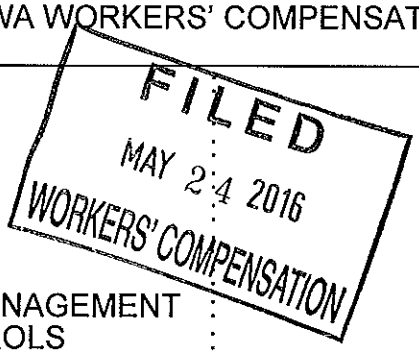
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



LLOYD SMITH,

Claimant,

vs.

EMERSON PROCESS MANAGEMENT LLP d/b/a FISHER CONTROLS INTERNATIONAL LLC,

Employer,

and

OLD REPUBLIC INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5049176

ARBITRATION

DECISION

Head Note Nos.: 1403.30; 1402.30; 1402.40; 1803; 2208; 2401

STATEMENT OF THE CASE

Claimant, Lloyd Smith, filed a petition in arbitration seeking workers' compensation benefits from Emerson Process Management LLP, d/b/a Fisher Controls International LLP, (Fisher), employer and Old Republic Insurance Company, insurer, both as defendants. This case was heard in Des Moines, Iowa, on January 4, 2016 with a final submission date of February 29, 2016.

At hearing, claimant objected to exhibit D, pages 8-9, as untimely served under rule 876 IAC 4.19(3)(d). Exhibit D pages 8-9, were excluded as untimely served and as being prejudicial. The parties stipulated to all other allegedly untimely served exhibits into the record. (Transcript pages 8-20)

The record consists of claimant's exhibits 1 through 10, defendants' exhibits A through F, and I through M, (excluding exhibit D, pages 8-9), and the testimony of claimant and Forrest Watts.

ISSUES

1. Whether claimant sustained an injury that arose out of and in the course of employment.

2. Whether the injury is a cause of permanent disability;

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

4. Whether claimant's claim is barred by the statute of limitations under Iowa Code section 85.23.

Claimant raised the issue of reimbursement of an IME and costs in his post hearing brief. (Claimant's post hearing brief, page 13) The issue of reimbursement for an IME, or costs were not raised as an issue in the hearing report or at hearing. (Tr. pp. 5-7) As a result, the reimbursement of the IME and costs are not discussed as issues to be determined in this decision.

FINDINGS OF FACT

Claimant was 65 years old at the time of the hearing. Claimant began working at Fisher at the age of 18, in 1969. He worked at Fisher until he retired at the age of 62 on November 30, 2012.

Claimant testified that when he began to work at Fisher, he did not believe he had any hearing loss.

Claimant testified he worked at Fisher in the assembly, machine shop, and paint areas of the plant. (Ex. 3, p. 60) Claimant testified he operated a bar machine shaping and bending metal rods. He said he operated a metal lathe. He said that he tested large valves using forced air pressure. Claimant said he also used a radial drill at Fisher that cut into metal. Claimant said the sound from the radial drill was directed mostly to his left ear. Claimant testified that all the areas he worked in were very loud.

Claimant testified the work environment at Fisher was very loud. He said conversation was difficult among coworkers. He said there were times that work areas were so loud that he had to move to reduce physical pain in his ears. Claimant said he believed he was exposed to high levels of noise most of his work life at Fisher.

Claimant testified that Fisher did not begin to make protective hearing mandatory until the late 1980's or early 1990's. He said prior to that time, Fisher made ear protection available, but not mandatory. Claimant said he used hearing protection provided by Fisher sporadically before his employer mandated use of hearing protection. Claimant testified he worked a few decades at Fisher where he wore no hearing protection. He said there were times when noise became very loud, even when using hearing protection.

Claimant testified that during the time he worked for Fisher, he worked on drag racing cars, drove tractors, and engaged in hunting. Claimant said he worked on drag racing cars for about seven years and used ear muffs at the track during that period of time. He said that this noise exposure to these sources was minimal when compared with the noise he experienced at Fisher. (Exhibit A, pages 2-36)

Audiometric reports from Fisher regarding claimant, indicates that beginning in 1978, claimant's hearing was tested yearly by Fisher. The audiometric reports indicate that claimant had an average hearing level of 28.75 decibels on the left beginning on

October 26, 1994. (15 + 15 + 40 + 45 ÷ 4) By October 31, 2012, claimant had an average hearing level of 37.5 decibels on the left. (25 + 25 + 55 + 45 ÷ 4) (Ex. A, p.1; Ex. 9) Claimant had an average hearing level of 20 decibels on the right when he left Fisher in 2012. (20 + 10 + 15 + 35 ÷ 4) (Ex. A, p. 1; Ex. 9)

In an August 14, 1989 letter, claimant was told that hearing protection was mandatory for him because he had a confirmed Standard Threshold Shift (STS). (Ex. A, p. 8)

Records from defendant indicate they alleged they first became aware of a claimed hearing loss accident on December 5, 2013. Claimant testified he was not aware of any notice given to defendants of a hearing loss claim before December 5, 2013. (Ex. K)

In a March 28, 2014 letter, Bruce Vircks, AuD., indicated that on October 21, 2012 claimant had an audiogram. On that day, claimant reported difficulty hearing and understanding speech in some environments, but did not report ringing in his ears. Mr. Vircks did not believe claimant's hearing impairment was primarily caused by noise exposure at Fisher. This was, in part, due to the asymmetrical hearing impairment claimant sustained. Mr. Vircks also believed claimant did not have hearing impairment caused by noise exposure at Fisher as claimant's threshold at 3000 hertz had been stable since November of 1988. (Ex. B, p. 4)

In an August 28, 2014 report, following interview and evaluation of documents, Richard Tyler, Ph.D., gave his opinions regarding claimant's hearing loss. Dr. Tyler noted hearing loss due to noise exposure has been found to be asymmetrical in factory operations. Dr. Tyler opined claimant's hearing loss and tinnitus was probably a result of his exposure to noise in his work at Fisher. He opined claimant had an 8.4 percent body as a whole permanent impairment due to tinnitus. (Ex. 1, pp. 1-17)

Claimant testified he retired in 2012 to care for his wife, who has Alzheimer's. Claimant testified his retirement was not due to his hearing loss or tinnitus. He testified he could have continued to work at Fisher even given his hearing loss and tinnitus.

In a December 12, 2014 letter, Bruce Plakke, Ph.D., gave his opinions regarding claimant's hearing loss. Dr. Plakke did not believe claimant's hearing loss was related to the noise at Fisher. This was, in part, because claimant's hearing loss progressed faster towards the end of his career at Fisher. He did not believe claimant sustained a work-related hearing loss while working at Fisher. He also indicated that since claimant used noise protection equipment during his final 20 years of his employment at Fisher, claimant's hearing loss was probably not due to the noise at the Fisher plant. (Ex. C, pp. 1-8)

Dr. Plakke testified in deposition, that he has given opinions primarily for defendants and insurance companies over the past 20 years as an expert in workers' compensation and hearing loss cases. He testified that in every single case, for

approximately 20 years, he has not found a compensable hearing loss or compensable tinnitus claim. (Ex. 7, pp. 128-129; Dep. pp. 40-45) Dr. Plakke also reiterated his opinions of claimant's hearing loss and tinnitus was not caused by noise at Fisher. (Ex. 7, pp. 120; Dep. p. 112)

In a September 10, 2015 letter, Dr. Tyler gave his opinions regarding Dr. Plakke's report. Dr. Tyler indicated research showed asymmetrical hearing loss can occur in a noise induced environment. Dr. Tyler also noted that claimant was not provided with hearing protection for the first 20 years he worked at Fisher, which in part, caused his hearing loss. Dr. Tyler noted in his review of Dr. Plakke's report did not change his opinion regarding the source of claimant's hearing loss. (Ex. 1, pp. 18-32)

In an October 16, 2015 letter, Mr. Vircks gave his opinion of Dr. Tyler's August 2014 report. Mr. Vircks indicated that due to the stability of hearing in claimant's left ear, the STS was not due to noise exposure at Fisher. Mr. Vircks could not say that Fisher's noise exposure did or did not contribute to some of claimant's hearing loss or tinnitus. He could not disagree with Dr. Tyler's 8.4 percent rating of claimant due to tinnitus. He also noted that on November 21, 2012, claimant showed significant high frequency loss and would benefit from hearing aids, possibly on both ears at the present. (Ex. B, p. 6)

In a November 18, 2015 letter, Robert Dobie, M.D., gave his opinions of claimant's hearing loss following a record review. Dr. Dobie is an otolaryngologist out of Texas. Dr. Dobie opined that claimant had an age-related hearing loss and tinnitus in his right ear. He opined claimant's left ear hearing loss and tinnitus was probably caused by aging and nonoccupational noise exposure. He opined claimant's left ear hearing loss was due to nonoccupational exposure, probably caused by shooting or operating tractors. Dr. Dobie noted that asymmetric hearing loss can occur in occupational noise exposure situations, but that losses are generally symmetrical. (Ex. D, pp. 1-7)

In a November 21, 2015 letter, written by defendants' counsel, Mr. Vircks indicated that while he examined claimant in November 2012, claimant did not complain of ringing noise in his ear. He believed claimant's hearing loss is probably not due to occupational hearing loss. He believed claimant's hearing loss was 3.6 percent. (Ex. B, pp. 7-8)

Claimant testified that since he left Fisher, he has difficulty hearing in crowds or at the movies. He said he has difficulty distinguishing conversation when multiple people are involved. He said that he has buzzing in his ears that makes sleep difficult.

Claimant said he never recognized tinnitus until after he retired from Fisher. He said that prior to meeting with Dr. Tyler, he thought his tinnitus was part of his hearing loss, and did not know it was a separate class of hearing loss injury. He said he first recognized he had a hearing loss when his wife said that the T.V. was too loud.

Forrest West testified that he works at Fisher as an industrial hygiene manager. Mr. West testified he is board certified as an industrial hygienist. Mr. West indicated he worked at the Fisher Marshalltown plant from 1991 through 2014. He said he believed Fisher's hearing protection program began in 1991. Mr. West testified he is not an audiologist.

Prior to working at Fisher, Mr. West worked for OSHA. Part of his job at OSHA, in 1984, was conducting a safety evaluation at the Marshalltown Fisher plant. It was Mr. West's recollection that the 1984 evaluation of the Fisher plant, that noise levels, at that time, were not overall dangerous to employees.

Mr. West testified that it was possible claimant could have been exposed to noise, prior to mandatory protection programs, that would have caused claimant's hearing loss.

CONCLUSIONS OF LAW

The first issue to be determined is did claimant have an injury that arose out of and in the course of his employment.

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 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).

Occupational hearing loss means that a portion of permanent sensorineural loss of hearing in one or both ears is in excess of 25 decibels, arises out of and in the course of employment and results from prolonged exposure to sound capable of producing hearing loss. Hearing loss attributable to age or any other exposures or conditions not arising out of and in the course of employment is not included in the occupational hearing loss. Iowa Code section 85B.4.

Claimant worked at Fisher for 43 years. There is little dispute that most of the time claimant worked in a loud noise environment. Records suggest that claimant was required to wear hearing protection from approximately 1989 due to a confirmed Standard Threshold Shift in claimant's hearing. (Ex. A, p. 8) The record indicates the claimant worked at Fisher, in a loud environment, for approximately 20 years where hearing protection was not required. Records indicate claimant had average hearing in the left of over 25 decibels beginning at least by 1994. (Ex. A, p. 1)

Claimant does have an occupational hearing loss on his left ear and tinnitus. Four experts opine the cause of his loss and tinnitus.

Dr. Plakke testified he has acted as an expert in hearing loss cases for approximately 20 years. He testified that, during that time, he has yet to find a compensable hearing loss or tinnitus claim. (Ex. 7, p. 45; Dep. pp. 40-45) Review of agency records indicates that Dr. Plakke has acted as an expert in hearing loss cases since approximately 1998. In several dozen cases where he has been an expert, consistent with his testimony, Dr. Plakke has opined that no claimant has had a compensable hearing loss or a tinnitus claim. (See Brown v. John Deere Waterloo Works, File No. 1134797 (Arb. December 31, 1998); Weisenberger v. John Deere Waterloo Works, File No. 1134061 (Arb. March 6, 2000); Brecount v. Shaeffer Corp., File No. 5014231 (Arb. February 28, 2007); Haizen v. Grain Processing Corp., File No. 5048836 (Arb. October 9, 2015)) Based on this record, Dr. Plakke's opinions regarding causation are found not convincing.

Mr. Vircks opined that claimant's hearing loss is probably not due to occupational noise exposure. He could not say that the noise exposure at Fisher did or did not contribute to some of claimant's hearing loss or tinnitus. (Ex. B, pp. 6-8) Mr. Vircks opinions are based, in part, in that claimant's hearing loss is mostly manifested on the left. He opined that an asymmetrical pattern of hearing impairment does not support a conclusion of hearing loss due to noise exposure. (Ex. B, p. 4)

However, Dr. Dobie, another expert for defendants, indicated asymmetrical loss can occur in occupational noise exposure. (Ex. D, p. 4) Dr. Tyler also indicated that research shows that asymmetrical hearing loss can be caused by occupational noise. (Ex. 1, pp. 4, 19)

As the record indicates that asymmetrical hearing loss can occur in an occupational environment, Mr. Vircks' opinion regarding causation is found not convincing.

Dr. Dobie also opined that claimant's hearing loss and tinnitus was not an occupational loss. He also opined that claimant's hearing loss on the left was related to right hand shooting. (Ex. D, p. 7) There is scant evidence that supports that claimant's hearing loss on the left was due to hunting. Dr. Dobie did not interview claimant, but did perform a records review.

Dr. Tyler opined that claimant's hearing loss and tinnitus was due to claimant's noise exposure at Fisher. Dr. Tyler interviewed claimant. Dr. Tyler reviewed claimant's medical records. Dr. Tyler also referred to numerous research sources regarding occupational hearing loss.

As noted, claimant worked at Fisher for 43 years in a noisy environment. For approximately 20 years, claimant worked without noise protection. Dr. Dobie's opinion, that claimant's hearing loss is probably due to hunting, or other sources outside of Fisher, is speculative at best. Dr. Tyler met with claimant and interviewed him. Dr. Tyler's causation opinion is more probable and more likely given claimant's 43 years of noise exposure at Fisher. Based on this, it is found the opinions of Dr. Tyler are found to be more convincing than those of Dr. Dobie regarding causation of tinnitus and hearing loss.

Claimant worked at Fisher for 43 years. For 20 years, claimant did not use noise protection. The opinions of Dr. Tyler are found to be more convincing than those of the other experts. Based on this, claimant has carried his burden of proof that his hearing loss and tinnitus injuries arose out of and in the course of employment.

The next issue to be determined is if claimant sustained a permanent disability regarding his tinnitus and hearing loss. Audiometric reports indicated that claimant has a significant loss of hearing on the left. Claimant's unrebutted testimony is he has difficulty with hearing conversations involving multiple parties and has difficulty hearing in crowds. The record suggests claimant may require hearing aids in both his right and

left ears. Dr. Tyler opined claimant has a permanent impairment. Based on this record, claimant has carried his burden of proof he sustained a permanent disability regarding his hearing loss and his tinnitus.

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

Occupational hearing loss alone is compensated as a percentage of 175 weeks by use of a formula set forth in Iowa Code section 85B.9. Tinnitus is compensated industrially as an injury to the body as a whole. Ehteshamfar v. UTA Engineered Systems, 555 N.W.2d 450 (Iowa 1996). A claim for hearing loss and tinnitus from the same long-term noise exposure have the same injury date and are one loss and one disability. Meier v. John Deere Dubuque Works, File No. 5002128 (App. July 22, 2004).

Dr. Tyler opines that according to tables found in 876 IAC 8.10, and the guidelines in chapter 85B, claimant has a 5.6 percent bilateral hearing loss. Dr. Tyler's calculation follows the process of 876 IAC 8.10 and is correct. (Ex. 1, pp. 14-15) For this reason claimant has proven entitlement to benefits under chapter 85B and is due 9.8 weeks of benefits for the occupational hearing loss alone.

However, as noted above, a claim for hearing loss and tinnitus are considered one loss and one disability, and are compensated, when combined, industrially.

Dr. Tyler opined claimant sustained a 8.4 percent impairment as a result of his tinnitus, by a methodology created by Dr. Tyler. Tinnitus is a stand-alone diagnosis. I find Dr. Tyler's attempt to quantify the permanent impairment resulting from this independent diagnosis useful in considering the extent of functional impairment caused by claimant's tinnitus. While Dr. Tyler's methodology is not in accordance with the AMA Guides, the undersigned notes that while our administrative rule 876 IAC 2.4 recognizes that the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, is a useful tool in evaluating disability, it is only a guide and its use is not binding on this agency. Bisenius v. Mercy Medical Center, File No. 5036055 (App. April 1, 2013). Medical professionals are free to issue opinions based upon their expertise, as was done by Dr. Tyler.

Claimant was 65 years old at the time of hearing. He has a GED. Claimant has spent his entire work life employed with Fisher. Claimant left Fisher to care for his wife. Claimant's unrebutted testimony is that he has difficulty hearing conversations when several people are involved. He has difficulty with noise and crowds. His unrebutted testimony is that he has continual buzzing in his ears which affects his ability to sleep. Claimant has an 8.4 percent permanent impairment to the body as a whole due to tinnitus. Claimant also has a 5.6 percent bilateral hearing loss. When all relevant factors are considered, it is found that claimant has a 10 percent loss of earning capacity or industrial disability due to his hearing loss and tinnitus. Dr. Tyler's report regarding permanent impairment is dated August 28, 2014. Permanent partial disability benefits shall commence on August 28, 2014.

The next issue to be determined is if claimant's claim for benefits is barred by application of Iowa Code section 85.23.

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).

Iowa Code section 85.23 requires an employee to give notice of the occurrence of an injury to the employer within 90 days from the date of the occurrence, unless the employer has actual knowledge of the occurrence of the injury.

The purpose of the 90-day notice or actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. The actual knowledge alternative to notice is met when the employer, as a reasonably conscientious manager, is alerted to the possibility of a potential compensation claim through information which makes the employer aware that the injury occurred and that it may be work related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

Failure to give notice is an affirmative defense which the employer must prove by a preponderance of the evidence. DeLong v. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940).

The 90-day limit for notice does not begin running until the employee, acting reasonably, should know his injuries are both serious and work connected. Robinson v. Department of Transp., 296 N.W.2d 809, 812 (1980). The statute of limitations also does not begin to run until the employee knows that the physical condition is serious enough to have a permanent adverse impact on his employment or employability. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001).

Disability is found to have manifested when an employee has knowledge of a permanent impairment of the injury, and the causal impact the injury would have upon a job. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148, 152 (Iowa 1997). The date of surgery has been used as a correct date of injury in other cumulative injury cases. Wetzell v. Packaging Corporation, File Nos. 5000444, 5000445 (App. 2003).

The burden rests on the employer to prove claimant did not provide the 90-day notice. Once the employer can show an affirmative defense under Iowa Code section 85.23, the burden shifts to the employee to show the discovery rule exception applies. IBP, Inc. v. Burress, 779 N.W.2d 210, 219 (Iowa 2010).

Regarding claimant's occupational hearing loss claim, the record indicates that claimant worked in a noisy environment at Fisher for approximately 43 years. Sometime in 1989, Fisher notified claimant that hearing protection was mandatory for him because he had a confirmed Standard Threshold Shift regarding his hearing. (Ex. A, p. 8)

In short, claimant's unrebutted testimony is that he worked in a noisy environment. Defendant Fisher, knew claimant was exposed to high levels of noise and required him to wear protective hearing equipment beginning in approximately 1989. The record indicates defendants were alerted to the possibility of a potential compensable claim long before claimant left employment with Fisher. Given this record, defendants have failed to carry their burden of proof under Iowa Code section 85.23 that claimant's occupational hearing loss claim is barred.

Regarding claimant's tinnitus claim, claimant's credible unrebutted testimony was that he did not know his tinnitus condition, was a separate and distinct claim, from the hearing loss condition, until he met with Dr. Tyler. The record indicates claimant first met with Dr. Tyler on August 4, 2014. (Ex. 1, p. 1) Defendants were aware of a hearing loss claim from claimant at least by December 5, 2013. (Ex. K, p. 5) Given this record, defendants have failed to carry their burden of proof that claimant's tinnitus claim is barred by application of Iowa Code section 85.23.

ORDER

THEREFORE IT IS ORDERED:

That defendants shall pay claimant fifty (50) weeks of permanent partial disability benefits at the rate of seven hundred fifty-eight and 76/100 dollars ($758.76) per week commencing on August 28, 2014.

That defendants shall pay accrued weekly benefits in a lump sum.

That defendants shall pay interest on unpaid weekly benefits as ordered above and as set forth in Iowa Code section 85.30.

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

That defendants shall pay claimant's filing fee costs.

Signed and filed this 24th day of May, 2016.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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.