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' REPLY BRIEF

STEPHEN W. SPENCER
CHRISTOPHER S. SPENCER
PEDDICORD WHARTON, LLP
4949 WESTOWN PARKWAY, SUITE 200
WEST DES MOINES, IA 50266
Steves@peddicord.law
Chris@peddicord.law
Telephone: 515-243-2100; Facsimile: 515-243-2132
ATTORNEYS FOR PETITIONERS-APPELLANTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page**

Statutes:

Agency Decisions:

Other Sources:

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

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

Cases: *Heartland Express v. Gardner*, 675 N.W.2d 259, 262 (Iowa 2005)
White v. Northwestern Bell Telephone Co., 514 N.W.2d 70, 74 (Iowa 1994)
Shirley v. Pothast, 508 N.W.2d 712, 714 (Iowa 1993)
United Fire & Casualty Co. v. St. Paul & Marine Insurance Co., 677 N.W.2d 755 (Iowa 2004)
Ramirez Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759 (Iowa 2016)
Bankers Standard Insurance Co. v. Stanley, 661 N.W.2d 178 (Iowa 2003)
Terry v. Dorothy, 950 N.W.2d 246 (Iowa 2020)

Statutes: *Iowa Code §85.35*
Iowa Code §85.35(1)
Iowa Code §85.35(9)
Iowa Code §85.21
Iowa Code §85.22
Iowa Code §85.27
Iowa Code §85.35(6)
Iowa Code §85.35(4)
Iowa Code §85.35(5)

Agency Decisions:
Ahn v. Key City Transport, Inc., File No. 5042640 (App Dec. 10/8/15)
Milbrandt v. R.R. Donnelly, File No. 20009756.01 (App. Dec. 02/17/23)

Other Sources: 2005 *IA. Legis. Serv. Ch.* 168 (SF342)

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

Cases: *Ramirez Trujillo v. Quality Egg, L.L.C.*, 878 N.W.2d 759 (Iowa 2016)
Orr v. Lewis Central School District, 298 N.W.2d 256 (Iowa 1980)
Baker v. Bridgestone/Firestone, 872 N.W.2d 672 (Iowa 2015)
Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842 (Iowa 2009)
Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001)
Swartzendurber v. Schimmel, 613 N.W.2d 646 (Iowa 2000)

Statutes: *Iowa Code §85.26(1)*
Iowa Code §85.26

Agency Decisions: *Carter v. Bridgestone Americas, Inc.*, File No. 1649560.01 (App. Dec. 7/8/2021)

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

IV. IT WAS INCORRECT TO AWARD THE CLAIMANT THE COST ASSOCIATED WITH DR. SASSMAN'S INDEPENDENT MEDICAL EXAMINATION.

Cases: *Mid-American Const., LLC v. Sandlin*, 2023 WL2148754 (Iowa App. 2023)

Statutes: *Iowa Code §85.39*
Iowa Code §85.39(2)

Agency Decisions: *Kirkendall v. Cargill Meat Solutions Corp.*, File No. 5055494 (App. Dec., 12/17/18)

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

The Claimant makes no substantial argument regarding whether the approval of a compromise settlement under *Iowa Code* §85.35 deprives the Iowa Workers' Compensation Commissioner of subject matter jurisdiction. Similarly, the Claimant makes no substantial argument regarding waiver of the issue by Appellants. These were two of the grounds upon which the Iowa Workers' Compensation Commissioner rested his opinions. The District Court disagreed on both points. The only argument made by the Claimant is a footnote indicating that the Claimant is asserting a waiver of the particular issue.

The Workers' Compensation Commissioner has jurisdiction only to the extent that it is given by statute. *Heartland Express v. Gardner*, 675 N.W.2d 259, 262 (Iowa 2005). This stands in contrast to the District Court as a court of general jurisdiction which has jurisdiction over all claims except those that are taken from it by statute. This is why the cases regarding subject matter jurisdiction of the Iowa Workers' Compensation Commissioner were cited previous to the District Court and in the Appellants' Brief. These cites were to be illustrative of the limits

of the subject matter jurisdiction of the Agency, due to the fact the Iowa Workers' Compensation Commissioner found a waiver of the issue as subject matter jurisdiction cannot be waived or conferred by consent.

A case that is settled under *Iowa Code* §85.35 also falls outside the subject matter jurisdiction of the Workers' Compensation Commissioner. As noted in the Iowa Supreme Court case law, a settlement under *Iowa Code* §85.35, due to the final bar provisions, ends all claims under the Iowa Workers' Compensation Act.

The statute and Iowa Supreme Court precedent is clear that a case that is settled under *Iowa Code* §85.35 terminates the jurisdiction of the Iowa Workers' Compensation Commissioner. This is owing to the fact that the settlement ends any claim that is cognizable under the Iowa Workers' Compensation Act. The case would then be outside the subject matter jurisdiction of the Iowa Workers' Compensation Commissioner.

Once the settlement is approved, the Agency lost subject matter jurisdiction as the claim is no longer cognizable under the Iowa Workers' Compensation Act. Indeed, this is exactly how the Iowa Supreme Court discussed *Iowa Code* §85.35 explicitly in the case law. The Agency has specific and narrow jurisdiction, and any claim that would fall outside of the Workers' Compensation Act, for any reason, falls outside the subject matter jurisdiction of the Agency.

Further, Appellants raised the issue at the earliest possible time. At the time of the hearing, the Compromise Settlement had not yet even been submitted for approval. The potential issue was identified in the Post-Hearing Briefs, which were also filed before the Compromise Settlement was even submitted for approval. Therefore, the Iowa Workers' Compensation Commissioner was incorrect in finding that the issue was waived. Either this is a matter of subject matter jurisdiction and cannot be waived, or the issue was raised at the earliest opportunity. While the Appellants believe the issue is one of subject matter jurisdiction and would therefore be impossible to waive, the District Court ultimately found that the issue was not waived and went on to decide the case on the merits.

The Iowa Supreme Court has held that settlements under 85.35 terminate the subject matter jurisdiction of the Iowa Workers' Compensation Commissioner. *White v. Northwestern Bell Telephone Co.*, 514 N.W.2d 70, 74 (Iowa 1994). The actual language that the Court used in examining the jurisdictional issue made clear that the Supreme Court was treating this as "subject matter" jurisdiction, and actually explicitly so states in the opinion. *Id.* at 74.

Also, in this case, it is clear that the jurisdictional potential 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). A settlement must be approved by the Workers' Compensation Commissioner. *Iowa Code* §85.35(1). It is the approval that triggers the bar of subject matter jurisdiction. *Iowa Code* §85.35(9). This remained the case at the time of the hearing, and even at the time the post-hearing briefs were filed, though the Appellants noted the potential issue in their post-hearing brief. The settlement was actually finally approved by the Agency on April 23, 2021. The Arbitration Decision later filed did not address the issue. This resulted in the Motion for Rehearing. Clearly the Employer and its Insurance Carrier brought up the issue at the earliest opportunity.

This then turns to the arguments that a party can somehow carve out or reserve certain rights in a settlement approved under *Iowa Code* §85.35. Again, this is contrary to all of the Iowa Supreme Court precedent on this particular issue. In the *White* case the 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 held 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 regards 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 settlement is approved, it is a final bar and resolves the claim in total, taking it outside of the Iowa Workers' Compensation Act and depriving the Iowa Workers' Compensation Commissioner of subject matter jurisdiction.

The case law has not been overturned, and indeed the Iowa Supreme Court has continued to cite this line of cases with approval. *Terry v. Dorothy*, 950 N.W.2d 246 (Iowa 2020). Only claims that were not cognizable under the Iowa Workers' Compensation Act in the first place would survive a settlement made pursuant to *Iowa Code §*85.35. *Id.* at 249-250. Again, this owes to the same final bar provisions that were the subject of the earlier line of cases and are at issue in this matter. *Id.* This case illustrates that the broad final bar provision is still being applied.

The statute was eventually 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). *Iowa Code* §85.35(4) now also allows a combination of an Agreement for Settlement and a Compromise Settlement that would establish liability for some body parts of a

claim, but makes a full and final disposition of other body parts of a claim. *Iowa Code* §85.35(4). Both of these sections under *Iowa Code* §85.35 now allow specific things to be carved out of what would otherwise be a full and final disposition of a claim. Again, such amendments would not have been necessary if the Claimant's view on *Iowa Code* §85.35 is accepted. If the parties can carve out whatever exceptions from the final bar provision they deem fit, then there would be no need for such a provision to allow the parties to essentially carve out disputes under set terms under *Iowa Code* §85.27 or settle some body parts of claim on a final basis while reserving other body parts of the claim. Further, if the Claimant's 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 to settlements could be allowed to make all sorts of exceptions to retain certain rights under the Iowa Workers' Compensation Act.

In the legislative enactment that created the 2005 amendments cited to by the Claimant, *Iowa Code* §85.35 received some other changes. The Appellants contend that these other changes are the reason for the language of the final bar provision being slightly modified. That same legislative enactment created *Iowa Code* §85.35(4) that allowed a combination of an agreement for settlement and a compromise settlement to allow for a full and final disposition of part of a claim, but an open file settlement on a different portion. 2005 *IA. Legis. Serv. Ch.* 168

(SF342). Further, this same legislative enactment created a contingent settlement that could be approved, and then made contingent upon some subsequent happening as set forth in *Iowa Code* §85.35(5). *Id.* It is much more likely that those changes were the ones that necessitated the modification of the final bar provision to state that it was regarding the "subject matter of the compromise". *Iowa Code* §85.35(9). The legislature had modified *Iowa Code* §85.35 to allow for the Agency to retain jurisdiction in limited circumstances over a settlement: either certain body parts that were carved out on an open file basis, or while a contingency was waiting to occur. Both of these amendments contemplated that the Agency may be required to take further action after the settlement was approved. This would not have otherwise been possible as a compromise settlement would deprive the Agency of complete subject matter jurisdiction and dispensed of the whole claim.

As noted in the foregoing, the legislature also chose to later include what is now *Iowa Code* §85.35(6) that would allow the Agency to retain jurisdiction over certain medical issues pursuant to *Iowa Code* §85.27. Again, this shows that the final bar contemplated by *Iowa Code* §85.35(9) is still broad and all encompassing. The legislature is choosing to carve out certain exceptions to allow the Iowa Workers' Compensation Commissioner to retain jurisdiction on certain limited issues as agreed to by the parties, and it is for that reason that the final bar

provision states that it is regarding the "subject matter of the compromise", as the parties can now limit the compromise in certain ways pursuant to statutory authority.

However, the District Court and the Commissioner are allowing the final bar provision to be curtailed in a much more significant way, which taken to its logical conclusion would allow parties to now carve out whatever exceptions they may like. While a settlement is a contract, and the parties do have some intention as to what is being compromised, it comes with statutory baggage. The statute limits what the parties may and may not do in a compromise settlement. The cases cited to by the Appellants show that parties to a compromise settlement may intend for one thing to occur, or to reserve certain rights that they may have held, but those intentions are not given any effect due to the statutory nature of the settlement. Whether something may be carved out of the final bar of a compromise settlement is a statutory issue, and the District Court, as well as the Workers' Compensation Commissioner, have both incorrectly interpreted the statute to allow parties to except out certain parts of a workers' compensation claim from the final bar provisions of *Iowa Code* §85.35(9) not otherwise provided by statute. This is in clear contravention of all of the Iowa Supreme Court precedent on the particular issue.

Even the Iowa Workers' Compensation Commissioner has previously recognized that the final bar provisions will be applicable in a situation such as presented here. *Ahn v. Key City Transport, Inc.*, File No. 5042640 (App. Dec. 10/8/2015). While the Agency has reversed course on this particular point in the more recent case of *Milbrandt v. R.R. Donnelly,* all this shows is that the Iowa Workers' Compensation Commissioner has reversed course on this particular issue. *Milbrandt v. R.R. Donnelly,* File No. 20009756.01 (App. Dec., 02/17/23) One should note that it was the same Commissioner Ruling in *Ahn* and then reversing himself in *Milbrandt.* It is of note that the interpretation of statutes is for the Iowa Supreme Court, and no further deference is going to be given to the Agency interpretation. *Ramirez Trujillo v. Quality Egg, LLC*, 878 N.W.2d 759, 770 (Iowa 2016).

As to the policy arguments, the Iowa Supreme Court has already addressed the policy behind a broad and all-encompassing final bar provision. *Bankers Standard Insurance Co. v. Stanley,* 661 N.W.2d 178, 181-182 (Iowa 2003). In addition, allowing a party to settle part of a workers' compensation claim, such as the case against the Second Injury Fund, and proceed on to hearing against an employer and its insurance carrier, does not save any judicial economy. What does save judicial economy is a more broad and all-encompassing settlement. If a broad final bar provision is enforced, all the parties would know exactly what they are

getting in a compromise settlement. It resolves everything relative to the workers' compensation claim. This is precisely what was recognized by the Iowa Supreme Court as a policy favoring the broad final bar provisions. *Id.*

A broad bar interpretation would also encourage more complete and full settlements as a party would not be settling portions of a workers' compensation claim piecemeal and proceeding to hearing on other parts. In this instance, the Claimant would have had to settle with both the Appellants and the Second Injury Fund, and there would have been no need for a hearing or the subsequent appeals. The case would have been resolved in whole. However, what the Claimant is proposing to do, and what the District Court has allowed with its interpretation of law, is for parties to begin carving out portions of a claim as being outside the subject matter of the compromise. If a Second Injury Fund claim is outside the subject matter of the compromise, similar arguments could be made in terms of rights under *Iowa Code* §85.21 or *Iowa Code* §85.22, which were already the subject of Iowa Supreme Court cases. As argued by the Appellants in their Brief, the Second Injury Fund's liability springs from the second compensable work injury. It is part of the workers' compensation claim as the rights only accrue due to the second compensable injury.

Iowa law is clear that the final bar provision in *Iowa Code §*85.35(9) terminates all claims under the Iowa Workers' Compensation Act. The subject

matter of the dispute compromised is the claim for benefits, and in this case it would be the claim for benefits relative to the alleged February 1, 2018 date of injury. This was part of the claim that the Claimant was making against the Second Injury Fund of Iowa. This was the date of injury and claim that triggered the potential Second Injury Fund liability in this instance. Just as the Claimant gave up the rights to compensation against the Second Injury Fund of Iowa contained in the Iowa Workers' Compensation Act, he gave up all of his rights relative to his claimed injury under the Iowa Workers' Compensation Act. The Iowa Supreme Court has already made it clear that the final bar provisions terminate all claims relative to the injury.

The Claimant attempts some type of policy argument about favoring settlements. In fact, the Iowa Supreme Court in examining a settlement under *Iowa Code §*85.35 and indemnification or subrogation rights under *Iowa Code §*85.22 found that the final bar provisions taking away those rights would actually further the objectives of *Iowa Code §*85.35 by making it better for the injured worker to know prior to settling a contested case that a settlement would cut off all rights between the parties. *Bankers Standard Insurance Co. v. Stanley*, 661 N.W.2d at 182-183. The Iowa Supreme Court has already determined that it furthers the goals of settling a case by enforcing a broad and strict final bar provision as all of the parties will understand that reaching such a settlement

terminates all rights under the Iowa Workers' Compensation Act. The policy argument being made by the Claimant has already been decided against the interpretation that the Claimant seeks to impose.

The Claimant also makes a wide ranging, unsupported argument that the interpretation of law being advanced by Appellants would lead to wide ranging malpractice liability against the defense bar of this State. However, the Iowa Supreme Court has indicated that an *Iowa Code §*85.35 settlement does deprive the Agency of subject matter jurisdiction, and has addressed other similar situations to the one at present in terms of the ramifications of a compromise settlement as well as subject matter jurisdiction. The specific holding in this case would only impact a small segment of cases, and those would only be situations where the injured worker settled on a compromise settlement under *Iowa Code §*85.35 with the Second Injury Fund, and then attempted to proceed on to hearing to claim benefits against an employer and its insurance carrier. Such broad ranging liability that the Claimant is arguing could occur is overblown.

The Appellants would also point out that the Second Injury Fund uses similar arguments in regards to a compromise settlement that might be reached with an employer prior to trial. The parties to a settlement under *Iowa Code §*85.35 have to know that reaching a settlement ends all the claims relative to that injury under the Workers' Compensation Act. The Iowa Supreme Court has

already stated in other circumstances that this is actually a benefit to settlement in that each party knows what they are getting into. While a settlement is a contract, in the workers' compensation context it comes with additional statutory provisions that dictate what the settlement does. As indicated in the other settlement cases cited to by the Employer and its Insurance Carrier in this Brief and their Appeal Brief, the parties may have intention for one thing to occur, such as reserving certain rights under the Workers' Compensation Act, but due to the statutory nature of the settlement, those intentions cannot be given effect. Given this law the legislature has seen fit to allow certain things to be carved out of the settlement such as medical care under set terms under *Iowa Code §*85.27, or to settle part of a claim on an open file basis while closing out other parts. However, that would require invoking those specific portions of *Iowa Code §*85.35.

The Iowa Workers' Compensation Commissioner lacked subject matter jurisdiction over this claim as of the date the compromise settlement was approved between the Claimant and the Second Injury Fund of Iowa. Pursuant to *Iowa Code §*85.35(9), and the Iowa Supreme Court precedent, this terminated all rights the Claimant had under the Iowa Workers' Compensation Act relative to the alleged February 1, 2018, injury. As subject matter jurisdiction cannot be waived or conferred upon the Agency by the parties, the only option would be to dismiss the claim as the Agency would not have had subject matter jurisdiction on the day the

Arbitration Decision was issued. It was error to find that the compromise settlement with the Second Injury Fund did not bar the claims against the Employer and its Insurance Carrier, and the award of the Workers' Compensation Commissioner 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.

All of the Supreme Court precedent that the Claimant cites in his brief regarding the discovery rule occurred prior to the statutory amendments in 2017. Therefore, none of those cases dealt with the new language contained in the *Iowa Code*. The only cases subsequent to the statutory amendments that the Claimant cites to are from the Agency. However, the Iowa Workers' Compensation Commissioner has not been vested with the authority to interpret the workers' compensation statutes. *Ramirez Trujillo v. Quality Egg, L.L.C.*, 878 N.W.2d 759, 770 (Iowa 2016). Thus, any Agency decisions interpreting the 2017 amendments to the Iowa Workers' Compensation Act would not be binding or definitive precedent on the issue.

However, the Iowa Workers' Compensation Commissioner's opinion in *Carter v. Bridgestone Americas, Inc.*, File No. 1649560.01 (App. Dec. 7/8/2021) is

incorrect in its assessment of the changes to *Iowa Code §*85.26(1). Specifically, in 2017, *Iowa Code §*85.26(1) had an additional sentence added that defined the term "date of the occurrence of the injury" as the date that the employee knew or should have known that the injury was work-related. *Iowa Code §*85.26(1). This is exceptionally pertinent in interpreting the statute as that same subparagraph specifically states that "[a]n original proceeding for benefits under this chapter . . . 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 . . ." *Iowa Code §*85.26(1). Read another way, with the definition now contained in that subsection, the *Code* now essentially reads that an original proceeding for benefits shall not be maintained in any contested case unless that proceeding is commenced within two years from the date that the employee "knew or should have known that the injury was work-related".

In interpreting the statute, the goal is to effectuate the legislature's intent. *Ramirez Trujillo v. Quality Egg, LLC,* 878 N.W. 2d at 770. The language used will be reviewed by the Court and terms will be given their ordinary and common meaning in the absence of a statutory definition. *Id.* Language that is ambiguous will be reviewed to produce a harmonious result. *Id.* The Court will also avoid construing a statute in a way that will lead to an absurd result. *Id.*

In this particular circumstance, the word "shall" connotes a mandatory duty or obligation. The *Code* now actually also defines the "date of occurrence" to which that duty appends. That is when the employee knew or should have known that the injury was work-related.

What is absent is that the legislature did not choose to include language codifying an additional element that would apply to the discovery rule. That is the element dealing with the seriousness of the alleged injury. The Claimant argues that as the legislature did not mention the discovery rule by name, that this omission should mean that the discovery rule is preserved. However, this is incorrect as the legislature chose not to include the seriousness element in dealing with *Iowa Code* §85.26 and setting the statute of limitations. Focusing on the language actually used, it is clear the legislature left the seriousness element out. This is further supported by that portion of the floor debate cited by the Appellants in their Appeal Brief and by the District Court.

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 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 the foundation upon which the discovery rule was built. However, in 2017 the legislature has now defined that term 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 the case law by now statutorily defining the term at issue.

It is clear that the legislature actually codified a new abbreviated test that now 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. This is the interpretation that is consistent with the language used by the legislature, and would be the appropriate construction to be given to the statute. 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. The legislature is presumed to have known the state of the law at the time it was passing the legislation. The legislature chose not to include the other element of the discovery rule as articulated by the Iowa Supreme Court. Merely because the legislature chose to codify a portion of the test, does not mean that it intended to codify the whole thing. The legislature did not choose to do so, and the additional portion of the test should not be read back into the statute when it was left out. What is clear is that the Iowa legislature, by the language chosen, did not include the additional test applied previously by the Iowa Supreme Court about the seriousness of the injury. The legislative floor debate shows that there

was an intention that there not be long running liability on the part of employers and insurance carriers for injuries. That is essentially what the discovery rule, as it was originally formulated, would allow for. It could potentially be a great length of time before someone might actually recognize the seriousness of an injury, though they may know that they had an injury and that it was work-related for quite some time.

Applying the proper interpretation to the 2017 amendment, the Claimant's claim would clearly be time barred. The Claimant testified that he had an incident in July of 2017, and he thought it was work-related from the beginning. This is the Claimant's own testimony. Using the language actually contained in the statute, the statute of limitations would run from that date in July of 2017. This would make the Claimant's claim time barred.

The District Court in this instance seems to have agreed in part with the arguments made by the Appellants in regards to statutory construction. That is that the common law discovery rule was done away with by statute, and in its place is now a more abbreviated test for the statute of limitations. Unfortunately, the District Court then went on to essentially allow the Claimant to split apart the workers' compensation claim with the elbow claim being time-barred, but the claims relative to the deltoid tear being allowed to survive. As argued by the Appellants in their Brief, this is contrary to Iowa law regarding sequelae, and

makes no sense in terms of the interpretation of the language contained in *Iowa Code* §85.26.

The Claimant clearly knew that he had an injury, and that it was work-related from the beginning, in July 2017. This is uncontroverted in the case. This occurred more than two years before the Claimant filed the Petition in this matter. This case illustrates why the Iowa legislature would have wanted to limit the potential for a discovery rule to the extent that it has. Specifically, an injured worker in this instance was treating for a condition that he knew was work-related from the beginning. However, he did not choose to present it as a work injury until much later. This would force an employer and an insurance carrier to investigate and defend a claim that may have been going on for many years. The test as now formulated would require that the injured worker bring their claim within two years of the date that they knew they had an injury and that it was work-related. This gives the injured worker enough time to determine whether or not to bring a claim for injuries so that not every ache and pain would be turned in as a claim.

Clearly the Workers' Compensation Commissioner committed an error of law in its interpretation of the statute, and the District Court carried over making errors of law in allowing the Claimant to split apart his workers' compensation claim. The issue is going to be reviewed for errors of law, and it is clear that the

statute by its own terms would require the interpretation advanced by the Appellants, and that the Claimant's claim should be dismissed as untimely.

However, even under the original formulation of the discovery rule, the Claimant's claim still fails. The Claimant cites the case of *Baker v. Bridgestone/Firestone* for the proposition that the discovery rule should save his claim. *Baker v. Bridgestone/Firestone*, 872 N.W.2d 672 (Iowa 2015). However, the Claimant appears to read too much into the Iowa Supreme Court 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 would state that the statute of limitations did not run until the injured worker also recognized, or should have recognized, the nature, serious and probable compensable nature 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, 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. *Swartzendruber 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.*

By his own admission, the Claimant clearly believed that he had an injury or condition and that it was work-related from the beginning in July of 2017. The only additional item would be whether the Claimant actually knew 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 this date.

The Claimant's timeline in his brief fails to point out some additional facts relevant to this inquiry. In July of 2017 the Claimant did know he injured his right arm. This is the time when the Claimant knew that he had an injury and it was work-related. The Claimant did initially receive some treatment in August of 2017, and was provided conservative care. What Claimant refuses to take into account is that 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. Most importantly, Claimant testified that he was <u>not</u> 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 wages during this time as he was not able to perform his work duties. The records disclose that Lon Tweeten then actually

stopped paying the Claimant his usual wages in the fall of 2017. (Ex. G, p. 58, App. 142). Thus, in this particular case the Claimant knew he had an injury, had received initial treatment for said injury, and testified that the condition was actually worsening to the point that it was having an impact on his ability to do his job, and resulted in him not being paid wages during that period of time. Clearly that would evidence that the condition was serious and might have an impact upon his ability to do his job. Certainly it shows that a reasonable person should have investigated further. All of this occurred before 2018.

Therefore, if the interpretation of the statutory amendments in 2017 is as the Appellants would posit, the Claimant's claim is clearly barred. Further, the District Court committed errors of law in allowing the Claimant to essentially split apart his claim. This should be reversed, and the Claimant's claim would be time-barred. The claim would have properly been dismissed and the Claimant should take nothing from these proceedings. However, even if the discovery rule as it was previously formulated is applied to this case, the claim would still be time barred. In either case, the decision of the Workers' Compensation Commissioner should be reversed and the Claimant should take nothing from these proceedings.

BRIEF POINT III

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

The Claimant's argument as to the entitlement to medical expenses centers around some type of objection to Joint Exhibit 10. This is not the argument that is being made by Appellants. The argument being advanced by the Employer and its Insurance Carrier is that the Claimant has failed in his burden of proof as was outlined in the Appellants' Appeal Brief.

The Claimant must establish his entitlement to medical benefits. While the Agency may look favorably upon medical summaries, this does not relieve the Claimant of his burden of proof. In this particular case that is especially troubling as the Claimant was simultaneously treating for other conditions outside of his epicondylitis and deltoid tear.

Furthermore, the Hearing Report is of no benefit to the Claimant. It is identified as disputed in the Hearing Report that the listed expenses are causally connected to the work injury. (Hearing Report, App. 8-11) Further, it was disputed that the listed expenses are at least causally connected to the medical conditions upon which the claim is based. (Hearing Report, App. 8-11) Therefore, there is nothing in the Hearing Report that would relieve the Claimant of his burden to establish the causal connection of the medical expenses. This is not an objection to evidence. The Claimant not meeting his burden of proof to establish that the

alleged medical expenses are related to the claimed injury arising out of and in the course of his employment. This is the Claimant's burden, and the issue was identified as disputed at hearing.

The summary entered into evidence does not provide adequate evidence or basis upon which such a finding could be made. The Claimant is the party who bears the burden of proof and suffers the loss in the event that his burden is not met. The Claimant has not introduced evidence upon which he could meet that burden and the benefits cannot be awarded. As such, the award of the medical expenses should be reversed.

BRIEF POINT IV

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

The Claimant again misapprehends the argument being made by the Appellants in regards to his exam under *Iowa Code §*85.39. The post-2017 *Code* now limits the reasonable costs that may be reimbursed to the cost to perform an impairment rating. *Iowa Code §*85.39(2). This is different than a full independent medical examination which could touch upon numerous other issues besides a rating of disability. The Claimant can still get a full independent medical examination, but the *Code* now limits what he could receive in reimbursement from the total cost of an independent medical examination. Only the reasonable

cost to perform the functional impairment rating is reimbursable. If the Claimant wishes to obtain other opinions for purposes of litigation, he would now have to shoulder that burden himself, as those opinions would no longer be reimbursable under the new definition of what is a reasonable cost for an *Iowa Code §*85.39 exam. Any additional evaluation or opinions are not compensable as a part of an *Iowa Code §*85.39 exam.

The Claimant argues that the interpretation of the law being advanced by the Appellants is somehow novel or unusual. However, the Claimant concedes that the Iowa Court of Appeals has already agreed with the interpretation being advanced by the Appellants. *Mid-American Const., LLC v. Sandlin*, 2023 WL2148754 (Iowa App. 2023) In the *Sandlin* case there was a fee schedule that was used to set the examination reimbursement amount, the Claimant argues that that is not present here. The Claimant is the one with the burden of proof to establish what the reasonable costs would be of the *Iowa Code* §85.39 exam. If the Claimant does not introduce evidence that would otherwise show what the costs to perform a functional impairment in the locality will be, he will not be reimbursed. The Claimant presented no such evidence in this case.

The statute is clear by its terms that a worker can only receive reimbursement for the costs associated with performing an impairment rating. The Claimant can get an examination, and request opinions, on any particular issue he

would like, but the reimbursement will only be for the impairment rating. This is not an examination to get opinions on causation, restrictions, future care, or myriad of other issues. The Claimant can get those opinions, but those opinions are outside of the reimbursement that is now contemplated by *Iowa Code* §85.39. The Claimant would have to show specifically the costs to perform a functional impairment rating in the locality where the examination occurred. In this instance, the Claimant has failed to do so, and would not receive reimbursement for his *Iowa Code* §85.39 exam.

In assessing what would be reasonable, the total amount in controversy should be considered. The Claimant is still only entitled to reasonable reimbursement. It would be patently unreasonable to incur multiple thousands of dollars on the exam over only a few hundred dollars in benefits. This only goes to show that the injured worker in these instances has no incentive whatsoever to try to contain costs or otherwise act reasonably in terms of an *Iowa Code §*85.39 exam. In short, an injured worker can simply say it is not his or her problem and pass along any cost. This certainly does not fit with the assessment of what is reasonable.

The Claimant concedes that Dr. Sassman issued opinions and rated body parts beyond those that were found compensable in this case. *Iowa Code §*85.39(2) only covers injuries or conditions that are deemed compensable. The

Claimant is the party who bears the burden of proof. If the Claimant cannot show what part of the exam is associated with the compensable conditions, the Claimant will suffer the loss. This is consistent with Agency precedent in this regard. *Kirkendall v. Cargill Meat Solutions Corp.*, File No. 5055494 (App. Dec., 12/17/18). The Claimant further concedes that Dr. Sassman provided no such breakdown. The earlier statement that Dr. Sassman spent the majority of her report talking about the Claimant's deltoid and arm does not provide the concrete evidence upon which it could be determined what part of the exam and report were specifically related to those conditions. As such, the Claimant cannot receive an award of Dr. Sassman's independent medical examination bill.

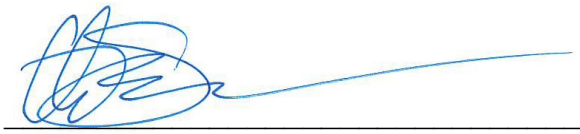
CONCLUSION

The Iowa Workers' Compensation Commissioner did not have subject matter jurisdiction over this claim due to the approval of Claimant's compromise settlement with the Second Injury Fund prior to issuing the Arbitration Decision. Further, the Claimant's claim would be barred by the applicable statute of limitations as his occurrence of injury took place more than two years prior to the filing of his Petition, and the discovery rule would not operate to save the Claimant's claim. The District Court's finding that the Claimant could split apart his claim for his elbow and his deltoid is incorrect as a matter of law. Therefore, the finding that any part of the claim was timely should be reversed. Lastly, the

award of the examination of Dr. Sassman was in error as the charges are not reasonable within the definition of the *Code*, and the Claimant has not introduced evidence upon which it could be determined what portions of the exam would be compensable. In either case, the award of the examination fees should be reversed. For the aforesaid reasons the Iowa Workers' Compensation Commissioner's decision should be reversed in total and the Claimant should take nothing from these proceedings.

CERTIFICATE OF COMPLIANCE

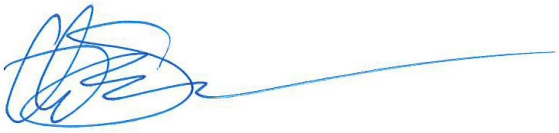
This brief complies with the typeface requirements and type-volume limitation of *Iowa Rs. App. P.* 6.903(1)(d) and 6.903(1)(g)(1) or (2) because it has been prepared in a proportionally spaced typeface using Time New Roman in 14 point font and contains 6,680 words, excluding the parts of the brief exempted by *Iowa R. App. P.* 6.903(1)(g)(1).



Christopher S. Spencer 04/10/23
Date

CERTIFICATE OF SERVICE

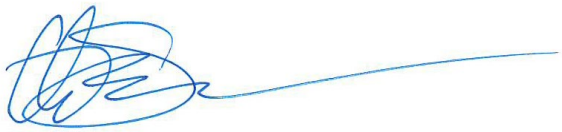
I, Christopher S. Spencer, member of the Bar of Iowa, hereby certify that on April 10, 2023, I or a person acting on my behalf served the above Petitioners-Appellants' Reply Brief to the Respondent-Appellee's attorneys of record, Janece Valentine, via EDMS in full compliance with *Rules of Appellate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



Christopher S. Spencer

CERTIFICATE OF FILING

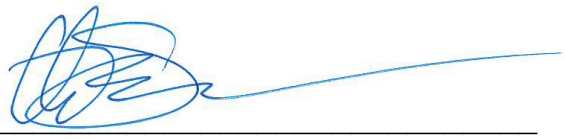
I, Christopher S. Spencer, hereby certify that I, or a person acting in my direction, did file the attached Petitioners-Appellants' Reply Brief upon the Clerk of the Iowa Supreme Court via EDMS on this 10th day of April, 2023.



Christopher S. Spencer

ATTORNEY'S COST CERTIFICATE

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



Christopher S. Spencer