IN THE SUPREME COURT OF IOWA

No. 22-0684

LORRI HAGEN,

Petitioner-Appellee,

vs.

SERTA/NATIONAL BEDDING CO., LLC and
SAFETY NATIONAL CASUALY CO.,

Respondents-Appellants.

APPEAL FROM THE IOWA DISTRICT COURT FOR
WORTH COUNTY
THE HONORABLE CHRIS FOY
NO. CVCV012778

APPELLANTS' FINAL BRIEF

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ROUTING STATEMENT

This case involves the application of existing legal principals and should be transferred to the Court of Appeals pursuant to Iowa Rules of Appellate Procedure 6.1101.

STATEMENT OF THE CASE

Appellee Lorri Hagen (hereinafter "Hagen") alleges she sustained an injury to her right foot/ankle and a sequelae injury to her body as a whole due to an altered gait after an injury occurring on February 21, 2017. Appellants Serta/National Bedding Company (hereinafter "Serta") accepted compensability of this claim but denied that Hagen's need for ankle surgery was causally related to the work injury on May 17, 2018. Serta later accepted compensability of the ankle surgery on January 2, 2019. Hagen filed a Petition alleging an injury to her "foot, ankle, leg" on August 21, 2019. (App. 17). This matter came for hearing before Deputy Andrew Phillips on September 25, 2020.

In the Arbitration Decision filed on November 24, 2020, Deputy Phillips excluded Hagen's exhibits 10 and 11 from evidence, which were Hagen's expert reports from Dr. Kuhnlein and Mr. Karrow. (App. 29). Deputy Phillips determined that Hagen reached maximum medical improvement on July 22, 2019. (App. 51). Therefore, Hagen was not entitled

to any additional temporary total disability benefits. (Id.). Deputy Phillips held that Hagen was not permanently and totally disabled and had sustained 60% industrial disability. (App. 52). He found that Hagen was not entitled to reimbursement for the independent medical examination with Dr. Kuhnlein. (App. 53). The deputy awarded Hagen $5,394.28 in penalty benefits for late payment of TTD benefits. (App. 56). Hagen was awarded $685.00 for case costs. (App. 57).

Hagen filed an appeal to the Iowa Workers' Compensation Commissioner on December 10, 2020. (App. 59). Serta filed a cross-appeal on December 14, 2020. (App. 61).

In the Appeal Decision filed by the Commissioner on May 17, 2021, the Arbitration Decision was affirmed in part, modified in part, and reversed in part. (App. 64). The Commissioner affirmed the exclusion of Mr. Karrow and Dr. Kuhnlein's expert reports. (App. 65). The decision not to tax the cost of Mr. Karrow's report to Serta was affirmed. (App. 66). The Commissioner reversed the decision regarding reimbursement of the invoice from Dr. Kuhnlein and ordered Serta to reimburse Hagen for that expense. (Id.). The Commissioner affirmed that Hagen reached maximum medical improvement on July 22, 2019 and Hagen was not entitled to any additional healing period benefits. (Id.). The determination that Hagen sustained 60% industrial

disability and was not permanently and totally disabled was affirmed. (App. 67). The Commissioner modified the award of penalty benefits and awarded $12,171.36 in penalty benefits. (App. 68).

Hagen filed a Petition for Judicial Review with the Worth County District Court on June 10, 2021. (App. 71). In the Ruling on Petition for Judicial Review filed by Judge Foy on April 11, 2022, he only dealt with the first assignment of error alleged by Hagen as it was dispositive of the relief to be granted on judicial review. (App. 84). Judge Foy determined that the Commissioner excluding Hagen's two expert reports was an abuse of discretion and failure to apply and interpret the law correctly. (App. 85). He stated the Commissioner failed to identify how Serta would be unfairly prejudiced by the admission of the late reports. (App. 86).

Serta filed an appeal of the district court decision to the Iowa Supreme Court on April 21, 2022. (App. 89).

STATEMENT OF THE FACTS

Hagen sustained an injury to her right foot on February 21, 2017 when a 350-pound cart rolled over her foot. (App. 114). Hagen underwent surgery on her right ankle on June 12, 2018. (App. 117). Hagen underwent an independent medical examination with Dr. Gorsche at Serta's request on July 22, 2019. (App. 180). Dr. Gorsche opined that Hagen had reached

maximum medical improvement for the work injury as of July 22, 2019. (App. 186). He provided an opinion regarding the extent of permanent impairment to the right ankle and provided an opinion regarding the need for permanent work restrictions. (App. 186-87).

Hagen filed a Petition with the Iowa Workers' Compensation Commissioner alleging entitlement to workers' compensation benefits on August 5, 2019. (App. 17). Hagen's treating physician, Dr. Henrich, stated in correspondence dated November 4, 2019 that Hagen had reached maximum medical improvement on August 27, 2019. (App. 123). Hagen's counsel emailed Serta's counsel on November 5, 2019 regarding whether they were in agreement that Hagen was entitled to obtain an independent medical examination pursuant to Iowa Code § 85.39. (See App. 26). Serta agreed that Hagen was entitled to an independent medical examination since Serta had obtained an impairment rating. (Id.). The Commissioner filed the Hearing Assignment Order on December 31, 2019 stating that the hearing was set for September 25, 2020 at 1:00 p.m. (App. 18).

A claimant is required to designate their experts 120 days in advance of the arbitration hearing. IOWA ADMINISTRATIVE CODE 876—4.19(3)(b) (2020). A claimant may designate rebuttal experts 60 days in advance of hearing. IOWA ADMINISTRATIVE CODE 876—4.19(3)(b)

(2020). The parties are required to produce all expert reports 30 days in advance of the hearing. IOWA ADMINISTRATIVE CODE 876—4.19(3)(d) (2020). Hagen did not designate any experts 120 days in advance of the hearing. Hagen did not designate any rebuttal experts 60 days in advance of the hearing. Hagen did not produce any expert reports 30 days in advance of the hearing.

Hagen was scheduled to undergo an independent medical examination with Dr. Kuhnlein, a physician of her own choosing, on May 19, 2020. (App. 26). Dr. Kuhnlein was sick that day and it was rescheduled to June 23, 2020. (Id.). Dr. Kuhnlein did not complete his report until September 10, 2020. (Id.).

Hagen's counsel supplemented discovery responses on August 19, 2020 to state that Mr. Karrow was a potential vocational expert. (App. 26). Hagen's counsel emailed Serta's counsel on August 27, 2020 (less than 30 days prior to the arbitration hearing) to state that he expected to receive his two expert reports soon. (App. 27).

Hagen produced her expert physician, Dr. Kuhnlein's report to Serta 15 days prior to hearing. Hagen produced Mr. Karrow's report (her vocational expert) to Serta 14 days prior to hearing. Hagen filed her proposed hearing exhibits on September 11, 2020, 14 days prior to the

arbitration hearing. (App. 21). Serta filed their objections to proposed Exhibits 10 and 11 on September 18, 2020. (App. 23). Hagen responded to the Objection on September 18, 2020. (App. 26).

At the arbitration hearing on September 25, 2020, Serta renewed its objection to the introduction of Exhibits 10 and 11 based on timeliness. (App. 98). Hagen's counsel proposed leaving the record open for Serta to obtain rebuttal reports to Dr. Kuhnlein and Mr. Karrow's reports. (App. 103). Deputy Phillips sustained the objection and excluded the reports from evidence. (App. 107).

ARGUMENT

I. THERE IS NOT SUBSTANTIAL EVIDENCE TO SUPPORT THE COMMISSIONER'S DECISION THAT MOORE'S SYMPTOMS AFTER AUGUST 2016 ARE CAUSALLY RELATED TO THE WORK INJURY.

A. Preservation of Error

Hagen preserved error on this issue by appealing to the Commissioner and to the district court. When the prior decisions were overturned, Serta then appealed this issue to the Iowa Supreme Court.

B. Standard of Review

Iowa Code Chapter 17A governs appellate court review of decisions of the Iowa Workers' Compensation Commissioner. See IOWA CODE § 86.26

(2021); Watson v. Iowa Dep't of Transp., 829 N.W.2d 556, 568 (Iowa 2013). The Iowa Supreme Court stated in Schoenfeld:

> We review rulings of the industrial commissioner for correction of errors of law, as does the district court. Squealer Feeds, 530 N.W.2d at 681. We may affirm, reverse, modify, or grant any other appropriate equitable or legal relief. Iowa Code § 17A.19(8); Squealer Feeds, 530 N.W.2d at 681. We may grant relief where substantial rights of a party have been prejudiced and the agency decision is (1) affected by error of law, (2) not supported by substantial evidence in the record, or (3) characterized by an abuse of discretion. Iowa Code §§ 17A.19(8)(e), (f), (g). "The imposition of sanctions by administrative agencies is discretionary." Stephenson v. Furnas Elec. Co., 522 N.W.2d 828, 831 (Iowa 1994).

Schoenfeld v. FDL Foods, Inc., 560 N.W.2d 595, 597-98 (Iowa 1997). The Iowa Supreme Court stated that the standard of review is whether the Commissioner's decision was an abuse of discretion. Id. at 598.

C. Argument

The Commissioner's decision to exclude Hagen's expert reports was not an abuse of discretion. The district erred in overturning the exclusion of the reports and invoice and remanding the matter back to the Commissioner.

A claimant is required to designate their experts 120 days in advance of the arbitration hearing. IOWA ADMINISTRATIVE CODE 876—4.19(3)(b) (2020). A claimant may designate rebuttal experts 60 days in advance of hearing. IOWA ADMINISTRATIVE CODE 876—4.19(3)(b) (2020). The parties

are required to produce all expert reports 30 days in advance of the hearing. IOWA ADMINISTRATIVE CODE 876—4.19(3)(d) (2020).

The Iowa Administrative Code sets forth the consequence of failing to provide the required disclosures:

> If evidence is offered at hearing that was not disclosed in the time and manner required by these rules, as altered by order of the workers' compensation commissioner or a deputy workers' compensation commissioner or by a written agreement by the parties, the evidence will be excluded if the objecting party shows that receipt of the evidence would be unfairly prejudicial. Sanctions may be imposed pursuant to 876—4.36(86) in addition to or in lieu of exclusion if exclusion is not an effective remedy for the prejudice.

IOWA ADMINISTRATIVE CODE 876—4.19(3)(e) (2020). "The imposition of sanctions by administrative agencies is discretionary." Stephenson v. Furnas Elec. Co., 522 N.W.2d 828, 831 (Iowa 1994). The Iowa Supreme Court has stated:

> An abuse of discretion occurs when a ruling rests on grounds or reasons clearly untenable or unreasonable. Squealer Feeds, 530 N.W.2d at 681. In other words, "abuse of discretion is synonymous with unreasonableness, and involves lack of rationality, focusing on whether the agency has made a decision clearly against reason and evidence." Stephenson, 522 N.W.2d at 831. Exclusion of evidence is the most severe sanction available under Iowa Rule of Civil Procedure 125(c), the rule concerning discovery of experts, and is justified only when prejudice would result. Id.
>
> We have been reluctant to reverse the Commissioner's imposition of the sanction of exclusion for noncompliance with the scheduling order or the rule that requires information thirty

> days prior to hearing. See Dunlavey v. Economy Fire & Cas. Co., 526 N.W.2d 845, 859 (Iowa 1995); Stephenson, 522 N.W.2d at 831–32.

Schoenfeld v. FDL Foods, Inc., 560 N.W.2d 595, 598 (Iowa 1997).

The Commissioner's exclusion of Hagen's expert reports was not an abuse of discretion as it was reasonable under the circumstances. Hagen did not designate any experts 120 days in advance of the hearing. Hagen did not designate any rebuttal experts 60 days in advance of the hearing. Hagen did not produce any expert reports 30 days in advance of the hearing. Rather, Hagen produced Dr. Kuhnlein's report 15 days prior to hearing and Mr. Karrow's report 14 prior to hearing. The production of the reports is clearly outside of the time period specified in the Iowa Administrative Code. The exclusion was reasonable.

Hagen had plenty of time to obtain the expert reports; she simply failed to do so in accordance with the case preparation deadlines. Dr. Gorsche opined Hagen reached maximum medical improvement related to the work injury on July 22, 2019. (App. 186). Hagen's treating physician opined she reached maximum medical improvement in correspondence dated November 4, 2019. (App. 123). Hagen's counsel and Serta's counsel agreed that Hagen was entitled to obtain an independent medical examination on November 5, 2019. (See App. 26). The Hearing Assignment

Order was issued on December 31, 2019 stating that the hearing was set for September 25, 2020. (App. 18). Hagen's appointment with Dr. Kuhnlein was not scheduled until May 19, 2020. (App. 26). While Dr. Kuhnlein had to reschedule the appointment to June 23, 2020, he simply did not complete his report until September 10, 2020. (Id.). It was 10 months from the time that Serta agreed Hagen was entitled to obtain an expert physician report until the time that she produced it to Serta. It was nearly eight months from the time the Hearing Assignment Order was issued until the deadline to produce expert reports 30 days in advance of hearing. Hagen simply did not timely obtain her physician or vocational expert reports.

"Discovery rules exist to avoid trial by ambush. Rules of discovery and the case preparation completion requirements in the Hearing Assignment Order are all designed to prompt parties to evaluate cases well in advance of hearing so the information can be evaluated, rebutting evidence obtained as appropriate and the parties can better evaluate their cases." Ramirez v. Riverview Care Center, File Nos. 1243830; 1253740; 1253741; 1253742; 1253743 (App. Dec. August 2, 2002). The Agency has previously stated that parties should not assume their late reports will be admitted into evidence. Richards v. Menard's Distr., File No. 5041336 (App.

Dec. July 6, 2015). The Agency reviews each situation in a case-by-case basis. Id.

The late production of the reports to Serta was unfairly prejudicial in this case and the Agency was correct in excluding the reports. Serta were not aware what Dr. Kuhnlein's or Mr. Karrow's conclusions would be in their expert reports prior to receiving them. Hagen alleged that she was permanently and totally disabled due to the work injury. She was relying upon her expert reports to support this assertion. Accepting expert reports into evidence that were produced 2 weeks prior to the arbitration hearing is inherently unfairly prejudicial. The Iowa Supreme Court has noted that it is reluctant to overturn the Commissioner's sanction of exclusion for non-compliance. There is no reason to overturn the Commissioner's sanction in this case and the district court erred in doing so.

Hagen asserted at the arbitration hearing that the reports should have been admitted into evidence and then the record could have remained open to allow Serta an opportunity to respond. (App. 103). However, Serta would have no ability to obtain new experts or otherwise respond to the reports other than requesting an existing expert to provide a response. Further, leaving the record open and obtaining rebuttal reports only delays the final disposition of a case. "The fundamental reason for the enactment of [the

workers' compensation act] is to avoid litigation, lessen the expense incident thereto, minimize appeals, and afford an efficient and speedy tribunal to determine and award compensation under the terms of this act." Zomer v. West River Farms, Inc., 666 N.W.2d 130, 133 (Iowa 2003).

The Supreme Court allowed the late report in Schoenfeld into evidence. However, the report in Schoenfeld that was admitted into evidence was the report of a treating physician, not an expert physician. The Supreme Court stated: "Field was Schoenfeld's treating physician. His evaluation report is limited to an assessment of the right knee he treated. As such, the duty to designate a treating physician as an expert witness under rule 125(c) is limited." Schoenfeld v. FDL Foods, Inc., 560 N.W.2d 595, 598 (Iowa 1997). The Supreme Court made a distinction between treating physicians and expert physicians, which need to be designated. Dr. Kuhnlein and Mr. Karrow were not treating physicians.

In addition, the Agency has determined in similar cases in the past that a report untimely produced should be excluded. For example, in Aalbers, the claimant's expert's new medical opinion that was produced 25 days prior to the arbitration hearing was excluded from evidence as it was unfairly prejudicial. Aalbers Pioneer Hi-Bred Int'l, File No. 5042600 (App. Dec. March 24, 2016). In light of the circumstances of this case, the

Commissioner was reasonable to exclude Dr. Kuhnlein and Mr. Karrow's expert reports. This decision should be affirmed.

The Iowa Supreme Court has noted that it is reluctant to reverse the Commissioner's imposition of the sanction of exclusion for noncompliance. The district court erred in overturning the sanction in this case. The Commissioner's decision was not an abuse of discretion as it was reasonable. The Commissioner's decision should be reinstated.

CONCLUSION

The Commissioner's exclusion of Hagen's expert reports from evidence was not an abuse of discretion. The district court erred in reversing and remanding this issue to the Commissioner. The Commissioner's decision regarding the exclusion of the reports should be affirmed.

ORAL ARGUMENT

Appellants believe oral argument is necessary for resolution of the issues raised in this appeal and, therefore, request an opportunity to be heard in oral argument.

SMITH MILLS
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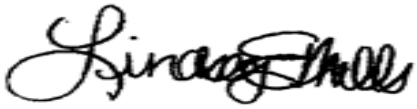

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CERTIFICATE OF FILING/SERVICE

I hereby certify that a true and accurate copy of this instrument has been and will be filed electronically with the Clerk of the Iowa Supreme Court and forwarded to all counsel via the electronic filing system on this 12th of August, 2022, and by U.S. Mail for any party not registered to receive notice of filings via the ECF process.

/s/ Lindsey E. Mills

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 2,771 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 2017 in Times New Roman 14 point type.

/s/ Lindsey E. Mills