IN THE SUPREME COURT OF IOWA

NO. 18-1051

ANITA GUMM,

Appellant,

vs.

EASTER SEAL SOCIETY OF IOWA, INC, AMERICAN COMPENSATION INS. CO., and SFM COMPANIES,

Appellees.

APPEAL FROM THE DISTRICT COURT OF POLK COUNTY
HONORABLE PAUL SCOTT

APPELLANT'S BRIEF

Joseph S. Powell AT0010116
THOMAS J. REILLY LAW FIRM, P.C.
4900 University Avenue, Suite 200
Des Moines, Iowa 50311
Phone: (515) 255-8300
Fax: (515) 255-6938
Email: jpowell@reillylawfirm.com
ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Iowa Cases **Page/s**

Iowa Code **Page/s**

STATEMENT OF ISSUES PRESETNED FOR REVIEW

1. Whether the Iowa Workers' Compensation Commissioner Correctly Applied Cumulative Aggravation Injury Law to Appellant's Case.

Authorities:

Iowa Code section 17A.19(10)

Dep't of Transp. v. Van Cannon, 459 N.W.2d 900 (Iowa App. 1990)

Floyd v. Quaker Oats, 646 N.W.2d 105 (Iowa 2002)

McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1986)

Neal v. Annett Holdings, Inc., 814 N.W.2d 512 (Iowa 2012)

Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa Ct. App. 1994)

Univ. of Iowa Hosps. & Clinics v. Waters, 674 N.W. 2d 92 (Iowa 2004)

W. Des Moines Cmty. Sch. v. Fry, 859 N.W.2d 671 (Iowa Ct. App. 2014)

Ziegler v. United States Gypsum Co., 106 N.W.2d 591 (Iowa 1960)

ROUTING STATEMENT

This appeal involves a substantial issue in which there appears to be a conflict between published decisions of the Supreme Court and Court of Appeals, and as such should be retained by the Supreme Court. *See* Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

This case involves an appeal from an agency ruling on Appellant Anita Gumm's (hereinafter "Gumm") petition for workers' compensation benefits for a cumulative work injury. (App. 17). Hearing was held in Des Moines, Iowa on March 12, 2015. (App. 17). An Arbitration Decision was issued on February 18, 2016 finding Gumm had failed to establish a cumulative injury. (App. 17, 39). A timely agency appeal was filed on February 26, 2016. (App. 41). An Appeal Decision was issued on October 12, 2017, affirming the Arbitration Decision. (App. 43-47). Petitioner filed

a timely Petition for Judicial Review on October 31, 2017. (App. 51-52). On May 16, 2018 the District Court issued a Ruling denying Gumm's Petition for Judicial Review. (App. 53-60). Gumm filed a timely Notice of Appeal on June 15, 2018. (App. 62-63).

STATEMENT OF FACTS

Gumm generally agrees with the factual findings of the agency. (App. 19-31). In 2008 Gumm began working as a janitor with Appellee Easter Seals of Iowa (hereinafter "Easter Seals"). (App. 19). Her job at Easter Seals required her to be on her feet throughout the day and she was required to bend, stoop, twist, and lift and move a minimum of 80 pounds. (App. 19).

On October 28, 2008 Gumm slipped on wet grass at work and sustained a fracture to her right ankle. (App. 19). She received medical treatment with Eric Barp, DPM. (App. 19). Dr. Barp diagnosed Gumm with a trimalleolar ankle fracture, and performed an open reduction and internal fixation surgical procedure. (App. 19). On January 15, 2009 Dr. Barp stated that Ms. Gumm had reached MMI, was doing very well and could return to full activity and work without restrictions. (App. 19). On January 19, 2009 Dr. Barp assigned a 17% lower extremity impairment rating for the ankle fracture. (App. 104). Gumm returned to Dr. Barp for a final visit on April 7, 2009 and reported that she had completed physical therapy and was feeling

fine and had no stiffness or problems with her ankle. (App. 19-20). She had returned to full activity without pain or discomfort and was released from Dr. Barp's care. (App. 110). Easter Seals' insurance carrier paid workers' compensation benefits pursuant to Dr. Barp's impairment rating, with the last payment being made on May 21, 2010. (App. 20).

One year later – on April 22, 2010 – Gumm returned to Dr. Barp with complaints of right ankle pain and stiffness. (App. 20). Dr. Barp performed surgery on May 3, 2010 to remove hardware from her ankle. (App. 20). On June 22, 2010 Gumm was again released to full duty by Dr. Barp. (App. 20). On July 16, 2010 Dr. Barp issued a report to Easter Seals's insurance carrier stating Gumm had done quite well with the hardware removal and did not suffer any additional impairment. (App. 125). Gumm testified that after the hardware removal surgery she felt better and was able to return to work. (App. 68-69).

For the next 21 months Gumm worked at Easter Seals without issue or need for medical treatment for her ankle. (App. 20). Then, on March 6, 2012, her ankle pain returned and she returned to see Dr. Barp. (App. 20). She reported pain in the ankle the longer she was on it walking throughout the day, and stated that she sometimes had to "drag it" behind her. (App. 20). Dr. Barp ultimately performed an ankle arthroscopy on April 18, 2012.

(App. 20). Dr. Barp released Gumm to return to work without restrictions beginning May 3, 2012. (App. 20; 140). Gumm returned to her usual shifts at that time without issue. (App. 270). On July 17, 2012 Gumm saw Dr. Barp, and he noted that "Anita is doing very well and is pain free. She has no restrictions and will f/u with me as needed." (App. 143). Gumm testified that following the surgery she was again able to return to work without problems. (App. 71). Eight months later, on March 19, 2013, Dr. Barp issued a letter to Easter Seals's insurance carrier stating Gumm had done well following the arthroscopic surgery, had completely healed, and had not sustained any additional impairment. (App. 146).

On May 16, 2013 – ***10 months since her last visit*** – Gumm returned to Dr. Barp with complaints of right ankle pain. (App. 21; 147). At that point Dr. Barp provided an injection and informed Gumm that she may need an ankle arthrodesis/fusion at some point. (App. 21; 148). She returned to Dr. Barp on June 27, 2013 and reported the injection provided some pain relief. (App. 21). She was released from Dr. Barp's care at that time, though Dr. Barp noted she may need a repeat injection. (App. 21; 149). Gumm returned to Dr. Barp shortly thereafter on August 2, 2013. (App. 21). Dr. Barp recommended a CT scan, and again stated that Gumm may need a fusion surgery. (App. 21). On August 19, 2013 Gumm followed up with

Dr. Barp, and it was determined to proceed with an arthrodesis/fusion surgery (App. 21; 154).

Gumm underwent a pre-operative physical with her family physician on October 16, 2013. It was noted that "Anita works as a custodian and by the end of the day, her R ankle is screaming." (App. 22; 201). Gumm continued to work until the day of her arthrodesis fusion surgery. (App. 278). Dr. Barp performed the ankle fusion surgery on October 23, 2013. (App. 22; 163). Gumm was taken off work at that time. (App. 167; 278). On January 10, 2014 Dr. Barp allowed Gumm to return to work beginning January 13, 2014 for 4-5 hours per day, and Gumm did so. (App 176; 279). This was the first time that Dr. Barp had issued a restriction of part-time work following a surgery. (App. 75).

Gumm saw Dr. Barp on February 14, 2014 and "lower back pain and knee pain from gait changes due to ankle" were noted. (App. 178). Dr. Barp stated that Ms. Gumm's back and knee pain were likely from gait changes associated with her ankle, and recommended physical therapy. (App. 179). Dr. Barp also assigned a restriction of no lifting over 5 pounds and no mopping until further notice. (App. 180). ***This was the first time Dr. Barp had ever assigned such restrictions***. (App. 75). Gumm took the

restrictions from Dr. Barp to Easter Seals. Easter Seals informed her they could not accommodate her restrictions. (App. 23).

Gumm was released from Dr. Barp's care on December 16, 2014. (App. 196). Dr. Barp issued a note stating Gumm met the definition of a handicapped person pursuant to Iowa Code 321L.1, and her condition was permanent. (App. 197). Gumm's inability to walk from her ankle fusion resulted in Dr. Barp giving her the handicap statement. (App. 79).

On February 14, 2014 Gumm filed two workers' compensation petitions. One petition involved the October 28, 2008 acute injury, and the other asserted a cumulative injury with injury dates of March 6, 2012, May 16, 2013, and/or January 15, 2014.[1] (App. 9-10). Gumm and Easter Seals stipulated that Gumm's October 28, 2008 injury reached maximum medical improvement on January 15, 2009 and resulted in a 17% lower extremity impairment rating. (App. 11).

Dr. Barp's deposition was taken on March 2, 2015 as part of Gumm's lawsuit. (App. 235). He was questioned about whether Gumm's return to work after her acute 2008 injury substantially aggravated and contributed to her need for fusion surgery in 2013, and testified as follows:

[1] Easter Seals changed workers' compensation insurance carriers several times between 2008 and 2014, resulting in multiple insurance carriers defending the claim.

Q: What role did spending time on her feet, whether at home or work, play in the development of this arthritis?

A: Yeah. So I think that the more time somebody spends on their feet that has developed arthritis, it certainly can exacerbate those symptoms.

Q: And when you say exacerbate the symptoms, would there be anything about spending time on her feet while at work at the Easter Seals which substantially alters or changes the natural progression of her condition from the injury and surgery?

A: Well, I think that the more somebody uses that ankle, the faster it's going to progress to become more arthritic. I do think that. And I guess my thought process was if somebody's sitting at home with their ankle up, that's not going to progress as quickly.

(App. 237 (deposition pp. 11-12)). Later in the deposition Dr. Barp reiterated:

Q: I want to shift gears a little bit and ask you about a letter that Mr. Hook wrote to you and your response to him. You can just take a minute and review that, if you'd like.

A: Yep. Okay.

Q: And it looks like from the letter as though you agreed with Mr. Hook's statement in the letter, and then you wrote an addition on the last page of the letter, that spending time on her feet at work could certainly aggravate her symptoms form the underlying injury?

A: That's right.

Q: Can you explain what you mean by that?

A: Well, like we talked about, I think a person that has ankle arthritis, if they're about walking all day versus sitting at a desk, I think the more they walk, the more that can certainly aggravate the ankle arthritis causing pain.

Q: And when you say it would aggravate, you know, the pain, in your opinion, though, ***would spending time on her feet change substantially the progression of her condition***?

A: ***I would say yes.***

(App. 239-240 (deposition p. 20-21)) (emphasis added). Later the question was again asked, and Dr. Barp again answered:

Q: And being up on your feet eight hours a day, 40 hours in a week, that is more likely to speed up the arthritic changes in her right ankle?

A: Yes, it certainly could.

Q: Is that what happened in this case, to a reasonable degree of medical certainty?

A**:** ***Yes, to a reasonable degree of medical certainty, I do think that is the case.***

(App. 245 (deposition p. 42)) (emphasis added).

Gumm was seen by Robin Sassman, M.D., for an IME on October 15, 2014. (App. 217). Dr. Sassman also opined that Gumm's continued work at Easter Seals substantially aggravated her prior acute injury, resulting in the need for fusion surgery and permanent restrictions. (App. 224).

During his deposition, Dr. Barp was asked to give his opinion on Dr. Sassman's opinions:

Q: ***Do you agree with Dr. Sassman, that her work in May of 2013 was a substantial aggravating factor?***

A: ***Yeah.***

Q: ***And resulted in the need for arthrodesis?***

A: ***Yes.***

Q: Regarding the second paragraph, the bilateral knee pain and low back pain, is this consistent with our opinion regarding the causation for her knee and back pain?

A: Yes. As we just talked about, I think that because her ankle hurt, it altered her gait, which results in - - certainly can result in bilateral knee and low back pain.

Q: So after reviewing just the two causation paragraphs in Dr. Sassman's report, is it fair to say that you agree a hundred percent with her causation analysis?

A: Yeah, based on my review of those two paragraphs, I agree.

(App. 246 (deposition pp. 46-47)) (emphasis added). No other medical opinions exist in this case.

The agency acknowledged Dr. Barp's opinion, finding "he opined claimant spending time on her feet did substantially change the progression of her condition" and that "he expressed agreement that claimant's work in May 2013 was a substantial aggravating factor and resulted in claimant's need for arthrodesis." (App. 31). The agency concluded that "Dr. Barp's opinion confirms claimant suffered an injury and disability, and through further work activities, the disability increased." (App. 33). However, based on the Iowa Supreme Court case of *Ellingson v. Fleetguard, Inc.*, the

agency found this evidence was legally insufficient to establish a cumulative injury. (App. 34). On agency appeal Gumm pointed out that the subsequent ruling in the Iowa Supreme Court case of *Floyd v. Quaker Oats* applies in this case, but the agency found it must apply *Ellingson* until it is reversed. (App. 47). The District Court noted "the difficulty in reconciling the seemingly incompatible holdings of *Ellingson* and *Floyd*," and ultimately denied Gumm's Petition for Judicial Review. (App. 59).

BRIEF AND ARGUMENT

I. Gumm Established the Legal Requirements for a Cumulative Aggravation Injury.

A. Preservation of Error

The issue in this appeal is whether the agency applied correct cumulative injury law to Gumm's case. This issue was directly addressed and ruled on by the agency and District Court. (App. 47; 59).

B. Standard of Review

Judicial review of administrative decisions is governed by Iowa Code section 17A.19(10). Whether the commissioner misapplied the cumulative injury doctrine in this case depends on the application of law to facts, and as such this Court should review the agency's decision to determine whether it is irrational, illogical, or wholly unjustifiable. *See Neal v. Annett Holdings, Inc.*, 814 N.W.2d 512, 526 (Iowa 2012); Iowa Code § 17A.19(10)(m).

C. Gumm Established a Compensable Injury pursuant to *Floyd v. Quaker Oats*.

The issue in this case is whether Gumm sustained a cumulative aggravation of her acute October 28, 2008 injury after she returned to work. It is settled law that if a worker has a preexisting condition or disability that is aggravated, accelerated, worsened or lighted up by an injury which arose out of and in the course of employment resulting in a disability found to exist, the claimant is entitled to compensation. *Dep't of Transp. v. Van Cannon*, 459 N.W.2d 900, 904 (Iowa Ct. App. 1990). Further, the cumulative injury doctrine establishes that an injury which develops over time from performing work-related activities and ultimately results in some degree of industrial disability is a compensable work injury. *McKeever Custom Cabinets v. Smith*, 379 N.W.2d 368, 373-74 (Iowa 1986). The question of whether an injury is causally connected to work is within the domain of expert testimony. *Poula v. Siouxland Wall & Ceiling, Inc*., 516 N.W.2d 910 (Iowa Ct. App. 1994).

In Gumm's case, both Dr. Barp and Dr. Sassman opined that Gumm's return to work following her initial acute injury of October 28, 2008 was a substantial aggravating factor of her prior injury, resulting in the need for fusion surgery. (App. 224; 245). The agency found that Gumm's return to

work aggravated her injury and increased her disability. (App. 33). Medical causation of a cumulative aggravation injury was established.

Relying on the 1999 Iowa Supreme Court case of *Ellingson v. Fleetguard*, the agency ruled Gumm failed to show "a 'distinct and discreet' disability attributable to the post-fracture work activities" and thus did not establish a cumulative injury. (App. 34). The agency failed to acknowledge and apply subsequent case law that modified the ruling in *Ellingson*.

Following *Ellingson*, the Iowa Supreme Court issued a decision in *Floyd v. Quaker Oats* that is directly on point. In *Floyd*, the Court addressed a situation where a worker had an acute injury that was later cumulatively aggravated by the workers' returning to employment. *Floyd v. Quaker Oats*, 646 N.W.2d 105, 108-09 (Iowa 2002). The issue squarely before the Court was whether a cumulative injury claim exists under such circumstances in light of the *Ellingson* case. The Court ruled:

> The employer contends that a cumulative injury has not been established. It urges that to show a cumulative injury a claimant must produce evidence of having suffered a distinct and discreet disability solely attributable to work activities over time, as opposed to an aggravation of a preexisting injury from an identified traumatic event. The employer urges that this argument is supported by our decision in *Ellingson v. Fleetguard, Inc.*, 599 N.W.2d 440, 444 (Iowa 1999).
> …
>
> In the present case, claimant's arbitration petition seeking benefits for the September 3, 1993 injury was voluntarily dismissed in the face of a statute-of-limitations defense by the employer. The industrial

> commissioner concluded that the dismissal of that petition precluded any consideration of the September 3, 1993 injury as a compensable event. ***Given this circumstance, we believe that claimant should be permitted to recover by way of a cumulative-injury claim for any increase in functional disability shown to have occurred as the result of day-to-day activities in the workplace subsequent to the September 3, 1993 injury***.
>
> Some support for our conclusion on this issue is found in *Ziegler v. United States Gypsum Co.*, 252 Iowa 613, 620, 106 N.W.2d 591, 595 (1960). ***In that case, an earlier traumatic injury had been compensated, and the claimant, in lieu of a review reopening proceeding, elected to file an original arbitration petition in which he sought compensation for the increased degree of disability that resulted from day- to-day workplace activities that aggravated a prior back injury. We approved a separate award for the percentage of permanent partial disability shown to exist over and above the percentage of disability adjudged with respect to the prior injury.***
>
> ***The Ziegler decision stands for the proposition that, when a permanent disability has been established by an adjudicated award, a later aggravation may provide an independent compensable event but only to the extent of the increased disability that flows therefrom. See Ziegler, 252 Iowa at 620, 106 N.W.2d at 595. We do not believe that the results should be different in the present case simply because there was no award for the prior injury as a result of the claim having become time barred.*** We are convinced that the agency's conclusion that the evidence supported an award of compensation for a cumulative injury is not contrary to law.

Id. (emphasis added). Pursuant to *Floyd*, as well as *Ziegler v. United States Gypsum* cited therein, following an acute injury a worker may recover under a cumulative injury claim for an increase in disability that occurs from day-to-day work activities. *Id*.

Gumm's circumstances are nearly identical to those in *Floyd* and *Ziegler*. She sustained an acute injury in October of 2008, and the parties stipulated that injury resulted in a 17% lower extremity impairment rating. (App. 11; 67). That stipulation was accepted and incorporated by reference into the agency's decision. (App. 18). Like the claimants in *Ziegler* and *Floyd*, Gumm did not seek to litigate the extent of disability benefits for the October 2008 injury due to the statute of limitations having run. (App. 46). The parties further stipulated that Easter Seals would receive a credit for the 17% previously paid for the 2008 injury, requiring Gumm to establish an increase in disability above 17% in order to recover. (App. 14).

The physicians unanimously agreed Gumm's October 2008 injury was substantially aggravated by her return to work, resulting in the need for a fusion surgery, increased disability, and need for permanent restrictions. The agency found that "Dr. Barp's opinion confirms claimant suffered an injury and disability, and through further work activities, the disability increased." (App. 33). This is the exact standard necessary to establish a cumulative injury set forth in *Floyd*. *See Floyd*, 646 N.W.2d at 108. The commissioner misapplied the law in finding Gumm failed to meet the legal requirements of a cumulative injury.

The ruling in *Floyd* allowing a worker to recover for a cumulative aggravation injury after a prior acute injury by returning to work for an employer has been upheld and followed by Iowa's Court of Appeals:

> Fry's situation is similar to that in *Floyd.* The cumulative injury to his left SI joint began with an acute injury in January 2007 and manifested in another acute injury in September 2008. Between these bookends, Fry performed rigorous and repetitive physical work activities as a school custodian. Both his treating physician, Dr. Honsey, and Dr. Stoken discussed multiple aggravations worsening the initial injury to Fry's SI joint. **Under the analysis in *Floyd*, Fry may recover by way of a cumulative-injury claim for any functional disability resulting from his day-to-day activities at the school, subsequent to his fall in January 2007.**

W. Des Moines Cmty. Sch. v. Fry, 859 N.W.2d 671 (Iowa Ct. App. 2014) (emphasis added).

The acting commissioner acknowledged *Floyd*, but determined it must apply *Ellingson* until *Ellingson* it is overturned. (App. 47). The law has evolved since *Ellingson*, and pursuant to *Floyd* Gumm is allowed to recover by way of a cumulative-injury claim for increased disability resulting from her day-today activities at work following her 2008 injury. *See Floyd*, 646 N.W.2d at 108; *see also Fry*, 859 N.W.2d 671. The agency made a legal error in concluding otherwise, and the agency's application of law to Gumm's facts was irrational, illogical, or wholly unjustifiable.

In addition to being legally correct, allowing Gumm to recover under *Floyd* also serves the humanitarian purpose of the law. Gumm did not seek increased disability benefits for the October 2008 injury as the statute of limitations had expired. No weekly benefits had been paid to her since May 21, 2010, and as such the statute of limitations ran on May 21, 2013. (App. 46; Iowa Code §85.26(1)). Gumm went a prolonged period without receiving weekly benefits because five years passed between her initial injury and eventual need for an ankle fusion and any permanent restrictions. During that time period Gumm remained employed and working full-time without restrictions. There is no dispute that Gumm's need for the fusion surgery was the result of a work-related injury. To hold that Gumm is barred from making any recovery for her work-related injury and ankle fusion is unjust. When analyzing workers' compensation appeals, the law should be liberally construed to benefit working men and women. *Univ. of Iowa Hosps. & Clinics v. Waters*, 674 N.W. 2d 92, 96 (Iowa 2004). In the current case, the legal standard set forth in *Floyd* should be applied to allow Gumm recovery for her injury.

Even assuming, *arguendo*, that *Ellingson* is the correct legal standard, Ms. Gumm's treating and evaluating physicians have stated that her work after her fracture substantially aggravated her condition as of May 2013

resulting in the need for a fusion surgery and significant permanent restrictions. The physicians also unanimously agreed that following the 2013 fusion surgery, Gumm developed bilateral knee pain and back pain. (App. 225; 245-246 (deposition pp. 44-47)). The development of knee and back pain and need for permanent restrictions following the fusion surgery is clearly a distinct disability attributable to Gumm's post-fracture work activities that satisfies even the *Ellingson* standard. The agency erred in finding otherwise.

CONCLUSION

WHEREFORE, Gumm requests that the District Court's Ruling be reversed and that the case be remanded to the Iowa Workers' Compensation Commissioner to determine further benefits and relief.

REQUEST FOR ORAL ARGUMENT

Gumm requests the opportunity for oral argument.

CERTIFICATE OF COST

The undersigned certifies that the cost of printing the required copies of the preceding Appellant's Brief was $0, as it was electronically filed.

By: */s/ Joseph S. Powell*
Joseph S. Powell AT0010116

CERTIFICATE OF FILING / SERVICE

The undersigned certifies that on October 8, 2018 he electronically filed the preceding Appellant's Brief.

By: */s/ Joseph S. Powell*
Joseph S. Powell AT0010116

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface and type-volume requirements of Iowa Rule of Appellate Procedure 6.903(1)(g)(1) because this brief has been prepared using a proportionally spaced typeface using Times New Roman in 14-point font and contains 3,923 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

By: */s/ Joseph S. Powell*
Joseph S. Powell AT0010116