with claimant is telling. Mr. Genereux has mostly worked with affluent older citizens and advised them on how to maximize the return on their discretionary income and savings. Claimant hardly fits that description. If one of Mr. Genereux's other clients experiences a severe loss on the stock market, they will still survive as their basic costs of living are met, and the funds lost were discretionary. Claimant, on the other hand, has no discretionary funds. His funds are his lifeblood, literally. They need to be protected so they will always be there for his needs, which are considerable. His mother and father are to be commended for their hard work in caring

for their son, but they are of course a generation older and may be gone someday, at which time claimant will have to pay for care he now gets for free from their love for him. Again, it is all important that money is there for claimant, and the plan offered by his attorney and Mr. Genereux does not guarantee that. The plan carries risk, and risk is something claimant cannot afford. The payment of weekly benefits carries no risk.

It is also noted Mr. Genereux at one point in his testimony stated claimant would withdraw four percent of his money per year. That is a common rule of thumb the undersigned has heard recommended for persons planning to retire. Four percent per year would mean the money would last 25 years or slightly more with interest earned. That may be appropriate for a person retiring in their 60s, as 25 years is an average life expectancy for them. But claimant is only 29, and Mr. Genereux himself mentioned claimant's life expectancy is 50 years. If the funds are depleted in 25 years, when claimant is 54, what will be used for his care in his remaining years? At the same time, claimant urges in his post-hearing brief his life expectancy is less because he is a quadriplegic, and another reason for the commutation is to provide something for his parents if he were to pass away.

Claimant seeks a partial commutation because the discount rate is at a historic low and it would be a hedge against inflation, because he wants a fund with which to pay medical bills on a timely basis when the insurer fails to do so. But he offers no written plan, and the verbal plan he offers carries with it risk of loss, and reduction for attorney and financial advisor fees. The plan offered raises many red flags that show it is not in claimant's best interests. It is found the petition for commutation is not in claimant's best interests and it is denied.

Although this is a disappointment to claimant, again it is noted claimant's main concern was not inflation or maximizing growth, concepts with which he is not familiar, but rather having a fund to pay medical bills when the insurer failed to do so in a timely fashion. This can be accomplished in other ways short of the drastic remedy of a commutation. First, there is no showing claimant has ever used the alternate medical care procedures of our agency to address problems with receiving the proper bandages, or other treatment problems. There is also no showing he has filed a petition for medical benefits for unpaid medical bills. In other words, the workers' compensation law provides other remedies for the problems claimant described that are not detrimental to claimant's long-term best interests, as a commutation would be. Presumably, the inability to pay attorney's fees for such actions may be a factor. But that does not mean a commutation is the remedy.

It is hoped Ms. Sudik's assurance to the undersigned the problems with providing appropriate medical care to claimant in a timely fashion and without a hyper-technical insistence on procedures would be addressed and corrected is carried out. It is also hoped that when claimant's attorney brings such a problem to the insurer's attention, it is looked into and addressed as quickly as possible rather than ignored. The undersigned would hope all agree this claimant deserves no less.

If corrections are not made and the problems persist, claimant still has the option to file a new petition for a lesser commutation, perhaps for an amount that would provide the set-aside funds he requested for covering delays in paying medical bills by the insurer and making the modifications to his house and vehicle, yet would be something less drastic than the commutation requested here. Such a petition would need to be accompanied by a written plan so both defendants and the deputy will know what it entails. A provision for a guardian or conservator would also go a long ways toward approval, given claimant's lack of financial sophistication.

ORDER

THEREFORE IT IS ORDERED:

The petition for commutation is denied.

Costs will be paid by defendants.

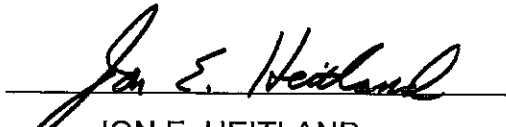
Signed and filed this 7th day of December, 2015.

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JON E. HEITLAND
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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.