IOWA WORKERS' COMPENSATION:

2017 STATUTORY CHANGES COMING INTO FOCUS

2020 PCBA GENERAL PRACTICE SEMENAR

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INTRODUCTION

On March 30, 2017, the Iowa Legislature Passed HF 518, which made significant changes to the Workers' Compensation Chapter. Most of the changes took effect for injuries occurring on or after July 1, 2017. The provisions concerning commutations and interest, took effect on July 1, 2017, regardless of the date of injury.

These reforms were billed as "balanced" and were approved in the wake of the 2016 election cycle, after much debate in committee and on the floor of the legislature.

Two years later, hearing and appeal decisions of the Division of Workers' Compensation are starting to implement the statutory changes. A handful of cases have reached the district court level. Decisions from the Iowa Supreme Court (or Court of Appeals) are months away.

1. 85.16(1)--(2) - INTOXICATION

New Law: If an injured worker fails a post-injury alcohol or drug test, intoxication is presumed, and the *burden of proof shifts to the worker to disprove* he or she: (i.) was intoxicated at the time of injury; and, (ii.) that the intoxication was a substantial factor causing injury.

An injured employee must defeat one or the other elements to recover benefits. Disputing causation requires medical expertise. Expert reports are expensive, which is a factor in deciding to forego a claim.

Old Law: Intoxication was an affirmative defense, with the employer responsible for establishing both the intoxication and substantial factor elements.

New Cases:

a. *Toler v. Midwest Cornerstone Property Management*, File No. 5066128 (Grell Arb. 11/4/19)(affirmed on appeal 6/15/20). A toxicology expert was needed in order to rebut the intoxication presumption. Toler's post injury drug test at UIHC was positive for THC. Toler admitted marijuana use, but claimed it was ten days earlier. Deputy Grell ruled "[Toler] offered no expert testimony and no convincing evidence to establish that he was not under the influence of marijuana." The new statutory presumptions were not rebutted, and recovery was barred.

b. *Gully v. Liguria Foods,* File No. 5063429 (Appeal 1/30/20). Drug testing one week after an injury is too remote in time to be given any weight.

2. 85.18 – RETALIATION

The pre-amendment language of this section prohibits employers from avoiding workers' compensation requirements by contract. This amendment prohibits a private cause of action based on this code section.

3. 85.23 - NOTICE

New Law: Defines the date of injury as the date "the employee knew or should have known that the injury was work related." This amendment essentially codified existing case law.

Old Law: An injured employee must give written (or actual) notice to the employer within 90 days. The Discovery Rule was applied by the Iowa Supreme Court, so as to extend the notice period.

New Cases:

a. *Stiles v. Annett Holdings,* File No. 5064673 (Palmer Arb. 11/15/19). Post July 1, 2017, the Discovery Rule applies to Notice and Statute of Limitations questions.

b. *Wilton v. Dexter Laundry*, File No. 5066443 (Gerrish-Lampe Arb. 1/21/2020). "The defendant's argument is that the modification to section 85.23 eliminates the discovery rule from cumulative injury cases. However, the plain language of the statute includes the *knew or should have known* language which has been used by the Iowa Supreme Court for decades in applying the discovery rule. From the face of the statute, the legislative intent appears to have codified the discovery rule. ... Therefore, without specific language rejecting the discovery rule, the discovery rule still applies to the application of Iowa code § 85.23 as it relates to cumulative injuries."

c. *Alm v. Archer Daniels Midland Company*, File No. 5067128 (Pals Arb. 6/10/20). Discovery rule issue for a post 2017 injury was analyzed using pre 2017 statute and precedent.

4. 85.26 - STATUTE OF LIMITATIONS

New Law: Defines the date of injury as the date "the employee knew or should have known that the injury was work related." This amendment essentially codified existing case law.

Old Law: An injured employee must file a Petition with the Division of Workers' Compensation within two years of the date of injury (or three years from the last weekly benefit payment). The Discovery Rule was applied by the Iowa Supreme Court, so as to extend the statute of limitations.

New Cases:

a. *Stiles v. Annett Holdings,* File No. 5064673 (Palmer Arb. 11/15/19). Post July 1, 2017, the Discovery Rule applies to Notice and Statute of Limitations questions.

Wilton v. Dexter Laundry, File No. 5066443 (Gerrish-Lampe Arb. 1/21/2020). "By the same argument and by using the same date of manifestation, claimant's petition filed on October 18, 2018, was within the two-year statute of limitations set forth in Iowa § 85.26. Like § 85.23, the 2017 modification to § 85.26 was the addition of the knew or should have known language. The date of occurrence of the injury is the manifestation date. In this case, it is found that the manifestation date is April 24, 2018."

b. *Bradwell v. Quaker Oats*, File No. 5059782 (Appeal 7/15/20). Discovery Rule applied to Statute of Limitations analysis, in post July 1, 2017 claims.

5. 85.33(3) - REFUSAL OF WORK / SUSPENSION OF TTD

New Law: Amendment mandates that offers of suitable temporary work by made in writing. Injured worker must accept or decline the offer, in writing. Temporary benefits may be suspended if the employee does not address the unsuitability of light duty, in writing. As a practical matter, suitable work now includes light duty assignments at charities.

Light duty work offered at the employer's principle place of business is considered to be geographically suitable, for any employee whose work involves travel more than 50% of the time.

Old Law: The pre 2017 statute did not require written conveyances of offers of light duty or responses. Case law stated Employers could not compel light duty (or treatment) if arrangements for light duty involved significant travel between employer's workplace and employee's home.

New Cases:

a. *Hays v. Central Iowa Fencing*, File No. 5064784 (Lunn Arb. 5/28/20) "It is asserted that defendants verbally offered claimant light duty work; however, an oral offer of suitable temporary work does not meet the requirements outlined in the amended workers' compensation act. I find defendants did not provide a written offer of temporary work to claimant. ... Defendants are correct that the suspension of temporary benefits is allowed if suitable work is offered and declined. However, for injuries occurring on or after July 1, 2017, offers of suitable, temporary work must be in writing. Iowa Code section 85.33(3)(b). No such written offer of suitable, temporary work exists in the evidentiary record."

6. 85.34(2) - MMI/COMMENCEMENT OF BENEFITS

This amendment provides that permanent partial disability benefits (PPD) commence at the date of maximum medical improvement (MMI). The pre 2017 statute allowed benefits to commence upon a return to work, the date a return to similar work was medically indicated or MMI. This section delays the onset of PPD and reduces employer's exposure to interest payments.

7. 85.34(2)(n) – SHOULDERS ARE SCHEDULE MEMBER INJURIES

New Law: Shoulder injuries are now schedule member injuries. Shoulder injuries are limited to an impairment of the upper extremity, based on lost function, with a maximum benefit of 400 weeks. Vocational benefits added for shoulder injuries. See, §85.70, below.

Old Law: Pre 2017, shoulders were compensated based on the injured employee's industrial disability, or loss of earning capacity, with a 500-week maximum.

New Cases:

a. *Stiles v. Annett Holdings,* File No. 5064673 (Palmer Arb. 11/15/19). A shoulder injury should be treated as a scheduled injury. No indication that any contrary argument was presented by claimant.

b. *Anderson v. Broadlawns*, File No. 5064991 (Christenson Arb. 12/16/2019). Reference to shoulder being compensated functionally under 85.34(2)(n), but no analysis. Compensated industrially, anyway, due to lymphedema.

c. *Hernandez v. Tyson*, File No. 5064403 (Gerrish-Lampe Arb. 12/19/19). Claimant alleged shoulder injury should be compensated industrially because injury extended into neck. Deputy found Claimant did not prove extension into neck and, therefore, compensated functionally.

d. *Hou v. Smithfield Foods*, File No. 5066327 (Elliot Arb. 1/13/2020). Since parties stipulated "shoulder" injury only issue is which rating.

e. *Arroyo v. Smithfield Foods*, File No. 5066288 (Grell Arb. 2/6/20). Shoulder injury compensated as scheduled member. Right rotator cuff tear and SLAP tear with no surgery.

f. *Chavez v. MS Technology, LLC*, File No. 5066270 (McGovern 2/5/20). Rotator Cuff tear found to be BAW injury; Bansal opinion taken against surgeon who only rated to the arm. No ID because no decrease in earnings. Although she did have less in gross earnings post injury, judge found that this was due to "market trends" and not her injury.

g. *Deng v. Farmland,* File No. 5061883 (McGovern Arb. 2/25/20). Post July 1, 2017 injury to shoulder, arm and neck. Held that injury to shoulder was BAW due to medical evidence that it extended to the proximal part of the glenohumeral joint. Parties stipulated that there was no industrial loss. 5% BAW awarded.

h. *Smidt v. JKB Restaurants*, File No. 5067766 (Grell Arb. 5/6/20). "Given that the injured anatomic structures (rotator cuff tendons and muscles) attach and originate proximal to the glenohumeral joint and that retraction of these tendons was proximal to the glenohumeral joint, I conclude that the injuries to claimant's supraspinatus and infraspinatus tendons result in an injury proximal to the shoulder joint. Therefore, I conclude that claimant has proven his injury results in an injury to the body as a whole, or an unscheduled injury. Unscheduled injuries are compensated pursuant to Iowa Code section 85.34(2)(v) (2017)."

i. *Rubalcava v. Siouxpreme Egg Products, Inc.*, File No. 5066865 (Grell Arb. 6/23/20). "Given that the injured anatomic structures (rotator cuff tendons and distal clavicle excision) originate or are located proximal to the glenohumeral joint, I conclude that the injuries to claimant's supraspinatus and infraspinatus tendons, as well as the distal clavicle excision, result in an injury proximal to the shoulder joint. I found, pursuant to unrebutted medical evidence, that the labral tears are part of the shoulder joint and that the subacromial decompression is also a surgical procedure to part of the shoulder joint. I provide no findings relative to the subscapularis tendon tear, as there is not sufficient medical evidence in this case to support a finding that condition is distal to, proximal to, or part of the glenohumeral "shoulder" joint. Therefore, having found claimant proved injuries proximal to the shoulder, I conclude that claimant has proven his injury results in an injury to the body as a whole, or an unscheduled injury." (However, because Claimant had returned to work with increased earnings, compensation was limited to functional impairment pursuant to 85.34(2)(v).)

j. *Deng v. Farmland,* File No. 5061883 (Cortese Appeal 9/29/20). *Reversing* arbitration decision: "I find the muscles that make up the rotator cuff are included within the definition of 'shoulder' under section 85.34(2)(n)."

8. 85.34(2)(o)(Feet); 85.34(2)(p)(Legs); 85.34(2)(q)(Eyes); 85.34(2)(1)-(2)(Hearing Loss); 85.34(2)(w)(Maximum Payments); and, 85.34(2)(u)(Disfigurement)

Multiple amendments made tweaks made to various schedule member provisions. "Double-dipping" prohibited.

9. 85.34(2)(v) - AGE TAKEN INTO ACCOUNT

New Law: Amendment allows for consideration of the number of years an injured worker was reasonably expected to work in calculating industrial disability.

New Cases:

a. *Wilton v. Dexter Laundry*, File No. 5066443 (Gerrish-Lampe Arb. 1/21/2020). Based on the plain language of the statute, however, it does not appear this new provision applies in cases of permanent and total disability. "As correctly noted by claimant, however, the legislature did not specify what impact this consideration should have on a determination of earning capacity, nor did the legislature indicate this consideration should be given any greater weight than the other industrial disability factors."

Pelley v. John Deere Waterloo Works, File No. 5067771 (Elliott Arb. 5/11/20). Claimant's age was taken into account to *increase* industrial disability: "The claimant was 40 years old at the time of the hearing. He intends to work until retirement at age 67. Claimant has another 27 years of reasonably anticipated work life. Claimant's earning capacity over the 27 years has been seriously eroded by his work injuries." Claimant still employed, but making less, was determined to have 75% industrial disability.

10. 85.34(2)(v) - OFFER OR RETURN TO WORK – RESULTING IN SAME JOB SAME PAY – RECOVERY CAPPED AT PPD

New Law: When an injured worker, with an industrial disability claim, returns to work, or is offered work, at the same or similar earnings, compensation is capped at the functional impairment rating. This amendment allows for a review-reopening proceeding to be brought, if the employee is later terminated--and sets no time limit for filing it.

Old Law: Regardless of whether an injured worker with a body as a whole injury returned to work, his or her case was subject to an industrial disability analysis. Pre 2017 shoulder injuries were also analyzed this way. Industrial loss factors include age, education, ratings, restrictions, ability to return to work, and ability to find other suitable employment. Three-year statute of limitations applied to all review-reopening claims.

New Cases:

a. *Wilkie v. Kelly Services and Indemnity Ins Co.*, File No. 5064366 (Copley Arb. 10/28/19)(Aff'd on Appeal Cortese 9/2/20). "Of note, based on the plain language of the statute, it does not appear this new provision that limits compensation to functional impairment applies in cases of permanent and total disability. Subpart (v) of Iowa Code section 85.34(2), to which this new provision was added, begins with the phrase, "In all cases of permanent partial disability other than those herein above described or referred to in paragraphs 'a' through 'u.'" Iowa Code § 85.34(v) (emphasis added). Thus, when the above-stated new provision refers to eligibility "under this paragraph," it is specific to permanent partial disability for unscheduled injuries. Permanent total disability is addressed in an entirely separate subsection—Iowa Code section 85.34(3)." Citing: *Drake University v. Davis*, 769 N.W.2d 176, 184-85 (Iowa 2009).

b. *Wilton v. Dexter Laundry*, File No. 5066443 (Gerrish-Lampe Arb. 1/21/2020). "In the present case, claimant has returned to work without official restrictions. He does have some personal modifications in place, but there were no restrictions imposed by his surgeon. This may be, in part, due to the defendants' refusal to accommodate the initial restrictions. Nonetheless, the facts are that claimant is currently working the same or similar job post-injury that he was working pre-injury and he is paid more post-injury than pre-injury. Under the 2017 statutory changes, regardless of the fact

that claimant has sustained what would be considered a whole-body injury, his loss can only be compensated based on the functional impairment resulting from the injury, and not in relation to the employee's earning capacity."

c. *Mayes v. Tyson Foods, Inc.*, File No. 5066393 (Pals Arb. 3/26/20). There were "discussions" about the injured worker returning to work, but no formal offer was ever made. "I conclude there is no documentation in evidence to demonstrate that Tyson offered Melvin work. There is also no documentation that Melvin refused any such offer of work. I find the evidence does not demonstrate that Melvin was offered work for which he would receive the same or greater wages than he received at the time of the August 6, 2018 injury. Because the evidence does not demonstrate that Melvin was offered work for which he would have received the same or greater wages than he received at the time of the injury, his compensation is not based only upon his functional impairment, rather an award of industrial disability is appropriate."

d. *Greer v. Hahn Ready Mix*, File No. 5066470 (Palmer Arb. 4/9/20) Because claimant returned to her past work at the same rate of pay under 85.34(2)(v) the deputy concluded that claimant's recovery was limited to her functional impairment and she was provided with 25 weeks of benefits based on 5% rating from IME.

e. *Chavez v. MS Technology, LLC*, File No. 5066270 (McGovern Arb. 2/5/20). Rotator Cuff tear found to be BAW injury. No ID because no decrease in earnings. Although she did have less in gross earnings post injury, judge found that this was due to "market trends" and not her injury.

f. *Till v. Windstar Lines, Inc.*, File No. 5067027 (Pals Arb. 7/10/20). Employer never offered work to employee following injury and ultimately fired claimant, so case was considered industrially (30% where functional ratings were 20%).

g. *Martinez v. Pavlich*, File No. 5063900 (Cortese Appeal 7/30/20) Claimant was entitled to industrial disability benefits because he suffered a loss to three scheduled members. (Affirming prior agency case law.) However, Claimant had voluntarily resigned from employment and found a job earning more money. The commissioner concluded that the industrial provisions of 85.34(2)(v) applied because the voluntary separation from employment removed his claim from the functional impairment analysis. In other words, this APPEAL decision stands for the proposition that in order for the

functional loss limitation of 85.34(2)(v) to apply, the injured worker must return to work at an earnings level the same or greater than at the time of the injury *with the same employer*.

11. 85.34(2)(x) - LAY TESTIMONY BARRED FROM SCHEDULE MEMBER CLAIMS

New Law: The only evidence that can be considered in a scheduled member claim are impairment ratings.

Old Law: Lay witness testimony, about limitations imposed on a worker because of an injury, could be considered to enhance an award of PPD beyond impairment ratings.

New Cases:

a. *Streif v. John Deere Dubuque Works,* File No. 5068621 (Christenson Arb. 12/3/19) Lay testimony may be used to decide which impairment rating is more convincing or credible.

b. *Ramirez V. Arconic, Inc.*, File No. 5066573 (Christenson Arb. 1/30/20). "Consistent with the new statute, the undersigned has not used lay testimony to 'determine' loss or the percentage of permanent impairment. However, the new statute does not appear to prohibit using lay testimony in aiding to ascertain which of the two ratings in this case is more convincing or credible."

c. *Sorenson v. T.A. Bauer*, File No. 5059588 (Cortese Appeal 8/4/20) In a post 2017 claim, claimant's leg injury was accepted, and a brain injury denied. A 25% functional award was given to claimant, although there were no ratings above 10%. On appeal, the commissioner affirms the finding of a leg injury and denial of a brain injury. The amount of the award is reduced to 10%, as this was the only rating provided.

12. 85.34(2)(y) - NO PPD/PTD OVERLAP

This new section ends PPD benefits on the date that permanent total disability benefits (PTD) commence. Bringing an end to the rare case where a PPD award was paid out, after a PTD award commenced.

13. 85.34(3)(c) - NO PTD AWARD IF CLAIMANT'S CURRENT WAGES EXCEED 50% OF STATE AVERAGE OR THEY RECEIVE UNEMPLOYENT COMPENSATION

This section prohibits an award of PTD to a claimant who is also receiving wages over 50% of state average or unemployment benefits.

14. 85.34(4) & (5) – CREDITS FOR OVERPAID BENEFITS AGAINST FUTURE WEEKLY PAYMENTS

Section 4 allows credits for any overpayment of temporary benefits (healing period, temporary total disability or temporary partial disability) against future benefits. Section 5 allows a credit for overpaid permanent partial disability against future benefits.

15. 85.34(7) - SUCCESSIVE DISABILITIES

New Law: An employer is responsible for compensating only that portion of disability that arises out of, and in the course of, that employment and which relates to the work injury asserted. Disability attributable to previous employer(s) is not to be compensated.

If the injured employee had been compensated for previous injuries with his or her employer, the employer may assert a credit.

Old Law: Apportionment for prior injuries was cushioned by application of the Fresh-Start Rule. The Fresh-Start Rule holds the employer liable for a work-related permanent partial loss of new earning capacity, refreshed by market forces and existing at the time of the successive injury.

New Case:

a. *Wilkie v. Kelly Services and Indemnity Ins Co.*, File No. 5064366 (Copley Arb. 10/28/19)(Aff'd by Cortese on Appeal 9/2/20). Apportionment does not apply to PTD awards, given a lack legislative intent to do so in the amended statute. The legislature's 2017 amendments did not modify the fresh start rule for claimants sustaining successive work-related unscheduled injuries with different employers.

16. 85.39 - IME'S

New Law: An injured worker forfeits benefits if he or she refuses to attend an employer's Independent Medical Exam (IME).

The injured worker may only recover the costs of his own IME, if the employer is held liable for the injury. The reasonable cost of the IME shall be reimbursed, based on the typical fee charged by medical providers in the area where the IME is done.

Old Law: Claimant's IME fees typically awarded at hearing. An IME fee may also be awarded as a cost, under 876 IAC 4.33(6)("the reasonable costs of obtaining no more than two doctor's or practitioner's reports…").

New Case:

a. *Greer v. Hahn Ready Mix*, File No. 5066470 (Palmer Arb. 4/9/20) IME costs were denied under 85.39 because defendants' doctor had concluded claimant's injury had not arisen out of employment and had not provided a rating. 50% of report was awarded as a cost, because claimant had been evaluated for two injuries, but one of the claims had settled before hearing.

17. 85.45(1) – COMMUTATIONS

New Law: Mutual consent of the parties required to obtain a commutation of benefits. And, a full commutation may leave future medical care "open." Effective July 1, 2017, regardless of the injury date.

Old Law: Even though resisted by defendants, commutations were granted after a hearing and a successful showing that it was in the claimant's best interests.

18. 85.70 - VOCATIONAL REHABILITATION

An award of up to $15,000.00, for vocational assistance, and education at a nearby community college, is available to workers who suffer shoulder injuries and "cannot return to gainful employment."

19. 85.71(1) – JURISDICTION NARROWED

This amendment narrows jurisdiction to bring a claim in Iowa. Workers must be injured in Iowa or regularly work in Iowa in order to bring a claim.

20. 85.26 & 86.42 – STAY OF EXECUTION PENDING JUDICIAL REVIEW

Rules set out, for obtaining a stay of execution of judgment, provided sufficient bond is filed in connection with seeking judicial review of an adverse agency decision in district court.

21. 86.39 - ATTORNEY FEES

An attorney shall not be paid fees for compensation voluntarily paid to a claimant. Fee disputes are may be resolved by the hearing before the agency. Essentially codifies existing practice and ethical requirements.

22. 535.3 – INTEREST ON PAST DUE BENEFITS

New Law: Variable interest for past-due workers' compensation benefits is based on the treasury maturity index, as published by the Iowa Supreme Court, plus 2%. Adopting the civil rate of interest. Effective July 1, 2017, regardless of the injury date.

Old Law: 10% rate on all past-due benefits.

New Case:

a. *Gamble v. Ag Leader Technology*, File No. 5054686 (Cortese Appeal 4/24/18) Interest on weekly benefits which became due, but were not paid, by June 30, 2017, was set at 10%. Interest on weekly benefits which became due, but were not paid, on or after July 1, 2017, was set at the treasury maturity index rate, settled on the date of injury, plus 2%.