LITIGATION TRACK
Work Comp 101

2:30 pm.-3:30 p.m.

Presented by
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OVERVIEW OF WORKERS' COMPENSATION

I. INTRODUCTION

The workers' compensation system is entirely a creature of statute. For this reason, the only benefits an injured worker can receive--and the responsibilities for employers and insurance carriers for claims handling--are those specifically provided for in the statute. In addition, the only rules governing procedure are those specifically created in the workers' compensation statutes, the administrative rules of the Iowa Workers' Compensation Commissioner’s office, and the Iowa Administrative Procedures Act (Chapter 17).

When a person suffers a work related injury, they are primarily entitled to three things and ONLY three things: (1) Medical benefits; (2) temporary disability or healing period benefits (to compensate for time off work recovering from the injury); and, (3) permanent disability benefits (if they have suffered permanent functional impairment as a result of the injury).

Note that the work comp statute is silent with respect to employment rights. That is because the workers’ compensation act is not a job security law. Whatever right a worker had to their job before they were injured is completely unaltered by the fact they have suffered a work injury.

In addition to the substantive law, the claim procedure itself is also a creature of statute. Although the Iowa Workers' Compensation Commissioner’s office has adopted the Iowa Rules of Civil Procedure for arbitration proceedings (876 IAC 4.35), there are important exceptions and variations. Moreover, because workers' compensation claims are treated as administrative claims, they are governed by a completely different set of evidentiary rules (i.e. more relaxed evidentiary standards) than civil cases. Iowa Code §17A.14; 85.18(1).

The rules of procedure and evidence in arbitration proceedings before the Workers' Compensation Commissioner are supposed to make the claims quicker, simpler, and easier to pursue. Also, unlike most litigation, the statute and the rules of the Commissioner's office place certain burdens on defendant employers and insurance carriers with respect to claims handling. For instance, the case law places an affirmative burden on the employer and their insurance carrier to adequately investigate claims and to promptly pay benefits or, in the case of denial, to communicate such the denial, and the reasons for it, to the injured worker. A failure to abide by these requirements is a compliance violation, and the employer and insurance carrier can be fined by the Commissioner's office or be subjected to penalty benefits for such failure. A failure by the insurance carrier to meet these obligations can also result in a bad faith case.

Applicable Iowa statutes are:

1. Chapter 85- Workers Compensation
2. Chapter 85A- Occupational Disease Compensation
3. Chapter 85B- Occupational Hearing Loss
4. Chapter 86- Division of Workers Compensation [organization of the WC Division]
5. Chapter 87- Compensation Liability Insurance
Applicable federal statutes are:

1. FECA- “Federal Employees Compensation Act”, administered by the Office of Workers’ Compensation Programs (OWCP), which is a division of the Department of Labor. An injury is compensable if the employee is “killed or disable” as a “result of an injury that is sustained while in the performance of duty”.
2. FELA- “Federal Employers Liability Act- providing compensation for federal employees engaged in interstate transportation, such as railway workers.
4. Long shore and Harbor Workers’ Compensation Act- providing benefits to longshoremen and others engaged in maritime activities on navigable waters.

II. ELEMENTS OF A WORKERS' COMPENSATION CASE

In order to prove entitlement to worker's compensation benefits, the injured worker really only has to show that (1) they were an employee at the time of injury and that (2) they suffered an injury "arising out of" and "in the course of" employment.

A. EMPLOYEE / INDEPENDENT CONTRACTOR

Employees are covered by the workers' compensation act. Independent contractors are not covered, and neither are their employees, generally. Once a worker has proven that at the time of the injury the worker was rendering services for the employer, the burden shifts to the employer to prove that the worker was an independent contractor and not an employee. Whether a particular individual doing a particular job is an "employee" or an "independent contractor" is a question of fact. Neither the intent of the parties nor one particular factor is determinative. The relevant factors were set out in Malinger v. Webster City Oil Co., 211 Iowa 847, 851; 234 N.W. 254 (1931), and over time, eight factors have developed:

1. The existence of a contract for performance by a person of a certain piece or kind of work at a fixed price.
2. The independent nature of the worker’s business or of his distinct calling.
3. The worker’s employment of assistants with the right to supervise their activities.
4. His obligation to furnish necessary tools, supplies, and materials to perform the work.
5. His right to control the progress of the work, except as to final result.
6. The time for which the worker is employed.
7. The method of payment, whether by time, or by the job.
8. Whether the work is part of the regular business of the employer.

B. ARISING OUT OF / IN COURSE OF EMPLOYMENT

In order to be compensable, an injury must both arise out of and occur in the course of employment: “Every employer, not specifically excepted by the provisions of this chapter, shall provide, secure, and pay compensation according to the provisions of this chapter for any and all personal injuries sustained by an employee arising out of and in the course of the employment... " Iowa Code § 85.3(1)(emphasis supplied).
The words "arising out of" refer to the cause or source of the injury. The words "in the course of" refer to the time, place and circumstances of the injury. *Sheerin v. Holin Co.*, 380 N.W.2d 415 (Iowa 1986); *McClure v. Union County*, 188 N.W.2d 283 (Iowa 1971).

“Arising out of,” means that employment activity contributed in some fashion to the injury. “In the course of” means the injury happened at work or because of work. So, for instance, if a person has a heart attack at work, that may be in the course of employment (since it happened at work), but it is not necessarily arising out of employment (since the heart attack may have been caused by non-employment factors such as atherosclerosis or high blood pressure). Or, if a worker is injured by a co-worker when both are engaged in horseplay, the injury meets the arising out of requirement, but not the in the course of requirement.

The Iowa Supreme Court has distinguished the “arising out of” standard from the concept of proximate cause: “It is accurate to say that an injury must proximately cause the disability, but it is not accurate to say the employment must proximately cause the injury. The injury need only ‘arise out of’ the employment—a less onerous standard than the proximate-cause standard from tort law.” *Meyer v. IBP*, 710 N.W.2d 213, 222 (Iowa 2006).

The meaning of “arising-out-of” has developed over time. While older courts have looked to whether the employment presented an “increased risk” or “peculiar risk” other than a harm to which all people have equal exposure, the modern courts look to whether there is a “direct causal connection between the plaintiff’s injury and the general and incidental requirements or duties contemplated by her employer.” *Crowe v. De Soto Consol. Sch. Dist.*, 68 N.W.2d 63 (1955). Other descriptions have been made as well: “when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury.” *Burt v. John Deere Waterloo Tractor Works*, 73 N.W.2d 732 (1955). Accordingly, “arising-out-of” has included situations where a teacher fell on the road outside of the school building when she was checking road conditions for co-employees and students and coverage for an employee who was injured by assault from a co-employee who had an insane delusion. In *McIlravy*, a torn meniscus was compensable because the nature of the employment required more physical labor, but in *Miedema v. Dial Corp*, a worker who injured his back while turning to flush the toilet did not recover because the particular injury could have occurred at any toilet.

The meaning of “in the course of”- 85.61(7) provides that injuries to employees who provide services on, in, or about the premises which are occupied, used, or controlled by the employer and injuries occurring in places where the employer’s business requires their presence and subjects them to dangers incident to business are compensable. Departure by the employee from the usual place of employment must not amount to abandonment of employment or be an act wholly foreign to usual work.

- Injuries in employer-provided parking are generally compensable, while those in public parking are not. *Ruvalcaba v. Tyson Foods*, No. 1859173 (WC Arb. 2008).
- A fall on ice on sidewalk in front of the employer’s business was so closely related in time, location, and employee usage to the work premises to be covered. *Frost v. S.S. Kresge Co.*, 299 N.W.2d 646 (Iowa 1980).
- Sometimes an employee living on the premises has a compensable injury, or may have a compensable injury occur during break. *Sister Mary Benedict v. Saint Mary’s Corporation*, 124 N.W.2d 548 (Iowa 1963); *Halstead v. Johnson’s Texaco*, 264 N.W.2d 757 (Iowa 1978).
• Traveling employees are generally covered, while on the road. *Medical Associates Clinic, P.C. v. First Nat. Bank of Dubuque*, 440 N.W.2d 374 (Iowa 1989).

• Injuries at company social events (i.e. the company picnic or entertaining clients) may be covered if the employer is shown to benefit from the activity. *Linderman v. Cownie Furs*, 13 N.W.2d 677 (Iowa 1944).

Generally, the going and coming rule states that injuries are not compensable if the employee is going or coming to or from work except when the employee shows additional facts to bring himself under an exception to the rule. Contrast someone injured taking her usual in-town commute to work (not usually in the course of work) with a traveling salesperson driving to his next appointment on the road (typically in the course of work). *Bulman v. Sanitary Farm Dairies*, 73 N.W.2d 27 (Iowa 1955)(general rule described). See also, *2800 Corp. v. Fernandez*, 528 N.W.2d 27, 30 (Iowa 1995)(“zone of danger” created by workforce intoxication, extended to provide work comp benefits to bar employee who was seriously injured in car crash after mandatory drinking with patrons).

C. IDIOPATHIC INJURIES

The issue of so-called "idiopathic" injuries relates specifically to the "arising out of" requirement for work injuries. The idea is that an injury that occurs at work, but for reasons that are either unexplained or entirely personal to the worker, does not arise out of the work activity and, therefore, is not compensable.


To be compensable, an idiopathic injury must be shown to either contribute to the risk, or aggravate the injury. Consequently, injuries from idiopathic falls from heights and stairways or hitting one’s head on a structure on the way down to the floor are generally sufficient to be compensable whereas falls onto level surfaces are generally not compensable. The Iowa Supreme Court found that a fall from 3 to 4 feet from a ladder while the worker was suffering from alcohol withdrawal presented sufficient risk from employment to render a fall compensable. *Koehler Elec. v. Wills*, 608 N.W.2d 1 (Iowa 2000).

III. LIMITATION PERIODS

A. TWO--YEAR STATUTE OF LIMITATIONS

If no weekly benefits have been paid to the injured worker, the injured worker has two years from the date of injury to file a workers' compensation claim. Iowa Code § 85.26. Medical benefits DO NOT count as weekly benefits.

B. THREE--YEAR STATUTE OF LIMITATIONS

If weekly benefits have been paid, then the injured worker has 3 years from the
date of last payment (not date of last receipt of benefits) to file a claim.  *Kiesecker v. Webster City Custom Meats, Inc.*, 528 N.W. 2d 109, 112 (Iowa 1995)(payments made when mailed not when received).  Again, however, medical benefits do not count as weekly benefits.  The three-year limitations period from the last date of payment of weekly benefits is clear and definite.  There is no room for ambiguity as to when the period starts and ends (as with the two-year statute and the discovery rule or cumulative injury rule, where each scenario is examined on a case by case basis).  *Whitmer v. Internat’l Paper Co.*, 314 N.W.2d 411 (Iowa 1982).

There are several ways to confirm whether weekly benefits have been paid and the date of last payment.  The first is to ask the client, however, this can be notoriously unreliable, particularly when specific dates are involved or if the client received some other form of private or non-occupational disability benefit that they mistakenly thought was workers compensation.  The payment of these types of benefits does NOT extend the statute of limitations.

Sometimes the client will have the original or a copy of the last weekly benefit check received, and that is a reliable source for pinning down this date.  Another option is to obtain from the Commissioner’s office a copy of the periodic activity report (PAR) the insurance carrier should have filed with the Commissioner's office when benefits were stopped.  If properly completed and filed, this document will state exactly the last date of payment of any weekly benefits.  However, insurance carriers are often lax in filing documents, so don’t be surprised if nothing is on file.  Note that you will need two forms to obtain a copy from the Commissioner ‘s office: 1.) request form; and, 2.) waiver.

Another option is to simply contact the insurance carrier directly and request a copy of their file or an itemization of benefits paid.  A sample letter of representation is attached.

C. DISCOVERY RULE AND THE SOL

Both the 90-day notice requirement (Iowa Code §85.23) and the statute of limitations (Iowa Code §85.26) can be extended based upon the discovery rule.  Under the discovery rule, the Claimant must have actual or imputed knowledge of the nature, seriousness and probable compensable character of the injury or disease before the statute begins to run.  *Swartzendruber v. Schimmel*, 613 N.W.2d 646, 650 (Iowa 2000).  See also, *Orr v. Lewis Central School District*, 298 N.W.2d 256, 261 (Iowa 1980).

The two-year statute of limitations does not begin to run until the claimant: 1.) Knows of the injury; and, 2.) Is aware of its probable, compensable nature.  *Herrera v. IBP, Inc.*, 633 N.W.2d 284 (Iowa 2001).

The Commissioner has held that the defense was waived when the employer didn’t plead it in the answer, as an affirmative defense.  *Shirley v. Shirley Ag. Serv.*, 90-91 IAWC 339 (App. Dec. 1990).

The “Cumulative Injury Rule” applies to injuries, which develop over the course of time.  The date of injury is the date on which the disability “manifests itself.”  A cumulative injury manifests itself “… when the injury and the causal relationship of the injury to the claimant’s employment would be plainly apparent to a reasonable person.”  *Oscar Mayer Foods Corp. v Tasler*, 483 N.W.2d 824, 829 (Iowa 1992).  The Iowa Supreme Court has stated that a cumulative injury is “manifested” when the person is plainly aware that: 1.) He or she suffers
from a condition or injury; and, 2.) The condition or injury was caused by employment. *Herrera v. IBP, Inc.*, 633 N.W.2d 284, 284 (Iowa 2001). In order for the two-year statute of limitations to be triggered, the claimant must know “that the condition is serious enough to have a permanent adverse impact on the claimant’s employment or employability, i.e. the claimant knows, or should know the ‘nature, seriousness and probable compensable character’ of his injury or condition.” *Herrera*, at 288. Minor pain or symptoms may not trigger the discovery rule. *Perkins v. HEA of Iowa*, 651 N.W.2d 40 (Iowa 2002).

**D. NINETY--DAY NOTICE REQUIREMENT**

Iowa Code § 85.23 requires that an injured worker give notice to their employer of their injury within 90 days of the injury. Actual notice (i.e., first-hand knowledge) of the injury by the employer or the employer's representative is sufficient.

The discovery rule may apply to the notice requirement: the 90-day notice begins to run from the occurrence of the injury. An injury occurs when the employee, acting as a reasonable person, recognizes its nature, seriousness, and probable compensable nature. *McKeever Custom Cabinets v. Smith*, 379 N.W.2d (Iowa 1985).

The notice requirement is waived if the employer or its insurance company paid benefits on the claim.

No particular form of notice is required. Iowa Code § 85.24.

**IV. MEDICAL BENEFITS AND RELATED MATTERS**

Iowa Code § 85.27 provides that the employer has to pay the medical bills for treating a work-related injury.

**A. EMPLOYER CHOICE OF CARE**

So long as the employer is paying the bills, the employer gets to pick the doctor. Generally speaking, if the injured worker incurs medical expenses treating with an "unauthorized" doctor, the employer will not be obligated to pay the bill. However, there are exceptions to this rule.

Pursuant to *Haack v. Von Hoffman Graphics*, File No1268172 (Appeal Dec., July 31, 2002): An employer waives the right to choose the care and loses any subsequent lack of authorization defense by either abandoning care or denying liability for the worker's medical problem. Where an alternate care proceeding was not initiated under Iowa Code § 85.27(4) and rule 876 IAC 4.48, the reasonable cost of subsequent care chosen by the injured worker, following the employer's abandonment of care or a failure to assume liability for the condition sought to be treated, may be reimbursed upon a showing that the care was reasonable and necessary treatment of the work injury. When there has been no abandonment of care and liability is admitted, an injured worker may be reimbursed for unauthorized care without initiating an alternate care proceeding upon a showing that the unauthorized care was successful and beneficial toward improving the employee's condition in a way that benefited the employer as well as the employee.
B. ALTERNATE CARE

If the injured worker is not satisfied with the care provided by the employer's chosen physician, the injured worker may petition the Commissioner's office for alternative care. Iowa Code § 85.27(4); Rule 4.48. In order to prevail the injured worker must show that the employer-provided care is "unreasonable." This evidence often takes the form of a medical opinion from another provider. The employee must communicate the reason he or she is dissatisfied with the care prior to filing a Petition for Alternate Care, to allow the parties to reach an agreement voluntarily. The Petition is filed using Form 100C. There is no filing fee. Rule 4.8(2).

A telephone hearing will be scheduled within ten days of the Petition being filed. Note that an Alternate Care Petition will be dismissed, if the defendant denies that the claimant’s condition is related to his or her work injury.

One basis for filing an Alt Med Care Petition occurs when an authorized treating doctor has no further care to offer, even though the claimant is still symptomatic. In this situation, the defendant has failed to offer care reasonably suited to treat the injury and alternate care may be ordered. *Rapoport v. Morrell & Co.*, WC File No. 1254301 (Arb. Dec. 11/20/01); *Pirelli-Armstrong Tire Co. v. Reynolds*, 562 N.W.2nd 433 (Iowa 1997).

Alternate Medical Care may be sought where an employer refuses to authorize a referral to a specialist or tests. Referrals and prescriptions by authorized medical providers are usually found to be authorized care.

A claimant may seek alternate care if he or she is unduly inconvenienced by being made to travel outside of his or her local area, if suitable care is available locally. *West Side Transport v. Cordell*, 601 N.W.2d 691 (Iowa 1999).

The Alternate Care Petition may be used as a means of getting treatment for a client who has group health insurance coverage. Health insurance policies typically exclude work-related injuries and will not pay treatment bills. Accordingly, a problem arises when some work comp carriers don’t want to admit OR deny the injury and instead, want to “investigate”. If the client needs a denial to get group health insurance coverage or you want the work comp carrier to admit or deny the claim, formally, then filing a Petition for Alternate Care is a good way to achieve these results. If the work comp carrier denies the claim, group health insurance becomes liable for medical benefits, pursuant to Iowa Code §85.38(2). In addition, the employer and work comp carrier lose the right to assert the defense of unauthorized treatment.

C. RELEASE OF MEDICAL INFORMATION

The injured worker is required to give a patient's waiver to the employer. Rule 3.1(17) provides for an official WCC patient waiver form, which form was recently modified to track the ISBA form patient waiver and comply with HIPPA. This form is available in pdf format from the Commissioner's web site.

It is a good idea to have your client fill out a couple of blank waivers so that you can keep them in your file to be copied and used as information is needed in the case.
D. DEBT COLLECTION PROHIBITION

Iowa Code § 85.27 provides that while a contested case is pending, no debt collection may be pursued over a disputed medical bill. Debt and Debt Collection are defined in Iowa’s Commercial Code, §537.7102(4),(5). Also, Iowa Code § 85.38(2) provides that if an employer denies liability for a workers' compensation claim, a private health insurer cannot deny payment for medical expenses on the basis that the employer's liability is unresolved. Attached is a form letter that can be sent to providers or collection agencies, to halt collections, while a case is pending.

E. INDEPENDENT MEDICAL EVALUATION

Pursuant to Iowa Code § 85.39, an injured worker may get an Independent Medical Evaluation—at the employer’s expense. This is a one-time, second opinion from a doctor of the injured worker's choice, regarding permanency. There is a Form 100A Petition, which is used for asking the Commissioner to order such an IME, if an authorized treating doctor has provided a rating, and claimant thinks the rating is too low, or incomplete in some way. However, most IME evaluations are agreed to between the parties, without the necessity of filing a Petition. This is an evaluation, not treatment.

F. MILEAGE

Injured workers are entitled to have their mileage expense reimbursed for traveling to and from doctor’s appointments. The mileage reimbursement rate for workers compensation purposes is the same as allowed by the IRS for business travel. Rule 8.1(2). The current rate is available from the Commissioner’s web site (effective July 1, 2013, the mileage reimbursement rate is 56.5 cents per mile.).

V. WEEKLY BENEFIT RATE

The weekly benefit rate is 80% of the injured worker’s after tax average weekly wage. Iowa Code §§ 85.35, 85.36 and 85.37. However, this simple concept can become a huge issue in a case since there are many ways of calculating the "average weekly wage" of an injured worker. See, Iowa Code § 85.36. Weekly rate tables are available at the Commissioner’s web site, in downloadable formats.

In order to calculate the correct average weekly wage (and, therefore, the correct weekly benefit rate) both sides must have access to all payroll records in the employer’s possession regarding the injured worker. For hourly workers, "non-representative" weeks are not to be used in figuring an average weekly wage. Thus, it's important to see all the payroll records to see what the representative weeks really are, and also to know the reasons for the non-representative weeks. If an injured worker has fewer hours one week because they were sick or took a vacation, which is not a representative week. However, if the hours are short because of a natural work slow down, then arguably that would still be a representative week.

Also remember that some certain non-wage items can be included in figuring the average weekly wage of the injured worker, such as regular bonuses or room and board. The key here is whether these non-wage items are "regularly" paid or not.
A practice pointer for beginners is to remember to ask your client during your initial interview whether he or she is married or has dependent children. The applicable rate increases depending upon how many dependents the client has. The agency has typically looked to the claimant’s tax filings, if a dispute arises over the number of exemptions an injured worker may claim for rate calculation purposes.

Another practice pointer for clients whose payroll records show a lot of overtime is that in worker’s compensation, full credit is not given for overtime. Instead, a client who earns $10.00 per hour and works 50 hours per week will earn $650.00 gross if they were uninjured. However, in worker’s compensation, time and one-half is not paid for overtime. Instead, the regular pay rate is used and in this instance, rate would be based upon 50 hours at $10.00 per hour, rather than 40 hours at $10 and 10 hours at $15.00

VI. WEEKLY BENEFIT TYPES

A. TEMPORARY BENEFITS

Technically, temporary total (TTD) or temporary partial (TPD) and healing period (HP) benefits are different, even though they compensate for the same time periods. The point of temporary benefits is to replace the injured worker’s wages while they are off work recovering from their injury. These benefits begin on the date of injury and run until the injured worker either: (1) returns to work; (2) is medically capable of returning to work; or, (3) has reached maximum medical improvement from the injury, whichever occurs first. Iowa Code §85.34(1). Thus, these benefits can end even if the injured worker has not returned to work. In addition, a worker can fluctuate throughout their treatment from TTD and TPD, depending upon their ability to work on a part-time basis. An attorney should also keep an accounting of the amounts, weeks and dates of weekly benefits paid. Keep the envelopes as proof the date each check was mailed.

Occasionally, an attorney will have a client come in because they were terminated while they were off work and under a doctor’s care. Some carriers believe that a termination is a license for them to cut off weekly benefits. Instead, Iowa Code §85.33 provides that an employee is to be paid temporary benefits if: 1.) No work within the employee’s restrictions; or, 2.) The employer refuses to offer suitable employment. If “suitable work consistent with the employee’s disability” is offered, the employee must take it or risk the suspension of temporary benefits. Id.

B. TEMPORARY PARTIAL DISABILITY BENEFITS

Temporary partial disability (TPD) benefits come into play if the injured worker is still medically limited in what they can do because of the injury (and, therefore, still temporarily disabled), but is released to return to work in some partial or part time capacity. The employer pays for the hours worked, and the comp carrier pays two-thirds of the difference between the average weekly wage and the actual wages paid by the employer.

C. PERMANENT INJURIES

If an injury causes a worker to suffer a permanent functional loss of part of their body, then they are entitled to some measure of permanent disability benefits (PPD) in addition to medical and temporary disability benefits. The amount depends on three things: (1) the body part affected; (2) the degree of impairment or disability; and, (3) the weekly benefit rate.
Generally, "scheduled injuries" are limited to a specific body part listed in Iowa Code § 85.34(2) and benefits will be paid based only on the impairment to the specific body part, without regard to whether the claimant has been terminated, has no other job skills, is very aged or uneducated, or other similar factor.

"Unscheduled injuries" to body parts not listed on the schedule, are known as "body as a whole" injuries, are compensated much differently. With unscheduled injuries, the injured worker will be compensated based on "industrial disability", which means that in addition to the degree of loss suffered from the injury, the finder of fact must take into account the particular worker’s age, education, work experience, and similar factors. A worksheet for industrial disability factors is attached to assist you with preparation of your cases.

D. SECOND INJURY FUND BENEFITS

If a worker has suffered two scheduled injuries to separate body parts from separate incidents, they may be entitled to Second Injury Fund (SIF) benefits. Eligibility for these benefits is somewhat technical and is covered by Iowa Code §§ 85.63 through 85.69. Essentially, the idea is that compensation for two separate scheduled injuries may not adequately compensate a worker for the resulting loss of earning capacity (industrial disability) the combination of two injuries may create. The employer pays any scheduled benefits, and the Second Injury Fund pays any extra industrial disability resulting from the two injuries.

Be aware that only the SECOND injury need be work-related; the first injury can be from any cause whatsoever. So it is usually a good idea to ask a potential client with a scheduled injury claim about any other injury, disease or source of disability in their life preceding that injury.

In order to obtain SIF benefits, both injuries must be to scheduled members; a body as a whole injury does not work as either the first or second injury.

E. DEATH BENEFITS

Death benefits are covered by Iowa Code §§ 85.28, 85.29, 85.31, 85.42, and 85.44. A surviving spouse receives weekly benefits for the remainder of his or her life, unless they remarry. In the case of remarriage, the surviving spouse receives a lump sum of two years of benefits, if there are no surviving children entitled to benefits. Surviving children may receive benefits until age 18 or, if they are a student, until age 25.

In some instances, a worker may leave a widow but also have dependents from a previous relationship. In these instances, there is no “black and white” rule to determine which individuals should receive benefits. Instead, the deputy will “equitably apportion” the benefits among all eligible beneficiaries.
VII. COMMENCEMENT AND TERMINATION OF TTD, HP & TPD BENEFITS

A. COMMENCEMENT OF BENEFITS

1. Temporary Total Disability (TTD)

Iowa Code § 85.32:

Except as to injuries resulting in permanent partial disability, compensation shall begin on the fourth day of disability after the injury. If the period of incapacity extends beyond the fourteenth day following the date of injury, then the compensation due during the third week shall be increased by adding thereto an amount equal to three days of compensation.

2. Temporary Partial Disability (TPD)

Iowa Code § 85.33(2):

“Temporary partial disability” or “temporarily, partially disabled” means the condition of an employee for whom it is medically indicated that the employee is not capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, but is able to perform other work consistent with the employee's disability.

3. Healing Period (HP)

Iowa Code § 85.34(1):

If an employee has suffered a personal injury causing permanent partial disability ... the employer shall pay to the employee compensation for a healing period ... beginning on the first day of disability after the injury...

4. When Benefits Start--The "Waiting Period"

TTD and TPD benefits are only due after the third day of missed work. Healing period benefits, on the other hand, are due beginning on the first day of missed work. The potential difficulty is that healing period benefits are only defined in reference to whether the injury has caused some degree of permanent disability, which certainly may not be known for months following the injury. So whether these benefits should start on the first or fourth day following the injury is often unknown at the time the benefits are actually due.

In any event, if the period of disability (i.e., time off work following the injury) extends beyond two weeks, then any benefits not paid during the 3rd day "waiting period" must now be paid.

5. TPD: Partial Return to Work with Same or Different Employer

TPD benefits start when the injured worker is able to return to some type of work, but not the same work they were doing before. This is true whether the period of total disability is
considered TTD or HP. Iowa Code § 85.33(2)("... in lieu of temporary total disability and healing period benefits...").

TPD benefits only become payable when the injured worker resumes work for pay less than the work the injured worker was receiving when injured. Iowa Code § 85.33(2)(TPD benefits are paid to an employee "because of the employee's temporary partial reduction in earning ability as a result of the employee's temporary partial disability."). Obviously, this reduction in earnings could be due to fewer hours, fewer dollars per hour, or both, but there must be an actual reduction in earnings.

Iowa Code § 85.33(4) states that TPD benefits are paid based upon two-thirds of the difference between the employee's weekly earnings at the time of injury and the employee's actual gross weekly income from employment during the period of temporary partial disability.

Note that TPD benefits are paid when the partially disabled worker returns to work--at less money--with the same employer OR with a different employer. Iowa Code § 85.33(3)("If suitable work is not offered by the employer for whom the employee was working at the time of the injury and the employee who is temporarily partially disabled elects to perform work with a different employer, the employee shall be compensated with temporary partial benefits.").

B. TERMINATION OF BENEFITS

1. Temporary Total & Temporary Partial Disability

Iowa Code § 85.33(1):

... Until the employee has returned to work or is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

2. Healing Period

Iowa Code § 85.34(1):

... until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

3. Difference Between TTD/TPD and HP

Technically, there is a difference between what terminates temporary as opposed to healing period benefits. TTD/TPD benefits terminate when one of TWO things happens: (1) the employee returns to work; or, (2) is medically capable of returning to work.

HP benefits terminate when one of THREE things happens: (1) the employee returns to work; (2) is medically capable of returning to work; or (3) reaches maximum medical improvement (MMI).
From a practical standpoint this difference probably means very little, since the designation of benefits as "temporary" presupposes a full recovery. If that is indeed the case, then the day the doctor releases the injured worker to return to work would also, logically, be the date of maximum improvement and end entitlement to weekly benefits whether they are characterized as TTD, TPD or HP.

The Iowa Supreme Court has said:

We have recognized that temporary total disability compensation and healing-period compensation refer to the same condition. ... For this reason, we believe that the payment of healing-period compensation is subject to the same restrictions that apply to temporary total disability payments ... 

_Ellingson v. Fleetgaurd, Inc._, 599 N.W.2d 440, 446 (Iowa 1999).

4. Termination of Temporary Benefits Due to Return to Work (RTW)

There are multiple RTW scenarios that may affect temporary disability (TTD, TPD and HP) benefits. The simplest scenario is when the injured worker is released by the doctor with a full recovery and simply returns to their old job. Under any definition of temporary disability, any entitlement to TTD, TPD or HP benefits ends at that point.

Note that in order for a return to work to terminate temporary benefits, the return must be to work "substantially similar" to that in which the worker was engaged at the time of injury. So, for instance, a return to work at restricted hours does not terminate all temporary disability benefits, it just makes the injured worker a temporarily partially disabled worker. _Bowers v. HyVee Food Stores_, File No. 1049057 (Appeal Dec., November 1995). See also, _Mitchell v. IBP, Inc._, File No. 980259 (Arb. Dec., March 1994)("[N]othing in the statute provides that a release to return to light duty with work restrictions constitutes a termination of healing period. ... A release to return to work light duty with significant restrictions cannot be equated to a return to work as that term is used in the statute or a return to substantially similar employment as those words are used in the statute.")

Nor does the return to work does not have to be completely without restrictions in order to end the temporary disability period. _Stephenson v. Furnas Electric Co._, 522 N.W.2d 828, 832 (Iowa 1994).

Also, in order for a return to work to end the temporary disability period, the return must be successful. A failed return to work does not end the period of temporary disability. _Lithcote v. Ballenger_, 471 N.W.2d 64, 67 (Iowa App. 1991)(Claimant attempted to return to work for 5 days in April 1985; attempt to return to work was unsuccessful; claimant had surgery in June 1985, returning to work again August 26, 1985. Held that healing period ran through August 26, 1985, except for the 5 days worked).

5. Termination of Benefits Due to Failure to Accept Suitable Work

Iowa Code § 85.33(3) provides:
If an employee is temporarily, partially disabled and the employer for whom the employee was working at the time of the injury offers to the employee suitable work consistent with the employee's disability the employee shall accept the suitable work, and be compensated with temporary partial benefits. If the employee refuses to accept the suitable work with the same employer, the employee shall not be compensated with temporary partial, temporary total, or healing period benefits during the period of the refusal.

Thus, if the employer offers suitable work, and the employee refuses the work, then: “...the employee shall not be compensated with temporary partial, temporary total, or healing period benefits during the period of the refusal. During such a period of refusal, temporary benefits are simply not payable; that is, they are forfeited.” *McCormick v. North Star Foods, Inc.*, 533 N.W.2d 196 (Iowa 1995). This is to be contrasted with permanent partial disability benefits, which may be suspended in certain circumstances, but are not forfeited. *Id.*; 533 N.W.2d at 198-99.

The question in these cases turns on whether the work offered by the employer was "suitable." At a minimum, in order to be "suitable" the offered employment must be consistent with any medical restrictions. If work is offered consistent with medical restrictions--and the injured worker refuses the work for no good reason--then temporary benefits will be terminated. *Id.*; 533 N.W.2d at 196-97.


**Burden of Proof.** It should also be noted that "failure to accept suitable work" is treated as an affirmative defense by the Commissioner, and defendants have the burden of proving that: (1) defendants' offer was suitable under the statute; and, (2) claimant's refusal was unreasonable under *McCormick, infra*.

**Actual Offer Required.** The statute speaks of an "offer" of employment. Generally speaking, it is not sufficient for the employer to claim that they are not liable for temporary disability benefits because suitable work was available. Rather, the employer must actually offer that suitable work to the injured worker. *Mitchell v. IBP, Inc.*, File No. 9980259 (Arb. Dec., March 1994).

6. **Termination of Benefits Due to MMI**


The *Pitzer* decision also thoroughly discusses what is meant by the phrase "medically indicated that significant improvement from the injury is not anticipated" in Iowa Code § 85.34(1). It is important to understand exactly what this phrase means--and doesn't mean--since this phrase is the statutory basis for terminating healing period benefits when the injured worker has reached maximum medical improvement (MMI).
There are several holdings in *Pitzer* that are important in analyzing any MMI issue:

a. There is no statutory or common law limitation on how long healing period benefits may run. *Id.*, at p. 391;

b. The healing period may be characterized as that period during which there is reasonable expectation of improvement of the disabling condition. *Id.*, at p. 391, citing *Armstrong Tire & Rubber Co. v. Kubli*, 312 N.W.2d 60 (Iowa App. 1981); and,

c. The persistence of pain after the underlying injury has stabilized may or may not extend the healing period. In such an instance, the question becomes whether the claimant's 'industrial disability' has stabilized, rather than the medical condition. *Id.*, at pp. 391-92.

Another way of thinking about MMI is to link it with PPD. In other words, a person cannot be given an impairment rating (PPD) until their condition is stable (MMI); and conversely, their condition cannot be stable (MMI) until they reach the point they can be given an impairment rating (PPD). This was precisely the court's thinking in *Thomas v. William Knudson & Son, Inc.*, 349 N.W.2d 124 (Iowa App. 1984).

In *Thomas*, treating surgeon William Boulden, M.D. had issued an opinion that the injured worker was "as good as he was going to get" in December of 1980. In testimony Dr. Boulden admitted that the injured worker had made little improvement since May of 1980. However, Dr. Boulden also testified that he did not KNOW that there would be little improvement until December of 1980 and, therefore, stuck by his opinion that December 1980 was the correct date of MMI. The deputy found December 1980 as the end of healing period; the Commissioner changed that to May 1980. The Iowa Court of Appeals called it a "close question" but held that December 1980 was the correct date for ending the healing period. The Court of Appeals reasoned:

> It is only at the point at which a disability can be determined that the disability award can be made. Until such time, healing benefits are awarded the injured worker. The evidence presented by Dr. Boulden clearly indicates that he could make no determination as to the end of the healing period until December of 1980.

*Thomas*, 349 N.W.2d at 126.

In other words, entitlement to HP ends when entitlement to PPD begins. And entitlement to PPD does not begin until permanent injury is established. See also, *Hall v. Backman Sheet Metal*, 470 N.W.2d 52, 56 (Iowa App. 1991)(claimant is entitled to healing period benefits while undergoing conservative treatment that is administered in anticipation of some improvement of the condition even if, ultimately, the conservative treatment does not improve the condition).

7. Intermittent Temporary Disability Periods

Generally, the Commissioner's office recognizes that there may be situations where it appears the period of temporary disability is over, only to turn out that the period is not over. Therefore, it is entirely possible to have more than one healing period or, more accurately,
intermittent periods for which temporary disability benefits are payable. Since, generally speaking, there are only two situations that terminate the temporary period (return to work and MMI), there are two common situations where this issue arises: (1) a failed return to work; and, (2) additional medical treatment after MMI or RTW.

Failed Return to Work. The law encourages injured workers to return to work--even partially--as soon as possible after an injury. This is accomplished by terminating temporary benefits when a doctor releases an injured worker to return to work (whether there is a job waiting for them or not) and also by penalizing them by forfeiture of benefits for those workers who do not accept suitable employment when offered during a period of temporary disability.

An unsuccessful attempt to return to work does not end the period of temporary disability. Lithcote v. Ballenger, 471 N.W.2d 64, 67 (Iowa App. 1991)(Claimant attempted to return to work for 5 days in April, 1985; attempt to return to work was unsuccessful; claimant had surgery in June, 1985, returning to work again on August 26, 1985. Held that healing period ran through August 26, 1985, except for the 5 days worked).

Additional Treatment after RTW or MMI. Additional medical treatment following RTW or MMI does not automatically extend the healing period. It depends on the situation. Certainly, if the additional medical treatment does not lead to lost time from work there would be no temporary disability benefits due. Moreover, if the additional treatment is to treat ongoing pain or similar symptoms, rather than the underlying disabling condition, it will not be seen as starting a new period of temporary disability. Pitzer v. Rowley Interstate, 507 N.W.2d 389, 390 (Iowa 1993).

If, on the other hand, the additional treatment is directed at improving the underlying condition or the disability associated with the underlying condition, then additional treatment may give rise to an extension of the temporary disability period. Pitzer v. Rowley Interstate, 507 N.W.2d 389, 390 (Iowa 1993); Hall v. Backman Sheet Metal, 470 N.W.2d 52, 56 (Iowa App. 1991).

Additional Surgery. The Commissioner's office has consistently held that if a person has a second surgery, after MMI or RTW, then that person will be allowed two intermittent healing periods. See, Pinney v. Brower Construction Co., File No.863234 (Arb. Dec., February 1991). See also, Bice v. ALCOA, File No. 881267 (Arb. Dec., March 1991)(healing period found to be "intermittent.")

Putting it Together: Ellingson v. Fleetguard. The Iowa Supreme Court has examined these two situations (RTW and additional medical treatment) as they relate to intermittent healing periods:

Ellingson's argument concerning a recommencement of the healing period based on a retrogression in a worker's disability has application, if at all, to situations where healing-period benefits have been terminated based on the employee's return to work prior to attaining maximum improvement of the injury. In contrast, once it has been established through a decision of the Commissioner or a reviewing court that further significant improvement is not anticipated, all temporary disability benefits from a single injury are finally terminated to be followed by an permanent partial
disability benefit payments than are established by the Commissioner's order.

Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999)

The holding in Ellingson must be read narrowly, since the facts upon which it was based are narrow. First, the Court clearly excludes from its analysis failed or intermittent return to work situations. Second, the court clearly limits its analysis to "retrogression," that is, the worsening of a condition, as opposed to additional medical treatment, such as surgery, that typically gives rise to a discrete period of temporary disability. Thus, the Ellingson decision does not apply to the two most common causes of intermittent temporary disability.

Finally, Ellingson only applies to cases where MMI has been established "through a decision of the Commissioner or a reviewing court." Reading Pitzer and Ellingson together seems to make clear that the Commissioner and reviewing courts are fully authorized to use hindsight and find and adjust healing periods according to the facts of the case.

VIII. PENALTY AND INTEREST

A. PENALTY BENEFITS

Iowa Code § 86.13 provides for penalty benefits of up to 50% of weekly benefits, which were improperly denied, delayed or terminated. The Iowa Legislature amended this statute in 2009. The most important provision of the current penalty statute reads:

4(a). If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers’ compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.

4(b). The workers’ compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts: (1) The employee has demonstrated a denial, delay in payment, or termination of benefits, (2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.

4(c). In order to be considered a reasonable or probable cause or excuse under paragraph (b), an excuse shall satisfy all of the following criteria:

(1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.
(2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.

(3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

(Emphasis added).

Attorneys who have penalties as a potential issue in the case should be sure to amend their standard discovery to include a penalty-specific question at least for injuries occurring after the effective date of the statute. Below is an example penalty interrogatory:

State whether you deny compensability or have terminated Claimant’s benefits for the injury alleged herein, and if so, pursuant to Iowa Code § 86.13(4), state the following:

a) The nature and extent of your investigation into whether the benefits were owed;
b) All facts and law you rely on for that denial/termination of benefits;
c) Whether notice was given to the Claimant regarding the denial/termination of benefits;
d) If notice was given, whether such notice was written or oral;
e) If notice was given, the date of such notice;
f) If notice was given, who gave the notice;
g) If notice was given, the precise contents of the notice; and
h) If you claim that claimant was non-cooperative, and that benefits were denied or terminated as a result of the non-cooperation, the specific acts of non-cooperation alleged, and whether claimant was notified of that non-cooperation.

B. INTEREST

Unlike penalty benefits, interest is due on delayed or unpaid benefits regardless of whether the delay was unreasonable. In other words, interest is simply due on unpaid benefits, regardless of the reason. Pursuant to Iowa Code § 535.3, interest on worker’s compensation benefits is set at 10% per annum. See the Commissioner’s claims handling guide, in the preface of the Rate Book, for instructions on calculating interest (this information is included in the on-line format of the rate books, available at the Commissioner’s web site).

Precise recordkeeping by the attorney helps to keep track of weekly benefits and potential penalties. Since worker’s compensation cases are often handled in volume, an attorney should teach a staff member how to account for benefit checks as they come in.

A simple spreadsheet may be set up for each client, indicating:

1. The date(s) the weekly benefit check was intended to cover.
2. The amount of the check.
3. The type of benefit paid (HP/TTD; TPD; PPD)
4. The date the check was mailed.
5. The day the check was received by the attorney.
6. The date the check was due.
7. Attorney fees and/or costs deducted from the check.

IX. HEARING PROCEDURE

A. PRE-HEARING PROCEDURE

Pre-hearing procedure and deadlines are set out in Rule 4.19(3) (and in the Hearing Assignment Order sent out by the Commissioner’s office once the case is set for hearing).

The parties have a window of 60 to 120 days after the filing of a Petition, to jointly contact the hearing administrator and schedule the place, date and time of the arbitration hearing. The hearing administrator may be contacted by telephone: (515)281-6621, Monday through Friday, between 8:30 a.m. and 11:00 a.m., excluding holidays. By E-mail: dwc.hearing@iwd.state.ia.us

A party may request at hearing date, ex-parte, after 120 days have passed. Rule 4.19(3)(a).

Note that hearings are to be set within 12 months of the filing of the Petition, or as soon as practicable thereafter. Rule 4.19(3)(a).

Important pre-hearing deadlines are as follows:

- Window to Schedule Hearing: 120 to 60 days after Petition filed
- Claimant’s Expert Disclosure: 120 Days Before Hearing
- Defendant’s Expert Disclosure: 90 Days Before Hearing
- Rebuttal Expert Disclosure: 60 Days Before Hearing
- Deadline to Propound Discovery: 60 Days Before Hearing
- Exchange Witness and Exhibit Lists: 30 Days Before Hearing
- Discovery Closes: 30 Days Before Hearing

Rule 4.19(3)(a)—(d).

B. HEARING EXHIBITS

The Hearing Assignment Order provides that:

All exhibits, including medical records and reports, shall be organized by author in chronological form. Exhibit pages shall be consecutively numbered.

In reality, the individual deputies often have individual preferences as to the preparation of exhibits. Use the IAJ list-serve to glean information about these preferences.

The Hearing Assignment Order also provides that 50 pages or less of written evidence will be presumed NOT to be irrelevant, immaterial or repetitious. This gives rise to the so-called policy of a 50-page limit. However, some deputies strictly enforce this non-existent policy. Again, ask fellow attorneys on the list serve or the work comp core group about individual deputy preferences. No matter what, keep the exhibits organized chronologically, by provider, and avoid duplication.
The deputy presiding at the hearing, if an objecting party shows that receipt of the evidence would be “unduly prejudicial” may exclude evidence that is not disclosed to an opposing party, in keeping with the rules. Rule 4.19(3)(e).

C. TAXABLE COSTS

Rule 4.33 sets forth the costs recoverable in a workers' compensation case. Attach a copy of costs to the hearing report, if there is a dispute over any of them.

X. APPEALS

A. INTRA-AGENCY APPEAL

Intra-agency appeal is governed by Iowa Code § 86.24 and Rules 4.27 and 4.28, unless you feel like asking for a re-hearing, in which case you need to look at Rules 4.24 and 4.25 as well. An intra-agency appeal is commenced by filing a notice of appeal with the Commissioner's office within 20 days of the filing of the decision from which you are appealing. Rule 4.27. THE DATE THE NOTICE OF APPEAL IS "FILED" IS THE DATE IT IS RECEIVED BY THE AGENCY. Id. Because of this, you should send your notice of appeal to the Commissioner’s office as far in advance of the 20 day deadline as possible, and call to make sure it has been timely received. Moreover, you should be able to fax file the notice of appeal by following the procedure in Rule 4.39.

Moreover, be wary of any ruling “from the bench” made by any deputy. Currently, at least one appeal is pending wherein some ruling was made by the deputy from the bench while the actual written decision was not “filed” with the agency until days later. Accordingly, when the appeal was filed on the 20th day from the date the order was “filed” it was argued as untimely since the ruling was actually made orally, on the record.

B. JUDICIAL REVIEW

If a party is still aggrieved by the Commissioner's appeal decision (which is the final agency action), that party may file a petition for judicial review under Iowa Code §§ 17A.19 and 86.26. Note that the petition for judicial review is just that, a petition filed in district court, with its own set of rules and requirements, which must be met, including proof of service.

A petition for judicial review must be filed within 30 days of the date the Commissioner’s decision was filed. Iowa Code § 17A.19(3).

The filing of a petition for judicial review does not automatically stay enforcement of the Commissioner's decision. The party filing the petition must ask for and receive a stay from the district court pending resolution of the petition. See, Iowa Code § 86.42.

Once the petition for judicial review is filed, the Commissioner's office is required pursuant to Iowa Code § 86.26, to transmit a certified copy of the record of the contested case within 30 days after receiving written notice from the party filing the petition that a Petition for Judicial Review had been filed. Therefore, it is always good to send a copy of the Petition for Judicial Review to the Commissioner's office so they know to transmit the record.
The Petition for judicial review is instituted by filing a Petition in Polk County or in the district court for the county in which the petitioner resides or has its principal place of business. The court may then transfer venue to a more appropriate county. An attorney should consult Iowa Code § 17A.9 for additional rules and procedures regarding judicial review.

C. FURTHER APPEAL

A district court's ruling may be appealed to the Iowa Supreme Court, just like any other ruling by a district court. The same rules apply with respect to the standard of review, briefing schedules and requirements, oral argument, etc. A Supreme Court Notice of Appeal must be filed within 30 days of the filing of the district court order. Iowa Rule of Appellate Procedure 6.5(1).

XII. OTHER CAUSES OF ACTION

Iowa Code § 85.20 provides that the rights and remedies provided under Iowa's workers' compensation laws are the only rights and remedies an injured worker has against his employer for work related injuries. Although workers' compensation is the exclusive remedy of an injured worker as against his employer for a work related injury, that same injury may give rise to other claims.

The workers' compensation carrier generally has a right of subrogation on any money recovered in the third party action pursuant to Iowa Code § 85.22. However, there has been much litigation regarding subrogation and it is always a good idea to research the issue. For instance, compensation received under the injured worker's own uninsured motorist coverage is NOT subject to subrogation. March v. Pekin Ins. Co., 464 N.W.2d 852 (Iowa 1991).

A. THIRD PARTY CLAIMS

These are the most common types of "collateral" claims involved in worker's compensation. Typically the claim arises out of a motor vehicle accident or a construction site accident where the client was injured by somebody who was not his co-worker. Thus, the salesperson who is driving in the course and scope of his employment and is hit by another driver would have both a workers' compensation claim against his employer and a personal injury claim against the opposing driver. Another example would be the client who is working for a heating and plumbing subcontractor on a construction project who is hit in the head with a piece of sheathing being thrown off the roof by somebody working for the roofing subcontractor. If the subcontractors are separate entities, then the injured worker has both a workers' compensation claim against his employer AND a personal injury claim against the person who threw the sheathing AND that person's employer AND a possible premises liability claim against the general contractor.

B. PRODUCTS LIABILITY

When a production worker is injured in the course of employment while working with a machine, there may be a products liability claim against the manufacturer of that machine. Again, this is a third party claim subject to subrogation on behalf of the comp carrier. Of course, a products liability claim (or any third party claim) may be harder to make than a workers' compensation claim since fault has to be proven.
C. RETALIATORY DISCHARGE

*Springer v. Weeks and Leo Co., Inc.*, 429 N.W.2d 558 (Iowa 1988) the Iowa Supreme Court held that an employer's discharge of an employee merely for pursuing the statutory right to compensation for work related injuries was against public policy and would support a claim for tortious interference with a contractual relation.

There have been several cases involving permutations on the principle stated in *Springer*:

- *Below v. Skarr*, 569 N.W.2d 510 (Iowa 1997) (employer's harassment of employee, including a threat to terminate employee for exercising workers' compensation rights, was not actionable; termination must actually occur, threatened termination is not sufficient);

- *Yockey v. State*, 540 N.W.2d 418 (Iowa 1995) (no retaliatory discharge if discharge was due to reasons other than work comp claim);

- *Sanford v. Meadow Gold Dairies*, 534 N.W.2d 410 (Iowa 1995);

- *Clarey v. K-Products, Inc.*, 514 N.W.2d 900 (Iowa 1994);

- *Smith v. Smithway Motor Xpress, Inc.*, 464 N.W.2d 682 (Iowa 1990) (viable retaliatory discharge claim even if there was no interference with receipt of work comp benefits);

- *Weinzetl v. Ruan Single Source Transp. Co.*, 587 N.W.2d 809 (Iowa App. 1998) (termination due to absences was not actionable even where absenteeism was due to work related injuries); and,

- *Graves v. O'Hara*, 576 N.W.2d 625 (Iowa App. 1998) (retaliation must only be determining factor in discharge, not only factor).

D. CO-WORKER GROSS NEGLIGENCE CLAIMS

Iowa Code § 85.20(2) provides that workers' compensation is the exclusive remedy for an injured worker against co-workers except where the injury is caused by "gross negligence amounting to such lack of care as to amount to wanton neglect for the safety of another." In other words, an injured worker can sue a co-worker if the injured worker can prove that co-worker was grossly negligent. The injured worker still cannot sue the employer. In *Hernandez v. Midwest Gas Co.*, 523 N.W.2d 300 (Iowa App. 1994) the Iowa Court of Appeals held that in order to establish a gross negligence case, the plaintiff has to show that the defendant knew that injury to the plaintiff was probable, not just possible.

E. OTHER AREAS

Other potential claims not excluded by the "exclusive remedy" provisions of Iowa Code § 85.20 include or which may come up and need to be looked at include, but are not limited to: unemployment claims; disability discrimination under the ADA; civil rights claims; bad faith claims against the work comp insurance carrier; and failure to insure under Iowa Code § 87.21.
XIII. PARTICULAR RECURRING ISSUES

Because of the nature of the practice, and the statutory scheme that is the workers' compensation law, there are issues that all parties involved in the system will confront on a regular basis:

- Continued employment or job security for the injured worker; trying to protect the injured worker’s job if he or she is fortunate enough to still be working.

- Should the injured worker who is not working be looking for work, and where does he or she go to find it.

- Medical care disputes with the company doctor, and explaining to the injured worker why he or she can’t just go to their own doctor.

- Conflicts with medical and vocational consultants hired by the insurance carrier.

- Conflicts between private health insurance companies and the workers' compensation carrier as to who is paying the bills, and then trying to figure out who has paid what bills and the rights of subrogation that flow from that once the case is settled or tried.

- Explaining to the injured worker that fault doesn’t matter.

- Getting benefits started and keeping them going, which becomes critically important for the injured worker who is off work and, therefore, has no income to feed his or her family.

- Dealing with medical providers who want to be paid, and the subrogation claims of insurance companies who have paid.

- Trying to figure out who has paid what on which medical expense, and what is outstanding, so the client knows where the money will go if his or her case is settled.

- Suing co-workers, but not the employer.

- Late or missing benefit checks.

- Improperly calculated weekly rates of compensation.

- Unpaid medical mileage benefits.

- The interplay between Social Security Disability, Medicare and Worker’s Compensation Benefits.