IN THE IOWA SUPREME COURT

NO. 18-1051

Polk County No. CVCV055213

ANITA GUMM

Appellant,

vs.

EASTER SEAL SOCIETY OF IOWA, INC., AMERICAN COMPENSATION INS. CO., AND SFM INSURANCE COMPANY

Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
THE HON. PAUL SCOTT, JUDGE

APPELLEE'S BRIEF AND CONDITIONAL REQUEST FOR ORAL ARGUMENT

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ROUTING STATEMENT

This appeal involves the issue of whether the Iowa Workers' Compensation Commissioner's application of the law regarding cumulative injuries verses sequela injuries was irrational, illogical, or wholly unjustifiable, and whether the Commissioner's finding that Appellant did not sustain a cumulative injury was based on substantial evidence on the record. Appellee asserts substantial evidence supports the Commissioner's finding that Appelant sustained sequela injuries, not new cumulative injuries. Appellee disagrees with Appellant that published decisions of the Supreme Court of Iowa and the Court of Appeals are in conflict; rather, Appellee asserts the cases are distinguishable. As such, this case should be transferred to the Court of Appeals of Iowa. *See* Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

This case involves an appeal from the Iowa Workers' Compensation Commissioner's ruling on Appellant Anita Gumm's (hereinafter "Gumm") Petition for workers' compensation benefits for an alleged work-related cumulative injury to her right ankle. (Arbitration Decision p. 2, App. 17; Ruling on Petition for Judicial Review p. 1, App. 53) Gumm alleged a cumulative aggravation of a prior work injury to her right ankle, which occurred on October 28, 2008. (Arbitration Decision p. 2, App. 17) The

Employer, Easter Seal Society of Iowa, Inc. ("Easter Seals"), was insured by Accident Fund Insurance Co. ("Accident Fund"), at the time of the October 28, 2008 injury; Easter Seals was insured by American Compensation Ins. Co. ("American Compensation"), at the time of the alleged cumulative injuries manifestation dates of March 6, 2012 and May 16, 2013; and Easter Seals was insured by SFM Insurance Co. ("SFM") at the time of the alleged cumulative injuries manifestation date of January 15, 2014, with an effective coverage date of September 1, 2013. (Arbitration Decision p. 2, App. 17) Hearing was held in Des Moines, Iowa, on March 12, 2015. (Appeal Decision p. 2, App. 44) The Deputy Commissioner filed an Arbitration Decision finding that Gumm failed to prove she had sustained a cumulative injury at any of the aforementioned alleged manifestation dates. (Arbitration Decision p. 22, App. 37; Ruling on Petition for Judicial Review p. 3, App. 55) Gumm appealed the decision to the Commissioner, and on October 12, 2017, the Commissioner issued an Appeal Decision affirming and upholding the Arbitration Decision in its entirety. (Appeal Decision p. 5, App. 47; Ruling on Petition for Judicial Review p. 3, App. 55) Gumm timely petitioned the District Court for Judicial Review on October 31, 2017, and the District Court issued a Ruling denying Gumm's Petition for Judicial Review on May 16, 2018. (Ruling on Petition for Judicial Review p. 8, App. 60). Gumm timely filed a Notice of Appeal on

June 15, 2018, with the Supreme Court of Iowa.

STATEMENT OF FACTS

Like Gumm, SFM agrees with the factual findings of the Commissioner, which the District Court in its Ruling on Gumm's Petition for Judicial Review summarized. (Ruling on Petition for Judicial Review p. 1–3, App. 53-55) It is undisputed that Gumm fractured her right ankle on October 28, 2008, after slipping on wet grass while working. (Arbitration Decision p. 4, App. 19) The injury required surgery, which was performed by Dr. Eric Barp. (Exhibit 1, p. 1, App. 85; Arbitration Decision p. 4, App. 19) Dr. Barp performed an open reduction internal fixation surgery shortly thereafter. (Exhibit 1, pp. 1-4, App. 85-88; Arbitration Decision p. 4, App. 19) Gumm 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 Gumm 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, Gumm returned to work, Dr. Barp placed Gumm at maximum medical improvement, and Dr. Barp assigned Gumm 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, Gumm 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) Gumm followed up with Dr. Barp on April 7, 2009, after completing physical therapy, and she reported she had resumed full activity without pain or discomfort, so again, Dr. Barp discharged Gumm from care. (Exhibit 1, p. 26, App. 110; Arbitration Decision p. 5, App. 20)

Gumm 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)

Gumm 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). Gumm 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, Gumm returned to Dr. Barp, complaining of right foot pain. (Exhibit 1, p. 42, App. 126: Arbitration Decision p. 5, App. 20) Gumm followed up with Dr. Barp 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 Gumm that she might require an ankle arthroscopy. (Exhibit 1, pp. 44–45, App. 128-129; Arbitration Decision p. 5, App. 20) While the injection provided some relief, Gumm still presented with complaints of pain, and Dr. Barp recommended right ankle arthroscopy, which was performed 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 Gumm ***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) Gumm presented to Dr. Barp on June 1, 2012, complaining of continued tenderness, soreness, and swelling in her right ankle, and Gumm also inquired as to pursuing "disability." (Exhibit 1, p. 58, App. 142; Arbitration Decision p. 6, App. 21). On July 17, 2012, Gumm

returned and Dr. Barp released Gumm without restrictions. (Exhibit 1, p. 59, App. 143; Arbitration Decision p. 6, App. 21).

On May 16, 2013, Gumm reported to Dr. Barp with complaints of ankle pain; the record indicated that Gumm 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). X-rays revealed degenerative joint disease of the ankle; Dr. Barp performed an ankle injection; and Dr. Barp opined that Gumm 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). Again, Gumm expressed that she "would like to file for disability" at the May 16 appointment. (Exhibit 1, pp. 63–64, App. 147-148; Arbitration Decision p. 6, App. 21). Gumm presented to her personal physician, Dr. Timothy Vermillion, on May 29, 2013, and the record indicated that since the 2008 ankle injury at work, Gumm 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). Gumm 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, Gumm presented to Dr. Barp complaining of ankle pain for the past week or week and a half, and Dr. Barp ordered a CT scan of Gumm's

right ankle, which demonstrated posttraumatic degenerative joint disease; Dr. Barp recommended ankle arthrodesis but stated Gumm needed to cease smoking prior to surgery. (Exhibit 1, pp. 66, 67, and 70, App. 150, 151, 154: Arbitration Decision p. 6, App. 21)

Dr. Barp testified at his deposition that "whenever you have a dislocation of ankle such as she did, that's going to cause that posttraumatic arthrosis." (Exhibit 4, p. Arbitration Decision p. 14, App. 29). And Dr. Barp further testified that the types of complaints of pain with prolonged walking was an expected consequence of the May 2008 injury and surgery and that "[w]henever you have a fracture as she did, and the arthritis or [degenerative joint disease] or however you want to describe that, I mean, the more she's on it, the worse it's going to hurt or it can hurt." (Exhibit 4, p. 3, App. 237; Arbitration Decision p. 14, App. 29). Ultimately, Dr. Barp opined that "***the development of arthritis of the ankle was a natural consequence of the October 2008 injury and resultant surgery, regardless of whether a patient returned to work***." (Exhibit 4, p. 3, App. 237; Arbitration Decision p. 14–15, App. 29-30 (emphasis added)). Dr. Barp opined that an arthrosis or ankle replacement surgery would be a natural sequela of the work injury, and the injections Gumm received to her ankle were purely temporary in nature, with the goal being to "kick the can down the road." (Exhibit 4, p. 7, App. 241;

Arbitration Decision p. 16, App. 31) Dr. Barp further opined that either surgical procedure – arthrosis or ankle replacement – would be a natural sequela of the 2008 work injury. (Exhibit 4, p. 6, App. 240; Arbitration Decision p. 16, App. 31)

On August 28, 2013, Gumm provided Easter Seals with a notice of intent to retire effective February 28, 2014. (Exhibit B, pp. 1–2, App. 249-250; Arbitration Decision p. 6, App. 21) Gumm testified that she turned 62 years of age on February 14, 2014, and thus it was her intention to apply for Social Security benefits at that time. (Hearing Transcript p. 67, App. 84)

Gumm presented to Dr. Barp on October 1, 2013, reporting that she had quit smoking; Dr. Barp recommended proceeding with surgery. Dr. Vermillion cleared Gumm for surgery on October 16, 2013, and 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 Gumm "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 Deputy, "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). While Dr. Barp opined that after Gumm returned to work in May of 2012, her work substantially aggravated the right ankle condition and resulted in the need for surgery, he further opined (1) Gumm would have developed arthritis and required arthrodesis regardless of if she returned to work and (2) Gumm's return to work may or may not have played a role in how quickly she required fusion surgery. (Exhibit 4, pp. 4–6, and 10, App. 238-240; Arbitration Decision p. 16, App. 31).

Gumm took FMLA leave from the day of the surgery to January 13, 2014; she then worked partial days on six occasions, took one day of sick leave, and received one day of paid holiday time from January 13 to January 24, 2014. (Exhibit 1, pp. 81 – 84, App. 165-168; Exhibit B, pp. 6–7, App. 254-255; Exhibit BBB, pp. 10–12, App. 278-280; Arbitration Decision p. 7, App. 22). Gumm's last day of employment with Easter Seals was February 28, 2014, which was the same day as she had provided in her notice of retirement back in August of 2013. (Exhibit B, pp. 6–7, App. 254-255; Exhibit BBB, pp. 10–12, App. 278-280; Arbitration Decision p. 8, App. 23).

On October 15, 2014, Gumm presented to Dr. Robin Sassman for an

independent medical examination. (Arbitration Decision p. 11–12, App. 26-27) ***The Deputy found that Dr. Sassman's opinions set forth in her report were not credible because they were based on inaccurate information/assumptions***—that is, Dr. Sassman's IME report stated that Gumm felt she was "completely healed" during the significant gap in treatment from July of 2012 to May of 2013, but Gumm testified that (1) she did not recall expressing that sentiment to Dr. Sassman; (2) she never felt as if her ankle healed completely; and (3) her on-going ankle problems dated back to her 2008 work injury in which she fractured and dislocated her right ankle. (Hearing Transcript pp. 63–64, App. 80-81; Arbitration Decision pp. 13, 18, App. 28, 33). Thus, Dr. Barp's opinions and statements made with regard to Dr. Sassman's causation opinions are not credible/applicable, as Dr. Sassman's underlying causation opinions were based on inaccurate factual history. (Hearing Transcript pp. 63–64, App. 80-81; Arbitration Decision pp. 13, 16, 18, App. 28, 31, 33; *cf.* Appellant's Brief p. 7). The Deputy crystalized Dr. Barp's testimony and opinions, when the Deputy stated:

> 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 [Gumm] to rely upon in establishing she suffered a cumulative work injury following the right ankle fracture.*** Dr. Barp's opinion does ***not*** establish [Gumm] suffered disability gradually,

> reaching an injurious condition at some later point. Rather, Dr. Barp's opinion confirms [Gumm] suffered an injury and disability, and through further work activities, the disability increased.

(Arbitration Decision p. 18, App. 33 (emphasis added)).

Furthermore, the Deputy ultimately found, and the Commissioner agreed, that:

> [Gumm] failed to prove by a preponderance of the evidence that her continued work duties at Easter Seals after the October 28, 2008 [injury] resulted in a cumulative injury. Rather, [Gumm] sustained a significant fracture to her right ankle on October 28, 2008; although [Gumm] successfully returned to work, her ankle condition required ongoing care. While it is true the ongoing care did not persist at regular intervals, the care was regular enough in frequency to warrant four surgeries and [two] injection[s] of the ankle over a five-year period.

(Arbitration Decision p. 18, App. 33).

BRIEF AND ARGUMENT

I. THE IOWA WORKERS' COMPENSATION CORRECTLY FOUND THAT GUMM DID NOT SUSTAIN A CUMMLATIVE INJURY, WHICH IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND THE COMMISSIONER'S APPLICATION OF CUMULATIVE INJURY LAW WAS NOT ERRONEOUS.

a. Preservation of Error for Appeal.

SFM agrees with Gumm that she has properly preserved the issue for appeal.

b. Standard of Review

SFM agrees with Gumm in that this appeal involves correction of errors of law—that is, the Commissioner's application of the law to the facts. And the Court can only reverse the Commissioner's application of the law to the facts "if it is 'irrational, illogical, or wholly unjustifiable.'" *Jacobson Transp. Co. v. Harris*, 778 N.W.2d 192, 196 (Iowa 2010). In addition, however, the ultimate issue in this case – that is, whether Gumm sustained a new cumulative injury – is a substantial evidence question. *McKeever Custom Cabinets v. Smith*, 379 N.W.2d 368, 374 (Iowa 1985) ("Agency fact findings which have substantial evidentiary support in the record as a whole are binding on us." (citing Iowa Code § 17A.19(8)(f)). Specifically, in sequela-injury situations, the issue is a substantial evidence question. *Mike Brooks, Inc. v. House*, 843 N.W.2d 885, 889–90 (Iowa 2014) ("Accordingly, we conclude substantial evidence amply supports the causation finding actually made by the commissioner, and we are not at liberty to disturb it on the ground the vidence could support a different determination."); *Robbennolt v. Snap-On Tools Corp.*, 555 N.W.2d 229, 233 (Iowa 1996).

This case arises out of an alleged cumulative injury to Claimant's right ankle that allegedly manifested years after an acute injury to the same body part. Cumulative-injury law in the Iowa workers' compensation arena is

primarily governed by case law. The Supreme Court of Iowa adopted the "cumulative injury rule" in *McKeever* in 1985, holding the Claimant's injury came on gradually and thus "[the Claimant] had a compensable injury." 379 N.W.2d at 374–75. The development of cumulative injury law continued in *Oscar Mayer Foods Corp. v. Tasler*, where the Court, quoting the Illinois case of *Bellwood Nursing Home v. Industrial Commissioner*, provided some clarity on "manifestation date" as "the date on which both [(1)] the fact of the injury and [(2)] the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person." *Oscar Mayer*, 483 N.W.2d 824, 829 (Iowa 1992) (quoting *Bellwood Nursing Home*, 505 N.E.2d 1026, 1029 (Illinois 1987)).

In 1999, the Court decided *Ellingson v. Fleetguard*, holding that in order to establish a cumulative injury to the same body part that was affected by an acute injury, the Claimant must show "she has suffered a distinct and discreet disability attributable to post-[acute injury] work activities rather than as an aggravation of the [acute injury]." 599 N.W.2d 440, 444 (Iowa 1999).

In 2002, the Court decided *Floyd v. Quaker Oats*, which, as the district court noted "refined the legal standard for cumulative injuries following acute injuries," and, in so doing, distinguished *Ellingson*. *Floyd*, 646 N.W.2d 105, 109 (Iowa 2002) ("[t]he significant factor in the *Ellingson* case was that the

extent of the [acute] injury was being litigated in the same proceeding in which the separate cumulative-injury claim was being urged."). And more importantly for purposes of the case at hand involving Gumm, "the evidence [, in *Ellingson*,] conclusively showed that the ultimate extent of industrial disability was affected by job-related activities that aggravated the [acute] injury, [and therefore,] the compensable consequences of the aggravation of the [acute] injury must be adjudicated as part of the disability flowing from that injury." *Floyd*, 646 N.W.2d at 108.

c. While *Floyd* Is Instructive, *Ellingson* Is Dispositive: Gumm Did Not Sustain Any New Cumulative Trauma Injury.

Here, the Commissioner applied *Ellingson* and distinguished *Floyd*. The Commissioner's application of *Ellingson* was not irrational, illogical, or wholly unreasonable. The Court "do[es] not determine whether the evidence might support a different finding but whether it supports the finding made." *Ellingson v. Fleetguard, Inc.*, 599 N.W.2d 440, 445 (Iowa 1999). In the case at hand, the Commissioner found, that the evidence was insufficient for Gumm to establish she sustained a cumulative work injury. (Arbitration Decision p. 18, App. 33)

The Supreme Court of Iowa, in *Ellingson*, stated the standard for establishing a post-acute, cumulative-injury claim as follows:

> It is clear, however, that [claimant] may not establish a

> cumulative-injury claim by merely asserting that her disability immediately following the [acute] injury was increased by subsequent aggravating work activities. . . . To show a cumulative injury [claimant] must demonstrate that [claimant] has suffered a ***distinct and discreet disability*** attributable to post-[acute injury] work activities ***rather than as an aggravation of the [acute] injury***.

Ellingson, 599 N.W.2d at 444 (emphasis added).

As the Commissioner noted, "the facts of this case are more aligned with the facts in *Ellingson* than in *Floyd*." (Appeal Decision p. 4, App. 46) In *Ellingson*, the claimant, Ellingson, suffered an injury on January 4, 1985, when a box fell on her head at work. *Id.* Thereafter, Ellingson experienced neck, shoulder, and back pain, presenting for treatment the next few months of 1985 (and missing work for the same), again for a few months in 1987 (modified work schedule), and then again in 1989 (off work from May to November); and ultimately, Ellingson underwent surgery for C6-C7 degenerated disk in March of 1990. *Ellingson*, 599 N.W.2d at 442. Ellingson presented in November of 1991 for continuing neck and arm pain, in February/March of 1992, in April of 1992, in November of 1992, and in December of 1992, she ultimately underwent another surgical procedure. *Id.* at 442–43. She continued to miss work off and on through 1993 for neck/arm/shoulder pain. *Id.* at 443.

In *Ellingson*, Ellingson's treating physician opined that Ellingson's

"ongoing condition ha[d] its origins in her work incident on January 4, 1985." *Id.* at 444. Such is the case at hand. Ellingson argued, as does Gumm in the instant case, that the Commissioner misinterpreted the treating physician's testimony, suggesting Ellingson had not sustained a cumulative injury. *Id.* at 445. As stated above, the Court's job is not to determine whether the evidence could have supported a different finding, rather it is whether the evidence supports the finding that was made; in the case at hand, like in *Ellingson*, the evidence supports the finding of the Commissioner. *See id.* at 445. The Commissioner found that Dr. Barp's testimony supported the position that Gumm did not suffer a gradual injury, resulting in a cumulative injury; rather, Dr. Barp's opinions supported the proposition that Gumm sustained an acute injury, of which arthritic progression was a natural and expected result with required future surgical procedures, therapy, and treatment. *See id.* 442–43. Gumm would ask that the Court overrule the Commissioner's decision based on the theory that Gumm's October 28, 2008, injury was cumulatively aggravated by work activities in the years that followed. As quoted above, *Ellingson* requires more than "aggravation." *See id.*

As indicated above, Gumm sustained a significant fracture to her right ankle on October 28, 2008. Gumm alleged "new" injuries, but in fact, all of her subsequent surgeries and complaints were a direct result of the October

28, 2008, original injury. *See id.* at 444. Gumm's medical care/treatment indicate exactly that: Gumm had immediate surgery after her October 28 injury. Hardware was removed on May 23, 1010. Injections were performed providing temporary relief. And, as early as June of 2012, Gumm was inquiring about disability. (Arbitration Decision p. 6, App. 21). She again inquired about disability in May of 2013, and also discussed the need for an ankle arthrodesis at that same time. (Arbitration Decision p. 6, App. 21). Gumm had a CT performed of her right ankle and decided on August 19, 2013 to proceed with ankle fusion surgery. The Claimant decided to retire and gave her notice of resignation on August 28, 2013, to be effective February 28, 2014, as then she would be 62 years old (February 14 birthday) and would apply for Social Security. (Arbitration Decision p. 6–7, App. 21-22). While injections helped with pain, she was aware that they were only temporary solutions, as confirmed by Dr. Barp.

Gumm block quotes a significant portion of the *Floyd* case in her brief, albeit she omits the following pertinent paragraph:

> 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.

Floyd v. Quaker Oats, 646 N.W.2d 105, 108-109 (Iowa 2002) (emphasis added). This case is *Ellingson*: the compensable consequences of aggravation of Gumm's significant right ankle injury must be adjudicated as part of the disability flowing from that injury, which could be accomplished by a timely filed original petition and/or a review re-opening procedure. *See Floyd*, 646 N.W.2d at 108–09. *Ellingson* requires a distinct and discreet injury, which the Commissioner found Gumm failed to prove. *See Ellingson*, 599 N.W.2d at 444.

The Supreme Court of Iowa attempted to carve out an exception to the *Ellingson* holding. In so doing, the *Floyd* court relied on the holding in the *Ziegler v. United States Gypsum Co.*, which involved a traumatic injury that was adjudicated and the Court allowed the claimant in question to bring a subsequent and separate cumulative-injury claim. *Floyd*, 646 N.W.2d. at 108 (citing *Ziegler*, 106 N.W.2d 591, 595 (Iowa 1960)). Even though Gumm attempts to analyze *Floyd* and *Ziegler* in such a way that makes them applicable to the case at hand, such application is misguided for two reasons: procedurally and evidentiary.

First, from a procedural standpoint, this case differs. In *Ziegler*, the

court was handling a situation in which a claim had been "adjudicated" and the Court was faced with an "unusual situation" where the Claimant claimed he aggravated a back injury in performing light-duty work during a 6-day period when he attempted to return to work – and opted to file a separate claim as opposed to a petition for review re-opening (which he could have). *Ziegler*, 106 N.W.2d at 591–94. Claimant had previously settled the initial workers' compensation claim which involved a third-party tortfeasor. *Id.* Instead of seeking additional benefits related to the first injury (which involved numerous body parts, not subject to the subsequent claim), Claimant sought a separate claim for aggravation of a prior injury, to the extent that his permanent disability was increased. *Id.* The Court allowed for the separate claim because Claimant was able to show, by medical opinions, that his previous disc bulge in his back increased in severity with his light-duty work activities, which caused an *acute* aggravation. *Id.* Thus, *Ziegler* is distinguishable from the case at hand for two reasons: (1) there was a previously adjudicated award, which is not the case here; and (2) the subsequent injury was an acute aggravation injury, not cumulative injury. *See id.*

In Gumm's case, an original Petition was never filed within the statute of limitations for the October 28, 2008, injury, and thus the injury was not

adjudicated; Gumm could have addressed her sequela complaints in an timely filed original petition and/or later in a review re-opening procedure, which would be the normal and usual legal avenue for pursuing additional benefits for compensating her sequela injury(ies). (Appeal Decision p. 4, App. 46) *See DeShaw v. Energy Mfg. Co.*, 192 N.W.2d 777, 780 (Iowa 1971) (citing *Oldham v. Scofield &Welch*, 266 N.W. 480, 482 (Iowa 1936)). In addition, Gumm did not sustain a separate, compensable acute aggravation injury, like the Claimant in *Ziegler* – the subsequent complaints/symptoms were a natural and proximate result of the March 28, 2008, acute injury. *See Oldham*, 266 N.W. at 482. Gumm seeks to obtain compensation by calling her sequela injuries "a cumulative injury." As the Commissioner found, Gumm did not sustain a distinct and discreet new disability. *Ellingson*, 599 N.W.2d at 444.

Second, there is a factual issue with the argument that Gumm sustained a subsequent aggravation of an existing disability resulting from an acute injury per *Floyd*. Dr. Sassman's report provided the only other impairment rating and opinion regarding causation – but the Deputy discredited Dr. Sassman's IME report as the opinions therein were based on inaccurate facts, specifically mistaken facts about Gumm's reported statements/complaints. The factual/evidentiary basis, or lack thereof, for finding a cumulative injury post-acute injury is discussed in more detail in Section d. below. Nonetheless,

Floyd is distinguishable from the case at hand because, in *Floyd*, credible medical evidence regarding the extent of cumulative aggravation after an acute injury was provided/presented. *Floyd*, 646 N.W.2d at 107. The Court in *Floyd* confirmed that because the prior acute injury had been adjudicated the subsequent cumulative aggravation claim could be proved by showing aggravation of the disability. *Id.* at 108. In addition, the Court indicated that such aggravation then had to be related to on-going work condition subsequent to the acute injury. *Id. Floyd* is inapplicable on both accords. As found by the Commissioner, there is only one credible medical opinion – that is, Dr. Barp's as it relates to impairment rating, causation, and sequela of Gumm's subsequent and on-going right ankle complaints after she sustained a significant right ankle fracture/injury in October of 2008. (Appeal Decision p. 4–5, App. 46-47) As to the second issue – work conditions aggravating the injury – Dr. Barp opined that Gumm's arthritic changes were an expected and natural consequence of the significant ankle fracture, regardless of whether Claimant would have returned to work; further treatment up to and including surgery was not a matter of "if" but "when". (Arbitration Decision p. 18, App. 33)

The undisputed facts of this case are clear: the compensable consequences of Gumm's October 28, 2008, injury must be adjudicated as

part of the disability flowing from the original injury, not as a new cumulative injury. *See Ellingson* 599 N.W.2d at 444. Thus, as the Commissioner found:

> After considering all of the evidence presented, the undersigned finds claimant failed to prove by a preponderance of the evidence that her continued work duties at Easter Seals after the October 28, 2008 [injury] resulted in a cumulative injury. Rather, claimant sustained a significant fracture to her right ankle on October 28, 2008; although claimant successfully returned to work, her ankle condition required ongoing care. While it is true the ongoing care did not persist at regular intervals, the care was regular enough in frequency to warrant four surgeries and two injection[s] of the ankle over a five-year period.

(Arbitration Decision p. 18, App. 33).

SFM agrees with the Commissioner that Gumm's case is more aligned with *Ellingson* than it is with *Floyd* and/or *Ziegler*. (Appeal Decision p. 4, App. 46) Regardless, the Commissioner's application of *Ellingson* was not irrational, illogical, or wholly unjustifiable, and as such, the District Court's Ruling, denying Gumm's Petition for Judicial Review, should be affirmed.

d. Assuming Arguendo That *Floyd* Applies, Substantial Evidence Supports The Finding Of The Commissioner That Gumm Did Not Sustain A Cumulative Injury Under Either *Ellingson* or *Floyd*.

Regardless of whether *Floyd* or *Ellingson* is applied and in addition to the above-referenced argument that the this case is aligned with *Ellingson*, substantial evidence supports the Commissioner's decision that Gumm did not sustain a post-acute, cumulative aggravation injury, rather Gumm simply

sustained sequela-type injuries/complaints stemming from the October 2008 acute injury. *See House*, 843 N.W.2d at 889–90. Substantial evidence applies because (1) this is a sequela case; and (2) no credible medical evidence exists for Commissioner to find that it was a post-acute cumulative aggravation case, like in *Floyd*. In *Floyd*, Dr. Coates, the orthopedic surgeon, provided the basis for the Commissioner's decision in *Floyd. Floyd*, 646 N.W.2d at 107. Dr. Coates opined that work activities performed on a routine basis contributed to the cumulative injury. *Id.* at 108.

Thus, *Floyd* requires the claimant to attribute permanency to the cumulative injury and to prove work activities caused the additional permanency. *See id.* at 107–08. Gumm asserts in her Brief that "[m]edical causation of a cumulative aggravation injury was established," noting that "both Dr. Barp and Dr. Sassman opined that Gumm's return to work following her initial acute injury of October 28, 2008 was a substantial aggravating factor of her prior injury, resulting in the need for fusion surgery." (Gumm Appellant Brief p. 15) Such "medical causation" is based on the discredited Dr. Sassman causation opinion; the same causation opinion that provided the only other impairment rating with regard to Gumm's right ankle. (Arbitration Decision p. 12, App 27) Gumm relies on Dr. Sassman's IME report and testimony from Dr. Barp regarding the same (after review of two paragraphs

of Dr. Sassman's IME Report), in alleging that Dr. Sassman and Dr. Barp agreed that Gumm's work activities following the initial injury were a substantial aggravating factor and that such a cumulative injury was manifested at a later date—i.e., March 6, 2012, May 16, 2013, and/or January 15, 2014. (Arbitration Decision p. 16, App. 31) However, Dr. Sassman stated in her IME report that Gumm thought her ankle had "completely healed" after arthroscopic surgery in April of 2012. (Arbitration Decision p. 11, App. 26) Gumm made clear that statement was not correct, clarifying that she had difficulty with her right ankle, including continued pain and soreness, ever since 2008 when the injury occurred. (Arbitration Decision p. 13, App. 28; Hearing Transcript pp. 63-64, App. 80-81).

Gumm can only rely on Dr. Barp's opinion with regard to causation, which, according to Gumm, was the same as Dr. Sassman's, which was based on inaccurate information. (Arbitration Decision pp. 13, 16, 18, App. 28, 31, 33). The Commissioner found Dr. Barp's opinion and testimony (that which was separate and independent of Dr. Sassman's) ***was insufficient to find a cumulative injury***—the evidence suggested that Gumm suffered a significant injury; it never fully healed; she was treated for complaints with regard to her injury for the five years after; ***the follow-up surgeries would have been required regardless of work activities***; and as such, there was not sufficient

evidence to support a cumulative injury subsequent to an initial, acute injury. (Arbitration Decision p. 18, App. 33)

Dr. Barp opined that Gumm's subsequent complaints in or related to her right ankle were a natural consequence of the October 28, 2008, injury—i.e., this is a substantial evidence case in which the Commissioner found that Gumm's subsequent injuries were sequela to the significant, acute injury in October of 2008. Further, Gumm put forth no credible expert opinion attributing a percentage of impairment to the alleged cumulative injury; Gumm provided no credible expert opinion as to causation of the cumulative injury or when an alleged cumulative injury manifested; and Gumm provided no evidence regarding "the extent of the increased disability that flows" from a later aggravation. *See Floyd*, 646 N.W.2d at 109. Even if *Floyd* applies, the Claimant has failed to prove by a preponderance of the evidence how much, if any, the subsequent cumulative injury increased Claimant's disability. *See id.* Therefore, the Commissioner could have found, based on substantial evidence, that Gumm did not sustain a cumulative injury under either case, *Ellingson* or *Floyd*, and in fact, did find that Gumm's "new" injuries were actually expected as a result of the significant, initial right ankle fracture. Again, the Commissioner decided to use *Ellingson*, which was not an illogical, irrational, or wholly unjustifiable application of the law.

CONCLUSION

WHEREFORE, SFM requests that the District Court's Ruling be affirmed, as the District Court correctly found that the Commissioner's application of the law to the facts in the Commissioner's Appeal Decision was not illogical, irrational, or wholly unjustifiable. Alternatively, the Ruling should be affirmed because this case involved sequela injuries/complaints/symptoms and the Commissioner had ample and substantial evidence to find the same. Alternatively, if the Court agrees with Appellant that *Floyd*, not *Ellingson*, should govern, the Commissioner's Appeal Decision should be affirmed as the Commissioner's decision that Claimant did not sustain a cumulative trauma injury was supported by substantial evidence under either *Floyd* or *Ellingson*.

CONDITIONAL REQUEST FOR ORAL ARGUMENT

Appellees, by the undersigned counsel, state that they desire to be heard orally if oral argument is granted to Appellant.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. 6.903(1)(g)(1) because this brief contains 5,974 words, excluding the parts of the brief exempted by Iowa. R. App. P. 6.903(1)(g)(1).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14.

/s/ Tyler S. Smith — 10/08/18
Tyler S. Smith — Date

CERTIFICATE OF SERVICE

I, Tyler S. Smith , member of the Bar of Iowa, hereby certify that on October 8, 2018, I or a person acting on my behalf served the above Appellee's Brief and Request for Oral Argument to the Respondent/Appellee's attorney of record, Joseph S. Powell, via EDMS in full compliance with Rules of Appellate Procedure and Rules of Civil Procedure.

/s/ Tyler S. Smith
Tyler S. Smith

CERTIFICATE OF FILING

I, Tyler S. Smith, hereby certify that I, or a person acting in my direction, did file the attached Appellee's Brief and Request for Oral Argument upon the Clerk of the Iowa Supreme Court via EDMS on this 8th day of October, 2018.

_/s/ Tyler S. Smith _____
Tyler S. Smith