

# Section 0

## Case Law Update

**Jeffrey Schultz**  
Hupy & Abraham, SC, PC  
6600 Westown Pkwy., Ste. 270  
West Des Moines, IA  
jschultz@hupy.com



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## **ACKNOWLEDGMENTS**

This summary of cases has been updated for cases from September 2019 through the present, and it adds to the efforts of Shannon Bravo and James Colwell of Schott Mauss and Associates and Joni L. Ploeger of Davis, Brown, Koehn, Shors & Roberts, P.C. who have previously presented on updates of workers' compensation appellate cases for the period of October 2018 through September 2019.

Readers are of course encouraged to read the entire cases in full and to make any determinations regarding a particular case's applicability to any legal issue. The full text of these decisions can be found at <https://www.iowacourts.gov/iowa-courts/supreme-court/supreme-court-opinions/> (Iowa Supreme Court) and <https://www.iowacourts.gov/iowa-courts/court-of-appeals/court-of-appeals-court-opinions/> (Iowa Court of Appeals).

## **AGENCY JURISDICTION**

***Niday v. Roehl Transp., Inc.*, 928 N.W.2d 659 (Iowa Ct. App. 2019).**

Decision Date: 04/03/19

Facts/Arguments: After applying for a position with Defendant, Claimant (an Iowa resident) received a phone call from a Roehl Transport recruiter while he was on a job for his prior employer in Iowa. During that call, the recruiter said she had received Claimant's application and they discussed that he would like to accept a job in the Midwest region. After that call, on May 10, 2013, Claimant received a letter at his home in Iowa with a "conditional" offer of employment provided he complete all the pre-hire requirements. Claimant went to Indiana and Wisconsin to complete the pre-hire requirements. Claimant subsequently suffered a work injury while on the job in Kentucky. Claimant filed a Petition with the Iowa Workers' Compensation Commission. Defendant argued the Agency lacked jurisdiction given it had no place of business in Iowa, Claimant's work was performed outside of Iowa, and the injury occurred in Kentucky.

Procedural History: The hearing Deputy determined the Agency lacked jurisdiction. The Deputy found that the phone call and letter on May 10, 2013 did not bind the parties into an employment relationship at that time. The conversation and letter merely reflected an "agreement to agree to enter into an employment contract." The Deputy's decision was affirmed on appeal by the Commissioner and by the District Court.

Holding: The Iowa Court of Appeals overturned the prior decisions. The court found the May 10, 2013 letter constituted conditions precedent to the performance of the contract, but that the contract was actually formed via the phone call and letter on May 10, 2013, while Claimant was in Iowa. The court pointed out that the terms of employment were settled during the phone call and reiterated in the May 10, 2013 letter. The case was largely decided on contract law principles regarding the formation of a contract.

## **ALTERNATE MEDICAL CARE**

***Harris Steel Group, Inc. v. Botkin*, File No. 19-0015, 2020 WL 109587 (Iowa Ct. App. 2020).**

Decision Date: 1/9/20

Facts/Arguments: Claimant injured his shoulder while working for Harris Steel in June 2015. He received authorized treatment and surgery in November 2015. A year later, Claimant returned for a follow-up appointment complaining of an increase in pain. Claimant attempted to schedule an appointment with the authorized treating physician in late 2017. Claimant was told by the physician to get his employer's authorization because more than two years had passed since his injury. Harris Steel instead scheduled Claimant for an IME for December 2017. Claimant refused to go, and in turn, Harris Steel refused to authorize additional treatment with the previously authorized provider.

Procedural History: In April 2018, Claimant submitted an alternate care petition, and the deputy found that Harris Steel was not allowed to interfere with the treatment practices of the authorized provider. The deputy ruled it was reasonable to request continued treatment and ordered Harris Steel to authorize continued treatment.

Harris Steel applied for rehearing arguing the denial was warranted based on Claimant's refusal to submit to an IME. The application was denied. Harris Steel raised the same argument in a petition for judicial review, which the district court also denied.

Holding: The Iowa Court of Appeals affirmed the lower decisions. Harris Steel relied on the portion of 85.39 (pre 7/1/17 language) that states if an injured employee refuses to attend an IME, compensation is suspended for the period of refusal. However, the court differentiated between compensation and medical care benefits. The two code sections at play are separate and serve different objectives. Section 85.27 governs the responsibility of the employer to provide medical care and the mechanism of a dissatisfied employee to seek alternative care. Section 85.39 concerns the examination of injured employees to determine the extent and character of the injury for purpose of compensation. An alternate care claim is only meant for situations of uncontested compensability. Compensability was not at issue in this case, as Harris Steel admitted Claimant sustained a work injury, and Harris Steel never conveyed that it was no longer authorizing care. Harris Steel conceded that regardless of the court's decision, Claimant would be entitled to continue care with the authorized provider as long as that provider indicates it was related to the work injury.

***Huff v. CRST Expedited, Inc., 928 N.W.2d 153 (Iowa Ct. App. 2019).***

Decision Date: 03/06/19

Facts/Arguments: Claimant, a truck driver, was injured in a motor vehicle accident on April 24, 2016. The accident resulted in numerous injuries and caused Claimant to be wheelchair dependent and homebound. At the time of the injury, Claimant had been living out of his truck and using it as his personal vehicle. After the accident, Claimant moved in with his son in a second-floor apartment. Claimant filed an Application for Alternate Medical Care requesting handicap-accessible living, a handicap van, and a home healthcare provider. As an exhibit at hearing, he submitted a Comprehensive Adult Assessment from a registered nurse that assessed his ability to perform activities of daily living. At the time of the hearing, Claimant testified he expected to be evicted from his apartment after his son moved out.

Procedural History: The Deputy denied Claimant's requests noting no medical providers opined Claimant needed handicap-accessible living, a handicap van, and a home healthcare provider. Claimant filed for rehearing, but this was denied. Claimant then filed a new Application for Alternate Medical Care, this time submitting an assessment of activities of daily living from the Costal Regional Commission of Georgia - Area Agency on Aging. During the hearing, Claimant's attorney informed the Deputy that Claimant had been evicted from his apartment.

The Deputy again denied the requests noting no medical providers had opined Claimant needed the handicap-accessible living, a handicap van, and a home healthcare provider.

Claimant filed a Petition for Judicial Review on both alternate care decisions; the cases were consolidated by the District Court. The court held evidence from a medical provider was not required and noted the requests fell within the definition of allowable “appliances” or “services” under Iowa Code section 85.27(1). Defendants appealed.

After filing for judicial review, but before a decision was rendered by the District Court, the parties participated in an arbitration hearing. In her Arbitration Decision, the Deputy noted the Agency lacked jurisdiction to hear Claimant’s renewed claims for alternate medical care given the issue had been appealed.

Holding: The Iowa Court of Appeals held that while medical evidence is usually essential for a claimant to sustain his/her burden of proof for alternate medical care, the lack thereof is not a complete bar to recovery given no statute requires the submission of medical evidence. Thus, the court found the alternate care deputies erroneously interpreted the law. In regard to Defendants’ argument that the requested care was not allowed under Iowa Code section 85.27(1), the court declined to offer an opinion and found the District Courts’ findings on the issue improperly relied on factual determinations never made by the deputies. It reversed the District Court’s conclusion in that regard.

***Lynch Livestock, Inc. v. Bursell, 928 N.W.2d 151 (Iowa Ct. App. 2019).***

Decision Date: 03/06/19

Facts/Arguments: Claimant sustained an accepted left ankle injury. He underwent two tarsal tunnel decompressions to alleviate the pain. Defendants then authorized a referral to Dr. Cook and he diagnosed complex regional pain syndrome. He recommended a laparoscopic lumbar sympathectomy. Other doctors disputed this procedure and whether Claimant had complex regional pain syndrome. Defendants did not authorize the surgery and Claimant filed an Application for Alternate Medical Care.

Procedural History: In his Alternate Medical Care Decision, the Deputy found the recommendation for surgery was reasonable and necessary and the request was granted. Defendants appealed to the District Court and the decision was reversed. The court concluded the Deputy failed to apply the correct legal test to Claimant’s alternate medical care claim in that the Deputy failed to decide whether the care authorized by Defendants was unreasonable. The Iowa Court of Appeals affirmed the District Court. The court noted the Deputy cited the correct controlling case law, but he incorrectly applied the law to the facts when he held the care recommended by Dr. Cook was reasonable and necessary. Instead, the law dictates a conclusion must be made on whether the care offered by Defendants was unreasonable, ineffective, or inferior.

On remand from the Iowa Court of Appeals, the Deputy held Claimant failed to show the care authorized by Defendants was unreasonable, ineffective, or inferior. Although Dr. Cook recommended the surgery, he directed that it be performed by Dr. Kelly. Dr. Kelly said the surgery would only be performed after conservative care was exhausted and failed. Claimant, however, did not undergo the conservative care. Because he did not undergo the recommended conservative care, Claimant could not show that it was unreasonable, ineffective, or inferior.

During the appeal process for the alternate care matter, an arbitration hearing was conducted and the Deputy awarded reimbursement for the surgery as Claimant had already undergone the surgery at that time. On intra-agency appeal, the appeal Deputy found the unauthorized medical care provided by Dr. Cook and Dr. Kelly was reasonable and beneficial. On judicial review, the District Court found the Deputy applied the correct legal standard. However, the court held that because the recommended care was not unreasonable, it was therefore unreasonable for Claimant to undergo surgery without first undergoing conservative care. Thus, the court found the unauthorized care was not reasonable or beneficial and Defendants were not liable for the surgery costs. Yet the court then found Claimant was also not liable because he was not aware that the care was unauthorized at the time he received it (Claimant underwent the surgery after the Alternate Care Decision awarded the care and before the District Court's reversal). "The issue of liability remains. Currently, payment is owed due to a mistake committed by the Workers' Compensation Commissioner." Despite these conclusions, the District Court affirmed the appeal Deputy's assessment of costs against Defendants for the surgery.

Holding: The Iowa Court of Appeals found the District Court's decision was inconsistent and reversed it. The court found that at the time the care was obtained, it was not authorized. Even though it had been awarded, the decision was being contested on appeal by Defendants. Given the care was not authorized, the proper standard was whether the unauthorized care was reasonable and beneficial. However, because Claimant never cross-appealed the District Court's finding that the unauthorized care was not reasonable or beneficial, Claimant failed to preserve the issue. Even so, the court agreed with the District Court that there was not substantial evidence supporting the Deputy's finding that the unauthorized care was reasonable and beneficial.

### **ARISING OUT OF - IDIOPATHIC INJURIES**

***Bluml v. Dee Jay's Inc., 920 N.W.2d 82 (Iowa 2018).***

Decision Date: 11/16/18

Facts/Arguments: On the date of injury, Claimant (a fast-food employee) was handling a customer order. He had a seizure and fell backwards directly onto the ceramic tile floor. Claimant did not hit any tables, chairs, or kitchen equipment as he fell to the floor. The fall was on a level surface and Claimant did not fall from a height. He sustained a traumatic brain injury. Defendants denied the claim based on an idiopathic fall defense.

Procedural History: The Deputy denied benefits as a matter of law concluding idiopathic falls on level, unobstructed, and dry floors are not compensable. The Commissioner affirmed on appeal, however, he added that the injuries Claimant sustained were worsened due to falling on a ceramic tile floor. The District Court affirmed the denial of benefits on judicial review and so too did the Iowa Court of Appeals.

Holding: The Iowa Supreme Court reversed, holding there was no blanket rule rendering certain categories of workplace falls as non-compensable. The court remanded the case finding it should have been analyzed under the facts of the particular case, not as a matter of law. The court reasoned that if the work environment places a worker in a position that increases the effects of a fall, then it is compensable. In other words, whether the condition of the floor posed an increased risk of injury should be determined factually just like any other workplace condition. The court noted that prior case law “did not foreclose the possibility that an especially hard floor could amount to such a hazard.”

Misc.: Effective July 1, 2019, an amendment to Iowa Code section 85.61(7) went into effect. The existing section defines “personal injur[ies] arising out of and in the course of employment” and has been amended to exclude idiopathic injuries and unexplained falls on level surfaces. “Personal injurie due to idiopathic or unexplained falls from a level surface onto the same level surface do not arise out of and in the course of employment and are not compensable under this chapter.” The amendment 2019 WL 3317353 as proposed in February 2019, in response to the holding in *Bluml*.

## **BAD FAITH**

***Saltern v. HNI Corp.*, File No. 18-1748, 2019 WL 5063321 (Iowa Ct. App. 2019).**

Decision Date: 10/9/19

Facts/Arguments: Saltern developed bilateral carpal tunnel syndrome after years of repetitive sewing for a furniture manufacturer. In March 2011, she saw her medical provider, and testing led to the diagnosis. Saltern notified HNI in May when she requested approval to see a pain specialist. Saltern filed a workers’ compensation claim in June 2011, but after her medical providers failed to produce her medical records for HNI, HNI denied the compensability of her claim in July 2011. The claim was voluntarily dismissed then re-filed, but the claim was again denied. Saltern set up an IME in March 2013, and the report concluded her carpal tunnel stemmed from her work. She also received the same opinion from her primary care provider in April 2013. She informed HNI of these opinions later in the month. HNI sent her to an IME, and in September 2013, the report echoed the prior reports. HNI then agreed to pay Claimant’s healing period benefits.

The matter went to hearing before a deputy commissioner, and penalty benefits were imposed against HNI for failing to communicate its reasons for denying the claim. The decision was affirmed up through the district court level. Saltern then filed the derivative lawsuit for the common law tort of bad faith.

Procedural History: Saltern filed a motion for partial summary judgment asking the court to find HNI did not have a reasonable basis for denying her claim. HNI filed a cross-motion for summary judgment asking the court to find that Saltern could not prove HNI did not have a reasonable basis for the denial. The district court granted HNI's cross-motion, ruling that HNI, at least initially, did not have any information on the subject of how her carpal tunnel was causally related to her employment. Saltern appealed.

Holding: Saltern argued on appeal that HNI knew the nature of her work, HNI's third party claim administrator wrote a report stating the claim would likely be accepted due to Saltern's repetitive work, and there was a prior ruling that HNI failed to communicate its reasons for denial. However, the Iowa Court of Appeals held that the claim was still fairly debatable when HNI denied it. The court ruled that when an employee seeks workers' compensation, the employee has the burden to show the injury arose in the course of employment. Without supporting, affirmative evidence, the claim remains open to dispute. A res-ipsa-loquitur-type claim is insufficient.

Saltern also argued that HNI could not reasonably deny the claim as of April 11, 2013 when it was served with Saltern's IME report and the report from her primary care doctor. The court ruled that despite that time period being raised in Saltern's petition, that precise time frame was not relied upon in her motion for summary judgment or in her resistance to HNI's motion for summary judgment. Saltern moved to amend and enlarge for consideration of that time period, but the court denied the motion without specifying its rationale. The Iowa Court of Appeals declined to hear argument on HNI's denial post-April 11, 2013.

Lastly, Saltern argued that subsequent to section 86.13's amendment in 2009, the employer has a duty to investigate before determining it will deny the claim. Subsection (4)c.(1) mandates that the excuse must be "preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee . . ." The court agreed with HNI that statutory penalties under section 86.13 are distinct from a bad-faith claim. Courts can infer bad faith from such a violation, but it does not alone guarantee a finding of bad faith. The court again pointed to HNI's efforts to investigate the claim, which were stymied by the lack of medical records.

***Dunlap v. AIG, Inc., 927 N.W.2d 201 (Iowa Ct. App. 2019).***

Decision Date: 01/09/19

Facts/Arguments: Plaintiff sustained a work injury in 2007 and was awarded weekly benefits at hearing. Plaintiff had also claimed penalty benefits at the time, but these were denied by the Deputy. The Deputy concluded the employer and insurance carrier did not act unreasonably in denying weekly benefits when relying on a doctor's release to full duty and a doctor's opinion finding against causation. The Commissioner affirmed on appeal, but the District Court reversed. The Iowa Court of Appeals affirmed the Commissioner's decision holding, "we agree

there was a reasonable basis for [the employer]’s position that no benefits were owing to Dunlap.”

During the pendency of the workers’ compensation litigation, Plaintiff filed a civil action asserting bad faith. In its Motion for Summary Judgment, Defendants argued issue preclusion barred Plaintiff’s bad faith claim for the handling of the 2007 work injury.

Procedural History: For the 2007 work injury, the District Court found issue preclusion was appropriate because Defendants had the burden of proving their denial was reasonable on the underlying workers’ compensation action, also an essential element in establishing bad faith.

Holding: The Iowa Court of Appeals affirmed. The court explained that because the reasonableness of the denial had previously been decided through the workers’ compensation litigation, the issue could not be re-litigated through the bad faith action. “While the tort of bad faith is not within the jurisdiction of the workers’ compensation commissioner, the reasonable-basis issue itself was directly before the Agency as part of the determination of whether Dunlap was entitled to penalty benefits under section 86.13.”

Misc.: Although Defendants’ argument was accepted on the bad faith claim for the 2007 work injury, they filed for further review of the Iowa Court of Appeals decision because the court also found Defendants’ denial of a subsequent 2012 work injury was not reasonable. Note, the issue of whether the denial of benefits was reasonable was not an issue presented during the underlying workers’ compensation action, so issue preclusion was not an available argument. The Iowa Court of Appeals found that an expert opinion denying causation is not enough, in and of itself, to show a denial is fairly debatable. “Rather, an insurer can only rely upon a reasonable opinion denying causation to successfully defeat a claim of bad faith.” The Iowa Supreme Court declined to take the matter on further review. The bad faith claim relating to the 2012 injury is scheduled for trial on April 6, 2020.

***De Dios v. Indemnity Ins. Co. of N. Am., 927 N.W.2d 611 (Iowa 2019).***

Decision Date: 05/10/19 (amended on 05/14/19)

Facts/Arguments: Plaintiff was injured in a motor vehicle accident while working for Brand Energy & Infrastructure Services. He filed a claim for workers’ compensation benefits and the employer and insurance carrier denied the claim based on the coming and going rule. The Deputy concluded the injury arose out of and in the course of Plaintiff’s employment. On appeal, the Commissioner affirmed. Plaintiff later filed a bad faith action against the employer’s workers’ compensation insurance carrier and the third-party administrator for an unreasonable denial of the claim. Broadspire moved to dismiss the claim against it for failure to state a claim upon which relief could be granted.

Procedural History: Sua sponte, the United States District Court for the Northern District of Iowa certified a question of law to the Iowa Supreme Court: Can third-party administrators be liable for bad faith failure to pay workers’ compensation benefits?

Holding: As a matter of first impression, the Iowa Supreme Court concluded a common law claim for bad faith is not available against third-party administrators. In its decision, the court reasoned that a third-party administrator does not possess the attributes of an insurance carrier, nor does it have an affirmative, statutory obligation to act, so it cannot be held liable in bad faith for failure to pay workers' compensation benefits. The court noted bad faith liability had been extended to workers' compensation insurance carriers in *Boylan v. Am. Motorists Ins.*, 489 N.W.2d 742, 744 (Iowa 1992) because Iowa statutes and the Iowa Administrative Code placed obligations on these insurance carriers with regard to payment of workers' compensation benefits. Bad faith liability was then extended to self-insured employers in *Reedy v. White Consolidated Ind., Inc.*, 503 N.W.2d 601, 603 (Iowa 1993) because the court found these self-insured employers voluntarily assume the self-insured status, a status recognized under the Iowa Workers' Compensation Act, carrying with it the statutory obligation to act. However, in *Bremer v. Wallace*, 728 N.W.2d 803, 806 (Iowa 2007), the court declined to extend bad-faith liability to uninsured employers because they are not substantially equivalent to an insurer and there is no insurer/insured relationship. Likewise, the court found there was no insurer/insured relationship involving the third-party administrator stating, "[a] third-party administrator is not in an insurer/insured relationship with anyone." The court also found the third-party administrator was not under any statutory obligations to act or under the supervision of the Iowa Workers' Compensation Commissioner.

Misc.: The impact of this decision is that third-party administrators cannot be held liable in bad faith for failing to pay workers' compensation benefits. However, the Iowa Supreme Court noted that workers' compensation insurance carriers may still be liable for the acts of their third-party administrators via vicarious liability. The case has been remanded to the United States District Court for the Northern District of Iowa for further proceedings.

## **MEDICAL CAUSATION**

***Presbyterian Homes & Services, Inc. v. Buchanan*, File No. 19-0010, 2020 WL 108373 (Iowa Ct. App. 2020).**

Decision Date: 1/9/20

Facts/Arguments: On February 2, 2014, Claimant, a full-time CNA, was performing duties as a shower aide. This involved moving patients in a Hoyer lift from their beds or wheelchairs to the shower. She testified that she felt the onset of a constant burning sensation and throbbing pain in her left ankle. She did not report the injury immediately, as she could not identify what she had done and believed the pain would subside on its own. She was seen by her primary care provider on April 28, 2014, informing the doctor that the pain had been present for about two months and was in a different location than previous issues of plantar fasciitis. Claimant saw another provider on June 4, 2014 and stated the pain began seven to ten days prior and was unrelated to work activities. She was again diagnosed with plantar fasciitis. No work restrictions were imposed, and Claimant continued normal shifts. Claimant addressed the issue of her pain with her employer, which does business as Mill Pond, in August 2014. Her shifts and hours were

reduced. Mill Pond offered to start workers' compensation benefits, but Claimant declined based on her doctor's assessment.

Claimant's pain persisted, and she filed an incident report on October 28, 2014. She was then examined by an employer-authorized physician. The authorized physician restricted Claimant's use of the Hoyer lift, as that appeared to be the provocative activity. The authorized physician also questioned Claimant's previous diagnosis based on discrepancies between the complaints and the diagnosis of her treating physician. The authorized physician opined that the condition was work related after Claimant reported improvement after avoiding the Hoyer lift. Claimant was returned to full duty on November 26, 2014, but her restriction of not using the Hoyer lift was reinstated after an increase in ankle pain. On December 3, 2014, Mill Pond/Zurich informed her that they would not be treating the injury as a workers' compensation matter, and Claimant would not be allowed to return to work until she was released by her doctor at full duty. On December 8, 2014, Claimant was diagnosed with peroneal tendonitis, and an MRI then revealed a tear in the peroneus longus tendon of Claimant's left ankle. Claimant was provided a CAM boot to wear for the next eight weeks. Physical therapy followed, and increased ankle pain led to another MRI, which revealed a stress fracture on the medial cuneiform bone of Claimant's ankle. Surgery was performed on May 28, 2015. Claimant received custom orthotics, but she reported that they badly hurt her feet. By March 28, 2016, Claimant complained of increased pain in both feet and that she had to change the way she walked. Two treatment providers provided expert opinions relating Claimant's injury to the pain she experienced on February 2, 2014 with the Hoyer lift.

Claimant underwent an IME at Mill Pond/Zurich's request on August 26, 2015, which concluded the Hoyer lift activities would not be of a significant intensity to cause a tear, and her injury was more consistent with a chronic condition, such as ankle instability, resulting in tendon tearing. Claimant underwent her own IME, which concluded that the activities with the Hoyer lift would cause stretching and injury to the peroneal tendons from the traction pressure. Restrictions on time spent walking and types of terrain were given as well.

Claimant also alleged a sequela injury to her back as a result of the ankle injury. She reported on July 7, 2015 that she had been experiencing back pain for about a year. Claimant underwent physical therapy, where malalignments of her low back and pelvis and antalgic gait were noted. X-rays and an MRI revealed degenerative changes and moderate facet joint osteoarthritic changes. Claimant's IME concluded that the change in the way she walked subsequent to the injury disturbed her sacroiliac joint biomechanics, which led to facet arthropathy and sacroiliitis, which would be permanent conditions. A 7% whole person impairment with restrictions of no lifting over twenty pounds and no lifting over ten pounds frequently were given.

Procedural History: The deputy commissioner concluded Claimant sustained injury to her foot and ankle in the course of her employment on February 2, 2014, which led to the sequela injury. The deputy found industrial disability of 65% in part due to Claimant's vocational evaluation that found a 64.2% loss of access to the labor market due to her injuries. The deputy further concluded that Claimant's employer unreasonably denied workers' compensation benefits. Mill Pond's authorized provider felt Claimant's problems were work related, and Mill Pond/Zurich

never explained to Claimant why they rejected that view. It was unreasonable to deny benefits from the date of injury until the IME on August 26, 2015 when the causation issue became fairly debatable.

Mill Pond/Zurich appealed, and on appeal to the Commissioner, the Commission upheld the decision of the deputy in its entirety. Mill Pond/Zurich then sought judicial review, and the district court affirmed the commissioner's decision on medical causation and industrial disability, but it reversed the commissioner's decision on penalty benefits. The district court held it was not unreasonable for Mill Pond/Zurich to rely on Claimant's failure to identify or describe a work-related injury, and the initial medical records indicated that Claimant stated the injury was not related to an injury or work activity.

The Iowa Court of Appeals then heard Mill Pond/Zurich's appeal on the issue of medical causation and extent of industrial disability. Claimant cross-appealed on the issue of penalty benefits.

Holding: The Iowa Court of Appeals affirmed the district court's determination that substantial evidence supported a finding that Claimant's ankle and sequela back injury were caused by and arose out of her employment. Mill Pond/Zurich argued that inconsistencies in Claimant's medical records and her recollection of the injury suggest the injury did not occur on February 2, 2014. They essentially asked the court to find Claimant's statements "so impossible or absurd and self-contradictory that [they] should be deemed a nullity by the court. *Graham v. Chi. & Nw. Ry.*, 119 N.W. 708, 744 (Iowa 1909). The court held that the deputy weighed those inconsistencies, but the deputy simply weighed and interpreted those facts differently than Mill Pond/Zurich would have liked. The deputy also had to weigh the inconsistencies of the initial treatment records and found Claimant more credible. Substantial evidence therefor supported the deputy's decision on medical causation.

Mill Pond/Zurich next argued that the 65% industrial disability finding was not supported by substantial evidence. Again, the court ruled substantial evidence did in fact exist. The deputy weighed the usual factors of age, work experience, education, functional limitations, restrictions, etc., as well as the vocational evaluation, which was undisputed by Mill Pond/Zurich. The court held that decision was not irrational, illogical, or wholly unjustifiable.

Claimant cross-appealed the district court's decision that reversed the penalty benefits finding of the Commissioner and deputy. The Iowa Court of Appeals affirmed the district court. The court ruled that the basis for a denial must be conveyed to the Claimant, but the denial does not have to disclose the results of the investigation. Mill Pond/Zurich conveyed to Claimant that her injury was not related to an incident at work, and the court found this sufficient. The court also found it reasonable to deny penalty benefits for the period after which the MRI revealed the initial diagnosis was incorrect. The court stated that even though the MRI established a different injury, it did not establish how the Claimant was injured, which was justifiably disputed.

***Leeper v. Pioneer Hi-Bred International, Inc.*, File No. 18-1637, 2019 WL 6358432 (Iowa Ct. App. 2019).**

Decision Date: 11/27/19

Facts/Arguments: Claimant sustained an injury to his bilateral arms on or about August 27, 2013, which was stipulated by the parties. Claimant underwent bilateral carpal tunnel release after conservative treatment failed. Claimant was later released in December 2014 to full duty with zero percent partial impairment. Claimant reported less strength but denied significant numbness or tingling. No future diagnostic or therapeutic interventions were recommended, but Claimant was advised to continue work with a stress ball or grip strengthening device and wear wrist splints at night. Claimant requested additional care due to constant but fluctuating bilateral wrist pain. The treating physician's assessment in June 2015 was bilateral hand pillar pain status post bilateral carpal tunnel releases. In August 2015, Claimant reported acute but improved symptoms and that his pain had nearly completely resolved. Claimant was placed at MMI as of August 27, 2015 and released with no restrictions with instruction to follow-up as needed.

Claimant requested and was seen for an IME on July 16, 2015. Claimant reported ongoing pain in both palms and occasional numbness when he did not wear his splint. After Claimant finished the treatment noted above, he was re-examined by the IME provider. Claimant's IME report stated he suffered no ratable impairment using the Tissue Rating Methodology. However, under chapter 18 of the AMA Guides, Claimant's IME found a 1% left upper extremity impairment for the pillar pain and a 1% right upper extremity impairment for pillar pain. The report additionally noted Claimant's difficulties with activities of daily living at work and at home, especially with gripping and grasping. With respect to restrictions, use of gloves to limit exposure to vibration would be reasonable. Claimant argued that he suffered permanent impairment based on the change in his anatomy and his ongoing symptomatology.

Procedural History: The deputy commissioner found that despite operative notes stating Claimant had a complete or near complete loss or at least derangement of the transverse carpal ligaments, no expert opinion stated that he suffered permanent impairment on this basis. Functional disability is limited to the loss of the physiological capacity of the body or body part.

As for Claimant's ongoing symptomatology, the deputy ruled that despite the AMA Guides inclusions of specific protocol for assessment which permits physicians to reach conclusions about pain-related impairment, Claimant's IME was insufficient. The deputy ruled that Claimant's IME report did not state what, if any, of the protocols were used in arriving at the impairment rating. Because Claimant's IME report failed to disclose the protocol or basis for the assessment of impairment, the opinion was not found persuasive. Neither of Claimant's treating physicians found permanent impairment or restrictions, so the deputy held that Claimant failed to carry his burden of proof to show by a preponderance of the evidence that the August 27, 2013 injury was the cause of permanent impairment.

Rehearing was denied, and the deputy's decision was affirmed by the Commissioner. On appeal, the district court found that the record as a whole does not support a finding of permanency. The district court found that the deputy stated the evidence relied upon and the reasons for the

conclusions, including the findings of the treating physicians and the rationale for not finding Claimant's IME report persuasive. The district court found that substantial evidence supported the decision to not award permanency benefits.

Holding: The Iowa Court of Appeals affirmed the lower decision. Claimant argued that the agency disregarded "the extensive evidence of subjectively-manifested pain and the "sworn lay testimony" as well as documents where he was noted to have complained of pain in the past.

The court ruled that a trier of fact might conclude otherwise based on the evidence, but the task on appeal is not to determine whether the evidence supports a different finding; the task is to determine whether substantial evidence supports the findings made. The treating physicians noted that the Claimant reported doing well, and they both returned him to work without impairment or restrictions. Claimant's IME report was found to be flawed because of the lack of basis for the assessment of impairment, so the deputy's reliance on the substantial evidence of the treating physicians was found to be proper.

***McDonald v. EZ Payroll & Staffing Solutions, LLC, File No. 18-1152, 2019 WL 3317888 (Iowa Ct. App. 2019).***

Decision Date: 07/24/19

Facts/Arguments: Claimant filed a petition asserting his Legionnaire's disease arose out of and in the course of his employment. EZ Payroll & Staffing Solutions is a temporary employment agency; Claimant started working for one of its clients, ALPLA (plastic fabrication company), on August 20, 2012. He was required to clean molds used in production of plastic bottles.

Claimant's treating physician opined he was exposed to Legionella bacterium and contracted Legionella pneumonia while spraying molds in August 2012. Dr. Bansal also gave a positive causation opinion. ALPLA's safety manager submitted an affidavit that the water system utilized by the employer was highly-controlled, closed-circuited, and contained several additives to control microbes and bacteria. An investigation since 2010 showed ALPLA's water supply was never compromised with Legionella bacteria and there were no other reported cases of any respiratory conditions. Defendants' expert opined the disease could not be attributed to exposure to water at ALPLA.

Procedural History: The Deputy found in favor of Claimant and gave more weight to the treating physicians' causation opinions. On intra-agency appeal, the Commissioner reversed. The Commissioner rejected the treating physicians' opinion and Dr. Bansal's opinion citing the fact they were both unaware of the procedures followed by ALPLA to prevent contamination of the water supply. The Commissioner felt this was crucial information and instead accepted the opinion of Defendants' expert, who did consider this information.

The Commissioner's holding was affirmed by the District Court on judicial review. The court found there was substantial evidence supporting the Commissioner's finding on causation based on the affidavit and Defendants' expert report. The court found the Commissioner properly

considered all of the evidence and did not improperly shift the burden of proof on causation. The court also found the affidavit and expert report was timely admitted given the continuance of the hearing deadlines due to Claimant's amendment to the petition, one day before the hearing, to allege an odd-lot claim. Further, the information was made available to Claimant's attorney more than thirty days before the hearing.

Holding: The Iowa Court of Appeals found the Commissioner did not abuse his discretion in allowing Defendants' expert opinion and the affidavit from the safety director. The court refused to analyze whether the evidence supported Claimant's position of causation and instead reiterated that its role was to determine whether the Commissioner's ruling was supported by substantial evidence. The court found the denial of benefits was supported by substantial evidence, pointing to ALPLA's steps to reduce contaminants in its water, information that Claimant did not share with his experts. On the other hand, Defendants' expert considered this evidence. However, the court indicated it was "troubled" by the Commissioner's reliance on an affidavit and an expert report that were not subject to cross-examination and it was unknown whether the Legionella bacteria was one of the contaminants ALPLA was attempting to mitigate in its water.

### **CLASS CERTIFICATION**

***Roland v. Annett Holdings, Inc., File No. 18-1092, 2019 WL 3317353 (Iowa Ct. App. 2019).***

Decision Date: 07/24/19

Facts/Arguments: Plaintiff suffered a work injury in October 2013. While Plaintiff was on restrictions, Defendant assigned him to perform light duty work in Des Moines even though he lived in Alabama. Defendant also transferred his medical care to Des Moines. Plaintiff temporarily relocated but was not satisfied with his medical care in Iowa, so he asked to be returned to Alabama for surgery. Defendant agreed, but after the surgery, Plaintiff was again required to return to light duty work in Des Moines and forgo follow-up care in Alabama. All drivers were required to sign a Memorandum of Understanding as a condition of their employment with Annett Holdings, which provided that the worker agreed they may have to temporarily relocate to Des Moines for modified duty work in the event of a work injury or their workers' compensation benefits could be suspended.

In 2014, Plaintiff filed a Petition for Alternate Medical Care seeking care in Alabama instead of Des Moines. The care was awarded and the Deputy found the Memorandum of Understanding deprived Plaintiff of reasonable medical care given it was both unreasonable and an undue inconvenience for Plaintiff to transfer his care to Des Moines. The alternate care issue was appealed and the District Court and Iowa Court of Appeals affirmed.

Immediately after the Iowa Court of Appeals decision on the alternate care issue, Plaintiff filed a Petition alleging bad faith and violation of statutory rights on behalf of himself and others due to Defendant's continued attempts to compel him to travel to Des Moines for the light-duty work program. Defendant stipulated the prospective class consisted of more than forty drivers who

signed the same Memorandum of Understanding, had workers' compensation claims, and had been compelled to travel to Des Moines for the light-duty work program.

The company moved to decertify the class action. Although Defendant conceded the class was numerous enough, it argued the class did not share a common question of law or fact. In support of this, Defendant argued the class did not suffer the same injury or damages. Defendant also argued the class certification would not promote a fair and efficient adjudication because the individual questions would predominate over those common to the class.

Procedural History: The District Court held Plaintiff and the other drivers met the requirements for class certification. The court found 1) the class, sharing a common question of law or fact, was so numerous as to render joinder of all parties impracticable; 2) class certification would promote the fair and efficient adjudication of the controversy; and 3) the representative party would fairly and adequately protect the class' interests. The District Court disagreed with Defendant on both of their arguments.

Holding: The Iowa Court of Appeals found the District Court did not abuse its discretion in allowing the class certification. It pointed out that the members shared a common legal grievance (i.e. that the use of the Memorandum of Understanding to deny benefits was a violation of Iowa Code section 85.18 and Defendant knew enforcement of the Memorandum of Understanding violated the law). In holding the class certification would promote fair and efficient adjudication, the court found evidence relating to the legality of the Memorandum of Understanding would be central to each claim, even if individual class members would offer specific evidence of their own damages. The court held this was true on the bad faith claim as well given the central evidence presented would be about whether Defendant knew that using the Memorandum of Understanding would deny workers' compensation benefits without a reasonable basis. Although evidence about damages would be individualized, which is a difficulty faced in any class action, the legality of the Memorandum of Authority and Defendant's knowledge of its violation of law would predominate the litigation.

## **CUMULATIVE INJURY**

***Gumm v. Easter Seal Society of Iowa, Inc., 928 N.W.2d 858 (Iowa Ct. App. 2019).***

Decision Date: 05/15/19

Facts/Arguments: Claimant sustained a fracture to her right ankle on October 28, 2008 when she slipped and fell at work. The injury required surgery and the treating doctor assessed seventeen percent permanent impairment to the lower extremity and returned Claimant to work without restrictions. Defendants paid out the rating, the last check being issued on May 21, 2010. In 2010, Claimant underwent another surgery to remove painful hardware, but the treating doctor said there was no additional permanent impairment. In 2012, Claimant returned to the treating physician for foot pain and altered gait. She ultimately underwent a right ankle arthroscopy on April 11, 2012 for ankle synovitis. She was eventually released without restrictions and the treating doctor again said there was no additional permanent impairment. In 2013, Claimant

continued treating for right ankle pain. The treating physician performed another surgery on October 23, 2013 consisting of ankle arthrodesis for arthritis. After the surgery, Claimant complained of left knee, low back, and shoulder pain due to overcompensation for her right ankle/foot.

Dr. Sassman performed an IME on behalf of Claimant and opined Claimant had healed completely after the surgery in 2012 and there was a significant gap in care until May 2013 when Claimant resumed treatment. She opined Claimant's work in May 2013 was a substantial aggravating factor in her right ankle symptoms. She also opined the knee and back symptoms were due to gait change from the ankle condition. She assessed twenty-nine percent permanent impairment for the right ankle condition, but also gave a combined rating of twenty percent to the body as a whole for the ankle, knee, and back conditions. She gave permanent restrictions.

Claimant filed two workers' compensation actions on February 25, 2014; one Petition alleged an injury date of October 28, 2008 and the other alleged a cumulative injury manifesting on several possible dates. Claimant argued she had a cumulative aggravation of her acute injury from October 2008. Defendants asserted a statute of limitations defense for the 2008 injury. Prior to the hearing, the parties stipulated the 2008 injury caused seventeen percent permanent impairment to the lower extremity, which Defendants had paid.

Procedural History: The Deputy found Claimant failed to show her work duties after October 28, 2008 resulted in a cumulative injury. The Deputy found Claimant's original ankle injury never healed and noted Dr. Sassman's causation opinion was flawed; Claimant testified there was no significant gap in her care and she felt her ankle never completely healed after the surgeries, which was contrary to what was noted in Dr. Sassman's report. The treating physician opined that given the severity of the original injury, Claimant would inevitably develop arthritis and he was unable to state with certainty that the work activities accelerated the development of the arthritis as multiple factors play a role in the pace of development of arthritis. Thus, the Deputy concluded there was no "distinct and discreet" disability attributable to the post-injury work activities and Claimant's complaints represented a sequela of the original fracture.

The appeal Deputy affirmed and found the holding in *Floyd v. Quaker Oats*, 646 N.W.2d 105 (Iowa 2002) did not apply. The *Floyd* case held that when a prior injury is not compensable (i.e. by virtue of the statute of limitations), the claimant should be permitted to recover through a cumulative injury claim due to any increase in functional disability due to day-to-day activities in the work place after the initial injury. *Floyd* is the exception to the rule in *Ellingson v. Fleetguard, Inc.*, 599 N.W.2d 440 (Iowa 1999) that in order to establish a cumulative injury after an acute injury, the claimant must show he/she has suffered a "distinct and discrete" disability due to work activities after the initial acute injury. The District Court affirmed holding that Deputy's finding that all of Claimant's disability was the result of the traumatic injury and the natural results therefrom was not an irrational, illogical, or wholly unjustifiable application of the law.

Holding: The Iowa Court of Appeals reversed, noting the exception in *Floyd* was applicable. Although the court found Claimant failed to show a “distinct and discreet” disability attributable to her post-injury work activities, it concluded Claimant showed she faced a statute of limitations defense for the original injury and was therefore permitted to show a cumulative injury claim for any increase in functional disability due to her day-to-day work activities after the acute injury in October 2008. “In other words, 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 a 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 discreet’ disability attributable to the post-original-trauma work activities.” The court remanded the case for a determination of permanency under *Floyd*.

Misc.: In his dissent, Judge Mullins noted that the case at bar differed from *Floyd* in an important respect. In *Floyd*, the claimant was not compensated for the initial injury that was barred by the statute of limitations. However, in the case at bar, Claimant had already been compensated for her underlying injury. His concern was that Claimant was being allowed to pursue additional benefits for an injury for which she had already been compensated, which is an extension of *Floyd*. Defendants filed for further review, which was recently granted by the Iowa Supreme Court.

### **EXTENT OF PERMANENCY**

***Cerwick v. Tyson Fresh Meats, Inc.*, 927 N.W.2d 691 (Iowa Ct. App. 2019).**

Decision Date: 02/06/19

Facts/Arguments: Claimant fell at work on February 28, 2013. Immediately after the injury, Claimant reported to her employer and doctors that she fell with her hands braced behind her back and landed on her back. There were several examining and treating doctors that gave causation and permanency opinions for both parties’ positions. Defendants admitted a temporary back injury but denied Claimant’s allegations of injuries to her right hip and right shoulder.

During the hearing, Claimant chose to use an interpreter. She was born in Morocco and although she could speak English, she could not read or write in English. There were many problems with the interpretations during the hearing. There were times when Claimant had trouble identifying words in Arabic and asked to answer the questions in English. There were also times when the interpreter indicated Claimant did not understand the Arabic as she was responding to the questions incorrectly. Thus, Claimant decided to waive the use of an interpreter as it was easier for her to speak in English than in Arabic.

Procedural History: The Deputy concluded Claimant failed to show she sustained a work injury beyond a temporary aggravation to her back. In regard to the denial of permanency for the back, the Deputy gave weight to the opinions of Dr. Jackson, Dr. Igram, and Dr. Mooney who all

assessed no permanent restrictions for the back condition; Dr. Mooney assessed zero percent permanent impairment.

In concluding Claimant failed to show causation for the hip and shoulder conditions, the Deputy gave more weight to the causation opinions of Dr. Aviles and Dr. Jacobson (Claimant treated with both doctors on referral from her family physician). Both doctors could not causally relate the conditions to the work injury. The Deputy also noted inconsistencies in the histories Claimant provided her medical providers over time in comparison to her initial reports to the employer and doctors. For example, immediately after the injury, she reported landing on her back with her hands braced behind her. Almost a year after the injury, she reported that her legs went into a splits position when she fell and that she fell onto her outstretched arm. Further, she did not report hip symptoms until months after the fall, which is inconsistent with a traumatic labral tear according to several medical providers. She did not report shoulder symptoms until more than a year after the fall and in giving his causation opinion, Dr. Jacobson also cited the lack of a temporal relationship.

The Commissioner affirmed and denied Claimant's Application for Rehearing. He specifically noted considerable deference was given to the Deputy's assessment of Claimant's credibility. When Claimant filed for judicial review, she alleged the Agency's findings were impacted by implicit bias.

Holding: The Iowa Court of Appeals performed a "fairly intensive review" of the record and concluded substantial evidence supported the Agency's findings that Claimant provided an inconsistent history of the work injury. It found the Agency did not ignore any evidence and gave a detailed recitation and the weight afforded.

***Baccam v. ACH Food Co., Inc., 928 N.W.2d 157 (Iowa Ct. App. 2019).***

Decision Date: 03/06/19

Facts/Arguments: Claimant sustained an accepted crush injury to his left leg on June 12, 2012 as a result of a forklift accident. He underwent conservative treatment. He worked light duty for a time but was eventually returned to work without restrictions. The treating orthopedic surgeon assessed one percent permanent impairment to the lower extremity. Defendants paid out the rating. Claimant later underwent an IME with Dr. Taylor at his attorney's request and was assessed with three percent permanent impairment to the lower extremity. Dr. Taylor gave permanent restrictions. The treating orthopedic medicine physician later agreed with the one percent rating from the orthopedic surgeon.

Procedural History: The Deputy awarded three percent permanent impairment to the lower extremity based on Dr. Taylor's opinion. While considering Claimant's testimony about his loss of function, the Deputy did not award additional permanency based on his testimony. The Deputy noted Dr. Taylor's rating considered Claimant's statements regarding his abilities. The Deputy also awarded temporary benefits and a forty percent penalty for a delay in payment of those benefits. The Deputy declined to award the costs of the hearing transcript to Claimant as

the Deputy did not request submission of the hearing transcript. The appeal Deputy affirmed all conclusions, but she gave a specific temporary benefit award amount and added a five percent penalty for not communicating the delay in payment of permanency benefits. The District Court affirmed the awards but remanded the penalty benefit issue to the Commissioner to explain the finding that Defendants conducted a reasonable investigation into permanency benefits.

Holding: On the permanency issue, the Iowa Court of Appeals affirmed the Deputy's award. The court found the Deputy's reliance on Dr. Taylor's permanency assessment was supported by substantial evidence, as was the level of consideration given to Claimant's testimony about his impairments. On the penalty benefit issue, the court reversed the District Court's decision given Defendants conceded it no longer objected to the five percent penalty benefit award. On the court cost issue, the court affirmed the Deputy's denial of reimbursement of the transcription cost to Claimant. The court found the Deputy did not abuse her discretion. The court reversed the District Court's decision only as it related to remanding the case to the Agency on the penalty benefit issue.

***Saghir v. Menards*, File No. 18-1712, 2019 WL 3714826 (Iowa Ct. App. 2019).**

Decision Date: 08/07/19

Facts/Arguments: On January 1, 2015, Claimant sustained a work injury when a piece of lumbar fell on his head. CTs and MRIs of his head, neck, and back were normal. A neuropsychological examination was determined to be invalid due to somatic complaints. The treating neurologist, Dr. Ajax, opined Claimant did not have any permanent impairment or restrictions.

Claimant was examined by Dr. Mandelkorn for his vision issues and he opined there was significant atrophy of the optic nerves and a failure to converge, which was due to a traumatic brain injury from the work injury. Claimant later underwent an IME with Dr. Bansal. Dr. Bansal diagnosed traumatic brain injury and aggravation of cervical spondylosis with disc protrusion at C6-7. He assessed permanent impairment for the vision issues, gait issues, and neck condition.

Procedural History: The Deputy found neither Dr. Mandelkorn nor Dr. Bansal were aware of a prior motor vehicle accident in 2010 resulting in very similar symptoms: headaches, neck pain/stiffness, post-concussive syndrome, and muscular neck pain. Following the 2010 motor vehicle accident, Claimant had undergone similar neurological testing that showed a deliberate effort to perform poorly. Dr. Ajax was aware of the prior motor vehicle accident and provided treatment to Claimant. Thus, his opinion was given more weight relating to permanency for the 2015 work injury. The Deputy also found Claimant was not credible based on his demeanor that was consistent with a deliberate effort to exaggerate and conceal, also specifically noting that Claimant's memory appeared worse upon cross-examination at hearing. The Commissioner affirmed on appeal noting two major facts in support of a conclusion of no permanency: 1) neither Dr. Madelkorn nor Dr. Bansal were aware of the prior motor vehicle accident involving similar symptoms; and 2) Claimant was not a credible witness. The District Court affirmed.

Holding: The Iowa Court of Appeals agreed substantial evidence supported the Commissioner's conclusion that Claimant had not sustained a permanent disability. Claimant's alleged neck, back, head, vision, and memory issues were similar to symptoms he had following an injury in 2010 and neither Dr. Madelkorn nor Dr. Bansal took this into account. Further, in light of the Deputy's finding that Claimant was not credible, this also supported the conclusion Claimant had not sustained a permanent injury.

***A-Tec Recycling, Inc. v. Wood, File No. 18-2182, 2019 WL 4302132 (Iowa Ct. App. 2019).***

Decision Date: 09/11/19

Facts/Arguments: On March 4, 2013, Claimant slipped and fell from a truck at work and injured his right side, including a chest wall rib contusion. He did not initially seek medical treatment, but his condition worsened to the point that he developed atrial fibrillation, pneumonia, and pleural effusion. He was hospitalized for several days. Claimant was examined by many specialists including pulmonology, nephrology, cardiology, and infectious disease. Claimant was a long-term smoker and overweight. He was instructed on several occasions after the work injury to stop smoking, lose weight, and exercise. He was eventually returned to work with temporary restrictions. According to Claimant's testimony, his cardiologist later gave permanent restrictions of no lifting/pushing more than 100 pounds. He voluntarily left his employment with A-Tec Recycling and got a new job working as a tanker truck driver earning similar wages. He then got another job as a truck driver and was earning more at the time of the hearing than he did at the time of the work injury.

Defendants' examining physician causally related the atrial fibrillation to the work injury, but he was unable to state if the pulmonary issues were related. He was also unable to state that Claimant sustained permanent impairment of his cardiac or pulmonary systems because of the work injury. Claimant's treating cardiologist opined the atrial fibrillation was caused by the work injury and he gave permanent lifting restrictions. Claimant's treating pulmonologist opined the rib and lung pain were work related, but no permanent impairment or restrictions were given for those conditions.

Procedural History: The Deputy found the cardiac and pulmonary issues were work related, based on the opinions of the treating cardiologist and pulmonologist, and awarded ten percent industrial disability due to permanent impairment to Claimant's cardiac system. The Deputy found Claimant had ongoing atrial fibrillation, would require lifelong medication, and had a permanent lifting restriction. The Commissioner and District Court affirmed on appeal.

Holding: The Iowa Court of Appeals affirmed the finding that Claimant's heart condition was caused by the work injury. Claimant was not diagnosed with atrial fibrillation until shortly after the work injury and Claimant's treating cardiologist opined the work injury was a substantial contributing factor to causing the condition. Defendants' examining physician could only say it was not possible to determine the cause of the atrial fibrillation. The court also affirmed the award of permanent impairment and industrial disability. The cardiologist gave a lifting

restriction that Claimant testified was permanent and noted Claimant would need medication for the rest of his life as people with atrial fibrillation are at risk of recurrence. Claimant did in fact experience episodes of recurrence.

***Hecht v. Highline Const., Inc., File No. 18-2017, 2019 WL 4297287 (Iowa Ct. App. 2019).***

Decision Date: 09/11/19

Facts/Arguments: Claimant, a mechanic, sustained a work injury on August 13, 2014 when an air brake system exploded inches from his right ear. He was assessed with traumatic hearing loss and tinnitus. Three doctors gave permanency opinions. Dr. McMains, Defendants' expert, assessed ten percent permanent impairment to the body as a whole for the tinnitus. Dr. Tyler, Claimant's expert, assessed four percent permanent impairment to the right ear for the hearing loss and twenty-two percent to the body as a whole for the tinnitus. He also assessed permanent restrictions. Claimant was then evaluated by Dr. Hansen at Defendants' request. He determined prior audiology testing was inconsistent but noted the non-subjective testing showed no hearing loss in the right ear. Thus, he assessed no permanent impairment for the hearing loss. He also said there was no impairment for the tinnitus because there was no significant impact on activities of daily living. When presented with Dr. Hansen's report, Dr. McMains withdrew his opinion and stated Claimant did not suffer any permanent impairment. Claimant was then examined by Dr. Bansal who assigned twenty-two percent permanent impairment to the body as a whole for the tinnitus and he gave permanent restrictions.

At the hearing, Claimant testified he voluntarily quit his job with Highline Construction after the work injury. He then worked as a truck driver for Telecom Construction, but said he quit because he almost ran a car off the road due to his hearing loss and did not feel safe driving a commercial vehicle. At the time of hearing, he had left commercial truck driving at the advice of Dr. Bansal and was working for Pyramid Network earning \$30,000.00 less per year.

Procedural History: The Deputy awarded thirty percent industrial disability based on the tinnitus permanent impairment ratings from Dr. Tyler and Dr. Bansal and the fact Claimant was no longer working as a mechanic or driver, making substantially less money. Penalty benefits were awarded given Defendants did not pay the full impairment rating from Dr. McMains. After the hearing, Defendants discovered that Claimant's personnel file showed he resigned from Telecom Construction due to "unacceptable performance." Yet his unemployment records showed Claimant alleged he quit for refusing to conduct illegal DOT inspections. Both were contrary to Claimant's testimony at hearing. The new evidence also showed Claimant took a job as a mechanic after the date of injury, which he did not disclose during the hearing. He left this job three days after being hired because he wanted to be in the field more and use his own tools. Defendants filed their Notice of Appeal on July 26, 2016 and their application to submit this additional evidence on August 16, 2016. Claimant resisted the application to submit additional evidence, as being filed one day late. The application was granted prior to the Commissioner's Appeal Decision based on a showing of good cause for the extension.

The Commissioner affirmed the Deputy's ruling to admit the evidence. The Commissioner found the evidence showed Claimant was not credible and reversed the award for industrial disability and penalty benefits. The Commissioner relied on the opinions of Dr. Hansen and Dr. McMains because their testing was objective, thorough, and reliable. The testing relied upon by Dr. Tyler and Dr. Bansal were based on non-credible, subjective complaints.

Claimant appealed the decision relating to the acceptance of additional evidence after the arbitration hearing. The District Court affirmed the Commissioner, holding the good cause standard can be applied pursuant to Iowa Administrative Code rules 876-2.1 and 4.28, as well as Iowa Rule of Appellate Procedure 6.1003. The court also found the evidence could not have been discovered previously given Claimant's failure to supplement discovery with his employment information. Finally, the court agreed a hearing on the admissibility of the evidence was properly denied given Claimant failed to request a hearing when Defendants' filed their Motion or after the ruling admitting the evidence. Claimant did not request a hearing until after the Commissioner entered his Appeal Decision.

Holding: The Iowa Court of Appeals affirmed finding the Commissioner had authority to consider the additional evidence and that Defendants showed good cause to extend the additional evidence deadline. Although Iowa Administrative Code rule 876-4.28 provides a party must file a request for submission of additional evidence within twenty days after a notice of appeal, the court found this was not a mandatory statute in light of rule 876-2.1 that permits the Commissioner to modify deadlines of any rule for good cause. The court affirmed there was good cause for the extension given the death of a close family member of the Defendants' attorney, and the delay was only one day.

## **IME REIMBURSEMENT**

***Ostwinkle v. Mathy Construction Co., File No. 19-0341, 2019 WL 4678205 (Iowa Ct. App. 2019).***

Decision Date: 9/25/19

Facts/Arguments: Claimant sustained a back injury during the course of his employment with Mathy on July 23, 2013. Claimant filed an arbitration petition in July 2015. The employer-authorized doctor placed Claimant at MMI in October 2015. The matter went to hearing in November 2016, and the deputy awarded healing period and temporary partial disability benefits. The parties stipulated that the issue of permanent disability was not yet ripe.

Claimant filed a review-reopening petition seeking additional healing period and temporary disability benefits in February 2017. Claimant obtained an authorized IME in July 2017, which Mathy reimbursed. Claimant dismissed his petition without prejudice in August 2017 and thereafter underwent additional treatment. On June 8, 2018, the employer-authorized doctor gave an opinion that Claimant had reached MMI and also provided restrictions and an impairment rating.

On June 11, 2018, Claimant re-filed his review-reopening petition and requested healing period, TPD, industrial disability, PTD, and odd-lot disability benefits. On August 23, 2018, Claimant sought another IME at Mathy's expense, which Mathy resisted because of the previously reimbursed IME.

Procedural History: The Commissioner granted Claimant's application for the new IME, ruling that the second review-reopening petition constituted a new petition under which Claimant had not yet had an IME reimbursed. Mathy filed a motion for rehearing, which was denied, then petitioned the district court for judicial review. The district court found that because a new evaluation had been made by a doctor retained by Mathy in the new review-reopening proceeding, Claimant was entitled to a subsequent exam by his chosen physician.

Holding: The Iowa Court of Appeals held that Claimant was entitled to reimbursement for a second IME in this instance. Mathy argued that section 85.39 only permits a single reimbursable IME for the same injury. However, the court points to *Kohlhaas v. Hog Slat, Inc.*, 777 N.W.2d 387 (Iowa 2009), which examined an IME reimbursement in the context of a review-reopening. That court ruled that a review-reopening was a new and distinct proceeding apart from the original arbitration action, in which the Claimant had the burden of proving something different than he proved in the previous action. This second review-reopening, being ten months after the dismissal of the first review-reopening petition and following additional treatment, involves the determination of *permanency*, not healing period and temporary disability benefits as the first review-reopening petition did. Additionally, Mathy had obtained an IME regarding the issues at hand in this second review-reopening. Claimant sought to rebut the new disability evaluation.

## **IN THE COURSE OF EMPLOYMENT - COMING AND GOING RULE EXCEPTIONS**

***Carroll Area Nursing Serv. v. Malloy*, File No. 18-2126, 2019 WL 3317915 (Iowa Ct. App. 2019).**

Decision Date: 07/24/19

Facts/Arguments: Claimant was a registered nurse with Carroll Area Nursing Services at the time of the injury. As part of her job duties, she would drive her personal vehicle to patients' homes to provide them with medical care. She was reimbursed for her mileage and Carroll Area Nursing Services had a GPS installed in her car. On the date of injury, Claimant took the morning off work to attend a personal medical appointment. She left her car at her mother's home, two miles north of her own home. They went to the medical appointment and on their way back, Claimant stopped at her own house to change into her work uniform. Her mother then drove Claimant back to the mother's house so Claimant could pick up her car, which contained her medical supplies. Claimant then drove her own car to her patient's house. On the way to the patient's house, she was involved in a head-on collision and sustained serious injuries. The accident occurred on a route that was longer than the route Claimant would have used if she had left directly from her own house. Defendants denied the claim based on the coming and going rule.

Procedural History: Although the Deputy found Claimant did not establish the special errand exception to the coming and going rule, she did conclude Claimant came within the personal vehicle exception. Claimant did not have fixed hours and made frequent trips to patients' homes. She was required to be on-call regularly, making it necessary she have ready transportation. The Deputy also found Claimant did not deviate from her employment at the time of the accident; she had resumed her employment activities once she began driving to her patient's home. The Deputy awarded running healing period benefits. The Commissioner affirmed, as did the District Court.

Holding: The Iowa Court of Appeals affirmed the conclusion that Claimant's injury was compensable under the personal vehicle exception to the coming and going rule. Claimant was required to provide her own vehicle to drive to appointments with her patients. Her use of her vehicle at the time of the injury was in the furtherance of Carroll Area Nursing Services' interests. The court disagreed with Defendants that Claimant's injury occurred during a personal deviation. There was not substantial evidence to show Claimant abandoned her employment given the injury occurred when Claimant had resumed her work duties by driving toward her patient's home. At the time Claimant left her mother's home to go to her patient's home, she was in her work uniform and had her work supplies.

## **JURISDICTION ON APPEAL**

***Evenson v. Winnebago Ind., Inc.*, 922 N.W.2d 335 (Iowa 2019).**

Decision Date: 01/18/19

Facts/Arguments: In a judicial review decision on August 25, 2017, the District Court found Defendants' denial/delay of benefits was fairly debatable, yet it remanded the case to the Agency to make a determination under Iowa Code section 86.13(4)(c) as specifically instructed by the Iowa Supreme Court on a prior remand. Claimant disagreed and attempted to appeal the remand decision to the Iowa Supreme Court.

Procedural History: Claimant's attorney served a Notice of Appeal on September 5, 2017 to Defendants' attorney, then filed it with the Iowa Supreme Court the next day. Claimant's attorney then served a second notice on September 7, 2019 and again filed it with the Iowa Supreme Court. The caption on the first notice was for the Winnebago County District Court and the caption on the second notice was for the Polk County District Court. However, neither notice was filed with the corresponding district court. It was not until January 29, 2018 that Claimant's attorney filed a Corrected Notice of Appeal with the Polk County clerk of court, which was also filed with the Iowa Supreme Court clerk of court. Defendants then filed a Motion to Dismiss for Claimant's failure to file a notice of appeal within thirty days of the final order/judgment under Iowa Rule of Appellate Procedure 6.101(1)(b).

Holding: The Iowa Supreme Court noted that Iowa Rule of Civil Procedure 1.442(4) tolls the time requirement for filing an appeal with the district court for a "reasonable time" after service has been made. The court determined 144 days was not a reasonable amount of time given prior

cases finding twenty-six days was “near the deadline” and sixty-three days was not reasonable. *Gordon v. Wright County Bd. of Supervisors*, 320 N.W.2d 565, 567 (Iowa 1982) (citation omitted). The court dismissed the case for lack of jurisdiction.

***Ortiz v. Loyd Roling Constr.*, 928 N.W.2d 651 (Iowa 2019).**

Decision Date: 05/24/19

Facts/Arguments: Claimant filed a Petition for Judicial Review with the District Court following a decision from the Commissioner. The day after the Petition was filed, Claimant’s attorney emailed the file-stamped copy of the Petition to Defendants’ attorney. The email was sent before the expiration of the ten-day service deadline under Iowa Code section 17A.19(2). However, the Petition was not mailed to the Defendants’ attorney until after the deadline. Claimant argued substantial compliance with the service requirements.

Procedural History: The District Court granted Defendants’ Motion to Dismiss finding it lacked jurisdiction over the action because the Petition was not properly served via mail prior to the expiration of the service deadline. The Iowa Court of Appeals agreed and strictly interpreted the statute as only permitting personal service or mailing as satisfying the service requirements under Iowa Code section 17A.19(2). In rejecting Claimant’s substantial compliance argument, the court cited cases in which the petitioner had attempted to comply with service requirements before the ten-day period expired but there was a mistake in the mailing, recipient’s address, or caption of the petition. The court declined to read language into the statute that was not present and which could have been amended if the legislature so desired.

Holding: The Iowa Supreme Court reversed, holding Claimant’s attorney substantially complied with the statutory requirements by timely emailing a copy of the Petition to Defendants’ attorney. The court focused on the fact Iowa Code section 17A.19(2) was enacted in 1975 before email was widely used. The substantial compliance doctrine “permits leeway in meeting the requirements of the statute when the facts and circumstances indicate the purpose and meaning of the statute have been met.” The purpose of the statute is to make judicial review simple and accessible; permitting service by email accomplishes this. The court also noted email is a more reliable and convenient form of communication, consistent with the expected manner of communications between lawyers today.

***Bell v. 3E*, File No. 19-0310, 2019 WL 4298045 (Iowa Ct. App. 2019).**

Decision Date: 09/11/19

Facts/Arguments: Claimant filed a Petition for Judicial Review on May 22, 2018. The Petition stated it was served electronically through EDMS to Defendants’ counsel. After ninety days of the Petition being on file, the District Court issued an order on August 22, 2018 stating the record did not evidence notice as required under Iowa Rule of Civil Procedure 1.302(5). Claimant was ordered to file a return of service showing service within fourteen days or submit a

motion for good cause. On August 27, 2018, Claimant filed a Proof of Mailing indicating the Petition was mailed to Defendants' attorney on August 24, 2018. Claimant contemporaneously filed a Motion to Extend Time for Service with an affidavit from Claimant's attorney's legal assistant indicating she was unaware of the need to mail a copy of the Petition in light of electronic service via EDMS. This was resisted and Defendants sought a dismissal of the Petition.

Procedural History: A hearing was held by the District Court and Claimant was permitted additional time to serve the Petition as there was no prejudice to 3E although the court did "not condone the delay in service." On November 30, 2018, the parties gave oral arguments on the merits of the underlying workers' compensation case and Defendants again moved to dismiss the Petition based on lack of jurisdiction. The Motion to Dismiss was again denied by the District Court without analysis.

Holding: The Iowa Court of Appeals reversed holding that under Iowa Code section 17A.19 and Iowa Rule of Electronic Procedure 16.314(3), Claimant did not satisfy the mandatory and jurisdictional mailing requirements when filing an original action for judicial review. Thus, the District Court was deprived of jurisdiction to consider the Petition and it erred in denying the Motion to Dismiss. The Iowa Court of Appeals did not decide the merits of the underlying workers' compensation case.

## **MENTAL INJURIES**

***Dubinovic v. Des Moines Public Schools, 928 N.W.2d 871 (Iowa Ct. App. 2019).***

Decision Date: 05/15/19

Facts/Arguments: Claimant filed two Petitions. His first Petition alleged a mental-mental injury after a tense meeting with his supervisors on November 11, 2011. Defendant denied the mental-mental claim in its entirety. The second Petition alleged an injury to his right upper extremity on December 20, 2012. Defendant accepted liability for this claim but denied the extent of permanency. This appeal pertains to the alleged mental-mental injury.

Claimant, a school custodian, was on medication prior to the alleged work injury for anxiety and depression. During a meeting with his supervisors on November 11, 2011, Claimant asked his supervisors to force students to clean up better and gave his opinion on how the school should be cleaned. At prior meetings with his supervisors, Claimant expressed the same thoughts about the administration making students clean up after themselves, which was not within his authority to make. Instead, Claimant intentionally left pencils on the floor or rooms uncleaned to discipline the students and bring attention to the problem. He stopped coming to work after treating with his psychiatrist and was terminated due to non-attendance. Both Claimant's psychiatrist and psychologist opined Claimant's overwhelming work stress exacerbated his underlying mental condition. However, testimony from several witnesses who performed custodial work admitted the job required quota work within a given time frame and there was a certain amount of stress that was common to the position.

Procedural History: The Deputy found that although Claimant proved medical causation based on his doctors' opinions, he failed to show legal causation. The Deputy found Claimant failed to show workplace stress greater than that experienced by other workers in the same or similar job based on various witness statements. These witnesses, all related to or a friend of Claimant performing non-residential custodial work, admitted custodial work involves performing a certain amount of work in a given amount of time, which could be stressful, but was common to the position. Claimant's supervisor testified Claimant's job involved a normal workload and the expectations were not uncommon or unreasonable. The Deputy also noted Claimant had a history of complaining that various supervisors disrespected him and that he was overly sensitive to valid and reasonable criticism of his work.

Claimant argued the legal and factual causation requirements for mental-mental injuries outlined in *Dunlavey v. Economy Fire & Cas. Co.*, 526 N.W.2d 845 (Iowa 1995) should be overruled. He argued the statute only provides for a single-causation standard (i.e. that the injury arises out of and in the course of employment) and application of a different causation standard is for the Iowa Legislature. In the alternative, he argued he proved legal causation under a modified standard in *Brown v. Quik Trip Corp.*, 641 N.W.2d 725 (Iowa 2002) for a claim based on "a manifest happening of a sudden traumatic nature from an unexpected cause or unusual strain." The Commissioner affirmed the Deputy's findings and conclusions as did the District Court.

Holding: The Iowa Court of Appeals affirmed finding there was no evidence presented by the witnesses or Claimant that his work expectations were greater than that of others in the same or similar position. Also, the court found the causation standard in *Brown* was inapplicable given Claimant's alleged nervous breakdown occurred after several meetings with his supervisors; cases where the *Brown* standard was applicable involved instances where the claimant was personally and physically threatened, witnessed a gruesome injury, or witnessed someone's death. Finally, the court declined to overrule controlling precedent to change the causation requirements for mental-mental injuries outlined in *Dunlavey*.

***Sullivan v. West Central Coop.*, File No. 18-1811, 2019 WL 3946004 (Iowa Ct. App. 2019).**

Decision Date: 08/21/19

Facts/Arguments: Claimant sustained a severe work injury on October 2, 2011 when a wheel loader he was driving was struck by a train. His injuries included a hip fracture, back fractures, rib fracture, head trauma, etc. Despite the severe nature of the incident, Claimant was able to return to light duty work almost two months after the injury. He had a protracted medical course and treated with a myriad of physicians for numerous problems. Not one of the treating doctors observed symptoms of a mental disorder, nor did Claimant make any such complaints.

After Claimant requested a consultation by a pain psychologist in February 2014, he was sent to Dr. Chesen (psychiatrist) by Defendants. Dr. Chesen opined Claimant had no psychiatric condition and it would be atypical for him to have mental symptoms two years after the work injury when by that time, the condition would have improved with or without treatment. At his

attorney's request, Claimant underwent a neuropsychological assessment with Dr. Mills. Dr. Mills concluded that it was likely Claimant had attention, concentration, and memory difficulties due to a mild traumatic brain injury from the work injury. Dr. Mills diagnosed posttraumatic stress disorder and major depressive disorder. Claimant was next seen by Dr. Gallagher (psychiatrist) at his attorney's request. He diagnosed major depressive disorder and anxiety, most consistent with PTSD. Dr. Chesen later reviewed the reports from Dr. Mills and Dr. Gallagher and he continued to maintain his prior opinions.

After the hearing, Defendants sent Claimant for an IME with Dr. Andrikopoulos (neuropsychologist). Although cognitive testing showed impaired memory and attention, it was in excess of what would be found in patients with a mild head injury and the testing was deemed invalid due to malingering. Personality testing also suggested exaggeration of symptoms.

Procedural History: The Deputy found the alleged mental condition was not caused by the work injury. He relied on the fact that Claimant did not report any mental issues until more than two years after the work injury and his medical providers did not observe symptoms consistent with a mental condition. Claimant's wife attended many of the medical appointments and never indicated changes in mood, relationship, etc. The Deputy concluded Claimant did not have a work-related mental condition and was malingering. The appeal Deputy affirmed as did the District Court.

Holding: The Iowa Court of Appeals held the Deputy's decision regarding causation for the mental condition was supported by substantial evidence. It was based on the opinions of Dr. Chesen and Dr. Andrikopoulos, Claimant's questionable credibility, and the timing of Claimant's alleged mental complaints (first being made during an IME).

## **NOTICE/STATUTE OF LIMITATIONS**

***Del Rosario Romero v. Curly's Foods, File No. 18-2066, 2019 WL 5790890 (Iowa Ct. App. 2019).***

Decision Date: 11/6/19

Facts/Arguments: Claimant developed a bilateral shoulder injury while working for Curly's Foods. She alleged a cumulative injury. The deputy commissioner found, as a result of Claimant's direct testimony, that May 2013 was the date Claimant began experiencing shoulder difficulties. The deputy also found May 2013 to be the period when Claimant knew her condition was caused by her employment. The deputy found that Curly's did not have notice of Claimant's cumulative injury until March 28, 2014. The deputy therefor ruled that Claimant did not tender notice within ninety days of the date the bilateral shoulder condition manifested itself, so the claim was disallowed.

Procedural History: Both the Commissioner and district court affirmed the decision of the deputy commissioner.

Holding: As a note, this decision was under the old section 85.23 on notice of injury and failure to give notice. Claimant did not challenge the manifestation date and instead focused on the commissioner's application of the discovery rule. Claimant argued that it may be correct that the injury manifested itself in May 2013, but Claimant asserted the evidence showed Claimant did not know prior to May 2014 that her injury would cause a permanent adverse impact upon her employment. However, the court ruled, in a rather brief opinion, that the substantial evidence standard of review controlled the disposition, and the result is that the decision was affirmed. The deputy commissioner found that Claimant was aware of the work-relatedness and seriousness of her injury in May 2013. Claimant testified that she reported the injury at that time, but the deputy found the testimony of Curly's human resources manager and occupational health nurse more credible. They testified that Claimant did not report the injury until March 24, 2014. The deputy, as trier of fact, made a credibility determination, and that decision was found to be supported by substantial evidence. The court also found that the Commissioner's application of the discovery rule was not irrational, illogical, or wholly unjustifiable.

***Tilton v. H.J. Heinz Co., File No. 18-1629, 2019 WL 3317393 (Iowa Ct. App. 2019).***

Decision Date: 07/24/19

Facts/Arguments: Claimant was a long-term employee of Heinz. She started having back problems at work in 2001 and realized it was work related around this time. She consistently and extensively sought treatment since 2000, was on restrictions at various times, and went on disability in 2006, 2008, and 2010. Her back problems got worse after switching positions in 2010. In February 2010, her chiropractor said her back issues were permanent and would be subject to flare-ups that would cause her to miss work. Claimant underwent treatment consisting of chiropractic care, physical therapy, and injections prior to September 2010. The treatment provided temporary relief and she was returned to work by Dr. Mathew on September 8, 2010 without restrictions. However, her symptoms returned in February 2011 and she again stopped working. She went on disability in April 2013 and never returned to work. In March 2015, Claimant filed a Petition alleging a manifestation date of April 15, 2013.

Procedural History: The Deputy concluded Claimant was aware "by 2011 that her condition was work related, serious, and potentially compensable." Given she did not give notice to Heinz until 2013 and the Petition was not filed until 2015, her claim was barred by the notice statute and statute of limitations. The appeal Deputy agreed the claim was barred by the notice statute; in light of this conclusion, he did not make a conclusion about the statute of limitations defense given it was moot.

The District Court held the Agency failed to apply the appropriate legal standard (i.e. determine the manifestation date of the cumulative injury and then separately determine when the notice/statute of limitations runs under the discovery rule). The court further held the Agency's conclusion of a manifestation/discovery date of September 8, 2010 was not supported by substantial evidence, focusing on Claimant's improved back condition and lack of restrictions per Dr. Mathew on September 8, 2010. The court found Claimant was not aware she had suffered a loss of earning capacity until 2013.

Holding: The Iowa Court of Appeals agreed with the District Court that the Agency blurred the concept of the manifestation date and the discovery rule, but this did not mandate reversal. The Agency applied the correct framework laid out in *Herrera v. IBP, Inc.*, 633 N.W.2d 284 (Iowa 2001) and the ultimate conclusion was deducible from the Agency's legal conclusions. However, the court reversed the Agency's conclusion that Claimant knew or should have known the seriousness of her condition and that it would have a permanent impact on her employment by September 8, 2010 at the latest. The court found the conclusion was not supported by substantial evidence given Dr. Mathew returned Claimant to work without restrictions on September 8, 2010 and Claimant did return to work full duty. The case was remanded to the District Court to enter an order to reverse the Agency decision and remand for further proceedings.

## **PENALTY BENEFITS**

***Dubinovic v. Des Moines Public Schools*, 928 N.W.2d 885 (Iowa Ct. App. 2019).**

Decision Date: 06/05/19

Facts/Arguments: Claimant filed two Petitions. His first Petition alleged a mental-mental injury after a tense meeting with his supervisors on November 11, 2011. Defendant denied the mental-mental claim in its entirety. The second Petition alleged an injury to his right upper extremity on December 20, 2012. Defendant accepted liability for this claim but denied the extent of permanency. This appeal pertains to the 2012 injury.

Claimant sustained a radius fracture and was given temporary restrictions. Claimant later reported no pain in his wrist on follow up visits. However, during an IME with Dr. Taylor, he reported constant pain and Dr. Taylor assessed eight percent permanent impairment to the right upper extremity. At Defendant's request, Dr. Brehmner gave an impairment rating; he assessed two percent to the upper extremity. Defendant paid out the two percent rating on July 2, 2013, which was prior to Dr. Brehmner's rating given on January 30, 2014.

Procedural History: The Deputy declined to award penalty benefits on permanency given it was not unreasonable for Defendant to pay based on a lower rating from the authorized treating physician rather than the higher rating from Claimant's examining physician given the pain

complaint discrepancies. In fact, Defendant volunteered the payment prior to Dr. Brehmner actually giving a rating. The Deputy declined to award penalty on temporary benefits as well. The Commissioner affirmed and specifically declined to award penalty on temporary benefits given Claimant had been paid his full wages initially and temporary benefits were paid at a higher rate.

Holding: The Iowa Court of Appeals affirmed the denial of penalty benefits and found the Commissioner's decision to deny penalty benefits was not irrational, illogical, or wholly unjustifiable.

## **REVIEW-REOPENING**

***Pella Corp. v. Winn*, 927 N.W.2d 203 (Iowa Ct. App. 2019).**

Decision Date: 01/09/19

Facts/Arguments: Claimant filed a review-reopening claim for a left shoulder injury from 2008. The claim previously went to hearing in 2010 and causation for the shoulder injury was determined in favor of Claimant; permanency was not raised as an issue. At the time of the hearing, Claimant submitted an IME report from Dr. Stoken assessing thirteen percent permanent impairment to the body as a whole, though she recommended surgery to repair the left rotator cuff. Claimant previously filed a Petition for a right shoulder injury from 2010 and was awarded eighty percent industrial disability. Claimant's review-reopening action was solely for the left shoulder condition from an injury in 2008.

At the time of the review-reopening hearing, Claimant was no longer employed by Pella, which was a change since the arbitration hearing. She testified she was unable to find full-time work and worked part-time at Casey's and Wal-Mart, but she eventually could not work due to lifting restrictions. Claimant's IME expert, Dr. Bansal, assessed thirteen percent permanent impairment to the body as a whole. He also gave permanent restrictions.

Defendant argued review-reopening was not available to Claimant because only medical benefits had been awarded at the initial arbitration hearing for the left shoulder injury. Defendant also argued Claimant was not entitled to permanent total disability or penalty benefits.

Procedural History: The Deputy awarded permanent total disability benefits. He found Claimant showed both a change in her economic and physical condition. This award was affirmed by the Commissioner. The Commissioner noted there was a change in Claimant's physical condition given she had not yet achieved MMI for the left shoulder injury at the time of the arbitration hearing. Although Dr. Stoken previously provided a rating, she only did so assuming no further treatment would be provided. She previously did not think Claimant was at MMI because she agreed with the treating orthopedic surgeons that Claimant required surgery. The Commissioner concluded Claimant was now at MMI based on the opinions from Dr. Kuhnlein and Dr. Bansal, both of whom doubted surgery would be beneficial given the length of time since the initial recommendation. He also affirmed the Deputy's finding that Claimant

made a reasonable but unsuccessful return to the workforce, supporting the change in her economic condition. The Commissioner agreed with penalty benefits given the only notice provided by Defendants regarding the denial of the review-reopening claim was their disagreement with Iowa Supreme Court precedent about whether review-reopening actions are permitted after an award of only medical benefits. On judicial review, the District Court affirmed.

Holding: The Iowa Court of Appeals affirmed. The court dismissed Defendants' argument that review-reopening actions are not available subsequent to medical only awards citing *Beier Glass Co. v. Brundige*, 329 N.W.2d 280, 287 (Iowa 1983) (holding an award of medical benefits is sufficient to support a review-reopening action). Although Iowa Code section 85.26(2) has been amended multiple times since *Beier Glass*, the court found the essential language of the statute was substantively unchanged and the court was unwilling to overrule case precedent.

The court agreed Claimant was not at MMI at the time of the arbitration hearing, and given she was at MMI at the time of the review-reopening hearing, a change of physical condition had been established. The court dismissed Defendants' equitable and laches arguments; Dr. Bansal's report and Claimant's testimony provided substantial evidence that Claimant did not act with negligence or delay in claiming disability benefits through a review-reopening petition.

In regard to the permanent total disability award, the court found substantial evidence supported the holding based on Claimant's testimony, Dr. Bansal's expert opinions, her limited treatment prospects, and her lack of meaningful employment after the arbitration hearing. The court affirmed the payment of concurrent permanent total disability benefits for the left shoulder injury and permanent partial disability benefits for the subsequent right shoulder injury citing the broad holding in *JBS Swift & Co. v. Ochoa*, 888 N.W.2d 887 (Iowa 2016) (permitting concurrent permanent total benefits and permanent partial benefits arising from separate injuries, no matter the order of the injuries).

Finally, the court affirmed the award of penalty benefits given Defendants' basis for their denial of the review-reopening claim was based on their position that *Beier Glass* should be overruled. The court found that while Defendants were free to argue the precedent should be overruled, this cannot be a basis for withholding benefits.

## **TORT LIABILITY**

***Ganka v. Clark*, File No. 18-1397, 2019 WL 6358301 (Iowa Ct. App. 2019).**

Decision Date: 11/27/19

Facts/Arguments: Claimant brought a gross-negligence action against the defendant on behalf of her husband, who died because of a workplace injury. Bronson Ganka worked for a property management business. The defendant, who was the son of the owners, worked for the business and would assign tasks to Ganka. In April 2014, the defendant assigned Ganka and his crew with the task of drilling vent holes in a building, approximately twelve to thirteen feet off the

ground. Ganka asked the defendant if he could use a telescoping forklift for the job, and defendant denied the request due to the need to block off the street and obtain a permit. The defendant did not direct Ganka how to complete the task, but it was undisputed that several pieces of equipment were available. The defendant assumed Ganka would determine how to best accomplish the task. Ganka ultimately chose a ladder. Something went wrong, and Ganka fell from the ladder, landing on the pavement below. He died days later. The task was accomplished the day after this accident using a scissor lift, which was available at the time of the accident.

Procedural History: A jury trial commenced in February 2018, and at the end of Ganka's evidence, the defendant moved for a directed verdict. The court reserved ruling on the motion. The defendant renewed the motion at the end of evidence, and the court again reserved ruling. The jury returned a seven million dollar verdict finding the defendant grossly negligent and 80% at fault. The defendant then moved for JNOV or a new trial. The court granted the defendant's motion for JNOV and concluded the evidence was insufficient to establish gross negligence under Iowa law.

Holding: The Iowa Court of Appeals affirmed the district court. As did the district court, this court assumed Ganka's evidence was sufficient to show the defendant had knowledge of the peril to be apprehended. However, the defendant must have knowledge that injury is probable, not just possible, as a result of the danger. The court noted this is an exceptionally difficult standard. Evidence must show the defendant knew his actions would place Ganka, or another employee, in imminent danger so that the employee would more likely than not be injured by the conduct. The court noted that this was not a risk-free task, and the defendant could have taken steps to reduce the risk. However, the evidence did not show that he had knowledge that his actions would make an injury probable. He left the details of the job to Ganka and his crew. There were multiple pieces of equipment to use, including the one that was ultimately used to safely complete the task, and even knowledge of use of the ladder would not show knowledge that an injury was probable.

***Clark v. Ins. Co. State of Pennsylvania, 927 N.W.2d 180 (Iowa 2019).***

Decision Date: 05/03/19

Facts/Arguments: Employees and former employees of an Iowa manufacturing company brought a tort claim against their employer's workers' compensation insurance carrier alleging the carrier failed to conduct, or negligently conducted insurance inspections, which caused serious health problems for Plaintiffs. Specifically, Plaintiffs alleged they were exposed to hazardous chemicals due to the carrier's failure to properly inspect the facility. Plaintiffs sought compensatory damages, medical expenses, lost wages, and punitive damages.

Procedural History: Defendant moved to dismiss based on the immunity provision in Iowa Code section 517.5, "no inspection of any place of employment made by insurance company inspectors...shall be the basis for the imposition of civil liability" against the insurer. Plaintiffs resisted the motion, arguing the provision is unconstitutional. The District Court held the provision was constitutional and granted the Motion to Dismiss.

Holding: In applying the rational basis test based on the prior decisions in *Suckow v. NEOWA FS, Inc.*, 445 N.W.2d 776 (Iowa 1989) and *Seivert v. Resnick*, 342 N.W.2d 484 (Iowa 1984), the Iowa Supreme Court affirmed the District Court's dismissal of the claim. The court held these decisions stand for the proposition that the Iowa Legislature may include a limitation on the liability of co-employees as part of the grand bargain of the workers' compensation scheme, which could logically be extended to provide immunity for inspections performed by the carrier. The workers' compensation carrier is "inextricably tied to the employer" thus the remedy available to the employees was limited to the provisions in the workers' compensation law. The court held there was no absolute elimination of a right to recovery for on-the-job injuries, only a reasonable regulation of it by statute, therefore, the statute is constitutional.