IN THE SUPREME COURT OF IOWA

No.: 22-2081

Polk County No. CVCV 063846

LON TWEETEN d/b/a TWEETEN FARMS and GRINNELL MUTUAL,
Petitioners-Appellants,

vs.

COREY TWEETEN,
Respondent-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
THE HON. DAVID NELMARK, JUDGE

PETITIONERS-APPELLANTS' FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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ROUTING STATEMENT

Pursuant to *Iowa R. App. P.* 6.1101(2), this case should be retained by the Iowa Supreme Court. This case involves the interpretation of the statute of limitations under *Iowa Code* § 85.26 in light of 2017 statutory amendments. Further, this case would require interpretation of *Iowa Code* § 85.35 and the final bar provisions as amended in 2005. Finally, this case involves interpretation of 2017 amendments to Iowa Code § 85.39. As the case involves interpretation of statutory amendments, retention by the Iowa Supreme Court would be appropriate to address the substantive questions of the interpretation law.

STATEMENT OF THE CASE

Corey Tweeten (hereinafter "Claimant") filed a Petition with the Iowa Workers' Compensation Commissioner on January 21, 2020, alleging an injury on February 1, 2018, to his right upper extremity. (January 21, 2020, Petition, App. p. 5). The case proceeded on to hearing on March 10, 2021, before Deputy Workers' Compensation Commissioner James F. Christenson. On September 17, 2021 an Arbitration Decision was filed finding that the Claimant suffered from right elbow epicondylitis and a deltoid tear arising out of and in the course of his employment, finding that by virtue of the discovery rule the Claimant's claim for benefits was not time barred by *Iowa Code* § 85.26, awarding the Claimant temporary total

disability benefits at a rate of $217.99 per week, awarding permanency benefits for 5% to the right upper extremity at a rate of $217.99 per week, awarding the Claimant medical expenses and the costs associated with Dr. Sassman's examination. (September 17, 2021, Arbitration Decision, App. p. 18-31). On September 30, 2021, the Employer and its Insurance Carrier filed a Motion for Rehearing asserting that there was an error in applying the weekly rate at the statewide minimum for temporary total disability benefits, and that an issue was not addressed in the Arbitration Decision as to whether the Claimant's claim would be extinguished by virtue of the compromise settlement filed between the Claimant and the Second Injury Fund. (September 30, 2021, Motion for Rehearing, App. p. 32-36). On October 13, 2021, a Ruling on the Motion for Rehearing was issued finding that the Employer and its Insurance Carrier were correct that the temporary total or healing period benefits should be at a rate of $142.22 per week but finding that the Claimant's claim was not barred by the compromise settlement between the Claimant and the Second Injury Fund. (October 13, 2021, Ruling on Motion for Rehearing, App. p. 38-42). The Employer and its Insurance Carrier filed a Notice of Appeal to the Iowa Workers' Compensation Commissioner on October 21, 2021. (October 21, 2021, Notice of Appeal, App. p. 43-44). On May 20, 2022, the Workers' Compensation Commissioner affirmed the Arbitration Decision in pertinent part, finding that the Claimant suffered right lateral epicondylitis and a

right deltoid tear due to his alleged injury, affirming that the Claimant was entitled to healing period benefits at a rate of $142.22, affirming the 5% award of permanent impairment to the right upper extremity at a rate of $217.99, affirming the award of past medical expenses, and the award of Dr. Sassman's examination. (May 20, 2022, Appeal Decision, App. p. 45-54). The Workers' Compensation Commissioner also affirmed the findings that the compromise settlement entered into with the Second Injury Fund did not deprive the Agency of subject matter jurisdiction but offered substituted analysis. (May 20, 2022, Appeal Decision, App. p. 45-54).

The Employer and its Insurance Carrier filed a Petition for Judicial Review with the Polk County District Court on June 13, 2022, and shortly thereafter on June 17, 2022, filed an Amended Petition for Judicial Review. (June 13, 2022, Petition for Judicial Review, App. 55-57; June 17, 2022, Amended Petition for Judicial Review, App. p. 58-60). The Polk County District Court issued a ruling on Petition for Judicial Review on November 30, 2022. (November 30, 2022, Ruling on Petition for Judicial Review, App. p. 61-88). The Polk County District Court affirmed the Workers' Compensation Commissioner's finding that the claimant sustained a deltoid tear and the award of permanency benefits. (November 30, 2022, Ruling on Petition for Judicial Review, App. p. 61). The Polk County District Court did find that the common law discovery rule would not be applicable

in light of 2017 statutory amendments to *Iowa Code* § 85.26 but separated the claim into two medical components with only the original epicondylitis being barred by the statute of limitations. (November 30, 2020, Ruling on Petition for Judicial Review, App. p. 61-88). The Polk County District Court found that the compromise settlement would not bar the claims against the Employer and its Insurance Carrier and affirmed the Agency decision on alternative statutory interpretation and grounds. (November 30, 2022, Ruling on Petition for Judicial Review, App. p. 61-88). The Polk County District Court reversed part of the award of medical expenses and affirmed the award of Dr. Sassman's independent medical examination charges. (November 30, 2022, Ruling on Petition for Judicial Review, App. p. 61-88) The Polk County District Court reversed the award of healing period benefits. (November 30, 2022, Ruling on Petition for Judicial Review, App. p. 61-88). The Employer and its Insurance Carrier filed a Notice of Appeal to the Iowa Supreme Court on December 21, 2022 (December 21, 2022, Notice of Appeal, App. p. 89-90).

STATEMENT OF FACTS

The Claimant works on a family farm and testified that in July of 2017 he noticed symptoms in his right arm. (Hrg. Tr. p. 26 lines 5-22, App. p. 165; Ex. H, depo p. 45, lines 1-16, App. p. 145). The Claimant described wrestling a large

diameter hose while cleaning out a grain bin at work. (Tr. p. 56, lines 2-25, App. p. 172). Lon Tweeten, Claimant's Employer and father, testified that he was working with his son on the Charleson farm on July 25, 2017, and at that time noticed that his son was injured. (Tr. pp. 66-67, lines 20-10, App. p. 176-177). Lon Tweeten testified that he saw his son get hurt. (Tr. p. 67, lines 3-10, App. p. 177).

Lon Tweeten was very interested and concerned about his son's physical condition and knows of no other injuries than the incident in July of 2017. (Tr. pp. 75-77, lines 12-6, App. p. 179-181). The Claimant admitted that his pain in his right arm has been present since the incident at the Charleson farm on July 25, 2017. (Tr. p. 57, lines 1-23, App. p. 173). Lon Tweeten has confirmed that his son's arm has never been the same since the incident at the Charleson farm. (Tr. p. 67, lines 11-22, App. p. 177). Lon Tweeten testified that since the July 2017 injury, the Claimant has had symptoms in the right arm which have affected his work from the date of injury in 2017 all the way to the present time. (Tr. pp. 67-68, lines 11-17, App. p. 177-178).

The Claimant has admitted that his right arm has never been the same since the incident at the Charleson farm. (Tr. p. 57, lines 7-23, App. p. 173). The Claimant testified that in 2017 the symptoms in his arm were so limiting that they were impacting what he could do on the family farm. (Tr. p. 58, lines 3-22, App.

p. 174). The Claimant testified that his condition impacted his ability to work around the farm to the point where he asked his father not pay him for a period of time. (Tr. p. 58, lines 3-22, App. p. 174; Ex. H, Depo. p. 15-16, lines 1-23, App. p. 144). The Claimant stated that, if the work was not getting done, he was not really earning those wages. (Tr. p. 45, lines 5-18, App. 168; Tr. p. 48, lines 2-9, App. 169; Ex. G, p. 58, App. p. 142). The Claimant believed from the very beginning that the symptoms in his right arm were due to the incident on the Charleson farm as they could not be related to any other activity. (Tr. p. 57, lines 16-20, App. p. 173). The Claimant has never been paid any workers' compensation benefits relative to his alleged injury. (Tr. p. 59, lines 17-19, App. p. 175).

On August 14, 2017 the Claimant was evaluated by a physician's assistant for right elbow pain over the previous three weeks. (Jt. Ex. 2, p. 6, App. p. 91). The Claimant was given an elbow strap and told to ice his elbow. (Jt. Ex. 2, p. 6, App. p. 91). The Claimant followed up with a physician's assistant on January 3, 2018, with a history that his tennis elbow had not improved. (Jt. Ex. 2, p. 8, App. p. 92). The Claimant was assessed as having right lateral epicondylitis and referred to physical therapy. (Jt. Ex. 2, p. 8, App. p. 92).

The Claimant testified that during the timeframe from July 2017 up until April 2018 his pain expanded from his elbow up his arm. (Tr. p. 28, lines 4-18,

App. p. 166). The Claimant was evaluated on April 13, 2018, for elbow pain. (Jt. Ex. 2, pp. 11-12, App. p. 94-95). The Claimant also had some pain in the area of his deltoid. (Jt. Ex. 2, pp. 11-12, App. p. 94-95).

The Claimant was evaluated on May 11, 2018 with continued pain in the area of his deltoid. (Jt. Ex. 2, pp. 13-14, App. p. 96-97). It was recommended that the Claimant have an MRI of his right shoulder. (Jt. Ex. 2, pp. 13-14, App. p. 96-97). On May 22, 2018, the Claimant underwent an MRI of the right shoulder, which was read as showing a subcentimeter cyst adjacent to the labrum. (Jt. Ex. 9, pp. 74-75, App. p. 128-129).

The Claimant was evaluated by Dr. Warme on June 1, 2018 for right arm and shoulder pain. (Jt. Ex. 3, p. 19, App. p. 99). Lon Tweeten testified that it was at this appointment with Dr. Warme that he had asked about the Claimant's medical bills. (Tr. p. 15, lines 12-15, App. p. 163). The Claimant testified that since August of 2017 he had been submitting all of his medical bills to his health insurance through Tweeten Farms. (Tr. p. 54, lines 12-25, App. p. 170). Health insurance was not paying toward Claimant's bills, and they had begun to accumulate. (Tr. p. 54, lines 12-25, App. p. 170).

An MRI of the right humerus showed a partial thickness tear at the insertion of the deltoid. (Jt. Ex. 9, p. 78, App. p. 130). The Claimant returned to Dr. Warme on June 12, 2018, and it was noted that the MRI showed Claimant had a

deltoid insertion tear. (Jt. Ex. 3, p. 20, App. p. 100). The Claimant elected to proceed with the surgical repair. (Jt. Ex. 3, p. 20, App. p. 100). It was after the Claimant saw Dr. Warme, and had elected to have surgery on June 18, 2018, that Lon Tweeten first turned in the claim as workers' compensation. (Tr. pp. 54-55, lines 3-11, App. p. 170-171). The Claimant did not have his own workers' compensation coverage. (Tr. pp. 55-56, lines 13-1, App. p. 171-172).

On June 18, 2018, the Claimant had a surgical repair of his right distal deltoid. (Jt. Ex. 3, p. 21, App. p. 101).

The Claimant received his usual $2,000.00 in wages per month from Tweeten Farms on June 25, 2018, July 5, 2018, October 27, 2018, and November 3, 2018. (Ex. G, p. 58, App. p. 142).

The Claimant returned to Dr. Warme on October 16, 2018, who opined that the Claimant had likely overcompensated for his tennis elbow and had some tearing at the deltoid insertion which was made worse with use. (Jt. Ex. 3, p. 28, App. p. 103).

In an October 21, 2020, letter Dr. Aviles states that it was reasonable to believe that the Claimant's injury of July 25, 2017, caused the arm problems based on Claimant and Lon Tweeten's adamant assertion that Claimant's arm symptoms began at that time. (Ex. B, p. 10, App. p. 141).

On October 26, 2020, the Claimant underwent an EMG which showed no evidence of carpal tunnel syndrome. (Jt. Ex. 9, pp. 85-86, App. p. 131-132). The Claimant has also been evaluated by Dr. Camp at the Mayo Clinic. (Jt. Ex. 7, pp. 56-57, App. p. 117-118). The Claimant was recommended to be evaluated for thoracic outlet syndrome at the Mayo Clinic. (Jt. Ex. 7, pp. 56-57, App. p. 117-118). The Claimant was evaluated by Dr. Shields at the Mayo Clinic who found that the Claimant did not have symptoms consistent with thoracic outlet syndrome. (Jt. Ex. 7, p. 57, App. p. 118). A cervical MRI was recommended. (Jt. Ex. 7, p. 57, App. p. 118).

The Claimant had a cervical MRI which showed a minimal disc bulge at C3-4 and a possible mild impingement of the nerve root at C3-4. (Jt. Ex. 9, p. 87, App. p. 133). The Claimant was subsequently evaluated by Dr. Stitt on January 12, 2021. (Jt. Ex. 6, pp. 42-46, App. p. 104-108). Dr. Stitt recommended a referral to the pain clinic at the Mayo Clinic. (Jt. Ex. 6, pp. 42-46, App. p. 104-108). The Claimant was evaluated by the pain clinic at the Mayo Clinic, and a subscapularis injection was recommended. (Jt. Ex. 6, pp. 48-49, App. p. 109-110).

STANDARD OF REVIEW AS TO ALL ISSUES

Judicial Review of an administrative agency is governed by *Iowa Code* Chapter 17A. An agency decision shall be reversed or modified if the agency

decision is unsupported by substantial evidence, affected by error of law or unreasonable, arbitrary, or capricious. *Iowa Code* § 17A.19(8). To the extent a claim of error rests on statutory interpretation, the Court's review is for correction of errors of law. *Wilson v. IBP, Inc.*, 589 N.W.2d 729, 730 (Iowa 1999). The Legislature has not delegated any special power to the Workers' Compensation Commissioner regarding statutory interpretation of *Iowa Code* Chapter 85, and as such, any interpretation of the statute will be reviewed for errors at law. *Waldinger Corp. v. Mettler, Inc.,* 817 N.W.2d 1, 4-5 (Iowa 2012). The Commissioner must state reasons for rejecting any evidence and detail the path to the decision. *Murillo v. Black Hawk Foundry*, 571 N.W.2d 16, 20 (Iowa 1997). Without this explanation, Appellate Courts have no way to determine whether the Commissioner acted arbitrarily or misapplied the law. *Id. Iowa Code* § 17A.19(10) provides in pertinent part:

> The Court may affirm the agency action or remand to the agency for further proceedings. The Court shall reverse, modify, or grant other appropriate relief from agency action, equitable or legal and including declaratory relief, if it determines that the substantial rights of the person seeking judicial relief have been prejudiced because the agency action is any of the following:
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> f. Based upon a determination of fact clearly vested by a provision of law in the discretion of the agency that is not supported by substantial evidence in the record before the Court when that record is viewed as a whole. For purposes of this paragraph, the following terms have the following meanings:

(1) "Substantial evidence" means the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance.

The reviewing Court may disregard the agency's conclusions if it decides, after reviewing the entire record, the direct and circumstantial evidence is so compelling that a reasonable mind would find the evidence inadequate to reach the same conclusions. *Ringland Johnson, Inc. v. Hunecke,* 585 N.W.2d 269, 272 (Iowa 1998). In terms of issues of substantial evidence, the record before the agency must be viewed as a whole to determine if there is substantial evidence to support the Workers' Compensation Commissioner's decision. *2800 Corp. v. Fernandez*, 528 N.W.2d 124, 126 (Iowa 1995). The Workers' Compensation Commissioner's application of law to fact is given a review that is a less deferential than that under substantial evidence and can reveal that the agency decision is affected by other grounds for error. *Meyer v. IBP, Inc.,* 710 N.W.2d 213, 218-219 (Iowa 2006) (citing *Iowa Code* § 17A.19(10)(c), (i), (j), (m)). The Court will reverse the application of law to fact if it is "irrational, illogical, or wholly unjustifiable". *Neal v. Annette Holdings, Inc.,* 814 N.W.2d 493, 518 (Iowa 2012) (quoting *Lakeside Casino v. Blue*, 743 N.W.2d 169, 173 (Iowa 2007)).

BRIEF POINT I

IT WAS ERROR TO FIND THAT THE CLAIMANT'S CLAIM FOR BENEFITS WAS NOT EXTINGUISHED BY THE COMPROMISE SETTLEMENT ENTERED INTO BETWEEN THE CLAIMANT AND THE SECOND INJURY FUND WHICH DEPRIVED THE WORKERS' COMPENSATION COMMISSIONER OF SUBJECT MATTER JURISDICTION OVER THE CLAIM

Preservation of Error: Error was preserved by the Appellants-Petitioners on this issue by filing a Petition for Judicial Review and briefing the issue to the District Court. The Petitioners sustained an adverse ruling by the Polk County District Court in the Ruling on Petition for Judicial Review filed on November 30, 2022 (November 30, 2022, Ruling on Petition for Judicial Review, App. p. 61-88)

Argument

The Claimant filed a Notice of Intent to Settle with the Second Injury Fund on February 15, 2021. The settlement documents were not submitted for approval until much later. On April 20, 2021, the Claimant and the Second Injury Fund received a Show Cause Order due to the delay in submitting the settlement in violation of Commissioner Rule. The compromise settlement between the Claimant and the Second Injury Fund was approved on April 23, 2021. The Appellants in this matter raised an issue about the effect a compromise settlement had on the claim in their Post-Hearing Brief filed, after the Notice of Intent was filed but, before the actual settlement was approved. At the time of the hearing

there would have been no approved compromise settlement, but the settlement ended up being approved before the Arbitration Decision was issued on September 17, 2021.

After the Arbitration Decision was filed, this issue was submitted in a Motion for Rehearing, and the Deputy Workers' Compensation Commissioner found that the compromise settlement would not bar the Claimant's claim or deprive the Agency of subject matter jurisdiction. The Workers' Compensation Commissioner affirmed the result with some additional analysis. This was an error of law, and will be reviewed for errors of law.

The Workers' Compensation Commissioner's finding that, merely because this case deals with a workplace injury, there is subject matter jurisdiction is false as a matter of law. Subject matter jurisdiction "is the power to hear and determine cases of the general class to which the proceedings belong." *Heartland Express v. Gardner*, 675 N.W.2d 259, 262 (Iowa 2003) (quoting *Shirley v. Pothast*, 508 N.W.2d 712, 714 (Iowa 1993). The Iowa Workers' Compensation Commissioner has subject matter jurisdiction over workers' compensation claims subject to any further circumscription by the legislature. *Id.* If a claim for some reason would fall outside of the Iowa Workers' Compensation Act, the Iowa Workers' Compensation Commissioner no longer would have subject matter jurisdiction over said claim even though it involved a work injury. An example of one such

circumscription is *Iowa Code* § 85.71 dealing with injuries outside the state of Iowa. *Id.* at 262-263.

The Court had a similar discussion in terms of the agency subject matter jurisdiction dealing with claims involving seamen under the Jones Act, and whether claims relative to riverboat casino employees would be cognizable under the subject matter jurisdiction of the Iowa Workers' Compensation Commissioner. *See Generally Harvey's Casino v. Isenhour*, 713 N.W.2d 247 (Iowa 2006). Such claims dealt with workplace injuries but, as the legislature had circumscribed part of the Iowa Workers' Compensation Commissioner's jurisdiction (removed from coverage under the Iowa Workers' Compensation Act certain employees that would be covered under the Jones Act), the Commissioner did not have subject matter jurisdiction over those work injuries. *Id.*

The Workers' Compensation Commissioner herein found that, merely because this case involves a workplace injury, there is subject matter jurisdiction. The Workers' Compensation Commissioner ignored the above holdings, illustrative of the limits of the agency subject matter jurisdiction.

The Commissioner only would have subject matter jurisdiction over a claim that would be cognizable under the Iowa Workers' Compensation Act. This is owing to the nature of the Commissioner's jurisdiction in that it is specifically

statutorily conferred by the legislature in the Act. Any claim that would fall outside of the Act, is outside the subject matter jurisdiction of the Commissioner.

The Commissioner sidestepped the jurisdiction issue by stating the issue deals merely with the power to "hear" a particular case, not his subject matter jurisdiction, and that Appellants had somehow waived the issue. However, this is the same argument and reasoning rejected by the Iowa Supreme Court in *Heartland Express v. Gardner*. *See Generally Heartland Express v. Gardner*, 675 N.W.2d 259 (Iowa 2003).

The District Court agreed with the Appellants that the issue at hand was one of subject matter jurisdiction and could be raised at any time. However, the District Court then goes on to distinguish the *Gardner* and *Isenhouer* cases. Appellants cited these cases as illustrative of the limits of the subject matter jurisdiction of the Iowa Workers' Compensation Commissioner. This is due to the fact that the Commissioner rested his holding upon the notion that the Compromise Settlement did not deprive him of subject matter jurisdiction over this claim, and that the issue was waived by not raising it at the hearing itself.

Regardless, it is clear that the jurisdictional problem was raised at the earliest opportunity, though an issue of subject matter jurisdiction may be raised at any time, including on appeal. *Shirley v. Pothast*, 508 N.W.2d 712, 714 (Iowa 1993). The Claimant filed a Notice of Intent to Settle on February 15, 2021.

While the Claimant filed a Notice of Intent, the actual settlement had not been submitted or approved. So while the Employer and its Insurance Carrier may have been aware that the Claimant had an intention to settle, the claim had not actually been settled at that point. This remained the case at the time of the hearing, and even at the time the post-hearing briefs were filed in this case, though the Employer and its Insurance Carrier noted the potential issue in the post-hearing brief. The Claimant received a Show Cause Order on April 20, 2021, and the compromise settlement between the Claimant and the Second Injury Fund was finally submitted thereafter. The settlement was actually approved on April 23, 2021. The Employer and its Insurance Carrier had brought up this issue in the post-hearing brief, but the Arbitration Decision that was later issued did not address the issue. This resulted in the Motion for Rehearing that was filed. It is clear that the Employer and its Insurance Carrier in this case brought up the issue at the earliest opportunity. This was the earliest opportunity after the settlement was actually approved.

The District Court also seems to have agreed with Appellants that, as the settlement itself had not been approved at the time of the hearing, the issue was actually raised at the earliest opportunity anyway. Thus, the District Court correctly reversed the agency determination and interpretation of law that a settlement under *Iowa Code* § 85.35 does not deprive the agency of subject matter

jurisdiction, but then goes on to interpret the final bar provisions of *Iowa Code* § 85.35 on a more narrow basis to allow a party to carve out parts of a claim from the effects of the settlement. The District Court, like the Claimant, appears to believe that the final bar provisions should be read in the narrowest sense, but this is contrary to all of the Iowa Supreme Court precedent that has interpreted *Iowa Code* § 85.35 and the final bar provisions finding a broad and wide-ranging effect. The District Court is incorrect in the interpretation of Iowa law in this regard.

The Iowa Supreme Court has held that a settlement under *Iowa Code* § 85.35 terminates the jurisdiction of the Iowa Workers' Compensation Commissioner. *White v. Northwestern Bell Telephone Co.*, 514 N.W.2d 70, 74 (Iowa 1994). Nothing in an agreement between the parties can work to revive that jurisdiction once it is terminated. *Id.* at 75 (citing *State Ex. Rel. Iowa St. Hwy. Comm'n v. Read*, 228 N.W.2d 199, 202 (Iowa 1975)). A compromise settlement pursuant to *Iowa Code* § 85.35 would end the jurisdiction of the Workers' Compensation Commissioner, and once the subject matter jurisdiction is terminated, it cannot be revived by an agreement of the parties or otherwise. *Id.*

The language used by the Iowa Supreme Court is clear that the termination of jurisdiction contemplated by *Iowa Code* § 85.35 is a matter of subject matter jurisdiction. Iowa law is further clear that subject matter jurisdiction must be established as a threshold matter and must be present as an inflexible and

immutable principle for a case to proceed. *Heartland Express v. Gardner*, 675 N.W.2d at 265-266. As subject matter jurisdiction goes to the core of judicial power, it must exist in light of the law pertaining to subject matter jurisdiction at the time that the judicial power is going to be exercised. *Id.*

The Court has also held that a party may not retain rights under the Iowa Workers' Compensation Act via language included in a settlement approved under *Iowa Code* § 85.35. *United Fire & Casualty Co. v. St. Paul Fire & Marine Insurance Co.*, 677 N.W.2d 755 (Iowa 2004) (citing *Bankers Standard Insurance Co. v. Stanley*, 661 N.W.2d 178 (Iowa 2003)). Specifically, the Iowa Supreme Court has made clear that a party may not reserve rights under the Iowa Workers' Compensation Act by virtue of the final bar provisions contained in *Iowa Code* § 85.35(9). *Id.* at 760-761.

In *United Fire & Casualty Co.*, the Court stated as follows:

> St. Paul also argues *Banker's Standard* is distinguishable from the present case, because the language in the compromise special case settlement agreement preserved St. Paul's right to proceed against United Fire under section 85.21. We do not find this argument persuasive. The approval of the compromise special case settlement terminated the workers' compensation commissioner's jurisdiction over any claims arising out of a properly approved compromise special case settlement. *White v. Northwestern Bell Tel. Co.*, 514 N.W.2d 70, 74 (Iowa 1994). The language of the compromise special case settlement cannot revive the commissioner's jurisdiction for the 1995 injury. *Id.* at 75.

United Fire & Casualty Co. v. . St. Paul Fire & Marine Insurance Co., 677 N.W.2d at 760-761.

The Iowa Supreme Court has determined that the final bar provision of *Iowa Code* § 85.35 will prevent an insurance carrier who settled pursuant to *Iowa Code* § 85.35 from exercising its rights under *Iowa Code* § 85.21 against another carrier not party to that settlement. *United Fire & Casualty Co. v. St. Paul Fire & Marine Insurance Co.*, 677 N.W.2d at 760. Indeed, recently the Iowa Supreme Court has held that only claims that are not cognizable under the Workers' Compensation Act survive a compromise settlement approved pursuant to *Iowa Code* § 85.35 due to the final bar provision contained in Iowa Code § 85.35(9). *Terry v. Dorothy*, 950 N.W.2d 246, 249-250 (Iowa 2020).

Additionally, even the Iowa Workers' Compensation Commissioner has determined that the final bar provision will be applicable in a case involving the Second Injury Fund. *Ahn v. Key City Transport, Inc.*, File No. 5042640 (Appeal 10/8/2015). Since the holding in *Ahn*, the Iowa Supreme Court has continued to cite with approval its prior holdings in the cases cited in the foregoing. *Terry v. Dorothy*, 950 N.W.2d 246, 249 (Iowa 2020) (citing *Bankers Standard Insurance v. Stanley*, 661 N.W.2d 178, 181-182 (Iowa 2003)). While the *Ahn* decision seems to indicate that it is possible to carve out an exception to the final bar provision, that

was not at issue in the *Ahn* case. The settlement at issue in that particular case had no such language.

Examining the Supreme Court precedent cited in the foregoing, it is clear that a party cannot reserve claims under the Iowa Workers' Compensation Act in a compromise settlement. Any attempt to do so is not given any legal effect. The same result should occur when a Claimant tries to reserve a claim under the Iowa Workers' Compensation Act. There is no indication that any recent changes to *Iowa Code* § 85.35 have impacted the case law, overall analysis, and the legal effect given to the final bar provisions in *Iowa Code* § 85.35. The Agency and District Court were incorrect as a matter of law in holding to the contrary. The case law is clear that the approval of a settlement under *Iowa Code* § 85.35 deprives the agency of subject matter jurisdiction.

The District Court dismissed the holding in *Ahn* and its reasoning. The District Court went on to note that the same Iowa Workers' Compensation Commissioner who issued the appeal decision in *Ahn* also rejected the arguments in this case. However, in the instant case, the Commissioner based his decision upon a finding that the settlement in question did not deprive the agency of "subject matter jurisdiction", and the issue had been thus waived by not being brought up at the hearing. What the *Ahn* case is illustrative of is that the final bar provisions have also recently been given broad interpretation by even the Iowa

Workers' Compensation Commissioner in line with the case precedent cited previous.

The District Court upheld the award herein on interpretation of the statutory amendments in 2005 to *Iowa Code* § 85.35. The District Court read the amendment to narrow the final bar provisions, so the bar only encompassed the liability of the Second Injury Fund. It is of some note that a treatise on Iowa Workers' Compensation is of the opinion that the 2005 amendments to Iowa Code § 85.35 did not impact the previous case holdings of the Iowa Supreme Court. *Iowa Practice Series Volume* 15 § 26:4 (2022-2023).

The District Court's interpretation of the 2005 amendments finds that a workers' compensation claimant's settlement with the Fund merely compromises the claimant's claim solely against the Fund. However, this is not the case. A claimant's claim involving the Fund and settlement with the Fund ultimately involves aspects of the underlying work injury. First, the underlying work injury must be compensable to establish a second qualifying injury to trigger Fund liability. Most of the time it is not a sure thing that a Claimant will establish compensability of the underlying claim to trigger Fund liability. Secondly, Claimant's claim against the Fund is essentially for "industrial disability" for the claim. A worker cannot advance a body as a whole industrial disability claim against the Employer and its Carrier or risk, if successful, defeating the claim

against the Fund. Finally, the Fund's liability is only to the extent of industrial disability above the liability of the employer and its carrier for the underlying scheduled injury. The more successful the claimant would be in increasing the liability for the scheduled injury of the employer and its carrier, the less the Fund would owe. For all these reasons, a claimant would have reason to try to settle with the Fund prior to proceeding to hearing against the employer and its carrier on the underlying claim. Thus, it is not correct to hold that a settlement with the Fund solely relates to the Fund's liability.

Thus, it appears that the District Court is permitting parties to carve out parts of a claim as beyond the "subject matter" of the dispute that was resolved by a compromise settlement. But such is clearly contrary to all of the Iowa Supreme Court precedent on this particular issue. In the *White* case the Iowa Supreme Court found that a settlement under *Iowa Code* § 85.35 divested the Agency of jurisdiction and any ability to deal with the disputes that arose thereafter. *White v. Northwestern Bell Telephone Co.*, 514 N.W.2d 70 (Iowa 1994). The Iowa Supreme Court has determined that parties cannot reserve indemnification rights under *Iowa Code* § 85.21 due to a settlement approved under *Iowa Code* § 85.35. *United Fire & Casualty Co. v. St. Paul & Marine Insurance Co.*, 677 N.W.2d 755 (Iowa 2004). This also was the case in regard to trying to reserve rights under *Iowa Code* § 85.22 from a third-party settlement. *Bankers Standard Insurance Co.*

v. Stanley, 661 N.W.2d 178 (Iowa 2003). What all of these cases make clear is that it is not possible for parties to carve out any part of a workers' compensation claim to avoid the final bar of a settlement under *Iowa Code* § 85.35. Once that settlement is approved, it is a final bar and resolves all rights and claims under the Act in total. Thus, the Iowa Workers' Compensation Commissioner no longer has subject matter jurisdiction.

In distinguishing the case precedent, the District Court shows the flaws in the legal reasoning. The case of *United Fire & Casualty Co.*, is illustrative of a similar issue. In *United Fire & Casualty Co.*, the injured worker had an earlier injury to the low back, and then subsequently had a second low back injury in the same area. *United Fire & Casualty Co. v St. Paul Fire and Marine Ins. Co.,* 677 N.W. 2d. 755 (Iowa 2004). In regard to the second injury, there were opinions that indicated that the back problems may be due to the earlier injury. *Id.* For that reason, the carrier and employer for the latter injury attempted to assert rights under *Iowa Code* § 85.21 against the employer and insurance carrier for the earlier injury. *Id.* The employer and its insurance carrier in the latter injury had settled the claim with the injured worker on the basis of a compromise settlement under *Iowa Code* § 85.35. *Id.* This is not all that dissimilar from the situation involved with a Second Injury Fund claim. In a Second Injury Fund claim, there is an earlier scheduled loss, and a subsequent compensable scheduled loss. The injured

worker's ability to make a Second Injury Fund claim is triggered by the second compensable scheduled injury. This is similar to how the employer and its insurance carrier in the subsequent injury in *United Fire,* attempted to assert rights under *Iowa Code* § 85.21. The final bar provision was held to have prevented this despite the fact that the party against whom continued claims were asserted was not a party to the settlement. This is also similar to what occurred in cases dealing with Iowa Code § 85.22 cited in the foregoing.

What all of these cases have in common is that one of the parties to a compromise settlement was attempting to assert some rights under the Iowa Workers' Compensation Act post-settlement. That is exactly what is occurring in the instant case: The Claimant is now attempting to assert rights under the Iowa Workers' Compensation Act relative to his injury against another party. Just as the employer and its insurance carrier could not preserve *Iowa Code* § 85.21 or *Iowa Code* § 85.22 rights, the Claimant cannot subsequently in this case preserve the rights to compensation under the Iowa Workers' Compensation Act.

The District Court distinguished these holdings in that the rights under *Iowa Code* § 85.21 and *Iowa Code* § 85.22 came from the same obligations and subject matter. Given how the Second Injury Fund works, the same could be said of the claim for Second Injury Fund benefits as it is predicated and based upon having the second compensable scheduled injury to trigger liability.

It is asserted that 2005 statutory amendments somehow changed the landscape. The case law has not been overturned, and indeed the Iowa Supreme Court has continued to cite this line of cases with approval in *Terry v. Dorothy. Terry v. Dorothy*, 950 N.W.2d 246 (Iowa 2020). It is for that reason that only claims that were not cognizable under the Iowa Workers' Compensation Act would survive a settlement made pursuant to *Iowa Code* § 85.35. *Id.* at 249-250. This is again owing to those same final bar provisions contained in *Iowa Code* § 85.35(9) that were the subject of the earlier line of cases. *Id.*

The statute was later further amended to allow for the parties to continue to give the Iowa Workers' Compensation Commissioner subject matter jurisdiction over disputes pursuant to *Iowa Code* § 85.27 under such terms as might be agreed to by the parties in a compromise settlement. *Iowa Code* § 85.35(6). Such an amendment would not have been necessary if the more narrow interpretation of the bar provision were true. If the parties can carve out whatever exceptions from the final bar provision they deem fit, and remove them from the "subject matter" of the settlement, there would be no need for such a statutory provision to allow the parties to essentially carve out medicals under set terms under *Iowa Code* § 85.27.

If the narrow view on *Iowa Code* § 85.35 is accepted, this would cast doubt upon all of the prior Iowa Supreme Court precedents, and would open up the possibility that parties could in fact be allowed to make any exceptions they wish

to retain certain rights under the Iowa Workers' Compensation Act. Essentially the parties to an agreement would be setting the boundaries of the Commissioner's subject matter jurisdiction, not the legislature.

Immediately upon the approval of the compromise settlement in this matter the Iowa Workers' Compensation Commissioner lost subject matter jurisdiction over this claim. At the time the Agency was attempting to exercise its authority by issuing the Arbitration Decision it thus lacked subject matter jurisdiction. The Commissioner holding otherwise is legally flawed, and incorrect as a matter of law. The District Court likewise misinterpreted Iowa law by interpreting the subject matter of the dispute and final bar provisions narrowly despite the broad interpretation given these provisions by the Iowa Supreme Court. While the District Court based its interpretation and ultimate holding upon different legal grounds, both the Commissioner and the District Court were flawed in their interpretation of law and the impact of a settlement under Iowa Code § 85.35. The holdings call into question all of the prior Iowa Supreme Court precedent interpreting the broad final bar provisions, and would open up the possibility that parties could attempt to preserve any part of the claim under the Act.

Nothing the Claimant could do would be able to revive that subject matter jurisdiction or attempt to reserve the claims to confer subject matter jurisdiction back on the Iowa Workers' Compensation Commissioner. There is only one

possible result, and that is the claim would need to be dismissed as the Agency lacked subject matter jurisdiction prior to issuing the Arbitration Decision. The Workers' Compensation Commissioner erred by holding otherwise, and this holding should be reversed.

BRIEF POINT II

IT WAS ERROR TO FIND THAT THE CLAIMANT'S CLAIM WAS NOT BARRED BY THE STATUTE OF LIMITATIONS AND THE IOWA WORKERS' COMPENSATION COMMISSIONER WAS IN ERROR IN APPLYING THE DISCOVERY RULE TO AVOID THE STATUTE OF LIMITATIONS DEFENSE.

Preservation of Error: Error was preserved by the Appellants-Petitioners on this issue by filing a Petition for Judicial Review and briefing the issue to the District Court. The Petitioner sustained an adverse ruling by the Polk County District Court in the Ruling on Petition for Judicial Review filed on November 30, 2022 (November 30, 2022, Ruling on Petition for Judicial Review, App. p. 61-88)

Argument

The Workers' Compensation Commissioner applied the common law formulation of the discovery rule to save the claimant's workers' compensation claim from the statute of limitations. The Polk County District Court found that only part of the claimant's claim was saved by interpretation of *Iowa Code* § 85.26. The District Court determined that under its interpretation of *Iowa Code* §

85.26 the Claimant's elbow condition would be barred, but the deltoid condition was saved.

The District Court misinterpreted Iowa Code § 85.26 by essentially splitting the Claimant's injury into two separate medical parts; an elbow and a deltoid condition. Interpreting *Iowa Code* § 85.26 to allow splitting a claim in this fashion is contrary to the statutory language and the prior interpretations given to sequela conditions under the Iowa Workers' Compensation Act. The District Court's interpretation is clearly erroneous, and the proper interpretation would bar the entirety of the claimant's injury, not just a part.

The Claimant's testimony is that he had symptoms in his right arm from July of 2017 forward. The Employer, Claimant's father, likewise so testified. Given that the Claimant is alleging onset of symptoms on July 25, 2017, the appropriate date of injury is actually in July of 2017. The discovery rule would not save the Claimant's claim from being time barred.

This claim would fall under the 2017 amended version of *Iowa Code* § 85.26. *Iowa Code* § 85.26(1) states as follows:

> 1. An original proceeding for benefits under this chapter or chapter 85A, 85B, or 86, shall not be maintained in any contested case unless the proceeding is commenced within two years from the date of the occurrence of the injury for which benefits are claimed or, if weekly compensation benefits are paid under section 86.13, within three years from the date of the last payment of weekly compensation benefits. For the purposes of this section, "date of the occurrence of the

> injury" means the date that the employee knew or should have known that the injury was work-related.

Iowa Code § 85.26(1). Since 2017, The *Code* now specifies that, for purposes of the statute of limitations, the date of the occurrence of the injury would mean: "the date that the employee knew or should have known that the injury was work-related." *Id.*

The impact upon the statute of limitations of the 2017 statutory amendments will necessitate statutory construction. The legislature has not vested in the Workers' Compensation Commissioner authority to interpret the statutes, and review of the Commissioner's interpretation of the statutes will be for errors of law. *Trujillo v. Quality Egg, L.L.C.*, 878 N.W.2d 759, 768-769 (Iowa 2016). The goal in interpreting the Iowa Workers' Compensation Act is to determine and effectuate the legislature's intent. *Id.* (citing *United Fire & Casualty Co. v. St. Paul Fire & Marine Insurance Co.*, 667 N.W.2d 755, 759 (Iowa 2004). *Id.* at 770. To determine the legislative intent, the Court will look to the language chosen by the legislature and not at what the legislature might have said. *Id.* (citing *Schadendorf v. Snap-On Tools Corp.*, 757 N.W.2d 330, 337 (Iowa 2008)). Absent statutory definition, the Court will consider statutory terms in their context and give them their ordinary and common meaning. *Id.* (citing *Rojas v. Pine Ridge Farms, L.L.C.*, 779 N.W.2d 223, 235 (Iowa 2010)). If the statutory language is ambiguous, the words are to be reviewed in the statute as a whole to produce a

harmonious result. *Id.* The Court will also presume that the legislature included every part of the statute for a purpose and will avoid any statutory construction that would make any portion redundant or irrelevant. *Id.* The Court will also avoid construing the statute in a way that will lead to an absurd result. *Id.*

The *Code* specifically states that an action must be commenced "within two years of the date of the occurrence of injury for which benefits are claimed . . .". *Iowa Code* § 85.26(1). The 2017 amendments to the Act defined the date of occurrence of injury as when "the employee knew or should have known that the injury was work-related." *Iowa Code* § 85.26(1). What this language has done is to codify a test as to when the injury will have occurred, and from that date of occurrence the statute of limitations is then set. This additional language modified the case law surrounding cumulative injuries and the discovery rule. The purpose was clearly to amend pre-existing 2017 case law. In fact it is presumed that when the legislature amends a statute that there is an intention to change the law. *Chavez v. MS Technology LLC,* 972 N.W.2d 662, 670 (Iowa 2022).

Looking back at the origin of the discovery rule in relation to *Iowa Code* § 85.26, it is clear that the initial line of cases relied in part upon an interpretation of what was meant by the date of the occurrence of an injury. *Orr v. Lewis Central School District*, 298 N.W.2d 256, 257-258 (Iowa 1980). This was part of the foundation upon which the discovery rule was built. The legislature has now

defined the date of occurrence in the statute itself. The original interpretation of that language no longer holds. While the legislature may not have referred to the discovery rule by name, it certainly eliminated the underpinnings of the discovery rule as it was originally created by case law.

Prior to the 2017 statutory amendments the discovery rule provided that the statute of limitations would not begin to run until the injured worker recognized, or should have recognized, the nature, seriousness and probable compensable character of the injury. *Larson Mfg. Co., Inc. v. Thorson*, 763 N.W.2d 842, 854 (Iowa 2009); *Herrera v. IBP, Inc.*, 633 N.W.2d 284, 287 (Iowa 2001). The statute of limitations would begin to run when the injured worker gained information sufficient to alert a reasonable person to the need to investigate. *Swartzendurber v. Schimmel*, 613 N.W.2d 646, 650 (Iowa 2000). As of that date the injured worker was on inquiry notice of all facts that would have been disclosed by said diligent investigation. *Perkins v. HEA of Iowa, Inc.*, 651 N.W.2d 40, 44-45 (Iowa 2002). Previous to the statutory amendments, the Iowa Supreme Court had held that a cumulative injury and the discovery rule were separate and distinct concepts. *Herrera v. IBP, Inc.*, 633 N.W.2d at 287. Reviewing the two tests set forth by the Iowa Supreme Court, it appears that the additional element for the discovery rule was that the injured worker, as a reasonable person, would have to recognize the seriousness of the alleged condition.

The District Court noted in the legislative history and discussions regarding the 2017 amendments to *Iowa Code* § 85.26 that the legislative intent was much as is being argued by the Appellants. The amendment sponsor during floor debate in the senate stated as follows:

> One of the things this bill is trying to collect are those instances where the employee doesn't notify their employer until two or more years after the actual injury because the employee didn't realize it was of a serious nature. It is not fair to the employer because they would have to pay the interest back to the date of the injury whether they were even aware the injury had occurred.

Senate Video (2017-03-27), Iowa Legislature, at 2:56:33-2:58:08 PM; S.J. 783, at 789

It is clear that the intention of the 2017 changes to *Iowa Code* § 85.26 was to limit the discovery rule as it had been formulated under the common law. The legislature intentionally did not codify the entirety of the test that had been previously formulated by the case law. The legislature actually codified a new (and simplified) test that would be applied for determining when the statute of limitations will begin to run on a claim: this would be the date that the employee knew or should have known that the injury was work-related. It is clear that the new statutory definition is contrary to the original basis for the creation and interpretation of law that gave rise to the discovery rule. In its place, the legislature codified a more abbreviated version of the test. Such is the

interpretation that is consistent with the language used by the legislature, and would be the appropriate construction to be given to current statute.

The District Court actually agreed with this interpretation of the current statute. However, the District Court found that under this interpretation of *Iowa Code* § 85.26, the deltoid tear and the elbow condition were somehow separate and distinct. First, to separate the claim is not supported by the evidence. The Claimant did not suffer two separate and distinct traumas or incidents. The deltoid tear was only compensable because it was found to be a sequela or some aggravation due to the original 2017 work injury to the arm. The Iowa Supreme Court has held that a sequela is compensable as the employer and its insurance carrier are liable for all the consequences that naturally and proximately flow from a work injury. *Oldham v Scofield & Welch,* 222 Iowa 764, 767-768, 266 N.W. 480, 482 (1936). The Iowa Supreme Court has more recently examined issues regarding whether conditions are part of an original compensable injury or would qualify as a separate and discrete injury compensated apart from the original incident. *Gumm v Easter Seals Society of Iowa, Inc.,* 943 NW 2d. 23 (Iowa 2020). The Iowa Supreme Court held that, for there to be another separate and distinct injury, there must actually be a separate and discreet condition rather than a worsening or aggravation related to the original work incident. *Id* at 30-32. The medical problems of Claimant in the instant case were not separate and distinct injuries. The individual medical

components of Claimant's injury should rise and fall together in terms of the statute of limitations. There is no reason or language in *Iowa Code* § 85.26 that would support splitting apart a claim as was done by the District Court.

Secondly, the Claimant testified that he had a work incident in July of 2017, injuring his right arm, and he thought it was work-related from the beginning. Claimant admits he knew he had a work-related injury. Pursuant to the statute as amended in 2017, and in effect at the time of his work injury, the statute of limitations ran from that date in July of 2017. Claimant further admits he never received any workers' compensation weekly benefits. This would make the Claimant's claim time barred as his Petition was not filed until more than two years later.

While the District Court did agree with the interpretation advanced by the Appellants that the 2017 amendment of § 85.26 abrogated the discovery rule, the Court did improperly interpret *Iowa Code* § 85.26 by essentially allowing the Claimant to split what would otherwise be an indivisible single injury into two. In the end, the District Court (as did the Commissioner) continued to apply the discovery rule as originally formulated under the common law. This is contrary to Iowa law. This application does not produce a harmonious result in terms of interpretation of the Iowa Workers' Compensation Act as a whole, and to allow

such splitting of claims is contrary to tenants of statutory construction. Claimant's whole claim must be time barred, not just the elbow portion.

Furthermore, even under the pre-2017 common law of the discovery rule, Claimant's entire claim would likewise be time barred anyway. The Claimant argued that *Baker v. Bridgestone/Firestone* would support application of the discovery rule to save his claim. *Baker v. Bridgestone/Firestone*, 872 N.W.2d 672 (Iowa 2015). This argument is flawed. First, the *Baker* decision was before the 2017 amendment to § 85.26. Second, the Claimant appears to read too much into the holding in *Baker*. All the *Baker* case holds is that the discovery rule would be applied to a specific injury and would preclude summary resolution of that particular issue. *Id.* at 683-684. The case was remanded to the Commissioner for further proceedings. *Id.* at 684-685.

The discovery rule as originally formulated stated that the statute of limitations did not begin to run until the injured worker also recognized, or should have recognized, the nature, seriousness and probable compensability of a work injury. *Larson Mfg. Co., Inc. v. Thorson*, 763 N.W.2d 842, 854 (Iowa 2009); *Herrera v. IBP, Inc.*, 633 N.W.2d 284, 286 (Iowa 2001). The statute of limitations would begin to run when the injured worker gained the information sufficient to alert them to the need to investigate. *Swartzendurber v. Schimmel*, 613 N.W.2d 646, 650 (Iowa 2000). The injured worker would also be imputed to have

knowledge of all facts that would have been disclosed by a reasonable and diligent investigation. *Id.*

The Claimant herein admitted that he believed he had an injury or condition and that it was work-related from the beginning in July of 2017. The only additional item needed to satisfy the old discovery rule was whether the Claimant actually realized the seriousness of the alleged injury prior to his later diagnosis with a deltoid tear. The facts of this case clearly disclose that a reasonable person, and a person conducting a reasonable investigation, would have known the seriousness of the condition prior to that date.

The Claimant did initially receive some treatment in August of 2017, and was provided conservative care. Importantly the Claimant testified that his condition was actually worsening in the timeframe after his initial treatment. The Claimant was wearing a brace on his arm in the Fall of 2017 and testified that he was not doing his full work duties around the farm in the Fall of 2017. In actuality the Claimant had asked Lon Tweeten to not pay him in the Fall of 2017 as he was not able to adequately perform his work duties. The records disclose that Lon Tweeten did actually stop paying the Claimant his wages in the Fall of 2017. (Ex. G, p. 58, App. p. 142). The Claimant knew he had an injury, had received initial treatment for said injury, and testified that the condition was actually worsening. It had worsened in the Fall of 2017 to the point that it was having an immediate

impact on his ability to do his job and resulted in him asking not to be paid during that time. Clearly that would evidence that the condition was serious and might have a permanent impact upon his ability to do his job. Certainly, at the very least this shows that a reasonable person should have investigated further.

The issue is not whether the Claimant understood that he had been diagnosed with a deltoid tear, or that he even had a deltoid tear, the facts disclose that the Claimant was aware that he had an arm injury, that it was work-related, and it was serious in nature. The Claimant's own testimony establishes that the injury was progressively worsening and was having an adverse impact on his ability to work in 2017. All of this occurred before 2018.

Even under the old case law the Claimant's claim would thus still be time barred as the discovery rule would not bring this case within two years of the date the Claimant filed his Petition in this matter. The Claimant filed his Petition on January 21, 2020. That means any date tripping the discovery rule that occurs on or before January 20, 2018, would bar this claim pursuant to the statute of limitations. Even if one would accept that it is the date the Claimant finally decided to return to seek out medical attention for his condition, the Claimant went back to the physician's assistant on January 3, 2018, indicating that his tennis elbow had not been improved. At that point the Claimant was even sent for physical therapy due to the failure of his condition to improve. At the very least,

by that point the Claimant should have been aware that his condition was not improving as it had been going on, and ostensibly getting worse, for approximately five months.

Irrespective of how the statute is interpreted, the Claimant's claim for benefits is time barred. The Workers' Compensation Commissioner's finding otherwise should be reversed. The Workers' Compensation Commissioner's holding should be reversed in total. Likewise, the District Court should be reversed in its application of Iowa law. Under the appropriate interpretation of the statute, the Claimant's claim would be barred in total rather than just for one condition. Therefore, any award of benefits should be reversed.

BRIEF POINT III

THE CLAIMANT HAS NOT ESTABLISHED ENTITLEMENT TO THE MEDICAL EXPENSES SUBMITTED AT TRIAL.

Preservation of Error: Error was preserved by the Appellants-Petitioners on this issue by filing a Petition for Judicial Review and briefing the issue to the District Court. The Petitioner sustained an adverse ruling by the Polk County District Court in the Ruling on Petition for Judicial Review filed on November 30, 2022 (November 30, 2022, Ruling on Petition for Judicial Review, App. p. 61-88)

Argument

The Workers' Compensation Commissioner affirmed the award of medical expenses the Claimant submitted at hearing. The Polk County District Court

affirmed this award in part. Based upon the statute of limitations, the District Court did not permit the claimant to recover for any elbow treatments. The District Court determined that only those treatments and expenses listed in Joint Exhibit 10 from and after April 13, 2018, when the deltoid injury was first suspected, would be awarded. The District Court thus affirmed the remainder of the award of medical benefits.

However, Claimant failed to show entitlement to any medical expenses. The Claimant bears the burden of proof in this matter, and the evidence submitted by the Claimant does not substantiate the alleged medical expenses. The only exhibit outlining anything regarding medical expenses is a summary. (Jt. Ex. 10, p. 90, App. p. 134). The District Court cited to some testimony that the Claimant gave stating that he believed the expenses in Exhibit 10 were related to his work injury. Such is far from adequate support for an award of benefits as the Claimant would actually have to substantiate that the bills are causally connected to the claim upon which it is based. The Claimant would need some additional evidence to establish that these expenses are causally connected to any compensable condition.

Further, the summary of medical bills does not provide any specific detail as to the services being billed or documentation confirming the payments made. Joint Exhibit 10 merely shows the dates of service listed, but the dates do not all correspond to medical records that are in evidence. Thus, it is not clear what all of

these services relate to as many of the entries do not have corresponding medical records in evidence, and none of the entries have any billing summaries to identify what is being billed. The Hearing Report in this matter lists as disputed whether the medical expenses are causally connected to the alleged work injury. There are no specific records to verify each of the individual appointments, or to identify that these appointments are due to a compensable condition.

What is troubling is that the Claimant is the one who bears the burden of proof in this matter. *Ayers v. D&N Fence Co., Inc.*, 731 N.W.2d 11, 17 (Iowa 2007); *Quaker Oats Co. v. Ciha*, 552 N.W.2d 143, 150 (Iowa 1996). If the Claimant has not provided enough evidence to identify what medical expenses relate to what medical conditions, there is no evidence that could substantiate that he has carried his burden of proof in this matter. The bare summary the Claimant submitted at hearing contained in Joint Exhibit 10 does not contain adequate information regarding the Claimant's medical expenses upon which an award of those expenses could be made. It was the Claimant's obligation to submit the corresponding medical records for the services claimed as well as any billing records to substantiate the charges being submitted at hearing. The mere statement by the Claimant that he believed these charges were due to his work injury would not be enough for him to meet his burden under the law. The District Court was in error for so finding. This is not substantial evidence to support the award of any

medical benefits. Without additional information, all that is in the record is that there was a bill for an amount corresponding to a certain date and nothing else. This is particularly difficult in this instance as the Claimant has been treating for conditions outside of his deltoid tear. There is nothing to support the award of medical expenses, and the award should be reversed.

BRIEF POINT IV

IT WAS INCORRECT TO AWARD THE CLAMANT THE COSTS ASSOCIATED WITH DR. SASSMAN'S INDEPENDENT MEDICAL EXAMINATION.

Preservation of Error: Error was preserved by the Appellants-Petitioners on this issue by filing a Petition for Judicial Review and briefing the issue to the District Court. The Petitioner sustained an adverse ruling by the Polk County District Court in the Ruling on Petition for Judicial Review filed on November 30, 2022 (November 30, 2022, Ruling on Petition for Judicial Review, App. p. 61-88)

Argument

The Polk County District Court affirmed the award of the expenses associated with the independent medical examination of Dr. Sassman. It looks as though the District Court merely found that there was substantial evidence to support the award of these expenses. This misses the larger legal point in terms of addressing the reasonable charges of those medical expenses. There are statutory amendments in 2017 to *Iowa Code* § 85.39 that would need to be addressed in

terms of assessing what costs would be reasonable to be subject to an award under *Iowa Code* § 85.39.

This case falls under the new 2017 version of *Iowa Code* § 85.39. *Iowa Code* § 85.39 specifically provides that only the "reasonable" costs associated with an examination for an "impairment rating" are to be reimbursed. *The Code* now says "[a] determination of the reasonableness of a fee for an examination made pursuant to this subsection, shall be based on the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination occurred". *Iowa Code* § 85.39(2) (Emphasis added). It is clear that the legislature modified *Iowa Code* § 85.39 to limit the amount of fees that could be charged for *Iowa Code* § 85.39 medical examinations. The limitation is the actual cost of performing an impairment rating. This is not the same as the costs of an "independent medical examination" as the *Code* only states the charge is to be that of a medical provider to perform an impairment rating alone. Section 85.39 does not cover additional costs to provide other opinions beyond impairment or even necessitate reviewing a great deal of records.

In reviewing statutory interpretation, the Court will review for corrections of errors of law. *Wilson v. IBP, Inc.*, 589 N.W.2d 729, 730 (Iowa 1999). The Iowa Supreme Court has determined that the legislature has not vested in the Workers' Compensation Commissioner authority to interpret the statutes, and the review of

the Iowa Workers' Compensation Act and the interpretation of the statutes will be for errors of law. *Trujillo v. Quality Egg, L.L.C.*, 878 N.W.2d 759, 768-769 (Iowa 2016). The goal is to determine and effectuate the legislature's intent. *Id.* (citing *United Fire & Casualty Co. v. St. Paul Fire & Marine Insurance Co.*, 667 N.W.2d 755, 759 (Iowa 2004). *Id.* at 770. To determine the legislative intent, the Court will look to the language chosen by the legislature and not at what the legislature might have said. *Id.* (citing *Schadendorf v. Snap-On Tools Corp.*, 757 N.W.2d 330, 337 (Iowa 2008)). Absent statutory definition, the Court will consider statutory terms in their context and give them their ordinary and common meaning. *Id.* (citing *Rojas v. Pine Ridge Farms, L.L.C.*, 779 N.W.2d 223, 235 (Iowa 2010)). If the statutory language is ambiguous, the words are to be reviewed in the statute as a whole to produce a harmonious result. *Id.* The Court will also presume that the legislature included every part of the statute for a purpose and will avoid any statutory construction that would make any portion redundant or irrelevant. *Id.* The Court will also avoid construing the statute in a way that will lead to an absurd result. *Id.*

The language of the 2017 amendment is clear that what is <u>now</u> provided for in § 85.39 is different than an independent medical examination which could touch on issues far beyond a simple impairment rating such as causation, diagnosis, treatment, restrictions, maximum medical improvement in addition to an

impairment rating as well. It is clear that the legislature has chosen to put some limit on the reimbursement scope of an evaluation under 85.39 in enacting the 2017 amendments. The amount reimbursable under § 85.39 is now specifically limited to the cost to perform an "impairment rating". The *Code* does not include the costs for any additional opinions for litigation purposes. The legislature could have stated that the reasonable cost was that of performing an "independent medical examination" but chose to specify that it was the cost to perform an "impairment rating".

This interpretation is further supported by the original portions of *Iowa Code* § 85.39. Specifically, *Iowa Code* § 85.39 previously specified that the injured worker may only have an examination when there has been "an evaluation of permanent disability" by a physician that was retained by the employer, "and the employee believes this evaluation to be too low . . .". *Iowa Code* § 85.39(2). In short, an injured worker was getting an evaluation to rebut an impairment rating authored by an employer-retained physician that is believed to be too low. In the 2017 amendments, the legislature went further to now define specifically that workers only could get reimbursed the reasonable costs of performing an "impairment rating".

The Claimant submitted a bill for an independent medical examination of Dr. Sassman in the amount of $4,650.00. (Jt. Ex. 7, p. 66, App. p. 127) The

Appellants would argue that this amount is unreasonable. The report goes far beyond providing an impairment rating, which is what *Iowa Code* § 85.39(2) specifies as the measure of the reasonable reimbursable costs. The District Court erred in assessing the full cost under *Iowa Code* § 85.39, and the Iowa Workers' Compensation Commissioner's award of the full cost of the independent medical examination of Dr. Sassman should be reversed.

Further, Dr. Sassman also rates the Claimant for other conditions which were deemed to not be compensable or were not claimed to be related to the alleged work injury. This includes the neck problem and a right ankle issue. Neither of these conditions were found to be a part of the alleged injury, and it appears that Dr. Sassman is rating the Claimant for conditions beyond those that are a part of this claim. *Iowa Code* § 85.39(2) only covers injuries that are deemed to be compensable under the Iowa Workers' Compensation Act. Dr. Sassman has rated and evaluated conditions that were not found compensable. Additionally, Dr. Sassman provided opinions associated with an earlier disability for purposes of Claimant's Second Injury Fund claim. Under *Iowa Code* 85.39 the Employer and its Insurance Carrier would not be responsible for the costs that would be associated with these additional conditions, even if the costs of the examination would be awarded. Since Claimant has the burden of proof, if a billing statement offered by the Claimant does not properly breakdown the charges so that they can

be determined and apportioned, no such expenses will be awarded. *Kirkendall v. Cargill Meat Solutions Corp.*, File No. 5055494 (Appeal Decision December 17, 2018). Given that Dr. Sassman's billing statement does not breakdown what part of the charges relate to what body parts, the whole of the bill cannot be awarded. (Jt. Ex. 7, p. 66, App. p. 127). The award for reimbursement of the cost of Dr. Sassman's independent medical examination report should be reversed.

CONCLUSION

The Agency was deprived of subject matter jurisdiction over the claim by virtue of the approval of Claimant's compromise settlement with the Second Injury Fund prior to the issuance of the Arbitration Decision, and the claim should have been dismissed. It was error to award the Claimant benefits relative to his alleged work injury. Further, Claimant's claim was barred by the applicable statute of limitations as the actual injury date was more than two years before the Claimant filed his Petition. Claimant's claim is not saved by the so-called "discovery rule". The pre-existing "discovery rule" was abrogated by the 2017 amendment to Iowa Code § 85.26. Moreover, the Claimant has not substantiated any entitlement to his submitted medical expenses based upon the evidence in the record. Lastly, the award of the examination of Dr. Sassman was in error as the charges are excessive and include conditions that were not deemed to be compensable or even alleged as

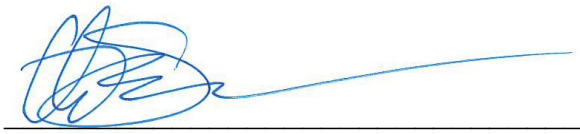
part of this claim. For these reasons the award should be reversed in total and the Claimant should take nothing further from these proceedings.

REQUEST FOR ORAL ARGUMENT

The Petitioners-Appellants, Tweeten Farms and Grinnell Mutual, through the undersigned counsel, state that they desire to be heard in oral argument.

CERTIFICATE OF COMPLIANCE

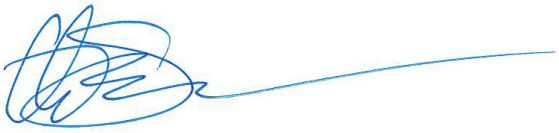
This brief complies with the typeface requirements and type-volume limitation of *Iowa Rs. App. P.* 6.903(1)(d) and 6.903(1)(g)(1) or (2) because it has been prepared in a proportionally spaced typeface using Time New Roman in 14 point font and contains 11,479 words, excluding the parts of the brief exempted by *Iowa R. App. P.* 6.903(1)(g)(1).



Christopher S. Spencer 04/10/23
Date

CERTIFICATE OF SERVICE

I, Christopher S. Spencer, member of the Bar of Iowa, hereby certify that on April 10, 2023, I or a person acting on my behalf served the above Petitioners-Appellants' Final Brief and Request for Oral Argument to the Respondent-Appellee's attorneys of record, Janece Valentine, via EDMS in full compliance with *Rules of Appellate Procedure and Rules of Civil Procedure.*



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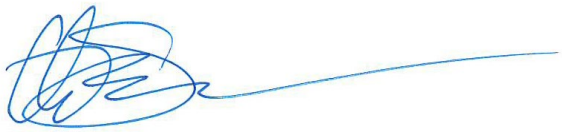
CERTIFICATE OF FILING

I, Christopher S. Spencer, hereby certify that I, or a person acting in my direction, did file the attached Petitioners-Appellants' Final Brief and Request for Oral Argument upon the Clerk of the Iowa Supreme Court via EDMS on this 10th day of April, 2023.



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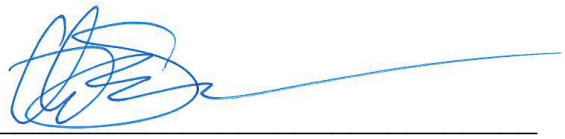
ATTORNEY'S COST CERTIFICATE

The undersigned attorney does hereby certify that the actual cost of producing the foregoing Petitioners-Appellants' Final Brief and Request for Oral Argument was $0 because of service and filing via EDMS.



Christopher S. Spencer