

Section I

New Work Comp Law: Avoiding Pitfalls and Stumbling Blocks

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Avoiding Pitfalls and Stumbling Blocks

IAJ 46th Annual Convention - Des Moines, Iowa
November 7, 2019

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This outline is based, a lot, on outlines previously prepared by Jason Neifert and Jennifer Zupp. Also, anything I say about the shoulder was probably first said by Corey Walker.

1. EFFECTIVE DATE

- a. Most provisions apply only to *injuries* that occur on or after July 1, 2017.
- b. The changes to commutation apply to *applications* for commutation filed on or after July 1, 2017 regardless of the date of injury.

2. INTOXICATION - IOWA CODE §85.16

- a. This section lists affirmative defenses employers can use to deny compensation for on the job injuries. One defense is intoxication.
- b. Prior to changes, an employer had to the burden of proving both that (1) the injured worker was intoxicated at the time of an injury and (2) that the intoxication was a substantial factor in causing the injury.
- c. CHANGE: The amendments to this section create a presumption that both are proven if an injured worker fails a post-injury alcohol or drug test.
- d. This is a rebuttable presumption which transfers the burden to the employee to disprove either element. The presumption only applies if the test result was taken at the time of the injury or "immediately following the injury". The scope of the time was not defined.

3. RETALIATION - IOWA CODE §85.18

- a. This section prevents employers from creating contracts to avoid their obligation to provide workers' compensation coverage.
- b. The Supreme Court case that created a retaliation cause of action relied on the *public policy* expressed in this section. *Springer v. Weeks*, 429 N.W.2d 558 (1988).
- c. CHANGE: The amendment to this section provides that the code section does not create a private cause of action.

- d. It is unclear whether this will have any effect since the Court in *Springer* relied on the *public policy* expressed by the statute, and not the language of the statute *per se*.

4. NOTICE AND STATUTE OF LIMITATIONS - IOWA CODE §85.23 & 85.26

- a. 90 Day Notice - 85.23
 - i. This section requires an injured worker provide notice within 90 days of an injury.
 - ii. The amendment to this section defines the “date of injury” as the date the "employee knew or should have known that the injury was work related."
 - iii. This is a codification of common law "manifestation date" definition of a when an injury is said to have occurred. *Herrera v. IBP, Inc.*, 633 N.W.2d 284, 288 (Iowa 2001). Accordingly, the amendment may simply have codified the case law.
 - iv. PRACTICE POINTER: Claimants should still be able to argue that they did not know of an injury because it was not yet serious in an effort to avoid the notice defense. Also, err on the side of giving notice.
- b. Statute of Limitations - 85.26
 - i. CHANGE: The amendment to this section is identical to the amendment to Iowa Code §85.23 in terms of defining when an injury has occurred for purposes of calculating the statute of limitations.
 - ii. PRACTICE POINTER: Still 3 years if weekly benefits paid; but medical benefits are not weekly benefits.

5. HEALING PERIOD / TEMPORARY DISABILITY BENEFITS - IOWA CODE §85.33(3)

- a. Subsection (3) has to do with suspension of temporary disability benefits for an unreasonable refusal of return to “suitable” work.
- b. CHANGE: The first change deals with the geographical suitability of such offers, stating that “Work offered at the employer's principal place of business or established place of operation where the employee has previously worked is presumed to be geographically suitable for an employee whose duties involve travel away from the employer's principal place of business or established place of operation more than fifty percent of the time.” Prior to this amendment, geographical suitability was often a fighting issue.
- c. CHANGE: The second change requires that job offers and refusals to accept be in writing. This will eliminate a lot of the “he-said, she-said” at trial about work having been offered or refused by the Claimant.
- d. PRACTICE POINTER: Always try to return to work.

6. PERMANENT DISABILITY BENEFITS - IOWA CODE §85.34

- a. This section deals with permanent disability compensation. *It was by far the most significantly changed by amendments.*
- b. CHANGE: Subsection (2) was amended to provide that the only commencement date for permanent partial disability compensation is that date of maximum medical improvement. This removes (1) the date of return to work and (2) the date that a return to similar work was medically indicated as potential commencement dates. This will delay the date of commencement and reduce the amount of accrual interest in a significant number of cases.
- c. CHANGE: Subsection (2) was also amended to add a new paragraph making “shoulder” injuries scheduled injuries with a value of 400 weeks.
- d. PRACTICE POINTER: “Shoulder” is not defined.
- e. CHANGE: Subsection 2(u) was amended to expressly allow for the consideration of the number of years remaining in the injured worker's expected working life when determining industrial disability.
- f. PRACTICE POINTER: The new language does not say this consideration should be used to *reduce* industrial disability in the case of older workers. Indeed, if it is used to reduce awards for older workers, then it must also be used to *increase* industrial disability for younger workers.
- g. CHANGE: Subsection 2(u) was also amended to say that if a "worker who is eligible for compensation under this paragraph" returns to work or is offered work wherein the employee receives or would receive "the same or similar earnings" then the worker shall be compensated based *solely on the functional impairment rating and not based on loss of earning capacity.*
 - i. This essentially eliminates industrial disability compensation for injured workers who have been returned - or offered the ability to return - to substantially similar employment.
 - ii. However, if the employee is later terminated, the statute also provides for an unlimited statute of limitations for review-reopening to determine the overall industrial disability of the Claimant.
- h. PRACTICE POINTER: It appears that in order for “lifetime” statute of limitations to be effective, an agreement for settlement or arbitration award must be obtained as to the functional impairment rating.
- i. CHANGE: Subsection (2) was also amended to add a new subsection (w) limiting evidence regarding the extent of impairment in scheduled member cases to only impairment ratings. Lay witness testimony and agency expertise are not allowed to be considered in that determination.
- j. QUERY: Can Claimant testify?

- k. CHANGE: Subsection (2) was amended to include a new subsection (x) that ends permanent partial disability compensation for an injury on the date that an injured worker begins to receive permanent total disability compensation for any injury. This was a legislative response to case law where a worker received 70% industrial disability for an injury and for another date of injury with the same employer, the worker was awarded Permanent and Total Disability. The code only gave the employer credit for Permanent Partial Disability Benefits that were paid under “the same code section” and since the 70% was paid under 85.34(2), and PTD is paid under 85.34(3), the worker was able to keep both streams of benefits. The scenario legislated against was a prior anomaly so won't affect many claims.
- l. CHANGE: Subsection (3) was amended to provide, again, that an injured worker who is awarded permanent partial disability benefits cannot also receive permanent and total disability benefits.
- m. CHANGE: Subsection (3) was also amended to provide that an injured worker cannot receive permanent and total disability benefits if that worker is receiving weekly earnings that exceed fifty percent of the statewide average weekly wage. This puts a finer point on prior law allowing that an injured worker can be permanently and totally disabled even if they remained employed in some capacity. Last year's statewide average weekly wage was \$860.06 so if the worker earns \$430.03 per week from their work, then they cannot receive permanent and total disability benefits.
- n. PRACTICE POINTER: For all practical purposes, an injured worker making \$400 per week at the time of hearing wasn't going to get PTD anyway.
- o. CHANGE: An injured worker cannot receive permanent and total disability benefits and unemployment benefits at the same time.
- p. PRACTICE POINTER: Another rare situation since to qualify for unemployment benefits an injured worker has to be ready, willing and "able" to work.
- q. CHANGE: Subsections (4) and (5) amended to change the manner in which credits for an overpayment is allowed. These changes allow an employer to claim a credit for an overpayment of benefits in the context of a current claim as opposed to waiting to assert a credit in a subsequent claim.
- r. CHANGE: Subsection (7) was amended in ways that will remain unclear for years. This subsection deals with “successive disabilities” or, more accurately, successive injuries resulting in disability. It was originally created in an effort apportion permanent disability compensation where a previous, permanent work injury has been sustained. The current amendments remove many of the provisions that had started to become settled law and replace them with language that will require many more years of litigation to resolve.

7. INDEPENDENT MEDICAL EVALUATIONS - IOWA CODE §85.39

- a. This section governs independent medical examinations. As previously written, an injured worker who refused to attend an evaluation scheduled by the employer was subject to a "suspension" of weekly benefits while refusing to attend.
- b. CHANGE: As amended, that injured worker will now be subject to a "forfeiture" of the right to weekly compensation if there is a refusal to attend.
- c. CHANGE: In addition, an injured worker will only be able obtain reimbursement for the cost of an independent evaluation if that worker proves that the employer is liable for the injury at issue.
- d. PRACTICE POINTER: Don't assure injured workers that they get a second opinion at the insurance company's expense. First, most injured workers don't know what a "second opinion" is in the context of work comp. Second, based on this revision coupled with recent Supreme Court and Commissioner decisions, that simply isn't true anymore.

8. COMMUTATIONS - IOWA CODE §85.45

- a. This is the section governing an injured worker's right to commute an award of future weekly compensation benefits and receive a present value, lump sum. Under prior law, an injured worker could obtain a commutation by demonstrating it was in that injured worker's best interest to obtain a commutation.
- b. CHANGE: As amended, this subsection will only allow for a commutation upon mutual agreement of the parties.
- c. PRACTICE POINTER: Many Claimant's filed their claims for commutation before the law changed and even though their future entitlement had not yet been established by the agency. The Commissioner has issued dismissals of these petitions saying that there is nothing to commute. Appeals are pending.
- d. CHANGE: This section was also amended to provide that the parties to a commutation can allow the injured worker to retain the right to future medical care even though the right to weekly benefits is closed.

9. VOCATIONAL BENEFITS - IOWA CODE §85.70

- a. CHANGE: Creates a new vocational assistance benefit to injured workers who have sustained a "shoulder" injury and "cannot return to gainful employment."
- b. The agency has created a new petition for vocational rehabilitation benefits similar to the Petition for Alternate Medical Care, form 14-0009, which is available on its website.
- c. Under the code, workers are eligible for up to \$15,000.00 for the cost of tuition, books, and supplies to attend vocational training or community college at the college located closest to the employee or other college agreed to by Iowa Workforce

Development. The Claimant must be working toward an Associate Degree or obtain another certificate that will enable them to return to the workforce.

- d. The \$100.00 per week vocational benefits which were previously allowed for employees remains eligible for folks who do not have a shoulder injury.

10. JURISDICTION - IOWA CODE 85.71

- a. This section deals with injuries occurring outside of this state. As previously written, an Iowa citizen who worked for a company that has a place of business in this state but was injured in a different state was covered by Iowa's worker's compensation laws.
- b. CHANGE: As amended, Iowa citizens will only be covered by Iowa's laws if they are injured in, or regularly work in, this state.

11. STAYS ON JUDICIAL REVIEW - IOWA CODE §§85.26 & AND 86.42

- a. These sections deal with Judicial Review proceedings.
- b. CHANGE: As amended an appealing party is now going to be allowed an automatic stay if they file a bond in a reasonable amount as fixed by the court. Previously, the appealing party had to demonstrate a likelihood of success on the merits.

12. ATTORNEY FEES - IOWA CODE §86.39

- a. This section allows the agency to oversee attorney fees. It was amended by adding a new subsection which specifies that an attorney can only charge a contingent fee against the benefits that attorney obtains over and above the benefits voluntarily paid by the employer. This change should not have any practical effect as this is the manner in which attorneys should have already been charging contingent fees.
- b. PRACTICE POINTER: Many say this is merely a codification of existing law and ethics rules to the effect that an attorney cannot charge a contingency fee on benefits their effort did not procure.

13. INTEREST - IOWA CODE § 535.3

- a. Under prior law, the interest rate for past due benefits was a flat 10%.
- b. CHANGE: As amended, the interest rate will now be a variable rate based upon the treasury maturity rate plus 2%.
- c. PRACTICE POINTER: The Commissioner has ruled that interest owed for all benefits that accrued prior to July 1, 2017 will be paid at 10% and interest for all benefits accrued after July 1, 2017 will have 2% plus the interest rate in effect on the particular date of loss.

14. OTHER STUFF

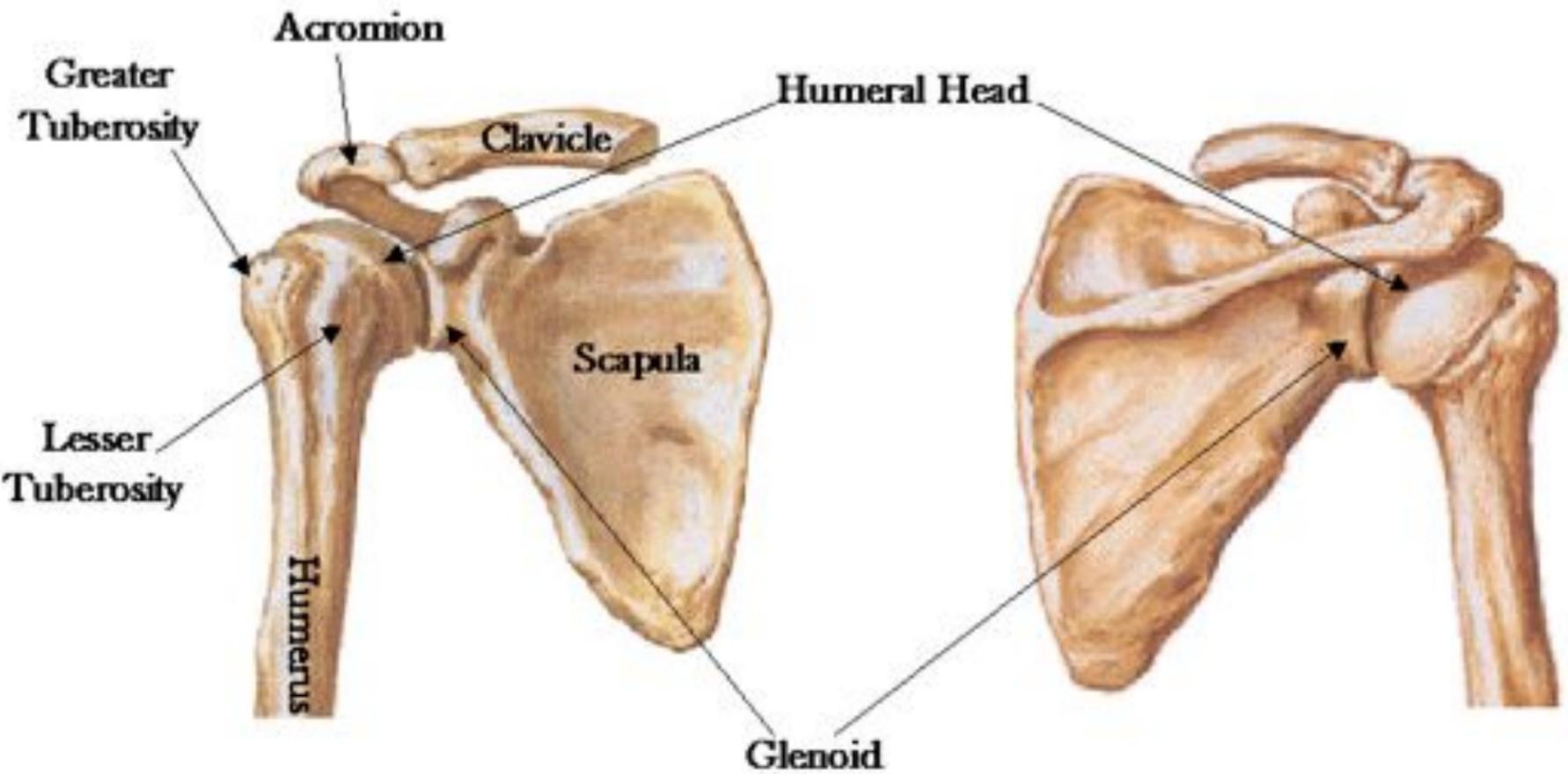
- a. Workers' Compensation Electronic System (WCES)
- b. Health insurance - Iowa Code Section 85.28
- c. Penalty benefits for failure to explain reason for denial

- d. Second Injury Fund
- e. Supported work
- f. Third Party Claims - Subrogation Iowa Code Section 85.22
- g. Medicare - Combination settlements
- h. Social Security Offset

**Acromioclavicular
joint**

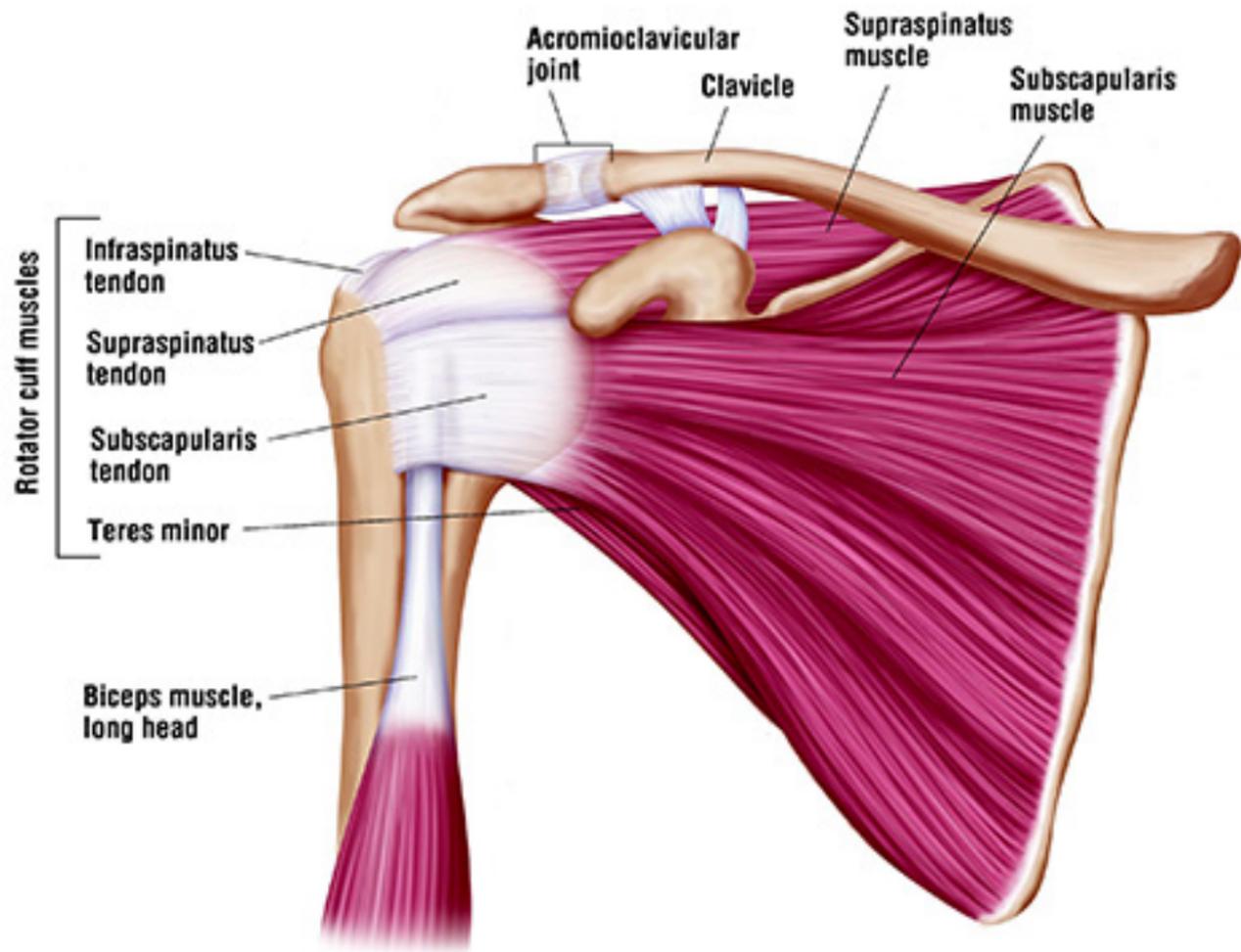
**Glenohumeral
joint**





FRONT VIEW

BACK VIEW



Muscles of the Rotator Cuff

