Agency Case Law Update

June 2022 – Present

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Apportionment

***Murray v. City of Missouri Valley*, File Nos. 1664884.03, 19700585.02 (App. Dec. June 14, 2022).**

Issue: How to apportion preexisting disability unrelated to employment, while Claimant was employed by the defendant-employer.

The Claimant, chief of police for the city of Missouri Valley, was involved in two physical altercations with suspects, one on April 17, 2019 and another on April 30, 2019. Claimant suffered injuries to his neck and shoulder and was awarded permanent partial disability (PPD) benefits for his industrial disability. Claimant had a non-work-related motor vehicle accident in 2015 for which he was assigned eight percent impairment. Defendants sought apportionment against the industrial disability award under Iowa Code section 85.34(7), which was amended in 2017. The Commissioner previously found that the "fresh start" rule for successive injuries was not affected by the legislative change. *See Wilke v. Kelly Servs.*, File No. 5064366 (Arb. Dec. Oct. 28, 2019). Claimant Murray did not have a labor market "fresh start" through a change in employment/with a new employer; therefore, apportionment was appropriate. The reduction in earning capacity following the injury was divided by the earning capacity possessed at the time the injury occurred. (e.g., 72% reduction in earning capacity from injury x 92% pre-injury earning capacity = 78.26% x 500 weeks = 391.3 weeks PPD entitlement).

***Small v. Lennox Indus., Inc.*, File No. 20010306.01 (Arb. Dec. June 17, 2022).**

Issue: How to apportion successive disabilities under the amended section 85.34(7).

The Claimant had sustained several injuries over his 27 years of employment with the Defendant. During the Derecho on August 10, 2020 he sustained a head and shoulder injury. The Defendant sought apportionment for twenty three percent disability awarded in a prior settlement. The Deputy Commissioner Stated the amended section 85.34(7) is a "straightforward approach" under which the employer is only to provide compensation for the injury being litigated, not prior injuries as well. The prior award was subtracted from the current award as follows: (35 percent x 500 weeks) - (23 percent x 500 weeks) = 60 weeks PPD owed.

***Phipps v. MidAmerican Energy Co.*, File Nos. 5066050.1, 20005453.01, 20700369.01 (App. Dec. July 11, 2022).**

Issue: Whether apportionment applies to unrelated successive injuries to the same scheduled member.

On appeal the Defendant asserted the Deputy erred in finding apportionment did not apply to two separate injuries—one to Claimant's right elbow in 2012, and the other to his right wrist in 2019—because "there was no evidence the rating for the 2019 injury to his right wrist was related, in any way, to the 2012 injury to his right elbow." The Commissioner reversed, finding there is no language in the statute stating apportionment does not apply where the successive injury is to the same member. *See* Iowa Code § 85.34(7). Because the functional loss from the November 2019 injury was not greater than the loss awarded for the April 2012 injury, Claimant was not entitled to additional PPD benefits. The Claimant could no longer perform his job duties, considered himself retired, and had no motivation to work; the Commissioner awarded an additional five percent industrial disability.

***Dotts v. City of Des Moines*, File No. 20700979.01 (Arb. Dec. July 15, 2022).**

Issue: Whether apportionment applies to successive whole body disabilities under section 85.34(v) when one is compensated functionally and the other is compensated industrially.

The parties had settled a prior back injury that Mr. Dotts sustained on January 25, 2019. Following that injury Mr. Dotts returned to work with the same or greater earnings. Accordingly, in settlement, the parties stipulated he was entitled to PPD of 5.2 percent body as a whole functional impairment. When Mr. Dotts sustained a subsequent injury on October 22, 2020, Defendants sought apportionment for the prior 5.2 percent disability under Iowa Code 85.34(7). The Claimant asserted the Defendant was not entitled to any apportionment since the prior injury compensation was limited to functional impairment and "treated like a schedule member case." The Deputy found the Claimant's injury was to the body as a whole, regardless of the fact it was compensated based on functional impairment, and the straightforward approach of 85.34(7) applied. The 15 percent industrial disability award (75 weeks) was reduced by the prior stipulated 5.2 percent (26 weeks).

Penalty

***Walton v. Compass Group USA, Inc.*, File No. 1663689.02 (App. Dec. June 20, 2022).**

Issue: Whether penalty is appropriate when the treating physician delayed in issuing a rating for more than three months.

Claimant was placed at MMI on May 6, 2019. The Defendants requested an impairment rating from the treating physician on May 24, 2019, but the physician did not issue a rating until September 4, 2019. Defendants issued PPD commencing September 18, 2019. The Deputy had awarded a thirty percent penalty for this period between MMI and commencement of PPD. On appeal, the Commissioner reversed this award of penalty, finding the Defendants acted reasonably as they timely requested the impairment rating and promptly commenced PPD payments.

Method of Compensation

***Clark v. Arconic, Inc.*, File No. 5061553.01 (App. Dec. June 28, 2022).**

Issue: How should Claimant's functional mental disability under Iowa Code section 85.34(2)(v) be assessed?

The Commissioner affirmed the finding of a mental injury (PTSD) as a result of the work injury. Claimant had returned to work with the same or greater earnings, so she was statutorily limited to functional impairment compensation. *See* Iowa Code § 85.34(2)(v). The amended section 85.34(2)(x) provides that functional impairment shall be determined based solely upon the AMA Guides, not lay testimony or agency expertise. At Hearing, a disability rating of 100 percent was admitted by the Claimant, and the Defendants admitted an expert report with analysis, but no numerical impairment rating. The Deputy found that Iowa Code section 85.34(2)(x) limited her to adopting the 100 percent impairment rating. The Commissioner reversed this finding.

Chapter four of the AMA Guides addresses mental and behavioral disorders, and it does not direct assignment of numerical impairment. Rather, the AMA Guides advise examiners to use four categories to assess areas of function: "(1) the ability to perform activities of daily living; (2) social functioning; (3) concentration, persistence and pace; and (4) deterioration or decompensation in work or worklike settings. Independence, appropriateness, and effectiveness of activities should also be considered." The examiner should then assign a ranking to each category of impairment—Class 1 being no impairment or mild, and Class 5 being the highest impairment or extreme. The Commissioner found that the legislature did not intend to treat mental disorders differently than other body parts. Comparing the two expert opinions, the

Commissioner found the evidence was most consistent with the Defense expert's opinion. It was concluded Claimant sustained 30 percent functional loss.

***Dungan v. Den Hartog Indus.*, File No. 21700246.01 (Arb. Dec. Sep. 30, 2022).**

Issue: Whether a Claimant who returns to work with the employer at the same or greater earnings as prior to the injury, and subsequently voluntarily resigns, is entitled to functional or industrial compensation under Iowa Code section 85.34(2)(v).

Claimant sustained a back injury while working for the Defendant. He returned to work at the same hourly wage and rate of pay as at the time of the injury, and subsequently received a raise from the employer. After approximately eleven months of returning to work for the employer, the Claimant voluntarily resigned with the Defendant and obtained employment with higher earnings. The Defendant argued that section 85.34(2)(v) limited Claimant to his functional impairment because he "return[ed] to work or [was] offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury." The Deputy stated the statute should be read as a whole, considering the next sentence: "if an employee . . . returns to work with the same employer and is compensated based only upon the employee's functional impairment resulting from the injury . . . and is terminated from employment by that employer, the award or agreement. . . shall be reviewed upon commencement of review reopening proceedings by the employee for a determination of any reduction in the employee's earning capacity." The Deputy referred to this as a "mandatory bifurcated litigation process" limited *only* to Claimants who return to work with the defendant-employer or are offered work by the defendant-employer at the same or greater earnings but who are later terminated by the defendant-employer. It was found that the text of this section does not apply when the claimant quits employment with the defendant-employer before the hearing. The Claimant was awarded industrial disability.

*This case was affirmed in its entirety by the Commissioner on appeal and is currently on Judicial Review. *See* Polk County Case No. CVCV065006.

***Clickner v. Prairie Farms Dairy, Inc.*, File No. 20000273.01 (Arb. Dec. July 1, 2022).**

Issue: Whether Claimant's injury extended beyond the shoulder due to trapezius pain.

In this case the Claimant suffered an injury to his shoulder and complained of pain in the neck and shoulder blade as well. The Deputy Commissioner determined that the Claimant did not satisfy the burden of proof because he did not provide evidence that he sustained a separate, specific injury to his neck. Further, no physician has diagnosed a neck injury. Claimant asserted he was entitled to industrial disability based upon trapezius pain or distal clavicle resection. The Commissioner found that neither extended the injury beyond the shoulder to the body as a whole—the trapezius was pain alone, and the distal clavicle resection is to improve the glenohumeral joint function.

***Hastings v. Orkin Pest Control*, File No. 5063710 (Arb. Dec. July 15, 2022).**

Issue: Whether Claimant was permanently and totally disabled.

The Claimant met his burden on permanent and total disability where: (1) he was a motivated worker to perform physical jobs beyond his capabilities, (2) his permanent restrictions prevented him from returning to his past jobs, (3) an employability assessment found he was not skilled at computers and could no longer use his CDL, and (4) there was an insufficient record to conclude he could obtain employment strictly in sales (which used to be a portion of his job duties).

***Nehring v. Martin Marietta Materials, Inc*., File No. 19006754.02 (Arb. Dec. Aug. 5, 2022).**

Issue: Whether an injury that causes an extended seasonal layoff period for Claimant warrants industrial compensation when the Claimant's wages are otherwise the same or greater as before the injury.

Claimant sustained injury to his shoulder and neck. The parties disputed whether Claimant returned to work or was offered work for which he would receive the same or greater earnings under Iowa Code section 85.34(2)(v). Claimant worked in a position where he experienced a layoff in the winter, but he would traditionally complete maintenance during this period prior to the injury. After the injury he could not complete the winter maintenance due to his restrictions. Additionally, his layoff that year lasted longer than most. The Defendant argued Claimant was limited to functional impairment compensation under section 85.34(2)(v). Claimant argued his longer layoff and lack of sporadic winter work entitled him to industrial disability. The Deputy found that Claimant returned to work with the same hourly wage and hours post-injury and pre-layoff, and that he was "basically guaranteed to be recalled" at the same or greater earnings. It was found: "the purpose, or intention, of the new language in Iowa Code section 85.34(2)(v) is to encourage an employer to maintain an employee after an injury and to pay that employee a wage that is the same or greater than he or she earned prior to being injured." The Deputy found the Claimant returned to work or was offered work for the same or greater wages and thus the code section mandated functional impairment compensation.

***Jay v. Archer Skid Loader Serv., LLC*, File No. 19003586.01 (App. Dec. Aug. 23, 2022).**

Issue: How is a distal clavicle excision to be rated under the AMA Guides?

The Claimant sustained a shoulder injury and underwent a revision procedure, including a distal clavicle excision (aka distal claviculectomy, distal clavicle resection, or Mumford procedure). Treating physician Dr. Vincent assigned three percent permanent impairment for loss of range of motion and did not assign any specific impairment for the distal clavicle excision. Claimant had an IME with Dr. Taylor who assessed five percent impairment for loss of range of motion and ten percent impairment for the distal clavicle excision under Table 16-27 of the AMA Guides. Dr. Vincent reviewed the IME report and provided a detailed opinion as to why he does not assign impairment for the distal clavicle excision alone. He stated Table 16-27 is for "arthroplasty procedures" or joint replacements, which a distal clavicle excision is not. The Deputy found that the AMA Guides assign ten percent impairment for the procedure, and Dr. Vincent merely disagreed with a policy choice of the AMA publishers. The legislature mandated functional impairment be determined by the 5th Edition AMA Guides, so the Deputy adopted Dr. Taylor's opinion. On appeal, the Defendant argued alternatively that Dr. Taylor should have applied a modifier to the ten percent rating for the distal clavicle. The Defendant relied upon three cases where Dr. Kuhnlein's ratings assigned a value modified by Table 16-18 for the distal clavicle excision. The Commissioner found that under Table 16-18 of the AMA Guides, the appropriate multiplier for the acromioclavicular joint is 25 percent. This results in 2.5 percent impairment for a distal clavicle excision.

***Newburry v. The Lutheran Home for the Aged Ass'n*, File No. 21000314.02 (Arb. Dec. Jan 9, 2023).**

Issue: What constitutes "offered work" under Iowa Code section 85.34(2)(v), especially as it relates to industrial disability analysis versus functional impairment analysis?

Claimant worked for the defendant-employer as a certified nursing assistant (CNA). While assisting with the transfer of a resident, claimant suffered a back injury that sent pain radiating down his leg and into his foot. At the time of the hearing, claimant's injuries, and the permanent restrictions provided by a functional capacity evaluation, were agreed upon and stipulated too. Defendant's claim that by offering the claimant his previous position, at the same pay, regardless of whether he is permitted to do the job, they have satisfied 85.34(2)(V). The deputy commissioner acknowledged "that an argument may be made that the plain language of [85.34(2)(v)] does not specifically state that claimant must be capable of performing the offered work." However, if that reading of the statute were adopted, it would allow "an employer to evade any liability for industrial disability merely by offering the employee a job for which the employee would receive equal or greater pay even though the employee is not capable of performing or perhaps not even qualified to perform the offered job." Therefore, the deputy commissioner concludes that 85.34(2)(v), "clearly contemplates the employee actually returning to work and performing the work. The statutory language implies that the employee must be capable of performing the work he is offered." Therefore, offering employees a job they cannot perform does not satisfy 85.34(2)(v). Claimant was entitled to an industrial disability analysis.

***Weimerskirch v. Progressive Processing LLC*, File No. 1655936.01 (App. Dec. March 21, 2023).**

Issue: Did claimant sustain a left shoulder injury that is sequela to the work-related right shoulder injury?

Claimant sustained a sequela injury to his left shoulder on January 22, 2019, caused by the stipulated April 5, 2018, right shoulder injury. Claimant suffered an acute injury to his left shoulder when his right shoulder restrictions compelled him to perform a two-handed job with one hand. For a sequela injury to be compensable, the injury must be one "that naturally and proximately flow[s] from" an injury arising out of and in the course of employment. Oldham v. Schofield & Welch, 266 N.W.2d 480, 482 (Iowa 1936) ("[i]f 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"). As a result, the commissioner found that claimant's injuries naturally and proximately flowed from the initial injury. Specifically, the commissioner stated that "this is not a situation where claimant tripped and fell on a pallet while walking, injuring his leg, head, hip, or back, which clearly are not injuries that would be proximately caused by an injury to a shoulder. Claimant sustained a left rotator cuff injury while moving 24 cans of Spam at a time with his left arm." Based on the preceding, the commissioner determined that "the increased stress on the shoulder joint created by the one-arm activity is akin to the development of lower back pain caused by an altered gait following an injury to the leg. I find claimant has established his January 2019 left shoulder injury is a sequela of his April 2018 right shoulder injury."

***Mulvaney v. John Deer Davenport Works*, File No. 21009145.01 (Arb. Dec. Feb. 28, 2023).**

Issue: What implications, if any, does a voluntary resignation have on 85.34(2)(v) industrial disability vs. functional impairment analysis?

Claimant, Mulvany, worked for John Deere Davenport Works from November 15, 2010, to August 2, 2021. Claimant suffered injuries to his right knee and right wrist while working for John Deere - both injuries were stipulated too at the time of the hearing. On August 2, 2021, the defendant-employer notified claimant that his employment had been suspended for absenteeism. Claimant subsequently met with a John Deere Labor Relations representative to review the disciplinary matter. While sitting in the disciplinary meeting, claimant realized "he had enough, he knew termination was coming," so he decided to hand in his things and quit. After leaving, claimant began working for a new employer, earning more than he did with John Deere.

Nevertheless, the deputy commissioner determined that claimant remains entitled to an industrial disability analysis as “the employment relationship was terminated prior to the evidentiary hearing.” See Martinez v. Pavlich, Inc., File No. 5063900 (Appeal July 2020) (which states, “though claimant in this case was earning greater wages at the time of the hearing than he was when he was injured, I conclude his earlier voluntary separation from defendant-employer removed claimant from the functional impairment analysis and triggered his entitlement to benefits using the industrial disability analysis.”) Claimant is therefore entitled to industrial disability analysis due to his employment being terminated in August of 2021, well before the evidentiary hearing in this case.

***Derifield v. John Deere Waterloo Works*, File No. 21701314.01 (Arb. Dec. June 12, 2023).**

Issue: Does a right shoulder injury that extends into the bicep constitute an unscheduled injury and warrant an industrial disability analysis?

Claimant, Amy Derifield, sustained a work-related injury while employed with John Deere Waterloo Works. On October 16, 2020, while working for John Deere, claimant felt a pop in her right shoulder. Defendant authorized treatment with orthopaedic surgeon Robert B. Bartelt, M.D. Dr. Bartelt diagnosed claimant with a complete tear of her right rotator cuff and recommended surgical intervention. Claimant submitted to the recommended surgery on December 3, 2020, and Dr. Bartelt performed a right shoulder arthroscopy, including a right rotator cuff repair and a right biceps tenodesis. Claimant alleged her injury was unscheduled due to the injury affecting both her shoulder and her arm. However, the Iowa Supreme Court interprets the word “shoulder” in Iowa Code section 85.34(2)(n) to mean “the glenohumeral joint as well as all of the muscles, tendons, and ligaments that are essential for the shoulder to function.” See Chavez v. MS Technology, L.L.C., 972 N.W.2d 663 (Iowa 2022). As a result, the deputy commissioner found that claimant’s shoulder injury was a scheduled member claim.

***Shadlow v. Loves Travel Stops*, File No. 21001168.01 (Arb. Dec. June 12, 2023).**

Issue: Is claimant permanently and totally disabled under the odd-lot doctrine?

Claimant, who was labeled as 60% disabled by the Department of Veteran’s Affairs before his employment with Love’s, slipped and fell at work on September 25, 2019. The defendant-employer authorized and directed claimant’s treatment following his work-related injury. However, claimant was later informed that he could no longer be employed at Love’s Travel Stop - based on his permanent restrictions. Following his release from Love’s, claimant began working at Culver’s. However, his symptoms became so severe during the probationary period of his employment that Culver’s had to terminate claimant as well. Guyton v. Irving Jensen Co., describes how a worker “becomes an odd-lot employee when an injury makes the worker incapable of obtaining employment in any well-known branch of the labor market.” 373 N.W.2d 101 (Iowa 1985). An odd-lot worker is thus totally disabled if the only services the worker can perform are “so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist.” Guyton, 373 N.W.2d at 105 (Iowa 1985). When comparing the ruling in Guyton with the evidence produced at hearing, the deputy commissioner determined claimant met his burden of proof in establishing he was permanently and totally disabled by way of the odd-lot doctrine.

IME Reimbursement

***Calderon v. Smithfield Foods, Inc.,* File No. 5068837 (App. Dec. July 15, 2022).**

Issue: Whether IME reimbursement may be pro rata based on the compensability of the conditions evaluated. Whether a second claimant's IME is reimbursable under Iowa Code § 85.39.

The Claimant alleged injury to her shoulder and cervical spine. After the authorized treating physician provided an impairment rating for the shoulder, the Claimant sought an IME per Iowa Code section 85.39. The Claimant had two IMEs with Dr. Bansal: the first on April 18, 2019 and the second on December 31, 2020. No physician had offered an impairment rating or causation opinion relative to the neck prior to the IMEs. Each of Dr. Bansal's reports contained ratings for both the accepted shoulder injury and the alleged cervical injury. The Claimant sought reimbursement of both IMEs, and the Defendant argued they should only be liable to reimburse a pro rata share of one IME—the share attributable to the shoulder injury. The Deputy declined to award the portion of the first IME related to the neck, because (1) no employer-retained physician had provided a neck rating at that time, and (2) the neck was not found to be compensable. The Deputy also declined to award the cost of the second IME entirely. On appeal, the Commissioner awarded the full amount of the first IME, because Iowa Code section 85.39 does not address pro rata and because Defendants did not offer argument on appeal related to the first IME. The Commissioner affirmed denial of the second IME costs, because "under the statute, a claimant is entitled to recover the cost of one independent medical examination . . ." Additionally, the Defendant was not liable for a second FCE because it was not ordered by a physician.

***Bradley v. Quick Flights*, File No. 20700791.01 (Arb. Dec. July 28, 2022).**

Issue: Whether Claimant's IME fee should be reimbursed.

Claimant, Dean Bradley, sustained a herniated disc injury in 2017, from which he recovered. On May 22, 2019, Bradley was working for Quick Flights, and while loading luggage to a conveyor belt he felt pain in his low back. The next day he sought medical attention. Bradley saw various doctors and the Defendants arranged for him to undergo an independent medical examination. Dr. Boulden opined that Bradley had reached maximum medical improvement. Two doctors, Dr. Sherrill and Dr. Boulden, determined that the work injury at issue here did not cause Bradley's disc herniation. Bradley failed to meet the burden of proof to show causation and he is not to receive permanent disability benefits. In 2017, section 85.39 was amended. Iowa Code section 85.39(2) now provides, "An employer is not liable for the cost of such an examination if the injury for which the employee is being examined is determined not to be a compensable injury." In 2017 the Claimant would have been reimbursed for the IME. However, Because Bradley's alleged work injury was not compensable, he was not awarded for the cost of IME.

***Fisher v. Arconic, Inc.*, File No. 1651146, (App. Dec. Nov. 17, 2022).**

Issue: Does failing to acknowledge the request for an 85.39 IME reimbursement on a Hearing Report preclude you from recovering said cost?

Rule 87 Iowa Administrative Code 4.19 (3)(f) requires the parties submit a joint hearing report which "defines the claims, defenses, and issues that are to be submitted to the deputy commissioner who presides at the hearing." By failing to raise the issue of whether claimant was entitled to an 85.39 IME reimbursement on the hearing report, and at the hearing itself, claimant is precluded from recovery. However, failing to raise this issue under 85.39 did not preclude claimant from recovering the cost of the IME Report under 876 IAC 4.33.

***Wenzel v. Archer Daniels Midland Co.*, File No. 1612257.01 (Arb. Dec. Jan. 31, 2023).**

Issue: Is apportionment of an IME between the defendant-employer and the Second Injury Fund proper when the report references both sets of injuries?

Claimant sustained work injuries to his ankle and wrist after falling approximately ten (10) feet from a ladder on February 10, 2016. Claimant also developed a back injury when his broken ankle began altering his gait. Due to the nature of the injuries, claimant also brought a claim against the Second Injury Fund – which was settled prior to the hearing. In their post-hearing brief, the defendant-employer submitted that they should only be liable for a portion of the IME, as the report also mentioned the injury related to the Second Injury Fund Claim. Having reviewed the report, the commissioner determined that "The only reference [to the Second Injury Fund] appears to be two sentences found at the bottom of [the report.] Since little of the IME report addresses claimant's Second Injury Fund claim, 5 percent of [the billing] will be reduced."

***Kelly V. East Side Jersey Dairy, Inc.*, File No. 1621904 (App. Dec. March 7, 2023).**

Issue: What permits reimbursement of an 85.39 IME?

Claimant, Brian Kelly, was evaluated for an impairment rating by authorized treating physician Tobias Mann, M.D., on April 12, 2019.

Claimant, who was unrepresented at the time, contacted the adjuster to request a second opinion. The adjuster granted claimant's request, provided that claimant's evaluation was performed by a physician in Dubuque. Only two such providers existed. The first, Dr. Field, was unavailable. The second, Dr. Kennedy had previously treated claimant for this work-related injury. Claimant ultimately elected to be evaluated by Dr. Kennedy, as that was the only option available. Later, after obtaining representation, claimant was sent to a third provider, Dr. Sassman, for an additional IME.

On November 8, 2022, the deputy commissioner ordered Dr. Kennedy's IME to be reimbursed by defendant. Additionally, the deputy commissioner ordered Dr. Sassman's IME Report to be reimbursed as a cost under 876 IAC 4.33. *Kelly V. East Side Jersey Dairy, Inc.*, File No. 1621904 (Arb. Dec. Nov. 8, 2022). However, the commissioner reversed this decision based on the following:

> "Dr. Kennedy was an authorized treating physician for claimant's injury shortly after the injury occurred, which [the adjuster] undoubtedly would have known, and because [the adjuster] instructed claimant to limit his search for an impairment rating provider to Dubuque, with the result that the only option for the evaluation was [the Doctor], [the evaluation] of claimant cannot be considered an independent evaluation under the meaning of section 85.39."

Since Dr. Kennedy's evaluation did not constitute an IME under 85.39, claimant had no longer exercised their right to a second opinion. Therefore, the commissioner ordered the defendant to reimburse Dr. Sassman's IME under 85.39 instead of 876 IAC 4.33. Defendant also remained liable for Dr. Kennedy's evaluation. Therefore, any remaining cost analysis under 876 IAC 4.33 was moot.

<u>Causation</u>

***Myers v. Lazer Spot, Inc.*, File No. 21004833.01 (Arb. Dec, July 28, 2022).**

Issue: Whether Claimant's injury arose out of and in the course of employment with Defendant.

The Claimant worked for the Defendant sweeping semi-trailers. His personal medical history included encephalopathy due to a congenital defect, arrested hydrocephalus, mild retardation, atrial fibrillation, and frontal arachnoid cyst. A coworker was working alongside the Claimant on the date of injury. Claimant left the trailer abruptly and the coworker heard a vomiting noise; when the noise stopped

he found the Claimant lying on the ground against a barrier, unresponsive. The Claimant sustained a skull fracture and intracranial injuries. Three doctors provided opinions (two M.D., one Ph.D.) regarding the *likely* mechanism of injury; none were conclusive. This was found to be an unexplained fall, and under the actual risk doctrine, Claimant did not meet his burden to prove the injury arose out of and in the course of employment. The Deputy found that even if, arguendo, it was an idiopathic fall, the Claimant likewise would not have satisfied the increased risk test.

***Roberts v. Linn County Iowa*, File No. 19000117.01 (Arb. Dec. Oct. 06, 2022).**

Issue: Whether Claimant—a correctional facility nurse—had a mental injury arising out of and in the course of her employment.

The Claimant was an RN for the Linn County Jail. On June 5, 2019, while passing out medication with a Deputy, an inmate in a "dry cell" with no water access threw a milk carton full of an unknown liquid at her. This got on her face and in her eyes and mouth. The inmate claimed that the sticky liquid just water. To support an assault charge, the Claimant testified she could not wash the liquid off herself for a few hours until evaluated by a medical provider. After the incident, Claimant experienced nightmares, flashbacks, was unable to enjoy her vacation, and had difficulty letting water touch her face in the shower. She was diagnosed with PTSD. The Deputy found a compensable mental injury, and permanent total disability under the odd-lot doctrine.

The Second Injury Fund of Iowa

***Strable v. Second Injury Fund of Iowa,* File No. 1666216.03 (Arb. Dec. Aug. 8, 2022).**

The parties stipulated to the first qualifying injury of carpal tunnel in 2009. Claimant sustained a work injury to her left ankle on April 25, 2019. She subsequently had an injury to her low back and a mental injury. Claimant asserted a separate injury date for the mental and back, but the Deputy found they were both a direct result of the left ankle injury. Claimant had previously reached a full commutation agreement with the employer stipulating to an April 25, 2019 left leg injury. The following day she also entered into a compromise settlement for the alleged hip, back, and mental injuries. The Second Injury Fund disputed that the leg injury could be the second qualifying injury, arguing it was not a second scheduled member "independent" of the low back and mental injuries. The Deputy analyzed Iowa Supreme Court case *Gregory v. Second Injury Fund of Iowa*, 777 N.W.2d 395 (Iowa 2010). In that case the issue was whether a hand injury could qualify for fund purposes when it occurred simultaneously with bilateral shoulder injuries on the same date of injury. The decision was split 4–3. The majority found Gregory's injury qualified "only because it was situated in an enumerated member and was not confined to an unenumerated part of her body." *Id.* at 401. The Deputy found this case was distinguishable because unlike the hand and shoulders in *Gregory*, Claimant's ankle, back, and mental injuries could not be parsed out, since they all evolved from the left ankle injury. The majority decision in *Gregory* was interpreted to apply in situations where there are "two or more separate and distinct body parts involved with an otherwise qualifying injury." The mental and back were not separate body parts, but inherently part of the leg injury. Thus, they would convert the leg injury to an unenumerated injury. The Deputy was also concerned about double recovery by the Claimant, as was the dissent in *Gregory*. Claimant failed to prove a qualifying second injury.

***Strable v. Second Injury Fund of Iowa*, File No. 1666216.03 (App. Dec. Nov. 29, 2022).**

The Commissioner affirmed the deputy commissioner's findings in part and reversed in part with additional analysis. See, Gregory v. Second Injury Fund of Iowa, 777 N.W.2d 395 (Iowa 2010) for foundation of analysis.

"The record is clear, claimant sustained a permanent injury to her left lower extremity and she sustained permanent back and mental health injuries as a sequelae of her left lower extremity injury. [The agency is instructed] to look at whether the alleged first qualifying injury caused an injury to an enumerated member (a hand, arm, foot, leg, or eye), and whether the alleged second qualifying injury caused an injury to another enumerated member that was caused by claimant's employment regardless of whether the injuries caused other enumerated scheduled injuries, or tother non enumerated or unscheduled injuries."

Therefore, the commissioner held that the Second Injury Fund can still have liability for combined scheduled member injuries, even if the claim against the Employer has a BAW/industrial claim. The judge must apportion what industrial disability is attributable to the Employer for the BAW injury, versus what industrial disability is attributable to the combined, scheduled member injuries.

***Williams v. Second Injury Fund of Iowa,* File No. 19001029.01 (Arb. Dec. Feb. 21, 2023).**

Issue: Does Cerebral Palsy Qualify as a first qualifying loss in a claim against the Fund?

In late 2008, claimant began working at Westside Auto Pros ("Westside"). He managed the AAA portion of their business as a motor service manager. Over the next ten years, claimant began to experience significant ankle pain. Claimant began pursuing workers' compensation benefits and was treated by Eric Barp, DPM. Claimant eventually underwent two ankle fusions because of his work-related injuries. Following the surgeries, claimant discovered he no longer had any range of motion in his ankle. Claimant pursued a workers' compensation claim against his employer and the Second Injury Fund.

To maintain a first qualifying loss, Iowa Code section 85.64 requires an injury to a hand, arm, foot, leg, or eye. Claimant asserts a qualifying loss to his bilateral legs based on his congenital cerebral palsy. However, cerebral palsy is an injury to the brain, not an injury to a scheduled member. Bowman v. General Dynamics Info. Tech., File No. 5061908 (January 23, 2020, affirmed on Appeal August 31, 2020). As a result, claimant failed to establish a first qualifying loss.

<u>Agency Jurisdiction</u>

***Milbrandt v. R.R. Donnelly*, File No. 20009756.01 (Arb. Dec. Aug. 29, 2022).**

Issue: Whether a compromise settlement between Claimant and the Second Injury Fund forecloses claims against the employer and insurance carrier.

Milbrandt alleged cumulative injury to her bilateral upper extremities with an injury date of November 26, 2019. She also asserted a claim against the Second Injury Fund. Prior to the arbitration hearing, Claimant and the Fund entered into a compromise settlement under section 85.35(3) which was approved by the Commissioner. The settlement included the November 26, 2019 upper extremity injuries. The Defendants argued the Workers' Compensation Commissioner did not have jurisdiction because section 85.35(9) states "an approved compromise settlement shall constitute a final bar to any further rights arising under this chapter . . . regarding the subject matter of the compromise." The Claimant argued the

settlement was only binding on the parties to the contract, the language in the compromise preserved her claim against the defendant-employer. The Deputy found that the plain language of 85.35(9) stated an approved compromise is a final bar of any further rights under Chapter 85 regarding the subject matter of the compromise. Since the November 26, 2019 injury was the subject matter of her compromise settlement with the Fund, it deprived the agency of jurisdiction to re-litigate the same as a matter of law.

*This case is currently on Judicial Review. *See* Polk County Case No. CVCV065238.

***Williams v. Second Injury Fund of Iowa,* File No. 19001029.01 (Arb. Dec. Feb. 21, 2023).**

Issue 1: Does filing and settling an ICRC complaint preclude the Agency from hearing a Worker's Compensation claim due to lack of subject matter jurisdiction?

In late 2008, claimant began working at Westside Auto Pros ("Defendant). He managed the AAA portion of their business as a motor service manager. Over the next ten years, claimant began to experience significant ankle pain. Claimant began pursuing workers' compensation benefits and was treated by Eric Barp, DPM. Claimant remained employed with defendant until his termination on February 4, 2019. Following his termination, claimant pursued a claim against Westside alleging discrimination, a hostile work environment, and wrongful termination. The Iowa Civil Rights Commission complaint specifically referenced allegations that claimant was demoted or terminated due to certain whistleblower activities in addition to being replaced by a younger employee, who was paid considerably less. Following investigations by the Iowa Civil Rights Commission and the EEOC, claimant was notified of his right to sue. The parties later settled the claim via a confidential agreement. Following the settlement of claimant's discrimination and whistleblower claims, defendant alleged that the Agency no longer had Subject Matter jurisdiction to hear the claim.

However, for a workers' compensation claim to be preempted by a discrimination claim, the two claims must be grounded in the same set of facts. See Ottumwa Housing Authority v. State Farm Fire, 495 N.W.2d 723, 729 (Iowa 1993); Delgado-Zuniga v. Dickey & Campbell Law Firm, 2017 WL 4050285 (Iowa App. 2017). In the case at hand, claimant's workers' compensation claim is based on a physical injury to his lower extremity injury. Alternatively, claimant's discrimination claims are grounded in facts that relate to age discrimination and whistleblower retaliation. The two claims are founded on separate facts, which grants the Agency jurisdiction over the claim.

Alternate Medical Care

***Duda v. Polk County Iowa*, File No. 22003263.01 (Alt. Med. Care Dec. Sept. 19, 2022).**

Claimant sustained an injury on January 24, 2022. He had a left upper extremity surgery in Des Moines. He and his family subsequently moved to a suburb of Rockford, Illinois. Claimant intended to get an apartment in Des Moines when he could return to work, and travel to Illinois on the weekends and did follow through with this plan for some time. It was later determined he needed surgery on the right upper extremity as well. Claimant requested surgery and physical therapy be in Rockford, Illinois so he could recover near his wife. The Defendants declined to transfer care and wanted to send Claimant back to his prior surgeon in Des Moines. The Deputy relayed that precedent establishes care more than a 50-mile travel radius is unreasonable. The Deputy found Claimant's residence in Illinois was not temporary, although he intended to return to Des Moines, and the distance was unreasonable. He was entitled to alternate medical care.

***Freese v. Cemstone Concrete Materials, Inc.*, File No. 20006149.02 (Arb. Dec. Oct. 5, 2022).**

Issue: Is Claimant's knee replacement surgery causally related to his meniscus tear injury?

Claimant sustained a right side meniscus tear at work and had an arthroscopic repair. He subsequently underwent a right knee arthroplasty/replacement. Treatment records prior to the injury revealed bilateral knee pain, instability, and injections. Claimant argued he sustained an aggravation of his pre-existing condition which ultimately led to the knee replacement. The Deputy found there was not substantial evidence to support the replacement surgery was the result of work duties.

***Tomayo-Perez v. Hormel Foods Corp.*, File No. 20003849.05 (Alt. Med. Care Dec., May 25, 2022).**

Issue: May the agency permit Judicial Estoppel in Alternate Medical Care Proceedings?

Claimant sustained a work injury on December 19, 2019, and received authorized and directed care from April 18, 2022. Four separate Alternate Medical Care Petitions (July 12, 2021, September 28, 2021, October 15, 2021, and April 27, 2022) have been filed on this claim. The July 12, 2021, petition was dismissed before the hearing due to authorization of the care. Therefore, no formal admittance of liability was recorded. However, defendant later accepted liability during the September 28, 2021, and October 15, 2021, Alternate Medical Care proceedings. Despite those two prior admissions of liability, defendant later denied liability in response to the April 2022 Alternate Medical Care petition. The deputy commissioner dismissed the claim without prejudice, due to the denied liability, which prompted claimant to file for a re-hearing. The agency subsequently instructed claimant to file a fifth Alternate Medical Care Petition on the basis of Judicial Estoppel. Claimant did as instructed. Following the hearing, the deputy commissioner found that Judicial Estoppel was proper because "generally, once an employer admits liability for a claim in an alternate medical care proceeding, it is bound by that assertion." The defendant attempted to justify their denial of liability by pointing to a doctor's report they had obtained in June of 2021. The deputy commissioner ultimately finds this report irrelevant because Winnebago Industries v. Haverly, requires a "significant change in the facts after the admission of liability" is needed to later deny liability. 727 N.W.2d 567, 575 (Iowa 2006). Therefore, no significant change occurred to warrant defendant's sudden denial of liability, and Judicial Estoppel was proper.

*Judicial Estoppel Affirmed by the District Court in an Appeal on January 1, 2023.

***Loffer V. Fedex Ground Package System*, File No. 23700155.03 (Alt Med. Dec. May 8, 2023).**

Issue: What is a reasonable time to wait for authorized treatment?

Claimant sustained a work-related left shoulder injury on November 25, 2022. The defendant admitted liability for the injury and authorized treatment with Kyle Switzer, M.D., at the Physicians' Clinic of Iowa. At some point during claimant's treatment, Dr. Swtizer recommended claimant receive an injection for her shoulder. On April 17, 2023, claimant filed an Alternate Medical Care petition requesting that the defendant authorize the injection recommended by Dr. Switzer. On April 18, 2023, claimant filed a motion to dismiss her alternate care action because the defendant authorized the injection and scheduled it for June 19, 2023. Claimant's counsel subsequently contacted the defendant stating their dissatisfaction with this appointment, as two months is too long for an injured worker to wait for prescribed treatment. Claimant alleged that the delay was due to Dr. Switzer's office experiencing a backlog of clients. As a result, claimant attempted to get the injections authorized by a different provider who may be able to perform the injections earlier. Specifically, claimant's attorney produced evidence that Dr. Ramme could see claimant in 2-3 weeks. However, claimant's attorney could not confirm during the hearing whether Dr. Ramme could perform the injection during the initial appointment. The deputy commissioner noted

that the evidence only demonstrates that "patients can generally get an appointment with Dr. Ramme in 2-3 weeks. However, [the] evidence is silent on how quickly Dr. Ramme could or would provide an injection—which is the crucial question in this proceeding." Therefore, the defendant's care was found to be reasonable.

Indemnity

***Teeters v. Menard, Inc.*, File No. 1657466.01 (Nov. 15, 2022).**

The Claimant was a truck driver who sustained a work injury while driving for Menard, Inc. Menard paid over $79,000 in benefits to Claimant. Menard brought suit against the third party tortfeasor for property damage to the truck driven by Claimant at the time of the accident. Claimant filed a separate tort action against the same tortfeasors. Menard filed a notice of its workers' compensation lien, but did not intervene in the suit. Menard took its property damage claim to trial which yielded a verdict that the tortfeasor was 70% at fault. Following this verdict, the Claimant filed a motion for summary judgment asking the court to find Defendants 70% at fault. A mediation was soon scheduled; Claimant notified Menard of mediation in his personal injury action and invited its counsel to participate, but it declined. After Claimant settled his personal injury action, Menard notified Claimant's attorney they would not be reducing their workers' compensation lien to account for Claimant's attorney fees. Menard argued it had already expended significant amounts pursuing the property damage claim, which Claimant used to his advantage in securing the settlement. The settlement was approved and Menard was indemnified, but ordered to reimburse a proportionate share of Claimant's attorney fees and litigation costs from the personal injury suit.