IN THE SUPREME COURT OF IOWA

No. 18-1092

ANNETT HOLDINGS, INC.

Appellant,

versus

ANTHONY ROLAND,

Appellee.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
THE HONORABLE KAREN ROMANO
NO. CVCV051326

APPELLANT'S FINAL REPLY BRIEF

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I. THE DISTRICT COURT ERRED IN CERTIFYING THE PURPORTED CLASS.

In his appeal brief, Roland simply regurgitates the findings of the district court without any meaningful analysis of the points raised in Annett Holdings' brief. Because Annett Holdings' initial brief addressed the shortcomings of the district court's opinion, it has already addressed the majority of Roland's arguments on appeal. To the extent Roland's arguments in his brief expand beyond the findings of the district court, Annett Holdings' reply thereto is set forth below.

A. The District Court's Finding That A Common Question Existed Across the Class Because Each Purported Class Member Suffered a Violation of Statutory Rights is Incorrect.

Regarding Iowa Rule of Civil Procedure 1.261(2)'s requirement that he prove the existence of a question of law or fact common to the class, Roland's purported common question of fact is "drivers each signed the same unlawful contract, and that these drivers were compelled by Annett Holdings to travel to Des Moines, Iowa for light-duty work." (Br. p. 20). There are several reasons why

Roland's suggested common question of fact is insufficient to meet the "commonality" requirement in Rule 1.261(2).

1. Allegation that the MOU is Unlawful

Roland says the MOU is "illegal" and "unlawful." His assertion is not supported by controlling case law. The MOU obligates an employee who suffers a work injury to temporarily relocate to Iowa to perform light duty work in the event of a work injury. (App. 16). The requirement to relocate to Iowa temporarily for light duty work does not violate any statute. In fact, in 2017, the legislature specifically proscribed by statute that for traveling employees, light duty work offered at the employer's business is permissible even when the employee would have to relocate. Iowa Code Section 85.33(3) (2017). Further, the MOU does not require an employee to accept medical care in any specific place. To the contrary, the MOU indicates if ongoing medical care is necessary, Annett Holdings will coordinate the light duty schedule with medical appointments to ensure the least amount of disruption with the medical care being received. The contract on its face does not deprive an injured worker of any right or benefit under Iowa's workers' compensation laws, nor does it operate to alleviate Annett Holdings' liability under Chapter 85.

In affirming the agency's conclusion that the MOU violated Section 85.18, the Iowa Court of Appeals explained that Annett Holding's enforcement of the MOU disrupted Roland's medical care mid-course and was unduly inconvenient. *Annett Holdings, Inc. v. Roland*, 881 N.W.2d 470 (Table) 2016 WL *6 (Iowa App. 2016). Therefore, as applied in that case, the Court of Appeals found substantial evidence supported the Agency's conclusion. The key facts cited by the Iowa of Appeals in so holding directly related to Annett Holdings' enforcement of the MOU in that particular case: disruption of the medical care plan of the treating doctor (inability to use cooling machine during travels) and inferior care (PT in Alabama superior to PT in Iowa). (App. 105). The Court of Appeals did not hold the MOU contained terms that expressly violated section 85.27(4), or that Iowa Code Section 85.18 prohibits Annett Holdings in all circumstances from offering physical therapy in Des Moines to an employee who has temporarily relocated there for light duty.

This distinction is crucial because the common fact pattern (to fulfill Rule 1.261(2) requirement) found by the district court (and regurgitated by Roland), i.e., (1) all employees signed an MOU, (2) all had work injuries, and (3) all came to Iowa for light duty and received medical care, does not prove the purported members suffered the same injury (or any injury for that matter), nor do these facts

establish the validity of either of the claims raised on a class-wide. That is to say, proof that all members sign an MOU, had a work injury, and came to Iowa for light duty and received medical care in Iowa does not establish liability on either of the claims pled in this case. *Wal-Mart Stores, Inc. v. Duke*, 564 U.S. 338, 349 (2011). Consideration of the specific facts of each case regarding the nature of the injury, medical care offered and medical care received are necessary to determine whether the MOU "operat[ed] to relieve Annett Holdings from any liability" created by Chapter 85. Iowa Code § 85.18. The determination of whether a purported member was denied a statutory right under Chapter 85 requires a greater showing than the common fact pattern found by the district court. There is no common fact pattern central to either of the claims that can be resolved on a class-wide basis, period. The district court erred in holding otherwise.

B. The District Court Further Erred in Holding the Class Should Be Permitted For the Fair and Efficient Adjudication of the Controversy.

There would be nothing efficient in proceeding as a class action in this case. Liability on either claim will require the presentation of individualized evidence for each purported class member – the MOU itself does not establish liability because it by itself does not operate to relieve Annett Holdings of any liability

under Chapter 85 nor amount to bad faith. It is Annett Holdings use or enforcement of the MOU which allegedly creates potential statutory and bad faith liability. That is why the case of *Staley v. Barkalow* cited by Roland is factually distinguishable from this case.

In *Barkalow*, the plaintiff alleged the lease his landlord required him and similarly situated persons to sign contained terms that were prohibited by statute. In concluding class certification was proper, the appellate court explained not only did the lease signed by the purported members contain terms prohibited by statute, but the statute also created a cause of action and available remedy solely for the inclusion of the prohibited terms in the lease and did not require proof that the landlord ever tried to enforce the prohibited terms (i.e. resulting damage) or the extent of any individualized damages. *Staley v. Barkalow*, 843 N.W.2d 873 (Table), 2013 WL 2368825 (Iowa App. 2013). That is to say, individualized proof was not necessary to establish liability or damages because the lease itself, by including the prohibited terms, created statutory liability for the landlord, irrespective of whether the tenant was actually damaged as a result. *Id.*; *see also Kline v. SouthGate Prop. Mgmt., LLC*, 895 N.W.2d 427 (Iowa 2017) (noting Landlord Tenant Act authorized statutory damages for mere inclusion of prohibited terms in lease).

Unlike the Landlord Tenant Act at issue in *Barkalow*, Iowa Code Section 85.18 does not create liability for the mere inclusion of any term or provision in a contract between an employer and employee (in fact, Section 85.18 does not create any liability whatsoever because it does not create a private cause of action) nor does Annett Holdings continued requirement that employees sign the MOU as a condition of employment alone create liability. Proof under either theory of recovery would require the submission of individualized evidence from every purported class member of how Annett Holdings allegedly used the MOU to relieve it from its obligations under Chapter 85, as well individualized proof relevant to whether each purported class member was damaged and to what extent. Roland's implication that the MOU alone creates liability of Annett Holdings to the entire class, without more, is simply incorrect and contrary to the established law. Bad faith liability rests on more than simply proof that the MOU requires injured workers to temporarily relocate to Iowa in the event of a work injury, and so does Roland's alleged statutory rights violation pursuant to Iowa Code Section 85.18. In order to determine whether the MOU operated to relieve Annett Holdings' of any liability under Chapter 85, the extent of Annett Holdings' liability would need to be established for each individual member. *See Iowa Code § 85.18*. As it relates to medical care, Annett Holdings' liability is limited to offering

reasonable medical care that is not unduly inconvenient, necessitated by the work injury, promptly. Iowa Code Section 85.27(4). What medical care is reasonable and necessary, not inconvenient, and promptly provided is fact specific for every single work injury. *Pirelli-Armstrong Tire Co. Reynolds*, 562 N.W.2d 433 (Iowa 1997) ("[D]etermining what care is reasonable under the statute is a question of fact"). The determination of whether the offered medical care is unduly inconvenient is also a fact question. *Westside v. Cordell*, 601 N.W.2d 691, 693 (Iowa 1999). That is to say, Annett Holdings' liability under Chapter 85 is wholly dependent on the facts and circumstances surrounding the specific injury and care offered to each worker. The requirement of proving resulting damage (not to be confused with the amount of damages) from the defendant's actions is an essential element of liability.

Not only do Roland's claims require individualized testimony and evidence regarding liability from every purported member, the damages sought clearly require individualized testimony from every member. Roland suggests that trial on liability and damages can be bifurcated. What Roland fails to address however is the inefficiencies that would be created by having separate mini trials on damages for each individual class member. Discovery would be cumbersome considering most if not all of the purported class members live in states other than Iowa.

Discovery of information relevant to each class member's damages would exist primarily in that class member's state of residence. Each class member would be forced to travel to Iowa to be deposed (without an order from the Court providing otherwise). Subpoenas for information would require hiring local counsel practicing before the local court in each purported class member's geographic area. Roland did not make one single suggestion on how to streamline preparation and trial on damages other than to recommend bifurcation. Roland's plan to bifurcate damages in separate trials is not a plan at all.

CONCLUSION

An employer's obligations under Chapter 85 depend on the nature and extent of each individual worker's injury. An injured worker unsatisfied with the medical care offered by the employer can seek alternative medical care from the agency after providing notice to the employer. It is within the purview of the Agency to determine whether alternative medical care is appropriate based on the specific facts of the case. Iowa Code Section 85.27(4) does not proscribe what treatment an employer must offer, except the expectation that it is reasonable, prompt and not unduly inconvenient. The MOU itself says nothing about Annett Holdings

obligations under Section 85.27(4). The MOU itself does not alleviate Annett Holdings from its obligations under Section 85.27(4). Any claim for statutory violation of rights or bad faith necessarily requires an individualized assessment of the facts related to each and every purported member's workers' compensation claim. Neither liability nor damages can be established through a class representative with generalized evidence for the entire class. Class certification is not appropriate in this case. The case should be remanded with a directive to the district court to decertify the class.

PROOF OF SERVICE

The undersigned certifies that on the 3rd day of January, 2019, she served the Appellant's Final Reply Brief on counsel for the Appellee electronically using the EDMS. Per Rule 16.317(1)(a), this constitutes service of the document for the purposes of the Iowa Court Rules.

/s/ Sasha L. Monthei

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa Rule of Appellate Procedure 6.903(1)(g)(1) because it contains 2,177 words, excluding the parts of the brief exempted.

2. This brief complies with the typeface requirement of Iowa Rule of Appellate Procedure 6.903(1)(e) because it has been prepared in proportionately

spaced typeface using Microsoft Word 2010 in Times New Roman 14 point type.

/s/ Sasha L. Monthei

CERTIFICATE OF COST

The undersigned certifies the cost of this final reply brief (amount actually paid for printing or duplicating paper copies of briefs) was $0.00.

/s/ Sasha L. Monthei