

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MEK BACCAM,

Claimant,

vs.

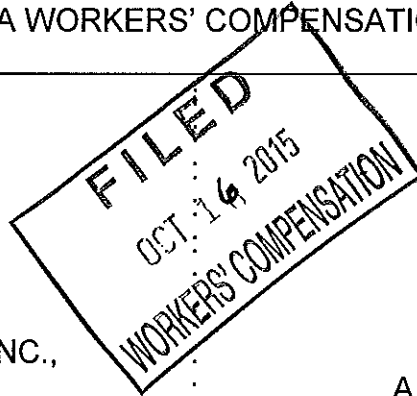
ACH FOOD COMPANIES, INC.,

Employer,

and

SENTRY INSURANCE,

Insurance Carrier,
Defendants.



File No. 5045171

ARBITRATION

DECISION

Head Note Nos.: 1801.1, 1803, 3001, 4000

STATEMENT OF THE CASE

Claimant, Mek Baccam, filed a petition in arbitration seeking workers' compensation benefits from ACH Food Companies, Inc., employer, and Sentry Insurance, insurance carrier, both as defendants, as a result of a stipulated injury sustained on June 12, 2012. This matter came on for hearing before Deputy Workers' Compensation Commissioner, Erica J. Fitch, on November 17, 2014, in Des Moines, Iowa. The record in this case consists of claimant's exhibits 1 and 2, defendants' exhibits A through E, and the testimony of the claimant. The parties submitted post-hearing briefs, the matter being fully submitted on December 15, 2014.

ISSUES

The parties submitted the following issues for determination:

1. Whether claimant is entitled to temporary partial disability benefits from June 12, 2012 through July 7, 2012;
2. The extent of claimant's permanent disability to the scheduled member leg;
3. The proper rate of compensation;
4. Whether claimant is entitled to payment of medical mileage;

5. Whether claimant is entitled to reimbursement for an independent medical evaluation pursuant to Iowa Code section 85.39;
6. Whether claimant is entitled to interest pursuant to Iowa Code section 85.30, and if so, how much;
7. Whether claimant is entitled to penalty benefits pursuant to Iowa Code section 86.13, and if so, how much; and
8. Specific taxation of costs.

The stipulations of the parties in the hearing report are incorporated by reference in this decision.

FINDINGS OF FACT

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

Claimant's testimony was consistent as compared to the evidentiary record, and his demeanor at the time of evidentiary hearing gave the undersigned no reason to doubt claimant's veracity. Claimant is found credible.

Claimant was 48 years of age at the time of hearing. Claimant is originally from Laos, but has resided in Des Moines, Iowa for the last 35 years. (Claimant's testimony) Claimant graduated high school in 1985 and Northwest Technical College in 1987. (Exhibit 2, page 37) His work history consists of manufacturing, assembly, warehouse laborer, and at defendant-employer. Claimant began work at defendant-employer in 1994 as a miller-blender. He has remained in that position throughout the whole of his employ with defendant-employer. Claimant worked 10 hours per day, 4 days per week; specifically, 5:00 a.m. to 3:30 p.m. Monday through Thursday. Claimant testified he occasionally worked overtime on Friday and Saturday. (Claimant's testimony; Ex. 2, pp. 37-39) Claimant denied any history of injuries, including workers' compensation claims. He considered himself to be in good health, exercising daily. (Claimant's testimony)

On June 12, 2012, claimant was operating a forklift at work when the brakes malfunctioned. As a result, claimant's left leg was caught between the forklift and a door frame. Claimant felt immediate pain, described as a level 10 on a 10-point scale. He was trapped in that position for a couple minutes. When freed, he sat down and was provided a bandage and ice. An employee in the safety department transported claimant to the emergency room. (Claimant's testimony)

At the emergency department of Mercy Clinics, claimant was evaluated by Timothy Colby, D.O. X-rays of left lower leg were negative. (Ex. 1, p. 3) Dr. Colby repaired a laceration on claimant's left lower leg with eight sutures. Dr. Colby described the wound as simple and clean, without foreign body, tissue loss or tendon injury. (Ex. 1, p. 3)

Later that same date, defendants referred claimant to Iowa Methodist Occupational Health and Medicine, where claimant was evaluated by Nicholas Bingham, M.D. Claimant complained of pain at a level 10 on a 10-point scale and numbness inferior to the wound. On examination, Dr. Bingham noted range of motion of the left foot was limited by pain and the presence of soft tissue swelling. Dr. Bingham assessed a left leg contusion and laceration and prescribed tramadol. Dr. Bingham released claimant to return to work on sit-down duty; no kneeling, squatting, or climbing; and with the caveat claimant elevate the leg and use ice when possible. Dr. Bingham noted claimant was scheduled to work the next two days but would be off from Friday through Sunday. Accordingly, he advised claimant to return for evaluation on Monday morning, at which point Dr. Bingham anticipated loosening the work restrictions somewhat. Dr. Bingham also indicated wounds of this nature typically heal a bit more slowly. (Ex. 1, pp. 4-5)

Claimant chose to use vacation hours on June 13, 2012, as that date represented the last date of his typical work week. When claimant returned to work the following week, his light-duty assignment required him to work 5 days per week on 8-hour shifts, from 6 a.m. to 2:30 p.m. Claimant's assignment involved seated work, wrapping bags. While on light duty, claimant earned less per hour. He also was not provided the opportunity to work overtime hours. Claimant testified he did not receive any workers' compensation benefits to compensate him for the lost hourly wage and lost hours; he also received no explanation for the lack of payment from defendants. (Claimant's testimony)

On June 15, 2012, claimant returned to Dr. Bingham prior to his scheduled return due to complaints of bruising, redness, and warmth about the wound. Following examination, Dr. Bingham found no presence of infection. Dr. Bingham released claimant under the existing work restrictions and medication regimen, to return for evaluation the following Tuesday. (Ex. 1, pp. 5-6)

Claimant returned to Dr. Bingham on June 19, 2012 with complaints of continued pain with walking, flexion, and extension of the foot. Claimant acknowledged his pain had lessened. On examination, Dr. Bingham noted range of motion near full, but with some complaint of pain, as well as swelling of the calf. Dr. Bingham maintained claimant's medication regimen and released claimant to return to work under restrictions of sit down duties primarily, with standing and walking as tolerated, and no kneeling or squatting. He advised claimant to return for evaluation on Friday. (Ex. 1, pp. 6-7)

On June 22, 2012, claimant returned to Dr. Bingham for evaluation. Dr. Bingham removed claimant's sutures, but placed two steri-strips on the lower portion of claimant's wound. Dr. Bingham noted mild swelling and mild limitation in range of motion of the left foot due to pain. He prescribed naproxen and released claimant to work under restrictions of standing, walking, kneeling, and squatting as tolerated. (Ex. 1, p. 8)

Claimant completed a claim report for Sentry Insurance on June 25, 2012. (Ex. 2, p. 3) Claimant indicated he had been placed on light duty beginning June 13, 2012

and continued to work light duty. He also reported continued complaints of soreness and swelling of his leg. (Ex. 2, pp. 1-2)

Claimant returned to Dr. Bingham on June 29, 2012. Dr. Bingham noted claimant reported not experiencing much pain and believed himself capable of returning to full duty. He did complain of a bit of swelling around the laceration, which was observed by Dr. Bingham. Dr. Bingham released claimant to return to work full duty on June 29, 2012 and maintained claimant's existing medications. (Ex. 1, p. 9)

Claimant testified while on light duty, his symptoms improved, as he spent limited time on his feet and was able to walk around. Claimant denied, however, requesting a full-duty release from Dr. Bingham. Claimant testified at the time of his release, his symptoms had not resolved and continued to include numbness, tingling, burning, and itching. Following release, claimant returned to his pre-injury miller-blender job. (Claimant's testimony)

On July 6, 2012, claimant presented to personal physician Brandon Madson, M.D. Claimant reported suffering with continued soreness and swelling of his lower leg and requested Dr. Madson's opinion. On examination, Dr. Madson noted an 8 centimeter healing laceration, no redness or sign of infection, and claimant ambulating with a normal gait. Claimant described swelling below the laceration, but Dr. Madson indicated he did not appreciate any significant swelling. Dr. Madson reassured claimant the laceration "should continue to heal without any long-term sequela," with the limited amount of residual soreness and swelling gradually resolving. (Ex. 1, p. 13)

Claimant returned to Dr. Bingham on July 13, 2012. Claimant complained of a pulling sensation of the lower leg. He also reported an inability to run or exercise since the work injury. On examination, Dr. Bingham noted continued swelling next to the tibia, mild limitation in plantar and dorsiflexion of the foot, and pain complaints. Dr. Bingham allowed claimant to continue full duty, but referred him for a course of physical therapy. (Ex. 1, pp. 10-11)

Physical therapy records indicate claimant began therapy on August 2, 2012. At that time, the therapist, Timothy Alberhasky, PT, denoted diagnoses of wound of the lower limb without mention of complication, swelling of the limb, pain and effusion of the lower leg, and generalized muscle weakness. (Ex. 1, p. 15) Mr. Alberhasky also noted limitations related to pain, swelling, weakness, and difficulty standing or walking for prolonged periods. Claimant complained of pain at a level 7 on a 10-point scale. On examination, Mr. Alberhasky noted full active motion of the left lower extremity, gross muscle strength of 4/5, tenderness over the anterior tibia, and swelling in the mid lower leg circumference ranging from a 1.5 centimeter maximum to a 3 millimeter minimum as compared to the normal right lower leg. (Ex. 1, pp. 16-18)

Mr. Alberhasky discharged claimant from physical therapy on August 20, 2012, following seven sessions. At that time, Mr. Alberhasky noted a subjective report of pain at a level 5. Mr. Alberhasky noted objective findings of resolved left lower leg pain,

gross strength of the left lower leg of 5/5, and excellent range of motion of the lower leg with all motions of the knee and ankle within normal limits. Mr. Alberhasky opined claimant demonstrated normal functioning for all activities involving the left leg and claimant was ready for discharge to a home exercise program. (Ex. 1, pp. 50-51) Claimant denied relief of symptoms with the course of physical therapy. (Claimant's testimony)

On August 24, 2012, after completing the course of physical therapy, claimant returned to Dr. Bingham. Claimant reported no relief with therapy. Claimant complained of edema and paresthesias below the wound and around the calf. On examination, Dr. Bingham noted full range of motion and a normal gait, but mild pitting edema below the wound. At claimant's insistence, Dr. Bingham referred claimant for an orthopedic evaluation. (Ex. 1, pp. 11-12)

Defendants arranged for evaluation of claimant by board-certified orthopedic surgeon, Joshua Kimelman, D.O., on September 6, 2012. (Ex. 1, p. 56; Ex. E) At evaluation, claimant reported mild, but constant, symptoms. (Ex. 1, p. 58) Symptoms included residual tingling, numbness, decreased sensation, and edema. Dr. Kimelman noted claimant was capable of heel and toe walking, with no atrophy or weakness. (Ex. 1, p. 59)

Dr. Kimelman explained claimant had sustained a laceration and contusion. As a result of the contusion, claimant sustained nerve damage in the back of the leg due to the crushing injury. He anticipated those nerves would improve with time. As the cutaneous nerves around the wound were lacerated, however, he indicated these would likely not improve. Dr. Kimelman also anticipated the edema would improve with time. Dr. Kimelman opined claimant sustained permanent impairment as a result of the injury, but the permanency was "cosmetic and superficial." Dr. Kimelman opined claimant could resume activity as tolerated and recommended claimant return in three months if symptoms persisted. (Ex. 1, p. 59)

Claimant returned to Dr. Kimelman on January 31, 2013. At that time, Dr. Kimelman noted complaints of mild, random symptoms. Symptoms included itching, burning and numbness of the left leg. Claimant reported some improvement in symptoms, as he quantified his discomfort at the time of the prior September evaluation as a level 10 on a 10-point scale, with his current discomfort measuring as a level 8. Dr. Kimelman noted, however, that claimant's history form completed in September reported discomfort at a level 5. (Ex. 1, p. 60) Overall, claimant reported approximately 20 percent improvement since Dr. Kimelman's prior evaluation. Dr. Kimelman informed claimant injuries like his take 12 to 18 months to heal. (Ex. 1, p. 61)

Dr. Kimelman observed a 2 ½ to 3 inch scar, with claimant reporting decreased sensation distal to the laceration site and a burning sensation on the anterior tibia. On examination, Dr. Kimelman noted excellent range of motion and strength, as well as the ability to heel and toe walk without restriction of motion. (Ex. 1, p. 60) Dr. Kimelman assessed a crush injury with laceration, with some permanency secondary to discomfort

and loss of sensation. He recommended claimant return in June 2013, one year post-injury, for assessment of permanency. He imposed no work restrictions. (Ex. 1, p. 61)

On June 27, 2013, claimant returned to Dr. Kimelman and reported no change in symptoms from the prior visit. He continued to complain of pain in the anterior compartment of the left leg, burning, and decreased sensation anterior to the laceration site. Claimant reported working full time. He also reported moderate restriction in his activities due to pain and worsened symptoms with standing. Claimant reported relief with use of ice, rest and taking Tylenol, which he indicated could be required up to three times per day due to pain. (Ex. 1, p. 62)

On examination, Dr. Kimelman noted claimant was capable of ambulating around the exam room with a normal, casual gait and was able to heel and toe walk without weakness. Dr. Kimelman measured a maximum ¼ inch girth loss of the left leg as compared to the right. Dr. Kimelman also noted decreased sensation to light touch and local tenderness of the middle proximal junction of the left leg. Following examination, Dr. Kimelman opined claimant continued to demonstrate loss of sensation and discomfort of the left leg over one year post-injury. Dr. Kimelman indicated he did not anticipate claimant's condition would change or worsen, but had resulted in some associated permanency. (Ex. 1, p. 63)

Subsequently, on August 9, 2013, Dr. Kimelman opined the work injury resulted in discomfort, loss of sensation, and a scar. As a result of these conditions, Dr. Kimelman opined claimant sustained a 1 percent lower extremity impairment by the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Ex. 1, p. 64)

On August 15, 2013, defendants authored a letter to claimant indicating Dr. Kimelman had placed claimant at maximum medical improvement (MMI) and assigned a 1 percent lower extremity rating, warranting 2.2 weeks of permanent partial disability benefits. Defendants included a check for permanent partial disability benefits in the amount of \$1,237.94 plus interest of \$12.98 for the period of June 27, 2013 through July 11, 2013. (Ex. 2, pp. 5-6, 24; Ex. D, pp. 1-2)

At the referral of claimant's attorney, on March 25, 2014, claimant presented for his independent medical evaluation (IME) with board-certified occupational and environmental medicine physician, Mark Taylor, M.D. (Ex. 1, p. 79) Dr. Taylor produced a report of his findings and opinions dated April 16, 2014. (Ex. 1, p. 73) At the time of evaluation, claimant reported continued symptoms of the left lower leg, namely constant numbness, intermittent itching, tingling, and a constant burning pain which worsened with activities, stair climbing, or prolonged standing, sitting, or walking. Claimant reported an average discomfort level of 6 on a 10-point scale, with the discomfort ranging from a level 4 to a level 8. Claimant testified he attempted to relieve his symptoms by alternating between walking, standing, and sitting whenever possible, massaging the leg, rest, and occasionally through use of Tylenol. (Ex. 1, pp. 74-75)

Dr. Taylor observed claimant ambulate about the exam room without obvious difficulty and without significant limping. Dr. Taylor indicated claimant was able to heel and toe walk without difficulty. (Ex. 1, p. 75) On examination, Dr. Taylor observed an approximately 5 centimeter scar over the anterior/medial lower leg where claimant had a well-healed laceration. Palpation of the laceration site did not reveal tenderness, but claimant displayed palpable tenderness and discomfort over the musculature lateral to the laceration site and lateral to the tibia itself, extending midway down the tibia. On closer inspection of the tender region, Dr. Taylor observed a "mild prominence" of the area as compared to the right leg. Dr. Taylor noted symmetric leg circumference and grade-5 strength throughout the lower extremities. On sensory examination, Dr. Taylor noted decreased pinprick and light touch in the left lower anterior/medial leg distal to the laceration site. (Ex. 1, p. 76)

Following interview, records review, and examination, Dr. Taylor opined claimant had maximized his treatment and had achieved MMI as of June 27, 2013, the date claimant was last evaluated by Dr. Kimelman. Dr. Taylor opined claimant sustained a permanent impairment to his left lower extremity, specifically located between claimant's left knee and ankle. With respect to the extent of claimant's permanent impairment, Dr. Taylor opined claimant did not demonstrate evidence of gait derangement nor muscle atrophy and displayed symmetric strength and range of motion of the lower extremities, without evidence of weakness. (Ex. 1, p. 77) Dr. Taylor opined claimant did demonstrate an area of numbness in the anterior medial left lower leg distal to the laceration site. According to Dr. Taylor, the maximum left lower extremity impairment rating for sensory changes/dysesthesias is 5 percent by the AMA Guides. Using a 60 percent modifier due to the symptom causing interference with activities and abnormal sensations/pain, Dr. Taylor opined claimant sustained a 3 percent left lower extremity impairment as a result of the work injury. (Ex. 1, p. 78) Also with respect to the extent of claimant's permanent impairment, claimant's counsel posed the following question to Dr. Taylor, with Dr. Taylor's response to follow (in italics):

To the extent that you believe the 6/12/12 injury has proximately caused permanent impairment for which the *AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition* (2000), does not provide the means to rate such permanent impairment, will you please identify this permanent impairment and describe how it impacts upon the function of the affected part(s) of [claimant's] body?

In this particular circumstance, [claimant's] previous state of health, prior to the injury, was that of a normal leg with no limitations on his activities at home or at work. Since the injury occurred, he has had to alter his activities. This has mainly been related to the tolerances of standing, walking, and even sitting. He has found that he has to change positions more often. He also has found that the symptoms occasionally require that he stop what he's doing and reach down and massage the left lower leg and that he take occasional Tylenol. Therefore, [claimant] has not successfully returned to his baseline status and has ongoing

permanent impairment that has led to an alteration in his day-to-day activities within his work and home environments.

(Ex. 1, p. 78)

Dr. Taylor recommended permanent restrictions of the ability to alternate walking, standing and sitting as needed for comfort; exercise of caution on uneven surfaces; occasionally crawl, kneel, or climb stairs; occasionally climb ladders, but to do so with caution and avoid use of extension ladders; and to choose footwear in consideration of the location upon which his leg a boot would rub. (Ex. 1, p. 78)

On October 14, 2014, Dr. Bingham opined the 1 percent lower extremity impairment assigned by Dr. Kimelman would represent the maximum rating possible for claimant. Dr. Bingham agreed he believed it more likely claimant sustained zero permanent impairment, as he would have expected claimant's complaints to resolve without permanent disability. He confirmed claimant had been released to full duty, without restrictions, and he recommended no additional treatment. (Ex. A, p. 2)

Claimant testified he continues to suffer with burning, itching, constant numbness, and intermittent tingling. He locates his symptoms along the inside of the front of his left leg, as well as on the opposite side of the calf. Symptoms range in severity from a level 4 to level 8 on a 10-point scale. Claimant testified he receives relief with relaxing the leg and use of Tylenol twice per day. (Claimant's testimony)

Claimant labors under no restrictions in his pre-injury miller-blender position. Claimant testified he is able to perform all his duties and complete his entire work shift. If he feels symptoms developing during work, he rubs his leg or changes position. Following work, claimant testified he has less energy than prior to the work injury and is consequently, less active. (Claimant's testimony)

Claimant testified his left leg is not in the same condition as prior to the work injury. Claimant feels as if his left leg is not as strong as prior to the work injury, and he believes the motion and agility in the left leg are less than in his right leg. Claimant also believes he walks differently than prior to the work injury. Further, claimant testified he has been unable to rehabilitate his leg to its pre-injury condition. He explained he has been unable to exercise as frequently or to the same level as he had prior to the work injury. He currently exercises a maximum of two days per week, and the exercises he performs are lighter in nature. Prior to work injury, claimant testified he exercised daily, running 1 to 2 miles 4 days per week, lifting weights for 30 minutes daily, and walking. He considered his left leg prior to the work injury to be better than that of an average person. Since the work injury, claimant believes his left leg is below a normal level. (Claimant's testimony)

Defendant-employer's records of claimant's earnings reveal the following hours, rate of pay, and gross pay:

PAY PERIOD (ENDING)	HOURS	RATE	GROSS PAY
1/7/2012	50 regular	\$20.0600	\$2,086.24
	16 overtime	\$30.0900	
	30 holiday	\$20.0600	
1/21/2012	70 regular	\$20.2100	\$1,616.80
	10 vacation	\$20.2100	
2/4/2012	80 regular	\$20.2100	\$1,616.80
2/18/2012	70 regular	\$20.2100	\$1,616.80
	10 vacation	\$20.2100	
3/3/2012	65 regular	\$20.2100	\$1,616.80
	15 vacation	\$20.2100	
3/17/2012	70 regular	\$20.2100	\$2,586.88
	32 overtime	\$30.3150	
	10 vacation	\$20.2100	
3/31/2012	70 regular	\$20.2100	\$1,859.32
	8 overtime	\$30.3150	
	10 vacation	\$20.2100	
4/14/2012	70 regular	\$20.2100	\$2,105.44
	16 overtime	\$30.3150	
	10 personal	\$20.2100	
4/28/2012	60 regular	\$20.2100	\$1,862.92
	8 overtime	\$30.3150	

	20 vacation	\$20.2100	
5/12/2012	60 regular	\$20.2100	\$1,859.32
	8 overtime	\$30.3150	
	10 personal	\$20.2100	
	10 vacation	\$20.2100	
5/26/2012	70 regular	\$20.2100	\$1,859.32
	8 overtime	\$30.3150	
	10 vacation	\$20.2100	
6/9/2012	70 regular	\$20.2100	\$2,101.84
	16 overtime	\$30.3150	
	10 holiday	\$20.2100	
6/23/2012	64 regular	\$17.2025	\$1,424.32
	8 personal	\$20.2100	
	8 vacation	\$20.2100	
7/7/2012	64 regular	\$17.7038	\$1,456.40
	8 holiday	\$20.2100	
	8 vacation	\$20.2100	
7/21/2012	80 regular	\$20.4100	\$1,632.80

(Ex. 2, pp. 11-22; Ex. C) Defendant-employer's records also reveal claimant worked the following number of hours in the given weeks listed:

WEEK OF	TOTAL HOURS
3/11/2012 – 3/17/2012	56
3/18/2012 – 3/24/2012	40

3/25/2012 – 3/31/2012	48
4/1/2012 – 4/7/2012	40
4/8/2012-4/14/2012	56
4/15/2012-4/21/2012	48
4/22/2012-4/28/2012	40
4/29/2012-5/5/2012	40
5/6/2012-5/12/2012	48
5/13/2012-5/19/2012	48
5/20/2012-5/26/2012	40
5/27/2012-6/2/2012	48
6/3/2012-6/9/2012	48
6/10/2012-6/16/2012	40
6/17/2012-6/23/2012	40
6/24/2012-6/30/2012	40

(Ex. 2, pp. 31-34)

CONCLUSIONS OF LAW

The first issue for determination is claimant's proper rate of compensation.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

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 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.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings, including shift differential pay but not including overtime or premium pay, 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 86.36(6)

Although claimant was paid on a biweekly basis, use of section 85.36(2) in computing his gross average weekly wage is inappropriate, as he was not a salaried employee. Claimant's earnings were computed on an hourly basis, rendering use of section 85.36(6) appropriate in computing claimant's gross average weekly wage.

The evidentiary record reveals claimant's hours worked on a weekly basis for the 13 weeks preceding the work injury on June 12, 2012. This period stretches from March 11, 2012 through June 9, 2012. Defendants argue inclusion of the thirteenth week, March 11 through March 17, 2012 is inappropriate as unrepresentative given claimant's weekly hours included vacation time and consequently resulted in higher earnings. During the week in question, claimant was paid for 56 hours. During the 13-week period, claimant's hours ranged from 40 hours to 56 hours, including multiple 48-hour weeks and two 56-hour weeks. Defendants included the other 56-hour week in their computation of rate based on the 12 weeks preceding the work injury. Review of the record also reveals claimant took vacation, holiday, or personal time in each of the pay periods offered by the parties in computation of rate. Therefore, the undersigned will not exclude a week of earnings because it includes vacation or personal time, as claimant clearly utilized such time on a regular basis.

Section 85.36(6) sets forth the basis for computing claimant's gross average weekly earnings. The section requires consideration of the 13 weeks preceding the date of injury. The evidentiary record contains proof of claimant's hours during these 13 weeks. There is no convincing reason any of the weeks should be excluded as unrepresentative. Therefore, each of the 13 weeks preceding the work injury, from March 11 through June 9, 2012, is properly included in computation of claimant's gross average weekly wage.

During the 13 weeks preceding claimant's work injury (March 11, 2012 through June 9, 2012), claimant was paid for 600 hours of work time. These hours included overtime pay not properly included in computation of gross average weekly wage. Claimant's standard hourly wage during the weeks in question was \$20.21. Therefore, his gross earnings for purposes of computation of rate during this period is \$12,126.00 (600 hours x \$20.21 = \$12,126.00). When this figure is divided by 13, the resultant gross average weekly wage is \$932.77 (\$12,126.00 ÷ 13 weeks = \$932.77). Claimant's gross average weekly wage is therefore found to be \$932.77. The parties stipulated at the time of the work injury, claimant was single and entitled to 1 exemption. The proper rate of compensation is therefore, \$565.75.

The next issue for determination is whether claimant is entitled to temporary partial disability benefits from June 12, 2012 through July 7, 2012.

An employee is entitled to appropriate temporary partial disability benefits during those periods in which the employee is temporarily, partially disabled. An employee is

temporarily, partially disabled when the employee is not capable medically of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury, but is able to perform other work consistent with the employee's disability. Temporary partial benefits are not payable upon termination of temporary disability, healing period, or permanent partial disability simply because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of the injury. Section 85.33(2).

Following the work injury on June 12, 2012, Dr. Bingham imposed work restrictions of sit-down duty only; no kneeling, squatting, or climbing; and to elevate and ice the leg when possible. Claimant elected to use vacation time on June 13, 2012; it appears defendants paid claimant eight hours of vacation time on that date. The following week, claimant returned to work and defendant-employer provided claimant light duty work for 40 hours per week. During this time, claimant testified he performed seated work, wrapping bags. Claimant remained under work restrictions in some form until Dr. Bingham released him on June 29, 2012. During the light-duty period, claimant earned less per hour than in his pre-injury position and was not extended the opportunity to perform overtime work. Claimant's payroll records reveal claimant earned \$17.2025 per hour for the biweekly period ending June 23, 2012 and \$17.7038 per hour for the biweekly period ending July 7, 2012.

Claimant requests temporary partial disability benefits to compensate him for the lost hours and reduced hourly wage for the period of June 12, 2012 through July 7, 2012. Defendants assert temporary partial disability benefits are not warranted as claimant returned to full-time, substantially similar work.

Claimant suffered a stipulated work-related injury on June 12, 2012. Dr. Bingham imposed work restrictions that same date, restrictions which remained in effect until claimant's release on June 29, 2012. Defendant-employer provided claimant work within the work restrictions, work which claimant accepted and which brought claimant a lesser hourly wage and fewer work hours. Defendants' argument claimant is not entitled to temporary partial disability benefits on the basis he returned to full-time substantially similar employment is without merit. While claimant returned to work, he returned to seated work which brought him neither commensurate hours nor the same rate of pay as his pre-injury position. The undersigned fails to see how work is substantially similar if defendant-employer assigned a lesser rate of pay to the light duty work and declined to offer commensurate total work hours.

Claimant is therefore entitled to temporary partial disability benefits beginning June 12, 2012 and extending through June 29, 2012 when claimant was released without restrictions, with one caveat. On June 13, 2012, claimant elected to take vacation time instead of presenting for light duty. As claimant did not make himself available for light duty on June 13, 2012, he is not entitled to temporary partial disability benefits for that date. However, as the light duty assignment consistently offered only eight hours of work per day and claimant was paid only eight hours of vacation that date, it is determined claimant is ineligible for temporary partial disability benefits for the

eight-hour period. Furthermore, claimant was paid for eight hours of vacation time at his higher rate of \$20.2100, resulting in no basis for temporary partial disability benefits within that eight-hour period. Claimant however, also lost two hours of pay on July 13, 2012, as defendant-employer paid claimant for only eight hours of vacation time as opposed to claimant's typical ten-hour pre-injury day. Defendant-employer has therefore, underpaid claimant for two hours of vacation time.

Dr. Bingham released claimant to full duty on June 29, 2012. Despite this release, the records reveal defendant-employer continued to pay claimant at the lesser light duty rate of pay until July 7, 2012. Claimant should not bear the burden of the loss of earnings resultant from defendant-employer's failure to return him to his pre-injury position and rate of pay immediately. Defendants either were unaware of Dr. Bingham's release or elected to keep claimant in the light-duty position until the end of the existing pay period. In either case, there is no evidence claimant was at fault. Defendant-employer scheduled hours and assigned the work duties; claimant accepted the work. This continued placement of claimant in a light-duty position beyond his release to full-duty work resulted in a prolonged loss of earnings to claimant. Claimant is therefore entitled to temporary partial disability benefits until defendant returned claimant's to his full-duty position with his pre-injury hourly wage. Defendant did not return claimant to his pre-injury position and pre-injury wages until the pay period following July 7, 2012. Claimant's temporary partial disability benefits should therefore extend through July 7, 2012.

Claimant's proposed computation of temporary partial disability benefits is based upon a light duty hourly rate of \$17.2025 and is therefore, inaccurate, as at least a portion of claimant's light-duty hours were paid at the rate of \$17.7038. Defendants provided no computation of temporary partial disability benefits on the belief no such benefits were warranted. The undersigned is therefore unable to adopt a computation of temporary partial disability benefits. The evidentiary record fails to include a daily breakdown for the hours worked for the entire period of temporary disability. Such records are only included up through June 30, 2012. I am therefore unable to affix a precise dollar amount to the temporary partial disability owed, as requested by claimant. Therefore, the order with respect to payment of temporary partial disability benefits shall reflect that claimant is entitled to temporary partial disability benefits from June 12, 2012 through July 7, 2012, with the exception of the hours paid on June 13, 2012, as claimant did not present to accept light duty. Claimant is entitled to temporary partial disability benefits based both upon payment of lesser hours and at a lesser hourly rate of pay. Claimant's temporary partial disability benefits should therefore be computed at two-thirds the difference between claimant's gross average weekly wage of \$932.77 and his actual weekly earnings during the period of June 12, 2012 through July 7, 2012, again with the exception of the hours refused on June 13, 2012.

The next issue for determination is the extent of claimant's permanent disability to the scheduled member leg.

Under the Iowa Workers' Compensation Act, permanent partial disability is compensated either for a loss or loss of use of a scheduled member under Iowa Code section 85.34(2)(a)-(t) or for loss of earning capacity under section 85.34(2)(u). The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). The fact finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

Evidence considered in assessing the loss of use of a particular scheduled member may entail more than a medical rating pursuant to standardized guides for evaluating permanent impairment. A claimant's testimony and demonstration of difficulties incurred in using the injured member and medical evidence regarding general loss of use may be considered in determining the actual loss of use compensable. Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936). Consideration is not given to what effect the scheduled loss has on claimant's earning capacity. The scheduled loss system created by the legislature is presumed to include compensation for reduced capacity to labor and to earn. Schell v. Central Engineering Co., 232 Iowa 421, 4 N.W.2d 339 (1942).

The right of a worker to receive compensation for injuries sustained which arose out of and in the course of employment is statutory. The statute conferring this right can also fix the amount of compensation to be paid for different specific injuries, and the employee is not entitled to compensation except as provided by statute. Soukup, 222 Iowa 272, 268 N.W. 598.

Board-certified orthopedic surgeon, Dr. Kimelman, served as one of claimant's treating physicians. Dr. Kimelman opined claimant sustained permanent impairment as a result of the stipulated work injury, but the impairment was cosmetic and superficial in nature. He later opined claimant's discomfort, scar, and loss of sensation resulted in permanent impairment. Dr. Kimelman opined these conditions warranted a 1 percent left lower extremity impairment by the AMA Guides. He imposed no permanent restrictions.

Occupational medicine physician, Dr. Bingham, also served as one of claimant's treating physicians. He opined the maximum permanent impairment sustained by claimant was the 1 percent rating assigned by Dr. Kimelman. He further opined claimant more likely sustained zero ratable permanent impairment. Dr. Bingham also imposed no permanent restrictions.

Dr. Taylor, claimant's chosen IME physician and a board-certified occupational and environmental medicine physician, specifically found no evidence of gait derangement nor muscle atrophy, and symmetric strength and range of motion of the

lower extremities, without evidence of weakness. He did note numbness, which he opined warranted a maximum 5 percent lower extremity impairment by the AMA Guides. He ultimately opined claimant sustained a 3 percent lower extremity impairment. Dr. Taylor also noted claimant's injury resulted in alteration of many activities in his home and work environments, factors not subject to rating by the AMA Guides. Accordingly, he recommended permanent work restrictions of the ability to alternate walking, standing and sitting as needed for comfort; occasionally crawl, kneel, or climb stairs; occasionally climb ladders, but do so with caution and avoid use of extension ladders; and to choose footwear in consideration of the location upon which his leg a boot would rub.

Claimant testified he continues to suffer with burning, itching, constant numbness, and intermittent tingling. He testified symptoms ranged in severity from a level 4 to a level 8 on a 10-point scale. Claimant testified he receives relief from relaxing the leg and use of Tylenol on a daily basis. He continues his employment in his pre-injury miller-blender position and is capable of completing his duties, although he may need to change positions or rub his leg during work. Claimant also testified to possessing less energy and believing his leg has not rehabilitated to its pre-injury level, impeding his ability to exercise.

In determining the extent of an injured worker's functional loss to a scheduled member, the undersigned generally views the opinions of the medical providers on extent of impairment as the most persuasive evidence. It is the medical providers who possess the requisite education, training, and anatomical expertise to opine as to the functional loss sustained as a result of an injury. In this matter, three physicians have specifically opined as to the extent of claimant's permanent impairment, Drs. Kimelman, Bingham, and Taylor. The permanent impairment ratings issued by these physicians are 1 percent, zero or 1 percent, and 3 percent, respectively. Dr. Taylor even opined the maximum ratable impairment by the AMA Guides was 5 percent whole person.

Claimant is unsatisfied with the opinions of each physician and believes none adequately compensate him for his functional loss. Claimant's argument rests in large part upon his belief his left leg was in superior condition to the average individual's at the time of the work injury. Claimant provides no evidence to support his assertion, outside his own testimony. This is not a case involving an avid marathoner who is no longer able to participate in marathons due to the work injury. While claimant credibly testified he is no longer able to exercise in the same manner or with the same frequency as pre-injury, this testimony alone is insufficient to warrant an increase in claimant's functional loss. The undersigned will not arbitrarily assign a functional loss in excess of the impairment assigned by evaluating physicians without more convincing evidence than that provided in this case.

When determining the extent of functional loss, the relevant inquiry is the worker's loss of physiological capacity. While the undersigned is tasked with consideration of both medical and layperson testimony, I find physician opinions entitled to greater weight than objectively unquantifiable layperson testimony. Claimant has

advocated for a permanent impairment of 10 percent lower extremity, over triple the highest physician-imposed permanent impairment rating. This seemingly randomly selected percentage is not supported by objective evidence and will not be awarded by the undersigned.

While the undersigned has declined to award the 10 percent permanent impairment requested by claimant based simply on subjective complaints, claimant's credible complaints are validly considered in determining functional loss. Specifically, claimant's testimony buttresses the medical opinion of Dr. Taylor. Dr. Taylor performed and described a detailed examination of claimant and considered claimant's statements regarding his abilities. Dr. Taylor noted no gait derangement or muscle atrophy and found claimant demonstrated symmetric strength and range of motion. Dr. Taylor ultimately based his impairment rating upon sensory changes in the lower extremity.

Due to the specificity provided by Dr. Taylor in explaining the rationale behind and justification for the 3 percent permanent impairment rating, it is determined the opinion of Dr. Taylor is entitled to the greatest weight amongst the medical providers. Dr. Bingham did not examine claimant contemporaneous with issuance of his permanent impairment rating. While Dr. Kimelman served as authorized physician and performed a contemporaneous examination, his opinion on the extent of claimant's permanent impairment cites only a general reference to discomfort, loss of sensation, and scar tissue. Dr. Kimelman did not explain how he arrived at the 1 percent rating in as explicit a manner as Dr. Taylor justified his impairment rating.

It is therefore determined claimant sustained a 3 percent left lower extremity impairment as a result of the stipulated work-related injury of June 12, 2012. Such an award entitles claimant to 6.6 weeks of permanent partial disability benefits (3 percent x 220 weeks = 6.6 weeks). Such benefits shall be paid at the weekly rate of \$565.75, as determined *supra*.

Although the parties stipulated permanent partial disability benefits should commence on June 13, 2012, the undersigned determined by this decision that claimant was entitled to temporary partial disability benefits. Permanent partial disability benefits cannot therefore, commence prior to the conclusion of this temporary disability period. As permanent partial disability benefits commence at the termination of the healing period pursuant to Iowa Code section 85.34, claimant's permanent partial disability benefits shall commence on July 8, 2012.

The next issue for determination is whether claimant is entitled to payment of medical mileage. At the time of evidentiary hearing, defendants stipulated payment would be made for claimant's claimed medical mileage. A determination on this issue by the undersigned is therefore, unnecessary.

The next issue for determination is whether claimant is entitled to reimbursement for an independent medical evaluation pursuant to Iowa Code section 85.39. At the time of evidentiary hearing, defendants stipulated payment would be made for

claimant's independent medical evaluation. A determination on this issue by the undersigned is therefore, unnecessary.

The next issue for determination is whether claimant is entitled to interest on benefits paid. The undersigned determined claimant is entitled to temporary partial disability benefits from June 12, 2012 through July 7, 2012. The undersigned also determined claimant is entitled to 6.6 weeks of permanent partial disability benefits commencing July 8, 2012. Claimant is therefore entitled to interest on the benefits ordered pursuant to Iowa Code section 85.30. No expert report was submitted computing the precise amount of interest owed on the disability benefits ordered by this decision; therefore, no precise dollar amount will be affixed by this decision on the amount of interest owed.

The next issue for determination is whether claimant is entitled to penalty benefits pursuant to Iowa Code section 86.13, and if so, how much.

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996).

Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It also is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

The employer's failure to communicate the reason for the delay or denial to the employee contemporaneously with the delay or denial is not an independent ground for imposition of a penalty, however. Keystone Nursing Care Center v. Craddock, 705 N.W.2d 299 (Iowa 2005).

If the employer fails to show reasonable cause or excuse for the delay or denial, the commissioner shall impose a penalty in an amount up to 50 percent of the amount unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty

include the length of the delay, the number of delays, the information available to the employer and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

Iowa Code 86.13, as amended effective July 1, 2009, states:

4. a. If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.

b. The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:

(1) The employee has demonstrated a denial, delay in payment, or termination of benefits.

(2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

c. In order to be considered a reasonable or probable cause or excuse under paragraph "b", an excuse shall satisfy all of the following criteria:

(1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.

(2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.

(3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

By this decision, the undersigned found claimant entitled to temporary partial disability benefits from June 12, 2012 through July 7, 2012 and 6.6 weeks of permanent partial disability benefits. Claimant therefore has two potential bases for a claim for penalty benefits.

The first basis is the award of temporary partial disability benefits. No such benefits have been paid; claimant has therefore established a delay or denial of benefits. The burden then shifts to defendants to prove a reasonable or probable cause or excuse for the denial or delay. Section 86.13(4)(c) sets forth specific requirements for defendants to fulfill in order to establish a reasonable or probable cause or excuse. Defendants failed to provide evidence complying with section 86.13(4)(c), most notably contemporaneous conveyance to claimant of the basis for the delay or denial of benefits. As defendants failed to do so, claimant is entitled to an award of penalty benefits.

However, the evidentiary record lacks the information required to allow the undersigned to determine the precise amount of temporary partial disability benefits owed to claimant. Accordingly, the undersigned is unable to provide a specific dollar amount to the penalty award, which is based upon the failure to pay such benefits. The undersigned finds no legitimate basis for defendants' failure to pay claimant temporary partial disability benefits under the facts of this case. Defendants knew claimant was under work restrictions, moved him to a position within those restrictions, knew the position carried a lesser hourly wage and failed to provide commensurate hours, and failed to pay temporary partial disability benefits or inform claimant of the decision not to pay such benefits. However, the undersigned was unable to locate any cases assessing penalties against defendant-employer in the past. Therefore, it is determined claimant is entitled to penalty benefits in the amount of 40 percent of the temporary partial disability benefits owed from June 12, 2012 through July 7, 2012.

The second basis for an award of penalty benefits is the award of permanent partial disability benefits. By this decision, the undersigned awarded claimant 6.6 weeks of permanent partial disability benefits. Defendants previously paid 2.2 weeks of benefits, representing Dr. Kimelman's rating of 1 percent lower extremity. As defendants have not paid all permanent partial disability benefits accrued as awarded by this decision, claimant has proven a delay or denial of payment of benefits.

The burden then shifts to defendants to prove a reasonable or probable cause or excuse for the delay or denial. Section 86.13(4)(c) sets forth specific requirements for defendants to fulfill in order to establish a reasonable or probable cause or excuse. Dr. Kimelman issued his permanent impairment rating on August 9, 2013; defendants issued claimant a check for these benefits and a letter explaining the payment on August 15, 2013. Defendants have proven a reasonable investigation was made by requesting the opinion of Dr. Kimelman, the results of which formed the basis of the payment made, and this explanation was provided to claimant within six days of receipt of the opinion. An award of penalty benefits is not warranted based upon these facts. Although the undersigned ordered an award of greater permanent disability benefits, defendants' reliance upon the opinions of the authorized physician is entirely reasonable.

Claimant also argues the delay between Dr. Kimelman's opinion and defendants' payment was actually longer than 6 days, as Dr. Kimelman opined claimant sustained

permanency on June 27, 2013. However, Dr. Kimelman did not affix an impairment rating of 1 percent until just over 1 month later. Defendants did not control when Dr. Kimelman issued his opinion. Defendants did act promptly upon receipt of the opinion, issued payment, and explained the basis for the payment. An award of penalty benefits on permanent partial disability benefits ordered is not warranted.

The final issue for determination is a specific taxation of costs pursuant to Iowa Code section 86.40 and rule 876 IAC 4.33. At the time of evidentiary hearing, claimant requested taxation of the costs of: \$100.00 filing fee; \$14.74 service fee; and the independent medical evaluation of Dr. Taylor. (Ex. 2, p. 7) As set forth *supra*, defendants stipulated reimbursement for Dr. Taylor's IME would be made pursuant to section 85.39. A request for taxation of the IME expense is therefore, moot. Claimant also requested taxation of the costs of filing fee and service fee. These are allowable costs and are taxed to defendants.

By post-hearing brief, claimant also requested taxation of the cost of hearing transcript in the amount of \$522.28. Claimant's request for taxation of this cost is inappropriate, as the undersigned did not request submission of the hearing transcript. Claimant chose to request the transcript and submitted it to this agency without request; therefore, claimant shall bear the cost of the hearing transcript.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay unto claimant temporary partial disability benefits for the period of June 12, 2012 through July 7, 2012 as set forth in the decision.

Defendants shall pay unto claimant six point six (6.6) weeks of permanent partial disability benefits commencing July 8, 2012 at the weekly rate of five hundred sixty-five and 75/100 dollars (\$565.75).

Defendants shall pay claimant's prior medical mileage expenses submitted by claimant at the hearing as set forth in the decision.

Defendants shall reimburse claimant for Dr. Taylor's independent medical evaluation expenses as set forth in the decision.

Defendants shall pay penalty benefits in the amount of forty (40) percent of the temporary partial disability benefits owed from June 12, 2012 through July 7, 2012.

Defendants shall pay interest on the penalty benefits from the date of this decision. See Schadendorf v. Snap On Tools Corp., 757 N.W.2d 330, 339 (Iowa 2008).

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest pursuant to Iowa Code section 85.30 as set forth in the decision.

Defendants shall receive credit for benefits paid.

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

Costs are taxed to defendants pursuant to 876 IAC 4.33 in the amount of one hundred fourteen and 74/100 dollars (\$114.74) as set forth in the decision.

Signed and filed this 16th day of October, 2015.



ERICA J. FITCH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Mark S. Soldat
Attorney at Law
3408 Woodland Ave, Ste. 302
West Des Moines, IA 50266
markspslaw@aol.com

Patrick V. Waldron
Attorney at Law
505 - 5th Ave., Ste. 729
Des Moines, IA 50309
pwaldron@pattersonfirm.com

EJF/sam

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.