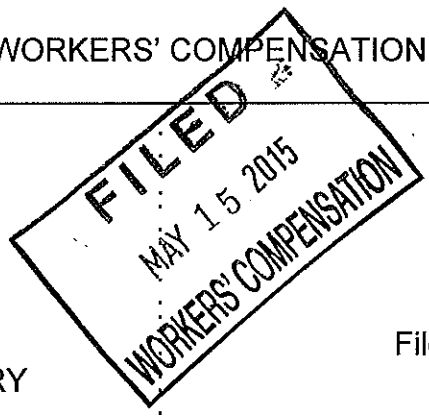
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



KENNETH B. RAY, JR.,

Claimant,

vs.

ANDERSON ERICKSON DAIRY COMPANY,

Employer,

and

TRAVELERS INDEMNITY COMPANY OF CONNECTICUT,

Insurance Carrier,
Defendants.

File No. 5046942

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Kenneth B. Ray, Jr., the claimant, seeks workers' compensation benefits from defendants, Anderson Erickson Dairy Company, the employer, and its insurer, Travelers Indemnity Company of Connecticut, as a result of an alleged injury on January 4, 2013. Presiding in this matter is Larry P. Walshire, a deputy Iowa Workers' Compensation Commissioner. An oral evidentiary hearing commenced on April 23, 2015, but the matter was not fully submitted until the receipt of the parties' briefs and argument on May 1, 2015. Oral testimonies and written exhibits received into evidence at hearing are set forth in the hearing transcript.

Claimant's exhibits were marked numerically. Defendants' exhibits were marked alphabetically. References to a page of a transcript shall be to the actual page number of the original transcript, not to the page number of a copy containing multiple pages of the original transcript.

The parties agreed to the following matters in a written hearing report submitted at hearing:

1. On January 4, 2013, claimant received an injury arising out of and in the course of employment with defendant employer.

2. Claimant is not seeking additional healing period benefits.

3. The injury is a cause of some degree of permanent industrial disability to the body as a whole.

4. Permanent partial disability benefits shall commence August 3, 2013.

5. At the time of the injury, claimant was single.

6. Medical benefits are not in dispute.

7. Prior to hearing, defendants voluntarily paid weekly benefits for this work injury as set forth in Exhibit B.

ISSUES

At hearing, the parties submitted the following issues for determination:

I. The extent of claimant's entitlement to permanent disability benefits; and,

II. For the purpose of calculating claimant's rate of compensation, the number of exemptions to which claimant is entitled and his gross weekly rate of earnings at the time of his work injury.

FINDINGS OF FACT

In these findings, I will refer to the claimant by his first name, Kenneth, and to the defendant employer as AE.

Kenneth is 44 years old, single, and lives in Des Moines. (Exhibit 9 page 4-5) He is a high school graduate with six years of college, including a two-year Associates Degree (in the field of laboratory & biotechnology technician) and four years at Iowa State University (studying genetics and biology). (Ex. 6 p. 3; Ex. 9 pp. 7-8) At hearing, Kenneth said that he is 15 credit hours short of obtaining a Bachelor of Science Degree and has no plans to complete this. To date, he has not utilized any of his post high school education in employment after leaving college.

Kenneth's medical history before his work injury in this case includes recurrent headaches, back pain, and neck pain, for which he sees a chiropractor at least 22 visits per year for the last several years, which is the maximum allowed by his health insurance. (Ex. 9 pp. 21-22, 23; Ex. F pp. 15, 18; Ex. G p. 20; Ex. H pp. 24, 27-28) He continues this chiropractic care at the present time. (Ex. 9 pp. 21-22) In his deposition, claimant denied that this chiropractic care included the left shoulder. However, defendants point to a couple of notations by a treating chiropractor in 2010 and 2011 of cervical and thoracic spine pain traveling to the left shoulder. (Ex. F p. 19; Ex. H pp. 25, 27) It is unclear from these notations whether the chiropractor meant to report an actual

injury to the shoulder. A considerable amount of the chiropractic records in evidence are unreadable.

Kenneth has had two prior workers' compensation claims. In May 2000, he was treated for a work injury to one of his fingers and recovered. In August 2009, he injured his right shoulder and underwent surgery. (Ex. 9 p. 18, Ex. K p. 33, Ex. M) It is unknown if Kenneth received any permanency benefits from these prior injuries, but I assume not, because this was not brought up by either party at hearing or in the post-hearing briefs.

Kenneth asserts that despite his prior injuries and medical conditions, he had no prior permanent physical activity restrictions prior to the work injury in this case. There is nothing in this record to suggest otherwise.

On October 1, 1998, Kenneth started working for AE. He has worked there continuously since that time, and he continues to work for AE today. (Ex. 9 pp. 14, 25, 42; Ex. A p. 4) Kenneth has performed at least 13 different jobs at AE. At the time of the stipulated injury in his case, Kenneth was performing the job called "12 ounce plastic" filler operator. (Ex. 9 pp. 25-26) His primary task was to maintain and run a milk line machine. (Ex. 9 pp. 26-27) Kenneth states that this was one of the easier jobs in the plant because it involved inky operating the machine and occasional lifting up to 20 pounds to shoulder height. (Ex. 9 p. 26) Kenneth's hourly rate was $18.88. (Ex. B p. 6) While on light duty from his work injury, Kenneth was bumped off of this job by a more senior worker according to the union contract.

Also, at the time of his work injury in this case, claimant was an assistant wrestling coach in the Des Moines school system. He coached grade school and high school students. He had been coaching since receiving his coaching certificate in 1995. However, except for one year, Kenneth was an unpaid volunteer. Kenneth continues his unpaid, volunteer coaching at the present time.

The stipulated work injury in this case occurred on January 4, 2013 and involved the left shoulder. (Ex. 1, p. 1) Kenneth testified that the injury occurred when he was attempting to dislodge a jammed case of milk, about 15 feet above floor level. He climbed a 12-foot step ladder to fix the jam. When the case dislodged, he fell off the ladder and caught himself with his left arm. He testified that the weight of his body was too much for his left shoulder, forcing him to let go and fall the rest of the way to the ground. (Ex. 9 pp. 29-33)

After reporting the injury, defendants referred Kenneth to Concentra for medical care, and he was treated by Terrance Kurtz, M.D. (Ex. 1, p. 1) Initially treatment consisted of medications, physical therapy and temporary work restrictions. (Ex. 1, p. 1) Kenneth then returned to work performing light-duty work within his restrictions. When Kenneth failed to significantly improve, Dr. Kurtz recommended referral to an orthopedist. (Ex. 1 p. 5) Defendants' adjuster allowed Kenneth to choose the orthopedist, and Kenneth chose the physicians at Des Moines Orthopedics. (Ex. 9, p.

34) He was previously treated by one of the physicians at this clinic for his right shoulder injury. Kenneth initially was treated by Kary Schulte, M.D. However, Kenneth found the doctor rude and uncaring, and he asked for a different doctor. He was subsequently treated by Jeffrey Davick, M.D. at the same orthopedic clinic who continued the work restrictions. (Ex. 9 pp. 34-35)

On April 30, 2013, Dr. Davick performed a left shoulder subacromial decompression. (Ex. 2, p. 12) Kenneth testified that he was off work for only three to four weeks and was returned back to light-duty work. After completing additional physical therapy and finding Kenneth to be doing well, Dr. Davick released Kenneth back to full duty without restrictions on August 3, 2013. When physical therapy ended, the physical therapist reported that Kenneth was experiencing minimal pain, only when reaching up and lifting overhead; ability to lift floor to waist of 80 pounds and 50 pounds waist to shoulder; and that all but one goal was met. The partially met goal was full AAROM elevation. (Ex. L p. 35) Despite a release to return to full-duty work, Dr. Davick opines using the AMA Guides, Fifth edition, Kenneth has 3 percent permanent partial impairment to the whole person due to reduced range of motion of the left shoulder joint. (Ex. 2 p. 12)

As stated above, claimant was bumped from the job he held at the time of his injury. Kenneth testified that he chose a work shift so he could be available during the daytime on weekends and in the early evenings after school to be with his children and attend their daytime and evening school events and activities. He stated that the only jobs available on that shift were in the cooler, which he admits are more physical than the job he had at the time of his injury. (Ex. 9 pp. 40-41) Defendants assert he was inconsistent by stating that he wanted both daytime and nighttime off for that purpose. However, when you consider the actual hours of his current shift, the shift he wanted, extends from 11:00 p.m. to 7:00 a.m., his testimony is more understandable.

Kenneth had the choice between positions in the cooler. At hearing, he stated that his seniority would have allowed him to take a job called "picker." This job is extremely physical because the milk crates are stacked six high, and it involves consistent pushing, pulling, overhead work and lifting 100-200 pounds. Despite the physical nature of this job, it is considered to be a more favorable job because it allows workers to finish early and still get paid for a full day. Kenneth testified that he would normally have chosen the picker job. However, he did not because he thought that his left shoulder condition would not allow him to do that job.

Kenneth testified that he chose a job called "cooler break man" in which he gives breaks to other persons in the cooler. Seniority governs which job he relieves. He typically only relieves persons in "load out." This job involves loading stacks of cases containing milk onto trucks using carts and a pushing machine and then adjusting the stacks in the truck. Kenneth explained that this work does not involve a lot of lifting, just dragging, pushing and pulling using a hand-held hook. He must stack cases of milk weighing 20-40 pounds each. Lifting is only three to ten times per hour. (Ex. 9 pp. 42-43) In order to perform this work, Kenneth claims that he avoids the use of his left arm

when possible and uses the hook only with his right hand. Kenneth admits he is right-hand dominate.

Kenneth testified that he is being accommodated for his shoulder problems in his break job. He explains that the job requires that he not only relieve load out, but relieve persons doing merging and picking. He states that he is not trained for merging and cannot do the picking, as stated above. Consequently, when he took the job he told two of his supervisors (neither of whom now work for AE) that he is unable to relieve the merging or picking jobs, and the supervisor told him that "we'll cross that bridge when we get there." (Ex. 9 p. 44) The AE job description for this job indicates the job title to be "cooler relief". The physical requirements of the job includes continuous movement of empty and full cases weighing 48 pounds, and stacks weighing up to 288 pounds, using a hook, frequent lifting and bending, squatting, and twisting on a regular basis. (Ex. 7 p. 4)

AE's safety manager testified at hearing that he has received no request for any accommodation from claimant and is not aware of any such accommodation as described by Kenneth. He states that he would be involved in any accommodation for a worker at AE. However, he admits he has only been the safety director since May 2014 and may not be aware of what may have been done prior to May 2014 that would not be documented in Kenneth's file. Defendants point out that Kenneth did not call as a witness the former supervisors who were providing him accommodations.

At the request of his attorney, Kenneth was evaluated by Robin Sassman, M.D., an occupational medicine physician on January 8, 2014. From her examination, record review and history provided by Kenneth, Dr. Sassman opined Kenneth has a 10 percent permanent partial impairment due to lost range of motion. However, unlike Dr. Davick, Dr. Sassman recommends restrictions which limit lifting and carrying to 50 pounds occasionally from floor to waist and waist to shoulder; limit pushing and pulling to 100 pounds occasionally below shoulder height; and, limit working overhead to only rare occasions. The doctor causally relates the impairment and restrictions to the January 4, 2013 work injury at AE. (Ex. 5 p. 6) Kenneth testified that he agrees with the work restrictions recommended by Dr. Sassman, but admitted that he never provided these to AE.

Kenneth asserts that his left shoulder is weaker than before his injury and the shoulder aches daily, especially after work activity. He says that he gets fatigued. He also has sharp pain in his arm pit. (Ex. 9 p. 38) Kenneth testified that his personal life, in addition to his job, is affected by his work injury. He stated that he purchased a motorcycle after his injury, but is not able to ride for longer periods of time due to the pain in his shoulder.

Kenneth continues coaching, but he testified that he must be extra cautious to avoid aggravating his left shoulder. He limits live wrestling to two minutes and only with experienced wrestlers who are aware of his shoulder problems.

At the time of hearing, Kenneth was still performing his relief job and is currently earning $22.55 per hour and works about 50 hours a week, 10 of which is overtime with additional pay. He also gets a $.50 per hour shift differential. He admits that he does not miss any overtime hours due to his injury in his current job, although he testified there are more overtime opportunities in the picking job. Kenneth has no plans to leave AE and plans to stay until retirement.

Defendants challenged Kenneth's credibility in this proceeding. In their post-hearing brief they state as follows regarding inconsistencies in claimant's testimonies:

> 1. In his deposition, Claimant adamantly testified he had never had any prior write-ups for disciplinary problems. (Ex. 9 p. 29) However, this is false, and the employer's records show he has been written up and/or disciplined on multiple occasions for a variety of reasons. (See Ex. E pp. 9-14)
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> 2. In his deposition, Claimant denied any prior left shoulder pain or treatment. (Ex. 9 p. 24) However, although the chiropractic records are somewhat difficult to read and interpret, Claimant has clearly mentioned left shoulder pain before the work injury. (See, e.g., Ex. F p. 19; Ex. H pp. 25, 27)
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> 3. At the hearing, on direct examination, Claimant suggested to the Deputy that his overtime hours are reduced due to the work injury claim. However, on cross examination, he conceded this is not correct, and he has not missed out on any OT hours due to the work injury. To the contrary, to the extent there are any reduced hours, it is due to his personal choice so he can maintain visitation with his children and so he does not miss his children's activities.
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> 4. At the hearing, Claimant suggested to the Deputy that his job options at AE Dairy were limited since the work injury because of his "preference for day shifts." However, later on in his testimony, Claimant conceded he has been working nights for several months because that fits better with his personal schedule (i.e. visitation and children's activities).
>
> 5. At the hearing, Claimant repeatedly testified about alleged difficulties in using his left arm at work and the alleged effect it has had on his job. Aside from the fact that such allegations are not supported by the medical evidence, there are other problems with such testimony. For example, on cross examination, Claimant conceded he is right-hand/arm dominant and always has been. Furthermore, due to the nature of his job, he has always primarily used his right hand/arm and has not had to change his body mechanics in performing his job duties since the work injury.

I find the only significant inconsistency is Kenneth's testimony concerning his disciplinary record at AE. He clearly stated that he was proud of his lack of disciplinary actions in his deposition. (Ex. 9 p.29) However, defendants produce documentation showing he received three oral admonitions and three written warnings between February 2006 and October 2012. I am perplexed by this inconsistency and claimant's was armament that he had no disciplinary problems. Surely, he would know that his record would be available to AE's attorney. Possibly six disciplinary actions are indeed low compared to other production workers at AE having 16 plus years of seniority. Possible he forgot about the prior actions. At any rate, I am confused by this testimony,

I do not believe that chiropractic records show a prior chronic shoulder condition. The records only describe neck and back pain radiating to shoulder.

Kenneth's testimony was confusing on his loss of overtime hours and why he wants his current shift hours, but I do not believe this shows a significant lack of honesty.

Although his testimony about past disciplinary actions is a concern, overall I do not find the inconsistencies show a complete lack of candor. His testimony is not unlike many claimants in these cases who tend to overplay the things they cannot do and underplay the things they can do.

I believe claimant is continuing to experience some residual pain with activity and loss of function, but he has suffered only a mild permanent disability from his work injury as least at this time. His treating orthopedist, whose views must be given considerable weight given his expertise in orthopedic medicine and greater clinical experience with Kenneth, does not provide him with restrictions based on apparently what Kenneth reported to him. Also, Kenneth did not seek any permanent restrictions until his attorney began preparing his case for hearing. Dr. Davick was not a company doctor. His clinic was chosen by claimant, not defendants. Kenneth is continuing to perform a very physical job at AE and has done so since August 2013 without any performance difficulties according to AE management.

On the other hand, he does have a permanent impairment as opined by two doctors and a record of another shoulder surgery, which will haunt him for the rest of his working life. Given his better explanation in how the AMA Guides were utilized to arrive at his rating, I find Dr. Sassman's 10 percent impairment rating more convincing. Since claimant has not seen Dr. Davick since being released from his care, Dr. Davick has not been provided claimant's current complaints, but it is unknown what he would say today. Claimant's medical history of a prior work injury and receipt of permanent disability benefits would have an adverse impact on his ability to compete with younger, healthier persons in the highly competitive labor market.

Therefore, I find that the work injury is a cause of a 10 percent permanent partial impairment to the body as a whole. Although I am unable to find that the work injury did

not compel the treating doctor to impose restrictions, I do find that this work injury is a cause of a mild permanent industrial disability or loss of earning capacity of 15 percent.

I find claimant only claimed one of his children as a dependent at the time of his injury pursuant to his divorce agreement.

I find that Kenneth's gross weekly earnings for the previous 13 representative weeks is as calculated by defendants in their Exhibit B, page 6, namely: $987.39. Claimant apparently argues for a lower rate of $969.73 for some reason. At any rate, defendants' exclusion of weekly with holiday pay appears to be the proper approach in this case.

CONCLUSIONS OF LAW

I. The extent of claimant's entitlement to permanent disability benefits under Chapter 85 of the Code of Iowa is determined by one of two methods. If it is found that the permanent physical impairment or loss of use is limited to a body member specifically listed in schedules set forth in one of the subsections of Iowa Code section 85.34(2)(a-t), the disability is considered a scheduled member disability and measured functionally. If it is found that the permanent physical impairment or loss of use is to the body as a whole, the disability is unscheduled and measured industrially under Code subsection 85.34(2)(u). Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983); Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960).

The parties agreed in this case that the work injury is a cause of some degree of permanent industrial disability. Consequently, this agency must measure the extent of claimant's loss of earning capacity as a result of this impairment.

Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W.2d 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. However, consideration must also be given to the injured worker's medical condition before the injury, immediately after the injury and presently; the situs of the injury, its severity, and the length of healing period; the work experience of the injured worker prior to the injury, after the injury, and potential for rehabilitation; the injured worker's qualifications intellectually, emotionally and physically; the worker's earnings before and after the injury; the willingness of the employer to re-employ the injured worker after the injury; the worker's age, education, and motivation; and, finally the inability because of the injury to engage in employment for which the worker is best fitted; Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 616, (Iowa 1995); 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).

A showing that claimant had no loss of his job or actual earnings does not preclude a finding of industrial disability. Loss of access to the labor market is often of paramount importance in determining loss of earning capacity, although income from continued employment should not be overlooked in assessing overall disability. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Bearce v. FMC Corp., 465 N.W.2d 531 (Iowa 1991); Collier v. Sioux City Comm. Sch. Dist., File No. 953453 (App. February 25, 1994); Michael v. Harrison County, Thirty-fourth Biennial Rep. of the Industrial Comm'r, 218, 220 (App. January 30, 1979).

Although claimant is closer to a normal retirement age than younger workers, proximity to retirement cannot be considered in assessing the extent of industrial disability. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995).

A release to return to full-duty work by a physician is not always evidence that an injured worker has no permanent industrial disability, especially if that physician has also opined that the worker has permanent impairment under the AMA Guides. Such a rating means that the worker is limited in the activities of daily living. See AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Chapter 1.2, p. 2. Work activity is commonly an activity of daily living. This agency has seen countless examples where physicians have returned a worker to full duty, even when the evidence is clear that the worker continues to have physical or mental symptoms that limit work activity, *e.g.* the worker in a particular job will not be engaging in a type of activity that would cause additional problems, or risk further injury; the physician may be reluctant to endanger the workers' future livelihood, especially if the worker strongly desires a return to work and where the risk of re-injury is low; or, a physician, who has been retained by the employer, has succumbed to pressure by the employer to return an injured worker to work. Consequently, the impact of a release to full duty must be determined by the facts of each case.

Assessments of industrial disability involve a viewing of loss of earning capacity in terms of the injured workers' present ability to earn in the competitive labor market without regard to any accommodation furnished by one's present employer. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 158 (Iowa 1996); Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 617 (Iowa 1995). Ending a prior accommodation is not a change of condition warranting a review-reopening of a past settlement or award. U.S. West v. Overholser, 566 N.W.2d 873 (Iowa 1997).

In the case sub judice, I found that claimant suffered a 15 percent loss of his earning capacity as a result of the work injury. Such a finding entitles claimant to 75 weeks of permanent partial disability benefits as a matter of law under Iowa Code section 85.34(2)(u), which is 15 percent of 500 weeks, the maximum allowable number of weeks for an injury to the body as a whole in that subsection.

II. Claimant's weekly rate of compensation is at issue. The only stipulation of the parties relevant to the rate issue is claimant's marital status; he is single. Therefore, claimant's entitlement to exemptions and his gross weekly rate at the time of claimant's injury must be determined.

I found that at the time of his injury, claimant was only able to take one of his two children as a dependent on his income tax returns due to a divorce agreement with his ex-wife. For the purpose of calculating rate, the number of exemptions that can be used are determined under eligibility regulations of the Internal Revenue Service. Middleton v. Des Moines Water Works, File No. 1084734 (App. March 31, 2000); Thompson v. Seed and Grain Construction, File No. 1059299 (App. December 28, 1998). In divorce situations where there is an agreement as to which party can take deductions on tax returns, IRS regulations specify that a taxpayer can only claim the number of dependents specified the agreement. Therefore, claimant in this case is only entitled to one dependent in addition to himself in the calculation of his rate of compensation.

Weekly earnings are defined as gross salary, wages or earnings of an employee to which such employee would have been entitled had he worried the customary hours for the full pay period in which he was injured, as regularly required by his employer for the work or employment for which he was employed. Iowa Code section 85.36. This Code section provides varies methods of computing weekly earnings depending upon the type of earnings and employment. If an employee is paid on a daily or hourly basis or by output, the weekly earnings are computed by dividing by 13 the earnings over the 13-week period before the work injury. Iowa Code section 85.36(6). In calculating gross weekly earrings over the previous 13 weeks, weeks should be excluded from the calculation which are not representative of hours typically or customarily worked during a typical or customary full week of work, not whether a particular absence from work was anticipated. Jacobson Transp. Co. v. Harris, 778 N.W.2d 192 (Iowa 2010); Griffin Pipe Products Co. v. Guarino, 663 N.W.2d 862 (Iowa 2003).

In this case, I found defendants' calculations to be the most representative of claimant's customary gross weekly earnings; this is $987.39. Therefore, given single status, entitlement to two exemptions and a gross weekly rate of $987.89, claimant's rate of weekly compensation is $612.02, according to the commissioner's published rate booklet for this date of injury.

ORDER

1. Defendants shall pay to claimant seventy-five (75) weeks of permanent partial disability benefits at a rate of six-hundred twelve and 02/100 dollars ($612.02) per week from the stipulated date of August 3, 2013.

2. Defendants shall pay accrued weekly benefits in a lump sum and shall receive credit against this award for the permanency benefits previously paid as set forth in Exhibit D.

3. Defendants shall pay interest on unpaid weekly benefits awarded herein pursuant to Iowa Code section 85.30.

4. Defendants shall pay the costs of this action pursuant to administrative rule 876 IAC 4.33, including reimbursement to claimant for any filing fee paid in this matter.

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

Signed and filed this 15th day of May, 2015.

LARRY WALSHIRE
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.