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' APPLICATION FOR FURTHER REVIEW

Lindsey E. Mills AT0010854
SMITH MILLS LAW P.C.
1225 Jordan Creek Pkwy, Suite 108
West Des Moines, IA 50266
Telephone: (319) 286-1743
Fax: (319) 286-1748
Email: lmills@smithmillslaw.com
ATTORNEY FOR APPELLANTS
SERTA/NATIONAL BEDDING and
SAFETY NATIONAL CASUALTY

QUESTION PRESENTED FOR REVIEW

DID THE COURT OF APPEALS ERR IN CONCLUDING THAT THE COMMISSIONER ABUSED HIS DISCRETION IN EXCLUDING APPELLEE'S UNTIMELY EXPERT REPORTS BECAUSE APPELLANTS FAILED TO SHOW THAT ADMISSION OF THE EVIDENCE WOULD BE UNFAIRLY PREJUDICIAL PURSUANT TO RULE 876-4.19(3)(e)?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Cases

Other Authorities

STATEMENT SUPPORTING FURTHER REVIEW

The Workers' Compensation Commissioner's decision to exclude the Hagen's expert reports from evidence was not an abuse of discretion, and the District Court and Court of Appeals erred in concluding otherwise. Further review is warranted because the Court of Appeals' decision is in conflict with a decision of the Court of Appeals, and this case presents an important question of changing legal principles.

Specifically, the Court of Appeals decision is in direct conflict with *Square D Co. v. Plagmann*, 810 N.W.2d 25 (Table), 2011 WL 6673544 (Iowa Ct. App. 2011). Therein, the Court of Appeals affirmed the Deputy Commissioner's decision to exclude an untimely expert report and determined the Deputy did not abuse their discretion in doing so. *Id.* The Court went on to state that, "Although the deputy did not make a specific finding of fact concerning the possibility of unfair prejudice to Plagmann, we infer that such a finding was implicit in the deputy's decision to sustain Plagmann's objection and to exclude the exhibit." *Id.*

Here, too, the conflict centers around a party's failure to timely produce untimely expert reports and the deputy's decision to exclude the untimely reports. In this case, Hagen failed to not only timely produce two expert reports pursuant to Iowa Administrative Code rule 876-4.19(3)(c), but

she also failed to certify her experts in accordance with Iowa Administrative Code rule 876-4.19(3)(b). As such, the deputy excluded the reports pursuant to Iowa Administrative Code rule 876-4.19(3)(e), which provides "evidence will be excluded if the objecting party shows that receipt of the evidence would be unfairly prejudicial." Both the Deputy Commissioner and the Commissioner specifically indicated in their decisions that Serta was unfairly prejudiced by Hagen's failures to comply with the rules, which warranted exclusion of two expert reports. The Court of Appeals erred in their analysis and rationale, including in their application of the abuse of discretion standard of review, as well as issuing a decision that is in direct conflict with the principles set forth in *Plagmann*, and therefore warrants further review. 810 N.W.2d 25 (Table), 2011 WL 6673544. In order to correct these errors, the Court of Appeals' decision must be reversed and the Deputy's decision to exclude Hagen's untimely reports must be affirmed.

Additionally, the Court of Appeals' opinion suggests that an alternate standard of review, i.e., correction of errors at law, must apply when evaluating whether Serta met their burden to show unfair prejudice, despite acknowledging that this standard was not applied by the Supreme Court in *Schoenfeld v. FDL Foods, Inc.*, 560 N.W.2d 595 (Iowa Ct. App. 1997) or *Trade Professionals, Inc. v. Shriver*, 661 N.W.2d 119, 123 (Iowa 2003), "or

by this court in reliance on those cases." (Opinion, p. 11, n. 4). This analysis by the majority opinion of the Court of Appeals presents an important question of changing legal principles in the context of analyzing the unfair prejudice prong of Iowa Administrative Code rule 876-4.19(3)(e). The Iowa Supreme Court must address this proposal for an alternate standard of review to clarify the standard of review and avoid further confusion.

BRIEF IN SUPPORT OF FURTHER REVIEW

I. Statement of the Facts

Hagen sustained an injury to her right foot on February 21, 2017. (App. 114). Hagen underwent surgery on her right ankle on June 12, 2018. (App. 117). Hagen underwent an independent medical examination ("IME") 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 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 IME pursuant to Iowa Code § 85.39. (See App. 26). Serta agreed that Hagen was entitled to an IME since Serta had obtained an impairment rating. (Id.). The Commissioner filed the Hearing Assignment Order on December 31, 2019 stating that 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 rule 876—4.19(3)(b) (2020). A claimant may designate rebuttal experts 60 days in advance of hearing. Iowa Administrative Code rule 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 rule 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 IME 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). The Commissioner affirmed the decision to exclude the expert reports with additional analysis in the appeal decision dated August 12, 2022. (App. 64-66).

II. Argument

The Commissioner's decision to exclude Hagen's expert reports was not an abuse of discretion, and the Court of Appeals erred in concluding otherwise. The same rationale as applied in *Plagmann* should have been applied in the current case to uphold the Commissioner's decision to exclude two of Hagen's expert reports, which were not properly or timely disclosed or produced in accordance with the required deadlines set forth in Iowa Administrative Code rule 876-4.19(3). 810 N.W.2d 25 (Table), 2011 WL 6673544.

Iowa Administrative Code rule 876-4.19(3) required Hagen to "certify to all other parties the expert's name, subject matter of expertise, qualifications, and a summary of the expert's opinions" 120 days before the scheduled hearing, if she planned to submit evidence from an expert. Iowa Admin. Code rule 876-4.19(3)(b). Hagen was also required to certify the same information for rebuttal experts 60 days before hearing. *Id.* Rule 876-4.19(3)(c) goes on to require Hagen to serve "[a]ll discovery responses, depositions, and reports from independent medical examinations . . . at least 30 days before hearing." *Id.* r. 876-4.19(3)(c). Additionally, Rule 876-4.19(3)(d) requires the parties to serve witness and exhibit lists at least 30 days before hearing. *Id.* r. 876-4.19(3)(d). The rule goes on to require the

parties to file proposed exhibits at least 14 days prior to hearing, and then written objections or motions to exclude evidence are to be filed at least 7 days before hearing. *Id.* r. 876-4.19(3)(d). Finally, this rule specifically sets forth the consequences when a party does not abide by the prescribed deadlines, which states, "the evidence will be excluded if the objecting party shows that receipt of the evidence would be unfairly prejudicial." *Id.* r. 876-4.19(3)(e).

The question here centers around whether the Commissioner abused his discretion by excluding the two untimely expert reports submitted by Hagen. Iowa Code section 17A.19(10)(n) (2021). "An abuse of discretion occurs when the agency exercises its discretion on untenable grounds or its exercise of discretion was clearly erroneous." *Plagmann*, 2011 WL 6673544, at *5 (citing *IBP v. Al-Gharib*, 604 N.W.2d 621, 630 (Iowa 2000)). "A ground or reason is untenable when it is not supported by substantial evidence . . . ." *Fortune v. State*, 957 N.W.2d 696, 703 (Iowa 2021) (quoting *State v. Gomez Garcia*, 904 N.W.2d 172, 177 (Iowa 2017)). "Evidence is substantial if a reasonable person would find it adequate to reach a conclusion." *Holland v. Sheaffer Pen Corp.*, 710 N.W.2d 257 (Table), 2005 WL 3115632, at *4 (Iowa Ct. App. Nov. 23, 2005) (citing *Simonson v. Snap-On Tools Corp.*, 588 N.W.2d 430, 434 (Iowa 1999)). "Substantial evidence

need not amount to a preponderance but must be more than a scintilla." *Id.* (citing *Elliott v. Iowa Dep't of Transp.*, 377 N.W.2d 250, 256 (Iowa Ct. App. 1985)). "An administrative agency decision constitutes an abuse of discretion only if it is clearly unreasonable, lacks rationality, and is clearly against reason and evidence." *McMahon v. Iowa Dept. of Transp.*, 522 N.W.2d 51, 56 (Iowa 1994) (citing *Frank v. Iowa Dep't of Transp.*, 386 N.W.2d 86, 87-88 (Iowa 1986)). "This standard grants agencies broad discretion to determine their affairs." *Id.* Deference is given to the agency's findings just as deference would be given to a jury verdict. *See IBP, Inc. v. Harpole*, 621 N.W.2d 410, 414 (Iowa 2001).

The Deputy Commissioner, in the arbitration decision dated November 24, 2020, specifically sets forth the reason and rationale for his decision to exclude Hagen's expert reports from Dr. Kuhnlein and Mr. Karrow. (App. 29). The Deputy Commissioner specifically stated that after "having reviewed the record, the objections, and the hearing arguments, [he] sustained the defendants' objection and excluded Exhibits 10 and 11 from the record, based upon the applicable law." (App. 29). The Deputy's exclusion of these reports was not based on untenable grounds or clearly erroneous such that the Court would be justified in reversing his decision. And as the Court of Appeals previously acknowledged and stated in the

Plagmann decision, "[T]he deputy has discretion in imposing sanctions for failure to comply with prehearing orders." 2011 WL 6673544, at *6. This Court has even gone further to state, "It is of no concern to a court reviewing an administrative sanction whether a different sanction would be more appropriate or whether a less extensive sanction would have sufficed; such matters are the province of the agency." *Marovec v. PMX Indus.*, 693 N.W.2d 779, 786 (Iowa 2005).

The Commissioner added additional analysis and rationale to support the decision to exclude the expert reports, and he even stated, "exclusion of evidence is an allowable sanction under the rules when a party establishes prejudice, as defendants did in this case." (App. 65). The Commissioner specifically analyzed the applicable Iowa Supreme Court cases that guide whether expert reports should be excluded. (App. 65). The Commissioner's conclusions were based upon the expert reports being authored by non-treating providers, the reports were first exchanged roughly two weeks before hearing, Mr. Karrow was not identified as an expert until one month before hearing, and Mr. Karrow's report contained opinion(s) not shared by any other expert. (App. 65). As such, "[D]efendants proved unfair surprise and prejudice by the untimely exchange of these reports." (App. 65).

The Court of Appeals erred in reaching its conclusion in this case in

part by relying upon the other sanctions that could have been imposed by the Deputy, including the offer to hold the record open for rebuttal, which was actually a proposal made by opposing counsel in this case. (Iowa Ct. App. Opinion, p. 9; App. 103). The Court of Appeals stated that "Serta could have taken advantage of the offer to hold the record open for rebuttal . . . which the commissioner noted is 'the preferred remedy employed by deputy commissioners in similar circumstances.'" (Iowa Ct. App. Opinion, p. 9) (quoting *Bos. v. Climate Eng'rs, Inc.*, No. 17-0159, 2017 WL 3027162, at *4 (Iowa Ct. App. Nov. 22, 2017)). The court's reliance on other potential sanctions or remedies in lieu of excluding the reports should not have been considered by the court when determining if Serta was prejudiced by the late disclosure of the reports. The only inquiry should be whether Serta was prejudiced by the failure of Hagen to timely certify, disclose, and produce the expert reports of Dr. Kuhnlein and Mr. Karrow under the rules as written. Under such rules, Serta would have had no opportunity to secure rebuttal reports in such close proximity to hearing, and the Deputy's offer to allow rebuttal reports outside the timelines prescribed by the rules should have no bearing on the Court's analysis in this case.

However, even this offered alternative remedy is unfairly prejudicial to Serta, as they are required to incur additional costs and expenses to

respond to such untimely reports produced by Hagen. (App. 103). Serta should not be required to expend additional sums of money in order to respond to untimely reports after such blatant disregard for the rules dictating certification and disclosure of experts and production of their reports. To do so is inherently prejudicial to Serta. (App. 104-05).

As the arbitration decision sets forth, Serta specifically objected and argued that the untimely expert reports were prejudicial to defendants, and therefore, the Deputy took into consideration the unfairly prejudicial standard when reaching his conclusion. (App. 29, 104-05). The Commissioner also made a specific finding that "defendants proved unfair surprise and prejudice by the untimely exchange of these reports." (App. 65). However, even if the Deputy did not make "a specific finding of fact concerning the possibility of unfair prejudice[,]" the court, in line with it's prior holding in *Plagmann*, must "infer that such a finding was implicit in the deputy's decision to sustained [Serta's] objection and to exclude the exhibit[s]." 2011 WL 6673544, at *6 (citing *Hubby v. State*, 331 N.W.2d 690, 695 (Iowa 1983) ("[W]e assume as fact an unstated finding that is necessary to support the judgment against plaintiff.")). The court in *Plagmann* did not require the objecting party to explain with any further specificity how it would have been unfairly prejudiced by the admission of

the untimely expert report, and instead, the court granted deference to the deputy's decision to exclude the report based upon his discretion. *Id.* To hold in this case that Serta had to provide specific instances of unfair prejudice is directly contrary to the *Plagmann* decision and leads to inconsistent requirements under the rules. Additionally, the Court of Appeals' decision in this case would severely limit the discretion and authority of the agency to determine the appropriate sanctions to administer for failure to timely certify and produce expert reports, which is a result that should not be encouraged.

Furthermore, the rules violations by Hagen in this case are more extensive and severe than what occurred in *Plagmann*, which further justifies exclusion of Hagen's reports. In *Plagmann*, both parties had timely certified and produced expert reports within the applicable deadlines. 2011 WL 6673544, at *1-2. Thereafter, Square D produced a rebuttal report from their expert, who had already authored a timely report, less than two weeks prior to hearing. 2011 WL 6673544, at *5. This new report addressed additional information relied upon by Plagmann's expert, which included medical information that Square D did not receive until shortly before hearing. 2011 WL 6673544, at *2, *5. There was simply one violation by Square D, the timeliness of the production of the expert report.

In the case at issue, Hagen had multiple violations of the rules set forth in Iowa Administrative Code rule 876-4.19(3). These violations included: (1) failure to certify and identify Hagen's experts; and (2) failure to complete and serve expert reports at least 30 days before hearing. Iowa Admin. Code r. 876-4.19(3)(b), (c). With a hearing date of September 25, 2020, Hagen was required to certify experts by May 28, 2020, and she was required to produce her expert reports by August 26, 2020. Neither of these occurred.

Although Hagen requested an independent medical examination under Iowa Code section 85.39 and obtained approval from Serta, this did not alleviate Hagen's requirement to provide the required expert certifications. The purpose of the certification is to provide the opposing party with information regarding the expert's "subject matter of expertise, qualifications, and a summary of the expert's opinions." Iowa Admin. Code r. 876-4.19(3)(b). This additional information allows the opposing party to determine what additional expert evidence may be required on their part, and failure to provide this information was inherently prejudicial to Serta. Serta had had no opportunity to evaluate what type(s) of expert opinions Hagen would be obtaining in order to secure thorough and appropriate responsive expert opinions, including ensuring the qualifications and credentials of

Serta's experts were similar to those of Hagen's experts, and ensuring all subject areas addressed by Hagen's experts were similarly addressed by Serta's experts.

Hagen had ample opportunity to secure and produce expert reports within the prescribed rules. Not only did Dr. Gorsche place claimant at maximum medical improvement on July 22, 2019, the treating physician placed claimant at maximum medical improvement on August 27, 2019. (App. 186, 123). Hagen requested approval for an independent medical examination on November 5, 2019, and Serta agreed to such examination on November 7, 2019. (App. 26). Hagen had 204 days or 29 weeks and 1 day to determine who its 85.39 expert would be in order to properly identify and certify its expert. Clearly Hagen knew who her 85.39 expert was going to be, as the examination with Dr. Kuhnlein was originally scheduled for May 19, 2020, prior to the expert certification and disclosure deadline. (App. 26). There is no reasonable justification for Hagen's failure to comply with the certification and disclosure deadline, and there is certainly no reasonable justification for Hagen's failure to identify and/or produce a report within the 30-day window before hearing. This is especially true when Hagen opted to finally identify Mr. Karrow as a potential vocational expert on August 19, 2020, through supplemental discovery responses, but yet again,

Hagen still did not disclose Dr. Kuhnlein's identification as an expert.

The tactic used by Hagen to disregard the rules and submit multiple untimely expert reports, despite having nearly 10 months to secure an expert report per the agreement of defendants, cannot be a method encouraged by the courts. There is no question that Serta was unfairly prejudiced by Hagen's tactics, as Serta was in essence preparing their defense in the dark and hoping that they selected appropriate experts with similar qualifications and areas of expertise, and that they anticipated all subject areas that Hagen's experts would address. Hagen asserts that Serta knew expert reports were coming in late-August 2020; however, there is a difference between knowing reports are coming and knowing who is issuing the reports, their qualifications, and the subject matter areas that will be addressed in such reports. In the latter, Serta would have been able to properly evaluate and determine what evidence was required on their part to properly defend this claim. In the first, which is what occurred, Serta had to wait until actual production of the reports to understand what was being addressed in these reports. This is prejudicial to Serta, as Serta had properly identified its experts to Hagen, allowing Hagen to have a leg-up in securing similarly qualified and skilled experts compared to Serta's experts.

As the Agency has previously stated,

> When [discovery rules and assignment order] are blatantly ignored, as occurred in this case, a sanction of exclusion is warranted. A party cannot wait until after the case preparation and evidence disclosure deadlines have expired to generate entirely new evidence and then have it received at hearing with only a few days' notice to the opponent. If that conduct is allowed, all rules governing discovery and case preparation may as well be repealed. Normally the standard is one of unfair prejudice to the opponent but in this case the violation is so blatant that it was sanctionable under rule 876 IAC 4.36 by the deputy closing the record to the untimely exhibits. This case is very different from a party asking a treating physician who was known and readily accessible to both parties a question that was essential to the case but had not previously been asked by either party.

Ramirez v. Riverview Care Center, File Nos. 1243830, 1253740, 1253741, 1253742, 1253743, 2002 WL 32125248 (Iowa Workers' Comp. Com'n Aug. 2, 2002) (citing *Schoenfeld v. FDL Foods, Inc.*, 560 N.W.2d 595 (Iowa Ct. App. 1997)). This is exactly the type of situation that occurred in this case. The Deputy was unquestionably justified in excluding Hagen's untimely reports, and this was not an abuse of discretion given the facts of this case.

The Commissioner, in the appeal decision, went even further to provide further explanation and analysis in support of the decision to exclude Hagen's untimely reports. (App. 64-66). The Commissioner sufficiently set forth justifiable reasons why exclusion was a proper sanction in this case. (App. 64-66). He explains that the reports were not authored by

treating physicians and not exchanged for the first time until approximately two weeks before hearing, which was a violation of IAC rule 4.19(3). (App. 65). He further explains that "Mr Karrow's report concluded that claimant was permanently and total disabled, which was an opinion not shared by any other experts in this case." (App. 65). Due to this combination of facts, the Commissioner "f[ound] that defendants proved unfair surprise and prejudice by the untimely exchange of these reports." (App. 65). "These rulings are discretionary." *Trade Professionals, Inc. v. Shriver*, 661 N.W.2d 119, 123 (Iowa 2003).

In order for the Commissioner's decision to be reversed, "the [Commissioner's] discretion [must be] exercised to a clearly unreasonable degree." *See Pexa v. Auto Owners Ins. Co.*, 686 N.W.2d 150, 160 (Iowa 2004). When considering whether an abuse of discretion has occurred, the analysis requires deference to the Commissioner's resolution and imposition of sanctions. *See McMahon*, 522 N.W.2d 51. In analyzing the reasoning and rationale set forth by the Deputy and Commissioner in this case, there is more than substantial evidence supporting the sanction of exclusion of the expert reports. The conclusions of the Deputy and Commissioner cannot be said to be *clearly* unreasonable, irrational, or *clearly* against reason and evidence. The Deputy and Commissioner set forth specific reasons why

admission of the evidence would unfairly prejudice Serta, and significant deference must be given to the reasons relied upon by the Deputy and Commissioner. The District Court and then Court of Appeals erred by not granting deference to the Agency's conclusions and in severely limiting the scope of the Agency's discretion. This is evident by the Court of Appeals' opinion failing to even mention the deference that is afforded to the Agency's determinations. (Opinion, pp. 7-12).

Instead, the majority opinion seems to suggest a different standard of review, correction of errors at law, must apply when evaluating whether Serta met their burden to show unfair prejudice, despite acknowledging that this standard was not applied by the Supreme Court in *Schoenfeld* or *Trade Professionals*, "or by this court in reliance on those cases." (Opinion, p. 11, n. 4). Based upon this acknowledgement, there is no basis for this Court to adopt any alternate standard of review when analyzing whether a Commissioner's decision to exclude evidence under Iowa Administrative Code rule 876-4.19(3)(e) was proper. The abuse of discretion standard has been consistently applied by this Court, and there is no authority to impose any other standard of review. This remains true even after the unfair prejudice standard was implemented in rule 876-4.19(3)(e). *See Bos*, 2017 WL 6027162. As the *Bos* court stated, "Rulings on a report's admissibility

are within the discretion of the agency. . . . We may reverse if we find an abuse of discretion." *Id.* at *4 (citing *Trade Professionals,* 661 N.W.2d at 123**Error! Bookmark not defined.**). The *Bos* court continued by stating, "'[A]buse 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.'" *Id.* (quoting *Schoenfeld,* 560 N.W.2d at 598). Finally, the court went on to analyze the Commissioner's decision to allow an untimely expert report under the abuse of discretion standard, including making a specific finding that admitting the report was not unfairly prejudicial. *Id.* There was no standard of review implemented by the court other than the abuse of discretion standard. However, even if an alternate standard of review was to be used, the Commissioner's finding of unfair prejudice was a proper application of the law to the facts and was supported by substantial evidence in the record. Therefore, under any applicable standard of review, the Commissioner's conclusions should not have been reversed.

The dissenting opinion of Judge Greer is the only portion of the opinion that actually discusses the deferential standard of review to be given to Agency determinations. (Opinion, p. 14). As the dissent correctly explains, "the commissioner outlined the appropriate standard and

recognized that unfair prejudice was a prerequisite to the exclusion." (Opinion, p. 13). The dissent goes on to explain that "[k]nowing a report is coming as opposed to having the expert reports available so that trial preparation can be meaningful are two totally different considerations." (Opinion, p. 13). Because of these circumstances, the dissent explains that "the commissioner's choice to uphold the deadlines imposed rather than employing a work-around [would not] be an abuse of discretion" or unreasonable. (Opinion, pp. 13-14). Finally, the dissent noted concern for the result that the majority opinion would stand for: "a map to ignore deadlines and navigate around the rules." (Opinion, p. 14). The dissenting opinion is in line with the prior precedent of this court and the Court of Appeals and appropriately analyzed the abuse of discretion standard, determining the decision to exclude the expert reports was proper given the facts of this case. (Opinion, pp. 13-14).

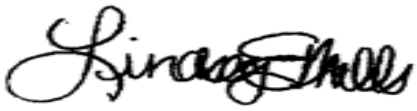
The Agency's discretion in applying sanctions for failure to comply with applicable evidentiary deadlines should not be so limited as urged by the majority's opinion. If the Agency is not given discretion to apply the standards set forth in the rules, it will inevitably become the pattern of parties to not follow the rules knowing there will be no major consequences. As such, this Court must reverse the decision of the District Court and Court

of Appeals, and reaffirm the Commissioner's decision to exclude Hagen's untimely expert reports.

CONCLUSION

The Court of Appeals erred in affirming the District Court's reversal of the Commissioner's decision to exclude Hagen's untimely reports. The District Court's reversal and the Court of Appeals' decision is in direct conflict with the Court of Appeals' decision in *Square D Co. v. Plagmann*, and therefore warrants reversal. Based upon the arguments set forth in this Application for Further Review, the Court of Appeals' decision in this case must be reversed and the Commissioner's decision to exclude Hagen's untimely expert reports must be reinstated and affirmed.

SMITH MILLS LAW P.C.



Lindsey E. Mills AT0010854
1225 Jordan Creek Parkway, Suite 108
West Des Moines, IA 52066
Telephone: (515) 223-9920
Fax: (515) 262-1384
Email: lmills@smithmillslaw.com
ATTORNEY FOR APPELLANTS

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 18th day of April, 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) and 6.1103(4) because it contains 4,598 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_____