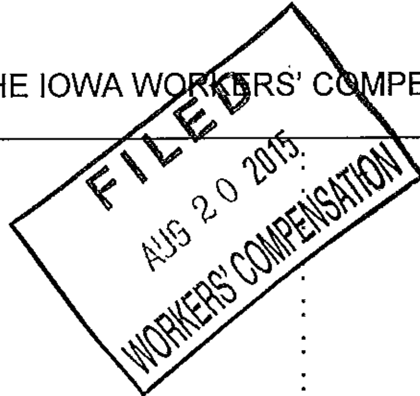
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



JAMES POLL,

Claimant,

vs.

SECOND INJURY FUND OF IOWA,

Defendant.

File Nos. 5041522, 5041523

ARBITRATION

DECISION

Head Note Nos.: 3001, 3200

STATEMENT OF THE CASE

Claimant, James Poll, filed two petitions for arbitration seeking workers' compensation benefits from Quad Graphics, LLC, employer, and Travelers Insurance, insurance carrier, in addition to the Second Injury Fund of Iowa, hereafter, "the Fund." Prior to hearing, the employer and insurance carrier settled both claims with the claimant. The claimant and the Fund requested the record be held open and the agency take administrative notice of the settlement documents.

The matter came on for hearing on October 27, 2014, before Deputy Workers' Compensation Commissioner Joseph L. Walsh in Des Moines, Iowa. The record in the case consists of claimant's exhibits 1 through 18; defense exhibits AA through CC, and the sworn testimony of claimant. (For purposes of agency economy, the parties agreed to reach an agreement regarding exhibit 2, which are voluminous physical therapy records; the precise pages comprising exhibit 2 were entered following the completion of briefing by agreement). Roxann Zuniga was appointed the official reporter and custodian of the notes of the proceedings. The parties briefed this case, and the matter was fully submitted on December 5, 2014.

STIPULATIONS

The claimant has filed two injury dates, both alleging disabilities to the right leg and foot. With regard to those claims, the parties have formally stipulated to the following:

1. The parties had an employer-employee relationship at all relevant times.

2. Claimant sustained injuries which arose out of and in the course of employment on March 8, 2011 and January 31, 2012.

3. Claimant received healing period benefits from May 25, 2012 through March 6, 2014. No further temporary disability benefits are owed, and claimant makes no claim for temporary disability or healing period.

4. If either (or both) injury(ies) is/are found to be a cause of permanent disability, it is a scheduled disability in the right leg.

5. There are no claims for medical or penalty.

6. Affirmative defenses have been waived.

7. For File No. 5041522, the claimant's gross wages are $975.05, and he was married with three exemptions as of the date of injury. The parties could not stipulate to the gross wages for File No. 5041523, however, it is stipulated that claimant was married with three exemptions.

8. For File No. 5041522, the commencement date for any permanent partial disability benefits is March 9, 2011, interrupted by healing period from May 25, 2012, through March 6, 2014. For File No. 5041523, the commencement date for any permanent partial disability is March 7, 2014.

9. The claimant settled his claims with the employer on an open file. The Second Injury Fund is not bound by such settlements.

10. The employer paid 6.18 percent of the right leg on File No. 5041522 and 1.8 percent of the right leg on File No. 5041523, totaling approximately 7 percent of the right leg. Official notice has been taken of the settlement documents filed by the employer and claimant with the consent of the parties.

ISSUES

The parties have submitted several issues for determination.

1. Whether the claimant has proven a first qualifying loss pursuant to Iowa Code section 85.64. Moreover, in the event that a first qualifying loss has been proven, the Fund claims entitlement to a credit for all qualifying losses.

2. Whether the claimant has proven that either injury is a cause of any permanent disability.

3. If the claimant has demonstrated entitlement to Second Injury Fund benefits, the extent of any industrial disability is disputed. The Fund alleges there is only minor industrial disability.

4. The claimant's rate of compensation is disputed for File No. 5041523. The Fund contends the claimant is limited to the rate set forth in his Agreement for Settlement.

FINDINGS OF FACT

The claimant, James Poll, was born in 1952 and was 62 years old as of the date of hearing. At the time of hearing, he was married with one minor child (age 13) and one adult offspring (age 38). He graduated from Dubuque Senior High School and attended community college for diesel mechanic training, which he did not complete. James has worked as a press operator for many years beginning in 1973. He has worked for numerous employers.

James has been generally healthy prior to the work injury, which is the subject of this claim. He did have surgeries on both knees, including a 1990 left knee surgery. He also had right-sided carpal tunnel surgery in 1996. James suffered a functional disability to his left leg stemming from the left knee injury. G.L. Meester, M.D. assigned a 10 percent permanent disability rating to the left leg based upon "significant damage in his knee" in October 1990. (Cl. Ex. 11, p. 9) It was noted that the knee condition interfered with his work activities to some extent. (Cl. Ex. 11, pp. 8-9) James was treated for the carpal tunnel by Stephen Pierotti, M.D. in 1996. Dr. Pierotti released James in April 1996 with "no symptoms any longer." (Cl. Ex. 11, p. 14) According to the records James had minor pain in his thumb and hand but it was not severe. He was released to full duty with no restrictions, no impairment and no evidence of any ongoing functional disability. (Cl. Ex. 11, p. 14)

James began working for the employer in this case, Quad Graphics, Inc., in approximately 2002. He operated presses. The job descriptions which describe the work he performed (first press operator and second press operator) are contained in the record. (Cl. Ex. 13 and 14) He generally worked a twelve-hour, 7 p.m. to 7 a.m. shift. Since approximately 2005, James had worked primarily as a first press operator. This was physical work which required bending, squatting, climbing and kneeling. He earned excellent wages, averaging somewhere between $944.00 and $1163.00 per week in January 2012 (counting overtime as straight time). These are the highest earnings in his working career.

On March 8, 2011, James worked his regular shift. Toward the end of his work shift, James climbed the steps on a printing press and suddenly felt a sharp pain in the lower part of his right leg and the back of his ankle. He had been taking a printing press apart, working on his hands and knees for an hour and a half before this incident. James was wearing steel-toed boots. He finished his shift and left for the day. He testified that after he took his boot off, he had difficulty walking. He was in significant pain and sought medical treatment. He was seen the same day at Tri-State Occupational Health. Joseph Garrity, M.D. diagnosed right heel pain and a possible partial Achilles' tendon tear. (Cl. Ex. 3, p. 2) He was provided crutches, a 3D boot, medication and work restrictions which took him off the press.

The following day an MRI was performed at Mercy Hospital. (Cl. Ex. 5, p. 1) The MRI noted some abnormalities; however, it was ultimately inconclusive. Eventually an appointment was arranged with David Field, M.D., an orthopedic specialist. Dr. Field documented the following on March 17, 2011:

> Seen today for evaluation relative to soreness in the right Achilles area. He stepped off a machine wrong and felt a pop in the back of his foot/heel area. . . . This occurred on 03/08/11. The pain has started to improve. Initially he had difficulty even walking, now the pain is better. He still has some sensitivity in the heel itself. MRI report suggested a questionable injury, substance injury, to the tendon.

(Cl. Ex. 4, p. 4) He concluded that the Achilles tendon was "fully intact" and not torn. He recommended against surgery. (Cl. Ex. 4, p. 4)

On followup, Dr. Field referred to the injury as a sprain and continued to treat it conservatively. He ordered physical therapy and continued the restrictions on March 28, 2011. (Cl. Ex. 4, p. 4) Through the spring and summer of 2012, James attempted various types of treatment through Dr. Field, including various medications (including patches and gels), assistive devices, physical therapy and restrictions. (Cl. Ex. 4, pp. 9-19) Over time his activities were increased. On August 22, 2011, he was released back to work without any restrictions. James was not 100 percent healed at this time; however, Dr. Field provided no impairment rating. James testified credibly that he continued to have symptoms in his ankle and leg. Dr. Field recommended James continue his stretching exercises. (Cl. Ex. 4, p. 19)

James resumed his duties as a first press operator. Many of his work activities aggravated his symptoms, particularly walking, climbing and squatting. On January 31, 2012, James suffered a second injury, which was very similar to the first. He felt a sharp pain in his right leg. The pain was similar to the pain he experienced after the first injury, but more intense. The pain was also more wide-ranging, going up his leg and down into his toes. He could barely walk following this incident. He was referred back to Tri-State Occupational Health where he saw Dr. Garrity again. Dr. Garrity recorded the following:

> The patient comes in for evaluation of right heel/Achilles tendon pain. Since he last saw me, he was under the care of Dr. Field. It sounds like he was in a 3D boot placed on in early March 2011, with crutches. Eventually crutches were removed and he went into an Aircast splint and later was released to full duty, it would appear from the history, sometime in August 2011. Do not have notes for that time. States he has been functioning fine as far as concerning going up and down stairs and doing other activities, having no heel pain. Two days ago, he was just stepping up on a machine on platform steps and essentially got the balls of his right foot and mid foot on the platform, was all the room there was, when he felt

> sudden severe pain in his right heel. Been icing it, was advised to come in and be seen.

(Cl. Ex. 3, p. 9) Dr. Garrity sent him back to Dr. Field. He was given work restrictions, including no driving. (Cl. Ex. 3, p. 11)

Dr. Field continued with conservative care initially, stating "it appears that he has an Achilles tendon pattern of sprain/strain again." (Cl. Ex. 4, p. 22) Many of the same modalities of treatment were tried, including medications, 3D cast, physical therapy and restrictions. He mentioned a possible diagnosis of plantar fasciitis. (Cl. Ex. 4, p. 22) He was sent for a new MRI in April after the conservative treatment methods were failing. (Cl. Ex. 4, p. 30) The MRI was performed April 23, 2012, and did not conclusively show any tear. (Cl. Ex. 5, p. 2) Dr. Field recommended an injection of the ankle. (Cl. Ex. 4, p. 34)

In May 2012, James was permanently laid off due to downsizing and an eventual closure of the Dubuque operation. After he was laid off, the light-duty ended, and the employer began paying healing period benefits. In late May 2012, Dr. Field acknowledged that the condition was not improving, the injection had not worked, and referred James to a foot/ankle specialist at the University of Iowa Hospitals and Clinics. He also placed James on Neurontin. (Cl. Ex. 4, p. 37) The Neurontin was ultimately discontinued due to the side effects. James was experiencing a constant, burning pain during this time period.

On July 7, 2012, James was seen by Phinit Phisitkul, M.D. at the University of Iowa Hospitals and Clinics. (Cl. Ex. 7, p. 1) Dr. Phisitkul documented a thorough evaluation and examination. He diagnosed "right plantar fasciitis" and recommended nonsurgical treatment. (Cl. Ex. 7, p. 5) Conservative care of physical therapy and medications continued. He continued to follow up. On September 27, 2012, Dr. Phisitkul recommended "another three months of nonoperative treatment." (Cl. Ex. 7, p. 18) This included physical therapy. The surgical options were discussed in detail. (Cl. Ex. 7, p. 18) The therapy made the symptoms and pain worse. In January 2013, Dr. Phisitkul recommended James attempt a pain treatment with Sunny Kim, M.D. (Cl. Ex. 7, p. 38) James tried it and it did not work. Efforts to find a treatment which would work for the claimant continued without success for an unusually long period of time, including additional testing. (Cl. Ex. 7, pp. 41-55) Finally surgery was recommended and performed on September 20, 2013. (Cl. Ex. 7, p. 59) The surgery is best described as "endoscopic gastrocnemius release, tarsal tunnel release, and open partial plantar fasciotomy." (Cl. Ex. 7, p. 63)

Following the surgery, the calf pain, cramping and symptoms resolved significantly. (Cl. Ex. 7, p. 66) James continued his followup treatment with Dr. Phisitkul. Followup treatment included physical therapy, medications and restrictions. In January, it was noted that James could do light-duty work if he avoided uneven ground and limited his lifting to 30 pounds. (Cl. Ex. 7, p. 76) He was,

nevertheless, still wearing a "boot" at that time. No light-duty was available. On March 6, 2014, James was placed at maximum medical improvement. (Cl. Ex. 7, p. 81) It is apparent that James was not symptom free at this time. (Cl. Ex. 7, p. 79) Dr. Phisitkul placed a 7 percent rating to his right leg. (Cl. Ex. 7, p. 86)

Since being released, James drew some unemployment benefits and then eventually attained employment with several different employers. He testified he worked for Quanex Manufacturing in Dubuque assembling screens for $10.00 per hour, 10 hours per day. He was constantly on his feet and had to step up frequently. He quit after a week because he could not physically do it. He then worked for Uelner Tool and Die as a press operator earning $12.00 per hour. He lasted a month before he left. He again testified credibly that it was too much standing. By the summer of 2014, he attained employment as a part-time bus driver for the City of Dubuque. He earned $16.46 per hour working 30 hours per week with no benefits. This was physically much easier work than his employment as a press operator. In August 2014, James secured full-time employment with Hillcrest Family Services in Dubuque in maintenance. The job was physically more demanding than the bus driving work; however, he received benefits and full-time hours. He earns $12.65 per hour. James testified he was being set up for termination because he had a work injury at Hillcrest and was having issues performing the physical work. Nevertheless, he was working at the time of the injury, and I find that while the work was difficult, he was physically capable of performing it.

James was evaluated at Medix Occupational Health Services in July 2014 by Mark C. Taylor, M.D. (Cl. Ex. 12) Dr. Taylor performed a thorough evaluation of the right leg and foot issues. He reviewed a plethora of medical records and documentation. Dr. Taylor acknowledged the diagnosis of Dr. Phisitkul and concluded that James' condition was caused by a combination of his two work injuries. (Cl. Ex. 12, p. 10) He concurred with the 7 percent functional disability rating. (Cl. Ex. 12, pp. 10-11)

He also examined and reviewed records related to the 1990 left knee disability and the 1996 right arm/wrist disability. (Cl. Ex. 12, p. 1) Dr. Taylor assigned a 3 percent right arm rating for the carpal tunnel. (Cl. Ex. 12, pp. 11-12) He also recommended some restrictions. This rating is not convincing. The documentation of Dr. Pierotti, that James fully healed with no functional disability, is more convincing. (Cl. Ex. 11, p. 14) Dr. Taylor did confirm the functional disability in James' left leg, which resulted from his 1990 knee injury and surgery. (Cl. Ex. 12, p. 12) I find that the 10 percent functional disability rating sufficiently quantifies the loss of function in his left leg.

At the time of hearing, James testified as to his current symptoms. He still has pain in the arch of his right foot through his toes. The pain is constant, and he often has shooting pains up his leg. He suffers from weakness in his right ankle, which is particularly noticeable when he is standing, walking, squatting or climbing. He no longer uses ladders, and he can only walk for a couple hundred yards before he needs a break. He no longer runs or exercises the same way. James takes ibuprofen on a daily

basis to manage the pain. He has occasional cramping feeling in his right leg like a Charlie horse, which he estimates occurs up to three times a week. James testified credibly at hearing.

CONCLUSIONS OF LAW

The primary issues in this case involve whether Second Injury Fund liability is triggered based upon the facts in evidence.

The first unnumbered paragraph of section 85.64 states:

> If an employee who has previously lost, or lost the use of, one hand, one arm, one foot, one leg, or one eye, becomes permanently disabled by a compensable injury which has resulted in the loss of or loss of use of another such member or organ, the employer shall be liable only for the degree of disability which would have resulted from the latter injury if there had been no preexisting disability. In addition to such compensation, and after the expiration of the full period provided by law for the payments thereof by the employer, the employee shall be paid out of the "*Second Injury Fund*" created by this division the remainder of such compensation as would be payable for the degree of permanent disability involved after first deducting from such remainder the compensable value of the previously lost member or organ.

Iowa Code section 85.64 governs Second Injury Fund liability. Before liability of the Fund is triggered, three requirements must be met. First, the employee must have lost or lost the use of a hand, arm, foot, leg, or eye. Second, the employee must sustain a loss or loss of use of another specified member or organ through a compensable injury. Third, permanent disability must exist as to both the initial injury and the second injury.

The Second Injury Fund Act exists to encourage the hiring of workers with disabilities by making a current employer responsible only for the amount of disability related to an injury occurring while that employer employed the individual as if the individual had had no preexisting disability. See Anderson v. Second Injury Fund, 262 N.W.2d 789 (Iowa 1978).

The Fund is responsible only for the industrial disability present after the second injury that exceeds the disability attributable to the first and second injuries. Section 85.64. Second Injury Fund of Iowa v. Braden, 459 N.W.2d 467 (Iowa 1990); Second Injury Fund v. Neelans, 436 N.W.2d 335 (Iowa 1989); Second Injury Fund v. Mich. Coal Co., 274 N.W.2d 300 (Iowa 1970).

James argues that he suffered two first injuries, his left leg and his right arm. The Fund argues that James did not suffer any first injury. I find that James suffered a first qualifying injury in March 1990 to his left leg. This injury resulted in surgery, and

ultimately a 10 percent impairment rating of his left leg which was given contemporaneously upon his recuperation from the injury. (Cl. Ex. 11, p. 9) It is also contemporaneously documented that this condition interfered with his activities of daily living including his ability to work. (Cl. Ex. 11, pp. 9-10) By a preponderance of evidence, James has shown that the left leg injury is a first qualifying injury. The right arm is less convincing. He did have carpal tunnel surgery, which is evidence of a first qualifying injury. The 1996-97 contemporaneous records do not support a finding of permanent functional loss at that time. He was given no rating, no restrictions and there is no documentation of any symptoms other than intermittent pain. The claimant failed to meet his burden that his right arm injury amounted to a first qualifying disability.

The next issue is whether James suffered a second qualifying injury under the statute. James alleges the right foot injuries of March 2011 and January 2012 are "second injuries" under the statute. The Fund argues James has failed to meet his burden of proof. Again, I find James has met his burden of proof. The real question here is whether either or both of the stipulated work injuries caused or permanently aggravated a permanent condition in his right leg, ankle and foot.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

The two experts in the record both support a finding of medical causation. The diagnoses are best described as equinus ankle contracture, plantar fasciitis, and tarsal tunnel syndrome. (Cl. Ex. 7, p. 59) The opinions of Dr. Phisitkul and Dr. Taylor both support a finding that these conditions, and the treatment necessitated, were materially caused or aggravated by a combination of the stipulated work injuries of March 8, 2011, and January 31, 2012. (*See* Cl. Ex. 7, pp. 9, 50, 86; *and* Cl. Ex. 12, pp. 9-10) There

are no experts, however, who opine against medical causation. When combined with the uncontroverted lay evidence, the record is overwhelming that the condition amounts to a permanent functional loss in the claimant's right leg which was developed after his prior left leg disability. The greater weight of the evidence supports a finding that the January 31, 2012, injury was a substantial contributing factor to James' disability. James had only been diagnosed with a strain from the March 2011 injury, and the record is more convincing that the January 2012 injury caused the conditions which ultimately led to surgery and permanent functional loss. I find the claimant's right leg condition amounts to a qualifying second injury under the statute.

The next issue is the extent of permanent partial disability and the Fund's liability therefore.

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 the 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.

When considering all of the factors of industrial disability, I find that James has suffered a 50 percent industrial loss as a result of the combination of his successive functional disabilities. The primary factors weighing in favor of this significant disability is the fact that he can no longer work as a press operator, which he has performed essentially since 1973, his lengthy healing period from the second injury (January 2012 through March 2014), his advanced age (61) and his significant loss of actual earnings. The primary factor weighing against a large award is that the treating physician did not provide permanent restrictions. Based upon the record before me, it is unclear why Dr. Phisitkul did not place formal restrictions upon the claimant. In any event, it is apparent that he is no longer able to perform the work of a press operator. (Cl. Exs. 13 and 14) These jobs involved substantial climbing and the use of ladders and occasional

very heavy lifting. Moreover, the right leg restrictions suggested by Dr. Taylor are common sense restrictions for his condition which accurately reflect his work abilities. (Cl. Ex. 12, p. 11)

The Fund is liable for the industrial disability caused by the combination of the injuries after subtracting the functional disabilities from the first and second injuries. The functional disability from the 1996 left leg injury is 10 percent of 220 weeks or 22 weeks. The functional disability from the 2012 right leg injury is 7 percent of 220 weeks or 15.4 weeks. Therefore, the total credit is 37.4 weeks. His industrial disability resulting from the combination of the two injuries is 50 percent of 500 weeks or 250 weeks.

The final issue is the rate of compensation. It is stipulated that James was married with two exemptions as of the date of injury (January 31, 2012). The only issue is his gross wages.

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.

The parties have presented competing calculations. (Compare Cl. Ex. 16 with Def. Ex. CC) James testified credibly that his regular work schedule was three 12-hour days one week and four 12-hour days the following week. Overtime was offered on occasion, which he accepted on occasion. I find that the claimant's calculations more accurately reflect his representative earnings. The claimant's gross wages are $1,163.00 per week. Being married with three exemptions, his weekly rate of compensation is $749.26.

ORDER

THEREFORE IT IS ORDERED:

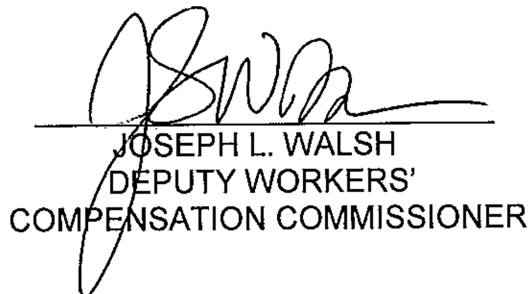
Defendant shall pay the claimant two hundred twelve and six tenths (212.6) weeks of benefits at the rate of seven hundred forty-nine and 26/100 dollars ($749.26) per week commencing March 7, 2014.

Defendant shall pay accrued weekly benefits in a lump sum.

Interest shall accrue as of the date of this decision.

Costs are taxed to defendant.

Signed and filed this 20th day of August, 2015.



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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.