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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 APPLICATION FOR FURTHER REVIEW FROM THE DECISION OF THE IOWA COURT OF APPEALS FILED AUGUST 19, 2026

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals erred in "leav[ing] for another day the question of whether to affirmatively adopt the [Larson] section 27.03[2] standard" for compensability of non-mandatory vaccine injuries. Rather than deciding this legal question of first impression, the Court of Appeals instead ruled that there were insufficient facts, apparently as a matter of law, to establish compensability under the Larson standard it did not adopt. The Court of Appeals factfinding was made notwithstanding the Commissioner's findings of fact expressly stating the City's messaging regarding the taking the Covid-19 vaccine was "exactly what 'strong urging' looks like," thereby satisfying the Larson standard.

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STATEMENT SUPPORTING FURTHER REVIEW

Claimant, Larry Driscoll, a Manager Distribution Manager with the City of Cedar Rapids, was seriously injured as a result of getting vaccinated while in the course of his employment with the City. Professor Larson's treatise, routinely adopted by the Iowa Supreme Court, makes non-mandatory vaccine injuries compensable when "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." *Larson's Workers' Compensation Law,* § 27.03[2]. In its findings of fact, the Iowa Workers' Compensation Commissioner expressly found eleven of the City of Cedar Rapids' thirteen published newsletters urged its employees to get vaccinated against the Covid-19 virus, stating the newsletter's language, including "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," are "exactly what 'strong urging looks like.'" Nevertheless, the Commissioner rejected the Larson treatise, holding that because the Covid-19 vaccine was not mandated by the City, Claimant's adverse reaction to it was not a rational consequence or hazard connected with his employment because the vaccine was not mandatory.

The Court of Appeals, noting the issue of whether a non-mandatory vaccine injury is compensable under Iowa law was one of first impression, agreed with Driscoll that the Larson standard was not inconsistent with Iowa law. Yet strangely, it left "for another day" whether to adopt the Larson standard, and determined that the facts *as a matter of law* would not meet the standard – a factual finding not even made by the Commissioner.

Driscoll requests the Iowa Supreme Court grant further review to adopt the Larson test for compensability of non-mandatory vaccine injuries. This is an important question of law that has not been, and should be, settled by the Iowa Supreme Court, and it presents an issue of broad public importance. Ultimately, Driscoll requests the court remand the case to the Commissioner to apply the correct legal standard to its factual determinations, an outcome espoused by the dissent in the court of appeals.

BRIEF IN SUPPORT OF FURTHER REVIEW

I. SECTION 27.03[2] OF LARSON'S TREATISE, WHICH DEALS WITH VACCINE INJURIES, IS CONSISTENT WITH IOWA LAW AND SHOULD BE ADOPTED BY THIS COURT.

The issue here is whether Claimant's adverse reaction to a non-mandatory vaccine arose out of his employment. Iowa law is clear that to arise out of employment, "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). Iowa courts have never dealt with whether a non-mandatory vaccine injury may arise out of employment. *Larson's Worker's Compensation* § 27.03[2] expressly discusses this issue and provides:

> When the inoculation is 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.

The Iowa Workers' Compensation Commissioner rejected the *Larson* standard, stating: "I simply reject the 'strongly urged' standard created by Larson's treatise and I conclude that the injured worker must demonstrate that he or she sustained an injury that arose out

of his or her employment as a result of an actual risk associated with the employment." (Appeal Decision, p. 19)

Unlike the Commissioner, the court of appeals agreed with Driscoll that the *Larson* standard does not change the actual risk requirement, but is instead "merely a lens through which to view that requirement." (Court of Appeals decision, pp. 4-5) The court of appeals stated "the section 27.03[2] standard does not inherently violate the arising-out-of or in-the-course-of elements for workers' compensation liability." *Id.* (Citing *Meyer v. IBP, Inc.,* 710 N.W.2d 213, 223 (Iowa 2006) ("When one speaks of an event 'arising out of employment,' the initiative, the moving force, is something other than the employment; the employment is thought of more as a *condition* out of which the event arises than as the force producing the event in affirmative fashion.")

II. THE COURT OF APPEALS ERRED IN FAILING TO REMAND THE CASE TO THE COMMISSIONER TO APPLY FACTS USING THE CORRECT LEGAL STANDARD.

Where the Court of Appeals went astray is when it usurped the province of the Commissioner and concluded that, even if the Larson standard was adopted (a question it left "for another day"), the facts in this record "do not rise to that level or warrant liability." (Ct. App. Dec., p. 5)[1] As aptly noted by the dissent, the commissioner rejected Larson and never applied the correct legal standard. Critically, there were ample facts in the record that would have satisfied the *Larson* standard had that standard been applied by the Commissioner. In his dissent, Judge Sandy stated:

[1] Judge Sandy, dissenting, stated: "Having agreed that section 27.03[2] is consistent with Iowa law, we should say so and adopt it. Courts confronting issues of first impression in this field have long looked to *Larson's Workers' Compensation Law* for guidance. There is no reason to withhold that guidance from the commissioner who must decide the next case and the employers and employees who must order their affairs in the meantime."

> In *Lakeside Casino,* the stairs were an ordinary feature of daily life, yet because they were also a condition of the claimant's workplace, her fall arose out of her employment. 743 N.W.2d at 174. So too here. The vaccine was available to the public at large, but Driscoll did not encounter it as a member of the general public. He encountered it as an employee – through a scheduling link his employer secured and reserved for City employees alone; at a clinic his employer arranged, during work hours, as his employer's leave policy expressly allowed; and after months of his employer's insistence that "it takes everyone" and that "you are key." The employment did not merely coincide with the risk; it delivered it. That is the causal connection our workers' compensation statute requires. *See Miedema v. Dial Corp.,* 551 N.W.2d 309, 311 (Iowa 1996)

Court of Appeals Decision, p. 8 (Sandy, J., dissenting). Judge Sandy noted the City's messaging regarding the vaccine was, as expressly found by the commissioner, "exactly what 'strong urging' looks like." But the commissioner's failure to apply Larson's "strong urging" standard to the facts of the case warrant reversal and remand to the commissioner.

That remand to the Commissioner is the appropriate procedural step here is well established. *See, e.g.,* Iowa Code § 17A.19(10) (reversal, modification, or remand to the agency for further proceedings appropriate where the agency action is affected by an error of law); *Dunlavey v. Economy Fire & Cas. Co.,* 526 N.W.2d 845, 847 (Iowa 1995) (remand to commissioner for application of correct legal causation standard was appropriate where commissioner denied benefits to employee seeking to recover for nontraumatic mental injury).

CONCLUSION

Claimant requests this Court grant further review of the court of appeals decision, and that it adopts section 27.03[2] of Larson's treatise for vaccine injuries. Claimant further requests the Court remand this case to the commissioner for an application of the facts to this correct legal standard.

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

LARRY DRISCOLL, Claimant, vs. CITY OF CEDAR RAPIDS, Self-Insured Employer, Defendant.	FILE NO. 22001119.01 A P P E A L D E C I S I O N Headnotes: 1101; 1102; 1107; 1402.20; 1402.30; 1802; 2907

STATEMENT OF THE CASE

Defendant City of Cedar Rapids, self-insured employer, appeals from an arbitration decision filed on June 19, 2023. Claimant Larry Driscoll responds to the appeal. This case was heard on October 18, 2022, and it was considered fully submitted in front of the deputy workers' compensation commissioner on December 1, 2022.

This appeal involves an issue of first impression in Iowa and is essentially a legal challenge to whether claimant's injury arose out of and in the course of his employment with defendant. The deputy commissioner found claimant sustained an injury arising out of and in the course of his employment when he suffered a reaction and complications following inoculation with a Covid-19 vaccination. Defendant asserts on appeal that the deputy commissioner erred in finding defendant is liable and in awarding benefits to claimant.

Claimant asserts on appeal that the arbitration decision should be affirmed in its entirety.

Those portions of the proposed arbitration decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 17A.5 and 86.24, the arbitration decision filed on June 19, 2023, is reversed.

The parties' stipulations, set forth in the hearing report were accepted by the deputy commissioner and the parties are bound by those stipulations. The evidentiary record includes Joint Exhibits 1 through 7, Claimant's Exhibits 1 through 14, and

Defendants' Exhibits A through G. Claimant testified on his own behalf. Justin Koller also testified on behalf of claimant. Gretchen Barske testified on behalf of the employer.

ISSUES

1. Whether claimant sustained an injury arising out of and in the course of his employment on April 8, 2021[1];
2. If so, whether a running award of temporary benefits is appropriate;
3. Payment of medical expenses;
4. Payment of an independent medical examination under Iowa Code section 85.39;
5. Alternate medical care under Iowa Code section 85.27;
6. Whether claimant is entitled to penalty benefits pursuant to Iowa Code section 86.13; and
7. Taxation of costs.

FINDINGS OF FACT

The parties do not assert significant factual disputes in this case. Rather, the majority of the relevant facts are not disputed. The deputy commissioner entered detailed findings of fact and I accept the majority of those findings as set forth below. Having conducted a de novo review of the record and considered all of the evidence and testimony in the record, I find:

The deputy commissioner had the best vantage point of the live witnesses to assess credibility. The presiding deputy commissioner found claimant to be credible. I accept that finding.

At the time of hearing, claimant was 51 years old. (Joint Exhibit 1, page 1) Claimant is married with one adult daughter. (Hearing Transcript, p. 25) He is a high school graduate, and attended Kirkwood Community College where he earned a diploma in the water/wastewater environmental program in 1991. (Tr., p. 26; Claimant's Exhibit 3, p. 58) In 2011, claimant earned an associate degree from Kirkwood Community College in business management. (Cl. Ex. 3, p. 58)

Claimant worked for People's Natural Gas for about eleven years as an operator in water and wastewater systems. (Tr., p. 27) After that, he went to work for the City of Anamosa as the public works director for eight or nine years. In approximately 2012, he went to work for the City of Fort Madison as the public works director. (Tr., p. 28; Cl. Ex. 10, p. 78) In November of 2019, claimant was hired as the water distribution manager for defendant. (Tr., p. 28; Cl. Ex. 10, p. 79)

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[1] The primary issue on appeal is whether this injury arose out of and in the course of employment. However, I have set forth the disputed issues at the time of the arbitration hearing because this decision is substituted for the arbitration decision.

In his role as water distribution manager, claimant was responsible for protecting the water distribution system, including replacing fire hydrants and valves, repairing water main breaks, and managing the department's approximately 20 employees. (Cl. Ex. 10, p. 79) He testified that he spent about 90 percent of his time in the office, and the other 10 percent in the field, (Tr., p. 29)

Claimant has alleged a work-related injury occurred on April 8, 2021. On that date, claimant received Johnson and Johnson's Janssen COVID-19 vaccination. (Tr., pp. 30-32; Cl. Ex. 7, p. 69) About two weeks after receiving the vaccination, claimant began to experience adverse effects. (Tr., p. 34) There is no dispute between the parties that the symptoms and diagnoses claimant has experienced since receiving the vaccine are causally related to the vaccine. The main issue to determine in this matter is whether his injuries, resulting from the vaccine, arose out of and in the course of his employment with the City of Cedar Rapids.

Gretchen Barske testified at hearing on behalf of defendant. The presiding deputy commissioner found Ms. Barske's testimony to be consistent with other evidence in the record and assessed her demeanor at hearing. The deputy commissioner found that Ms. Barske was a credible witness and I accept that finding.

Ms. Barske is the benefits manager for defendant and was involved with the City's response to the COVID-19 pandemic. (Tr., pp. 88-89) Throughout the pandemic, Ms. Barske helped draft some of the City's healthy workplace leave policies, she helped the City follow guidelines set forth by the Centers for Disease Control and Prevention (CDC), and she helped keep track of CDC updates regarding COVID-19. (Tr., p. 89) Ms. Barske testified that the City's policy throughout the pandemic was to follow all CDC guidelines, including messages regarding vaccination.

Ms. Barske confirmed that defendant encouraged employees to get the COVID-19 vaccine. (Tr., p. 90) The City did not mandate the vaccine or host a vaccination clinic on City property at any time. Employees were not required to report their vaccination status to defendant. (Tr., pp. 90-91)[2] Ms. Barske testified that the defendant did reach out to Unity Point, a local medical provider, at some point inquiring about vaccinations. (Tr., p. 92) Subsequently, Unity Point contacted Ms. Barske on Thursday, April 1, 2021, with an email containing a link for city employees to schedule a vaccination. (Tr., p. 92; Defendant's Exhibit E, pp. 62-63)

The email Unity Point sent to Ms. Barske reads, in part, as follows:

> We are reaching out to you because you are part of Phase 1A and Phase 1B, for COVID-19 vaccinations. Based on the survey completed by your

[2] There was a brief period in November 2021 when it appeared the federal government was going to require certain employees to be vaccinated or submit to weekly COVID-19 testing. During that time, the City began to gather required information regarding employee vaccinations. However, claimant no longer worked for the City at that time, and no such requirement came to pass.

> organization, you have been linked to UnityPoint, St. Luke's – Work Well as a vaccination host site.
>
> 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).
>
> Vaccinations will occur by appointment only, on a "first come, first serve basis" and we encourage you or your team to sign up as soon as possible.

(Def. Ex. E, pp. 62-63)

The email then provides instructions for registration using a specific link to Unity Point's website, and indicates the link is for "specific organizations/individuals and should not be shared with family or friends." (Def. Ex. E, p. 63)

Over the next couple of days, Ms. Barske and the Unity Point representative emailed back and forth a few times to clarify some details, including that the link was only to be used by City employees and they should not share it with family and friends. (Def. Ex. E, pp. 60-62) Teresa Feldmann, Human Resources Director, sent an email to all City employees on April 5, 2021, as follows:

> We have been notified by Unity Point that City employees are now eligible to register 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 not 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).
>
> Vaccinations will occur by appointment only, on a "first come, first serve basis" and we encourage you or your team to sign up as soon as possible.

(Cl. Ex. 5, pp. 62-63; Def. Ex. B, pp. 4-5)

Ms. Feldman's email then provides the same instructions for registration using the Unity Point link. Ms. Feldmann then added: "As another resource, you can checkout (sic) VaccineFinder at https://vaccinefinder.org."

Ms. Barske testified that defendant did not have to pay for the vaccine clinic. (Tr., p. 92) If an employee expressed that they did not plan to get the vaccine, Ms. Barske said the city would advise that it was each employee's choice and was not mandatory. (Tr., p. 94) Defendant offered a healthy workplace leave policy, which Ms. Barske said was modeled after the federal COVID relief program. (Tr., pp. 95-96) Defendant chose to continue the program once the federal program ended. Part of that program allowed City employees to take up to two hours of paid time off work in order to get a COVID-19 vaccine. Claimant testified that as a manager, he did not have to "punch a clock" to leave work, so he did not directly use the healthy workplace leave when he received his vaccine. (Tr., pp. 62) He did receive the vaccine during regular work hours, at the Unity Point clinic.

There is no dispute between the parties that defendant did not mandate that employees get vaccinated. (See Tr., pp. 13-14; 58; 90) The parties also agree that defendant "encouraged" employees to get vaccinated.

Justin Koller testified on behalf of claimant. Mr. Koller was employed by defendant from 2013 until April of 2022. (Tr., pp. 9-10) From 2016 until he left defendant, he was the sewer operations manager, and, like claimant, Mr. Koller oversaw other employees in his department. (Tr., pp. 10-11) Mr. Koller knew claimant and at times collaborated with claimant when their work overlapped. (Tr., p. 11) Again, the presiding deputy commissioner found Mr. Koller's testimony to be consistent with other evidence in the record and found him to be a credible witness. I accept that finding.

Mr. Koller testified about the emails and newsletter that defendant sent to employees over the course of the COVID-19 pandemic. (Tr., p. 12) He recalled receiving multiple emails concerning COVID, as well as vaccination times and locations. (Tr., p. 13) While he agreed that defendant did not mandate vaccines, he felt the City strongly encouraged employees to get the vaccine. (Tr., pp. 13-14) Mr. Koller testified that during managers' meetings, which claimant also attended, there was conversation regarding the benefits of the vaccine, as well as conversation regarding how to work with vaccinated versus unvaccinated people. (Tr., p. 14) Mr. Koller stated this was "an ongoing conversation that would have spanned across the date that we're talking about [April 2021], and it was multiple conversations over time within that '20 to '21 year." (Tr., pp. 21-22) Mr. Koller did not recall feeling more pressure as a manager to get the vaccine, but he thought defendant "strongly encouraged" all employees to get the vaccine. (Tr., p. 15) Mr. Koller testified he received a vaccine, like claimant, using an email he received from defendant with the link to register at Unity Point. (Tr., pp. 17, 20)

With respect to the emails and newsletters defendant provided to employees, Mr. Koller agreed that defendant followed CDC guidelines with respect to COVID-19 protocols, including masking and social distancing. (Tr., pp. 18-19) He testified that in April of 2021, if an employee was not wearing a mask, there would be remedial action. (Tr., p. 23) However, there was no remedial action if an employee did not get vaccinated, as it was not required. Finally, Mr. Koller testified he did not feel defendant

was "overbearing" with respect to vaccinations, but that "it was a continuous message that was routinely recited, but not overbearing." (Tr., p. 23)

Claimant testified and he also agreed that defendant at no time actually mandated that employees receive a vaccine. (Tr., p. 58) Claimant also agreed that several newsletters and emails were sent to employees encouraging vaccination. He did not receive the vaccine on city property, but he scheduled it through the link provided in the April 5, 2021, email. (Tr., p. 59) Claimant agreed he likely would have been eligible to receive a COVID-19 vaccination earlier than April 5, 2021, but did not really look into it prior to that time. (Tr., p. 60) He also acknowledged that access to the vaccine prior to that time was limited and it could be difficult to find. (Tr., pp. 60-61) He was not provided with any incentive or additional monetary payment from defendant when he did receive the vaccine, but he did go during work hours. (Tr., pp. 61-62) He was aware of the healthy workplace leave policy but did not use it due to his status as a manager. (Tr., p. 62)

Claimant testified, both at his deposition and at hearing, that he decided to get the vaccine because he felt it was the right thing to do. (Tr., p. 66; Cl. Ex. 2, p. 39; Deposition Transcript, p. 22) At his deposition, claimant testified that while defendant did not mandate the vaccine, it was "highly encouraged to get the vaccine to protect yourself and my department, I mean, there's 21 guys in my department." (Cl. Ex. 2, p. 39; Depo. Tr., pp. 21-22) He testified that when he received the email that defendant "secured or sponsored" a vaccine clinic at Unity Point, he spoke to the supervisor of the department:

> The City sent out an email that they secured or sponsored a vaccine shot at Unity Point, and when I met with the supervisor of the department we both felt that it was – I'd say at least myself felt that at that time that we needed to protect my guys as much as we could. We followed all the City safety guidelines for COVID. And I felt that it was the proper thing to do since we're all essential workers and we were there at-site all the time, and you know, the City secured these vaccines for City employees. And I just felt that it was a good option for me to lead the department to just ensure that my guys didn't get sick from me.

(Cl. Ex. 2, p. 39; Depo. Tr., p. 22)

Claimant later testified that prior to receiving the email at work, he was not really interested in getting a vaccine. (Cl. Ex. 2, p. 39; Depo. Tr., p. 23) However, "the more the CDC and the City came out with guidelines, that was the honorable thing to do." (Cl. Ex. 2, p. 39; Depo. Tr., pp. 23-24) Claimant registered for the vaccine using the link in the email he received from defendant, using his work computer while he was at work, and went to the clinic and received the vaccine during work hours as well. (Cl. Ex. 2, pp. 45-46; Depo. Tr., pp.48-50)

At hearing, claimant testified that at the time he received the vaccine, his wife had already been vaccinated. (Tr., p. 66) Both her job in a medical clinic and a personal health condition made her eligible for the vaccine at an earlier time. (Tr., p. 86) Claimant testified that in the spring of 2021, other than going to work, he and his wife did not venture out often. (Tr., p. 66) Claimant said he felt "a little bit of peer pressure" at work to get vaccinated, as it was talked about a lot in manager meetings, and he felt he "owed it" to his department to get vaccinated. (Tr., p. 68) He agreed that wearing a mask was mandated while working, unless working outdoors alone. (Tr., pp. 69-70) If an employee was not wearing a mask, he was to ask the employee to put it on and contact human resources.

The parties included several of the emails and newsletters referenced in testimony as exhibits.[3] The first email in evidence is from Human Resources Director Teresa Feldmann, dated December 29, 2020, and is addressed to all City employees. (Def. Ex. B, p. 2) The email contains a notification that two city employees had recently tested positive for COVID-19. The email also notes that Ms. Feldmann had started to receive questions regarding COVID vaccines, and how that may impact City policies and processes. She advised it was a new topic that was continually evolving, and she would keep everyone informed of any changes that might impact the workforce. She also provided a link to a questions-and-answers section of the CDC website regarding vaccines and discontinuing the use of masks.

The next email in the record is dated March 19, 2021. (Def. Ex. B, p. 3) The email notes that the first two weeks in March were the longest defendant had gone with no positive COVID cases in the past seven months, but then notifies of several employees who had tested positive that week. The second paragraph of the email 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. Beginning April 5, 2021, all Iowans will be able to locate the vaccine at a pharmacy or healthcare provider, regardless of their employment.

(Def. Ex. B, p. 3) The email then provides a link for additional information, but the link's destination is not visible in the printout of the email. Finally, the last email in evidence is the email from April 5, 2021 with the link to register for a vaccine, which is discussed in detail above. (Def. Ex. B, pp. 4-5)

Defendant also provided copies of its newsletters between January 18, 2021 and May 10, 2021. (Def. Ex. C) The newsletter from January 18, 2021, includes a paragraph regarding the Vaccine Distribution Team:

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[3] Claimant's Exhibits 5 and 6 are duplicative of documents included in Defendant's Exhibits B and C. This decision will only reference Defendant's Exhibits for clarity.

> The City has established an internal team to work on a plan for the roll out of COVID-19 vaccinations for City employees. We don't have a timeline for when vaccines will be available, but are working to be prepared so distribution goes smoothly. We will provide more information as the plan is developed.

(Def. Ex. C, pp. 6-7)

The February 1, 2021, newsletter begins with an announcement that defendant created a COVID-19 Vaccine Task force. (Def. Ex. C, pp. 8-9) It states that the task force was created "to make sure that City employees have the latest information and appropriate plans for vaccination opportunities when the COVID-19 vaccine is made available through Linn County Public Health." (Def. Ex. C, p. 9) It then discusses the various phases of vaccine distribution and explains that the task force was working with the Iowa Department of Public Health "so that as soon as vaccines are available, we can provide City employees with an opportunity to be vaccinated." The February 8, 2021, newsletter provided an update regarding vaccine eligibility for law enforcement officers, and notes that defendant continued to work with Linn County Public Health "to make sure that eligible employees get a vaccine opportunity as soon as they are eligible." (Def. Ex. C, pp. 10-11)

On March 1, 2021, defendant's Vaccine Task Force provided an update. (Def. Ex. C, pp. 12-15) The notice states that the task force was continuing to work with Linn County Public Health and other healthcare professionals to provide the most up-to-date information on vaccine availability. (Def. Ex. C, p. 14) It states that the "health and safety of our employees is our primary concern." It also states:

> The COVID-19 vaccine is not mandatory, however the City of Cedar Rapids is encouraging employees to get the vaccine. The supply of COVID-19 vaccine is limited, therefore, an opportunity to receive the vaccine <u>through your employer</u> because of your occupation (identified through the Iowa Department of Public Health's tiered prioritization) may be several months before you are otherwise eligible or have access to the vaccine.

(Def. Ex. C, p. 14) (emphasis added).

The notice then lists several benefits to getting the vaccine, according to the CDC, including preventing COVID-19; reducing the severity of illness if COVID-19 is contracted; protecting the people around you, especially those at risk for severe illness; and preventing the spread of COVID-19. The notice also states that vaccination is a safer way to help build protection and explains that the benefits of the vaccine outweigh the known and potential risks.

The task force update continues by noting that vaccination will be "an important tool to help stop the pandemic." (Def. Ex. C, p. 15) It states that the "combination of getting vaccinated and following CDC's recommendations <u>to protect yourself and others</u>

will offer the best protection from COVID-19." (Def. Ex. C, p. 15) (emphasis in original) Finally, the update contains a projected vaccination timeline chart from the Iowa Department of Public Health (IDPH) showing the estimated timeline for various population groups across the state.

There is also a flyer, which states it is from Health Solutions "your health and wellness partner," which states in large, block letters: "It's more than hands, face, and space. VACCINATE." (Def. Ex. C, p. 13) (capitalization in original) (Hereinafter referred to as "Health Solutions vaccine flyer") At the top of the flyer is a graphic of a small orange circle with the words "I got my Covid-19 vaccine!" and a picture of a bandage and a check mark in the shape of the letter V. It also states: "We ask you to join us in protecting yourself, your family and friends, and our community by getting vaccinated. Stopping the COVID pandemic requires using ALL the tools we have available and IT TAKES EVERYONE." (capitalization in original) Under that text, there are 4 large graphics, each a circle, depicting a mask, social distancing, hand-washing, and a vaccine syringe. Finally, under those graphics is additional text that reads: "We want everyone in our community to be safe and get back to hugging our families and friends and shaking hands with our neighbors. We all play a part in this effort, and you are key."

On March 8, 2021, defendant shared another vaccination update. (Def. Ex. C, pp. 16-20) It included the same Health Solutions vaccine flyer as the previous update. (Def. Ex. C, p. 17) It provided an update regarding individuals then eligible for vaccines, including those 64 years of age and younger with medical conditions who are or may be at an increased risk of severe illness from COVID-19. (Def. Ex. C, p. 18) It also notes that Linn County Public Health was not able to provide vaccinations for those individuals at that time, but pharmacies and other facilities may have the vaccine available. It states: "We encourage you to schedule an appointment directly with a pharmacy if you are eligible." It then provides links for information about how to get a vaccine, and information regarding pre-existing conditions that qualify individuals for the next phase of vaccination.

The update continues with the following statement:

> The City of Cedar Rapids is encouraging you to get vaccinated. Please contact your physician if you have any questions or concerns about the vaccine. We encourage all employees who are eligible for a vaccine to schedule an appointment and get vaccinated for your health, the health of your loved ones, and for the community you serve.
>
> Please remember if you were previously eligible for the COVID-19 vaccination and declined, you may still decide to get vaccinated. You may schedule an appointment through a vaccine provider or let your supervisor know you would like to be vaccinated when additional vaccinations are available through the City.

(Def. Ex. C, p. 19)

The update also notes that it is "critical" to continue practicing mitigation measures to slow the spread of COVID-19, and provided a list of such measures, including getting a vaccine when eligible. Under that information is an updated vaccination timeline chart from IDPH.

Finally, the last page of the update is a flyer from IDPH featuring a color photograph of an elderly man, with information on helping "your loved one" get a COVID-19 vaccine. (Def. Ex. C, p. 20) The flyer provides information, including websites and phone numbers, for help getting older Iowans to receive a vaccine.

On March 15, 2021, defendant provided another update. (Def. Ex. C, pp. 21-25) It included another Health Solutions flyer, very similar to the prior flyer, but with additional text regarding vaccines rather than the four circular graphics. (Def. Ex. C, p. 22) Much of the text is the same, with some additional information about the effectiveness of the vaccines available and side effects. The update states again that the City "is encouraging employees to get the COVID-19 vaccine," and encourages employees who are eligible to schedule an appointment "and get vaccinated for your health, the health of your loved ones, and for the community you serve." (Def. Ex. C, p. 23) Much of the same information is provided regarding where to find a vaccine and pre-existing conditions that qualify for a vaccine. (Def. Ex. C, pp. 23-24) Finally, the same IDPH flyer providing information to help older Iowans was also included. (Def. Ex. C, p. 25)

On March 22, 2021, defendant provided a shorter update. (Def. Ex. C, pp. 26-28) The notice states, in part:

> 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. Beginning April 5, 2021, all Iowans will be able to locate a vaccine at a pharmacy or healthcare provider regardless of their employment. Although the City has offered to host a vaccination clinic, it is unlikely that supply will be allocated from Linn County Public Health before most employees would be able to get a vaccine on their own at a pharmacy or healthcare provider.

(Def. Ex. C, p. 27)

The notice again provides a link to a COVID-19 vaccine finder website, and also provides a summary of the Healthy Workplace Leave Policy, which allowed employees to use up to two hours during normal work hours to get a COVID-19 vaccination. At the bottom, there is a graphic with a color photograph of a young woman wearing a mask, with the same orange "I got my Covid-19 Vaccine!" graphic next to her head, and the words "You Are Essential" over her torso. Under the graphic it states, "Getting a COVID-19 vaccine adds one more layer of protection." next to the CDC's website address.

Finally, the update also includes the second version of the Health Solutions vaccine flyer. (Def. Ex. C, p. 28)

The next update was provided on March 29, 2021. (Def. Ex. C, pp. 29-31) The update starts with the sentence: "COVID-19 vaccine: It's our turn to roll up our sleeves and get vaccinated!" in boldface font. (Def. Ex. C, p. 30) There is a graphic to the right with a color photograph of a woman wearing a mask and short-sleeved shirt, posing with her left arm flexed, pointing at a bandage on her upper arm where a vaccination would typically be injected. The update also states, in part:

> You've kept our city running through one of the most challenging times in our history. The responsibility is ours, as a community, to help stop this virus. Now we have a safe and effective tool to help us do that – COVID-19 vaccines.
>
> **It takes everyone.**
>
> We all need to step up to beat COVID-19. We ask you to join us in protecting your community by getting vaccinated.
>
> Getting vaccinated adds one more layer of protection for you, your coworkers, your family, and your loved ones.
>
> . . .
>
> Stopping a pandemic requires using all the tools we have available - wearing masks, social distancing, washing hands frequently, and **getting vaccinated.**
>
> We want the pandemic to be over. We want you all to feel safe at work and in your community and to be able to shake hands with your coworkers.
>
> We all play a part in this effort, and you are key. Beginning April 5, 2021, all Iowans will be able to locate a vaccine at a pharmacy or healthcare provider regardless of their employment. Although the City has offered to host a vaccination clinic, it is unlikely that supply will be allocated from Linn County Public Health before most employees would be able to get a vaccine on their own at a pharmacy or healthcare provider.

(Def. Ex. C, p. 30) (emphasis in original) The notice then provides the same information as prior updates regarding a vaccine finder website and the Healthy Workplace Leave Policy. Finally, the second version of the Health Solutions vaccine flyer is again included. (Def. Ex. C, p. 31)

The next update was provided on April 5, 2021, which is the same date the email with the link to register for a vaccine at Unity Point was sent to all City employees. (Def. Ex. C, pp. 32- 35) The update starts with a large heading in bold font that states, in all

caps, "VACCINATION OPPORTUNITIES OPEN TO ALL IOWANS EFFECTIVE APRIL 5, 2021." (Def. Ex. C, p. 33) The update notes that while vaccine supply is increasing, "supply is still limited, so persistence and patience are important factors to consider when seeking a vaccination opportunity." The notice again provides website links and phone numbers for resources to help locate vaccines, and again notes that while defendant offered to host a vaccine clinic, it was unlikely to be allocated supply. It then states, again in bold font: "We encourage you to contact your primary care physician. Several employees have been able to contact their physician and get a vaccination appointment scheduled." Information about the Healthy Workplace Leave Policy is repeated.

The next page of this update contains "Myths and Facts about COVID-19 Vaccines." (Def. Ex. C, p. 34) It briefly explains that the vaccine does not contain live virus and cannot make a person sick with COVID-19, and how it works in the body and why it is important. Finally, the second version of the Health Solutions vaccine flyer is again included. (Def. Ex. C, p. 35)

On April 12, 2021, the update begins with a sentence, again in bold font and fully capitalized, stating: "THE CITY OF CEDAR RAPIDS ENCOURAGES YOU TO GET VACCINATED!" (Def. Ex. C, pp. 36-37) It also contains the following:

> **City Employee Vaccination Opportunity through UnityPoint Health**
> City employees are eligible to register for appointments for the COVID-19 vaccine through the UnityPoint Health Clinic. Please note that 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 not 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 the side facing Bank of the West. Vaccinations will occur by appointment only, on a "*first come, first serve basis*" and we encourage you or your team to sign up as soon as possible.

(Def. Ex. C, p. 37) (emphasis in original)

The notice then provides the same instructions for registration as provided in the April 5 email, and again repeats information regarding vaccine-finder websites and the Healthy Workplace Leave Policy. Once again, the second version of the Health Solutions vaccine flyer is provided. (Def. Ex. C, p. 38)

The next update on April 19, 2021, is essentially the same. (Def. Ex. C, pp. 39-41) It again begins with the information regarding the "City Employee Vaccination Opportunity through UnityPoint Health." (Def. Ex. C, p. 40) It also

states at the beginning of the update that vaccine supply is continuing to increase, so vaccination opportunities are becoming less stressful to schedule. It also contains a new paragraph noting that Linn County Public Health held a vaccination clinic the prior weekend, and additional vaccination clinics would be announced on their website. It states: "Most City of Cedar Rapids employees will likely find the best opportunity to get a vaccination is through the UnityPoint Health Clinic, a pharmacy, or through your healthcare provider." The information regarding the Healthy Workplace Leave Policy, as well as the Health Source vaccine flyer, are again included. (Def. Ex. C, pp. 40-41) The remaining updates, issued on April 26, 2021, May 3, 2021, and May 10, 2021, appear to be identical to the April 19 update. (Def. Ex. C, pp. 42-47) The Health Solutions vaccine flyer was not included with these updates, however.

While 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. First, the fact that defendant created a Vaccine Task Force to ensure City employees "have the latest information and appropriate plans for vaccination opportunities" shows that the City wanted its employees to be vaccinated as soon as possible. (Def. Ex. C, p. 9) Additionally, 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. (See Def. Ex. C, pp. 12-47) The same/similar Health Solutions vaccine flyer was included on at least eight occasions. (Def. Ex. C, pp. 13, 17, 22, 28, 31, 35, 38, 41) Only one newsletter, on March 1, 2021, stated that vaccines were not mandatory. (Def. Ex. C, p. 14)

The newsletters and emails from defendant to employees also note with frequency the reasons vaccines were being encouraged. There are several instances noted above in which the benefits of vaccination are explained, including the desire to end the pandemic, and protect the health of the employees, their loved ones, and the community the employees serve. 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. Defendant certainly used its communication efforts to frequently urge employees to get the COVID-19 vaccine. On the other hand, defendant maintained a policy that receiving the vaccine was voluntary and it offered no incentives to specifically encourage or "strong-arm" employees toward getting the vaccine.

The deputy commissioner noted that the pandemic clearly affected employee attendance, as noted in the March 19, 2021, email from Ms. Feldmann to all employees. (Def. Ex. B, p. 3) In that email, Ms. Feldmann notes that the first two weeks in March were the longest the City had gone in seven months with no positive COVID cases among employees. However, at that time six employees were reporting positive results. The deputy commissioner drew the conclusion from this that vaccination would decrease absenteeism, as fewer

people became ill from the virus, and those who did become ill would likely suffer a shorter and less serious illness, therefore missing less time from work.

While I concur with the deputy commissioner that defendant was urging its employees to get vaccinated, I further find defendant made it clear the vaccinations were only recommended and not mandatory. Defendant offered no incentives (financial or otherwise) to its employees to take the vaccine. Defendant imposed no disciplinary action or other adverse actions on employees who elected not to get vaccinated or delayed in getting a vaccine.

I further find that defendant offered a link for employees to get a vaccine through Unity Point. However, defendant also offered a vaccine finder link and allowed employees to seek vaccination through other providers. Defendant also recommended that employees seek the advice of their personal physician if they had questions or concerns about the vaccine. While defendant appears to have desired its employees to get vaccinated and encouraged them to do so, defendant offered no tangible benefits if an employee got vaccinated and no tangible penalties if an employee elected not to get vaccinated.

Defendant allowed employees to seek their own medical advice, pursue vaccination at a clinic or location of their choosing, or to decline vaccination for any reason. Defendant did not mandate a specific type of vaccine that its employees should receive. Instead, any such decisions were left to the individual employee and employees were encouraged to consult their own physician with any questions about the vaccine.

While I concur that defendant urged, or encouraged, its employees to get vaccinated, I do not necessarily find defendant's efforts constitute "strong encouragement." Defendant could have offered a bonus to obtain the vaccine, offered pay raises to secure the vaccine, imposed disciplinary action for those refusing to take the vaccine, or undertaken many other actions if it intended to mandate, or strongly encourage, employees to take the vaccine. Ultimately, sending e-mails and newsletters touting the benefits of the vaccine, offering a location to secure the vaccine, but not mandating the vaccine and telling employees to consult their personal physician with any concerns or questions about the vaccine, does not constitute "strongly encouraging" employees to take the vaccine. Rather, I find defendant was attempting to protect its employees and was offering a timely and convenient way for its employees to secure the vaccine if they chose to do so. Defendant undertook an admirable voluntary program to benefit its employees.

Unfortunately, claimant sustained significant side-effects from the Johnson & Johnson vaccine and continues to struggle with long-term effects and symptoms, as detailed in the arbitration decision. However, I find that the seriousness and long-lasting side-effects of the vaccine, in and of themselves, do not cause the injury to arise out of or in the course of employment. Therefore,

while terribly unfortunate, I offer no specific findings about claimant's condition at the time of the arbitration hearing because they are unnecessary to the outcome of this decision.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3)(e). The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143, 150 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309, 311 (Iowa 1996).

The words "arising out of" refer to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d at 311. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1, 3 (Iowa 2000); Miedema, 551 N.W.2d at 311. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d at 150. An employee does not cease to be in the course of employment merely because the employee is not actually engaged in doing some specifically prescribed task, if, in the course of employment, the employee does some act which he or she deems necessary for the benefit or interest of the employer. United Parcel Serv. v. Miller, No. 99-1596, 2000 WL 1421800, at *1 (Iowa Ct. App. Sept. 27, 2000) (citing Farmers Elevator Co. v. Manning, 286 N.W.2d 174, 177 (Iowa 1979)).

This case appears to present an issue of first impression in Iowa. The legal question presented is whether an adverse reaction to a vaccination that was not mandated by the employer can arise out of and in the course of employment. The deputy commissioner found that the employer strongly encouraged, or urged, Mr. Driscoll to receive the vaccine such that the resulting adverse reaction arose out of and in the course of his employment.

The presiding deputy commissioner acknowledged this is an issue of first impression in Iowa. In considering the issue, she appropriately consulted Arthur Larson's treatise on workers' compensation law for guidance. With respect to inoculations and vaccines, Larson's treatise first notes that when inoculation is occasioned by the particular conditions of employment, or there is an element of actual compulsion emanating from the employer, the work connection is beyond question. 3 Larson's Workers' Compensation Law § 27.03[2] (2022) The treatise goes on to state:

> When the inoculation is not thus 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.

Larson's treatise is highly respected and often relied upon throughout the country. However, I reject the "strong urging" test or standard established by Larson. 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.

The Iowa Supreme Court has stated repeatedly that workers' compensation statutes are for the benefit of injured workers and should, within reason, be liberally construed. Barton v. Nevada Poultry Co., 253 Iowa 285, 289, 110 N.W. 2d 660, 662 (1961) On the other hand, Iowa's workers' compensation statutes are not intended to be general health insurance policies. Miedema v. Dial Corp., 551 N.W.2d 309, 312 (Iowa 1996). The workers' compensation system is a statutory creation and eligibility for benefits under this system is determined by the confines of the statutory provisions. Tripp v. Scott Emergency Communication Center, 977 N.W.2d 459, 467 (Iowa 2022). "The role of this [agency] is to apply the words 'of a statute as written.' 'We may not—under the guise of statutory construction—enlarge or otherwise change the terms of a statute as the legislature adopted it.'" Id. It is "not for us to create favored or disfavored classifications among occupations or injuries when the legislature has made no such classifications in its statute." Id. at 470.

There is no dispute between the parties in this matter that defendant did not mandate that employees get vaccinated. (See Tr., pp. 13-14; 58; 90) The parties also agree that defendant "encouraged" employees to get vaccinated. Claimant was permitted to obtain the vaccine during work time.

Given that defendant permitted claimant, as well as other employees, to use work time to secure a vaccine, I believe Mr. Driscoll can establish he was within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. As such, Mr. Driscoll established by a preponderance of the evidence that he obtained the vaccine in the course of his employment, meaning within a time and place he was expected or permitted by the employer to be. Ciha, 552 N.W.2d at 150.

Where I disagree with Larson's analysis is whether the injury arises out of claimant's employment. "Injuries that occur in the course of employment or on the employer's premises do not necessarily arise out of that employment."

Miedema, 551 N.W.2d at 311. As noted above, an injury arises out of employment when a causal relationship exists between the injury and the employment. Id. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1, 3 (Iowa 2000); Miedema, 551 N.W.2d at 311. "[T] 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 [the] employment." Lakeside Casino v. Blue, 743 N.W.2d 169, 174 (Iowa 2007) (quoting Miedema, 511 N.W.2d at 311).

Iowa has adopted an actual risk doctrine, which states:

> 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 the employment. And it makes no difference that the risk was common to the general public on the day of the injury.

Hanson v. Reichelt, 452 N.W.2d 164, 168 (Iowa 1990).

Claimant concedes that the vaccine was not mandated by the employer. No federal or state law required claimant to secure the vaccine to complete his work duties. Claimant was free to continue his employment even if he did not receive the vaccine. If he had continued his employment without taking the vaccine, there would be no adverse reaction or injury. 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. Nothing about his work duties exposed him to an actual risk of such an adverse reaction. In language used by the Iowa Supreme Court, "The risk of [an adverse reaction to a Covid-19 vaccine] in this circumstance is in no way connected to nor increased by his employment with [the City of Cedar Rapids]." Miedema, 551 N.W.2d at 311. Only Mr. Driscoll's voluntary decision to take the vaccine exposed him to this risk.

Certainly, if proven to have been contracted at work, injuries or conditions resulting from the Covid-19 vaccine would be compensable and arise out of employment. However, given that the vaccine was not mandated, and that the employer did not mandate which vaccine could be taken, claimant fails to establish a causal connection between his work activities and the ultimate adverse reaction to this vaccine. Taking the Covid-19 vaccine was not a rational consequence or hazard connected with claimant's employment. The vaccine was offered to those with medical conditions, older individuals, and ultimately to the general public, regardless of their employment status.

Certainly, if the vaccine had been mandated by the employer, claimant could establish it is a rational consequence, or hazard, between the adverse vaccine reaction and his employment. See Spicer Mfg. Co. v. Tucker, 188 N.E. 870 (Ohio 1934); Texas Employers' Ins. Assoc. v. Mitchell, 27 S.W.2d600 (Tex. Civ. App. 1930); Krout v. J L

Hudson Co., 166 N.W. 848 (Mich. 1918). Perhaps if the employer had offered a financial or some other incentive to encourage employees to obtain the vaccine, or if the employer's offer of a vaccine was part of a specific employment contract, claimant could prove that there was a rational consequence between the employment and the injury. See Lee v. Wentworth Mfg. Co., 125 S.E.2d 7 (S.C. 1962) (holding adverse reaction to a vaccine obtained pursuant to a union contract demonstrated a mutual benefit such that injury arose out of and in the course of employment). However, given that receipt of the vaccine was voluntary, and claimant faced no adverse employment actions if he refused the vaccine, claimant has not established that development of an adverse reaction to a Covid-19 vaccine is a rational consequence or hazard connected with his employment at defendant. Therefore, I find claimant failed to prove his injury arose out of his employment with defendant.

The deputy commissioner phrased the legal question presented as : "whether the City's encouragement rises to the level of 'strong urging' such that it might 'induce an employee to submit to treatment who might not otherwise have done so.' Smith v. Brown Paper Mill, 152 So. 700, 704 (La. Ct. App. 1934)." The Smith case involved vaccinations occurring on the employer's premises and applied the Larson standard, which I do not believe appropriately considers the "arising out of" standard.

The Larson analysis also relies upon Saintsing v. Steinbach Co., 64 A.2d 99 (N.J. Super. Ct. App. Div. 1949). In that case, the employer offered free smallpox inoculations "for all who choose to be immunized against smallpox." Id. at 99. The notice distributed to employees also stated that "everyone is aware of the current spread of smallpox and we strongly urge that you take advantage of this service, which we are glad to provide in the interest of your health." Id. Again, the vaccination occurred on the employer's premises, which certainly would lend more credence to the argument that the employer strongly urged the vaccine and that employees felt more pressure to accept the vaccine.

The arbitration decision also noted Monette v. Manatee Memorial Hospital, 579 So.2d 195 (Fla. Dist. Ct. App. 1991) as a case supporting an award in this case. Once again, in Monette, the vaccination was offered on the employer's premises. Claimant specifically cites and relies upon E.I. Dupont De Nemours & Co. v. Faupel, 859 A.2d 1042 (Del. Super. Ct. 2004) in support of Larson's analysis. In Faupel, an employee suffered an adverse reaction to a flu vaccination, including reactions similar to Mr. Driscoll. Id. at 1044. Once again, this vaccine was provided on the employer's premises and by the employer's in-house medical health department during work hours. Id.

The final case relied on in the arbitration decision is Case of Hicks, 820 N.E.2d 826 (Mass. App. Ct. 2005). In Hicks, an employee of Boston Medical Center had an adverse reaction to a flu vaccine she received over her lunch hour on the employer's premises. Id. at 828. None of these cases involve a voluntary vaccine, sought out by an employee at a location other than the employer's premises, or in which an employer recommended all questions and concerns be directed to the employee's personal physician.

In relying upon Larson's analysis and reaching her conclusion, the deputy rationalized that the employer chose to promote the vaccine and chose to provide the Unity Point link for vaccine registration to all City employees. In addition, providing a link solely for City employee use to register for a vaccine at a time when supply was limited and appointments were scarce made it more convenient for employees to get vaccinated. Certainly, these factual findings are accurate, and the employer is to be lauded for trying to assist its employees in protecting their health and securing vaccines, if desired. However, the law should encourage good behavior and good deeds by an employer, rather than discouraging such behavior by extending liability for an adverse reaction to an experimental vaccine that was not mandated by the employer. Adopting Larson's "strongly urged" standard, as applied by the deputy commissioner creates a disincentive for employers to assist their employees and/or to provide convenience for their employees. More importantly, Larson's standard creates a favored classification, or injury, that is not carved out or created by the statute. See Tripp v. Scott Emergency Communication Center, 977 N.W.2d 459, 470 (Iowa 2022). However, "[o]ur task is to interpret the statute, not improve it." Id. at 468 (quoting Brakke v. Iowa Dep't of Nat. Res., 897 N.W.2d 522, 541 (Iowa 2017)).

If an employer "strongly urged" its employees to eat healthy and consume green vegetables, it would seem strange to conclude that an employee who choked on some broccoli at home would have sustained an injury that arose out of his employment. Yet, strongly urging an employee to eat healthy would have a mutual benefit to the employer of a healthier workforce and less absenteeism, just as is alleged to be the case in this situation.

If an employer strongly urged its employees to pursue annual physicals, it would seem strange that the employer would be found liable for an injury if the worker fell on ice while attending a physical with their personal physician. Yet, encouraging employees to obtain annual physicals would result in a healthier workforce and presumably less absenteeism. The standard set forth in Larson's treatise seems to convert the worker's compensation system into a general health insurance program, if the employee can demonstrate that the employer encouraged an employee to do something, even if the injury was not foreseeable, likely, or controllable by the employer. I simply reject the "strongly urged" standard created by Larson's treatise and I conclude that the injured worker must demonstrate that he or she sustained an injury that arose out of his or her employment as a result of an actual risk associated with the employment. In this case, the employment duties claimant performed did not present an actual risk of an adverse reaction to a vaccine. Therefore, I find claimant's injury did not arise out of his employment with defendant.

Moreover, the "strongly urged" standard created by Larson's treatise is not universally accepted. In fact, in Smith v. Seamless Rubber Co., 150 A. 110 (Conn. 1930), the court held that an adverse reaction to a voluntary vaccination did not arise out of and in the course of employment. The Supreme Court of Connecticut stated the general rule as:

> 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.

In King v. Arthur, 96 S.E.2d 846, 849 (N.C. 1957), the Supreme Court of North Carolina concurred, holding:

> Where a board of health recommends but does not direct that the employees of an employer be vaccinated in an effort to prevent a threatened epidemic, and the employer makes available the facilities for the vaccination without cost to his employees, but leaves it purely optional with the individual employee as to whether or not he will be vaccinated, and the employee as a result of the vaccination contracts an infection, ordinarily such injury is not compensable. In such a situation the vaccination is recommended not for the benefit of the employer but primarily for the benefit and protection of the employee and the public generally.

In this case, I find that 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. This case involves a situation in which the ties to the employer are even more tenuous because the vaccination was performed at a location other than the employer's premises and the employee was permitted to select Unity Point or seek the vaccine at a location of his choosing, or not take the vaccine at all. Three different vaccines were available to the claimant, and he could have chosen a different vaccine, if so inclined. I believe the test established and stated by the Supreme Court of North Carolina accurately applies the "arising out of" test and is consistent with existing Iowa law.

Other courts have also rejected the strongly urged test created by Larson. Michigan has determined that adverse reactions to vaccines taken voluntarily and offered for the employee's benefit and the benefit of the public as a whole do not arise out of the employment and are not compensable. See Krout v. JL Hudson Co., 166 N.W.848 (Mich. 1918). More recently, in Rolsen v. Walgreen Co., 2016 WL 7427246 (Ohio App. December 2016), the court held that receipt of a voluntary pneumonia vaccine on the employer's premises was not in the course of employment. The court specifically noted that the vaccine was

voluntary and not mandated by the employer, though it was given on the employer's premises and free of charge. Id.

Ultimately, I find the vaccine was taken voluntarily by claimant and that defendant recommended its employees obtain the vaccine primarily for their own health and for the public good. I find no actual risk of an adverse reaction to a vaccine was present when claimant performed his job duties with defendant. Having reached these findings, I apply the test set forth in Smith v. Seamless Rubber Co., 150 A. 110 (Conn. 1930) and King v. Arthur, 96 S.E.2d 846, 849 (N.C. 1957). I find claimant's adverse reaction to the Covid-19 vaccine did not arise out of his employment with defendant. I find all other issues raised in this matter are moot Therefore, I find claimant's petition should be dismissed without an award of benefits.

THEREFORE, IT IS ORDERED:

The arbitration decision filed in this matter on June 19, 2023, is reversed.

Claimant's original notice and petition is dismissed.

Claimant shall take nothing from these proceedings.

Pursuant to rule 876 IAC 4.33, the parties shall pay their own costs of the arbitration proceeding, and claimant shall pay the costs of the appeal, including the cost of the hearing transcript.

Pursuant to rule 876 IAC 3.1(2), defendant shall file subsequent reports of injury as required by this agency.

Signed and filed on this 5th day of January, 2023.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Thomas D. Wolle (via WCES)

Jason Wiltfang (via WCES)

IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

LARRY DRISCOLL, Petitioner, **CITY OF CEDAR RAPIDS,** Respondent.	Case No. **CVCV066632** **ORDER ON JUDICIAL REVIEW**

This is a petition for judicial review from a final decision of the Iowa Workers' Compensation Commission. At hearing, Petitioner, Larry Driscoll ("Driscoll") appeared by attorney, Thomas Wolle. Respondent, City of Cedar Rapids, ("City") appeared through attorney, Dillon Carpenter. After hearing the arguments of counsel, reviewing the court file, the administrative record, and being otherwise advised in the premises, the court enters the following ruling:

I. PROCEDURAL POSTURE AND FACTUAL BACKGROUND.

The parties do not dispute the underlying, material facts in this case. At all times pertinent to this Application for Judicial Review, Driscoll was employed by the City as the Water Distribution Manager where he supervised approximately 23 employees. In March 2021, the City's Human Resources Director sent an email to all city employees, encouraging them to obtain the Covid-19 vaccines. In April 2021, the City sent a second email to its employees, letting them know that city employees were now eligible for vaccine appointments. In April 2021, the City's newsletter informed employees that they could receive up to 2 hours of health workplace leave if they opted to get their Covid vaccine during work hours.

In April 2021, Driscoll utilized the link included in the City's April 2021 email to make a vaccine appointment at Unity Point. On April 8, 2021, he received the Johnson & Johnson Covid-19 vaccine in his left arm. Within two weeks of receiving the vaccine, Driscoll started having complications from the vaccine. Those complications became increasingly worse over time. At the time of the arbitration hearing Driscoll had not yet reached maximum medical improvement and was continuing to suffer from major health conditions because of the Covid-19 vaccine.

Driscoll filed an arbitration petition, seeking workers' compensation benefits and alleging his injuries arose out of his employment with the City. Following hearing, the Deputy Commissioner ruled that Driscoll had met his burden of proof, finding that Driscoll's injuries arose out of, and in the course of, his employment. As a result, the Deputy Commissioner awarded Driscoll an award of temporary total disability benefits.

The City appealed the Arbitration Decision to the Commissioner. The Commissioner reversed the Deputy Commissioner, finding that Driscoll's injuries did not arise out of the course of his employment with the City.

Driscoll appeals the final agency decision in its entirety.

II. ANALYSIS AND CONCLUSIONS OF LAW.

A. Standard.

Chapter 17A of the Iowa Code governs judicial review of final decisions by the workers' compensation commission. Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 768 (Iowa 2016), reh'g denied (May 27, 2016); see Iowa Code § 86.26. The district court acts in an appellate capacity to review decisions of the Workers' Compensation

Commission. Meyer v. IBP, Inc., 710 N.W.2d 213, 219 (Iowa 2006). The standard of review varies based upon the type of error allegedly committed by the Commissioner. Jacobson Transp. Co. v. Harris, 778 N.W.2d 192, 196 (Iowa 2010).

If the alleged error is one of fact, the Court reviews the record to determine if the findings are supported by substantial evidence. Harris, 778 N.W.2d at 196; Schutjer v. Algona Manor Care Ctr., 780 N.W.2d 549, 557 (Iowa 2010) (quoting Iowa Code § 17A.19(10)(f)) (finding this Court will defer to the Commissioner's findings of fact if based on "substantial evidence in the record before the court when that record is viewed as a whole"). "Evidence is substantial if a reasonable person would find the evidence adequate to reach the same conclusion." Grundmeyer v. Weyerhaeuser Co., 649 N.W.2d 744, 748 (Iowa 2002) (citing Ehteshamfar v. UTA Engineered Sys. Div., 555 N.W.2d 450, 452 (Iowa 1996)). "[A] reviewing court can only disturb those factual findings if they are 'not supported by substantial evidence in the record before the court when that record is reviewed as a whole.'" Burton, 813 N.W.2d at 256 (quoting Iowa Code §17A.19(10)(f)). This Court's review "is limited to the findings that were actually made by the agency and not other findings the agency could have made." Id. "In reviewing an agency's findings of fact for substantial evidence, courts must engage in a 'fairly intensive review of the record to ensure the fact finding is itself reasonable.'" Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 518 (Iowa 2012) (quoting Wal-Mart Stores, Inc. v. Caselman, 657 N.W.2d 493, 499 (Iowa 2003)).

If the agency's application of the law to the facts is challenged, "the question on review is whether the agency abused its discretion by, for example, employing wholly

irrational reasoning or ignoring important and relevant evidence." Meyer, 710 N.W.2d at 219; Iowa Code §17A.19(10)(i), (j).

If a challenge is to the interpretation of law, the standard of review depends upon whether interpretation of the provision of law at issue has been clearly vested in the discretion of the agency. Compare Iowa Code §17A.19(c) with §17A.19(l). The Iowa Supreme Court has repeatedly found the Iowa Workers' Compensation Commission is not vested with authority to interpret Iowa's workers' compensation statutes. See e.g. Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 769 (Iowa 2016) (finding legislature did not vest commission with authority to interpret provision at issue and noting the Court has declined to defer to the commissioner's interpretations of various provisions in recent years). Therefore, review is for correction of errors at law. Id. at 768; Iowa Code §17A.19(c) (court reviews whether agency action was "based upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency.") When reviewing application of the workers' compensation law to the facts, the commission has been vested with this authority. Therefore, the Commissioner's application of the law to the facts can only be reversed if it is 'irrational, illogical or wholly unjustifiable.'

B. Analysis

Driscoll argues that the Commissioner erred in ruling that Driscoll's injuries did not arise out of the course of his employment with the City. At the commission level, "[a] claimant must prove by a preponderance of the evidence that the injury is a proximate cause of the claimed disability." Schutjer v. Algona Manor Care Ctr., 780 N.W.2d 549, 560 (Iowa 2010) (quoting Grundmeyer v. Weyerhaeuser Co., 649 N.W.2d 744, 752 (Iowa

2002)). An injury "arises out of" the employment when a causal relationship exists between an injury and the employment. Miedema v. Dial Corp., 551 N.W.2d 309, 311 (Iowa 1996). An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Quaker Oats v. Ciha, 552 N.W.2d 143, 150 (Iowa 1996)

"As [Iowa appellate courts have] noted in prior cases, '[i]njuries that occur in the course of employment or on the employer's premises do not necessarily arise out of that employment.' 'The two tests are separate and distinct and both must be satisfied in order for an injury to be deemed compensable.'" Lakeside Casino v. Blue, 743 N.W.2d 169, 174 (Iowa 2007) (quoting Miedema v. Dial Corp., 551 N.W.2d 309, 311 (Iowa 1996)).

"The element of "in the course of" refers to the time, place, and circumstances of the injury. To satisfy this requirement, the injury must take place within the period of the employment, at a place where the employee reasonably may be, and while the employee is fulfilling work duties or engaged in doing something incidental thereto." Lakeside Casino, 743 N.W.2d at 174 (internal citations omitted).

"The element of "arising out of" requires proof 'that a causal connection exists between the conditions of [the] employment and the injury.'" Id. (quoting 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 [the] employment.'" Id. As it relates to the "arising out of" element, Iowa has adopted the actual-risk rule, which provides, "[i]f 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 the employment. And it makes no difference that the risk was common to the general public on the day of the injury." Hanson v. Reichelt, 452 N.W.2d 164, 168 (Iowa 1990).

In determining Driscoll's injuries arose out of his employment, the Deputy Commissioner consulted Larson's Workers' Compensation Law treatise. Specifically, the Deputy Commissioner relied on the following language:

> When the inoculation is not thus strongly tied to the employment either by employer compulsion or by the special risks, it may still be covered if there is a combination of strong urging of the employer and some element of mutual benefit in the form of lessened absenteeism and improved employee relations.

Larson's Workers' Compensation Law §27.03[2] (2022). Applying this test, the Deputy Commissioner found both that the City had "strongly encouraged" its employees to get the Covid-19 vaccine, and that there was an element of mutual benefit in the form of lessened absenteeism.

On appeal, the Commissioner rejected the "strongly encouraged" test for two reasons. First, the Commissioner found the "strongly encouraged" test fails to focus on the requirements of the "arising out of" element and instead creates an exception to these requirements. (App. Dec. p.16). In the Commissioner's estimation, the "strongly encouraged" test both establishes poor public policy and turns the workers' compensation statute into a general health insurance policy.

Second, the Commissioner notes that the "strongly encouraged' test is not universally accepted or applied in every state. (App. Dec. p,17). The Commissioner detailed several cases that declined to apply the "strongly encouraged" test, and he found these cases were more persuasive than the cases which adopted this test. (Id.) Instead,

the Commissioner applied the actual-risk rule and reversed the Deputy Commissioner's finding that Driscoll's injuries arose out of the course of his employment.

On appeal, Driscoll asserts the Commissioner erred in rejecting the "strongly encouraged" test. Driscoll argues the "strongly encouraged" test is the appropriate test to apply when determining whether injuries resulting from inoculations arise out of the course of a person's employment. Driscoll points to the Iowa Supreme Court's ruling in Briar Cliff College v. Campolo, 360 N.W.2d 91 (Iowa 1984) to support his assertion. In Campolo, the Iowa Supreme Court found that a college professor's heart attack, which occurred during a non-mandatory intramural basketball game, arose out the course of his employment. In doing so, the Court found both that the injury occurred on the employer's premises, and that the employer received a benefit from the professor's participation in the intramural sporting event.

The court finds, however, that the Commissioner applied the appropriate law to this case. Iowa has not adopted the "strongly encouraged" test at this time, and the court agrees that the jurisdictions who have declined to adopt the test have put forth the more persuasive arguments.

The court also agrees with the Commissioner's interpretation that the vaccine was offered voluntarily, that the City's vaccination information, while certainly encouraged employees to get vaccinated, did not rise to the level of "strong" encouragement. The City offered no bonus or incentive to the employees for getting vaccinated, they did not follow-up with employees to confirm their vaccination status, and they did not make any vaccination clinics accessible on their premises.

The Commissioner applied the actual-risk doctrine, which has been adopted by Iowa courts. In doing so, the Commissioner found:

> Claimant concedes that the vaccine was not mandated by the employer. No federal or state law required claimant to secure the vaccine to complete his work duties. Claimant was free to continue his employment even if he did not receive the vaccine. If he had continued his employment without taking the vaccine, there would be no adverse reaction or injury. 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. Nothing about his work duties exposed him to an actual risk of such an adverse reaction. In language used by the Iowa Supreme Court, "The risk of [an adverse reaction to a Covid-10 vaccine] in this circumstance is in no way connected to nor increased by his employment with [the City of Cedar Rapids]." Miedema, 551 N.W.2d at 311. Only Mr. Driscoll's voluntary decision to take the vaccine exposed him to the risk.

(App. Dec. p.17). The court cannot find the Commissioner's application of facts to this law is irrational, illogical or wholly unjustifiable.

Finally, the court does not find Campolo to be directly on point or binding authority on the issue of vaccines. First, the vaccination clinics did not occur on the City's premises or in the City's presence. Second, unlike the special role of a teacher and the benefit the college received from the teachers having increased camaraderie and relationships due to the intramural sporting teams, there is no such special role between the City and its employees, even the managers and supervisors. Additionally, the benefit the college received from increased relations between teachers and students, such as student retention, is much greater and much less tenuous than the benefit the City would receive if its employees received a voluntary vaccination. There is no similar argument that employee retention would increase. It can be argued the City might benefit from reduced absenteeism; however, the extent of that benefit is unknown. The Covid-19 vaccines did not prevent Covid infections, although they did lower the severity of infections for many

people who chose to be inoculated. It is purely speculative on this record, however, to determine the size of the benefit to the City in terms of specific reduction in absenteeism.

Accordingly, based on the foregoing, the court finds the Applicant has failed to meet his burden of proof. The decision of the Workers' Compensation Commission is affirmed.

Order

IT IS HEREBY ORDERED that the decision of the Worker's Compensation Commission is AFFIRMED. Costs are assessed to the Petitioner.

State of Iowa Courts

Case Number	**Case Title**
CVCV066632	LARRY DRISCOLL VS CITY OF CEDAR RAPIDS
Type:	ORDER OF DISPOSITION

So Ordered

Heather Lauber, District Judge,
Fifth Judicial District of Iowa

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ELECTRONICALLY FILED AUG 19, 2026 CLERK OF SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 25-1236
Filed August 19, 2026

Larry Driscoll,
Petitioner–Appellant,
v.
City of Cedar Rapids,
Respondent–Appellee.

Appeal from the Iowa District Court for Polk County,
The Honorable Heather Lauber, Judge.

AFFIRMED

Thomas D. Wolle of Simmons Perrine Moyer Bergman PLC, Cedar Rapids, attorney for appellant.

Jason P. Wiltfang of Scheldrup Wiltfang Corridorlaw Group Iowa P.C., Cedar Rapids, attorney for appellee.

Considered without oral argument
by Ahlers, P.J., and Buller and Sandy, JJ.
Opinion by Buller, J.

BULLER, Judge.

Larry Driscoll appeals from a judicial-review proceeding arising out of a contested workers' compensation case. Driscoll argues the district court and the workers' compensation commissioner erred by rejecting a proposed standard to determine whether a vaccine reaction occurred in the course of employment and finding his injury non-compensable. For the reasons discussed below, we affirm.

BACKGROUND FACTS AND PROCEEDINGS

Most of the material facts in this case are not disputed. Driscoll worked as a water distribution manager for the City of Cedar Rapids (the City) from 2019 until 2021—encompassing the height of the COVID-19 pandemic. Early in the pandemic, the City published a weekly newsletter for its employees addressing COVID-19 safety guidelines and vaccine updates. Once the COVID-19 vaccine was available, these publications encouraged employees to get vaccinated and announced that employees could use two hours of their work time for a vaccine appointment. The City also sent emails discussing COVID-19's impact on the City's operational capacity in terms of sick employees in each department. In management meetings, supervisors would discuss amongst themselves the need to vaccinate, and Driscoll said he felt "a little bit of peer pressure" and that he "owed it to [his] department to get vaccinated." A former manager described the City's encouragement on vaccines as "a continuous message that was routinely recited, but not overbearing."

On April 5, 2021, the COVID-19 vaccine became available to all Iowans over the age of sixteen. The City sent out an email announcing a local hospital was hosting a vaccination clinic open to city employees. Using the hyperlink the City provided, Driscoll set up an appointment and got

vaccinated. Two weeks later, he woke up to his arm feeling limp and the back of his knees hurting. When his symptoms persisted and escalated, he went to urgent care. Driscoll was eventually diagnosed with an acute autoimmune syndrome that progressed into a chronic inflammatory autoimmune condition. As a result, his lower extremities have atrophied and he has mobility issues. Driscoll also suffered from Bell's palsy for about six months and continues to exhibit some symptoms. Driscoll continues to have tremors in his hands and spends a significant amount of his time in physical therapy.

Driscoll sought workers' compensation benefits in 2021. Following arbitration, a deputy workers' compensation commissioner determined Driscoll's injury arose out of and in the course of his employment, citing a standard for compensability of non-mandatory vaccine injuries adapted from 3 Arthur Larson, Lex K. Larson & Thomas A. Robinson, *Larson's Workers' Compensation Law* § 27.03[2] (2025) (hereinafter *Larson's Workers' Comp.*). The City appealed to the commissioner, who reversed the deputy's award. The commissioner found that the section 27.03[2] standard was incompatible with Iowa law and Driscoll was not entitled to relief.

Driscoll petitioned for judicial review in the district court, urging the commissioner erred in rejecting the section 27.03[2] standard. The district court affirmed the commissioner, and Driscoll appeals.

STANDARD OF REVIEW

"Judicial review of the decisions of the workers' compensation commissioner is governed by Iowa Code chapter 17A." *Neal v. Annett Holdings, Inc.*, 814 N.W.2d 512, 518 (Iowa 2012). "It is well settled that the interpretation of workers' compensation statutes and related case law has not been clearly vested by a provision of law in the discretion of the agency. We

therefore do not defer to the commissioner's interpretation of the law." *Larson Mfg. Co. v. Thorson*, 763 N.W.2d 842, 850 (Iowa 2009) (cleaned up). "Factual determinations in workers' compensation cases, on the other hand, are clearly vested by a provision of law in the discretion of the agency." *Id.* (cleaned up). "The application of the law to the facts is also an enterprise vested in the commissioner." *Id.*

DISCUSSION

To prevail, Driscoll must show his injury "arose out of" and "in the course of" his employment. *Koehler Elec. v. Wills*, 608 N.W.2d 1, 3 (Iowa 2000); *accord* Iowa Code § 85.3(1) (2021). Whether a non-mandatory vaccine injury is compensable under our workers' compensation law is an issue of first impression. We turn to the same workers' compensation treatise as the commissioner and deputy, which discusses the issue:

> When the inoculation is 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.

Larson's Workers' Comp. § 27.03[2]. Driscoll urges that this section 27.03[2] standard is compatible with existing Iowa law and that the facts here satisfy the standard. We consider each argument in turn.

I. Compatibility under Iowa Law

The commissioner rejected the section 27.03[2] standard—looking for the existence of "strong urging by the employer and some element of mutual benefit"—and found it "establishes an exception to [the arising-out-of and in-the-course-of employment] requirement[s]." Driscoll argues the standard doesn't change the arising-out-of requirement but is instead "merely a lens

through which to view that requirement." On this narrow issue of compatibility with existing Iowa law, we agree with Driscoll.

The "arising out of" element requires the injury to "in some way be caused by or related to the working environment or the conditions of the employment." *Lakeside Casino v. Blue*, 743 N.W.2d 169, 174 (Iowa 2007) (cleaned up). "When one speaks of an event 'arising out of employment,' the initiative, the moving force, is something other than the employment; the employment is thought of more as a *condition* out of which the event arises than as the force producing the event in affirmative fashion." *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 223 (Iowa 2006) (citation omitted) (differentiating workers' compensation and tort law causation standards). We agree with Driscoll that the section 27.03[2] standard does not inherently violate the arising-out-of or in-the-course-of elements for workers' compensation liability.

II. Application of the Facts to Section 27.03[2]

Driscoll advocates that we should adopt the section 27.03[2] standard to make non-mandatory vaccine injuries compensable. But we decline to do so today because we find that, even on his proposed standard, Driscoll would not be owed relief. Focusing on the "strong urging" language of the section 27.03[2] standard, we conclude the facts in this record do not rise to that level or warrant liability.

The facts here establish routine encouragement: the City emailed newsletters that suggested vaccination, emailed updates about its operational capacity, and allowed employees to use two hours of work time to get vaccinated. We recognize Driscoll said he felt "a little bit of peer pressure" to get vaccinated and thought he owed it to his department to do so. But that pressure was largely internal, not something generated by the City. In any

event, the City did not offer a financial incentive for vaccination or a disincentive for those who declined. It only offered a hyperlink to a third-party clinic operated off-site, after the vaccine was available to all adult Iowans. We do not think allowing employees the option to use work time to get vaccinated changes the analysis. And, outside of an emergency temporary Occupational Safety and Health Administration order, the City never collected the names of those who did take advantage of the clinic.

After reviewing this record and deferring to the commissioner where appropriate, we affirm that the City's actions did not rise to "strong urging" that "strongly tied" the vaccine to employment. *See Larson's Workers' Comp.* § 27.03[2]. We think a former manager characterized the City's encouragement aptly: "a continuous message that was routinely recited, but not overbearing." Because Driscoll did not establish "strong urging," he would not be entitled to relief even if Iowa law embraced section 27.03[2] fully. We leave for another day the question of whether to affirmatively adopt the section-27.03[2] standard.

AFFIRMED.

Ahlers, P.J., concurs; Sandy, J., dissents.

SANDY, Judge (dissenting).

I agree with the majority that the compensability standard drawn from 3 Arthur Larson, Lex K. Larson & Thomas A. Robinson, *Larson's Workers' Compensation Law* § 27.03[2] (2025), does not offend the "arising out of" or "in the course of" requirements of our workers' compensation law. *See Koehler Elec. v. Wills*, 608 N.W.2d 1, 3 (Iowa 2000); *accord* Iowa Code § 85.3(1) (2021). I depart from my colleagues in two respects. I would adopt that standard rather than reserve doing so for another day, and I would reverse and remand to the commissioner for application of the correct section 27.03[2] standard, which I believe we cannot fully resolve on the factual record before us. I thus respectfully dissent.

I begin where the majority ends. Having agreed that section 27.03[2] is consistent with Iowa law, we should say so and adopt it. Courts confronting issues of first impression in this field have long looked to *Larson's Workers' Compensation Law* for guidance. There is no reason to withhold that guidance from the commissioner who must decide the next case and the employers and employees who must order their affairs in the meantime. I would hold that where an employer does not compel vaccination but strongly urges it, and where the urging yields a mutual benefit in the form of lessened absenteeism and improved employee relations, an adverse reaction to the vaccine arises out of the employment.

Adopting that standard is an application of the actual-risk doctrine. Under that doctrine, an injury is compensable so long as the employment subjected the claimant to the risk that caused it, and it makes no difference that the same risk was shared by the general public. *See Lakeside Casino v. Blue*, 743 N.W.2d 169, 176 (Iowa 2007); *Hanson v. Reichelt*, 452 N.W.2d 164, 168 (Iowa 1990). In *Lakeside Casino*, the stairs were an ordinary feature of

daily life, yet because they were also a condition of the claimant's workplace, her fall arose out of her employment. 743 N.W.2d at 174. So too here. The vaccine was available to the public at large, but Driscoll did not encounter it as a member of the public. He encountered it as an employee—through a scheduling link his employer secured and reserved for City employees alone; at a clinic his employer arranged, during work hours, as his employer's leave policy expressly allowed; and after months of his employer's insistence that "it takes everyone" and that "you are key." The employment did not merely coincide with the risk; it delivered it. That is the causal connection our workers' compensation statute requires. *See Miedema v. Dial Corp.*, 551 N.W.2d 309, 311 (Iowa 1996) (discussing the necessary causal connection "between the conditions of . . . employment and the injury").

Because I would adopt section 27.03[2], I cannot join the majority's alternative holding that, even under that standard, the record fails to show strong urging. The difficulty is that the commissioner rejected § 27.03[2] outright. He therefore never applied the correct legal standard, and his conclusion is not entitled to the deference we reserve for an agency's application of the law we have given it. The commissioner is not vested with authority to interpret our workers' compensation statute, and we review his legal determinations for correction of errors. *Larson Mfg. Co. v. Thorson*, 763 N.W.2d 842, 850 (Iowa 2009). Having identified the governing standard, we owe no deference to a decision that declined to use it. *See id.*

Even if we treated the commissioner's finding as an application of section 27.03[2] rather than a rejection of it, that finding could not stand. I disagree with the majority's suggestion that the commissioner's compensability finding is reconcilable with the commissioner's own findings

of fact. So I do not agree that Driscoll would not be entitled to relief even if section 27.03[2] is fully embraced.

The commissioner found that the City assembled a vaccine task force to see its employees vaccinated as soon as possible; that eleven of the thirteen newsletters in evidence urged vaccination while only one mentioned that it was not mandatory; that the City repeated its "vaccinate" flyer at least eight times; and that the City's messaging—"it's our turn," "join us in protecting your community," "we all play a part in this effort, and you are key"—was, in the commissioner's words, "exactly what 'strong urging' looks like." A conclusion that this same conduct was not strong urging does not follow from those findings; it contradicts them. On an undisputed record, that conclusion is wholly unjustifiable. *See Lakeside Casino*, 743 N.W.2d at 173; Iowa Code § 17A.19(10)(m).

The majority, like the commissioner and the district court, ultimately rests on the vaccine's voluntariness—Driscoll was free to keep his job unvaccinated, so his choice was personal. But voluntariness has never been the dividing line in our workers' compensation law. The professor in *Briar Cliff College v. Campolo* was under no obligation to join the intramural game that killed him, yet his death "arose out of" employment because the activity served the college's interests. 360 N.W.2d 91, 94 (Iowa 1984). The pertinent question is not whether the employee was compelled, but whether the employer strongly urged the activity and drew a benefit from it. Here the benefit is undisputed and was documented by the City: its March 19 message to employees tied vaccination directly to keeping its workforce healthy. The weight of persuasive authority applying the *Larson* treatise's principles agrees. *E.I. duPont De Nemours & Co. v. Faupel*, 859 A.2d 1042, 1053 (Del. Super. Ct. 2004), *aff'd*, 860 A.2d 810 (Del. 2004); *Saintsing v. Steinbach Co.*,

64 A.2d 99, 101 (N.J. Super. Ct. App. Div. 1949) *aff'd,* 66 A.2d 158 (N.J. 1949); *Monette v. Manatee Mem'l Hosp.*, 579 So. 2d 195, 197 (Fla. Dist. Ct. App. 1991).

I am mindful that our workers' compensation statute is to be construed liberally, within reason, for the benefit of the worker it was enacted to protect. *Barton v. Nevada Poultry Co.*, 110 N.W.2d 660, 662 (Iowa 1961). Larry Driscoll took the vaccine because he believed, in his words, that it was "the proper thing to do" and that he "owed it to [his] department." He led his people as his employer asked him to lead them, and he has paid for it with the normal use of his legs. I would reverse and remand to the commissioner for the commissioner's application of the correct section 27.03[2] standard.



IOWA APPELLATE COURTS

State of Iowa Courts

Case Number	**Case Title**
25-1236	Driscoll v. City of Cedar Rapids

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