BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JENNIE MARTINEZ,

Claimant,

vs.

PACKERS SANITATION SERVICES, INC.,

Employer,

and

ACE AMERICAN INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5060542

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Jennie Martinez, claimant, filed a petition in arbitration seeking workers' compensation benefits from Packers Sanitation Services, Inc. (PSSI) and its insurer, Ace American Insurance Company, as a result of an injury she sustained on May 3, 2017 that arose out of and in the course of her employment. This case was heard in Des Moines, Iowa, and fully submitted on February 22, 2019. The evidence in this case consists of the testimony of claimant, Laura Eudaley, Defendants' Exhibits A - E and Claimant's Exhibits 1 - 7. Both parties submitted briefs. The hearing was interpreted.

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.

ISSUES

1. Whether the alleged injury is a cause of permanent disability and, if so, the extent of claimant's disability.

2. Whether claimant is entitled to payment of certain medical expenses.

3. Whether claimant is entitled to payment of a functional capacity examination and report.

4. Assessment of costs.

FINDINGS OF FACT

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

Jennie Martinez, claimant was 35 years old at the time of the hearing. Claimant attended about three years of schooling in Mexico. She has no other formal education and does not have a high school degree or GED. (Exhibit 5, page 42) Claimant is able to read and speak a little English. Claimant worked for a brief time as a temporary worker in California at minimum wage. Her job was to fill balls with air. Claimant worked at a number of fast food restaurants. From 2006 through 2013 claimant worked at a Burger King in Iowa. (Ex. 5, p. 42) Claimant was the kitchen manager for about two years at Burger King and supervised four other employees. Claimant was earning less than eight dollars an hour in this job. (Transcript page16)

Claimant began her employment at PSSI on May 25, 2013 and was still working for PSSI at the time of the hearing. PSSI contracts with meat packing companies to perform cleaning so factories can pass USDA inspections. (Tr. p. 65) Claimant testified when she was hired, her job was to shovel meat off the floor and put it into tubs. Claimant was shoveling meat and washing bins when she was injured on May 3, 2017. (Tr. p. 20) Claimant testified that her current job at PSSI is to scrub, clean the lines and metal. (Tr. p. 22) This is a 40-hour per week job. (Tr. p.43) Claimant has to lift 5-gallon buckets twice a day for this job and move a foam machine. (Tr. p. 23) Claimant is earning more now at PSSI than she did at the time of her injury. (Tr. p.43)

Claimant was for a time period a trainer at PSSI. Claimant received a dollar an hour more as a trainer. (Tr. p. 42) Claimant said she missed meetings, due to her medication and oversleeping, and was removed from the trainer position. (Tr. p. 22) Claimant testified that if she could attend the meetings on her day off she could qualify to be a trainer again. (Tr. p. 47)

Claimant was lifting meat with a shovel at work on May 3, 2017 when she felt a pain in her back. In her deposition claimant said,

> A. Well, I was picking meat up on the line, and then all of a sudden I felt this pull in my back, in my lower back. And so I reported it, but at that time I only felt that. And so then they told me just to take some pills and that I should go home to rest, but then, when I was at home, I felt a pain here (indicating) in my neck and my shoulder, my left shoulder. And - - well, that's how it happened, and that's it.

(Ex. D, p. 25, depo. p. 23) Claimant reported this to her employer. Claimant said that after she went home and rested she woke up with pain in her back and neck and left shoulder. (Tr. p. 25)

Claimant said that originally she felt a tingling pain in her left shoulder, but at the time of the hearing she feels she is losing strength in her arm. (Tr. p. 25) Claimant described her current back symptoms as if something was picking at her back. She said she had a sharp pain in her back. (Tr. pp. 25, 26) Claimant takes a muscle relaxer medication when she in not working and Tylenol about every third day. (Tr. p. 26) Claimant agreed that Jacqueline Stoken, D.O., note under Current Status that her independent medical examination (IME) was accurate at the time of the IME. (Tr. p. 28) (See Dr. Stoken's evaluation Exhibit 1, pages 3 and 4). Claimant said that since her IME, her back has a stabbing pain and her leg goes numb if she stands for long periods. (Tr. p. 29)

Claimant testified that she could not return to her work in the factory and some fast food jobs due to the standing. Claimant did believe she could return to the kitchen supervisor job as there was some sitting in that job. (Tr. p.36)

Claimant obtained medical care that was not authorized by defendants. Claimant went to William Palmer, M.D., at the Mercy Family Care – Perry (Mercy) on March 14, 2018. Claimant was assessed with left shoulder pain. (Ex. 2, p. 13) Claimant testified she was prescribed medication (naproxen) after that visit. (Ex. 2, p. 14) She returned to Mercy for follow up care and physical therapy. (Tr. p. 38)

Claimant went to the emergency room due to neck and back pain on April 19 2018. (Ex. 3, p. 25). Claimant received an injection of Toradol. Claimant was also placed on a course of prednisone, muscle relaxers, and Tylenol and told to go to her primary care physician. (Ex. 3, p. 27)

On April 27, 2019, claimant returned to Mercy with worsening left shoulder pain. Jason Nobel PA assessed claimant with left shoulder pain, lumbar back pain, and cervical neck pain. PA Nobel prescribed medication and recommended physical therapy. (Ex. 2, p. 17) PA Nobel saw claimant for neck and shoulder pain on September 7, 2018 and October 2, 2018. (Ex. 2, pp. 19, 21) Claimant has requested payment for the emergency room visit and treatment by Mercy. (Ex. 7, pp. 47 - 50)

I find that the expenses for medical care in Exhibit 7 are causally related to claimant's May 3, 2017 work injury.

Claimant obtained care without defendant's authorization. Claimant said she spoke to Jose Martinez, "her biggest boss", to get authorization for medical care but was told no. (Tr. p. 39) Claimant testified that she was told by PSSI that her case was discharged and her case was over with PSSI. (Tr. p. 37) Claimant said she spoke to her supervisor James Willis about getting additional care and was denied. (Tr. pp. 37, 38) Claimant testified that the unauthorized treatments helped some, at least temporarily. (Tr. pp. 38, 40) I find that the unauthorized care claimant received provided a medical benefit to the claimant.

Claimant did receive help from an advocate of the employer when she was first injured. (Tr. p. 52) Claimant said that after she was initially helped by an advocate, it was difficult to get in contact with the advocate and claimant believed she was to talk to her supervisors. (Tr. p. 53)

Laura Eudaley the workers' compensation director at PSSI testified. In this position Ms. Eudaley manages "... a team of safety gals and work comp and claims advocate gals in the office as well as oversee some claims that come in." (Tr. pp. 56, 60) Ms. Eudaley said claimant was in contact with a claim advocate. (Tr. p. 61) Ms. Eudaley said claimant's case was not closed and claimant could have contacted a claim advocate if she needed medical care. (Tr. p. 62) Ms. Eudaley spoke to Jose Martinez a week before the hearing and was told that claimant had not made a request for medical care to him. (Tr. p. 64)

Ms. Eudaley testified that in the cleaning process that PSSI uses there are seven stages and that no employee would always be performing the dry pick up (shoveling) as each stage is separate and all must be performed in sequence. (Tr. p.66)

On May 26, 2017, Dr. Berg examined claimant. He noted the claimant's MRI was normal. Dr. Berg's assessment was, "1. Resolved left levator scapula syndrome. 2. Left S1 joint dysfunction." (Ex. B, p. 3) Dr. Berg said claimant had classic left S1 joint dysfunction with appropriate paresthesia in her lower leg due to her S1 and S2 nerve roots. Dr. Berg noted claimant had been offered injections two separate times and declined. Dr. Berg provided restrictions and had claimant attend physical therapy. (Ex. B, p. 3)

On September 8, 2017, claimant was seen by Dr. Berg. He noted that he provided an injection in the left levator scapula area. Dr. Berg's assessment was "Left levator scapula syndrome." (Ex. B, p. 4) Based upon the prior MRI, claimant was released to return to her prior job with no impairment of disability associated with the May 3, 2017 injury. (Ex. B, p. 4)

On August 20, 2018, claimant had a one-day functional capacity examination (FCE) at Kinetic Edge Physical Therapy. Todd Schemper, PT, DPT, OCS performed the testing. The testing was deemed valid. (Ex. 4, p. 30) The FCE recommended the following;

2. The client's capabilities are in the sedentary category (waist to floor lifting up to 10 pounds on an occasional basis and 15 pounds on a rare basis) of physical demand characteristics. Specific capabilities are noted with the FCE Test Results and Interpretation grid.

3. Her ability with waist to crown lifting falls within the light category, lifting up to 15 pounds occasionally and 20 pounds rarely.

4. Her ability with front carrying and left carrying meets the light category, carrying up to 20 pounds occasionally and 25 pounds rarely.

5. Her ability with right carrying falls within the low range of the medium category, carrying up to 25 pounds occasionally and 30 pounds rarely.

(Ex. 4, p. 31)

On November 13, 2018, claimant was examined by ARC Physical Therapy for a FCE. (Ex. C) Aaron Christiansen, MSPT, performed the testing. The FCE was deemed invalid due to the inconsistent results in testing. (Ex. C. p. 9)

Dr. Stoken examined claimant on February 26, 2019 and issued an IME report on March 8, 2018. (Ex. 1) Dr. Stoken noted that claimant was seen by David Berg, D.O., on May 8, 2017, due to claimant's May 3, 2017 work injury. Dr. Berg diagnosed claimant with left levator scapula syndrome and left S1 joint dysfunction. Claimant was offered an injection which she declined. (Ex. 1, p. 2) Claimant retuned to Dr. Berg on May 10, 2017 and May 26, 2017. Dr. Berg had ordered a MRI of the lumbar spine which was normal. (Ex. 1, p. 2: Ex. A, p. 1)

Dr. Stoken's impression of claimant was,

IMPRESSION:

1. Status post work injury on 5/03/17 with acute low back and left shoulder strain.

2. Chronic mechanical low back pain, chronic myofascial neck pain, chronic left shoulder bursitis/pain, and left greater trochanter bursitis.

(Ex. 1, p. 5). Dr. Stoked said that both the claimant's back injury and left shoulder injury were causally related to claimant's May 3, 2017 work injury. (Ex. 1, pp. 5, 6). Dr. Stoken assigned a 5 percent whole person impairment for the claimant's back and recommended claimant not frequently lift over 20 pounds. (Ex. 1, p. 6) Dr. Stoken provided a 4 percent whole body impairment rating for claimant's left shoulder and recommended claimant avoid repetitive work above the shoulder. (Ex. 1, p. 7)

Dr. Stoken, using the Combined Values Chart in the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, found claimant had a 9 percent whole body impairment and recommended claimant work in the light-medium range of work with frequent lifting of up to 18 pounds, occasional lifting of 25 pounds and rarely lifting 35 pounds. I find that these are claimant's restrictions.

Claimant has been working a light job at PSSI since her injury. She is working 40 hours per week and is earning more money than she was making at the time of the injury.

I find that the restrictions recommended by Dr. Stoken are the appropriate restrictions for claimant. Claimant is restricted to light/medium work. I find claimant has a 20 percent loss of earning capacity.

I find claimant's gross wages were $642.66 per week. Claimant was single and entitled to three exemptions at the time of her injury. Using the rate book in effect at the time of her injury I find that claimant's weekly workers' compensation rate is $419.55.

Claimant has requested costs of the FCE of $992.00 and filing fee of $100.00. (Ex. 6, pp. 44, 45) The FCE costs were comprised of $372 for the evaluation and $620.00 for the report. (Ex. 6, p. 45)

CONCLUSIONS OF LAW

CAUSATION

The defendants have stipulated that claimant had an injury that arose out of and in the course of her employment with PSSI on May 3, 2017. The defendants dispute that claimant has any permanent impairment due to this injury.

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).

I find that claimant has proven by a preponderance of the evidence that her work injury on May 3, 2017 has caused permanent disability to her shoulder and lower back. These injuries are to the whole body.

I did not find Dr. Bergs opinion that claimant had no permanent impairment convincing. While the MRI in this case was normal, that fact is not dispositive that claimant has permanent impairments. Claimant has consistently complained of symptoms both before Dr. Berg released her from care and after. I find the opinions of Dr. Stoken to be convincing. Dr. Stoken's report was more complete and detailed than Dr. Berg. Her deposition testimony was consistent with her IME. Dr. Berg released claimant without restriction. Claimant has sought treatment after her release by Dr. Berg due to her continuing symptoms.

The shoulder and back symptoms limit the range of work claimant can perform. There is no indication in the medical records or claimant's testimony that the shoulder and back symptom will subside in the future.

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 Ry. Co. of Iowa, 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.

In assessing an unscheduled, whole-body injury case, the claimant's loss of earning capacity is determined as of the time of the hearing based upon industrial disability factors then existing. The commissioner does not determine permanent disability, or industrial disability, based upon anticipated future developments. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 392 (Iowa 2009).

In making my award of permanent partial disability benefits I considered the fact claimant is still working for PSSI. Claimant has shown motivation to work. Claimant has a very limited education. She communicates in basic English. Claimant has not had surgery and none has been recommended. Claimant is limited to light/medium work as set forth by Dr. Stoken. While claimant was a supervisor, it was at a low level and was

making less than $8.00 per hour. Claimant does not have any unique or marketable skills. Considering all of the factor of industrial disability I find claimant has a 20 percent whole body impairment which entitled claimant to 100 weeks of permanent partial disability benefits.

UNAUTHORIZED MEDICAL CARE

Employers are required to provide reasonable medical care to injured employees. Iowa Code section 85.27 provides in part;

> 1. The employer, for all injuries compensable under this chapter or chapter 85A, shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies therefor and shall allow reasonably necessary transportation expenses incurred for such services.
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> . . . .
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> 4. For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. If the employer chooses the care, the employer shall hold the employee harmless for the cost of care until the employer notifies the employee that the employer is no longer authorizing all or any part of the care and the reason for the change in authorization. An employer is not liable for the cost of care that the employer arranges in response to a sudden emergency if the employee's condition, for which care was arranged, is not related to the employment. The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. . . . In an emergency, the employee may choose the employee's care at the employer's expense, provided the employer or the employer's agent cannot be reached immediately. . . . The employer shall notify an injured employee of the employee's ability to contest the employer's choice of care pursuant to this subsection.

The claimant went to the emergency department on April 19, 2018. There was no testimony or proof the employer or employer's agent could not be reached before claimant went to the emergency department. As such, claimant is not entitled to reimbursement under the emergency provision of 85.27(4). The request for reimbursement of this care is analyzed below along with the care claimant obtained at Mercy Family Clinic – Perry.

The Iowa Supreme Court in Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193 (Iowa 2010) analyzed under what circumstances an employee may obtain payment for unauthorized medical care and what an employee must prove to obtain such payment.

> We begin by recognizing that nothing in the statute prohibits an injured employee from selecting his or her own medical care at his or her own expense at any time following an injury. *Id.* at 197. Additionally, the statute contains no language to indicate the basic duty of an employer to furnish reasonable medical care for compensable injuries is discharged once an employee deprives an employer of its right to control medical care by obtaining alternative care not authorized by the statute. Clearly, the legislature has not specifically addressed the issue of reimbursement for unauthorized medical care. Instead, the claim that an employer is not responsible for expenses based on unauthorized care resonates solely from the employer's loss of the statutory right to choose care when an employee abandons the care provided by the employer and obtains unauthorized alternative care without the employer's consent or the commissioner's authorization.

Id. at 205–06

> We do not believe the statute can be narrowly construed to foreclose all claims by an employee for unauthorized alternative medical care solely because the care was unauthorized. Instead, the duty of the employer to furnish reasonable medical care supports all claims for care by an employee that are reasonable under the totality of the circumstances, even when the employee obtains unauthorized care, upon proof by a preponderance of the evidence that such care was reasonable and beneficial. In this context, unauthorized medical care is beneficial if it provides a more favorable medical outcome than would likely have been achieved by the care authorized by the employer. The allocation of this significant burden to the claimant maintains the employer's statutory right to choose the care under section 85.27(4), while permitting a claimant to obtain reimbursement for alternative medical care upon proof by a preponderance of the evidence that such care was reasonable and beneficial.

Id. at 206

> Although an employee may assert a claim for expenses of the unauthorized medical care, the employee must prove the unauthorized care was reasonable and beneficial under all the surrounding circumstances, including the reasonableness of the employer-provided care, and the reasonableness of the decision to abandon the care

> furnished by the employer in the absence of an order from the commissioner authorizing alternative care. Consistent with the rationale for giving the employer control over medical care, the concept of reasonableness in this analysis includes the quality of the alternative care and the quality of the employer-provided care. As we have already noted, the question of whether the unauthorized care was beneficial focuses on whether the care provided a more favorable medical outcome than would likely have been achieved by the care authorized by the employer.

Id at 208

Claimant credibly testified she had been told by two supervisors that her case was closed and PSSI was not going to provide additional medical care. While Ms. Eudaley testified that Mr. Martinez said claimant did not request additional medical care, I do not find that testimony as credible as claimant's. Mr. Martinez did not testify and claimant's testimony was under oath subject to cross examination. Dr. Berg discharged claimant from care in September 2017. Claimant told Mercy on April 27, 2018 that she was not receiving any additional care from her employer.

Ms. Eudaley testified claimant's case was not closed and claimant could have spoken to a bilingual advocate if she needed help in obtaining medical care. I find Ms. Eudaley's testimony credible, that claimant's case was not closed, and there were advocates that claimant could have contacted. However, I find claimant was acting reasonable under the circumstances in following the advice of her supervisors who told her the case was closed. While that information may have not been accurate based upon PSSI's policies, given the totality of the circumstance, claimant's action in obtaining unauthorized medical care was reasonable.

The question to answer next is whether the unauthorized care claimant received provided a more favorable medical outcome that would likely have been achieved by the care authorized by the employer.

Dr. Berg in his last treatment note of September 8, 2017 said "Despite physical therapy, medications and injections nothing has helped her." (Ex. B, p. 4) Dr. Berg had nothing else to offer claimant although he said claimant could return if she has problems. Claimant testified that the unauthorized treatments have helped her to some extent. I find that claimant has shown that the care she received was more medically beneficial than the care the defendants would have been providing. Claimant is entitled to reimbursement of the medical expense found in Exhibit 7.

COSTS

Iowa Code section 86.40 states:

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

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

Costs. Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be ..., (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate ...

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)

I award claimant the filing fee of $100.00. I award claimant the cost of the report portion of the FCE of $620.00. (Ex. 6, p. 45) Total costs awarded are $720.00

ORDER

Defendants shall pay claimant one hundred (100) weeks of permanent partial disability benefits at the weekly rate of four hundred nineteen and 55/100 dollars ($419.55) commencing September 8, 2017.

Defendants shall pay the costs of medical care as set out in Exhibit 7.

Defendants shall pay costs of seven hundred twenty dollars ($720.00).

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See. Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018)

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

Signed and filed this 7th day of August, 2019.

JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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JFE/kjw

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.