BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BARRY RETTERATH, Claimant, vs. JOHN DEERE WATERLOO WORKS, Employer, Self-Insured, Defendant.	:	File No. 5067003 ARBITRATION DECISION Head Note Nos.: 1803, 4000.2

STATEMENT OF THE CASE

Barry Retterath filed a petition for arbitration seeking workers' compensation benefits from, the employer, John Deere Waterloo Works, a self-insured employer.

The matter came on for hearing on February 6, 2020, before Deputy Workers' Compensation Commissioner Joseph L. Walsh in Waterloo, Iowa. The record in the case consists of Joint Exhibits 1 through 6; Claimant's Exhibits 1 through 7; Defendant's Exhibits A through D; as well the sworn testimony of claimant. Dwight Van Wyngarden served as the court reporter. The parties argued this case and the matter was fully submitted on March 3, 2020.

ISSUES AND STIPULATIONS

The stipulations contained in the hearing order have been approved and are deemed ordered with the consent of the parties.

The parties have stipulated that claimant sustained an injury which arose out of and in the course of employment on July 12, 2017. This injury is a cause of both temporary and permanent disability. The claimant is not seeking any additional temporary disability benefits, however, he contends he is entitled to additional permanent partial disability benefits for permanent injury to his body as a whole. The defendant contends this is a scheduled right shoulder disability. The parties stipulate that the commencement date for disability benefits is March 26, 2018. The defendant denies claimant is entitled to any additional weekly benefits.

The elements which comprise the rate of compensation are all stipulated at this time. Affirmative defenses have been waived. The parties reached a stipulation regarding the credit to which defendant is entitled. Claimant makes no claim for medical expenses, however, he does seek reimbursement for the independent medical evaluation under Section 85.39, which has been partially paid. The claimant seeks penalty benefits for an unreasonable denial and delay of benefits.

FINDINGS OF FACT

Barry Retterath was 55 years old as of the date of hearing. He testified live and under oath at hearing. He is found to be highly credible. While he could not recall exact treatment dates at hearing, his testimony was generally consistent with the other evidence in the record. His testimony was straightforward and matter-of-fact. There was nothing about his demeanor which caused the undersigned any concern regarding his credibility. On the contrary, Mr. Retterath appeared entirely honest and sincere and his testimony is afforded significant weight.

Mr. Retterath, has a two-year vocational degree in HVAC. After graduating high school, he joined the Army National Guard, where he worked as a supply truck driver. He served in the military for six years and was honorably discharged. Since leaving the military, Mr. Retterath has worked exclusively in the field of HVAC. From the time of his discharge until 2005, he worked for several different companies either installing or servicing HVAC equipment. He testified extensively regarding the difference in job activities in those positions. Installation work is generally more physically demanding, requiring lifting and significant overhead work. Service work involves more trouble-shooting and problem solving. The work is usually lower to the ground and less physically strenuous.

In 2005, Mr. Retterath began employment with John Deere Waterloo Works (hereafter, Deere). He was hired to perform HVAC work in Department 27. He passed Deere's preemployment physical and had no restrictions at his time of hire.

On July 12, 2017, Mr. Retterath sustained a work injury which arose out of and in the course of his employment. Specifically, while he was disconnecting boiler piping he felt something give way in his right shoulder. "I could tell something either snapped or popped or whatever, and I looked down and I had a great big ball like in my bicep area. (Transcript, page 16) He immediately reported the injury, was seen by Deere's medical department and sent for an MRI. The MRI revealed a complete tear of the long head biceps tendon, a partial tear of the distal supraspinatus, infraspinatus and subscapularis tendons, and a partial tear of the common extensor tendon. (Joint Exhibit 2, page 5) He was quickly referred to an orthopedic surgeon, Robert Bartelt, M.D.

There is no real dispute regarding Mr. Retterath's course of treatment. Dr. Bartelt treated him conservatively with work restrictions, physical therapy and injections and eventually placed him at maximum medical improvement on October 9, 2017. At that time, Dr. Bartelt recommended he return to work with no restrictions. Dr. Bartelt assigned an impairment rating on October 17, 2017, stating the following:

> As you know, I treated Barry for his right shoulder injury. This was treated conservatively. He had a long head of biceps tendon rupture at the shoulder as well as a partial thickness tear of the rotator cuff. He has returned to work. I evaluated the patient on 10/16/17 in order to assess his motion and strength.

> The patient demonstrates 160 degrees of both forward flexion and abduction. He demonstrates 90 degrees external rotation and 20 degrees internal rotation. Using the AMA Guides to the Evaluation of Permanent Impairment, fifth edition, pages 475 through 479, we assign the patient 6% impairment to this right upper extremity based on loss of motion of the shoulder.

(Def. Ex. A, p. 1) Deere initially paid this rating as six percent of an arm, or 15 weeks of benefits.

Mr. Retterath, however, was not fully healed. In November 2017, Mr. Retterath returned for an additional injection. In January 2018, Jeffrey Clark, M.D., evaluated him for additional treatment options. Dr. Clark provided two options. Either he could have further conservative treatment or he could have a surgical arthroscopy to further assess and repair his rotator cuff. Mr. Retterath decided to "just live with it right now." (Jt. Ex. 6, p. 27)

Since being released, Mr. Retterath returned to his regular job in Department 027. He continues to work at his regular position, with the same or better earnings. He testified that he is able to perform this job but he does receive assistance from co-workers on some of the heavier, overhead tasks. His hobbies have changed. In particular, he has given up bow hunting and he has been unable to bowl. He testified credibly that he would be unable to perform some of the heavier HVAC installation work that he performed prior to starting at Deere. I find Mr. Retterath undoubtedly has a significant loss of function resulting from the work injury.

Mr. Retterath was evaluated by Arnold Delbridge, M.D., in May 2018, for purposes of an Iowa Code section 85.39 independent medical evaluation (IME). Dr. Delbridge issued a report from this evaluation in September 2018 which assessed an 8 percent upper extremity impairment.

> Mr. Retterath's diagnosis from his injury of July 12, 2017 when he was reaching on piping at work and felt pain in his biceps and a deformity was not able to work was: 1) incomplete tear of right rotator cuff, 2) subacromial impingement, 3) arthritis of his AC joint on the right and 4) ruptured proximal biceps long head tendon.
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> It is difficult to say that the rotator cuff incomplete tear was materially aggravated by his injury and it probably did not aggravate his AC joint or his subacromial impingement. However, the injury of consequence was a rupture of the proximal biceps tendon, the long head of the biceps tendon. The long head of the biceps tendon arises from the superior portion of the glenoid which is definitely on the scapular side of the shoulder joint. In other words, the long head of the biceps does arise proximal to the shoulder joint itself. It would qualify as an injury or impairment proximal to the shoulder joint itself. It would quality [sic] as an injury or impairment proximal to the glenohumeral joint and would be considered a body-as-a-whole injury.

> What I found in my evaluation of Mr. Retterath on 5-29-18 when I examined him, was that he had limited range of motion of internal rotation of 60 degrees, a loss of 30 degrees, a 2% impairment.
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> The long head of the biceps does not always affect strength in the shoulder but it persistently affects strength in the elbow flexion and supination. Mr. Retterath has definite loss of range of motion in his shoulder per figure 16-46 in Guides to Evaluation of Permanent Impairment. While he does not have much loss of motion of his pronation and supination, he does have definite weakness in elbow flexion of which a rupture of the long head of the biceps would affect. On Table 16-35, flexion of his elbow is weak and I placed his strength deficit as a 3 and his extension is normal and his pronation is normal, but his supination is considerably weaker than on the other side and I placed that as a 3 as well. Adding up those two gives 6% impairment of the right upper extremity on the basis of loss of strength of flexion and supination of his elbow.

(Cl. Ex. 1, pp. 1-2)

Combining all the deficits, Dr. Delbridge arrived at an 8 percent impairment of the right upper extremity, which converts to 5 percent of the whole body. (Cl. Ex. 1, p. 2) He suggested further treatment including injections and possibly surgery, would be necessary in the future. (Jt. Ex. 1, p. 3)

I find Dr. Delbridge's report to be convincing as it is highly consistent with Mr. Retterath's testimony and the other evidence in the record.

CONCLUSIONS OF LAW

The fighting issue in this case is primarily a legal one. It involves the 2017 legislative changes to Iowa Code Chapter 85 which added the "shoulder" to the list of scheduled members in Iowa Code section 85.34(2) (2019). The specific issue in this case is whether claimant's disability is a scheduled disability to his "shoulder" under Iowa Code section 85.34(2)(n) or an unscheduled disability under Section 85.34(2)(v).

As fate would have it, the claimant sustained his injury on July 12, 2017, eleven days after the new law became effective. There is no dispute about this. There is also no real fact dispute about the situs of the injury and resulting disability. Mr. Retterath's primary disabling condition is best described as ruptured proximal biceps long head tendon. (Cl. Ex. 1, p. 1; Jt. Ex. 6, p. 27; Def. Ex. A, p. 1) Mr. Retterath had other diagnoses, however, this was his primary disabling condition associated with the work injury. The legal issue in the case is whether this specific, undisputed condition is a disability to his "shoulder" or whether it is an unscheduled disability to his body as a whole.

Since this case was heard, the Commissioner filed two appeal decisions which are controlling on the legal issue. The first was Deng v. Farmland Foods, File No. 5061883 (Appeal September 29, 2020). In Deng, the Commissioner held that the 2017

amendments to Chapter 85 were ambiguous as to the definition of the shoulder. He therefore undertook an effort to construe the statute by looking to the intent of the legislature. Id. at 5. He ultimately concluded the following:

> I recognize the well-established standard that workers' compensation statutes are to be liberally construed in favor of the worker, as their primary purposes is to benefit the worker. See Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 842 (Iowa 2015) (citations omitted); see also Jacobson Transp. Co. v. Harris, 778 N.W.2d 192, 197 (Iowa 2010); Xenia Rural Water Dist. v. Vegors, 786 N.W.2d 250, 257 (Iowa 2010) ("We apply the workers' compensation statute broadly and liberally in keeping with its humanitarian objective...."); Griffin Pipe Prods. Co. v. Guarino, 663 N.W.2d 862, 865 (Iowa 2003) ("[T]he primary purpose of chapter 85 is to benefit the worker and so we interpret this law liberally in favor of the employee."). This liberal construction, however, cannot be performed in a vacuum. As discussed above, several of the principles of statutory construction indicate the legislature did not intend to limit the definition of "shoulder" under section 85.34(2)(n) to the glenohumeral joint. For these reasons, I conclude "shoulder" under section 85.34(2)(n) is not limited to the glenohumeral joint.
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> Claimant's injury in this case was to the infraspinatus muscle. As discussed, the infraspinatus is part of the rotator cuff, and the rotator cuff's main function is to stabilize the ball-and-socket joint. As noted by both Dr. Bansal and Dr. Bolda, the rotator cuff is generally proximal to the joint. However, because the rotator cuff is essential to the function of the glenohumeral joint, it seems arbitrary to exclude it from the definition of "shoulder" under section 85.34(2)(n) simply because it "originates on the scapula, which is proximal to the glenohumeral joint for the most part." (Def. Ex. A, [Depo. Tr., 27]). In other words, being proximal to the joint should not render the muscle automatically distinct.
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> Given the entwinement of the glenohumeral joint and the muscles that make up the rotator cuff, including the infraspinatus, and the importance of the rotator cuff to the function of the joint, I find the muscles that make up the rotator cuff are included within the definition of "shoulder" under section 85.34(2)(n). Thus, I find claimant's injury to her infraspinatus should be compensated as a shoulder under section 85.34(2)(n). The deputy commissioner's determination that claimant's infraspinatus injury is a whole body injury that should be compensated industrially under section 85.34(2)(v) is therefore respectfully reversed.

Deng, at 10-11.

The second is Chavez v. MS Technology, LLC, File No. 5066270 (App. September 30, 2020), which was filed the day after Deng. In Chavez, the Commissioner affirmed his legal holding in Deng and applied his interpretation to the various impairments and disabilities sustained by the claimant in that case.

> Again, as explained in Dr. Peterson's operative note, claimant's subacromial decompression was performed to remove scar tissue and fraying between the supraspinatus and the underside of the acromion. As discussed above, the acromiom forms part of the socket and helps protect the glenoid cavity, and as such, I found it is closely interconnected with the glenohumeral joint in both location and function. And as discussed in Deng, I found the supraspinatus - a muscle that forms the rotator cuff - to be similarly entwined with the glenohumeral joint. Thus, claimant's subacromial decompression impacted two anatomical parts that are essential to the functioning of the glenohumeral joint; in fact, the procedure was actually performed to improve the function of the joint. As such, I find any disability resulting from her subacromial decompression should be compensated as a shoulder under section 85.34(2)(n).
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> I therefore find none of claimant's injuries are compensable as unscheduled, whole body injuries under section 85.34(2)(v). The deputy commissioner's finding that claimant sustained an injury to her body as a whole is therefore respectfully reversed.

Chavez, at 6.

The key holdings of Deng and Chavez are:

1. The definition of a "shoulder" is ambiguous in Section 85.34(2)(n). Deng, at 4.

2. There is no "ordinary" meaning of the word shoulder. Deng, at 5.

3. The appropriate way to interpret the statute is to examine at the legislative history. Deng, at 5.

4. The well-established history of "liberal construction" of workers' compensation statutes is inapplicable here because to do so would be to ignore the legislature's intent to limit compensation to injured workers in the 2017 amendments.[1] Deng, at 10-11.

5. The legislature did not intend to limit the definition of a "shoulder" to the glenohumeral joint. Rather, the legislature intended to include the

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[1] The fundamental guiding principle of statutory construction in a workers' compensation case is that the statute is to be interpreted liberally in favor of the injured worker and their family. "*Any* doubt in its construction is thus resolved in favor of the employee." Teel v. McCord, 394 N.W. 2d 405, 407 (Iowa 1986). Workers' compensation laws are to be construed in favor of the injured worker. Myers. v. F.C.A. Services, Inc., 592 N.W.2d 354, 356 (Iowa 1999). The beneficent purpose is not to be defeated by reading something into the statute that is not there. Cedar Rapids Community School v. Cady, 278 N.W.2d 298 (Iowa 1979). This, combined with the legal principle that the legislature is presumed to know the prior construction of the law. State ex rel. Palmer v. Board of Supervisors of Polk County, 365 N.W.2d 35, 37 (Iowa 1985), would lead me to side with the claimant in this case. This, however, is not what the Commissioner held. As a Deputy Commissioner, I am bound to follow the rulings of the Commissioner.

> entwinement of the glenohumeral joint and the muscles that make up the rotator cuff. Deng, at 11.

Applying this interpretation of the facts of this case, I find the claimant suffered an injury to his "shoulder" under Iowa Code section 85.43(2)(n). As such, his disability shall be assessed as a scheduled disability, which means I am arbitrarily limited to choosing between the impairment ratings of the expert physicians.

Having reviewed the record as a whole, I find that the claimant has suffered an 8 percent functional impairment to his right shoulder, as assigned by Dr. Delbridge. I find Dr. Delbridge's rating and explanation to be the most credible rating and the most consistent with the other evidence in the record, including the claimant's highly credible testimony. Dr. Delbridge's rating was performed after Mr. Retterath had returned to work. In other words, the timing of his evaluation was more reliable than Dr. Bartelt's rating, which was performed a week after he returned to full-duty. As such, the claimant is entitled to 8 percent of 400 weeks or 32 weeks of compensation commencing on March 26, 2018.

The next issue is penalty.

Iowa Code 86.13(4) provides the basis for awarding penalties against an employer. Iowa Code 86.13(4) states:

> (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, or chapter 85, 85A, or 85B, up to fifty present of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.
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> (b) The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
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> > (1) The employee has demonstrated a denial, delay in payment, or termination of benefits.
> >
> > (2) The employer has failed to provide a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.
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> (c) In order to be considered a reasonable or probable cause or excuse under paragraph "b", an excuse shall satisfy all of the following criteria:
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> > (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.
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> (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, Iowa Code section86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229 (Iowa 1996). Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Custom Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It is also 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 an employer fails to show reasonable cause or excuse for the delay or denial, the commissioner shall impose a penalty in an amount up to 50 percent of the amount unreasonably delayed or denied. Christensen v. Snap-On Tools Corp., 554 N.W.2d 254 (Iowa 1996). The factors to be considered in determining the amount of the penalty include: the length of the delay, the number of delays, the information available to the employer, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

For purposes of determining whether an employer has delayed in making payments, payments are considered "made" either (a) when the check addressed to a claimant is mailed, or (b) when the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 235-236; Kiesecker, 528 N.W.2d at 112.

Penalty is not imposed for delayed interest payments. Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 338 (Iowa 2008); Davidson v. Bruce, 594 N.W.2d 833, 840 (Iowa 1999).

Claimant asserts penalty is mandatory because Deere initially assessed and paid permanency based upon claimant's impairment to his right upper extremity. (Cl. Ex. C) Deere treated the right upper extremity as an arm under Section 85.34(2)(m) and paid the 6 percent as a percentage of 250 weeks instead of 400 weeks (under subsection n). In its brief, Deere acknowledges this mistake stating no one "discovered the inadvertent

mistake until the Claimant notified Defendant of the change and that the payment should have been made on 400 weeks for a shoulder on 3/20/19." (Ex 5-15)." (Deere Brief, p. 11)

While I find this excuse completely believable, it is not a legally valid excuse, particularly in light of the fact that Deere has taken the position from the beginning that this is a scheduled disability rather than unscheduled. Deere did take action to correct the mistake as soon as the claimant, through counsel, pointed it out. I find that penalty is mandatory. Nine weeks of permanency benefits owed to the claimant were delayed for over a year due to Deere's improper calculations. The appropriate amount for the penalty, considering all of the relevant factors including Deere's history of penalties in Claimant's Exhibit 7, is $3,299.00, an amount which should serve to deter Deere from such mistakes in the future.

The next issue is IME expense.

IME Blurb

Claimant seeks reimbursement for an 85.39 IME as set forth in Claimant's Exhibit 6. This included x-rays and records review, which Deere declined to pay. These expenses totaled $399.00. I find that these expenses should be reimbursed under Section 85.39.

The final issue is costs.

Iowa Code section 86.40 states:

> **Costs.** All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states:

> **Costs.** Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the

> expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010) The entire reasonable costs of doctors' and practitioners' reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

The claimant's deposition was entered into evidence and reviewed by the undersigned. Having reviewed the file as a whole, I find Deere is responsible for the costs in the amount of $164.40.

ORDER

THEREFORE IT IS ORDERED

Defendant shall pay claimant thirty-two (32) weeks of permanent partial disability benefits at the rate of seven hundred fifty-five and 46/100 ($755.46) per week from March 26, 2018.

Defendant shall pay accrued weekly benefits in a lump sum.

Defendant shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

Defendant shall be given credit for the weeks previously paid.

Defendant shall pay a penalty in the amount of three thousand two hundred ninety-nine and no/100 dollars ($3,299.00).

Defendant shall reimburse the unreimbursed IME expenses in the amount of three hundred ninety-nine and no/100 dollars ($399.00).

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

Costs in the amount of one hundred sixty four and 40/100 dollars ($164.40) are taxed to defendant.

Signed and filed this 22nd day of December, 2020.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

James Kalkhoff (via WCES)

Charles Showalter (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.