IN THE IOWA DISTRICT COURT FOR POLK COUNTY

TWIN CITY FIRE INSURANCE COMPANY, **Petitioner-Appellee** **ITA GROUP, INC.,** **Petitioner-Employer** **vs.** **CHERYL MCKOY a/k/a JACOBSON,** **Respondent-Appellant**	**Case No. CVCV062881** **RULING ON PETITION FOR JUDICIAL REVIEW OF AGENCY DECISION**

Respondent (Jacobson), was the recipient of workers compensation benefits paid by Petitioners, ITA Group, Inc. and its insurer Twin City Fire Insurance Company. A Deputy Commissioner of the Iowa Workers' Compensation Commission submitted its Arbitration Decision in favor of Petitioners on August 9, 2021. On August 17, 2021, Jacobson submitted a notice of appeal from the Deputy Commissioner's Arbitration Decision. The Iowa Workers' Compensation Commissioner (Commissioner) affirmed the Deputy Commissioner's Decision on December 2, 2021. Jacobson filed the present Petition for Judicial Review on December 8, 2021. Petitioners submitted their Answer to Petition for Judicial Review on December 16, 2021, and their Brief in Response to Petition for Judicial on June 23, 2022. Jacobson submitted her Brief on Petition for Judicial on May 24, 2022. After consideration of arguments and reviewing the court file, including the briefs and other pleadings filed by both parties, and the Certified Administrative Record, the Court now enters the following ruling.

I. WORKERS' COMPENSATION SETTLEMENT.

Jacobson was injured during the course of a presentation for a conference at the Iowa Events Center on October 8, 2015. (Arb. Dec. p. 1). The speaker enticed members of the crowd to ascend to the stage by offering money as a reward for volunteering. *Id.* A scramble ensued and

another woman knocked Jacobson to the ground, causing her to sustain injuries. *Id*. At the time of the injury, Jacobson was employed by Petitioner-ITA Group and was acting within the scope of her employment. *Id*. On June 26, 2018, the Commission approved a settlement between Twin City Fire Insurance Company and Jacobson for workers' compensation benefits. *Id*. at 2. The workers' compensation settlement paid Jacobson and her medical providers $148,501.60 for medical costs and indemnity payments. *Id*. at 1. Following the Commission's approval of the settlement, Petitioners filed a Notice of Workers' Compensation Lien as required by Iowa Code section 85.22. *Id*. at 2.

II. TORTFEASOR RELEASE AND SETTLEMENT AGREEMENT & NOTICE OF CONSENT TO SETTLE.

Following the receipt of workers' compensation benefits, Jacobson initiated proceedings to collect damages from the tortfeasor. On October 17, 2018, Jacobson's attorney sent a demand letter to the third-party tortfeasor alleging $292,411.00 in economic loss caused by the tortfeasor, and $750,000.00 for a release of her action. (Arb. Dec. p. 2, Ex. 3). The demand letter did not mention damages for pain and suffering. (Ex. 3). During discovery for their action set to be heard in mid-November 2020, Jacobson stated that lost wages was an element of her calculation of damages. (Arb. Dec. p. 2, Ex. 6). In April 2020 preceding the trial date, Jacobson and the tortfeasor attended mediation where Jacobson told the mediator that lost wages were included in her calculation of damages. (Ex. 6). Petitioners contend that their counsel was never asked to approve the terms in the settlement agreement. Jacobson and the tortfeasor agreed to a settlement of $175,000.00. (Arb. Dec. p. 2).

On May 13, 2020, Twin City filed a Notice of Consent to Settle (Notice) and the settlement agreement was filed in District Court the next day. (Arb. Dec. p. 2, Ex. 5). The following month, Petitioners filed a Notice of a Lien in the amount of $148,501.60, seeking to recoup workers'

compensation benefits paid to Jacobson pursuant to Iowa Code section 85.22. That provision authorizes a workers' compensation payor to indemnification of benefits paid once the recipient of the benefits prevails in a third-party lawsuit against a tortfeasor and is awarded damages. *See* Iowa Code § 85.22. Shortly after the Notice of a Lien was filed, Jacobson filed a Release and Settlement Agreement (Release). (Arb. Dec. p. 2). Allegedly, the Release presented to Petitioners included a provision stating all damages paid in the third-party settlement were for pain and suffering, lost wages, and medical bills. (Arb. Dec. p. 2-3; Ex. D, p. 6). This language was in paragraph 3 of the Release:

> The above payment is for pain and suffering, loss of function, and medical bills. Further, nothing in this settlement is for lost wages and loss of future earning capacity, as these were compensated for by the underlying workers' compensation settlement.

Id. The Release was only signed by Jacobson, and Petitioners claim that they did not provide written assent to the Release. (Arb. Dec. p. 3, Ex. D).

Petitioners submitted a request for reimbursement of their lien to the Commission on February 10, 2021. (Resp't Intra-Agency Br. p. 2). In August, 2021, the Deputy Commissioner entered a ruling setting Petitioners' lien amount at $116,666.67 and awarding Jacobson attorney fees totaling $58,333.33 (one-third of $175,000). (Arb. Dec. p. 1). Iowa Code section 85.22(1) provides that a workers' compensation beneficiary shall be, "indemnified out of the recovery of damages to the extent of the payment so made, with legal interest, except for such attorney fees as may be allowed. . . ." Thus, in calculating Petitioners' lien amount, the Deputy Commissioner started with the total settlement proceeds ($175,000.00), reduced that amount by attorney's fees and arrived at a lien amount of $116,666.67. (Arb. Dec. p. 5). The Commissioner affirmed the Deputy Commissioner's analysis and lien calculation.

Jacobson now seeks judicial review of the Court. Three primary issues must be

addressed: (1) whether pain and suffering damages are excluded from Petitioners' indemnification rights under section 85.22; (2) if the Release is a valid contract and its effect is to render the entire third-party settlement ineligible for indemnification by Petitioners; and (3) whether the Commission erred in its calculation of Petitioners' lien by beginning with the settlement proceeds rather than the amount paid by Petitioners and omitting a proportional share of expenses that should have been deducted from the lien. Alternatively, Jacobson also asks the Court to reduce the lien amount to $97,660.46. Petitioners argue that the Commission's calculation of the lien was appropriate, and hence, Jacobson's arguments are without merit. Petitioners contend that pain and suffering damages awarded to Jacobson in the third-party settlement are eligible for indemnification.

III. STANDARD OF REVIEW.

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 statute delegating the authority to exercise discretion to decide an issue. "When discretion has been vested in the commissioner, 'we reverse only if the commissioner's application was *irrational*, *illogical*, or *wholly unjustifiable*.'" *Id*. at 842 (quoting *Larson Mfg. Co. v. Thorson*, 763 N.W.2d 842, 850 (Iowa 2009)); *see* Iowa Code § 17A.19(10)(*l*). 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*).

Iowa precedent has, ". . . . [P]reviously 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)). "The same analysis applies to [section] 85.22(1)." *Id*. at 89. "[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 Communication Center*, 977 N.W.2d 459, 464 (Iowa 2022) (citing *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 219 (Iowa 2006)). This case involves an interpretation of Iowa Code section 85.22 which provides for indemnification of the injured party's settlement awards against third-party tortfeasors by the workers' compensation payor. Iowa Code § 85.22(1). Therefore, the standard of review is for errors at law. The Court may substitute its judgment for that of the Commissioner's. *See Lakeside Casino v. Blue*, 743 N.W.2d 169, 173 (Iowa 2007).

"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*). 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 occurs when 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). Where the application of facts to law is vested in the commissioner's discretion, an "irrational, illogical, or wholly unjustifiable" application of law to fact is required for reversal. Iowa Code § 17A.19(10)(*m*).

In this case, the Commissioner exercised legislatively-granted discretion in applying the facts of the case to Iowa Code section 85.22. *Ruud*, 754 N.W.2d at 864. Performing that function requires statutory interpretation which is not vested in the Commissioner regarding section 85.22.

Tripp, 977 N.W.2d at 464. The standard of review in this case is whether substantial evidence supports the Commissioner's findings, or, stated another way, whether the Commissioner's interpretation of section 85.22 was incorrect. *Id*; Iowa Code § 17A.19(10)(*f*).

IV. ANALYSIS.

Jacobson argues that the legal effect of paragraph 3 to the Release is to render all damages awarded in their third-party suit immune to indemnification by Petitioners. This contention contains two premises: (1) that paragraph 3 of the Notice and Settlement Agreement, characterizing all damages paid to Jacobson in the third-party suit as renumeration for pain and suffering, is a valid contract; and (2) that damages awarded in the third-party settlement for pain and suffering may not be indemnified by Petitioners under section 85.22. The Court agrees with the first premise. However, for the reasons detailed below the Court concludes the argument that recovery of damages from third-parties for pain and suffering cannot be indemnified by Petitioners is inconsistent with Iowa law.

Jacobson also argues that the Deputy Commissioner miscalculated Petitioners' lien amount because he reduced the total damages awarded in the third-party settlement by Jacobson's attorney fees, rather than reducing the total amount paid by Petitioners for workers' compensation benefits by one-third to account for attorney fees and one-third of the total expenses incurred by Jacobson in the third-party lawsuit. (Resp't Br. on Pet. for Jud. Rev. p. 6). By following Jacobson's method of calculating Petitioners' total lien amount, the resulting figure is $97,660.46. The Court agrees with Jacobson's method of calculation. Petitioners' contention that the lien is calculated based on third-party settlement proceeds is not supported by case law or the purpose of section 85.22.

A. Indemnification of Pain and Suffering Damages.

Supporting their theory that pain and suffering damages awarded in a third-party settlement

may not be considered in the calculation of a workers' compensation lien amount, Jacobson cites two cases. The first states, "The amount of recovery for tort might be greater in amount than the compensation fixed by the workers' compensation statute, since there may be other elements of damage allowed in an action for tort, as for instance, pain and suffering." *Black v. Chicago Great W. Ry.*, 187 Iowa 94, 917 (1919). Pairing this quote with Jacobson's interpretation of *Greenfield v. Cincinnati Ins. Co.*, 737 N.W.2d 112 (Iowa 2007), Jacobson concludes that pain and suffering damages are immune from indemnification because only duplicative elements of damages that were paid to Jacobson in workers' compensation benefits are subject to reimbursement from the proceeds of the third-party settlement. The Court concludes this is an inaccurate interpretation of the holding in *Greenfield*.

Jacobson's characterization of the purpose of section 85.22, "to 'prevent double recovery by the injured worker—compensation in a law action as well as workers' compensation of the same injury,'" ignores that Petitioners must first have the right to indemnification of third-party settlements. *Liberty Mut. Ins. Co. v. Winter*, 385 N.W.2d 529, 832 (Iowa 1986)). Jacobson's argument would have Petitioners unable to recover *any* of the benefits they paid to Jacobson. In the absence of a recovery, there cannot be "double recovery." Prevention of double recovery is a "downstream" issue after it has first been established that a workers' compensation payor may recover the benefits they already paid. The *Sourbier* court's implementation of the rules of statutory interpretation addressed the purpose of section 85.22:

> [T]he purpose of . . . . section 85.22(1) is to permit the employer to recoup monies it has been required to pay under the provisions of chapter 85 from a tortious third party whose conduct has produced the injury which necessitated such payments.

Sourbier v. State, 498 N.W.2d 720, 724 (Iowa 1993) (citing *Johnson v. Harlan Community School District*, 427 N.W.2d 460, 462 (Iowa 1988)). It would be odd for section 85.22's chief purpose to

be one of limiting duplicative recovery without first providing a workers' compensation payor a statutory right to recover. This Court declines Jacobson's invitation to "miss the forest for the trees" by assigning a secondary purpose of section 85.22 as the primary one. Jacobson's argument as to the purpose of section 85.22 would undermine the statutory right to recovery of workers' compensation benefits already paid by Petitioners, i.e., the purpose of section 85.22.

The limiting language regarding damages eligible for indemnification by Petitioners is allegedly found in *Greenfield*. There, the petitioner sought recovery under her employer's underinsured motorist (UIM) policy after their employer had already paid workers' compensation benefits. Jacobson's "duplicative elements of damage" requirement for Petitioners' indemnification comes from the *Greenfield* court's analysis of an "Exclusions and exemptions" provision in the employer's UIM policy. *See Greenfield*, 737 N.W.2d at 118-19. This "reduction-of-benefits" clause limited the employer's right to indemnification of proceeds awarded to the Plaintiff in their third-party suit to damages that were duplicative of payments already paid to plaintiff in workers' compensation benefits. *See Id*. at 119 ("With respect to the underinsured motorist coverage, the Cincinnati policy expressly limits offsets to payments for 'elements of loss' that are 'duplicative.'").

The reduction-of-benefits clause found in the *Greenfield* employer's UIM policy became common in auto-insurance policies following the legislature's amendment of Iowa Code section 516A.2 in 1991. In 1990, the Iowa Supreme Court held that insurance policy provisions forbidding the collection of duplicative damages under two separate uninsured motorist (UM) and/or UIM policies were unenforceable. *Hernandez v. Farmers Insurance Co.*, 460 N.W.2d 842, 845 (Iowa 1990). This concept, known as stacking, ". . . . [O]ccurs when the insured recovers underinsured or uninsured benefits under more than one policy." *Mortensen v. Heritage Mut. Ins. Co.*, 590

N.W.2d 35, 38 (1999) (citing *Farm Bureau Mut. Ins. Co. v. Ries*, 551 N.W.2d 316, 318 (Iowa 1996)). The objective of the legislature was to allow insurers to include anti-stacking provisions. *See* Iowa Code § 516A.2(1)(*b*). "Such forms of coverage may include terms, exclusions, limitations, conditions, and offsets which are designed to avoid duplication of insurance or other benefits." Iowa Code § 516A.2(1)(*a*). The language of the reduction-of-benefits clause in *Greenfield* was clearly chosen to conform with the objective of the amendment.

Greenfield considered, "[W]hether an injured employee's recovery under the uninsured motorist provision of her employer's automobile policy is reduced in whole or in part by benefits she received for injuries arising out of the same accident." 737 N.W.2d at 117. The court reasoned that section 516A.2 authorized, but did not mandate, reduction-of-benefits clauses in insurance policies as to prevent double recovery by the plaintiff under two policies. *Id*. Therefore, the insurer-defendant was only entitled to an "offset" (reduction of damages owed under the policy), "to the extent that its reduction-of-benefits provision authorizes such offsets." *Id*. The language of the reduction-of-benefits clause reads:

> No one will be entitled to receive *duplicative payments for the same elements of "loss"* under this Coverage and any Liability Coverage Form.

Id. at 118 (emphasis added). Jacobson's "duplicative elements of damage" argument that cites the above language is the product of an analysis addressing the indemnification rights of an employer under a UIM policy. Petitioners seek indemnification of proceeds from a *third-party settlement* under section 85.22, not under an auto-insurance policy.

Greenfield held that the employer's indemnification rights were controlled by the existence of a reduction-of-benefits clause that was authorized by section 516A.2 to be included in the policy. *Id*. at 118-19. The statute demanded that these clauses be consistent with the statute's purpose: to prevent double recovery. Iowa Code § 516A.2(1)(*a*). The petitioner in *Greenfield* was

not seeking recovery under a statutory right such as Petitioners are here. Therefore, the plain meaning of the policy's reduction-of-benefits provision was controlling in that case. Here, workers' compensation indemnification is expressly granted by Iowa Code section 85.22. The language of the statute governs this case. There is no limiting language to the effect of "recovery is only permitted of duplicative elements of damage" in section 85.22 as opposed to UM and UIM policies' exemption clauses that conform with section 516A.2. The legislature's concern when amending 516A.2 was to allow for anti-stacking provisions which is directly related to prohibiting duplicative recovery. Iowa Code section 85.22, the controlling language in this case, does not impose the same conditions on recovery that section 516A.2 does.

In *Greenfield*, the court found that a jury's special verdict for pain and suffering was not duplicative of benefits received through workers' compensation. *Greenfield*, 737 N.W.2d at 121-22. That holding is irrelevant in answering the issues presented in this case. Even a UI or UIM policy without this restrictive language allows for recovery of the total sum received in workers' compensation by the UM or UIM insurer. *Id*. at 120. *See Matthess v. State Farm Insurance Co.*, 548 N.W.2d 562, 564-65 (Iowa 1996) (finding reduction-of-benefits provision that allowed for indemnification of "all sums paid or payable" in workers' compensation benefits entitled defendant-insurer to an of the total third-party settlement proceeds awarded to plaintiff-employee). *Greenfield*'s holding does not establish a prohibition of indemnification for pain and suffering damages by workers' compensation payors.

Jacobson also cites *Black v. Chicago Great W. Ry.*, 187 Iowa 904, 917, 174 N.W. 774, 778-79 (1919), "Nothing in the workers' compensation statute authorizes recovery for pain and suffering not related to an industrial disability." This statement was quoted in *Greenfield* for the proposition that a jury's special verdict providing for pain and suffering damages to the plaintiff-

employee was not duplicative of any payments received for workers' compensation benefits. *Greenfield*, 737 N.W.2d at 121. "Recovery" as used in *Black*, clearly refers to the plaintiff-employee and not the defendant-insurer's indemnification rights given its role in articulating why, under the reduction-of-benefits provisions, pain and suffering was immune from the insurer's right to indemnify the petitioner's third-party settlement proceeds. *Black*, 174 N.W.2d at 778-79. The Court finds Jacobson's argument to be without merit. Delineating the boundaries of Petitioners' right to indemnify, however, does not end there.

The language of section Iowa section 85.22 is ambiguous and requires application of the principles of statutory interpretation. "The first step in our statutory interpretation analysis is to determine whether the statute is ambiguous." *State v. Zacarias*, 958 N.W.2d 573, 581 (Iowa 2021) (quoting *State v. Ross*, 941 N.W.2d 341, 346 (Iowa 2020)). Section 85.22 does not specify the type of payments to which an employer/insurer is entitled, prompting Iowa courts to hold that the provision's language is ambiguous. *Bertrand v. Sioux City Grain Exch.*, 419 N.W.2d 402, 404 (Iowa 1988). Having established ambiguity, the Court's goal is to, "ascertain legislative intent. . . ." and, ". . . . if possible, to give it effect." *State v. Coleman*, 907 N.W.2d 124, 136 (Iowa 2018) (quoting *State v. Finders*, 743 N.W.2d 546, 548 (Iowa 2008)). "Construing section 85.22 to permit the employer to recoup monies from third-party payments received by the employee for pain and suffering furthers the section's primary purpose." *Sourbier*, 498 N.W.2d at 724; *United States v. Lorenzetti*, 467 U.S. 167, 178, 104 S.Ct. 2284, 2291, 81, L.Ed.2d 134, 145 (1984).

Sourbier directly answers the issue regarding recovery of damages awarded for pain and suffering in the context of a payor's indemnification rights granted by Iowa code section 85.22. In their interpretation, the *Sourbier* court concluded that "compensation" as used in the statute includes damages. *Sourbier*, 498 N.W.2d at 724. ("[W]e believe an employer's right to

indemnification out of the recovery of *damages* should include the amount allowed for pain and suffering.") *Id*. "Compensation" itself does not contemplate recovery of damages absent precedent providing that it does. *Id*. The court reasoned, "Because the employer has a subrogation right under section 85.22(2) to bring an action to recover damages to the same extent the employee might, it is reasonable to construe indemnification provision of 85.22(1) to impose a lien on the amount recovered by the employee for pain and suffering." *Id*.

The *Sourbier* court's analysis of workers' compensation payors' indemnification rights is consistent with established Iowa law. First, the court cited precedent providing that the language of section 85.22 is ambiguous. *Id*. at 723 (citing *Bertrand*, 419 N.W.2d at 404). This precedent substantiated the propriety of the *Sourbier* court's implementation of the rules of statutory interpretation. Next, our supreme court addressed the purpose of section 85.22:

> [T]he purpose of… section 85.22(1) is to permit the employer to recoup monies it has been required to pay under the provisions of chapter 85 from a tortious third party whose conduct has produced the injury which necessitated such payments.

Id (citing *Johnson v. Harlan Community School District*, 427 N.W.2d 460, 462 (Iowa 1988)). Finally, the court in *Sourbier* applied an interpretation of section 85.22 that furthered the purpose of the provision. *Id*. at 724. Placing the employer/insurer in the same position as the employee in terms of recovering damages required that employers/insurers be indemnified for pain and suffering awarded to the employee. *Id*. "We have held that this right of indemnity attaches to the injured employee's entire recovery." *Toomey v. Surgical Services, P.C.*, 558 N.W.2d 166, 168 (Iowa 1997) (citing *Sourbier*, 498 N.W.2d at 724).

Jacobson does not cite any other authority indicating that pain and suffering damages are immune from indemnification towards a workers' compensation lien. *Sourbier* recognized that the language of section 85.22 is ambiguous, and proceeded to analyze the section according to the

principles of statutory interpretation. The conclusion reached by that court directly undermines Jacobson's argument, and was not contended to be overruled by the *Greenfield* court, nor the Petitioners. As a rebuttal, in a footnote to their Brief, Jacobson mentions that *Sourbier* "pre-dates" *Greenfield*. (Pet. ['s] Br. on Pet. for Jud. Rev. p. 9). This comment would be relevant if *Greenfield* held what Jacobson claimed it did or if *Greenfield* asserted to overrule *Sourbier*. Neither is the case. The Court concludes that pain and suffering damages paid to an injured party in an action against a third-party may be indemnified by the workers' compensation payor.

B. Validity of Release and Settlement Agreement & Notice of Consent to Settle.

The focus of this analysis is on paragraph 3 of the Release. That section stated:

> The above payment is for pain and suffering, loss of function, and medical bills. Further, nothing in this settlement is for lost wages and loss of future earning capacity, as these were compensated for by the underlying workers' compensation settlement.

(Arb. Dec. p. 2-3; Ex. D, p. 6). Jacobson claims that the purpose of this provision was to "expressly exclude [pain and suffering damages] from reimbursement." (Resp't Br. on Pet. for Jud. Rev. p. 9). Petitioners claim that they did not assent to the terms in paragraph 3. However, Petitioners filed their Notice shortly after the settlement was reached. (Arb. Dec. p. 2, Ex. 5). The purpose of the Notice is to function *as assent* to the settlement reached between Jacobson and the third-party tortfeasor. (Arb. Dec. p. 2, Ex. B). Additionally, the Notice stated that Petitioners had not waived their right to place a lien on the third-party settlement awards. (Arb. Dec. p. 2, Ex. 5).

". . . . [S]ettlement agreements are 'essentially contracts, and general principles of contract law apply to their creation and interpretation." *Estate of Cox by Cox v. Dunakey & Klatt, P.C.*, 893 N.W.2d 295, 302 (Iowa 2017) (quoting *Sierra Club v. Wayne Weber LLC*, 689 N.W.2d 696, 702 (Iowa 1994)). The Notice of Agreement may only be rescinded or reformed if one party to the contract made a mistake and the other acted in an inequitable manner. *Wellman Sav. Bank v.*

Adams, 454 N.W.2d 852, 855 (Iowa 1990). Extrinsic evidence may be used to "show what is meant by the words chosen by the parties to express their agreement. . . ." but not to "vary, add to, or subtract from a written agreement. . . ." *Kroblin v. R.D.R. Motels, Inc.*, 347 N.W.2d 430, 433 (Iowa 1984); *McGee v. Damstra*, 431 N.W.2d 375, 377 (Iowa 1988). Petitioners offer extrinsic evidence to demonstrate that the entirety of the settlement could not have been for pain and suffering. (Pet'r [s'] Br. on Pet. for Jud. Rev. p. 8). The relief Petitioners would ask of the Court is invalidation of paragraph 3. Subtracting from a written agreement is not something this Court does without due regard, and paragraph 3's promotion of the purpose of section 85.22 discourages this Court from exercising that power.

The Release may only be voided had Petitioners made a mistake and Jacobson acted inequitably, if there was a mistake of law, fraud, or a mutual mistake of fact. *Kufer v. Carson*, 230 N.W.2d 500, 503 (Iowa 1975). Jacobson's misinterpretation of *Greenfield* prevented inequitable conduct. Petitioners correctly argued that pain and suffering damages may be indemnified. That view is a correct interpretation of law, not a mistaken one. Jacobson's intent behind the provision was to accomplish something impossible, to eliminate Petitioners' statutory right of recovery. Any relief sought by Jacobson regarding paragraph 3 would be moot absent permission to re-categorize the damages awarded in the settlement. Without additional language, the entire settlement amount would still be subjected to reimbursement. As in *Greenfield*, "We decline the invitation to rewrite [Jacobson's] own contract." *Greenfield*, 737 N.W.2d at 121. Jacobson's inclusion of paragraph 3 does not constitute a legal mistake. Where the intent of a party is to circumvent a legal obligation, this Court will not grant remedial measures because the party failed to achieve that goal. Finally, a mutual mistake of fact is not present. Jacobson did not argue that the damages were mislabeled, she argued the opposite.

Jacobson cites *Peak v. Adams*, 799 N.W.2d 535, 543 (Iowa 2011), and *Pillsbury Co. v. Wells Dairy, Inc.*, 752 N.W.2d 430, 437 (Iowa 2008), for the proposition that the chief factors are the intentions of the parties at the time they entered the Release and Settlement Agreement and Notice of Consent to Settle. This is well-settled law and the Court agrees with these legal axioms. The Court disagrees, however, with Jacobson's claim that the shared intention of the parties when filing the Release and Notice was to "expressly exclude [pain and suffering damages] from reimbursement." (Resp't Br. on Pet. for Jud. Rev. p. 10). Jacobson argues that damages awarded for pain and suffering are immune from indemnification by Petitioners. Thus, Petitioners had to have intended to waive their rights to be reimbursed from the settlement. However, the Court concludes this intent is directly contradicted by Petitioners' Notice.

A contract must be definite and certain to be given legal effect. *Palmer v. Albert*, 310 N.W.2d 169, 172 (Iowa 1981). "However, this rule should not be carried to extreme lengths nor should it be used to defeat the intent of the parties." *Id*. (Citing J. Murray, Contracts s 27 (2d rev. ed. 1974) at 110-11). "[W]hatsoever is ascertainable with reasonable effort is sufficiently certain to be enforced." *Id*. (citing *Wickham & Burton Coal Co. v. Farmers Lumber Co.*, 189 Iowa 1183, 1185, 179 N.W. 417, 418 (1920)). Petitioners' intent was clearly stated in their Notice.

"Courts are reluctant to hold a contract unenforceable for uncertainty and they bend every effort to avoid such a result." *Id*. Citing 1 S. Williston, *A Treatise on the Law of Contracts* s 37 (3d ed. W. Jaegar 1957) at 110-11. This is not a case deserving of "bend[ing] every effort." *Id*. Invalidating the Notice would set back years of litigation at the expense of reaching the same result by holding the Release valid. The only relief Jacobson may receive would occur if a court granted permission to relabel damages. This Court will not re-write the contract because of a failed attempt to evade reimbursing Petitioners and Jacobson's misinterpretation of Iowa law. Petitioners

assented to the document by filing their Notice. The Court concludes the Release, including paragraph 3, is a valid contract that must be enforced.

C. Workers' Compensation Lien Calculation.

Both parties advance separate methods for calculation of Petitioners' workers' compensation lien that differ in two respects. First, the parties disagree on the starting point that the lien should be set at prior to any reductions. Second, the parties differ on whether attorney fees are one-third the settlement award or one-third the amount paid by the employer/insurer. Petitioners desire that the Commissioner's calculation be upheld. However, the Commissioner's method suffers from two defects: (1) Commissioner began his calculation with the amount received in the third-party settlement and not the amount paid to Jacobson in workers' compensation benefits; and (2) Commissioner did not account for Petitioners' share of expenses incurred in the third-party litigation. The starting point for this analysis is the text of the statute:

> If compensation is paid to the employee. . . . under this chapter, the employer. . . . or the employer's insurer which paid it, shall be indemnified out of the recovery of damages to the extent of the payment so made, with legal interest, except for such attorney fees as may be allowed, by the district court. . . .

Iowa Code § 85.22(1) (2022). This provision of the statute has been found to be ambiguous because "recovery of damages" does not specify what type of damages that the lienholder is entitled. *See Sourbier*, 498 N.W.2d at 723.

Although the "recovery of damages" language is ambiguous, "[t]o the extent of the payment so made. . . ." is not, and its effect is to set Petitioners' lien total at the amount they paid to Jacobson in workers' compensation benefits. *See Id*. ("The statute. . . . provides for distribution of proceeds to repay the employer for the amount of compensation actually paid by the employer. . . ."); *Johnson*, 427 N.W.2d at 462 ("[T]he purpose of the subrogation provisions of section 85.22(1) is to permit the employer to recoup monies it has been required to pay under the

provisions of chapter 85 from a tortious third party whose conduct has produced the injury. . . ."); *United Fire & Cas. Co. v. St. Paul Fire and Marine Ins. Co.*, 677 N.W.2d 755, 760 (Iowa 2004) ("Under section 85.22(1), if an employee recovers damages from a third party for an injury, for which the employee received workers' compensation benefits, the employee is required to pay the employer and its insurer from the recovery an amount equal to the workers' compensation benefits the employee receive s. . . ."); *Daniels v. Hi-Way Truck Equipment, Inc.*, 505 N.W.2d 485, 488 (Iowa 1993) (quoting *Sladek v. K Mart Corp.*, 493 N.W.2d 838, 840 (Iowa 1992)) ("[W]e have stated the purpose of [section 85.22(1)] 'is to encourage employers to pay bills and benefits with the expectation that they may recoup those payments from responsible third parties."); *Bankers Standard Ins. Co. v. Stanley*, 661 N.W.2d 178 (Iowa 2003) (citing *Daniels*, 505 N.W.2d at 489) ("[O]ne of the purposes of providing indemnification under section 85.22(1) is to permit an employer to recover from tortious third parties money it has been required to pay."); *Winter*, 385 N.W.2d at 531 ("[Section 85.22] provides the employer or insurer two methods of recovering benefits paid to the worker . . . ."); *Schonberger v. Roberts*, 456 N.W.2d 201, 202 (Iowa 1990) (citing *Winter*, 385 N.W.2d at 531-32) ("Without doubt [petitioner's] workers' compensation insurer is entitled to be compensated from his recovery . . . . for any amounts paid to or for him on account of his injury."); *American Mut. Liability Ins. Co. v. State Auto. Ins. Ass'n*, 246 Iowa 1294, 1301, 72 N.W.2d 88, 92 (Iowa 1955) ("Subsection 1 provides the employer or his insurer 'shall be indemnified out of the recovery of damages to the extent of' compensation paid."). Iowa case law is clear regarding the starting point for the lien calculation. Petitioners' request to begin the lien calculation with the amount awarded to Jacobson in their third-party settlement would ignore that the settlement total is not the amount paid by Petitioners in workers' compensation benefits. Therefore, the Court determines the starting point for the lien in this case is $148,501.60.

Petitioners also made no deduction for litigation expenses. "Iowa Code section 85.22(1) limits indemnification by allowing a reduction for attorney's fees. It does not expressly include other litigation expenses but we think the legislature intended to include them as an adjunct to attorney fees." *Fisher v. Keller Industries, Inc.*, 485 N.W.2d 626, 630 (Iowa 1992) (*abrogated on other grounds* by *Toomey*, 558 N.W.2d 166 (Iowa 1997)); *Sourbier*, 498 N.W.2d at 725 (citing *Fisher*, 485 N.W.2d at 630) ("Although section 85.22(1) does not expressly include a deduction for other litigation expenses, we include them as an adjunct to attorney fees."); *Sanchez v. Celadon Trucking Services*, 2013 WL 541416 at *2 (Iowa Ct. App. Feb. 13, 2013) (citing *Sourbier*, 498 N.W.2d at 725) ("The future [workers' compensation] lien is to be reduced by the reasonable litigation costs and attorney's fees incurred in obtaining the third-party recovery."); *Ewing v. Allied Const. Services*, 592 N.W.2d 689, 690 (Iowa 1999) (citing *Ahlers v. EMCASCO Ins. Co.*, 548 N.W.2d 892, 894 (Iowa 1996)) ("Entitlement is subject to [insurer's] obligation to pay its. . . . proportionate share of the $17,945.25 in administrative expenses that had been expended pursuing the third party suit."); *Martin v. DCS Sanitation*, 597 N.W.2d 62, 63-64 (Iowa 1999) ("We are unable to discern any double recovery that would result from granting claimant's request that respondents make an additional contribution toward her . . . . costs in the third-party litigation."); Jacobson correctly argues that the Commission erroneously did not assign Petitioners any share of expenses incurred in the litigation of the third-party settlement. That amount is $4,021,83. One-third of that amount is $1,340.61. The Court concludes this figure should be deducted from Petitioners' lien after assessing attorney's fees.

The final issue is whether the one-third reduction for attorney's fees should be based upon the settlement total or the lien total. The effect of an attorney fee calculation based on the total settlement amount clearly indicates that the answer is that attorney's fees should be one-third the

total paid by Petitioners (starting lien amount). The Court concludes that reducing the lien amount by one-third of the settlement proceeds plainly contradicts the purpose of section 85.22 in situations where the amount recovered in a settlement with a third-party is greater than the amount paid by the insurer. If the basis for the attorney's fees calculation was the settlement amount, the employer/insurer loses the more the employee wins in their third-party settlement.

In this case, Jacobson's demand letter asked for $750,000.00. If this figure were awarded in the settlement, Petitioners' lien amount of $148,502.60 would be reduced to a negative balance; a credit owed to Petitioners before expenses are even deducted (one-third of $750,000.00 is over $100,000.00 greater than Petitioners' lien total). A less extreme example, an award of $150,000 in the settlement (less than what Jacobson actually received), poses the same contradiction. The resulting lien apportionment, using that calculation, is less than if the one-third attorney fees were assessed using the total lien amount. Using the settlement award as the figure to calculate attorney's fees prevents Petitioners from recouping as much of the benefits they paid as possible.

The Iowa Supreme Court has determined that where an insurer-respondent argued that their participation in the litigation immunized their lien from a reduction for attorney fees, the court said, "[T]he actions of intervenor's attorneys should not diminish the intervenor's responsibility under sections 668.5(3) and (4) for a *pro rata* share of reasonable attorney fee for collecting the entire amount paid by defendants; insurance carrier." *Krapfl v. Farm Bureau Mut. Ins. Co.*, 548 N.W.2d 877, 879 (Iowa 1996) (emphasis added). The court reordered a *pro rate* share of "reasonable attorney fees." *Id*. In *Farris v. General Growth Development Corp*., 381 N.W.2d 625 (Iowa 1986), the court rejected a request by an appellant to waive attorney's fees because the appellant was both the liable employer's workers' compensation insurer and their liability carrier. In rejecting this argument, the court stated:

> [Injured employee] argues that [appellant/insurer] should pay its share of the attorney fees. The district court agreed, and so do we. If the controlling purpose of section 85.22(1) is said to be to prevent unjust enrichment to an indemnitee, [appellant/insurer's] position would be correct; it was not unjustly enriched by this third-party suit. On the other hand, if the purpose of the section is to provide a fair *distribution of fees* under the exercise of a court's judgment, it would have to be construed in favor of [injured employee]. We believe the latter view is correct.

Id. at 627 (emphasis added). These cases have been interpreted as remediating the inequity of calculating attorney's fees based on the settlement recovery by demanding a *pro rata* "distribution of fees." *See* 74 A.L.R.3d 854 (1976) (citing *Farris*, 381 N.W.2d at 627) (". . . [I]ndemnitee was required to pay its share of attorney fees, to be deducted from amount of its lien on employee's recovery from third party. . . ."); 55 Drake L. Rev. 113, 161 ("The proportion of [attorneys' fees and litigation expenses] allocated to the employer is the proportion of the employer's recovery compared to the total recovery."). Judicially-reviewed cases where the attorney's fees calculation begins the amount paid by the employer/insurer are instructive.

The Court finds *Ewing*'s articulation, 592 N.W.2d at 690, expository of the correct method to calculate attorney's fees:

> Prior to the third-party settlement, Allied had paid Ewing healing period and permanency benefits and necessary medical care totaling $195,435.47. Under Iowa Code section 85.22(1) (1993) Allied was entitled be reimbursed out of the third-party recovery. *See Shirley v. Pothast*, 508 N.W.2d 712, 718 (Iowa 1993); *Christensen v. Pocket Lounge, Inc.*, 519 N.W.2d 401, 403 (Iowa 1994). Entitlement is subject to Allied's obligation to pay its proportionate share of the $250,000 contingent attorney fees Ewing had paid his attorneys and its proportionate share of $17,945.21 in administrative expenses that had been expended pursuing the third-party suit. *Ahlers v. EMCASCO Ins. Co.*, 548 N.W.2d 892, 894 (Iowa 1996). A net of $126,392.60 was accordingly paid to Allied.

Ignoring the settlement amount, $195,435.47 is reduced by one-third to account for attorney's fees. That figure is $130,290.31. Next, Jacobson's method would correctly deduct one-third total expenses incurred by Ewing, or $5,981.75. The resulting figure is $124,308.56, but the *Ewing* court awarded $126,392.60. *Id*. at 690. The $2,084.04 difference between the proper calculation

and the lien total awarded can be attributed to the payment method used to reimburse attorney's fees. "The parties seem to be in agreement that the following three methods are ways by which the distribution of the lien could proceed: an immediate lump-sum payment of attorney fees, periodic payment of attorneys fees and deferred payment of attorneys fees." *Id*. at 690-91. The court ordered periodic payments and reduced the lien for sums already paid by Allied. *Id*. The Court here concludes that attorney's fees are accounted for by diminution of the workers' compensation payors' initial lien balance by one-third.

In our case, the calculation is $148,501.60, minus $49,500.53 for attorney's fees, and again reduced by $1,340.61 for Petitioners' share of expenses, resulting in a total lien amount of $97,660.46. Jacobson's "alternative" calculation of the workers' compensation lien properly reflects how the lien should be calculated. The decision of the Commission to set the lien at $116,666.67 was erroneous. The Court concludes the workers' compensation lien must be reduced by $19,006.21 to cognize the method of calculating the lien demanded by law.

V. CONCLUSION AND DISPOSTION.

This case presented three issues. The first was defining the parameters of Petitioners' indemnification rights under Iowa Code section 85.22. Specifically, whether pain and suffering damages in a third-party settlement may be indemnified by a workers' compensation payor in their lien on the settlement. On that question, the Court answers in the affirmative. Second, the Court scrutinized the viability of Jacobson's Release and Settlement Agreement and Petitioners' Notice of Consent to Settle. The latter document provided assent to the terms in the first, including paragraph 3 of the Release. Though lacking in veracity, any invidious intent was negated by Jacobson's misinterpretation of Iowa law. The Court finds that both documents are valid and enforceable. Petitioners consented to the settlement with the objective of reimbursement for

benefits paid. Paragraph 3 of the Release did not injure that statutory right.

Last, the method used to calculate the total workers' compensation lien was reviewed. Jacobson correctly argues that the method affirmed by the Commissioner was erroneous. The lien amount begins with what Petitioners already paid in benefits. Then, to account for attorney's fees, the amount paid in benefits is reduced by one-third. Last, one-third of total expenses is deducted from the lien. The Commissioner erred in calculating Petitioners' lien because he began with the proceeds of Jacobson's third-party settlement and reduced that amount by one-third. Also, there was no mention of Petitioners' share of expenses. The lien set by the Commissioner should be adjusted by $19,006.21 to total $97,660.46.

For all the reasons set forth above, the Court concludes that Jacobson's Petition for Judicial Review is **GRANTED**. The Iowa Workers' Compensation Commission's Decision is **REVERSED AND REMANDED WITH INSTRUCTIONS.**

State of Iowa Courts

Case Number	**Case Title**
CVCV062881	TWIN CITY FIRE INS CO ET AL VS CHERYL MCKOY
Type:	ORDER FOR JUDGMENT

So Ordered

Scott J. Beattie, District Court Judge,
Fifth Judicial District of Iowa

Electronically signed on 2022-09-28 14:36:16