BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

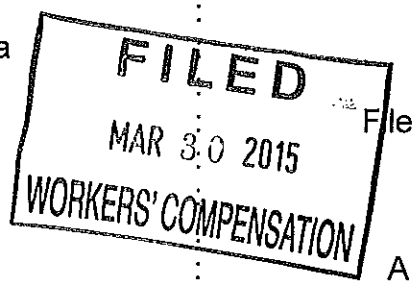
ROSALINDA ENGREN, f/k/a ROSALINDA DUENES,

Claimant,

vs.

CUMMINS FILTRATION, INC., f/k/a FLEETGUARD, INC.,

Employer,
Self-Insured,
Defendant.



File Nos. 5046650
5046697
5046698

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Rosalinda Engren, claimant, has filed a petition in arbitration and seeks workers' compensation from Cummins Filtration, Inc., self-insured employer.

This matter came on for hearing before deputy workers' compensation commissioner, Jon E. Heitland, on January 28, 2015 in Iowa Falls, Iowa. The record in the case consists of claimant's exhibits 1 through 29; defense exhibits A through I; as well as the testimony of the claimant, and Anita Vogt. Subsequent to the hearing, claimant submitted additional documents concerning a Functional Capacity Evaluation approved by William Brunell, M.D. Defendants stipulated to their admission and they have been designated Exhibit 30.

ISSUES

The parties present the following disputed issues in File No. 5046650 (right shoulder, date of injury October 1, 2007, with alternative dates of injury April 5, 2012 and May 7, 2012), File No. 5046697 (shoulders, forearms, elbows, fingers and thumb, date of injury July 12, 2013), and File No. 5046698 (fingers and thumb, date of injury February 20, 2013):

1. Whether claimant suffered an injury arising out of and in the course of employment on the alleged date or dates of injury.

2. Whether the alleged injury is a cause of permanent disability.

3. The extent of the claimant's entitlement to permanent partial disability benefits.

4. Defendants assert an affirmative defense of lack of timely notice under Iowa Code section 85.23 for the July 12, 2013, cumulative injury date only.

5. Whether the claimant is entitled to penalty benefits.

6. Whether claimant is entitled to alternate medical care by Michael Forseth, M.D.

FINDINGS OF FACT

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

Claimant testified she was formerly known as Rosalinda Duenes. She is 55 years old. Her education consists of completing the 11th grade. She had problems learning in school. She dropped out to support her siblings. Today she has some limited computer skills and ability to use the internet.

Once she was working at Cummins Filtration, defendant employer, she was assigned a computer task that only required clicking on some photos and she was able to do that. At her current job, she has trouble using the internet. She has trouble logging in and needs help with her password. She sometimes mixes up her left and right. Her strengths include being flexible, liking to finish what she starts, and being punctual. She is fast, and is able to work with pain.

After school she worked at Sweeney's Cleaners in St. Paul, Minnesota. In 1980 she worked at Banquet Food, then Brown Printing, and another job.

She began with defendant employer in 1983. She worked in the sub-assembly work, where she worked as a tapper-operator. She used her left hand to hold a retainer, and another part was in her right hand. Her hands were constantly turning and rotating. The job was fast paced and repetitive. She was required to use fine motor skills, in that she had to use her thumb to find a lip on the retainer and make sure it was in the right position. She also had to push and pull heavy baskets with her legs. She had some temporary assignments, including safety and "water spider" assignments. The work was repetitive on those jobs as well, and also included constant fine motor activities. She liked her work and the people she worked with.

She was required to rotate between jobs. All of her jobs required constant use of her fingers, hands, arms, and shoulders. She would usually do one job all day. At one machine she did 42 or 43 pieces per minute. Other machines required more. All the machines had a fast pace.

Before she worked for the employer, she had some back problems while working for Banquet Foods. Her doctor said there was no evidence of tendonitis. Claimant does not recall if she underwent a physical before working for Cummins. She does remember going to the emergency room in the early 1990s after working at Cummins.

She and her first husband had a big argument and she went to the emergency room. She was also in a motor vehicle accident.

After working at Cummins about ten years, in 2000 or 2001, she began to have problems with her elbows and her shoulders, as well as her fingers on her right hand, and later her left hand fingers. She had to have surgery on her left hand. She recently had injections to her right hand. The pain comes and goes. Over a long period of time, she experienced pain in her fingers, elbows, and shoulders. This continued up to her last day of work.

She also used a torque screw gun at work. This required her to reach above shoulder height to move a shelf to its position, and also required her to twist sideways. She had to push things backwards and forwards, which hurt her shoulders. She had to clean the machines, which also caused pain. She had to screw in small screws by hand. She also had to use a wrench and a pair of pliers. She worked at a gauging job that also caused pain. Again, she had to use both hands and screw in a part.

The procedure for work injuries with the employer was the worker was to go first to the on-site health center. Exhibit 4 shows the Cummins health center records. Claimant stated those records are incomplete, as she went there many more times than shown. Claimant asked for all of her medical records before her last day of work from Anita Vogt, a supervisor, but she did not receive them.

Claimant continued to work in spite of her pain up until her last day of work. She told her supervisors she was having pain. She received medical treatment first for her elbows, including a stimulation procedure and later surgery on the right elbow. She then underwent a functional capacity evaluation (FCE), which found she should be limited to lifting 15 pounds, with restrictions on pushing and pulling. She told her supervisors her work required her to work beyond her FCE. They would sometimes put her in "re-work", which also hurt her hands and shoulders, but after a time she would be returned to her regular job.

She also underwent injections over the years. The employer did consider her bilateral shoulder condition as work related. She continued to do the work that bothered her left shoulder, and underwent left shoulder surgery, followed by injections.

Today she cannot work over shoulder height without pain. Her left thumb tends to lock up, in that it locks in position next to her palm and she has to take her other hand and pry it back up, which is painful. Her left little finger sometimes shoots pain into the side of her hand. Her left index finger also locks up.

For her right hand, she had trouble with her right middle finger. Dr. Brunell gave her an injection underneath her scar tissue, which brought her finger straight again. But today she still has pain when trying to open a bottle of pop and needs help doing so. She stated any reference in the medical records to left hand pain actually refers to her left middle finger.

Claimant underwent right shoulder treatment as well. Exhibit 4, page 8, dated May 21, 2007, is the in-house Cummins medical record. It notes pain in both shoulders, both elbows, and right wrist and hand. Claimant feels this is notice to the employer in 2007 of problems with both shoulders.

Exhibit 4, page 11, is an incident report. This is a form the worker would fill out and give to their supervisor. It is dated October 1, 2007, the date of injury in File No. 5046650. It refers to the left little finger, right middle finger, and bilateral elbow pain. It does not specifically mention shoulders.

Exhibit 4, page 13, is another incident report, dated January 11, 2008. It refers to the right shoulder. When asked if the condition developed over days or weeks, claimant wrote "months". Claimant states she had complained of her shoulders back in May 2007, and they were bothering her still at the time of the January 2008, report, even though the October report does not mention them.

Timothy Gibbons, M.D., treated her right shoulder. Claimant underwent two surgeries on the right shoulder. Exhibit 7, page 34, is a record of her surgeon, Dr. Gibbons, showing he had nothing further to offer her after the first surgery. The report is dated February 18, 2010. Claimant then asked Cummins for a second opinion, but they ignored her. She underwent injections for her right shoulder, and had to undergo a second surgery in 2012. She had to get more injections after that. Her most recent injection was by Dr. Brunell in 2014.

Other than her two right shoulder surgeries, she has had no other injury that would have caused the scar tissue there. She told Dr. Gibbons she did not want restrictions because she did not want to lose her job. He again told her he had nothing further to offer her.

Claimant asked Becky Avelar, the nurse case manager, if she could get a second opinion, and she was ignored again. Cummins did pay for all of her medical care. Dr. Gibbons was not very friendly to her, and he noted a negative demeanor and embellishment in his reports. When he examined her, he was rough with her shoulder and caused her pain.

About two weeks after returning to work, she called Dr. Gibbons' office and told him she was having pain, but he told her to work with the employer and there was nothing further he could do. When she returned to work, she was unable to dress herself and had to have her grandson help her. Dr. Gibbons restricted her from driving for six weeks and she had to have friends pick her up. Dr. Gibbons told her to find another job every time she saw him. She was able to make the same money by working with her pain. She first realized her injury was going to affect her ability to earn a living after she left Cummins and tried to work as a Certified Nursing Assistant.

Claimant was warned by Cummins management not to complain, and not to ask for any accommodation. She was told she would be terminated because they were already accommodating her as much as they could.

Cummins paid her for the permanent impairment to her shoulders with benefits. She continues to treat with Dr. Brunell. Dr. Brunell recommended an FCE for her, and it was conducted the week of the hearing. She put forth her best effort. She recently saw Michael Forseth, M.D. He recommended surgery, and claimant would like to have that surgery.

Her last day of work was in July 2013. She had worked for defendant employer for nearly 30 years, first as production assembler, then a press operator, and for the last eight or nine years as a spindle tapper operator. The latter job required her to lift up to 35 pounds pushing boxes, gripping, and using wrenches and pliers. (Exhibit 15, page 2) The spindle operator job was repetitive, requiring her to work with up to 32 pieces per minute, as well as fine motor activity and reaching away from her body.

She then attended a college to become a Certified Nurse's Aide (CNA) in Austin, Minnesota. She obtained her certificate in December 2013. She did not tell them she had been injured. She worked part-time as a cashier at a pizza restaurant at the same time. She would have pain when she had to wipe off tables with her right hand. She also obtained unemployment benefits for a time, as well as a partial wage loss reimbursement from a program.

Claimant also worked at St. Clair's nursing home in Minnesota but only worked there three weeks. She learned how damaged she was when she tried to work with the elderly, trying to help them get dressed in the mornings, which hurt her shoulders. John Kuhnlein, D.O., in Exhibit 14, page 4, notes she did this work before leaving Cummins but that is an error.

After three weeks at the nursing home, she worked at a casino in Hinckley, Minnesota. She now works there 37 hours per week. She is a locker room attendant. When she has to clean windows or the locker room, she modifies her cleaning tools with long handles and rubber bands so she does not have to reach overhead. She is able to take breaks when she wants, and she gets free massages when her shoulders hurt, which is frequently. She had a chance to make more money at the front desk, but she told her boss the job was too much responsibility and she would not be able to do the computer work. She was criticized by a customer when she tried the job.

Dr. Brunell noted she pulled away when he tried to examine her hand. Claimant said this was because it hurt. Claimant has asked Cummins to pay for a health club membership but they have not responded. They have not responded to her request to pay for her left thumb surgery. She currently earns $8.00 per hour, with no benefits. At Cummins she earned $16.35 with full benefits.

On cross examination, claimant was asked about her 2005 FCE. She does not recall whether she read it or not. Exhibit 1, page 12, shows she has the ability to lift horizontally 40 pounds, push 29 pounds, pull 26 pounds, left hand carry 38 pounds, front carry 40 pounds, all on an occasional basis. Exhibit 1, page 10, shows a recommendation by a physical therapist noting her abilities matched the requirements of a spindle tapper operator provided by the employer.

Claimant had a restriction consisting of no pushing, pulling, etc. on a frequent basis over 15 pounds, with frequent being up to 5 hours per day and occasionally not over 3 hours per day. Claimant agreed she did not have to do much lifting in her job, right up to the time the plant closed. The parts she did lift did not weigh much. She worked most of the time as a spindle tapper operator, up until she left the plant. She was always able to do her job within her permanent restrictions. She agreed she was happy working there, and if the plant had not closed, she would have worked there until retirement. However, the plant closed and her job no longer existed.

At the pizza restaurant where she worked after leaving Cummins, she earned about $7.50 per hour as a cashier and bussing tables. She only worked two to three hours at a time, and not every day. She worked there from the fall of 2012 until October 2013. She then went to school to become a CNA. She did not realize that job would require lifting heavy patients. She was told there really are no CNA jobs that did not require lifting patients.

The first surgery she had was on October 8, 2004, to her right elbow, by Teri Formanek, M.D. Exhibit 2, page 2, dated February 17, 2005, noted increasing pain in her right elbow plus pain beginning in her left elbow. Exhibit 2, page 3, in March, 2005, noted left shoulder pain. She treated with three doctors for her left shoulder.

Exhibit 6 contains Dr. Kirkland's records. Exhibit 6, page 1, shows he saw claimant in 2005, and noted pain in her left shoulder since October 8, 2004, but actually beginning in 2001. Claimant has diabetes which is more or less under control with medication. It has been out of control when she had no insurance and could not take medication. She did take Ibuprofen for pain but it was hard on her kidneys so she discontinued it.

Exhibit 6, page 8, notes claimant declined surgery at that time and she was placed on maximum medical improvement (MMI) and said she had no impairment. But her shoulder worsened and she returned to Dr. Kirkland in October 2005, and on exhibit 6, page 10, she received another injection. In January 2006, she had some heart problems. She had two stents put in but has had no problems since then.

In 2006, her care for her left shoulder was switched from Dr. Kirkland to Dr. Gibbons, in Mason City, Iowa. She underwent surgery by him on July 17, 2006, an arthroscopic procedure. He provided follow up care as well. On July 19, 2007, Exhibit 7, page 20, he found her to be at MMI. He gave an impairment rating of ten percent of

the left upper extremity, which converted to six percent of the body as a whole. He released her to return to regular duty.

In November 2007, claimant had trouble with her left trigger finger. She returned to Dr. Formanek for treatment. She reported locking of her left middle and little fingers. He later performed a trigger finger release. (Ex. 2, p. 5) She was later found to be at MMI for that condition. He assigned no rating of impairment.

In May 2009 she returned to Dr. Formanek for left elbow and hand pain. He administered injections, which helped for a while. She was on light duty restrictions while treating for these conditions. (Ex. 2, p. 9) At this time she was being treated for her hands and elbows by Dr. Formanek, and for her shoulders by Dr. Gibbons.

On March 25, 2010, she was returned to work without any additional restrictions by Dr. Formanek. She still had in place her permanent restrictions from 2005. (Ex. 2, p. 22) In January 2011, she was told by Dr. Gibbons he had nothing further to offer her for her shoulders. (Ex. 7, p. 41) He had told her this before but she continued to treat with him.

She continued to treat with Dr. Formanek for her hands and elbows. He offered her surgery for her left middle finger, which she underwent. She was then released to return to work under light duty restrictions, and eventually was back to work under her permanent restrictions. He found her to be at MMI on September 22, 2011. (Ex. 2, p. 24, p. 30)

In December 2011, she returned to Dr. Gibbons for her right shoulder. He gave her an injection which helped, and she was released to her regular duties. (Ex. 7, p. 42) She returned to him in March 2012, when her shoulder was still bothering her. (Ex. 7, p. 45) She underwent an MRI, and continued to work regular duty for Cummins. She underwent another surgery on May 7, 2012, for her right shoulder because the MRI showed a partial thickness tear of her rotator cuff. (Ex. 7, p. 51; Ex. 3, p. 5) This was an arthroscopic procedure. The tear was not addressed.

Claimant in September 2012, developed a trigger finger problem on her right hand middle finger. (Ex. 7, p. 62) Dr. Formanek told her to see a doctor closer to her home, so she saw Dr. Gibbons for that condition. He performed surgery on her right middle finger. Dr. Gibbons gave her an impairment rating for her right middle finger of one percent of the upper extremity on October 17, 2013. (Ex. 7, p. 90)

She left Cummins in July 2013. She was released back to regular duties in October 2013. (Ex. 7, p. 91) In December 2013 she tried the CNA job. She now works at the casino job. She was offered a job paying $9.25 per hour doing housekeeping on the casino floor, but she turned it down because the number of hours was not guaranteed like her present job as a locker room attendant. Thursdays are special cleaning days which involve more work. She works in the casino spa, which has a steam room, a Jacuzzi, showers, etc. She cleans the showers with a towel. She

normally works Thursday through Sunday, with ten hour days on Friday, Saturday, and Sunday, and eight hours on Thursdays. She intends to keep working there. Her husband works there also.

She does not use a computer in her current home. She has not used a computer to search the internet. She used one occasionally at Cummins. She was reprimanded for checking when she would have received her tax refund on a work computer. The water spider job was an inspector job. This was a temporary job. Her permanent job was spindle tapper operator.

On re-direct examination, she did not think she could be hired for or perform factory work today. She was in pain when she did that work at Cummins. Exhibit 1, page 12, the FCE, shows below average for some gripping and pinching activities. The water spider job was a light duty job she did only for a few months.

Anita Vogt was called by claimant as a witness. She is the Human Resources person for the employer. Part of her job does include talking to medical professionals about injured workers, as well as talking to the workers' supervisors. She has not had discussions with Becky Avelar in preparation for the hearing. She has known claimant for 20 years.

When a worker is injured, she is notified. The worker would be referred to the in-house clinic. The witness has not reviewed the medical records of claimant. She would discuss what restrictions had been imposed, and whether the employer could accommodate them.

Exhibit 9, page 35 is a document from Alaris, the third party administrator for the employer. Alaris is a nurse case management company. On page 34, an entry date of September 27, 2011, shows claimant reported problems with her right shoulder again. Claimant was advised to use ice over the weekend. She has spoken in the past with Ms. Avelar about claimant.

She became involved with claimant's injury in March 2012. Becky Avelar would send status updates after each medical visit claimant had. Claimant was given a phone number to call if she wanted her medical records, as they were shipped to a storage site, referred to as Iron Mountain, after the company closed.

The witness did not remember the first time she was asked for medical records in October 2013. She could not agree or disagree with a statement that it was a year after the initial request before any medical records were provided. She was unable to get records from Iron Mountain. She stated it was not true a request for records had to come from the employer and not the employee, even if Iron Mountain so stated. She testified the employer was not the owner of the records.

A first report of injury was not filed until October 2011. She did not know why. The witness has only been involved the last six years. Exhibit 4, page 11, is an accident report indicating an injury involving bilateral elbow pain, finger pain, but no reference to bilateral shoulders. A January 11, 2008 incident report does mention the shoulders. It was not the witness who decided October 1, 2007, was the injury date for claimant to be reported on a first report of injury.

The witness was asked in an interrogatory when the employer had notice of claimant's injury. The answer noted the employer pled lack of notice for a July 12, 2013, injury. (Ex. 17, p. 8) Exhibit 17, page 3 is an interrogatory asking for the identity of all persons providing a basis for the answers, which shows Brandon McLaughlin, who works for the third party administrator, Sedgwick, and the witness.

Exhibit 20, page 6, is a report to the commissioner showing what has been paid. One line shows for the October 1, 2007, injury date, which is the date used by the employer, the document shows a rate a little over $347.00 was paid. The parties have stipulated the correct rate should be $435.46. The witness agreed claimant was paid at the lower, incorrect rate.

Ms. Vogt indicated she is not a manager. She has to get authority from others to make any workers' compensation decisions. She has not destroyed any documents related to claimant, and has given claimant's counsel all documents in her possession.

She agreed the health club membership recommended by Dr. Brunell had not been approved. Jennifer Lewis is the person who would have to do that. The employer is self-insured. The witness does not know why it has not been approved.

Dr. Forseth is the hand specialist in Minnesota. He recently recommended left hand surgery. Claimant requests it be approved. The witness does not know why it has not been approved. The visit with the doctor was approved, as was the recent FCE.

On cross examination, Ms. Vogt indicated she assumed responsibility for workers' compensation matters for the employer March 1, 2013. Before that she had little involvement. The in-house medical clinic was operated by a third party. When they closed the clinic, the records were shipped off to Iron Mountain, a storage facility.

Exhibit 28 is the recent FCE. Ms. Vogt stated claimant could have continued working her job at Cummins even with those recommended limitations.

On re-direct, she was asked about Exhibit 16, page 16. It is a document from Iron Mountain, where all the employee medical files are kept. The document indicates a request for records would have to come from the employer, but the witness states that is incorrect. Ms. Vogt testified she would have to seek approval from someone else before any medical treatment could be authorized for claimant.

For her elbow complaints, her medical records show her bilateral elbow complaints were treated from 2003 to 2005. She had her FCE in 2005, which resulted in her permanent restrictions of not lifting more than 15 pounds bilaterally. (Ex. 1, pp. 1-4, 9-17; Ex. 2, p. 4; Ex. 4, p. 3) Elbow pain was noted in 2008, 2009, 2010, and 2011 as well. (Ex. 2, p. 9; Ex. 2, pp. 11-15; Ex. 2, p. 17; Ex. 4, pp. 30-32, Ex. 9, p. 22; Ex. 2, pp. 22-26, Ex. 4, p. 45, Ex. 9, p. 25) However, Dr. Gibbons declined to treat her elbow complaints. She did receive an elbow injection from Dr. Formanek on May 28, 2009. (Ex. 2, p. 9) When her pain returned in October 2009, he gave her another injection on November 20, 2009. (Ex. 2, p. 15) The employer's records show claimant reported elbow pain. (Ex. 9, p. 22; Ex. 4, p. 45) Claimant received another injection from Dr. Formanek on June 1, 2011. (Ex. 2, p. 26) Dr. Kuhnlein found claimant's left elbow to be at maximum medical improvement (MMI) on July 1, 2011. (Ex. 14, p. 17) Her FCE found elbow pain limited her abilities. (Ex. 28, p. 8) The FCE recommended restrictions for both arms of not lifting over 20 pounds occasionally, 10 pounds occasionally, and 5 pounds frequently. (Ex. 28, p. 1)

For her left shoulder pain, the records show this began in 2004 after her right arm surgery and after compensating for the right shoulder condition. (Ex. 5, p. 1; Ex. 6, pp. 1-11; Ex. 4, pp. 1-2; Ex. 2, p. 1, p. 3) She received an injection from Dr. Kirkland on June 15, 2005. He attributed her shoulder condition to her work activities for the employer. Claimant underwent surgery on her left shoulder on July 17, 2006, for a rotator cuff tear by Dr. Gibbons. (Ex. 7, pp. 16, 18, 20; Ex. 4, pp. 8, 9) Dr. Gibbons assigned a rating of permanent partial impairment of 10 percent of the upper extremity. (Ex. 7, p. 20) However, claimant's shoulder pain continued into 2014, but Dr. Gibbons stated he had nothing further to offer her. Dr. Gibbons stated he did not feel claimant's shoulder complaints were related to her work activities. (Ex. 7, p. 97) Dr. Brunell gave claimant an injection to her left shoulder on October 29, 2014, and diagnosed left shoulder impingement secondary to a cumulative injury disorder, caused by her work. (Ex. 13, p. 19, p. 21) He found her to be at MMI on November 18, 2014, and stated she had no impairment and did not need restrictions. (Ex. 13, p. 24) However, on December 10, 2014, he stated claimant was not at MMI and that she needed an FCE and a hand surgery consultation before a determination of impairment and restrictions could be made. (Ex. 13, p. 28) That FCE recommended restricting claimant to light-duty work and not lifting over 20 pounds with frequent lifting limited to 10 pounds. (Ex. 28, p. 8)

For claimant's fingers, claimant stated her left small finger and her right long finger lock up, beginning in 2007. (Ex. 2, pp. 5-8; Ex. 4, pp. 9-15). In 2009, she had similar problems with her left ring finger. (Ex. 2, pp. 9, 12, 15, 17-19; Ex. 9, p. 11) In 2010, she had more finger problems. (Ex. 2, pp. 20, 22; Ex. 4, pp. 30, 31-32, 35) Scarring was noted in her right hand. (Ex. 2, p. 19; Ex. 9, p. 12) She continued to have right middle finger pain in 2010, left long finger pain in 2011, and in 2012, her right third finger began triggering. (Ex. 9, p. 22; Ex. 2, p. 24, pp. 26-27, pp. 29-30; Ex. 4, p. 47; Ex. 7, p. 58). She underwent surgery, and then engaged in physical therapy and received injections. (Ex. 9, p. 32; Ex. 2, p. 29) She was diagnosed with tendonitis by Dr. Gibbons after he performed a release on February 20, 2013. (Ex. 7, p. 71) In 2013,

he assigned a rating of one percent permanent impairment of the right upper extremity for her right middle finger. (Ex. 7, p. 90) Dr. Brunell gave claimant's right middle finger an injection on May 14, 2014 and stated the condition was work related. (Ex. 13, p. 1, p. 3) He later gave her another injection but stated they were no longer working and she should have an FCE. (Ex. 13, p. 16) He stated it was work related, but she was not at MMI for her right middle finger. (Ex. 13, p. 28)

Today, claimant has her sleep disrupted by her pain. The night before the hearing she turned and something popped in her left shoulder. It is hard for her to reach over her head. Her symptoms are the same now as when she worked at Cummins. Her condition gradually worsened over the 20 years she worked there. The injections helped but they would wear off and the pain would come back.

CONCLUSIONS OF LAW

The first issue in this case is whether claimant suffered an injury arising out of and in the course of employment on the alleged date or dates of injury. As this is a cumulative injury case, closely related is the issue of whether the injuries and conditions are causally related to work activities, and both issues will be discussed together.

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 R. App. P. 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.

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. The date of manifestation inherently is a fact based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

Claimant filed three separate petitions, alleging three separate injury dates.

For File No. 5046650, date of injury October 1, 2007, claimant also alleges alternative injury dates of April 5, 2012, and May 17, 2012. This cumulative injury allegedly involved the right shoulder.

For File No. 5046697, date of injury July 12, 2013, claimant alleges a cumulative injury to the bilateral shoulders, forearms and elbows.

For File No. 5046698, date of injury February 20, 2013, claimant alleges a cumulative injury to the fingers and thumb.

Claimant's attorney indicated to the undersigned at the hearing the entire case is actually one cumulative injury, not three or more injuries. Claimant asserts her last day of work, July 12, 2013, as the date of manifestation of her cumulative injury.

Defendants assert the facts show several possible injuries. Defendant denies liability for these injuries except for the October 1, 2007 injury date.

For the 2007 injury, Dr. Gould found claimant's elbow condition was caused by her repetitive work for the employer. (Ex. 1, p. 2) The employer accepted liability for this injury in 2010. (Ex. 4, pp. 30, 31)

For the left shoulder, both Dr. Kirkland and Dr. Gibbons have expressed the opinion claimant's left shoulder condition was caused by her work. (Ex. 6, p.5; Ex. 7, p. 2) Claimant was released to work without any restrictions or rating of impairment for her left shoulder in November 2005, the employer's in-house clinic later acknowledged this condition was work related in 2007. (Ex. 4, pp. 5, 6; Ex. 20, pp. 1-3)

For her trigger finger conditions, Dr. Formanek in 2008 found this condition to be the result of her work activities which aggravated the condition. (Ex. 2, page 6) In-house medical records confirm this conclusion. (Ex. 4, pp. 20, 29, 30, 31, 35; Ex. 10, p. 1)

For her right shoulder condition, Dr. Kirkland found her to have right shoulder acromioclavicular joint internal derangement/osteoarthroses and supraspinatus tendonitis, which he felt was related to her work. (Ex. 6, p. 13) Again, in-house records confirm a relation between this condition and her work. (Ex. 4, pp. 25, 26, 35, 44; Ex. 10, p. 2) Dr. Gibbons told the nurse case manager claimant's right shoulder condition was work related. (Ex. 9, p. 38) However, at other times he did not think it was work related. (Ex. 7, pp. 96, 97)

For her left hand complaints, the employer's in-house records show these were also considered work related. (Ex. 4, p. 46)

Her current treating physician, Dr. Brunell, found claimant to have left trigger finger thumb, right middle finger chronic pain, left shoulder cumulative injury, and right shoulder chronic pain after surgery. He found all these conditions to be work related, and also stated she is not at maximum medical improvement for them. (Ex. 13, p. 28)

Defendants have accepted liability for the right shoulder injury in File No. 5046650, date of injury October 1, 2007, and also admitted claimant sustained a five percent permanent partial impairment of the body as a whole. Defendants also admit claimant sustained injuries to her bilateral shoulders, forearms, elbows, fingers and thumb that arose out of and in the course of employment prior to July 12, 2013, but denies claimant sustained a cumulative injury to any body part on July 12, 2013.

For the left shoulder cumulative injury, defendants acknowledge an injury date of June 15, 2005, and no later than July 17, 2006. Claimant underwent a right lateral epicondylectomy in 2004, and during a follow-up visit with Dr. Formanek, first reported left shoulder pain. Dr. Formanek ordered a Functional Capacity Evaluation (FCE), and imposed permanent work restrictions of no frequent lifting, pushing or pulling over 15 pounds for her right arm. (Ex. 2, pp. 2, 4; Ex. 1, pp. 9-17) Dr. Kirkland also found a left shoulder condition, and gave claimant an injection. He also recommended surgery, but the employer did not authorize it. Claimant was then treated by Dr. Gibbons, who performed arthroscopic surgery on July 17, 2006 on the left shoulder. She was later released to regular work with a rating of ten percent impairment of the left arm. (Ex. 7, p. 20) Defendants assert an injury date for the left shoulder condition of no later than July 17, 2006. They argue claimant knew she suffered from a condition or injury, and that the condition was caused by her employment, as of June 15, 2005, and certainly by July 17, 2006, the date of her surgery for that condition and when she started collecting temporary benefits, she would have known she suffered a work injury.

For the right shoulder injury, defendants assert a date of injury of January 28, 2008. Claimant first reported right shoulder pain on December 29, 2007. (Ex. 4, p. 13) Dr. Kirkland found a right shoulder condition which was caused by her work. (Ex. 6, pp. 12-13) Claimant saw Dr. Kirkland on January 28, 2008, and defendants argue claimant was aware she had a right shoulder condition, and that it was caused by her work, as of that date, and therefore the proper date of injury is January 28, 2008, for the right shoulder.

Claimant continued to receive treatment for the right shoulder after January 28, 2008, and in fact underwent surgery by Dr. Gibbons on April 6, 2009, and released her to full work duty on June 25, 2009. (Ex. 3, p. 3; Ex. 7, p. 30) He found her to be at maximum medical improvement on September 24, 2009, and assigned a rating of permanent partial impairment of ten percent of the right upper extremity, without any work restrictions. (Ex. 7, p. 23) He later assigned this same rating a second time on March 5, 2013, after a second arthroscopic procedure. (Ex. 7, pp. 68-70)

Defendants argue the proper date of cumulative injury for the right shoulder is January 28, 2008, as her work activities after that date cannot be said to have caused any additional permanent injury or impairment.

For the right elbow condition, there is no record of when claimant first reported this condition. She was seen by Dr. Formanek on January 6, 2005, for a follow up visit after her right lateral epicondylectomy, and defendants assert that as the appropriate date of injury for this condition.

For the left elbow condition, claimant first reported symptoms of pain to Dr. Formanek on February 17, 2005. (Ex. 2, p. 2) She was found to be at maximum medical improvement for both elbows on March 31, 2005. Dr. Formanek did not assign a rating of impairment. (Ex. 2, p. 3) Defendants assert a date of injury for this condition as February 17, 2005.

Claimant reported bilateral elbow pain on May 21, 2007, along with bilateral shoulder pain and right wrist pain. (Ex. 4, p. 8) Dr. Formanek diagnosed left medial epicondylitis and gave her an injection to both her left elbow and her left ring finger. (Ex. 2, pp. 9-10) Claimant returned to him on October 5, 2009, again reporting left elbow pain, and he again administered an injection on November 20, 2009. (Ex. 2, pp. 12, 15) Defendants urge an additional date of injury for the left elbow of May 28, 2009, when Dr. Formanek diagnosed left medial epicondylitis. (Ex. 2, p. 9)

For the left small finger and right long finger and forearm pain, this was first reported to Dr. Formanek on November 8, 2007. (Ex. 2, p. 5) He found the trigger finger conditions to be work related on March 12, 2008. (Ex. 2, p. 6) Dr. Formanek performed a left small trigger finger release on April 25, 2008, and placed claimant at MMI on July 15, 2008, with no impairment. Defendants assert the proper date of cumulative injury for the left small finger and right long fingers would be March 12, 2008.

Claimant reported left thumb locking on June 13, 2008. (Ex. 4, p. 17) Defendants assert June 13, 2008, as the date of injury for that condition.

Claimant reported locking of her left ring finger to Dr. Formanek on May 28, 2009. Dr. Formanek performed a release procedure on November 20, 2009, and returned claimant to work without restrictions on March 25, 2010. (Ex. 2, pp. 15, 22) Defendants assert May 28, 2009, as the date of injury for that condition.

Claimant was seen by Dr. Formanek for her bilateral long finger trigger finger conditions on May 3, 2011. Dr. Formanek performed a release procedure on June 1, 2011. (Ex. 2, p. 26) Defendants assert May 3, 2011, as the proper date of injury for this condition.

Generally, defendants assert the date of cumulative injuries to claimant's elbows, forearms, fingers and thumb are at various dates prior to July 12, 2013. They do not, in their post hearing brief, dispute the causal connection between claimant's various

conditions and her repetitive work for the employer. Rather, they dispute the pled dates of injury chosen by claimant.

The undersigned is granted substantial latitude in making the determination of the appropriate date of injury in a cumulative injury case such as this. Factors that may be considered are when a worker has to miss work due to the injury, or when significant medical care is required for the condition. The statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Contrary to the assertions in defendants brief, it is not merely when the worker knows he or she has suffered an injury, and the injury is causally related to his or her work. It also requires knowledge as a reasonable person that the condition is serious enough to affect the worker's ability to be employed.

This case involves multiple alleged conditions, which resulted in symptoms at various times over the many years claimant worked for defendant employer. There is no dispute claimant's work was repetitive. There is no dispute claimant's various conditions were caused by that work. The dispute centers on when these conditions manifested, which as noted above, is largely in the discretion of the undersigned.

Viewing the record as a whole, it is clear it was one long, continuous process of repetitive work over the decades claimant worked for this employer that led to all of her current conditions. Her doctors, with only one exception, have attributed her conditions to her work. At what point during this long, complicated process of symptoms appearing, worsening, requiring medical treatment, reaching maximum medical improvement, etc., can it be said the injury manifested? During her medical treatment, claimant continued working for much of that time. Her exposure to repetitive trauma to her shoulders, forearms, hands, fingers, elbows, etc., was ongoing. It is concluded claimant, as a reasonable person, would not have been aware of the adverse effect of her injuries on her ability to work until she left her employment with this employer and removed herself from the cumulative trauma.

It is found claimant has, as her attorney suggested at the hearing, suffered one overall cumulative injury as a result of her work for the employer, even though she has filed three petitions for benefits and pled additional alternative injury dates. That injury affected various parts of her body, as pled in claimant's petitions, but nevertheless involved one continuous series of cumulative and repetitive micro-traumas over the many years she worked there. It is further found the cumulative injury manifested on her last day of work for the employer, July 12, 2013.

The next issue is the extent of the claimant's entitlement to permanent partial disability benefits.

The parties stipulate claimant has suffered a scheduled injury to the elbows, forearms, fingers and thumb. Defendants' dispute claimant has suffered an unscheduled injury to the shoulders, but if a permanent disability is found, they agree it has resulted in industrial 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.

Claimant seeks a finding of permanency and an award of industrial disability. Many of her doctors have found claimant to be at maximum medical improvement for her various conditions, although her most recent doctor feels she has not reached MMI. Some of claimant's conditions are the result of injuries to the body as a whole, others, standing alone, would be scheduled member injuries. As claimant is found to have suffered a single injury to the body as a whole, all claimant's conditions are subsumed into this one cumulative industrial disability injury.

For the left shoulder condition, Dr. Kuhnlein assigned claimant a permanent impairment rating of five percent of the left upper extremity, or three percent of the body as a whole. (Ex. 7, p. 20) Dr. Gibbons rated claimant's left shoulder at ten percent of the left upper extremity, or six percent of the body as a whole. Dr. Brunell, however, assigns no permanent impairment for the left shoulder. (Ex. 13, p. 25)

For the right shoulder condition, Dr. Gibbons assigned a rating of permanent partial impairment of ten percent of the right upper extremity, without any work restrictions. (Ex. 7, p. 23) Dr. Kuhnlein assigned claimant a rating of eight percent of the right upper extremity, or five percent of the whole person, after his examination of December 15, 2014. (Ex. 14, p. 1) He adopted Dr. Formanek's restrictions. (Ex. 14, p. 19)

For claimant's right elbow condition, Dr. Formanek assigned permanent restrictions of no frequent lifting, pushing or pulling over 15 pounds for her right lateral epicondylitis. (Ex. 2, pp. 2, 4; Ex. 1, pp. 9-17)

For the long finger trigger finger condition, Dr. Gibbons assigned a rating of impairment of one percent of the right upper extremity. (Ex. 7, pp. 89-90)

Claimant is 55 years old. Her education is limited to the 11th grade. Her work experience has been mostly factory work for this employer, for over 30 years. She has work restrictions as a result of her injury, which generally prohibit her from lifting over 15 pounds, as well as not working on ladders, no use of vibratory or power tools, and no working on a production line. (Ex. 14, pp. 15, 33)

As a result of her injuries, she now has work restrictions and ratings of impairment which will put her at a disadvantage when competing with non-injured workers for future jobs. Many of her doctors said she should change jobs because of the adverse effect the work was having on her body. As a practical matter she cannot expect to work in a factory setting again in the future if it involves further repetitive work. She has no skills or education that will help her find a job other than manual labor. Claimant's age also works against her in competing with younger workers for jobs requiring physical stamina. She has been able to obtain less strenuous work at a casino. She was earning $16.36 per hour at Cummins, and now earns $8.00 per hour for the casino. (Ex. 17, p. 53; Ex. 18, p. 7) She no longer gets bonuses and benefits she had at Cummins. Her position there was eliminated.

Based on these and all other appropriate factors of industrial disability, it is found claimant has, as a result of her cumulative injury, a total industrial disability of 60 percent for all three files, as they have been found to constitute a single cumulative injury.

The next issue is defendants assert an affirmative defense of lack of timely notice under Iowa Code section 85.23 for the July 12, 2013, cumulative injury date only.

Iowa Code section 85.23 requires an employee to give notice of the occurrence of an injury to the employer within 90 days from the date of the occurrence, unless the employer has actual knowledge of the occurrence of the injury.

The purpose of the 90-day notice or actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. The actual knowledge alternative to notice is met when the employer, as a reasonably conscientious manager, is alerted to the possibility of a potential compensation claim through information which makes the employer aware that the injury occurred and that it may be work related. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

Failure to give notice is an affirmative defense which the employer must prove by a preponderance of the evidence. DeLong v. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940).

Claimant's date of injury for all of her conditions has been found to be July 12, 2013. Thus, her petitions were filed within the two year statute of limitations, and the defendants are found to have failed to carry their burden of proof to show her petitions were not timely filed. In addition, even if an earlier injury date were to be found, claimant's petitions would be timely filed under the discovery rule.

The next issue is whether the claimant is entitled to penalty benefits.

If weekly compensation benefits are not fully paid when due, section 86.13 requires that additional benefits be awarded unless the employer shows reasonable cause or excuse for the delay or denial. 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 Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It also 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 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.

Claimant seeks penalty benefits in part because, she alleges, defendants failed to timely produce medical records, failed to provide a second medical opinion when requested, and failed to comply with discovery rules. However, the statute does not contemplate imposition of penalty benefits for this conduct, but rather only for a denial, delay in payment, or termination of benefits without reasonable or probable cause or excuse. Abuses of the obligation to provide medical treatment and medical records are not covered by the penalty statute.

Claimant also seeks penalty benefits for the underpayment of the correct rate of benefits. Claimant was paid temporary benefits at the rates of $342.07 per week, $349.65, and $365.08 per week for shoulder injuries. (Ex. 20, p. 6; Ex. 17, pp. 6, 50). In the hearing report, defendants stipulated to a rate of $435.46.

Claimant's injury has now been found to have occurred on July 12, 2013. The stipulated rate for that date of injury is $494.49. Defendants previously paid rates lower than that. When an issue is fairly debatable, penalty benefits are not appropriate. However, claimant pled multiple injury dates, and differing rates. In addition, defendants had the right to assert the affirmative defense of an untimely claim, even though that argument has been rejected in this decision. It is found claimant's rate of compensation was fairly debatable during the pendency of this case. Penalty benefits are not appropriate.

The next issue is whether claimant is entitled to alternate medical care in the form of surgery by Michael Forseth of the Blaine Clinic. This procedure has been duly recommended but not provided by defendants. It is reasonable treatment for claimant's injury and defendants shall provide and pay for the treatment.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay unto the claimant three hundred (300) weeks of permanent partial disability benefits at the rate of four hundred ninety-four and 49/100 dollars ($494.49) per week from July 12, 2013.

Defendants shall pay accrued weekly benefits in a lump sum.

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

Defendants shall be given credit for benefits previously paid.

Defendants shall pay the claimant's prior medical expenses submitted by claimant at the hearing, including medical mileage and the costs of an independent medical examination.

Defendants shall pay the future medical expenses of the claimant necessitated by the work injury.

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

Costs are taxed to defendants.

Signed and filed this 30th day of March, 2015.

JON E. HEITLAND
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.