AGENCY CASE LAW UPDATE

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This outline provides summaries of select agency cases from October 2022 – September 2023.

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INDUSTRIAL DISABILITY ANALYSIS

Songer v. XPO Logistics Freight, Inc. & Indemnity Ins. Co. of North America, **File No. 21013046.01 (Arb. Dec. Oct. 4, 2022)**

Claimant alleged the work injury of October 23, 2019 accelerated the degenerative condition and need for medical intervention. Claimant alleged due to the acceleration of his condition, he is PTD or Odd-lot. Defendants denied Claimant's back injury after receiving an opinion from authorized treater, Betsy Bolton, PA-C, who opined that claimant's degenerative changes were likely causing the majority of his then current symptoms; however, she noted that the muscular strain injury from October 23, 2019, could not be entirely excluded as a cause for Mr. Songer's symptoms and she reiterated that a spine specialist would have better insight on causation and chronicity. Defendants did not send Claimant to a spine specialist and denied Claimant's back injury. Defendants got an opinion from Dr. Piper, one of Claimant's treating physicians, who related Claimant's condition to the degenerative condition rather than "flare up". Defendants later got an IME with Dr. Chen who related Claimant's and medical care to a slip and fall he had a couple weeks after Claimant's work injury. The Deputy found that Defendants met their burden of proof to deny Claimant's work injury and were not assessed penalties.

Claimant had favorable expert opinions from Matthew Biggerstaff, D.O. (who recommended a spinal cord stimulator that did help relieve Claimant's pain) and Dr. Jacqueline Stoken. The Deputy accepted their opinions and rejected Dr. Chen and Dr. Piper's opinions.

After getting the spinal cord stimulator and being recommended a lifting restriction of no more than 50 lbs., Claimant's employment ended because employer asked Claimant to come back when he was able to work without restrictions. Claimant did not perform any sort of job search and desired to "move forward with retirement."

> Martinez implies, but does not specifically state, that the phrase "termination from employment by that employer" is a broad standard to be interpreted liberally. The standard is not limited to situations in which the employer terminates, or fires, the injured worker. Importantly, the claimant in Martinez was offered work at the same

> or higher wages and accepted said offer; however, he later terminated his employment with the employer prior to the date of the evidentiary hearing.
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> Until a definitive interpretation is provided by the Iowa appellate courts, I am bound by the precedent of this agency found in Martinez. I conclude that claimant's injury should be compensated using the industrial disability analysis because claimant's employment was terminated with the employer after the injury and after he initially returned to work. Iowa Code section 85.34(2)(v); Martinez v. Pavlich, Inc., File No. 5063900 (Appeal July 30, 2020).

Songer, File No. 21013046.01, at p. 14 (Arb. Dec. Oct. 4, 2022). The Deputy found Claimant did suffer an acceleration of his degenerative condition but did not find that Claimant met the burden of proving he was permanently and totally disabled or that he was an odd-lot employee. The Deputy awarded the Claimant 50% industrial disability.

*On **Appeal**, the award was reduced to 25% ID due to Claimant's lack of motivation. (App. Dec. Jan. 24, 2023)

***Gurule v. Lowe's Home Centers*, File No. 5066730.01 (Arb. Dec. Oct. 5, 2022)**
Claimant had pre-existing back complaints. Claimant suffered an injury to his back and heel when he fell out of a moving semi while at work. Defendants obtained a medical opinion from Dr. Ian Crabb, who opined that Claimant was recommended to undergo PT, strengthening exercises, weight loss, and core strengthening exercises for the exacerbation of his lumbar spondylosis and pain. Claimant continued treating and it was found that Claimant had a small fracture fragment avulsion on the foot. Claimant was also diagnosed with facet arthrosis and spondylosis particularly at L4-5 and L5-S1, as well as severe foraminal narrowing on the left at L4-5, which he thought was causing the intermittent radiculopathy. He was provided with injections and PT for his back. He also had medial branch blocks and was recommended to undergo radiofrequency ablation. Defendant obtained two supplemental opinions from Dr. Crabb without providing information to him about the medical care Claimant had undergone since he was first seen by Dr. Crabb and without subsequent physical examination. Dr. Crabb opined Claimant was at MMI and could return to work full duty and that no further treatment was necessary. Meanwhile, Claimant's treating physician recommended surgery for his back, which Claimant underwent. Defendant denied liability and offered return to work full duty. The offer of work was not suitable in light of Claimant's restrictions and need for surgery at the time, and at the time of hearing, Claimant had not returned to work with Lowe's. The

Deputy rejected Dr. Crabb's opinions and accepted Dr. Klopper's (treating physician) and Dr. McGuire's (Claimant's IME) opinions. The Deputy awarded 80% ID.

The Deputy assessed penalties against the Defendant because Defendant withheld information from its IME doctor, Dr. Ian Crabb, and Defendants relied on the medical opinion even though Dr. Crabb was not provided complete information regarding the claimant's treatment and condition. Therefore, the Defendant's termination of benefits was without reasonable or probable cause or excuse.

*Affirmed on **Appeal** in its entirety (App. Dec. 4/20/23)

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

The employer does not escape liability for industrial disability simply by offering work at the same or greater wages if the employee is unable to perform such work. Claimant worked for the defendant-employer as a certified nursing assistant (CNA). While assisting with the transfer of a resident, claimant suffered a back injury that sent pain radiating down his leg and into his foot. At the time of the hearing, claimant's injuries, and the permanent restrictions provided by a functional capacity evaluation, were agreed upon and stipulated too. Defendant's claim that by offering the claimant his previous position, at the same pay, regardless of whether he is permitted to do the job, they have satisfied 85.34(2)(V). The deputy commissioner acknowledged "that an argument may be made that the plain language of [85.34(2)(v)] does not specifically state that claimant must be capable of performing the offered work." However, if that reading of the statute were adopted, it would allow "an employer to evade any liability for industrial disability merely by offering the employee a job for which the employee would receive equal or greater pay even though the employee is not capable of performing or perhaps not even qualified to perform the offered job." The deputy concluded that 85.34(2)(v), "clearly contemplates the employee actually returning to work and performing the work. The statutory language implies that the employee must be capable of performing the work he is offered." Therefore, offering employees a job they cannot perform does not satisfy 85.34(2)(v). The deputy found Claimant sustained 60% ID.

***Dungan v. Den Hartog Industries*, File No. 21700246.01 (App. Dec. Jan. 13, 2023)**

The Commissioner affirmed the finding that Claimant sustained a permanent disability to his back, and the injury was considered industrially because claimant's employment with the employer had ended. The Claimant was earning greater wages than at the time of injury, but voluntarily quit due to moving away with his

family. The deputy concluded that claimant was entitled to industrial disability under 85.34(2)(v), as interpreted by the commissioner in *Martinez v. Pavlich*, No. 5063900 (App. July 30, 2020). The deputy also concluded Claimant did not have to pursue a second action in order to receive industrial disability in these circumstances. A 15% industrial disability was awarded. The commissioner affirms without additional comment.

***Wohlers v. Pottawattamie County*, File Nos. 20701202.01, 20701189.01 (Arb. Dec. Jan. 26, 2023)**

Claimant alleged two separate injuries: 1. West Nile Virus (either by injury or occupational disease), 2. Neck injury from a MVA.

Regarding the first, Claimant took nothing. The Deputy rejected the Occ disease theory on the basis that claimant failed to prove the harmful conditions were more prevalent in employment versus daily life. The Deputy also rejected the injury theory because she concluded Dr. Bansal could not be relied upon because he had an incorrect or incomplete history. Dr. Bansal indicated that claimant worked at least 40 hours per week, but the record indicated claimant had taken one day off per week during the relevant time frame. Defense expert was John G. Southard, M.D., board certified in Internal Medicine and Pulmonary Diseases. The Deputy concluded he was better qualified to opine on causation. Dr. Southard opined that it was impossible to say whether claimant contracted WNV from work exposure because claimant admitted he was active outdoors in his non-work life.

On the second injury, Claimant was limited to functional rating. Claimant suffered a cervical strain from a MVA. Dr. Bansal provided a 5% BAW rating based upon myofascial pain syndrome. Claimant resigned his job with the County and took a less physically demanding job due to the combination of the effects of the MVA, WNV and COVID. The Deputy concluded claimant was not entitled to an industrial award because he voluntarily resigned from his job. No mention in the deputy's decision of the Commissioner's ruling in Martinez.

* Affirmed on **Appeal** in its entirety. (App. Dec. 7/11/23)

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

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

Claimant, Mulvany, worked for John Deere Davenport Works from November 15, 2010, to August 2, 2021. The Deputy found that Claimant sustained a permanent

injury to the right arm and right shoulder and the combination of these injuries should be compensated as an unscheduled injury under Iowa Code section 85.34(2)(v). (citing *Anderson v. Bridgestone Americas, Inc., and Second Injury Fund of Iowa*, File No. 5067475 (App. Dec. Jan. 2022).

On August 2, 2021, the defendant-employer notified claimant that his employment had been suspended for absenteeism. Claimant subsequently met with a John Deere Labor Relations representative to review the disciplinary matter. While sitting in the disciplinary meeting, claimant realized "he had enough, he knew termination was coming," so he decided to hand in his things and quit. After leaving, claimant began working for a new employer, earning more than he did with John Deere. The Deputy relied on *Martinez v. Pavlich, Inc.*, File No. 5063900 (App. Dec. July 2020) to find that the claimant terminated his employment and thus the work injury should be analyzed industrially. The Deputy found that Claimant sustained 25% ID.

[Apportionment] - *Brunk v. Glenwood Resource Center*, File No. 19003535.02 (App. Dec. Feb. 27, 2023)

The Commissioner affirmed the Deputy's decision in part and found that Claimant's act of popping his co-worker's back to relieve his pain did not constitute horseplay and that Claimant sustained an 8% functional impairment to the back. The Commissioner reversed the finding that Defendant was not entitled to an apportionment against the award based on a prior right shoulder injury. The Commissioner found that the revised 85.34(7) allowed for apportionment of an old shoulder injury (treated industrially) against a current back injury (treated functionally since claimant was still working for the employer). "With the 2017 amendments, the unscheduled functional losses are included in the same subsection as unscheduled industrial losses, Iowa Code section 85.34(2)(v), in relation to 500 weeks of benefits." To avoid double recoveries, the defendants were entitled to a credit for the prior industrial loss of the shoulder, thus, Claimant takes no PPD.

[Same or Greater Wages?] - *Hermanstorfer v. Lennox Industries, Inc.,* File No. 19002216.01 (Arb. Dec. April 4, 2023)

The Deputy found that Claimant sustained a traumatic brain injury. Dr. Irving Wolfe, a neurologist, opined Claimant sustained a 7% impairment to the body as a whole. Because Claimant was still employed by Lennox at the time of the Hearing, albeit in a different position than at the time of the work injury, in order to determine whether Claimant should be awarded a functional award or industrial award, the Deputy analyzed whether Claimant was earning the same or greater wages. The Deputy calculated what the Claimant's average weekly earnings were prior to the

work injury to determine the rate, which was disputed by the parties. Then, the Deputy calculated what the average weekly earnings were prior to the Hearing – the earnings fluctuated. Considering about 12 weeks of wages prior to the Hearing, the deputy found that for 8 weeks, claimant earned more than the AWW prior to DOI, and for 4 weeks, claimant earned less than the AWW prior to the DOI. The averaged earnings for the 12 weeks prior to hearing were $899.87 per week versus the average earnings prior to the DOI which were $880.89 per week. The Deputy noted that Claimant appeared to have sustained a future loss of earning capacity because if she were working in her old position, she would have been making more money than she was at her current position, but under the plain language of the statute, because the actual earnings were slightly more than at the time of the work injury, she was limited to the functional impairment. Claimant was awarded the 7% functional impairment (35 weeks).
* Affirmed on **Appeal** in its entirety. (App. Dec. 08/14/23).

***Schoenberger v. Zephyr Aluminum Products*, File No. 1642927.02 (Remand Dec. June 6, 2023)**
This case comes to the Commissioner from a Court of Appeals decision finding that Claimant had preserved error on the issue of whether an injury was industrial versus scheduled. The underlying dispute concerned an injury Claimant suffered to the shoulder and arm. On remand, the Commissioner concluded that as a result of Claimant's shoulder injury, Claimant suffered a sequela injury to his arm. The Commissioner found the opinions of Dr. Kuhnlein and Dr. Nepola to be more persuasive than the opinion of Dr. Field, who found that Claimant's arm injury was not directly related to his shoulder injury. Dr. Kuhnlein had noted that Claimant only developed numbness and tingling in the arm following his shoulder surgery and Dr. Nepola also concluded that the arm injury was a sequela injury.
The Commissioner concluded that Claimant's injury fell within the catch-all section 85.34(2)(v) and that his injury should be considered to be unscheduled. Claimant returned to work with the employer and was earning greater wages at the time of the Hearing than at the time of injury; therefore, Claimant was limited to the functional impairment. Claimant was awarded the 11% functional impairment endorsed by Dr. Kuhnlein.

***Derifield v. John Deere Waterloo Works*, File No. 21701314.01 (Arb. Dec. June 12, 2023).**
Issue: Does a right shoulder injury that extends into the bicep constitute an unscheduled injury and warrant an industrial disability analysis?

Claimant, Amy Derifield, sustained a work-related injury while employed with John Deere Waterloo Works. On October 16, 2020, while working for John Deere, Claimant felt a pop in her right shoulder. Defendant authorized treatment with orthopaedic surgeon Robert B. Bartelt, M.D. Dr. Bartelt diagnosed Claimant with a complete tear of her right rotator cuff and recommended surgical intervention. Claimant underwent surgery on December 3, 2020, and Dr. Bartelt performed a right shoulder arthroscopy, including a right rotator cuff repair and a right biceps tenodesis. The Deputy found Dr. Garrel's impairment rating to be most convincing finding that claimant sustained a 2% impairment to the right upper extremity as a result of the right should er injury. Relying on *Chavez,* the Deputy held that Claimant sustained a scheduled injury due to the injury affecting both her shoulder and her arm. The Iowa Supreme Court interprets the word "shoulder" in Iowa Code section 85.34(2)(n) to mean "the glenohumeral joint as well as all of the muscles, tendons, and ligaments that are essential for the shoulder to function." *See Chavez v. MS Technology, L.L.C*., 972 N.W.2d 663 (Iowa 2022). Claimant was awarded 2% of the shoulder (8 weeks) of PPD.

***Hofer v. Lennox Industries, Inc.*, File No. 20003191.01 (App. Dec. June 20, 2023)**
Claimant was found to be a credible witness and was awarded a 20% industrial disability for work-related tinnitus and hearing loss. The costs of Dr. Simplot's IME were reimbursed.
On Appeal, the Commissioner affirmed that Claimant had developed tinnitus and hearing loss as a result of his work, but reversed the finding that Claimant was only eligible for the functional losses he sustained and not industrial disability. The Commissioner concluded that under 85.34(2)(v) claimant, who had retired, was not "terminated from employment" by the employer. Because of this, the award to claimant was to be functional rather than industrial. Claimant was awarded 60 weeks of benefits on a functional basis, based on a 3% rating for tinnitus and a 26.25% binaural hearing loss.

[SKIN IMPAIRMENTS ARE NOT NECESSARILY BAW INJURIES] *Laguerre v. JBS USA Holdings, Inc.*, File. No. 21012994.01 (Arb. Dec. August 3, 2022)
Claimant sustained a severe degloving of his right upper arm because of a mechanical knife sliced him bad. He was admitted to UIHC. Skin grafts from right thigh were done and provided to the RUE. Photos of the thigh were introduced. Claimant reported pain over the donor site (right thigh). Claimant saw a pain clinic Dr. Rayburn who assessed him with neuralgia, myalgia, and chronic pain. Claimant was taking lyrica daily. Dr. Rayburn gave no permanent restrictions and deferred a rating to his "former colleague" Dr. Chen. Dr. Chen rated Claimant at 9% RUE. He

opined no other body parts were affected and no permanent work restrictions. Deputy found Dr. Chen does not adhere to Table 8-2 of AMA Guides and applies "his own methodology." Dr. Bansal rated Claimant at 7% BAW. The rating was for RUE and the RLE (thigh donor cite). He noted loss of grip strength and sensitivity to environmental conditions like heat and sunlight. Deputy found Dr. Bansal's rating was flawed as well. Deputy still adopts Dr. Bansal's rating. Deputy finds that the injury falls under Section 85.34(2)(t) and not (v). The Deputy (citing to past Agency cases) concludes that a skin injury that is confined to a schedule is a scheduled member case. The Deputy went on to describe that donor sites can be rated and Dr. Bansal was found more convincing – yet, the case still only involved 2 scheduled member sites. Thus, the case was awarded under 85.34(2)(t) and the award was BAW under the schedule.

[PTD/Odd-lot] *Shadlow v. Love's Travel Stops*, File No. 21001168.01 (Arb. Dec. June 12, 2023).

Claimant had been deemed 60% disabled by the Department of Veteran's Affairs before his employment with Love's due to his PTSD, clavicle/scapula impairment, and limited range of motion of his ankle and finger. He also had a pre-existing back condition. Claimant suffered a significant slip & fall at work on September 25, 2019 and sustained a back injury with bilateral radiculopathy. The defendant-employer authorized and directed claimant's treatment following his work-related injury. However, claimant was later informed that he could no longer be employed at Love's Travel Stop - based on his permanent restrictions. Following his release from Love's, claimant began working at Culver's. However, his symptoms became so severe during the probationary period of his employment that he had to leave that job – he could hardly walk anymore. *Guyton v. Irving Jensen Co.* describes how a worker "becomes an odd-lot employee when an injury makes the worker incapable of obtaining employment in any well-known branch of the labor market." 373 N.W.2d 101 (Iowa 1985). An odd-lot worker is thus totally disabled if the only services the worker can perform are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." *Guyton*, 373 N.W.2d at 105 (Iowa 1985). "Love's acknowledged that his symptoms and restrictions were so significant that they were unable to maintain his employment in any manner. Given the severity of Mr. Shadlow's restrictions and overall condition, this was a rational decision by the employer. This is, nevertheless, strong evidence of total disability." p. 8. The Deputy found Claimant was PTD under the odd-lot doctrine.

SEQUELAE

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

Claimant was found to have sustained a left shoulder sequela injury in January of 2019, caused by a stipulated 2018 right shoulder injury. For a sequela injury to be compensable, the injury must be one "that naturally and proximately flow[s] from" an injury arising out of and in the course of employment. *Oldham v. Schofield & Welch*, 266 N.W.2d 480, 482 (Iowa 1936) ("[i]f an employee suffers a compensable injury and thereafter suffers further disability which is the proximate result of the original injury, such further disability is compensable").

The Commissioner affirms the deputy's finding that Claimant suffered a sequela to the left shoulder and makes further comments regarding the sequela injury and the date of injury. The commissioner finds that claimant sustained the left shoulder injury as a result of the fact that he was restricted from using his right arm as a result of the initial injury. The commissioner notes there was specific medical evidence from the treating physician that claimant's performance of his job with only one arm "would be much more stressful on the shoulder joint than performing the job with two arms."

Because the left shoulder was found to be a sequela injury from the right shoulder and not a new injury, the Claimant was awarded 35% ID.

The Commissioner changed the commencement date for permanency from August 9, 2020 to December 9, 2020. The parties had not stipulated to a commencement date and the commissioner used the MMI date from IME report (Dr. Segal) as the commencement date for permanency benefits.

***Beyer v. RR Donnelley and Sons Co.*, File No. 20009249.01 (App. Dec. March 22, 2023)**

The deputy concluded that claimant's first injury to her left shoulder and sequela injury to the right shoulder best falls under the catch-all section, 85.34(2)(v). The separation from employment triggered the industrial evaluation. Defendants appeal and the commissioner affirms on all accounts. With respect to the consideration of claimant's injury as industrial, the Commissioner, citing his earlier decision in *Carmer v. Nordstrom*, No. 1656062.01 (App. Dec. 29, 2021), concludes that the catch-all provision 85.34(2)(v) governs rather than the section 84.34(2)(n). Thus, a bilateral shoulder injury is to be treated industrially and the 40% award is affirmed.

***Oppman v. Eaton Corporation*, File No. 1649999.01 (App. Dec. April 6, 2023)**

Claimant sustained a stipulated right knee injury. Claimant had pre-existing pulmonary and obesity conditions which were found to be exacerbated by the work injury. After undergoing knee surgery (by Dr. Bollier) and physical therapy, Claimant developed an antalgic gait, which caused back pain and spasms. He

returned to Dr. Bollier, who informed him that "per work comp rules, the back pain is not considered a work injury." Dr. Bollier provided a 2% rating to the knee. Dr. Kuhnlein subsequently provided a 10% injury to the knee and a 5% injury to the back. He provided lifting restrictions of 20 pounds. Dr. Baker, who had seen claimant for his back, also found that the back problems were a sequela of the knee injury. Dr. Chen found that the right knee condition did not lead to the low back symptoms. Dr. Bollier agreed.

The Commissioner found that the opinions of Dr. Kuhnlein and Dr. Baker were more persuasive on the sequela issue. The Commissioner noted that Dr. Bollier had not indicated what "work comp rules" he was referring to in concluding claimant's back injury was not work-related.

The Commissioner affirmed the permanent total disability award although he disagreed with the Deputy that the employer had no work for Claimant. He concludes, however, that Claimant would be unable to return to work with the employer given his permanent restrictions. The Commissioner noted that Claimant had worked for the employer for 20 years, was a motivated worker and had been found disabled by SSA despite the fact that he was only 48 years old. The PTD award was affirmed.

CAUSATION

***Pingel v. Iowa Central Community College*, File No. 20003971.01 (App. Dec. May 10, 2023)**

The Deputy concluded Claimant had established a permanent aggravation of her preexisting pulmonary condition as a result of exposures at work. Claimant was awarded 20% ID.

On Appeal, the Commissioner reverses the Deputy's decision and concludes that claimant's pulmonary condition was not aggravated by her work activities.

In reversing, the Commissioner concludes that claimant's first medical record indicating that her exposure to chemicals at work had aggravated her pulmonary condition had not occurred until October 23, 2019. A pulmonary function test in January of 2020 demonstrated COPD. The physician indicated that claimant had smoked two packs of cigarettes a day for 45 years and also noted that she was not specific as to the chemicals that had caused her problems. In documenting the reason for claimant's problems, Dr. Meyer, the treating physician, did not note chemical exposures as one of the causal factors for those medical problems. Dr. Meyer later indicated that rather than claimant going on disability, she should find another job where she was not exposed to cleaning chemicals and stated that working with those chemicals "causes complications with her respiratory system." Although claimant indicated that Dr. Meyer had requested MSDS sheets for the chemicals to which she

was exposed, nothing in Dr. Meyer's records references any MSDS sheets. The Commissioner finds Dr. Meyer's notes, which were void of any causation opinions, were more accurate and convincing than claimant's later statements. Claimant noted that she had not experienced any flare-ups since she last worked for the employer in January of 2020.

The Commissioner specifically disagreed that the contemporaneous medical records documented the development of claimant's condition and concluded that those records do not support a finding of permanent disability. Dr. Hawk and Dr. Brimeyer (a pulmonologist) did not relate the injury to work, while Dr. Bansal did. The Commissioner rejected Dr. Bansal's opinion, finding that he "never affirmatively opines that claimant's workplace exposures materially and/or permanently aggravated her pre-existing condition." The Commissioner rejected Dr. Bansal's permanent impairment finding because Dr. Bansal did not rely on pulmonary function tests but rather the fact that claimant routinely used an inhaler and nebulizer. Claimant takes nothing.

AGENCY EXPERTISE

Kehrli v. Overhead Door Co. of Waterloo, Inc. **File No. 1653327.01 (App. Dec. June 19, 2023)**
The Deputy found that Claimant had sustained a 35% functional impairment of his right lower extremity and further concluded that defendants failed to preserve their "failure to mitigate" defense.
On Appeal, the Commissioner affirmed the 35% award, but modified the commencement date and found that the "failure to mitigate" defense was preserved. The failure to mitigate claim was based on claimant's refusal to undergo surgery for his meniscal tear. The Commissioner found the argument lacked merit because addressing this defense would "require the use of agency expertise to determine whether the functional rating assigned by Dr. Manshadi should be reduced." Section 85.34(2)(x) precludes the use of agency expertise, thus, the defense was found to lack merit. The commencement date was changed from November 19, 2018 to July 27, 2020, as this was the date Claimant was found to have reached MMI.

Hughes v. IMT Mutual**, File. No. 22003564.01 (Arb. Dec. August 15, 2023)**
Claimant was alleging TTD and PPD for deep venous thrombosis which he attributed to his work driving a 2019 Toyota Camry LE. The Deputy found him to be an "exceptionally credible witness," yet found Claimant did not prove a

permanent disability for his injury. The Deputy discredited Dr. Kuhnlein's rating because it was not detailed enough to indicate why the chosen section (section 9) of the Guides was appropriate. The Deputy also criticized Dr. Kuhnlein's rating because it relied on different sizes of the right and left calves but there were no actual measurements in the report. The treater (Dr. Nabi) stated that Claimant had a "permanent injury" but it was not "per the Guides." The records review of Defendants experts were also discredited.

> The record does not indicate that the claimant suffers from a hemorrhagic disorder. "Hemorrhage is the medical term for bleeding…" and commonly refers to excessive bleeding. See MedlinePlus, online: https://medlineplus.gov/ency/article/000045.htm (last visited June 7, 2023). The record also does not indicate, nor is there any explanation that would indicate that Mr. Hughes suffers from a platelet disorder. Mr. Hughes has a genetic mutation known as prothrombin gene mutation, or Factor II mutation. Furthermore, there is no evidence that Mr. Hughes' blood clotting defect is acquired, as indicated by Dr. Kuhnlein. Acquired in the context of this section means something caused by another factor and not something that is congenital. See Guides at 203. In this regard, Mr. Hughes does not have an acquired clotting issue. Mr. Hughes has a genetic condition that makes it more likely for him to experience a clot such as a DVT. The Guides indicates that "[a]cquired blood-clotting defects are usually secondary to severe underlying conditions, such as chronic liver disease." Id.
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> The claimant did not prove, by a preponderance of the evidence, that his work injury was a cause of permanent impairment. Dr. Kuhnlein's opinions regarding permanent impairment are not detailed enough to indicate why his chosen section of the Guides is the appropriate evaluation of permanent disability. The undersigned is not a medical expert, and therefore cannot substitute his own expertise to displace that of a medical doctor. Because of the foregoing, the claimant failed to meet his burden.

Thus, the Deputy did not award TTD or PPD, but did award medical benefits. Had he awarded benefits, the Deputy would have assessed penalties against Defendants.

***Perry v. AbbeHealth, Inc.*, File No. 1653524 (Arb. Dec. August 29, 2023)**

Claimant had a shoulder injury. Battle of the experts: Dr. Bollier (3%), Dr. Kuhnlein (4%), or Dr. Segal (21%). Claimant states Dr. Segal is best as the most recent and most thorough evaluation, corresponding to actual symptoms. Defendants say Dr. Segal is unreliable. Deputy states that the statute provides no guidance on how to determine which impairment rating should be utilized.

The Deputy adopts Dr. Kuhnlein's rating for the distal clavicle excision (3%) and Dr. Segal's ratings for her range of motion loss (6%) and for her motor loss (7%). After combining said ratings under the AMA Guides 5th Ed. Combined Values Chart, p. 605, the Deputy finds that Claimant sustained a 16% functional impairment under the Guides.

***Brown v. Estes Express*, File No. 20014133.01 (Arb. Dec. Sept. 6, 2023)**

The Claimant sustained an injury to his left upper extremity – the parties stipulated it was a scheduled injury to the shoulder. The Deputy evaluated the competing medical opinions by Dr. Vinyard and Dr. Kirkland. The Deputy noted neither opinion was completely accurate. Dr. Vinyard did not provide a rating of the distal clavicle excision performed on Claimant's shoulder. *Jay v. Archer Skid Loader Service, LLC* held that "[t]he AMA Guides direct the physician to assign a rating for the distal clavicle excision." File No. 19003586.01 (Appeal Dec. August 2022). Dr. Kirkland did provide a rating for the distal clavicle excision but the Deputy found it was inflated because Dr. Kirkland did not reduce the rating by the 25 percent multiplier. Relying on *Jay*, the Deputy made the necessary modification and found Claimant proved a 13 percent permanent functional impairment of the left shoulder.

***Hunt v. Second Injury Fund of Iowa,* File No. 1650632.03 (App. Dec. March 1, 2023)**

The deputy found that Claimant sustained a first qualifying injury (right knee) and second qualifying injury (left knee) and was awarded a 65% industrial disability, with credits of 22 weeks for the first injury to the right knee and 81.4 weeks for the second injury to the left knee. The commissioner affirms the industrial award of 65%, but modified the credit for the first injury.

The commissioner did not consider claimant's impairment rating for the first injury to be accurate because Dr. Sassman's rating was based on claimant's understanding of his range of motion rather than on objective measurements and based on a medical record from 2002. Claimant subsequently had a total knee replacement to the right knee and the Fund asserts that an 81.4 week credit was appropriate. There was no impairment rating from a doctor based on the total knee replacement of the right knee. Claimant argues that since the total knee replacement came after the second injury, it should not be considered. The commissioner concludes that, despite the absence of a rating, the total knee replacement is rated at 37% under the Guides.

> The deputy commissioner does not act as a medical professional or utilize agency expertise when converting impairment ratings. Similarly, the deputy commissioner does not act as a medical professional or utilize agency expertise when locating and applying a minimum impairment rating assigned as the result of a surgical procedure for the purpose of a credit under Iowa Code section 85.64.

Id. at 6. The commissioner therefore provides an 81.4 week credit for the first injury. The commissioner also provides an additional 11 weeks of credit because of a 5% permanent disability that preexisted the second injury (a left ankle).

ALTERNATE CARE ISSUES

***Morrow v. Winger Co*., File No. 19000418.03 (Alt. Care. Dec. Oct. 5, 2022)**
Defendants had authorized treatment for a back injury. The Claimant underwent a HydroCision procedure and he had a follow-up about two weeks later. Claimant was provided with increased restrictions. He was then scheduled for another follow-up two weeks later, 9/29/22, due to some increased nerve irritation immediately after the procedure.

Defendants received surveillance footage that had been obtained two months prior (from a July 16, 2022 golf tournament). Defendants relied on the surveillance footage of Claimant playing golf to de-authorize treatment and cancel the follow-up appointment scheduled for 9/29/22. Defendants also scheduled a phone conference with the doctor to obtain his opinion/recommendation after reviewing the surveillance.
The Deputy held that "the de-authorization of treatment is an unreasonable interference with the medical judgment of the claimant's authorized treating physician." *5.

> While defendants have every right to send the surveillance materials to Dr. Kowalkowski and seek his opinions regarding same, **defendants have no legal basis on which to terminate or delay the authorized physician's recommended treatments while waiting for that to occur**. While his response has not been as timely as they desire, there is no medical evidence to suggest their refusal to authorize care was reasonable.

Morrow, File No. 19000418.03, at p. 5 (Alt. Care. Dec. Oct. 5, 2022). The Deputy considered this denial "especially egregious given that the cancelled appointment was scheduled as a follow-up to a procedure that defendants previously authorized, which took place after the surveillance footage was obtained." *Id.* at p. 6.

***Getiso v. Tyson Fresh Meats*, File No. 200004806.01 (App. Dec. April 20, 2023)**
Claimant was found to have sustained a 13% impairment to the lower extremity (affirmed on Appeal). Certain medical expenses were denied because Claimant did not request additional medical treatment prior to seeking alternate medical care. The Deputy awarded alternate medical care with Avera Therapy, Sioux Falls Foot Specialist and AMG Neurology. The Commissioner reversed the alternate medical care award finding that the Claimant did not request additional medical care up through the time of the Hearing and that there was no showing of an abandonment of care. Because no request for medical care had been made, an award for alternate care was inappropriate.

***McClain v. Sundance, Inc.*, File No. 22008820.02 (Alt. Med. Dec. April 21, 2023)**
Claimant requested medical treatment in Alabama because she was moving. Defendants denied further care given that Claimant had missed appointments and had been difficult to reach. Part of the reason for missing appointment was Claimant's flux in her living situation and life. The Deputy found that Defendants provided no legal authority for the proposition that noncompliance with treatment is a basis for discontinuation of medical treatment. "Having thoroughly reviewed Iowa Code section 85.27, I conclude that isolated instances of noncompliance with treatment (i.e., missing a few appointments; being difficult to communicate with) is not a basis for denial of medical care as a matter of law." Defendants did not prove that the level of Claimant's noncompliance was tantamount to a refusal to engage in medical care; therefore, alternate care was granted.

***Loffer V. Fedex Ground Package System*, File No. 23700155.03 (Alt Med. Dec. May 8, 2023).**
Claimant sustained a work-related left shoulder injury on November 25, 2022. The defendant admitted liability for the injury and authorized treatment with Kyle Switzer, M.D., at the Physicians' Clinic of Iowa. At some point during claimant's treatment, Dr. Swtizer recommended claimant receive an injection for her shoulder. On April 17, 2023, claimant filed an Alternate Medical Care petition requesting that the defendant authorize the injection recommended by Dr. Switzer. On April 18, 2023, claimant filed a motion to dismiss her alternate care action because the defendant authorized the injection and scheduled it for June 19, 2023. Claimant's counsel subsequently contacted the defendant stating their dissatisfaction with this appointment, as two months is too long for an injured worker to wait for prescribed treatment. Claimant alleged that the delay was due to Dr. Switzer's office experiencing a backlog of clients. As a result, Claimant attempted to get the injections authorized by a different provider who may be able to perform the injections earlier. Specifically, Claimant's attorney produced evidence that Dr. Ramme could see claimant in 2-3 weeks. However, claimant's attorney could not confirm during the hearing whether Dr. Ramme could perform the injection during the initial appointment. The deputy commissioner noted that the evidence only demonstrates that "patients can generally get an appointment with Dr. Ramme in 2-3 weeks. However, [the] evidence is silent on how quickly Dr. Ramme could or would provide an injection—which is the crucial question in this proceeding." Therefore, Claimant did not carry her burden to show that the care offered by Dr. Switzer was inferior to that that would be offered by Dr. Ramme.

***Mero Bustos v. Tyson Foods, Inc.*, File No. 19700550.01 (Remand Dec. May 18, 2023)**

This case was before the Commissioner on remand from the district court, which held that the agency's denial of Claimant's request for alternate care was "entirely conclusory." The Commissioner again denies alternate medical care.

The Commissioner notes that Claimant had been recommended a lumbar surgery by Dr. Jensen and had filed an alternate medical care proceeding which had been denied. Claimant did not appeal the alternate medical care decision. Following this proceeding, Claimant continued to have difficulties and Dr. Jensen again indicated that surgery could be considered "rational as a treatment course." He ultimately performed a posterior lumbar instrumented fusion in October of 2020. Dr. Johnson, the authorized treater, indicated that the surgery had not resulted in a substantial improvement of Claimant's condition. Dr. Jensen reported that Claimant's back pain had improved significantly following surgery and that his radiculopathy had improved. Authorized treaters, Dr. Johnson and Dr. Archer, did not recommend surgery performed by Dr. Jensen. At Hearing, Claimant requested payment for the surgery, which was denied. Claimant also requested alternate care with Dr. Jensen. In the remand decision, the Commissioner finds there was no evidence Defendant had abandoned care and also finds that Claimant had failed to prove the care offered by Defendant was unreasonable. Because of this, the Commissioner denied alternate care

***Strabala v. Spee Dee Delivery Service*, File No. 1662079.01 (Alt. Care Dec. Sept. 11, 2023).**

The Claimant filed an application for Alternate Care after waiting for two months for authorization of a referral to orthopedic surgeon, Dr. Bollier. Defendants authorized the appointment after Claimatn filed the application for alt. care but at the time of Hearing, no appointment had been scheduled. Due to UIHC policies, the insurance carrier was required to make the appointment and Claimant could not schedule on his own. The Defendants argued that authorizing the appointment fulfilled their duty under 85.27(4). The deputy Commissioner disagreed and granted the alt. care, stating: “Authorization of care alone—without the arrangement of tangible services and supplies to treat the injury promptly and without undue inconvenience to the employee—fails to fully satisfy an employer’s responsibility under the statute. There is no treatment without an appointment, which makes authorization of care only part of the equation under the statute.”

CUMULATIVE INJURIES

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

Claimant alleged a cumulative, right-side meniscus tear at work and had an arthroscopic repair. He subsequently underwent a right knee replacement. Treatment records prior to the injury revealed bilateral knee pain, instability, and injections. Claimant argued he sustained an aggravation or lighting up of his degenerative disease which ultimately led to the knee replacement. The Deputy found there was not substantial evidence to support the knee replacement surgery was the result of work duties aggravating a pre-existing degenerative condition. Claimant takes nothing.

*Affirmed on **Appeal** in its entirety (App. Dec. 4/08/23)

Davis v. Kraft Heinz Co., File No. 5066322 (App. April 14, 2023)

Claimant was found to have a cumulative injury to her bilateral arms and shoulder, with the injury manifesting on March 9, 2017. Healing period, medical expenses and costs were provided. A 30% industrial award was provided (Walsh). The employer appeals, arguing that healing period was not payable, that claimant had not reached MMI and that even if MMI was reached, a 30% industrial award was in error. The commissioner affirms the healing period award as well as finding an injury to the arms and shoulder. The manifestation date was reversed, but the industrial award was affirmed.

Claimant reported to her PCP on October 20, 2016, that she was chronically tired, had back aches, arm soreness and chronic neck pain when working all day. The neck pain had begun following a 2002 auto accident. When claimant returned to her PCP on March 9, 2017, she reported her neck and bilateral upper extremity pain made her entire spine sore. On May 9, 2017, claimant reported her injuries to both hands, neck pain, right shoulder pain and low back pain from overuse as a result of the labeler and cleanup function of her job. Dr. Frederick recommended a job evaluation to determine work-relatedness. A PT observed the job and concluded it would not lead to carpal tunnel syndrome. An EMG showed bilateral carpal tunnel. Ultimately, Dr. Frederick and Dr. Boulden found that claimant's carpal tunnel and shoulder injury were not related to work. Dr. Bansal found the injury was work-related and noted that claimant's cleaning job, which required use of a pressure hose, was a causal factor in claimant's injury. Neither Dr. Frederick nor Dr. Boulden noted anything about the use of the pressure hose.

The Commissioner noted that based on Claimant's testimony and medical records that her injury manifested on September 30, 2016 rather than March 9, 2017. Although Claimant told a nurse at work of her pain in late 2016, there was no evidence that Claimant knew the seriousness or probable compensable character of

her injury at that time. However, the Commissioner then finds that at the time she saw her PCP on March 9, he advised her to work with the employer's workers' compensation representative. The Commissioner concludes this is the date on which claimant knew of the seriousness and probable compensable character of her injury. Since she reported the injury on May 9, she notified the employer in a timely manner. She also filed her claim well within two years of her knowledge of the nature and seriousness of the injury.

Because the injury to the shoulder happened prior to July 1, 2017, the injury should be compensated industrially. The Commissioner noted that Claimant was 60 years old and had been able to return to work with the employer. Claimant was awarded 30% ID.

***Tilton v. H.J. Heinz Co.*, File No. 5053002 (Remand Dec. May 22, 2023)**

This remand action was before the Agency for a third time following an earlier remand from the Court of Appeals and the current remand from a decision dated July 20, 2022. The injury in question occurred in April of 2013 and Hearing was conducted on March 16, 2016. The primary issue in the case was the timeliness of notice under 85.23 and the date on which the claim manifested. In the second Court of Appeals decision, the court remanded to the Agency for a determination of the date Claimant knew or should have known the injury would have a permanent adverse effect on her employment.

Claimant had back problems beginning in the mid-2000s. According to Dr. Mathew, Dr. Bradley and Dr. Hines, Claimant's work activities at Heinz aggravated her underlying back condition, but she continued to work. In February of 2010, Dr. Bradley indicated claimant would have flareups with her back occasionally, but did not indicate she had a permanent impairment. After 2010, Claimant suffered falls resulting in further problems with her back and received steroid injections. She also had a slip and fall on January 11, 2013 outside of work, resulting in a Toradol injection. On April 15, 2013, Claimant reported to work and began having pain that caused her to tell her employer she could no longer perform the work. Claimant did not work after April 15.

The Deputy first concludes that claimant's preexisting "chronic low back pain became worse over time while she was working for Heinz to the point where she could no longer tolerate the pain on April 15, 2013. . .." The Deputy concluded Claimant had suffered a permanent aggravation of her back condition. The Deputy also concluded that claimant's adjustment disorder was related to her injury, based on the opinions of Dr. Mittauer. The Deputy then concluded that no physician had provided Claimant with permanent restrictions before her last day of employment. "Under the discovery rule the notice and limitations periods do 'not

begin to run until the claimant knows or in the exercise of reasonable diligence should know the 'nature, seriousness[,] and probable compensable character' of his or her work injury." p. 24. Although the Deputy found her injury manifested in 2001, Claimant did not receive permanent restrictions until April 15, 2013. Thus, the Deputy concluded that the limitations period was tolled until April 15, 2013 under the discovery rule. Claimant therefore gave timely notice and filed her claim in a timely manner.

The deputy finally concludes that claimant was entitled to permanent total disability. Both Dr. Mathew and Dr. Mittauer indicated that claimant was not capable of working. Defendants' vocational expert opinion (Connie Oppedal, M.S.) was rejected because there were no specific positions identified that claimant could perform. A credit of $37,764.48 was applied for long term disability benefits. Claimant's request for alternate medical care was awarded and defendants were found liable for claimant's medical care. Defendants were also found liable for $20,000 in penalty for failure to properly investigate the claim.

MENTAL INJURIES

***Roberts v. Linn County Iowa*, File No. 19000117.01 (Arb. Dec. Oct. 06, 2022).**
Claimant was an RN for the Linn County Jail. On June 5, 2019, while passing out medication with a Deputy, an inmate in a "dry cell" with no water access threw a milk carton full of an unknown liquid at her. This got on her face and in her eyes and mouth. The inmate claimed that the sticky liquid was just water, but Claimant believed it to be bodily fluids. To support an assault charge, the Claimant testified she could not wash the liquid off herself for a few hours until evaluated by a medical provider and subsequently had to undergo STD testing. After the incident, Claimant experienced nightmares, flashbacks, was unable to enjoy her vacation, and had difficulty letting water touch her face in the shower. She was diagnosed with PTSD. Claimant's medical expert, Dr. Ressler, opined Claimant fell under Class 3 of the AMA Guides 5th Ed. Three doctors opined Claimant could not return to work and she was terminated by the correctional facility. The Deputy found a compensable mental injury, and awarded permanent total disability under the odd-lot doctrine.

*Affirmed on **Appeal** in its entirety (App. Dec. 2/8/23).

Tegtmeirer v. Buchanan County Health, File No. 5060404.03 (Arb. Dec. August 29, 2023)

Claimant had been working extra hours the night before watching a psych patient with dementia who had been combative. On the DOI, Claimant got a call that a patient needed to be showered. She asked if he was being combative and was told no. Claimant went to the patient's room and began bathing him. The patient became agitated and began beating Claimant with the shower head, saying "I'm going to kill you, Nazi." The patient also grabbed her by the neck and began choking her. The patient ended the attack and went into the hallway half naked.

Claimant returned to work the next day and was giving a female patient a shower and she started shaking. She got hot and sweaty – her heart was racing. Dr. McMains diagnosed with acute PTSD and recommended psych evaluation and treatment. Dr. Jabarri recommended a psych consult ASAP. Claimant start treating with Schaefer LMHC, who recommended EMDR and to be off work for awhile. It was recommended to see a psychiatrist. Her PCP, Dr. McCormick, was told about the event. Psych and EMDR was being denied by WC at this point. Dr. McCormick's assessment was PTSD and panic attacks. He strongly recommended psychiatry and psychologist trained in EMDR.

Defendants had Claimant see Dr. Jasper for a neuropsych evaluation. Dr. Jasper opined that Claimant was malingering and, therefore, he could not state whether she had legitimate mental health conditions and/or whether her issues are longstanding in nature that predate work injury. Dr. Booke authored a report for Defendants opining Claimant had no PTSD. Dr. Brooke's opinions rejected because Dr. Brooke never met with Claimant. Dr. Carpenter performed an IME. He diagnosed malingering. The Deputy dismissed his opinions for a few reasons:

> Dr. Carpenter's report is problematic for several reasons. First, he dismisses claimant's reaction to being assaulted at work because it was not the reaction he believes he would have had. His statement that most healthcare workers would just "shake it off" and move on is purely anecdotal and completely irrelevant. In addition, his outright denial of any mental health diagnosis whatsoever is not supported by the weight of the evidence and fails to explain claimant's ongoing symptoms since the date of injury. Finally, like Dr. Brooke, his opinion that claimant's treatment and medications have been ineffective is also contrary to the evidence. Dr. Carpenter met with claimant one time, and like those of Dr. Jasper and Dr. Brooke, his opinions are contrary to all other providers who have actually provided claimant with ongoing treatment for her mental health conditions. Therefore, I find Dr. Carpenter's opinions unconvincing.

The Deputy found the treating psychiatrist, Patrick O'Conner, PhD most convincing. Claimant was awarded a running award because Claimant had not reached MMI.

RATE ISSUES

***Reichert v. John Deere Waterloo Works and Second Injury Fund of Iowa*, File No. 21700341.01 (App. Dec. April 19, 2023)**

The Deputy found Claimant met the burden of establishing both a first and second qualifying injury, entitling her to benefits from the SIF. The Deputy found Claimant sustained 5% ID. After credits to the Fund, claimant was found eligible for 20 weeks of benefits. Claimant's rate was computed without including weekly Continuous Pay Plans (CIPP**)** payments.

On Appeal, the Commissioner concluded that the Deputy incorrectly computed Claimant's rate. With respect to the rate, Claimant contended that the Deputy should have included CIPP payments in addition to a profit-sharing bonus. The employer agrees that CIPP payments should be included. With respect to the profit-sharing bonus, the Commissioner noted that he had earlier addressed this issue in a Declaratory Order. The Commissioner concludes that a bonus is not to be included unless "the employee's right to the benefit has vested at the time of his or her injury." *citing Noel v. Rolscreen*, 475 N.W.2d 666 (Iowa App. 1991) and the earlier Declaratory Order. The Commissioner found that the bonus had not vested and concluded that the bonus should not be included in Claimant's gross weekly wage. On the industrial issue, the Commissioner concluded that Claimant has continued problems with gripping and lifting and continued pain, but has continued to work for the employer. The Commissioner increased the award and found Claimant sustained 10% ID, less the SIF's credit of ten weeks.

***Brown v. Estes Express*, File No. 20014133.01 (Arb. Dec. Sept. 6, 2023)**

When determining the rate, the Deputy considered that both the Claimant and his wife were over the age of 65, thus, under Section 85.61(6), Claimant was entitled to 4 exemptions.

INDEMNIFICATION AND OTHER ACTIONS

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

The Claimant was a truck driver who sustained a work injury while driving for Menard, Inc. Menard paid over $79,000 in benefits to Claimant. Menard brought suit against the third party tortfeasor for property damage to the truck driven by Claimant at the time of the accident. Claimant filed a separate tort action against the same tortfeasors. Menard filed a notice of its workers' compensation lien, but did not intervene in the suit. Menard took its property damage claim to trial which yielded a verdict that the tortfeasor was 70% at fault. Following this verdict, the Claimant

filed a motion for summary judgment asking the court to find Defendants 70% at fault, which was not ruled on. A mediation was soon scheduled; Claimant notified Menard of mediation in his personal injury action and invited its counsel to participate, but it declined. After Claimant settled his personal injury action, Menard notified Claimant's attorney they would not be reducing their workers' compensation lien to account for Claimant's attorney fees. Menard argued it had already expended significant amounts pursuing the property damage claim, which Claimant used to his advantage in securing the settlement. The settlement was approved and Menard was indemnified, but ordered to reimburse a proportionate share of Claimant's attorney fees and litigation costs from the personal injury suit. Defendant Menard also maintained its credit for all medical benefits payable into the future as well as all weekly benefits payable beyond what was already paid.

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

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

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

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

The two claims are founded on separate facts, which grants the Agency jurisdiction over the claim.
* This part of the decision was affirmed on **Appeal**. (App. Dec. 7/20/23)

IME REIMBURSEMENT

***Fisher v. Arconic, Inc.*, File No. 1651146, (App. Dec. Nov. 17, 2022).**
Issue: Does failing to acknowledge the request for an 85.39 IME reimbursement on a Hearing Report preclude you from recovering said cost?
Rule 876 Iowa Administrative Code 4.19 (3)(f) requires the parties submit a joint hearing report which "defines the claims, defenses, and issues that are to be submitted to the deputy commissioner who presides at the hearing." By failing to raise the issue of whether Claimant was entitled to an 85.39 IME reimbursement on the hearing report, and at the hearing itself, claimant is precluded from recovery. However, failing to raise this issue under 85.39 did not preclude claimant from recovering the cost of the IME Report under 876 IAC 4.33.

***Wenzel v. Archer Daniels Midland Co.*, File No. 1612257.01 (Arb. Dec. Jan. 31, 2023).**
Issue: Is apportionment of an IME between the defendant-employer and the Second Injury Fund proper when the report references both sets of injuries?
Claimant sustained work injuries to his ankle and wrist after falling approximately ten (10) feet from a ladder on February 10, 2016. Claimant also developed a back injury when his broken ankle began altering his gait. Due to the nature of the injuries, claimant also brought a claim against the Second Injury Fund – which was settled prior to the hearing. In their post-hearing brief, the defendant-employer submitted that they should only be liable for a portion of the IME, as the report also mentioned the injury related to the Second Injury Fund Claim. Having reviewed the report, the commissioner determined that "The only reference [to the Second Injury Fund] appears to be two sentences found at the bottom of [the report.] Since little of the IME report addresses claimant's Second Injury Fund claim, 5 percent of [the billing] will be reduced."
Regarding Claimant's injuries, the Deputy found that Claimant sustained permanent injuries to his ankle, wrist, and back. Claimant continued working for the employer ADM with accommodations for his restrictions and in a different position earning lesser wages. Claimant was awarded 30% ID.

* On **Appeal**, the Commissioner affirmed but modified the decision finding that Claimant sustained 50% ID and that Defendant employer should be responsible for 80% rather than 95% of the IME. (App. Dec. 6/16/23)

***Kelly v. East Side Jersey Dairy, Inc.*, File No. 1621904.01 (App. Dec. March 7, 2023).**

Claimant, Brian Kelly, sustained a work injury to his right arm and right shoulder. He was evaluated for an impairment rating by authorized treating physician Tobias Mann, M.D., on April 12, 2019. Claimant, who was unrepresented at the time, contacted the adjuster to request a second opinion. The adjuster granted claimant's request, provided that claimant's evaluation was performed by a physician in Dubuque. Only two such providers existed. The first, Dr. Field, was unavailable. The second, Dr. Kennedy, who had previously treated claimant for this work-related injury. Claimant ultimately elected to be evaluated by Dr. Kennedy, as that was the only option available. Later, after obtaining representation, claimant was sent to Dr. Sassman for another expert opinion.

On November 8, 2022, the deputy commissioner ordered Dr. Kennedy's IME to be reimbursed by defendant. Additionally, the deputy commissioner ordered Dr. Sassman's IME Report to be reimbursed as a cost under 876 IAC 4.33. *Kelly V. East Side Jersey Dairy, Inc.*, File No. 1621904 .01 (Arb. Dec. Nov. 8, 2022). The Commissioner reversed this finding because Dr. Kennedy was an authorized treating-physician, the adjuster limited the second opinion to the Dubuque-area, and therefore, the evaluation could not be considered an IME under section 85.39.

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

***Klendworth v. Quaker Oats Co.*, File No. 22000591.01 (Arb. Dec. April 25, 2023)**

Claimant sustained a work injury for which she needed surgery. At the time of hearing, Claimant had not undergone surgery yet. The Deputy accepted the opinions of Dr. Broghammer, Dr. Coester, and Dr. Taylor who causally relating the condition to the work injury. No determination was made on permanency because Claimant was not at MMI. Defendants were ordered to furnish reasonable medical care for the left shoulder injury, including surgery and follow-up care. Defendants were also ordered to pay for Dr. Taylor's IME because Defendants obtained a "no causation" opinion from a physician prior to the IME. The Deputy accepted *Kern* and rejected *Sandlin* in its application to this case.

SECOND INJURY FUND OF IOWA

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

The Claimant's first qualifying injury was bilateral carpal tunnel. The Claimant's second qualifying injury was to the left ankle/leg. At arbitration, the Deputy found the Claimant had not sustained a second qualifying injury because the left ankle injury caused sequelae to the back and mental health. The Commissioner reversed that finding with additional analysis. *See Gregory v. Second Injury Fund of Iowa*, 777 N.W.2d 395 (Iowa 2010) for foundation of analysis.

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

Id. at p. 7. The Commissioner found that Claimant sustained 70% ID, less the SIF credit of 112.4 weeks.

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

Issue: Does a lower extremity affected by Cerebral Palsy qualify as a first qualifying loss in a claim against the Fund?

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

To maintain a first qualifying loss, Iowa Code section 85.64 requires an injury to a hand, arm, foot, leg, or eye. Claimant asserts a qualifying loss to his bilateral legs based on his congenital cerebral palsy. Claimant testified his tendons and ligaments in his legs were not fully developed and he had difficulties with balance and flexibility in his legs due to cerebral palsy. The Deputy conducted his own research and relied on the Centers for Disease Control and Prevention (which had not been introduced into evidence by either party) and concluded that cerebral palsy is an injury to the brain, not an injury to a scheduled member. *Bowman v. General Dynamics Info. Tech*., File No. 5061908 (January 23, 2020, affirmed on Appeal August 31, 2020). As a result, the Deputy found claimant failed to establish a first qualifying loss.

* On **Appeal**, the Commissioner found the Deputy erred by relying on the outside reference under Iowa Code section 17A.12 to secure a medical opinion rather than to determine the plain and ordinary meaning in a statute. The Commissioner relied on Dr. Hawk's medical opinion and found the Claimant did meet the burden of proof for establishing a first qualifying injury and that Claimant sustained 30% ID, less the SIF credit of 41.8 weeks. (App. Dec. 7/20/23)

***Hunt v. Second Injury Fund of Iowa,* File No. 1650632.03 (App. Dec. March 1, 2023)**

The deputy found that Claimant sustained a first qualifying injury (right knee) and second qualifying injury (left knee) and was awarded a 65% industrial disability, with credits of 22 weeks for the first injury to the right knee and 81.4 weeks for the second injury to the left knee. The commissioner affirms the industrial award of 65%, but modified the credit for the first injury.

The commissioner did not consider claimant's impairment rating for the first injury to be accurate because Dr. Sassman's rating was based on claimant's understanding of his range of motion rather than on objective measurements and based on a medical record from 2002. Claimant subsequently had a total knee replacement to the right knee and the Fund asserts that an 81.4 week credit was appropriate. There was no impairment rating from a doctor based on the total knee replacement of the right knee. Claimant argues that since the total knee replacement came after the second injury, it should not be considered. The commissioner concludes that, despite the absence of a rating, the total knee replacement is rated at 37% under the Guides.

> The deputy commissioner does not act as a medical professional or utilize agency expertise when converting impairment ratings. Similarly, the deputy commissioner does not act as a medical professional or utilize agency expertise when locating and applying a minimum impairment rating assigned as the result of a surgical procedure for the purpose of a credit under Iowa Code section 85.64.

Id. at 6. The commissioner therefore provides an 81.4 week credit for the first injury. The commissioner also provides an additional 11 weeks of credit because of a 5% permanent disability that preexisted the second injury (a left ankle).

***Severin v. Second Injury Fund*, File No. 1521101.01 (Remand Dec. May 24, 2023)**
The district court reversed the agency's finding that the opinion of Dr. Hines was flawed because it was not based on a review of the radiographic evidence. The district court concluded that there was no evidence to support the decision of the agency on this point and remanded for further proceedings. The opinion of Dr. Hines was based on claimant's first injury and the compensability of second injury was not in issue.
On remand, the commissioner notes that the only doctor addressing the first injury was Dr. Hines. The Fund did not present evidence on this point. Given the remand decision, the Commissioner finds Dr. Hines credible and concludes Claimant had established a first injury to the right leg. The Commissioner concludes that the impairment rating from Dr. Chen for the second injury (1% to the bilateral arms) was more accurate than that of Dr. Hines (18% whole person impairment for the arm injuries) and accepts the opinion of Dr. Chen, while strongly criticizing Hines' report, including a string citation of cases in which Dr. Hines had been found not credible. Claimant was awarded 30% ID, less the SIF credit of 24.4 weeks.

IDIOPATHIC INJURY

***Murphy v. Ottumwa Regional Health Center*, File No. 21006375.01 (Arb. Dec. April 28, 2023)**
Defendants denied Claimant's injury because she had an unexplained fall from a level surface onto the same level surface. Claimant testified she fell due to a paper clip that was stuck to her shoe. The Deputy did not find this explanation credible. Claimant testified nobody knows the cause of her fall. The Deputy found that Defendants carried their burden of proof that Claimant's fall in this case is an unexplained fall and the Claimant did not prove the injury arose out of and in the course of employment. Claimant takes nothing.