APPELLATE CASE LAW UPDATE

Case Law from the Iowa Supreme Court and Iowa Court of Appeals
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I. IOWA SUPREME COURT

APPORTIONMENT AND PERMANENT TOTAL DISABILITY

JBS Swift & Co. and American Zurich Ins. Co. v. Ochoa, 888 N.W.2d 887 (December 30, 2016)

Background: The issue was whether Iowa workers' compensation law prohibits an employee from collecting both permanent partial disability benefits and permanent total disability benefits at the same time when the employee suffers successive injuries at the same workplace. Claimant filed two workers' compensation petitions against Employer and its workers' compensation insurance carrier. The first petition alleged a whole person cumulative hernia injury occurring on or about February 24, 2011. The second petition alleged a whole person cumulative injury to the neck and right shoulder occurring on or about December 15, 2011. The deputy worker's compensation commissioner found the injuries arose out of employment, that the claimant had sustained a seventy percent permanent partial disability as a result of the hernia injury and that the neck and shoulder injury resulted in permanent total disability. The deputy ordered the Employer to pay the Claimant permanent partial disability benefits for the hernia injury commencing June 14, 2011 and to pay Claimant permanent total disability benefits commencing December 15, 2011. However, significantly, the deputy indicated that "[t]he permanent partial disability benefits...for the February 24, 2011 injury end at the commencement of this permanent total disability award." Therefore, the deputy's award eliminated what would otherwise have amounted to overlapping partial disability benefits and total disability benefits.

Claimant cross-appealed the deputy's decision to the Commissioner. Claimant asked that the awards "be allowed to run concurrently...to the extent the two awards overlap." The Commissioner upheld Claimant's cross-appeal. The Commissioner concluded that Claimant's permanent partial disability payments should not have terminated as of the date when her permanent total disability payments commenced. The Commissioner ordered Employer to pay a full 350 weeks of permanent partial disability benefits commencing June 14, 2011 and permanent total disability benefits commencing December 15, 2011 meaning Claimant would receive over six years of overlapping weekly benefits-substantially in excess of Claimant's per week earnings when she stopped working for Employer. The District Court denied judicial review of the Commissioner's decision on the ground that a permanent partial disability award and a permanent total disability award could not be apportioned under Iowa Code section 85.34(7). Employer appealed and its appeal was affirmed by the Iowa Court of Appeals. The Iowa Supreme Court granted Employer's application for further review.

Key Holding: Affirmed. The Supreme Court held that Iowa Code section 85.34(3)(b) as worded prohibits an overlapping award of permanent total disability benefits for an injury only if that injury is already the basis for permanent partial disability benefits. In the event that "same injury" produces a permanent total disability, the employer is entitled to offset any permanent partial disability benefits. However, in this case, the disabilities were caused by separate and successive injuries; therefore, Iowa Code section

85.34(3)(b), on its face, does not prohibit Claimant from drawing compensation for permanent partial disability and permanent total disability concurrently so long as the benefit awards do not arise from the same injury.

AUTHORIZATION OF CARE

Ramirez-Trujillo v. Quality Egg, L.L.C. and Selective Ins. Co. of America, 878 N.W.2d 759 (April 15, 2016)

Background: Claimant sustained an accepted back injury at work and Employer authorized care. Employer paid for the costs of the care the employee received to treat the back injury through September 30, 2009. Claimant brought a workers' compensation claim seeking reimbursement of medical expenses she incurred for additional back treatment between May 2010 and April 2011 and workers' compensation benefits for the same period. Employer argued it did not authorize the medical expenses Claimant incurred between May 2010 and April 2011. Employer also maintained the expenses did not have a causal connection to the compensable injury. The Commissioner concluded the treatment Claimant received between May 2010 and April 2011 was not causally related to the work injury. However, the Commissioner held the Employer was nonetheless liable for the claimed medical expenses because the Employer failed to notify the Claimant it was no longer authorizing care as required by Iowa Code section 85.27(4). Both parties sought judicial review. The District Court reversed in part, concluding the Commissioner misinterpreted section 85.27(4). The District Court found Employer reasonably believed Claimant had recovered from the work injury and would not seek further care for that injury after September 30, 2009. The District Court also found Employer did not receive notice Claimant was seeking further care after that date for conditions related to the work injury. Therefore, the District Court concluded Employer was not liable for the expenses Claimant incurred after September 30. Both parties appealed and the case was transferred to the Iowa Court of Appeals. The Court of Appeals reversed the District Court in part, concluding the District Court erroneously interpreted section 85.27(4). The Court of Appeals reversed the portion of the District Court judgment reversing the Commissioner's determination that Employer was liable to Claimant for the expenses she incurred from May 2010 through April 2011. The Iowa Supreme Court granted further review.

Key Holding: The Court of Appeals' opinion is vacated in part and remanded. The Iowa Supreme Court concluded "section 85.27(4) limits employer liability for unauthorized care to expenses incurred seeking care related to the medical condition or conditions for which the employee sought care in the aftermath of a workplace injury and upon which the employee's claim for workers' compensation benefits is based." On an issue of first impression, Employer who had not provided notice that it no longer authorized medical care could establish that it was not liable for expenses by proving that employee knew or should have known that care was not authorized.

"We simply do not believe section 85.27(4) requires an employer to notify an employee it is no longer authorizing care when the employee knows or reasonably should know the

care sought is for a condition unrelated to a compensable workplace injury or the prior authorization is no longer in effect....Accordingly, we conclude an employer may establish it is not liable for the cost of care an employee received from an authorized medical provider if it proves by a preponderance of the evidence the employee knew or reasonably should have known either that the care was unrelated to the medical condition or conditions upon which the employee's claim for workers' compensation benefits is based or that the employer no longer authorized the care the employee received at the time the employee received it." Importantly, "[a]n employer may avoid liability by showing the employer gave the employee actual notice of a change in authorization as required by section 85.27(4)." "We conclude an employer may prove it is not liable for the cost of care an employee received from an authorized medical provider despite the employer's failure to give the notice section 85.27(4) requires under limited circumstances."

In determining whether the employer has proven by a preponderance of the evidence the employee knew or reasonably should have known it no longer authorized the care the employee received at the time the employee received it, the Commissioner shall consider the following facts and circumstances:

(1) The method in which the employer communicated to the employee that care was authorized throughout the period during which the employer concedes care was authorized;
(2) The actual communications between the employer and employee throughout that period and thereafter concerning the injury, the care, and the costs of the care;
(3) Any communications between the employee and medical providers;
(4) How much time passed between the date the employer authorized care and the date the employee sought the disputed care;
(5) The nature of the injury for which the employer authorized care;
(6) The nature of the care the employee received, including the overall course of the care and the frequency with which the employee sought or received care throughout the period during which the employer concedes care was authorized and thereafter; and
(7) Any other matters shown by the evidence to bear on what the employee knew or did not know with respect to the question of whether the employer authorized the care sought when the employee received it.

If the employer proves the employee knew or reasonably should have known the employer did not authorize further care when he or she received care from a previously authorized provider, the employer is not liable for the cost of the unauthorized care.

AVERAGE WEEKLY WAGE AND PPD COMMENCEMENT

Evenson v. Winnebago Ind., Inc. and Sentry Ins. Co., 881 N.W. 2d 360 (June 3, 2016)

Background: Claimant filed a petition seeking workers' compensation benefits related to a left elbow injury. Among other benefits, the deputy commissioner awarded Claimant healing period benefits between April 14, 2011 and June 14, 2011. The deputy found Employer paid all healing period benefits owed up to the time of Claimant's surgery in September 2011 but found additional healing periods owed for subsequent time off work were both delayed and insufficient in amount and therefore awarded penalty benefits. The deputy also concluded that Employer's contributions to Claimant's 401k plan were a fringe benefit and therefore not included in the calculation of average weekly gross earnings. Employer and Insurance Carrier appealed and Claimant cross-appealed to the Commissioner. The Commissioner affirmed on all issues. Claimant sought judicial review which the District Court denied. Claimant appealed to the Iowa Supreme Court.

Key Holding: Affirmed in part and reversed in part. The Iowa Supreme Court held that an employer's matching contributions to an employee's 401k plan are not weekly earnings for purposes of calculating workers' compensation weekly benefits. The Court stated: "It is clear from the ordinary meaning of the words salary, wage, and earnings that an employer's matching contribution to an employee's 401k plan is not meant to be included in weekly earnings for purposes of our workers' compensation statute. When we read the dictionary definitions in conjunction with the exclusionary language contained in our statute, we conclude our legislature intended to exclude employer contributions to 401k plans from the definition of gross earning."

A majority of the Court also concluded that because the first healing period ended on September 20, there is not substantial evidence in the record to support the Commissioner's finding the healing period benefits terminated in November 2011. "When there are multiple healing periods, we must determine whether PPD begins to run from the end of the first healing period or whether the fact finder may choose among the multiple healing periods that are supported by substantial evidence, as occurred here. We hold that the statute clearly states the healing period lasts until whichever situation *occurs first*....In this case, the first of the three alternative events to occur was [Claimant's] return to work in September 2010." Therefore, the date of Claimant's first return to work established the end of the healing period and the commencement of PPD benefits because it was the earliest of the three triggering events prescribed in section 85.34(1). The Supreme Court also concluded that *Presthus v. Barco, Inc.*, 531 N.W.2d 476, 480 (Iowa Ct. App. 1995, was wrongly decided-the fact that TPD benefits were paid to Claimant after he first returned to work following the injury does not delay commencement of Employer's obligation to pay PPD benefits. PPD benefits can be owed for periods during which a claimant was paid temporary partial disability.

II IOWA COURT OF APPEALS

ALTERNATE MEDICAL CARE

Newt Marine Service DBA and Liberty Mutual Ins. v. Abitz, 885 N.W.2d 830 (TABLE), 2016 WL 4036185 (July 27, 2016)

Background: Claimant sustained injuries to his right shoulder in 2013 and 2014. Claimant requested that he receive alternate medical care from a doctor specializing in shoulder injuries at the University of Iowa Hospitals and Clinics. The deputy commissioner issued a decision finding Claimant had met his burden of showing Employer failed to provide medical treatment reasonably suited to fully treat Claimant's work injuries and authorizing the specialist to evaluate and treat Claimant's shoulder injury. The District Court denied Employer's judicial review petition. Employer appealed to the Iowa Court of Appeals.

Key Holding: Affirmed as substantial evidence supports the deputy's finding and the ruling is not irrational, illogical, or wholly unjustifiable. "Although there is also evidence to the contrary, a reasonable person could find the medical care provided by Newt Marine has not been effective. Abitz is now without further treatment options through the medical care authorized by Newt Marine because Dr. Field has found Abitz reached maximum medical improvement. Therefore, the medical treatment provided by Newt Marine-or the lack thereof-is less extensive than the care Abitz requests, and the deputy commissioner was justified in authorizing alternate medical care."

ABF Freight System, Inc. and Ace Am. Ins. Co. v. Veenendaal, 889 N.W.2d 701 (TABLE), 2016 WL 6902874 (November 23, 2016)

Background: A deputy commissioner determined that Claimant sustained a work-related injury in 2006. The deputy commissioner found that Claimant was advised by Employer's claims administrator that surgery to treat the injury would not be covered due to the doctor's opinion that his herniated disc was not related to the work injury. Claimant consequently did not have the surgery. The deputy also awarded PPD benefits. The deputy's decision was affirmed on intra-agency appeal and on judicial review. Claimant subsequently petitioned for review-reopening where he sought various forms of relief, including medical benefits. After hearing on the review-reopening petition, a deputy commissioner found that the need for surgery was related to the 2006 work injury and ordered employer and its carrier to authorize surgery "promptly". The Commissioner affirmed the order for surgery. The District Court affirmed on judicial review. Employer and its carrier appealed to the Iowa Court of Appeals.

Key Holding: Affirmed. The Commissioner's findings and determination are supported by substantial evidence.

Westling v. Hormel Foods Corp., 2017 WL 108572 (TABLE) (January 11, 2017)

Background: Claimant worked for Employer for thirty years. During that time, Claimant twice injured his right knee at Employer's meatpacking plant and received workers' compensation benefits for those injuries, including ongoing medical benefits. Claimant underwent several surgeries on his knee, including one in 1998 performed by Dr. Crane. Claimant received a total knee replacement in 2005 by Dr. Wolbrink. Claimant retired from Employer the following year. However, Claimant continued experiencing problems with his knee. Employer approved an appointment with Dr. Crane. On October 19,

2011, Dr. Crane examined Claimant's knee and ordered and reviewed x-rays. Dr. Crane offered the following impression and recommendations:

> I would not suggest a revision at this point-with the lucency medial there is a potential it could fracture....With his previous complications I would suggest he wait until he has more trouble to consider revision....He should be seen in about [two] years with an x-ray.

Claimant was dissatisfied with Dr. Crane's recommendations and requested a referral to a different orthopedic physician which Employer denied. Instead, Employer had Dr. Crane's recommendations reviewed by a physician at the University of Iowa who concurred with Dr. Crane's recommendations. Claimant then filed a petition for alternate medical care with the Commissioner seeking the referral to a different orthopedic physician. The deputy commissioner determined Claimant had not met his burden to prove the medical care provided by Employer was unreasonable or ineffective and denied Claimant's petition. The Commissioner affirmed. On judicial review, the District Court remanded to the Commissioner to set forth the facts relied upon in determining Claimant had failed to meet his burden of proof on the alternate medical care issue. The Commissioner again affirmed with additional reference to the evidence presented at hearing. The District Court then affirmed on judicial review. Claimant appealed to the Iowa Court of Appeals.

Key Holding: Affirmed as the Commissioner's decision denying alternate care complied with the law and was supported by substantial evidence. The Iowa Court of Appeals stated:

> We disagree that as a matter of law a diagnostic appointment-where the doctor takes a patient history, performs a clinical examination, orders new x-rays and compares those images to prior x-rays, and considers this particular patient's previous complications before recommending against revision surgery at the present time and scheduling additional x-rays in two years-cannot be considered treatment under section 85.27(4)....
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> [Claimant] did not present evidence to the commissioner that the wait-and-see approach advocated by Dr. Crane was unreasonable. [Claimant] offered no proof Dr. Crane refused to give "necessary treatment." In fact, the commissioner relied on [Employer]'s "second opinion regarding the reasonableness of Dr. Crane's medical treatment" in deciding "the treatment offered to claimant was reasonable care." Like Dr. Crane, [the University of Iowa physician] did not recommend further surgery based on the current condition of the knee, instead recommending follow-up x-rays every year or two....

Penny v. Whirlpool, 2017 WL 512601 (TABLE) (February 8, 2017)

Background: Claimant filed a petition for alternate medical care with the Commission seeking transfer of care for his accepted back injury to a neurosurgeon. Following an evidentiary hearing, the Commission denied the petition because it could not find the care offered by Employer to be unreasonable. The District Court denied the judicial review petition. Claimant appealed to the Iowa Court of Appeals.

Key Holding: Affirmed. Claimant "has failed to show the commission's decision was based on an erroneous legal interpretation, was inconsistent with its prior precedent, or was based on a determination of fact that is not supported by substantial record evidence."

AVERAGE WEEKLY WAGE

Delire v. Key City Transport, Inc., 2016 WL 7393935 (TABLE) (December 21, 2016)

Background: Employer hired Claimant to work as an over-the-road truck driver to make long-haul trips from Iowa to California and back. Claimant's compensation was calculated based on mileage plus drop fees. Claimant commenced employment with Employer on May 23, 2008. During Claimant's first week with Employer, he did not make any long-haul runs. He did make several local runs. In his first week, Claimant earned $257.04 in mileage and $155 in drop fees, for a total of $412.04. The next week, Claimant traveled to California and back. Claimant earned $1,254.26 in mileage and $40 in drop fees for a single drop, for a total of $1,294.26. In his third week of work, Claimant made a second trip to California and back. This time, he earned $1,425.62 in mileage and $240 in drop fees, for a total of $1,665.62. The injury at issue occurred during this third trip. During the first appeal of this case, the Iowa Court of Appeals affirmed the District Court's affirmance of the Commissioner's award of benefits but reversed the agency's calculation of weekly earnings finding it to be irrational, illogical and unjustifiable. The Iowa Court of Appeals concluded "[t]he commissioner's use of hypothetical annual earnings to obtain weekly earnings cannot be upheld as rational, logical, or justifiable when the acceptable methods of determining [Claimant]'s weekly earnings are set forth by statute." The Iowa Court of Appeals remanded the case to the agency to calculate weekly earnings in accord with the statute based on the existing record.

On remand, given there was no evidence of "the earnings of other employees" in the record and Claimant was employed fewer than thirteen weeks, the Commissioner interpreted Iowa Code section 85.36(7) to require the calculation of Claimant's average weekly earnings based on the compensation actually paid Claimant. The Commissioner did so and found Claimant's weekly earnings were $1,026.14. The District Court affirmed on judicial review. Claimant appealed the average weekly wage calculation to the Iowa Court of Appeals.

Key Holding: Affirmed as the agency decision is supported by substantial evidence and it was not irrational for the Commissioner to calculate Claimant's weekly earnings according to the applicable statute and to comply with the Iowa Court of Appeals' mandate. "The commissioner calculated [Claimant]'s actual average weekly earnings based on his historical earnings. This is all the statute allowed. Our case law provides this method of determining weekly earnings is fair."

CAUSATION

Pella Corporation v. Marshall, 883 N.W.2d 538 (TABLE), 2016 WL 1358956 (April 6, 2016)

Background: The sixty-three year old Claimant was struck by a forklift at work. The impact threw him about seven feet. He landed on his hands, right arm, right side and face. Claimant was subsequently seen by Dr. Thurston, the company doctor and occupational physician. Almost two weeks after the accident, Claimant complained of pain in his right shoulder for the first time. Dr. Thurston sent Claimant to a physical therapist who could evaluate and treat Claimant's right shoulder. During physical therapy over the next few weeks, Claimant reported that his shoulder only hurt during work and that he felt he has a torn rotator cuff. The physical therapist discharged Claimant from therapy seven weeks after the accident stating he had met all goals and was displaying normal scapular stability. Claimant was later seen by orthopedic surgeon Dr. Neff who ordered an MRI of the right shoulder. The MRI showed "a full thickness rotator cuff tear of the supraspinatus and some tear involving the infraspinatus, as well."

Dr. Neff later authored a letter stating a full thickness rotator cuff tear "can occur naturally, simply with the passage of time" without being related to an injury and such tears are very common in sixty-year-olds. Dr. Neff opined the injury to Claimant's right shoulder was not work-related. Claimant later saw his primary care physician who explained that Claimant had no history of problems with his right shoulder and opined Claimant's rotator cuff tear was caused by the forklift incident and not by advancing age.

Claimant filed a petition seeking worker's compensation benefits on September 3, 2009. Claimant's primary care physician referred Claimant to orthopedic surgeon Dr. Galles who initially opined the forklift incident "was a significant contributing factor to him continuing to have right shoulder girdle pain that has not resolved despite appropriate conservative treatment and modalities for the past year." Dr. Galles found it significant Claimant had seen his primary care physician shortly before the work incident and had "no shoulder pain at all." Dr. Galles operated on Claimant's right shoulder. After a conference with defense counsel, Dr. Galles signed defense counsel's letter stating he could no longer opine the work incident "caused" the rotator cuff tear or "substantially aggravated" any rotator cuff tear. Dr. Epp conducted an IME of Claimant and opined Claimant's rotator cuff injury and surgical repair were "directly and causally related" to the forklift accident.

The deputy commissioner's decision recognized the expert opinions regarding causation were "mixed" and concluded Claimant had failed to prove a nexus between the work

injury and Claimant's surgical condition. Claimant filed an intra-agency appeal challenging the deputy's ruling on causation. The Commissioner reversed the deputy finding that Claimant's right shoulder injury was causally related to the work incident. On judicial review, the District Court remanded the case back to the Commissioner for a "new decision" after making specific credibility findings consistent with the record. After making such credibility findings, the Commissioner concluded "the totality of the record of evidence supports a finding of causation between the workplace injury and [Claimant]'s torn rotator cuff." The Commissioner gave greatest weight to the medical opinions predicated on Claimant's ongoing shoulder pain, the absence of a prior right shoulder condition, and the severity of Claimant's traumatic injury. Specifically, the Commissioner found the initial assessments of Dr. Galles and Dr. Neff and the consistent opinions of the primary care physician and Dr. Epp to be the best and most reliable causation evidence. The Commissioner specifically found Dr. Thurston's view not credible.

Claimant again sought judicial review. The District Court upheld the Commissioner's causation ruling. Employer appealed to the Iowa Court of Appeals.

Key Holding: Affirmed as substantial evidence supports the Commissioner's causation ruling. "As is common in the workers' compensation arena, the commissioner encountered a 'battle of the experts' in Claimant's case....Longstanding authority vests the commissioner with the role of deciding the weight to be given exert medical testimony. [Citation omitted]. Our job is not to reweigh the evidence, but to determine whether substantial evidence supports the causation finding the commissioner actually made...."

Saracevic v. Tyson Fresh Meats, Inc., 888 N.W.2d 902 (TABLE), 2016 WL 6396348 (October 26, 2016)

Background: Claimant's job with Employer required her to repeatedly shave various parts of hog carcasses as they moved down an automated line. Claimant-who is left-hand dominant-developed pain in her left shoulder, arm and fingers. An MRI scan indicated calcific supraspinatus tendonitis. Surgery to excise calcification tendonitis was recommended. Employer denied liability for Claimant's condition. Claimant filed a petition for permanent partial workers' compensation benefits alleging left shoulder and left carpal-tunnel injury due to repetitive work performed at Employer. Both parties submitted competing expert reports on the cause of Claimant's shoulder condition. The deputy commissioner determined that the opinions of Employer's experts were entitled to more weight and concluded that Claimant's shoulder condition was not work-related and, therefore, not compensable. Both the Commissioner and the District Court affirmed. On appeal to the Iowa Court of Appeals, Claimant asserted the Commissioner's application of law to fact was irrational, illogical, or wholly unjustifiable because the video relied upon by Employer's experts was misleading and therefore their opinions were unreliable and should not have been entitled to more weight.

Key Holding: Affirmed. "Although different conclusions could be drawn from the evidence, we conclude there is substantial evidence to support the commissioner's findings and we agree with the district court. Because the commissioner's findings are supported by substantial evidence and its conclusions were not irrational, illogical, or wholly unjustifiable, we affirm."

Monsanto and Indemnity Ins. Co. of N. America v. Delgado, 2017 WL 510949 (TABLE) (February 8, 2017)

Background: Claimant suffered a work-related injury recalling reporting pain to her left wrist, arm, shoulder and neck. Employer stipulated the injury to Claimant's wrist and arm caused temporary disability but denied Claimant suffered a work-related injury to her shoulder and neck. The deputy commissioner found Claimant proved her left wrist, arm, shoulder and neck complaints were causally connected to her work injury. The Commissioner and District Court affirmed the decision. Employer appealed to the Iowa Court of Appeals claiming substantial evidence did not support the Commissioner's findings that Claimant suffered a work-related injury to her left shoulder and the Commissioner's decision is irrational, illogical, and wholly unjustifiable.

Key Holding: Affirmed as "the agency's decision is supported by substantial evidence and is not irrational, illogical, or wholly unjustifiable." The Court of Appeals stated:

> In reaching its decision, the agency carefully assessed the medical evidence as reflected in [Claimant]'s medical records and the opinions of different physicians, including Drs. Tijmes, Ronan, Wilkinson, and Stoken. The agency credited some of the medical opinions over others based on consistent medical records showing pain in [Claimant]'s shoulder and neck throughout her treatment and based on whether the opinions were supported or corroborated by [Claimant]'s testimony-which the agency found to be credible-regarding her symptoms.

ERROR PRESERVATION

Stark Construction and Charles Stark v. Lauterwasser, 888 N.W.2d 902 (TABLE), 2016 WL 6270256 (October 26, 2016)

Background: Claimant was injured while working for Employer in 2009. Claimant filed his claim for workers' compensation benefits against Employer in 2010. After hearing, the deputy workers' compensation commissioner denied benefits finding Claimant was not Employer's employee but was instead a subcontractor. On intra-agency appeal, the Commissioner reversed and Claimant was awarded benefits. Employer sought judicial review from the District Court and the District Court concluded the agency erred in finding Claimant was an employee. The District Court reversed the agency decision finding the agency's conclusion that Claimant was an employee was "illogical". On appeal to the Iowa Court of Appeals, the Iowa Court of Appeals reversed the District

Court concluding substantial evidence supported the agency's factual findings and its application of law to the facts was not irrational, illogical or wholly unjustifiable. The Iowa Court of Appeals remanded the case to the District Court "for consideration of the remaining challenges to the commissioner's award." On remand, the District Court noted the only remaining issue was Employer's claim that Claimant failed to give timely notice of his injury. The District Court stated there was no agency ruling on the lack-of-notice issue but that the issue of the timeliness of notice was a factual determination. The District Court then remanded the matter to the agency "for issuance of a decision on [Employer]'s argument that [Claimant] failed to give notice of his work injury." Claimant appealed to the Iowa Court of Appeals claiming the District Court's remand to the agency was improper because the lack of agency ruling on this issue is indicative of Employer's failure to preserve error on the issue of its notice defense for judicial review.

Key Holding: Reversed. "We agree with [Claimant] the district court erred in remanding the case to the agency for a ruling on an issue previously presented to the agency. In light of Employer's failure to preserve error by neglecting to file a motion for rehearing when the agency did not rule on its lack-of-notice defense prior to filing the petition for judicial review, the district court should have denied Employer's petition for judicial review and affirmed the agency's final decision awarding benefits to Claimant." "When an agency fails to address an issue in its ruling and a party fails to point out the issue in a motion for rehearing, we find that error on these issues has not been preserved....we decline to entertain issues not ruled upon by an agency when the aggrieved party failed to follow available procedures to alert the agency of the issue."

INDUSTRIAL DISABILITY

Polaris Industries, Inc. v. McCormick, 885 N.W.2d 221 (TABLE), 2016 WL 3276277 (June 15, 2016)

Background: Claimant sustained a workplace injury to her right shoulder and elbow. Claimant's IME physician strongly recommended that Claimant not engage in the following:

> [L]ifting above shoulder height, repetitive abduction or lifting of the arm at the shoulder and repetitive flexion and extension at the wrist, but perhaps somewhat more importantly rotation across the elbow and wrist, as well as repetitive hyperextension or grip activity on the right. She should be careful to avoid exposures to extreme temperature and/or vibration.

Claimant's unrebutted testimony was that she was unable to work at any of her prior jobs given limitations to her right upper extremity. Employer appealed to the Iowa Court of Appeals claiming there was not support for the Commissioner's finding of permanent work restrictions and that Claimant failed to prove she sustained an industrial disability because Claimant returned to full-time employment and is "earning more today than she did at the time of her alleged injury."

Key Holding: Affirmed as the Commissioner's finding of permanent impairment and twenty percent industrial disability are both supported by substantial evidence. "[Claimant] is not required to prove an actual reduction in earnings to establish a loss of earning capacity."

Polaris Industries, Inc. v. Quastad, 886 N.W.2d 106 (TABLE), 2016 WL 4384744 (August 17, 2016)

Background: The Commissioner found Claimant suffered a thirty-five percent industrial disability. The District Court affirmed the Commissioner's award. Employer appealed to the Iowa Court of Appeals contending "the commissioner erred in awarding Quastad industrial disability benefits because Quastad returned to employment without restriction."

Key Holding: Affirmed noting the Court's "review of a workers' compensation decision is limited" and that "nearly all disputes are won or lost at the agency level." "Like the district court, we cannot conclude the agency's decision is irrational, illogical, or wholly unjustifiable. 'The commissioner may find there has been a diminution in earning capacity, even when there has not been a diminution in actual earnings."

Polaris Industries, Inc. v. Reed, 889 N.W.2d 244 (TABLE), 2016 WL 6652378 (November 9, 2016)

Background: Claimant was injured at work when a tote box filled with motorcycle fender rails weighing approximately 170 pounds fell thirty-five feet, striking her on the head and back and knocking her to the ground. Claimant returned to her preinjury job about a week later gradually increasing the time spent at work over the next few weeks until she was able to work full days. The treating doctor did not assign any work restrictions though Claimant testified at hearing that she is now in significant and constant pain and has reduced her work day by two to four hours each day. The deputy commissioner awarded Claimant ten percent industrial disability. On intra-agency appeal, the Commissioner increased the award to twenty percent industrial disability. The District Court affirmed the Commissioner's decision on judicial review. Both parties appealed to the Iowa Court of Appeals.

Key Holding: Affirmed. "We agree with the district court's decision that the facts of *Wright* and the facts of the other agency cases cited by Polaris are sufficiently distinguishable from the facts of this case, such that an award of twenty percent industrial disability does not violate Iowa Code section 17A.19(10)(h)....While the commissioner did not specifically articulate its reasons for increasing the industrial disability award from ten to twenty percent, we do not find the agency's decision on industrial disability to be 'irrational, illogical, or wholly unjustifiable' or 'unreasonable, arbitrary, capricious, or an abuse of discretion.'"

INFORMAL DISPUTE RESOLUTION FOR MEDICAL FEES

United Fire & Casualty Co. v. Cedars Sinai Medical Center and Sequetor, Inc., 2016 WL 7403736 (TABLE) (December 21, 2016)[1]

Background: A twenty-two year old working in California for an Iowa company insured by workers' compensation carrier United Fire fell twenty-five feet from scaffolding sustaining catastrophic head injuries. Over the course of the injured worker's 131-day hospital stay, the injured worker had more than twenty surgical procedures and required care from the neurosurgical unit. The California hospital that treated the injured worker eventually discharged the injured worker and submitted a medical bill totaling $5,314,001.96 to United Fire. United Fire submitted the bill to its bill auditor which applied the California Official Medical Fee Schedule in setting the reimbursable amount at $939,455.03. United Fire sent a check in that amount to the California hospital. After receiving this payment from United Fire, the California hospital hired an outside company-Sequetor, Inc.-to pursue recovery of the remaining amount owed on its bill.

Sequetor, on behalf of the California hospital, sought a medical fee determination under the informal dispute resolution process laid out in Iowa Code section 85.27(3) and Iowa Administrative Code rule 876-10.3. Over United Fire's objection, the agency eventually selected the medical fee reviewer nominated by Sequetor to review the medical fee dispute. After United Fire submitted documentation, the selected reviewer issued his opinion that an additional $2,266,089.20 be reimbursed to the California hospital.

United Fire then initiated a contested case proceeding against the California hospital and Sequetor raising issues of standing, accord and satisfaction and reviewer bias. After reviewing the materials provided by the parties, including a competing opinion on the reasonableness of the medical fees offered by an expert for United Fire, the deputy commissioner issued a decision adopting the selected reviewer's fee determination. On judicial review, United Fire renewed the arguments it had raised before the agency and added claims that the Iowa Workers' Compensation Commission compliance administrator did not have authority to select the reviewers, the compliance administrator was biased in selecting the reviewers and the agency erred in allowing the California hospital and Sequetor to submit additional filings. The District Court affirmed on judicial review. United Fire then appealed to the Iowa Court of Appeals.

Key Holding: Affirmed. United Fire did not preserve error on its claims involving the compliance administrator or on its procedural due process claim regarding the inability to submit evidence and brief several legal issues. The selected reviewer did not have a conflict of interest; therefore, the agency did not commit procedural error in retaining the selected reviewer. It was not error for the agency to conclude Sequetor had authority to initiate informal dispute resolution proceedings under rule 10.3. "The agency's interpretation of the term 'provider' as including an agent of a provider was reasonable."

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[1] An application for further review is pending with the Iowa Supreme Court.

United Fire did not prove accord and satisfaction. "We find the medical-fee determination neither irrational nor illogical."

NINETY DAY NOTICE

Ross v. American Ordnance and New Hampshire Ins. Co., 2017 WL 104960 (TABLE) (January 11, 2017)

Background: On or about November 1, 2012, while working at Employer, Claimant told her supervisor she hurt her shoulder. The supervisor asked if she wanted him to call an ambulance or if she wanted to see a doctor but Claimant declined stating she did not think she was "hurt that bad". The supervisor did not fill out an injury report. Claimant later stated she injured her right shoulder that day when a box started to fall off the line and she grabbed it to keep it from falling. Claimant continued to have problems with her shoulder. She saw a doctor two months later and received a cortisone injection. After a discussion with her foreman, an incident report about the November 1, 2012 injury was made on March 14, 2013. Claimant was diagnosed with a torn rotator cuff and surgery was performed on her right shoulder on July 17, 2013.

Claimant filed a petition requesting workers' compensation benefits. Employer claimed Claimant did not give timely notice as required by Iowa Code section 85.23. In a deposition, Claimant testified she told her supervisor, "I hurt my shoulder." However, at hearing, Claimant testified she told her supervisor, "Scott, a box has fallen, I hurt my shoulder." The supervisor testified Claimant told him, "Hey, Scott, my shoulder hurts a little bit." When the supervisor asked if she was all right, Claimant said, "It's just really sore." The supervisor stated he "didn't know for sure" whether Claimant meant her injury was related to her work activities. During this same conversation, Claimant reportedly said that she suffered from arthritis and would need to get a prescription refilled. The supervisor did not ask Claimant whether she was injured while performing her job.

The deputy commissioner found:

> [Claimant] told her supervisor that her shoulder was hurting, but she did not tell him that it was related to her employment....It is not enough for [Claimant] to simply tell her supervisor that she has pain; she needs to tell the employer that she thinks that it is connected to her job, at least in some fashion that would alert the employer that they needed to investigate the work injury. [Claimant] did not do that, and thus her claim must fail.

The Commissioner found:

> [Claimant]'s discussion with [the supervisor] on the day she was injured was not sufficient to tell [the supervisor], or defendant-employer, that her shoulder problem was work-related. It was not

> enough for [Claimant] to simply tell her supervisor she had shoulder pain. [Claimant] needed to tell the employer she thought her shoulder problem was related to her job. [Claimant] needed to alert the employer that it was necessary to investigate a work-related injury. [Claimant] needed to report the injury as work-related on or before January 29, 2013, 90 days after the injury occurred.

The Commissioner concluded Claimant's claim was barred because she did not inform Employer she had a work-related injury within ninety days as required by section 85.23. The Commissioner also concluded the discovery rule did not apply. Claimant filed a petition for judicial review. The District Court affirmed finding there was substantial evidence in the record to support the Commissioner's conclusion Claimant did not tell her Employer she had been injured at work within the ninety-day period. The District Court also found the Commissioner's decision regarding the discovery rule was not irrational, illogical, or wholly unjustifiable because Claimant knew the nature, seriousness, and potential compensability of the injury at the time of the accident. Claimant appealed to the Iowa Court of Appeals claiming the Commissioner improperly required her to tell her supervisor the injury was related to her work.

Key Holding: Affirmed finding the Commissioner properly determined Claimant needed to do more than just tell her Employer her shoulder was sore. "There is substantial evidence in the record to support the commissioner's finding the employer did not have actual knowledge of a reasonable possibility [Claimant]'s injury was related to her work, especially given the credibility findings made by the commissioner. [Claimant] told [her supervisor] her shoulder was sore and did not tell him there was a reasonable possibility her condition was connected to her work."

PENALTY BENEFITS

Polaris Industries, Inc. v. Doty, 2017 WL 362005 (TABLE) (January 25, 2017)

Background: Claimant sustained a right shoulder injury while working at Employer in October 2012. Claimant was referred to orthopedic surgeon Dr. Hough. Dr. Hough examined Claimant in February 2013. An MRI revealed a partial thickness rotator cuff tear prompting Dr. Hough to recommend arthroscopic surgery in March 2013. Employer's claims administrator requested a second opinion with Dr. Blow. Dr. Blow believed Claimant's MRI findings were consistent with her age and not related to her work injury. Dr. Blow could not "relate the need for surgery to her work activities." Dr. Hough disagreed with Dr. Blow's assessment. Dr. Hough reexamined Claimant in August 2013 and again recommended shoulder surgery. Employer served Dr. Blow's report on Claimant by notice of service dated September 18, 2013. Claimant underwent an independent medical examination in March 2014 with Dr. Hines who agreed with Dr. Hough and disagreed with Dr. Blow regarding the permanency of the work-related shoulder injury. The deputy commissioner found Dr. Blow's opinion was "a strain to accept" given Claimant's pain-free condition when hired and unabated shoulder

discomfort after the work injury. The deputy credited the views of Dr. Hough and Dr. Hines finding they were buttressed by Claimant's physical condition, her consistent testimony and the notes of Employer's occupational therapist. The deputy awarded TTD benefits and medical expenses and ordered Employer to pay penalty benefits in the amount of 25% for the wrongful denial of the TTD benefits. The deputy did not believe Dr. Blow's opinion provided Employer a reasonable basis for denying Claimant's claim. The Commissioner reached the same conclusion as the deputy but for a different reason. The Commissioner found Employer could have relied on Dr. Blow's opinion to supply the reasonable basis to deny the TTD benefits but determined the record lacked evidence Employer conveyed to Claimant or her counsel that Dr. Blow's report formed its basis for refusing to pay the TTD benefits. The District Court affirmed on judicial review. Employer appealed to the Iowa Court of Appeals.

Key Holding: Affirmed because the record contains substantial evidence to support the Commissioner's award of penalty benefits. Employer's serving Dr. Blow's report on Claimant, without more, did not satisfy Employer's obligation to convey the basis for denying the TTD benefits. "Part of the employer's burden to show the delay or denial was reasonable is the contemporaneous communication of its basis to the employee. The record does not show [Employer] performed that step here."

PERMANENT TOTAL DISABILITY

Jack Cooper Transport Co., Inc. and California Ins. Co. v. Jones, 883 N.W.2d 538 (TABLE), 2016 WL 1358659 (April 6, 2016)

Background: Claimant had been employed as a truck driver since 1976. Claimant injured his back lifting a skid at work. Claimant had a pre-existing history of back problems, including prior back surgeries. Dr. John Ciccarelli found Claimant had burning sensations across his low back and right buttocks area, which were not present prior to the injury. Dr. David Boarini stated he did not believe Claimant had any significant structural abnormality or permanent problem caused by the work injury. IME physician Dr. Koprivica gave Claimant restrictions, including from "whole body vibration or jarring activities such as operating heavy equipment or commercial driving". Dr. Koprivica gave his opinion that the work injury was the direct and prevailing factor in causing further permanent aggravating injury to Claimant's back. Claimant subsequently resigned from his employment stating he was in too much pain to continue working.

Claimant filed a claim for workers' compensation benefits. The deputy commissioner determined Dr. Koprivica's opinion should be given more weight than Dr. Boarini or Dr. Ciccarelli. The deputy found Claimant suffered permanent disability caused by the work injury noting Claimant now had work restrictions which Claimant did not have before. The deputy found Claimant was permanently and totally disabled. The Commissioner affirmed the finding that Claimant was permanently and totally disabled. The District Court affirmed on judicial review. Employer appealed to the Iowa Court of Appeals.

Key Holding: Affirmed as "[t]he commissioner properly considered the facts and the law in finding [Claimant] was permanently and totally disabled." "While there is contrary evidence in the record, '[we] do not consider the evidence insubstantial merely because we may draw different conclusions from the record.'" "We conclude the commissioner's decision on this issue is not irrational, illogical, or wholly unjustifiable."

Dr. Pepper Snapple Group, Inc. and New Hampshire Ins. Co. v. Jorgensen, 886 N.W.2d 618 (TABLE), 2016 WL 4802724 (September 14, 2016)

Background: Claimant was diagnosed with a "[l]arge disc rupture L4-5 left side as a result of work-related activity." Neither conservative treatment nor two surgeries alleviated his lower back pain. Claimant filed a claim for workers' compensation benefits. The deputy commissioner concluded Claimant was permanently and totally disabled. The deputy found Claimant "was 46 years old" at the time of the hearing, had an 11th grade education, and had a work history of "physically demanding" labor involving "truck driving [and] delivery." The deputy further found Claimant had not driven a vehicle since his back surgery, could not "sit in a chair," and was placed on restrictions that included "no lifting, no bending, and no squatting." The deputy found Claimant "severely limited in his ability to function as a result of his work injury" based on his "diagnosis of failed back syndrome" and "chronic pain." The Commissioner's designee affirmed as did the District Court on judicial review. Employer appealed to the Iowa Court of Appeals.

Key Holding: Affirmed as substantial evidence supports the agency's findings and its determination of permanent and total disability. "[Employer] points to various pieces of evidence that might support contrary findings, but it is not our role to weigh evidence....That is particularly true here, where the deputy commissioner made detailed findings addressing the disputed evidence."

Bridgestone/Firestone and Old Republic Ins. v. Jackman, 889 N.W.2d 244 (TABLE), 2016 WL 6636867 (November 9, 2016)

Background: Claimant, 62, began to experience neck problems accompanied by low back pain. Claimant stated that around this time Employer increased the rate of tire production significantly. A neurosurgeon determined Claimant had "a significant amount of degenerative changes in basically his entire cervical spine", notably disk bulging and foraminal narrowing of C5-6 and C6-7. Claimant's family physician diagnosed Claimant with lumbar disk disease and right lower extremity radiculopathy. A physiatrist imposed a permanent work restriction of lifting no greater than 15 pounds and no repetitive bending and twisting. These restrictions were affirmed by another treating physician. Claimant subsequently applied for early retirement due to disability and his request was approved.

Claimant subsequently filed a petition for worker's compensation benefits with the Commission. As part of the claim, both parties obtained independent medical evaluations and vocational reports. Dr. Kuhnlein evaluated Claimant and diagnosed degenerative

disc disease of the cervical spine with chronic neck pain and spondylolisthese of L4-S1 with chronic low back pain and complaints of lower extremity symptoms without true radiculopathy. Dr. Neff examined Claimant and stated "the degenerative changes noted in [Claimant]'s cervical and lumbar spine are commonly related to simply the normal processes and progressions of life." Employer's vocational report indicates several viable employment opportunities existed for Claimant's skill and ability. Claimant's vocational report stated Claimant is "precluded 100% from a gainful, competitive labor market" due to his injury.

The deputy commissioner awarded Claimant permanent total disability benefits despite Claimant's failure to conduct a reasonable and legitimate job search. The Commissioner affirmed. On judicial review, the District Court affirmed the Commissioner's award. Employer appealed to the Iowa Court of Appeals disputing the Commissioner's award of permanent total disability claiming Claimant remains employable.

Key Holding: Affirmed as the Commissioner's findings of fact are supported by substantial evidence and the conclusion of permanent total disability is not irrational, illogical or wholly unjustifiable. The Court of Appeals stated:

> The medical opinions established [Claimant] had permanent work restrictions, including the inability to lift over fifteen pounds. As a result of [Claimant]'s limitations, [Employer] found there was no work available for him. Further, although one vocational expert report stated jobs were available for [Claimant], another found no job position was available....

REIMBURSEMENT FOR SPOUSE'S LOST WAGES WHILE TRANSPORTING CLAIMANT TO MEDICAL APPOINTMENTS

Reynolds v. Algona Manor Care Center and Canon Cochran Management Services, Inc., 885 N.W.2d 830 (TABLE), 2016 WL 4036116 (July 27, 2016)

Background: Claimant was employed by Employer when she sustained a work injury. Claimant filed a workers' compensation petition with the Commissioner seeking compensation for her injury. The uncontroverted evidence at hearing established that, due to her medical condition, Claimant was unable to drive herself to out-of-town medical appointments. After hearing, the deputy commissioner awarded Claimant various benefits but denied Claimant's claim to reimburse her husband for wages he lost while driving Claimant to medical appointments. The Commissioner affirmed on appeal. On judicial review, the District Court affirmed the Commissioner's decision denying reimbursement for Claimant's husband's lost wages while driving Claimant to medical appointments. The Claimant appealed the issue to the Iowa Court of Appeals. On appeal, Claimant argued that her husband's lost wages were reimbursable as a transportation expense.

Key Holding: Reversed on the issue of reimbursement for Claimant's husband's lost wages while driving Claimant to medical appointments. "Reynolds and her husband testified, in essence, that although there may have been other means of transportation available, there was no other *reasonable* means of transportation between her home in Algona and her medical appointments in Spencer, Iowa City, and Ankeny. Accordingly, there could be no reasonable transportation that was also more economical than her husband driving her to these appointments. The burden then shifted to Algona Manor to show a more reasonable and economical transportation method existed, of which Reynolds could have been aware but chose not to use. Algona Manor failed to make such a showing."

REVIEW-REOPENING

Wehde v. Georgia-Pacific Corrugated, L.L.C., Ace Am. Ins. Co. and Second Injury Fund of Iowa, 884 N.W.2d 222 (TABLE), 2016 WL 1679645 (April 27, 2016)

Background: Claimant sustained work-related injuries to both her knees in 2007 and 2008 respectively while working for Employer. Claimant had arthroscopic surgery on the left knee in 2007 and 2008, and had arthroscopic surgery on the right knee in 2008. In February 2010, after a contested hearing in front of the Commission, Claimant was awarded 4% PPD for the left leg and 12% PPD for the right leg. Claimant was also awarded 35% industrial disability benefits from the Second Injury Fund. After hearing, Claimant continued to have pain in both knees, sought treatment, had multiple injections into both knees and had a third arthroscopic surgery on the left knee after an MRI revealed a complex tear of the posterior horn of the medical meniscus. While Claimant was off work due to the third left knee surgery, Employer closed its plant and Claimant lost her job. The treating physician imposed permanent restrictions in June 2012. Claimant subsequently filed a review-reopening petition requesting additional compensation as a result of her knee injuries and subsequent aggravations. The deputy commissioner awarded Claimant an additional 8% PPD for loss of use of the left leg, no additional PPD for the right leg and no additional industrial disability benefits from the Second Injury Fund. The Commissioner affirmed the deputy commissioner's decision. The District Court denied the judicial review petition. Claimant appealed to the Iowa Court of Appeals.

Key Holding: Affirmed. Substantial evidence supports the Commissioner's factual findings and the Commissioner's conclusion that Claimant was not entitled to an additional industrial disability award was not irrational, illogical, or wholly unjustifiable.

O'Reilly Auto Parts and Indemnity Ins. Co. of North Am. v. Kuder, 886 N.W.2d 617 (TABLE), 2016 WL 4803743 (September 14, 2016)

Background: Claimant injured his right shoulder on the job. The injury required surgery and his physician restricted him from lifting any more than twenty-five pounds. Claimant's employment with Employer ended in December 2008 because the company could not accommodate his permanent work restrictions. In September 2011, the deputy

commissioner awarded Claimant permanent total disability benefits. The Commissioner affirmed the decision and Employer did not seek judicial review. Just one month after the Commissioner's affirmance, Employer filed an action for review and reopening of the permanent total disability award. After a hearing on Employer's review-reopening petition, the deputy commissioner ruled that Employer did not carry its burden to show "a change of condition indicating a decrease in claimant's disability has occurred." The deputy commissioner stated that Claimant was just as disabled at the review-reopening hearing as he was at the time of the initial arbitration decision finding him permanently, totally disabled. The Commissioner affirmed the deputy's decision on appeal. The District Court denied Employer's petition for judicial review.

Key Holding: Affirmed as Employer failed to prove Claimant's earning capacity had increased since the original award. Substantial evidence supported the Commissioner's decision not to reopen the award of permanent total disability benefits. "We do not find the agency's decision that O'Reilly did not meet its burden to show a change in Kuder's condition to be irrational, illogical, or an unjustifiable application of law." "Substantial evidence supports the agency's conclusion that Kuder's extra hours at B-Bops did not establish an increase in his earning capacity or ability to compete in the job market. Upon our deferential review, we believe the agency adequately considered all relevant industrial-disability factors and appropriately decided O'Reilly failed to show Kuder sustained an economic change of condition since the original award so as to justify a decrease in compensation benefits."

Ayala v. Tyson Foods Inc., 2017 WL 104949 (TABLE) (January 11, 2017)

Background: Claimant suffered a compensable back injury with Employer in 2006. In 2009, the agency found Claimant suffered a forty-five percent industrial disability and awarded him commensurate permanent disability benefits. Neither party appealed this prior agency decision. Claimant then underwent fusion surgery in May 2012. He returned to work in October 2012. In February 2013, Claimant filed a petition for review-reopening claiming his industrial disability had increased and he was entitled to additional industrial disability benefits. In 2013, Claimant's doctor found Claimant had sustained eighteen percent partial impairment to the body as a whole and imposed a restriction of not lifting more than fifty pounds. Claimant's IME physician Dr. Milas determined Claimant had an impairment rating of twenty-three percent. Dr. Milas also recommended restricting lifting to twenty pounds. Claimant complained of new symptoms associated with his injury, including numbness in his feet and difficulty sleeping. After hearing, the deputy commissioner found Claimant had not proved any increase in his industrial disability and denied the petition. On intra-agency appeal, the Commissioner acknowledged the medical evidence but also found there had been no change in Claimant's earning capacity. The Commissioner noted the following: 1) Claimant was able to manage his pain with over-the-counter medication; 2) Claimant's work restrictions remained largely unchanged or lessened; 3) Claimant earned $14.00 per hour-more than at the time of the initial decision; 4) Claimant worked approximately forty to fifty hours per week; and 5) Claimant had not suffered any absenteeism due to his impairment. Claimant appealed to the Iowa Court of Appeals contending the

Commissioner's decision was not supported by substantial evidence and was irrational, illogical and wholly unjustifiable.

Key Holding: Affirmed as "[w]e cannot conclude the commissioner's decision was irrational, illogical, or wholly unjustifiable" and "[w]e conclude the agency's findings are supported by substantial evidence." The Iowa Court of Appeals stated:

> While there may be some medical evidence supporting the finding that [Claimant]'s physical condition has worsened since the time of the original industrial disability award, the medical evidence is only a single factor in determining industrial disability. Other evidence supported the agency's finding that [Claimant]'s earning capacity remained unchanged. As the district court explained:
>
> > While [Claimant] underwent surgery following the original arbitration decision, there is substantial evidence to indicate that it did not further hinder his earning capacity. He has been fully able to perform in the same capacity as he did at the time of the Arbitration Decision. He does not require any further accommodations than what he did at the time of the Arbitration Decision. His work restrictions, if changed, have improved. He is content in his job. He does not take prescription medicine for pain. A reasonable mind would deem this evidence adequate to support the conclusion that [Claimant]'s present condition is no worse than it was in September of 2009.

RUNNING AWARD OF TTD BENEFITS

Tyson Foods, Inc. v. Teah, 884 N.W.2d 224 (TABLE), 2016 WL 1703046 (April 27, 2016)

Background: Claimant sustained a shoulder injury at work. On June 30, 2011, a physician's assistant placed Clamant at maximum medical improvement effective July 14, 2011 with no follow-up appointments. On December 30, 2011, the treating orthopedic physician gave the following opinion:

> [Claimant] may benefit by shoulder arthroscopy which would include subacromial bursectomy with decompression and debridement of the calcific tendinitis. However, this is not mandatory at the time, but rather should be based on her symptoms. I would allow the patient to make this final decision based on her symptoms.

On January 23, 2012, the treating orthopedic physician gave his opinion that "no further treatment is indicated at this time as it relates to the work-related symptoms of the shoulder" but "if symptoms become more severe then the shoulder may require

arthroscopic treatment as a non-work related condition." Claimant filed a workers' compensation action seeking entitlement to temporary and permanent benefits related to the work injury. The deputy commissioner issued a decision granting Claimant a running award of temporary total disability benefits/healing period benefits. The Commissioner affirmed.

On judicial review, the District Court affirmed as well. The District Court gave the following reasoning:

> As found by the commissioner and as argued by [Claimant]'s counsel, [the treating orthopedic physician], in his December 30, 2011, letter, stated that [Claimant] may benefit by shoulder arthroscopy which would include subacromial bursectomy with decompression and debridement of the calcific tendonitis. He opined that this is not mandatory at this time but rather should be based on her symptoms. He suggested that [Claimant] be allowed to make this final decision based on her symptoms, and if she elected to proceed with surgery he believes her symptoms could be substantially improved but that she may still have some residual symptoms as well as need for permanent restrictions with respect to full forward reaching, overhead reaching, and rapid shoulder motions. The Court agrees with the commissioner's conclusion that [Claimant] is still in a healing period, and it cannot be determined if her condition is temporary or permanent until she has received all the medical treatment appropriate for her injury....

Employer appealed to the Iowa Court of Appeals claiming substantial evidence does not support the Commissioner's finding Claimant was entitled to a running award of temporary total disability benefits.

Key Holding: Affirmed as substantial evidence supports the Commissioner's finding. "We agree with the district court's reasoning. [The treating orthopedic physician]'s January 23, 2012 letter states [Claimant]'s injury is 'only a temporary aggravation' but later opines her shoulder may require surgery. [The treating orthopedic physician]'s December 30, 2011 letter also states [Claimant] 'may benefit by shoulder arthroscopy' though it was not mandatory at that time. [The treating orthopedic physician] noted this determination 'should be based on her symptoms.'"

SCHEDULED INJURY VERSUS BODY AS A WHOLE INJURY

Janssen v. Merry Lanes, Inc. and Firstcomp Ins., 886 N.W.2d 618 (TABLE), 2016 WL 4802147 (September 14, 2016)

Background: Claimant sustained an injury to her hamstring when she slipped and did the splits while working as a bartender for Employer. Claimant filed a petition for workers' compensation benefits with the Iowa Workers' Compensation Commissioner. Employer

and its insurer denied Claimant sustained an injury to her body as a whole and instead maintained her injury was limited to her scheduled member leg. The deputy commissioner found Claimant sustained an injury to her body as a whole and was permanent and totally disabled. On intra-agency appeal, the Acting Commissioner determined Claimant had failed to prove she sustained a whole-body injury and that the evidence demonstrated Claimant's injury was limited to her left lower extremity. Claimant sought judicial review in the District Court which affirmed the Acting Commissioner. Claimant appealed to the Iowa Court of Appeals.

Key Holding: Affirmed because substantial evidence supports the Commissioner's findings and its application of law to the facts is not wholly unjustifiable. Citing expert opinions, the Acting Commissioner determined:

> In the present case, claimant's injury is confined to the leg. There is no question claimant suffered a right proximal hamstring tear causing damage to the sciatic nerve. The sciatic nerve injury was limited to the section of the lateral upper hamstring. Objective testimony showed the sciatic nerve injury did not extend into the low back.

SECOND INJURY FUND

Stowe v. Second Injury Fund of Iowa, 2017 WL 362002 (TABLE) (January 25, 2017)

Background: In 2014, Claimant entered into a Commissioner approved settlement agreement with her employer and its insurance carrier where the parties agreed Claimant sustained an employment injury in December 2010 to Claimant's left thumb. Prior to entering into the settlement agreement, Claimant in December 2013 filed a petition claiming she was entitled to Second Injury Fund benefits. This petition stated Claimant injured her left hand by way of repetitive motion on August 25, 2011 and alleged prior injuries to Claimant's left knee and right hand. After Claimant entered into the settlement agreement with Employer, the Fund filed a motion for summary judgment arguing that because Claimant agreed she sustained an injury to her left thumb in December 2010 in the settlement agreement, she was precluded from subsequently asserting that she suffered an injury to her hand. Because a thumb injury is not a compensable injury under the Second Injury Compensation Act and because Claimant was precluded from claiming injury to her hand, the Fund argued it was entitled to summary judgment as a matter of law and requested Claimant's Petition be dismissed. The deputy commissioner agreed granting the motion for summary judgment and dismissing Claimant's petition. The Commissioner affirmed on intra-agency appeal. On judicial review, the District Court reversed. The District Court found the Commissioner erred as a mater law when he concluded the language of Claimant's settlement agreement precluded her from seeking Fund benefits on the basis of a hand injury. The District Court concluded a genuine issue of material fact existed as to whether the settlement concerned the injury to the thumb, hand or the metacarpal joint and it remanded the matter back to the agency. The Fund appealed to the Iowa Court of Appeals arguing that

the doctrine of judicial estoppel barred Claimant's claim of a hand injury because it was inconsistent with Claimant's statement in the other judicial proceeding that she injured her thumb.

Key Holding: Affirmed because "we do not find [Claimant]'s settlement agreement's use of the word 'thumb' is unequivocally inconsistent with her claim of a hand injury for purposes of Fund benefits such that the doctrine of judicial estoppel is applicable." "[Claimant]'s settlement agreement did not explicitly exclude the possibility of a hand injury, and the medical documentation attached to the agreement supports a claim of a hand injury by way of an injury to the joint...."

STANDARD OF REVIEW ON APPEAL

McComas-Lacina Construction and United Wisconsin Ins. Co. d/b/a United Heartland v. Drake, 884 N.W.2d 225 (TABLE), 2016 WL 2744948 (May 11, 2016)

Background: The District Court affirmed a workers' compensation award in Claimant's favor. On appeal to the Iowa Court of Appeals, Employer argued the agency's decision "that [Claimant] was credible and entitled to substantial disability in relation to his first two dates of injury and permanent total disability concerning his last date of injury was an abuse of discretion, irrational, illogical, unreasonable, unjustifiable, arbitrary and capricious, an error of law and not supported by substantial evidence."

Key Holding: Affirmed. The Iowa Court of Appeals stated:

> We begin and end our analysis with the following observation: "The administrative process presupposes judgment calls are to be left to the agency. Nearly all disputes are won or lost there." [citation omitted]. A case reversing final agency action on the ground the agency's action is unsupported by substantial evidence or is irrational, illogical, or wholly unjustifiable is the Bigfoot of the legal community-an urban legend, rumored to exist but never confirmed. Here, the employer had a full and fair opportunity to present its evidence and argument to the deputy commissioner and the commissioner without success. The employer challenged the agency's findings, conclusions, and application of the facts to the law in the district court without success. Like the district court, we have carefully examined the grainy eight millimeter film of the administrative record. We can add little to the thorough and well-reasoned ruling of the district court, and we will not reiterate the same analysis here. We conclude the agency's findings are supported by substantial evidence, and its decision is not irrational, illogical, unreasonable, unjustifiable, arbitrary and capricious, or legally erroneous. The search for Bigfoot continues....