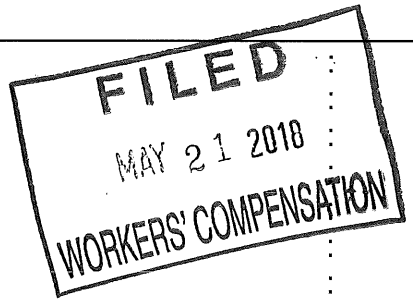
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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| TIFFANY NASH, | : | File No. 5058143 |
| Claimant, | : | ARBITRATION |
| vs. | : | DECISION |
| POLK COUNTY, IOWA, | : | |
| Employer, Defendant. | : | Head Notes: 1108.50, 1402.20, 1402.30, 2907 |

## STATEMENT OF THE CASE

Tiffany Nash, claimant, filed a petition in arbitration seeking workers' compensation benefits from Polk County, Iowa, self-insured employer as defendant. Hearing was held on March 12, 2018 in Des Moines, Iowa.

Claimant, Tiffany Nash, was the only witness to testify live at trial. The evidentiary record also includes joint exhibits JE1-JE10, claimant's exhibits 1-2, and defendant's exhibits A-I.

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 parties submitted post-hearing briefs on April 9, 2018.

## ISSUES

The parties submitted the following issues for resolution:

1. Whether claimant sustained an injury on March 2, 2015 which arose out of and in the course of employment.

2. Whether the alleged injury was the cause of permanent disability? If so, the extent of industrial disability claimant sustained.

3. Whether the alleged injury is the cause of any temporary benefits?

4. The appropriate commencement date for permanent partial disability benefits.

5. The number of exemptions claimant is entitled to claim for purposes of calculating weekly workers' compensation benefits.

6. Whether claimant is entitled to payment of past medical expenses?

7. Whether claimant is entitled to an IME under Iowa Code section 85.39?

8. Whether defendant is entitled to a credit under 85.38(2)?

9. Assessment of costs.

## FINDINGS OF FACT

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

Claimant, Tiffany Nash (hereinafter "Nash" or "claimant") alleges she sustained a work injury to her back on March 2, 2015. Defendant denies that Nash sustained a compensable injury.

Nash was employed as a detention officer for Polk County, Iowa (hereinafter "Polk County" or "defendant employer"). Nash has alleged an injury date of March 2, 2015. She alleged she injured her back and left leg during defensive tactics training. This is annual training to help the officers defend themselves against inmates. Nash is not able to point to an exact maneuver or event during the training that she believes caused her injury. She testified that during the training they worked on the star technique for restraint, strikes, and pressure points. She described the training as very physical. At the end of the training, employees are asked if they sustained an injury during the training. At the end of the training Nash denied any injury. (Testimony)

Nash did have a history of back pain prior to the alleged injury. There are medical treatment records from September 2011 which demonstrate she had low back pain that radiated to her right and left thighs. She also sought treatment for her low back in 2013 with a medical provider and a chiropractor. (JE1, pp. 1-6)

Additionally, Nash had been treating at Hassel Chiropractic for quite some time before the alleged injury. She reported a four-wheeler accident that aggravated her chronic neck and back pain in July of 2012. She also reported lower back and leg pain. Her lower back locked up when she bent over in the shower. In February of 2013 she reported lower back pain radiating to her legs. In September of 2013, she sought chiropractic treatment for her low back pain. (JE3, pp. 1-14)

In October of 2013, Nash was seen at Mercy Johnston Clinic for low back pain which had been present for a week. The pain radiated down her legs. In December of 2013, she sought additional treatment from Mercy for low back and tailbone pain. At that time, she reported she was working two jobs for a total of 16 hours per day. In January of 2015, she sought additional chiropractic treatment for her low and mid back

pain, as well as for her neck pain. In February of 2015, she sought additional treatment for her low back pain which she rated as 8/10. She also reported constant sharp, aching, shooting and throbbing discomfort in her buttocks which she rated as 9/10. (JE1, pp. 3-5; JE3, pp. 8-21)

At the arbitration hearing Nash testified that the pain began in her left leg the day after the March 2, 2015 training. Initially, Nash thought she was just sore. However, the pain was still there a week later, and her back also bothered her. She decided to seek treatment at a walk-in clinic. (Testimony)

The first treatment Nash sought after the March 2, 2015, alleged date of injury was on March 14, 2015 at Merle Hay Family Medicine. The clinical notes indicate she was there for low back pain, including what she believed was tailbone pain. She reported that she had the pain for the past 4 months. The notes state, "[s]he has not had any injury, no fall. The pain has been present for 4 months. She went to her chiropractor who told her that her hips were uneven and this is causing her low back pain." (JE2, p. 1) Notably, Nash had not seen a chiropractor since before the March 2, 2015 alleged injury. The notes do not mention any leg pain. The assessment was lumbar strain. She was prescribed Naproxen and Cyclobenzaprine. She was advised to follow up with her primary care physician. (JE2, pp. 1-2)

On March 16, 2015, Nash was seen at Hassel Family Chiropractic clinic. There is no mention of the work incident in the records. It should be noted that there are treatment notes in evidence from Hassel dating back to 2012. (JE3) It should also be noted that counsel for defendant deposed Vince Hassel, D.C. in December of 2017. (Ex. H)

On March 23, 2015, Nash was seen at Mercy Johnston Medical Clinic by Barbara Heck, ARNP. Nash reported a three-week history of left leg pain that started at her upper thigh and went down through her calf. She reported that she worked three jobs and was on her feet a lot. There is no mention of any injury sustained during defensive tactics training. She reported low back pain in her history. The assessment was left leg pain and lower back pain. (JE1, pp. 7-8)

Nash reported the alleged injury to her employer on March 24, 2015. She sent an email to the employer. She stated that she noticed some pain in her left leg after the March 2nd DT training. However, she did not think much of it because she had not used those muscles in a while and thought the pain would go away. After about one and a half weeks of pain Nash decided to seek treatment. Nash stated she was not sure if this all stemmed from the DT training, but she stated her pain was not there before the training. Nash completed an injury report for her employer indicating that her left leg was sore. (Ex. C & D)

The Mercy Johnston Medical Clinic notes dated March 27, 2015 state that Nash had a disc herniation at L5-S1 that was causing her left leg pain. Nash was referred for pain management. Again, there is no mention of a work injury. (JE1, pp. 10-11)

On April 27, 2015, Nash was seen at the emergency department of Mercy West Lakes. This is the first time that a clinical note contains a history of performing tactical maneuvers at work. She also reported working a second job. She was only taking three of the four medications that had been prescribed to her. She reported that each day her pain was worse, she could no longer stand, and at times her legs were numb. She reported a two-month history of lumbar pain. The notes indicate a diffuse numbness from the waist down which was felt to not be neurologic in origin. The diagnosis was low back pain, lumbar herniated disc. Nash was discharged home. (JE4, pp. 1-4)

Nash returned to the emergency department on June 22, 2015. She reported left buttock pain with radiation to the left leg since March of 2015. Her pain was worse last night. Her pain had been better after the ESI she received in May. The notes indicate that there was no injury. The impression was sciatica. (JE4, pp. 6-9)

She returned to the emergency department two days later. She reported that she had experienced pain for several months. However, she was at work three days prior when she sat in her chair wrong or twisted. Her pain was so bad that morning she was unable to get out of her car after seeing her chiropractor. Emergency medical services brought her to the emergency department. (Testimony; JE4, pp. 11-14)

For more than three months after the alleged injury Nash continued to work full time, without restrictions, at both of her jobs. (Testimony)

On June 10, 2015, Michael D. Jackson, M.D. saw Nash for low back pain with radiation into her left leg. Nash reported that she was injured on March 2, 2015 during defense tactic training for the Polk County Detention Officer Program. She told Dr. Jackson that she did not know how she injured herself because she had no pain at the time of training. She noticed low back pain radiating into her left lower extremity the next day. Initially, she sought chiropractic care and massage therapy. However, when her symptoms did not resolve she sought medical treatment. Dr. Jackson noted the treatment she had received since the time of the alleged injury. At the time of the appointment she was experiencing constant low back pain, which she described as an aching sensation. Dr. Jackson's impression was lumbar degenerative disc disease with L5-S1 herniated disc, resulting in radiculopathy. She was still working full duty. He noted that he would allow her to continue full duty and that none of her previous providers had felt it was necessary to place restrictions on her activities. Nash stated that she could not afford be off work. She preferred to be at work despite her symptoms. Dr. Jackson recommended adding physical therapy to her current treatment. The doctor wanted a chance to review her medical records before he offered an opinion on causation. (JE8, pp. 1-3)

On June 15, 2015, after Dr. Jackson had an opportunity to review Nash's medical records he authored a missive. The doctor noted the chiropractic and medical treatment Nash sought prior to the alleged work injury. He noted what he felt was the pertinent medical history. Dr. Jackson stated,

> It is my medical opinion that Ms. Nash may have sustained mild exacerbation of her pre-existing tailbone pain after defensive tactics training, but it resolved after a session of chiropractic treatment, achieving maximum medical improvement on March 9th. Her current symptoms, tailbone pain with radiation into the lower extremities, are related to her pre-existing condition, which was exacerbated after the March 9th chiropractic treatment.
>
> Furthermore, there is no evidence of Ms. Nash sustaining injury that would have resulted in herniated discs in the lumbar spine during the defensive tactics training. As a result the lumbar herniated discs are not work related.

(JE8, p. 5)

On June 22, 2015, Polk County informed Nash that her workers' compensation claim was denied. (Def. Ex. E, p. 1) Nash resigned her position with Polk County due to her health conditions. (Def. Ex. F)

On August 13, 2015, Esmiralda Yeremeyeva-Henderson, M.D. of Mercy Neurosurgery performed a left-sided hemilaminectomy and L5-S1 microdiskectomy with decompression of thecal sac and downgoing left S1 nerve root. The postoperative diagnosis was left S1 radiculopathy from left L5-S1 herniated disk. (JE7, pp. 6-8) Two weeks post-op Nash reported that her pain was very mild. She was doing very well. The pain in her left lower extremity had completely resolved. When Nash was seen at Mercy Neurology in late August she was doing well and was told to follow up on an as-needed basis. (JE7, pp. 9-10)

On March 10, 2016, Daniel J. McGuire, M.D. of Iowa Spine Care saw Nash. Dr. McGuire noted that he did not have access to any of Dr. Henderson's notes. He stated:

> She has an antecedent history of some minor aches and pains in the back like we all have. She relates to me a specific day of activities and following this, she had gradual progression of rather significant back and left leg pain. I feel her back sciatica and significant disk herniation were aggravated by her work activities that included _____ defensive tactic maneuvers.

(JE9, p. 1)

Dr. McGuire placed her at maximum medical improvement (MMI) three to six months after surgery. He assigned 10 percent impairment to the body as a whole as a result of the work incident and subsequent surgery. He noted that he would not release her back to her job at Polk County. He felt she might need a few common sense suggestions such as a little bit of weight limit around 20 or 30 pounds. He believed that

if she went through an appropriate rehabilitation program and a functional capacity evaluation (FCE) she might be able to do a bit better, but he was not be optimistic that she would be able to return to her prior job. (JE9, pp.1-2) Dr. McGuire issued a second letter on March 24, 2016 after he had received the records from the neurosurgeon. (JE9, p. 5)

Nash returned to Mercy Neurosurgery in May of 2016. She reported that since her surgery she had persistent tingling and numbness but good strength. She had been doing well, however, over the last three to six months she experienced a gradual onset of right-sided leg symptoms. An MRI was ordered. The MRI was carried out on June 1, 2016. The MRI revealed a recurrent moderate-sized broad-based central left paracentral disc herniation. A redo left L5-S1 MIS microdiscectomy was discussed. The second surgery was carried out on August 25, 2016. Nash followed up with Mercy Neurosurgery on September 13, 2016. The assessment at that time was successful redo minimally invasive L5-S1 discectomy. She was discharged from care. She was released to return to work the next day full time but no heavy lifting until October 6, 2016. (JE7, pp. 11-26)

Nash returned to Dr. McGuire on February 17, 2017 so he could reevaluate her. Dr. McGuire stated that "[r]ecords have been provided, although again nothing from the neurosurgeon." (JE9, p. 6) Dr. McGuire noted that Nash had a second surgery on her low back in August of 2016. She lifted a laundry basket in May of 2016, and after that she had a recurrence of her left leg pain. She still has daily backaches and pains but continues to work two jobs each week. She reported that she hurts everywhere, but Dr. McGuire guessed that her pain was more focused in her low back. Dr. McGuire considered the second surgery related to her first surgery. He stated that a recurrent disk herniation within months of surgery did occur somewhere 3 percent to 7 percent of the time. Nash reported that her primary care physician had placed restrictions on her activities, but Dr. McGuire was unsure what those restrictions were. Dr. McGuire assigned 5 percent whole person impairment related to her second surgery. He felt she probably did need to be on a gentle exercise program but felt she did not have time for that. (JE9, pp. 6-7)

On November 29, 2017, Dr. Jackson issued another opinion letter. Prior to issuing this letter he had the opportunity to review additional medical records concerning Nash. He stated,

> I maintain my previous opinion that there is no evidence of Ms. Nash having sustained significant injury during the defensive tactics training that would have resulted in a herniated disc of the lumbar spine. Herniated discs will typically result in a point in time injury where you have pain immediately that will wax and wane over the course of time. In my opinion, her lumbar degenerative disc disease progressed normally resulting lumbar disc herniation back in 2012 or 2013. It just had not been diagnosed because no one obtained an MRI. Again, not to be redundant, I maintain my position that Ms. Nash may have sustained a mild

> exacerbation of her pre-existing tailbone and low back pain, but it resolved after a session of chiropractic treatment, and she achieved maximum medical improvement as of March 9th, 2015. Any ongoing lumbar pain would be a result of her pre-existing lumbar degenerative disc disease.

(JE8, p. 9)

At the request of the defendant, Trevor R. Schmitz, M.D., an orthopaedic surgeon, evaluated Nash on December 11, 2017. As a result of that examination and review of medical records Dr. Schmitz issued a report dated January 2, 2018. The report set forth a detailed history based upon his interview of Nash and a review of the medical records provided to him. He noted that she had been treating for lower back issues for several months before the alleged injury. He noted that she was seen in urgent care on March 14, 2015 and reported that there had not been an injury. She also reported that she had been experiencing symptoms for the past four months. The orthopaedic surgeon did not causally relate Nash's condition to the alleged work injury. Dr. Schmitz also stated, "I cannot point to any objective medical evidence that would indicate that the occupational event of March 2, 2015 material [sic] aggravated, accelerated or worsened this preexisting condition." (JE10, p. 9) Dr. Schmitz opined that Nash was capable of returning to work without restrictions. (JE10) I find Dr. Schmitz's opinion to be well-reasoned and based on an accurate and complete history. I find Dr. Schmitz's opinions to be persuasive.

Counsel for the defendant took the deposition of Dr. McGuire on December 15, 2017. During his deposition it became apparent that Dr. McGuire had based his opinions on an inaccurate and/or incomplete history. He admitted that Nash did not tell him about her prior four-wheeler accident or previous motor vehicle accident. She also failed to tell Dr. McGuire that she had symptoms of radiculopathy prior to the alleged work injury dating back as far as 2011. She did not advise Dr. McGuire that she had received chiropractic treatment for leg, buttock, and back pain. Nash also did not tell Dr. McGuire that she had a second job where she worked approximately 30-40 hours per week. Dr. McGuire testified that had he known about these things he probably would have changed his opinion. (Def. Ex. I, depo. p. 41, lines 20-25, depo. p. 42, lines 1-2) Additionally, Dr. McGuire was under the impression that Nash did not have much sciatica prior to the alleged injury. He testified, "I mean so if you presented information that said she had terrible leg pain in January and February and March – January and February of 2015, then I would have to change my opinion." (Def. Ex. I, depo. p. 31, lines 12-16)

The first issue to address is whether Nash sustained an injury to her back and left leg which arose out of and in the course of her employment on March 2, 2015. The initial treatment records after the alleged injury do not support Nash's contention that she sustained a work injury on March 2, 2015. On March 14, 2015, Nash reported to Family Medicine – Merle Hay that she had not sustained an injury and her pain had been present for four months. (JE2, p. 1) The chiropractic records demonstrate that

she had been receiving adjustments for her low back in the months leading up to the alleged injury. (JE3, pp. 16-22)

Claimant relies on the expert medical opinion of Dr. McGuire who causally relates Nash's low back, sciatica, and disk herniation to the alleged work injury. However, I do not find his opinions to be persuasive in this matter. Based on the record, it is unclear what medical records or history Dr. McGuire reviewed prior to rendering his opinions. In his initial report dated March 10, 2016, Dr. McGuire does not set forth what, if any records, he actually reviewed, but he does specifically state that he did not have access to Dr. Henderson's notes. Additionally, Dr. McGuire states that prior to the alleged injury Nash had only some minor aches and pains in her back. He appears to have been unaware that Nash had symptoms in her buttocks and legs and that her back would lock up prior to the alleged injury. He also seems to be unaware that Nash received chiropractic treatment prior to the work injury. Additionally, Dr. McGuire seems to be unaware or at least does not acknowledge that even Nash reported that her symptoms had been present for months before the alleged injury. In Dr. McGuire's second letter he states he did receive notes from Dr. Henderson, but they were computerized, which made it "very, very difficult to accurately state the history or complaints . . ." (JE9, p. 5) However, in his latest note from February of 2017, Dr. McGuire states that nothing from the neurosurgeon had been provided to him. (JE9, p. 6) Thus, the record is confusing, at best, as to what records Dr. McGuire considered when rendering his opinions. Also, Nash admitted at hearing that she did not provide a complete history to Dr. McGuire. (JE9) Furthermore, Dr. McGuire uses phrases such as: "probably needs some work restrictions" and "I am going to assume she had a laminectomy . . ." and "I would guess it is more focused in the low back." (JE9, pp. 1, 3, 6) Dr. McGuire does not state his opinions in terms or reasonable medical certainty; rather he seems to be guessing. For these reasons, I do not find the opinions of Dr. McGuire to be persuasive.

Dr. Jackson also rendered an opinion in this matter. Dr. Jackson felt that Ms. Nash may have sustained a mild exacerbation of her pre-existing tailbone and low back pain, but any exacerbation resolved after a session of chiropractic treatment, and she achieved maximum medical improvement as of March 9th, 2015. He opined that any ongoing lumbar pain would be a result of her pre-existing lumbar degenerative disc disease. (JE8, pp. 6-9) Therefore, Dr. Jackson's opinion does not support claimant's claim for permanency. His opinion also does not support claimant's claim for temporary disability benefits from July 9, 2015 through November 1, 2015.

The opinion of Dr. Schmitz is also in evidence in this case. He could not point to any objective medical evidence that would indicate that the occupational event of March 2, 2015 materially aggravated, accelerated or worsened Nash's preexisting condition. (JE10, p. 9)

I find that claimant has failed to prove by a preponderance of the evidence that she sustained an injury which arose out of and in the course of her employment on March 2, 2015. There is simply a lack of a reliable expert opinion to support her

contention. The most persuasive expert in this case is Dr. Schmitz who does not support claimant's claim.

Claimant is also seeking reimbursement for the IME of Dr. McGuire. Polk County denied that Nash sustained a compensable injury. There is no dispute that claimant did not obtain an agreement or consent from Polk County to pay for the IME. I find the record is void of any evidence that an employer-retained physician provided an impairment rating prior to the rating of Dr. McGuire. Therefore, I find that the prerequisites of Iowa Code section 85.39 were not met. As such, I find defendant is not responsible for the Dr. McGuire IME expense.

Finally, claimant is seeking an assessment of costs. However, because claimant was generally not successful in her claim I find that an assessment of costs against the defendant is not appropriate. Each party shall bear their own costs.

Because claimant failed to carry her burden of proof with regard to causation, all other issues have been rendered moot.

## CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6)(e).

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).

Based on the above findings of fact, I conclude that Nash has failed to prove by a preponderance of the evidence that she sustained an injury on March 2, 2015, which arose out of and in the course of her employment with Polk County. The treatment records generated shortly after the alleged injury do not support her claim that she sustained an injury. Furthermore, there is a lack of a reliable expert medical opinion which causally relates her conditions to the alleged work injury.

Iowa Code 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. In the present case, I found that claimant failed to prove that an employer-retained physician had previously evaluated permanent disability and therefore, the requirements of Iowa Code section 85.39 were not met. As such, defendant is not responsible for the charges for Dr. McGuire's IME.

Costs are to be assessed at the discretion of the deputy workers' compensation commissioner hearing the case. 876 IAC 4.33. I found that claimant was not successful in her claim. I exercise my discretion and conclude that costs should not be assessed against defendant. Each side shall bear their own costs.

All other issues are rendered moot.

## ORDER

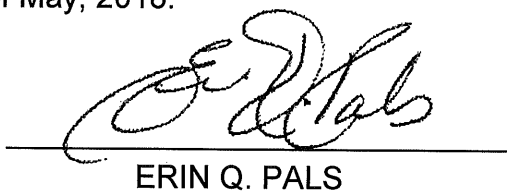
THEREFORE, IT IS ORDERED:

Claimant shall take nothing.

Each party shall bear their own costs.

Defendant 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 21st day of May, 2018.



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EQP/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.