IN THE SUPREME COURT OF IOWA

No. 18-1051

ANITA GUMM,

Plaintiff-Appellant,

vs.

EASTER SEAL SOCIETY OF IOWA, INC., AMERICAN COMPENSATION INS. CO., and SFM COMPANIES,

Defendants-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT OF POLK COUNTY
THE HONORABLE PAUL SCOTT
CASE NO CVCV055213

DEFENDANTS-APPELLEES EASTER SEAL SOCIETY OF IOWA, INC. AND AMERICAN COMPENSATION INS. CO'S APPLICATION FOR FURTHER REVIEW OF THE COURT OF APPEALS' DECISION OF MAY 15, 2019

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QUESTION PRESENTED FOR REVIEW

Whether the Iowa Court of Appeals erred in reversing the Workers' Compensation Commissioner's decision, affirmed by the Iowa District Court, that Claimant did not establish a cumulative trauma injury claim because she did not sustain a distinct and discreet disability attributable to work activities following surgery for a traumatic injury to her right ankle.

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STATEMENT SUPPORTING FURTHER REVIEW

Defendants Easter Seal Society of Iowa, Inc., American Compensation Insurance Co., and SFM Insurance Co., pursuant to Iowa Rule of Appellate Procedure 6.1103, apply to the Supreme Court for further review of the Court of Appeals decision. The Court of Appeals abandoned the well-established rule applicable to cumulative trauma injury cases, set forth in *Ellingson v. Fleetguard, Inc.,* 599 N.W.2d 440 (Iowa 1999), that requires a Claimant to prove a "distinct and discreet disability" attributable to work activities after her traumatic injury, rather than as an aggravation of her traumatic injury. As pointed out by the Court of Appeals' dissent, the Court of Appeals decision improperly extended *Floyd v. Quaker Oats,* 646 N.W.2d 105, 108 (Iowa 2002) by creating an exception to the rule in *Ellingson* merely because Claimant was barred by the statute of limitations from recovering workers' compensation benefits for an alleged cumulative trauma injury to her back after she had already received benefits for her traumatic injury to the lower extremity.

STATEMENT OF FACTS

Claimant Anita Gumm fractured her right ankle on October 28, 2008, after slipping on wet grass while working. (Arbitration Decision p. 4, App. 19) Dr. Eric Barp performed an open reduction internal fixation (ORIF) surgery shortly thereafter. (Exhibit 1, pp. 1-4, App. 85-88; Arbitration Decision p. 4, App. 19)

Claimant presented to Dr. Barp for follow-up care and treatment for her right ankle in the years that followed, which included three more surgeries and two injections. (Arbitration Decision pp. 4–7, App. 19-22)

Dr. Barp initially released Claimant from care on December 11, 2008, noting that Gumm may require surgical removal of hardware in the future. (Arbitration Decision p. 4, App. 19) In January of 2009, Claimant returned to work, and Dr. Barp placed her at maximum medical improvement and assigned a 17% permanent impairment rating to her right lower extremity. (Exhibit 1, pp. 10–13, 16–18, and 20, App. 94-97, 100-102, 104; Arbitration Decision p. 4, App. 19; Ruling on Petition for Judicial Review p. 1, App. 53) Less than a month later, on February 9, 2009, Claimant returned to Dr. Barp with reports of pain and swelling of the ankle, so Dr. Barp ordered physical therapy. (Exhibit 1, pp. 22–23, App. 106-107; Arbitration Decision p. 4, App. 19) After completing therapy Claimant returned to Dr. Barp on April 7 and reported she had resumed full activity without pain or discomfort, so Dr. Barp again discharged her from care. (Exhibit 1, p. 26, App. 110; Arbitration Decision p. 5, App. 20)

Claimant was paid 37.4 weeks of permanent partial disability benefits, representing Dr. Barp's 17% lower extremity impairment rating. (Exhibit 10, p.1, App. 248; Exhibit E, p. 5, App. 264). The last check for such indemnity benefits

was issued on May 21, 2010. (Exhibit E, p. 2, App. 261; Exhibit FF, p. 2, App. 266)

Claimant returned to Dr. Barp on April 22, 2010, complaining of right ankle pain and stiffness, and less than two weeks later, on May 3, 2010, Dr. Barp performed hardware removal surgery. (Exhibit 1, pp. 27, 30–31, and 33–35, App. 111, 114-115, 117-119; Arbitration Decision p. 5, App. 20). Claimant returned to Dr. Barp on June 22, 2010, for follow up, noting that her right ankle pain came and went (at that visit, she reported 6/10 pain rating). (Exhibit 1, p. 39, App. 123; Arbitration Decision p. 5, App. 20) Dr. Barp released her from care again and opined she had sustained no further permanent impairment as a result of the hardware removal surgery. (Exhibit 1, p. 39, App. 123; Arbitration Decision p. 5, App. 20).

On January 30, 2012, Claimant returned to Dr. Barp complaining of right foot pain. (Exhibit 1, p. 42, App. 126: Arbitration Decision p. 5, App. 20) She saw him again on March 6, 2012, with complaints of right ankle pain and difficulty walking due to pain with weight bearing. (Exhibit 1, p. 44, App. 128; Arbitration Decision p. 5, App. 20) Dr. Barp performed an injection and advised Claimant that she might require an ankle arthroscopy. (Exhibit 1, pp. 44–45, App. 128-129; Arbitration Decision p. 5, App. 20) Dr. Barp performed the arthroscopy on April 11, 2012. (Exhibit 1, pp. 46, 50, and 52, App. 130, 134, 136; Arbitration Decision

p. 5, App. 20) Dr. Barp's operative report stated that Claimant suffered with posttraumatic arthritis of the ankle following ORIF and had developed synovitis. (Exhibit 1, p. 52, App. 136; Arbitration Decision p. 5, App. 20) Claimant presented to Dr. Barp on June 1, 2012, complaining of continued tenderness, soreness, and swelling in her right ankle. (Exhibit 1, p. 58, App. 142; Arbitration Decision p. 6, App. 21). On July 17, 2012, Dr. Barp released Claimant without restrictions. (Exhibit 1, p. 59, App. 143; Arbitration Decision p. 6, App. 21).

On May 16, 2013, Claimant saw Dr. Barp and reported complaints of ankle pain; the record indicated that she had been experiencing such pain for past 3 to 4 months. (Exhibit 1, pp. 63–64, App. 147-148; Arbitration Decision p. 6, App. 21). Dr. Barp performed an ankle injection and opined that Claimant may need an ankle arthrodesis at some point in the future. (Exhibit 1, pp. 63–64, App. 147-148; Arbitration Decision p. 6, App. 21). Claimant presented to her personal physician, Dr. Timothy Vermillion, on May 29, 2013, and the record indicated that since the 2008 ankle injury at work, she had continued to experience ankle pain with walking, standing, and working as she was always on her feet. (Exhibit 2, p. 1–3, App. 198-200; Arbitration Decision p. 6, App. 21). Claimant returned to Dr. Barp on June 27, 2013, reporting some relief with injection but continued intermittent right ankle pain. (Exhibit 1, p. 65, App. 149; Arbitration Decision p. 6, App. 21). On August 2, 2013, Dr. Barp recommended ankle arthrodesis.

On October 23, 2013, Dr. Barp performed arthroscopic right ankle arthrodesis with fluoroscopy for noted diagnosis of right ankle arthritis. (Exhibit 1, pp. 73 and 79, App. 157, 163; Arbitration Decision p. 7, App. 22). Dr. Barp's operative noted stated Claimant "suffered a trimalleolar ankle fracture dislocation resulting in ORIF which secondarily resulted in DJD of her ankle." (Exhibit 1, p. 79, App. 163; Arbitration Decision p. 7, App. 22). As noted by the Commissioner, "Dr. Barp opined the ankle arthrodesis 'certainly was a result of [Gumm's] 2008 fracture.'" (Exhibit 4, p. 5, App. 239; Arbitration Decision p. 15, App. 30). Further, Dr. Barp agreed that an ankle replacement or ankle arthrodesis (in Gumm's case) would be a natural sequela of the 2008 work injury. (Exhibit 4, p. 6, App. 240; Arbitration Decision p. 16, App. 31).

TABLE OF AUTHORITIES

CASES

Ellingson v. Fleetguard, Inc.,
599 N.W. 2d 440 (Iowa 1999*)* 4,10,11,12,13,14,15

Floyd v. Quaker Oats, 646 N.W.2d 105 (Iowa 2002) 4,12,13,14,15

McKeever Customer Cabinets v. Smith,
379 N.W. 2d 368 (Iowa 1986) 10

Waldinger Corp. v. Mettler, 817 N.W. 2d 1, 7 (Iowa 2012) 10

ARGUMENT

The Iowa Supreme Court discussed the very issue present here – whether there is a "cumulative trauma" injury as opposed to an aggravation of an existing injury due to work – in *Ellingson v. Fleetguard, Inc.,* 599 N.W.2d 440 (Iowa 1999).[1] In *Ellingson*, Claimant began working at Fleetguard in 1968. She was injured on January 4, 1985 when a 40-lb box fell on her head, resulting in neck, head, and arm pain that required surgeries in March 1990 and December 1992. *Id.* at 442. Ellingson returned to Fleetguard after the injury. After the surgeries, she periodically missed work to treat for her condition. By May 1993, her condition had progressed. Claimant sought benefits alleging two dates of injury – the acute trauma, and an alleged cumulative trauma due to ongoing work duties, that manifested on June 17, 1992.[2] The Iowa Supreme Court cited *McKeever Customer Cabinets v. Smith*, 379 N.W.2d 368, 373-74 (Iowa 1986) for the proposition that Iowa recognizes a cumulative trauma as "the type of injury that develops over time from performing work-related activities and ultimately produces some degree of industrial disability." *Id.* Claimant argued that her ongoing work activities at

[1] *Ellingson* was overruled on other grounds in *Waldinger Corp. v. Mettler,* 817 N.W.2d 1, 7 (Iowa 2012) (healing period benefits may be intermittent such that a claimant is not limited to a single period of temporary disability).

[2] The court noted that Claimant "freely admits that her cumulative-injury claim is designed to produce a new date of injury that will provide a higher wage base for computing her compensation." *Id.* at 444.

Fleetguard were a substantial factor in materially aggravating her condition. In rejecting Claimant's argument, the court stated:

> To the extent that the evidence reveals a subsequent aggravation of Ellingson's January 4, 1985 injury, this is a relevant circumstance in fixing the extent of her permanent disability. Aggravating work activities were doubtless a causal factor with respect to the total degree of disability that she exhibited at the time of the hearing. It is clear, however, that she may not establish a cumulative-injury claim by merely asserting that her disability immediately following the January 4, 1985 injury was increased by subsequent aggravating work activities. That circumstance only serves to increase the disability attributable to the January 4, 1985 injury. **To show a cumulative injury she must demonstrate that she has suffered a distinct and discreet disability attributable to post-1985 work activities rather than as an aggravation of the January 4, 1985 injury. . .**

Id. at 444 (emphasis added).

This case is similar to *Ellingson.* Here, Claimant suffered a complex, acute injury to her right foot in October 2008 that led to four different surgeries. Not surprisingly, her treating physician, Dr. Barp, stated that Claimant aggravated her underlying condition by spending time on her feet at work as opposed to having her foot up and resting. However, as made clear by *Ellingson,* that serves only to increase the disability associated with the underlying injury. It does not form the basis for a new, cumulative injury. That can occur only if Claimant can show that "she has suffered a distinct and discreet disability attributable to post-1985 work activities rather than as an aggravation of the [October 23, 2008] injury." *Ellingson*, 599 N.W.2d at 444.

The Commissioner correctly determined Claimant's current condition was a result of her October 2008 injury, and not any work activities that occurred thereafter. The Commissioner, relying on the testimony of Dr. Barp, concluded:

> Dr. Barp's opinion relies upon a common-sense argument, that a person with an arthritic joint will have greater problems with the joint if the joint is stressed than would a person who minimally uses the joint. This form of opinion is insufficient for claimant to rely upon in establishing she suffered a cumulative work injury following the right ankle fracture. Dr. Barp's opinion does not establish claimant suffered a disability gradually, reaching an injurious condition at some point. Rather, Dr. Barp's opinion confirms claimant suffered from an injury and disability, and through further work activities, the disability increased.

(Id.) The Commissioner's factual finding that Claimant did not establish a cumulative trauma injury under the *Ellingson* standard is supported by substantial evidence.

The Court of Appeals discussed *Ellingson,* but stated that the case of *Floyd v. Quaker Oats*, 646 N.W.2d 105 (Iowa 2002) "creates a carefully circumscribed exception to the *Ellingson* holding." According to the Court of Appeals, "if a claimant is precluded by the statute of limitations from bringing an original proceeding or review-reopening, the claimant may recover by way of a cumulative-injury claim for any increase in functional disability shown to have occurred as the result of day-to-day activities in the workplace subsequent to the original injury without having to show he or she suffered a 'distinct and discreet'

disability attributable to the post-original-trauma work activities.'" (Court of Appeals Decision, pp. 7-8)

In *Floyd,* Claimant sought compensation via two separate petitions, both of which were scheduled injuries to his lower extremity. One petition alleged a traumatic injury on September 3, 1993 and the other alleged a cumulative injury due to work activities after September 3, 1993. *Id.* at 107. Claimant voluntarily dismissed the traumatic injury claim in the face of a statute-of-limitations defense by the employer. *Id.* at 108. The Iowa Supreme Court stated:

> Given this circumstance, we believe that Claimant should be permitted to recover by way of a cumulative-injury claim for any increase in functional disability shown to have occurred as the result of day-to-day activities in the workplace subsequent to the September 3, 1993 injury.

Id. The *Floyd* court discussed *Ellingson,* noting that a cumulative injury requires a "distinct and discreet disability solely attributable to work activities over time, as opposed to an aggravation of a preexisting injury." *Id.* at 108. The court did not address whether the Claimant in *Floyd* had proven such a discreet disability, nor did the court criticize or question this critical component of *Ellingson.* However, because the Claimant in *Floyd* was able to show the extent of permanent disability to his lower extremity increased after September 3, 1993, and because he was precluded from recovering any benefits for the September 3 injury due to the statute of limitations, the court permitted him to recover for the "increase in

functional disability shown to have occurred as the result of day-to-day activities in the workplace subsequent to the September 3, 1993 injury." *Id.*

The Court of Appeals substantially broadened the narrow exception of *Floyd* in this case. Here, Claimant was paid PPD benefits pursuant to the impairment rating given by Dr. Barp. (App. 248) More than three years later, she sought to recover additional PPD benefits, by way of a cumulative trauma injury, for an entirely new (and unscheduled) injury to her low back and to her bilateral knees, which she claimed were aggravated as a result of her ankle injury. Under the clear language of *Ellingson,* she should not be permitted to do so absent proof that she sustained a distinct and discreet disability solely attributable to work activities over time, as opposed to an aggravation of a preexisting injury. The Commissioner made a factual finding that while Claimant's continued work duties after the October 28, 2008 injury "may have played a role in aggravating the right ankle condition and resulted in the need for further treatment," they did not cause a "distinct and discreet" disability. (Arb. Dec., p. 19) Instead, the bilateral knee and back complaints for which Claimant sought additional compensation by way of her cumulative injury claim "reflect[ed] sequelae of the original October 28, 2008 injury and are not distinct cumulative injuries." (Id.)

While Defendants believe *Ellingson* plainly precludes recovery under these circumstances, this case also presents an opportunity for the court to clarify to

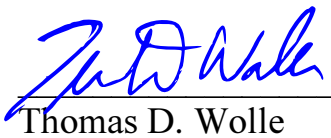
narrow boundaries of the apparent exception to *Ellingson* that this court allowed in *Floyd.* As a policy matter, a Claimant who has sustained an acute injury and been compensated for the same, but whose claim for additional benefits for the injury is barred by the statute of limitations, should not be permitted to recover on a cumulative trauma theory merely by showing that ongoing work duties contributed to the development of increased disability. That is why the court's standard in *Ellingson* of requiring a "distinct and discreet" disability attributable to work activities after the initial acute injury is important and makes sense. Absent such a requirement, injured workers in Iowa could get another bite at the apple years after the statute of limitations on their acute injury claim (or even a review-reopening claim) has expired. All they would need to do is show they continued working, and that their work played a part in the development of a condition (such as arthritis in this case) which would "inevitably develop at some point in the future" irrespective whether the employee continued working. (App. 33) This slippery slope is especially evident here, where Claimant merely spent time on her feet at work as opposed to performing physically demanding or repetitive work. A claim for sequelae of an initial acute injury must be brought as part of the acute injury claim (either in an original proceeding or review-reopening). A new cumulative trauma claim should not be allowed absent a showing of a "distinct and discreet" disability due to work activities following the employee's return to work. The

Commissioner's determination that Claimant failed to make that showing here is supported by substantial evidence and should be affirmed.

CONCLUSION

For the foregoing reasons, Defendants respectfully request the Court reverse the decision of the Iowa Court of Appeals and affirm the decision of the Workers' Compensation Commissioner.

Respectfully submitted,



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CERTIFICATE OF ELECTRONIC FILING AND SERVICE

I certify that on June 4, 2019, I electronically filed the forgoing with the Clerk of Court of the Supreme Court using the Iowa Electronic Document Management System, which will send notification of electronic filing to the following opposing counsel. Per Iowa Rule 16.317(1)(a)(2), this constitutes service of the document for the purposes of the Iowa Court Rules.

By: _____
Thomas D. Wolle, AT0008564

CERTIFICATE OF COMPLIANCE WITH TYPE REQUIREMENTS

This Application for Further Review complies with the typeface and type-volume requirements of Iowa Rule of Appellate Procedure 6.903(1)(d) and 6.903(1)(g)(1) because this Application of Further Review has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-Point Times New Roman and contains 2724 words, excluding the parts of the brief exempted by Iowa R. App. P.6.903(1)(g)(1).

By: _____
Thomas D. Wolle, AT0008564

IN THE COURT OF APPEALS OF IOWA

No. 18-1051
Filed May 15, 2019

ANITA GUMM,
Plaintiff-Appellant,

vs.

EASTER SEAL SOCIETY OF IOWA, INC., AMERICAN COMPENSATION INS. CO., and SFM INSURANCE COMPANY,
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Paul Scott, Judge.

Anita Gumm appeals the denial of her petition for judicial review upholding the Workers' Compensation Commissioner's denial of her petition asserting she sustained a cumulative workplace injury. **REVERSED AND REMANDED.**

Joseph S. Powell of Thomas J. Reilly Law Firm, P.C., Des Moines, for appellant.

Lee P. Hook and Tyler S. Smith of Peddicord Wharton, LLP, West Des Moines, for appellees Easter Seal Society of Iowa, Inc. and SFM Insurance Company.

Thomas D. Wolle of Simmons Perrine Moyer Bergman PLC, Cedar Rapids, for appellee American Compensation Ins. Co.

Considered by Doyle, P.J., Mullins, J., and Danilson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2019).

DOYLE, Presiding Judge.

Anita Gumm appeals the denial of her petition for judicial review upholding the Workers' Compensation Commissioner's denial of her petition asserting she sustained a cumulative workplace injury. Upon our review, we reverse the district court's ruling and remand to the commissioner for further proceedings.

***I. Background and Standard of Review*.**

In 2008, Anita Gumm slipped while working and fractured her right ankle. In 2009, it was determined Gumm was at maximum medical improvement for her injury, and she was assigned a 17% extremity impairment rating for the ankle fracture. She received permanent partial disability benefits and returned to full work activity without restrictions.

In 2014, Gumm filed a workers' compensation petition claiming she sustained a cumulative injury after she returned to work subsequent to the 2008 fracture. She alleged injury dates of March 6, 2012, May 16, 2013, and/or January 15, 2014. Ultimately, the agency found that Gumm failed to establish she sustained a cumulative injury following the 2008 fracture. A deputy commissioner found:

> Claimant has not shown she suffered a "distinct and discreet" disability attributable to the post-fracture work activities. Her continued work activities may have played a role in aggravating the right ankle condition and resulted in the need for further treatment, however, by the standard of the *Ellingson* [*v. Fleetguard, Inc*., 599 N.W.2d 440 (Iowa 1999),] case, this form of aggravation is insufficient. Claimant suffered a significant fracture-dislocation and developed the inevitable posttraumatic arthritis that would be expected from such an injury. As a result of the arthritic condition, claimant required arthroscopy, arthrodesis, and more conservative treatment of the right ankle. These procedures represent sequelae of the original October 28, 2008 injury, not distinct cumulative injuries. Claimant also developed bilateral knee and back complaints

> as a result of an altered gait following arthrodesis; these complaints also reflect sequelae of the original October 28, 2008 injury and are not distinct cumulative injuries.

The decision was affirmed by the agency and a petition for judicial review followed. The district court upheld the agency's determination and denied Gumm's petition. Gumm now appeals, renewing her arguments asserted before the district court.

Our analysis is shaped largely by the deference we are statutorily obligated to afford the agency. *See Mike Brooks, Inc. v. House*, 843 N.W.2d 885, 888-89 (Iowa 2014). In judicial review proceedings, the district court acts in an appellate capacity, reviewing the commissioner's decision to correct legal error. *See id.* at 888. On appeal, we apply the standards of Iowa Code chapter 17A (2017) to decide if we reach the same conclusion as the district court. *See id*. at 889. The commissioner is vested with the authority to apply the law to the facts. *See Drake Univ. v. Davis*, 769 N.W.2d 176, 183 (Iowa 2009). Because whether the commissioner misapplied the cumulative-injury doctrine to Gumm's situation depends on the application of law to facts, we will not disturb the decision unless it is "irrational, illogical, or wholly unjustifiable." *See Neal v. Annett Holdings, Inc.*, 814 N.W.2d 512, 526 (Iowa 2012); *see also* Iowa Code § 17A.19(10)(i), (m). "A decision is 'irrational' when it is 'not governed by or according to reason.' A decision is 'illogical' when it is 'contrary to or devoid of logic.' A decision is 'unjustifiable' when it has no foundation in fact or reason." *Sherwin-Williams Co. v. Iowa Dep't of Revenue*, 789 N.W.2d 417, 432 (Iowa 2010) (citations omitted).

II. Discussion.

Starting with the applicable law, we note disabilities arising from one-time traumas are not the only kind of injuries covered by our workers' compensation

statute. *See McKeever Custom Cabinets v. Smith*, 379 N.W.2d 368, 373 (Iowa 1985). Disabilities gradually developing over a period of time from repetitive physical trauma in the workplace—a cumulative injury—also subject employers to liability. *See id*. at 372-74. In other words, a cumulative injury "develops over time from performing work-related activities and ultimately produces some degree of industrial disability." *Ellingson v. Fleetguard, Inc.*, 599 N.W.2d 440, 444 (Iowa 1999), *overruled on other grounds by Waldinger Corp. v. Mettler*, 817 N.W.2d 1 (Iowa 2012). When an employee whose work activities collectively cause the worker to suffer a debilitating condition, our "cumulative injury rule" allows the employee to receive compensation when the employee becomes aware of the injury. *See Excel Corp. v. Smithart*, 654 N.W.2d 891, 896-97 (Iowa 2002), *superseded by statute*, 2004 Iowa Acts 1st Extraordinary Sess. ch. 1001, § 12, *as recognized in JBS Swift & Co. v. Ochoa*, 888 N.W.2d 887, 898 (Iowa 2016).

Cumulative-injury cases typically involve an injury resulting from years of continuous, repetitive movement that has taken a physical toll on a worker's body. *See, e.g., Larson Mfg., Co., Inc. v. Thorson*, 763 N.W.2d 842, 846-49 (Iowa 2009) (chronicling daily tasks of worker at storm door factory). In such cases, a series of smaller hurts advances toward manifestation as an employee requires medical treatment and modification of work activities due to deterioration in function. *See id*. at 859. But the acceptance of gradual injury as the mechanism of harm does not exclude the idea that acute injuries can contribute to the employee's compensable disability under the cumulative-injury doctrine. In the first Iowa case to recognize cumulative injury as a viable theory of recovery under the workers' compensation code, our supreme court recognized two acute injuries to the

worker's wrist as "the beginning of a series of hurts." *McKeever Custom Cabinets*, 379 N.W.2d at 373. Similarly, in *Floyd v. Quaker Oats*, the court rejected the employer's argument that "to show a cumulative injury a claimant must produce evidence of having suffered a distinct and discrete disability solely attributable to work activities over time, as opposed to an aggravation of a preexisting injury from an identified traumatic event." 646 N.W.2d 105, 108 (Iowa 2002). The fly in the ointment here is the *Ellingson* case.

In *Ellingson*, Ellingson was seeking benefits for "two separate compensable injuries"—the initial injury and the "distinct and discreet cumulative neck injury from which an episode of disability was manifested on June 17, 1992." 599 N.W.2d at 443. The agency "found that the only compensable injury established by the evidence was the January 4, 1985 injury." *Id*. More specifically:

> While claimant seeks to assert a cumulative injury occurring on or about June 17, 1992, the treating physician opines that claimant's ongoing condition has its origins in her work incident of January 4, 1985. Claimant's continuing symptoms and her need for additional surgery and other medical care causally relate back to the January 4, 1985 work injury. Hence, claimant has not established a separate injury arising out of or in the course of her employment on or about June 17, 1992.

Id. at 444-45. On appeal from judicial review, the supreme court held,

> To the extent that the evidence reveals a subsequent aggravation of Ellingson's January 4, 1985 injury, this is a relevant circumstance in fixing the extent of her permanent disability. Aggravating work activities were doubtless a causal factor with respect to the total degree of disability that she exhibited at the time of the hearing. It is clear, however, that she may not establish a cumulative-injury claim by merely asserting that her disability immediately following the January 4, 1985 injury was increased by subsequent aggravating work activities. That circumstance only serves to increase the disability attributable to the January 4, 1985 injury. To show a cumulative injury she must demonstrate that she has suffered a distinct and discreet disability attributable to post-1985 work activities

> rather than as an aggravation of the January 4, 1985 injury. In presenting that claim to the commissioner, she could only prevail if the commissioner, as primary fact finder, found that a factual basis for a cumulative-injury disability existed. The commissioner did not make that finding.

Id. at 444. The court affirmed the district court upholding the agency's ruling on the issue. *Id*. at 445.

Here, Gumm maintains she sustained a cumulative aggravation of her acute October 2008 injury after she returned to work, contrary to the agency's determination. Gumm insists the facts of her case are like those in *Floyd*:

> She sustained an acute injury in October of 2008, and the parties stipulated that injury resulted in a 17% lower extremity impairment rating. That stipulation was accepted and incorporated by reference into the agency's decision. Like . . . Floyd, Gumm did not seek to litigate the extent of disability benefits for the October 2008 injury due to the statute of limitations having run. The parties further stipulated that Easter Seals would receive a credit for the 17% previously paid for the 2008 injury, requiring Gumm to establish an increase in disability above 17% in order to recover.

In *Floyd*, Floyd sought compensation via two separate petitions. *See* 646 N.W.2d at 107. One petition sought compensation for his scheduled injury that occurred on September 3, 1993. *See id*. at 106-07. The other claimed "a cumulative injury subsequent to September 3, 1993." *Id*. at 107. Facing a statute of limitations defense, Floyd voluntarily dismissed without prejudice the petition involving the September 3 injury. *Id*. The second petition proceeded, and the deputy commissioner determined Floyd "had sustained a cumulative injury of 3.75% from day-to-day work activities after September 3, 1993." *Id*. The employer in *Floyd* argued Floyd did not establish a cumulative injury because there was no showing that Floyd "suffered a distinct and discreet disability solely attributable to work activities over time, as opposed to an aggravation of a preexisting injury from

an identified traumatic event." *Id*. at 108. The court found Floyd "should be permitted to recover *by way of a cumulative-injury claim* for any increase in functional disability shown to have occurred as the result of day-to-day activities in the workplace subsequent to the September 3, 1993 injury." *Id*. at 108 (emphasis added).

At first blush, the holdings of the two cases are seemingly incompatible, but reconciliation turns on the specific circumstances of the litigation in the two cases. The supreme court distinguished the two cases, explaining:

> The significant factor in the *Ellingson* case was that the extent of the 1985 injury was being litigated in the same proceeding in which the separate cumulative-injury claim was being urged. Moreover, the evidence conclusively showed that the ultimate extent of industrial disability was affected by job-related activities that aggravated the 1985 neck injury. As a result of that circumstance, this court held that the compensable consequences of the aggravation of the 1985 neck injury must be adjudicated as part of the disability flowing from that injury.
>
> In the present case, [Floyd's] arbitration petition seeking benefits for the September 3, 1993 injury was voluntarily dismissed in the face of a statute-of-limitations defense by the employer. The industrial commissioner concluded that the dismissal of that petition precluded any consideration of the September 3, 1993 injury as a compensable event. Given this circumstance, we believe that claimant should be permitted to recover by way of a cumulative-injury claim for any increase in functional disability shown to have occurred as the result of day-to-day activities in the workplace subsequent to the September 3, 1993 injury.

Id.[1] Our takeaway is that the *Floyd* holding creates a carefully circumscribed exception to the *Ellingson* holding. In other words, if a claimant is precluded by the statute of limitations from bringing an original proceeding or review-reopening, the claimant may recover by way of a cumulative-injury claim for any increase in

[1] We note that Justice Carter authored both *Ellingson* and *Floyd*.

functional disability shown to have occurred as the result of day-to-day activities in the workplace subsequent to the original injury without having to show he or she suffered a "distinct and discreet" disability attributable to the post-original-trauma work activities.

After analyzing the facts of this case and applicable law, the district court concluded:

> Here, the agency found that Gumm's day-to-day work activities may have played a role in aggravating her ankle, however it found this alone was not enough to establish a cumulative injury under *Ellingson*. The agency found that Gumm's ankle had never fully healed, and therefore she did not show by a preponderance of the evidence that she suffered a cumulative-trauma injury. Thus, the agency ultimately determined that any disability flowing from the original ankle injury would need to be adjudicated and calculated as one injury. A plain reading of *Floyd* suggests that it is immaterial whether or not the ankle fully healed if part of the industrial disability could be attributed to the acute injury and the rest of the disability could be attributed to post-injury work-related aggravation. The court recognizes the difficulty in reconciling the seemingly incompatible holdings of *Ellingson* and *Floyd*. Regardless, the agency, as the finder of fact, found that all of Gumm's disability stemmed from the traumatic injury that occurred on October 28, 2008 and the natural results therefrom, and therefore applied the holding from *Ellingson* to conclude that Gumm did not suffer a cumulative-trauma injury. The agency's application of the law was not irrational, illogical, or wholly unjustifiable in finding that Gumm failed to establish a cumulative injury by a preponderance of the evidence.

We agree with the agency that under the holding of *Ellingson*, Gumm failed to show she suffered a "distinct and discreet" disability attributable to her post-fracture work activities. But, that does not end the matter. The question boils down to whether the agency erred in failing to apply the *Floyd* holding.

Gumm, like Floyd, faced a statute of limitations defense. *See* Iowa Code § 85.26(1).[2] Gumm's last weekly payments were paid in May 2010. She filed her petition in February 2014, after the statute of limitations expired. Under similar circumstances, the supreme court held, "we believe that claimant should be permitted to recover by way of a cumulative-injury claim for any increase in functional disability shown to have occurred as the result of day-to-day activities in the workplace subsequent to the [traumatic] injury." *Floyd*, 646 N.W.2d at 108. We reach the same conclusion, particularly given "that our workers' compensation statute is to be liberally construed to implement its remedial purposes." *Swiss Colony, Inc. v. Deutmeyer*, 789 N.W.2d 129, 135 (Iowa 2010). Accordingly, we conclude the judgment of the district court must be reversed and the case remanded to the commissioner for further proceedings.

REVERSED AND REMANDED.

Danilson, S.J., concurs; Mullins, J., dissents.

[2] Iowa Code § 85.26(1) provides:

> An original proceeding for benefits under this chapter or chapters 85A, 85B, or 86, shall not be maintained in any contested case unless the proceeding is commenced . . . if weekly compensation benefits are paid under section 86.13, within three years from the date of the last payment of weekly compensation benefits.

MULLINGS, Judge (dissenting).

I respectfully dissent. I agree this case does not fit neatly within the analytical frameworks of either *Floyd v. Quaker Oats*, 646 N.W.2d 105, 108 (Iowa 2002), or *Ellingson v. Fleetguard, Inc.*, 599 N.W.2d 440 (Iowa 1999). *Floyd* can be understood as an exception to *Ellingson*, basically concluding if there is no compensation for the underlying injury, that injury can be included as part of a cumulative injury claim. *See Floyd*, 646 N.W.2d at 108. The "no compensation" in *Floyd* was because a statute of limitations barred the claim. *See id*.

In the present case, Gumm successfully resolved a claim for the underlying injury. I read the majority opinion to allow Gumm to pursue additional benefits for the underlying injury because the statute of limitations prevents her from claiming additional benefits for the underlying injury. I respectfully submit such a conclusion is an extension of *Floyd*, which I do not believe is or should be authorized. I would affirm.

IOWA APPELLATE COURTS

State of Iowa Courts

Case Number	**Case Title**
18-1051	Gumm v. Easter Seal Society of Iowa

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