IN THE IOWA SUPREME COURT OF IOWA

No. 22-0684

LORRI HAGEN,
Petitioner-Appellee/Claimant

vs

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

Respondent-Appellant/Defendants

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR WORTH COUNTY, IOWA
THE HONORABLE CHRIS FOY, DISTRICT JUDGE
NO. CVCV012778

APPELLEE'S FINAL BRIEF

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STATEMENT OF ISSUE PRESENTED FOR REVIEW

I. THE DISTRICT COURT'S REVERSAL OF THE COMMISSIONER'S EXCLUSION OF HAGEN'S REPORTS FROM EVIDENCE AND REOPENING OF THE RECORD WAS APPROPRIATE AND SHOULD BE AFFIRMED.

ROUTING STATEMENT

SEE APPELANT'S BRIEF. THE APPELLEE ACCEPTS APPELANT'S ROUTING STATEMENT.

STATEMENT OF THE CASE

SEE APPELANT'S BRIEF. THE APPELLEE ACCEPTS APPELENT'S STATEMENT OF THE CASE with the following additions: The District Court found that the Commissioner's failure to identify how Defendants would be unfairly prejudiced was an abuse of discretion. (App. 85). The District Court also stated that there was no evidence in the record to support a finding of unfair prejudice and that this constituted an abuse of discretion by the Commissioner and a failure to apply and interpret the law correctly. *Id.* Deputy Phillips also excluded the corresponding bills offered in App. 155 and App. 156 (App. 229). District Court Judge Foy directed that Commissioner Coretese reopen the administrative record, admit App. 125, App. 142 and App. 156, permit Defendants an opportunity to file responsive reports, and then revisit and rule on the issues that Hagen raised in her appeal. (App. 86 and App. 87)

STATEMENT OF FACTS

Ms. Hagen is a 59-year-old former employee and laborer for Defendant, Serta. Her job duties at Serta included moving carts stacked with quilt tops for mattresses from one part of the factory to another. (App. 109). On February 21, 2017, while rolling a cart stacked seven feet high and weighing approximately 350 lbs., Ms. Hagen stopped to round a corner when the cart rolled into the back of her right foot and over the outside of her foot. (App 109 and App. 110). The force of impact pulled off Ms. Hagen's shoe and knocked her to the ground. (App. 109 and App. 110).

Ms. Hagen participated in a long series of medical treatments, and experienced numerous denials of treatment and the denial of acceptance of compensability by Defendants. The extent of the treatments are not necessarily relevant to this issue on appeal and therefore only summarized for purposes of establishing the specific reports that were obtained by the parties and a timeline. On February 16, 2018 Ms. Hagen sought a second opinion with Dr. Edward Henrich who ordered an MRI. (App. 115). The MRI, dated April 3, 2018, showed that Ms. Hagen suffered partial thickness tearing of the distal Achilles tendon just above the enthesis with mild edema at the medial end of the enthesis and a longitudinal splitting of a short segment of the peroneus brevis. (App. 116). Ms. Hagen followed up with Dr.

Henrich on April 9th who reviewed the MRI and recommended surgical repair. *Id.*

Defendants refused to authorize surgery so Ms. Hagen filed a Petition for Alternative Medical Care. (Court Record). Defendants denied compensability under the Petition and Ms. Hagen was forced to pursue surgery under her own health insurance. (App. 118). Dr. Henrich ultimately performed surgery on June 12, 2018 which included open debridement, repair, and grafting of the right Achilles tendon and the peroneus brevis tendon. (App. 117).

On September 18, 2018, Dr. Henrich verified several opinions he held concerning Ms. Hagen's condition. (App. 120). He felt that that the tearing present on the April 3, 2018 MRI developed over time as a natural progression of her February 21, 2017 work injury and that Defendants' reasoning for denying causation was flawed. *Id.* He believed that her condition and need for surgery was directly related to her work injury. *Id*. Despite this, Defendants continued to deny compensability. (App. 28).

On November 19, 2018, Defendants sent Ms. Hagen to Dr. Charles Mooney for a defense IME. (App.172) Dr. Mooney agreed with Dr. Henrich and also related her condition and need for surgery to the original work

injury. *Id.* Defendants thereafter accepted compensability and issued the first benefit payment on January 29, 2019, nearly a year after Ms. Hagen's right foot gave out at work. (App. 56).

Defendants requested another IME, this time with Dr. Thomas Gorsche which took place on July 22, 2019. (App. 180). Dr. Gorsche agreed with Drs. Henrich and Mooney in that Ms. Hagen's condition was related to the February 21, 2017 work injury, noting that she had never been pain free after the accident or subsequent surgery. *Id.* He further noted Ms. Hagen suffered a gait derangement entitling her to a 7% whole person impairment. *Id.* He recommended permanent sedentary restrictions with limited standing and walking and no climbing or squatting. *Id.* He believed maximum medical improvement to be the date of his evaluation, July 22, 2019. *Id.*

Defendants also sought and submitted into the record at the arbitration hearing the report of Lana Sellner, who completed an employability report on behalf of the Defendants. (App. 158).

During the course of the case, in response to an e-mail from Ms. Hagen's counsel dated November 5, 2019, on November 7, 2019 counsel for the Defendant consented to Ms. Hagen obtaining an IME evaluation pursuant to I.C.A. 85.39 without the filing of a Petition for IME and became

aware of the forthcoming IME (App. 26). Ms. Hagen was scheduled to participate in an IME with Dr. Kuhnlein on May 19, 2020. *Id.* On that same day, Dr. Kuhnlein's office reported to Ms. Hagen's counsel he was sick and unavailable. *Id.* The IME appointment was pushed back to June 23, 2020. *Id.* Dr. Kuhnlein did not complete his IME report until September 10, 2020. *Id.* Counsel for Ms. Hagen provided the report to counsel for the Defendant on that same day, 15 days prior to the hearing date. *Id.*

Ms. Hagen updated her discovery response to provide notice of Mr. Karrow's vocational report on August 19, 2020. *Id.* Mr. Karrow's report was provided to counsel for the Defendants the day it was available on September 11, 2020, 14 days prior to the hearing. *Id.* Additionally, counsel for Ms. Hagen provided an update to counsel for the Defendants on August 27, 2020 that both reports are expected soon and would be provided immediately upon receipt. *Id.* All reports were timely submitted to the Court as exhibits 14 days prior to the hearing. Despite being aware of the forthcoming exhibits, the first notice of any objection to the Exhibits from Defendants was provided by the filing of an Objection to Hearing Exhibits on September 18, 2020. (App. 23).

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE DECISION OF THE DISTRICT COURT FINDING THAT THE COMMISSIONER'S EXCLUSION OF HAGAN'S EXHIBITS WAS AN ABUSE OF DISCRETION, inter alia.

The District Court Ruling should be affirmed.

Preservation of Error

Hagen agrees with Defendants' statement regarding preservation of error.

Standard of Review

Defendants have stated the correct Standard of Review.

Argument

A. Analysis.

Following review of the record, District Court Judge Christopher Foy issued a ruling on April 11, 2022 finding that both the Commissioner and the Deputy Commissioner excluded the Kuhnlein report and Karrow report without first making the necessary finding that admitting these reports would unfairly prejudice the Defendants, as the administrative code requires. (App. 85). Judge Foy continued that instead, both "assumed the prejudice to Respondents inherent in the late disclosure and production of the reports by Hagen was sufficient, in itself, to warrant their exclusion from the record."

Id. The Court found that reliance on this assumption is an abuse of discretion and contrary to correct interpretation of the law. *Id*. "Not only did Commissioner Cortese fail to find Respondent would suffer unfair prejudice if the two reports were admitted, there is no evidence in the record to support such a finding." *Id*.

Of importance and distinction, the issue at hand is an interpretation and application of the law, not of fact. "Because the interpretation of workers' compensation statues and related case law has not been clearly vested in the discretion of his office, interpretations of law made by made by the workers' compensation commissioner are not entitled to deference." Larson Mfg. Co., Inc v. Thorson, 763 NW2d 842, 850 (Iowa 2009).

The decision of the District Court should be affirmed.

1. The District Court correctly concluded that the Commissioner's decision to exclude Hagen's Expert Reports was an abuse of discretion.

At the hearing on September 25, 2020, Ms. Hagen offered App. 125 and App.142, which were Dr. John Kuhnlein's IME report and Tom Karrow's vocational report, respectively. She also offered App. 156, Tom Karrow's invoice. They were excluded due to "timeliness" as they were provided to Defendants less than 30 days prior to the hearing, though they were provided 15 and 14 days prior to hearing, respectively. The

Commissioner affirmed that ruling in his Appeal Decision.

The ruling was an abuse of discretion most notably because it was a decision that did not apply or follow the applicable law and was contrary to the evidence provided. Next, it was inconsistent with a practice or precedent to the detriment of Ms. Hagen. Finally, the decision was an inappropriate application of the workers compensation law because the result amounted to a disproportionate and unequal outcome to Ms. Hagen compared to other similarly situated claimants.

a. The Commissioner's ruling was an abuse of discretion and contrary to the law as there was no evidence or finding of <u>unfair</u> prejudice.

Both exhibits were provided at least two weeks prior to the hearing and were listed in the timely filed exhibit list provided August 27, 2020. Both exhibits were timely filed with the Court 14 days prior to the hearing. Defendants were aware the reports were forthcoming and were not unfairly surprised by their filing.

Iowa Administrative Code 4.19(3)(e) states in part:

> 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**.

I.A.C. 4.19(3)(e) (emphasis added).

The Commissioner's exclusion of these reports (and their corresponding invoices) was abuse of discretion because the Defendants were not unfairly prejudiced by the delay nor were Defendants surprised by their existence or contents. Further, the Commissioner applies the wrong standard and does not explain how Defendants were unfairly prejudiced, just concludes without explanation, Defendants were prejudiced.

> An abuse of discretion occurs when a ruling rests on grounds or reasons clearly untenable or unreasonable. 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.' **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.

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

Ms. Hagen previously cited and the Commissioner considered the Schoenfield case cited above. In that case the claimant provided reports of a treating physician just six days prior to the hearing. In Schoenfiled, the

exhibit was excluded by the Commissioner but on appeal the Supreme Court ruled that the Employer was not unfairly surprised by the existence of the report and that exclusion would run contrary to the primary purposes of the worker's compensation statute, which is for the benefit of the worker. *Id at 599.*

The Commissioner distinguished Schoenfield by relying on the fact these reports are not from a treating physician. However, regardless if the reports are from a treating physician or a non-treating provider, the intent of the worker's compensation statute is to inure benefit to the worker, not the employer. "The primary purpose of the workers' compensation statutes is to benefit the worker and his or her dependents, insofar as statutory requirements permit." McSpadden v. Big Ben Coal Company, 288 N.W.2d, 181, 188 (Iowa 1980). Providing the Court with the complete file is of primary importance. Further, a situation where parties are provided at least two weeks to review, analyze, and prepare is far from being unfairly prejudicial and the reports were not a surprise.

The District Court analyzed the baseless arguments of the Defendants in support of their position to exclude the reports. The District Court was correct in concluding that neither are evidence of unfair prejudice. Of significance, even in their appellant brief in this present matter, Defendants

continue to detrimentally and exclusively rely on the argument of timeliness and the incorrect assumption that timeliness equals unfair prejudice. The rule allows for late filings, and does not on its own create unfair prejudice.

At the hearing level, the Defendants first asserted they would not have the opportunity to gather or present rebuttal evidence. This is not true for two reasons. One, they already submitted evidence to rebut the reports. Defendants sought and submitted two of their own IME's and their own vocational report. The fact that they are not favorable to the Defendants is of no consequence. Second, Ms. Hagen offered to leave the record open to permit Defendants an opportunity to submit even more evidence to rebut the position of the reports. Defendant declined citing delay of final disposition, but as Judge Foy pointed out, "[g]iven that Commissioner Cortese found Respondent to have unreasonably denied or delayed paying Hagen temporary disability benefits for over seven months…the Court questions whether Respondent has any genuine concerns about disposing of this case promptly." (App. 85). Also of note, despite medical support to the contrary, Defendants denied compensability for nearly a year, resisted an alternative med petition, were consistently late in payments, and failed all together to reimburse expenses. Defendants concern regarding delay does not hold water.

Are we to conclude that the additional 13 or 14 days was so consequential for the Defendants to overcome, that they were caught so off guard by these documents, that they could never fairly defend the case? Absolutely not. What would Defendants have done to further rebut App. 125 and App. 142? Obtain yet additional reports? Fine, they were given that opportunity and refused.

Further, there was no evidence of any defense rebuttal expert waiting in the wings, ready to author a reply to App. 125 and App. 142. There was no evidence of any effort taken by the Defendants in the 15 days prior to the hearing to obtain a rebuttal but were unable due to time restraints. Defendants received the reports and took no action except to complain about the late exchange of the reports.

Nothing about the late offering of App. 125 and App. 142 created an unfair prejudice. 876 Iowa Administrative Code 4.19(3)(e) proscribes that evidence will be excluded only "if the objecting party shows that receipt of the evidence *would be unfairly prejudicial*." *Id.* The Commissioner cites no unfair prejudice the Defendants experienced in reaching his ruling excluding the evidence. Rather he only cites that they were late, and that due to the lateness, Defendants were unfairly prejudiced. (App. 65).

The Commissioner misapplies the law and his logic is circular. The late disclosure of exhibits on its own does not amount to unfair prejudice, as that would run contrary to the rule, which allows late disclosures so long as there is no unfair prejudice. Citing late disclosure as the basis for creating unfair prejudice creates a circular logic that renders the text and caveat of the Administrative Code worthless and inapplicable in any situation involving a late filing. As applied by the Commissioner, ALL late filings are to be excluded, regardless if receipt would be unfairly prejudicial. That is not what the Administrative code states.

As for any delay that any party would have experienced as a result of leaving the record open, the only party who would experience any prejudice is Ms. Hagen herself. Ms. Hagen is the only party physically injured with limited income and interested in a speedy resolution of this matter. This is one of presumably hundreds of cases on the Defendants' docket and it can hardly be anticipated Defendants would suffer any loss by an additional 30 days. Further, at Ms. Hagen's discretion, she could have voluntarily dismissed the case, re-filed, and submitted the exhibits, causing significant delay for all parties and the Commission, but instead chose to proceed in the interest of resolving the matter as quickly as possible.

As the District Court noted, cost was not a legitimate concern creating

prejudice for Defendants. Even if exchanged 14 days earlier, Defendants would have incurred the costs of any additional rebuttal reports.

The District Court correctly concluded that the exclusion of App. 125 and App. 142 and their corresponding invoices, App. 155 and App. 156, by the Commissioner was an abuse of discretion and an inappropriate application of 876 Iowa Administrative Code 4.19(3)(e).

b. The Commissioner's ruling was an action that is inconsistent with prior practice or precedents to the detriment of Ms. Hagen and therefore an abuse of the. applicability of the law

In his Appeal Ruling, the Commissioner stated, "…deputy commissioners often admit late reports and keep the record open to allow defendant additional time to acquire responsive reports." (App. 65). He continued "[w]hile keeping the record open and offering the objecting party the opportunity to seek responsive reports *is often the preferred remedy* employed by deputy commissioners in similar circumstances, exclusion of the evidence is an allowable sanction under the rules when a party establishes prejudice…" *Id.* Emphasis added. (Of note, the Commissioner not only misapplies the law, he misstates the law by excluding the word "unfair" from his ruling and then fails to cite any prejudice).

The Commissioner's logic acknowledging the universal precedent but

failing to follow it creates an untenable problem. The problem created by this established precedent is the reliance by parties on said precedent, apparently to their detriment. While the rule requiring disclosure of reports 30 days prior to hearing is technically the rule, the Commissioner's own statements in his decision confirm that not only is the rule rarely followed, it is preferred not to follow the rule, and providing the opposing party additional time is the "preferred remedy employed." The "preferred remedy employed" is not exclusion of the reports, as was done in this case. However, the Commissioner and deputy simply followed an across the board "if it is late, the report is excluded" policy that is contrary to the rule and general practice. The failure of the Commissioner (and Deputy) to apply discretion and follow the established "preferred" precedent is in of itself an abuse of discretion. "A failure to exercise discretion is an abuse of discretion." IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 630 (Iowa 2000).

Many times, as is the case here, parties are at the mercy of those authoring the reports, which sometimes are provided to parties after the so-called "deadline." Dr. Kuhnlein was sick and rescheduled the appointment, and then was delayed in authoring the report. Most deputies recognize this and understand a precedent has been set in the industry permitting late disclosure with a remedy of allowing the opposing party additional time for

rebuttal.

This precedent likely falls into an alternative timeline as permitted by I.A.C 4.19(3)(e) which states in part: "If evidence is offered at hearing that was not disclosed…***as altered by order of the workers compensation commissioner or a deputy workers compensation commissioner…"*** I.A.C. 4.19(3)(e). (Emphasis added). The Commissioner himself acknowledges a precedent among Deputies and the precedent is so engrained in practice, it could be argued that Deputies by their actions have "altered" the rule to permit untimely filings. Failure by the Commissioner to enforce the precedent while still acknowledging its existence, is an abuse of discretion.

The end result of acknowledging the precedent but not following it results in a disproportionate result to Ms. Hagen, as those two reports would have significantly supported Ms. Hagen's position for permanent total disability. Without those reports, the Commissioner only gave Ms. Hagen a 60% industrial disability. The Commissioner thought it more appropriate to ignore available evidence which likely would have resulted in a significantly different outcome and instead apply an arbitrary rule that is rarely followed. Doing so was an abuse of discretion worthy of reversal.

c. The Commissioner's error in excluding the reports results in an unequal and unpredictable application of the law across similarly situated claimants.

As stated above, the Commissioner acknowledges the regular and "preferred" practice among the deputies to allow late filings and then permit the opposing party additional time to provide rebuttal evidence. An inappropriate result of permitting this practice creates an unequal and unpredictable application of the law creating inconsistent results among factually similar claimants based solely on the deputy assigned to the case and not on the facts of the case.

This practice further creates forum shopping, deputy shopping, and results in voluntary dismissals and unnecessary delays if a party believes a deputy may apply the law adversely. This creates a delay in case resolution and inefficient and ineffective application of judicial resources.

In his ruling excluding the reports, the Commissioner defers and adopts the reasoning of the deputy. The Commissioner's failure to recognize this conundrum and use his discretion in light of the "preferred" practice among the deputies and admit the IME and vocational report resulted in a substantially different outcome for Ms. Hagen. With those reports in the record, it is very likely that Ms. Hagen would be deemed permanently and totally disabled. Simply because of the luck of the draw of

the deputy, and the Commissioner's affirmation of the deputy (despite being aware of the unequal application of the law), Ms. Hagen received a substantially different result then those similarly situated claimants who were assigned to a different deputy. The facts, not the draw of the deputy, should determine the outcomes of these cases. Accordingly, the law was not applied to Ms. Hagen equally and the result was inappropriate for the reasons stated above.

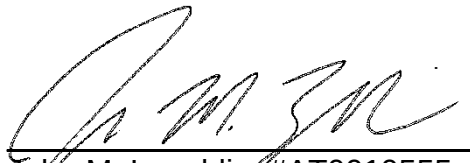
CONCLUSION

The District Court correctly concluded that the Commissioner (and Deputy) abused their discretions when applying the law to the case. There was no finding of unfair prejudice, nor any evidence in support of such, as it relates to the late filings. Further, the general practice of allowing late filings and leaving the record open for rebuttal created an established precedent. Not following it was contrary to the law. Exclusion of the App. 125, App. 142, App. 155 and App. 156 was an abuse of discretion and the findings and holding of the District Court should be affirmed.

ORAL ARGUMENT

Appellee believes this matter can be submitted without oral argument.

Respectively submitted.



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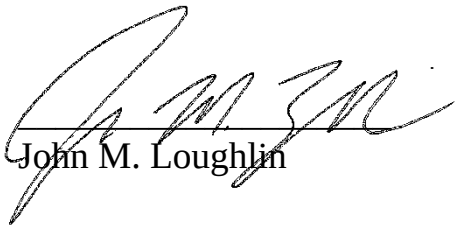
I, John M. Loughlin, certify that I will file this Appellee's final brief by filing with the Clerk of the Supreme Court by EDMS on the 16th day of August, 2022.



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I, John M. Loughlin, certify that that I served this Appellee's final brief on the 16th day of August 2022 by EDMS by sending a copy to:

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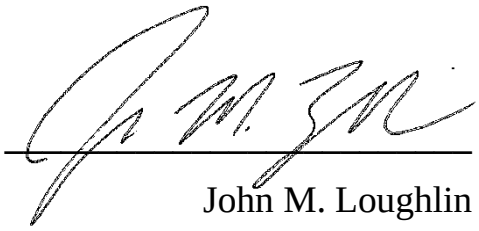

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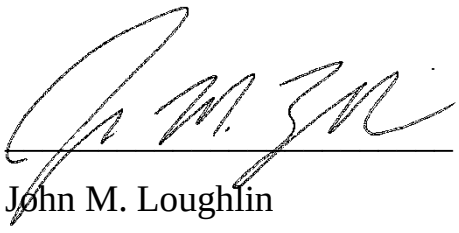

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