

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 RESISTANCE TO
APPLICATION FOR FURTHER REVIEW OF
THE IOWA COURT OF APPEALS MAY 15, 2019 DECISION**

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STATEMENT OF ISSUES PRESETNED FOR REVIEW

I. Whether the Court of Appeals Applied the Wrong Standard of Review.

Authorities:

Iowa Code section 17A.19(10)

Neal v. Annett Holdings, Inc., 814 N.W.2d 512 (Iowa 2012)

II. Whether the Court of Appeals Erred in Applying *Floyd v. Quaker Oats*.

Authorities:

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

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

STATEMENT OF RESISTANCE TO FURTHER REVIEW

The Court of Appeals applied the appropriate standard of review and correctly reversed the ruling of the district court and the agency for failing to apply controlling cumulative injury case law: *Floyd v. Quaker Oats*. There is no basis for Further Review.

STATEMENT OF FACTS

In 2008 Appellant Anita Gumm (“Gumm”) began working as a janitor with Appellee Easter Seals of Iowa (hereinafter “Easter Seals”). (App. 19). Her job at Easter Seals required her to be on her feet throughout the day and she was required to bend, stoop, twist, and lift and move a minimum of 80 pounds. (App. 19).

On October 28, 2008 Gumm slipped on wet grass at work and sustained a fracture to her right ankle. (App. 19). She received medical treatment with Eric Barp, DPM. (App. 19). Dr. Barp diagnosed Gumm with a trimalleolar ankle fracture, and performed an open reduction and internal fixation surgical procedure. (App. 19). On January 15, 2009 Dr. Barp stated that Ms. Gumm had reached MMI, was doing very well and could return to full activity and work without restrictions. (App. 19). On January 19, 2009 Dr. Barp assigned a 17% lower extremity impairment rating for the ankle fracture. (App. 104). Gumm returned to Dr. Barp for a final visit on April 7,

2009 and reported that she had completed physical therapy and was feeling fine and had no stiffness or problems with her ankle. (App. 19-20). She had returned to full activity without pain or discomfort and was released from Dr. Barp's care. (App. 110). Easter Seals' insurance carrier paid workers' compensation benefits pursuant to Dr. Barp's impairment rating, with the last payment being made on May 21, 2010. (App. 20).

One year later – on April 22, 2010 – Gumm returned to Dr. Barp with complaints of right ankle pain and stiffness. (App. 20). Dr. Barp performed surgery on May 3, 2010 to remove hardware from her ankle. (App. 20). On June 22, 2010 Gumm was again released to full duty by Dr. Barp. (App. 20). On July 16, 2010 Dr. Barp issued a report to Easter Seals's insurance carrier stating Gumm had done quite well with the hardware removal and did not suffer any additional impairment. (App. 125). Gumm testified that after the hardware removal surgery she felt better and was able to return to work. (App. 68-69).

For the next 21 months Gumm worked at Easter Seals without issue or need for medical treatment for her ankle. (App. 20). Then, on March 6, 2012, her ankle pain returned and she returned to see Dr. Barp. (App. 20). She reported pain in the ankle the longer she was on it walking throughout the day, and stated that she sometimes had to "drag it" behind her. (App.

20). Dr. Barp ultimately performed an ankle arthroscopy on April 18, 2012. (App. 20). Dr. Barp released Gumm to return to work without restrictions beginning May 3, 2012. (App. 20; 140). Gumm returned to her usual shifts at that time without issue. (App. 270). On July 17, 2012 Gumm saw Dr. Barp, and he noted that “Anita is doing very well and is pain free. She has no restrictions and will f/u with me as needed.” (App. 143). Gumm testified that following the surgery she was again able to return to work without problems. (App. 71). Eight months later, on March 19, 2013, Dr. Barp issued a letter to Easter Seals’s insurance carrier stating Gumm had done well following the arthroscopic surgery, had completely healed, and had not sustained any additional impairment. (App. 146).

On May 16, 2013 – 10 months since her last visit – Gumm returned to Dr. Barp with complaints of right ankle pain. (App. 21; 147). At that point Dr. Barp provided an injection and informed Gumm that she may need an ankle arthrodesis/fusion at some point. (App. 21; 148). She returned to Dr. Barp on June 27, 2013 and reported the injection provided some pain relief. (App. 21). She was released from Dr. Barp’s care at that time, though Dr. Barp noted she may need a repeat injection. (App. 21; 149). Gumm returned to Dr. Barp shortly thereafter on August 2, 2013. (App. 21). Dr. Barp recommended a CT scan, and again stated that Gumm may need a

fusion surgery. (App. 21). On August 19, 2013 Gumm followed up with Dr. Barp, and it was determined to proceed with an arthrodesis/fusion surgery (App. 21; 154).

Gumm continued to work until the day of her arthrodesis fusion surgery. (App. 278). Dr. Barp performed the ankle fusion surgery on October 23, 2013. (App. 22; 163). Gumm was taken off work at that time. (App. 167; 278). Gumm saw Dr. Barp on February 14, 2014 and “lower back pain and knee pain from gait changes due to ankle” were noted. (App. 178). Dr. Barp stated that Ms. Gumm’s back and knee pain were likely from gait changes associated with her ankle, and recommended physical therapy. (App. 179). Dr. Barp also assigned a restriction of no lifting over 5 pounds and no mopping until further notice. (App. 180). This was the first time Dr. Barp had ever assigned such restrictions. (App. 75).

Gumm was released from Dr. Barp’s care on December 16, 2014. (App. 196). Dr. Barp issued a note stating Gumm met the definition of a handicapped person pursuant to Iowa Code 321L.1, and her condition was permanent. (App. 197). Gumm’s inability to walk from her ankle fusion resulted in Dr. Barp giving her the handicap statement. (App. 79).

On February 14, 2014 Gumm filed two workers’ compensation petitions. One petition involved the October 28, 2008 acute injury, and the

other asserted a cumulative injury with injury dates of March 6, 2012, May 16, 2013, and/or January 15, 2014. (App. 9-10). Gumm and Easter Seals stipulated that Gumm's October 28, 2008 injury reached maximum medical improvement on January 15, 2009 and resulted in a 17% lower extremity impairment rating. (App. 11).

Dr. Barp's deposition was taken on March 2, 2015 as part of Gumm's lawsuit. (App. 235). He testified Gumm's return to work after her acute 2008 injury substantially aggravated and contributed to her need for fusion surgery in 2013. (App. 239-240 (deposition p. 20-21); App. 245) (emphasis added).

Gumm was seen by Robin Sassman, M.D., for an IME on October 15, 2014. (App. 217). Dr. Sassman also opined that Gumm's continued work at Easter Seals substantially aggravated her prior acute injury, resulting in the need for fusion surgery and permanent restrictions. (App. 224). Dr. Barp agreed with Dr. Sassman's opinions. (App. 246 (deposition pp. 46-47)).

The agency acknowledged Dr. Barp's opinion, finding "he opined claimant spending time on her feet did substantially change the progression of her condition" and that "he expressed agreement that claimant's work in May 2013 was a substantial aggravating factor and resulted in claimant's need for arthrodesis." (App. 31). The agency concluded that "Dr. Barp's

opinion confirms claimant suffered an injury and disability, and through further work activities, the disability increased.” (App. 33). However, based on the Iowa Supreme Court case of *Ellingson v. Fleetguard, Inc.*, the agency found this evidence was legally insufficient to establish a cumulative injury. (App. 34). On agency appeal Gumm pointed out that the subsequent ruling in the Iowa Supreme Court case of *Floyd v. Quaker Oats* applies in this case, but the agency failed to apply *Floyd*. (App. 47). The District Court noted “the difficulty in reconciling the seemingly incompatible holdings of *Ellingson* and *Floyd*,” and ultimately denied Gumm’s Petition for Judicial Review. (App. 59). The Court of Appeals reversed the district court on May 15, 2019 and remanded the case to the agency so that *Floyd* could correctly be applied.

BRIEF AND ARGUMENT

I. The Court of Appeals Applied the Correct Standard of Review

Appellee SFM Companies’ Application for Further Review is based on an allegation that the Court of Appeals applied the wrong Standard of Review. Whether the workers’ compensation commissioner misapplied the cumulative injury doctrine in this case depends on the application of law to facts. *See Neal v. Annett Holdings, Inc.*, 814 N.W.2d 512, 526 (Iowa 2012); Iowa Code section 17A.19 (10). The Court of Appeals applied this exact

standard of review to reach the correct legal conclusion on appeal. Further review is not warranted.

II. The Court of Appeals Correctly Applied *Floyd v. Quaker Oats*.

Floyd v. Quaker Oats is directly on point. In *Floyd*, the Court addressed a situation where a worker had an acute injury that was later cumulatively aggravated by the workers' returning to employment. *Floyd v. Quaker Oats*, 646 N.W.2d 105, 108-09 (Iowa 2002). This is the exact situation at issue in this case. Pursuant to *Floyd*, 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. *Id.* (citing *Ziegler v. United States Gypsum Co.*, 252 Iowa 613, 620, 106 N.W.2d 591, 595 (1960)).

In the current case, Gumm was not seeking to recover for her initial acute injury, but was rather seeking to recover for disability above and beyond her initial injury that resulted from her day-to-day work activities following her acute injury. The Court of Appeals correctly held that *Floyd* is the appropriate case to apply.

Appellee's argue that the Court of Appeals' decision is extending the ruling in *Floyd*. However, the Court of Appeals decision simply requires the agency to correctly apply *Floyd*. It in no way extended the ruling.

Appellees' request for Further Review is actually a request to overturn *Floyd*. That request should be denied.

CONCLUSION

WHEREFORE, Gumm requests Appellees' Applications for Further Review be denied and that procedendo be issued.

CERTIFICATE OF COST

The undersigned certifies that the cost of printing the required copies of the preceding document 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 June 10, 2019 he electronically filed the preceding Appellant's Resistance to Application for Further Review.

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

CERTIFICATE OF COMPLIANCE

This document complies with the typeface and type-volume requirements of Iowa Rule of Appellate Procedure 6.903(1)(g)(1) as it has been prepared using a proportionally spaced typeface using Times New Roman in 14-point font

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