BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

AMERICAN HOME ASSURANCE, Petitioner, vs. LIBERTY MUTUAL FIRE INSURANCE COMPANY, Defendant.	File No. 5033079 APPEAL DECISION RE: RULING ON MOTIONS FOR SUMMARY JUDGMENT

On September 12, 2019, the Iowa Workers' Compensation Commissioner delegated authority to the undersigned to enter a final agency decision with respect to the appeal of the ruling on motions for summary judgment filed on July 24, 2018. Therefore, this appeal decision is entered as final agency action pursuant to Iowa Code section 17A.15(3) and Iowa Code section 86.24.

I performed a de novo review of the evidentiary record before the presiding deputy workers' compensation commissioner and the detailed arguments of petitioner American Home Assurance (hereinafter "American Home") and defendant Liberty Mutual Fire Insurance Company (hereinafter "Liberty Mutual").

Pursuant to Iowa Code section 86.24 and 17A.15, those portions of the proposed ruling on motions for summary judgment filed on July 24, 2018 that relate to issues properly raised on intra-agency appeal are respectfully reversed.

The issue before me on appeal requires an understanding of the procedural history of this case, which was concisely summarized by the presiding deputy commissioner as follows:

> On November 30, 2010, John Thompson (Thompson), filed a petition in arbitration seeking workers' compensation benefits from Keokuk Steel Castings (Keokuk Steel) as employer, and Chartis as insurance carrier, regarding an alleged November 15, 2007 work-related injury. On December 17, 2010, Keokuk Steel and American Home filed an answer to Thompson's petition and affirmatively stated American Home was the workers' compensation carrier for Keokuk Steel at the time of the alleged November 15, 2007 injury. Thompson subsequently moved to amend his petition to allege an alternative injury date of June 30, 2008. The arbitration hearing occurred on November 2, 2011. At hearing, the parties

raised the proper injury date as an issue for the deputy to determine and identified three potential injury dates: November 12, 2007; June 16, 2008; or June 30, 2008. The presiding deputy commissioner issued an arbitration decision on February 22, 2012, whereby he determined Thompson's injury date as June 16, 2008, with Thompson sustaining a 25 percent loss of earning capacity as a result of that injury. Keokuk Steel/American Home filed an appeal; Thompson filed a cross-appeal. On delegation, a distinct deputy commissioner entered an appeal decision summarily affirming the arbitration decision. No further review was taken.

American Home paid benefits pursuant to final agency action. The final payment of indemnity benefits was paid on or about May 21, 2013. (Exhibit C, pages 13-23)

On March 4, 2016, Thompson filed an original notice and petition against Keokuk Steel and American Home, identifying the types of petition as arbitration, review-reopening, and medical benefits. By the petition, claimant sought additional benefits related to the June 16, 2008 date of injury. On March 25, 2016, Keokuk Steel and American Home filed an answer. On November 30, 2016, Keokuk Steel and American Home filed an amended answer, thereby stating it had been discovered that Keokuk Steel was insured on June 16, 2008 by Liberty Mutual; accordingly, American Home denied it was the proper insurance carrier.

On December 29, 2016, American Home filed an application and consent order for payment of benefits under Iowa Code section 85.21. The application was approved by the agency on January 3, 2017. On January 12, 2017, American Home filed a petition for contribution against Liberty Mutual pursuant to section 85.21. Thereby, American Home noted Liberty Mutual's coverage period began on May 1, 2008 and therefore, requested reimbursement from Liberty Mutual for benefits paid as a result of the June 16, 2008 injury, both in the original arbitration and any owed in the subsequent review-reopening. Liberty Mutual filed answers to American Home's original notice and petition and petition for contribution.

On April 7, 2017, the [presiding deputy commissioner] heard Thompson's review-reopening petition. . . . [She] subsequently entered a review-reopening decision whereby it was determined Thompson failed to prove a change in condition and thus, was not entitled to additional benefits. Thompson filed a timely notice of appeal; an appeal decision has not yet been issued.

On April 11, 2017, Liberty Mutual filed amended answers with respect to American Home's contribution actions.

> Thereafter, on May 30, 2017, Liberty Mutual filed a motion for partial summary judgment with respect to American Home's claims of contribution. Liberty Mutual argued American Home could only receive contribution for benefits paid after issuance of a section 85.21 consent order, which was issued in this matter on January 3, 2017. . . . Liberty Mutual requested a determination that benefits paid prior to January 3, 2017 were not reimbursable.
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> American Home filed a resistance on June 23, 2017. American Home admitted the facts as set forth in Liberty Mutual's statement of undisputed facts. American Home argued the agency determined Thompson's injury date as June 16, 2008, within Liberty Mutual's coverage period, and thus, benefits mistakenly paid by American Home should be reimbursed by Liberty Mutual. American Home attempted to distinguish the cases cited by Liberty Mutual, as the cases did not involve mistaken payments by one carrier for benefits falling within the coverage period of another insurance carrier. American Home argued section 85.21 was designed to lay responsibility for benefits upon the insurance carrier who held coverage on the date of injury. As Liberty Mutual held coverage and accepted premiums paid, American Home argued Liberty Mutual should be responsible for payment of benefits arising out of the June 16, 2008 injury date.
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> On July 6, 2017, Liberty Mutual filed a reply to American Home's resistance.
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> Thereafter, on July 17, 2017, American Home filed its own motion for summary judgment. On the basis of the same facts as set forth with respect to Liberty Mutual's motion for summary judgment, American Home requested a determination that Liberty Mutual owed contribution for benefits paid as a result of the June 16, 2008 injury, as Liberty Mutual carried Keokuk Steel's workers' compensation insurance on that date.
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> Liberty Mutual did not file a resistance to American Home's motion for summary judgment.

(Ruling, pp. 1-3)

In the ruling on motions for summary judgment, the presiding deputy commissioner determined Liberty Mutual was liable for contribution to American Home pursuant to Iowa Code section 85.21 for benefits paid relating to Thompson's June 16, 2008 injury date. As such, the deputy commissioner sustained American Home's motion and overruled Liberty Mutual's motion. Liberty Mutual appealed.

On appeal, Liberty Mutual acknowledges American Home is entitled to contribution/reimbursement for benefits paid after the consent order was approved on

January 3, 2017, but Liberty Mutual asserts Iowa Code section 85.21 does not permit reimbursement for benefits paid prior to the order.

Iowa Code section 85.21 provides, in relevant part:

> 1. The workers' compensation commissioner may order any number or combination of alleged workers' compensation insurance carriers and alleged employers, which are parties to a contested case or to a dispute which could culminate in a contested case, to pay all or part of the benefits due to an employee or an employee's dependent or legal representative if any of the carriers or employers agree, or the commissioner determines after an evidentiary hearing, that one or more of the carriers or employers is liable to the employee or to the employee's dependent or legal representative for benefits under this chapter or under chapter 85A or 85B, but the carriers or employers cannot agree, or the commissioner has not determined which carriers or employers are liable.
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> . . . .
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> 3. When liability is finally determined by the workers' compensation commissioner, the commissioner shall order the carriers or employers liable to the employee or to the employee's dependent or legal representative to reimburse the carriers or employers which are not liable but were required to pay benefits. Benefits paid or reimbursed pursuant to an order authorized by this section do not require the filing of a memorandum of agreement. However, a contested case for benefits under this chapter or under chapter 85A or 85B shall not be maintained against a party to a case or dispute resulting in an order authorized by this section unless the contested case is commenced within three years from the date of the last benefit payment under the order. The commissioner may determine liability for the payment of workers' compensation benefits under this section.

Iowa Code § 85.21.

At the outset, it is important to note that scenario created by American Home is not the circumstance for which Iowa Code section 85.21 was intended. Iowa Code section is intended to encourage the voluntary payment of benefits to a claimant when insurers dispute who is responsible. See Second Injury Fund v. Bergeson, 526 N.W.2d 543, 549 (Iowa 1995); Bridge v. Karr Tuckpointing Co., File No. 5010244 (App. Aug. 13, 2007). In this case, however, American Home initially accepted responsibility despite being put on alert via claimant's amended petition in the spring of 2011 that Thompson's actual injury date may be June 30, 2008, which was outside of Liberty Mutual's

coverage period. American Home mistakenly continued to admit it was the correct insurer for the next five and a half years, including at the arbitration hearing, before it recognized its error in November of 2016.

Due to this oversight, American Home did not seek a consent order until December 29, 2016, when one could have been sought in 2011. Despite waiting until 2016 to seek such an order, American Home now requests retroactive reimbursement for payments made pursuant to the arbitration decision, including indemnity benefits which were last paid in May of 2013.

Liberty Mutual, on the other hand, asserts that because American Home's 85.21 consent order was not issued prior to the arbitration hearing, reimbursement can only be prospective in nature. In support of this position, Liberty mutual cites to a rule established in an agency appeal decision from 1998—a rule that is cited in virtually all recent cases in which one insurance carrier disputes the other's ability to seek retroactive reimbursement under Iowa Code section 85.21. That rule provides:

> Where a petitioner for reimbursement has sought an order pursuant to Iowa Code section 85.21 prior to the evidentiary hearing, reimbursement may include payments made both before and after the order was issued. But where no order under 85.21 issues before the evidentiary hearing in a case, reimbursement will not be ordered.

Employers Mutual Casualty Companies v. Van Wyngarden & Abrahamson, File Nos. 1059572, 1059573, 1059574, 1011165 (App. June 30, 1998).

The decision in Van Wyngarden was issued after a line of seemingly contradictory cases, starting with Van Dyk v. Hope Haven, a decision from 1995. In Van Dyk, an insurer (St. Paul) entered into an agreement for settlement with the claimant before seeking an 85.21 consent order. In a decision denying contribution to St. Paul, the deputy commissioner held as follows:

> [A] reading of the statute convinces the reader that [Iowa Code section 85.21] is intended to be prospective in nature. The entire scheme is set up to allow an employer to seek an order prior to payment of benefits, and only when liability is finally determined, to seek contribution for benefits that employer was "required to pay" under the order. It would require an extremely strained reading of the statute to allow one employer to pay all benefits due, enter or not enter into an agreement for settlement as the case may be, and only then bring in a former or subsequent employer in an effort to obtain contribution. Note also that an action against a party must be commenced within three days from the date of the last benefit payment under the order.

> One is unpersuaded that there are compelling policy reasons to adopt such a strained construction as Siouxpreme and St. Paul suggest. Litigation can be expected to proceed much more expeditiously where, as the statute contemplates, relief under section 85.21 is sought in advance, and all parties are subsequently well aware that potential contribution is an issue. Typically, it may well be expected that litigation or settlement will involve all interested parties, rather than proceeding in a piecemeal fashion as here. Under the construction urged by Siouxpreme and St. Paul, no employer or insurance company will ever be able to make voluntary payment of benefits without fear that litigation may later ensue if claimant suffers a subsequent injury (or claims to have) in different employment.
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> It is held that retroactive contribution is not available under section 85.21

Van Dyk, File Nos. 1021846, 1030780 (Contribution Dec., Feb. 1995) (emphasis added).

Then, in Bromert v. Trausch Co., an appeal decision from June of 1996, claimant and an insurer (Heritage) entered into an agreement for settlement, but the Heritage "simultaneously" filed a consent order under Iowa Code section 85.21. The commissioner held as follows:

> There does not appear to be any provision, either under the applicable statute, or in case law, which mandates that the application must be signed, filed and approved before an insurance company's right to reimbursement is valid. As a result, Heritage shall be reimbursed for all benefits paid for the left shoulder which were not paid during the time Heritage provided insurance to the employer.

Bromert, File No. 788831 (App. June 28, 1996) (emphasis added).

Just months after Bromert, a chief deputy commissioner issued an appeal decision in Barglof v. G.W. "Pete" Howe, Inc. that mirrored the deputy commissioner's decision in Van Dyk. In Barglof, one insurer (Liberty Mutual) was ordered to pay benefits under Iowa Code section 85.21, and the other (USF&G) was not. USF&G did not seek an order under Iowa Code section 85.21 at any time and instead waited until "8 years after the injury and two and a half years after final adjudication" to seek relief under Iowa Code section 85.21. Barglof, File Nos. 872409, 840249 (App. Dec., Nov. 20, 1996) In denying contribution to USF&G, the chief deputy held as follows:

> Section 85.21 contemplates that sometime prior to an evidentiary hearing the industrial commissioner may order an insurance carrier to pay benefits

> due to an employee until liability is finally determined. In the event of a later determination that the named insurance carrier is not liable to a claimant the named insurance carrier is entitled to an order for reimbursement from the insurance carrier that is liable. Subsection 85.21(3) allows the named insurance carrier to bring a contested case against another insurance carrier or employer but only if the case is commenced within three years from the date of the last benefit payment under this order.
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> The statutory scheme of section 85.21 is set up to allow an employer or insurance carrier to seek an order prior to payment of benefits, and only when liability is finally determined, to seek reimbursement for benefits the employer or insurance carrier was "required to pay" under the order. There are no compelling policy reasons to allow USF&G to be reimbursed. Litigation can be expected to proceed much more expeditiously where, as the statute contemplates, relief under section 85.21 is sought in advance, and all parties are subsequently well aware that potential contribution is an issue. Retroactive contribution is not available under section 85.21.

Barglof, File Nos. 872409, 840249 (App. Dec., Nov. 20, 1996) (emphasis added).

In short, it appeared in one scenario the agency held there was no retroactive contribution under 85.21 but in another scenario there was. The commissioner attempted to rectify this apparent contradiction in Van Wyngarden:

> [I]t is noted that the two cases above [meaning Barglof and Bromert] are not factually identical. In Bromert, an order under 85.21 was issued. In Barglof, no such order was sought by the party seeking reimbursement. Rather, the petitioner sought reimbursement more than two years after the adjudication in the case without first obtaining an 85.21 order.

Van Wyngarden, File Nos. 1059572, 1059573, 1059574, 1011165 (App. June 20, 1998). Based on this distinction, the commissioner held the cases were not in conflict and established the above-quoted rule on which Liberty Mutual now relies.

As mentioned, this rule has been cited numerously over the years in decisions holding that the failure to seek an order under Iowa Code section 85.21 prior to hearing is a bar to retroactive reimbursement. See Arreola v. Bodeans Baking Group Holding, File Nos. 5040956, 5040974 (App. Feb. 16, 2018); see also Dakota Truck Underwriters v. Continental Western Ins., File Nos. 5028722, 5028738 (App. Sept. 28, 2011); Hysell v. Golden Age Care Ctr., File Nos. 1075022, 1042236, 987874 (App. Oct. 19, 1999); Cambridge Integrated v. Fareway Stores, Inc., File No. 1292163 (Arb. Dec. 21, 2001); Virginia Surety Co., Inc. v. Kiowa Corp., File No. 1195075 (Arb. April 22, 1999).

For example, in Arreola v. Bodeans Baking Group Holding, an appeal decision from 2018, permanent total disability benefits were awarded to claimant after an evidentiary hearing in May of 2013. Arreola, File Nos. 5040956, 5040974 (App. Feb. 16, 2018). In March of 2016, the insurer (Farmington) filed an original notice and petition for reimbursement of benefits paid. A deputy commissioner dismissed Farmington's petition for contribution, noting there was no prior order pursuant to Iowa Code section 85.21 to allow a claim for reimbursement consistent with the rule set forth in Van Wyngarden. On appeal to a different deputy commissioner via delegation, the deputy commissioner affirmed the underlying deputy commissioner's reliance on Van Wyngarden and offered the following additional analysis:

> In this case, Farmington failed to raise the issue of reimbursement at any time prior to evidentiary hearing. Farmington did not raise the issue of reimbursement until March 7, 2016, a period of 3 ½ years after claimant's arbitration petitions were filed and 2 years, 9 months following evidentiary hearing. A procedure was available to Farmington whereby Farmington could maintain a right to seek reimbursement; Farmington did not utilize the procedure. The undersigned is unaware of any case law permitting a petition under the facts of this case. I concur with the deputy's determination that Farmington's petition for reimbursement was improper as filed.

Arreola, File Nos. 5040956, 5040974 (App. Feb. 16, 2018).

While none of these cases involve the precise scenario in this case, the facts of this case remain extremely analogous to the scenarios in Van Dyk, Barglof, and Arreola, where the insurers seeking retroactive reimbursement failed to seek orders under Iowa Code section 85.21 before the respective evidentiary hearings. In this case, the arbitration hearing was held in November 2, 2011, and American Home did not file for their consent order until December 29, 2016. As noted by the deputy commissioner in Arreola, a procedure was available to American Home to utilize, yet through its oversight it failed to take advantage of that procedure until after the arbitration decision became final agency action and all of the benefits ordered under that decision were paid. Arreola, File Nos. 5040956, 5040974 (App. Feb. 16, 2018) ("A procedure was available to Farmington to utilize, yet it failed to do so.").

Consistent with roughly 20 years of agency precedent, therefore, I respectfully reverse the deputy commissioner and find American Home is not entitled to retroactive reimbursement for benefits ordered to be paid and paid under the arbitration decision.

The deputy commissioner in her ruling attempted to distinguish this case from agency precedent by noting none of the earlier cases "specifically hold that contribution

is improper for benefits mistakenly paid prior to determination of the proper injury date." (Ruling, p. 6) (emphasis added). The deputy commissioner believed this distinction promoted the public policy of encouraging insurance carriers to render payment to injured workers "even if it is subsequently determined that the injury fell outside that carrier's coverage period." (Ruling, p. 7) The deputy commissioner's point is not without support. As correctly noted by American Home, mistaken payments in workers' compensation matters are often recoverable. See Wilson Food Corp. v. Cherry, 315 N.W.2d 756, 757 (Iowa 1982) ("Employers may generally recover payments made by mistake in workers' compensation matters."); Carney v. Pirelli/Armstrong and Titan Tire Corp., File Nos. 1093480, 1169899 (Arb. Nov. 1998); see also Iowa Code § 85.34 (credit provisions).

While I agree with the deputy commissioner's public policy statement, that is precisely why Iowa Code section 85.21 and its procedures exist. See Bergeson, 526 N.W.2d at 549. And again, but for American Home's own oversight, those procedures were available to protect American Home. In this sense, American Home's oversight is not distinguishable from the oversights of the insurers in Van Dyk, Barglof, and Arreola.

That being said, I share the concern of the deputy commissioner in this case with respect to cumulative injury claims and the potential for the involvement of multiple carriers that is not known until after a decision is rendered. As explained by the deputy commissioner in her ruling:

> This is especially relevant in cumulative injury claims where only one injury has occurred, but the date of manifestation of that injury has not been determined. While there are instances where multiple injury dates may be pleaded, thus altering to the potential for multiple carriers to be involved, the precise injury date is not determined until receipt of final agency action affixing the date of injury. As a result, an insurance carrier may be unaware that an injury manifested outside of its coverage period until after receipt of an agency decision. I believe this carrier should not be financially punished for paying a claim in good faith. I also believe the injured worker should not be punished due to uncertainty by the insurance carrier as to the date of injury. Furthermore, an employer should not be punished, in the form of a worker being hindered in the healing process and potentially unable to work, when the employer has properly obtained workers' compensation insurance to cover its employees.

(Ruling, p. 7)

This, however, is not that case. In this case, American Home was made aware via claimant's amended petition in March of 2011—months before the arbitration

hearing—that the correct injury date could fall outside of its coverage period, yet due to oversight it did nothing. Thus, while I recognize the dilemma outlined by the deputy commissioner could arise from a different set of facts, I am not persuaded that a theoretical problem under facts not present in this case should outweigh 20 years of agency precedent that is directly applicable to the facts of this case.

While not addressed in the deputy commissioner's ruling, American Home on appeal argues that the Iowa Supreme Court's interpretation of Iowa Code section 85.21 in Second Injury Fund of Iowa v. Bergeson, 526 N.W.2d 543 (Iowa 1995) gives the agency authority in this case to award retroactive reimbursement. The court in Bergeson held, "Section 85.21 gives the commissioner authority to order reimbursement where one party makes voluntary payment that ultimately the commissioner determines should have been paid by another party." 526 N.W.2d at 549. Admittedly, this is a broad-sweeping statement, and nowhere in the court's analysis in Bergeson is there a discussion regarding the correct "timeline" for 85.21 orders or their effect on retroactive or prospective reimbursement. In fact, there is no such language in that statute either.

As noted in various arbitration decisions since Bergeson and Van Wyngarden, the absence of clear language in Iowa Code section 85.21 could be applied in various ways. For example, in Virginia Surety Co. Inc. v. KIOWA Corp., the deputy commissioner noted as follows:

> Aetna argues that Virginia Surety is not entitled to reimbursement in any event due to the absence of a prior 85.21 order. It can be convincingly argued that this agency has the power to order such a reimbursement under Iowa Code section 85.21 regardless of a prior order. The second paragraph states that after liability is finally determined, this agency can order reimbursement to employers and insurers which are not liable but "required to pay benefits." In the past, these last words were interpreted to mean those required to pay benefits under an order issued pursuant to the previous paragraph. However, the words "required to pay benefits" does not refer to the previous paragraph. It must be noted that this agency has held that a non-payment of benefits to an injured worker based simply on a dispute between insurers subjects employers and their insurers to penalty benefits. Brunner v. M. Harper Ltd., File No. 1052838 (App. Dec. August 21, 1997). Insurers can no longer take the position in these situations that neither are required to pay without an order from this agency to do so. Furthermore, the issuance of an order under Iowa Code section 85.21 only at the request of an insurer who has already decided to pay benefits is hardly a requirement to pay benefits.
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> However, this agency has issued three appeal decisions on the matter. Barglof v. G. W. "Pete" Howe, Inc., File Nos. 8724098 & 840249 (App. Dec. November 20, 1996); Bromert v. Trausch Co., File No. 78831 (App. Dec. June 28, 1996); Zurich American vs. Allied Mutual Insurace, File Nos. 1011165, 1059572, 1059573, 1059574 (App. Dec. June 20,

> 1998). The last case interprets Barglof and Bromert and is binding on the undersigned.

Virginia Surety Co. Inc., File No. 1195075 (Arb. April 1999) (emphasis added).

A different deputy commissioner in Careny v. Pirelli/Armstrong offered a contrary commentary:

> A close reading of section 85.21 indicates that the section is designed to function in a manner in which an order to pay is issued by the agency to compel payments to be paid. This implies that the order be made before payments to the employee are actually paid. Subsection 3 states in part "When liability is finally determined . . . the commissioner shall order the carriers or employers liable to the employee . . . to reimburse the carriers or employers which are not liable but were required (emphasis added) to pay benefits." The express literal terms in subsection 3 do not provide for an order to reimburse benefits other than those which were required (emphasis added) by the order issued in accordance with subsection 1. It seems elementary that in these cases the payments to the claimant could not have been required by the order from the agency if the payments had been paid before the order was issued. The most recent case decided by the workers' compensation commissioner which deals with this issue held that so long as the order under subsection 1 of section 85.21 is issued prior to the time that the employee's entitlement is adjudicated that any payments paid prior to the entry of the order can thereafter be the subject of an order for reimbursement under subsection 3. Employers Mutual Casualty Company v. Van Wyngarden & Abrahamson, file numbers 1059572, 1059573, 1059574, 1011165 (App. Decn. June 20, 1998). Prior agency precedent had held that the order entered under section 85.21(1) did not operated retroactively. Barglof v. G.W. "Pete" Howe, Inc., file number 872409, 840249 (App. Decn. November 20, 1996). The more recent agency precedent is more equitable than the earlier precedents. Even though the outcome from the more recent agency precedent is not strongly suggested by the statute the construction adopted by the agency is consistent with the rules of statutory construction which direct a practical and workable result. . . .

File Nos. 1093480, 1169899 (Arb. Nov. 1998) (emphasis added).

Similarly, in Onken v. Fareway Stores, Inc., the deputy commissioner remarked:

> Allied responds that Cambridge did not secure the 85.21 consent order until well after they paid the medical benefits. Consequently, the provisions of Iowa Code section 85.21 are not applicable. Arguably, the language of 85.21 appears to contemplate only a prospective payment of benefits after an order to do so. Obviously, the purpose of Iowa Code section 85.21 was to facilitate a more prompt payment of benefits for

> obvious work injuries when liability is disputed among two or more employers or insurance carriers. Arguably, this code provision was not designed to encourage reimbursement to carriers who have already paid benefits.
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> Regardless of the merits of Allied's position, this agency has held that an employer or insurance carrier can obtain reimbursement for benefit payments made prior to issuance of our agency consent orders so long as the order is filed sometime prior to hearing. Employers Mutual Casualty Companies v. Vanwyngarden & Abrahamson, File Nos. 1059572, 1059573, 1059573 & 1011165 (App. June 30, 1998). This is binding precedent upon me.

Onken, File No. 1292163 (Arb. Dec. 21, 2001) (emphasis added).

Notably, despite these acknowledgements of the vagueness of the statutory language in Iowa Code section 85.21 and possible alternative applications, in each decision the deputy commissioner referred back to the rule set forth in Van Wyngarden, which was issued after Bergeson. If the rule set forth in Van Wyngarden was improper, it is presumed it would have been modified by the legislature or the appellate courts over the course of the last 20 years.

While not explicitly stated, it appears the Van Wyngarden rule draws a line in the sand at evidentiary hearing in an attempt to establish the fairest result for insurers. By the time the evidentiary hearing is held, the insurer pled by the claimant will have had a full opportunity to conduct discovery, depose the necessary individuals, and investigate. By that point, the pled insurer in most cases should reasonably know whether there is a possibility that the correct injury date may fall outside its coverage period. Thus, allowing retroactive reimbursement only if an 85.21 consent order is sought prior to the evidentiary hearing protects the public policy of encouraging insurers to render payment even if it is subsequently determined that the injury is outside their coverage period while discouraging drawn out or piecemeal litigation. In other words, it balances the public policy interests and judicial efficiency.

For these reasons, while I understand the rationale set forth by the deputy commissioner, her ruling is respectfully overruled. Because American Home failed to seek an Iowa Code section 85.21 consent order prior to the arbitration hearing, Liberty Mutual is not liable for contribution to American Home for benefits ordered to be paid and paid pursuant to the arbitration decision.

American Home, however, did file its consent order prior to the evidentiary hearing on claimant's petition for review-reopening. Thus, under the Van Wyngarden rule (on which Liberty Mutual relies in their motion), American Home may be entitled to retroactive reimbursement for benefits paid before January 3, 2019 so long as those benefits were tied to the review-reopening claim and were not ordered pursuant to the arbitration decision. American Home's cross-motion for summary judgment is therefore

denied in part and granted in part, and Liberty Mutual's motion for summary judgment is granted in part and denied in part.

More specifically, Liberty Mutual's motion is granted and American Home's cross-motion is denied to the extent that Liberty Mutual is not liable for contribution to American Home for benefits ordered to be paid and paid pursuant to the arbitration decision. Liberty Mutual's motion is denied and American Home's cross-motion is granted to the extent that Liberty Mutual is liable for contribution to American Home for any payments of permanent partial disability benefits paid in excess of the 125 weeks ordered by the arbitration decision (which does not appear to have occurred) and for any medical benefits paid after the date of the arbitration hearing and not ordered by the arbitration decision (if any such payments exist).

ORDER

IT IS THEREFORE ORDERED that the ruling on motions for summary judgment filed on July 24, 2018 is reversed.

Liberty Mutual's motion for summary judgment is granted in part and denied in part as set forth above.

American Home's cross-motion for summary judgment is denied in part and granted in part as set forth above.

The parties shall split the cost of this appeal.

Signed and filed this 7th day of October, 2019.

STEPHANIE J. COPLEY
DEPUTY WORKERS' COMPENSATION
COMMISSIONER

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