**IAWC Presentation Outline**

**Interesting Hodge Podge JPW Section:**

**Quit v. Term for ID Entitlement, 85.39 Issues and HP Writing Requirements**

## 1. Quit v. Term for Industrial Disability Entitlement

*Iowa Code Section 85.34(2)(v) provides:*
*…If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment rating from the injury, and not in relation to the employee's earning capacity. Notwithstanding section 85.26, subsection 2, if an employee who is eligible for compensation under this paragraph returns to work with the same employer and is compensated based only upon the employee's functional impairment resulting from the injury as provided in this paragraph and is terminated from employment by that employer, the award or agreement for settlement for benefits under this chapter shall be reviewed upon commencement of reopening proceedings by the employee for a determination of any reduction in the employee's earning capacity caused by the employee's permanent partial disability.*

**CASES**

### A. GROCHALA V. QUIKTRIP & MIDWEST EMPLOYERS CASUALTY, 2023 WL 2170956 File no. 1638239.01 (Iowa Workers' Comp. Com'n) February 23, 2023

- CRPS diagnosis following cut sustained while working in the kitchen for Defendant/employer. Defendant asserted that the condition had resolved however was unsuccessful as Dr. Kuhnlein's IME was deemed credible. Therefore, the claim was deemed a body as a whole injury.
- In this case, Claimant did return to work post-injury at the same or higher wages following the injury and subsequently voluntarily resigned to take a higher paying job at Principal financial where he was still employed at the time of hearing.
- Deputy Cleereman found that the facts of the case were similar to Pavlich Inc. v. Martinez., File No. 5063900 (App. July 2020) where the Commissioner held: *Thus, though claimant in this case was earning greater wages at the time of hearing than he was when he was injured, I conclude his earlier voluntary separation from defendant-employer removed claimant from the functional impairment analysis and triggered his entitlement to benefits using the industrial disability analysis.*
- Although she found that the industrial disability analysis applied she stated the following: In this case, claimant has obtained a college degree and moved to a much higher-paying position with Principal since the injury occurred. No treating physician assigned permanent work restrictions, although Dr. Kuhnlein recommended he limit lifting to 40 pounds on an occasional basis. Claimant's current job does not require lifting, and he is able to perform his job duties with no difficulty. No employer has

turned him down for a job because of his injury, and he could have continued to work at QuikTrip had he not resigned. Claimant's earning capacity has not been dramatically affected by the injury. While he may not be eligible for a position in law enforcement, he has not made any attempts to apply since 2014, years prior to the injury. Considering all the factors of industrial disability, I find claimant is entitled to five percent permanent partial disability to the body as a whole related to the September 17, 2017 injury. This entitles him to 25 weeks of benefits.

**B. CRUZ V. GERLEMAN MANAGEMENT & ATLANTIC STATES INSURANCE CO., File No. 1662244.03 (Iowa Workers Comp. Com'n) August 15, 2023**

- Claimant was 43 years old, born in El Salvador but had a college degree in Legal Sciences (obtained in El Salvador). Moved to Des Moines in 2007.
- Employment background primarily consisted of work in service industry.
- Employed as a "preparer" for Defendant employer working 37 hours per week. Sustained an injury to her neck (and also alleged shoulder) and subsequently underwent a cervical diskectomy. Assigned 25% and 29% body as a whole by treating surgery and IME.
- Claimant contacted defendant about returning to work but was told no work was available at that time. Claimant accepted a position at Tasty Tacos as a cook. She subsequently returned to work for Defendant employer working 18-21 hours per week in addition to her job with Tasty Tacos. At the time of hearing, she had quit the Tasty Tacos Job and was working for the employer and Cheesecake factory for 16-18 hours per week earning $19.50 per hour.
- Defendant asserted that since she had returned to work with no restrictions and was earning more money (by working two jobs) than she was at the time of the injury she did not qualify for industrial disability benefits.
- Deputy Lunn held that while Claimant had a higher wage at the time of hearing her hours were not the same and therefore here earnings were less. She was awarded 40% Industrial Disability.

**C. BRADBURY v. THE ANDERSONS INC. & AIU INS. CO., File No. 22700285.01 (Iowa Workers' Comp. Com'n) August 20, 2023**

- Claimant was 62 years old with 9$^{th}$ grade education. Worked as a maintenance technician at employer's zinc fertilizer plant since 1998. Job duties entailed building catwalks, welding pipes, set tanks, boilers, and fixing/maintaining machinery.
- Alleged cumulative low back injury associated with his job duties and had previously undergone surgery in 2015. He returned to full duty but developed issues again in 2020. Underwent 2 more low back surgeries associated with the 2020 alleged injury with complications in his recovery.
- Claimant was off work for a period of time following his surgeries and indicated that he decided to resign when he perceived the surgeon was going to release him to return to work. Claimant received a 35% impairment rating.
- Claimant admitted he did not apply for any work and did not intend to seek any employment at hearing. Also claimed he did not feel he could perform any jobs identified by the Defendants vocational expert. Defendants disputed Claimant's claims of the physical

requirements of the job and noted that various machines were available to assist with heavier tasks.

- Deputy Grell did not find the Defendants' vocational report convincing and endorsed the findings in Claimant's vocational report which deemed he was permanently and totally disabled.
- Given the determination that Claimant was permanently and totally disabled, Deputy Grell determined that 85.34(2)(v) did not apply to the case at hand.

## 2. IOWA CODE 85.39 ISSUES

Iowa Code Section 85.39 provides:

*If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination. The physician chosen by the employee has the right to confer with and obtain from the employer-retained physician sufficient history of the injury to make a proper examination. An employer is only liable to reimburse an employee for the cost of an examination conducted pursuant to this subsection if the injury for which the employee is being examined is determined to be compensable under this chapter or chapter 85A or 85B. An employer is not liable for the cost of such an examination if the injury for which the employee is being examined is determined not to be a compensable injury. A determination of the reasonableness of a fee for an examination made pursuant to this subsection, shall be based on the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination is conducted.*

Cases:

A. **KERN v. FENCHEL, DOSTER & BUCK, P.L.C. & PHARMACISTS MUTUAL INS., 966 N.W.2d 326 (Iowa Ct. App., September 1, 2021)**
    - Appeal claiming Commissioner failed to award IME reimbursement.
    - At arbitration Deputy endorsed Claimant's IME opinion but held that Claimant was unable "to establish the prerequisites of Iowa Code section 85.39 to qualify for an evaluation at [Defendants'] expense."
    - Treating doctor opined that Claimant's injuries were not work-related but never offered an impairment rating prior to the IME sought by Claimant. Deputy held that this opinion went no further than causation and thus 85.39 was not triggered.
    - Court of Appeals found that an "opinion on lack of causation is tantamount to a zero percent impairment…"
    - Additionally, the Deputy declined to tax the costs for report drafting against Defendants pursuant to Iowa Code section 86.40. Although the IME "provided a breakdown of the fees for the report, specifying the costs of (1) the physical examination and (2) the record review and report. Because it did not specify, and [claimant] was then unable to

prove, the cost of drafting the report apart from the record review, the deputy declined to tax cost of the report pursuant to the

- Court of Appeals remanded the case to the commissioner to determine the appropriate costs for the drafting of the report.

B. **MIDAMERICAN CONST. LLC & GRINNELL MUTUAL INS. CO. v. SANDLIN, No. 22-0471 (Iowa Ct. App. Feb. 22, 2023)**
    - Claimant was evaluated by physician directed by the employer (and nurse case manager) to opine on MMI and impairment since the treating doctor did not address MMI/disability related to workers' compensation cases. The fees charged by the provider was $174.25.
    - Claimant obtained an IME that cost $2,020. Defendants indicated that they would not pay the rating assigned or pay the full cost of the IME disputing the location of the injury as well as the cost.
    - Deputy awarded IME reimbursement at hearing. Defendants sought rehearing (and prevailed on the location of the injury but denied the IME reimbursement), appeal and judicial review claiming that "Claimant was not entitled to IME reimbursement and that, if he was, the amount was unreasonable."
    - Defendants contended that they did not "retain" the physician who evaluated Claimant for the impairment assessment but rather she was referred by the treating provider and the case manager set-up the appointment.
    - While the Court of Appeals noted that there was evidence to suggest that the appointment was a referral and not at the direction of the employer/insurer, per their standard of review there was substantial evidence to support the Commissioner's findings that reimbursement was appropriate.
    - The next issue addressed was whether the costs of the IME were excessive. The Court of Appeals cited the revised 85.39 (*cost was limited to the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination is conducted).*
    - The Court noted that the IME doctor provided an "Examination Fee" schedule which indicated that an impairment rating/restrictions exam had a flat fee of $500.
    - Court held that Claimant was only entitled to $500 per the statute based on the fee schedule.

C. **P.M. LATTNER MFG. CO. & ACCIDENT FUND GEN. INS. CO. V. RIFE, No. 22-1421 (Iowa Ct. App. June 7, 2023)**
    - Claimant sustained an injury to his right shoulder (he had a prior injury in 2009 and settled on a full commutation). He underwent treatment with the authorized provided who recommended and FCE but it did not occur.
    - Claimant obtained an FCE and IME on his own. The IME addressed impairment for the right shoulder but also asked about impairment for a right ankle injury occurring in 2005 which the doctor declined to address.

- At hearing the deputy awarded the full cost of the IME and this issues as affirmed by the Commissioner (note that the Defendants did not contest the entitlement to the IME, just the issue of cost).
- The district court reversed on judicial review and determined that Claimant had not satisfied the requirements of 85.39 for reimbursement. They remanded to the commissioner. Claimant appealed.
- The Court of Appeals held that Defendant failed to preserve the issue of entitlement to reimbursement and therefore the district court erred in reversing the commissioner's decision. However, they did agree that the reimbursement should be limited to costs associated with the examination related to the impairment rating for the right shoulder. The case was remanded to the commissioner to determine those costs.

## 3. WRITTEN OFFER REQUIREMENTS

Iowa Code 85.33(3) provides:

*(a) If an employee is temporarily, partially disabled and the employer for whom the employee was working at the time of the injury offers to the employee suitable work consistent with the employee's disability the employee shall accept the suitable work and be compensated with temporary partial benefits. If the employee refuses to accept the suitable work with the same employer, the employee shall not be compensated with temporary partial, temporary total, or healing period benefits during the period of the refusal. The employer is required to communicate an offer of temporary work to the employee in writing.*

*(b) The offer should include certain details regarding details of lodging, meals, and transportation. It should also warn the employee that, if the offer is refused, the employee will not be entitled to temporary disability benefits during the period of refusal.*

### A. DAMJANOVIC V. HAWKEYE MOLD & DESIGN CO., File No. 1666137.02 (Iowa Workers' Comp Com'n April 25, 2023)

- Claimant sought healing period benefits from June 18, 2019 – April 18, 2022.
- Defendants paid healing period from June 19, 2019 – August 4, 2019.
- On August 4, 2019, treating doctor indicated that Claimant was able to return to light duty work effective August 5, 2019.
- Defendants subsequently stopped paying benefits on August 4, 2019, citing the office note from the treating provide and also argued that they had engaged in verbal conversations regarding a return to work and the type of work being offered.
- Claimant contended that these conversations were never memorialized in writing as required by statute.
- Deputy held that there were no written offers of work provided to Claimant at any time in conjunction with the light duty restrictions assigned. Therefore, healing period benefits were owed from that period of time until Claimant was released to full-duty (August 26, 2019).

**B. HANSEN V. HELPING HANDS NURSING SOLUTIONS & TECH. INS. CO., File Nos. 19001260.02, 19700152.02 (Iowa Workers' Comp Com'n January 5, 2022)**

- Defendant extended several offers of work to Claimant to work in their office at 3 different locations. The attorneys for the parties communicated offers and responses to said offers.
- Additionally, representatives for the employer sent text messages to Claimant asking her to respond to emails sent regarding available work in the office.
- The Deputy cited several letters, emails, texts, and communications that provided offers of work and certain details regarding these offers.
- However, the Deputy noted that the offers were lacking the statutory requirements, specifically the following: that if she refused the offer, she would need to communicate the refusal and reason for the refusal in writing to Defendants, and that during the period of refusal she would not be compensated with temporary benefits, unless the work was not suitable, as required by the statute.
- Therefore, despite providing written offers on several occasions, Defendants failed to meet their burden to show that suitable offers of work were made, and Claimant was awarded healing period for the timeframe sought.

**C. HOWARD V. PRESTAGE FOODS OF IOWA, LLC & SAFETY NATIONAL CASUALTY CORP., File No. 1665279.01 (Iowa Workers' Comp. Com'n April 14, 2021).**

- Claimant made a claim for healing period benefits from April of 2020 through the date of hearing (January 19, 2021) and beyond based on a finding that he was not at MMI.
- Defendants offered Claimant light duty in writing per the restrictions assigned by the treating doctor. Claimant did perform the work starting in April of 2020 but claimed it was difficult for him and he stopped showing up for work regularly. He worked sporadically with his last day of work being September 10, 2020.
- At the time of hearing Defendant-employer was still offering work and Claimant was calling in daily to state he was unable to work.
- Claimant admitted that no doctor took him off work, that he notified the employer via phone only, and that the employer always had work available for him.
- Deputy held that Defendants' offer of work was sufficient under Iowa Code 85.33(b) and that Claimant failed to assert that the work was not suitable in writing as required by statute. Therefore, the Deputy held that Claimant was not eligible for temporary benefits for the days he did not work through the date of hearing which in turn negated his claims for a running award.