IN THE SUPREME COURT OF IOWA

NO. 18-1051

ANITA GUMM,

Appellant,

vs.

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

Appellees.

APPEAL FROM THE DISTRICT COURT OF POLK COUNTY
HONORABLE PAUL SCOTT

APPELLANT'S REPLY BRIEF

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STATEMENT OF ISSUES PRESETNED FOR REVIEW

1. Whether the Iowa Workers' Compensation Commissioner Correctly Applied Cumulative Aggravation Injury Law to Appellant's Case.

Authorities:

Dep't of Transp. v. Van Cannon, 459 N.W.2d 900 (Iowa App. 1990)

Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999)

Floyd v. Quaker Oats, 646 N.W.2d 105 (Iowa 2002)

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

W. Des Moines Cmty. Sch. v. Fry, 859 N.W.2d 671 (Iowa Ct. App. 2014)

Ziegler v. United States Gypsum Co., 106 N.W.2d 591 (Iowa 1960)

ARGUMENT

I. Gumm Established the Legal Requirements for a Cumulative Aggravation Injury.

A. *Ellingson v. Fleetguard* is not Applicable.

Appellee's both rely heavily on *Ellingson v. Fleetguard* in their briefs. As set forth in Gumm's primary Brief, *Ellingson* is not the correct law. Further, Gumm's case is vastly different than the claimant in *Ellingson.*

In *Ellingson*, the injured worker had multiple work interruptions following the initial injury. As stated by the Iowa Supreme Court at the beginning of the opinion: "A synopsis of Ellingson's alleged work interruptions following her January 4, 1985 injury includes those episodes described below. Our list may not include all such claims but is designed to highlight the substantial number of work interruptions that have been asserted by Ellingson." *Ellingson v. Fleetguard, Inc*., 599 N.W.2d 440, 442 (Iowa 1999). After giving this statement, the *Ellingson* Court went on to summarize approximately eight time periods Ellingson was off work between 1985 and 1993 because of her injury, as well as approximately six additional episodes during this same time period she was on restricted or light duty work. *See Id*. This is just what the Court included in their synopsis – there may have been additional periods of missed work and limited work.

Gumm's case is the opposite of *Ellingson*. Gumm had an initial injury, and then went extensive periods of time *without* missing any work and *without* having any limitations. This is the very reason the statute of limitations became an issue.

In applying *Ellingson* to Gumm's case the agency noted, "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." (App. 45) (citing *Floyd v. Quaker Oats*, 646 N.W.2d 105, 108 (Iowa 2002). The agency further noted "In Ellingson, the claimant sustained a traumatic injury to her neck. She continued to suffer problems over the next several years. She then sought recovery for both the 1985 neck injury and the subsequent cumulative trauma." (App. 47). What the agency failed to realize was that unlike Ellingson, Gumm did *not* seek to litigate the extent of her initial October 28, 2008. The agency illogically and incorrectly applied *Ellingson* instead of *Floyd*.

B. Gumm Established a Compensable Injury pursuant to *Floyd v. Quaker Oats*.

As stated in Gumm's primary Brief, pursuant to *Floyd v. Quaker Oats* and *Ziegler v. United States Gypsum*, following an acute injury a worker may recover under a cumulative injury claim for an increase in disability that occurs from day-to-day work activities. *See Floyd v. Quaker Oats*, 646

N.W.2d 105 (Iowa 2002); *Ziegler v. United States Gypsum Co.*, 252 Iowa 613, 620, 106 N.W.2d 591, 595 (1960). Gumm suffered a cumulative injury pursuant to the cumulative injury law set forth in *Floyd*.

Appellee SFM argues that under *Floyd* Gumm failed to establish a cumulative injury. The agency never applied *Floyd,* and as such it is not possible to review whether the agency correctly applied *Floyd*.

C. *Ellingson v. Fleetguard* Should be Overturned.

As stated above, Gumm did not seek to litigate the extent of her initial October 2008 injury. As such, the legal standard of *Ellingson* should not have been applied. However, the agency determined it must apply *Ellingson* until the case is overturned. (App. 47). The District Court ruled "the court recognizes the difficulty in reconciling the seemingly incompatible holdings of *Ellingson* and *Floyd*." (App. 59). The rulings in *Ellingson* and *Floyd* reached opposite conclusions. While the ruling in *Ellingson* may have made sense in the unique situation of that case, its ruling is not in line with established cumulative injury law and is not in line with *Floyd*. *Ellingson* should be overturned.

If a worker has a preexisting condition or disability that is aggravated, accelerated, worsened or lighted up by an injury which arose out of and in the course of employment resulting in a disability found to exist, the

claimant is entitled to compensation. *Dep't of Transp. v. Van Cannon*, 459 N.W.2d 900, 904 (Iowa Ct. App. 1990). An injury which develops over time from performing work-related activities and ultimately results in some degree of industrial disability is a compensable work injury. *McKeever Custom Cabinets v. Smith*, 379 N.W.2d 368, 373-74 (Iowa 1986). These are well established cumulative injury concepts.

Ellingson requires an injured worker to establish a "distinct and discreet" disability attributable to post-injury activities in order to establish a cumulative injury claim. *Ellingson*, 599 N.W.2d at 444. *Ellingson* places an increased burden on a worker who suffers a prior acute injury in order to establish a cumulative aggravation injury. This heightened standard is not in compliance with long-standing Iowa law regarding aggravation and cumulative injuries.

Ellingson involved an injured worker attempting to create a cumulative injury claim in order to obtain a higher compensation rate, while at the same time litigating the extent of the initial acute injury. *Id*. at 444. This was a unique circumstance, and as such the Iowa Supreme Court applied a unique legal standard. *Ellingson* was a departure from previously established cumulative injury law without any applicability outside the facts of its own case. The agency found – and appellee's argue – that *Floyd*

simply created an exception to the *Ellingson* holding. However, *Floyd* cited the past case of *Ziegler* to restore appropriate cumulative injury law, finding that following an acute injury an injured worker is allowed to recover under a cumulative injury claim for increased disability occurring from daily work activities. Iowa courts have subsequently followed *Floyd* rather than *Ellingson*. *See W. Des Moines Cmty. Sch. v. Fry*, 859 N.W.2d 671 (Iowa Ct. App. 2014). *Floyd* was not the exception to Iowa law; *Ellingson* was.

Ellingson departs from prior established law, creates an unnecessary heightened standard for cumulative injury claims, has no applicability beyond its own unique facts, is not in line with subsequent Iowa Supreme Court and Court of Appeals cases, and creates confusion. It should be overturned.

CONCLUSION

WHEREFORE, Gumm requests that the District Court's Ruling be reversed and that the case be remanded to the Iowa Workers' Compensation Commissioner to determine further benefits and relief.

CERTIFICATE OF COST

The undersigned certifies that the cost of printing the required copies of the preceding Appellant's Reply Brief was $0, as it was electronically filed.

By: */s/ Joseph S. Powell*
Joseph S. Powell AT0010116

CERTIFICATE OF FILING / SERVICE

The undersigned certifies that on October 8, 2018 he electronically filed the preceding Appellant's Reply Brief.

By: */s/ Joseph S. Powell*
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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface and type-volume requirements of Iowa Rule of Appellate Procedure 6.903(1)(g)(1) because this brief has been prepared using a proportionally spaced typeface using Times New Roman in 14-point font and contains 993 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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