IN THE SUPREME COURT OF IOWA

NO. 18-0317

JASON BLUML,
Petitioner/Appellant

Vs.

DEE JAY'S INC. d/b/a LONG JOHN SILVERS & COMMERCE & INDUSTRY INS. CO.,
Respondents/Appellees

APPEAL FROM THE IOWA DISTRICT COURT
FOR POTTAWATTAMIE COUNTY
THE HONORABLE JEFFREY L. LARSON
CASE NO. CVCV116561

PETITIONER'S/APPELLANT'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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ROUTING STATEMENT

Under the provisions of Iowa Rule of Appellate Procedure 6.1101(2)(c), Appellant respectfully represents that this case be retained by the Iowa Supreme Court because it presents a substantial issue of first impression. Specifically, the issue in this case is whether or not an idiopathic fall onto a level floor should be compensable under Iowa Workers Compensation laws when the hardness of the floor affects the severity of the injury.

V.

STATEMENT OF THE CASE

This matter is before the Iowa Supreme Court on appeal from a Ruling on Petition for Judicial Review entered by the Iowa District Court of Pottawattamie County. A summary of the proceeding are as follows.

On February 7, 2014, Jason Bluml filed a Petition for arbitration seeking workers' compensation benefits pertaining to an incident that occurred on February 15, 2012 at his employment, Long John Silvers, in Council Bluffs, Iowa. (App at 30). The case went to hearing/trial on October 13, 2015 before Deputy Commissioner John Christenson. (App. At 11). The issues of the case were the following:

1. Whether Mr. Bluml sustained an injury that arose out of and in the course of employment;
2. Whether the injury resulted in a temporary disability;
3. Whether the injury resulted in a permanent disability; and if so
4. The extent of Mr. Bluml's entitlement to permanent partial/total disability benefits;
5. Whether Mr. Bluml qualified and would be considered an odd-lot employee;
6. Whether there was a causal connection between the injury and the claimed medical expenses and if so, Mr. Bluml's entitlement to payment of requested past medical expenses and future medical expenses necessitated by the fall; and
7. Whether the Defendants were liable for penalty under Iowa Code Section 86.13. (App at 11-12)

On January 13, 2016 the Deputy Commissioner ruled that Mr. Bluml failed to carry his burden of proof that he sustained an injury that arose out of and in the course and scope of his employment. Specifically, Deputy Christenson stated, in part:

> Claimant had a fall caused by a seizure. Claimant's fall was due to a personal condition. He fell on a level surface. There is no evidence in the record claimant hit any tables, chairs, or kitchen equipment as he fell to the floor. There is no evidence claimant struck his head on any kind of work structure. Claimant had an idiopathic fall on a level surface. As noted in dicta in the Koehler, Benco and Whitacre decisions, and as detailed in Larson's, falls of this nature are not compensable.
>
> ….the law appears clear that idiopathic falls to level surfaces are not compensable under Iowa law. Given this record, claimant has failed to carry his burden of proof he sustained an injury that arose out of and in the course of employment. (App. at 18)

Due to Deputy Christenson finding Mr. Bluml failed to carry his burden of proof on the issues of causation and compensability, the Deputy Commissioner found all other issues moot. (App. at 18).

Mr. Bluml appealed the case to the Iowa Workers Compensation Commissioner. (App at 20). On July 20, 2017, Joseph S. Cortese II, Iowa Workers Compensation Commissioner, also ruled that Mr. Bluml, failed to carry his burden of proof that on February 15, 2012, he sustained an injury which arose out of and in the course of his employment. Commissioner Cortese stated in part:

> Claimant in this matter hit no objects or structures as he fell to the floor. There is no real dispute that the injuries sustained by claimant were

> rendered more serious because claimant's fall occurred on a ceramic tile floor inside defendant-employer's restaurant. **This appears to be a case of first impression in the State of Iowa.** Claimant argues Iowa should adopt the rule followed by the minority of jurisdictions which hold that idiopathic falls on a level floor surface are compensable when the hardness of the floor affects the severity of the injury. (Citations Omitted)
>
> Defendants in this matter argue that Iowa should adopt the rule followed by the majority of jurisdictions which hold that idiopathic falls on a level floor are not compensable regardless of the hardness of the floor on a theory that presents a risk or hazard encountered everywhere and that such risks and hazards presented by a level floor are the same risks which confront all members of the public. (Citations omitted)…..
>
> I find the authority and the arguments presented by Defendants in support of the majority rule on this issue are more persuasive than the authority and arguments presented by claimant in support of the minority rule. I therefore affirm the deputy commissioner's finds that claimant failed to carry his burden of proof that on February 15, 2012, he sustained an injury which arose out of and in the course of his employment with defendant-employer as alleged…. (App at 22-23; 28).

Due to the Commissioner finding that Mr. Bluml failed to carry his burden of proof on the issues of causation and compensability, Mr. Cortese found it unnecessary to address the other issues raised by Mr. Bluml, including the entitlement to permanent benefits, penalty benefits and entitlement to payment of past medical expenses and future medical expenses necessitated by the fall. (App. At 21).

On August 16, 2017, Mr. Bluml filed a Petition for Judicial Review in the District Court of Pottawattamie County, Iowa. (App at 30-55). Mr. Bluml

asserted a number of matters were subject to appeal. First Mr. Bluml asserted the Deputy and Commissioner misinterpreted the law and are incorrect in finding that Mr. Bluml failed to carry his burden of proof that on February 15, 2012 Petitioner sustained an injury that arose out of and in the course of his employment. (App at 31)

Secondly, Mr. Bluml asserted had the Deputy and/or Commissioner correctly interpreted the law in finding this was a compensable matter, the other issues raised by Mr. Bluml in the arbitration proceeding, which include the extent of entitlement, if any, to temporary and permanent disability benefits, Mr. Bluml's entitlement to penalty benefits, and Mr. Bluml's entitlement to payment of requested past medical expenses and future medical expenses necessitated by the fall, would have been determined in his favor. (App at 32). Briefs were filed with the District Court by both parties.

On January 25, 2018, Judge Jeffrey Larson affirmed the decision of the Workers' Compensation Commissioner. (App at 56-67.) Mr. Bluml timely filed this appeal, on February 21, 2018, asserting the February 15, 2012 work place injury was indeed a compensable injury under Iowa Workers Compensation laws and the other issues raised by him, including the entitlement to permanent benefits, penalty benefits and entitlement to payment of past medical expenses and future medical expenses necessitated by the fall, should be found in his favor. (App. At 69)

STATEMENT OF FACTS

On February 15, 2012, Jason Bluml was working at the Long John Silver's restaurant located at 603 32nd Avenue in Council Bluffs, Iowa, when he fell to the ground striking his head on a tile floor. (App 316-320). Mr. Bluml testified that he had no recollection of the fall (App at 82 ¶12- 83 ¶13), but was aware he hit his head on a tile floor. (App at 82 ¶ 14-17). Pictures of the area where Mr. Bluml fell depict a hard tile/ceramic surface, metal counters and a relatively narrow working area. (App at 323-324). While Mr. Bluml has a history of seizures, sometimes caused by alcohol consumption, lab reports show Mr. Bluml did not have any alcohol in his system on the date of the accident, February 15, 2012. (App at 173).

Witnesses at the restaurant observed Mr. Bluml fall straight back, with his head landing on the floor. (See App at 316-320). Mr. Bluml's co-workers, Amanda Cyr, Craig Drew and Matthew Klabunde, all heard Mr. Bluml's head strike the floor and subsequently observed blood coming out of his ear. (See App at 316-320). The Council Bluffs Fire Department/Ambulance arrived at the scene and observed Mr. Bluml had a large hematoma on the back side of his head. (App at 164). Mr. Bluml was transported to Mercy Hospital's Emergency room in Council Bluffs and was found to have a subarachnoid hemorrhage and subdural hemorrhage. (App. At 167; 169). Mr. Bluml required intubation, and after stabilized, was

transported to the University of Nebraska Medical Center for further treatment. (App at 220).

Follow up CT scans showed a bilateral hemorrhagic contusion, bilateral subarachnoid and intraventricular hemorrhages and a left frontal subdural hematoma. On February 18, 2012, Mr. Bluml underwent a decompressive craniotomy (App at 205; 220). Subsequently on March 2, 2015, Mr. Bluml underwent a tracheostomy and a PEG tube placement. (App at 205; 220).

On March 12, 2012, Mr. Bluml was transferred to Immanuel Medical center for acute brain injury rehabilitation. Subsequently on April 11, 2012, Mr. Bluml was transferred to Quality Living Incorporated where he underwent rehabilitation consisting of physical therapy, cognitive therapy and speech therapy. (App at 205). On June 6, 2012, Mr. Bluml was readmitted to the Nebraska Medical Center where he underwent a cranioplasty. (App at 206). Following surgery he went back to QLI until he was released to his girlfriend's home on August 30, 2012. (App at 220).

Dr. David Surdell, the neurosurgeon who operated on Mr. Bluml, stated that the subarachnoid hemorrhage and subdural hemorrhage resulted from the February 15, 2012 fall. (App 238-239). Dr. Surdell further opined that the February 15, 2012 fall necessitated neurosurgical treatment in the form of the left sided decompressive craniectomy, placement of a right frontal intracranial monitoring bolt and subsequent cranioplasty. (App 238-239). Dr. Surdell also opined that the fall

resulted in a traumatic brain injury resulting in cognitive impairments. (App 238-239).

A CT of Mr. Bluml's brain has revealed extensive encephalomalacia of the anterior lateral left temporal lobe and left frontal lobe. (App at 248). Dr. John Hannam, a neurologist at Lakeside Hospital in Omaha, Nebraska, has opined that Mr. Bluml has convulsive seizure disorder, posttraumatic epilepsy due to left cerebral hemisphere injury which led to the previous craniectomy and decompression. (App at 230).

Dr. Christine Jeffrey, Mr. Bluml's primary physician, evaluated Mr. Bluml on September 19, 2012 and found that Mr. Bluml had significant cognitive impairments as a result of the February 15, 2012 fall and resulting brain injury. (App. at 187).

Following his release from QLI, Mr. Bluml experienced seizures on December 23, 2012, January 22, 2013, March 30, 2013, January 20, 2014, May 10, 2014 and May 24, 2015. All of these seizures were believed to involve alcohol use. (App at 220). On April 8, 2013 Dr. Jeffrey noted that due to memory issues, Mr. Bluml would probably forget being counseled not to drink alcohol. (App. At 192-194). Mr. Bluml was admitted to rehabilitation centers to treat his alcohol abuse problems. (App. 251; 257).

An August 14, 2015 report drafted by Dr. Jeffrey states in part:

Currently Jason has diagnoses of traumatic brain injury, cognitive impairment, seizure disorder, and alcohol abuse. I feel that Jason's injury was related to the fall that he sustained at work when he hit his head on the tile floor, and this fall did, and the subsequent injury did, contribute to the following cognitive impairments that he currently experiences.

At this time he has reached maximum medical improvement for the most part, although he still has the potential to make continued improvements. So in that regard, it is difficult to say if he has reached the maximum that is possible for him. It is likely that he will continue to improve if he is able to abstain from alcohol. As a result of the injury, Jason did not experience any impairment to his arms, legs, or back; however, he did sustain the traumatic brain injury, but I am unsure as to the percentage of that impairment.

His cognitive impairments really are in relation to lack of insight to remember the things that he needs to keep himself away from alcohol. He is able to understand simple instructions, and if he has a repetitive job where the instructions are laid out and he has supervision, he is able to perform those without any trouble. However any complicated or complex tasks would be beyond what he is able to perform at this time. Because of his injury, he does not have the insight to understand why he needs to abstain from alcohol. When you talk to him, however, he is able to tell you that he cannot drink any longer because of his seizure disorder, but in the next minute, he will forget that (and) be unable to recall the steps that he needs to take to avoid going back to alcohol use.

As a result of his injuries, it is likely that Jason will have continued problems with his cognitive impairment and while he will continue to make small gains, he has for the most part achieved the majority of his improvement. His preexisting seizure disorder is something that he will need to deal with on a daily basis. I would anticipate that Jason will require future medical treatment in the form of medications as well as ongoing therapies to help him improve his cognitive abilities. Also if he would relapse and start drinking again, then he would also have medical treatments related to that……

Jason's cognitive impairments, his lack of judgment, and his limited insight, are all things that are going to present problems for him in the

> future. At this point, it has been over three years since his brain injury. The likelihood of significant improvement is low, and I think he will require lifetime supervision. He has such limited insight into his alcohol problems, that he cannot problem solve ways to avoid triggering his impulse to drink. With his frontal lobe injury, I am not sure that is ever going to be anything that he is going to be able to learn. It is entirely possible that he may need placement in a care facility that is able to supervise him adequately enough to keep him away from the alcohol, which I believe is the root of all his problems at this time. His seizure disorder, not withstanding, when he drinks it lowers the effectiveness of the medication that he takes, although it does not directly cause him to have a seizure.
>
> As far as any of the anticipated cause for his future medical treatments, he will follow up with me at least every six months in the office; however, he has required multiple hospitalizations due to recurrent seizures that have occurred after he has been drinking.
>
> Also if the decision is made to put him into a care facility, that is also something that will need to be factored in, although it is extremely difficult to say with any degree of certainty how much that might be. (App 220-222).

Mr. Bluml underwent a neuropsychological exam performed by Amelia Nelson Sheese on July 8, 2015. The test results were abnormal, finding numerous impairments pertaining to language and memory deficits. Dr. Sheese stated: "Mr. Bluml's results show evidence of dominant left hemisphere dysfunction, particularly frontal and temporal areas, which is consistent with the areas of encephalomalacia described on his most recent head CT scan (2012) from his severe TBI." Dr. Sheese recommended that Lynn Bluml, Jason Bluml's father, remain as his power of

attorney for major medical and financial decisions due to the extent of Mr. Bluml's cognitive injuries. (App 263-270).

Mr. Bluml testified that since the accident he has difficulty with reading (App at 85 ¶8-15), speech (App. 85 ¶ 22 – 86 ¶ 14) and memory (App. at 86 ¶15 – 87 ¶1). Deputy Christenson also noted in his opinion that Mr. Bluml appeared to have difficulty with memory, word finding and word processing at the hearing. (App at 15). Mr. Bluml's parents testified that he has trouble with the above issues along with understanding and processing information and taking care of his finances. (App 123 ¶23 – App 126 ¶23; App at 141 ¶18- App 145 ¶23).

Kevin Jarosik, Mr. Bluml's employer, testified that Mr. Bluml began working at Runza Restaurant part time as a fryer in March of 2013. Mr. Bluml makes ten dollars an hour and works approximately 20-25 hours per week. (App at 108 ¶ 1- App 109 ¶ 11). Mr. Jarosik normally drives Mr. Bluml to and from work. (App at 111 ¶ 22 – App at 112 ¶ 12). In an August 19, 2015 letter, Dr. Jeffrey opined that Mr. Bluml was at risk for operating a motor vehicle. (App at 223).

Mr. Jarosik testified that Mr. Bluml has difficulty reading and has memory issues, which limits the type of jobs Mr. Bluml can perform at the restaurant. (App at 109 ¶12 – App at 11 ¶ 15). Ron Schmidt, a vocational rehabilitation counselor opines that Mr. Bluml is an odd lot worker. (App. at 276).

Mr. Bluml's medical bills caused from the accident total $703,278.26, and likely increasing, with Medicare and Nebraska Medicaid making payments to the medical providers due to the Defendants denial of the claim. (App at 330-344). The Medicaid lien indicated the medical providers billed $662,824.74. Medicare showed additional total charges of $41,304. (App at 330-344).

Mr. Bluml's medical providers relate all of the medical treatment as shown on the medical itemization to the February 15, 2012 accident. (App at 238-239; App. at 220-222; App at 230; App at 330-344). Dr. Jeffrey opines that the subsequent seizures brought upon by alcohol use is related to the cognitive impairments which have resulted from the February 15, 2012 traumatic brain injury. In short, Dr. Jeffrey asserts Mr. Bluml's cognitive impairments don't allow him the ability to stop drinking, which results in him having seizures. (App at 220-222).

ARGUMENT I

The Deputy Workers Compensation Commissioner, the Iowa Workers Compensation Commissioner and District Court Committed an Error of Law and an Abuse of Discretion in determining Mr. Bluml's injury did not arise out and in the course and scope of his employment.

Preservation of Error

Mr. Bluml asserts his February 15, 2012 accident arose out of his employment and should be found compensable under the Workers Compensation Act. This issue

was first raised in his Workers Compensation Petition, argued at the arbitration hearing and appealed to the Iowa Workers Compensation Director. Mr. Bluml filed a Petition for Judicial review with the District Court of Pottawattamie County, Iowa arguing that the Commissioner erred in his interpretation of the law, failed to follow case precedent and filed a decision that was irrational, illogical and unjustifiable. (App at 30-55; App at 61).

Following the January 25, 2018 Ruling on Petition for Judicial Review where the District Court affirmed the Commissioner's decision, Mr. Bluml filed this appeal to the Iowa Supreme Court. (App at 69).

Standard of Review

On Appeal, this Court follows much the same process as review by the District Court. The District Court reviews the Commissioner's actions in an appellate capacity and may grant relief if the Commissioner's action have prejudiced the Petitioner's substantial rights and the Commissioner's action meets on of the criteria set out in Iowa Code §17A.19(10)(a) through (n). Burton v. Hilltop Care Center, 813 N.W. 2d 250, 256 (Iowa 2012). This Court applies those same criteria to determine whether the district court correctly applied the law in exercising its judicial review. Id. at 255-256; Westling v. Hormel Foods Corp., 810 N.W. 2d 247, 251 (Iowa 2012); Herrera v. IBP, Inc., 633 N.W. 2d 284, 286-87 (Iowa 2001).

The role of the Court reviewing an agency decision is threefold: 1) determine if the commissioner and district court applied the proper legal standard or interpretation of the law; 2) determine if there was substantial evidence to support the commissioner's and District Court's findings; and 3) determine if the commissioner's application of the law to the facts was irrational, illogical or wholly unjustifiable. Clark v. Vicorp Restaurants, Inc., 696 N.W. 2d 596, 603-04 (Iowa 2005).

Whether an injury arose out of employment is a "mixed question of law and fact." Lakeside Casino v. Blue, 743 N.W. 2d 169, 173 (Iowa 2007). The factual aspect "requires the commissioner to determine the operative events that give rise to the injury." Id. The legal aspect is "whether the facts as determined, support a conclusion that…[the] injury arose out of employment. Id.

The facts are essentially undisputed in this case. Thus the focus is whether the facts support a conclusion that the injury arose out of Mr. Bluml's employment. This argument implicates standards of review set forth in Iowa Code Section 17A.19(10)(c)(h)(m), which states:

> The Court shall reverse modify, or grant other appropriate relief from agency action, equitable or legal and including declaratory relief, of it determines the substantial rights of the person seeking judicial relief have been prejudiced because the agency action is any of the following:
>
> c) an erroneous interpretation of a provision of law whose interpretation has not been clearly vested by a provision of law in the discretion of the agency;

> h) action other than a rule that is inconsistent with the agency's prior practice or precedents, unless the agency has justified that inconsistency by stating credible reasons sufficient to indicate a fair and rational basis for the inconsistency;
>
> m) an irrational, illogical or wholly unjustifiable application of law to fact that has clearly been vested by a provision of law in the discretion of the agency. (Iowa Code § 17A. 19 (10) (c)(h)(m).

Interpretation of the worker's compensation statutes and related case law has not been clearly vested by a provision of law in the discretion of the Commissioner and the District Court/appellate Court is free to substitute its own judgment based on an erroneous interpretation of a provision of law. Lakeside Casino v. Blue, 743 N.W. 2d 169, 173 (Iowa 2007); On the other hand, application of the workers compensation law to the facts as found by the Commissioner is clearly vested in the Commissioner. Accordingly, the District Court may reverse the Commissioner's application of the law to the facts if it is "irrational, illogical or wholly unjustifiable." Id.

With regards to § 17A.19(10)(h), the key is whether an agency decision was reached in a manner consistent with the reasoned balancing of factors displayed in its prior, similar cases. Anthon-Oto Cmty Sch. Dist. v. Public Employment Relations Bd., 404 N.W. 2d 140, 144 (Iowa 1987). This section is an elaboration of agency action that is arbitrary, capricious or an abuse of discretion. Finch v. Schneider Specialized Carriers, Inc., 700 N.W. 2d 328, 332 (Iowa 2005). An agency

action is arbitrary or capricious when the agency acts without regards to the law or facts of the case. Dico, Inc. v. Iowa Employment Appel Bd., 576 N.W. 2d 352, 355 (Iowa 1998). An agency action is unreasonable when it is clearly against reason and evidence. Soo Line R.R. v. Iowa Dep't. of Transp., 521 N.W. 2d 685, 688-89 (Iowa 1986). An abuse of discretion occurs when the agency action rest on grounds or reasons clearly untenable or unreasonable. Schoenfeld v. FDL Foods, Inc., 560 N.W. 2d 595, 598 (Iowa 1997).

In regards to Iowa Code §17A. 19(10)(m), a decision is irrational when it is not governed by or according to reason. A decision is illogical when it is contrary to or devoid of logic. A decision is unjustifiable when it has no foundation in fact or reason. AFSCME Iowa Council 61 v. State, Department of Administrative Services., 846 N.W. 2d 873,878 (Iowa 2014).

Argument

Mr. Bluml asserts the Deputy Commissioner, Commissioner and District Court incorrectly ruled that he did not sustain an injury which arose out of and in the course and scope of his employment. Mr. Bluml asserts the Deputy Commissioner, Commissioner and District Court did not properly apply the law nor followed precedent from previous workers compensation cases. Further, Mr. Bluml asserts the rulings are irrational, illogical and wholly unjustifiable.

The Iowa Workers Compensation Commissioner stated in his July 20, 2017 appeal decision that the issue of whether an idiopathic fall on a level floor is compensable when the hardness of the floor affects the injury appears to be a case of first impression in Iowa. (App at 22).

Iowa Courts are to construe the Workers Compensation Act liberally in favor of the employee and resolve all doubts in favor of the employee. Teel v. McCord, 394 N.W. 2d 405, 406 (Iowa 1986). Mr. Bluml has the burden of proving by the preponderance of the evidence that the February 15, 2012 injury actually occurred and that it both arose out of and in the course and scope of his employment. Quaker Oats Co. v. Ciha, 552 N.W. 2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W. 2d 309 (Iowa 1996). The words "arising out of" refer to the cause or source of 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 (Iowa 1995).

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 duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W. 2d 142. As Mr. Bluml was performing his job duties when the fall occurred, there is no doubt that the he was injured in the scope of his employment. The element of arising out of requires proof that a causal connection exists between the conditions of employment and the injury. Miedema, 551 N.W.

2d 309. Mr. Bluml struck his head on a hard ceramic/tile floor, a work condition, causing his serious injuries. Mr. Bluml asserts Iowa law is clear that idiopathic falls are compensable when a condition of the employment, i.e. hard floors, aggravates the effects of the idiopathic fall and/or increases the risk of injury.

In Iowa, the general rule is that idiopathic injuries, or injuries personal to an employee, are not compensable. However, there are exceptions to the rule. Koehler Electric v. Wills, 608 N.W. 2d 1 (Iowa 2000) In Koehler, the employee fell from a ladder and landed on a hard concrete floor. Evidence suggested that the employee fell from the ladder due to a risk personal to the claimant, which was withdrawal of alcohol. The Iowa Supreme Court, finding that this was a compensable injury stated in part: "We hold that it is not necessary for a claimant injured in an idiopathic fall to prove that his injuries were worse because he fell from a height. It is only required that he prove that a condition of his employment increased the risk of injury. Id.

The Court in In AARP v. Whitacre, 834 N.W. 2d 870 (Iowa App. 2013), further clarified the point stating that the Koehler decision did not require the existence of a dangerous condition. It simply required that an employee be "placed in a position that aggravates the effects of an idiopathic fall." The hard ceramic floor at the Long John Silver's Restaurant clearly aggravated the effects of Mr. Bluml's fall. Mr. Bluml's medical providers relate all of the medical treatment to the February 15, 2012 fall where Mr. Bluml hit his head on the hard floor surface. (App

at 238-239; App at 220-222; App at 230). Despite agreeing that the injuries sustained by Mr. Bluml were rendered more serious because the fall occurred on a hard floor surface, the Commissioner ruled against Mr. Bluml. (App at 22) The District Court affirmed the Commissioners decision. (App at 67) Mr. Bluml asserts the Commissioner's and District Court's decisions are not only illogical, but does not follow clear Iowa law.

The first case to clearly support Mr. Bluml's position is an April 16, 2003 Iowa Workers Compensation Arbitration decision in Ladwig v. Farner Bocken Co., (File No 5000116 April 16, 2003). Deputy Workers Compensation Commissioner Jon Heitland stated in part: "…It has also been held that the hardness of the floor struck during the fall can constitute a sufficient element of risk or hazard as to make the fall arise out of the employment. An idiopathic fall to a concrete floor may be compensable because of the effects of the hard surface." Id.

In Ladwig, the claimant asserted he either fell, slipped and fell, or tripped and fell, hitting his head on the concrete floor, which in turn resulted in a skull fracture and concussion. The defendants denied the claim, urging that the real cause of the claimant hitting his head was not anything associated with work, but rather the claimant's hypoglycemia, which resulted in the claimant passing out or fainting, falling onto his pallet jack and then hitting his head on the floor. Id.

Deputy Heitland in discussing idiopathic injuries and falls in the Ladwig case quoted Kriegel v. Kwik Trip, Inc. (File No. 1168032 (App. November 30, 1999) which stated in part:

> The rules of law regarding compensability of idiopathic and unexplained falls are well established.
>
> The basic rule on which there is now general agreement, is that the effects of such a fall are compensable if the employment places an employee in a position increasing the dangerous effects of such a fall, such as on a height, near machinery or sharp corners, or in a moving vehicle.
>
> The general rule is that injuries sustained in an idiopathic fall onto a level floor surface are not compensable, except for some jurisdictions in which compensability has been awarded if the floor is concrete or hard.

After reviewing the evidence and testimony in the Ladwig matter, Deputy Heitland concluded that the greater weight of evidence made it more likely that the claimant's fall was due to a hypoglycemic reaction and not due to tripping or slipping. Accordingly, he found that the claimant's fall was idiopathic in nature. Deputy Heitland then stated in part:

> This does not automatically lead to the conclusion that the claimant's fall injury does not arise out of the employment. Such a fall may still constitute a compensable work injury if the employment contributed some additional risk or hazard, as noted above. The Kriegel case noted that such increased hazards may include working at a height, on or near machinery, or falling onto a hard floor surface.
>
> Thus we must examine the facts to see if the employment contributed to the injury, such as placing an object in the path of the fall that increased the damage to the claimant's body. In this case, the claimant

> fell onto and across his pallet jack, a hard metal machine, which was in the path of his fall. It is found that the presence of the hard metal pallet jack in the path of the claimant's fall increased the risk of injury.
>
> It has been held by various jurisdictions that even an idiopathic fall can be compensable if the claimant was required to work at a height that increased the danger of the fall. Many cases hold that even a low height of a few inches may be sufficient to establish a hazard. It is not necessary for a claimant injured in an idiopathic fall to prove his injuries were worse because he fell from a height. It is only required that he prove that a condition of his employment increased the risk of injury. Koehler Electric v. Wills, 608 N.W. 2d 1 (Iowa 2000).
>
> In this case, the claimant was required to work standing on his pallet jack, which was a few inches off the floor. When he fell, his body landed across the pallet jack and his neck extended downward, resulting in his head striking the floor. This constitutes a height which increased the risks of the fall.
>
> Finally, it has also been held that the hardness of the floor struck during the fall can constitute a sufficient element of risk or hazard as to make the fall arise out of employment. An idiopathic fall to a concrete floor may be compensable because of the effects of the hard surface. Chapman, Dependents of v. Hanson Scale Co., 495 So. 2d 1357 (Miss. 1986).
>
> Thus, on not one but all three of these grounds, it is found that the claimant's fall although idiopathic in origin, nevertheless arose out of his employment due to various aspects of the workplace described above and contributed to the risk of injury. Ladwig v. Farner Bocken Co., (File No 5000116).

Accordingly, there is clear precedent in Iowa that that the hardness of a floor struck during a fall can constitute a sufficient element of risk or hazard as to make the fall arise out of employment. Deputy Commissioner Heitland specifically stated in the Ladwig case, his finding was based on three factors, which included that the

hardness of the floor struck during the fall constituted a sufficient independent element of risk or hazard as to make the fall arise out of employment. Id.

The Ladwig decision specifically followed the ruling of the Mississippi Supreme Court in Chapman, Dependents of v. Hanson Scale Co., 495 So. 2d 1357 (Miss. 1986).

In Chapman, the claimant fell at work, hit his head and died. The Court noted that the worker did not trip, slip nor was pushed; he just fell. Evidence suggested that Mr. Chapman may have fallen as a result of a grand mal seizure. The Mississippi Supreme Court in ruling Mr. Chapman's death arose out of and within the course and scope of his employment stated in part:

> Without contradiction Chapman's death was caused when his head struck the concrete floor of his employer's premises. We regard the floor as an appurtenance of the employer's premises the same as any other piece of equipment or fixture. We see no appreciable difference between a worker's collision with another piece of equipment, a table or a trash can, which would be compensable, on the one hand, and a collision with a concrete floor, on the other. Both are collisions by the worker with an appurtenance of the employment, both are encounters by the worker with an employment risk, both contribute to injury or death and, as a matter of law, both arise out of and in the course of employment. Chapman, 495 So. 2d at 1360.

In a later case, the Mississippi Supreme Court stated: "Injury or death arises out of and in the course of employment even when the employment merely aggravates or contributes to the injury. Smith v. Container General Corp. (559 So. 2d 1019 (Miss. 1990).

Similarly in George v. Great Eastern Food Products, Inc., 44 N.J. 44 (N.J. 1965), which was cited in the Chapman case, an employee died from a fractured skull as the result of an idiopathic fall. An attack of dizziness, apparently induced by some cardiovascular condition, precipitated the occurrence. The employee did not strike anything until his head hit the level concrete floor upon which he was standing. The Court found that the incident arose out of and in the course and scope of his employment. The Court could not find any consistent or meaningful distinction as to why an employee who hits a table, chair or other object on the way down from a fall should be compensated but one that hits a floor, which caused injury or death, be found not compensable. Id.

In General Ins. Corp v. Wickersham, 235 S.W. 2d 215 (Tex. 1950) an employee entered the door of the restaurant where he worked and fell to the floor, which at the point of the fall was covered with tile. He died four hours later and an autopsy later revealed that head injuries were the cause of death. The Texas Court found the incident to be a compensable workers compensation claim and stated in part:

> We can find no sound reason for denying a recovery where the fall is to the floor, when recovery is allowed where the fall is from a ladder, or platform or similar place, or into a hole, or against some object as a table, machine or post. Suppose the employee had fallen against a counter or showcase. It seems clear that a recovery would be allowed under the Garcia case and even under the cases from New York, Massachusetts and Ohio. What difference can it make that employee's

head struck a tile floor, rather some object a few inches above or below the level of the floor? Id.

Returning back to Iowa cases, In AARP v. Whitacre, 834 N.W. 2d 870 (2013) the Iowa Court of Appeals found an employer liable for a workers compensation claim which arose out of a personal and idiopathic condition when the claimant struck his head on hard surfaces. In Whitacre, the claimant was a 79 year old part-time janitor. Claimant was on a coffee break with one of his supervisors when he began to choke. At that time, he stood up to get a drink of water, stumbled, and hit the corner of his supervisor's desk and the concrete wall. Claimant than landed head first on a hard floor. There was no evidence that he stumbled on anything. His resultant injuries were lacerations to his head and face and a blood clot in his brain. Id.

The Court of Appeals specifically disavowed the increased risk doctrine and stated that the analysis is whether the nature of the employment exposes the employee to the risk of such injury. Further it pointed out that Iowa has abandoned any requirement that the employment subject the employee to a risk or hazard that is greater than that faced by the general public. Id.; Lakeside Casino v. Blue, 743 N.W. 2d 169 (Iowa 2007).

The Court of Appeals noted that although work conditions did not cause the claimant to fall and blackout, work conditions in the form of the concrete wall

definitely worsened the effects of the fall. The employer argued that there was no dangerous condition created by the employment and that a wall, standing alone, was not a risk that could aggravate an injury. However the Court of Appeals noted that the employee did not have to be placed in a dangerous condition, but merely a position that aggravates the effects of an idiopathic fall. Id.

The Court also stated that the construction of the office in which claimant was working had contributed to the effects of the injury. The office was small, with concrete walls and a concrete floor. Id. Similarly the area in which Mr. Bluml was narrow with hard floors and metal counters. (App at 323-324). Mr. Whitacre's claim was found compensable because his head hit hard surfaces (wall and floor) which aggravated the effects of his injury. In Mr. Bluml's case, his matter was found non-compensable for the simple fact he hit his head on a floor as opposed to the wall, metal counters or if there was another object on the floor. However it is undisputed that hitting his head on the hard floor surface rendered his injuries more serious. (App at 22). It is illogical and inequitable to allow compensability to Mr. Whitacre but deny Mr. Bluml's claim on this basis.

It should also be noted that in the original arbitration decision, Whitacre v. AARP (File No 5029751), the Deputy Commissioner wrote in part:

> It has also been recognized that where a claimant falls and hits the floor, the hardness of the floor struck during the fall can constitute a sufficient element of risk or hazard as to make the fall arise out of the employment. An idiopathic fall to a concrete floor may be

> compensable because of the effects of the hard surface. Here it is both the hardness of the wall upon which the claimant hit his head that primarily caused claimant's injury, and the hardness of the floor, which also contributed to his facial injuries, which constitute the element of an adverse work condition.
>
> This case is distinguishable from Miedema, the rest room back injury case, above, in that, in Miedema, there was no showing the rest room stall's design or construction in any way contributed to the employee's injury. Here in contrast, the design and construction of the office where claimant passed out significantly contributed to claimant's injury.
>
> If the wall claimant fell against had been of some material other than hard concrete, the effects of his head hitting it would have been less onerous. If he had choked and passed out in another part of the building, such as in the hallway, which was carpeted, his injury may well have been less serious. But he choked and passed out in a small office with hard concrete walls and a hard floor. Hitting his head against such a hard, unyielding surface resulted in a great deal of damage to his head and brain. This although work conditions did not cause him to black out and fall, work conditions in the form of the concrete wall definitely worsened the effects of the fall. It is found that claimant's injury arose out of his employment. Whitacre v. AARP (File No. 5029751).

Iowa case law and past workers compensation decisions seem to coincide with the jurisdictions that find idiopathic falls to level floors to be compensable when the hard surface aggravates or increases the risk of injury. The Ladwig and Whitacre cases are prime examples. However, other Iowa cases, follow the same rationale.

In Benco Manufacturing v. Albertsen, 764 N.W. 2d 783 (Iowa Ct. App. 2009), the Court concluded that an employee who fell backwards into a cement wall screening a restroom sustained injuries arising out of her employment. The Court held that the cement wall screening the restroom door is related to the working

environment and aggravated Albertsen's injury from her fall by breaking her neck. Id. Instead of a hard floor causing the injury, the Benco case granted compensability due to an employee striking her head on a hard wall, a work condition. Similarly, Mr. Bluml striking his head on a hard floor is a work condition that aggravated his injuries from the fall.

It should also be noted that the Iowa Court of Appeals in Curries Company and Travelers Insurance Company v. McCurdy, 746 N.W. 2d 278 (Iowa App. 2008) found compensable a claim by a gentleman who asserted he incurred a bilateral foot condition due to standing or walking on a hard concrete floor for twelve years. In McCurdy, the employee's doctor pointed out that the employee's bilateral foot conditions were caused by him walking or standing on hard surfaces for long periods of time and being unable to relax certain foot tendons. The Appeals Court agreed that the legal standard was met because all of the medical opinions in the case established that the bilateral foot conditions were caused by the work conditions. The Commissioner in his original ruling stated: "By pointing out that the claimant worked for 12 years on a hard concrete floor, the defendants only underscore the claimant's case." Id. While obviously not entirely on point with this case, the McCurdy decision does provide additional precedent that the hardness of a floor can constitute a sufficient risk or hazard of employment, increase the risk of injury and/or aggravate the effects of an injury.

Respondents have argued that Benco and Whitacre cases are distinguishable from our present matter because the employees struck their head against a hard wall instead of a hard floor. Although in Whitacre the employee's injuries were also caused by striking his head on a hard floor surface. Mr. Bluml fails to see any difference in an employee being injured due to falling into a hard wall as opposed to a hard floor. The hard ceramic floor at Long John Silvers was a real and tangible employment condition that clearly aggravated the effects of Mr. Bluml's injury when his head struck said floor. See AARP v. Whitacre, 834 N.W. 2d 870 (2013). The question the Court should focus on is whether the hard surface increased the risk of injury or aggravated the effects of the fall.

Further, in AARP v. Whitacre, 834 N.W. 2d 870 (Iowa App. 2013), the Court stated that the Koehler decision did not require the existence of a dangerous condition. It simply required that an employee be "placed in a position that aggravates the effects of an idiopathic fall." In Lakeside Casino v. Blue, 743 N.W. 2d 169 (Iowa 2007), the Iowa Supreme Court abandoned any requirement that the employment subject the employee to a risk or hazard that is greater than that faced by the general public. Id. Falling on the hard ceramic floor at Long John Silver's clearly aggravated and made for worse injuries sustained by Mr. Bluml.

Mr. Bluml also asserts that the hard floor at his place of employment was an instrumentality essential to the work of the defendant-employer. In the case of

American General Insurance Company v. Barrett, 300 S.W. 2d 358 (Tex. Civ. App. 1957), Barrett suddenly blacked out and fell striking his head on a paved road. The fatal accident occurred just as Barrett was leaving his place of employment on the company premises. An X-Ray revealed a skull fracture. Testimony by doctors supported a conclusion that Mr. Barrett died from natural causes rather than those of a traumatic origin. However, the testimony also supported a conclusion that the fracture could have caused the death. The trial Court found that the skull fracture caused or contributed to cause the death of Mr. Barrett. The Court of Appeals affirmed stating that the injury originated out of the work of the employer:

> In the instant case it can be said that the hard-surfaced road was an instrumentality essential to the work of the employer and falling against it was a hazard to which Barrett was exposed because of the employment and injury and death came to him because he was then working in the course of his employment. Id.

It seems only logical that a fast food restaurant would not have a carpet or soft floors behind the counter. Spilling of food and drinks must be common, necessitating a tile/ceramic surface. Obviously, tile/ceramic surfaces are hard. Falling on the hard, unyielding surface at the Long John Silver's Restaurant was a hazard of employment to which Mr. Bluml was exposed to and resulted in his injuries being much more severe than had he fallen on a softer surface.

In summary, Mr. Bluml asserts he sustained a compensable work injury because striking his head on the hard, unyielding tile/ceramic floor aggravated the

effects of the fall and increased the severity of his injuries. Iowa Workers Compensation decisions have specifically stated that the hardness of the floor struck during a fall can constitute a sufficient element of risk or hazard as to make the fall arise out of the employment. Ladwig v. Farner Bocken Co., (File No 5000116); Whitacre v. AARP (File No. 5029751). The Ladwig case adopted the following line of reasoning:

> …It has also been held that the hardness of the floor struck during the fall can constitute a sufficient element of risk or hazard as to make the fall arise out of employment. An idiopathic fall to a concrete floor may be compensable because of the effects of the hard surface. Chapman, Dependents of v. Hanson Scale Co., 495 So. 2d 1357 (Miss. 1986).

Iowa courts follow the rule of law that an idiopathic fall to a hard surface is compensable when the effects of the hard surface aggravate or make the injury worse. AARP v. Whitacre, 834 N.W. 2d 870 (2013). Respondents have argued that idiopathic falls on a level floor are not compensable regardless of the hardness of the floor on the theory that a floor presents a risk or hazard encountered everywhere and that such risks and hazards presented by a level floor are the same risks which confront all member of the public. Luvaul v. A. Ray Barker Motor Co., 72 N.M. 447, 384 P. 2d 885 (1963); Ledbetter v. Michigan Carton Co., 74 Mich. App. 330, 253 N.W. 2d 753 (1977); et al. For example, "Virginia follows the actual risk doctrine which excludes an injury which comes from a hazard to which the employee would have been equally exposed apart from employment. Bernardo v. Carlson

Cos.-TGIF, 728 S.E. 2d 508, 511 (2012). However, the Iowa Supreme Court, which also follow the actual risk doctrine, abandoned any requirement that the employment subject the employee to a risk or hazard that is greater than that faced by the general public. Lakeside Casino v. Blue, 743 N.W. 2d 169 (Iowa 2007). Accordingly, Mr. Bluml asserts it is incorrect and illogical for the Deputy Commissioner, Commissioner and District Court to find Iowa follows the majority of jurisdictions that rule idiopathic falls onto a level floor surface are not compensable.

Mr. Bluml asserts the Deputy Commissioner, Commissioner and District Court erred in their interpretation of the law, failed to follow case precedent and filed decisions which are irrational, illogical and unjustifiable. There is no doubt that the extensive injuries suffered by Mr. Bluml were caused by his head hitting the hard tile floor. Falling against this hard surface was a hazard to which Mr. Bluml was exposed to and worsened the effects of the fall. According Mr. Bluml respectfully requests the Court reverse the decisions made by the Deputy Commissioner, Commissioner and District Court and find that Mr. Bluml's February 15, 2012 workplace accident arose out of and in the course of his employment.

ISSUE #2

The Deputy Workers Compensation Commissioner, the Iowa Workers Compensation Commissioner and District Court Committed an Error of Law and an Abuse of Discretion in determining Mr. Bluml's injury did not arise

out and in the course and scope of his employment and finding all other matters moot. If error had not occurred it should have been found that Mr. Bluml has incurred a permanent disability and is entitled to Permanent Disability benefits.

Preservation of Error

Mr. Bluml asserts he is entitled to Permanent Total Disability benefits. This issue was first raised in his Workers Compensation Petition, argued at the arbitration hearing and appealed to the Iowa Workers Compensation Director. Mr. Bluml filed a Petition for Judicial review that the Commissioner erred in his interpretation of the law, failed to follow case precedent and filed a decision that was irrational, illogical and unjustifiable. (App at 30; App at 61). Further, this issue was specifically raised in the Petition for Review (App. at 32).

Following the January 25, 2018 Ruling on Petition for Judicial Review where the District Court affirmed the Commissioner's decision, Mr. Bluml filed this appeal to the Iowa Supreme Court. (App at 69)

Standard of Review

On Appeal, this Court follows much the same process as review by the District Court. The District Court reviews the Commissioner's actions in an appellate capacity and may grant relief if the Commissioner's action have prejudiced the Petitioner's substantial rights and the Commissioner's action meets one of the

criteria set out in Iowa Code §17A.19(10)(a) through (n). Burton v. Hilltop Care Center, 813 N.W. 2d 250, 256 (Iowa 2012). This Court applies those same criteria to determine whether the district court correctly applied the law in exercising its judicial review. Id. at 255-256; Westling v. Hormel Foods Corp., 810 N.W. 2d 247, 251 (Iowa 2012); Herrera v. IBP, Inc., 633 N.W. 2d 284, 286-87 (Iowa 2001).

The role of the Court reviewing an agency decision is threefold: 1) determine if the commissioner and district court applied the proper legal standard or interpretation of the law; 2) determine if there was substantial evidence to support the commissioner's and District Court's findings; and 3) determine if the commissioner's application of the law to the facts was irrational, illogical or wholly unjustifiable. Clark v. Vicorp Rests., Inc., 696 N.W. 2d 596, 603-04 (Iowa 2005).

As the remaining issues of the case where considered moot by the Iowa Workers Compensation Commissioner and District Court, should the court reverse the order finding this matter did arise out of Mr. Bluml's employment a number of remaining issues need to be addressed. The first being that if the Court finds this to be a compensable injury, the Court should find Mr. Bluml has sustained a permanent disability and entitled to permanent total disability benefits.

The Court shall reverse, modify, or grant other appropriate relief from agency action if the agency action (and District Court action) was based upon a determination of fact clearly vested by a provision of law in the discretion of the

agency that is not supported by substantial evidence in the record before the Court when the record is viewed as a whole. Iowa Code § 17A.19(10)(f). Substantial evidence means the quality and quantity of evidence that would be deemed sufficient by a neutral, detached and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance. Iowa Code 17A. 19(10)(f)(1). The adequacy of the evidence in the record to support a particular finding of fact must be judged in light of all the relevant evidence in the record supports its material findings of fact. Iowa Code §17A. 19(10)(f)(3); Lange v. Iowa Dep't of Revenue, 710 N.W. 2d 242, 247 (Iowa 2006). To the extent error is predicated on an erroneous interpretation of the law, we do not give deference to the workers' compensation commissioner. Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 334 (Iowa 2008).

Argument

It is clear from the medical records, detailed in the Fact section of this brief, that Mr. Bluml has incurred a permanent disability as a result of this fall.

Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence and physical capacities would otherwise permit the employee to perform. McSpadden v. Big Ben Coal Co., 288 N.W. 2d 181 (Iowa 1980). A finding that

claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability. Chamberlin v. Ralston Purina, File No. 661698 (App. October 29, 1987); Shadel v. Snap-on-Tools Corp., File No. 5006828 (April 12, 2004).

In Guyton v. Irving Jensen Co., 373 N.W. 2d 101 (Iowa 1985), the Iowa courts formally adopted the odd-lot doctrine. Under that doctrine, a worker becomes an odd-lot employee when an injury makes the worker incapable of obtaining employment in any well-known branch of the labor market. An odd-lot worker is thus totally disabled if the only services the worker can perform are so limited in quality, dependability, or quantity that a reasonable stable market for them does not exist. Guyton, 372 N.W. 2d at 105.

Under the odd-lot doctrine, the burden of persuasion on the issue of industrial disability always remains with the worker. Nevertheless, when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to produce evidence showing availability of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of facts finds the worker does fall in the odd-lot category, the worker is entitled to a finding of total disability. Guyton, 372 N.W. 2d at 106.

Factors to be considered in determining whether a worker is an odd-lot employee include the worker's reasonable but unsuccessful effort to find steady suitable employment, vocational or other expert evidence demonstrating suitable work is not available for the worker, the extent of the worker's physical impairment, intelligence, education, age, training, and potential for retraining. No factor is necessarily dispositive on the issue. Secondary Injury Fund of Iowa v. Nelson, 544 N.W. 2d 258 (Iowa 1995).

While Mr. Bluml has returned to work, running the fryer at a Runza restaurant, he should still be considered an odd-lot worker. Dr. Jeffrey has opined that Mr. Bluml is "able to understand simple instructions, and if he has a repetitive job where the instructions are laid out and he has supervision, he is able to perform those without any trouble. However, any complicated tasks would be beyond what he is able to perform at this time." (App at 220-222). Further Dr. Jeffrey stated: "With his frontal lobe injury, I am not sure there is ever going to be anything that he is going to be able to learn." (App at 220-222). Dr. Jeffrey has also opined that Mr. Bluml may need placement into a care facility to supervise him adequately. (App at 222). A CT of the head has revealed Mr. Bluml has extensive encephalomalacia of the anterior lateral left temporal lobe and left frontal lobe. (App at 248). Deputy Commissioner Christenson remarked: "Petitioner sustained a brain trauma injury that has had a devastating impact on his life and the life of his mother and father.

(App at 18). Further, due to his seizure issues, Mr. Bluml has been advised not to drive. (App at 223)

Kevin Jarosik, Mr. Bluml's employer, testified that Mr. Bluml has difficulty reading and has memory issues, which limits the type of jobs Mr. Bluml can perform at the restaurant. (App at 109 ¶12 – App at 111 ¶ 15). Mr. Jarosik only allows Mr. Bluml to conduct simple repetitive tasks, and will not allow him to work on the cash register or take orders due to Mr. Bluml's cognitive impairments. (App at 109 – App 112).

Mr. Jarosik normally drives Mr. Bluml to and from work (App at 111 ¶ 22 – App at 112 ¶ 12) as Mr. Bluml has been advised not to drive by Dr. Jeffrey. (App at 223). Ron Schmidt, a vocational rehabilitation counselor opines that Mr. Bluml is an odd lot worker. (App at 275).

Based upon the above, we believe Mr. Bluml meets the definition of being an odd-lot employee and should be awarded total permanent disability benefits. The commencement date for such benefits should be the date of injury, February 15, 2012. See Debose v. Process Mechanical Inc. File No. 889569 (Feb. 22, 1993).

Although this issue was found moot by the Deputy Commissioner, Commissioner and District Court, if the claim is found compensable there is undisputable evidence that this incident has caused permanent medical issues for Mr. Bluml, restricts his ability to work and has caused a permanent disability.

ISSUE #3

The Deputy Workers Compensation Commissioner, the Iowa Workers Compensation Commissioner and District Court Committed an Error of Law and an Abuse of Discretion in determining Mr. Bluml's injury did not arise out and in the course and scope of his employment and finding all other matters moot. If error had not occurred it should have been found that Mr. Bluml is entitled to penalty benefits.

Preservation of Error

Mr. Bluml asserts he is entitled to penalty benefits. This issue was first raised in his Workers Compensation Petition, argued at the arbitration hearing and appealed to the Iowa Workers Compensation Director. Mr. Bluml filed a Petition for Judicial review that the Commissioner erred in his interpretation of the law, failed to follow case precedent and filed a decision that was irrational, illogical and unjustifiable. (App at 30-55; App at 61). Further, this issue was specifically raised in the Petition for Review (App at 32).

Following the January 25, 2018 Ruling on Petition for Judicial Review where the District Court affirmed the Commissioner's decision, Mr. Bluml filed this appeal to the Iowa Supreme Court.

Standard of Review

Section 17A.19(10) of the Code governs the standard upon which the Court reviews a decision of the commissioner. It is well settled that " ‘ [t]he 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.’ " Lakeside Casino v. Blue, 743 N.W.2d 169, 173 (Iowa 2007) (citation omitted). Therefore, when The Court interprets a workers' compensation statute the Court will not give the commissioner's interpretation of the law deference and are free to substitute their own judgment. Id.; see also Iowa Code § 17A.19(10)(c) (1999 Supp.). When reviewing the agency's factual determinations, The Court determines whether the factual determinations are based on " substantial evidence in the record before the court when that record is viewed as a whole." Iowa Code § 17A.19(10)(f) (1999 Supp.).

The Code defines " substantial evidence" as [T]he quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance. Id. § 17A.19 (10)(f)(1). The factual determinations made by the workers' compensation commissioner are " ‘ clearly vested by a provision of law in the discretion of the agency,’ " together with the application of the law to those facts. Mycogen Seeds v.

Sands, 686 N.W.2d 457, 465 (Iowa 2004) (citation omitted). When applying the " substantial evidence" standard to the agency's fact-finding, The Court must give the agency the appropriate discretion. Id. The Court reviews an agency's decision to determine whether its application of the law to the facts was " ' irrational, illogical, or wholly unjustifiable.' " Id. (citation omitted). This standard of review affords appropriate deference to the agency. Id.

The commissioner may award penalty benefits on benefits that were unreasonably delayed or denied. Iowa Code § 86.13. The Code provides in relevant part that [i]f a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were unreasonably delayed or denied. Id. To receive a penalty benefit award under section 86.13, the claimant must first establish a delay in the payment of benefits. Keystone Nursing Care Ctr. v. Craddock, 705 N.W.2d 299, 307 (Iowa 2005). The burden then shifts to the employer to prove a reasonable cause or excuse for the 757 N.W.2d 335 delay. Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 260 (Iowa 1996).

To the extent error is predicated on an erroneous interpretation of the law, we do not give deference to the workers' compensation commissioner. Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 334 (Iowa 2008).

Argument

Iowa Code §86.13 provides that a penalty of up to 50% shall be awarded if a delay in commencement or termination of benefits occurs without reasonable or probably cause or excuse. A reasonable basis exists for denial of policy benefits if the insured's claim is fairly debatable when it is open to dispute on any logical basis. Stated another way, if reasonable minds can differ on the coverage- determining facts or law, then the claim is fairly debatable. City of Madrid v. Blasnitz, 742 N.W. 2d 77 (Iowa 2007).

Based on Iowa law as discussed earlier in this brief, Mr. Bluml does not see any reasonably debatable issue as to why the Defendants denied coverage/benefits in this case. It is quite clear, at least to Mr. Bluml, that Iowa courts follow the rule of law that an idiopathic fall to a hard surface is compensable when the effects of the hard surface aggravate or make the injury worse. Accordingly, Mr. Bluml asserts he is entitled to a 50% penalty benefit pursuant to Iowa Code §86.13.

ISSUE # 4

The Deputy Workers Compensation Commissioner, the Iowa Workers Compensation Commissioner and District Court Committed an Error of Law and an Abuse of Discretion in determining Mr. Bluml's injury did not arise out and in the course and scope of his employment and finding all other

matters moot. If error had not occurred it should have been found that Mr. Bluml is entitled to payment of all medical expenses pursuant to Iowa Code section 85.27.

Preservation of Error

Mr. Bluml asserts he is entitled to payment of all medical expenses. This issue was first raised in his Workers Compensation Petition, argued at the arbitration hearing and appealed to the Iowa Workers Compensation Director. Mr. Bluml filed a Petition for Judicial review that the Commissioner erred in his interpretation of the law, failed to follow case precedent and filed a decision that was irrational, illogical and unjustifiable. (App at 30-55; App at 61). Further, this issue was specifically raised in the Petition for Review (App at 32).

Following the January 25, 2018 Ruling on Petition for Judicial Review where the District Court affirmed the Commissioner's decision, Mr. Bluml filed this appeal to the Iowa Supreme Court.

Standard of Review

The Court applies the standards of judicial review set forth in the Iowa Administrative Procedure Act in our review of workers' compensation decisions. Tyson Foods, Inc. v. Hedlund, 740 N.W.2d 192, 195 (Iowa 2007). The court may reverse, modify, or grant other relief when agency action is based on fact determinations " not supported by substantial evidence in the record before the court

when that record is viewed as a whole." Iowa Code § 17A.19(10)(f) (2001). "Substantial evidence" is statutorily defined as the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance. Id. § 17A.19(10)(f)(1). To the extent error is predicated on an erroneous interpretation of the law, the court does not give deference to the workers' compensation commissioner. Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 334 (Iowa 2008).

Argument

Mr. Bluml's medical bills caused from the accident total $703,278.26, and likely increasing, with Medicare and Nebraska Medicaid making payments to the medical providers due to the Defendants denial of the claim. (App at 330-344). The Medicaid lien indicated the medical providers billed $662,824.74. (App at 341) Medicare showed additional total charges of $41,304. (App at 344).

Mr. Bluml's medical providers relate all of the medical treatment as shown on the medical itemization to the February 15, 2012 accident. (App at 238-239; App at 220-222; App at 230; App at 330-344). Dr. Jeffrey opines that the subsequent seizures brought upon by alcohol use is related to the cognitive impairments which have resulted from the February 15, 2012 traumatic brain injury. In short, Dr. Jeffrey asserts Mr. Bluml's cognitive impairments don't allow him the ability to stop

drinking, which results in him having seizures. (App at 220-22). It is anticipated Mr. Bluml will treat for the rest of his life due to the injuries sustained in the February 15, 2012 accident and may need to be placed in a care facility. (App at 220-222).

An employer takes an employee subject to any active dormant health impairments. A work connected event that more than slightly aggravates the condition is considered to be a compensable injury. Ziegler v. United States Gypsum Co., 252 Iowa 613, 620 (Iowa 1961). Although Mr. Bluml had a pre-existing alcohol use problem and seizure disorder, the injuries sustained in the February 15, 2012 accident has aggravated this condition as opined by Dr. Jeffrey. (App at 220-222).

Dr. John Hannam, a neurologist at Lakeside Hospital in Omaha, Nebraska, has opined that Mr. Bluml has convulsive seizure disorder, posttraumatic epilepsy due to left cerebral hemisphere injury which led to the previous craniectomy and decompression. (App at 230). Accordingly, all of Mr. Bluml's hospitalizations and treatments related to seizures and alcohol treatment are related to this work place incident and should be reimbursed to Medicaid/Medicare. Further all future medicals related to the February 15, 2012 accident should be paid by Defendant.

On another note, if Mr. Bluml is successful and respondents are ordered to reimburse Medicaid/Medicare, the undersigned attorney asserts he should be entitled to a reasonable attorney fee. Nebraska Medicaid asserts that the full amount of the

payments it made on Mr. Bluml's behalf should be reimbursed to it, without attorney fees being assessed. It cites to Smalley v. Nebraska Dept. of Health & Human Services, 283 Neb. 544 (2012) and its regulations as to authority why it should be reimbursed the whole amount or the majority of the lien amount should any judgment be entered. Our case is distinguishable as neither Mr. Bluml nor the undersigned attorney made an agreement with Medicaid as was the situation in the Smalley case.

In Smalley, DHHS initially declined payment of the medical bills since a third party may have been liable. Smalley's attorney made a deal with DHHS that he would reimburse DHHS dollar for dollar any amounts paid Medicaid paid, in exchange of paying the bills while the case was in litigation. After the case settled, Smalley's attorney refused to pay back Medicaid the full amount, asserting the Arkansas Dept. Of Health & Human Services v. Ahlborn, 547 U.S. 268 (2006) case precluded Medicaid from obtaining the full lien amount.

In Ahlborn, the Plaintiff was asked to reimburse Medicaid $215,645.30 out of a $550,000 settlement. The parties in the settlement agreed that the case, if not disputed, was worth about six times the settlement amount. The United States Supreme Court asserted that since the case settled on a disputed basis at 1/6 of the true value, that Medicaid should only be reimbursed 1/6 of its lien amount, or $35,581.47.

However, because in the Smalley case the plaintiff's attorney and Medicaid reached an agreement during litigation that the full amount of the lien would be paid after settlement or judgment, the Nebraska Supreme Court felt the agreement was valid and ordered the Plaintiff to pay Medicaid back the full lien amount. Our case is distinguishable as Mr. Bluml nor his attorney ever made an agreement with Medicaid. The Workers Compensation insurer denied the claim and because Mr. Bluml did not have insurance, Medicaid stepped in and made payments.

Since this case has been a disputed case, Medicaid should help with the payment of attorney fees, should the Respondents be ordered to pay all past medical bills. Had the case not been pursued by Mr. Bluml's and his attorney, Medicaid would not obtain any monies whatsoever. The Iowa Workers Compensation manual states that in disputed cases, if the health insurance carrier is ordered to be reimbursed, a quantum meruit based fee is customarily paid by the health carrier. Courts in other jurisdictions have determined that attorney fees may be assessed on medical expenses recovered as part of a contested judgment. Langford v. Liberty Mutual Insurance Co., 854 S.W. 2d 100 (1993).

Accordingly, if medical bills are ordered to be reimbursed to Medicare/Medicaid, the undersigned requests that the Court grant the undersigned attorney reasonable attorney fees.

VIII

CONCLUSION

Mr. Bluml respectfully requests that the Court reverse the decision of the Iowa Workers Compensation Commissioner and District Court and find that Mr. Bluml's February 15, 2012 injury arose out of and in the course and scope of his employment and that his claim is compensable under Iowa law.

Further Mr. Bluml requests that the Court find for Mr. Bluml as detailed below or in the alternative remand back to the Iowa Workers Compensation Division for determination of the following:

a. Petitioner requests that the Court order the employer to pay Mr. Bluml permanent total disability benefits at the rate of $212.44 per week, commencing on February 15, 2012 and during the time Mr. Bluml remains permanently and totally disabled, which will be for the rest of his natural life.

b. The employer be ordered to pay accrued weekly benefits in a lump sum;

c. That employer pay interest on unpaid weekly benefits as set forth in Iowa Code Section 85.30;

d. That a penalty in the amount of 50% be awarded to Mr. Bluml pursuant to Iowa Code 86.13

e. That employer be ordered to pay Mr. Bluml's past medical expenses, including satisfaction of Medicare and Medicaid liens;

f. That the Court grant Mr. Bluml's attorney a reasonable attorney fee for medical benefits obtained for the benefit of Medicare and/or Medicaid or in the alternative allow for the sums to be paid to the lienholders be put into trust until the parties reach an agreement or litigate the matter pertaining to the undersigned's attorney request for a reasonable fee.

g. That the Court order the employer to pay for all future medical expenses of the Claimant necessitated by the February 15, 2012 work injury.

h. For any other order the Court deems just and equitable.

Jason Bluml, Petitioner

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IX

REQUEST FOR ORAL ARGUMENT

Notice is hereby given that the Appellants desire to be heard in oral argument upon submission of this cause to the Supreme Court.

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X.

CERTIFICATE OF COSTS

The undersigned hereby certifies that the costs paid for printing Appellants Brief and Request for Oral Argument was the sum of $0.

Jason Bluml, Petitioner

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME, LIMITATION, TYPEFACE REQUIREMENTS AND TYPE-STYLE REQUIREMENTS

1. This Brief complies with the type- volume limitation of Iowa R. App. P. 6.903(1)(g)(1) in that the Brief contains less than 14,000 words. Approximately 12,500 word after subtracting the Table of Contents, Table of Authorities, Statement of Issues and Certificates.
2. This brief complies with the typeface requirements of Iowa R. App. P. 6903(1)(e) and the typestyle requirements of Iowa R. App. P. 6903(1)(f) in that this Brief has been prepared proportionally spaced typeface using Times New Roman, 14 point.

Dated this 9th day of June, 2018.

Jason Bluml, Petitioner

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PROOF OF SERVICE

I hereby certify that on the 9th day of June, 2018, I did serve the Appellants' Proof Brief and Request for Oral Arguments on all other parties to this appeal by e-mailing, mailing or delivering one copy thereof to each of the following parties and attorneys:

Jean Z. Dickson
Paul Powers
1900 East 54th Street
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Attorney for Dee Jays, Inc d/b/a Long John Silvers & Commerce & Industry

In full compliance with Iowa R. App. P. 6.901.

Jason Bluml, Petitioner

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CERTIFICATE OF FILING

I, Douglas R. Novotny, Attorney for Appellant, does hereby certify that I have electronically filed the Appellant's Proof Brief on this 9th day of June, 2018, with the Supreme Court of Iowa.

Jason Bluml, Petitioner

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