BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RAODA HAGAR, Claimant, vs. STAFF MANAGEMENT SOLUTIONS, LLC, Employer, and NEW HAMPSHIRE INSURANCE CO. Insurance Carrier, and SECOND INJURY FUND OF IOWA, Defendants.	File No. 5064069 ARBITRATION DECISION Head Note Nos.: 1803.01, 2502, 3203

STATEMENT OF THE CASE

Claimant, Raoda Hagar, filed a petition in arbitration seeking workers' compensation benefits from Staff Management Solutions, LLC, (Staff Management), employer, New Hampshire Insurance Company, insurer, and the Second Injury Fund of Iowa, (Fund), all as defendants. This case was heard in Davenport, Iowa on June 4, 2019 with a full submission date of June 28, 2019.

The record in this case consists of Joint Exhibits 1-4, Claimant's Exhibits 1-8 and 10-13, Defendant Staff Management and insurer's Exhibits A through F, Defendant Fund's Exhibit AA, and the testimony of claimant. Serving as interpreter was Sumaya Rabee.

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. The extent of claimant's entitlement to permanent partial disability benefits.
2. Whether there is a causal connection between the injury and the claimed medical expenses.
3. Whether claimant is entitled to alternate medical care under Iowa Code section 85.27.
4. Whether claimant is entitled to reimbursement of an independent medical evaluation (IME) under Iowa Code section 85.39.
5. Whether claimant is entitled to Fund benefits.

FINDINGS OF FACT

Claimant was 43 years old at the time of hearing. Claimant graduated from high school in Sudan. Claimant has taken ESL classes at community colleges since 2013. Claimant speaks, reads, and writes a little English.

Claimant has worked at a donut shop as a cashier and working in the kitchen. She has also done production line work doing packaging.

Claimant began at Staff Management, a temporary agency, in May of 2015. Claimant's job description as a production worker required claimant to stand and walk frequently over an eight-hour shift and to lift 50 pounds regularly. (Exhibit 10, page 52)

Claimant testified in deposition her job required her to pack and palletize items. Claimant said most of the lifting involved boxes weighing two to three pounds. (Ex. 13, Deposition p. 18; Transcript, p. 30) At the time of injury claimant was doing production line work for Proctor and Gamble. (Joint Exhibit 1, p. 39)

In January of 2014 claimant was doing production line work for Raising Rose. Claimant testified a coworker accidentally sprayed a chemical in both of her eyes and her face. (Ex. 7, p. 6; Tr. pp. 18-19) Claimant received treatment at the University of Iowa Hospitals and Clinics (UIHC) for her eye condition.

Claimant ultimately underwent cataract surgery for her right eye on March 18, 2016. She had cataract surgery on her left eye on April 18, 2016. Both surgeries were performed by Thomas Oetting, M.D. (Jt. Ex. 1, pp. 10-12, 18-20)

Claimant testified she takes four prescription medications for her eye condition. (Tr. pp. 29-20; Ex. 7, p. 48)

Claimant testified she believes she has decreased vision and blurring in both eyes. She says she has difficulty driving, and doing class work for ESL classes. She said her eyes become easily irritated. (Ex. 7, p. 47; Ex. 13, p. 35; Jt. Ex. 1, p. 21)

Claimant testified that, on October 6, 2016, she slipped on a piece of paper at work and twisted her left knee. Claimant testified she began to develop back pain approximately two to three months after the October 6, 2016 date of injury. (Ex. 13; Depo. pp. 20-11; Tr. pp. 24, 30)

On November 11, 2016 claimant was evaluated at the UIHC by Richard Dobyns, M.D. for left knee pain. Knee pain was caused by a fall four weeks prior. An MRI of the left knee was recommended. (Jt. Ex. 1, pp. 23-25)

On November 15, 2016 claimant had an MRI of the left knee. It showed a full-thickness chondral defect of the lateral patellar facet. (Jt. Ex. 1, pp. 28-29)

Claimant was seen in physical therapy on November 23, 2016. Claimant had an antalgic gait on the left. Claimant was assessed as having left medial knee pain. (Jt. Ex. 1, pp. 35-36)

Claimant had another MRI of the left knee on December 12, 2016. It showed a meniscal tear. (Jt. Ex. 2, p. 101)

Claimant returned to Sudan on or about December 31, 2016. (Jt. Ex. 1, p. 37) Claimant stayed in Sudan until approximately March 1, 2017. While in Sudan claimant had no medical treatment. (Ex. 13; Depo. p. 26)

On March 8, 2017 claimant returned to UIHC in follow up for her knee injury. Claimant's symptoms had significantly improved. Claimant was returned to work at full-duty without restrictions. Claimant was referred to an orthopedic surgeon for consultation. (Jt. Ex. 1, pp. 37-38)

Claimant received physical therapy on August 21, 2017 for left knee pain. Claimant underwent physical therapy from approximately August 21, 2017 through September of 2017. (Jt. Ex. 1, pp. 39-44)

On August 29, 2017 claimant was evaluated at the UIHC for left knee pain. Claimant was given a cortisone injection in the left knee. (Jt. Ex. 1, pp. 60-61)

The record suggests the first time claimant discussed any lower back pain was with a treating physician on approximately October 9, 2017 and/or October 11, 2017. (Ex. A, p. 3)

On November 6, 2017 claimant was evaluated at the UIHC for migrating lower back pain. Claimant denied any trauma or acute injury. Claimant thought her lower back pain might be due to her menses. Claimant was recommended to have physical therapy. (Jt. Ex. 1, pp. 45-48)

On December 6, 2017 claimant had a Gel One injection in the left knee. Claimant did not have significant relief from pain from this injection. (Jt. Ex. 1, p. 61)

Claimant returned in follow up to the UIHC on April 3, 2018. Claimant had continued knee pain. Surgery was discussed as a treatment option. Claimant had resolution of her lower back pain. Claimant was returned to work with no restrictions. (Jt. Ex. 1, pp. 53-57)

Claimant was evaluated by Nicolas Noiseux, M.D., on July 10, 2018. Claimant chose not to have knee replacement surgery. Claimant was found to be at maximum medical improvement (MMI). Dr. Noiseux opined claimant had a 20 percent permanent impairment to the lower extremity, converting to an 8 percent permanent impairment to the body as a whole, based upon the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Jt. Ex. 1, pp. 65-66)

In August of 2018 claimant returned to Sudan. Claimant was in Sudan for approximately three months. During that time claimant did not receive any medical treatment. (Tr. p. 32)

Claimant reapplied to Staff Management on November 6, 2018. In the application claimant indicated she could lift more than 50 pounds. She also indicated she could lift at least 30 pounds without accommodations. Claimant indicated she could stand between eight to twelve hours per day. (Ex. C, pp. 17-20) Claimant testified at hearing someone at Staff Management helped her complete this application.

On January 13, 2019 claimant went to the emergency department at the UIHC complaining of an acute onset of right flank pain. Claimant indicated she woke up in the morning with pain that gradually increased throughout the day. (Jt. Ex. 1, pp. 71-85; Jt. Ex. 3, p. 103)

From February 5, 2019 through February 15, 2019 claimant was hospitalized. Claimant was assessed as having pneumonia and lactic acidosis secondary to hypovolemic shock. (Jt. Ex. 4, pp. 106-121)

Claimant testified she took off of work at Staff Management in February of 2019 and had not returned to work at the time of hearing. She said she has not applied for any other jobs. Claimant said she plans to return to Staff Management in the future. (Ex. 6, p. 45; Ex. 13; Depo. p. 22) Claimant says she was off work from Staff Management because of her work injury and because of a personal medical condition. (Tr. p. 34) A medical leave slip from Staff Management shows claimant as being off for a non-work-related medical condition. (Ex. E, p. 24)

In a May 2, 2019 report, Mark Taylor, M.D., gave his opinions of claimant's condition following an IME. Dr. Taylor agreed with Dr. Noiseux that claimant's MMI date for the left knee injury was July 10, 2018. He also agreed with Dr. Noiseux claimant had a 20 percent permanent impairment to the left lower extremity. (Ex. A, p. 9)

Dr. Taylor opined claimant's lower back condition had an uncertain etiology. He believed claimant's back pain was multifactorial. This was because the records indicate claimant's back pain came on suddenly. The records also indicate claimant's back pain improved, during some periods, while claimant had continued knee problems. (Ex. A, pp. 9-11)

In a May 3, 2019 report, Sunil Bansal, M.D. gave his opinions of claimant's medical condition following an IME. Claimant had continued knee pain. Claimant had continued lower back pain. Claimant's vision had decreased since her eye injury. Claimant's eyes were frequently dry. (Ex. 2, p. 23)

Dr. Bansal found claimant had a 16 percent permanent impairment to her eyes as a result of her injury. He opined claimant had a 20 percent permanent impairment to the left lower extremity as a result of her knee injury. He also found claimant had a lower back injury secondary to a gait problem. (Ex. 2, pp. 26-27)

Dr. Bansal found claimant had a 3 percent permanent impairment to the body as a whole as a result of her lower back injury. He limited claimant to lifting no greater than 10 pounds and no prolonged standing or walking more than 30 minutes at a time due to the knee and back injury. He also limited claimant to no commercial driving due to her eye condition. (Ex. 2, pp. 27-28)

Claimant testified she did not believe she could return to work to either of her prior jobs given her limitations. At the time of hearing, claimant had not returned to work at Staff Management. Claimant testified, at hearing, she planned to return to Staff Management in a month. Claimant said she has not looked for other work.

Claimant said since her eye injury, she only now drives short distances. Claimant testified no doctor has given her restrictions regarding driving.

CONCLUSIONS OF LAW

The first issue to be determined is the extent of claimant's entitlement to permanent partial disability benefits from defendant employer and insurer.

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 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).

An employer may be liable for a sequela of an original work injury if the employee sustained a compensable injury and later sustained further disability that is a proximate result of the original injury. Mallory v. Mercy Medical Center, File No. 5029834 (Appeal February 15, 2012).

The Iowa Supreme Court noted "where an accident occurs to an employee in the usual course of his employment, the employer is liable for all consequences that naturally and proximately flow from the accident." Oldham v. Schofield & Welch, 266 N.W. 480, 482 (1936). The Court explained:

> If an employee suffers a compensable injury and thereafter suffers further disability which is the proximate result of the original injury, such further disability is compensable. Where an employee suffers a compensable injury and thereafter returns to work and, as a result thereof, his first injury is aggravated and accelerated so that he is greater disabled than before, the entire disability may be compensated for." Id. at 481.

A sequela can be an after effect or secondary effect of an injury. Lewis v. Dee Zee Manufacturing, File No. 797154, (Arb. September 11, 1989). A sequela can take the form of a secondary effect on the claimant's body stemming from the original injury. For example, where a leg injury causing shortening of the leg in turn alters the claimant's gait, causing mechanical back pain, the back condition can be found to be a sequela of the leg injury. Fridlington v. 3M, File No. 788758, (Arb. November 15, 1991).

A sequela can also take the form of a later injury that is caused by the original injury. For example, where a leg injury leads to the claimant's knee giving out in a grocery store, the resulting fall is compensable as a sequela of the leg injury. Taylor v. Oscar Mayer & Co., 3 Iowa Ind. Comm. Rep. 257, 258 (1982).

Defendant employer and insurer contend claimant's permanent disability is limited to her left leg injury. Claimant contends she injured her lower back as a result of an altered gait due to her knee condition.

Claimant testified her lower back pain developed two to three months after the knee injury. (Ex. 13; Depo. pp. 10-11; Tr. pp. 24, 30) Claimant injured her left knee on October 1, 2016. Based on claimant's testimony, her lower back pain would have developed in either December of 2016 or January of 2017.

Claimant returned in follow up at the UIHC in March 2017 for treatment of her left knee. There is no indication, in treatment notes, at that time, that claimant had any lower back pain. (Jt. Ex. 1, pp. 37-39) Claimant had physical therapy from August of 2017 through September of 2017. There is no mention in these records of any lower back pain. (Jt. Ex. 1, pp. 39-44) Claimant was given a left knee injection in August of 2017 at the UIHC. There is no mention in the records from this period of lower back pain. (Jt. Ex. 1, pp. 60-61) The first indication in the record that claimant spoke of any lower back pain, suggests this occurred in early August of 2017, approximately one year after her knee injury. (Ex. A, p. 3) Medical records also suggest claimant believed her lower back pain was caused by her menses. (Jt. Ex. 1, pp. 45-48)

Dr. Bansal based his opinion on causation, regarding the lower back condition, on an understanding claimant's lower back pain began a few months after the October of 2016 knee injury. (Ex. 2, p. 27) As detailed above, this understanding of causation is not supported by the record. The record indicates claimant first complained of a back condition nearly one year after the knee injury. Because Dr. Bansal's causation opinion is based on a misunderstanding of claimant's medical history, it is found his opinion, regarding causation of a lower back condition, is not convincing.

Dr. Taylor opined claimant's lower back condition is multifactorial. He indicated it is difficult to know the cause of claimant's back condition, as records indicated claimant's back condition improved, or waxed and waned, while claimant still had ongoing left knee symptoms. (Ex. A, pp. 9-11)

Claimant testified her back condition occurred approximately two to three months after the October of 2016 injury. Claimant's testimony is not supported by medical records. The record indicates the first record of a back complaint occurred almost one year after the knee injury of October 2016. The record indicates claimant's back condition periodically improved. The opinions of Dr. Bansal regarding causation of the back condition are found not convincing. Dr. Taylor found claimant's back condition was multifactorial, and he did not find causation between the October of 2016 knee injury and claimant's back symptoms. Based on this record, claimant has failed to carry her burden of proof her back condition is a sequela of the left knee injury.

Drs. Noiseux, Bansal and Taylor all found claimant had a 20 percent permanent impairment to the left lower extremity due to her work injury. This results in claimant being entitled to 44 weeks of permanent partial disability benefits from defendant employer and insurer for the October of 2016 knee injury (220 x 20%).

As claimant has failed to carry her burden of proof her back condition was caused by the October 6, 2016 work-related knee injury, the issue of defendants' liability

for medical bills related to claimant's back condition is moot. The issue regarding claimant's entitlement to alternate medical care for the back condition is also moot. Defendant employer and insurer are only liable for medical bills and medical care as it relates to claimant's knee condition.

The next issue to be determined is whether claimant is entitled to Fund benefits.

Section 85.64 governs Second Injury Fund liability. Before liability of the Fund is triggered, three requirements must be met. First, the employee must have lost or lost the use of a hand, arm, foot, leg, or eye. Second, the employee must sustain a loss or loss of use of another specified member or organ through a compensable injury. Third, permanent disability must exist as to both the initial injury and the second injury.

The Second Injury Fund Act exists to encourage the hiring of handicapped persons by making a current employer responsible only for the amount of disability related to an injury occurring while that employer employed the handicapped individual as if the individual had had no preexisting disability. See Anderson v. Second Injury Fund, 262 N.W.2d 789 (Iowa 1978); 15 Iowa Practice, Workers' Compensation, Lawyer, Section 17:1, p. 211 (2014-2015).

The Fund is responsible for the industrial disability present after the second injury that exceeds the disability attributable to the first and second injuries. Section 85.64. Second Injury Fund of Iowa v. Braden, 459 N.W.2d 467 (Iowa 1990); Second Injury Fund v. Neelans, 436 N.W.2d 355 (Iowa 1989); Second Injury Fund v. Mich. Coal Co., 274 N.W.2d 300 (Iowa 1970).

In Gregory v. Second Injury Fund of Iowa, 777 N.W.2d 395 (Iowa 2010), the Iowa Supreme Court noted: "In determining the Fund's liability under section 85.64, the commissioner shall consider only the extent to which Gregory's earning capacity was diminished by the combined effects of the 2000 and 2002 losses to her *enumerated extremities*." Id. at 401 (emphasis in original).

Based on the holding in Gregory, claimant's industrial disability, for the purposes of Fund benefits, can only be analyzed regarding the combined effect of claimant's eye and knee condition.

Claimant was 44 years old at the time of hearing. Claimant has worked at a donut shop and done production line work for Raising Rose. Claimant's unrebutted testimony is that given her knee condition she cannot return to her production line work at Raising Rose. Claimant has a 20 percent permanent impairment for her knee. She has a 16 percent impairment for her eye condition.

The only doctor who has given claimant work restrictions for the knee injury is Dr. Bansal. Dr. Bansal's restrictions are difficult to analyze, as they are given for both the back and the left knee condition. As noted above, claimant failed to carry her burden of proof she had a work-related back injury.

Dr. Bansal also opined claimant should not perform commercial driving regarding her eye condition. As claimant has no history of working as a commercial driver, this restriction has a negligible effect on claimant's earning capacity.

Claimant continued to work as a production line worker for Staff Management until she was hospitalized in February of 2019 for a non-work-related condition. Claimant has not returned to work at Staff Management since that time. Claimant testified her leave from Staff Management is due to her work injury and a personal health condition. Documents from Staff Management indicate claimant is off work for personal health reasons only. Claimant testified she plans to return to work at Staff Management.

Given this record, it is found claimant has a 30 percent loss of earning capacity or industrial disability.

The credit for the bilateral eye condition is 80 weeks (16% x 500 weeks). The credit to the Fund for the knee injury is 44 weeks. The combined credit for both injuries for the Fund is 124 weeks (80 + 44). Based upon the above findings and conclusions of law regarding claimant's loss of earning capacity, claimant is due 26 weeks of benefits from the Fund (150 – 124).

The next issue to be determined is whether claimant is entitled to reimbursement for an IME.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

Regarding the IME, the Iowa Supreme Court provided a literal interpretation of the plain-language of Iowa Code section 85.39, stating that section 85.39 only allows the employee to obtain an independent medical evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer. Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 847 (Iowa 2015).

Under the Young decision, an employee can only obtain an IME at the employer's expense if an evaluation of permanent disability has been made by an employer-retained physician.

Iowa Code section 85.39 limits an injured worker to one IME. Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842 (Iowa 2009).

The Supreme Court, in Young noted that in cases where Iowa Code section 85.39 is not triggered to allow for reimbursement of an independent medical examination (IME), a claimant can still be reimbursed at hearing the costs associated with the preparation of the written report as a cost under rule 876 IAC 4.33. Young at 846-847.

Dr. Bansal apportioned his billing for his IME for $1,274.00 for the eye condition, and $1,970.00 for the back and knee condition. (Ex. 5, p. 37)

Costs cannot be assessed against the Fund. See Hanna v. Second Injury Fund of Iowa, File No. 5052402 (Iowa Ct. App. July 25, 2015):

> The Second Injury Fund Act does not provide for costs to be paid from the Fund. (Iowa Code section 85.64) Additionally, subsection 2 of Iowa Code section 85.66, which codifies the creation of the Fund, specifically states, in pertinent part ". . . Moneys collected in the second injury fund shall be disbursed only for the purposes stated in this subchapter, and shall not at any time be appropriated or diverted to any other use or purpose." The plain language of Iowa Code section 85.66 does not allow for the assessment of costs against the Fund. Houseman v. Second Injury Fund, File No. 5052139 (Arb. Dec. Aug. 8, 2016); see also DART v. Young, 867 N.W.2d 839, at 845 (Iowa 2015) (declaring an agency's authority to tax costs cannot go beyond the scope of the powers delegated in the governing statute).

Regarding the $1,970.00 IME costs associated with the October 6, 2016 date of injury, Dr. Taylor issued his IME report on May 2, 2019. Dr. Bansal issued his report on May 3, 2019. Given the chronology of the reports in this case, claimant is due reimbursement of the $1,910.00 for Dr. Bansal's IME report from defendant insurer and employer.

ORDER

Therefore, it is ordered:

That defendant employer and insurer shall pay claimant forty-four (44) weeks of permanent partial disability benefits at the rate of one hundred ninety-seven and 92/100 dollars ($197.92) per week commencing on July 11, 2018.

That defendant insurer and employer shall be given credit for benefits previously paid.

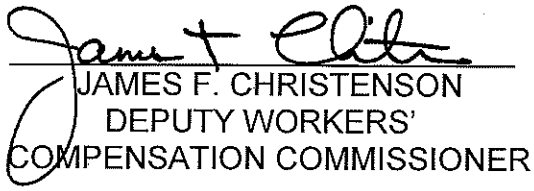
That defendant Fund shall pay claimant twenty-six (26) weeks of permanent partial disability benefits at the rate of one hundred ninety-seven and 92/100 dollars ($197.92) commencing one hundred twenty-four (124) weeks after July 11, 2018.

That defendant employer and insurer shall pay claimant one thousand nine hundred seventy dollars ($1,970.00) concerning costs associated with Dr. Bansal's IME.

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).

That defendant employer and insurer shall file subsequent reports of injury as required by this agency under rule 876 IAC 3.1(2).

Signed and filed this 26th day of September, 2019.



JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Andrew Bribriesco (via WCES)
Robert Gainer (via WCES)
Jonathan Bergman (via WCES)

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.