BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARGARITO NAVARRO ZEPEDA,	FILED	
Claimant,	APR 17 2018	
vs.	WORKERS COMPENSATION	File No. 5057156
TD&I CABLE & MAINTENANCE, INC.,		ARBITRATION DECISION
Employer,		
and		
AUTO-OWNERS INSURANCE,		
Insurance Carrier, Defendants.		Head Note Nos.: 1108, 1803

STATEMENT OF THE CASE

Margarito Navarro Zepeda, claimant, filed a petition in arbitration seeking workers' compensation benefits from TD&I Cable and Maintenance, Inc., the employer, and Auto-Owners Insurance, the insurance carrier.

The matter proceeded to hearing in Des Moines, Iowa on December 12, 2017. The hearing was interpreted by Mr. Rafael Geronimo.

The evidentiary record includes: Joint Medical Exhibits JEA through JED, Claimant's Exhibits 1 through 5 and Defendants' Exhibits E through M. At hearing, claimant and Fernando Gomez, a foreman/supervisor for the defendant employer, 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.

The parties submitted post-hearing briefs on or about February 5, 2018, and the matter was considered fully-submitted on that date.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether the neck claim is causally related to the stipulated work injury and the extent of permanent partial disability, if any.

2. Penalty.

FINDINGS OF FACT

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

Claimant was 37 years old at the time of the hearing. He was born in Mexico and attended school through the fourth grade. Claimant has had no additional education.

While living in Mexico, claimant worked in construction, as a welder's helper, and he cleaned milling machines.

Claimant came to the United States in 2002 at around age 17 and began working for Nebraska Construction, where he did cement finishing work. (Exhibit M, page 10) He worked full-time and earned $11.00 per hour. Claimant moved to Iowa and worked for an individual doing concrete work, constructing sidewalks and small parking lots. He then went to work for Bexstrom Construction operating an excavator machine earning $12.00 per hour at the beginning and finishing at $16.00 per hour. Bexstrom Construction places large junction boxes in the ground and lays cable for utilities, such as fiber optic and telephone lines. This job was full-time initially, but the hours decreased and he left to work full-time for the defendant employer, TD&I Cable & Maintenance, Inc.

Claimant began working for TD&I Cable & Maintenance in about the summer of 2015. (Ex. 2, pp. 16, 19) Claimant continued to work for the defendant employer at the time of the hearing. At this job, claimant lays underground cable and places large boxes for the cables in the ground, similar to the work that he performed for Bexstrom.

On February 29, 2016, while working for the defendant employer, claimant sustained a stipulated work injury that arose out of and in the course of his employment when a pick-up truck ran into a stop sign that fell over and struck claimant in the head/face.

Claimant testified that he did not recall too much about the incident, but did remember a co-worker taking his vest off and placing it on his face and waking up with a police officer looking at him.

Claimant was taken by emergency responders to Ottumwa Regional Health Center. He was noted to have a 6 centimeter (4 inch) laceration to his right cheek.

(Ex. JEA, pp. 1, 2) The laceration was described as going "through layers of skin and into muscle, masseter and mandible right." (Ex. JEA, p. 2) It was also noted that claimant's "[l]ower ear lobe [was] removed in [the] accident." (Id.) There were no fractures found. (Ex. JEA, p. 4) The "facial nerve function was found to be completely intact with no deficits in any of the right facial nerve branches." (Ex JEA, p. 6) Cranial nerve function was found to be normal and "other motor and sensory neurologic exam is entirely intact." (Ex. JEA, p. 7)

Frederick Swartzendruber, M.D. closed the laceration with a "[c]omplex layered repair," along with a "[s]imple repair of [the] right ear laceration." (Ex. JEA, pp. 12, 14)

Claimant returned to work around the end of March 2016. (Tr. pp. 41, 42) The parties stipulated that the correct commencement date for permanent partial disability is March 28, 2016. (Hearing Report, p. 1)

On April 5, 2016, claimant was noted to have "no discomfort whatsoever," with no difficulties of mandibular range of motion and no alteration of his bite. (Ex. JEB, p. 16) He was noted to have a "partial loss of the right ear lobe and a large curvilinear healing laceration of the right cheek." (Id.)

On June 13, 2016, Michael Carlisle, M.D. noted that the boomerang shaped scar was "approximately 15 cm long," and "widened." (Ex. JEC, p. 17) The plan at that time included scar revision surgery, although it was discussed at length that revision may result in a "hypertrophic scar again given his initial hypertrophic scarring." (Ex. JEC, p. 18)

On October 17, 2016, scar revision was discussed again with Dr. Carlisle and claimant was "thinking about it." (Ex. JEC, p. 20)

On October 10, 2016, claimant was seen by Daniel Miller, D.O. for neck complaints. Dr. Miller noted neck crepitus with arm numbness, but it was undetermined whether these symptoms were related to claimant's employment. (Ex. JED, p. 24) He was returned to work and declared to be fit for full-duty. On October 26, 2016, a cervical MRI was obtained that showed mild spondylosis. (Ex. JED, p. 185) On November 10, 2016, Dr. Miller opined that these symptoms were not related to claimant's employment. (Ex. JED, p. 26)

On December 27, 2016, Robin Sassman, M.D. of Medix, issued a report following an independent medical evaluation (IME) that occurred on December 6, 2016, at the request of claimant's counsel. (Ex. 1, p. 1) Dr. Sassman addressed the neck and facial scarring.

Dr. Sassman reviewed claimant's medical history and discussed claimant's current symptoms. Claimant complained of pain in the back of his head, and described it as a grinding sensation along with pain and numbness into the right side of his face.

He denied any pain in his arms. (Ex. 1, p. 4) He denied any ringing in his ears, problems with hearing or chewing, but notes "a clicking sensation in his right TMJ joint;" and feeling like it gets "locked up" on that side when he yawns or opens his mouth wide. (Ex. 1, p. 4) He denied having that problem before the accident. Dr. Sassman conducted a physical examination and concluded that claimant's scar was 11 cm from below the right ear to the mandibular part of his face and tooth #30 was missing. Claimant advised that he had a bridge in that area that was missing after the work incident. (Ex. 1, p. 6) Dr. Sassman opined that claimant was not yet at maximum medical improvement (MMI) until he receives additional treatment of: an evaluation by an ENT specialist to investigate a possible TMJ joint issue; a short course of physical therapy for the cervical spine; and replacement of the dental bridge. (Ex. 1, p. 7) Dr. Sassman also confirmed that claimant was not interested in scar revision surgery. She stated that in the absence of the recommended treatment, she would find claimant to be at MMI on February 29, 2017, one year after the incident. (Ex. 1, p. 7) Referring to the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition, (AMA Guides) Dr. Sassman assigned five percent impairment to the whole person for the facial scarring, relying on Table 11-5, page 256, and placement in Class I for facial disorders and/or disfigurement. (Id.) She also assigned five percent to the whole person for the cervical spine relying on Table 15-5, page 392 and placement in DRE Category II. Dr. Sassman combined the ratings and arrived at ten percent impairment to the whole person based on the Combined Values Chart at page 604 of the AMA Guides. (Ex. 1, p. 8) She assigned the restriction of avoiding the use of a mask or respirator to prevent aggravation of the symptoms on the right side of his face. (Id.)

Sometime after June 14, 2017, Dr. Carlisle appeared to place claimant at MMI based on claimant's failure to follow-up and noted that no evaluation of his function or impairment had been done. Presumably this was in reference to his own lack of assessment of permanent impairment and not considering Dr. Sassman's IME report. (Ex. JEC, p. 23)

On August 30, 2017, Dr. Miller authored a letter to the claims adjuster. (Ex. JED, pp. 29-30) Dr. Miller stated that he initially saw claimant only for "neck pain" but that claimant actually reported no neck pain, but rather a "cracking and sand feeling" in his neck with movement along with bilateral arm numbness and tingling only at night while sleeping. (Ex. JED, p. 29) Based on these symptoms and considering the mechanism of injury and the MRI findings, he "determined that the cervical signs and symptoms are not causally related to the work injury and assigned a 0% rating." (Id.) Concerning the facial scarring, he noted that Dr. Carlisle had declined to provide an impairment rating. Dr. Miller therefore assessed permanency, based on his prior general examination of claimant and a records review. Dr. Miller did "not do a specific examination of the facial injury." (Id.) Considering the facial scarring, Dr. Miller reported a "large hypertrophic scar/deformity at the base of the right ear going down the right anterior neck." (Id.) Dr. Miller assigned a three percent whole person rating based on placement in Class I for facial disorders and/or disfigurement of the AMA Guides, Table 15-5, page 256.

(Ex. JED, p. 30) He also assigned a four percent whole person impairment based on "symptoms corresponding with neuropathy" concerning the auricular nerve. (Id.) Dr. Miller relied on Table 13-11, page 331, placing claimant in Class I for impairment of cranial nerve V, for "mild uncontrolled neurological facial pain." (Id.) These ratings were combined to arrive at seven percent impairment to the whole person.

Claimant stated at hearing that he continues to hear the grinding noise in his neck when he moves his head. He initially indicated that he also had neck pain, but later agreed that he did not have pain, "only the noise." (Tr. p. 25) He does not have any limitation of movement of his neck.

Considering the neck claim, I note that Dr. Sassman's opinion concerning causation of the neck complaints are largely based on a lack of any prior neck complaints before the work injury. (Ex. 1, p. 7) There is no particular discussion concerning any relationship between the mechanism of injury and any objective findings or subjective complaints. Dr. Miller on the other hand, who saw claimant specifically for his neck complaints, clearly considered the mechanism of injury, the specific symptoms and complaints that claimant expressed, his subjective complaints and the objective MRI findings and determined that his neck condition is not causally related to the work injury. (Ex. JED, p. 29) I have reviewed Claimant's Exhibits 4 and 5, and find them to be unpersuasive in this particular matter on the issue of causation.

I accept the more clearly stated and supported opinion of Dr. Miller that claimant's neck condition is not related to his work injury.

Concerning the facial laceration injury, at the time of the hearing, claimant had a noticeable scar on the right side of his face and loss of the lower portion of his right ear lobe as described in the medical records. (Tr. p. 21)

Regarding the impairment ratings assigned for the facial laceration and resultant scarring, I accept Dr. Miller's opinion of seven percent impairment to the whole person over Dr. Sassman's opinion of five percent impairment because of Dr. Miller's inclusion of the impact on the cranial nerve.

Claimant testified that he did not follow through with the scar revision surgery because the doctor told him that it would look the same after revision. (Tr. p. 27)

At the time of the hearing, claimant had not had the scar revision surgery. During his IME with Dr. Sassman in December 2016, he advised that he did not intend to have scar revision surgery and he confirmed at his deposition on June 12, 2017, that he did not intend to have the surgery. (Tr. p. 28; Ex. 1, p. 7)

Defendants inquired with claimant through his attorney asking whether or not he intended to proceed with scar revision surgery on September 13, 2016 and November 23, 2016. (Ex. J, pp. 43-44) On January 19, 2017, defendants noted in the

IME report that claimant apparently did not intend to proceed with scar revision surgery and asked claimant, through his attorney, if that was accurate. (Ex. J, p. 45) On March 24, 2017, and April 18, 2017, defense counsel again sought confirmation that claimant did not want scar revision surgery. (Ex. J, p. 46) As of April 19, 2017, claimant's counsel was unable to confirm that claimant did not want to seek scar revision surgery. (Ex. J, p. 46) On June 12, 2017, claimant confirmed that he did not want to do the scar revision surgery at the time of his deposition.

On June 14, 2017, two days after the deposition, defendants requested an opinion from Dr. Carlisle concerning permanent impairment related to the facial scarring. There are three responses from Dr. Carlisle that are not dated, including an initial response that confusingly claimed that Dr. Carlisle had never treated claimant, which was incorrect. (Ex. JEC, p. 21) Dr. Carlisle was presumably reminded of his treatment of claimant and the third undated response indicates that no evaluation of permanent impairment has occurred. However, it does not indicate that Dr. Carlisle refused to provide such a rating.

On August 16, 2017, defendants requested an impairment rating from Dr. Miller, after it apparently became clear that Dr. Carlisle was not going to assess claimant's permanent impairment. (Ex. JED, p. 29)

Defendants made repeated inquiries concerning whether claimant intended to get scar revision surgery. (Ex. J, pp. 44, 46) Dr. Carlisle was asked on June 14, 2017, to provide an impairment rating, just two days after claimant confirmed that he did not intend to get the scar revision surgery done and confusingly stated that he had never treated claimant, which was not correct. (Ex. JEC, p. 21) After additional vague responses from Dr. Carlisle, defendants sought an opinion from Dr. Miller, another authorized treating physician in this case.

I do not see defendants being inattentive to the issue of permanency, but rather the records indicate that defendants pursued resolution of the issue of permanency and were stymied by both the uncertainty of whether claimant was going to get scar revision surgery, which undoubtedly could impact the permanency rating, and Dr. Carlisle's confusing initial response and subsequent refusal to render a permanent impairment opinion.

Claimant continues to work for the defendant employer and is able to do his job without restrictions or accommodations. (Tr. p. 31) He agreed that he has no work restrictions from this injury. (Tr. p. 31) He is able to use all the same equipment at work that he did prior to the injury and has been able to do any job that his employer has asked him to do. (Id.) He continues to work full-time. (Tr. pp. 32-33) He is happy with his job and has not looked for other employment. (Tr. p. 33) Claimant presently earns $16.00 per hour. He was hired at $13.00 per hour. (Tr. p. 18)

Regarding industrial disability, I note that claimant's relatively young age, his lack of permanent restrictions, his continued employment and his ability to perform his job without accommodation, along with his undiminished hourly wage after the injury all support a low industrial disability.

Claimant's limited education, his difficulty with the English language and the situs of the injury being a facial scar, may impede his access to the labor market. These factors and his functional impairment of seven percent would support a higher amount of industrial disability.

In view of the all of the above factors along with all other appropriate elements for the determination of industrial disability, I find that claimant has sustained ten percent industrial disability.

There is no allegation that there was any appreciable delay from the time of Dr. Miller's assessment of 7 percent permanent impairment until the payment of 35 weeks of permanent partial disability was received by claimant.

The parties agree that the correct rate for workers' compensation benefits is $497.86. (Hearing Report p. 1) The parties also agree that claimant was paid 35 weeks of permanent partial disability benefits before the date of the hearing. (Hearing Report, p. 2)

CONCLUSIONS OF LAW

1. The first disputed issue in this case is whether the neck complaint is related to the work injury.

Both Dr. Sassman and Dr. Miller assigned permanent impairment based on the stipulated facial laceration injury. Defendants disputed the neck claim asserted by claimant.

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).

I have accepted the opinion of Dr. Miller above for the reasons there stated concerning the neck claim and I conclude that claimant has failed to carry his burden of proof that he sustained an injury to his neck that arose out of and in the course of his employment on or about February 29, 2016.

Turning to the extent of industrial disability, I note that the parties stipulated that if any disability is found, it would be an industrial disability. (Hearing Report p. 1)

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 593; 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man." Functional impairment is an element to be considered in determining industrial disability, which is the reduction of earning capacity. However, consideration must also be given to the injured worker's medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured workers' qualifications intellectually, emotionally and physically; the worker's earning before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of the injury to engage in employment for which the worker is best fitted. Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616 (Iowa 1995); McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

There are no weighting guidelines that indicate how each of the factors is to be considered. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience as well as general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 529 (App. March 26, 1985); Peterson v. Truck Haven Cafe, Inc., Vol. 1 No. 3 Industrial Commissioner Decisions, 654 (App. February 28, 1985).

Assessments of industrial disability involve a viewing of loss of earning capacity in terms of the injured worker's present ability to earn in the competitive labor market without regard to any accommodation furnished by one's present employer. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 158 (Iowa 1996); Thilges v. Snap-On Tools Corp., 528 N.W.2d 614 (Iowa 1995).

I have found above for the reasons there stated that claimant has sustained industrial disability of ten percent.

2. The second issue is penalty.

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 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.

Payments are "made" either when (a) the check addressed to a claimant is mailed or when (b) the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 236; Kiesecker, 528 N.W.2d at 112.

In this case, although Dr. Sassman's report indicated that claimant did not intend to seek scar revision surgery, the matter remained unclear according to the correspondence exchanged between counsel. (Ex. J, pp. 43-46) Claimant's counsel was unable to provide a clear answer on the matter as late as April 19, 2017. (Ex. J, p. 46) When the question was affirmatively resolved at claimant's deposition on June 12, 2017, defendants promptly sent a letter to Dr. Carlisle on June 14, 2017, seeking an impairment rating. For reasons unknown to the undersigned and

uncontrolled by defendants, Dr. Carlisle initially indicated that he had never treated claimant, which was not accurate. (Ex. JEC, p.21) Two additional responses were received from Dr. Carlisle which failed to provide a permanent impairment rating and defendants then sought the opinion of Dr. Miller, on August 16, 2017. (Ex. JED, pp. 29-30) Defendants received Dr. Miller's opinion and promptly paid the seven percent impairment to the whole person.

Claimant's complaint is with the delay from not only the date of the deposition, but also from the date that claimant returned to work in late March 2016.

Claimant returned to work in late March 2016. (Tr. pp. 41, 42) Dr. Carlisle recommended scar revision surgery in June 2016. (Ex. JEC, p. 18) Defendants sought a conclusion from claimant whether or not he was going to get the scar revision surgery done. I find that this was reasonable for defendants to not immediately obtain an impairment rating because the surgery, if completed, would likely impact the applicable rating. Claimant indicated that he did not want to do the revision surgery in his IME and defendants sought confirmation of this, which claimant's counsel was unable to provide. It was not until the deposition, that defendants were clearly advised that claimant did not wish to obtain the scar revision surgery. Within two days thereafter, they sought an impairment rating. When it became clear that Dr. Carlisle would not provide the requested rating, defendants promptly sought the rating from Dr. Miller. When Dr. Miller issued the rating, defendants promptly paid the rating. It is also significant that, claimant had returned to full-time work for the defendant employer without restrictions or accommodations. I conclude that defendants had a reasonable basis to deny further voluntary payment of industrial disability beyond the functional loss.

I conclude that defendants conducted a reasonable investigation and kept claimant apprised of that investigation and promptly made payment when the rating was issued. I conclude that claimant has failed to carry his burden of proof that penalty benefits should be awarded.

The 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 conclude that in this case, defendants shall reimburse claimant costs of $100.00 representing the filing fee in this matter.

ORDER

IT IS THEREFORE ORDERED:

Defendants shall pay claimant industrial disability benefits of fifty (50) weeks, beginning on the stipulated commencement date of March 28, 2016 until all benefits are paid in full.

Defendants shall be entitled to credit for all weekly benefits paid to date. The parties have stipulated that defendants are entitled to a credit of thirty-five (35) weeks.

All weekly benefits shall be paid at the stipulated rate of four hundred ninety-seven and 86/100 dollars ($497.86) per week.

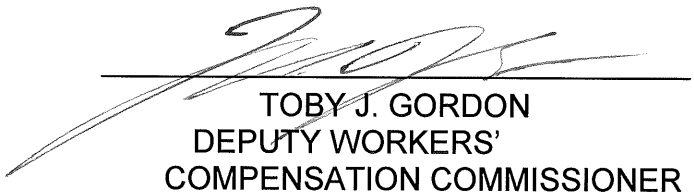
All accrued benefits shall be paid in a lump sum.

Defendants shall pay interest on any accrued weekly benefits pursuant to Iowa Code section 85.30

Defendants shall pay costs of one hundred and 00/100 dollars ($100.00).

Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 17th day of April, 2018.



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TJG/srs

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.