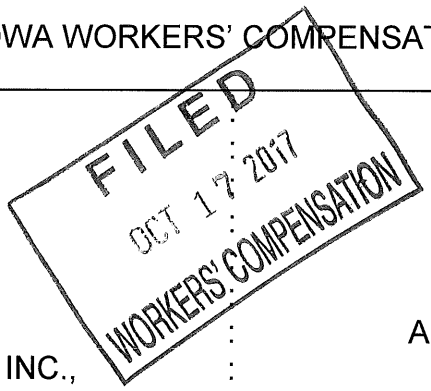
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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| ALFRED DRYE,<br><br>Claimant,<br><br>vs.<br><br>CRST VAN EXPEDITED, INC.,<br><br>Employer,<br><br>and<br><br>AIG CLAIM SERVICES,<br><br>Insurance Carrier,<br>Defendants. | File No. 5054960<br><br>A R B I T R A T I O N<br><br>D E C I S I O N<br><br>Head Note Nos.: 1108.20,<br>1402.40, 1802, 1803, 2907 |

## STATEMENT OF THE CASE

Alfred Drye, claimant, filed a petition for arbitration against CRST Van Expedited, Inc. (hereinafter referred to as "CRST"), as the employer and AIG Claim Services, as the insurance carrier. An in-person hearing occurred on February 13, 2017.

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

The evidentiary record includes claimant's exhibits 1 through 6 and defendants' exhibits A through O. All exhibits were admitted without objection. Claimant testified on his own behalf. No other witnesses were called to testify. The evidentiary record closed at the end of the February 13, 2017 hearing, but counsel requested an opportunity to file post-hearing briefs. The parties' request was granted and the parties filed post-hearing briefs on March 17, 2017, at which time the case was considered fully submitted.

## ISSUES

The parties submitted the following disputed issues for resolution:

1. Claimant's entitlement to healing period benefits, including a claim for a running healing period from February 2, 2015 through the date of the arbitration hearing.

2. If claimant's healing period has terminated, the extent of claimant's entitlement to permanent disability benefits and the proper commencement date for permanent disability benefits.

3. Whether costs should be assessed against either party.

## FINDINGS OF FACTS

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

At the time of hearing, Alfred Drye was a 27-year-old gentlemen. Mr. Drye resides in North Carolina. Mr. Drye graduated from high school in 2007 and attended some community college courses in 2012 or 2013 but did not receive a degree.

Claimant has worked since the age of 15. He began working at Burger King as a cook, working the customer register, and performing "closing" duties for the restaurant. He earned $8.75 at Burger King when he left its employment. Mr. Drye next worked at McDonald's in North Carolina, again as a cook and working as a cashier. He worked at McDonald's for approximately eight months on a part-time basis and earned $8.25 per hour.

Next, Mr. Drye began working for CC's Pizza as a cook and cleaning tables. He voluntarily quit this employment via a no-show/no-call because his work schedule was not conducive and consistent with his school schedule at the time.

Claimant also worked off and on over the years for his father in a lawn and landscaping business. In this position, claimant cut trees, performed stump removals, cut grass, trimmed hedges, and performed other typical landscaping type duties. Mr. Drye also performed customer service and bookkeeping duties for the company, as well as drawing up new landscape designs on a computer and providing estimates for the company's customers. Mr. Drye earned $11.00 per hour working for his father.

Mr. Drye has also worked for Smithfield Packaging, which is a meat processing facility. Clamant worked on the cut floor, performing meat cuts and packaging meat for shipping. He earned $650.00 to $800.00 per week in this job. He left Smithfield to pursue his position with CRST as an over-the-road truck driver.

Mr. Drye began working for CRST in January 2014. CRST brought claimant to Iowa to complete his CDL training and complete the hiring process. After being formally hired, claimant drove with a trainer for approximately four weeks before being released to drive with another partner. Once his training was completed, claimant estimated that he earned approximately $700.00 to $800.00 per week at CRST. His stipulated average gross weekly earnings at the time of the injury were $674.00. (Hearing Report)

On June 14, 2014, Mr. Drye was in his assigned truck. His co-driver was in the driver's seat when the crew encountered inclement weather. Mr. Drye was in the sleeper berth at the time. Mr. Drye testified that a tornado hit the semi in Kansas and caused Mr. Drye significant physical injuries.

Mr. Drye sustained a significant fracture of his right leg, which required an open reduction and internal fixation with a long leg cast for a period of time. Mr. Drye also complained of symptoms in his bilateral shoulders, right elbow, right knee, right foot, neck, and post-traumatic mental symptoms following the accident. After his initial surgery, claimant returned to North Carolina and care was transferred to an orthopaedic surgeon, David R. Allen, Jr., M.D. (Exhibit 1)

After appropriate orthopaedic care, most of Mr. Drye's physical symptoms resolved. Unfortunately, claimant's fractured right leg and both shoulders continued to cause claimant symptoms. Dr. Allen declared claimant to have achieved maximum medical improvement on March 31, 2015 for both shoulders as well as the right leg. Dr. Allen opined that claimant sustained a 30 percent permanent impairment of the right leg as well as 5 percent permanent impairment as a result of the right shoulder injury and an additional 5 percent impairment as a result of the left shoulder injury. Dr. Allen opined that claimant should have permanent restrictions that preclude lifting more than 75 pounds and preclude any running or jumping. (Ex. 1, p. 44)

Mr. Drye sought an independent medical evaluation, performed by Theron Q. Jameson, D.O. on May 14, 2016. Dr. Jameson identified no permanent impairment related to claimant's right elbow, ribs, low back, mid back, or right shoulder. Dr. Jameson opined that claimant sustained a 40 percent permanent impairment of the right lower extremity. Dr. Jameson also opined that claimant qualifies for a 9 percent whole person impairment as a result of his left shoulder injury. Dr. Jameson also opined that claimant sustained an 8 percent whole person impairment as a result of injury to his neck. (Ex. 5, p. 8) After converting and combining all of the impairment ratings, Dr. Jameson opined that Mr. Drye sustained 30 percent permanent impairment of the whole person for all of his physical injuries following the June 14, 2014 work accident. (Ex. 5, p. 9)

Dr. Jameson also recommended permanent restrictions for claimant's physical injuries. Specifically, Dr. Jameson recommended claimant not push, pull or lift greater than 40 pounds. He recommended against any running or jumping. Finally, he recommended against any work above chest height with claimant's left arm. (Ex. 5, p. 9)

Defendants also scheduled an independent medical evaluation, which was performed by Mark E. Brenner, M.D., on December 28, 2016. Like Dr. Jameson and Dr. Allen, Dr. Brenner is an orthopaedic surgeon. (Ex. C, pp. 1, 6) Dr. Brenner opined that claimant has a 30 percent permanent impairment of the right lower extremity as a result of his complicated fracture and resulting surgical procedure. Dr. Brenner also opined that claimant has a 5 percent permanent impairment related to his left shoulder. He believes that claimant is at maximum medical improvement and opines that claimant retains the capability to return to full-time employment as long as he does not require prolonged walking and can avoid squatting, stooping, kneeling, and crawling. He also opined that claimant will require the opportunity to occasionally sit if he is in a job that requires standing or sitting. Dr. Brenner also recommended avoidance of prolonged and sustained overhead work as a result of the left shoulder injury. (Ex. C, p. 2)

The orthopaedic surgeons are all relatively consistent with respect to the right leg fracture. I accept and rely upon the 30 percent permanent impairment ratings offered by Dr. Allen and Dr. Brenner as accurate with respect to the right leg. All three surgeons identified permanent impairment related to the left shoulder. I accept and rely upon the 5 percent permanent impairment ratings offered by Dr. Allen and Dr. Brenner with respect to the left shoulder.

Although Dr. Allen offered a permanent impairment rating related to the right shoulder, neither of the other two orthopaedic surgeons found permanent impairment in the right shoulder. Similarly, Dr. Jameson opined that claimant sustained permanent impairment related to the neck. Neither of the other two orthopaedic surgeons identified impairment of the neck. I do not accept the right shoulder impairment rating from Dr. Allen or the neck impairment rating from Dr. Jameson because those ratings were not corroborated and varied among evaluating orthopaedic surgeons. Claimant has not carried his burden of proof to establish permanent impairment or permanent disability involving the right shoulder or the neck.

With respect to claimant's physical injuries, I find that claimant has proven a 30 percent permanent impairment of the right leg and a 5 percent permanent impairment of the whole person as a result of the left shoulder injury. The 30 percent leg impairment converts to 12 percent of the whole person. See AMA Guides to the Evaluation of Permanent Impairment, 5th Edition, American Medical Association, Table 17-3, p. 527. The 5 percent impairment rating for the left shoulder and the 12 percent rating for the right leg combine to produce a permanent impairment rating of the whole person totaling 16 percent. See AMA Guides, Combined Values Chart, p. 604.

I accept the restrictions outlined by Dr. Brenner as reasonable and credible. Therefore, I find that claimant requires permanent restrictions that require him to avoid prolonged walking, avoidance of squatting, stooping, kneeling, or crawling, and that claimant will need to occasionally sit when working in a standing or walking position. In addition, I find that claimant cannot work on a prolonged and sustained basis overhead as a result of his left shoulder injury. (Ex. C, p. 2)

In addition to physical injuries, Mr. Drye asserts that he has sustained mental injuries as a result of the June 14, 2014 accident. Specifically, Mr. Drye asserts that he has sustained post-traumatic stress disorder (PTSD) and depression as a result of this traumatic incident. Defendants dispute this claim, but did schedule claimant to be evaluated by Richard C. Campbell, Ph.D. in February and March 2015. (Ex. 3)

Dr. Campbell administered psychological tests on claimant and identified that claimant demonstrated anxiety in the moderate to severe range. He identified mild depression. (Ex. 3, p. 2) However, Dr. Campbell's ultimate diagnosis was PTSD. (Ex. 3, p. 4) He recommended psychological treatment. (Ex. 3, pp. 2-3)

Dr. Campbell ultimately provided claimant the recommended psychological counseling. On July 20, 2015, Dr. Campbell declared Mr. Drye to be at maximum medical improvement for his psychological issues. Dr. Campbell opined that claimant was psychologically capable of returning to work, but would be restricted from commercial driving. (Ex. 3, p. 11) He opined that additional treatment could be pursued to get claimant back to a commercial driving job. Claimant declined further treatment in this regard.

Claimant sought an independent psychiatric evaluation performed by Mark Mittauer, M.D. on May 13, 2016. Dr. Mittauer diagnosed claimant with PTSD as well as major depressive disorder, single episode, moderate severity, without psychotic features. (Ex. 4, p. 9) Dr. Mittauer opined that claimant has difficulties with activities of daily living, social functioning, concentration, persistence and pace, and adaptation. Ultimately, utilizing the AMA Guides, Dr. Mittauer opines that claimant sustained 29 percent permanent impairment of the whole person as a result of his mental injuries. Dr. Mittauer also opined that claimant will have difficulties with the ability to attend work on a daily basis and will have difficulties interacting with supervisors and co-workers. (Ex. 4, p. 11)

Dr. Mittauer opined that claimant requires permanent restrictions from a psychiatric standpoint. Specifically, Dr. Mittauer recommended against any jobs that require claimant to drive a vehicle, that require intense concentration, or that require claimant to perform to precise standards. Dr. Mittauer recommended employment that avoids significant interpersonal interactions with coworkers, customers or supervisors and recommended a job in which claimant could take a break as needed if he experienced a panic attack. Finally, Dr. Mittauer recommended claimant avoid any jobs that require work at a rapid pace for sustained periods of time. (Ex. 4, p. 11)

Defendants also sought an independent psychological evaluation, which was performed by David R. Price, Ph.D. on October 1, 2015. Dr. Price administered a battery of psychological tests. Dr. Price noted that on at least two of the tests administered claimant provided invalid scores that suggested malingering. (Ex. D, p. 12) Dr. Price opined, "Mr. Drye performed in the exaggerated or Malingered range on all symptom validity measures administered to him by this examiner. Malingering would be a concern in this case." (Ex. D, p. 12) Ultimately, Dr. Price indicated, "[m]alingering

is a probability for Mr. Drye." (Ex. D, p. 13) Given his conclusion of malingering, Dr. Price declined to offer any formal permanent impairment rating related to claimant's alleged mental injuries. Similarly, Dr. Price opined that "there is no psychological need for any restrictions." (Ex. D, p. 16)

Dr. Price was specifically presented with the competing opinions of Dr. Mittauer and disagreed with those opinions. Although his evaluation occurred after Dr. Price, Dr. Mittauer was not aware of the test results obtained by Dr. Price. Dr. Mittauer admitted that he is not qualified to interpret the psychological testing performed by Dr. Price and did not directly disagree with the malingering interpretations and conclusions offered by Dr. Price as a result of his testing, though Dr. Mittauer indicated that he did consider and reject a diagnosis of malingering. (Ex. A, pp. 18, 20)

The nature of Mr. Drye's injury was quite traumatic and involved a stressful situation. It is possible that he sustained mental injuries, as he alleges. However, the history in the file varies at times as to a loss of consciousness or no loss of consciousness. Claimant's scores demonstrating malingering on Dr. Price's testing make his mental injury claim much less convincing. Claimant's asserted feeling of guilt that he has not returned to driving but denial of treatment to attempt to return to commercial driving do not instill a feeling of consistency or credibility.

Ultimately, considering the opinions of Dr. Campbell, Dr. Mittauer, and Dr. Price, I find the testing and opinions of Dr. Price to be most credible. Therefore, I find that claimant failed to prove by a preponderance of the evidence that he sustained a permanent mental injury as a result of the June 14, 2014 accident or that he has permanent impairment or requires permanent restrictions as a result of his alleged mental injuries. I will not consider claimant's alleged mental injuries, impairment or restrictions in rendering a permanent disability, or industrial disability, award in this case.

Both parties obtained and introduced opinions from vocational experts. Claimant obtained a vocational report from Al Walker. Mr. Walker reviewed the IME report from Dr. Jameson as well as the psychiatric IME report from Dr. Mittauer. He apparently reviewed interrogatory answers and claimant's deposition transcript. However, it does not appear that Mr. Walker possessed any competing medical evidence or any of the treatment records. (Ex. 6, p. 1)

Despite lacking all of the relevant information, Mr. Walker provides a relatively thorough analysis of claimant's background, injuries, and a reasonable analysis of claimant's current abilities to return to work and potential loss of future earnings and loss of future earning capacity. Ultimately, Mr. Walker opines that claimant sustained "a 74% reduction in his access to the labor market and a 29% to 47% loss of earning capacity." (Ex. 6, p. 10)

Defendants retained Tineta Wall as a vocational expert. Ms. Wall performed a labor market survey to identify potential employment options for claimant. Ms. Wall

does not identify the specific records reviewed in performance of her analysis. However, she refers to medical restrictions from Dr. Brenner.

Obviously, I have already found the restrictions outlined by Dr. Brenner to be reasonable and credible. Given that Ms. Wall specifically refers to these restrictions and given that Mr. Walker did not indicate any review of these records, Ms. Wall clearly considered the evidence I found to be most credible in rendering her opinions.

Ms. Wall identified additional educational opportunities for Mr. Drye. She identified potential job opportunities available within Mr. Drye's restrictions. Ultimately, it appears that Ms. Wall concludes claimant is employable. However, she does not offer any specific analysis of claimant's loss of earnings or earning capacity moving forward.

Both vocational reports are insightful in the sense that they offer opinions about claimant's employability into the future. Claimant appears to be employable, though he also appears to have lost some of his future earning capacity as a result of his right leg and left shoulder injuries.

Mr. Drye is a younger worker. He has significant work years remaining and retraining is a viable and potentially good option for him. He has significant injuries and requires permanent work restrictions, as outlined by Dr. Brenner. He has a relatively significant permanent impairment. His work history includes mainly physical labor-type positions. When I consider claimant's age, educational background, ability to retrain, his employment history, impairment, restrictions, the situs of his injuries, and all other factors of industrial disability outlined by the Iowa Supreme Court, I find that Mr. Drye has proven he sustained a 35 percent loss of future earning capacity.

The parties also disputed the proper conversion date for any permanent disability awarded. I find that Mr. Drye did not return to work between the asserted dates of healing period: February 2, 2015 and February 13, 2017. I find that Mr. Drye was not capable of returning to substantially similar employment as an over-the-road truck driver during this claimed period of time. However, I find that Mr. Drye achieved maximum medical improvement from his physical injuries on March 31, 2015. (Ex. 1, p. 44)

## CONCLUSIONS OF LAW

The parties stipulated that claimant sustained a work-related injury on June 14, 2014. The parties further stipulate that the injury caused temporary disability. However, defendants dispute whether claimant remains in a healing period. The parties stipulate that the June 14, 2014 work injury caused permanent disability and should be compensated industrially pursuant to Iowa Code section 85.34(2)(u). Defendants dispute whether claimant's alleged mental injury caused permanent disability or any ongoing healing period. (Hearing Report)

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).

In this case, I found that claimant failed to prove his alleged mental injury, including post-traumatic stress disorder, caused on ongoing healing period or caused permanent disability. Claimant bears the burden of proof to establish that the mental injury occurred, that it is causally related to the work injury, and that the alleged mental injury continues to cause temporary or permanent disability. I conclude that claimant failed to carry this burden of proof on the record established. Therefore, I conclude that claimant is not entitled to a running healing period as claimed, nor permanent disability benefits for the alleged mental injury.

Rather, I consider the admitted and obvious physical injuries that claimant sustained, including a right leg and left shoulder injury, as a result of the June 14, 2014 work injury in assessing claimant's entitlement to healing period and permanent disability.

Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

In this case, I found that Mr. Drye was off work and not capable of substantially similar employment due to his physical injuries during the claimed healing period from

February 2, 2015 through February 13, 2015. However, I found that Mr. Drye achieved maximum medical improvement from his physical injuries on March 31, 2015. Therefore, I conclude that the first factor outlined in Iowa Code section 85.34(1) is claimant's achievement of maximum medical improvement on March 31, 2015. Claimant is entitled to an award of healing period benefits from February 2, 2015 through March 31, 2015.

Permanent disability benefits commence upon the termination of healing period. Iowa Code section 85.34(1). Therefore, I conclude that the stipulated permanent disability benefits should commence on April 1, 2015.

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

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

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

Having considered claimant's physical injuries and all of the relevant industrial disability factors outlined by the Iowa Supreme Court, I found that claimant has proven a 35 percent loss of future earning capacity. This is equivalent to a 35 percent industrial disability and entitles claimant to an award of 175 weeks of permanent partial disability benefits. Iowa Code section 85.34(2)(u).

Claimant also seeks assessment of his costs. Costs are assessed at the discretion of the agency. Iowa Code section 85.40. Exercising the agency's discretion and recognizing that claimant has received an industrial disability award in this case, claimant's filing fee of $100.00 shall be assessed pursuant to 876 IAC 4.33(7). Claimant seeks assessment of the expense of service upon the employer and insurance carrier ($13.48). These costs are assessed pursuant to 876 IAC 4.33(3).

Claimant also seeks assessment of the expense of Dr. Mittauer's IME and his deposition transcript. In this instance, I did not rely upon Dr. Mittauer. I conclude that assessment of Dr. Mittauer's IME fee and/or deposition fee is not reasonable or appropriate under these circumstances.

Claimant also seeks assessment of his deposition transcript fee ($168.45). Defendants elected to place claimant's deposition transcript into evidence. (Ex. A) Therefore, I conclude that it is reasonable to assess the expense of claimant's deposition transcript pursuant to 876 IAC 4.33(2).

Finally, claimant seeks assessment of his vocational expert's assessment and report. Mr. Walker provided a thorough report that was helpful in analyzing claimant's industrial disability. I conclude that it is reasonable to assess the expense of writing Mr. Walker's report.

According to the invoice attached to the hearing report, Mr. Walker spent 2.7 hours writing his report at a rate of $45.00 per hour. Mr. Walker charged $121.50 to draft his report, which is a reasonable and appropriate charge. Therefore, I conclude that it is appropriate to assess Mr. Walker's charges for drafting his report ($121.50) pursuant to 876 IAC 4.33(6). In total, I assess costs against defendants totaling $403.43.

## ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant healing period benefits from February 2, 2015 through March 31, 2015.

Defendants shall pay claimant one hundred seventy-five (175) weeks of permanent partial disability benefits commencing on April 1, 2015.

All weekly benefits shall be paid at the stipulated weekly rate of four hundred fifteen and 43/100 dollars ($415.43).

Defendants shall pay all accrued weekly benefits in lump sum, along with applicable interest calculated pursuant to Iowa Code section 85.30.

Defendants shall be entitled to the credit stipulated to in the hearing report.

Defendants shall reimburse claimant's costs in the amount of four hundred three and 43/100 dollars ($403.43).

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 17th day of October, 2017.

WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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WHG/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.