BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SHERYL HERMANSTORFER, Claimant, vs. LENNOX INDUSTRIES, INC., Employer, INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Defendants.	:	File No. 19002216.01 ARBITRATION DECISION Head Note Nos.: 1803, 1803.1, 2907, 3001

STATEMENT OF THE CASE

Sheryl Hermanstorfer, claimant, filed a petition for arbitration against Lennox Industries, Incorporated (hereinafter referred to as "Lennox"), as the employer, and Indemnity Insurance Company of North America, as the insurance carrier. This case came before the undersigned for an arbitration hearing on October 19, 2022.

Pursuant to an order from the Iowa Workers' Compensation Commissioner, this case was heard via videoconference using Zoom. All participants appeared remotely for the hearing.

The parties filed a hearing report prior to the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 12, Claimant's Exhibits 1 through 6, as well as Defendants' Exhibits A through F. All exhibits were received without objection.

Claimant testified on her own behalf. She also called her husband, Jeff Hermanstorfer, to testify. No other witness was called to testify at the hearing. The evidentiary record closed at the conclusion of the arbitration hearing. However, counsel for the parties requested an opportunity to file post-hearing briefs. This request was granted, and both parties filed briefs simultaneously on November 28, 2022. The case was considered fully submitted to the undersigned on that date.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant's permanent disability should be compensated on a functional impairment basis or under an industrial disability analysis.

2. The extent of claimant's entitlement to permanent disability benefits.

3. Claimant's gross average weekly earnings prior to the injury date and the applicable weekly worker's compensation rate at which permanent disability benefits should be paid.

4. Whether claimant is entitled to reimbursement of her independent medical evaluation pursuant to Iowa Code section 85.39.

5. Whether costs should be assessed against either party and, if so, in what amount.

At the commencement of hearing, defendants conceded that claimant is entitled to reimbursement of her independent medical evaluation and indicated that payment for reimbursement of that evaluation was made prior to the hearing. Accordingly, the parties agreed that the dispute relative to claimant's independent medical evaluation was resolved, and the undersigned entered a verbal order directing defendants to reimburse that expense if they had not already done so. No further findings or conclusions will be made in this decision relative to the independent medical evaluation reimbursement claim.

FINDINGS OF FACT

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

Sheryl Hermanstorfer, claimant, is a 61-year-old married woman, who lives in Montour, Iowa. Ms. Hermanstorfer graduated from high school in 1979 and took a turn lathe class after high school. She possesses no additional education.

Claimant's employment history began at Hy-Vee as bookkeeper, working in the garden center, as a cashier. She worked approximately 32 hours per week for five years for Hy-Vee and then quit to stay home with children. When Ms. Hermanstorfer returned to the workforce, she performed secretarial work at a law firm for approximately two years. She then took a position with Fisher Controls running a machine engine lathe. She worked in that position for approximately three and a half years before being laid off.

Claimant found new employment with Marshalltown Instruments, performing office work for approximately one year. She clarified that neither of her secretarial

positions required the use of a computer and that she is not current or proficient with current office computer work skills. After leaving Marshalltown Instruments, Ms. Hermanstorfer obtained employment with Lennox. She has worked for Lennox for 28 years and continues to be employed by the company.

On and before August 21, 2019, Ms. Hermanstorfer worked in the coil group, lacing coils at Lennox. Although she had a history of headaches and balance issues. She required some time off work prior to August 21, 2019 because of those headaches and balance issues. However, Ms. Hermanstorfer worked without restrictions prior to August 21, 2019.

On August 21, 2019, Ms. Hermanstorfer was pulling a tub of copper when the endpiece on the tub broke. She fell backwards and struck the back of her head on the concrete floor. She sustained a concussion with possible loss of consciousness as well as a bruise on her tailbone. She was ultimately diagnosed with post-concussive syndrome, blurred vision, dizziness, as well as neck and low back pain after the work injury. She reported sleep disturbances, cognitive complaints, balance problems, mood disturbance and memory impairment to her treating medical providers after the work injury.

Ms. Hermanstorfer acknowledged that she experienced headaches and some balance issues prior to the work injury. However, she testified that she did not require medications to manage her headaches prior to August 21, 2019. She also explained that she now has eye pain along with her headaches. Ms. Hermanstorfer also explained that since her fall at work she experiences light sensitivity and that being outside for a period of time can cause her to develop a headache. She also testified that she experiences a change in her balance issues since August 21, 2019.

Jeff Hermanstorfer, claimant's husband, corroborated some of her testimony and symptoms. He explained that clamant is not as outgoing now, that she experiences light sensitivity that causes headaches, that she has worse memory since the injury, and that the light issues and her balance issues preclude her from working in her yard since the injury at Lennox.

Prior to August 21, 2019, claimant did not require the use of prescription eyeglasses. She now requires prescription eyeglasses with a prism and tinting as a result of the August 21, 2019 head injury. Finally, she testified that she has experienced some blurry or double vision since the August 21, 2019 accident.

As a result of her injuries, claimant has been medically restricted to working 8-hour days and no more than 40 hours per week. She testified that she worked 58 hours per week prior to the date of injury, though as will be discussed below, her pay records immediately prior to the injury date reflect her working less than 58 hours per week. Additionally, as a result of her injuries, Lennox transferred Ms. Hermanstorfer from the coil group into a position with the small packing area. Claimant testified she could not return to the coil group position she held in August 2019. However, she continues

working for the employer, performing a less physical job that is one pay grade lower than her coil group position.

Between June 19, 2022 and September 4, 2022, claimant earned between $601.34 and $1,020.89 per week. During that 12-week span, claimant earned more than $880.89 for 8 weeks and less than that amount for 4 weeks. During the documented 12 weeks immediately preceding hearing, claimant averaged earnings of $899.87 per week. (Claimant's Exhibit 5, p. 69)

The parties dispute claimant's applicable average gross weekly earnings at the time of her injury. Claimant's rate calculations are included at Claimant's Exhibit 4, pages 37-38. Ms. Hermanstorfer contends that several weeks of earnings should be excluded because they are not customary of her earnings prior to the injury date. Claimant contends that she required numerous FMLA leave hours prior to her injury date that artificially reduced her earnings such that they were not typical and should not be utilized in calculating her customary earnings.

Claimant testified that she typically worked 50 hours per week prior to her injury date. However, for the six-month period immediately preceding her injury date, she worked far less than 50 hours per week during many of those weeks. Ms. Hermanstorfer contends that her earnings during 15 weeks between February 10, 2019 and August 18, 2019 are atypical and not representative of her customary earnings. Instead, she urges those weeks be excluded and replaced by 13 weeks with earnings much closer to her "typical earnings" prior to the injury date. Claimant contends her average gross weekly earnings prior to her work injury were $1006.65. (Cl. Ex. 4, p. 38)

Defendants contend that claimant established a routine use of FMLA leave and reduced hours prior to the injury date such that her earnings during most of the weeks immediately preceding the injury date are representative of her typical earnings. Defendants concede that two of the lowest weeks of earnings should be excluded and replaced with earlier weeks of benefits to accurately reflect claimant's customary earnings. Defendants' calculations of the gross weekly earnings are included at Defendants' Exhibit 1, page 43. Defendants contend claimant's average gross weekly earnings were $794.64 prior to the work injury. (Defendants' Ex. E-1, p. 43)

I find that claimant established a pattern of work prior to the injury date in which she required medical leave and did not work 50 hours per week during at least the six months immediately preceding her injury. I find that it was customary for claimant to take this leave and work less than 50 hours in a week quite frequently. Both parties exclude the earnings for the weeks ending July 7, 2019 and May 26, 2019. I concur those earnings were not representative of claimant's typical earnings and that those weeks should be excluded when calculating claimant's gross average weekly earnings prior to the injury date.

Reviewing claimant's wage records and calculations, I note that claimant seeks to exclude 15 weeks of earnings to get 13 weeks she considers "typical" of her

earnings. Defendants seek to include some earnings that are relatively low and provide no explanation why they are "typical" when they are under 30 hours per week and significantly lower than other weeks' earnings. Ultimately, I find that it was typical for claimant to work between 32 and 51 hours per week immediately before her work injury. She either worked or took vacation or holiday hours to get 32 hours in a week twice, 33 hours twice, and 34 hours twice between April 28, 2019 and August 18, 2019. She established this was a typical "low" week for her. She worked weeks that included 40 hours, 41 hours, 42 hours, 47 hours, 48 hours, 49 hours, and 51 hours during the same timeframe to establish her "typical" high weeks of earnings.

I find that any weeks claimant was paid for less than 32 hours of work, vacation, or holiday were not representative of her typical earnings prior to the work injury. Therefore, I include the following weekly earnings in my calculation of her gross average weekly earnings prior to the work injury[1]:

Pay Period End Date	Regular/OT Hours	Holiday/Vacation Hours	Gross earnings.
8/18/19	40	0	$869.58
7/28/19	42.02	0	$905.54
7/21/19	47	0	$998.62
7/14/19	40	8	$1,017.31
6/23/19	29	8	$822.89
6/16/19	16	16	$772.72
6/9/19	24	8	$729.44
6/2/19	18	16	$766.82
5/19/19	22	12	$761.01
5/12/19	41	0	$891.84
5/5/19	23.02	28	$1,165.67
4/28/19	17	16	$703.93
4/14/19	33	26	$1,046.25

[1] The parties appear to concur on the wages, holiday pay, vacation pay, overtime pay, and incentive pay that should be included within the "gross earnings" for each week. Therefore, my chart is not as detailed as the parties' charts but simply includes the gross earnings for each week found to be representative of claimant's typical earnings.

Adding these wages together, I find that claimant earned $11,451.62 during the 13 earliest typical, or representative, weeks immediately preceding her work injury. Dividing this by 13 weeks results in a gross average weekly wage of $880.89. I find this to be a realistic and representative calculation of claimant's typical and customary earnings immediately preceding her work injury.

Claimant's treating physician, Shawn Spooner, M.D., credibly opined that claimant's headaches and convergence dysfunction are causally related to her work injury and I accept that opinion as accurate. (Jt. Ex. 9, p. 189) Dr. Spooner has also opined that claimant requires permanent work restrictions as a result of the injuries she sustained on July 21, 2019. (Jt. Ex. 9, pp. 181, 189) Again, this opinion is well-informed, credible, and accepted as accurate.

Three physicians performed independent medical evaluations and considered the permanent effects, if any, of the work injury. On June 28, 2021, defendants had claimant evaluated by Robert L. Broghammer, M.D., an occupational medicine specialist. Dr. Broghammer diagnosed claimant with chronic headache disorder. Chronic eye irritation, and dizziness, all attributable to the August 21, 2019 work injury. (Def. Ex. A2, p. 23) He opined that claimant only had mild permanent impairment as a result of the injury and that she was capable of continuing to work under her treating physician's restrictions. Dr. Broghammer referenced the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, and assigned claimant a three percent permanent functional impairment of the whole person as a result of her chronic pain. (Def. Ex. A2, pp. 25, 26)

After performing the independent medical evaluation, defense counsel contacted Dr. Broghammer and provided additional medical records. In a report dated April 21, 2022, Dr. Broghammer modified his medical opinions. In his supplemental report, Dr. Broghammer opined that claimant's diagnosis of chronic headache disorder is only partially related to the work injury on August 21, 2019. He opined that claimant's "bilateral vestibular disorder with intermittent dizziness predating the alleged injury" is "unrelated to Ms. Hermanstorfer's work injury." (Def. Ex. A1, p. 8) However, he reaffirmed that claimant's chronic eye irritation is related to the work injury. (Def. Ex. A1, p. 8)

In his supplemental report, Dr. Broghammer deferred to claimant's treating physician with respect to permanent restrictions but attributed the restrictions to claimant's pre-existing condition. Nevertheless, Dr. Broghammer opined that claimant still sustained a "mild amount of disability" but did not specifically reference the AMA Guides or quantify the permanent functional impairment.

Claimant sought an evaluation performed by a neurologist, Irving L. Wolfe, D.O., on June 13, 2022. Ms. Hermanstorfer testified that Dr. Wolfe performed the longest evaluation. Dr. Wolfe diagnosed claimant with a closed head injury resulting in traumatic brain injury and post-concussive syndrome. Interestingly, Dr. Wolfe understood that claimant was not under active treatment for headaches prior to the August 21, 2019 work injury. This is not an accurate assumption by Dr. Wolfe.

Nevertheless, he causally related all of claimant's symptoms to the work injury and declared maximum medical improvement to have occurred on April 19, 2021.

Dr. Wolfe opined that Ms. Hermanstorfer sustained a four percent permanent functional impairment of the whole person as the result of her balance issues related to a traumatic brain injury. He assigned an additional three percent of the whole person as a result of claimant's headaches. In total, Dr. Wolfe opined that claimant sustained a seven percent permanent functional impairment of the whole person as a result of the August 21, 2019 work injury. (Cl. Ex. 1, pp. 27-28) Dr. Wolfe opined that claimant should follow her treating physician's restrictions, including an 8-hour workday and 40-hour workweek, as well as no lifting, pushing, or pulling more than 10 pounds. He also recommended against work that required climbing or balancing activities. (Cl. Ex. 1, p. 28)

Defendants obtained another evaluation performed by neurologist, David Friedgood, D.O., on August 11, 2022. Dr. Friedgood opined that claimant sustained a closed head injury at work on August 21, 2019, which resulted in a mild concussion. He opined that claimant has recovered from the head injury and concussion. He specifically opines that "she is at Neurologic baseline as before her 2019 accident." Dr. Friedgood explained, "Ms. Hermanstorfer has recovered from her brain injury and I see no evidence of any permanent damage." (Def. Ex. B, p. 31) Dr. Friedgood opined that claimant does not qualify for a permanent impairment rating directly related to her head injury. However, he also conceded he is not an expert in applying permanent impairment ratings. (Def. Ex. B, p. 31) Dr. Friedgood also opined that claimant will require ongoing follow-up for her eye condition and for ongoing care of her headaches. He also deferred to the restrictions imposed by claimant's treating physician. (Def. Ex. B, p. 31)

As I ponder the three permanent impairments offered, I give the opinions of Dr. Friedgood little to no weight because he acknowledges he is not an expert in rendering permanent impairment ratings and he offers no reference to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. Both Dr. Broghammer and Dr. Wolfe reference the AMA Guides, Fifth Edition. Their impairment ratings must be considered.

Dr. Wolfe's opinions could be critiqued because he does not appear to be aware of claimant's pre-existing headaches and balance issues. However, the impairment ratings also appear to be directly applicable to the symptoms and conditions for which claimant asserts complaints and symptoms. Specifically, Dr. Wolfe offers a permanent impairment rating for claimant's dizziness and lightheadedness as well as a second impairment for post-traumatic headaches.

Dr. Broghammer could be critiqued because he had to modify his opinions and clearly did not have a complete medical history when he rendered his initial opinions. On the other hand, he was provided additional records from which to analyze this claim and render further opinions. Ultimately, Dr. Broghammer's supplemental report confirms that he believes claimant has a mild permanent functional impairment, but the

supplemental report does not confirm or change the prior impairment rating offered by Dr. Broghammer. I also note that Dr. Broghammer's impairment rating was related to chronic pain and not as specific to the alleged injuries as the impairment rating offered by Dr. Wolfe.

Ultimately, considering each of the permanent impairment ratings, as well as the strengths and weaknesses of each opinion, I ultimately find that the permanent functional impairment rating offered by Dr. Wolfe is the most specific and complete. I find that claimant proved she sustained a seven percent permanent functional impairment of the whole person as a result of the July 21, 2019 work injury at Lennox.

CONCLUSIONS OF LAW

Claimant seeks an award of industrial disability benefits in this case. There does not appear to be a dispute between the parties that this injury involves an unscheduled injury, including a head injury. Claimant contends she should receive industrial disability as a result of her reduction in future earning capacity. Iowa Code section 85.34(2)(v). However, defendants dispute whether claimant is entitled to an award of industrial disability benefits at this time. Instead, defendants contend claimant's recovery is limited to a functional permanent disability award pursuant to Iowa Code section 85.34(2)(v).

Iowa Code section 85.34(2)(v) provides in pertinent part:

> If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity.

In this instance, Ms. Hermanstorfer remains employed by Lennox and the company transferred her to a full-time position that is consistent with her injury and ongoing limitations. Lennox has treated claimant fairly, humanely, and in a way that has allowed her to maintain employment. Claimant earns more her hour in her current position than she earned working in the coil room. However, claimant's current position with Lennox is a paygrade lower than her prior position in the coil room. In other words, if claimant was able to return to the position she worked on the date of injury, she would earn more than she earns now.

Ms. Hermanstorfer also has limitations on the number of hours she can work since the date of injury. She testified that she works fewer hours now than she worked prior to the date of injury. Claimant also testified that she receives significantly less incentive pay in her current position than she earned at the time of her work injury.

The parties' dispute necessarily requires the undersigned to think about claimant's earnings at the time of her injury to compare those with her current earnings. The parties have a significant dispute about claimant's average gross earnings prior to the date of injury. Therefore, I will focus on the claimant's pre-injury earnings and determine the applicable gross average weekly earnings and applicable weekly worker's compensation rate before I determine whether claimant is entitled to an industrial disability award or a functional impairment award.

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

Both parties appear to concede and urge that claimant's gross average weekly earnings prior to the date of injury should be calculated pursuant to Iowa Code section 85.36(6). The parties, however, dispute which weeks of earnings should be included within the calculation of that gross average weekly wage.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings is excluded, however. Section 85.36(6).

Claimant asserts that her applicable average gross weekly wage at the time of her injury was $1,006.65 and that her applicable corresponding weekly workers' compensation rate is $655.14. By contrast, defendants assert the applicable average gross weekly wage should be $794.64 with a corresponding weekly workers' compensation rate of $529.06.

When determining the customary gross average weekly wages for a claimant, the standard to be utilized is the earnings that are "usual or typical for that employee." Jacobson Transp. Co. v. Harris, 778 N.W.2d 192, 198 (Iowa 2010). The standard is whether the earnings are customary for the employee, not whether the absence was anticipated. Id. at 867. The determination of what earnings or wages are customary is a factual issue that is expressly committed to the discretion of the agency by Iowa Code section 85.26(6). Id. at 200.

The significant difference between claimant and defendants is the result of the fact that claimant required significant time off prior to her injury. Ultimately, I found claimant's customary gross average weekly earnings prior to the injury date were $880.89. All parties stipulate claimant was married and entitled to two exemptions.

Utilizing the rate tables located on the agency's website[2], I conclude the claimant's applicable weekly workers' compensation rate is $580.56.

Having determined that the claimant's average customary gross weekly earnings prior to the injury date were $880.89, I can determine whether claimant currently receives the same or greater salary, wages, or earnings than at the time of the injury. Iowa Code section 85.34(2)(v). Claimant testified that she currently works 40 hours per week and earns $22.40 per hour. Using simple math and accepting claimant's testimony about her typical workweek and hourly rate, this totals earnings of $896.00 per week at the present time. Review of claimant's recent paystubs at Claimant's Exhibit 5 demonstrates that claimant's earnings still fluctuate weekly.

Between June 19, 2022 and September 4, 2022, claimant earned between $601.34 and $1,020.89 per week. During that 12-week span, claimant earned more than $880.89 for 8 weeks and less than that amount for 4 weeks. During the 12 weeks immediately preceding hearing, claimant averaged earnings of $899.87 per week. (Claimant's Exhibit 5, p. 69) Ultimately, I conclude claimant is earning slightly more now than she was earning at the time of the work injury. There is little guidance in the statute or in appellate case law to date about how to calculate the current earnings in comparison to earnings at the time of the injury. However, it appears that claimant likely has fallen behind her anticipated earnings if she had maintained her prior position and likely has sustained a future loss of earning capacity. Nevertheless, she continues to earn and be paid wages that are equal to or slightly more than she earned at the time of the injury. Therefore, under the plain language of Iowa Code section 85.34(2)(v), I conclude that claimant's permanent partial disability recovery is limited to a functional impairment rating at this time. Iowa Code section 85.34(2)(v).

Claimant's injury involves an unscheduled body part. Therefore, her injury is compensated on a 500-week basis. Having considered the competing medical opinions and impairment ratings in this evidentiary record, I ultimately found that claimant proved a seven percent permanent functional impairment of the whole person. This entitles claimant to 35 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(v).

The final disputed issue is whether costs should be assessed against either party. Costs are assessed at the discretion of the agency. Iowa Code section 86.40. Exercising the agency's discretion, I note that claimant receives a minimal award of permanent disability. However, she had to file the claim and pursue the claim to secure the permanent impairment rating that I ultimately accepted. I conclude it is reasonable to assess claimant's costs in some amount.

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[2] https://www.iowaworkcomp.gov/sites/authoring.iowadivisionofworkcomp.gov/files/Ratebook%20--%202018%E2%80%932019%20--%20Spreadsheet.xlsx

Claimant's requested costs are itemized in Claimant's Exhibit 6. The IME from Dr. Wolfe was resolved by the parties at the time of hearing and will not be further considered. Claimant's request for assessment of her filing fee ($103.00) and service fees ($7.33) are both reasonable and permissible. 876 IAC 4.33(3), (7). Claimant's request for the expense of obtaining a report from Dr. Spooner ($240.00) is also reasonable and permissible. 876 IAC 4.33(6).

I conclude the deposition of claimant was duplicative of evidence offered at hearing, unnecessary, and likely a violation of Iowa Code section 17A.14(1). I do not believe this is a reasonable expense under the circumstances. This expense request is denied. In total, claimant is granted reimbursement of expenses totaling $350.33.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall reimburse claimant's independent medical evaluation fees pursuant to their agreement at the commencement of the arbitration hearing and pursuant to the oral order entered at the time of the hearing.

Defendants shall pay claimant thirty-five (35) weeks of permanent partial disability benefits at the weekly rate of five hundred eighty and 56/100 dollars ($580.56).

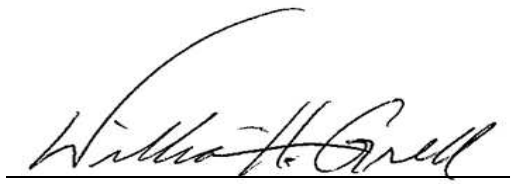
Permanent partial disability benefits shall commence on March 29, 2021 and be paid continuously until paid in full.

Defendants shall pay interest on any outstanding weekly benefits owed.

Defendants shall receive credit for benefits paid and stipulated to in the hearing report.

Defendants shall reimburse claimant's costs in the amount of three hundred fifty and 33/100 dollars ($350.33)

Signed and filed this 4th day of April, 2023.



WILLIAM H. GRELL

DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

James M. Ballard (via WCES)

Robert Cardell Gainer (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.