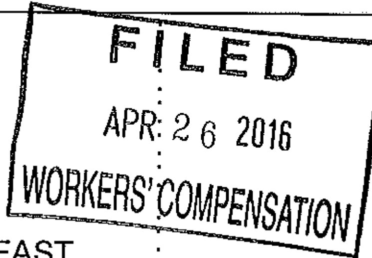
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



DONALD EIS,

Claimant,

vs.

GVD, INC., d/b/a THE BREAKFAST HOUSE,

Employer,

and

SOCIETY INSURANCE,

Insurance Carrier,
Defendants.

File No. 5051110

ARBITRATION

DECISION

Head Note Nos.: 1101; 1105; 1106; 1402; 1602

STATEMENT OF THE CASE

Donald Eis, claimant, filed a petition in arbitration seeking workers' compensation benefits from GVD, Inc., d/b/a The Breakfast House, and their workers' compensation carrier, Society Insurance. Hearing was held on December 1, 2015. Presiding at the hearing was Deputy Workers' Compensation Commissioner Erin Q. Pals.

Claimant, Donald Eis, and George Daoud both testified live at trial. The evidentiary record also includes claimant's exhibits 1-13 and 15-18 and defendant's exhibits A-F. Claimant's exhibit 14 was withdrawn because it dealt with the issue of the appropriate weekly workers' compensation rate which was stipulated to by the parties. The parties submitted a hearing report at the commencement of the evidentiary hearing. On the hearing report, the parties entered into certain stipulations. Those stipulations are accepted and relied upon in this decision. No findings of fact or conclusions of law will be made with respect to the parties' stipulations.

The parties requested the opportunity for post-hearing briefs which were submitted on February 18, 2016.

ISSUES

The parties submitted the following issues for resolution:

1. Whether claimant sustained an injury on May 26, 2014, which arose out of and in the course of his employment.

2. Whether claimant's claim is barred by the defense of willful injury by third party under Iowa Code section 85.16.
3. Whether claimant is entitled to temporary total disability benefits from May 27, 2014 through July 15, 2014.
4. Whether claimant is entitled to payment of medical expenses.
5. Assessment of costs.

FINDINGS OF FACT

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

On September 22, 2014, claimant filed an original notice and petition against the defendants in this matter. The Petition alleged that on May 26, 2014, Mr. Eis "was assaulted while at work." On November 17, 2014, defendants filed an answer to the petition; the defendants failed to raise any affirmative defenses in their answer. This matter proceeded to an arbitration hearing on December 1, 2015, in Cedar Rapids, Iowa. In the hearing report signed by the parties on the date of the hearing the defendants raised the affirmative defense of willful injury by third party. (Hearing Report, p. 2) At hearing claimant's counsel objected to the defense because it was never plead. At that point, defense counsel moved to amend the answer to allege the affirmative defense. The objection and motion to amend were taken under advisement and will now be addressed.

Claimant's counsel is correct in that Iowa Rule of Civil Procedure1.419 requires any defense which admits the facts of the adverse pleading that seeks to avoid their legal effect must be specially pleaded. The defense of willful injury by third party is considered an affirmative defense. In the present case, defendant did not move to amend his answer until the time of hearing. Amendments of pleadings are to be freely granted when required by the interest of justice as long as the amendment does not substantially change the issues or defense of the case. See Rife v. D.T. Corner, Inc., 641 N.W.2d 761 (Iowa 2002)(citations omitted). "Even an amendment that substantially changes the issues may still be allowed if the opposing party is not prejudiced or unfairly surprised." Id. at 767. In the present case, the amendment could substantially change the issues; however, at the time of hearing opposing counsel admitted that he was not sure that the amendment would prejudice the claimant. Therefore, claimant's objection to the affirmative defense of willful injury by third party is overruled. Defendants' motion to amend their answer to include the affirmative defense is granted.

We now turn to the merits of the case. Claimant, Donald Eis, ("Don") worked for defendant employer, GVD Inc. d/b/a The Breakfast House on the date of the injury. George Daoud is the owner of The Breakfast House. Don was hired at The Breakfast House in 2008. He was originally hired to help with remodeling the restaurant after a flood, but was then asked to continue working at the restaurant as a dishwasher, maintenance worker, and prep-cook.

The parties agree that Don was punched by Rod Riefenstahl on May 26, 2014. However, the parties' accounts of the events surrounding that altercation are not completely consistent. The central dispute in this case is whether the injury arose out of and in the course of Don's employment.

The two witnesses who testified live at hearing gave conflicting reports about the events surrounding the alleged work injury. When viewing the record as a whole I find that the testimony of Don Eis is more persuasive than the testimony of George Daoud. While I recognize that Don has a criminal history, I found his answers were more straight-forward and responsive to the questions posed. Furthermore, Don's accounts of the events surrounding the injury remained consistent whereas George's accounts were less inconsistent. For example, there appears to be some inconsistencies about when George initially learned of the "first altercation." There are also inconsistent accounts in the record about why George called Don to come to the restaurant on May 26, some information indicates it was to talk about the "first altercation", other accounts indicate it was to talk about the ongoing arguments between Don and Darrell, while another account indicates it was so Don's employment could be terminated.

Therefore, I find that the events occurred as set forth herein. On May 25, 2014, around 10:00 or 11:00 p.m. George received a call from the fire department notifying him of the smell of gas at the Breakfast House. The fire department informed George that the restaurant was shut-down until the gas leaked was fixed. George then spent most the remainder of his night and part of early the next morning at the restaurant; he was there until approximately 4:00 a.m. Prior to leaving the Breakfast House, he called the manager of the restaurant, Holly Starr. He instructed Holly to tell all employees that they would be closed for business on May 26, 2014 but that there was still work to be done. Evidently, the fire department had observed grease fire hazards which needed to be cleaned before the restaurant could re-open for business. George felt that they needed "all hands on deck" to get the restaurant opened as quickly as possible. (Testimony)

At the time of the injury, Don lived less than one block from the restaurant with his fiancé, Patricia Caslin. Ms. Caslin also worked at The Breakfast House as a dishwasher. Ms. Caslin was not available to testify at the hearing in this matter because sadly she died of an apparent heart attack on April 3, 2015.

Don testified that he was not originally scheduled to work on May 26, 2014; this was Memorial Day. However, Holly sent a text advising employees that The Breakfast House was closed until at least noon on Tuesday because the fire department had shut down the restaurant due to a gas leak. The text appears to have been sent at 3:19 a.m. However, Don testified that he did not see the text until he woke up in the morning. The text further advised that dishwashers should report to work on Monday at 10:00 a.m. because there was work to do. (Exhibit 15)

Don and his fiancé reported to work that day at 10:00 a.m. When they arrived at the restaurant Jim Doyle, Holly Starr, Darrell Starr, and their young son were already there. Darrell worked as a cook at the restaurant and was married to Holly. Darrell was not Don's supervisor. Don said there was also a regular customer there drinking coffee. Darrell told Don that the kitchen needed some heavy cleaning. Darrell told Don that he needed to do heavy cleaning, corner to corner, underneath the refrigerators, whatever needed to be done. Don testified that he then told Darrell that the kitchen would not be in such poor condition if they had helped Don when he asked for it on prior occasions. Darrell accused Don of whining and a verbal altercation/shouting match ensued. This exchange is what was referred to throughout the hearing as the "first altercation." Don testified that he did not threaten Darrell during this first altercation but that Darrell did threaten him. Specifically, Darrell threatened to get his cousin, Larry Starr, to beat Don up. Darrell told Don that Larry is who he had do all of his "light work." Don told Darrell to "Bring it." At the beginning of this first altercation, Don's fiancé went home. During this time, Holly repeatedly asked Don to leave. (Testimony) Holly was the manager of the Breakfast House.

During the first altercation Don went out the back door of the restaurant and called George and advised him of Darrell's threats. Don asked George what he should do; should he call the police or was George going to do something about it? Don testified that at that point George got angry and hung up on him. Don estimates that this happened around 10:30 a.m. Don went back through the restaurant and was going to leave. Darrell and his son were in front or the restaurant and Darrell just kept antagonizing Don. Although it was difficult for him to do, Don said he just kept walking and went home.

At 11:54 a.m. Don received a phone call from George asking him to come to The Breakfast House so they could resolve and discuss the problems that had developed that morning. (Ex. 16) Don said shortly after he received that call he walked back to the restaurant. Don noticed that George's car was not there and Darrell was out front of the restaurant so Don waited around the corner from the restaurant in an attempt to avoid Darrell until George arrived. George did arrive at the restaurant in his car along with Larry Starr and Kyle Barry, another dishwasher at The Breakfast House. Larry walked over to his cousin Darrell, Don saw them talk briefly, and then Larry immediately came towards Don in an aggressive manner. Larry starting asking him if he had a problem with Darrell and Don said something to the effect of "No, but apparently I have a problem with you." Larry then got in Don's face and started pointing his finger at Don and telling Don that he did not work at The Breakfast House anymore. Larry then started bumping Don's chest, stepping on his toes, and hurling insults. Then George came over and started yelling at Don, advising him he was just a dishwasher and that George paid his bills. Then, another fellow, who Don did not know, came over to provide backup for Larry and George. Don later learned that this individual's name was Rod Riefenstahl. The yelling continued and eventually, George instructed everyone to go inside the restaurant because he did not want them to make a scene outside.

Don did what George told him to do and went into the restaurant with the others. Don was afraid the men would attack him from behind so he walked backwards into The Breakfast House, and sat down on a chair with his back to the wall. Don asked George why these guys were here because they did not even work here and had nothing to do with this. George told Don that they were there because he had some work for them to do. At that point, George, Larry, and Rod were on the other side of the restaurant talking in a huddle. Don heard Larry say that Larry was about ready to "knock that MF'er out." Don went over to the three men and said, "Look, you know, I've been in jail and I'm from the streets, and if you tell me you're gonna knock me out, you're gonna have to." Don was then blindsided by Rod who punched Don in the jaw, dropping him to the ground. Once Don was on the ground Larry kicked him in the face. A tussle ensued. At this time, the individuals in the room were George, Jim Doyle (who was behind the cook's line), Larry, Rod, and Don. Don asked Jim to call 911 for an ambulance. Jim picked up the phone to call 911, but George immediately went over to Jim instructed him not to call anyone and took the phone out of Jim's hands. Don does not know if the call went through. These events are what is referred to as the "second altercation." (Testimony)

The police did arrive at The Breakfast House; Don was still in the dining area when they arrived. Don does not know what happened to Rod; Don assumes he went out the back door because he "just disappeared." When the police arrived they questioned everyone about what had happened. Larry and George reported that Don slipped and fell onto the floor. Because Don was afraid of retaliation he also reported that he slipped and fell. At that point, the police took Don outside and asked Don if he wanted to press charges because they were able to gleam from the situation that he had been assaulted. It was difficult for Don to speak because he had a broken jaw and was in a lot of pain. Also, Don did not want to "rat out" anyone in front of Larry and Darrell so he just asked to be taken to the hospital. A little bit later an ambulance arrived and took Don to Mercy Hospital in Cedar Rapids. (Testimony)

Don testified that although he had never met Rod prior to the "second altercation" he had seen him and heard his name before. Approximately, one month before the altercation Darrell and Don were in front of the restaurant when a car pulled up and Larry got out of the car. Rod was also in the car and Darrell commented that the other guy was Rod and that he was "a really good fighter and a bad ass mother f'er". Also, Don knew that at some point Larry and Rod lived together in the same house. (Ex. F, p. 52) Thus, Don knew that Rod was on of Larry's acquaintances.

Don testified that his dealings with George had to do with the Breakfast House. Don did help George remodel the house he lives in but Don did not associate with Don other than about work. Likewise, Don did not associate with Holly, Darrell, or Larry outside of work. He did have Jim Doyle over one time for Thanksgiving.

It should be noted that a few days after the "second altercation" Rod apparently had been coming around the restaurant trying to convince the employees that Don slipped and fell. One of the waitresses took a picture of Rod who had a cast on his right

arm; the picture was sent via text to Don. (Ex. 17, p. 10) Don then notified the police who had Don pick Rod out of a line-up.

The Cedar Rapids Police reports regarding the May 26, 2014 altercation are in evidence. The police investigation resulted in Don picking Rod out of a photo lineup. Don reported to the police that the assault took place in the dining area of The Breakfast House. (Ex. 17)

Defendants did offer documentation regarding claimant and the "first altercation." I note there is no documentation or reference regarding the "second altercation." (Exhibits A-D)

Portions of Don's unemployment claim file are also part of the record. (Ex. 18)

I find that claimant was called by the owner of the restaurant on May 26, 2014 to come to a meeting to discuss the work-related conflict between Darrel and Don. I further find that after Don arrived at the restaurant words were exchanged out front and the owner of the restaurant participated in this exchange of words. I specifically find that the owner then instructed the participants in the argument to go inside the restaurant where more words were exchanged and claimant was eventually assaulted.

Don testified that he did not return to work at The Breakfast House after the May 26 altercation because he felt it was a hostile work environment and he did not feel safe there. Since July 16, 2014, Don has been employed at Worley Warehouse, now it is called PepsiCo. Also, during most of this time he was restricted to no lifting greater than 30 pounds. (Ex. 5) Don testified that he would not have been physically able to perform his job at the Breakfast House. Regardless, defendants did not offer claimant suitable work. Thus, I find claimant has shown entitlement to temporary total disability benefits from May 26, 2014 through July 14, 2014.

With regard to his medical treatment claimant was initially taken via ambulance to Mercy Hospital in Cedar Rapids. (Ex. Ex. 3 & 4) However, they were not able to provide the appropriate treatment so he was sent to The University of Iowa Hospitals and Clinics where they eventually operated on him. They implanted titanium plates and screws and wired his jaw shut. His jaw was wired shut for two months. Subsequently, he had to undergo a second surgery to remove one of the plates. Claimant was off of work from May 26, 2014 through July 15, 2014. Until July 3, 2014, he was restricted to no lifting greater than 30 pounds. (Ex. 5) Don testified that even if he was not afraid to return to the restaurant he would not have been able to perform his job with that restriction. Furthermore, defendants' exhibits demonstrate that claimant had been terminated from the restaurant. Defendants did not offer claimant any suitable work following the injury. I find that claimant was off work during this timeframe due to his work injury.

Don testified that all of the medical bills or charges listed in his exhibits are related to the broken jaw and dental problems he had as a result of the assault. Likewise, the pharmacy charges were also related to Don's jaw and dental problems from the altercation. The reason some of the medications were in children's form was because he was only capable of taking liquid, not pills. The ambulance bills in exhibit 10 are related to the transport from The Breakfast House to the hospital. I find that the medical expenses submitted by claimant are causally connected to the work injury.

CONCLUSIONS OF LAW

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).

The first issue to be determined is whether Don sustained an injury that arose out of and in the course of his employment. The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

In the present case, I conclude that Don was at a time and place where he may reasonably be expected to be. Specifically, he was called by George to come to The Breakfast House for a meeting to discuss the work conflict between Don and Darrell. Don was then instructed by George to go into the restaurant and that is when the assault occurred. I also found that the injury arose out of the employment. The evidence in the record demonstrates that the subject matter of the conflict between Don and Darrell was cleaning of the restaurant's kitchen. The conflict was incidental to the Don's work duties. There is no indication that Don and Darrell or Don and Rod had any conflict outside of any work activities.

Defendants contend that the altercation did not arise out of the course of employment because claimant initiated and participated in the events. Defendants believe that the events surrounding the altercation are analogous to horseplay. In their brief, defendants argue that although this was not a case of horseplay, "it involved something even more egregious: extreme acts of aggression." (Defendants' brief p. 3)

Defendants contend that claimant initiated and actively participated in the aggressive actions with Larry and Rod. Specifically, claimant advised both men he had been on the streets and in jail and if they said they were going to knock him out then they needed to do so. I do not find this argument to be persuasive. Given the specific facts of this case I do not find that claimant's actions substantially deviated from the employment activities.

Horseplay in which an injured employee instigates or actively participates does not arise out of and in the course of employment. Xenia Rural Water Dist. v. Vegors, 786 N.W.2d 250, 254-255 (Iowa 2010); Ford v. Barcus, 261 Iowa 616, 623, 155 N.W.2d 507, 511 (1968); Wittmer v. Dexter Mfg. Co., 204 Iowa 180, 185, 214 N.W.2d 700, 702 (1927). On the other hand, not all acts of horseplay bar recovery. Vegors, 786 N.W.2d at 255. Instead, the relevant factual and legal question is whether the injured employee's actions substantially deviated from the employment activities so as to remove claimant from the course of his employment. Id. Defendants argue claimant's participation in the altercation was a deviation from his employment.

Not all acts of levity will preclude an injured employee from recovery. Instead, a claimant's actions—including horseplay—will bar recovery under the workers' compensation scheme when the claimant substantially deviates from the employment. Id. For employees who have initiated, or are participating in horseplay, the Iowa Supreme Court has identified the following four-prong test determine whether the horseplay constitutes a substantial deviation that removes the employee from the course of employment:

> (1) the extent and seriousness of the deviation, (2) the completeness of the deviation (i.e., whether it was commingled with the performance of duty or involved an abandonment of duty), (3) the extent to which the practice of horseplay had become an accepted part of the employment, and (4) the extent to which the nature of the employment may be expected to include some such horseplay.

Vegors, 786 N.W.2d at 256 (quoting Phillips v. John Morrell & Co., 484 N.W.2d 527, 530-531 (S.D. 1992)).

Regarding a possible deviation from employment, the swearing, pushing, and subsequent altercation was the result of work duties. In this particular case, the owner of the business was also participating in the verbal argument which led to the physical altercation. Because the owner called Don to a meeting to discuss what had occurred earlier in the day and because the owner was also involved in the events, including the verbal argument, which led to the physical altercation, I do not find that this was a deviation from the employment. Furthermore, the evidence of this case demonstrates that it was not uncommon for there to be arguments and conflict among co-workers at this particular establishment. Given the facts in this case, I conclude that Don did not deviate from his employment and that the injury arose out of and in the course of his employment.

We now turn to the affirmative defense. Defendants assert that claimant's claim is barred by application of Iowa Code section 85.16(3) because the injury was the result of the willful act of a third person directed against the claimant for reasons personal to the claimant. Iowa Code section 85.15(3).

> Iowa Code section 85.16(3) prohibits compensation where an employee's injury was caused '[b]y the willful act of a third party directed against the employee for reasons personal to such employee.' Iowa Code section 85.16(3) is an affirmative defense, and, therefore, the employer bears the burden to demonstrate compensation is barred. Cedar Rapids Cmty. Sch. v. Cady, 278 N.W.2d 298, 299 (Iowa 1979).

Xenia Rural Water Dist. v. Vegors, 786 N.W.2d 250, 258 (Iowa 2010). Actions by co-workers that are intentional and directed at the claimant for reasons personal to the claimant can preclude recovery under Iowa Code section 86.5(3). Id.

For purposes of applying Iowa Code section 85.16(3), actions taken by a co-worker against a claimant "will not bar compensation unless an employee's action is caused by 'influences originating entirely outside the working relation and no[t] substantially magnified by it.'" Vegors, 786 N.W.2d at 258 (quoting Hartford Accident & Indem. Co. v. Cardillo, 112 F.2d 11, 17 (D.C. Cir. 1940)). Given that this is an affirmative defense, defendants bear the burden to prove that the actions of claimant's co-worker were exclusively originating out of something personal between claimant and the co-worker and that the action was not substantially magnified by the work environment. Id.; Iowa R. App. P. 6.14(6)(e). In the present case, there has been no evidence introduced to indicate that claimant was assaulted for any reasons personal to the claimant. In fact, prior to the altercation claimant had never even met the male who assaulted him. I find that the altercation originated in matters related to Don's employment. In this case, I found that the actions of Larry and Rod arose out of the employment relationship and circumstances. No evidence was introduced to demonstrate a dispute between claimant and the others that originated outside of the employment setting. Therefore, defendants failed to establish their affirmative defense pursuant to Iowa Code section 85.16(3).

The next issue to address is whether claimant is entitled to temporary total disability benefits. When an injured worker has been unable to work during a period of recuperation from an injury that did not produce permanent disability, the worker is entitled to temporary total disability benefits during the time the worker is disabled by the injury. Those benefits are payable until the employee has returned to work, or is medically capable of returning to work substantially similar to the work performed at the time of injury. Section 85.33(1). Claimant is seeking temporary total disability (TTD) benefits from May 26, 2014 until July 15, 2014. During most of this time he was restricted to no lifting greater than 30 pounds. (Ex. 5) Don testified that he was afraid to return to the restaurant because the last time he was there he was assaulted in the presence of the owner. Don testified that he would not have been able to physically perform his job at the Breakfast House. Suitable work was not offered to the claimant.

Thus, I conclude claimant has shown entitlement to TTD benefits from May 26, 2014 through July 14, 2014.

We now turn to claimant's request for payment of medical bills. The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975). I conclude that the medical bills listed in claimant's exhibits were necessitated by the work injury of May 26, 2014. The bill chart is contained in exhibit 6 and the bills themselves are found in exhibits 7-13. Therefore, defendants are responsible for the medical bills.

Costs are to be assessed at the discretion of the deputy commissioner hearing the case. Because claimant was generally successful in his claim I find it is appropriate to assess costs against the defendants as set forth above. Thus, defendants shall reimburse claimant costs in the amount of one hundred and no/100 dollars ($100.00).

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the stipulated rate of two hundred nineteen and 34/100 dollars ($219.34).

Defendants shall pay claimant temporary total disability benefits from May 26, 2014 through July 14, 2014.

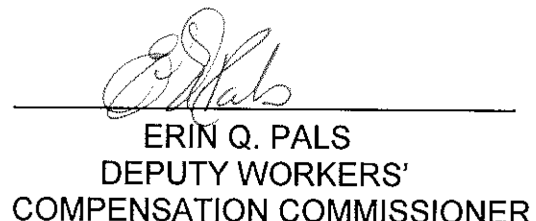
All past due weekly benefits shall be paid in lump sum with applicable interest pursuant to Iowa Code section 85.30.

Defendants shall be responsible for the medical bills as set forth above.

Defendants shall reimburse claimant's costs in the amount of one-hundred and no/100 dollars ($100.00).

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

Signed and filed this 26th day of April, 2016.



ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Thomas J. Currie
Attorney at Law
1853 51st Street NE, Suite 1
Cedar Rapids, IA 52402
tcurrie@currieliabo.com

Stephen W. Spencer
Attorney at Law
6800 Lake Drive, Suite 125
West Des Moines, IA 50266
steve.spencer@peddicord-law.com

EQP/kjw

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.