BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

THOMAS MYERS,

Claimant,

vs.

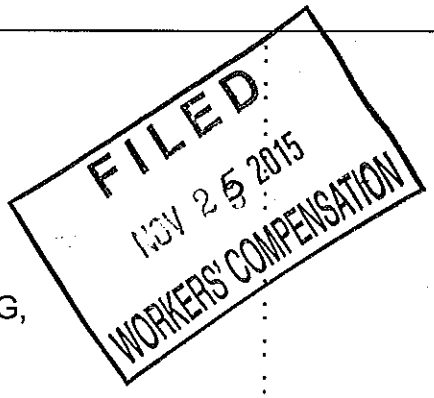
BEN SHINN TRUCKING,

Employer,

and

SPARTA INSURANCE CO.,

Insurance Carrier,
Defendants.



File No. 5047930

ARBITRATION

DECISION

Head Note Nos.: 1803, 2501, 4000.2

STATEMENT OF THE CASE

Claimant, Thomas Myers, filed a petition in arbitration seeking workers' compensation benefits from Ben Shinn Trucking (Shinn), employer, and Sparta Insurance Company, insurer, both as defendants. This case was heard in Des Moines, Iowa on September 15, 2015 and fully submitted on October 6, 2015. The record in this case consists of claimant's exhibits 1-10, defendants' exhibits A through K, and the testimony of claimant, Robert Salsberry, Dale Schlangen, and Roger Shinn.

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. Penalty.

The parties initially indicated, on the hearing report, rate was an issue in dispute. Following off the record discussions, the parties stipulated claimant's average weekly wage (AWW) was $1,173.53 per week, and claimant's rate was $748.30 per week.

The parties also indicated on the hearing report that reimbursement for an independent medical evaluation (IME) was in dispute. However, at hearing the parties indicated reimbursement of the IME was not an issue in dispute.

FINDINGS OF FACT

Claimant was 49 years old at the time of hearing. Claimant completed the eighth grade. He has a GED.

Claimant has worked in construction as a truck driver. He has also operated heavy equipment.

Claimant's prior medical history is relevant. Claimant testified he has Charcot-Marie-Tooth disease (CMT). Claimant's discovery responses indicated claimant has been assessed with CMT since 2005. Claimant indicated CMT was a type of muscular dystrophy. (Exhibit B, page 10) He testified the disease causes foot and ankle weakness. Claimant wears braces on both feet as a result of the disease. Claimant said the disease results in him having foot drop. He said the disease makes it hard for him to walk on uneven ground. Claimant said he has fallen due to his CMT. (Ex. I, p. 2; Ex. J, deposition pp. 26-27; Ex. D, p. 12)

Claimant testified he also has left shoulder pain and receives injections for that pain approximately every six months. (Ex. J, depo. pp. 27-28)

On December 16, 2013 claimant was evaluated at Monroe County Hospital for low back pain caused by lifting a box. (Ex. 3, p. 33) Claimant testified he strained his lower back moving boxes at work. (Ex. J, depo. pp. 30-31)

On December 24, 2013 claimant was lifting a suck hose attached to a tanker truck. Claimant testified the hose was frozen and weighed approximately 100 pounds. Claimant went to lift the hose and felt pain in the lower back radiating to the right leg.

On December 26, 2013 claimant was evaluated at the Monroe County Hospital for lower back pain. Claimant was assessed as having a lumbar sprain. (Ex. 3, pp. 35-38)

On January 6, 2014 claimant had a lumbar MRI. It showed disc protrusions at L2-L3, L3-4, and L4-5 with stenosis at the L3-4 levels. (Ex. 3, p. 38)

On February 11, 2014 claimant was evaluated by Lynn Nelson, M.D., an orthopedic surgeon. Treatment options were discussed, and claimant requested an L2-3 epidural steroid injection. (Ex. 5, pp. 59-61)

On March 6, 2014 claimant was found to be qualified for a two-year CDL. Claimant indicated on the report he had no chronic lower back pain. (Ex. G, pp. 4-7)

The epidural steroid injection and other conservative methods failed to significantly relieve claimant's lower back symptoms. (Ex. 5, pp. 62-71; Ex. G, p. 4) Claimant eventually chose to undergo surgery. On March 31, 2014 claimant underwent an L2 through L5 decompression with an L2-3 and L4-5 diskectomy. Surgery was performed by Dr. Nelson. (Ex. 5, pp. 73-74)

On May 23, 2014 claimant returned to Dr. Nelson. Claimant's back pain improved. Claimant was experiencing symptoms in the right lower extremity and paresthesia in the right hip. Claimant had limitations in walking and standing. Dr. Nelson returned claimant to work on May 27, 2014. Claimant was restricted to no lifting over 25 pounds and no repetitive bending and twisting. (Ex. 5, pp. 81-82)

On July 22, 2014 claimant returned to Dr. Nelson. Claimant indicated he was frustrated and struggling at work. Claimant had increased back pain with his return to work. He was told to see his primary care doctor or a pain management specialist for long-term pain medication. Further surgery was not recommended. Claimant was found to be at maximum medical improvement (MMI). (Ex. 5, pp. 83-84)

Claimant testified his family doctor is Gerald Haas, D.O. Claimant treated with Dr. Haas for prescription medication. (Ex. 3, p. 50) Claimant testified Dr. Haas ultimately referred claimant to a pain specialist, Timothy Miller, M.D. Claimant testified defendants have not paid medical bills associated with care provided by Dr. Haas or Dr. Miller.

On October 12, 2014 claimant underwent a second lumbar MRI. It showed small disc protrusions at L2 through L5 and epidural fibrosis at the L3-L5 levels. The MRI was recommended by Dr. Haas. (Ex. 3, p. 49)

In a February 6, 2015 note, Mary Shook, M.D., gave her opinions of claimant's condition following an evaluation. Claimant indicated he was working 40 hours per week, when he worked approximately 70 hours per week prior to his injury. Dr. Shook opined claimant's current lower back pain and stenosis were related to a preexisting condition and were not caused by his work injury. She opined claimant's need for pain medications and his continued pain were related to preexisting medical conditions. (Ex. B)

In a May 21, 2015 note Dr. Nelson indicated he released claimant to return to work with no permanent restrictions and told claimant to use common sense in determining work activities and hours. (Ex. 5, p. 89)

On June 12, 2015 claimant underwent an L5-S1 epidural steroid injection performed by Dr. Miller. (Ex. 6, p. 91)

On July 23, 2015 claimant underwent a functional capacity evaluation (FCE) performed by Charles Goodhue, M.S., M.P.T. The evaluation found claimant gave maximal and consistent effort. Based on the FCE claimant was limited to occasionally

lifting 20 pounds floor to waist and frequently lifting 10 pounds floor to waist. Claimant was found to fall in the light work category. Claimant was recommended to avoid lifting, pushing, pulling or carrying on a constant basis. Claimant was also recommended to be allowed to sit, stand and walk as needed. (Ex. 2)

In an August 6, 2015 report, Jacqueline Stoken, D.O., gave her opinions of claimant's condition following an IME. Claimant had lower back pain. Walking, sitting, bending and lifting aggravated claimant's pain. Dr. Stoken found claimant had a 13 percent permanent impairment to the body as a whole based on his lumbar condition, and found claimant fit into the DRE lumbar category III under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. She also found claimant had a 9 percent permanent impairment for gait disorder and found claimant had difficulty with elevations, grades and stairs. The combined values of the two impairments resulted in a 21 percent permanent impairment to the body as a whole. Dr. Stoken found claimant's permanent restrictions should be based on the July of 2015 FCE. She found claimant's future medical care should include pain management. (Ex. 1)

In an August 14, 2015 letter, written by claimant's counsel, Dr. Miller opined the FCE accurately reflected claimant's abilities and should be used as permanent restriction for claimant's function. He also indicated claimant would require further treatment for his pain. (Ex. 6, p. 90)

In a September 10, 2015 letter, Dr. Nelson opined claimant has an 11 percent permanent impairment to the body as a whole. He indicated claimant should continue to work without restrictions. He did not believe the FCE accurately reflected claimant's abilities. He also believed claimant's physical abilities were impacted by claimant's CMT disease and his morbid obesity. (Ex. A, p. 5)

Claimant testified when he treated with Dr. Nelson, they never discussed his CMT disease.

In a September 15, 2015 letter, written by claimant's counsel, Physical Therapist Goodhue indicated he did not notice any limitations in claimant's ability to function caused by claimant's use of braces. Physical Therapist Goodhue opined claimant's limiting factor was his back pain and not his CMT disease or his weight. (Ex. 2, pp. 32a-b)

In 2011 claimant earned $61,721.33 working for Shinn. (Ex. 12, p. 120) In 2012 claimant earned $51,982.93 working for Shinn. (Ex. 12, p. 125) In 2013 claimant earned $52,082.44. (Ex. 12, p. 130; Ex. 13) In 2014 claimant earned $34,521.84. (Ex. 13)

Robert Salsberry testified he is a truck driver for Shinn. In that capacity he has seen claimant at work, both before and after claimant's December 2013 work injury. Mr. Salsberry testified that before the injury, claimant did not have back problems, and

claimant always tried to take on extra loads for driving. He said claimant was a hard worker and his leg braces had no effect on claimant's ability to work.

Mr. Salsberry testified that since injury, claimant has slowed down. Mr. Salsberry said he has taken loads for claimant, and this was something that did not happen before claimant's injury. Mr. Salsberry said he has seen claimant since his injury, and claimant appears to have a hard time walking.

Dale Schlangen testified he is a truck driver for Shinn. In that capacity, he knows claimant and has seen claimant at work both before and after his work injury. Mr. Schlangen testified claimant was a hard worker. He said since his injury claimant has had difficulty physically. He said claimant has had other people covering for him at work and he has seen claimant stretched out in the back of cabs resting his back.

Roger Shinn testified he is president of Shinn. He said claimant had a good work ethic and never complained of any physical limitations before his injury. He said claimant does walk slow now following his work injury.

Mr. Shinn testified claimant currently drives a route for Iowa Renewable Energy (IRE). He said Shinn intends to keep claimant as an employee, after the expiration of the IRE contract, but he was not sure at the time of hearing what work claimant would do. Mr. Shinn said the IRE contract expired approximately in November of 2015.

Claimant testified that at present he has sharp burning pains in his lower back and into his right buttocks. He has weakness in his right leg. He says in the past six months his condition has deteriorated. Claimant testified he takes prescription medication for pain. Claimant stood at hearing.

Claimant testified, at the time of hearing, he predominantly drives a route for IRE. He said the route with IRE is easier, as IRE does not require as much climbing in and out of the truck. He said he is also not required to drag a hose as much with IRE. He said other routes require more climbing and for claimant to drag a hose. Claimant said he did not believe he could drive other routes for Shinn.

Claimant said before his injury he worked 65-70 hours per week. He said he now works 45-50 hours per week because of pain. He said when he drives for an hour, he needs to pull over to stretch his lower back. Claimant says he did not believe he could return to work to any of his prior jobs given the limitations with his lower back and leg.

CONCLUSIONS OF LAW

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

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).

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Claimant was 49 years old at the time of hearing. He did not graduate from high school. He has a GED. Claimant has worked in construction and driven trucks. He has also operated heavy equipment.

Claimant underwent a three-level decompression at the L2-L5 levels, and an L2-3 and L4-5 diskectomy in March of 2014. Surgery was performed by Dr. Nelson. (Ex. 5, pp. 73-74)

A number of experts opined regarding claimant's permanent impairment and permanent restrictions. Dr. Shook performed an evaluation of claimant. She opined that claimant's current back pain and need for medication was related to a preexisting condition and not due to claimant's December of 2013 injury and subsequent surgery. (Ex. B)

Dr. Shook's opinion was issued prior to claimant's FCE. As a result, Dr. Shook could not take into consideration findings of the FCE. Dr. Shook's opinions, that claimant's current symptoms are due to preexisting conditions, and not the December of 2013 injury, are also contrary to the testimony of claimant, Mr. Salsberry, Mr. Schlangen, and to some extent Mr. Shinn. Claimant, Mr. Salsberry and Mr. Schlangen all testified that claimant's functional abilities were significantly decreased post-injury and surgery. As Dr. Shook's opinions are contrary to the testimony of four witnesses at hearing, are contrary to evidence in the record, and did not take into consideration claimant's FCE, her opinions are found not convincing.

Dr. Nelson performed surgery on claimant and treated claimant for a period of time. In a September 2015 letter, Dr. Nelson found claimant had an 11 percent

permanent impairment to the body. He also opined the FCE did not accurately depict claimant's abilities. He opined claimant had no permanent restrictions and that claimant's physical capacity was compromised by his CMT disease and obesity. (Ex. A, p. 5)

The record indicates claimant last saw Dr. Nelson in July of 2014. This is approximately 14 months after the September 2015 opinion letter detailed above. There is no explanation or analysis how Dr. Nelson arrived at the 11 percent permanent impairment for claimant, using the explanations provided by the Guides. There is no explanation why the FCE at issue is allegedly not accurate. There is little evidence that claimant's CMT or weight negatively impacted his ability to perform his job at Shinn before his work injury. I respect Dr. Nelson's opinions. However, for the reasons detailed above, his opinions regarding permanent impairment and permanent restrictions are found not convincing.

Dr. Stoken evaluated claimant on one occasion for an IME. Her evaluation was performed close to the time of hearing, and as a result, is a more accurate picture of claimant's ability at the time of hearing. Dr. Stoken found claimant had a 21 percent permanent impairment to the body as a whole. This was based upon a finding that claimant had a 13 percent permanent impairment due to his lumbar spine. It is also based on a 9 percent permanent impairment due to claimant's gait disorder. The record indicates claimant does have difficulties with walking due to his CMT disease. Claimant's CMT disease is a preexisting condition. Based upon this, it is found while claimant does have a 13 percent permanent impairment to the body as a whole for his lumbar spine, he should not be found to have an additional 9 percent permanent impairment due to a gait disorder. I am able to follow Dr. Stoken's opinions of the 13 percent impairment by using the Guides. Given this record, it is found Dr. Stoken's opinion that claimant has a 13 percent permanent impairment to the body as a whole for the lumbar spine condition is found to be more convincing than the opinions of Dr. Shook and Dr. Nelson.

Dr. Miller treated claimant for pain and has evaluated claimant on a number of occasions. He opined claimant's FCE was an accurate assessment of claimant's abilities. (Ex. 6, p. 90)

Physical Therapist Goodhue opined claimant's braces and symptoms from CMT did not adversely affect claimant's FCE. (Ex. 2, pp. 32a-b)

Physical Therapist Goodhue and Dr. Miller's opinions bolster the opinions of Dr. Stoken regarding claimant's permanent impairment and permanent restrictions.

Based on the above, claimant is found to have a 13 percent permanent impairment to the body as a whole. He has permanent restrictions as detailed in the July of 2015 FCE, which in part limited him to not lifting more than 20 pounds occasionally. (Ex. 2)

Claimant credibly testified he worked 60-70 hours per week before his back injury. He credibly testified he now works 45-50 hours per week following his injury. His testimony is supported by the testimony of Mr. Schlangen and Mr. Salsberry. Evidence in the record suggests claimant has sustained approximately a 33 percent decrease in earnings when comparing his pre-injury to his post-injury earnings. (Ex. 12; Ex. 13)

Claimant testified he drives a route for IRE. He testified this is the only route, he believes, he could perform for Shinn given his limitations. The record indicates the IRE contract was to end approximately two months after the date of hearing, or sometime in November of 2015. Mr. Shinn testified he wants to keep claimant as a driver but is unsure what route the claimant would drive after the expiration of the IRE contract.

Claimant's loss of a job route with Shinn was unknown at the time of hearing. To base claimant's industrial disability on an unknown factor would be speculative at best. For this reason, facts regarding the contract with IRE and claimant's ability to continue to drive with Shinn, are not considered in determining claimant's industrial disability. If claimant does in fact lose his job with Shinn sometime in the future, claimant has the ability to file a review-reopening petition.

Claimant has a 13 percent permanent impairment to the body as a whole. He has limitations that restrict him, in part, to occasionally lifting 20 pounds. He has sustained an approximately 33 percent loss of earnings when comparing pre-injury to post-injury earnings. At the time of hearing, claimant was still employed with Shinn and worked 45-50 hours per week. When all factors, as well as those discussed above, are considered, it is found claimant has a 40 percent loss of earning capacity or industrial disability.

Claimant was returned to work on May 27, 2014 by Dr. Nelson. (Ex. 5, p. 81) Claimant's permanent partial disability benefits shall commence as of that date.

The next issue to be determined is if there is a causal connection between the injury and the claimed medical expenses.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

The record indicates Dr. Haas and Dr. Miller's bills for medical expenses have now been paid. Dr. Nelson, the authorized treating physician, recommended claimant have his primary care provider or a pain management specialist deal with issues of pain. (Ex. 5, p. 84) Dr. Haas is claimant's primary care provider. Dr. Haas

recommended claimant see Dr. Miller. As the authorized physician recommended claimant to Dr. Haas, defendants are liable for costs incurred with the treatment by Dr. Haas regarding claimant's back condition. As Dr. Nelson recommended a pain management specialist, and Dr. Haas referred claimant to Dr. Miller, bills associated with Dr. Miller's care are also to be paid by defendants.

The final issue to be determined is if defendants are liable for penalty.

In Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996), and Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996), the supreme court said:

> Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."
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> Christensen, 554 N.W.2d at 260.

The supreme court has stated:

> (1) If the employer has a reason for the delay and conveys that reason to the employee contemporaneously with the beginning of the delay, no penalty will be imposed if the reason is of such character that a reasonable fact-finder could conclude that it is a "reasonable or probable cause or excuse" under Iowa Code section 86.13. In that case, we will defer to the decision of the commissioner. See Christensen, 554 N.W.2d at 260 (substantial evidence found to support commissioner's finding of legitimate reason for delay pending receipt of medical report); Robbennolt, 555 N.W.2d at 236.
>
> (2) If no reason is given for the delay or if the "reason" is not one that a reasonable fact-finder could accept, we will hold that no such cause or excuse exists and remand to the commissioner for the sole purpose of assessing penalties under section 86.13. See Christensen, 554 N.W.2d at 261.
>
> (3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City Meats, Inc., 528 N.W.2d at 109, 111 (Iowa 1995); or (b) the employer had a reasonable basis to contest the claim—the "fairly debatable" basis for delay. See Christensen, 554

N.W.2d at 260 (holding two-month delay to obtain employer's own medical report reasonable under the circumstances).

(4) For the purpose of applying section 86.13, the benefits that are underpaid as well as late-paid benefits are subject to penalties, unless the employer establishes reasonable and probable cause or excuse. Robbennolt, 555 N.W.2d at 237 (underpayment resulting from application of wrong wage base; in absence of excuse, commissioner required to apply penalty).

> If we were to construe [section 86.13] to permit the avoidance of penalty if any amount of compensation benefits are paid, the purpose of the penalty statute would be frustrated. For these reasons, we conclude section 86.13 is applicable when payment of compensation is not timely . . . or when the full amount of compensation is not paid.

Id.

(5) For purposes of determining whether there has been a delay, payments are "made" when (a) the check addressed to a claimant is mailed (Robbennolt, 555 N.W.2d at 236; Kiesecker, 528 N.W.2d at 112), or (b) the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 235.

(6) In determining the amount of penalty, the commissioner is to consider factors such as the length of the delay, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.

(7) An employer's bare assertion that a claim is "fairly debatable" does not make it so. A fair reading of Christensen and Robbennolt, makes it clear that the employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." See Christensen, 554 N.W.2d at 260.

Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

Weekly compensation payments are due at the end of the compensation week. Robbennolt, 555 N.W.2d 229, 235.

Penalty is not imposed for delayed interest payments. Davidson v. Bruce, 593 N.W.2d 833, 840 (Iowa App. 1999). Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 338 (Iowa 2008).

When an employee's claim for benefits is fairly debatable based on a good faith dispute over the employee's factual or legal entitlement to benefits, an award of penalty benefits is not appropriate under the statute. Whether the issue was fairly debatable turns on whether there was a disputed factual dispute that, if resolved in favor of the employer, would have supported the employer's denial of compensability. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

There is little in the record indicating defendants should be liable for a penalty in this matter. Claimant did not discuss the issue of penalty at hearing. He did not discuss the issue of penalty in his post-hearing brief. Given this record, claimant has failed to carry his burden of proof that a penalty is appropriate in this case.

ORDER

THEREFORE IT IS ORDERED:

That defendants shall pay claimant two hundred (200) weeks of permanent partial disability benefits commencing on May 27, 2014 at the rate of seven hundred forty-eight and 30/100 dollars ($748.30) per week.

That defendants shall pay accrued benefits in a lump sum.

That defendants shall pay interest on unpaid weekly benefits as ordered above and as set forth in Iowa Code section 85.30.

That defendants shall receive a credit for benefits previously paid.

That defendants shall pay the medical charges, including medical mileage, as detailed above.

That defendants shall pay the costs of this matter.

That defendants shall file subsequent reports of injury as required under rule 876 IAC 3.1(2).

Signed and filed this 25th day of November, 2015.

JAMES F. CHRISTENSON
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.