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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 REPLY BRIEF

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INTRODUCTION

Defendant, the City of Cedar Rapids, pooh poohs the issue involved here, stating transfer to the court of appeals is appropriate as the "case involves the application of settled Iowa workers' compensation law." Claimant believes the legal issue is unique because it involves the Commissioner's failure to apply the "strong urging" test applicable to vaccine injury cases. But regardless whether the case is retained by the supreme court or transferred, it is clear the Commissioner erred in finding Claimant's injury did not arise out of employment, since the City strongly urged Claimant to get the vaccine and benefitted from its urging of employees to do so.

ARGUMENT

CLAIMANT'S INJURY AROSE OUT OF EMPLOYMENT BECAUSE THE CITY URGED EMPLOYEES TO GET VACCINATED AND DERIVED BENEFIT FROM ITS URGING.

To be clear, Claimant is not asking this court to revisit the actual-risk doctrine. Iowa law is clear that "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." *Miedema v. Dial Corp.,* 551 N.W.2d 309, 311 (Iowa 1996). But the Commissioner erred in his interpretation of this legal standard. The Commissioner acknowledged that "if the vaccine had been mandated by the [City], Claimant could establish it is a

rational consequence, or hazard, between the adverse vaccine reaction and his employment." D005, App. Dec. at 17. He even stated "[p]erhaps if the employer had offered a financial or some other incentive to encourage employees to obtain the vaccine . . . claimant could prove that there was a rational consequence between the employment and the injury. D005, App. Dec. at 18.[1] Where the Commissioner erred is in finding a legal distinction between these two situations, and one in which the employer strongly urges employees to get vaccinated and derives a benefit from such encouragement. There is nothing about the "strongly urged" test espoused by Professor Larson and the actual risk doctrine.

The Commissioner, citing *King v. Arthur,* 96 S.E.2d 846, 849 (N.C. 1957), found the "vaccine offered was similarly voluntary and also offered for the benefit and protection of the employee and the public generally, rather than for some benefit to the employer." D005, App. Dec. at 20. That is where the Commissioner went astray. The focus in the "arising out of" analysis is <u>not</u> on

[1] Defendant quibbles about whether the City provided a "financial incentive" by allowing City employees to use healthy workplace leave policy to get the vaccine. Claimant was a salaried employee and did not have to use the healthy leave policy. Ms. Barske, on behalf of the City, acknowledged that a salaried employee cannot just run a personal errand on their own time, as the errand must be work-related. D005, Hrg. Tr. at 98. In other words, absent a work-related purpose to getting the vaccine during work hours, Claimant would not have been allowed to do so.

whether there is some benefit to the employee or to the public – rather, it is whether there is some benefit to the employer (even if there is also some mutual benefit). Here, there clearly is. If employees disregarded the City's strong urging to get vaccinated, the City risked employees contracting COVID and being unable to work. *See Saintsing v. Steinbach,* 1 N.J. Super. 259, 64A.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.")

Moreover, while the Commissioner purports to rely on *King v. Arthur,* that case is easily distinguishable and actually supports Claimant's position. The very first paragraph of *King* reads:

> The defendant employer was under compulsion of law to see that the employees in his dairy took a Wassermann test each six months. If he failed to see that such tests were made and to furnish evidence thereof, upon request, to the Buncombe County Board of Health as required by its rules and regulations, his dairy would become subject to 'immediate degrading, suspension of permit,' and he would become guilty of a misdemeanor and upon conviction subject to a fine or imprisonment. . .

King, 245 N.C. at 600. So the court frame the issue as this:

> [T]he question posed for determination is simply this: Does an injury sustained by an employee while taking a medical test or examination, which test or examination is required by law in order for the employee to

> continue to hold her job, constitute an accident arising out of and in the course of her employment…?

Id. at 601. The court found the injury did not arise out of employment. (Claimant, Driscoll, agrees with that holding.)

But the issue here is different – what happens when the employee sustains an injury caused by a vaccination that his employer strongly urged him to get? The *King* court, while not addressing this precise issue, suggested the injury would indeed arise out of employment in that situation. Citing 58 Am.Jur., Workmen's Compensation, section 277, page 775, the court stated: "Incapacity caused by illness from vaccination or inoculation may properly be found to have arisen out of the employment where such treatment is submitted to pursuant to the direction or for the benefit of the employer, but the rule is otherwise where the employee voluntarily avails himself of such treatment solely for his own benefit, or in the interest of the public health, even though the facilities therefor were provided by the employer." *Id.* (emphasis added)

The other case relied upon heavily by the City, and cited by the Commissioner, is *Smith v. Seamless Rubber Co.,* 111 Conn. 365 (1930). As with *King*, a close reading of *Smith* also supports Claimant's position. In *Smith,* the court stated:

> 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.

Id. at 111 (emphasis added). The court found Claimant's vaccine injury did not arise out of employment, however, because there was no "urging" by the employer, which merely posted a notice stating its purpose was "to be of assistance to the board of health in its effort to prevent an epidemic of small pox." *Id.*[2] The court was also persuaded by the fact that the employer's "extension of the opportunity to secure vaccination to the families of employees." *Id.*

Here, the City's numerous communications were significantly more forceful in urging the vaccine than the single posting in *Smith.* The City's 3/19/21 email encouraging the vaccine specifically mentioned the health and

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[2] In *Smith,* the employer posted one (and only one) notice in its plant that stated: "We naturally desire to assist the Board of Health in their efforts to prevent a smallpox epidemic in New Haven and vicinity. Therefore, we are arranging so that you may be vaccinated without any charge to yourself at our hospital today and tomorrow. In order to handle this matter without confusion, all those desiring to be vaccinated kindly give their name to the department foreman or clerk, who will make up the list for each department, and he will notify you at what time you are to come down to the factory hospital. We take this opportunity to urge you to give this serious consideration and take advantage of the opportunity offered you."

safety of co-workers. D005, Def. Ex. B-003. Indeed, the Commissioner expressly stated the City's communications were "exactly what strong urging looks like." D005, App. Dec. at 13. Moreover, the City made clear its published opportunity to get the vaccine was available only to City employees and not their families. Id.

CONCLUSION

The Commissioner erroneously interpreted Iowa law by failing to recognize that when an employee engages in an activity where there is mutual benefit to the employer and employee, the injury arises out of employment. The undisputed record here shows there was a benefit to the City in having employees vaccinated, and the City encouraged its employees to do so. As a result, Claimant respectfully requests this court reverse the decision of the Commissioner and the district court.

CERTIFICATE OF ELECTRONIC FILING AND SERVICE

I certify that on November 6, 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.

CERTIFICATE OF COMPLIANCE WITH TYPE REQUIREMENTS

This brief complies with the typeface and type-volume requirements of Iowa Rule of Appellate Procedure 6.903(1)(d) and 6.903(1)(g)(1) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-Point Times New Roman and contains 1643 words, excluding the parts of the brief exempted by Iowa R. App. P.6.903(1)(g)(1).