**IN THE SUPREME COURT OF IOWA**

**No. 18-1051**

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ANITA GUMM,

Plaintiff-Appellant,

vs.

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

Defendants-Appellees.

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APPEAL FROM THE IOWA DISTRICT COURT OF POLK COUNTY
THE HONORABLE PAUL SCOTT
CASE NO CVCV055213

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# FINAL BRIEF OF APPELLEE AMERICAN COMPENSATION INS. CO.

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I. Whether the Commissioner correctly held that Claimant failed to prove she sustained a cumulative trauma.

Authorities:

Iowa Code 17A.19(10)

*Schutjer v. Algona Manor Care Center,*
780 N.W.2d 549 (Iowa 2010)

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

*Ellingson v. Fleetguard, Inc.,* 599 N.W. 2d 440 (Iowa 1999)

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

*Mercy Medical Center v Plumb,* 776 N.W. 2d 301 (Iowa App. 2009)

*Lakeside Casino v. Blue*, 743 N.W.2d 169 (Iowa 2007)

## ROUTING STATEMENT

Defendant submits that transfer to the court of appeals is appropriate under Iowa R. App. P. 6.1101(3). The Commissioner determined that Claimant did not establish a cumulative trauma injury. Whether substantial evidence supports that decision, and whether the Commissioner's application of law to fact, are questions involving application of existing legal principles.

## STATEMENT OF THE CASE

Defendant agrees with Claimant's statement of the case.

## STATEMENT OF FACTS

Claimant Anita Gumm ("Claimant") states she "generally agrees with the factual findings of the agency" (Appellant's Brief, p. 5), and nowhere in her brief does she argue that any of the agency's factual findings are not supported by substantial evidence. *See Burton v. Hilltop Care Center,* 813 N.W.2d 250, 256 (Iowa 2012) ("A reviewing court can only disturb those factual findings if they are 'not supported by substantial evidence in the record before the court when that record is reviewed as a whole.'") Nevertheless, in her own Statement of Facts she seeks to inject purported "facts" that were not adopted by the agency. For example, she states she "returned to her usual shifts in May 2012 without issue and that she had "done well following arthroscopic surgery" in April 2012 and had "completely healed." (Appellant's Brief, p. 7) To the contrary, the agency specifically noted that Claimant testified she had *never* completely healed, and that she continued to have soreness and tenderness with the right ankle from the time she sustained a fracture of her right foot in 2008. (App. 28) Indeed, the agency's decision denying the cumulative trauma theory advanced by claimant was premised on the factual finding that "although

claimant successfully returned to work [following the October 28, 2008 work injury], her ankle condition required ongoing care" including "four surgeries and one injection of the ankle over a five-year period." (App. 32) The agency found that Dr. Barp's opinions (that given the severity of claimant's fracture, she would inevitably develop posttraumatic arthritis at some point in the future, and that the amount of time claimant spent on her feet at work would have resulted in increased symptomatology and potentially hastened the development of arthritis) did not establish a cumulative trauma under the *Ellingson* case. *Ellingson v. Fleetguard, Inc.,* 599 N.W.2d 440, 444 (Iowa 1999).

## SUMMARY OF THE ARGUMENT

Claimant sustained a significant right ankle fracture and dislocation in 2008 when she slipped and fell on wet grass. Two days later she underwent surgery, an open reduction and internal fixation ("ORIF"). She returned to work as a maintenance employee (janitor) for Easter Seals – the same job she held at the time of her injury. She experienced continuous pain and problems with the right foot since the day she fell. She underwent four surgical procedures related to her injury, including an arthrodesis in October 2013. After the arthrodesis, she took FMLA leave and worked sporadically

until resigning in February 2014. After the arthrodesis, she developed back and bilateral knee pain.

Accident Fund, the insurance carrier for Easter Seals on the 10/28/08 injury date, paid for all of the surgeries. It also paid temporary and permanency benefits resulting from the injury. However, Claimant failed to pursue a claim for additional indemnity benefits against Accident Fund until more than three (3) years after the last payment of PPD benefits by Accident Fund. Accordingly, rather than abandoning her claim altogether, she filed "cumulative trauma" injury claims against Easter Seals' subsequent insurance carriers -- American Compensation Insurance Company, which insured the employer on two dates when Claimant merely sought medical treatment (3/6/12 and 5/16/13); and SFM Insurance Company, which was the employer's carrier on Claimant's last day worked (1/24/14).[1] While the cumulative trauma allegation represents a clever attempt to bypass the statute of limitations, it simply does not hold water. The Commissioner properly rejected Claimant's cumulative trauma theory under the *Ellingson* case because Claimant's condition "represents sequelae of the original

[1] Because the Agency rejected Claimant's cumulative trauma theory, it did not rule on the issue of the "date of injury" for the alleged cumulative trauma. Such a decision would have impacted which of the two Defendant insurance carriers was responsible for the injury.

October 28, 2008 injury, not distinct cumulative injuries." (App. 34) This decision should be affirmed by this court.

## ARGUMENT

### I. THE AGENCY CORRECTLY HELD THAT CLAIMANT DID NOT SUSTAIN A CUMULATIVE TRAUMA INJURY.

Defendant agrees that Claimant preserved error for this appeal. Defendant also agrees that judicial review of administrative decisions is governed by Iowa Code section 17A.19(10). However, Claimant does not squarely address the standard of review. Whether Claimant sustained a cumulative injury is a question of fact which the legislature vested the commissioner discretion to decide. *Schutjer v. Algona Manor Care Center,* 780 N.W.2d 549, 558 (Iowa 2010). Such fact determinations must be affirmed if they are supported by substantial evidence in the record when the record is viewed as a whole. *Id.*[2] Whether the Commissioner misapplied the cumulative injury doctrine to Claimant's situation depends on the application of law to facts; reversal is appropriate only when the Commissioner's application is irrational, illogical, or wholly unjustifiable. *Neal v. Annett Holdings, Inc.,* 814 N.W.2d 512, 526 (Iowa 2012).

[2] Claimant does not take issue with the Commissioner's factual findings.

The Iowa Supreme Court discussed the very issue present here – whether there is a "cumulative trauma" injury as opposed to an aggravation of an existing injury due to work – in *Ellingson v. Fleetguard, Inc.,* 599 N.W.2d 440 (Iowa 1999).[3] In *Ellingson*, Claimant began working at Fleetguard in 1968. She was injured on January 4, 1985 when a 40-lb box fell on her head, resulting in neck, head, and arm pain that required surgeries in March 1990 and December 1992. *Id.* at 442. Ellingson returned to Fleetguard after the injury. After the surgeries, she periodically missed work to treat for her condition. By May 1993, her condition had progressed. Claimant sought benefits alleging two dates of injury – the acute trauma, and an alleged cumulative trauma due to ongoing work duties, that manifested on June 17, 1992.[4] The Iowa Supreme Court cited *McKeever Customer Cabinets v. Smith*, 379 N.W.2d 368, 373-74 (Iowa 1986) for the proposition that Iowa recognizes a cumulative trauma as "the type of injury that develops over time from performing work-related activities and ultimately produces some degree of industrial disability." *Id.* Claimant argued that her ongoing work activities at Fleetguard were a substantial factor in

[3] *Ellingson* was overruled on other grounds in *Waldinger Corp. v. Mettler,* 817 N.W.2d 1, 7 (Iowa 2012) (healing period benefits may be intermittent such that a claimant is not limited to a single period of temporary disability).
[4] The court noted that Claimant "freely admits that her cumulative-injury claim is designed to produce a new date of injury that will provide a higher wage base for computing her compensation." *Id.* at 444.

materially aggravating her condition. In rejecting Claimant's argument, the court stated:

> To the extent that the evidence reveals a subsequent aggravation of Ellingson's January 4, 1985 injury, this is a relevant circumstance in fixing the extent of her permanent disability. Aggravating work activities were doubtless a causal factor with respect to the total degree of disability that she exhibited at the time of the hearing. It is clear, however, that she may not establish a cumulative-injury claim by merely asserting that her disability immediately following the January 4, 1985 injury was increased by subsequent aggravating work activities. That circumstance only serves to increase the disability attributable to the January 4, 1985 injury. **To show a cumulative injury she must demonstrate that she has suffered a distinct and discreet disability attributable to post-1985 work activities rather than as an aggravation of the January 4, 1985 injury. . .**

*Id.* at 444 (emphasis added).

This case is similar to *Ellingson.* Here, Claimant suffered a complex, acute injury to her right foot in October 2008 that led to four different surgeries. Not surprisingly, her treating physician, Dr. Barp, stated that Claimant aggravated her underlying condition by spending time on her feet at work as opposed to having her foot up and resting. However, as made clear by *Ellingson,* that serves only to increase the disability associated with the underlying injury. It does not form the basis for a new, cumulative injury. That can occur only if Claimant can show that "she has suffered a distinct and discreet disability attributable to post-1985 work activities rather

than as an aggravation of the [October 23, 2008] injury." *Ellingson*, 599 N.W.2d at 444.

The Commissioner correctly determined Claimant's current condition was a result of her October 2008 injury, and not any work activities that occurred thereafter. The Commissioner relied on the testimony of Dr. Barp in reaching that conclusion. (App. 30-31) The Commissioner cited Dr. Barp's opinion that Claimant would have developed arthritis and required arthrodesis surgery regardless whether she returned to work in May 2012. The Commissioner also noted Dr. Barp's opinion that "Claimant spending time on her feet did substantially change the progression of her condition." (App. 31) The Commissioner found, "[a]fter consider all of the evidence presented," that:

> The essence of Dr. Barp's opinion is that the amount of time claimant spent on her feet at work would have resulted in increased symptoms and potentially hastened the development of arthritis. However, Dr. Barp also opined given the severity of claimant's fracture-dislocation, she would inevitably develop posttraumatic arthritis at some point in the future. He was unable to state with certainty that claimant's work activities, in fact, hastened the development of arthritis and sped the need for surgery. He also acknowledged multiple factors play a role in the pace of development of arthritis . . .

(App. 33)

The Commissioner concluded:

> Dr. Barp's opinion relies upon a common-sense argument, that a person with an arthritic joint will have greater problems with the joint

> if the joint is stressed than would a person who minimally uses the joint. This form of opinion is insufficient for claimant to rely upon in establishing she suffered a cumulative work injury following the right ankle fracture. Dr. Barp's opinion does not establish claimant suffered a disability gradually, reaching an injurious condition at some point. Rather, Dr. Barp's opinion confirms claimant suffered from an injury and disability, and through further work activities, the disability increased.

(Id.) The Commissioner's factual finding that Claimant did not establish a cumulative trauma injury under the *Ellingson* standard is supported by substantial evidence.

Claimant argues *Ellingson* is not the correct legal standard, and that the law has "evolved" since *Ellingson* (Appellant's Brief, p.18). She argues the case is analogous to *Floyd v. Quaker Oats*, 646 N.W.2d 105 (Iowa 2002). The contention that *Ellingson* is not the proper standard is wrong. While *Ellingson* was overruled on other grounds, no case has *ever* modified, criticized or overruled the Court's analysis of the cumulative trauma doctrine.

In *Floyd,* the court stated:

> The significant factor in the *Ellingson* case was that the extent of the [prior, traumatic] injury was being litigated in the same proceeding in which the separate cumulative-injury claim was being urged. Moreover, the evidence conclusively showed that the ultimate extent of industrial disability was affected by job-related activities that aggravated the 1985 neck injury. As a result of that circumstance, this court held that the compensable consequences of the aggravation of the [prior traumatic] injury must be adjudicated as part of the disability flowing from that injury.

*Floyd*, 646 N.W.2d at 108. In *Floyd,* the court noted that claimant's arbitration petition seeking benefits for the initial, traumatic injury claim "was voluntarily dismissed in the face of a statute-of-limitations defense by the employer." *Id.* As such, the court stated "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." *Id.*[5]

Here, the agency squarely addressed the issue of whether Claimant had sustained industrial disability as a result of separate, cumulative-trauma work activities. The Deputy[6] stated:

> [Claimant's] continued work activities may have played a role in aggravating the right ankle condition and resulted in the need for further treatment, however, by the standard of the Ellingson case, this form of aggravation is insufficient. Claimant suffered a significant fracture-dislocation and developed the inevitable posttraumatic arthritis that would be expected from such an injury. As a result of the arthritic condition, claimant required arthroscopy, arthrodesis, and more conservative treatment of the right ankle. These procedures represent sequelae of the original October 28, 2008 injury, not distinct cumulative injuries.

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[5] Although the *Floyd* court did discuss *Ellingson,* the court did not address whether Floyd had proven (as required by *Ellingson*) a "distinct and discreet" disability as a result of his ongoing work duties at Quaker Oats. Presumably, however, this was implicit in the court's decision, since the court did not criticize or question this critical component of *Ellingson.*

[6] In the appeal decision the acting Commissioner adopted the Deputy's factual findings. (App. 44)

(App. 34)[7]

As a policy matter, a Claimant who has sustained an acute injury and been compensated for the same, but whose claim for additional benefits for the injury is barred by the statute of limitations, should not be permitted to recover on a cumulative trauma theory merely by showing that ongoing work duties contributed to the development of increased disability. That is why the court's standard in *Ellingson* of requiring a "distinct and discreet" disability attributable to work activities after the initial acute injury is important and makes sense. Absent such a requirement, injured workers in Iowa could another bite at the apple years after the statute of limitations on their acute injury claim (or even a review-reopening claim) has expired. All they would need to do is show they continued working, and that their work played a part in the development of a condition (such as arthritis in this case) which would "inevitably develop at some point in the future" irrespective

[7] Claimant also argues that "[t]he 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." (Appellant's Brief, p. 20) This argument, however, is easily disposed of by the Commissioner's express factual finding that: "As a result of the arthritic condition, claimant required arthroscopy, arthrodesis, and more conservative treatment of the right ankle. These procedures represent sequelae of the original October 28, 2008 injury, not distinct cumulative injuries." This finding is supported by substantial evidence, and nowhere does Claimant argue otherwise. *See Ellingson*, 599 N.W.2d at 445 (the court does not "determine whether the evidence might support a different finding but whether it supports the finding made.")

whether the employee continued working. (App. 33) This slippery slope is especially evident here, where Claimant merely spent time on her feet at work as opposed to performing physically demanding or repetitive work.[8] A claim for sequelae of an initial acute injury must be brought as part of the acute injury (either in an original proceeding or review-reopening). A new cumulative trauma claim should not be allowed absent a showing of a "distinct and discreet" disability due to work activities following the employee's return to work. The Commissioner's determination that Claimant failed to make that showing here is supported by substantial evidence and should be affirmed.

## CONCLUSION

Defendants Easter Seal Society of Iowa and American Compensation request the court affirm the agency's decision that Claimant failed to establish a "cumulative trauma" injury. Claimant's condition did not occur gradually over a period of time due to repetitive work activities. Her injury

[8] In order to satisfy the element of "arising out of employment," she must prove "that a causal connection exists between the conditions of employment and the injury." *Mercy Medical Center v. Plumb*, 776 N.W.2d 301 (Iowa App. 2009) (citing *Lakeside Casino v. Blue*, 743 n.W.2d 169, 174 (Iowa 2007)). In *Blue*, the court clarified that the "arising out of" element requires more than that the injury "coincidentally occurred while at work, but must in some way be caused by or related to the working environment or the conditions of the environment." *Id.* (citations omitted).

was a traumatic incident that caused a complex fracture and dislocation requiring multiple surgeries. Claimant's continued work duties after the injury required her to be on her feet and "aggravated" her condition. However, under *Ellingson*, this is insufficient for a finding of cumulative trauma.

## REQUEST FOR ORAL ARGUMENT

Appellees request the opportunity for oral argument.

By: _____
Thomas D. Wolle, AT0008564

## CERTIFICATE OF ELECTRONIC FILING AND SERVICE

I certify that on October 8, 2018, I electronically filed the forgoing with the Clerk of Court of the Supreme Court using the Iowa Electronic Document Management System, which will send notification of electronic filing to the following opposing counsel. Per Iowa Rule 16.317(1)(a)(2), this constitutes service of the document for the purposes of the Iowa Court Rules.

By: _____
Thomas D. Wolle, AT0008564

## CERTIFICATE OF COMPLIANCE WITH TYPE REQUIREMENTS

This brief complies with the typeface and type-volume requirements of Iowa Rule of Appellate Procedure 6.903(1)(d) and 6.903(1)(g)(1) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-Point Times New Roman and contains 2752 words, excluding the parts of the brief exempted by Iowa R. App. P.6.903(1)(g)(1).

By: _____
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