2002 Work Comp Seminar

Affirmative Defenses

10:45-11:15 a.m.

Presentation by:
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Friday, April 5, 2002

AFFIRMATIVE DEFENSES

On the prehearing conference report, the Workers' Compensation Commissioner lists the items found in Iowa Code §85.16 (willful injury or intoxication), lack of notice under Iowa Code §85.23, expiration of the statute under Iowa Code §85.26, and jurisdiction under Iowa Code §85.71 as affirmative defenses. Employers have the burden of proof of establishing these affirmative defenses and must plead them in the answer and assert them as issues in the prehearing report or risk losing such defenses.

IOWA CODE §85.16

A. Willful injury to self or another.

> No compensation under this chapter shall be allowed for an injury caused:
> 1. By the employee's willful intent to injure the employee's self or to willfully injury another. Iowa Code §85.16(1).

This section of the law is used to analyze suicide cases. The primary cases addressing the issue of suicide as a compensable event are *Reddick v. Grand Union Tea Co.,* 230 Iowa 108, 296 N.W. 2d 800 (1941), *Schofield v. White,* 250 Iowa 571, 95 N.W. 2d 40 (1959) where the court held that a suicide is only compensable if the mental condition of the decedent at the time of the suicidal act was such that he was motivated by an uncontrollable impulse or delirium of frenzy, without conscious volition to produce death, and *Kostelac v. Feldman's, Inc.,* 497 N.W. 2d 853 (Iowa 1993). In the last of these cases (*Kostelac,* at 857) the Supreme Court adopted a chain of causation test, that is

"compensablity turns upon proof that an employment-related injury caused deranged mental state which, in turn, caused the suicide."

The most recent suicide case decided by the Supreme court is found at *Humboldt Community Schools v. Fleming,* 603 N.W. 2d 759 (Iowa 1999) . David Fleming committed suicide while he was employed as superintendent of the Humboldt Community Schools. He advocated the adoption of outcome based education and as a result became the focal point of community criticism. He became depressed, was given medications and began to talk to his wife and doctor about possible suicide. His doctor testified that his suicide was the result of depression caused by stress associated with work, particularly the OBE controversy. An expert retained by defendants testified at trial that the claimant's depression was not caused by his employment but rather by a personality disorder and a history of growing up in a dysfunctional family. Applying the test stated in *Dunleavy* (i.e. whether the mental injury was caused by workplace stress of greater magnitude than the day-to-day mental stress of other workers in the same or similar jobs), the court determined that the claimant's suicide constituted a compensable event. The court specifically rejected the intentional injury defense stating the shift in emphasis from "proof that an employee acted in an impulsive, frenzied state to proof that but for an employment-related mental injury—however experienced—the employee would not have committed suicide" is a more sound way of dealing with the willful injury issue of Iowa Code §85.16(1). *Fleming,* at 762-763.

In *Spindler v. State of Iowa,* File No. 1199641 (App. Dec. filed 9/26/00), decedent was a correctional officer who was assaulted by an inmate and smeared with body fluids from the inmate, including into mucous membranes and lacerations sustained in the assault. He became depressed as a result of the incident and committed suicide. In analyzing the case, the Chief Deputy Workers' Compensation Commissioner stated that the assault was the proximate cause of decedents depression and subsequent suicide. Therefore, his suicide was directly linked to his employment and consequently compensable.

Defendants have also tried, unsuccessfully, to utilize this section of the law to argue that claims should be barred when a claimant continues to work in an injurious environment after being advised that such employment will result in injury. For example, in *Gavin v. John Deere Waterloo Works,* File No. 1058710 (App. Dec. filed 8/31/99). The Workers' Compensation Commissioner specifically rejected such a defense stating that this argument attempts to place the assumption of risk doctrine in workers' compensation law which is not applicable to Iowa. *Hawk v. Jim Hawk Chev.-Buick,* 282 N.W. 2d 84, 91 (Iowa 1979). Such a defense was also rejected in *Shields v. John Deere Foundry,* File No. 1133859 (App. Dec. filed 10/12/99).

However, note should be taken of *Sheppard v. Premier Casting,* File No. 1199183 (Arb. Dec. filed 3/08/00). In this case, the claimant sustained an epithelial defect in the form of a scratch to his cornea at work. Claimant sought and obtained medical treatment but failed to heal. The greater weight of evidence established that the claimant was abusing topical anesthetics which

caused his defect not to heal and this non-healing defect eventually destroyed the claimant's cornea resulting in his need for a cornea transplant. The deputy held that the employer was not responsible for claimant's failure to follow medical instructions when it results in increased injury.

B. Intoxication.

> No compensation under this chapter shall be allowed for an injury caused:
> 2. By the employee's intoxication, which did not arise out of and in the course of employment but which was due to the effects of alcohol or another narcotic, depressant, stimulant, hallucinogenic, or hypnotic drug not prescribed by an authorized medical practitioner, if the intoxication was a substantial factor in causing the injury. Iowa Code §86.16(2)

The essential elements of proving this affirmative defense are that the claimant was intoxicated AND that the intoxication was a substantial factor in bringing about the injury.

Intoxication is not specifically defined in the worker's compensation statute. Evidence of intoxication might be blood alcohol levels, the interpretation of blood alcohol test result, the number of drinks ingested and conduct prior to the injury. *Lawyer and Higgs, Iowa Workers' Compensation—Law and Practice*, §7-3. Under Iowa law, intoxication is presumed where the driver of a vehicle has a blood alcohol concentration of .10 (at the time of this writing). However, intoxication can be established from other evidence where the blood alcohol levels is below this. Iowa Code §321J.2(1). Persons are intoxicated when the persons are so far under the influence of intoxicating liquors that the liquor has visibly excited their passions or has impaired their judgment. *State v. Pierce*, 65

Iowa 85, 21 N.W.2d 1999 (1884). When the use of intoxicating liquors affects the person's reason or faculties or renders persons incoherent of speech or causes the persons to lose control in any manner, or to any extent, of the action or motion of their persons or bodies, the persons are intoxicated. *State v. Baughn*, 162 Iowa 308, 143 N.W. 2d 1100 (1913).

A substantial factor is equivalent to the concept of proximate cause found in *Blacksmith v. All-American*, 290 N.W. 2d 348 (Iowa 1980). To succeed, the defense must show intoxication is not merely a possible but rather a probable substantial factor. *Stull v. Truesdale Co-op Elevator Co.*, File No. 780309 (Appeal Dec., 1987). A factor is substantial when reasonable persons considering that factor would regard it as a cause; that is, as being in some pertinent part responsible for the result produced. *Pedersen v. Kuhr*, 201 N.W. 2d 711 (Iowa 1972).

In *Garcia v. Naylor Concrete Co.,* File No. 1197811 (Arb. Decs. Filed 2/25/00 and 9/27/00), claimant was denied benefits based on the defense of intoxication raised by defendants. While claimant denied he had consumed any alcohol on the morning of his 20' fall at a construction site where he was employed as a welder, the deputy held that the physical evidence indicated otherwise. Claimant was found to have alcohol in his blood at a level (.094) such that his reaction time, his visual acuity, his actual ability to see clearly and perceive the world about him would be impaired. Defendants expert also testified that the level of alcohol would have affected his peripheral vision, his balance, his dexterity, and his ability to conduct business. The expert sufficiently

established that the drinking pattern asserted by claimant could not have resulted in the blood level testing if it was true. The deputy concluded:

> Although other factors such as the obstructed vision from the use of the welding helmet may have contributed to claimant's fall, his intoxication affected his balance, dexterity and judgment. Defendants have also proved that the intoxication was a probable substantial factor in causing the accident.

Recently, the Workers' Compensation Commissioner's deputy rejected the condition of alcoholic cirrhosis of the liver, by itself, as a defense under Iowa Code §85.16 (even though this defense was not specifically raised). In *Stowers v. Sheehan Pipeline Construction,* File No. 1253432 (Arb. Dec. filed 2/12/02). In this case, claimants' decedent died as a result of complications from heat stoke. He was an alcoholic with cirrhosis of the liver. Were it not for the cirrhosis he probably would not have suffered the heat stroke and probably would not have died from it. The deputy stated:

> It could be but was not urged that David's alcoholic cirrhosis gives rise to a defense under section 85.16(2). It is certainly clear that his ingestion of alcohol was a substantial factor in causing both the original heat stroke injury and his death. The alcoholic cirrhosis is not, however, the only factor. The alcoholic cirrhosis was an underlying factor that was acted upon by the acute heat stroke injury. Section 85.16 speaks in terms of "intoxication." There is no evidence in the record of this case that David was intoxicated on July 16, 199, or that he developed heat stroke because he was intoxicated. Workers' compensations statutes are to be interpreted in a manner beneficent to the injured employee and the employee's dependents. To interpret the word "intoxication" as meaning any cause attributable to the remote ingestion of alcohol so as to deny compensablity where the ingestion of alcohol had created a preexisting condition is irreconcilable with the beneficent purposes of the workers' compensation statutes.

C. Willful act of a third party.

> No compensation under this chapter shall be allowed for an injury caused:
> 3. By the willful act of a third party directed against the employee for reasons personal to such employee. Iowa Code §85.16(3).

It is under this section of the law that cases involving horseplay are decided.

If a claimant was engaging in horseplay, which he voluntarily instigated and aggressively participated in, an injury arising out of and in the course of employment cannot be established and is, therefore, not compensable. *Wittmer v. Dexter Mfg. Co.,* 204 Iowa 180, 214 N.W. 700 (1939) and *Ford v. Barcus,* 155 N.W. 2d 507 (Iowa 1968.

In *Anderson v. Svedala Trellex,* File No. 1252307 (Arb. Dec. filed 7/03/01), the claimant jumped off the end of a loading dock and broke his foot. He attempted to explain his behavior at hearing by stating that he was trying to go outside to check the status of the weather as he was a member of the safety committee. However, it was found that he had no obligation as a member of this committee to make sure that employees were apprised of weather condition. His argument that he was acting in his employer's best interest by going outside to check the weather was found to be without credibility in light of testimony of co-workers one of whom was so concerned about his speed in running that he thought the claimant's pants were on fire and by the fact that there were stairs that the claimant could have used had he wanted to go outside. Since there was nothing in the claimant's job description which would have remotely come close to having to jump off the dock and three employees testified that the claimant

was fooling around, claimant's injury was found not to be compensable. This decision is on appeal before the commissioner.

Claimant's claim for benefits was denied in *Blancke v. Mister Pizza, Inc.*, File No. 1197989 (Arb. Dec. filed 3/13/00). In this case, the claimant was engaging in a mock knife fight with another employee when the other employee lunged at him waving the knife. Claimant attempted to back up with his hand down at his side and eventually brought the knife down in such a manner that it hit claimant's right thumb and cut off the end of the thumb. These two employees, on the way to the hospital, discussed coming up with a story as to how this accident happened in order to keep the other employee from being fired. They invented a story that was recorded in the emergency room record that was not what really happened. The two employees did not have any problems between them that would have resulted in one assaulting the other. Claimant acknowledged that the two employees were messing around but denied that he was engaged in any activity in response to the other employee's actions. The deputy did not find claimant's testimony to be credible in light of the testimony of other employees and therefore concluded that claimant was engaged in horseplay and not entitled to compensation benefits.

In *Vandarwarka v. Pro Environmental Abatement, Inc.*, File No. 1303751 (Arb. Dec. 9/27/01), the claimant was employed as a manual laborer involved in asbestos abatement of commercial buildings. The employer paid for a hotel room plus $15.00 per day for on the road living expenses. After work, claimant retired to the motel bar to play video games and drink beer. He arrived at the bar

about 6:00 p.m. and was shortly thereafter joined by his supervisor. They bought several beers and, after the supervisor departed, claimant was joined by some coworkers and passed the time consuming alcoholic beverages. Several hours later, the supervisor returned to the bar in an intoxicated state and a fight eventually ensued between the claimant and the supervisor. Claimant was injured. At issue was whether the assault to claimant by a supervisor and coworker constituted an injury arising out of and in the course of his employment. Defendants asserted that the claimant's injury resulted from a willful act directed against him for purely personal reasons. The deputy, who found that the supervisor was drunk out of his mind, stated that that was sufficient to show there was no personal intent to cause injury to the claimant and that the assault was not personal to the claimant for any reason. The deputy held that it was clear from the record that the supervisor had absolutely no idea what he was doing at the time he assaulted the claimant and there was nothing in the record to indicate that the supervisor had a grudge against the claimant or was arguing or fighting for some personal reason on the evening in question. Benefits were allowed.

The controlling Supreme Court case in this area is *Cedar Rapids Community Schools v. Cady,* 278 N.W 2d 298 (Iowa 1979) where the court held that to establish this affirmative defense it must be shown that the injury was motivated by reasons personal to the injured worker. In *Cady* the claimant's decedent was killed by a co-employee who suffered from paranoid schizophrenia with delusions of persecution. The two employees had little to no contact on the

job and no contact off the job. There was no evidence to establish that the attack resulting in the death had any personal basis.

IOWA CODE §85.23

Notice of injury.

> Unless the employer or the employer's representative shall have actual knowledge of the occurrence of an injury received within ninety days from the date of the occurrence of the injury, or unless the employee or someone on the employee's behalf or a dependent or someone on the dependent's behalf shall give notice thereof to the employer within ninety days from the date of the occurrence of the injury, no compensation shall be allowed. Iowa Code §85.23.

The purpose of the 90 day notice or actual knowledge requirement is to give the employer an opportunity to timely investigate the facts surrounding the injury. The actual knowledge alternative to notice is met when the employer, as a reasonably conscientious manager, is alerted to the possibility of a potential compensation claim through information which makes the employer aware that the injury occurred and that it may be work related. *Dillinger v. City of Sioux City,* 368 N.W. 2d 176 (Iowa 1985); *Robinson v. Dep't. of Transp.,* 296 N.W. 2d 809 (Iowa 1980).

The time period for giving notice does not begin to run until the claimant as a reasonable person should recognize the nature, seriousness and probable compensable character of the injury. The reasonableness of claimant's conduct is to be judged in light of claimant's education and intelligence. Claimant must know enough about the condition or incident to realize that it is both serious and work connected. Positive medical information is unnecessary if information from

any source gives notice of the condition's probable compensablity. *Robinson,* at 812.

IOWA CODE §85.26

Statute of Limitations.

> 1. An original proceeding for benefits under this chapter or chapter 85A, 85B, or 86, shall not be maintained in any contested case unless the proceeding is commenced within two years from the date of the occurrence of the injury for which benefits are claimed or, if weekly compensation benefits are paid under section 86.13, within three years from the date of the last payment of weekly compensation benefits. Iowa Code §85.26(1).

The issue of the statute of limitations for commencing an original proceeding can be a bit complex with the concept of the floating injury date.

If an injury is based on a traumatic event, the claimant has 2 years from the date of injury to commence a proceeding before the Workers' Compensation Commissioner. However, if the injury is based on a cumulative event, while the claimant still must commence a proceeding within 2 years, the question becomes when the 2 years begins to run.

With regard to the three year statute on cases where weekly benefits or an award of payments have been made, the most important thing to remember about this section of the law is the filing of the 2A under 876—2.6 of the rules.

> An employer or its insurance carrier filing a final claim activity report with the Workers' Compensation Commissioner shall also mail a copy to the employee at the employee's last known address.

Failure to both file this report with the commissioner and to send a copy to the injured worker may result in the extension of the three year statute.

IOWA CODE §85.71

Jurisdiction.

The compensability of an injury occurring outside the borders of Iowa is governed by Iowa Code §85.71 which reads, in part:

> If an employee, while working outside the territorial limits of this state, suffers an injury on account of which the employee, or in the event of death, the employee's dependents, would have been entitled to the benefits provided by this chapter had such injury occurred within this state, such employee, or in the event of death resulting from such injury, the employee's dependents, shall be entitled to the benefits provided by this chapter, if at the time of such injury any of the following is applicable:
> 1. The employment is principally localized in this state, that is, the employee's employer has a place of business in this or some other state and the employee regularly works in this state, or if the employee's employer has a place of business in this state and the employee is domiciled in this state.
> 2. The employee is working under a contract of hire made in this state in employment not principally localized in any state and the employee spends a substantial part of the employee's working time working for the employer in this state.
> 3. The employee is working under a contract of hire made in this state in employment principally localized in another state, whose workers' compensation law is not applicable to the employee's employer.
> 4. The employee is working under a contract of hire made in this state for employment outside the United States.

The usual factual situation in subject matter jurisdiction concerns truck drivers whose employment is not principally localized in any state since they travel interstate in the performance of their job.

In *Henriksen v. Younglove Construction,* 540 N.W. 2d 254 (Iowa 1995), the court determined that claimant, who worked for a company which built grain storage and feed mills throughout the United States, was hired in Iowa as a cement finisher in the employer's South Sioux City, Nebraska project. He injured

his back and applied for compensation benefits in Iowa. Claimant was denied benefits throughout his claim but the Supreme Court, after an exhaustive discussion of the history of the Iowa Act, the Model Act and *Iowa Beef Processors v. Miller,* 312 N.W.2d 530, (which specifically held that domicile was not sufficient to satisfy the "principally localized" test of 85.71) held:

> We hold that Henriksen's employment was "principally localized" in Iowa as that phrase has been defined by the legislature. Henriksen was domiciled in Iowa and therefore, the Iowa industrial commissioner has subject matter jurisdiction of Henriksen's claim.

Henriksen, at 261.

Iowa Code §85.71 was amended in 1997. In *Heartland Express v. Terry,* 631 N.W. 2d 260 (Iowa 2001), the claimant, a Georgia resident, responded to an ad in a Georgia newspaper for employment as a truck driver with Heartland Express, an Iowa company headquartered in Iowa. Claimant was injured in Louisiana and filed a claim for Iowa benefits. A dispute arose over whether Iowa had subject matter jurisdiction and the court, after reviewing the entire job application and hiring process determined that: first, claimant's job application was submitted in Georgia and was not sufficiently definite to constitute an offer of employment and therefore when the employer approved the application in Iowa, no contract of hire was made; and, second, the job offer was accepted in Georgia and therefore subsection 2 did not confer jurisdiction on this claim.