BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

PAULA L. ARREOLA, Claimant, vs. BODEANS BAKING GROUP HOLDING, LLC, Employer, FARMINGTON CASUALTY CO., Insurance Carrier, and INDIANA INSURANCE CO., Insurance Carrier, Defendants.	FILED FEB 16 2018 WORKERS' COMPENSATION File Nos. 5040956, 5040974 APPEAL DECISION

On August 13, 2012, claimant filed an original notice and petition in arbitration seeking workers' compensation benefits from BoDeans Baking Group Holding, LLC (BoDeans), employer, and Farmington Casualty Company (Farmington) arising from an alleged work injury to claimant's left shoulder on April 1, 2009; this petition was assigned File No. 5040956. An answer was timely filed by BoDeans/Farmington.

On August 15, 2012, claimant filed an original notice and petition in arbitration seeking workers' compensation benefits from BoDeans Baking Group Holding, LLC (BoDeans), employer, and Indiana Insurance Company (Indiana) arising from an alleged work injury to claimant's bilateral shoulders on October 25, 2010; this petition was assigned File No. 5040974. An answer was timely filed by BoDeans/Indiana.

The two arbitration petitions, File Nos. 5040956 and 5040974, were consolidated for hearing. Evidentiary hearing occurred on May 31, 2013. The presiding deputy commissioner issued arbitration decisions in both files on February 6, 2014. The deputy awarded no permanent disability benefits against BoDeans/Farmington in File No. 5040956. The deputy awarded permanent total disability benefits against BoDeans/Indiana in File No. 5040974.

No appeal or cross appeal was filed with respect to File No. 5040956. On February 21, 2014, BoDeans/Indiana filed an appeal in File No. 5040974. By her appeal brief in File No. 5040974, claimant argued for affirmance of the award against BoDeans/Indiana, or in the alternative, a finding of responsibility against BoDeans/Farmington.

On February 20, 2015, the workers' compensation commissioner delegated authority to a distinct deputy commissioner to issue the appeal decisions in File Nos. 5040956 and 5040974. By an appeal decision dated March 12, 2015, the commissioner's delegee ruled only File No. 5040974 had been properly appealed and declined to address any potential issues in File No. 5040956. The deputy then affirmed the award of permanent total disability benefits in File No. 5040974 against BoDeans/Indiana. BoDeans/Indiana sought judicial review; the district court affirmed the appeal decision by a ruling dated January 14, 2016. No further review was taken.

On February 26, 2016, claimant filed a petition for full commutation of the award of permanent total disability benefits against BoDeans/Indiana in File No. 5040974.

On March 7, 2016, Farmington filed an original notice and petition for reimbursement of benefits paid. Farmington identified the petition as being filed in File Nos. 5040956 and 5050974, listed both the April 1, 2009 and October 25, 2010 dates of injury, and identified both claimant and Indiana as parties. By an attachment to the petition, Farmington clarified it sought an order requiring Indiana to reimburse Farmington for benefits Farmington previously paid and which had been determined the obligation of Indiana.

On March 10, 2016, Indiana filed answers to claimant's petition for full commutation and to Farmington's petition for reimbursement.

Farmington's petition for reimbursement was provided to a distinct deputy commissioner for review. On March 16, 2016, that deputy issued a ruling dismissing Farmington's petition for contribution. The deputy reasoned:

> Apparently, Farmington Casualty Company paid claimant weekly benefits in excess of its liability in the arbitration decision. However, there was no claim in the arbitration proceeding by Farmington Casualty Company for contribution or indemnity for benefits paid. There was no prior order by this agency pursuant to Iowa Code section 85.21 to allow a claim by Farmington Casualty Company for reimbursement for benefits it paid after the liability of both insurers was finally determined.
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> First, any claim of reimbursement Farmington Casualty Company may have had against Indiana Insurance Company should have been raised in the arbitration proceedings and it failed to do so. Now, Farmington Casualty Company has no standing to pursue a claim for reimbursement.

(Ruling, March 16, 2016)

Following issuance of the March 16, 2016 ruling, Farmington appealed. Indiana resisted Farmington's appeal and argued the ruling should be affirmed, on the bases that Farmington lacked standing and was not entitled to reimbursement for voluntary indemnity benefits paid. Indiana highlighted Farmington's failure to procure a section 85.21 consent order and failure to assert a reimbursement issue at the time of evidentiary hearing in May 2013.

Claimant and Indiana subsequently entered into a compromise settlement pursuant to section 85.35, resolving their potential claims in File No. 5040974 on a full and final basis. The settlement documents were approved by this agency on August 24, 2016.

The commissioner delegated authority to the undersigned to issue the decision in the currently pending appeal. All other previously opened actions in File Nos. 5040956 and 5040974 have been resolved. The sole issue before me on appeal is the propriety of the March 16, 2016 ruling dismissing Farmington's petition for contribution.

The deputy accurately summarized the applicable law and agency precedent on point to this issue in his March 16, 2016 ruling:

> Except for review-reopening proceedings, an employer or insurer lacks standing before this agency pursuant to Iowa Code section 86.26(4) in that only injured workers or their representatives can file petitions with this agency seeking benefits. Dakota Truck Underwriters v. Continental Western Insurance, File Nos. 5028722 & 5028738 (App. September 28, 2011); Poindexter v. Grant's Carpet Service, Vol. 1-1, Iowa Industrial Commissioner 195, 196 (App. August 10, 1984). The only exception comes with the application of Iowa Code section 85.21 when there is a dispute as to liability and one of the parties is ordered by the agency to pay benefits initially. This agency can then order reimbursement to that party, if appropriate, when liability is finally determined. See Iowa Code section 85.21(3). In this case, there was no prior order for payment of benefits under Iowa Code section 85.21.
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> This agency has issued three agency precedent cases on this issue. Barglof v. G. W. "Pete" Howe, Inc., File Nos. 872409 & 840249 (App. November 20, 1996); Bromert v. Trausch Co., File No. 788831 (App. June 28, 1996); and Zurich American v. Allied Mutual Insurance, File Nos. 1011165, 1059572, 1059573, 1059574 (App. June 20, 1998). The last case interprets Barglof and Bromert. In Barglof, it was determined that an insurer or employer cannot seek reimbursement before this agency without an order under Iowa Code section 85.21 and then only for benefits paid subsequent to that order. In Bromert, it was held that an order of reimbursement is proper for benefits paid prior to an 85.21 order. In Zurich, it was determined that the distinguishing fact between Barglof and Bromert was the issuance of an 85.21 order prior to an evidentiary hearing on the issue of liability.

Based upon the foregoing, the deputy ordered dismissal of Farmington's petition for contribution. I affirm the deputy's decision, with the following additional analysis:

Iowa Code section 85.21 states, in relevant part:

85.21 Payments concerning liability disputes.

1. The workers' compensation commissioner may order any number or combination of alleged workers' compensation insurance carriers and alleged employers, which are parties to a contested case or to a dispute which could culminate in a contested case, to pay all or part of the benefits due to an employee or an employee's dependent or legal representative if any of the carriers or employers agree, or the commissioner determines after an evidentiary hearing, that one or more of the carriers or employers is liable to the employee or to the employee's dependent or legal representative for benefits under this chapter or under chapter 85A or 85B, but the carriers or employers cannot agree, or the commissioner has not determined which carriers or employers are liable.

...

3. When liability is finally determined by the workers' compensation commissioner, the commissioner shall order the carriers or employers liable to the employee or to the employee's dependent or legal representative to reimburse the carriers or employers which are not liable but were required to pay benefits. Benefits paid or reimbursed pursuant to an order authorized by this section do not require the filing of a memorandum of agreement. However, a contested case for benefits under this chapter or under chapter 85A or 85B shall not be maintained against a party to a case or dispute resulting in an order authorized by this section unless the contested case is commenced within three years from the date of the last benefit payment under the order. The commissioner may determine liability for the payment of workers' compensation benefits under this section.

Rule 876 IAC 3.1(11) provides for creation of a form entitled application and consent order for payment of benefits. The rule states:

This form is the application and consent order for payment of benefits under Iowa Code section 85.21 which is used by an employer or an insurance carrier to pay weekly and medical benefits without admitting liability and *to be able to seek reimbursement* from another carrier or employer. (Emphasis added.)

This language is not optional and creates an obligation upon the paying party, in this case Farmington, to file prior to seeking reimbursement. The form in question, agency form 14-0037, further supports this obligation, as it provides the approved form "shall be attached to the petition if reimbursement is sought." At no point did

Farmington complete the applicable form. A procedure was available to Farmington to utilize, yet it failed to do so.

Farmington's appeal brief relies upon the case of Second Injury Fund of Iowa v. Bergeson, 526 N.W.2d 543 (Iowa 1995). The facts of that case are distinguishable from the case at bar. In Bergeson, the issue of reimbursement was determined at the deputy level in connection with the original arbitration hearing. By raising the issue of reimbursement at the time of evidentiary hearing, the deputy is able to avoid the potential for double-recovery by a claimant or double-payment by a party. To wit, in Bergeson, the deputy ordered defendant-Second Injury Fund to reimburse defendant-insurance carrier for benefits paid by defendant-insurance carrier in excess of its ultimate liability. The order for reimbursement did not decrease the employee's total benefit, nor did it result in a double-payment of benefits by either defendant.

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

ORDER

IT IS THEREFORE ORDERED that the ruling of March 16, 2016 is AFFIRMED in its entirety, with the limited additional analysis set forth above.

Signed and filed this 16th day of February, 2018.

ERICA J. FITCH
DEPUTY WORKERS' COMPENSATION
COMMISSIONER

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