BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ALICIA DUSENBERRY, Claimant, vs. UNIVERSITY OF IOWA, STATE OF IOWA, Self-Insured, Employer, Defendant.	FILED FEB 17 2017 WORKERS COMPENSATION	File No. 5049019 ARBITRATION DECISION

STATEMENT OF THE CASE

Alicia Dusenberry, claimant, filed a petition in arbitration seeking workers' compensation benefits from the University of Iowa and its insurer, the State of Iowa as a result of an injury she sustained on June 22, 2010 which arose out of and in the course of her employment. This case was heard over two sessions and fully submitted on June 6, 2016. The evidence in this case consists of the testimony of claimant, Brook Dusenberry, Joint Exhibits 1 – 10, 12, 13, 15 – 28 and 30. Defendant's Exhibit A was admitted.

There was some mislabeling of the exhibits in the the Joint Exhibit list submitted. The Joint Exhibit, consisting of an interview of René Haigh, was withdrawn by the claimant. This exhibit was labeled number 29, but listed as Joint Exhibit 30. It was not admitted. Claimant then offered to submit Joint Exhibit 29, a listing of medical bills, but claimant did not have any of the bills. Defendant properly objected. The record was held open for claimant to submit Joint Exhibit 29. Claimant submitted Joint Exhibit 29 which consisted of 92 pages of various medical bills. This exhibit was not accepted and claimant was instructed to review the bills to include bills that are in dispute in this case. On March 2, 2016, claimant submitted a new Joint Exhibit 29 consisting of 18 pages. This exhibit was admitted.

ISSUES

Whether the alleged injury is a cause of temporary disability and, if so, the extent;

Whether the alleged injury is a cause of permanent disability and, if so;

The extent of claimant's disability including whether claimant is permanent total or an "odd-lot" worker and permanently disabled.

Commencement date for permanent benefits.

Payment of medical expenses.

The number of weeks of credit defendant is entitled to for payment of permanent benefits.

Whether defendant is entitled to a credit for sick or disability income.

Whether claimant's left hip is causally related to her work injury of January 22, 2010.

Whether penalty benefits should be awarded.

Assessment of costs.

STIPULATIONS

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.

A summary of the stipulations is as follows:

Claimant suffered an injury that arose out of and in the course of her employment on January 22, 2010.

Claimant suffered a temporary and permanent disability due to this injury.

Claimant was off work during the time periods listed in the hearing report section on temporary benefits.

Claimant's weekly rate is $425.06.

FINDINGS OF FACT

The deputy workers' compensation commissioner, having heard the testimony and considered the evidence in the record, finds that:

TESTIMONY AT HEARING

Alicia Dusenberry, claimant, was 47 years old at the time of the hearing. Claimant entered 12th grade, but did not graduate. She obtained a GED approximately 13 years after she left high school, in 2000. Claimant took one basic computer course at a community college. Claimant obtained a Medical Assistant diploma in 2006. (Exhibit 24, page 4)

Claimant testified she had a bulging disk at L4 – L5 that was surgically repaired by Chad Abernathey, M.D. in November 2006. (Transcript, p. 26) Dr. Abernathey did not provide claimant any restrictions after this surgery. (Tr. p. 27) Claimant's work was not affected after she recovered from the 2006 surgery.

Claimant testified that at the time of the hearing she had received restrictions from Farid Manshadi, M.D. of no bending, no stooping, and no twisting, with a ten-pound weight limitation. Claimant reported Dr. Manshadi also said that she should be able to sit frequently, able to move around and lie down if necessary. (Tr. p. 30) Claimant said Sergio Mendoza, M.D. put her on light duty after her work related back surgery and then again in 2013. (Tr. pp. 30, 31) Claimant testified that Dr. Mendoza did not lift the light work restrictions on November 2013. (Tr. p. 32) Claimant testified that Cassim Igram, M.D., Earnest Found, M.D. and Nicolas Noiseux, M.D. did not lift Dr. Mendoza's light work restrictions. (Tr. p. 32)

Claimant testified that currently she does not walk without her crutch and can only walk about one-half block. (Tr. p. 35) Claimant said since November 2013 she has at different times used a cane, two crutches or one crutch. (Tr. p. 38)

Claimant's work history before the University of Iowa starts in 1984 were she worked as a cashier and cook at a Taco John's for two years. She next worked from 1988 -1991 at CDS operating a machine and loaded skids with boxes of inserts. Claimant worked as an assistant manager at a Casey's from 1991 – 1993. She painted houses and did cleaning and yard work from 1993 – 1996. Claimant was self-employed and ran a daycare from 1997 – 2001. She then worked for an auto parts store delivering parts and stocking and answering phones in 2001 – 2002. Claimant worked at a Dollar General as a cashier, stocked product and cleaned in 2005 – 2006. (See Ex. 24, pp. 3, 4) Claimant testified she did not believe she could do any of her past work due to her restrictions and her limited ability to stand, lift or engage in other physical activities.

Claimant has hired by the University of Iowa as a medical assistant in 2007. Her employment was terminated on May 29, 2015. (See Ex. 23, p. 6) Claimant agreed that Exhibit 21 was a fair description of the work she was performing as a medical assistant. Claimant did not believe that she could perform the medical assistant job. Claimant identified walking, lifting, stooping, stocking supplies and assisting patients onto scales as beyond her physical abilities. (Tr. pp. 42- 45)

Claimant slipped on some water at work and fell on January 22, 2010. She reported her injury. (Ex. 18, pp. 1, 2) Claimant said she fell on her back and butt. (Tr. p. 49) Claimant was seen in the emergency department on January 23, 2010.

Claimant eventually had surgery on her back on March 14, 2011 and left hip on March 2, 2015. (Tr. p. 58) Claimant said that her back pain decreased for about a year after her back surgery. After her injury, claimant was assigned to light duty in the cancer center, some of her co-workers would assist claimant in such things as tying her

shoes, and had other staff transfer patients. (See Ex. 13, p. 1; Ex. 19, pp. 1 -3; Ex. 8, p. 90; Tr. p. 89)

On December 3, 2014, claimant was informed by the human resources department at the University of Iowa that with her limitations she could not do her regular work as a medical assistant and could not continue to do her temporary light duty assignment, phone triage and preauthorization. She was given had 90 days to find another job in the University of Iowa system. (Tr. p. 71; Ex. 23, pp. 2, 3) Claimant was informed that she would be provided help to find another job at the University of Iowa. Claimant did not feel that she received adequate help from the University of Iowa; however she found three positions to apply for on her own. (Tr. p. 76) Claimant received an interview for a coding job and patient finance, but was not offered the positions. She was told she was not qualified for a scheduling position. (Tr. pp. 78, 79) After claimant was terminated she looked for work. Between June 2015 and January 2016 she made inquiries or applied at around 56 different jobs. (Ex. 20, pp. 1 – 5) At the time of the hearing she was still looking for work. (Tr. p. 84)

Claimant said that after her injury in 2010 she was not able to do most household chores such as vacuum, scrub the bathroom, cook meals and also not able to garden, walk the dogs, and play outside with her children. (Tr. p. 85) Claimant's daughter assists claimant with some personal care. (Tr. p. 89)

Claimant said she developed scoliosis after her back surgery and the collapse of the L5 disk. (Tr. p. 90) Claimant said she has more difficulty driving and performing personal care due to her scoliosis.

Brook Dusenberry, (Brook) claimant's daughter testified when the hearing was reconvened[1]. Brook testified that after her work accident in January 2010, claimant could not do many household chores as she was having severe back pain. (Tr2, p.11) She agreed that claimant could not garden or mow the lawn or shovel snow after the accident. (Tr2, p. 12; Ex. 24, p. 17) Brook testified that claimant could only walk for one-half block before she had to stop due to pain. (Tr2, p. 14)

Claimant testified about some of her past medical conditions. Claimant had back surgery in 2006. (Tr2, p. 17) Claimant started taking opioids in 2002 for headaches. She was in treatment for opioids in 2004 and was receiving methadone through a treatment center at the time of the hearing. (Tr2, pp. 18, 19) Claimant, before her work injury, was treated for depression. (Tr2, p.19) At the time of the hearing, claimant had an appeal pending on her claim for social security disability.

In August 2010, Henri Cuddihy, M.D. noticed a difference in claimant's leg length and referred claimant to American Prosthetics who provided claimant with some lifts. (Tr2, p. 25) Dr. Cuddihy referred claimant to Dr. Mendoza at the University of Iowa Hospitals and Clinics (UIHC). Dr. Mendoza performed back surgery on March 14, 2011.

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[1] References to the transcript from the reconvened hearing will be Tr2, p.*.

Claimant was released to light duty by Dr. Mendoza in June 2011 and in July 2011 to eight hours of sedentary work per day. (Tr2, p. 26) Claimant admitted that on September 21, 2011 claimant was pain free and by November 2011 she was released to return to work without restrictions. (Tr2, p. 27) Claimant had no treatment for November 2011 until February 2013. Claimant said she did well for about a year and one-half after her back surgery. (Tr2, p. 27) Claimant received some treatment after February 2013, which included an injection on June 12, 2013. (Tr2, pp. 27, 28)

Claimant testified that due to her hip pain she insisted that Dr. Mendoza order an MRI of her left hip in October 2013. (Tr2, p. 28) Claimant was informed that she had a tear in her gluteus medius tendon. Claimant said she returned to Dr. Mendoza in October 2014 and discussed possible surgery for her scoliosis. However Dr. Mendoza left the UIHC and claimant's care was transferred to Dr. Igram. (Tr2, pp. 33, 34) Claimant testified that she thought that Dr. Mendoza had given her restrictions of light duty in November 2014 and never removed them. (Tr.2, p. 58; Ex.8, p. 126) Claimant agreed that Dr. Igram and Dr. Found did not believe that claimant should have surgery for her scoliosis. (Tr2, p. 34)

Claimant testified that Dr. Noiseux saw claimant for her left hip. Claimant testified that Dr. Noiseux recommended surgery, but told her he was not qualified to perform it laparoscopically. She did not recall being told by Dr. Noiseux's office that he wanted her to quit smoking before he performed her hip surgery. (Tr2, p. 35: Ex. 8, p. 119) Claimant eventually had her hip surgery performed by Matthew White, M.D. on March 2, 2015. Claimant testified that she had no restrictions for her hip. (Tr2, p. 42) Claimant testified that she was not informed that the medical bills for the treatment would not be covered by workers' compensation. (Tr2, pp. 58 - 60)

EVIDENCE FROM EXHIBITS

Claimant, on November 7, 2006, had surgery to her back by Dr. Abernathey. His post-operative diagnosis was "Right L5 radiculopathy, right L4-5 disk extrusion." (Ex. 1, p. 2) Claimant had a good recovery and was last seen by Dr. Abernathey on November 17, 2006. Claimant was not issued any restrictions. (Ex. 1, p. 3)

Claimant was hired by the University of Iowa to work as a Medical Assistant II on June 15, 2007. (Ex. 22, p. 1) She worked in the Holden Comprehensive Cancer Center. On January 22, 2010 claimant fell at work.

Claimant did not seek medical treatment on that day, but did the next day. She reported her injury to her employer. (Ex. 18, pp. 1, 2) Claimant went to the UIHC Emergency Department on January 23, 2010. She reported she slipped and landed on her back. She complained of mid and low back pain. X-rays did not show any acute injury. (Ex. 2, p. 1) She was taken off work form January 23 through January 26, 2010. (Ex. 2, p. 3)

On January 29, 2010 claimant was seen at UI Health Works by Tracie Abbott, ARNP. ARNP Abbott noted a lumbar spine with normal curvature and assessed

claimant with cervical strain, left trapezius/shoulder strain with spasm and lumbar/SI strains. Claimant was allowed to perform her regular work. (Ex. 3, p. 2) On February 11, 2010, ARNP Abbott noted claimant had continued discomfort over the left low back and occasionally into the left buttock. Claimant was able to work but has increased discomfort after walking long distances to get to work. (Ex. 3, p. 3) On February 19, 2010, Dr. Cuddihy noted claimant had discomfort over the left lower back out towards the gluteal area. His assessment was, "1. Left cervical and upper back strain. 2. Left quadratus lumborum and gluteal strain, resolving." (Ex. 3, p. 5) On February 29, 2010 ARNP Abbott noted, "More so, she has tenderness into the midsection of the left gluteal musculature with some increased tone noted. She has trace palpable tenderness over the left greater trochanter." (Ex. 3, p. 7) On March 23, 2010 ARNP Abbott assessed claimant with left trochanteric bursitis and scheduled a steroid injection for this condition. (Ex. 3, p. 8; Ex. 4, 5) On May 5, 2010, Neil Segal, M.D. administered a left greater trochanteric and gluteus medius insertion injection under ultrasound guidance. His diagnostic impression was subacute gluteus medius insertional tendinopathy. (Ex. 25, p. 1)

An MRI of June 21, 2010 of the thoracic spine showed mild disk bulging. (Ex. 5, p. 1) On June 25, 2010, Mary Murphy, D.O., noted claimant reported a grabbing pain in her left hip on June 23, 2010. (Ex. 3, p. 11)

An MRI of the lumbar spine on July 9, 2010 showed,

1. Postoperative changes of the posterior elements of L4 and L5 of uncertain nature.
2. Diffuse degenerative changes throughout the lumbar spine, resulting in severe spinal stenosis at L4/5, and moderate to severe spinal stenosis at L3/4 and L5/S1.
3. The pattern of foraminal narrowing suggests possible irritation of the exiting right L4 nerve root in its foraminal zone.
4. I do not see definite acute injury.

(Ex. 6, p. 2) On July 20, 2010, Dr. Cuddihy provided clamant with an injection to the left greater trochanteric bursa. (Ex. 3, p. 17; Ex. 13, p. 3) Claimant had an MRI of her hips on August 19, 2010. The technique section of this report stated the MR imaging of both the right and left hip was performed. (Ex. 7, p. 1) On September 1, 2010, Dr. Cuddihy noted claimant had a right and left hip MRI to rule out avascular necrosis (AVN). No evidence of AVN was found and the MRI was essentially normal. (Ex. 7, p. 2) He referred claimant to American Prosthetics due to uneven leg length. (Ex. 3, p. 21)

Claimant saw Dr. Mendoza on September 18, 2010 for low back and left buttock pain. Dr. Mendoza recommended a left-sided L5 injection and had claimant perform sedentary work for up to four hours per day. (Ex. 8, pp. 5, 6) On November 15, 2010, Dr. Mendoza recommended a revision laminotomy, a right L4-L5 laminotomy. (Ex. 8, p. 11) On March 14, 2011, Dr. Mendoza performed a L3-L5 direct lateral lumbar interbody fusion and L3-L5 posterior spinal fusion with instrumentation as well as lumbar decompression. (Ex. 8, pp. 23, 24, 29; Ex. 13, p. 4) On July 27, 2011,

Dr. Mendoza noted claimant had some left hip pain that was worsening since claimant had not been wearing her corrective shoes. (Ex. 8, p. 38) Claimant was allowed to work at the sedentary level for eight hours.

On November 2, 2011, claimant reported to Dr. Mendoza she was doing much better and requested that her restrictions be lifted. Dr. Mendoza returned claimant to work without restrictions. (Ex. 8, p. 46) On December 9, 2011, Dr. Mendoza provided a ten percent whole person impairment rating and stated that claimant was at maximum medical improvement (MMI) for her back injury as of November 2, 2011. (Ex. 8, p. 48) Defendant paid the rating of 50 weeks.

On March 28, 2012, claimant returned to UIHC and reported continuing left greater trochanter tenderness. (Ex. 8, p. 49) Claimant was allowed to work without restrictions. (Ex. 8, p. 53)

On February 6, 2013, Dr. Mendoza reviewed radiographs, which were consistent with asymmetric L5 disk space collapse. He wrote,

> A 44-year-old woman who is status post L2-L5 anterior, posterior fusion for L4-L5 left foraminal stenosis and L3-L4 central stenosis. She has developed scoliosis from asymmetric L5 disk space collapse. The leg length discrepancy can make some difference. Her leg symptoms are greater on the left than the right. Recommend shoe lift on the right side and MRI to evaluate the structure of the lumbar spine. Return to see Dr. Mendoza after the MRI.
>
> She may work without restrictions.

(Ex. 8, p. 62) On March 6, 2013, Dr. Mendoza recommended physical therapy and an LSO brace to help stabilize her spine and selective nerve root injection. He discussed with claimant about performing another fusion at L5-S1, an anterior lumbar interbody fusion (ALIF). (Ex. 8, pp. 71) He also discussed this surgery with claimant on October 8, 2014. (Ex. 8, p. 118) Claimant had an injection on May 15, 2013. On June 13, 2013, claimant had a left greater trochanteric injection. (Ex. 8, p. 86)

An MRI was performed of the left hip on November 21, 2013. The MRI showed,

> 1. Partial thickness tear at the insertion of the gluteus medius tendon with adjacent intramuscular edema.
>
> 2. Edema within the right gluteus maximus, nonspecific, but may be iatrogenic. Correlate clinically.
>
> 3. Postsurgical changes of the lumbar spine.

(Ex. 8, p. 89) On November 24, 2013, claimant was informed of the results of the MRI and light duty was recommended for her job. (Ex. 8, p. 89) Claimant was provided restrictions of 25 pound lift/push/pull occasionally; stooping, bending, twisting

occasionally and should have a sit/stand option. (Ex. 8, p. 99) Claimant was moved from her medical assistant job to another position at UIHC performing phone preauthorization. (Tr2, p. 44)

On December 11, 2013 Dr. Mendoza wrote to the third party administrator for the defendant. He noted a recent MRI showed evidence of a partial tear of the gluteus medius at the level of insertion. Dr. Mendoza wrote,

> To the nearest degree of medical certainty, I cannot attribute her left gluteus medius tear to her previous lumbar spine pathology, and the work incident of January 22, 2010. Her current complaints and need for treatment, including modified activity, are not likely due to the previous low back complaints, but rather, a separate and distinct problem.

(Ex. 8, p. 100)

On July 9, 2014, claimant retuned to Dr. Mendoza with the chief complaint of left hip pain. The note of that visit said, "This is related to a workers' compensation claim dated 01/22/2014 [*sic*]." (Tr. p. 105) Claimant was referred to Dr. Noiseux and continued on light duty. (Ex. 8, p. 106)

On October 8, 2014, Dr. Noiseux examined claimant. He noted the MRI of the hip showed a significant tear and she has been having hip problems the last three to five years. (Ex. 8, pp. 109, 110) Dr. Noiseux recommended a referral to Steve Aviles, M.D. to see if he could perform the repair by arthroscopy. Dr. Noiseux did offer open surgery to the claimant. (Ex. 8, p. 114) He recommended that claimant cease smoking. On October 14, 2014, claimant was informed Dr. Aviles was not available for the surgery and that Dr. Noiseux would perform the surgery after claimant had a negative nicotine test. (Ex. 8, p. 19)

On February 10, 2015, claimant was seen by Matthew White, M.D. for her left hip. Dr. White noted the claim of the hip had been denied as a workers' compensation injury. The records indicate that Dr. White saw claimant as a referral from Dr. Noiseux. (Ex. 9, p. 3) Dr. White recommended a hip endoscopy with gluteus medius repair and trochanteric bursectomy. (Ex. 9, p. 3) On February 23, 2015, Dr. White wrote on a FMLA form that claimant would not be able to work from March 2, 2015 through April 27, 2015 (est.) due to surgery. (Ex. 9, p. 5) On March 2, 2015, Dr. White performed surgery. His postoperative diagnosis was,

1. Left hip 70% high-grade partial thickness gluteus medius tear.

2. Left hip recalcitrant trochanteric bursitis.

(Ex. 10, p. 10)

On April 8, 2015, Dr. White wrote claimant's attorney concerning causation of her hip. He wrote,

> After review of all of her records provided including previous visits with orthopedic surgeons at the University of Iowa, I have no evidence that she had previous pain or medical treatments for the left hip prior to her fall on January 22, 2010. In addition, she had a rather high trade partial thickness gluteus medius tear, which would be rare for generalized wear and tear of the hip. Given these details, it is my opinion to at least a reasonable degree of medical certainty (51% or more likely) that Ms[.] Dusenberry's January 22, 2010 fall substantially caused her left hip condition for which I have treated.

(Ex. 9, p. 10) On April 12, 2015, Dr. White wrote that claimant could return to work in a sedentary/light desk job with no lifting, standing or twisting, with the ability to get up. (Ex. 10, p. 13) On May 26, 2015, Dr. White said claimant could do light work, but no patient transfers. (Ex. 10, p. 15) On July 28, 2015, Dr. White noted claimant's back had become more problematic. (Ex. 9, p. 15) Based upon Dr. White's last exam, claimant was at MMI for her hip injury on January 12, 2016, Dr. White noted her gluteus medius repair is intact. (Ex. 9, p. 20) He noted that claimant has a SI joint problem. (Ex. 9, p. 20)

On March 24, 2015, Dr. Noiseux responded to a letter form claimant's counsel concerning causation of her hip condition. Dr. Noiseux checked that he agreed to the following statement;

> I do not have any history from Alicia Dusenberry that she'd previously been medically-cared for or –treated for any left-hip condition; or had any significant left-hip pain before her January 22, 2010 fall. Assuming that Alicia Dusenberry had no such prior history, then it is my opinion to at least a reasonable degree of medical certainty (51% or more likely) that Ms. Dusenberry's January 22, 2010, fall substantially caused her left-hip injury condition for which I cared for and treated her on October 8, 2014.

(Ex. 8, p. 127)

On November 19, 2014, Dr. Mendoza restricted claimant to light work. (Ex. 8, p. 126) Claimant's care was transferred to Dr. Igram.

On March 18, 2015, Dr. Igram examined claimant. He disagreed with Dr. Mendoza about performing a "big surgery" to rebalance her spine. (Ex. 8, p. 132)

On April 2, 2015, Dr. Found examined claimant for her scoliosis. He noted,

> The patient is still recovering from her left hip arthroscopy procedure. Thus I cannot say how much functional recovery she'll ultimately have, or whether or not the moderate coronal balance will ultimately keep her out of work. Surgical correction of this problem would be a major undertaking, with substantial morbidity risk, particularly given her smoking history. We do not think she is at risk for rapid progression of her coronal deformity.

> However we do think it should be monitored over time. Would like to see her back again in three months with repeat scoliosis radiographs.

(Ex, 8, p. 138) This is the last record of treatment of claimant's scoliosis.

On May 6, 2015, Dr. Igram said claimant was at MMI for her back and that claimant should have a functional capacity examination (FCE) after she reaches MMI for her hip. (Ex. 8, p. 143) Dr. Igram noted her spine was stable and stated, "She is currently on work restrictions and I would continue with same with regard to her back is been generated from this clinic. I suspect she also has restrictions with regard to the hip for her treating surgeon for the hip." (Ex. 8, p. 151) On June 4, 2015, Dr. Igram added an addendum to the May 6, 2015 encounter notes. Dr. Igram agreed with Dr. Mendoza's opinion that claimant's left hip complaints and pathology was not related to her lumbar pathology and the work incident. Concerning her back, Dr. Igram decided to forgo the FCE and release claimant to work without restrictions. (Ex. 8, p. 150)

On May 12, 2014, Dr. Manshadi issued an independent medical examination (IME). Among other conditions he noted claimant developed scoliosis from asymmetric L5 disc space collapse. (Ex. 13, p. 8) Dr. Manshadi stated that claimant had an injury to her left hip which was shown in the November 2013 MRI as well as evidence of edema in the gluteus maximus muscle laterally at the level of the greater trochanter in the August 2010 MRI. He stated, "I also believe the work injury did substantially cause damage to Ms. Dusenberry's L5-SI disc, leading that disc to generate the pain condition that she is presently with now and for which Dr. Mendoza also is considering an L5 – SI ALIF procedure." (Ex. 13, p 8) He said that absent additional surgery for the back claimant had a 21 percent impairment whole body impairment. He assigned a 7 percent lower extremity rating for the hip— 3 percent whole body. (Ex. 13, p. 8) He opined claimant's scoliosis was caused by her work injury. (Ex. 13, p. 9) He provided an estimated functional capacity of occasionally lifting 10 pounds and occasional sitting, walking, standing and never to kneel and bend/stoop. (Ex. 13, p. 10)

Barbara Laughlin, M.A. prepared a vocational assessment on June 11, 2014. Depending on the limitations used, she opines claimant has either a 98 or 99 percent loss of unskilled occupations. She has either an 86.8 or 88.7 percent loss of generally transferable occupations. (Ex. 15, p. 7) Ms. Laughlin submitted another report on January 13, 2016 which reached very similar conclusions about claimant's vocational abilities and job prospects. (Ex. 16)

René Haigh, MS, CRC provided a vocational assessment on December 16, 2015. (Ex. 17) As Dr. Igram and Dr. Mendoza released claimant to work without restrictions, she opined claimant could perform the physical demands of all work in the Dictionary of Occupational Titles. Ms. Haig identified a number of positions she believed claimant could perform. (Ex. 17, pp. 13 – 14)

Based upon the testimony and Dr. Manshadi's report and other medical reports present I find claimant has the following restrictions: occasionally lifting ten pounds and

sitting with the ability to stand as needed, occasional walking, standing, and never to kneel and bend/stoop.

Claimant has requested healing period benefits for a number of days between June 2, 2014 and March 3, 2015. (Ex. 28, 1) There are some FMLA papers that are in evidence by Dr. White for the hip injury completed by Dr. White. Those documents have the claimant on FMLA leave after her surgery on March 2, 2015. There is no specific record of a physician advising claimant to take time off work, as needed, for the time period clamant is requesting between June 2, 2014 and March 1, 2015.

RATIONALE AND CONCLUSIONS OF LAW

Left Hip and Low Back

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).

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).

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4)(b); Iowa Code section 85A.8; Iowa Code section 85A.14.

The claimant has the burden of establishing an injury arising out of and in the course of employment. It was found above that she met that burden. The claimed health conditions in the left lower extremity arose out of and in the course of employment.

Dr. Mendoza wrote that the claimant's gluteus medius tear was not related to the previous lumbar spine pathology and the work incident of January 22, 2010. Dr. Igram agreed with Dr. Mendoza and stated that the claimant's left hip injury was not related to the January 22, 2010 injury.

Dr. Igram referred claimant to Dr. Noiseux to evaluate her hip. Presumably Dr. Igram respects Dr. Noiseux's expertise concerning hip injuries. Dr. Noiseux concluded, based upon the fact that claimant was not having hip problems before her fall at work in 2010; her left hip injuries were due to the work injury. Dr. White also concluded the hip injury was related to the work injury. Dr. White noted he had reviewed the records for the UIHC. He also had the opportunity to see the tear. He also said that given the nature of the tear it would be rare that it could have been caused by generalized wear and tear. While it is true that the MRI in 2010 of the hips did not reveal partial tear of the gluteus medius, the referral of the MRI was to determine if claimant may have AVN.

It is true that Dr. Noiseux responded to claimant's attorney in a check box response, however, he was a hip expert that Dr. Igram referred claimant to for evaluation.

I find the reports of Dr. Noiseux, Dr. White and Dr. Manshadi more convincing as to causation for her hip injury.

I find that in considering all of the medical evidence claimant has proven by a preponderance of the evidence that she injured her left hip on January 22, 2010, which caused permanent injury and the medical care she received for this injury was reasonable and related to her work injury. I find that the hip injury is an injury to the whole body, an industrial disability.

Defendant admitted claimant's back injury and surgery was a work related injury. I find that the back injury and medical treatment arose out of and in the course of work for defendant.

I find that claimant's scoliosis is also related to her work injury of January 22, 2010.

Extent of disability

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

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

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

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co.,

288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

A finding that claimant could perform some work despite claimant's physical and educational limitations do not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

In Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985), the Iowa court formally adopted the "odd-lot doctrine." Under that doctrine a worker becomes an odd-lot employee when an injury makes the worker incapable of obtaining employment in any well-known branch of the labor market. An odd-lot worker is thus totally disabled if the only services the worker can perform are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." Id., at 105.

Under the odd-lot doctrine, the burden of persuasion on the issue of industrial disability always remains with the worker. Nevertheless, when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to produce evidence showing availability of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of facts finds the worker does fall in the odd-lot category, the worker is entitled to a finding of total disability. Guyton, 373 N.W.2d at 106. Factors to be considered in determining whether a worker is an odd-lot employee include the worker's reasonable but unsuccessful effort to find steady employment, vocational or other expert evidence demonstrating suitable work is not available for the worker, the extent of the worker's physical impairment, intelligence, education, age, training, and potential for retraining. No factor is necessarily dispositive on the issue. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). Even under the odd-lot doctrine, the trier of fact is free to determine the weight and credibility of evidence in determining whether the worker's burden of persuasion has been carried, and only in an exceptional case would evidence be sufficiently strong as to compel a finding of total disability as a matter of law. Guyton, 373 N.W.2d at 106.

Dr. Mendoza's conclusion that claimant has no restrictions due to her lower back injury is not convincing. Claimant has had two lower back surgeries. Claimant did recover from the first back surgery without restrictions. The surgery Dr. Mendoza performed was an extensive fusion with hardware. Claimant developed L5 disk space collapse and developed scoliosis from that collapse. Dr. Mendoza recommended performing an ALIF at L5-S1. Dr. Igram and Dr. Found advised against significant invasive surgery to correct her scoliosis. It would take a remarkable human being not to have restrictions after that much injury to a lower back. Claimant was able to return to work. But over time claimant's back and hip have limited her ability to walk, sit, stand, bend and lift. Dr. Igram's opinion that claimant has no restrictions due to her back injury and fusion surgeries is also not convincing. He relies in part on the fact that Dr. Mendoza released claimant to return to work without restrictions on December 2, 2011. The medical evidence shows claimant continued to have pain and limitations in her back after November 2, 2011. She developed scoliosis and Dr. Mendoza

recommended another fusion surgery. The scoliosis was as a result of the work related back injury.

As claimant has not had a formal FCE, Dr. Manshadi did an estimated FCE. Based upon this report and claimant's and Brook's testimony, claimant is limited to sedentary work where she has the ability to occasionally lift ten pounds and sitting with the ability to stand as needed, occasional walking, standing, and never to kneel and bend/stoop.

Claimant has looked for a number of jobs and has not been successful. She testified that she thought she could do some jobs, such as the phone triage, coding and scheduling. Claimant has not proven that the work she can perform is so limited in quality and dependability that a reasonable and stable labor market does not exist.

While claimant's impairments are significant, the claimant has not proven that she is totally disabled or an odd-lot employee.

I did not find the vocational reports submitted by either party overly helpful. Ms. Laughlin's formulaic report that finds 98 or 99 percent loss of unskilled jobs is typical of her reports. And while claimant's vocational base is considerably reduced, I do not find that it has totally eroded. Ms. Haig's report assumes no restrictions. That assumption cannot be relied upon as I have found claimant has restrictions.

Claimant does not have an extensive education, she obtained a GED and later was a Certified Medical Assistant. She can no longer perform her medical assistant job. She cannot perform most of her prior work. She is limited to certain types of sedentary work.

Her hip has been repaired and should not cause a substantial impairment. Her back injury and the sequela scoliosis did cause significant limitations. She uses a crutch to walk. She cannot walk more than a block without significant pain.

I find claimant has a 70 percent industrial disability. She has a 70 percent loss of earning capacity.

Commencement date for Permanent Partial Disability

Iowa Code section 85.34(2) provides that "[c]ompensation for permanent partial disability shall begin at the termination of the healing period provided in subsection 1." Iowa Code section 85.34(1) provides that healing period benefits are payable until the employee: (1) has returned to work; (2) reaches MMI; or (3) is medically capable of returning to substantially similar employment to that which the employee was engaged in at the time of the injury. The Iowa Supreme Court in June, 2016 issued its decision in Evenson v. Winnebago, and stated that the injured worker's "first return to work established the end of the healing period and the commencement of PPD benefits because it was the earliest of the three triggering events prescribed in section 85.34(1)." Evenson v. Winnebago, 881 N.W.2d 360, at 372 (Iowa 2016). The Court went on to

state that "[o]ur determination that Evenson's return to work . . . established the commencement date for PPD benefits is not precluded by the fact that he was entitled to TPD benefits for subsequent weeks . . ." Evenson, 881 N.W.2d at 372. The majority opinion help that temporary benefits can be paid at the same time as permanent benefits, noting that the purpose of temporary and permanent benefits are different that the law allowed an overlapping of temporary and permanent benefits[2].

The evidence presented at hearing indicates that claimant was taken off work from January 23, 2010 through January 26, 2010. (Ex. 2, p. 3) Claimant returned to work January 29, 2010. I find that under the holding of Evenson this is the date for the commencement of permanent partial benefits – January 29, 2010.

Medical expenses

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 1975).

This decision causally connects the left hip injury. Defendant is responsible for the expenses in Exhibit 29.

Pursuant to Iowa Code section 85.27, claimant is entitled to payment of reasonable medical expenses incurred for treatment of a work injury. Claimant is entitled to an order of reimbursement if she has paid those expenses. Otherwise, claimant is entitled only to an order directing the responsible defendants to make such payments directly to the provider, pay the insurance provider who paid the expenses, or hold her otherwise harmless. See Krohn v. State, 420 N.W.2d 463 (Iowa 1988).

Temporary total/healing period

Claimant has requested 25 days of work she missed between June 2, 2014 and March 3, 2015 as intermittent healing period benefits. There is no medical evidence that claimant was advised to take time off for any of these absences. While workers

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[2] Evenson at 374 (Our conclusion that Evenson's entitlement to PPD benefits was not suspended beyond the end of the first healing period until after his period of temporary partial disability ended poses no risk of duplication or overpayment of benefits under the circumstances presented here. As we have noted, TPD payments are calculated to replace part of Evenson's loss of actual earnings after he returned to work during a period of partial disability. The PPD payments, by contrast, are intended to compensate him for a different loss: a permanent partial loss of his left arm. Thus, although we conclude today that PPD payments can be owed for periods during which a claimant was paid temporary partial disability, no duplication of benefits arises.)

may not need a "doctor's excuse" for every day they miss work, generally a claimant should have been given discretion to make a decision not to work by a medical provider. I find that claimant has not met her burden of proof that she was entitled to intermittent healing period benefits between June 2, 2014 and March 3, 2015.

Claimant has requested intermittent healing period benefits from the day of her hip surgery, March 2, 2015 until December 17, 2015. As I found claimant was at MMI for this injury on January 12, 2016, claimant is entitled to intermittent healing period benefits from March 2, 2015 through January 12, 2016.

While not briefed, claimant is entitled to healing period benefits when Dr. Mendoza performed his surgery on March 14, 2011 until she was released on November 2, 2011. Claimant is entitled to healing period or temporal partial disability for those times that she was unable to work due to injections, physical therapy appointments and medical treatment that required her to miss work.

Defendant is entitled to credit for wages and indemnity benefits paid to claimant.

Credit of vacation and sick pay

Defendant has requested credit for vacation and sick pay if claimant is awarded benefits during the time she used vacation and sick time. Defendant cites Jones v. Simpson, File No 5060122 (Arb. October 9, 2015) in support of this claim. Defendant's reliance is misplaced. The claimant does not have option of taking sick or vacation as she is no longer an employee. The deputy in Jones ruled,

> In this case, claimant was only off work four days due to her injury to receive ESIs. Given my finding of permanency, she is eligible for healing period benefits for this time off work. Iowa Code section 85.32. As she used accumulated sick or vacation pay, defendants would be able to take credit against an award of healing period benefits if claimant chooses to have her leave reinstated. However, she no longer works at Simpson and reinstatement of leave is not possible. Therefore, defendants will receive no credit for claimant's [*sic*] used her earned fringe benefit for the time off work. Terhark v. Hope Haven, Inc., File No. 5027246 (App. April 7, 2010). Evans v. Iowa Dept of Transportation, File No. 5046657 (Arb, March 25, 2015).

Recently the Iowa Supreme Court has ruled on this issue. In Evenson v. Winnebago Industries, Inc., 881 N.W.2d 360 (Iowa 2016)

> Additionally, the commissioner allows credits for sick pay and vacation pay in some situations. Iowa Practice, at 175–76; see also King v. Marion Indep. Cmty. Sch. Dist., Iowa Workers' Comp. Comm'n, 2013 WL 3185066, at *2–3 (June 10, 2013). If an employee elects to use sick pay or vacation pay during a time in which workers' compensation benefits are not being paid, an employer is not entitled to a credit for the pay unless the employee later elects to have the vacation or sick pay restored. Iowa Practice, at 176.

Evenson at 371. Defendant is not entitled to this credit.

Penalty

The next issue to be determined is if defendant is liable for a penalty.

In Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996), and Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996), the supreme court said:

> Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."
>
> Christensen, 554 N.W.2d at 260.
>
> The supreme court has stated:
>
> (1) If the employer has a reason for the delay and conveys that reason to the employee contemporaneously with the beginning of the delay, no penalty will be imposed if the reason is of such character that a reasonable fact-finder could conclude that it is a "reasonable or probable cause or excuse" under Iowa Code section 86.13. In that case, we will defer to the decision of the commissioner. See Christensen, 554 N.W.2d at 260 (substantial evidence found to support commissioner's finding of legitimate reason for delay pending receipt of medical report); Robbennolt, 555 N.W.2d at 236.
>
> (2) If no reason is given for the delay or if the "reason" is not one that a reasonable fact-finder could accept, we will hold that no such cause or excuse exists and remand to the commissioner for the sole purpose of assessing penalties under section 86.13. See Christensen, 554 N.W.2d at 261.
>
> (3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City Meats, Inc., 528 N.W.2d at 109, 111 (Iowa 1995); or (b) the employer had a reasonable basis to contest the claim—the "fairly debatable" basis for delay. See Christensen, 554 N.W.2d at 260 (holding two-month delay to obtain employer's own medical report reasonable under the circumstances).

> (4) For the purpose of applying section 86.13, the benefits that are underpaid as well as late-paid benefits are subject to penalties, unless the employer establishes reasonable and probable cause or excuse. Robbennolt, 555 N.W.2d at 237 (underpayment resulting from application of wrong wage base; in absence of excuse, commissioner required to apply penalty).
>
> > If we were to construe [section 86.13] to permit the avoidance of penalty if any amount of compensation benefits are paid, the purpose of the penalty statute would be frustrated. For these reasons, we conclude section 86.13 is applicable when payment of compensation is not timely . . . or when the full amount of compensation is not paid.
>
> Id.
>
> (5) For purposes of determining whether there has been a delay, payments are "made" when (a) the check addressed to a claimant is mailed (Robbennolt, 555 N.W.2d at 236; Kiesecker, 528 N.W.2d at 112), or (b) the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 235.
>
> (6) In determining the amount of penalty, the commissioner is to consider factors such as the length of the delay, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.
>
> (7) An employer's bare assertion that a claim is "fairly debatable" does not make it so. A fair reading of Christensen and Robbennolt, makes it clear that the employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." See Christensen, 554 N.W.2d at 260.
>
> Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

Weekly compensation payments are due at the end of the compensation week. Robbennolt, 555 N.W.2d 229, 235.

Penalty is not imposed for delayed interest payments. Davidson v. Bruce, 593 N.W.2d 833, 840 (Iowa App. 1999). Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 338 (Iowa 2008).

When an employee's claim for benefits is fairly debatable based on a good faith dispute over the employee's factual or legal entitlement to benefits, an award of penalty benefits is not appropriate under the statute. Whether the issue was fairly debatable turns on whether there was a disputed factual dispute that, if resolved in favor of the

employer, would have supported the employer's denial of compensability. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

Claimant did not brief the issue of penalty. The record is not clear exactly what claimant is identifying the basis of penalty. Defendant paid the ten percent rating of Dr. Mendoza. Given this record, a penalty is not appropriate.

Costs

Defendant asserts the report by Dr. Noiseux Is not a reasonable cost. The defendant asserts that $500.00 for a one page check box report is not reasonable. There is no evidence other than an attachment to the hearing report of a "phone conference with Dr. Noiseux." I award $100.00 for this report, which represents a reasonable amount attributable to the report.

I award the filing fee of $100.00 and the vocational report in the amount of $913.00.

Claimant is awarded a total of $1,123.00.

ORDER

Defendant shall pay claimant three hundred fifty (350) weeks of permanent partial disability commencing January 29, 2010 at the weekly rate of four hundred twenty-five and 06/100 dollars ($425.06).

Claimant is entitled to healing period benefits as set forth in this decision.

Defendant is entitled to credit for benefits and medical expenses previously paid.

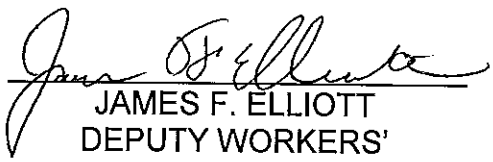
Defendant shall pay costs of one thousand one hundred thirteen and 00/100 dollars ($1,113.00)

Defendant shall pay the medical expenses as set forth in Exhibit 29.

Defendant shall pay any past due amounts with interest as provided by law.

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

Signed and filed this 17th day of February, 2017.



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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.