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IN THE SUPREME COURT OF IOWA

CASE NO. 25-1236

LARRY DRISCOLL

Claimant–Appellant,

vs.

CITY OF CEDAR RAPIDS,

Defendant–Appellee.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
CASE NO. CVCV066632
HONORABLE HEATHER LAUBER

CLAIMANT–APPELLANT'S BRIEF

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the Commissioner erred in determining that Claimant's injury from a vaccine did not arise out of employment even though the employer strongly urged him and other employees to get the vaccine and derived benefit from its urging.

ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court. It presents an issue of first impression in Iowa, as no appellate decision has considered whether an adverse reaction to a vaccination that was strongly urged, but not mandated, by the employer can arise out of employment.

NATURE OF THE CASE

This case involves judicial review of a decision of the Iowa Workers' Compensation Commissioner denying benefits to Claimant, Larry Driscoll, who was severely injured after receiving the Johnson & Johnson COVID-19 vaccine at the behest of his employer, the City of Cedar Rapids (the "City"). The Commissioner reversed the Deputy's decision finding the injury compensable. The Commissioner's decision denying benefits was affirmed by the district court. Claimant requests

the court reverse the Commissioner's decision because it is based on an erroneous interpretation of law.

STATEMENT OF THE FACTS

Background. As the Commissioner stated, "[t]he parties do not assert significant factual disputes in this case." D005, App. Dec. at 2 (1/5/24).[1] In March 2020, the United States federal government declared a national emergency due to the COVID-19 pandemic. In the midst of this public health crisis, the City urged its employees to get vaccinated against COVID-19. D005, Hrg. Tr. at 89-90 (10/18/22).

Claimant, Larry Driscoll, age 51, was employed by the City of Cedar Rapids as the Water Distribution Manager, a position he had held since November 2019. D005, Hrg. Tr. at 28 (10/18/22). The water distribution department has two groups -- one for water main breaks and one for maintenance of valve and hydrants. D005, Id. at 28-29. As Manager, Larry led a group of around twenty-three employees. D005, Id. at 30.

The City's Urging of Employees to Get Vaccinated. In the Spring of 2021 when vaccines for COVID-19 became available, the City

[1] The court is bound by the agency's findings of fact if supported in the record as a whole. *See Meyer v. IBP, Inc.,* 710 N.W.2d 213, 218 (Iowa 2006).

strongly encouraged employees to get vaccinated, a fact acknowledged by the City. D005, Hrg Tr. at 89. An e-mail dated March 19, 2021, to "Everyone-City" from Teresa Feldman, Human Resources Director, states "The City of Cedar Rapids is encouraging all employees to get the COVID-19 vaccine for your health, as well as the health and safety of your family, co-workers and the community you serve." D005, Def. Ex. B-003. On April 5, 2021, the City sent this e-mail to all employees:

> We have been notified by Unity Point that City employees are now eligible for appointments for COVID-19 vaccines through their clinic. Please follow the instructions below.
>
> > NOTE: When you click on the link provided below, it will say "If you were forwarded this scheduling link and did not receive it directly from UnityPoint Health, please do not schedule an appointment." This does <u>not</u> apply to you, as a City employee. UnityPoint provided us with this link to share with our organization. However, you should not share with friends or family.
>
> Your group may sign-up to receive a vaccine from 8:00 AM-4:30 PM at the Unity Point Health Community Vaccine Clinic, located

at 717 A Avenue NE, Cedar Rapids (please enter on side facing Bank of the West).

. . .

D006, Clmt. Ex. 5-62

The City's Newsletter also announced that vaccination opportunities would begin April 5, 2021. D006, Clmt. Ex. 6-64. Notably, the City's encouragement to employees included a financial incentive; it offered employees "up to 2 hours from the Health Workplace Leave Policy to get a COVID-19 vaccination during normal work hours from their own physician, an area pharmacy, or other vaccination provider." Id.

In light of the foregoing evidence, the Commissioner expressly found that "[w]hile defendant did not mandate that employees receive a COVID-19 vaccination, based on testimony and other evidence submitted, defendant certainly encouraged or urged employees to receive a vaccine." D005, App. Dec. at 13 (1/5/24) (emphasis added). The Commissioner noted that "of the thirteen newsletters/updates provided in evidence, spanning about four months' time, eleven of those specifically state that City employees are encouraged to get vaccinated . . . [while] only one newsletter, on March 1, 2021, stated that vaccines

were not mandatory." (Id.) The Commissioner's Findings of Fact included this:

> Using language such as "it takes everyone," "it's our turn," "join us in protecting your community," "we all play a part in this effort, and you are key," and similar such language is exactly what 'strong urging' looks like."

D005, App. Dec. at 13 (1/5/24) (emphasis added).

Justin Koller, a City employee who was Sewer Operations Manager in the Spring of 2021, testified the City strongly encouraged its employees to get the vaccine. D005, Hrg. Tr. at 14 (10/18/22) He said in manager's meetings "[t]here were conversations of, you know, how to work with vaccinated versus unvaccinated people, whether there should be other stipulations on if a person isn't vaccinated on entry to buildings and things of that nature. . ." (Id.)

Larry Gets Vaccinated. Larry "totally agreed" with Mr. Koller that the City strongly encouraged the vaccine. D005, Hrg. Tr. at 32 (10/18/22) He noted there were multiple e-mails on the subject as well as updates on people in each department who were getting sick. D005, Hrg. Tr. at 33 (10/18/22) Larry used the link in the e-mail to sign up for the vaccine. On April 8, 2021, he went to the UnityPoint clinic on A Avenue as directed in the e-mail. D005, Hrg. Tr. at 31 (10/18/22) When he arrived, he was injected on his left arm with the Johnson & Johnson

vaccine. D005, Hrg. Tr. at 32 (10/18/22) He was given no options for other vaccines. (Id.)

Larry's Injury. Two weeks after receiving the vaccine Larry "woke up and my left arm was like limp and back of my knees hurt." D005, Hrg. Tr. at 34 (10/18/22) He attended work on Thursday, and when he went to work the next day the pain was getting worse and starting to travel from shoulder to shoulder and up into his neck. (Id.) He went to the urgent care. Ultimately, Larry came under the care of Dr. Michael Gomendoza, M.D. On May 14, 2021, Dr. Gomendoza wrote a letter "To Whom It May Concern," stating Larry "has been having muscle aches, joint pain, and generalized weakness two weeks after his COVID-19 vaccine. He continues to undergo further workup for the cause of his symptoms. There is high suspicion that his symptoms may be related to the vaccine." D007, Joint Ex. 2 at 26.

At the time of hearing, Larry had not yet reached maximum medical improvement. He has nerve damage, Bell's palsy, Guillain-Barre syndrome, loss of balance, tremors, foot drop, and is unable to walk without a cane. D005, Hrg. Tr. at 35 (10/18/22)

ARGUMENT

THE COMMISSIONER ERRED IN FINDING CLAIMANT'S INJURY DID NOT ARISE OUT OF EMPLOYMENT

While the Deputy Commissioner determined Claimant's injuries arose out of his employment with the City, the Commissioner and district court disagreed. Claimant requests this court reverse the Commissioner's decision.

A. Standard of Review.

The court's review of agency action is well known. "Factual determinations in workers' compensation cases are 'clearly vested by a provision of law in the discretion of the agency,' and so is the application of the law to those facts." *Id.* (quoting *Mycogen Seeds v. Sands,* 686 N.W.2d 457, 465 (Iowa 2004)). "By applying the 'substantial evidence' standard to the agency's fact finding, we are giving the agency appropriate discretion. *Id.* When reviewing an agency's application of the law to the facts, we reverse only when the agency's application is 'irrational, illogical, or wholly unjustifiable.'" *Id. See also Xenia Rural Water Dist. v. Vegors,* 786 N.W.2d 240, 242 (Iowa 2010). Unlike the commissioner's findings of fact, "we give the commissioner's

interpretation of the law no deference and are free to substitute our own judgment." *Lakeside Casino v. Blue,* 743 N.W.2d 169, 173 (Iowa 2007).

"On the other hand, application of the workers' compensation law to the facts as found by the commissioner is clearly vested in the commissioner" and may be reversed "only if it is irrational, illogical, or wholly unjustifiable." *Id.* Claimant asserts this case presents an interpretation of the law, such that no deference is given the Commissioner. However, even under the "irrational, illogical, or wholly unjustifiable" standard, reversal is appropriate.

Whether an injury arises out of employment is a question of causation, referring "to the cause and origin of the injury." *Miedema v. Dial Corp.*, 551 N.W.2d 309, 311 (Iowa 1996). A claimant "must prove by a preponderance of the evidence that a causal connection exists between the conditions of his employment and the injury." *Id.* "A preponderance of evidence exists when the causal connection is probable rather than merely possible." *Sherman v. Pella Corp.*, 576 N.W.2d 312, 321 (Iowa 1998). The standard is not meant as a high bar. *See, e.g.*, *Armstrong Tire & Rubber Co. v. Kubli*, 312 N.W.2d 60, 64 ("In the workers' compensation context a cause is proximate if it is a substantial factor in

bringing about the result. . . It only needs to be one cause; it does not have to be the only cause.").

B. The Commissioner erred in rejecting the "strong urging" test applicable to vaccine injuries.

The Commissioner properly recognized the focus in the "arising out of" employment analysis must be on "causation." However, the Commissioner wrongly rejected the Deputy's arbitration decision because it was based on the "strong urging" test espoused by Professor Arthur Larson in his workers' compensation treatise.

Professor Larson's treatise, 2 Larson's Workers' Compensation Law, specifically addresses injuries from vaccinations. Section 27.03[2] provides that "[i]f there is an element of **actual compulsion** emanating from the employer, the work connection is beyond question, as when the company requires the employee to submit to vaccination by the company's doctor as soon as the employee is hired, or during an epidemic tells the workers that unless they are vaccinated they cannot work until the epidemic is over." *Id.* (emphasis added) Here, of course, there was not actual compulsion by the City.

But Professor Larson's treatise continues: "When the inoculation is not thus not strongly tied to the employment either by employer

compulsion or by the special risks of the assignment, **it may still be covered if there is a combination of strong urging by the employer and some element of mutual benefit in the form of lessened absenteeism and improved employee relations."** *Id.*

One example of the "strongly urged" rule is *E.I. Dupont de Nemours & Co. v. Faupel,* 859 A.2d 1042 (Del. Super Ct. 2004). In *Faupel,* the court held that an employee who sustained an injury as a result of the employer's vaccination plan was entitled to benefits, stating "[a] compensable injury [ ] does not have to take place during job-related activity and may be incidental to employment; therefore even if an employee is injured during an activity that results from a facility or act of the employer provided for the convenience of the employee, the injury may be compensable." *Id.* at 1052.

Professor Larson's rule was also followed in *Smith v. Seamless Rubber Co.,* 150 A. 110 (Conn. 1930), but the court there found the employee's adverse reaction to a voluntary vaccination did not arise out of and in the course of employment. The *Smith* court laid out the applicable standard:

> Where an employer merely permits an employee to perform a particular act, without direction or compulsion of any kind, the purpose and nature

> of the act becomes of great, often controlling significance in determining whether an injury suffered while performing it is compensable. If the act is one for the benefit of the employer or for the mutual benefit of both, an injury arising out of it will usually be compensable; on the other hand, if the act being performed is for the exclusive benefit of the employee so that it is a personal privilege, or is one which the employer permits the employee to undertake for the benefit of some other person or for some cause apart from his own interests, an injury arising out of it will not be compensable.

Smith, 150 A. at 111 (emphasis added). The employer in *Smith* did not engage in repeated urging of employees to get vaccinated. Rather, the company was asked by the Board of Health to host a vaccine clinic, and the company merely asked its employees who wanted to participate. *Id.* at 110. The full extent of the company's urging was to state: "We take this opportunity to urge you to give this serious consideration and take advantage of the opportunity offered you." *Id.* Moreover, the court emphasized the company's purpose was not for mutual benefit, but solely for the benefit of employees, as evidenced by the fact that the vaccine was not being offered exclusively to employees, but also to the families of employees. *Id.* at 111. *See also Saintsing v. Steinbach,* 1 N.J. Super. 259, 64 A.2d 99, 101 (App. Div. 1949) ("It would be unrealistic to find [the company's efforts] were for the exclusive benefit of the

employees and were not additionally designed to further a sound employer-employee relationship and safeguard the employer against the serious effects of a case of smallpox amongst its employees.")

Here, in contrast to *Smith,* the facts as found by the Commissioner show the City strongly encouraged the vaccine to its employees. It sent multiple e-mails and newsletters expressing its desire to have employees vaccinated and held manager meetings also encouraging the vaccine. Moreover, the City benefitted from the vaccine in the form of lessened absenteeism and improved employee relations. The more employees became vaccinated, the less concern it had with employee absenteeism. And unlike *Smith,* the arrangements made by the City to get the vaccine were available only to employees and not their families. Larry himself "felt that [the vaccine] was a good option for me to lead the department to just ensure that my guys didn't get sick from me." D006, Clmt. Ex. 2 at 39 [Claimant's depo., p. 22]

That the vaccine here was administered at a local clinic off the employer's premises by someone who was not a City employee is of no consequence. No case law hinges on those factors. Instead, the more important consideration is whether there is an employer-derived benefit of the activity. For example, in *Briar Cliff College v. Campolo,* 360 N.W.2d

91, 94 (Iowa 1984), the court held that a college professor who died of a heart attack during an intramural softball game was entitled to benefits because the intramural sports program furthered the goal of close relationship and contact between faculty and students.

In rejecting Larson's "strong urging" test, the Commissioner stated:

> Larson's treatise is highly respected and often relied upon throughout the country. However, I reject the "strong urging" test or standard established by Laron. In my judgment, this standard does not focus on the requirements of an injury to arise out of and in the course of employment and, instead, establishes an exception to this requirement. It establishes poor public policy that would discourage an employer from trying to support the greater good or trying to assist its employees. Moreover, this section of Larson's treatise and analysis is not universally accepted or applied throughout the states.

D005, App. Dec. at 16 (1/5/24).

Rather than accepting the sound reasoning of the "strong urging" test, the Commissioner instead focused on the notion that an adverse reaction from taking the vaccine was not an "actual risk" of employment and therefore did not "arise out of" employment. While Iowa has indeed adopted the actual risk doctrine, it makes no difference in this case.

The Commissioner stated that Claimant's decision to take the vaccine was voluntary, and he was "free to continue his employment

even if he did not receive the vaccine." D005, App. Dec. at 17 (1/5/24) As such, "Claimant has not demonstrated that there was an actual risk of an adverse reaction to a Covid-19 vaccine during the regular course of his employment." (Id.) Essentially, the Commissioner held that taking the vaccine was not a rational consequence or hazard connected with Claimant's employment.

Adopting the "strong urging" test fully comports with Iowa law and makes good sense. It certainly does not remove or change the requirement that an injury arise out of employment; rather, it is merely a lens through which to view that requirement.

In *Lakeside Casino v. Blue,* 743 N.W.2d 169, 174 (Iowa 2007) the court explained that the "arising out of" element requires proof that a causal connection exists between the conditions of the employment and the injury." (Citing *Miedema,* 551 N.W.2d at 311) In other words, the injury must not have coincidentally occurred while at work, but must in some way be caused by or related to the working environment or the conditions of employment." *Id.* "If the nature of the employment exposes the employee to the risk of such an injury, the employee suffers an accidental injury arising out of and during the course of employment. And it makes no difference that the risk was common to the general

public on the date of the injury." *Hanson v. Reichelt*, 452 N.W.2d 164, 168 (Iowa 1990). Under the actual-risk doctrine, an injury is compensable "'as long as the employment subjected [the] claimant to the actual risk that caused the injury.'" *Lakeside Casino,* 743 N.W.2d at 176 (quoting 1 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 3.04, at 3–5 (2007)). Under the actual-risk doctrine, to establish the "arising out of" element, a Claimant is only required to prove that the nature of his employment exposed him to the risk of such an injury. *Id.* at 174.

In *Lakeside Casino,* the court held the employee's claim was compensable under the actual-risk doctrine, stating:

> Blue injured her ankle when she stumbled as she was walking down stairs. It was not disputed that these stairs were a condition existing in her workplace. Moreover, it is a matter of common knowledge that stairs pose an actual risk of stumbling or falling when traversing them, similar to the risk posed by going up and down ladders. Although Blue did not stumble due to any particular defect in or condition of the stairs, it is not necessary under Iowa case law that the stairs in Blue's workplace be more dangerous than a typical set of steps. In addition, it matters not that she stumbled through her own inattention. Blue's misstep was causally related to the fact that she was walking on stairs, and therefore, the Commissioner rationally concluded her injury arose out of her employment.

Id. at 174. Quite simply, (a) it is common knowledge that stairs pose a risk of stumbling or falling when traversing them; (b) a person may be

just as likely to become injured while traversing stairs at home as he is at work; and (d) Blue's injury on the stairs occurred at work. Similarly, here, (a) it is common knowledge that vaccines pose a risk of adverse reaction; (b) Larry faced the risk of an adverse reaction whether or not he received the vaccine on his own time or while working; (c) He was urged by his employer to receive the vaccine and was injured when he did so. Both situations present injuries arising out of employment.

Just as the employer's premises in *Lakeside Casino* were equipped with stairs, here, the City provided a scheduling link unique to City employees for scheduling vaccination appointments, providing employees access to a vaccine that was still in limited supply. D005, App. Dec. at 3 (01/05/22), D005, Def Ex. C-020. City employees were allowed to use employer-paid sick leave to get vaccinated. (Id. p. 5). The City sent numerous communications to its employees encouraging them to get vaccinated. Id. pp. 5-6; D006 Clmt. Ex. 5 and 6 at 62-68, D005, Def. Ex. B-003. Vaccination was a subject of frequent discussion at work meetings, and Larry felt pressure to get the vaccine. D005, App. Dec. at 7 (1/05/24). Prior to receiving the City's communications, he was not interested in getting vaccinated. (Id. p. 6) Ultimately, he scheduled his vaccination appointment using a work computer, during work hours, via

the City-provided scheduling link, and went to his appointment during work hours.

Accepting the Commissioner's factual findings, there should be no doubt but that Larry's employment was "a substantial factor in bringing about" Larry's injuries. The Commissioner's decision to the contrary essentially requires greater proof than is necessary in the no-fault workers' compensation system. The City's urging of employees to get vaccinated, in the midst of a public health crisis no less, contributed to Larry's decision.

This situation is analogous to recreational or social activities, where injuries are compensable when an employee engages in an activity that provides a substantial benefit to the employer beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life. *See Brian Cliff College v. Campolo,* 360 N.W.2d 91 (Iowa 1984) (college professor who died of a heart attack during an intramural softball game was entitled to benefits because the intramural sports program furthered the goal of close relationship and contact between faculty and students). Surely dying of a heart attack during a non-mandatory softball game cannot be considered an "actual risk" of a college professor's employment. Yet the Commissioner

ignored *Campolo* and other situations involving recreational and social activities that are neither "mandatory" nor "required" by the employer. In these situations, injuries incurred during the recreational or social activity are compensable when there is a substantial benefit to the employer. Here, there was substantial benefit to the City in the form of reduced absenteeism for vaccinated employees, something the City highlighted in its newsletters. Moreover, Larry "felt that [the vaccine] was a good option for me to lead the department to just ensure that my guys didn't get sick from me." D006, Clmt. Ex. 2 at 39.

The Commissioner's concern – that the "strongly urged" standard would create a disincentive for employers to assist their employees and/or to provide convenience for their employees – is misplaced. To hold the City responsible based on its strong encouragement of vaccination is not "penalizing" the City. The question is not whether the City did anything *wrong* in encouraging the vaccine; after all, workers' compensation is a no-fault system where any fault of the employer or employee is of no consequence. But because the City strongly encouraged the vaccine and benefitted from it, an injury to an employee who is injured as a result of receiving the vaccine is compensable. Employers routinely weigh the pros and cons of whether or not to

encourage or require employee participation in various company-sponsored events. These decisions depend upon many factors. Potential liability for workers' compensation benefits may be one such factor. But that is not a reason to deny workers' compensation benefits when the activity occurs during the work day and the employer derives a benefit from the activity. Nor does it not send a message to employers that they did anything "wrong."

Additionally, beyond the undeniable benefit to the City of reduced absenteeism for employees who become vaccinated, the City, as a governmental municipality, benefited from being at the forefront of a public health crisis. The City played a crucial role in promoting a healthy community, serving as the frontline of public health and well-being through municipal and health services. The City's role and interest in these areas is greater than employers in the private sector. Government leaders possess the unique ability to implement policies, programs, and initiatives tailored to the specific needs and characteristics of their communities. Here, the City urged its employees to get vaccinated in furtherance of its role to promote a healthy community. By doing so, it brought itself within the scope of risk for which workers' compensation benefits are available to its injured employees.

CONCLUSION

In this matter of first impression, Claimant respectfully submits the court adopt the "strongly urged" test of compensability in cases involving injuries occurring from vaccine administration, and upon doing so, reverse the decision of the Workers' Compensation Commissioner denying workers' compensation benefits to Claimant, Larry Driscoll.

Respectfully submitted,

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CERTIFICATE OF ELECTRONIC FILING AND SERVICE

I certify that on September 19, 2025, I electronically filed the forgoing with the Clerk of Court of the Supreme Court using the Iowa Electronic Document Management System, which will send notification of electronic filing to the following opposing counsel. Per Iowa Rule 16.317(1)(a)(2), this constitutes service of the document for the purposes of the Iowa Court Rules.

By: _____
Thomas D. Wolle

CERTIFICATE OF COMPLIANCE WITH TYPE REQUIREMENTS

This brief complies with the type-face requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because this brief has been prepared in a proportionally spaced typeface, using Microsoft Word 2013 in 14-point Times New Roman and contains 4,000 words, excluding parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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