BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
FEB 14 2018
WORKERS COMPENSATION

TERRY WALLACE, Claimant, vs. NICHOLS ALUMINUM, LLC, Employer, and SENTRY CASUALTY CO., Insurance Carrier, Defendants.	:	File No. 5058154 ARBITRATION DECISION Head Note Nos.: 1803, 2500, 2208

STATEMENT OF THE CASE

This is a proceeding in arbitration. The contested case was initiated when claimant, Terry Wallace, filed his original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on February 16, 2017. Claimant alleged he sustained a work-related injury on July 1, 2016. (Original notice and petition.) Later the injury date was amended to August 4, 2016.

For purposes of workers' compensation, Nichols Aluminum, defendant, is insured by Sentry Casualty Co., defendant. Defendants filed their answer on February 20, 2017. They admitted the occurrence of the work injury. A First Report of Injury was filed on September 9, 2016.

The hearing administrator scheduled the case for hearing on January 25, 2018. The hearing took place in Davenport, Iowa at the Iowa Works Building. The undersigned appointed Ms. Heidi Krafka as the certified shorthand reporter. She is the official custodian of the records and notes.

Claimant testified on his own behalf. Defendants elected not to call any witnesses.

The parties offered exhibits. Claimant offered exhibit marked 1. Defendants offered exhibits marked A through C. The parties offered joint exhibits marked 1 through 3. All proffered exhibits were admitted as evidence in the case.

Post-hearing briefs were filed on or before February 2, 2018. The case was deemed fully submitted on that date.

STIPULATIONS

The parties completed the designated hearing report. The various stipulations are:

1. There was the existence of an employer-employee relationship at the time of the alleged injury;

2. Claimant sustained a work-related injury on August 4, 2016 which arose out of and in the course of his employment;

3. The alleged injury is a cause of temporary disability during a period of recovery;

4. The alleged injury is a cause of permanent disability during a period of recovery;

5. The parties agree if permanency is found, the permanency is a scheduled member disability to the right arm;

6. The parties agree, if a permanent work injury is determined, claimant reached maximum medical improvement on July 31, 2017;

7. The parties agree, the weekly benefit rate is $799.73;

8. Defendants have waived any affirmative defenses they may have had available; and

9. The parties agree certain costs that are detailed were paid by claimant.

ISSUES

The issues presented are:

1. What is the extent of claimant's permanent partial disability?

2. Claimant seeks the cost of an independent medical evaluation (IME) pursuant to Iowa Code section 85.39;

3. Prior to the date of the hearing, defendants paid claimant thirty-one (31) weeks of benefits in the amount of $799.73 and, the payments are ongoing; and,

4. Claimant is requesting certain IME reports be charged as costs.

FINDINGS OF FACT

This deputy, after listening to the testimony of claimant at hearing, after judging his credibility, and after reading the evidence, and the post-hearing briefs, makes the following findings of fact and conclusions of law:

The party who would suffer loss if an issue were not established has the burden of proving the issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6).

On August 4, 2016 claimant tripped and fell walking up a stairway within the Nichols plant. Claimant sustained a scapholunate ligament tear to the right wrist. He is a right hand individual.

Camilla Frederick, M.D., ordered a CT scan of the right wrist. The physician also ordered MR right wrist arthrogram testing. The findings showed:

> Triangular fibrocartilage complex: No tears. No contrast in the distal radioulnar joint.
>
> Scapholunate and lunotriquetral ligaments: Disrupted scapholunate ligament with contrast accumulating in the intracarpal joint space
>
> Tendons: Normal.
>
> Articular cartilage: Normal.
>
> Osseous/bone marrow: Alignment of the wrist is anatomic. There is no evidence of fracture. Marrow signal is normal.
>
> Carpal tunnel and Guyon's canal: Normal.
>
> Other: Incidental 3-mm ganglion cyst dorsal to the flexor tendon of the 3rd digit just distal to the capitate. No mass effect.
>
> IMPRESSION:
>
> 1. Torn scapholunate ligament.

(Joint Exhibit 1, pages 5-6)

Dr. Frederick referred claimant to Tobias Mann, M.D., an orthopedic surgeon at ORA Orthopedics in Moline, Illinois. Dr. Mann specializes in hand surgery. The initial appointment occurred on September 27, 2016. Dr. Mann suggested right wrist arthroscopy. (Jt. Ex. 2, p. 8)

On November 28, 2016, Dr. Mann performed the following procedures on claimant's right wrist:

1) Right wrist diagnostic arthroscopy.

2) Right wrist dorsal capsulodesis.

3) Right wrist scapholunate, scaphocapitate, lunotriquetral pinning.

4) Interpretation evaluation of intraoperative fluoroscopy.

5) A posterior interosseous nerve neurectomy.

(Jt. Ex. 3, p. 34) Claimant was placed into a cast for approximately eight weeks. Then Dr. Mann planned a second surgery to remove the stabilizing pins from the wrist. (Jt. Ex. 2, p. 13)

Claimant returned to Dr. Mann for follow-up care. The orthopedist returned claimant to work but claimant was restricted to one-handed duty. (Jt. Ex. 2, p. 22)

On February 2, 2017, claimant underwent a second surgical procedure. Dr. Mann performed the following procedures:

1) Right wrist hardware removal.

2) Interpretation and evaluation of intraoperative fluoroscopy.

3) Right radial sensory nerve field block.

4) Right ulnar sensory nerve field block.

(Jt. Ex. 3, p. 38)

Dr. Mann next examined claimant on March 3, 2017. (Jt. Ex. 2, p.23) Claimant was engaged in occupational therapy for two sessions per week. Dr. Mann provided a wrist and thumb spica brace for claimant. Claimant was encouraged to engage in a home exercise program. (Jt. Ex. 2, p. 23)

Effective March 17, 2017, Dr. Mann returned claimant to work with a 10 pound weight limit on the right upper extremity so long as claimant continued to wear his thumb/wrist spica brace. (Jt. Ex. 2, p. 26) On April 24, 2017, claimant's weight restriction was increased to 20 pounds. (Jt. Ex. 2, p. 28) Claimant was instructed to continue to wear his brace at work. (Jt. Ex. 2, p. 28) Effective June 19, 2017, Dr. Mann released claimant to return to work without restrictions. (Jt. Ex. 2, p. 29)

Claimant visited Dr. Mann for a final examination on July 31, 2017. (Jt. Ex. 2, p. 30) Dr. Mann physically examined claimant's right arm and wrist. The surgeon noted in his report for the same date:

> EXTREMITIES: Exam of his right upper extremity shows no obvious abnormalities. No swelling or erythema. Skin is intact. All the fingers are

warm and well perfused. He can extend his fingers fully and make a full composite fist. His wrist extension is about 30 degrees, flexion to 20 degrees, pronation and supination both to 90 degrees. Radial deviation to 15 degrees, ulnar deviation to 25 degrees. He has no significant pain with wrist motion. Sensation is grossly intact to light touch.

ASSESSMENT: Postop followup following right wrist dorsal capsulodesis with intercarpal pinning and subsequent removal of hardware. His hardware removal was done on February 2, 2017.

PLAN: He can continue now working without restrictions. Hopefully he may gain some motion back in his wrist, but I do think that since he has had really no change since we saw him last I think this is likely the amount of motion that he is going to get. He is happy with this. He is able to do everything he needs to do. At this point, we will therefore see back now on an as-needed basis. He can continue working without restrictions.

(Jt. Ex. 2, p. 30)

On June 23, 2017, claimant presented to Marc Hines, M.D., for an independent medical examination. The examination was initiated by counsel for claimant and the focus was the right upper extremity. (Ex. 1, pp. 1 -7) Dr. Hines opined claimant's condition was permanent and the evaluating physician had no anticipated date for resolution of claimant's symptoms. (Ex. 1, p. 6) Dr. Hines determined claimant had a permanent impairment and the evaluator rated the impairment according to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. Dr. Hines wrote in his report:

PERMANENT MEDICAL IMPAIRMENT:

Permanent medical impairment description using the fifth edition guides to evaluation of permanent medical impairment. We will begin the estimations using the descriptions provided by table 1631 through 1634. These will not be the final or deciding descriptors, but simply the initial estimates. According to his evaluation, the patient has certainly lost at least 50% of grip strength and pinch strength. By the estimate of pinch strength, it would be well greater than 50% of pinch strength on the right compared to the left particularly given that this is his dominant side. This would give him at least 20% upper extremity impairment and loss of pinch and grip. This would not merely be related to medial and ulnar impairment as this is not secondary simply to a nerve injury. Hand impairment values for sensory loss were given in figure 16-8, page 449 and would be 20% for the thumb, 10% for the long finger. Given the overall impairments being variable, but fairly predictably significant, these would be reasonable figures as initial values giving approximately 20% and 10% for the hand. Using combined values tables, page 604, 20 plus 10% would [be] 28% for

> the hand from sensory digit loss. Using table 16-2, page 439, 28% for the hand is equivalent to 25% upper extremity. Utilizing figure 16-28, page 467, the patient has lost 5% of the utilization of the upper extremity both that is per movement for loss of flexion and 5% for loss of extension of the wrist. Also, using figure 16-31, page 469, the patient will have lost 3% upper extremity function and 5% upper extremity function for loss of radial deviation and ulnar deviation respectively. Using combined values table, page 604, the patient's loss of strength gives as we estimated at least 20% loss of upper extremity function, the patient's loss of sensation is variable throughout the day, but is estimated to be 25% loss of upper extremity function. This worsens, however, throughout use and is therefore a very significant factor. We have reduced this 20%, but when combining 20% with the loss of 20% strength function using combined values table, this gives 36% loss in upper extremity function. Utilizing the loss in various motor functions, 36% plus 5% is 39%, 39% plus 5% is 42%, 42% plus 5% is 45%, 45% plus 3% is 47% loss of upper extremity function. The more limiting issue, however, is the development of pain. Unfortunately, the development of pain does place us into whole person dysfunction, though the pain at this point is according to the pain section, a 3% whole person. The 47% upper extremity function is then changed to whole person utilizing the table 16-3 conversion of upper extremity to whole person, 47% upper extremity then converts to 28% whole person using combined values table or 28% whole person combined with 3% is 30% whole person impairment. This will be the whole person impairment for this individual. The patient has adapted in his work by having assistance from his friends, adapted by using his left hand more frequently and becoming more dominant with his left hand. Using his right hand as much as is feasible. He is therefore not at this time having restrictions. I have not given him any restrictions. I did state, however, as a practical matter he would not be particularly safe climbing to heights with only one hand to utilize safely for this. However, he has a motor rise that he is able to use for this and hence not a requirement of work.

(Ex. 1, pp. 6-7)

Dr. Mann did not provide a permanent impairment rating for claimant until November 19, 2017. (Ex. A, p. 1) He also relied on the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, to render an impairment rating. Dr. Mann calculated the rating as follows:

> I will be using the AMA Guides to the Evaluation of Permanent Impairment for this rating. Using Figure 16.28, wrist extension to 30 degrees equates to a 5% impairment due to lost wrist extension. Wrist flexion to 20 degrees equates to a 7% impairment due to loss of wrist flexion. Using the combined values chart on page 604 combining 7 and 5 equates to a 12% loss due to lost flexion and extension. Using Figure

> 16.31, radial deviation to 15 degrees equates to a 1% impairment due to loss of radial deviation, and ulnar deviation to 25 degrees equates to a 1% impairment due to loss of ulnar deviation. Using the combined values chart on page 604 combining 1 and 1 equates to a 2% impairment due to loss of the radial and ulnar deviation. Again using the combined values chart on page 604 combining 12 and 2 equates to a 14% impairment of the upper extremity due to lost wrist motion. Using Table 16.3, a 14% upper extremity impairment equates to 8% percent [*sic*] whole person impairment. I will therefore assign Mr. Wallace an 8% whole person impairment due to his scapholunate ligament injury and surgery.

(Ex. A, p. 1)

Dr. Mann strongly disagreed with the rating provided by Dr. Hines because:

> I disagree with Dr. Hines' impairment rating for several reasons. First of all, a large portion of this impairment was based on his loss of grip and pinch strength. He was given a 20% upper extremity impairment due to loss of pinch and grip strength. According to the AMA Guides to the Evaluation of Permanent Partial Impairment, [*sic*] Fifth Edition, page 508, paragraph 16.8A, it states that decreased strength cannot be rated in the presence of decreased motion, painful conditions, deformities or absence of parts that present effective application of maximal force in the region being evaluated. Though Mr. Wallace did not report significant pain to me when I saw him, he does have significant decreased wrist motion, and according to the exam by Dr. Hines, does have significant pain. Therefore, I do not feel that decreased strength can be used for his permanent partial impairment rating. Also, loss of sensation is a significant part of the impairment rating given by Dr. Hines.
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> This has been estimated to be a 25% loss of upper extremity function due to lost sensation. Mr. Wallace has normal static 2-point discrimination of less than 5 mm. On Table 16.5, static 2-point discrimination less than 6 mm equates to no sensory loss and no sensory quality impairment. Static 2-point discrimination of 5 mm is also acknowledged by Dr. Hines in his evaluation. According to Table 16.5, the maximum upper extremity impairment due to sensory deficit for radial nerve transection would be 5% and for an ulnar nerve transection would be 7%, so if the patient had no sensation at all on the dorsal aspect of his hand, this would not give him a higher rating than 12% of upper extremity impairment. As acknowledged by Dr. Hines, he does have normal static 2-point discrimination. He does have some paresthesias over the dorsal aspect of the hand but this does not equate to a 25% upper extremity impairment due to lost sensation. On my exam, he did not have any objective lost sensation and therefore I do not feel that he has any impairment due to lost sensation. Also, I am not quite certain how to explain loss of sensation that worsens throughout the

> day. There is little basis for any organic explanation of a traumatic sensory loss that worsens throughout the day and then is better again come morning.
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> On Dr. Hines' exam of his motion, he had 30 degrees wrist extension and 30 degrees wrist flexion, which is slightly improved from my exam, where he had 30 degrees of wrist extension and 20 degrees of wrist flexion. Dr. Hines, however, states that he has inversion of 2 degrees and eversion of 4 degrees, which I can only take to mean radial deviation of 2 degrees and ulnar deviation of 4 degrees. This is significantly different from the measurements that I obtained at my last visit with him, which was 15 degrees of radial deviation and 25 degrees of ulnar deviation.
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> . . . .
>
> So, for this reason, I disagree with Dr. Hines' rating of 47% upper extremity impairment, converted to a 30% whole person impairment. As a point of reference, using Table 16.4, an amputation of all the fingers on the hand at the level of the MP joint except the thumb would result in a 54% upper extremity impairment and a 32% whole person impairment, almost the same as the impairment given to Mr. Wallace by Dr. Hines. I do not think that it is reasonable to assume that Mr. Wallace's loss of function from his scapholunate ligament injury and subsequent surgery is almost equivalent to the loss of function of someone who has had all of their [*sic*] fingers on the hand amputated at the level of the MP joint.

(Ex. A, pp. 2-3)

During his arbitration hearing, claimant testified about the current state of his right wrist and arm. He said he cannot bend his right arm as well as the left arm. He stated he does not have as much strength in the right arm as he had prior to the work injury. Claimant related he uses his left hand and arm to compensate for his right side. He also testified he often asks his co-workers to assist him with heavy tasks. Claimant demonstrated for the undersigned, the extent he could flex and extend his right wrist. He is not able to rotate his right wrist to full capacity.

Pursuant to cross-examination, claimant testified he often has a dull ache in his right hand. However, he admitted, normally he is able to handle the pain. He indicated he is able to live with his pain. Since claimant has been released to full duty work, he has not missed work due to his right hand condition.

RATIONALE AND CONCLUSIONS OF LAW

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the

claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

When an expert's opinion is based upon an incomplete history it is not necessarily binding on the commissioner or the court. It is then to be weighed, together with other facts and circumstances, the ultimate conclusion being for the finder of the fact. Musselman v. Central Telephone Company, 154 N.W.2d 128, 133 (Iowa 1967); Bodish v. Fischer, Inc., 257 Iowa 521, 522, 133 N.W.2d 867 (1965).

The weight to be given an expert opinion may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. St. Luke's Hospital v. Gray, 604 N.W.2d 646 (Iowa 2000).

Expert testimony may be buttressed by supportive lay testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 380; 101 N.W.2d 167, 170 (1960).

The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavey v. Economy Fire and Casualty Co., 526 N.W.2d 845 (Iowa 1995).

Under the Iowa Workers' Compensation Act permanent partial disability is categorized as either to a scheduled member or to the body as a whole. See section 85.34(2). Section 85.34(2)(a)-(t) sets forth specific scheduled injuries and compensation payable for those injuries. The extent of scheduled member disability benefits to which an injured worker is entitled is determined by using the functional method. Functional disability is "limited to the loss of the physiological capacity of the body or body part." Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993); Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). Compensation for scheduled injuries is not related to earning capacity. The fact-finder must consider both medical and lay evidence relating to the extent of the functional loss in determining permanent disability resulting from an injury to a scheduled member. Terwilliger v. Snap-On Tools Corp., 529 N.W.2d 267, 272-273 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417, 420 (Iowa 1994).

A wrist injury is an injury to the arm, not the hand. Holstein Elec. V. Breyfogle, 756 N.W.2d 812, 813 (Iowa 2008).

Iowa Code section 85.342(m) governs permanent partial disabilities for the arm. The provision provides:

> m. The loss of two-thirds of that part of an arm between the shoulder joint and the elbow joint shall equal the loss of an arm and the

compensation thereafter shall be weekly compensation during two hundred weeks.

There are two impairment ratings for the right arm. There is the rating from Dr. Mann which totals 14 percent to the arm. Dr. Hines has provided a rating of 47 percent to the arm. The rating of Dr. Hines seems elevated, given the nature of the 2 surgeries claimant underwent. However, the undersigned deputy is also relying on the credible testimony of claimant with respect to his symptoms and the changes he has had to make in order to perform his duties at work. This deputy personally observed the motions claimant was able to perform with his right wrist. Claimant is no longer performing the same job as prior to his work injury. He uses different skill sets now. In light of all of the evidence presented, it is the determination of the undersigned; claimant has a twenty-five (25) percent permanent disability to the right arm.

According to Iowa Code section 85.34(2)(m) claimant is entitled to: 200 weeks X .25 equals 50 weeks of permanent partial disability benefits at the stipulated weekly benefit rate of $799.73 per week and commencing from July 31, 2017. Defendants shall take credit for all benefits previously paid.

In arbitration proceedings, interest accrues on unpaid permanent disability benefits from the onset of permanent disability. Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174 (Iowa 1979); Benson v. Good Samaritan Ctr., File No. 765734 (Ruling on Rehearing, October 18, 1989).

The next issue is the matter of the payment for an independent medical examination pursuant to Iowa Code section 85.39. Iowa Code section 85.39, permits an employee to be reimbursed for a subsequent examination by a physician of the employee's choice when an employer-retained physician has previously evaluated "permanent disability" and the employee believes the initial evaluation is too low. Claimant is requesting reimbursement for the cost of the independent medical examination and report provided by Dr. Hines. The total cost was $2,266.66.

Defendants maintain claimant did not follow the provisions of Iowa Code section 85.39. Moreover, claimant did not comply with the established holding in Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 847 (Iowa 2015). Defendants are correct. Before an employer is required to pay for an independent medical examination of claimant's selection, the employer must first have obtained from a physician, an impairment rating which gives rise to a belief by claimant that the employer retained physician's rating is "too low." Claimant did not follow the specified procedures in Iowa Code section 85.39. Claimant obtained an independent medical examination from Dr. Hines prior to defendants obtaining a rating from a physician retained by them. Claimant is not entitled to be reimbursed for the IME. However, the preparation of the report in the amount of $750.00 will be taxed as a cost.

The final issue is costs to litigate. Iowa Code section 86.40 states:

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

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

Costs. Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes. Costs of service of notice and subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

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

The following costs are assessed to defendants:

Filing fee	$100.00
Service fee	unknown
Dr. Hines' Report fee	$750.00

ORDER

THEREFORE, IT IS ORDERED:

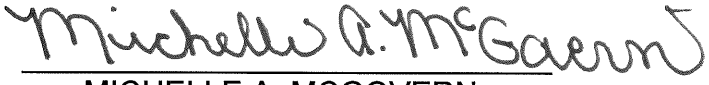
Defendants shall pay unto claimant fifty (50) weeks of permanent partial disability benefits at the stipulated weekly benefit rate of seven hundred ninety-nine and 73/100 dollars ($799.73) and payable from July 31, 2017.

Accrued benefits shall be paid in a lump sum, together with interest, as provided by law.

Costs are assessed to defendants as detailed in the body of this decision.

Defendants shall file all reports as required by law.

Signed and filed this 14th day of February, 2018.



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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.