IN THE IOWA DISTRICT COURT FOR POLK COUNTY

TWEETEN FARMS and GRINNELL MUTUAL, Petitioners vs. COREY TWEETEN, Respondent.	Case No. CVCV063846 **RULING ON PETITION FOR JUDICIAL REVIEW OF AGENCY DECISION**

On September 30, 2022, the above-captioned matter came before this Court for hearing. Petitioners Lon Tweeten d/b/a Tweeten Farms and its workers' compensation carrier, Petitioner Grinnell Mutual, were represented by attorneys Stephen W. Spencer and Christopher S. Spencer. Respondent Corey Tweeten was represented by attorney Janece Valentine. After hearing the arguments of Counsel and reviewing the court file, including the briefs filed by the parties and the Certified Administrative Record ("Cert. Rec."), the Court enters this Order.

Respondent filed a claim for workers' compensation benefits on January 21, 2020, for injuries he alleges were causally connected to an incident that occurred in July 2017 while working on his parents' farm, Tweeten Farms. Petitioners assert that Respondent's claims are barred by the applicable statute of limitations, that the Commission lacked subject matter jurisdiction to hear the case, and that there is a lack of substantial evidence to support findings made by the Commissioner.

I. FACTUAL AND PROCEDURAL BACKGROUND.

A. Background Facts.

Respondent suffered an injury in the course of his employment at Tweeten Farms on July 25, 2017. The injury was observed by Respondent's father, Lon Tweeten, who testified that it occurred when Respondent was using a large diameter hose while cleaning out a grain bin. Cert. Rec. Part I pp. 375-76.

Respondent testified that for a period of time he did not feel his work on the farm was deserving of his usual wages and he asked his father to stop paying him. According to Respondent, his father did stop paying him. Respondent's testimony also admits that he immediately knew the injury was work-related.

Respondent first sought medical care on August 14, 2017. He complained of elbow pain and was told to ice the injury and wear a splint. On January 3, 2018, Respondent received a second medical evaluation after he again complained of elbow pain. He was diagnosed with right lateral epicondylitis (tennis elbow) of the injured arm and was advised to begin physical therapy.

Respondent first complained of pain in his right shoulder at his third medical evaluation on April 13, 2018. At that time the physician's assistant provided a steroid to reduce inflammation. However, Respondent's shoulder issue grew more painful, prompting him to return to the physician's assistant on May 11, 2018. According to Respondent's testimony, the pain originated in his elbow and had moved up his arm into the shoulder during the months between the initial injury and the third evaluation. At the follow-up, the provider ordered an MRI of Respondent's right shoulder that was done on May 22, 2018. The results showed only a sub-centimeter cyst adjacent to the labrum which would not explain Respondent's continued shoulder pain. After discussing these results with Respondent, the provider referred him to Dr. Warme, an orthopedic surgeon and shoulder specialist. At Respondent's first visit with Dr. Warme on June 1, 2018, another MRI was ordered.

When Respondent returned to Dr. Warme on June 12, 2018, he learned that his recent MRI provided very different results from the one in May. Dr. Warme diagnosed Respondent with a partial thickness tear at the insertion of the deltoid (also referred to herein as the "shoulder injury"). In his notes from this visit, Dr. Warme opines the tear was likely a result of a prior injury. Provided

the options of palliative treatments or surgical repair, Respondent opted for the latter

The surgery was completed by Dr. Warme on June 18, 2018. Respondent was released from Dr. Warme's care on October 16, 2018. Respondent was awarded healing period benefits for this period of recovery, even though he continued to work as a truck driver. Respondent was also paid by Tweeten Farms on June 25, 2018, July 5, 2018, October 27, 2018, and November 3, 2018. The parties dispute whether these payments were for recent work or work done earlier in the year.

At the arbitration hearing, the parties presented Joint Exhibit 10 which summarized claimed medical expenses. Cert. Rec. Part II p. 120. This exhibit covers expenses from August 14, 2017 through March 28, 2019. Accordingly, the Court will not address any medical treatment after the latter date. Respondent also presented evidence at the arbitration hearing regarding a cervical injury, but the Commissioner did not award any benefits for the same. There is no evidence in the record that any of the expenses in Exhibit 10 related to the potential cervical injury.

The final category of relevant facts involves Respondent's Settlement Agreement with the Iowa Second Injury Fund ("SIF"). Respondent filed a Notice of Intent to Settle with SIF on February 15, 2021, pursuant to Iowa Code § 85.35. The Settlement Agreement was provided to the Commissioner on April 20, 2021, and approved three days later. Within the Settlement Agreement is language that limits the resolution to claims between the parties to the settlement. Language that would have prevented future claims against Respondent's employer was removed. Cert. Rec. Part I pp. 252-54. Petitioners argue that the final bar provision in Iowa Code §85.35(9) does not allow a party to retain rights to commence another proceeding authorized by a right afforded under Iowa Code chapter 85. Hence, according to Petitioners, the exact language of the Settlement is not material because the very existence of a settlement deprives the Workers' Compensation Commission of subject matter jurisdiction.

B. Procedural History.

Respondent filed his claim for workers' compensation benefits on January 21, 2020, contending the date of the work-related injury to his right upper extremity was February 1, 2018. An Arbitration Hearing was held on March 10, 2021. The Commission's adjudicator was Deputy Commissioner James F. Christenson, and he issued his Arbitration Decision on September 17, 2021.

The Deputy Commissioner first considered whether Respondent's claim had expired under the statute of limitations provided in Iowa Code § 85.36. He determined that the statute of limitations did not time-bar Respondent's claim due to the discovery rule. Having found the claim ripe for adjudication, the Deputy Commissioner determined that Respondent's tennis elbow diagnosed in August 2017 and the deltoid tear diagnosed in June 2018 were both attributable to Respondent's employment at Tweeten Farms. Accordingly, the Deputy Commissioner awarded temporary total disability benefits, benefits for a five percent disability rating of the upper extremity, and reimbursement of medical expenses incurred by Respondent.

Petitioners filed a Motion for Rehearing on two issues. First, Petitioners asserted that the Deputy Commissioner erred in calculating the temporary total disability payment owed to Respondent. Second, that the Deputy Commissioner failed to address an argument Petitioners made for the first time in their post-hearing brief after the Arbitration Hearing in March 2021.

On the first point, the Deputy Commissioner recalculated the amount of healing period benefits. Petitioners still contest the award of any such benefits, but do not dispute the recalculated rate contained in the October 13, 2021, Ruling on Motion for Rehearing of Decision.

The newly raised argument was that Respondent's claim was extinguished when he entered the Settlement Agreement with the Second Injury Fund by virtue of the final bar provision in Iowa

Code § 85.35(9). That provision states:

> Approval of a settlement by the workers' compensation commission is binding on the parties and shall not be construed as an original proceeding. Notwithstanding any provisions of this chapter … an approved compromise settlement shall constitute a final bar to any further rights arising under this chapter . . . regarding the subject matter of the compromise . . . .

The thrust of Petitioners' argument is that a Settlement Agreement with SIF is a compromise settlement that must be approved by the Commission, and thus the "final bar to any further rights under this chapter" includes Respondent's claim for workers' compensation benefits against his employer. This argument was rejected by the Deputy Commissioner.

The Commissioner's Appeal Decision was issued on May 20, 2022. The Commissioner affirmed the Deputy Commissioner's decision while making the following conclusions:

1. Respondent's settlement with the Iowa Second Injury Fund did not extinguish his claim under the final bar provision or deprive the Commission of subject matter jurisdiction to hear his claim against Petitioners;
2. The statute of limitations in Iowa Code section 85.26 did not time-bar Respondent's claim;
3. Substantial evidence supported the Deputy Commissioner's reliance on certain expert testimony over other conflicting expert testimony;
4. Respondent was entitled to healing benefits during the period when he was recovering from surgery between June 18, 2018, and October 16, 2018;
5. Respondent was entitled to 12.5 weeks of benefits due to a valid five percent impairment rating of his upper extremity; and
6. Substantial evidence supported the Deputy Commissioner's award of reimbursement for medical expenses, including the fees for Dr. Sassman's independent medical examination; and
7. Respondent did not sustain a cervical spine injury related to his work injury.

Cert. Rec. Part I pp. 12-21. In their Petition for Judicial Review, Petitioners challenge the first six of these conclusions.

II. STANDARD OF REVIEW FOR ALL ISSUES.

A party to a workers' compensation action may seek judicial review under Iowa Code section 17A.19(1) if they are "aggrieved or adversely affected by any final agency decision." *See*

Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 841-42 (Iowa 2015). The standard of review is controlled by the existence of a legislative grant of authority to exercise discretion to decide an issue. Where the commissioner has not been given authority to exercise discretion by the legislature, the review is for errors at law. Iowa Code § 17A.19(10)(*c*). "[I]f the claimed error pertains to the agency's interpretation of law, then the question on review was whether the agency's interpretation was wrong." *Tripp v. Scott Emergency Comm'n Ctr.*, 977 N.W.2d 459, 464 (Iowa 2022) (citing *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 219 (Iowa 2006)). Where discretion to decide an issue is not vested in the Commissioner, the Court may substitute its judgment for that of the Commissioner. *See Lakeside Casino v. Blue*, 743 N.W.2d 169, 173 (Iowa 2007).

The Iowa Supreme Court has "held the legislature has not delegated any special powers to the workers' compensation commissioner regarding statutory interpretation of Iowa Code chapter 85, which governs workers' compensation." *Coffey v. Mid Seven Transp. Co.*, 831 N.W.2d 81, 88-89 (Iowa 2013) (citing *Waldinger Corp. v. Mettler*, 817 N.W.2d 1, 4-5 (Iowa 2012)). "[I]f the claimed error pertains to the agency's interpretation of law, then the question on review was whether the agency's interpretation was wrong." *Tripp,* 977 N.W.2d at 464 (citing *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 219 (Iowa 2006)).

"When discretion has been vested in the commissioner, 'we reverse only if the commissioner's application was *irrational*, *illogical*, or *wholly unjustifiable*.'" *Des Moines Area Reg'l Transit Auth.* 867 N.W.2d at 842 (quoting *Larson Mfg. Co. v. Thorson*, 763 N.W.2d 842, 850 (Iowa 2009)); *see* Iowa Code § 17A.19(10)(*l*). Iowa Code § 17A.19(10)(*f*)(1). "Application of workers' compensation laws to facts as found by the commissioner is clearly vested in the commissioner." *Midwest Ambulance Service v. Ruud*, 754 N.W.2d 860, 864 (Iowa 2008) (citing

Mycogen Seeds v. Sands, 700 N.W.2d 328, 330 (Iowa 2005); *rev'd on other grounds*).

In sum, the Commissioner's findings are only reversed when they are not supported by substantial evidence when the record is viewed as a whole. Iowa Code § 17A.19(10)(*f*). A finding of substantial evidence is appropriate where a "neutral, detached, and reasonable person" determines that the evidence is sufficient to establish a fact that has serious and important consequences. Iowa Code § 17A.19(10)(*f*)(1). Common law provides additional guidance regarding the substantial evidence standard, and the appropriate deference owed to the Commissioner's findings.

"Evidence is not insubstantial merely because different conclusions may be drawn from the evidence." *Cedar Rapids Comm. Sch. Dist. v. Pease*, 807 N.W.2d 839, 845 (Iowa 2011) (citing *John Deere Dubuque Works of Deere & Co. v. Weyant*, 442 N.W.2d 101, 105 (Iowa 1989)). If the Court reaches a different conclusion on an issue, that disagreement alone is not enough to conclude substantial evidence did not support the Commissioner's decision. *Id.* ("[E]vidence may be substantial even though we may have drawn a different conclusion as fact finder.") (internal citations omitted). The Court is not concerned whether the facts support a finding other than the one made by the Commissioner. *Id*. Findings made by the Commissioner are only reversed when a contrary finding is compelled as a matter of law. *Long v. Roberts Dairy Co.*, 528 N.W.2d 122, 123 (Iowa 1995) ("In other words, the commissioner's findings are binding on appeal unless a contrary result is compelled as a matter of law.")

Despite discretion, the analysis still must be meaningful. "[C]ourts must not simply rubber stamp the agency fact finding without engaging in a fairly intensive review of the record to ensure that the fact finding is itself reasonable." *Wal-Mart Stores, Inc. v. Caselman*, 657 N.W.2d 493, 499 (Iowa 2003). At its minimum, the Court's review must be "fairly intensive" to require

consideration of all relevant information provided to it. The record is to be considered in its entirety. *Schutjer v. Algona Manor Care Ctr.*, 780 N.W.2d 549, 557-58 (Iowa 2010).

On the issues of the statute of limitations and subject matter jurisdiction the Court must determine if the Commissioner's interpretation of the statute is wrong. *Tripp*, 977 N.W.2d at 464. On other issues, such as medical causal connection, the substantial evidence standard is applicable. However, where a finding subject to the substantial evidence standard is predicated upon an erroneous interpretation of law, the Court may still substitute its judgment for the Commissioner's. *Bell Bros. Heating & Air Conditioning v. Gwinn*, 779 N.W.2d 193, 199 (Iowa 2010) ("To the extent error is predicated on an erroneous interpretation of law, we do not give deference to the workers' compensation commissioner.")

III. CAUSAL CONNECTION.

The causal connection in this case is somewhat unusual because there is one date of a work-related incident, but two distinct injuries – tennis elbow and a deltoid tear. The Commissioner found that both injuries were work-related. Petitioners argue that substantial evidence does not support the Commissioner's conclusion that the deltoid tear was caused by the work-related incident in July 2017.

Medical causal connection is a question of fact vested in the discretion of the Commissioner, with his findings afforded more deference because of his role in the adjudicatory process. An analysis of medical causal connection is "essentially within the domain of expert testimony." *Pease*, 807 N.W.2d at 846 (internal citations omitted). The Commissioner's duty is to determine which expert's testimony is more credible. *Id.* at 845. The Court "will therefore only disturb the commissioner's finding of medical causation if it is not supported by substantial evidence." *Id*.

Three expert opinions were presented to the Commissioner. Two experts, Dr. Aviles and Dr. Sassman, offered opinions for the purpose of litigation. Their opinions supported the party that paid for them. The third expert, Dr. Warme treated Respondent's deltoid tear. The question before the Court is whether substantial evidence supported the Commissioner's reliance on the opinions of Dr. Warme and Dr. Sassman in lieu of accepting Dr. Aviles' expert opinion.

"[T]he determination of whether to accept or reject an expert opinion is within the peculiar province of the commissioner." *Pease*, 807 N.W.2d at 845 (quoting *Deaver v. Armstrong Rubber Co.*, 170 N.W.2d 455, 464 (Iowa 1969)). Additionally, "the weight to be given such an opinion is for the finder of fact …." *Deaver*, 170 N.W.2d at 464 (internal citations omitted). The Commissioner's analysis considers "accuracy of the facts relied upon by the expert and other surrounding circumstances." *Schutjer*, 780 N.W.2d at 560.

Petitioners' argument regarding causation of the shoulder injury can be broken into four components: (1) Dr. Aviles' opinion indicates that a traumatic injury to the shoulder would be needed to cause the injury found; (2) Respondent testified that his pain moved from his elbow up his shoulder and into his deltoid; (3) Respondent's testimony indicates that his shoulder pain first manifested during his employment as a trucker months after his July work-related injury; and (4) Respondent's shoulder issues continued after his deltoid injury was repaired. Petitioners hope the Court will infer that the first point is supported by the following three. But the record does not suggest that Respondent sustained a separate traumatic injury at any point after July 2017.

In contrast, Dr. Warme's opinion addresses how pain could have eventually manifested in Respondent's shoulder: "It is my opinion that [Respondent] probably overcompensated for his tennis elbow using the arm and had some type of an overuse tendinopathy type injury with some microscopic tearing that became worse with overuse at the deltoid insertion." Cert. Rec. Part II p.

58 (Ex. 3 p. 28). Dr. Warme's opinion was supported by Dr. Sassman's. Absent any reason to afford Dr. Aviles' contrary opinion superior credibility, the Court concludes that substantial evidence supported the Commissioner's finding that both the tennis elbow and the deltoid tear were causally connected to the workplace incident.

IV. STATUTE OF LIMITATIONS.

Respondent had two injuries. The first is tennis elbow. It appears undisputed that this injury was sustained in July 2017 and diagnosed in August 2017. The second is a shoulder injury, specifically a deltoid tear. Petitioners argue that the second injury is not causally linked to the July 2017 work-related injury. The Commissioner disagreed. As discussed above, the Court finds that substantial evidence supports the Commissioner's determination. However, Petitioners still contend that Respondent's claims are barred by the statute of limitations.

Petitioners' argument that the statute of limitations bars Respondent's claim is dependent on the "date of the occurrence of the injury" being July 25, 2017. That is the date that Respondent was injured at work. It is also more than two years before the date he sought benefits: January 21, 2020. Nonetheless, the Commissioner applied the discovery rule and found that Respondent's claims were not barred by the statute of limitations on workers' compensation claims.

In discussing the effect of the discovery rule on an otherwise time-barred claim, the Iowa Supreme Court supreme has stated: "[W]e need only decide whether there is substantial evidence to support a finding that [claimant] knew the nature, seriousness, and probable compensable character of her injury within two years of the date [claimant] filed [their] petition for benefits." *Herrera v. IBP, Inc.*, 633 N.W.2d 284, 288 (Iowa 2001). However, in 2017, the Iowa Legislature codified the date of accrual for a claim under chapter 85. Petitioners argue that this prevents using the discovery rule to preserve an otherwise time-barred claim.

For injuries occurring on or after July 1, 2017, the statute of limitations for a workers' compensation claim is provided in Iowa Code section 85.26(1):

> An original proceeding for benefits under his chapter under this chapter … shall not be maintained in any contested case unless the proceeding is commenced within two years from the date of the occurrence of the injury for which benefits are claimed. … For purposes of this section, "date of the occurrence of the injury" means the date that the employee knew or should have known that the injury was work-related.

Iowa Code § 85.26(1). The sentence defining "date of occurrence of the injury" was added in 2017. H.F. 518, 87th Leg. (Ia. 2017). Petitioners argue that this provision's plain language should result in Respondent's claim being barred by the statute of limitations. Respondent argues that the Commissioner's finding on this issue, including his use of the discovery rule, should be upheld.

Whether the common law discovery rule continues to apply to workers' compensation claims after the 2017 amendment appears to be a question of first impression. The amendment, which defines the "date of occurrence of the injury" as "the date that the employee knew or should have known that the injury was work-related" is silent as to the serious nature or compensability of the injury. The parties agree that the *Herrera* standard was well-known prior to the 2017 amendment. Petitioners argue that the failure to include language along these lines demonstrates the Legislature's intent to abrogate *Herrera* and the discovery rule. Respondent argues that the Legislature's silence on this point indicates that it did not intend to disturb long-established common law. The Commissioner agreed with Respondent's arguments. However, because interpretation of Chapter 85 is not vested with the Workers' Compensation Commission, the Court gives no deference to the Commissioner's interpretation.

Although the amended language continues to account for situations where an employee does not know he is injured or when a cumulative injury does not manifest itself until later (both circumstances which are applicable to Respondent's later-discovered deltoid tear), there is no

allowance for a single injury that is later determined to be more serious than originally thought. This appears to have been an intentional omission. The purpose of the 2017 amendment was discussed in a statement by the amendment's sponsor during floor debate in the Senate:

> One of the things this bill is trying to collect are those instances where the employee doesn't notify their employer until two or more years after the actual injury because the employee didn't realize it was of a serious nature. It is not fair to the employer because they would have to pay the interest back to the date of the injury whether they were even aware the injury had occurred.

Senate Video (2017-03-27), Iowa Legislature, at 2:56:33—2:58:08 PM; S.J. 783, at 789.

Prior to 2017, the Legislature had not defined the phrase "date of occurrence of the injury." Thus, the Courts stepped in, and the common law discovery rule was developed. However, in 2017, the Legislature took the definition into its own hands. It could easily have said that the "date of occurrence of the injury" is the date "the employee knows or should have known the nature, seriousness, and probable compensable character of the injury" to comport with the common law discovery rule. The Legislature did not do so. Additionally, if the discovery rule continued to apply, the additional language added to the statute would serve no purpose. In light of the foregoing, the Court finds that the common law discovery rule no longer applies to workers' compensation claims following the 2017 Amendment.

Respondent's claim for benefits for tennis elbow (epicondylitis) is thus time-barred. Respondent knew his elbow was injured on July 25, 2017. He did not seek benefits until January 21, 2020, more than two years later. In the absence of the discovery rule, that claim cannot survive. The analysis is different with respect to Respondent's shoulder injury.

Respondent was aware of *an* injury on July 25, 2017. But that is not the only injury "for which benefits are claimed." No case law is needed to infer that knowledge of an injury is a prerequisite for knowledge that the injury was work-related. Here, Respondent had no knowledge

of a shoulder injury until he was within the two-year period before filing his claim for benefits.

Respondent was evaluated by only two providers before January 21, 2018. The first was Respondent's initial medical care following his work-related injury. That visit occurred on August 14, 2017. There, the physician's assistant recommended that Respondent wear a stabilization splint and ice the injury. Respondent did not complain of shoulder pain at that time. Respondent also did not complain of shoulder pain at his next evaluation on January 3, 2018. Rather, he again stated he was suffering elbow pain, and the provider diagnosed him with right lateral epicondylitis of the elbow and recommended physical therapy. Neither of these medical evaluations gave Respondent a reason to believe he had a shoulder injury. Further, Dr. Sassman and Dr. Warme offered their opinions that the deltoid injury was not actually sustained at the time of the initial elbow injury. Rather, it subsequently occurred due to Respondent overcompensating for the elbow injury. In sum, even without the benefit of the discovery rule, Respondent's claim for the deltoid injury survives. because he "did not know and should not have known" that he had this injury until April 2018. Iowa Code § 85.26(1

Petitioners' contrary argument is essentially that when *any* injury becomes known, it starts the clock running with respect to *all* later discovered injuries. That is not what the revised statute states. Further, the Court "must interpret the provisions within our workers' compensation statutory scheme to ensure our interpretation is harmonious with the statute as a whole." *Brewer-Strong v. HNI Corporation*, 913 N.W.2d 235, 253 (Iowa 2018) (internal quotations omitted). The primary purpose of Iowa Code Chapter 85 is to "benefit the injured worker." *Jacobson Transp. Co. v. Harris*, 778 N.W.2d 192, 17 (Iowa 2010).

V. SUBJECT MATTER JURISDICTION.

The Legislature only vests the Commissioner with authority to decide disputes controlled

by Iowa Code Chapter 85. Thus, Petitioners argue that the Commissioner lacked subject matter jurisdiction to hear Respondent's claim as of April 20, 2021, when the Commissioner approved Respondent's Settlement Agreement with the Second Injury Fund. Accordingly, Petitioners assert that the Commissioner's Arbitration Decision issued May 10, 2022, must be reversed entirely. Petitioners' position relies on the 2017 statutory amendments. Petitioners contend that since that time "[i]t is not possible for parties to carve out any part of a workers' compensation claim to avoid the final bar provision under Iowa Code section 85.35." Pets. Br. p. 20.

Respondent first objects that this argument was not timely made before the Commission and was thus waived. The Commissioner agreed with this argument. The Court does not.

> Jurisdiction of the trial court to act may nevertheless be attacked at any stage in order to avoid unwarranted exercise of judicial authority. Similarly, lack of inferior tribunal jurisdiction to act may be urged by the court even though not raised before the tribunal itself in order to avoid unwarranted exercise of such tribunal's authority.

Bowen v. Story County Bd. of Sup'rs, 209 N.W.2d 569, at 572 (Iowa 1973). The defendants in *Bowen* made an argument identical to Respondent's:

> Defendants assert plaintiffs are barred from asserting the board's want of jurisdiction because they did not raise the question before the board. Plaintiffs first raised the issue in their certiorari petition. Defendants rely on the principle . . . that an inferior tribunal 'does not act in excess of jurisdiction or otherwise illegally as to a matter not before it and courts will not review questions not presented to the inferior tribunal.'

Id. at 572 (internal citations omitted).

However, the *Bowen* court articulates a clear test: "The principle is applicable where . . . a party assails the tribunal's action as in excess of jurisdiction or illegal but is not applicable where . . . the tribunal is alleged to have had no jurisdiction to act at all." *Id*. "The principle" references situations where the Court cannot hear an objection not made to the lower tribunal. Whether the Court can entertain the objection of lack of jurisdiction, under this precedent, is dependent upon

the allegations. Petitioners argue that the final bar provision removes Respondent's claim from the purview of Chapter 85. If that argument were successful, it would deprive the Commissioner of subject matter jurisdiction. meaning that the Commissioner had no jurisdiction to act.[1]

Although Petitioners' substantive argument was also considered and rejected by the Commissioner, the Court can locate no appellate opinion on point. Thus, the Court must conduct its own statutory interpretation. The Court begins with the text of the statute. *Doe v. State,* 943 N.W.2d 608, 610 (Iowa 2020). The relevant part of Iowa Code § 85.35(9) provides:

> Approval of a settlement by the workers' compensation commissioner is binding on the parties and shall not be construed as an original proceeding. Notwithstanding any provisions of this chapter and chapters 85A, 85B, 86, and 87, an approved compromise settlement shall constitute a final bar to any further rights arising under this chapter and chapters 85A, 85B, 86, and 87 regarding the subject matter of the compromise ….

Respondent points out that the language "subject matter of the compromise" was added in 2005. Resp. Br. p. 14. The Court believes that this language, as a qualifier of claims subject to the final bar provision, is crucial in ascertaining whether the provision applies in this case. Additionally, the introductory provision of § 85.35 was amended to remove the term "final" from the sentence "The parties to a contested case or persons who are involved in a dispute which could culminate in a contested case may enter into a settlement of any claim … providing for final disposition of the claim." This suggests that something other than a full and final resolution would be possible in a settlement.

"Absent statutory definition, the Court will consider statutory terms in their context and give them their common and ordinary meaning." *Trujillo*, 878 N.W.2d at 770. The plain meaning of the statute does not allow the Court to consult materials other than the text of the statute if the

[1] Additionally, it appears that the settlement with SIF was not approved until after the arbitration hearing. Jurisdiction would not be deprived until the Commissioner approved the settlement. Thus, Petitioners raised the issue at the earliest opportunity.

language is ambiguous or if the application of the exact words of the text produces an absurd result. *Brakke v. Iowa Dep't of Nat. Res.*, 897 N.W.2d at 534. The "cardinal rule" of statutory interpretation provides, "The Court may not look beyond the express terms of the statute if the text of the statue is plan and its meanings clear." *Neal*, 814 N.W.2d at 519. Petitioners contend that the plain meaning demands that the Court conclude the Commission lacked jurisdiction to hear Respondent's claim due to his settlement with SIF. However, the Court finds the plain and ordinary meaning of the statutory text to support Respondent.

"Subject matter of the compromise" must have meaning. The only logical meaning is that the final bar provision applies only to claims that have the same subject matter as those released in a settlement. Here, the only claim released was for potential future compensation from SIF. There is no language releasing claims against the employer or its insurance carrier. Further, the potential liability of SIF was only the industrial loss resulting from the *combination* of the new arm injuries and a pre-existing ankle injury. The potential liability of Petitioners was solely for the arm injuries. Thus, the "subject matter of the compromise" was different than the subject matter of the workers' compensation proceedings. To find that an employer is relieved of liability because of a separate settlement with a third party for potential liability on a separate loss would defeat the purpose of the workers' compensation regime.

Petitioners have cited multiple cases, but the Court finds all to be distinguishable. The first case is *White v. Northwestern Bell Telephone Co.*, 514 N.W.2d 70 (1994). Petitioners cite this case for the undisputed proposition that the practical effect of the final bar provision is to deprive the Commissioner of subject matter jurisdiction. However, the application of the final bar provision that occurred in *White* is clearly distinguished from this case. *White* was decided on contract grounds. *Id*. at 76. More importantly, the contract analyzed was a settlement between White *and*

his employer under Iowa Code § 85.35. *Id*. at 72. The agreement provided the employer would pay for the petitioner's future medical care, and they did so for nine years. *Id*. at 75-76. When the employer stopped paying for medical expenses, the plaintiff filed an action in district court to which the employer objected stating the issue was vested in the Commissioner's subject matter jurisdiction. The court denied the objection holding that Iowa Code § 85.35, "evinces a legislative intent to terminate the jurisdiction of the industrial commissioner upon settlement approval."

In *White,* the final bar provision extinguished the subject matter jurisdiction to hear the employer's argument that it should not be required to continue paying the expenses. Thus, the employer attempted to re-litigate a settlement it previously agreed to. That is distinguishable from situations where the employee settles with a third party. Most importantly, the "subject matter" of the settlement and dispute were the same: the employer's obligation to pay expenses.

Next is *Bankers Standard Ins. Co. v. Stanley*, 661 N.W.2d 178 (Iowa 2003). This case addressed an insurer's rights to indemnify an employee out of third-party settlement proceeds up to the amount they paid the employee. *Id*. at 180. The court in *Bankers Standard* ultimately held the final bar provision applicable to the insurer's indemnification rights under Iowa Code §85.22, based on the plain meaning of Iowa Code § 85.35(9) and its bearing on the right to indemnify a recipient of workers' compensation up to the amount they paid. The right of indemnification is located in Iowa Code § 85.22. *Id*. Therefore, the court held the plain meaning of Iowa Code § 85.35(9), specifically the phrase "any further rights under this chapter," extinguished the insurer's right to indemnify the employee for third-party proceeds. *Id*. at 181; Iowa Code § 85.35(9). The court explained:

> A legislative bar to indemnification upon settlement of a contested case does not defeat the objectives of indemnification, but merely recognizes that the issue of indemnification . . . *must be considered in the process of settling a contested case* because the settlement will otherwise bar the statutory rights of the parties available

under the workers' compensation laws.

Id. (Emphasis added).

In sum, insurers are still able to indemnify employees out of recoveries from third-parties up to the amount they paid, less their share of attorney's fees, if they follow the correct procedural requirements. In the context of indemnification in workers' compensation' cases, Iowa Code § 85.22 demands that an insurer or employer who paid an employee workers' compensation benefits must first file a lien on the potential settlement awards. Iowa Code § 85.22(1). "In order to continue and preserve the lien, the employer shall, within thirty days after receiving notice of such suit . . . file . . . notice of the lien." *Id*. In *Bankers Standard*, the insurer failed to follow this process. The emphasized portion of the quote above substantiates that the invocation of the final bar provision was due to the employer's failure to follow the proper procedural methods to reap the rewards of indemnification rights. *Id*.

The Court also finds *Bankers Standard* distinguishable because the parties had already settled on the subject matter of the dispute—the obligations and entitlements of the parties triggered by the occurrence of a work-related injury—and the insurer's indemnification rights addressed the same subject matter. When the insurer failed to timely file a workers' compensation lien and initiated new proceedings to indemnify the employer for his third-party proceeds, they reopened a closed door: obligations of each party springing from a work-related injury.

The next three cases can be disposed of quickly for their lack of bearing on this issue. First, in *Heartland Exp. v. Gardner*, 675 N.W.2d 259, 270 (Iowa 2003), the final bar provision was not invoked. Rather, this case was decided upon a circumscription of subject matter jurisdiction of the Commissioner that was provided by the legislature in Iowa Code § 85.71. That section deals with claims from nonresidents of this state. It is well established that the legislature can circumscribe

subject matter jurisdiction of executive tribunals. But the Court does not believe that the Legislature did so with respect to settlements with SIF.

Harvey's Casino v. Isenhour, 724 N.W.2d 705, 708-09 (Iowa 2006) is similar to *Gardner* in that workers' compensation claims submitted by employees were denied by virtue of a legislative circumscription of subject matter jurisdiction. Iowa Code § 85.1(6) provides that entitlement to benefits under a federal law for a work-related injury precludes a double recovery from the Iowa Workers' Compensation Commission. *Id*. at 706. The employees in *Harvey's Casino* were "seamen" as defined in the Jones Act which affords benefits for work-related injuries. Therefore, Iowa Code § 85.1(6) applied and removed the jurisdiction of the Commission to hear the employees' claims. While this case could be argued to support that the purpose of the final bar provision is to prevent duplicative recovery, it certainly does not bear on whether Respondent's settlement with Iowa SIF bars the claim in this dispute. The potential future liability of SIF is different than that of the entity that employed the claimant at the time the original injury occurred.

In *Terry v. Dorothy*, 950 N.W.2d 246, 249-50 (Iowa 2020), the court considered "whether a gross negligence claim against a coemployee is a statutory claim that is extinguished under Iowa Code § 85.220 when the workers' compensation commissioner approved settlement of the statutory claim." The employee received benefits from her employer and then went after her coworkers for gross negligence. *Id*. at 248. After conducting an investigation into common law claims in an employment context that survived various amendments, placing those claims under the purview of Iowa Code Chapter 85, the court concluded: "[T]he common law claims against coemployees for gross negligence survived the amendment and are not within the scope of our workers' compensation statutes." *Id*. Because the claim was not subject to the provisions of Iowa Code Chapter 85, and therefore the final bar provision, the court stated: "[T]he district court's

ruling was flawed when it reasoned that a statutory workers' compensation claim extinguishes common law gross negligence claims against an employee …." *Id*. at 251.

The last Iowa judicial authority offered by Petitioners is again within the realm of insurance indemnification rights under Iowa Code § 85.21. *United Fire & Casualty Co. v. St. Paul Fire & Marine Ins. Co.*, 677 N.W.2d 755 (Iowa 2004), has facts similar to *Bankers Standard*. St. Paul and United Fire are both workers' compensation insurers. *Id*. at 757. The insurer of the employee's business was United Fire. *Id*. The injury giving rise to the dispute was found at trial to be an aggravation of a pre-existing injury suffered in the course of employment with an employer who received workers' compensation insurance through St. Paul. *Id*. Iowa Code § 85.21(3) allows an employer to request that a Commissioner of the Workers' Compensation Commission issue an employer an order allowing it to file a claim for indemnification against another employer or insurer who is responsible for all or part of the benefits the requesting party was obligated to pay. Pursuant to this provision, St. Paul sought indemnification of United Fire. *Id*. at 757-58. The court held that the final bar provision extinguished St. Paul's indemnification claim given they had already reached a compromise special case settlement on the same subject matter as their claim to indemnify United Fire. *Id*. at 760-61.

St. Paul contended that their claim under Iowa Code § 85.21(3) should not be barred because the parties to the claim under Iowa Code § 85.21(3) were not the same parties to the settlement reached with the employee. The court found this argument to be a "distinction without meaning." *Id*. at 760. However, the court's reasoning in *United Fire & Casualty Co.* provides support that "[t]he words 'subject matter of the compromise' have meaning and clarify what 'full and final' actually means." Resp. Br. p. 16. The Court takes note that those words Respondent argues to be material in this analysis were not added to Iowa Code § 85.35(9) until a year after

United Fire & Casualty Co. was decided.

The added language does not expand the pool of claims that would be barred under the provision. Rather, it limits the claims that are to be extinguished to those with the shared subject matter of the settlement. In *United Fire & Casualty Co.*, the subject matter of the settlement and St. Paul's indemnification claim under Iowa Code § 85.21(3) were the same because the obligation to pay arose from an injury for which St. Paul sought to indemnify United Fire. In the settlement, St. Paul sought to relieve its obligation to pay the employee benefits by filing a compromised agreement instead of disputing their contribution. *Id*. at 758. With the indemnification claim, St. Paul sought to indemnify United Fire for its same obligation to pay the employee benefits due to the finding that the new injury was aggravation of the first. *Id*. Again, *United Fire & Casualty Co.* is distinguishable because in the instant case, the subject matter of the compromise with SIF was different than the subject matter of the workers' compensation proceedings.

Finally, the Court addresses Petitioners' cited Appeal Decision of the Commissioner in *Ahn v. Key City Transport, Inc.*, File No, 5042640 (10/8/2015).

> The Iowa Supreme Court interpreted the statutory language, "final bar to any further rights," broadly in United Fire v. St. Paul Fire & Marine. The Court concluded that "a compromise special case settlement under section 85.33 bars an employer's or its insurer's statutory right to indemnification and contribution under section 85.21(3)." Had the Court interpreted this statutory language narrowly, perhaps it would have found a difference between the subject matter of the compromise and the third-party claim. The Supreme Court's broad interpretation of the legislative intent to terminate the commissioner's jurisdiction of a compromised claim indicates claimant's approved compromise settlement with SIF in File No. 5038569 bars his claim in this case against defendants. If an employer or its insurer cannot sue a third party for an injury resolved by way of a compromise settlement, it only stands to reason that a claimant cannot sue his employer and its insurer for the same injury previously resolved with the Second Injury Fund by way of compromise settlement.

Ahn, File No. 5042640 (App. 10/8/15) (internal citations omitted).

Ahn is of course, not binding on this Court. Additionally, the Court does not find persuasive its analysis concluding that the combined injuries at issue in the settlement constitute the same subject matter as the single injury sustained with the original employer. Further, the Court finds that Ahn is distinguishable. In *Ahn*, the Commissioner cites to the following language from the settlement agreement at issue:

> I am aware that if the Workers' Compensation Commissioner approves this compromise settlement and the Second Injury Fund pays me the agreed sum, then I am barred from future claims or benefits under the Iowa Workers' Compensation Law for the injury(ies) …

Id. p. 8. That language clearly puts a claimant on notice that future workers' compensation proceedings are barred upon approval of the settlement. Although that same language was present in the template used as a starting point for Respondent's Settlement Agreement with SIF, *that passage was ultimately deleted.* Cert. Rec. Part I p. 271. It is worth noting that Workers' Compensation Commissioner Joseph S. Cortese II who authored the Appeal Decision in *Ahn* found no merit to Petitioners' argument when applied to this case.

It would be fundamentally unfair to ban Respondent from pursuing his primary claim against his employer simply because he settled a smaller claim involving a potential combined injury – after removing language from the agreement that would bar future claims. Carving out a particular claim from the settlement *between the parties to the agreement* may be impermissible, but that is different than carving out claims against an employer not party to the settlement. Also, as noted by the Deputy Commissioner, such a ruling would prevent settlements with SIF before the underlying claims are fully resolved. Settlement agreements are viewed favorably by both the Workers' Compensation Commission and the Court. A contrary ruling precluding a workers' compensation claim from being pursued after settlement with SIF would greatly change practice in this area and call into question the many awards previously made in such circumstances.

VI. ENTITLEMENT TO BENEFITS AWARDED.

Petitioners challenge three components of Respondent's award: (1) the award of temporary total disability or healing period benefits; (2) the award of benefits due to permanent impairment; and (3) the award of medical expenses listed in Joint Exhibit 10. Here, the standard is clear. The findings of the Commissioner must be upheld if supported by substantial evidence. *Ruud*, 754 N.W.2d at 864 ("Application of workers' compensation laws to facts as found by the commissioner is clearly vested in the commissioner. …"); Iowa Code § 17A.19(10)(*f*).

Temporary Disability Benefits

"If the injury results in a permanent partial disability, payments made prior to an award of permanent partial disability are called temporary disability benefits." *Bell Bros Heating & Air Conditioning*, 779 N.W.2d at 200. These benefits are distinguished from those awarded where a permanent disability is not found. *Id*. The Supreme Court has provided the formula for an award of temporary total disability benefits. They "measure the extent to which the injury impairs the employee's ability to earn wages." *Mannes v. Fleetguard, Inc., Travelers Ins. Co.*, 770 N.W.2d 826, 830 (Iowa 2009) (internal citations omitted).

Iowa Code § 85.34(1) says that temporary disability benefits (also known as healing period benefits) shall be paid until the first of various occurrences, one of which is the employee returning to work. Respondent testified that he continued to work at Dave Jensen Trucking following surgery, but that his duties changed to shop work. Because he returned to work, Respondent is only entitled to benefits during this period if he "receive[d] a reduction in wages from what he or she earned prior to the injury." *Staff Mgmt. v. Jimenez*, 839 N.W.2d 640, 658 (Iowa 2013), as corrected (Nov. 18, 2013) (citing *Mannes v. Fleetguard, Inc.*, 770 N.W.2d 826, 830 (Iowa 2009).

Respondent argues that because the record does not reflect that he made the same wages,

he is entitled to benefits. Petitioners argue that because the record does not reflect a reduction in wages, Respondent is not entitled to benefits. The record does not show the amounts Respondent earned during this period. *Jimenez* instructs that in this situation the employee is not entitled to benefits. *Id.* at 658 ("Jimenez does not claim nor does the record support that she was receiving less than her full wage when she worked before and after her surgery. Accordingly, the commissioner should have excluded the dates Jimenez was working from the running award.").

The conclusion that healing period benefits should not have been awarded is also bolstered by the fact that Respondent received $2,000 payments from Tweeten Farms on June 25, 2018, July 5, 2018, October 27, 2018, and November 3, 2018. Cert. Rec. Part II p. 184 (Ex. G). Respondent began working for Dave Jensen Trucking in February 2018. Cert. Rec. Part I pp. 345, 360 (Tr. P. 35, 50). However, he also kept assisting at Tweeten Farms. *Id.* p. 346 (Tr. p. 36). The parties dispute whether the Tweeten Farms payments made in late 2018 were for work performed during the post-surgery period or for work performed earlier. The record does not contain Respondent's position as to the time frame these payments covered. In the absence of evidence supporting the proposition that the payments were for an earlier time period, it would not be reasonable to conclude the payments were intended to cover anything beyond the immediately preceding weeks.

The Court concludes that, in light of Respondent's ongoing employment, it was an improper application of the law to the facts to award Respondent temporary disability benefits.

Benefits Due to Permanent Impairment

The Court finds that substantial evidence supports the Commissioner's finding of a 5% permanent impairment rating entitling Respondent to 12.5 weeks of benefits. This issue was simply a battle of the experts. For the reasons discussed above, it was reasonable for the Commissioner to adopt the impairment rating assessed by Dr. Sassman rather than that urged by Dr. Aviles. The

Court notes that Dr. Sassman did not assign any impairment rating to the tennis elbow injury found to be time barred.

Medical Expenses

Petitioners contend that the medical expenses awarded by the Commissioner were not supported by substantial evidence. However, the expenses awarded were brought before the Commission via Joint Exhibit 10. According to Respondent, Petitioners are now unfairly retracting an agreed upon statement of medical expenses relevant to this case. However, Petitioners deny any objection to the joint exhibit itself, instead arguing that there is insufficient evidence to causally connect the expenses listed in the joint exhibit to the injuries. "It is identified as disputed in the Hearing Report that the listed expenses are causally connected to the work injury. Further, it was disputed that the listed expenses are at least causally connected to the medical conditions upon which the claim is based." Pets. Rep. Br. p. 26. In other words, it is not the amount of the expenses or their reasonableness that is disputed. It is whether the expenses relate to the injuries sustained.

The Court notes that Respondent testified at the hearing that all of the expenses on Joint Exhibit 10 were associated with his work-related injuries. Cert. Rec. Part I. pp. 350-51 (Tr. pp. 40-41). Petitioners did not offer any testimony or records refuting this point. In the Hearing Report, the Petitioners stipulated that "[a]lthough disputed, the medical providers would testify as to the reasonableness of their fees and/or treatment set forth in the listed expenses and defendants are not offering contrary evidence." Cert. Rec. Part I p. 408. The Court also notes that medical appointments exploring a potential cervical injury, which the Commissioner found to not be work-related, began in 2020 and are *not* included on Joint Exhibit 10.

Respondent asserts that all of the expenses on Exhibit 10 should be awarded. If the Court were to uphold the rest of the Commissioner's decision, it would logically follow that all of the

expenses on Exhibit 10 should be approved. A contrary ruling would reward Petitioners for apparent sandbagging by submitting the joint exhibit but then later arguing that the exhibit was insufficient. But, given the Court has found that the tennis elbow injury is barred by the statute of limitations, medical expenses cannot be awarded for that injury. Thus, the Court only approves those expenses on Joint Exhibit 10 from and after April 13, 2018 (the date the deltoid injury was first suspected). Cert. Rec. Part II p. 120.

Petitioners also assert that one specific cost related to the compensable injury was not reasonable: Dr. Sassman's independent medical examination. Petitioners argue that her evaluation addresses body parts other than the shoulder and arm and that Respondent is only entitled to reimbursement for an "impairment rating" rather than an independent medical evaluation. Petitioners do not establish how one could obtain an impairment rating in the absence of an evaluation. The Commissioner had access to Dr. Sassman's full evaluation and decided the costs were reimbursable. The Court finds that substantial evidence supports that determination.

VII. CONCLUSION.

As discussed, the Court holds that the statute of limitations bars compensation for Respondent's tennis elbow, but not for his shoulder injury. The Court holds that Respondent's settlement with the Iowa Second Injury Fund does not bar recovery. The Court finds that substantial evidence supports the finding of permanent impairment and the benefits related thereto (including the independent medical examination conducted by Dr. Sassman), but does not support the award of temporary disability benefits.

ORDER

For the foregoing, the Court concludes that Petitioners' Petition for Judicial Review is **GRANTED IN PART AND DENIED IN PART**.

Petitioners shall pay Respondent twelve point five (12.5) weeks of permanent partial disability benefits commencing on October 17, 2018, at the weekly rate of two hundred seventeen and 99/100 dollars ($217.99).

Petitioners shall receive credit for all benefits paid to date.

Petitioners shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent.

Petitioners shall pay Respondent those medical expenses listed on Joint Exhibit 10, Cert. Rec. Part II p. 120, except for those expenses incurred from August 14, 2017 through January 18, 2018.

Petitioners shall reimburse Respondent for the costs associated with Dr. Sassman's independent medical examination, including mileage.

Any outstanding court costs from this Petition for Judicial Review are assessed one-half to Respondent Corey Tweeten and one-half to Grinnell Mutual. Costs for the proceedings before the Commission remain as assessed by the Commissioner.

IT IS SO ORDERED.

State of Iowa Courts

Case Number	**Case Title**
CVCV063846	LON TWEETEN DBA TWEETEN FARMS V COREY TWEETEN
Type:	OTHER ORDER

So Ordered

David Nelmark, District Judge
Fifth Judicial District of Iowa

Electronically signed on 2022-11-30 09:27:13