Appellate Update: Recent Developments in Workers' Compensation Law

Jean Dickson, Betty, Neuman & McMahon PLC
Matt Dake, Rush & Nicholson, P.L.C.

IOWA SUPREME COURT

APPLICABILITY OF COVID ORDERS

Askvig v. Snap-On Logistics Co., a/k/a Snap-On Tools Corp., No. 20-0997 (Iowa Dec. 17, 2021)
12/17/21 – Supreme Court affirms denial of extension of time for filing for judicial review.

This case presents the question of whether the Supreme Court's COVID order of April 2, 2020 and May 8, 2020, which tolled the statute of limitations "or similar deadline" for commencing an action in district court applies to the filing of a petition for judicial review in a workers' compensation case, specifically a PJR filed following a deemed denial of a rehearing application before the agency. The Court concludes that the statute is not tolled in such a situation.

Claimant filed an application for rehearing with the workers' compensation commissioner on February 25, 2020. Under 876 IAC 4.24, if the commissioner fails to act on an application within 20 days, it is deemed denied. Under section 17A.19(3), an application for rehearing which is deemed denied, a PJR must be filed within 30 days of the deemed denial date, which in Askvig's case was April 15, 2020. No petition was filed by that date. Claimant's attorney was contacted by defendants' attorney noting that a petition for judicial review had not been filed and therefore the agency's action should take effect. Thirteen days later, Claimant's counsel responded that the court's COVID supervisory orders had the effect of tolling the deadline for seeking judicial review. A Petition was filed on that same date. The District Court concluded that the petition for judicial review was not timely filed. Claimant appealed.

On April 2, 2020, and on May 8, 2020, the Iowa Supreme Court entered supervisory orders regulating Iowa Judicial Branch practices and procedures in light of the Covid-19 pandemic. Those orders included provisions that tolled statutes of limitation and repose, and "similar deadlines for commencing an action in district court." On May 18, 2020, Jennifer Askvig filed her petition for judicial review, thirty-three days after the statutory deadline. She appeals from the district court's order granting Snap-On Logistics Company's motion to dismiss for failure to timely file her petition. She argues the court erred by denying the application of the tolling provisions of those supervisory orders.

The Supreme Court first notes that 17A.19(3) requires a Petition be filed within 30 days of the deemed denial date. Claimant acknowledged that the Petition was not timely filed, but alleged that the SC's COVID supervisory orders, which had tolled the statute of limitations for 76 days (from March 1, 2020 to June 1, 2020) applied to the filing of a Petition for Judicial Review. The SC notes that the deadline in 17A.19(3) was not a statute of limitations, but instead was an appellate deadline. In the case of appellate deadlines, the claims have already had a full hearing and there was "less tolerance for equitable modification of appellate deadlines." The SC concludes that filing

a judicial review would not present the same COVID-related difficulties that come with bringing an original action.

The Supreme Court also notes that the 30 day deadline under 17A.19(3) is jurisdictional and, thus, could not be waived by the opposing party and was not subject to equitable tolling. Citing Sioux City Brick and Tile v. EAB, 449 NW2d 634 (1989), the SC noted that "the courts of our state cannot expand their judicial review jurisdiction by allowing appeal of agency action in contested cases beyond the time limit specific for that purpose by the legislature." The SC also noted that workers' compensation cases were different from traditional civil actions in that workers' compensation actions had been entrusted to the executive branch. Extending deadlines would deny finality to the actions of another branch of government.

The SC notes that Askvig's attorney did not claim he delayed filing the petition in reliance on the SC's COVID orders and had acknowledged that the deadline was overlooked. The SC rejected the Claimant's contention that "similar deadlines" in the order contemplated appellate deadlines. The SC rejected the argument that Claimant had substantially complied with 17A.19(3), noting that substantial compliance had never been held sufficient under that section. In any event, the SC found that there had not been substantial compliance with that section. Claimant's petition was therefore dismissed.

PERSONAL SERVICE

Logan v. Bon Ton Stores, Inc., 943 N.W.2d 7 (Iowa 2020)
Supreme Court ruling from May 2020 regarding service of a Petition for Judicial Review. In this matter, the claimant filed a pro se petition seeking judicial review of her workers' compensation decision. Claimant faxed copies of the petition to her employer's attorney the same day, and counsel did not dispute that they received the petition. However, they moved to dismiss the petition because Iowa Code section 17A.19(2) requires the petitioner to either mail the petition or serve it by means provided in the Iowa rules of civil procedure for the personal service of an original notice. Because Claimant had not mailed the petition or caused it to be served personally, and because the 10 days allowed for service had expired, the employer requested dismissal of the petition.

Claimant resisted, attaching proof of her faxes to the resistance, and served opposing counsel with the petition again, this time by certified mail. The district court entered an order granting the motion to dismiss, finding that service by facsimile was not substantial compliance with the service requirements of section 17A.19(2). Claimant appealed, and the supreme court retained the appeal.

The supreme court reasoned that substantial- not literal- compliance with section 17A.19(2) is all that is necessary to invoke jurisdiction. They pointed out that one justification for recognizing substantial compliance under section 17A.19(2) lies in the difference between a petition for judicial review and an ordinary lawsuit- when a party seeks judicial review of an agency decision in a contested case under section 17A.19(2), the parties have already been litigating, and the petition for judicial review is just a continuation of the litigation and communication, which contrasts with a typical civil lawsuit that may come out of the blue to a defendant.

Iowa Code section 17A.19(2) was last amended in 1981- so the court reasoned that faxing was not likely on the legislature's mind at that time, as it did not flourish until the late 1980's and 1990's. Almost every law firm in the US today has fax machine and receives communication by facsimile. Faxing is a recognized form of service under rule 1.442(2).

The supreme court concluded that claimant substantially complied with the service requirements of Iowa code section 17A.19(2) by faxing the petition, and therefore it should not have been dismissed. There was no dispute that opposing counsel timely received the petition, and they did not claim prejudice for receiving it via fax rather than by mail.

CUMULATIVE INJURY

Gumm v. Easter Seal Society of Iowa, Inc., 943 N.W.2d 23 (Iowa 2020)
Supreme Court decision issued May 2020 involving a workers' compensation claimant who had received permanent partial disability benefits for an ankle injury in the past and was appealing the commissioner's denial of a cumulative injury claim that she filed more than 5 years after her ankle injury.

This case presented the question of whether a workers' compensation claimant who receives disability benefits for a traumatic injury can later recover disability benefits on a separate cumulative injury claim if the cumulative injury is based solely on aggravation of the earlier traumatic injury. Normally a claimant in this situation can ask that the earlier traumatic injury claim be reopened. Here, the claimant was unable to pursue review-reopening because the three-year statute of limitations for review-reopening had passed.

The Claimant filed two petitions with the agency. In the first, she claimed she had sustained an acute injury in October 2008 and admitted that the statute of limitations had expired. In the second, she claimed a cumulative injury with three potential injury dates in 2012, 2013, and 2014. Following the hearing, the deputy concluded that the claimant's conditions were sequelae of her October 2008 injury and that there was not a distinct or new injury after that date.

The claimant appealed to the commissioner, and the commissioner affirmed the deputy's determination that the claimant had failed to establish a distinct and discrete cumulative injury. The claimant then sought judicial review, and the district court upheld the commissioner's ruling and dismissed claimant's petition.

Claimant appealed and the case was transferred to the court of appeals, and in May 2019, a divided panel of the court of appeals reversed the district court and remanded for further proceedings. The court of appeals reasoned that there was an exception in precedent that if a claimant is precluded by the statute of limitations from bringing an original proceeding or review-reopening, the claimant may recover by way of a cumulative-injury claim for any increase in functional disability shown to have occurred as the result of day-to-day activities in the workplace subsequent to the original injury without having to show he or she suffered a 'distinct and discrete' disability attributable to the post-original-trauma work activities.

The supreme court then granted the employer's application for further review. The supreme court looked to the Floyd case that the court of appeals relied upon and concluded that it was distinctive in that the employee in that case had voluntarily dismissed his original petition due to the employer's statute of limitations defense, so the first injury was not a compensable event. But in this case, the Claimant was not precluded from recovering payments for the original trauma; a review-reopening claim could have been filed within three years, but wasn't. The court concluded that the distinction between cumulative aggravation of an existing compensable injury through the daily grind of working and a new, discrete injury remains valid in Iowa, and a review-reopening is the recognized remedy if the claimant desires additional disability benefits. A claimant cannot avoid legislatively imposed restrictions by reclassifying an injury unless the facts support that classification.

The Supreme Court concluded that the commissioner and the district court correctly ruled that where a claimant has received disability benefits for a prior compensable injury, the claimant is limited to the review-reopening remedy for additional disability benefits unless she can prove she has suffered another injury. If the subsequent injury is a cumulative injury, it must be a distinct and discrete injury, not merely the aggravation of the prior injury due to regular work activities. The court concluded that a separate cumulative injury claim was not available in these circumstances, as such a claim would allow the employee to bypass the parameters for review-reopening established by the legislature and would be inconsistent with precedent.

GROSS NEGLIGENCE

Terry v. Dorothy, 950 N.W.2d 246 (Iowa 2020)
Supreme Court decision issued in October 2020 involving a gross negligence claim filed after a compromise settlement had been reached.

District court awarded summary judgment in favor of Defendants based upon language in settlement documents releasing the employee's gross negligence claim against a supervisor.

Dorothy moved for summary judgment, seeking to dismiss the action. In her moving papers, Dorothy asserted alternative grounds, including relying upon "release language that releases plaintiffs' co-employee gross negligence claim against the defendant Dorothy."

The district court granted Dorothy's motion for summary judgment on both contract and statutory grounds. According to the district court, Mr. Terry lost any further rights to pursue damages under Iowa Code section 85.20 for gross negligence against a co-employee both because the Additional Terms of Settlement specifically include a release for all co-employees and because Iowa Code section 85.35(9) provides that a compromise settlement approved by the Commissioner is a final bar to any further rights under chapter 85.

The majority in the court of appeals reversed. The majority emphasized that a claim of gross negligence is a common law claim distinct and apart from a workers' compensation claim. The majority thus reasoned that the statutory settlement before the workers' compensation commissioner extinguished all statutory claims but a settlement with the workers' compensation commissioner did not release a common law claim of gross negligence against a co-employee.

While the majority recognized there might be a claim for summary judgment based upon the contractual terms of the additional terms of settlement, independent of any approval by the workers' compensation commissioner, the majority found that contractual theory was not before the court. According to the majority, Dorothy exclusively relied upon the premise that a gross negligence claim against a co-employee was part and parcel of a workers' compensation claim and that the commissioner's action in approving the settlement extinguished the gross negligence claim. A dissent, however, agreed that a gross negligence claim against a co-employee was not a statutory claim under Iowa Code section 85.20 but reasoned that the contract theory was, in fact, addressed by the district court and sufficiently presented on appeal to provide a basis to affirm the district court.

SHOULDER INJURY

Chavez v. MS Technology, LLC No. 21-0777 (Iowa April 1, 2022)
Deng v. Farmland Foods, Inc., No. 21-0760 (Iowa April 1, 2022)
In these two cases, the Supreme Court held that a shoulder injury is not limited to the glenohumeral joint. In 2017, Iowa legislature changed shoulder injuries from industrial disability to a scheduled member. The question presented in these two cases was whether injuries outside of the glenohumeral joint shoulder be treated as "BAW" or limited to the 400 weeks of benefits under 85.34(2)(n).

IOWA COURT OF APPEALS

ALTERNATE CARE

Lovan v. Broadlawns Medical Center, 947 N.W.2d 416 (Iowa Ct. App. 2020)
Court of Appeals decision issued in April 2020 dealing with a petition for alternate medical care.

At the agency level, the petition for alternate medical care was denied. The claimant filed a petition for judicial review and the district court reversed the agency's decision, and then the employer appealed further to the Iowa Court of Appeals.

At the agency level, the claimant had filed an application for alternate medical care seeking to authorize a certain doctor as the treating physician. The claimant provided testimony at the alt med hearing. In the ruling, the deputy found that the employer had offered treatment with a doctor that claimant no longer trusted due to his earlier causation opinion, but concluded that the treatment with that doctor was reasonable and that the claimant's misgivings had nothing to do with the doctor's actual examination or treatment recommendations. The application for alternate medical care was denied. The district court then reversed, finding that the treating doctor's earlier causation opinion was so contrary to all previous medical testimony that it rose to the level of the employer choosing improper medical care for the employee.

When the case came before the court of appeals, they noted that their record included the exhibits that were before the agency, but not a transcript or recording of the alternate medical care hearing. At oral argument, both parties confirmed that no transcript or recording of the alternate medical care hearing was provided to the district court either. The court of appeals concluded that the

claimant's own words were essential for understanding why she was dissatisfied with her treating physician's care and why she wanted to treat with another doctor instead, and the importance of claimant's testimony was highlighted by the fact that the deputy repeatedly cited to claimant's testimony in the alternate medical care ruling. The court of appeals said that without a transcript of the hearing, they couldn't properly review the agency's decision.

The court of appeals concluded that due to the lack of a transcript of the alternate medical care hearing, neither they nor the district court had an adequate record upon which to make an informed consideration of the issue presented- and when presented with an inadequate agency record on judicial review, the proper action is to dismiss the petition. The court of appeals therefore reversed the district court and dismissed the petition for judicial review, thereby reinstating the agency decision denying claimant's application for alternate medical care.

Dotts v. City of Des Moines, 965 N.W.2d 632 (Iowa Ct. App. 2021)
7/21/21: Court of Appeals affirms a denial of alternate care.

Claimant was injured while working for Defendant. Unsatisfied with his care, Claimant filed for alternate medical care under 85.27 and was denied such care by the Agency. Claimant appealed and on judicial review, the district court considered the record, which did not include a transcript of the agency hearing.

On appeal, the Claimant argued the Agency decision was not supported by substantial evidence and that the care provided was not reasonable. The COA, in affirming, held that it could not determine whether there was substantial evidence without a transcript of the agency hearing. Similarly, it could not evaluate the reasonableness of the treatment, as such decision was based upon the testimony of the Claimant. Because the Claimant bore the responsibility of ensuring the record was complete, the COA affirmed the decision.

Reinsbach v. Great Lakes Coop., 967 N.W.2d 211 (Iowa Ct. App. 2021)
9/22/21: Court of Appeal's affirms District Court's enforcement of Commissioner's decision

Claimant was originally injured in 2005. Following the injury, the parties settled some issues and in 2008, the commissioner, in a review-reopening proceeding, awarded future medical care and treatment as recommended by Dr. Strothman. On appeal, the District Court ordered that the care awarded be subject to provisions of Iowa Code Chapter 85 and be reasonable and necessary future care.

Claimant appealed to the COA, taking issue with the underlined sections. Citing *Rethamel v. Havey*, the COA held that the DC is bound to enter judgment in conformance with the commissioner's award. Here, the COA held that the additional language was implied in the award, and thus, was not an error.

PENALTY

True v. Heritage Care and Rehabilitation, 947 N.W.2d 418 (Iowa Ct. App. 2020)
Court of Appeals decision from April 2020 where the claimant appealed the commissioner's finding that she waived her claim to penalty benefits by not pursuing it in her initial claim under the workers' compensation act.

The claimant initially filed a petition seeking medical benefits only, and then three days before the statute of limitations expired, she filed a motion to amend her petition seeking to add additional disputes, including penalty. A hearing that was originally scheduled for the medical benefits claim was held to address claimant's motion to amend her petition, and the parties submitted a hearing report identifying the disputed issues. The issue of penalty was not included on the report. The deputy concluded that the petition was timely and directed claimant to refile her notice of petition. A few days later, claimant refiled and listed several disputes, but did not plead penalty as an issue in dispute even though the prior petition did seek penalty benefits. Claimant did not file a motion to amend to dismiss the penalty claim on the prior petition or file a notice of bifurcation to delay the issue of penalty benefits.

In May 2012, a hearing occurred and again the issue of penalty was not identified on the hearing report. Claimant was awarded permanent partial disability benefits as a result of the hearing.

Claimant later filed a new petition relating to the prior action identifying penalty as the dispute. In a December 2016 decision, the deputy found that Claimant had waived her penalty benefits claim by failing to bifurcate the penalty issue pled in her first motion to amend and failing to present the penalty claim for adjudication at the administrative hearing on her petition. The commissioner affirmed on appeal, as did the district court. The court found that Claimant's failure to brief, include in the hearing report, or argue her claim for penalty benefits at the May 2012 hearing acted as an implied waiver of the issue and she could not refile for the benefits.

The court of appeals concluded that although claimant pled penalty benefits in her first amendment to her petition, she took no further action on her claim for penalty benefits by pursuing them in the May 2012 hearing or serving a notice of bifurcation of the penalty issue. Claimant claimed to have withdrawn the original penalty issue by not including it in her second refiled petition, but the court reasoned that the first amended petition was the one in effect, not the post statute of limitations refiled petition. Claimant could not withdraw the penalty benefits issue after the first amendment by simply ignoring it and not listing it as a claimed benefit in her refiled petition.

The commissioner ruled that Claimant's failure to pursue or bifurcate her penalty benefits claim constituted waiver of all claim for penalty benefits. The court of appeals agreed that claimant waived her right to penalty benefits that had accrued prior to the May 2012 hearing, but reasoned that the doctrine of claim preclusion did not apply to any new cause of action that arose after the hearing. After the initial pleading, a claimant may file a new penalty benefits claim due to an employer's behavior AFTER the first claim. So the Court of Appeals affirmed the agency's dismissal of claimant's penalty benefit claims for delays before the May 2012 hearing, and reversed the decision with directions to remand to the commissioner for an evaluation of whether the employer's delay in paying benefits following the first hearing was unreasonable.

Regional Care Hospital Partners v. Marrs, 957 N.W.2d 719 (Iowa Ct. App. 2021)
On the penalty issue, the COA noted that approximately $80,000 of benefits were unpaid at the time of the hearing, for failure to pay healing period. The employer argued that Claimant stopped working due to conditions unrelated to her work injury and that Claimant had reached MMI. The COA noted that, in the agency's decision, the only argument raised was whether Defendants reasonably relied on Dr. Abernathey to deny liability. The Commissioner found that Abernathey offered his opinions months after benefits were stopped and that Defendants had not communicated the reason for the denial to Claimant. The COA affirms the penalty award, finding that substantial evidence supported the finding that Defendants failed to show it terminated benefits for reasonable cause.

The decision of the Commissioner and district court was therefore affirmed.

Clark v. Winnebago Industries, Inc., 964 N.W.2d 10 (Iowa Ct. App. 2021)
4/14/21: Court of Appeals rejects penalty claims in part, affirms finding of permanent disability and alternate care.

In July 2016, Claimant injured her right hand while working for Defendant. A hearing was held on the issues of permanency, alternative medical care, benefit rate, and penalties. The Deputy Commissioner found in the Claimant's favor on the issues of permanency and alternative medical care, finding a 10% impairment and awarding care at the Mayo Clinic. The Deputy denied penalties, finding that the issue of the benefit rate and permanency were 'fairly debatable', citing to the lack of a marriage certificate and W4's showing Claimant checked 'single' as supporting a single benefit rate. Additionally, it found the Dr. Gibbon's opinion finding no permanent impairment supported Defendant's denial of payment for permanency. The Deputy denied a motion for re-hearing, and the Commissioner affirmed the Deputy in full.

On appeal, the COA affirmed the denial of a penalty regarding the rate and permanency, finding the evidence presented made it fairly debatable. On a final penalty issue, delayed payment of healing period benefits, the COA found that this issue was not directly addressed by the Commissioner despite being presented by Claimant. Because the issue was raised but not decided, the COA remanded for further proceedings on the issue of penalty for late payment of healing period benefits.

Regarding the cross appeal, the COA affirmed on the issue of permanency and award of alternate care, finding that the facts supported the decision of the Agency and that the decision was not irrational, illogical, or wholly unjustifiable.

Drahozal v. Envoy Air, Inc. d/b/a American Airlines Group, 964 N.W.2d 351 (Iowa Ct. App. 2021)
4/28/21 – Court of Appeals Affirms the ruling on 80% industrial disability and healing period benefits, Affirm in part and Reverse in part the penalty benefits, Remand to District Court with instruction.

Claimant alleged she was permanently and totally disabled due to frostbite in 8 of her fingers, a subsequent mental health injury, and complex regional pain syndrome resulting from the initial

work injury. The Commissioner found that Claimant had suffered an 80% industrial disability due to the physical and mental health injuries, awarded healing period benefits, and awarded penalty benefits for 11 delayed payments of benefits. Penalty benefits for the mental health claim were denied. Following appeals by both parties, the district court affirmed the decision of the commissioner in its entirety.

Claimant had argued that due to her hand injuries, depression, age, and education, there were no jobs in the community for which she could reasonably compete. The Claimant alleged she was an odd-lot employee. The Commissioner concluded that Claimant had not produced evidence she was not employable in the Cedar Rapids labor market. The COA affirmed without much in the way of additional analysis, simply indicating that substantial evidence supported the decision of the Commissioner.

The COA affirmed the denial of penalty benefits based on Claimant's mental health diagnosis, finding that, because Defendants had the opinions of doctors finding no causation on this issue, the claim was fairly debatable. A denial of a second period of penalty benefits, based on Claimant's having reached MMI, was also affirmed by the COA on substantial evidence grounds.

On Defendants' cross-appeal, the COA affirmed the decision of the Agency that Claimant had suffered an industrial injury as a result of Claimant's depression, again finding that substantial evidence supported the decision of the Agency.

Defendants' alleged that eleven late healing period benefit payments should not have led to the imposition of a $3,611.00 penalty. The COA concluded that penalty was appropriate on the first payment of benefits, which was issue two weeks late. Five of the late payments were issued on Monday, the day after the compensation week. Claimant argued successfully that these payments should have been made by the end of the compensation week and that Defendants had not demonstrated the payments were mailed on the date they were issued. The COA found that if the five checks were mailed the day they were issued, they were timely under *Robbenolt*, which held that if a certain day (Monday in this case) was the first day of the compensation week, full payment of weekly compensation was due the following Monday. The COA concluded that Claimant had the burden of demonstrating that the checks were mailed late and, since they were dated on Monday, they were timely. The COA, therefore, reversed the penalty award on these five weeks of benefits. Four other payments were made two to three days late. Defendants argued that these payments were "minimally late," but the court notes that the statute does not turn on the length of delay in making the correct compensation payment. Any delay, under *Robbenolt*, entitles the employee to benefits in some amount. Penalty for these weeks of benefits was affirmed. The final late payment was a result of the rating for Claimant's hands. The rating was issued on January 25, 2016, but a lump sum payment was not made until March 31, 2016. These penalty benefits were also affirmed. The COA also noted that the penalty benefits awarded were within the statutory limits. Overall, penalty benefits were reduced to $2,790.15

City of Maxwell v. Marshall, No. 20-0916 (App. Oct. 20, 2021)
10/20/21: Court of Appeals Affirms award of healing period benefits, denies penalties.

Claimant suffered an injury while working as a volunteer firefighter for the City of Maxwell. Claimant had a number of surgeries and sought healing period benefits and penalties. The Deputy awarded healing period benefits but denied penalty benefits, finding that the employer was not consistently late in paying weekly benefits.

The Commissioner affirmed and both parties filed for judicial review. On judicial review, Defendant requested remand to the commissioner for consideration of additional evidence that was not available at the time of hearing. This request was denied and the district court affirmed the commissioner's decision. Both parties appealed to the Court of Appeals.

The penalty benefits issue centered around claimant's date of injury and the date on which benefits should have started. Claimant suffered an injury on December 11, 2013 and Claimant alleged that his first compensation week was December 12-18. Defendants allege that section 85.30 provides that compensation payments are to be provided on the 11th day after the injury. The Court of Appeals, citing *Robbenolt* and *Goodman*, concluded that the due date allowed for the passage of 11 days under 85.30 and then an additional 8 days to make payment (the eighth day after the first day of each subsequent compensation week). The payments were found to be timely and thus penalty benefits were denied.

The healing period benefit issue centered around the date of MMI. Claimant's presented evidence that he reached MMI as of April 10, 2017, whereas Defendant presented contrary evidence. The COA found that the deputy's determination MMI was not reached until 2017 was supported by substantial evidence.

Foster v. East Penn Manufacturing Co., Inc., No. 20-1738 (App. Dec. 15, 2021)
12/15/21 – Court of Appeals affirms penalty award.

Claimant suffered a work injury and was initially paid benefits for her time off work and for medical care. A second surgery was recommended, but the employer did not authorize the surgery or pay for her time off work after the second surgery. The Agency imposed penalty against the Employer and this finding was affirmed by the District Court. Defendant appeals, arguing that the delay was necessary to investigate the claim, there was a reasonable basis for the delay, and there was a good faith basis to dispute the entitlement to benefits.

The surgeon who had performed Claimant's original surgery (Dr. Goding) recommended a second surgery. Based on updated MRI results, Dr. Goding took Claimant off work and recommended a second surgery (February 2018). Claimant filed for Alt Care, and Defendants disputed liability. Claimant had the surgery and returned to work (April 2018). Claimant's records were sent to Dr. Boulden, who authored a report indicating that the second surgery was not related to work (June 2018). Formal denial letter sent on June 11, 2018. Later in June, Claimant was paid 5% permanency ($11,533.00). Claimant had an IME with Dr. Bansal, who found Claimant was not at MMI, and that the surgery related to Claimant's work injury. At hearing, the Deputy found that Claimant was not at MMI, found causation for both surgeries, and awarded TTD benefits and penalty. The Deputy allowed no credit for the PPD benefits paid. The Commissioner affirmed.

On the penalty question, the COA notes that, although Defendants argued that the delay was due to a need to investigate, there had apparently been no investigation from February 2018 until a letter to Dr. Boulden in May requesting an IME. The COA found this delay was not reasonable.

The COA also finds that there was no reasonable basis to contest the entitlement to benefits. The COA noted that there was no communication of the denial of benefits to Claimant until June of 2018. Although there was back and forth between counsel on the issue, the reason for the delay and denial was not contemporaneously conveyed to Claimant. Penalty benefits were therefore affirmed.

On the credit issue, Claimant alleges that the issue was waived because this issue was not raised at the arbitration hearing. The COA finds the issue was raised in post-hearing briefs and this was preserved for error. The COA notes that error is not preserved merely by filing an appeal and states that the issues must have been raised before the Agency and District Court. However, because Defendants agreed that Claimant was not at MMI, PPD was not at issue in the hearing. The Court finds that, although Defendants might have a credit against permanency, the benefits were not creditable against temporary benefits. The Agency decision was therefore affirmed.

Cochran v. Quest Liner, Inc., No. 21-0288 (Iowa Ct. App. Jan. 12, 2022)
The Court of Appeals affirms denial of penalty benefits. Claimant appealed the commissioner's denial of healing benefits arguing that defendants failed to obtain an impairment rating or do any further investigation to determine if he was entitled to benefits after claimant was placed at MMI. The court rejected claimant's argument concluding that the defendants could have inferred that if claimant was challenging the MMI finding, his entitlement to PPD benefits was also in dispute. The court noted that although there is a general duty to seek an impairment rating once claimant is at MMI, claimant had disputed the finding of MMI eight days after receiving notice of termination and 22 days before benefits were terminated.

EXCULPATORY CONTRACTS

Taylor v. Gazette Communications, Inc., 949 N.W.2d 257 (Iowa Ct. App. 2020)
June 2020 Court of Appeals Decision

After using a labor broker for employment with a commercial printing company, the plaintiff was injured while working with a printing machine.

He made a claim for workers' compensation benefits and brought suit against the printing company for negligence. However, the employment agreement he entered into with the labor broker contained an exculpatory provision that provided he would, in case of injury, look only to the labor broker's workers' compensation insurance and not bring suit against the labor broker's clients. The district court granted summary judgment and dismissed the plaintiff's suit against the printing company on the ground that the exculpatory provision barred his suit. The Court of Appeals affirmed.

The court found that the exculpatory clause to be both valid and enforceable. Nothing that the Supreme Court has previously held that contracts releasing persons from liability for their own

negligent acts have been found to be enforceable and are not contrary to public policy. They also reasoned that they had, in the past, upheld contract provisions in which an individual agrees in a labor brokerage contract that, in the event the individual is injured at the workplace of the labor broker's client, the individual's remedies shall be limited to a claim under the labor broker's workers' compensation insurance and shall not include a damages claim against the labor broker's client.

The Claimant also tried to argue that the exculpatory provision was inapplicable because Aerotek breached "by failing to ensure that he received site specific training and that he was working with properly guarded equipment in a safe workplace." He argued that the exculpatory provision in paragraph twelve of the CEA "is conditioned upon Aerotek's compliance with the terms of the conditional employment contract."

Fidel asserts three times that Aerotek agreed to ensure Fidel would have a safe workplace. First, he says "Aerotek agreed to place Fidel in a work environment free of hazards (like unguarded machinery) and to comply with IOSHA safety regulations." Next, "Aerotek promised Fidel he would receive site specific training before starting work at the Color Web plant. Aerotek breached that promise." Finally, "Aerotek promised Fidel he would be working in a safe workplace and that promise was breached as well." None of these assertions are accompanied by citations to the record. Aerotek did not make the promises Fidel has asserted were made. The CEA does not contain provisions relating to safety or hazards.

COMMUTATION

VanGetson v. Aero Concrete, Ltd., 949 N.W.2d 442 (Iowa Ct. App. 2020)
Court of Appeals Decision from July 2020 that deals with the dismissal of partial commutation petitions following the legislative changes that went into effect on July 1, 2017.

There were multiple claimants in this action with dismissals at the agency level that filed a joint petition for judicial review. The appellants argued that the agency misinterpreted Iowa Code section 85.45 in dismissing their commutation petitions, and that the dismissal violated their rights to due process and equal protection.

Following a hearing, the district court affirmed the agency's dismissal of the commutation petitions. The court concluded the agency correctly dismissed the commutation petitions without prejudice because they were not ripe for adjudication. As to the constitutional claims, the court essentially concluded the claims were not ripe because the appellants had yet to file commutation petitions after the effective date and therefore within the purview of the amendments to section 85.45 the respondents had not refused to consent to commutation, and thus the appellants had no basis to argue "something has been lost."

The Court of Appeals looked to precedent and found that the supreme court had already interpreted the statutory language at issue in this appeal. It was clear from precedent that an arbitration award or settlement is a jurisdictional prerequisite necessary for the decision maker to consider a commutation petition. There was no jurisdiction because, absent a determination of the period during which compensation is payable, by agreement or administrative decision, the issue of

commutation is not ripe for adjudication. The court of appeals concluded that the commutation petitions were not ripe for adjudication and dismissal was appropriate.

As to the constitutional claims, the Court of Appeals agreed with the District Court that the appellants had yet to proceed with their claims under the new statute and had therefore not yet suffered any constitutional injury as a result of its application to them, so they also did not consider that issue on appeal.

STANDARD OF REVIEW

Pruismann v. Iowa Tanklines, Inc., 949 N.W.2d 654 (Iowa Ct. App. 2020)
Court of Appeals decision from August 2020. The District court reversed the agency's decision on claimant's workers' compensation claim, which awarded 45% industrial disability, and instead awarded permanent total disability benefits based upon a conclusion that the commissioner's decision was not supported by substantial evidence. Defendants appealed, asserting that the district court employed the incorrect standard of review.

The Court of appeals noted that Industrial disability presents a mixed question of law and fact. Fact findings are reviewed for substantial evidence, while the agency's application of law to facts will not be disrupted unless it is irrational, illogical, or wholly unjustifiable. The court reasoned that a challenge to the agency's ultimate conclusion is a challenge to the agency's application of law to facts. The Court of Appeals reversed the district court, finding that the commissioner's findings of fact with respect to the extent of Claimant's industrial disability were supported by substantial evidence, and the commissioner's application of those facts in determining Claimant's degree of industrial disability was not irrational, illogical, or wholly unjustifiable.

NOTICE

John Deere Davenport Works v. Dickerson, 964 N.W.2d 21 (Final Publication Decision Pending)(Iowa Ct. App. 2021)
April 2021 Court of Appeals decision affirming award of WC benefits.

John Deere asserted that 90 day notice was not provided, relying on the fact that after the incident, a 'near miss' report was completed, but not an accident report.

The fact that a written report was completed, regardless of its title, put Deere on notice that an incident had occurred and gave it the opportunity to investigate. "The purpose of section 85.23 is to alert the employer to the possibility of a claim so that an investigation of the facts can be made while the information is fresh." *Robinson v. Dep't of Transp.*, 296 N.W.2d 809, 811 (Iowa 1980). Deere was fairly on notice about the *possibility* of a claim. If Deere was unclear whether Mr. Dickerson was injured in the incident, it could have reached out to him to ask. Deere did not do so.

City of Harlan v. Thygesen, No. 21-0265 (Iowa Ct. App. March 30, 2022)
The Court of Appeals held that Claimant has a duty to investigate probable compensable nature of a claim where an injury has manifested, and claimant knows the injury was work-related. Claimant

lost his hearing as a result of a work-related injury. However, Claimant did not file his claim until ten years later. The commissioner found that claimant did not appreciate the severity of the claim despite Claimant being aware of hearing loss and the fact that it was caused by his employment. The district court reversed and found that claimant was aware of the nature, seriousness and probable compensable character of the claim. On appeal, the Court of Appeals determined whether claimant had knowledge of facts sufficient to trigger his duty to investigate the injury. The Court found that there was no evidence that claimant pursued his duty to investigate. Claimant knew he had some form of hearing loss yet did not request a written record of his test results, the Court notes that it cannot support the agency finding that claimant "in the exercise of reasonable diligence" could not have recognized the probable compensable character of his hearing loss. This case creates the rule that claimants are required to investigate a claim even if their employment is not affected by the injury.

Taylor v. Iowa State University Extension, No. 20-1397 (Iowa Ct. App. Jan. 12, 2022)
The Court of Appeals affirms denial of workers' compensation benefits on Notice grounds. Claimant was injured from a car accident that took place while she was driving to her office from a presentation. Claimant didn't tell her employer until 22 months after the accident. The agency concluded that claimant did not provide notice to her employer within 90 days of the accident and the case was dismissed under section 85.32.

MOTION TO ENFORCE

Estate of Albaugh v. UPS Freight, 964 N.W.2d 350 (Iowa Ct. App. 2021) (Final publication decision pending)
April 2021 Court of Appeals Decision.

Contending settlement of Ed Albaugh's petition for partial commutation of workers' compensation benefits had been reached before he died, the Estate of Ed Albaugh applied to the district court to enforce the settlement. The Estate and UPS Freight filed dueling motions for summary judgment. The district court found "that the parties engaged in settlement negotiations that did not result in an agreement on its final terms." So the court found there was no agreement for the court to enforce. It denied the Estate's motion and granted UPS's motion. The Estate appealed.

The Claimant had been awarded perm total benefits in a 2014 Arbitration Decision. In March 2017, he filed a Petition for Partial Commutation of benefits, seeking a lump sum payment of over half a million dollars. The parties were negotiating settlement of the commutation action, emailed back and forth about settlement terms, and agreed to cancel the scheduled hearing. Three days after the cancelled hearing, the claimant was killed in a motorcycle collision.

The estate sought enforcement of the partial commutation settlement agreement with the district court, and Defendants filed a motion for summary judgment asserting that there was no settlement agreement. The district court granted summary judgment; claimant's estate appealed to the court of appeals. They agreed with the district court that there was no agreement to enforce. There was no clear offer and acceptance as required by a binding contract because they were still discussing terms, including the interest rate to be applied to the commutation, and claimant had not agreed to

the last interest rate proposed by Defendants prior to his untimely death. There was no mutual assent, so there was no contract to enforce.

SECOND INJURY FUND

Housley v. Second Injury Fund, 964 N.W.2d 15 (Iowa Ct. App. 2021)
4/14/21: Court of Appeals affirmed denial of benefits from Second Injury Fund.

Claimant suffered injury to right leg in 2005 and suffered second injury in 2006 while employed for Defendant. Defendant voluntarily paid benefits, including 5 weeks of permanency benefits and admitted liability at an alternate care hearing. No settlement or adjudication of liability were presented.

Claimant filed suit against the Second Injury Fund, but did not join Defendant. At the hearing, the Fund challenged the applicability of the Act, citing that without a settlement or adjudication showing Defendant's liability, Defendant was a necessary party.

The COA affirmed, citing Eaton v. Second Injury Fund, holding that voluntary benefits paid and admission of liability at an alt. care hearing were not admissions of liability, rendering Defendant a necessary party to the action.

Blake v. Second Injury Fund of Iowa, 967 N.W.2d 221 (Iowa Ct. App. 2021)
Iowa Court of Appeals decision issued September 22, 2021

Dispute involved whether the eye problems Claimant experienced due to Graves Disease are a 'first qualifying injury' within the context of Iowa's Second Injury Compensation Act.

The agency ruled that the eye problems did not qualify, the District Court affirmed, and the Court of Appeals also affirmed.

The Court of Appeals noted that the Supreme Court had expressly rejected the argument that an unscheduled injury that affects an enumerated member is enough to trigger the Fund's liability. The Claimant's condition to her body as a whole (Graves Disease) which 'merely affects' an enumerated member does not constitute a first qualifying injury.

Blake asserted the impairment to her eye caused by her Graves' disease constitutes a first qualifying injury because she has "lost the use of" one of her eyes. The Fund does not claim the first qualifying injury must be traumatic, work-related, or compensable. Rather, it asserts a first qualifying injury requires a disability to at least one of the enumerated members, not a disability to the body as a whole that results in symptoms to one of the enumerated members.

Blake relied on *Gregory*, wherein the claimant's first injury was to her hand—an enumerated member—but the hand injury also caused shoulder impairment and was therefore compensated as an nonscheduled injury under section 85.34(2)(u). 777 N.W.2d at 400. Even though the hand injury was combined with disability in unenumerated body parts, the supreme court determined the hand injury was still a first qualifying injury because the legislature "did not intend to disadvantage

claimants with histories of more complex combinations of enumerated and unenumerated member injuries." *Id.* at 401. In essence, *Gregory* held that an injury to an enumerated member constitutes a first qualifying injury even though the injury also causes impairment to the body as a whole
The court of appeals found that in Blake's case, it was the opposite of the situation in *Gregory*—an impairment to the body as a whole that also causes impairment to an enumerated, scheduled member.

The IA supreme court has expressly rejected the argument that an unscheduled injury that affects an enumerated member is enough to trigger the Fund's liability—the same argument Blake makes here. In *Second Injury Fund of Iowa v. Nelson*, the claimant sustained a first qualifying injury to his leg. 544 N.W.2d 258, 262 (Iowa 1995). Later, he sustained an injury to his shoulder that impaired the functionality of his arm (an enumerated member). *Id.* The supreme court rejected the claimant's argument than an injury that "merely affects a[n enumerated,] scheduled member" is enough to qualify as an injury that triggers the Fund's liability. *Id.* at 269.

The appellate court concluded that Blake's condition to her body as a whole (i.e., Graves' disease) that "merely affects" an enumerated member does not constitute a first qualifying injury.

HEALING PERIOD

Annett Holdings, Inc. v. Roberts, 964 N.W.2d 14 (Iowa Ct. App. 2021)
4/14/21: Court of Appeals affirmed award of industrial disability and healing-period benefits.

Claimant injured his back in November 2010 while working as a truck driver for Defendant. After care was not authorized, Claimant was evaluated by his family doctor, who released him to work with restrictions in January of 2011. Claimant ended employment with Defendant but obtained a new position at Reliable Transport. In 2013, the Commissioner held that the Claimant's injury was work related, was not at MMI, and awarded healing time benefits from the date of the accident until the Claimant was released for restricted work in January of 2011.

In May 2015, Claimant's employment with Reliable Transport ended. Claimant underwent subsequent MRI and treatment, was placed at MMI as of February 2016, and was given a 9% whole person impairment. At a review-reopening proceeding, the Commissioner awarded healing time benefits from May 2015 through February 2016, as well as a 30% industrial disability.

On appeal, Defendant argued that, because Claimant's employment did not end due to injury, he was not entitled to additional healing time benefits. The COA found no error in the Commissioner's analysis, which held that once Claimant's employment ended "the only relevant factors are those set out in Iowa Code section 85.32(1): whether claimant had returned to work, was medically capable of returning to substantially similar work, or was at MMI." Finding none were met, it was no error to award healing time benefits.

In addition, the COA affirmed an award for 30% ID, finding the 9% whole person impairment is only one factor to be relied upon, and there was substantial evidence to support a 30% ID.
Causation and/or Liability

Rizvic v. Titan Tire Corporation, 964 N.W.2d 562 (Iowa Ct. App. 2021)
5/12/21: Court of Appeals affirms Commissioner's finding of no permanent impairment.

In August of 2016, Claimant suffered an electrical shock, which he claimed led to headaches as well as difficulties with his cervical spine and back. During the course of Claimant's treatment, various doctors found that Claimant suffered no loss of range of motion and presented symptoms that were either inconsistent with objective findings or appeared magnified. Dr. Irving Wolfe found that Claimant's symptoms were consistent with a low voltage injury, diagnosed Claimant with a pain disorder, and found a 30-49% impairment. At the hearing, the Deputy found that Claimant was suffered permanent and total disability, relying on the Claimant's testimony and Dr. Wolfe's opinions.

On review, the Commissioner reversed the Deputy, finding the Claimant was not credible and suffered no impairment. Following appeal, the COA affirmed the Commissioner's findings, holding substantial evidence supported the finding that the Claimant's medical issues were not work-related.

Mahoney v. Robert Half International, 965 N.W.2d 490 (Iowa Ct. App. 2021)
6/30/21 – Court of Appeals affirms denial of benefits

The Deputy and Commissioner found that Claimant had failed to establish a new, permanent injury to her arm, and Claimant's case against the employer and Second Injury Fund was dismissed. Court of Appeals agreed, finding that the decision of the Commissioner was supported by substantial evidence.

Claimant had suffered an earlier injury to her right arm in 2006 as a result of an auto accident. This accident resulted in surgery to the arm. In 2015, Claimant began working for Tax Act and alleged that she developed new problems in her arm. She was diagnosed with tenosynovitis by Dr. Loth. Dr. Sassman later found that claimant had a 3% impairment rating for the injury, which was found to be a new repetitive motion injury. The Deputy concluded, based on the testimony of the employer's representative, that Claimant's work was not repetitive and found that Claimant's injuries were a continuation of problems she had since the time of the automobile accident. The Commissioner and district court affirmed.

The Court of Appeals affirms, finding that the Agency considered Dr. Sassman's report, but could have concluded that Dr. Sassman was not provided with accurate facts regarding Claimant's job description involving the degree of repetitive activity necessary. Because the agency is responsible for determining the weight to be provided medical evidence. the decision to discredit Dr. Sassman's opinion was appropriate. The COA finds there was support for the Agency's determination that Claimant's right arm injury was "not worked up independently." The COA finds that there was substantial evidence for the conclusion that Claimant consistently experienced symptoms and difficulties in her right wrist from the auto accident as late as 2012 and 2013. The commissioner properly determined the weight to be given to an expert medical opinion. The commissioner's application of the law to the facts was not irrational, illogical, or wholly unjustifiable.

Mercy Medical Center v. Lund, No. 21-0523 (Iowa Ct. App. Jan 12, 2022)
Claimant frequently pushed/pulled/lifted heavy equipment during her employment. She felt pain in her neck and shoulder when lifting equipment at work. Dr. Harbach diagnosed her with bilateral shoulder impingement and he determined it was caused after performing her work duties. Dr. Aviles diagnosed a full thickness rotator cuff tear and indicated that it was not related to work. Dr. Davick indicated that claimant's work was a substantial and material causative factor in both rotator cuff tears. The Deputy found that claimant's work duties caused her bilateral shoulder injuries and found Dr. Davick's opinion to be most consistent with claimant's testimony and work duties. The commissioner affirmed. The district court reversed and read Dr. Davick's medical opinion to mean the relationship between the frequent lifting at work and the injury was only a possibility. The Court of Appeals reversed and awarded benefits for bilateral shoulder injuries. The court noted that the commissioner is responsible for determining the weight to be given expert testimony and the commissioner in this case gave Dr. Davick's opinion greater weight than the competing experts.

EXPERT TESTIMONY

Des Moines Public Schools v. Hildreth by Hildreth, 965 N.W.2d 196 (Final Publication Decision Pending) (Iowa Ct. App. 2021)
June 2021 Decision by the Court of Appeals

District Court reversed the agency's award of WC death benefits, finding that the commissioner's decision was unsupported by substantial evidence.

The District Court's reversal was based upon an expert report that they deemed should be excluded from the analysis, as the expert's opinions were not made 'to a reasonable degree of medical certainty'.

Specifically, the district court excluded the expert opinion of Dr. Miller from its substantial evidence analysis and concluded, Without that evidence, there is insufficient evidence in the record to support the commission's conclusion that the stroke that claimed Mr. Hildreth's life in October 2013, was causally related to the concussion he sustained in August 2011. The district court's reasoning was based on its contention that the studies and theories Dr. Miller relied upon in forming his opinion were "not to a reasonable degree of medical certainty."

The Court of Appeals concluded the District Court's reversal was improper both because in establishing medical causation, phrases like 'to a reasonable degree of medical certainty' are not required, and because it was not the District Court's role on Judicial Review to weigh the credibility of the experts; this is a responsibility that is vested with the agency.

"Buzzwords like 'reasonable degree of medical certainty' are [sic] not necessary to generate a jury question on causation." "A lack of absolute certainty [in an expert's opinion] goes to the weight of the expert's testimony, not to its admissibility." "[T]he determination of whether to accept or reject an expert opinion is within the 'peculiar province' of the commissioner."

The district court's inquiry on judicial review is "closely and strictly circumscribed." *Morrison*, 434 N.W.2d at 876. An opposing expert's testimony explaining the limitations of certain types of methodology and an author's acknowledgment of the need for additional research into a particular medical field does not warrant the exclusion of an expert's testimony by the district court on judicial review. In doing so, the district court engaged in a re-weighing of the credibility of the experts and supplemented its judgment for that of the commissioner. "[T]he court's review is not de novo. The court must not reassess the weight of the evidence because the weight of the evidence remains within the agency's exclusive domain." *Robbennolt v. Snap-On Tools Corp.*, 555 N.W.2d 229, 234 (Iowa 1996).

On judicial review it is not the district court's role to weigh the credibility of the experts before the commissioner; the legislature has vested this responsibility with the commissioner. "Public interest demands that judicial hands must be kept off administrative judgment calls." *Morrison*, 434 N.W.2d at 876; *Sellers v. Emp. Appeals Bd.*, 531 N.W.2d 645, 646 (Iowa Ct. App. 1995) ("The administrative process presupposes judgment calls are to be left to agency. Nearly all disputes are won or lost there.").

PPD ENTITLEMENT

Snitker v. Seabright Ins. Co., 965 N.W.2d 204 (Iowa Ct. App. 2021)
6/16/21: Court of Appeals affirms Commissioners' finding of 40% industrial disability.

In February of 2013, Claimant slipped twice on ice and fell while working for Defendant as a car salesman. Claimant underwent surgical intervention for her back injury, with the dispute centered around the extent of industrial disability. At hearing, Defendants had presented evidence demonstrating that Claimant had the residual functional capacity for work as well as vocational evidence demonstrating the existence of jobs claimant could perform. Claimant presented countervailing evidence, including restrictions the placed her in the light duty category.

The Commissioner found that claimant had not demonstrated permanent total disability, noting, among other things, that claimant's social security disability application had not been approved until she added a mental component (not a part of the WC claim) to that application. Claimant argues that this language was key to the decision of the agency and were "completely wrong."
On Appeal, the COA affirmed the decision, holding that, while the Commissioner misinterpreted the social security decision, there was substantial evidence to support the Commissioner's finding of 40% ID. As such, the decision was not irrational, illogical, or wholly unjustifiable.

Pesicka v. Snap-On Logistics Company, 965 N.W.2d 638 (Iowa Ct. App. 2021)
July 2021 Court of Appeals Decision

Review-Reopening action wherein Claimant asserted that because he had all five toes on his right foot amputated, he should receive compensation for the loss of each of the toes- a minimum of 100 weeks of partial permanent disability compensation, as section 85.34(2) allows for forty weeks for the loss of the great toe and fifteen weeks each for the loss of the other toes.

The deputy commissioner, the commissioner, and the district court all found that as the previous settlement was for his right leg and the stipulation in the hearing report was that the injury was to the right leg, Pesicka was unable to claim an award under the paragraphs of section 85.34(2) pertaining to the loss of toes. He was bound by the previous settlement and written stipulation that the injury was to the right leg. The court of appeals agreed.

Masterbrand Cabinets v. Simons, 967 N.W.2d 224 (Iowa Ct. App. 2021)
9/22/21: Court of Appeals affirms industrial disability and penalty benefits.

Claimant suffered an injury to his right quadriceps tendon, which caused a loss of range of motion and pain in his hip. Defendant's medical expert opined that Claimant's injury was limited only to the right thigh and knee. At hearing, the Commissioner found Plaintiff's experts more credible and awarded industrial disability. The District Court affirmed.

On appeal, Defendant argued Claimant's injury was a scheduled member. The COA, in affirming the lower court, stated that Defendant's "miserly reading of the statute contradicts the purpose of the workers' compensation statute." The COA held that, when the resulting impairment is to the body as a whole, that is sufficient evidence for a finding of industrial disability.

MENTAL INJURY

Tripp v. Scott Emergency Communication Center and IMWCA (Currently on Appeal to Supreme Court)
6/11/21 – District Court affirms denial of benefits

Claimant was working as a 911 operator when she took a disturbing call about an infant death with a crying mother. Claimant alleged that the call was "unexpected" and "unusual." Claimants coworkers testified that the call was unusual, unexpected, or sudden. Claimant filed an Application for Arbitration and Medical Benefits, alleging a mental-mental injury sustained on September 30, 2018, at work. Defendant denied Claimant sustained a mental injury arising out of and in the course of her employment, as well as the nature and extent of any benefits to which she would be entitled. The Deputy found Tripp failed to carry her burden of proof that she sustained an injury that arose out of and in the course of employment. Accordingly, she was not entitled to any workers' compensation benefits. Tripp filed a Motion for Rehearing and Modification of Order, which SECC and IMWCA resisted. The Deputy denied Tripp's Motion. The Commissioner affirmed both the Arbitration Decision and Ruling on Application for Rehearing in their entirety. Tripp then filed a Petition for Judicial Review.

The District Court entered an Order on Judicial Review affirming the Commissioner's decision in its entirety. The DC stated, "In determining whether a particular event is unexpected or unusual, the Commissioner must first establish a baseline of what is expected or usual. As every individual's day-to-day life is unique, this baseline seems to be most appropriately drawn by looking to the unique features of each particular claimant's experiences – including their ordinary workplace activities."

The Commissioner found Tripp did not sustain a compensable purely mental injury ("mental-mental injury") because she did not satisfy the test for legal causation set forth in *Brown v. Quik Trip Corp*., 641 N.W.2d 725 (2002). Tripp argues the Commissioner erred as a matter of law when he concluded the legal causation test for mental-mental injuries set forth in Brown is a subjective standard.

Tripp further urges the Supreme Court to modify or overturn the Brown standard for mental injuries resulting in PTSD because the test is incompatible with modern medical understanding of PTSD and results in a harsh, unjust, and unintended denial of benefits to workers suffering from PTSD. Finally, Tripp argues the Commissioner's decision is not supported by substantial evidence.

SECTION 85.21

American Home Assurance v. Liberty Mutual Fire Insurance, 965 N.W.2d 633 (Iowa Ct. App. 2021)
7/21/21 – Court of Appeals reverse and remands

Claimant filed for workers' compensation benefits and was awarded those benefits against American Home, which American home paid. Claimant later filed a review-reopening petition, at which point American Home discovered it was not the insurer on the claim as of the time of injury. American then filed an application for payment of benefits under 85.21. American Home later filed a petition for contribution under section 85.21, seeking repayment of all benefits paid from Liberty Mutual, the insurer on the claim as of the time of injury. Liberty argued that they were only responsible for benefits paid after an 85.21 order had been issued.

The deputy found Liberty was on the hook for all benefits paid. The Commissioner partially reversed, finding that "because American Home failed to seek an Iowa Code section 85.21 consent order prior to the arbitration hearing, Liberty Mutual is not liable for contribution to American Home for benefits ordered to be paid and paid pursuant to the arbitration decision." The District Court reversed, finding that there was no time limitation on seeking reimbursement under section 85.21.

The Court of Appeals first noted that the Commissioner had issued numerous decisions over the years finding that contribution and reimbursement was dependent on an insurer filing and obtaining an order under section 85.21. The COA concluded that "the Commissioners actions relative to section 85.21 lead us to conclude that the Commissioner is clearly vested with the authority to interpret section 85.21." Therefore, review was dependent on whether the decision of the Commissioner was irrational, illogical or wholly unjustifiable. Assuming the COA was wrong on this point, the COA also decides to review the case on whether the actions of the commissioner were legally erroneous.

The COA reviewed section 85.21 and concludes that the Commissioner's authority in this area is broad. The opinions on this section did not stand for the proposition that the Commissioner is authorized to approve an insurer's reimbursement claim without considering when it was filed. Under section 85.21(3), an order regarding reimbursement will be entered only when liability is finally determined. Although American Home made its last payment in 2013, it did not seek

reimbursement until 2016. The court finds that the Commissioner's decision was consistent with precedent and was not irrational, illogical or wholly unjustifiable. The COA reverses the action of the DC and remands to the Agency for further proceedings.

Case is currently on appeal at Supreme Court.

INJURY

Smith v. TPI Iowa, LLC, 965 N.W.2d (Iowa Ct. App. 2021)
7/21/21 – Court of Appeals affirms denial of benefits.

Claimant allegedly suffered a shoulder injury for which she had surgery. Defendants denied the claim based on the report of Dr. Aviles. Claimant sought an IME with Dr. Stoken in which she indicated that Claimant had an impairment that was causally related to the subject injury but did not express an opinion that the subject injury was related to Claimant's employment. The Agency found Claimant had failed to demonstrate an injury that arose out of and in the course of employment.

The Court of Appeals notes that, although Claimant suffered an injury, she failed to provide expert testimony causally connecting her injury to her employment with TPI. Neither Dr. Aviles nor Dr. Sullivan (who performed the surgery) found that Claimant's injury arose out of employment. Dr. Stoken's opinion did not specifically connect the injury to Claimant's work. The COA concluded that substantial evidence supported the decision of the Agency. The COA noted that, even if Dr. Stoken's opinions were found to tie the injury and claimant's work together, there was still substantial evidence to support the decision of the Agency. The denial of benefits was affirmed.

Cufurovic v. Tyson Foods, Inc, 965 N.W.2d 925 (Iowa Ct. App. 2021)
8/4/21 – Court of Appeals reinstated Agency's finding that Claimant's injury was not compensable.

Claimant injured her back while working for Defendant. At hearing, Claimant presented a medical opinion that her injury arose out of her employment. Defendant presented two opinions to the contrary. The deputy found that Claimant's injuries did not arise out of her employment, relying on Defendant's medical experts. The Deputy found Defendant's experts more persuasive because they had the "most accurate work history," whereas Claimant's expert overstated Claimant's lifting duties.

On appeal to the District Court, the Agency's decision was reversed. The Court of Appeals, in reinstating the Agency's decision, held that there was substantial evidence to support it, and it is not the role of the appellate courts to "determine whether evidence supports a different finding."

Tew v. Sparboe Farms, Inc., No. 20-1202 (App. Oct. 6, 2021)
10/6/21 – Court of Appeals affirms denial of benefits

Claimant suffered an injury to his back prior to beginning his work at Sparboe Farms as a result of a motor vehicle accident. In 2016, he began suffering additional pain in his back, which he

ultimately attributed to his work. He reported sleeping wrong to his supervisor and also noted that he fell while mowing his lawn. Claimant did not report his injury as work-related until two months after he began having a recurrence of back pain. The Commissioner found that Claimant's attribution of his back injury to his work was not credible and benefits were denied.

On appeal, Claimant argues that the Commissioner erred in not finding a cumulative injury and claims that the Commissioner did not correctly apply the law to his claim. The Court of Appeals dismisses this argument, finding that although the injury could well have been cumulative, the Commissioner found that it did not arise out of his employment.

The COA also found that the decision was supported by substantial evidence and noted that there was a serious question of Claimant's credibility, given the conflicting reports of injury and that the Commissioner was within his rights in concluding that Claimant was not credible. Because the Commissioner's decision was supported by substantial evidence, that decision was affirmed.

SECTION 85.39 IME

Kern v. Fenchel, Doster & Buck, P.L.C., 966 N.W.2d 326 (Final Publication Decision Pending) (Iowa Ct. App. 2021)
September 2021 Court of Appeals Decision dealing with IME reimbursement.

As part of this appeal, Claimant argued that the cost of her IME report should be reimbursed. The agency relied upon Claimant's IME report, but denied reimbursement under 85.39 because no rating was obtained by Defendants, and denied reimbursement of the report cost because it was not clearly delineated.

Court of Appeals reasoned that Defendants had Claimant submit for an examination for a causation opinion, which amounted to a zero percent impairment rating. Therefore, the exam was reimbursable under 85.39.

Kern received no impairment rating from the evaluation by Dr. Paulson. Instead, Dr. Paulson opined the injuries were not caused by Kern's employment at all. Relying on the language of *Young*, the deputy found that no impairment rating was given at all because Dr. Paulson's evaluation went no further than causation. Thus, the IME with Dr. Bansal was not responsive to a disputed impairment rating and was outside the scope of section 85.39.

Dr. Paulson's report dated August 25, 2016, is clearly a disability evaluation. His determination that Kern's injuries were not caused by her employment with the firm was effectively an opinion she suffered no impairment as a result of her employment. Kern disagreed with that determination and obtained an IME from Dr. Bansal, finding there was permanent disability caused by her employment with the firm. It is worth noting that, ultimately, the commissioner relied on the opinions of Dr. Bansal in finding Kern suffered compensable injuries.

If the section 85.39 requirement that a claimant must receive an impairment rating—as opposed to no rating—from the employer's medical evaluator is read in its narrowest sense, as the district court and the commissioner did and the employer urges in this appeal, the door would be closed

to claimants like Kern who were examined by a doctor chosen by the employer when such examination resulted in a no-disability determination based on no causation.

"The primary purpose of the workers' compensation statute is to benefit the worker and his or her dependents, insofar as statutory requirements permit." *Harker*, 633 N.W.2d at 325 (quoting *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181, 188 (Iowa 1980)). Accordingly, the statutes are construed liberally. *Id.* In this case, Kern presented herself for an examination by Dr. Paulson, a provider of the employer's choosing. *See* Iowa Code § 85.39. Although Dr. Paulson did not use the words "zero" or "no" disability, the clear effect of his no-causation determination was a finding of no compensable permanent disability. Kern disagreed and thought such a determination was "too low." If we read section 85.39 liberally to benefit the worker, the next logical step was for Kern to have an IME, seeking evidence of permanent disability, which can only be made if there is also a causation determination, typically done in the same examination. In fact, there can be no disability determination arising out of a disability evaluation without a determination there was causation. Kern's request that the employer pay for that evaluation is consistent with the statutory procedural requirements of section 85.39 and also promotes an appropriate balance of the interests of each party.

Court of Appeals remanded the issue as to the cost of preparing the report in light of the finding that the deputy improperly denied the IME reimbursement.

DEATH CLAIM

Jackson v. Bridgestone Americas Tire Operations, No. 21-0017 (App. Dec. 15, 2021)
12/15/21: COA affirms denial of death benefits for Claimant's suicide.

Claimant a 28-year employee of Defendant who loved his job and had only missed 3 days of work. After committing insubordinate acts and lying about said acts, Claimant was suspended for a cooling off period and shortly thereafter fired. Plaintiff was previously diagnosed with major depressive disorder and anxiety disorder, for which he treated with psychotherapy. Hours after Claimant was terminated, he attempted suicide by locking himself in a garage with his car and thereafter committed suicide by hanging.

Dr. Gallagher issued opinion finding the death related to employment. At hearing, the Deputy found that Dr. Gallagher's opinion was based on incomplete information and that Claimant's mental health conditions were "rooted in personal issues."

On appeal, the COA affirmed, finding that sufficient evidence showed Claimant's estate failed to show factual or legal causation.

Regarding factual causation, Claimant's estate claimed that Dr. Gallagher's opinion, when read as a whole, demonstrates that (1) Claimant suffered a mental injury as a result of the firing and (2) the mental injury caused him to take his own life. The COA held that Claimant's mental injury was not from "on the job stressors" but rather from his "love of the job." As such, it concluded Claimant's estate didn't meat the burden of showing "the job caused the mental injury."

Regarding legal causation, Claimant's estate claimed that Claimant's devotion to the job made his termination "extreme punishment," placing him in a unusual circumstance compared to similarly situated workers. The COA rejected the reasoning, holding that there was no evidence of other employee's reaction to termination, such that there was no evidence that Claimant's stress was of greater magnitude or "unusual" when compared to other employees.

REVIEW-REOPEN

ABF Freight System Inc. v. Hilliard, No. 21-0855 (Iowa Ct. App. Jan. 27, 2022)

Claimant filed a request for review-reopening and was awarded an additional 20% by the deputy and commissioner. The finding was affirmed by the district court. The Court of Appeals affirmed the additional 20% and held that this finding was not irrational, illogical or wholly unjustifiable. The court noted that the agency's finding was not to be overturned unless irrational, illogical or wholly unjustifiable. The employer argued that there had been no changes in claimant's physical condition and argued that his doctor set no restrictions. The court found there was substantial evidence in the record to support that claimant's physical condition had changed. Claimant's physician opined that claimant's condition had declined since his surgery. The physician also explained that he did not impose restrictions upon claimant because they don't work and that he generally does not impost them unless absolutely necessary.

Green v. North Central Iowa Regional Waste Authority, No. 21-0490 (Iowa Ct. App. March 2, 2022)

The commissioner concluded that claimant failed to demonstrate a permanent injury arising out of employment. The district court affirmed. Claimant filed a petition for review-reopening asserting permanency. The employer argued that claimant could not relitigate her claim for permanency and filed a motion for summary judgment. The deputy granted the motion and the commissioner affirmed. The Court of Appeals reversed the commissioner's decision in favor of the employer. The Court of appeals found that defendants' argument that a prior finding of non-permanency bars a review-reopening action is not supported by caselaw or section 86.14. The court noted that review-reopening is available even when, as here, there is only an award of medical benefits.

PTD

Earling Grain and Fee v. Martin, No. 21-1446 (Iowa Ct. App. March 30, 2022)

In this case the Court of Appeals affirms permanent total disability award. The commissioner found Claimant to be permanently and totally disabled, which was contrary to the employer's position that Claimant had not reached MMI. The decision of the agency was affirmed because the agency had substantial evidence to support its findings that Claimant had reached MMI. On appeal, the Court noted that its review was limited and that the job of weighing the evidence was one for the commissioner.