BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SCOTT GRAHAM, Claimant, vs. MENARD'S, Employer, and XL INSURANCE AMERICA, INC., Insurance Carrier, Defendants.	File No. 5061562 A R B I T R A T I O N D E C I S I O N Head Note No.: 1803, 4000.2

STATEMENT OF THE CASE

Claimant, Scott Graham, filed a petition in arbitration seeking workers' compensation benefits from Menard's, employer and XL Insurance America, Inc., insurer, both as defendants.

This matter was heard on September 26, 2019, by Deputy Workers' Compensation Commissioner Benjamin Humphrey with a final submission date of November 12, 2019.

By order of delegation of authority, Deputy Workers' Compensation Commissioner Jim Christenson was appointed to prepare the findings of fact and proposed decision in this case due to the unavailability of Deputy Workers' Compensation Commissioner Humphrey. As a part of that order of delegation, the parties were given 14 days to notify the undersigned if they believed demeanor was a substantial issue in this matter, and whether a rehearing of the demeanor testimony was required.

Neither party filed a request within 14 days identifying demeanor as a substantial issue in this case, or if a demeanor hearing was required. Under 17A.15(2) and the Commissioner's order of delegation, the undersigned performed a review of the evidentiary record in this case and issues this arbitration decision under the direction of the Commissioner.

The record in this case consists of Joint Exhibits 1-6, Claimant's Exhibits 1-4, Defendants' Exhibits A-F, and the testimony of claimant and Ben Watson.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

ISSUES

The extent of claimant's entitlement to temporary benefits.

Whether the injury resulted in a permanent disability; and if so,

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

The commencement date of benefits.

Whether defendants are liable for a penalty.

Costs.

Claimant's entitlement to an independent medical evaluation (IME) was identified as an issue in dispute in the hearing report. The transcript indicates that defendants accepted liability for the IME. (Transcript, page 4) As a result, the issue of claimant's entitlement to reimbursement for an IME is not discussed as an issue in dispute in this decision.

FINDINGS OF FACT

Claimant was 55 years old at the time of hearing. Claimant graduated from high school. (Tr. p. 11)

Claimant worked for Consumer 500 Enterprises for four years. Claimant's duties with Consumer 500 were to change out and manufacture products, resetting manufacture lines and setting out new products. This involved tearing down displays and products, removing products from shelves and setting out new products. (Tr. p. 13)

After Consumer 500, claimant went to work for Mark McClain and Associates working inside sales of plumbing products. Claimant also worked for Hewlitt Packard in phone sales. (Exhibit D, pp. 6-7; Tr. pp. 13-17)

Claimant was hired at Menard's in 2013. Claimant was hired to work in the plumbing department. Claimant's job duties included stocking, lifting and remerchandising product. Claimant's job required that he lift 50 pounds or more. The job also required repetitive lifting, bending and twisting. (Ex. D, p. 6; Tr. pp. 19-23)

On November 8, 2016, claimant was on a ladder. Claimant was getting trash cans from a shelf. As claimant climbed back down the ladder, he lost his balance and fell approximately eight to ten feet. Claimant landed on his back. (Tr. pp. 25-27)

On November 9, 2016, claimant was evaluated by Carlos Moe, D.O. Claimant was assessed as having a lumbar strain. He was treated with medication and recommended to have a lower back x-ray. (JE 1, pp. 1-2)

Claimant treated with Dr. Moe from November 2016 through December 2016. (JE 1, pp. 3-8) Claimant returned to Dr. Moe on December 12, 2016. Claimant asked to be discharged from care. Claimant was discharged to full duty work. (JE 1, pp. 11-12)

Claimant returned to Dr. Moe on March 29, 2017, with complaints of returning back pain. Claimant was recommended to have a lumbar MRI. (JE 1, pp. 11-12)

A lumbar MRI, taken on April 4, 2017, showed an L2-L3 disc extrusion. (JE 3, pp. 58-59)

Claimant returned to Dr. Moe on May 11, 2017, with continued lower back pain. Claimant was referred to an orthopedic surgeon. Claimant was returned to work at full duty. (JE 1, pp. 14-15)

On May 31, 2017, claimant was evaluated by David Hatfield, M.D., an orthopedic surgeon. Claimant had daily lower back pain. Claimant was not having radicular pain. Surgery was not recommended. (JE 3, pp. 60-62)

Claimant returned to Dr. Moe on May 10, 2017, who referred claimant to pain management. (JE 1, pp. 17-18)

On May 17, 2017, claimant was seen by John Rayburn, M.D. Dr. Rayburn specializes in pain management. Claimant complained of progressively worsening lower back pain. Claimant was assessed as having a chronic pain syndrome. (JE 4, pp. 62-65) Claimant returned to Dr. Rayburn on July 25, 2017, and was given trigger point injections (TPI). (JE 4, pp. 68-69) Claimant returned to Dr. Rayburn on August 9, 2017. Claimant had received temporary relief from the TPI. He was prescribed physical therapy. (JE 4, pp. 70-73)

Claimant saw Dr. Rayburn on September 20, 2017 and October 16, 2017. Claimant had continued lower back pain. On October 16, 2017, claimant was given a right thoracic trigger point injection. (JE 4, pp. 74-78)

On April 18, 2018, claimant was evaluated by Trevor Schmitz, M.D., complaining of progressively worsening lower back pain. A second MRI was recommended. (JE 4, p. 84)

Claimant returned to Dr. Schmitz on May 24, 2018. Claimant had progressively worsening lower back pain. Epidural steroid injections (ESI) were recommended. (JE 4, pp. 88-89) On June 7, 2018, claimant underwent his first ESI at the L2-L3 levels. Injections were performed by Dr. Rayburn. (JE 4, pp. 90-93)

Claimant returned to Dr. Rayburn on June 20, 2018. Claimant indicated the ESI provided four days of relief, but then pain returned. Claimant had a second L2-L3 ESI on June 28, 2018. (JE 4, pp. 92-95) Claimant eventually had a third ESI on November 1, 2018. (JE 4, p. 96)

Claimant saw Dr. Schmitz on November 14, 2018. Claimant indicated his symptoms had improved following the third ESI injection. Claimant had no leg pain, but still had back pain. Claimant had left hip flexor weakness on exam. Claimant was recommended to do work hardening. (JE 4, pp. 98-99)

Claimant returned to Dr. Schmitz on December 17, 2018. Claimant had increased pain with work hardening. Surgery was discussed. Claimant indicated he wanted to proceed with a functional capacity evaluation (FCE). (JE 4, pp. 100-101)

On January 21, 2019, claimant underwent an FCE. Claimant's testing was found to be valid. Claimant was found to be able to work in the medium physical demand category. Claimant was limited to waist to floor lifting of 35 pounds occasionally; waist to shoulder of 35 pounds occasionally; pushing, pulling up to 40 pounds occasionally; carrying up to 35 pounds occasionally; and bending, squatting, kneeling or ladder climbing occasionally. (JE 5)

Claimant returned to Dr. Schmitz on February 18, 2019. Claimant was found to be at maximum medical improvement (MMI) on that date. (JE 4, pp. 103-104)

In an April 24, 2019 letter, Dr. Schmitz indicated that claimant had an L2-L3 paracentral disc herniation causing an L3 nerve root impingement and stenosis. He found claimant had a five percent permanent impairment to the body as a whole, based on a finding that claimant fell into the DRE lumbar category II. (JE 4, pp. 105-106)

In an August 26, 2019 report, Sunil Bansal, M.D., gave his opinions of claimant's condition following an IME. Claimant continued to have constant lower back pain radiating to both knees. Claimant used a five-gallon bucket to sit on at work to help relieve his back pain. Claimant had muscle spasms in his back. Claimant was still working at Menard's, but was allowed to have accommodations at work. (Ex. 1, pp. 1-10)

Claimant was assessed as having a left-sided disc herniation at the L2-L3 levels with radiculopathy. Claimant was found to have a 12 percent permanent impairment based on a finding that claimant fell into the lumbar DRE category III. Dr. Bansal agreed with the permanent restrictions found in the FCE. (Ex. 1, pp. 11-12)

Claimant was still working his job in the plumbing department at Menard's at the time of hearing. (Tr. p. 44) Claimant testified that because of his back pain, he was unable to handle freight and do repetitive bending and stooping to stock shelves. Claimant sits on a bucket while working with items on low shelves. (Tr. pp. 46-47) Claimant said he has missed time from work due to continued back pain. (Tr. p. 48) Claimant said Menard's has accommodated his restrictions. (Tr. pp. 98-99)

Claimant said he has not been taken off of work by any medical provider. (Tr. p. 62) He said he has had an increase in his hourly wage since the date of injury. (Tr. p. 69)

Claimant testified that given his back pain and limitations, he would be unable to return to work at most of his prior jobs, except his employment with Mark McClain. (Tr. pp. 42-45)

Claimant testified that due to his back pain, he has others shovel snow for him. Claimant said that because of his back pain he no longer golfs.

The record indicates that from November 9, 2016 through December 17, 2018, claimant missed a total of 140 hours from work due to attending medical appointments for his work injury. (Ex. 2)

CONCLUSIONS OF LAW

The first issue to be determined is whether claimant is due temporary benefits for the time lost attending medical appointments.

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 Rule of Appellate Procedure 6.14(6).

Pursuant to Iowa Code section 85.27(7), claimant is also entitled to an amount equivalent to the wages he lost in order to attend medical appointments during his scheduled work shift. The relevant portion of sub-section provides:

> (7) If, after the third day of incapacity to work following the date of sustaining a compensable injury which does not result in permanent partial disability, or if, at any time after sustaining a compensable injury which results in permanent partial disability, an employee, who is not receiving weekly benefits under section 85.33 or section 85.34, subsection 1, returns to work and is required to leave work for one full day or less to receive services pursuant to this section, the employee shall be paid an amount equivalent to the wages lost at the employee's regular rate of pay for the time the employee is required to leave work.

The language of Iowa Code section 85.27 clearly allows injured workers the right to receive wages for time lost due to medical appointments. Barnes v. State, 611

N.W.2d 290, 293 (Iowa 2000); Atajic v Wal-Mart Stores, File No. 5038567 (Arb. Dec. January 4, 2013).

Both Drs. Schmitz and Bansal found claimant has a permanent disability. As a result, the three-day waiting period detailed in subsection 7 is not applicable. Claimant is thus entitled to receive wages lost while attending medical appointments related to his work injury for 140 hours as detailed in Exhibit 2.

The next issue to be determined is whether the injury resulted in a permanent disability.

Dr. Schmitz found that claimant had a permanent disability due to his back injury. Dr. Bansal also found that claimant had a permanent disability due to his work-related back injury. Claimant has had permanent restrictions as per an FCE. Given this record, claimant has carried his burden of proof that his work injury resulted in a permanent disability.

The next issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Defendants' counsel raised at hearing, that "causation of disability" was in dispute. (Tr. p. 4) The evidence in this record indicates that claimant's injury to his lower back was caused solely by his fall at work. There is no evidence claimant's lower back injury was caused by anything else. Defendants' counsel offers no detail or explanation in his post-hearing brief why "causation of disability" is a disputed issue in this case, given this record. As the record is clear that claimant's disability is caused

solely by the fall at work, claimant has carried his burden of proof that his disability to his back was caused solely by his injury at work.

Regarding claimant's entitlement to permanent partial disability benefits, claimant was 55 years old at the time of hearing. Claimant graduated from high school. Claimant worked as a technician tearing down displays and changing and displaying manufactured products. He worked selling plumbing products. Claimant did telemarketing. Claimant has worked at Menard's since 2013. Claimant has permanent restrictions that limit him from waist to lower floor lifting of 35 pounds occasionally; waist to shoulder lifting of 35 pounds occasionally; pushing and pulling up to 40 pounds occasionally; carrying up to 35 pounds occasionally; and bending, squatting, kneeling or ladder-climbing occasionally. (JE 5)

Claimant has not had any surgery.

At the time of hearing, claimant was still working at the same job at Menard's as of the date of injury. Claimant has had an increase in his hourly pay since his date of injury. Claimant's unrebutted testimony is his work is accommodated by his employer. Claimant's unrebutted testimony is that given his permanent restrictions, pain and limitations, he would be unable to perform most of his prior jobs.

Two experts have opined regarding the extent of claimant's permanent impairment. Dr. Schmitz found that claimant had a 5 percent permanent impairment to the body as a whole based on a finding that claimant fell into the DRE lumbar category II. Dr. Bansal found that claimant had a 12 percent permanent impairment based on a finding that claimant was best analyzed under DRE lumbar category III of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition.

A review of Table 15-3 of the Guides suggests that the main difference between the two ratings is based largely on a finding if claimant still has radiculopathy in the lower extremities. Claimant did have temporary resolution of his radicular symptoms with ESIs. Dr. Schmitz's opinions of permanent impairment were made in April of 2019. In July of 2019, claimant had pain bilaterally in his legs. (JE 4, p. 107) An MRI taken in September of 2019 showed a disc protrusion at L2-L3 that could be impinging on the L3 nerve root. (JE 6, p. 123) Dr. Bansal's report indicates that claimant had bilateral lower extremity pain. (Ex. 1, p. 10)

Based on the facts detailed above, it is found that Dr. Bansal's opinion that claimant has a 12 percent permanent impairment is more convincing. Therefore, it is found that claimant has a 12 percent permanent impairment to the body as a whole.

Claimant is 55 years old. He has a high school education. He has permanent restrictions that limit his ability to lift, push, pull, stand, sit, and climb ladders. He has a 12 percent permanent impairment to the body as a whole. Claimant is still employed. Claimant's unrebutted testimony is that his job is accommodated by his employer. Claimant's unrebutted testimony is that given his current limitations, he would not be

able to return to most of his prior jobs. When all relevant factors are considered, it is found that claimant has a 20 percent loss of earning capacity or industrial disability.

The next issue to be determined is penalty.

In Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996), and Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996), the supreme court said:

> Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."
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> Christensen, 554 N.W.2d at 260.

The supreme court has stated:

> (1) If the employer has a reason for the delay and conveys that reason to the employee contemporaneously with the beginning of the delay, no penalty will be imposed if the reason is of such character that a reasonable fact-finder could conclude that it is a "reasonable or probable cause or excuse" under Iowa Code section 86.13. In that case, we will defer to the decision of the commissioner. See Christensen, 554 N.W.2d at 260 (substantial evidence found to support commissioner's finding of legitimate reason for delay pending receipt of medical report); Robbennolt, 555 N.W.2d at 236.
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> (2) If no reason is given for the delay or if the "reason" is not one that a reasonable fact-finder could accept, we will hold that no such cause or excuse exists and remand to the commissioner for the sole purpose of assessing penalties under section 86.13. See Christensen, 554 N.W.2d at 261.
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> (3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City Meats, Inc., 528 N.W.2d at 109, 111 (Iowa 1995); or (b) the employer had a reasonable basis to contest the claim—the "fairly debatable" basis for delay. See Christensen, 554 N.W.2d at 260 (holding two-month delay to obtain employer's own medical report reasonable under the circumstances).
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> (4) For the purpose of applying section 86.13, the benefits that are underpaid as well as late-paid benefits are subject to penalties, unless the

employer establishes reasonable and probable cause or excuse. Robbennolt, 555 N.W.2d at 237 (underpayment resulting from application of wrong wage base; in absence of excuse, commissioner required to apply penalty).

> If we were to construe [section 86.13] to permit the avoidance of penalty if any amount of compensation benefits are paid, the purpose of the penalty statute would be frustrated. For these reasons, we conclude section 86.13 is applicable when payment of compensation is not timely . . . or when the full amount of compensation is not paid.

Id.

(5) For purposes of determining whether there has been a delay, payments are "made" when (a) the check addressed to a claimant is mailed (Robbennolt, 555 N.W.2d at 236; Kiesecker, 528 N.W.2d at 112), or (b) the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 235.

(6) In determining the amount of penalty, the commissioner is to consider factors such as the length of the delay, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

(7) An employer's bare assertion that a claim is "fairly debatable" does not make it so. A fair reading of Christensen and Robbennolt, makes it clear that the employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." See Christensen, 554 N.W.2d at 260.

Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

Weekly compensation payments are due at the end of the compensation week. Robbennolt, 555 N.W.2d 229, 235.

Penalty is not imposed for delayed interest payments. Davidson v. Bruce, 593 N.W.2d 833, 840 (Iowa App. 1999). Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 338 (Iowa 2008).

When an employee's claim for benefits is fairly debatable based on a good faith dispute over the employee's factual or legal entitlement to benefits, an award of penalty benefits is not appropriate under the statute. Whether the issue was fairly debatable turns on whether there was a disputed factual dispute that, if resolved in favor of the employer, would have supported the employer's denial of compensability. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

Dr. Schmitz issued a rating on April 24, 2019. For some unknown reason, defendants' counsel allegedly did not receive the report until July 1, 2019. (Ex. F)

Defendants contend that because claimant is still employed with Menard's he, arguably, has no loss of earning capacity and that a penalty is not appropriate. (Def. Post-Hearing Brief, pp. 14-15)

Claimant was given a permanent impairment rating from both an authorized provider and Dr. Bansal. Claimant has permanent restrictions that limit his ability to lift, sit, stand, pull and push. The unrebutted testimony of claimant is that his job at Menard's is accommodated. The unrebutted testimony of claimant is that he would not be able to return to most of his prior positions. Given this record, defendants' failure to pay claimant even the permanent impairment rating given by Dr. Schmitz is unreasonable. In addition, the record does not indicate defendants ever communicated any rationale to claimant why they failed to pay permanent partial disability benefits given the facts as detailed above.

Given this record, a penalty is appropriate. Defendants allegedly did not see Dr. Schmitz's rating until July 1, 2019. Hearing for this matter occurred on September 26, 2019. The period between these two dates is approximately 12 weeks. A penalty of $1,977.06 is appropriate (12 weeks x $329.51 x 50 percent).

Defendants also failed to pay claimant any temporary benefits for the time he lost to attend medical appointments. The law is clear that under Iowa Code section 85.27(7), defendants have an obligation to pay claimant temporary benefits for time lost to attend medical treatment. Defendants contend, in part, that denial of temporary benefits, under 85.27(7) was reasonable as claimant did not have a permanent disability. (Def. Post-Hrg. Brief, p. 14) As noted, the authorized provider, Dr. Schmitz, found that claimant did have a permanent disability. The records also indicate there is no evidence that defendants communicated to claimant this, or any rationale, for the denial of temporary benefits. The record indicates claimant lost 140 hours to attend medical appointments. One hundred forty (140) hours is approximately 3.5 weeks. Defendants are liable for a penalty of $576.64 for failure to pay temporary benefits for claimant's time lost to attend medical appointments (3.5 weeks x $329.51 x 50 percent).

The next issue to be determined is the commencement date of benefits.

Permanent partial disability benefits commence on the earliest date when claimant returns to work, is medically capable of performing substantially similar work, or achieves maximum medical improvement. Iowa Code section 85.34(1); Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360, 372 (Iowa 2016).

The record indicates that, other than time lost for claimant to attend medical appointments, claimant did not lose time from working his full-time job at Menard's. As a result, the commencement date of permanent partial disability benefits should be the date of injury, November 8, 2016.

The final issue to be determined is costs. Costs are ordered at the discretion of this agency. Claimant has prevailed on all issues in this matter. Given this record, claimant is awarded costs.

ORDER

THEREFORE, IT IS ORDERED:

That defendants shall pay claimant one hundred forty (140) hours of work lost as temporary benefits under Iowa Code section 85.27(7) as detailed in Exhibit 2.

That defendants shall pay claimant one hundred (100) weeks of permanent partial disability benefits at the rate of three hundred twenty-nine and 51/100 dollars ($329.51) commencing on November 8, 2016.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30. Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

That defendants shall pay a penalty of one thousand nine hundred seventy-seven and 06/100 dollars ($1,977.06) for failure to pay claimant any permanent partial disability benefits.

That defendants shall pay a penalty of five hundred seventy-six and 64/100 dollars ($576.64) for failure to pay temporary benefits.

That defendants shall reimburse claimant for costs associated with Dr. Bansal's IME, including mileage.

That defendants shall pay costs.

That defendants shall file subsequent reports of injury as required under rule 876 IAC 3.1(2).

Signed and filed this 29th day of July, 2020.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

James M. Ballard (via WCES)

Thomas Shires (via WCES)
Timothy Clarke (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.