BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED

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WORKERS COMPENSATION

CARY STRAW,

Claimant,

vs.

LARSON CONSTRUCTION CO., INC.,

Employer,

and

WEST BEND MUTUAL INSURANCE,

Insurance Carrier,
Defendants.

File No. 5057143

ARBITRATION DECISION

Head Note Nos.: 1402.40, 1803, 2501

Claimant Cary Straw filed a petition in arbitration on August 15, 2016, alleging he sustained an injury to his low back and body as a whole while working for the defendant, Larson Construction Co., Inc. ("Larson Construction"), on August 15, 2015. Larson Construction, and its insurer, the defendant, West Bend Mutual Insurance Company ("West Bend"), filed an answer on September 6, 2016, admitting Straw sustained a work injury.

An arbitration hearing was held on August 15, 2017, at the Iowa Workforce Development Center in Cedar Rapids, Iowa. Attorney Matthew Petrzelka represented Straw. Straw appeared and testified. Attorney Nathan McConkey represented Larson Construction and West Bend. Doug Larson appeared and testified on behalf of Larson Construction and West Bend. Joint Exhibits ("JE") 1 through 11 were admitted into the record. The record was held open through September 15, 2017, for the receipt of post-hearing briefs. The briefs were received and the record was closed.

Before the hearing the parties prepared a hearing report listing stipulations and issues to be decided. Larson Construction and West Bend waived all affirmative defenses.

STIPULATIONS

1. An employer-employee relationship existed between Larson Construction and Straw at the time of the alleged injury.

2. Straw sustained an injury on August 15, 2015, which arose out of and in the course of his employment with Larson Construction.

3. The alleged injury is a cause of temporary disability during a period of recovery.

4. Temporary benefits are no longer in dispute.

5. If the alleged injury is found to be a cause of permanent disability, the disability is an industrial disability.

6. If the alleged injury is found to be a cause of permanent disability, the commencement date for permanent partial disability benefits, if any are awarded, is September 20, 2016.

7. At the time of the alleged injury, Straw's gross earnings were $745.00 per week, he was single and entitled to one exemption, and the parties believe the weekly rate is $456.74.

8. Prior to the hearing Straw was paid 35 weeks of permanent partial disability benefits, at the rate of $456.74.

ISSUES

1. Is the alleged injury is a cause of permanent disability?

2. If the alleged injury is a cause permanent disability, what is the extent of disability?

3. Is Straw entitled to payment of medical expenses set forth in Joint Exhibit 11?

FINDINGS OF FACT

Straw attended school through eighth grade in Winthrop, Iowa. (Transcript, pages 6-7) Straw testified he was a "troublemaker" in school and he was expelled. (Tr., p. 7) Straw has not received any formal education beyond the eighth grade. (Tr., p. 7) Straw is a smoker. (JE 2, p. 3) At the time of the hearing Straw was 58. (Tr., p. 6)

Straw had a troubled home life and left home at the age of fourteen to work for his uncle performing concrete and masonry work. (Tr., p. 8) Straw worked for his uncle from 1974 until approximately 1985, when his uncle's business went through bankruptcy. (Tr., p. 9) After leaving his uncle's business, Straw worked for several concrete businesses as a laborer, pouring concrete and performing form work and brickwork over the course of several years. (Tr., pp. 9-11) During the winter he experienced seasonal layoffs. (Tr., p. 11)

Straw stopped working for concrete businesses and started selling drugs. (Tr., p. 12) Straw performed some concrete projects on his own, on a part-time basis, for the county. (Tr., pp. 12-13) Straw submitted bids for the work he performed. (Tr., p. 53)

Following a drug conviction, Straw was incarcerated in 2002. (Tr., p. 13) During his incarceration Straw worked collecting garbage, taking care of cemeteries, and performing city and county work. (Tr., p. 13) Straw operated a skid loader. (Tr., p. 54) Straw was released from prison in 2004, and he participated in work release. (Tr., p. 14) Straw worked for a construction company pouring concrete floors. (Tr., p. 14)

A few months after his release from prison Larson Construction hired Straw as a laborer. (Tr., p. 14) Larson Construction is a general contracting business with approximately 100 employees who perform dirt work, concrete work, carpentry work, and steel work. (Tr., p. 58) Straw worked for Larson Construction until 2005, when he became involved in a verbal argument with a supervisor. (Tr., p. 15) Straw left Larson Construction and resumed selling drugs, until he was arrested again in 2005. (Tr., p. 15)

Straw was convicted of a drug offense and sent to prison for approximately twenty-two months. (Tr., pp. 15-16) During his incarceration, Straw performed janitorial work, stripping and waxing floors. (Tr., p. 16) After three months Straw received a job outside of the prison for a garbage company, collecting and separating plastic, cardboard, and other garbage. (Tr., p. 16) Straw then returned to the same concrete company he worked for following his prior incarceration. (Tr., p. 17)

Straw returned to selling drugs. (Tr., p. 19) He was arrested again in 2010, and he returned to prison a third time for two years. (Tr., p. 19)

In April 2014, Straw was released from prison. (Tr., p. 20) Straw testified he has not used any illegal drugs since August 2010. (Tr., p. 20) Following his release in 2014, Straw returned to concrete work, and he later returned to Larson Construction as a laborer. (Tr., p. 21) Straw testified Larson Construction has him "[p]ouring concrete, doing walls, finish work, setting up" full-time. (Tr., p. 21) At the time of the hearing Straw continued to work for Larson Construction.

On August 15, 2015, Straw was bull floating concrete for Larson Construction in Iowa City. (JE 10, p. 10; Tr., p. 24) Straw reported bull floating "levels and smoothes the concrete out so you can finish it with a power trowel or you can broom it or do whatever you want with it, but it smoothes it out." (Tr., p. 24) While he was backing up with the bull float Straw stepped into a hole and fell backwards. (JE 10, p. 10) Straw testified he felt a pinch in his lower back, like a needle, but he did not pay any attention to it and he kept working. (Tr., pp. 25-26, 47) Straw reported the work injury to his employer that day and he returned to work. (JE 10, p. 10) Straw testified he did not have any back problems prior to his work injury. (Tr., p. 23)

Straw testified a few months later he started having pain in his lower back and in his buttock that felt like "little needles" poking him, running down his leg, where he could not sit down. (Tr., pp. 26-27) He reported his symptoms to a supervisor at Larson Construction and he sought treatment through his primary care provider. (Tr., pp. 27-28)

On December 2, 2015, Straw attended an appointment with Sarah Kane, ARNP, with Peoples Community Health Clinic. (JE 2, p. 9; Tr., p. 28) Kane documented Straw was complaining of "pain in left buttock, when he sits it radiates down into his leg. States he will get numbness in the leg down to his foot and he has a spot on his foot that swells up. States top of foot is tingly. Denies any known injury. Denies any actual back pain." (JE 2, p. 9) During his prior appointments in August and October 2015, Straw did not report any back or leg pain. (JE 2, pp. 1-4) Kane assessed Straw with left sciatica, prescribed gabapentin, tramadol, and Meloxicam, and ordered him to use heat and ice. (JE 2, p. 11) Straw testified Kane wanted to prescribe hydrocodone, but he told her he did not want to take hydrocodone because of his prior drug use. (Tr., p. 28)

During a follow-up appointment with Kane on April 29, 2016, Straw complained of pain in his legs going down into his foot. (JE 2, p. 14) Kane documented Straw had returned to work full-time for the season pouring concrete and he "[n]otices the pain all of the time, sitting or standing for prolonged periods exacerbate pain. The leg will also go numb." (JE 2, p. 14) Kane continued Straw's medication. (JE 2, p. 16)

Straw received lumbar spine magnetic resonance imaging on May 6, 2016. (JE 3) The reviewing radiologist listed an impression of a diffuse disc bulge with left lateral disc protrusion at L4-L5, with mild spinal stenosis and moderate left neural foraminal stenosis, and possible impingement on the left L4 dorsal root ganglion. (JE 3, p. 1)

Straw attended an appointment with Allen Occupational Health Services on May 27, 2016, complaining of back pain as a result of a work injury on August 15, 2015. (JE 4, pp. 1-2) The medical provider Straw saw diagnosed him with chronic lumbar spondylosis with multilevel degenerative joint disease/degenerative disc disease and chronic left radiculopathy at L5, ordered Straw to see a neurosurgeon, and imposed a ten pound lifting restriction and restrictions of no climbing or bending, no work at or above shoulder level, no prolonged standing, walking, or sitting, no lifting below knee or above the shoulder, no commercial driving, and to limit physical exertion and to permit sitting, standing, and walking as necessary. (JE 4, pp. 4-5)

On July 1, 2016, Straw attended an appointment with Chad Abernathey, M.D., a neurosurgeon. (JE 5) Dr. Abernathey examined Straw, reviewed his imaging, and noted Straw "presents with a left L5 radiculopathy secondary to a left L4-5 disc extrusion and lateral recess stenosis." (JE 5, p. 1) Dr. Abernathy discussed conservative management versus surgical intervention and Straw elected to proceed with a surgical decompression. (JE 5, p. 1)

On July 1, 2016, Dr. Abernathey responded to a letter from West Bend, as follows:

> I will address your questions in the sequential order they were posed.
>
> 1. The patient's current complaints of left sciatica and left L4-5 disc extrusion with lateral recess stenosis on MRI would be consistent with a

> work injury of falling into a hole. The patient tells me that his symptoms began on 8-15-2015. Obviously, any discrepancy in the record purely raises the question of the veracity of the patient. It simply depends on whether you believe the patient's story is valid. He did not give any indication that he was not truthful.
>
> 2. I believe that surgery is indicated and would be related to his work injury of 8-15-2015, if the patient's history is accurate.
>
> 3. Not applicable.

(JE 5, p. 2)

Dr. Abernathey performed a lumbar laminectomy on Straw on August 9, 2016. (JE 5, p. 3) Dr. Abernathey prescribed pain medication and physical therapy. (JE 5, p. 3) On September 19, 2016, Dr. Abernathey released Straw to return to regular duty on September 20, 2016. (JE 5, p. 4)

Straw retained Richard Neiman, M.D., a neurologist, to perform an independent medical examination. (JE 6) Dr. Neiman examined Straw and summarized his history. (JE 6) Using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Neiman opined:

> he qualifies for Table 15-7, Section II, intervertebral disk or other soft tissue lesions, Section E, surgically treated disk lesion with residual, medically documented pain and rigidity, level of impairment will be 10% impairment of the whole person. His range of motion, he has had flexion forward at 40 degrees translated into 2.67% level of impairment, rounded 3% of the whole person. The extension at 30 would be zero. Lateral bending, right and left at 30 degrees using Table 15-9, no additional level of impairment can be given. If we use Table 15-18, he has weakness at the L5 nerve root approximately 30% times 37. Using Table 15-8, the level of impairment would be at 11.1% impairment of the lower extremity. Using Conversion Table 17-3, will be another 4% impairment of the whole person.

(JE 6, p. 3) Dr. Neiman recommended permanent restrictions of avoiding excessive flexion, extension, and lateral flexion of the lumbar spine, a lifting restriction of thirty-five pounds, and ten to fifteen pounds repetitively, and directed him to try to reduce squatting, kneeling, and bending. (JE 6, p. 3)

On February 10, 2017, Dr. Abernathey issued a letter opining, under the AMA Guides, "for chronic pain, decreased range of motion of the lumbosacral spine, previous disc extrusion and subsequent surgery; I would consider the patient to have a 7% whole body impairment rating. I would consider the patient to be at MMI as of this date." (JE 5, p. 5)

Counsel for Larson Construction and West Bend sent Dr. Abernathey a form letter, which Dr. Abernathy signed on May 1, 2017, agreeing "Mr. Straw did **not** suffer any type of structural change or damage to his spine as a result of **his work incident of August 15, 2015**." (JE 5, p. 7) Dr. Abernathey further agreed to the following statement:

> Mr. Straw suffered **at most a temporary** soft-tissue strain and/or **temporary** aggravation of preexisting degenerative condition in relation to his alleged work incident of **August 15, 2015**, which would have healed within a time period of several months and which did **not** result in any permanent impairment, pursuant to the *AMA Guides, 5th Ed.*, did **not** result in the need for any **permanent** work/activity restrictions, and where no further medical treatment would be causally related to, or necessitated by, this alleged incident.

(JE 5, p. 7)

Straw testified he continues to experience pain on a daily basis. (Tr., p. 48) Straw takes Aleve two times per day to help with the pain. (Tr., p. 48)

Straw is hard working and he takes pride in his work. (Tr., p. 26) Larson testified Straw is a good concrete finisher and he does a good job at work. (Tr., p. 59)

Straw reported he used to "top stick" a lot of concrete and pour a lot of concrete, and now he is just able to work on edges, run a self-propelled saw, and perform other "light-duty stuff." (Tr., p. 38) Straw reported he used to do a lot of bending, and since his injury he can do very little bending. (Tr., p. 39) Straw testified, "I can't get down and pour a top stick like I used to. I can't lift anything heavy, and I used to be able to do all of that, you know. I can run a power trowel for a matter of time." (Tr., p. 39) Straw relayed he continues to do some "bent-over work" for a "couple hours" per day. (Tr., p. 49) Straw is able to bull float, finish edges, berm concrete, and seal concrete while on his hands and knees. (Tr., p. 50) Straw can operate a skid loader and a mini hoe or excavator. (Tr., p. 55)

CONCLUSIONS OF LAW

I. Nature of the Injury

Straw contends he sustained a permanent impairment to his lumbar spine as a result of the work injury. Larson Construction and West Bend aver Straw sustained a temporary impairment only.

To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, the employee's injuries arose out of and in the course of the employee's employment with the employer. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats v. Ciha, 552

N.W.2d 143, 151 (Iowa 1996). The injury must be a rational consequence of a hazard connected with the employment, and not merely incidental to the employment. Koehler Elec. v. Willis, 608 N.W.2d 1, 3 (Iowa 2000). The Iowa Supreme Court has held, an injury occurs "in the course of employment" when:

> [I]t is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. *An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of the employer.*

Farmers Elevator Co. v. Manning, 286 N.W.2d 174, 177 (Iowa 1979) (Emphasis original). The claimant bears the burden of proving the claimant's work-related injury is a proximate cause of the claimant's disability and need for medical care. Ayers v. D & N Fence Co., Inc., 731 N.W.2d 11, 17 (Iowa 2007); George A. Hormel & Co. v. Jordan, 569 N.W.2d 148, 153 (Iowa 1997). "In order for a cause to be proximate, it must be a 'substantial factor.'" Ayers, 731 N.W.2d at 17. A probability of causation must exist, a mere possibility of causation is insufficient. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997).

The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The commissioner, as the trier of fact, must "weigh the evidence and measure the credibility of witnesses." Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye, 569 N.W.2d at 156. When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert's education, experience, training, and practice, and "all other factors which bear upon the weight and value" of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

It is well-established in workers' compensation that "if a claimant has a preexisting condition or disability, aggravated, accelerated, worsened, or 'lighted up' by an injury which arose out of and in the course of employment resulting in a disability found to exist," the claimant is entitled to compensation. Iowa Dep't of Transp. v. Van Cannon, 459 N.W.2d 900, 904 (Iowa 1990). The Iowa Supreme Court has held,

> [a] disease which under any rational work is likely to progress so as to finally disable an employee does not become a "personal injury" under our

> Workmen's Compensation Act merely because it reaches a point of disablement while work for an employer is being pursued. It is only when there is a direct causal connection between exertion of the employment and the injury that a compensation award can be made. The question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause.

Musselman v. Cent. Tel. Co., 261 Iowa 352, 359-60, 154 N.W.2d 128, 132 (1967).

Two physicians have provided opinions in this case, Dr. Abernathey, the treating neurosurgeon, and Dr. Neiman, a neurologist who performed an independent medical examination. In December 2016, Dr. Neiman opined Straw sustained a seventeen percent permanent impairment as a result of the work injury, and recommended permanent restrictions. (JE 6, p. 3) In February 2017, Dr. Abernathey originally opined Straw had sustained a seven percent permanent impairment as a result of the work injury. (JE 5, p. 5) On May 1, 2017, Dr. Abernathey responded to a form letter from counsel for Larson Construction and West Bend, checking he agreed Shaw had sustained "**at most a temporary** soft-tissue strain and/or **temporary** aggravation of preexisting degenerative condition in relation to his alleged work incident of **August 15, 2015**," which did not result in a permanent impairment, a need for permanent work restrictions, or additional medical care. (JE 5, p. 7) Dr. Abernathey did not provide any written comments when he responded to the letter.

I find Dr. Neiman's opinion more persuasive than Dr. Abernathey's opinion. Dr. Abernathey, the treating neurosurgeon, initially opined Straw sustained a permanent impairment of seven percent due to the work injury. A few months later he changed his opinion, pursuant to a form letter from opposing counsel, opining Straw had not sustained a permanent impairment. Dr. Abernathey has not provided a written explanation for the change in his opinion. He did not testify at hearing to explain why he changed his opinion. There is no evidence in the record that Straw sought treatment for his back or complained of back pain prior to the August 2015 work injury.

During the hearing Straw maintained appropriate eye contact and he did not engage in any furtive movements. I found Straw's testimony credible. Larson, his employer, also testified he is a good employee and reported, "I fully trust Cary." (Tr., pp. 63-65) I conclude Straw has established he sustained a permanent impairment as a result of his work injury.

II. Extent of Disability

"Industrial disability is determined by an evaluation of the employee's earning capacity." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 852 (Iowa 2011). In considering the employee's earning capacity, the deputy commissioner evaluates several factors, including "consideration of not only the claimant's functional disability, but also [his] age, education, qualifications, experience, and ability to engage in similar employment." Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 137-38 (Iowa 2010).

The inquiry focuses on the injured employee's "ability to be gainfully employed." Id. at 138.

The determination of the extent of disability is a mixed issue of law and fact. Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 525 (Iowa 2012). Compensation for permanent partial disability shall begin at the termination of the healing period. Iowa Code § 85.34(2). Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Id. § 85.34(2)(u). When considering the extent of disability, the deputy commissioner considers all evidence, both medical and nonmedical. Evenson v. Winnebago Indus., Inc., 818 N.W.2d 360, 370 (Iowa 2016).

The Iowa Supreme Court has held, "it is a fundamental requirement that the commissioner consider all evidence, both medical and nonmedical. Lay witness testimony is both relevant and material upon the cause and extent of injury." Evenson, 881 N.W.2d 360, 369 (Iowa 2016) (quoting Gits Mfg. Co. v. Frank, 855 N.W.2d 195, 199 (Iowa 2014)).

At the time of the hearing Straw was fifty-eight. (Tr., p. 6) Straw attended school through the eighth grade and he has not received any additional formal education. (Tr., pp. 6-7) Straw has worked in the concrete business for many years, and he has a significant criminal history. Following his work injury Straw returned to Larson Construction as a full-time employee. He continues to perform concrete work, but he cannot perform all the duties he used to perform. Straw can operate a skid loader and a mini hoe. He has also prepared bids for self-employment projects in the past. (Tr., p. 53) Straw is a hard worker who takes pride in his work. Considering all of the factors of industrial disability, I conclude Straw has sustained a thirty percent industrial disability.

III. Medical Bills

Straw seeks to recover the cost of an epidural steroid injection he received for his lumbar spine condition on June 1, 2017, totaling $3,288.42. (JE 11, pp. 3-4) Larson Construction and West Bend contend Straw did not sustain a permanent impairment and he does not need any additional medical treatment for his work injury.

An employer is required to furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, hospital services and supplies, and transportation expenses for all conditions compensable under the workers' compensation law. Iowa Code § 85.27(1). The employer has the right to choose the provider of care, except when the employer has denied liability for the injury. Id. "The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee." Id. § 85.27(4). If the employee is dissatisfied with the care, the employee should communicate the basis for the dissatisfaction to the employer. Id. If the employer and employee cannot agree on alternate care, the commissioner "may, upon application and reasonable proofs of necessity therefore, allow and order other care." Id. The statute requires the employer to furnish reasonable medical care. Id. § 85.27(4); Long v. Roberts Dairy Co., 528 N.W.2d 122, 124 (Iowa 1995) (noting "[t]he employer's obligation under the statute turns

on the question of reasonable necessity, not desirability"). The Iowa Supreme Court has held the employer has the right to choose the provider of care, except when the employer has denied liability for the injury, or has abandoned care. Iowa Code § 85.27(4); Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 204 (Iowa 2010).

The Iowa Supreme Court has held an employer may be responsible for unauthorized care "upon proof by a preponderance of the evidence that such care was reasonable and beneficial," meaning "it provides a more favorable medical outcome than would likely have been achieved by the care authorized by the employer." Gwinn, 779 N.W.2d at 206. Before attending his appointment Straw requested medical treatment from Larson Construction and West Bend. As analyzed above, Straw has sustained a permanent impairment as a result of the work injury. There was no evidence presented at hearing the care Straw received was unreasonable and not beneficial to Straw. I find the services Straw received were reasonable and necessary for the treatment of his work-related injury. Larson Construction and West Bend are responsible for all causally-related medical care.

ORDER

IT IS THEREFORE ORDERED, THAT:

Defendants shall pay the claimant one hundred and fifty (150) weeks of permanent partial disability benefits at the rate of four hundred fifty-six and 74/100 dollars ($456.74), commencing on September 20, 2016.

Defendants shall pay accrued benefits in a lump sum with interest on all received weekly benefits pursuant to Iowa Code section 85.30.

Defendants are entitled to a credit for benefits previously paid.

Defendants shall reimburse the claimant for all causally related medical bills totaling three thousand two hundred eighty-eight and 42/100 dollars ($3,288.42).

Defendants shall file subsequent reports of injury as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 15th day of November, 2017.

HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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HLP/srs

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.