BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RAFAELA L. ACEBEDO, Claimant, vs. HYVEE INC., HYVEE DISTRIBUTION, Employer, and EMC PROPERTY, Insurance Carrier, Defendants.	:	FILED JAN 03 2019 WORKERS' COMPENSATION File No. 5066051 A R B I T R A T I O N D E C I S I O N Head Notes: 1100, 1802, 2500, 3001

STATEMENT OF THE CASE

Rafaela Acebedo, claimant, filed a petition in arbitration seeking workers' compensation benefits from Hy-Vee Inc., Hy-Vee Distribution, the employer and EMC Property, the workers' compensation insurance carrier.

The matter proceeded to hearing on July 19, 2018. The hearing was interpreted by Frank Gonzalez. After an extension of time was granted at the request of the parties, post-hearing briefs were submitted on September 4, 2018, and the matter was considered fully submitted at that time.

The evidentiary record includes: Joint Exhibits JE1 through JE5; Claimant's exhibits 1 through 14; and, Defendants' Exhibits A through F. At hearing, claimant, Katie McKibben and Terry Graybill each provided testimony.

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.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether the stipulated injury that arose out of and in the course of claimant's employment on February 1, 2016, is limited to the accepted left knee or whether it includes the disputed left hip and low back.

2. Entitlement to temporary benefits from May 11, 2016 through present.

3. Rate – gross weekly earnings.

4. Reimbursement of medical expenses.

5. Reimbursement of IME expense, Iowa Code section 85.39.

6. Alternate medical care, Iowa Code section 85.27.

7. Penalty.

8. Costs.

FINDINGS OF FACT

After a review of the evidence presented, I find as follows:

At the time of the hearing claimant, Rafaela Acebedo, was 53 years old. (Tr. p. 13) She was born in Mexico. Her education in Mexico involved 6 years of elementary school, 3 years of secondary school and 3 years of "college." (Tr. pp. 14-15) She "studied to be a secretary" in school, however, her classes did not involve computer work. (Tr. pp. 15-16) Claimant also has a high school equivalency diploma. (Ex. 13, p. 3)

Employment History

Claimant worked in Mexico as a waitress. She understands the English language "[a] little bit." (Tr. p. 16) She believes that her limited English and her difficulties with her back and knee would prevent her from returning to waitressing in the United States. (Tr. p. 17)

Claimant moved to the United States in 1990. She moved to Storm Lake, Iowa in 1993. (Tr. pp. 17-18)

After arriving in Iowa, claimant started working for Bil-Mar, which later became known as Tyson, a turkey processing plant. She worked on the production line. (Tr. p. 18) Claimant was required to stand for long periods of time, grab, pull, and trim meat. She worked at a rapid pace and did this job for 17 years. (Tr. p. 19) She does not

believe she could return to this job due to her knee and hip condition. (Tr. p. 19) Claimant last worked for Tyson in 2010. (Tr. pp. 19-20)

After leaving Tyson, claimant stayed home for a few years with her small children. (Tr. p. 20)

In 2014, claimant was hired by defendant Hy-Vee Distribution Center, as a picker. She worked in the Repack Department. The job required claimant to use a manual forklift upon which she placed a pallet and various products. (Tr. p. 21) She had to stand/walk, bend, twist, reach, and maneuver product and the manual fork lift. (Tr. pp. 21-23) Claimant testified that she was required to walk many miles per shift to do her job. (Tr. p. 23)

Claimant last worked for the defendant employer on May 10, 2016. (Ex. A, p. 14)

Claimant requested family medical leave absence (FMLA) beginning on May 11, 2016 to take care of her mother who broke her leg, clearly unrelated to claimant's work injury. (Tr. pp. 28, 29) She also wanted to take care of her father in Texas who had eye surgery. Claimant was in Texas from May 15, 2016 through May 30, 2016. (Tr. pp. 35-36)

Claimant's FMLA request was denied and she was to return to work on May 22, 2016. (Ex. A, p. 6) The employer advised that the denial was based on incomplete information in the application, specifically, the leave duration was to be for one month after her mother's surgery, which had occurred on March 22, 2016. Therefore, the leave would expire on April 21, 2016. The application was denied because the one month period of time for which her mother would require care after her surgery, had expired prior to the time claimant requested to be off work, and no additional information was provided. On May 13, 2016, more than one month after her mother's surgery, the leave request was denied. (Ex. A, p. 8; Ex. 7, p. 1) Claimant was informed by letter that she was to return to work by May 22, 2016. (Ex. 6, p. 14) Two letters were sent to claimant's home advising her to return to work by May 22, 2016, one in English and one in Spanish. (Ex. A, pp. 6-7) The letters were sent certified mail, return receipt requested and were received and signed for by claimant's husband, Jose Acebedo. Claimant returned from Texas on May 30, 2016. (Tr. pp. 37-38) No one in claimant's family advised her while she was in Texas that the letters had arrived. Claimant was documented by the employer as no-call/no-show on May 22, 23, and 24, 2016. She was terminated as a result of three days of no-call/no-show. (Ex. A, pp. 12-14)

An employee who is terminated for no-call/no-show is not immediately eligible for rehire. (Tr. p. 96)

Claimant has not worked anywhere since her termination.

The Injury

Around February 2016, claimant reported knee pain to her employer. (Tr. pp. 23-24) The left knee injury was accepted by the employer, the left hip and low back claims have been denied.

Pre-Injury Medical Treatment

On August 6, 2015, claimant was seen at Unity Point Health/Storm Lake Family Health Center, with complaints of back and leg pain. (Ex. B, p. 1) At that time, she reported left heel pain for 5 months and a prior injection, along with back pain on the left side that hurt after standing at work for two hours. (Ex. B, p. 2) Claimant was previously diagnosed with diabetes. (Ex. B, p. 8)

Post-Injury Medical Treatment

After claimant reported her knee pain to her employer in February, 2016, she was sent by the employer to Timothy Rice, D.O., on April 15, 2016, with complaints of knee pain off and on for the past two months. (Ex. JE1, p. 1) Claimant reported that her left knee caused her "to leave work last night because she could not walk on it." (Id.) On May 4, 2016, she also reported that her difficulty with walking was "making her lower back hurt." (Ex. JE1, p. 8) Claimant was placed on restricted work duty from April 15, 2016 through May 16, 2016. (Ex. A, p. 5) Claimant returned to restricted duty work, but as stated above, she was terminated from her employment on May 10, 2016.

Dr. Rice diagnosed a medial meniscus and medial collateral ligament sprain of the left knee. (Ex. JE1, p. 10) He prescribed physical therapy and requested an MRI of the left knee. (Ex. JE1, pp. 3, 13)

On July 11, 2016, claimant had an MRI of her left knee, which showed a "complex multidirectional tear anterior horn medial meniscus with associated mild medial extrusion of the medial meniscal body," along with a "grade 1 MCL strain," osteoarthritic changes, a moderate popliteal cyst and "moderate joint effusion with evidence of nonspecific mild diffuse synovitis." (Ex. JE1, p. 16)

On September 7, 2016, claimant was sent to Seth Harrer, M.D. (Ex. JE2, p. 1) Dr. Harrer diagnosed a left medial meniscal tear and osteoarthritis. He injected claimant's left knee and prescribed physical therapy. (Ex. JE2, p. 2) Dr. Harrer returned claimant to work with no restrictions. (Ex. JE2, p. 4)

Dr. Harrer opined that claimant's injury caused an aggravation of her pre-existing osteoarthritis condition in her knee, based on her lack of symptoms prior to her injury and the persistence of those symptoms post-injury. (Ex. JE2, p. 9) However, he could not say whether the meniscal tear in her knee was a result of the work injury. (Ex. JE2, p. 5)

On October 27, 2016, claimant was seen at Buena Vista Regional Medical Center Rehab Services, wherein Dr. Harrer is noted to be the referring physician. Claimant was seen for pain in her low back, left leg and tingling in her left foot. (Ex. JE3, p. 1) On November 1, 2016, claimant reported continued significant pain "from back to hip." (Ex. JE3, p. 3)

On June 6, 2017, Dr. Harrer recommended total knee arthroplasty to address the ongoing knee pain. (Id.)

On June 21, 2017, claimant underwent total left knee arthroplasty with Dr. Harrer. (Ex. JE3, p. 5) Claimant stated that the pain in her back started after her knee replacement surgery. (Tr. p. 25) However, as stated above, claimant had actually reported back pain as early as May 4, 2016. (Ex. JE1, p. 8)

On June 28, 2017, about one week post-surgery, Dr. Harrer noted claimant was "doing really well." (Ex. JE2, p. 10) She was prescribed physical therapy. (Ex. JE2, pp. 10, 11) Following surgery, claimant was taken off work. (Ex. JE2, p. 12) She received home health therapy from June 28, 2017 through July 24, 2017. (Ex. JE4, p. 1)

Claimant had 68 physical therapy appointments between July 26, 2017 and January 12, 2018, with only one cancellation or no-show during that time. (Ex. JE4, p. 38) On August 16, 2017, the therapist noted that claimant had obvious swelling in her left lower extremity in the knee and lower leg, and her left lower extremity was longer than her right lower extremity "from umbilicus to distal tip of medial malleolus: R = 81.5cm, L = 82.2cm." At the conclusion of her therapy, she was deemed to have met maximal therapeutic benefits. (Ex. JE4, p. 3)

On August 9, 2017, she was noted to have a "very mild antalgic gait." (Ex. JE2, p. 13) However, Dr. Harrer stated that he believed claimant had "some issues with motivation to get that knee moving," but, there was no explanation as to what evidence Dr. Harrer relied on to reach this conclusion, and I therefore give it little weight. (Id.)

By September 6, 2017, claimant was noted to be "really struggling with her left total knee" replacement. (Ex. JE2, p. 16) She continued to have intermittent pain and had weakness and atrophy in her left quadriceps. She was instructed to push herself to improve strength and mobility. (Id.)

On October 17, 2017, claimant was returned to sedentary work only. (Ex. JE2, p. 19)

On December 6, 2017, her restrictions were increased to working up to 2 hours on her feet. (Ex. JE2, p. 24) By March, 2018, Dr. Harrer stated the claimant was walking with a non-antalgic gait, and her symptoms occurred only "every week or 2." (Ex. JE2, p. 25) However, Dr. Harrer did not specifically lift the prior restrictions and he stated that "it can take up to a year for this to fully settle in." (Id.)

On March 14, 2018, claimant was assigned restrictions by Dr. Harrer of limited kneeling, squatting and climbing. (Ex. JE2, p. 26)

On April 2, 2018, claimant was seen at the Storm Lake Family Health Clinic with complaints of pain in her low back, thoracic region, left neck and left side. (Ex. B, p. 39) She described the symptoms being present for about two weeks. "She states her lawyer told her to come in to get some physical therapy. She was not at work when this started and denies doing anything at home before this occurred." (Id.) She was doing physical therapy following her knee replacement and she "wanted to do some for her back and was told she could not." (Id.)

On April 11, 2018, claimant was seen by Robin Sassman, M.D., at the request of claimant's counsel for the purpose of an independent medical evaluation (IME). (Ex. 2, p. 1) Claimant reported pain in her left knee with a popping sensation and pain in her back radiating into her left leg and tingling in her left foot. (Ex. 2, p. 7) She stated that her symptoms were getting worse. (Ex. 2, p. 8) Claimant had "a slight limp," although she exhibited full range of motion in her left knee. (Ex. 2, pp. 8-9) Dr. Sassman diagnosed claimant with: left knee pain and meniscus tear status post left knee arthroplasty; and, low back pain with radicular symptoms. (Ex. 2, p. 9) She recommended an MRI of the lumbar spine and evaluation and possible treatment with a pain management specialist. (Id.) Dr. Sassman opined that claimant was not yet at maximum medical improvement (MMI) until her recommended care occurred. However, if the care was not delivered she would identify MMI as of June 20, 2018, one year post-surgery. (Ex. 2, p. 10)

Dr. Sassman opined that claimant's knee pain was work related and that her "gait change that came about due to her knee pain aggravated her low back." (Ex. 2, p. 9)

Concerning permanent impairment of the left knee, Dr. Sassman relied upon Table 17-35 on page 549 of the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition, (AMA Guides) to arrive at her opinion that claimant sustained 20 percent impairment to the whole person concerning her total knee arthroplasty and placement in the "fair results" category in Table 17-33 of the AMA Guides. Twenty percent to the whole person would be 50 percent to the lower extremity per Table 17-33. Placement in the "fair results" category requires an accumulation of 50 to 84 points from Table 17-35. (Ex. 2, p. 10) Points are assigned based on: pain; range of motion; stability; flexion contracture; extension lag; and, alignment. Dr. Sassman stated that she assigned 57 points, but did not discuss how she determined what point values to assign or on what basis they were assigned. Her stated opinion is conclusory and she did not discuss the categories for which points were assigned. In short, there is only a limited explanation of how Dr. Sassman arrived at the total knee arthroplasty impairment rating she assigned.

Regarding impairment of the lumbar spine, Dr. Sassman opined that claimant sustained 5 percent impairment of the whole person, based on section 15.2, page 379 of the AMA Guides under the DRE method. Dr. Sassman placed claimant in category

II, based on Table 15-3, due to non-verifiable radicular complaints on examination. (Ex. 2, p. 10)

Dr. Sassman combined the two impairment ratings using the Combined Values Chart in the AMA Guides and arrived at a total permanent impairment of 24 percent of the whole person. (Ex. 2, p. 10)

However, as stated above, Dr. Sassman does not believe claimant has reached MMI. (Ex. 2, p. 10)

Dr. Sassman assigned permanent restrictions of occasionally lifting, pushing, pulling or carrying 10 pounds from floor to waist; 20 pounds waist to shoulder; and 10 pounds above shoulder height. No kneeling, squatting, crawling or using ladders. Occasional walking and standing, and rarely use stairs. (Id.) Dr. Sassman does not discuss how she arrived at these restrictions or how they correlate to any clinical findings or claimant's complaints or symptoms.

On July 5, 2018, Dr. Harrer wrote a letter to "Whom it May Concern" and stated that physical therapy for claimant's low back is recommended secondary to her altered gait, which is "likely secondary to her knee injury." (Ex. 3, p. 2) Dr. Harrer believed that, "this can be resolved utilizing physical therapy without other significant interventions." (Ex. 3, p. 2) I find that Dr. Harrer has stated that he believes claimant can have significant improvement of her back condition, which he believes is likely caused by the knee injury. Therefore, it is highly unlikely that Dr. Harrer would place claimant at MMI for her back condition. In this respect, I find that Dr. Sassman and Dr. Harrer agree that claimant has not yet reached MMI concerning this alleged injury.

On April 2, 2018, claimant was seen at Storm Lake Family Health Center by Joan Nilles, M.D. who diagnosed claimant with chronic thoracic back pain, neck pain, and chronic low back pain without sciatica. (Ex. B, p. 38) the "[s]ymptoms have been present for 2 weeks," with "no initial inciting event; none, she states she just woke up with it about 2 weeks ago." (Ex. B, p. 39) Dr. Niles stated that because her complaints are "relatively recent as compared to the knee surgery I do not think they are related." (Ex. B, p. 43) However, as stated above, claimant complained of back pain within weeks of her initial treatment with Dr. Rice. I give the causal opinion of Dr. Nilles little weight.

On June 6, 2018, claimant reported some continuing knee pain, but also she described pain in her "back that goes down the posterior aspect of the thigh down the backside and into the foot." (Ex. JE2, p. 28) Dr. Harrer stated that "I do believe underlying this is more a back issue than anything going on with her knee." (Id.) Claimant was returned to work with reduced restrictions of being on her feet up to 2 to 4 hours per day. (Ex. JE2, p. 29) Again, Dr. Harrer gives no indication that claimant has reached MMI.

Claimant was returned to physical therapy on June 20, 2018, to address range of motion and improving her strength in her left knee. (Ex. JE5, p. 2) On June 29, 2018, claimant was noted to be very apprehensive to treatment and required frequent rest breaks. (Ex. JE5, p. 9)

Additional Findings

Following the injury, claimant was initially returned to work with restrictions, which were accommodated by the employer. She was terminated on May 10, 2016. She was later released to return to work on September 7, 2016. (Ex. 2, p. 4) However, claimant later had total knee replacement in June, 2017. On October 17, 2017, she was released to return to sedentary work only. (Ex. JE2, p. 19) On December 6, 2017, her restrictions were increased to working up to 2 hours on her feet. (Ex. JE2, p. 24)

Claimant was working with restrictions when she applied for FMLA leave.

Claimant admitted that before she left on FMLA leave, she never actually received permission from her employer. (Tr. p. 34) However, she testified that "the secretary told me don't worry. Go ahead and go. Hy-Vee never denies FMLA Act leave." (Tr. p. 35) The secretary was Saira Flores. (Id.)

Saira Flores, was no longer employed by the defendant at the time of her deposition. She stated that she previously worked for the defendant in Human Resources as a translator and she was involved in processing FMLA and short-term disability requests. I find her work as a translator would likely overcome any potential language barrier between Ms. Flores and claimant. Mr. Flores specifically testified that she did not recall ever telling claimant that her FMLA leave would be approved, and stated that she, in fact, did not tell claimant that she could leave for Texas because her FMLA was approved. (Ex. E, pp. 2, 7)

Claimant and Ms. Flores present different renditions of their conversation concerning claimant's FMLA leave request. Weighing the witnesses testimony, I find that Ms. Flores, who is no longer an employee of defendant had no interest in the outcome of this matter and I accept Ms. Flores' testimony as more reliable.

Claimant's last day of work was May 10, 2016.

Claimant did not seek FMLA leave based on the advice of any medical provider concerning her own work injury. I find that the reason claimant sought FMLA leave was to take care of her mother. She later also desired to take care of her father, which caused her to travel to Texas. Claimant did not timely provide appropriate information to her employer for the approval of the requested leave and she was terminated for reasons unrelated to her workers' compensation injury for repeated no-call/no-show.

Claimant was performing accommodated work through May 10, 2016 and was physically able to continue performing such work. (Tr. p. 51)

Claimant has not worked since she was terminated by the defendant employer in May, 2016. Neither did she take any classes in English or return to school. (Tr. pp. 61-63)

Terry Graybill, the Warehouse Director at the facility where claimant was employed, testified that claimant could have remained employed by the defendant, if she had not been terminated for reasons unrelated to her work injury. (Tr. p. 117) He also testified that failure to call or show up for work three days in a row results in termination and is strictly enforced. (Id.)

CONCLUSIONS OF LAW

1. The first issue for determination is whether the stipulated injury that arose out of and in the course of claimant's employment on February 1, 2016, includes the left hip and low back.

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 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 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).

When an expert opinion is based upon an incomplete history, the opinion is not necessarily binding upon the commissioner. The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence, together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavey v. Economy Fire & Casualty Co., 526 N.W.2d 845 (Iowa 1995).

In this case claimant complained on May 4, 2016 to Dr. Harrer that her knee caused her pain when she walked, which made her low back hurt. (Ex. JE1, p. 8) This complaint came within weeks of her initial visit with Dr. Harrer. Claimant continued to complain about back pain at various points during her treatment. (Ex. JE3, pp. 1-4) Claimant also testified that her back pain increased after her knee surgery in June, 2016. (Tr. p. 25)

Claimant's physical therapist measured her legs in August, 2017, after her knee replacement surgery, and found that post-surgery, her left leg was shorter than her right leg. (Ex. JE4, p. 3)

Dr. Sassman opined that claimant's "gait change that came about due to her knee pain aggravated her low back." (Ex. 2, p. 9)

The authorized treating physician, Dr. Harrer, stated on July 5, 2018, while discussing the recommended physical therapy for claimant's low back that her altered gait was "likely secondary to her knee injury." (Ex. 3, p. 2)

Defendants relied upon the opinion of Dr. Nilles, who stated on March 9, 2018, concerning claimant's neck, thoracic and low back pain, that because her complaints are "relatively recent as compared to the knee surgery I do not think they are related." (Ex. B, p. 43) Dr. Nilles was apparently unaware of claimant's prior complaints of back pain within weeks of first seeing Dr. Harrer. Dr. Nilles is claimant's primary care physician who treated her for diabetes, and does not specialize in orthopedics or occupational medicine.

I conclude that the opinion of the treating orthopedic physician, Dr. Harrer, is the most persuasive, which is supported by the opinion of Dr. Sassman concerning causation of the low back condition. I find that claimant's low back condition is more likely than not caused from claimant's altered gait due to her stipulated knee injury.

2. The second issue for determination is claimant's entitlement to temporary benefits and extent thereof.

Healing period benefits are payable to an employee who has sustained a permanent partial disability

> beginning on the first day of disability after the injury, and until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the

> employment in which the employee was engaged at the time of injury, whichever occurs first.

Iowa Code section 85.34(1)

In the case at bar, claimant continued to work following the injury and therefore, "returned to work" under the above statute. (Id.)

Claimant was terminated from her employment and defendants agree that claimant was off work from May 11, 2016 through the present time. (Hearing Report, p. 1)

Defendants assert that claimant refused to accept suitable light duty work beginning on May 11, 2016, which was consistent with her disability and she is therefore precluded from receiving temporary total or healing period benefits under Iowa Code section 85.33(3). The statute provides in pertinent part:

> If an employee is temporarily, partially disabled and the employer for whom the employee was working at the time of injury offers to the employee suitable work consistent with the employee's disability the employee shall accept the suitable work, and be compensated with temporary partial benefits. If the employee refuses to accept the suitable work with the same employer, the employee shall not be compensated with temporary partial, temporary total, or healing period benefits during the period of the refusal.

The Iowa Supreme Court held there is a two-part test to determine eligibility under section 85.33(3): "(1) whether the employee was offered suitable work, (2) which the employee refused. If so, benefits cannot be awarded, as provided in section 85.33(3)." Schutjer v. Algona Manor Care Center, 780 N.W.2d 549, 559 (Iowa 2010). "If the employer fails to offer suitable work, the employee will not be disqualified from receiving benefits regardless of the employee's motive for refusing the unsuitable work." Neal v. Annett Holdings, Inc., 814 N.W.2d 512 (Iowa 2012). The burden of proof to show a refusal of suitable work is on the employer. Koehler v. American Color Graphics, File No. 1248489, (App. February 25, 2005).

The Commissioner has also considered section 85.33(3) and applied the Supreme Court precedent as follows:

> The court has opined that an employer's acceptance of an employee's voluntary quit from suitable employment is a rejection of suitable work on that date and any future date. Schutjer v. Algona Manor Care Center, 780 N.W.2d 549, 559 (Iowa 2010). The court does not identify any mechanism for curing a refusal of a voluntary quit as ordered within the arbitration decision. Under the court's holding it can only be possible for claimant to receive temporary disability benefits if she

> undergoes further treatment and is removed from all employment for a period of healing. Once restricted duty is allowed, such healing period would end. In summation, the employer is not required to make work available to cure the workers' prior voluntary rejection of suitable work.

Carillo v. Sam's Club, File No. 5028491 (Appeal July 13, 2011).

In this case, the claimant returned to modified work after her injury. She last worked for the defendant employer on May 10, 2016. (Ex. A, p. 14) Prior to May 10, 2016, claimant had been working in a modified capacity based on her restrictions. (Ex. A, pp. 1-5) She applied for FMLA leave beginning on May 11, 2016, for reasons unrelated to her work injury, which was reasonably denied by the employer. However, claimant stopped coming to work based on her hope that the FMLA leave would be granted, and testified as follows:

> Q. Okay. Did you ever receive permission to go on Family Medical Leave Act before you went on leave?
>
> A. No.

(Tr. p. 34) Therefore, I consider whether or not claimant's leaving work and not returning under the hope that her FMLA leave would be granted is a "voluntary quit" as described in Schutjer v. Algona Manor Care Center, 780 N.W.2d 549, 559 (Iowa 2010).

I note that claimant testified she was told by Saira Flores that she should go on leave, because Hy-Vee never refuses FMLA leave requests. However, Saira Flores, who had no apparent reason to be dishonest or slant her testimony against claimant as a former employee of the defendant, stated that she did not tell claimant that her FMLA leave would be approved or that claimant could leave for Texas because her FMLA was approved. (Ex. E, pp. 2, 7) I have found Ms. Flores' testimony to be more reliable.

Further, claimant had been performing modified work offered by the employer, which was suitable as demonstrated by claimant's ability to carry out the work within her restrictions. Claimant's failure to provide appropriate information to the employer resulted in the employer's reasonable denial of FMLA leave and subsequent request that claimant return to work. The employer's communication effort of sending two certified letters in English and Spanish to her home, which were received by her husband, to inform claimant that she needed to return to work on May 22, 2016 was also reasonable. Claimant's failure to return to work and her status as a "no call/no show" for three consecutive days would lead any employer to reasonably terminate her employment.

I conclude that the employer offered suitable work, which claimant had initially accepted. She had been performing the modified work through May 10, 2016. Claimant's action of leaving work without having first secured FMLA leave approval was her voluntary act. She accepted the risk that her leave may not be approved. I have no

doubt that claimant had genuine concern for the wellbeing of her mother and father, but her decision to leave work remained her voluntary act and was a voluntary quit as described in Schutjer.

I conclude that under the Schutjer case, claimant is not entitled to temporary benefits beginning on May 11, 2016.

As stated in Carillo v. Sam's Club, File No. 5028491 (Appeal July 13, 2011), the court in Schutjer does not identify any mechanism for curing a refusal of a voluntary quit. Under the court's holding it can only be possible for claimant to receive temporary disability benefits if she undergoes further treatment and is removed from all employment for a period of healing, which would terminate upon placement on restricted duty.

Claimant underwent total knee replacement on June 20, 2017. Claimant was discharged from the hospital on June 23, 2017 with the use of a walker and on June 30, 2017, Dr. Harrer instructed claimant to remain off work. (Ex. 2, p. 5) Claimant was again continued off work on August 3, 2017 and September 6, 2017. (Ex. JE2, p. 12; Ex. 2, p. 6) Claimant remained off work on the instruction of Dr. Harrer until October 17, 2017, when claimant was returned to sedentary work only. (Ex. JE2, p. 19) Defendants asserted in correspondence to claimant's counsel that claimant was returned to work with restrictions on October 4, 2017, but the medical evidence provided, does not support this conclusion. (Ex. 11, p. 5; Ex. JE2, p. 19)

I conclude under Carillo v. Sam's Club, File No. 5028491 (Appeal July 13, 2011) and Schutjer, that claimant is entitled to healing period benefits beginning on June 20, 2017, the date of her surgery through October 17, 2017, when she was returned to work on restricted duty, which is 17 weeks.

It appears that defendants paid claimant temporary total disability benefits from the date of surgery on June 20, 2017 to October 4, 2017. (Ex. 11, pp. 3, 5)

I further note that at the time of the hearing, claimant remained under work restrictions from Dr. Harrer, which limited her to working on her feet only 2 to 4 hours per day. (Ex. JE2, p. 29) This restriction would prevent claimant from returning to the type of work that she was doing at the time of the work injury, and claimant has not yet returned to work or reached MMI based on the opinions of Dr. Harrer and Dr. Sassman. Therefore, claimant remains in a healing period at this time, but her entitlement to healing period benefits is limited to June 20, 2017, the time of the surgery, to October 17, 2017, when she was returned to work with restrictions.

3. The next issue is determination of rate.

Iowa Code section 85.36 sets forth the basis for determining an injured employee's compensation or rate. Mercy Med. Ctr. v. Healy, 801 N.W.2d 865, 870 (Iowa Ct. App. 2011). The statute expressly provides the determination is made using

the last thirteen consecutive calendar weeks immediately preceding the injury. Iowa Code § 85.36(6). Under the statute,

> The basis of compensation shall be the weekly earnings of the injured employee at the time of the injury. Weekly earnings means gross salary, wages, or earnings of an employee to which such employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured, as regularly required by the employee's employer for the work or employment for which the employee was employed, computed or determined as follows and then rounded to the nearest dollar:
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> * * * *
>
> 6. In the case of an employee who is paid on a daily or hourly basis, or by the output of the employee, the weekly earnings shall be computed by dividing by thirteen the earnings, including shift differential pay but not including overtime or premium pay, of the employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury. If the employee was absent from employment for reasons personal to the employee during part of the thirteen calendar weeks preceding the injury, the employee's weekly earnings shall be the amount the employee would have earned had the employee worked when work was available to other employees of the employer in a similar occupation. A week which does not fairly reflect the employee's customary earnings shall be replaced by the closest previous week with earnings that fairly represent the employee's customary earnings.

The statute defines "gross earnings" as "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," and "pay period" as "that period of employment for which the employer customarily or regularly makes payments to employees for work performed or services rendered." Id. § 85.61(3), (5).

Since claimant suffers a loss at a lower benefit rate, it is the claimant's burden to prove that the winter premium was part of the customary and regular payments. In the recent declaratory ruling by the Commissioner, irregular bonuses that are dependent on variables such as the overall profitability of a company are improper to include in a rate calculation. John Deere Des Moines Works, July 12, 2017 (Iowa Workers' Comp. Comm'r, Declaratory Order).

In this case, the dispute between the parties concerning the rate calculation is based on the calculation of claimant's gross earnings. Claimant has asserted gross

earnings of $706.51 and defendants have asserted gross earnings of $656.16. (Hearing Report, p. 1) This discrepancy is solely based on the inclusion or exclusion of "additional payments" beyond the agreed upon weekly wage and quarterly bonuses. (Ex. 14, p. 1; Ex. F, p. 1)

Claimant testified that she did not necessarily recall receiving payment from her employer beyond her hourly wage and quarterly bonuses. (Tr. pp. 44)

Katie McKinnen, testified that she formerly worked for the defendant employer in human resources. (Tr. p. 87) She stated that she was familiar with the wage log marked as Claimant's Exhibit 14, pages 2 and 3, but that the lack of column headings on the document made it more difficult to decipher. (Tr. pp. 100, 102) Ms. McKinnen stated that employees were eligible for "refer a friend" programs and/or holiday pay or holiday incentives. (Tr. p. 100) However, she also stated that she could not say for sure what the additional amounts represented in the wage log. (Tr. p. 102) I likewise agree that the clarity of the evidence is lacking, and I am unable to conclude that claimant established that the additional payments that claimant apparently received should be properly included in the determination of gross earnings as defined in Iowa Code section 85.61(3), because the nature of the additional payments is not clear.

I conclude that defendants' assessment of claimant's gross earnings is more reliable and I further adopt defendants' rate calculation of $449.70. (Ex. F, p. 1)

4. Reimbursement of medical expenses.

The next issue for determination is whether claimant is entitled to payment of medical expenses contained in Claimant's Exhibit 1.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 16, 1975).

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 Rule of Appellate Procedure 6.14(6).

Claimant requests payment of physical therapy treatment with Marion Gasner, PT. (Cl. Post-Hearing Brief, p. 16) In her brief, claimant refers the undersigned to Exhibit 1, page 1 and Exhibit JE5. Exhibit JE5 contains records from Select Physical Therapy, (Marion Gasner, PT) with dates of service beginning with the first appointment on June 20, 2018. Exhibit 1, page 1 is a bill for services provided on April 3, 2018 and

April 5, 2018. The dates do not correlate to the records in Exhibit JE5, and the bill provides insufficient detail to identify the part of the body involved, the referring physician or the cause of the need for the treatment.

In addition, I note that claimant testified that she was sent to physical therapy by her family physician, Dr. Nilles. (Tr. p. 27) The records indicate that Dr. Nilles recommended physical therapy for claimant's back and neck complaints. (Ex. B, p. 43) The neck is not part of this claim. The bill does not distinguish between services that may have been provided for claimant's neck and services related to her back.

Claimant has failed to establish the relationship between the services provided in Exhibit 1 and the work injury. Claimant has failed to carry her burden of proof and is not entitled to reimbursement of the requested medical expenses in Claimant's Exhibit 1.

Claimant's request for medical reimbursement is denied.

5. Reimbursement of IME expense, Iowa Code section 85.39.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

The Supreme Court has stated that:

> Even though we have not applied Iowa Code section 85.39 to review-reopening petitions, the industrial commissioner has. In Sheriff v. Intercity Express, 34 Iowa Indus. Comm'r Repts. 302 (Oct. 1978), the employee sought reimbursement for a section 85.39 medical evaluation during his second review-reopening proceeding. The employee asserted that the prior evaluation, which the new medical evaluation challenged, was the physician's report during the first review-reopening proceeding. Sheriff, 34 Iowa Indus. Comm'r Rpts. at 303. In denying the claim for reimbursement, the commissioner stated
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> > Claimant's subsequent attempt to obtain an examination pursuant to § 85.39 is either an attempt to get evidence of an

> evaluation of disability greater than that awarded by the deputy in the first review-reopening proceeding or an attempt to get evidence of a change in condition at the employer's expense. It is neither contemplated nor proper that § 85.39 be used for these purposes.
>
> Id. Although we do not defer to the commissioner's interpretation of the workers' compensation statute, Larson Mfg. Co. v. Thorson, 763 N.W.2d 842, 850 (Iowa 2009), we find the commissioner's reasoning persuasive here.
>
> We agree with the commissioner and the district court that Iowa Code section 85.39 does not expose the employer to liability for reimbursement of the cost of a medical evaluation unless the employer has obtained a rating in the same proceeding with which the claimant disagrees. In 2002, Kohlhaas entered into a settlement agreement establishing his disability. Three years later, he seeks reimbursement for a medical evaluation not to rebut a new impairment rating obtained by the employer in the review-reopening proceeding, but rather to cast doubt on an impairment rating obtained by the employer before the agreement for settlement was reached. If Kohlhaas wanted to challenge Dr. Crane's evaluation at his employer's expense, he should have done so in the original proceeding establishing his disability in 2002, not during the review-reopening proceeding three years later. The review-reopening proceeding in this case is a new and distinct proceeding apart from the original arbitration action, as the claimant had a burden to prove something different than he proved at the arbitration hearing. *See* Iowa Code § 86.14(2). As the employer did not obtain a new evaluation of Kohlhaas' disability in connection with the review-reopening proceeding, Kohlhaas is not entitled to reimbursement for expenses associated with Dr. Kuhnlein's medical evaluation under section 85.39. (Emphasis added.)

Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 394-395 (Iowa 2010).

In the present case claimant appears to concede in her post-hearing brief that there was not a prior opinion from an employer retained physician assessing permanent impairment that claimant was dissatisfied with justifying the request for reimbursement.

There is no evidence the undersigned is aware of that an employer retained physician offered an opinion of claimant's permanent impairment prior to Dr. Sassman's IME.

I conclude that claimant has failed to carry her burden of proof that an employer retained physician opined as to claimant's permanent impairment, which is a condition precedent to reimbursement under Iowa Code section 85.39.

Therefore, claimant's request for reimbursement of Dr. Sassman's IME under Iowa Code section 85.39 is denied.

6. Alternate Medical Care, Iowa Code section 85.27.

Under Iowa law, the employer is required to provide care to an injured employee and is permitted to choose the care. Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433 (Iowa 1997).

> [T]he employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

By challenging the employer's choice of treatment – and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See Iowa R. App. P. 14(f)(5); Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). Determining what care is reasonable under the statute is a question of fact. Id. The employer's obligation turns on the question of reasonable necessity, not desirability. Id.; Harned v. Farmland Foods, Inc., 331 N.W.2d 98 (Iowa 1983). In Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433 (Iowa 1997), the court approvingly quoted Bowles v. Los Lunas Schools, 109 N.M. 100, 781 P.2d 1178 (App. 1989):

> [T]he words "reasonable" and "adequate" appear to describe the same standard.
>
> [The New Mexico rule] requires the employer to provide a certain standard of care and excuses the employer from any obligation to provide other services only if that standard is met. We construe the terms "reasonable" and "adequate" as describing care that is both appropriate to the injury and sufficient to bring the worker to maximum recovery.

The commissioner is justified in ordering alternate care when employer-authorized care has not been effective and evidence shows that such care is "inferior or less extensive" care than other available care requested by the employee. Long; 528 N.W.2d at 124; Pirelli-Armstrong Tire Co.; 562 N.W.2d at 437.

In the case at bar, claimant seeks additional care in the form of the treatment recommended by Dr. Sassman of an MRI of the lumbar spine and evaluation with a

pain management physician. (Ex. 2, p. 9) Claimant also seeks continuation of physical therapy.

At this time, defendants have denied the back injury, which I have concluded above is causally related to the work injury.

Defendants are not currently providing any authorized medical care for the back condition as required under Iowa Code section 85.27. Therefore, I conclude that the lack of authorized treatment is unreasonable given claimant's continued symptomology and agree that the care recommended by Dr. Sassman is reasonable.

Defendants shall authorize appropriate medical care for claimant's back injury, including but not limited to, the care recommended by Dr. Sassman of a lumbar MRI and evaluation and possible treatment with a physician specializing in pain management. Additional care, including physical therapy, is left to the discretion of the authorized treating provider whom defendants shall promptly identify.

7. Penalty.

Iowa Code section 86.13(4) provides that:

(a) If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, of chapter 85, 84A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed or terminated without reasonable or probable cause or excuse.

(b) The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:

(1) The employee has demonstrated a denial, delay in payment, or termination of benefits.

(2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

(c) In order to be considered a reasonable or probable cause or excuse under paragraph "b", an excuse shall satisfy all the following criteria:

(1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.

(2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.

(3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of 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. Weekly compensation payments are due at the end of the compensation week. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229, 235 (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 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 commission must impose a penalty in an amount up to fifty percent of the amount unreasonably delayed or denied. Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996).

In this case I have concluded that claimant is entitled to healing period benefits from June 20, 2017 through October 17, 2017, which is a total of 17 weeks.

The parties have stipulated that claimant has been paid a total of 59.4286 weeks of temporary benefits, including temporary partial disability. It is unclear to the undersigned what periods of time prior to hearing were covered by the previously paid benefits. (Hearing Report, p. 2) However, it appears that defendants paid temporary benefits following claimant's total knee replacement surgery until claimant was assigned restrictions that Hy-Vee could have accommodated. (Ex. 11, p. 3) It appears that those temporary total benefits were paid from June 20, 2017 through October 4, 2017, at which time they were switched to temporary partial disability. (Ex. 11, p. 5)

However, I note that the letter advising claimant of the switch to temporary partial disability was dated November 28, 2017, about 7 weeks after October 4, 2017, which adds to the confusion. Therefore, it is unclear to the undersigned when the temporary total benefits actually were paid and then stopped being paid. Also, I note that the medical documents in evidence indicate a return to work on October 17, 2017 with restrictions, not October 4, 2017, which supports my determination above that claimant's entitlement to temporary total disability continued to October 17, 2017.

I am unable to conclude from the evidence provided whether claimant did or did not receive weekly temporary total disability benefits for the final two-week period of temporary total disability from October 4, 2017 to October 17, 2017. Therefore, being unable to determine if the weeks remain owing, and given the parties' stipulation that claimant was paid over 59 weeks of benefits prior to the hearing, which is more than the 17 weeks of temporary benefits owed, I cannot conclude that penalty benefits are appropriate because I am unable to determine that they have been delayed or denied.

Claimant's claim for penalty benefits is denied.

8. Costs.

The final issue is costs. Assessment of costs is a discretionary function of this agency. Iowa Code section 86.40. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case. 876 IAC 4.33. I exercise my discretion and assess costs against the defendants in this matter.

Claimant is awarded costs of $100.00 for the filing fee in this matter and $1,428.50 for the cost of obtaining Dr. Sassman's report as allowed by Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015).

ORDER

IT IS THEREFORE ORDERED:

Defendants shall pay claimant temporary total disability benefits for the period of June 20, 2017 to October 17, 2017, less a credit for temporary benefits paid to claimant prior to the hearing.

Claimant remains in a healing period having not returned to work after her total knee replacement, not being medically capable of returning to similar work in which she was engaged at the time of the work injury, and not attaining MMI. However, her eligibility for healing period benefits stopped on October 17, 2017. She may become eligible for additional healing period in the future if she undergoes further treatment and is removed from all employment for an additional period of healing.

All weekly benefits shall be paid at the rate of four hundred forty nine and 70/100 dollars ($449.70) per week.

Defendants shall pay accrued weekly benefits, if any, in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits, if any, accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent, See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

Defendants shall provide alternate medical care and authorize an appropriate medical provider for claimant's back injury, including but not limited to, the care recommended by Dr. Sassman of a lumbar MRI and evaluation and possible treatment with a physician specializing in pain management.

Defendants shall pay costs of one thousand five hundred twenty-eight and 50/100 dollars ($1,528.50) as set forth above.

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 3rd day of January, 2019.

TOBY J. GORDON
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.