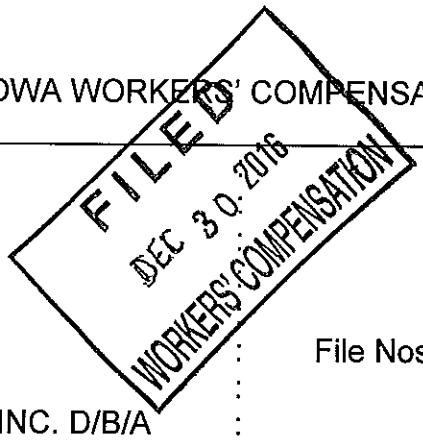
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



JOSEPH BUEHLMANN, Claimant, vs. KAS INVESTMENT CO. INC. D/B/A SWANSON GLASS, INC., Employer, and SFM SELECT INSURANCE COMPANY, Insurance Carrier, Defendants.	File Nos. 5047676, 5047678, 5054510 A R B I T R A T I O N D E C I S I O N Head Note Nos.: 1402.30, 1801.1, 1802, 1802, 1803, 2206, 2901, 3000, 4000

STATEMENT OF THE CASE

Joseph Buehlmann, claimant, filed a petition in arbitration seeking workers' compensation benefits from KAS Investment Co. Inc., d/b/a Swanson Glass, Inc. (Swanson) and its insurer, SFM Select Insurance Company as a result of injuries he allegedly sustained on November 3, 2012, February 14, 2013 and June 26, 2015 that allegedly arose out of and in the course of his employment. These cases were heard in Des Moines, Iowa and fully submitted on April 28, 2016. The evidence in these cases consists of the testimony of claimant, claimant's Exhibits 1 – 30 and 34 – 40 and defendants' Exhibits A –L. Defendants' Exhibit D pages 13 – 18 was excluded as being untimely disclosed. Official notice was taken of the pleadings, motions and rulings in the three files. Briefs were submitted by both parties.

ISSUES

For File No. 5047678 – Date of injury November 3, 2012

The parties identified the follow issues to be resolved;

1. Whether the alleged injury is a cause of temporary disability and, if so, the extent;

2. Whether the alleged injury is a cause of permanent disability and, if so;

3. The extent of claimant's disability.
4. Claimant's gross income and resulting weekly rate.
5. Payment of medical expenses.
6. Payment for an independent medical examination.
7. The credit against any award defendants may be entitled to receive.
8. Whether a penalty should be assessed against defendants.
9. Date of injury to the right shoulder.
10. Assessment of costs.

Stipulations

The parties stipulate to the following matters for this file;

1. Claimant had an injury on November 3, 2012 that arose out of and in the course of his employment with Swanson.
2. If a finding of a work-related injury is made, the parties agree the injury/disability is an industrial disability with a commencement date of January 16, 2014.
3. The claimant was single and entitled to two exemptions.

For File No. 5047676 – Date of injury February 14, 2013

The parties identified the follow issues to be resolved;

1. The extent of any temporary disability.
2. Whether claimant has an injury to his back.
3. The extent of claimant's disability.
4. Claimant's gross income and resulting weekly rate.
5. Payment of medical expenses.
6. Payment for an independent medical examination.
7. Whether claimant is entitled to alternate care for his back.
8. The credit against any award defendants may be entitled to receive.

9. Whether the defendants are entitled to a credit under Iowa Code 85.34(7).
10. Whether a penalty should be assessed against defendants.
11. Date of injury.
12. Assessment of costs.

Stipulations

The parties stipulate to the following matters for this file;

1. Claimant had an injury to his right shoulder that arose out of and the course of his employment with Swanson.
2. The parties agree the right shoulder injury/disability is an industrial disability with a commencement date of January 16, 2014.
3. The claimant was single and entitled to two exemptions.

For File No. 5047678 and File No. 5947676

Defendants agree that claimant sustained a permanent industrial disability to the right shoulder, but do not agree that claimant had two different permanent injuries to the right shoulder. (Transcript page 6)

For File No. 5054510 – Date of injury June 26, 2015

The parties identified the follow issues to be resolved;

1. Whether claimant sustained an injury on June 26, 2015 which arose out of and in the course of employment;
2. Whether the alleged injury is a cause of temporary disability and, if so, the extent;
3. Whether the alleged injury is a cause of permanent disability and, if so;
4. The extent of claimant's disability.
5. Whether claimant is entitled to a running award of temporary benefits.
6. The commencement date of permanent benefits.
7. Claimant's gross income and resulting weekly rate.
8. Payment of medical expenses.

9. Payment for an independent medical examination.

10. Whether claimant is entitled to alternate care for his back.

11. The credit against any award defendants may be entitled to receive.

12. Whether the defendants are entitled to a credit under Iowa Code 85.34(7).

13. Whether a penalty should be assessed against defendants.

14. Date of injury.

15. Assessment of costs.

Stipulations

The parties stipulate to the following matters for this file;

1. Claimant was an employee at the time of the alleged injury.

2. The alleged injury is an industrial disability.

3. The claimant was single and entitled to two exemptions.

The stipulations contained in the Hearing Reports for these three files are accepted. The parties are bound by their stipulations.

FINDINGS OF FACT

The deputy workers' compensation commissioner having heard the testimony and considered the evidence in the record finds that:

Joseph Buehlmann, claimant, was 42 years old at the time of the hearing. He graduated from an alternative high school. Claimant served 14 months in the Navy and was honorably discharged. (Exhibit 36, page 510) He has worked as an assistant manager in gas station/convenience stores, and worked in manufacturing. This work involved standing and some lifting, except his work at Parr Manufacturing involved very little lifting. (Transcript, p. 399) (See Ex. 17, p. 306; Ex. 23, p. 382; Ex. 36, pp. 510 – 514 and Ex. D, p. 11 for a complete work history).

Claimant began his work for Swanson January 24, 2000. Claimant left Swanson in July 2003 to work for another glass company and returned to Swanson in June 2006. (Ex. 23, p. 391) Claimant was laid off from Swanson on September 21, 2015. (Tr. p. 42)

At Swanson claimant started installing windows. The windows could be over 100 pounds. (Tr. p. 43) Claimant became a foreman/lead man shortly into his employment at Swanson. The foreman position was a working foreman position, as he

always performed the physical labor while he worked as foreman. Claimant became a manager at Swanson on May 1, 2014. As a manger claimant still performed work on installation of windows, such as finishing up projects when a crew had moved to another job. (Tr. p. 47) Claimant, as manager, would receive shipments and manually unload trucks. As manager claimant received $24.00 per hour and a $600.00 per month vehicle allowance. (Tr. p. 49) Claimant started receiving the vehicle allowance in June 2015. (Tr. p. 50) There was no evidence that this vehicle allowance was related to any actual vehicle expenses or that claimant's travel expenses increased as a result of his new position.

Claimant testified that prior to November 2012 he did not have any injuries or restrictions to his right shoulder. (Tr. p. 51) Claimant had two back surgeries. In 1994 he had a discectomy and laminectomy of the L5 – S1 by Lynn Nelson, M.D. (Ex. J, p. 2) and a second back surgery to repair the first surgery in 1994. (Tr. p. 51) Claimant testified that Daniel McGuire, M.D. performed this surgery; however, the medical records show that Dr. Nelson performed a second surgery on October 31, 2013. (Ex. J, p. 5) Clamant was off work for about two years after his back surgeries. (Tr. p. 52) When claimant returned to work after the back surgeries he had no restrictions. (Tr. p. 54) Claimant testified that by the time he started working for Swanson he was not having symptoms from his back surgery. (Ex. 37, p. 535)

Claimant had an incident when he hurt his back. In August 2010 a glass block fell pushing him against the wall. (Ex. 2, p. 33) He was told he had bruised back and ribs. (Tr. p. 55; Ex. 2, p. 34) Claimant had a pain shot in September 2010. (Tr. p. 56) Claimant received chiropractic care for his back between May and August of 2011. (Tr. p. 56) Claimant reported in April 2015 to physical therapy that he hurt his back when he stepped in a hole at work in February 2015. (Tr. p. 98)

On Saturday, November 3, 2012 claimant was setting frames for windows. Claimant said his arms burned like he had done too many pushups. (Tr. p. 57) Claimant informed his supervisor on Monday November 5, 2012. Claimant did not seek medical care until November 27, 2012. Claimant did not miss any work between November 2013 and February 13, 2013 due to a shoulder injury, although he did miss work due to an infection during this time. (Tr. p. 59)

On February 14, 2013 claimant was assembling a door frame and felt pain in his shoulder that caused him to drop his screw gun. He reported this injury. Claimant was referred to Mark Fish, D.O. Claimant was restricted to no use of the right arm and was on light duty. After obtaining an MRI Dr. Fish performed right shoulder surgery on May 22, 2013. Claimant testified he was off work from May 22, 2012 through November 3, 2013 and that he received indemnity benefits during that period. (Tr. pp. 62, 63) Claimant had a second right shoulder surgery on October 9, 2013. (Tr. p. 63) Dr. Fish returned claimant to work without restriction on January 16, 2014. (Ex. 5, p. 95) Dr. Fish did not provide him any formal restrictions. I find this to be the date claimant was at MMI and commencement date of permanency benefits for the November 2, 2012 injury. Dr. Fish found claimant to be at maximum medical

improvement (MMI) on February 13, 2014. (Ex. 5, p. 96) Claimant stated he was still having shoulder symptoms when Dr. Fish released him. He had weakness and pain when he was using his shoulder at the end of his limits. (Tr. p. 66) Claimant has had no treatment on his right shoulder since an injection by Dr. Fish in February 2014. (Tr. p. 88) Claimant is not taking any prescription medicine for his right shoulder and has not been assigned any restrictions due to his shoulder injury. Claimant admitted that after his release for his shoulder injury he resumed heavy-duty work for Swanson. (Tr. p. 89)

Claimant testified that there was no specific incident concerning his back and work, just that over time the aches and pains grew to the point he needed medical treatment. (Tr. p. 70) He noticed worsening back pain after he was made a manager in May 2014. (Ex. 37, p. 535) Claimant said he decided to get medical treatment for his back when the pain started down his legs. (Tr. p. 70) Claimant went to Mercy Adel Clinic on March 30, 2015 due to his back pain. He was assessed with lower back pain, chronic. (Ex. 6, p. 122) Claimant received restrictions for his back in April 2015 of 25 pounds. (Tr. p. 72) Claimant continued to work and performed lifting in excess of the 25-pound restriction. (Tr. pp. 72, 73)

On August 24 and 25, 2015 claimant injured his back while working in Iowa City. (Tr. p. 74; Ex. 35, p. 505) Claimant took time off during the first week of September 2015. Claimant was assigned a 10-pound lifting restriction after the August 24/25, 2015 injury. (Tr. p. 77; Ex. 37, p. 533) Claimant briefly stopped working for Swanson in early September 2015. He returned briefly on September 14, 2015 and was informed Swanson had no work for him as of September 21, 2015. (Ex. 35, p. 508) Claimant testified he had the ability to supervise work for Swanson at that time with his 10-pound lifting limitation. (Tr. p. 106) Claimant last received treatment for his back in December 2015. Claimant has not been able to obtain treatment for his back after he lost his insurance. (Tr. p. 80; Ex. 37, p. 541)

Claimant submitted requests for payment, (temporary partial disability payments), for work time he missed due to medical appointments. (Ex. 33, pp. 464 – 467) However, there is not clear evidence in the record to determine if claimant was paid for these hours. The fact that claimant had restrictions does not equate to entitlement to temporary partial disability payments. There are numerous wage records; however, the record is not clear enough to determine if claimant was not paid for time when he attended medical appointments. Claimant did not provide specific enough testimony to make a determination as to temporary partial benefits.

In his February 10, 2016 deposition claimant described his back condition he associated with his work at Swanson as, "Sciatica. Back pain from the mid-shoulders all the way down to my waistline. Cold, numb feet. And left leg predominantly. Right when I law down." (Ex. 37, p. 541, depo p. 37) "I can't – I have trouble sitting here right now. The walking, I have to push on my hip because it hurts inside of my hips. I've started walking with a cane because it helps – it's something to help lean on, especially for going up stairs." (Ex. 37, p. 541, depo p. 38)

At the time of the hearing claimant was not working. He was taking care of his two children and helping with his girlfriend by taking her children to daycare. Claimant had applied for and had been turned down for Social Security Disability. (Ex. 34, pp. 498, 499) He appealed his denial, but the appeal had not been heard at the time of the arbitration hearing.

Claimant's past medical history is relevant to his current claims. He had two back surgeries, September 12, 1994 and October 31, 1994. (Ex. J, pp. 6, 7) Claimant testified he was off work for about two years due to his surgeries. Claimant informed Dr. Kuhnlein that he has had back pain since his surgeries that was generally above the belt line and could occasionally radiate into the legs. Claimant told Dr. Kuhnlein that this pain was not so severe that it required him to miss work. (Ex. E, p. 6) Claimant received chiropractic care May 2011 through July 2011 for his back. (Ex. I, pp 1 – 15) On August 6, 2012 claimant was seen at Mercy West Clinic for back pain. Claimant was complaining of back pain for the past two days. He was assessed with low back pain. (Ex. 1, p. 5)

On November 27, 2012 claimant was seen by Randall Miller, D.O. for a finger injury, low back pain and shoulder injury. (Ex. 1, p. 6) Claimant informed Dr. Miller that his lower back had hurt for years and he was having shoulder issues the last three weeks. (Ex.1, p. 6; Ex. F, p. 1) Claimant was diagnosed with shoulder injury and low back pain and treated with nonsteroidal anti-inflammatory drugs and muscle relaxants. (Ex. 1. p. 7; Ex. E, p. 3)

Claimant testified that on February 14, 2013 he was unable to hold onto a tool at work due to shoulder pain. On February 15, 2013 he went to a medical clinic complaining of right shoulder pain. Dr. Miller assessed claimant with "Right shoulder pain – possible rotator cuff injury." (Ex. 1, p. 18)

On February 28, 2013 Dr. Fish examined claimant's right shoulder. Dr. Fish's impression was right shoulder pain, right labrum tear and rotator cuff tendonitis. (Ex. 5, p. 69) After an MRI, claimant returned to Dr. Fish. On April 5, 2013 Dr. Fish recommended right shoulder arthroscopic surgery. (Ex. D, p. 3) On May 22, 2013 Dr. Fish performed an operation. His post-operative diagnosis was, "A grade 1 superior labrum anterior and posterior tear with impingement, acromioclavicular arthrosis, a high-grade partial-thickness tear of supraspinatus tendon, bursal side." (Ex. 5, p. 74) On September 5, 2013 Dr. Fish recommended surgery release of the right shoulder under anesthesia with aggressive physical therapy. (Ex. 5, p. 81) On October 9, 2013 claimant underwent a second right shoulder surgery. Dr. Fish's postoperative diagnosis was, "Adhesive capsulitis, status post rotator cuff repair." (Ex. 5, p. 83) On January 16, 2014 Dr. Fish noted claimant's pain was a 4-5 out of 10 for his shoulder. He recommended claimant continue home physical therapy and released him from his care. (Ex. 5, p. 93) On February 13, 2014 clamant returned to Dr. Fish with increased pain. Dr. Fish provided a corticosteroid injection and stated claimant was at maximum medical improvement (MMI). On March 14, 2014 Dr. Fish provided a 6 percent impairment whole body rating for claimant's right shoulder. (Ex. 5, p. 98)

On March 3, 2014 claimant was at Unity Point West for right shoulder pain. He exhibited a decrease range of motion and pain. (Ex. 9, p. 182) On April 7, 2014 claimant was seen for right shoulder pain. At that time he was taking over 25 ibuprofen a day. (Ex. 6, p. 113) Claimant was advised to restrict his work to a 30-pound lifting limitation. Another MRI was recommended. (Ex. 6, pp. 114, 118)

Mark Kirkland, D.O. performed an independent medical examination (IME) on May 8, 2014. He noted that he did not see the MRI of April 2013. (Ex. 10, p. 195) At the time of the examination claimant informed Dr. Kirkland that he had just become the general manager and his work was going to be less physical with occasional lifting. (Ex. 10, p. 193) His impression was,

> 1. Supraspinatus rotator cuff tear, right shoulder.
>
> 2. Acromioclavicular joint osteoarthritis.
>
> 3. Status post right shoulder arthroscopic subacromial decompression, arthroscopic excision of the distal clavicle, and arthroscopic rotator cuff repair.
>
> 4. Status post right shoulder arthroscopic capsular release and manipulation under anesthesia.
>
> 5. Internal rotation deficit.

(Ex. 10, p. 195) He recommended claimant receive additional physical therapy. Regarding restrictions, Dr. Kirkland stated,

> It is my opinion after evaluating Joseph and talking about what type of work he is doing now that there are no restrictions. However, if there are any difficulties or question in the future it may be wise to consider a functional capacity evaluation.

(Ex. 10, p. 195) While he stated claimant had reached MMI, Dr. Kirkland also stated additional treatment would improve claimant's range of motion. (Ex. 10, p. 195)

On March 30, 2015 claimant was seen at Mercy Adel for back pain. Claimant said that he had back pain since his surgeries, but it had gotten worse in the last three weeks. Claimant said that he had burning pain on the left that radiates down to the outside of the left thigh. (Ex. 6, p. 121) Claimant was prescribed some additional medication and adjusted his over-the-counter medication. (Ex. 6, p. 122) An x-ray of March 31, 2015 showed,

> Disc space narrowing due to degenerative disc disease is moderately advanced at L5-S1. There is also mild facet joint osteoarthritis at L4-L5 and L5-S1 bilaterally. No spondylolysis.

(Ex.6, p. 124) After reviewing x-rays claimant was put on lifting restrictions of lifting no more than 25 pounds. (Ex. 6, p. 127) On May 19, 2015 claimant was diagnosed with low back pain – chronic degeneration intervertebral disc, lumbar and lumbar radiculopathy. Claimant was provided gabapentin and referred to a spine program. (Ex. 6, p. 128)

Claimant returned to Dr. Fish on May 28, 2015. Claimant testified that he thought he was seeing Dr. Fish for his back. (Tr. p. 70) Dr. Fish assessed claimant's shoulder and noted claimant was having significant back issues. (Ex. 5, p. 100)

On June 11, 2015 Jeffrey Pederson, D.O. examined claimant due to claimant's low back pain with bilateral leg pain, left greater than the right. Claimant reported he had experienced back pain for the last 20 years, but over the last 3-4 months it was worse. (Ex. 12, p. 253) Claimant told Dr. Pederson that he wanted this problem treated outside of the workers' compensation system, as he felt it took forever to get his shoulder problems addressed. (Ex. 12, p. 254) Dr. Pederson ordered an MRI. The MRI showed,

> Presumed recurrent slightly downward directed central disc bulge is seen which definitely touches both S1 nerve root sleeves, but without any nerve root compression or displacement. Superimposed tiny left paracentral downward directed disc herniation is also noted, which also touches the medial aspect of the left S1 nerve root. Far lateral disc bulges mildly narrow the neural foramina on both sides. Very mild retrolisthesis of L5 on S1 is noted, related to ligamentous laxity and overall degenerative change. At the L4-L5 level, central disc bulge with annular tear is present, which minimally touches both traversing L5 nerve roots. At the L3-L4 level, mild diffuse disc bulging is seen accompanied by tiny endplate spurs, minimally contacting both traversing L4nerve roots, as well as very mildly narrowing the bilateral neural foramina. AT T11-T12, minimal diffuse disc bulging is seen.

(Ex.16, p. 286) On July 14, 2015 claimant received a lumbar epidural injection. (Ex. 13, p. 265) Claimant went to Mercy Neurosurgery on October 5, 2015. Claimant reported his back symptoms increased in April 2015. As there was no focal nerve root compression surgery was not offered. (Ex. 14, p. 271)

On December 7, 2015 claimant was seen by Mercy Adel due to his back pain. Claimant was requesting a referral to pain management. He reported he was now using a cane due to the pain and had not worked since September 21, 2015. (Ex. 6, p. 135) The assessment from that visit was,

1. Lumbar radiculopathy

2. Low back pain

- Chronic

3. Degeneration, intervertebral disc, lumbar

4. Chronic myofascial pain

5. Livedo reticularis

(Ex. 6, pp. 136, 137) (Diagnostic codes omitted) On that date Megan Sanders, PA-C wrote,

> Patient has lumbar DDD, lumbar radiculopathy, & chronic low back pain. These could be related to injuries obtained on the job & related to heavy lifting.

(Ex. 6, p. 138)

On February 5, 2016 Sunil Bansal, M.D. performed an IME at the claimant's request. Dr. Bansal opined that claimant suffered an acute and chronic injury to his right shoulder on February 14, 2013. He noted that claimant had an episode with his right shoulder in November 2012 that seemed to improve with treatment. (Ex. 16, p. 294) Dr. Bansal agreed with Dr. Fish that claimant was at MMI for the right shoulder on February 13, 2014. (Ex. 16, p. 295) Dr. Bansal assigned a 9 percent whole body impairment for this injury and recommended restrictions of lifting up to 30 pounds occasionally and 15 pounds frequently with the right arm and no lifting more than 5 pounds occasionally above shoulder and no frequent lifting above shoulder. (Ex. 16, p. 296)

Concerning claimant's back condition his diagnosis was, "Recurrent L5-S1 disc protrusion with history of laminectomy at that level." (Ex. 16, p. 297) In response to a question as to whether claimant's work at Swanson was the cause of his current back condition, Dr. Bansal wrote,

> Yes.
>
> It is my medical opinion that the repeated lifting of heavy windows and frames while working for Swanson Glass was a significant contributory factor towards the aggravation of his lumbar spondylosis, with recurrent disc protrusion at L5-S1.

(Ex. 16, p. 297) Dr. Bansal was of the opinion that claimant was not at MMI for his back condition. He wrote,

> In my opinion, Mr. Buehlmann has not yet had adequate treatment for his recurrent disc herniation at L5-S1. He is a candidate for surgical arthrodesis. If he opts not to undergo the procedure Mr. Buehlmann would benefit from additional medications, epidural injections or nerve

> ablation, physical therapy, a TENS unit, or other treatment as recommended by a pain specialist.

(Ex. 16, p. 300) He provided an 8 percent whole person impairment rating and recommended restrictions for his back of no lifting over 20 pounds occasionally, no frequent bending, squatting, climbing or twisting. Claimant was to sit and stand as tolerated and avoid sitting and standing more than 30 minutes, as well as limiting walking to 30 minutes. (Ex. 16, p. 300)

John Kuhnlein, D.O. issued an IME report on March 1, 2016. Claimant reported that he would lift over 100 pounds by himself and up to 300 pounds with the help of other employees. (Ex. E, p. 2) Claimant informed Dr. Kuhnlein that he started having serious problems with his back in April 2015 and that after his two previous back surgeries he would have back pain; however, he did not lose time from work or require light duty. (Ex. E, p. 6) Dr. Kuhnlein noted that for his pre-shoulder surgery physical in April 2013 claimant's back pain was identified as chronic and stable. (Ex. E, p. 7) Dr. Kuhnlein stated,

> The right shoulder injury was directly and causally related to the November 3, 2012 incident. All treatment for the right shoulder would be related to this incident. Mr. Buehlmann related that he developed adhesive capsulitis, which would be a sequelae to the original surgery, and so would also be related to the November 3, 2012 injury, as would the subsequent surgery.

(Ex. E, p. 15)

Regarding claimant's lower back complaints Dr. Kuhnlein wrote, "The low back pain complaints are more difficult to assess, in part because Mr. Buehlmann's statements have varied somewhat over time." (Ex. E, p. 15) Dr. Kuhnlein noted,

> The work he performed would be considered a lumbar stressor, as he was lifting within the heavy physical demand level, and at times the very heavy physical demand level, in awkward positions. However, even though the work would be considered a lumbar stressor, that does not automatically equate to the work causing an injury.

(Ex. E, p. 16) Dr. Kuhnlein commented that claimant said at times his work at Swanson was beneficial to his back pain and has worsened since he stopped working.

Dr. Kuhnlein was not able to state with a reasonable degree of medical certainty that it was more probable than not that claimant's chronic back pain was worsened by his work for Swanson. (Ex. E, p. 17) Dr. Kuhnlein recommended that claimant consistently perform the Thera-Band and wall walking exercises for his shoulder and that he be referred to the University of Iowa Chronic Pain Clinic for his back. He also recommended claimant change his intake of ibuprofen. (Ex. E, p. 17) He provided a

4 percent whole body impairment rating for the right shoulder and a 12 percent for the back condition. He did not combine the ratings, as he could not find that the back was work related. (Ex. E, p. 18) He recommended lifting restrictions of 40 pounds occasionally and 50 pounds occasionally waist to shoulder. (Ex. E, p. 19) I find that these are claimant's lifting restrictions.

Carma Mitchell, M.S. C.D.M.S., C.R.C. provided a vocational report on February 29, 2016. Utilizing the restrictions of Dr. Bansal, Ms. Mitchell stated that claimant would not be able to do his past work or transfer acquired skills. She opined that claimant needs to stand and walk as tolerated, which would not allow the claimant to be competitively employed. (Ex. 17, p. 308)

On March 6, 2016 James Carroll M.Ed., C.R.C. issued a vocational assessment at the request of defendants. He reviewed claimant's work and medical history. He noted that Dr. Fish and Dr. Kirkland determined that claimant had no restrictions for his shoulder and that Dr. Kuhnlein provided restrictions limiting claimant to do light to medium work. He concluded that claimant has not lost any access to the labor market nor did he have any loss of earning capacity. (Ex. D, p. 12) Pages 13 - 18 of Exhibit D were excluded for being untimely disclosed. Had it been admitted it would not have changed the arbitration decision[1].

Claimant has limitations and restriction due to his right shoulder injury. He was able to work without restriction after Dr. Fish released him to return to work.

Dr. Bansal and Dr. Kuhnlein have recommended restrictions due to his right shoulder injury. Claimant has been a working foreman and working manager while at Swanson so that he performed heavy lifting as part of his duties. Due to his shoulder conditions claimant's ability to do heavy and frequent heavy work has been compromised. I find that claimant has a 20 percent loss of earning capacity for his right shoulder injury.

Dr. Kuhnlein opined that claimant was not at MMI for his back injury. (Ex. E, p. 18) Dr. Bansal opined claimant was not at MMI for his back injury. (Ex. 16, p. 291) I find that claimant is not at MMI for his lower back injury, File No. 5054510.

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[1] The excluded exhibit pages contained a supplemental vocational evaluation. Mr. Carroll updated the vocational report after receiving the IME of Dr. Bansal and a vocational assessment of Carma Mitchell. When using the restrictions of Dr. Bansal for the shoulder and back he found a 57 percent loss of access to employment and 55 percent loss of earning capacity. (Ex..D, p. 18) Using only Dr. Bansal's restrictions for the shoulder, Mr. Carroll said claimant has not lost access to employment or had a loss of earning capacity. (Ex. D, p. 18) Given the heavy work claimant was performing, I find Mr. Carroll's conclusion that the shoulder lifting restrictions would not adversely impact claimant's employment not credible.

Claimant has requested payment of costs in the amount of $858.16 for the petition filing and service fees, deposition costs and vocational report for File No. 5047678 (d/o/i 11/3/2012) (Ex. 39. p. 571) Claimant has requested $7,171.89 for the IME and other medical expenses for all three files. (Ex. 40, p. 581)

File No. 5047678 (d/o/i 11/3/2012) defendants and claimant agreed the claimant's weekly rate is $641.94. (Ex. A, p.1; Claimant's brief attachment 1) I find that claimant's weekly rate for File No. 5047678 is $641.94.

For File No. 5047676 defendants assert the weekly rate is $572.24. (Ex. A, p. 6) Claimant asserts the weekly rate to be $591.73. (Claimant's brief attachment 1) For reasons set forth later in this decision no determination is made concerning the weekly rate for this file.

For File No. 5054510 (d/o/i June 26, 2015) defendants assert the weekly rate is $704.30 based upon an average weekly wage of $1,198.71. (Ex. A, p. 12) Defendants do not include the week of June 20, 2015 and use the week of February 28, 2015 in their calculation of average weekly wage. Defendants do not include the $600.00 vehicle allowance in the rate calculation. Claimant asserts a weekly rate of $743.10 based upon an average weekly wage of $1,327.29. (Claimant's brief, attachment 1) Claimant uses the week of June 20, 2015 and includes the vehicle allowance in his wage calculation for two months, $1,200.00. The record shows a $600.00 payment in June and August 2015. (Ex. 30, p. 462) I find that claimant's choice of weeks is correct in calculating claimant's average weekly wage. Claimant testified that he started receiving the travel allowance in June. (Tr. p. 49) Therefore, claimant's calculation improperly includes a travel allowance of $600.00 for May 2015. There is no written evidence of a May payment. I find the correct calculation is,

Total

$2,286.00

$2,412.00

$2,256.00

$2,154.00

$2,112.00

$0.00

$3,474.00

$2,688.00

Vehicle Allowance $600.00

Total $17,982.00

With a travel allowance payment of $600.00 claimant's total earnings for the relevant time is $17,982.00. His average weekly earnings are $1,284.42. Using the correct rate book for single with two exemptions, I find the claimant's weekly rate is $718.56 for this file.

RATIONALE AND CONCLUSIONS OF LAW

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.

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).

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about,

not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. The date of manifestation inherently is a fact based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

Defendants admitted claimant had a temporary injury to the right shoulder on November 3, 2012. They have disputed the extent of any temporary and permanent benefits for this injury. Claimant asserts an injury on this date as well.

I find that claimant has proven both a temporary and permanent injury to his right shoulder that arose out of and in the course of his employment with Swanson.

Dr. Kuhnlein found an injury to the right shoulder at that date. Dr. Bansal did as well, although attributed most of the right shoulder injury to the February 14, 2013 injury date. While not specifically stated, Dr. Kirkland appears to agree that clamant injured his right shoulder at work in November 2012. Dr. Fish also found a work-related injury. The claimant has met his burden of proof as to suffering a work-related injury on November 3, 2013.

Claimant's unrefuted testimony and the medical records show that claimant regularly lifted heavy weights at work. At times he lifted over 100 pounds. Claimant also worked over 40 hours a week for Swanson. Records show that for two-week pay periods he would sometimes put in over 100 hours. (Ex. 22, p. 368)

Dr. Kirkland noted that claimant had no restriction for the work he was performing at the time of his IME. At that time claimant had just become a manager and assumed that he would only have to do occasional lifting. Dr. Kirkland suggested that a functional capacity examination might be appropriate at some time. (Ex. 10, p. 195) He did note in his diagnoses/impression that claimant had internal rotation deficit. Dr. Kirkland did not comment about the medical care claimant received in March and April 2014 for his right shoulder in his IME. His finding that claimant was at MMI but also stating his condition would improve with additional treatment was somewhat contradictory. Given the fact that claimant was required to do more than occasional lifting, has deficits in internal rotation, and was experiencing pain in his shoulder during the IME I do not find Dr. Kirkland's opinion that he has no restrictions convincing.

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. Iowa Code section 85.34.

Claimant has been a glazier for a number of years and at the time of his shoulder injury was making a little over $20.00 per hour. I found that claimant has the lifting restriction as set forth by Dr. Kuhnlein. He does not have a college degree. He has worked for Swanson for a number of years before he was laid off in September 2015. He was working as a glazier after his release from Dr. Fish. He cannot perform all the work as he performed in the past due to his shoulder-related restrictions. Claimant was supervising other employees and eventually was made a manager. He is intelligent and was motivated to work. I found that he had a 20 percent loss of earning capacity.

Considering all of the industrial factors for claimant's right shoulder injury I find that claimant has a 20 percent industrial disability.

File No. 5047678 - shoulder 2/14/2013

Claimant has not proven a separate injury to his shoulder on February 14, 2013. I find the convincing medical evidence to be that he had an injury on November 3, 2012. While he had increased difficulties at work on February 14, 2013 including inability to hold onto tools there does not appear to be a separate injury. While Dr. Bansal found this to be a separate date of injury, the weight of the evidence, including Dr. Kuhnlein's opinions, does not support two right shoulder injuries. As such, no other rulings will be made for File No. 5047676, as claimant did not prevail and costs will be addressed in the other injury dates proven by claimant.

File No. 504510 – back injury 6/26/2015

Claimant has asserted a cumulative injury to his back with an injury date of June 26, 2015. Claimant had a preexisting back condition prior to his work at Swanson. He had two surgeries and was off work for a significant time in 1992 – 1994. Claimant received treatment for his back after 1994. He informed a number of medical providers prior to June 2015 that he had longstanding back pain. Dr. Kuhnlein was unable to state with a reasonable degree of medical certainty as to whether claimant's back condition was related to his work for Swanson. Dr. Kuhnlein noted in his IME that a pre-surgery report of April 2013 indicated claimant's back was chronic and stable.

The evidence shows that claimant was able to work at the heavy work level until April 2015. It was in April and May of 2015 that claimant's back started to adversely impact claimant's ability to perform work. I find Dr. Bansal's opinion most convincing on causation for this injury. The evidence shows that claimant was able to work for a long period of time doing very heavy work without symptoms that impeded his work. He did have back symptoms when working for Swanson, but it did not become significant for a work until April 2015. The record shows that in April and May of 2015 his radicular symptoms increased. The MRI of June 25, 2015 showed some nerve disk bulge that touched his nerve. I find that June 26, 2015 is the date of injury for claimant's cumulative trauma injury to his back. I find that the work at Swanson lighted-up and permanently aggravated claimant's pre-existing back condition.

Claimant's last day of performing work for Swanson was September 21, 2015. I find that claimant is entitled to temporary total disability benefits commencing September 22, 2015 and continuing until he meets one of the factors in Iowa Code 85.34(1) which would stop temporary total benefits. Claimant is entitled to a running award of temporary benefits.

As I have found that claimant's back injury arose out of and in the course of his employment with Swanson, claimant is entitled to medical care for this condition. Defendants shall provide medical care for the claimant.

Underpayment of temporary benefits

Defendants paid healing period benefits at the rate of $591.73 per week. (Ex. B, p. 1) As I have found that the correct weekly rate is $649.94 defendants have underpaid claimant healing period benefits for each week or portion thereof where healing periods were paid and the incorrect rate. Defendants shall pay claimant the balance owed for the underpayment to healing period benefits.

Rate Calculation for File No. 5054510

Iowa Code 85.61(3) provides,

> "Gross earnings" means recurring payments by employer to the employee for employment, before any authorized or lawfully required deduction or withholding of funds by the employer, excluding irregular bonuses, retroactive pay, overtime, penalty pay, reimbursement of expenses, expense allowances, and the employer's contribution for welfare benefits.

Section 85.61(3) clearly excludes reimbursement and expense allowances from the definition of gross earnings. Once a claimant has established a rate of earnings, the burden then shifts to the employer to establish the portion that represents reimbursement of expenses. McCarty v. Freymiller Trucking, Inc., File Nos. 729340 and 729341 (App. February 25, 1986).

For a payment to be a bona fide per diem or expense allowance, there must be some relationship between the amount of the allowance and the amount of the expenses for which it is purportedly related. Berst v. TTC, Inc., File No. 1053524 (Arb. August 3, 1994). See also. Premium Transp. Staffing, Inc. v. Bowers, 872 N.W.2d 199 (Iowa App. 2015). There was no evidence that the travel allowance was reimbursement for actual expense. There was no evidence to show that this allowance was tied to the amount of traveling claimant did or that his traveling significantly changed when he was made a manager and given a raise. The evidence fairly understood shows that this was a means to increase claimant's income and was not a specific expense allowance for actual expenses incurred by claimant. As such, it should be included in the calculation of claimant's average weekly wage.

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 the employee was 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 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 85.36(6).

I previously found the weeks claimant used in his calculations to be most representative of the correct weeks to use. I also found the claimant' weekly rate for File No. 5054510 is $718.56.

Claimant's entitlement to temporary partial disability benefits is governed by Iowa Code section 85.33(2). Such benefits are available for a loss of weekly earnings due to acceptance of suitable work consistent with claimant's disability following a work injury. I was unable to determine based upon the evidence the amount, if any, of temporary partial disability benefits. Claimant failed to meet his burden of proof on this issue.

As no permanency benefits are being awarded in this claim file, Iowa Code 85.34(7) is not yet applicable.

Penalty Benefits

The next issue is whether claimant is entitled to penalty benefits.

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).

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.

Claimant seeks penalty benefits for defendants failing to pay the proper rate. Although claimant has shown defendants failed to pay the correct rate, defendants were entitled to assert the vehicle allowance should not be included in the calculation of rate. Defendants' argument did not prevail, but it was not unreasonable to make the argument. Claimant's rate was fairly debatable and penalty benefits will not be awarded for underpayment of rate.

Claimant also seeks penalty benefits for defendants failing to pay an appropriate amount of industrial disability benefits while this case was pending. Based upon the release by Dr. Fish and opinions of Dr. Kirkland and Kuhnlein, I find defendants had reasonable cause not to pay benefits and no penalty award is made in any of these files.

Claimant seeks penalty for failure to investigate claimant's back injury.

Defendants are under a continuing duty to evaluate their actions at all stages of the claim proceedings after receiving more information. To avoid penalty, defendants must show that they re-evaluated the case promptly after they had reason to know that the initial denial was unreasonable. Rice v. Wilian Holding Const. Products, Inc., File No. 5005096, (App. March 7, 2008); Simonson v. Snap-On Tools, File No. 851960 (Remand Dec., August 25, 2003).

An employer has an affirmative duty to investigate the compensability of a claim, even in the absence of evidence by the claimant. Jenson v. Cummins Filtration-Lake Mills, File Nos. 5032401-5032402 (App. September 25, 2012).

Under the statute defendant has an affirmative duty to investigate a claim before denying a claim, even in the absence of a causation opinion by claimant. Iowa Code 86.13(4)(c)(1); Jenson v. Cummins Filtration-Lake Mills, File Nos. 5032401-5032402 (App. September 25, 2012). They also have an obligation to convey the basis of the denial at or about the time of the denial. Iowa Code 86.13(4)(c)(3). Based on the record, it does not appear defendant complied with either one of these obligations under the law. "Acting reasonably means having a factual basis for all adjusting decisions that are made. It is not possible to act reasonably without conducting a reasonable investigation to determine the facts. The investigation must address all pertinent factors of the claim." Kuntz v. Clear Lake Bakery, File No. 1283423 (Rehearing Decision, July 13, 2004).

In this case claimant provided clear notice that he was asserting a back injury as of August 21, 2015. (Ex. 24, 399) Defendants filed an answer to the claimant's petition on October 27, 2015 stating they were unable to admit or deny the back injury. Defendants did not request additional information from claimant until October 30, 2015. (Ex. L) Defendants stated on October 30, 2015 that they wanted a supplemental

deposition, additional records and IME to investigate the back injury claim. The IME took place on February 17, 2016 and the report issued on March 1, 2016. (Ex. E, p. 1) The defendants took from August 21, 2015 until March 1, 2016 to make their determination-over 27 weeks. Some delay in reaching a determination is entirely reasonable. Claimant had a prior history of back surgery and treatment after his surgeries. But, 27 weeks without providing a response is not reasonable. I find that the delay in informing the claimant after 15 weeks was not reasonable. I find that a penalty is required for the time between December 3, 2015 and March 1, 2016. I do not have a history of prior penalty being awarded against the defendants. I find that a penalty of $1,500.00 is appropriate under the facts of this case to encourage defendants to timely investigate claims in the future.

Costs

Claimant has requested payment of costs in the amount of $858.16 for the petition filing and service fees, deposition costs and vocational report for File No. 5047678 (d/o/i 11/3/2012). (Ex. 39. p. 571) Claimant has requested $7,171.89 for IME and other medical expenses for all three files. (Ex. 40, p. 581) I find these costs to be reasonable and allowable under Iowa Code sections 85.36., 85.27, 86.40 and 876 IAC 4.33. I award these costs to claimant.

ORDER

The parties are ordered to comply with all stipulations that have been accepted by this agency.

For File No. 5047678 – Date of injury November 3, 2012

Defendants shall pay claimant one hundred (100) weeks of permanent partial disability benefits at the rate of six hundred forty-one and 94/100 dollars ($641.94) per week commencing on January 16, 2014.

Defendants shall pay the claimant the underpayment of healing period benefits.

Defendants shall have a credit for the payments of temporary and permanent disability payments they have made.

For File No. 5047676 – Date of injury February 14, 2013

The claimant shall take nothing further.

For File No. 5054510 – Date of injury June 26, 2015

Defendants shall pay claimant temporary total disability benefits at the rate of seven hundred eighteen and 56/100 dollars ($718.56) per week commencing on September 22, 2015 and continuing until claimant has returned to work; claimant is medically capable of returning to substantially similar employment; or claimant has achieved maximum medical improvement.

Defendants shall pay claimant a penalty of one thousand five-hundred dollars ($1,500.00). Interest on penalty accrues from the date of this decision.

Defendants shall provide medical care for claimant's low back.

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

For File No. 5047678 – Date of injury November 3, 2012 and File No. 5054510 – Date of injury June 26, 2015

Defendants shall pay costs, medical expenses and IME expenses as set forth in the decision.

Defendants shall pay any past due amounts in a lump sum with interest.

Signed and filed this 30th day of December, 2016.

JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JFE/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.