WORKERS' COMPENSATION:
Talk about Comic Relief

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I. INTRODUCTION

The landscape of law continues to change over time. Much like the medical profession, our calling unfortunately looks less and less like a professional service and more and more like a business. For those of us that struggled to memorize many of the oft-cited Rules of Civil Procedure, we now have all new numbers to learn. Women are no longer "trailblazers" in the profession, making up 50% of most law classes. And though some may disagree, I'm convinced the days of the town lawyer adequately handling every matter walking in the door are behind us.

Obviously, our rules do not require specialization to practice in a particular area. Our rules do, however, require competency. Practicing in an area of law in which you are not competent not only jeopardizes your client's best interests, but it could jeopardize your own license to practice law.

In my own experience, I've contemplated handling things outside my comfort zone. A friend once asked me to prepare a warranty deed. I thought to myself, "how hard could that be?" The deed sat on the corner of my desk. For days. Then for a couple of weeks. Finally, I requested the intervention of a lawyer that actually knew what he was doing. It took a grand total of five minutes. I've turned down every request to do a warranty deed since then.

Though these rules aren't technically found in our Code of Professional Ethics, my sense of whether I'm competent to handle a matter is determined by the following:

1. If I ask, "how hard could that be?" after being asked to handle something, I should say "no." Obviously, I don't the first thing about how hard it's going to be or I wouldn't be asking the question.

2. Would I look forward to doing what I'm being asked to handle for the next year of my life? If, like the deed, I'm going to let it sit and pretend like it's going to disappear, I should say "no." The request is obviously outside my comfort zone.

3. Would I honestly go to me for help with the problem in question? Egos aside, let's face it ... we can't be experts in everything. I readily admit that I can't change the oil in my car (though in college, I did get pretty good at changing flat tires). I know that if the furnace goes out, I'm going to require the services of someone that knows what they are doing (besides, pilot lights scare the heebie-jeebies out of me). So why would I think in a million years I could master every area of the law? I wouldn't dream of doing my own taxes nor would I prepare my own will. As a popular "Seinfeld" episode made famous, become the "master of your domain." Know what you know ... and perhaps even more importantly, know what you don't know and say "no."

II. Rule of Three

Typically, the Rule of Three refers to linguistic persuasive technique. That technique is to discuss things in a list of three. Apparently, there is some scientific evidence that doing so is more persuasive as people remember things in sets of three.

I have a different "Rule of Three" and there is no scientific evidence to support my "Rule of Three" theory. My practical experience is that most clients that come in the door have three legal issues going on at the same time. It varies between having three legal issues resulting from the same event, or three separate legal issues resulting from two or three separate happenings.

A common rule of three that I see is the work comp/medical negligence/wrongful termination trio. Or it may be the work comp/personal injury/unemployment trio. I've seen the work comp/domestic/criminal trio plenty of times, too. The key, though, is asking the right questions to unearth the potential causes of action existing at that point in time for your client. Don't expect the client to know what types of potential legal issues they may have. Clients do not categorize their problems under convenient sub-headings. It is your job (and ethical responsibility) to figure that out.

With that in mind, let's take a look at some potential interplay between workers' compensation and other areas of the law.

III. PERSONAL INJURY / WORK COMP

One of the most obvious interplays occurs between work comp and personal injury. Clarence Client comes to you and tells you he was in a car accident. From the police report, it is clear that Harried Harriet ran a red light and smashed into Clarence. You're thrilled that liability isn't an issue. In response to your question as to who is taking care of the medical bills, Clarence tells you that "insurance" is covering it.

A year later when Clarence's treatment is done, you proceed to negotiate a settlement with the adjuster. After cutting the checks and dispersing the funds, you get a nasty-gram from some unknown work comp adjuster telling you to fork over the cash. Work comp paid the medical bills on the case since the collision happened while Clarence was on an errand for his employer. You get that sick feeling in your stomach.

[Hint: Review Iowa Code §85.22 and the case law interpreting 85.22 before doing anything on a PI/Work Comp combo.]

Questions to ask anytime someone comes in with a "personal injury" claim:

1. Were you working when this happened?
2. Who owned the car you were driving/riding in?
3. Did the person that hit you appear to be working? In uniform? In a vehicle identified with a particular employer?
4. What were you doing at the time this happened? Where were you going? Why were you going there? Did anyone direct you to go there?

IV. UNEMPLOYMENT/WRONGFUL TERMINATION & WORK COMP

It's not uncommon for someone to lose his or her job after being hurt on the job. Sometimes it's unavoidable. Sometimes it's illegal. Here are some general questions that may help in discovering the difference:

1. Did you quit or were you fired?
2. What was the reason you quit?
3. What was the reason given for terminating you?
4. Do you know whether you qualify for unemployment benefits based upon the time you worked for this employer?
5. Were you under restrictions when you quit/were terminated?
6. Is there work in the plant that fits those restrictions?
7. Did the employer accommodate those restrictions?
8. Are you part of a union?
9. Were any comments made to you about your injury/restrictions? Did anyone witness those comments?
10. Are you aware of a pattern of getting rid of workers with injuries?
11. What is the worst thing that would be in your personnel file?
12. How long did you work for the employer? Were you still in a probationary period?
13. Is there a progressive discipline program? Was it followed?

If, like me, you don't handle unemployment cases, you should at least know that there is an offset between work comp benefits and unemployment benefits. I've always found the folks at unemployment to be very helpful in sorting that out.

As for retaliatory discharge cases, I have handled those in the past. Good, solid retaliatory discharge cases don't walk in the door often. Typically, a termination smells funny, but most employers are savvy enough not to blurt out the "real" reason for firing

an injured worker. Further, few individuals have perfect employment records - - particularly after the employer gets the file and embellishes on the details.

V. SOCIAL SECURITY & WORK COMP

Three words come to mind with this combo …. USE EXTREME CAUTION. This combo is a huge trap for the unwary. There is an absolute offset between social security benefits and work comp benefits. The particulars in managing this offset are a topic all on its own. Suffice it to say, if you have a client receiving or that you anticipate receiving social security benefits with a work comp claim in the mix, you had better get up to speed on how these two entities play together. There is language you can place in settlement documents to benefit your client and save you from malpractice. Out of an abundance of caution, I place such language in all my work comp settlements regardless of whether social security is an issue at the time of the settlement.

By way of further caution, do not simply expect the future medicals relating to a work comp injury to be foisted onto the government when your client is eligible for Medicaid/Medicare. Language also needs to be placed into any settlement agreement addressing the future medical situation to avoid a setoff of such medical benefits from your client's settlement.

VI. BANKRUPTCY & WORK COMP

The extent of my knowledge on bankruptcy consists of what was covered in the bar review course. It was enough to answer the bankruptcy question at the time. I've since purged all that knowledge. Practically speaking, though, I've learned that if you

have a work comp client that anticipates a bankruptcy, you need to tell them to be sure the bankruptcy attorney knows about the case so the proper exemptions can be recorded and filed.

VII. PROBATE & WORK COMP

In the context of a work comp situation, the death of your client is either related to the work injury, or it is unrelated to the work injury. If it is related to the work injury (and medical evidence substantiates that), you can pursue death benefits under Iowa Code section 85. If the death is unrelated to the work injury, the right to benefits ceases and liability terminates. Iowa Code §85.31(4).

However, the agency held that the employer is obligated to pay benefits to the decedent's estate up until the time of decedent's death, even if the employer contests the case and after the death is determined to be liable for benefits. The agency pointed out that to hold otherwise would result in a windfall for insurance carriers when an employee died from a non-work-related reason. Snodgrass v. Eagle Food Centers, Inc. File No.1199751 (Arb. 7/11/01).

VIII. MEDICAL NEGLIGENCE & WORK COMP

In the event medical negligence occurs in the context of the treatment of a work injury, it is important to note that a workers' compensation carrier has no lien under Iowa Code §85.22 against any recovery an employee may obtain in a medical negligence action against the physician who treated the employee's injury. Toomey v. Surgical Services, P.C., 558 N.W.2d 166, (Iowa 1997).

IX. IS IT A WORK COMP INJURY?

Most times it's easy to spot a work comp injury. When a worker loses his arm in the drill press, that's a work comp injury. When a worker hears a pop in her back when she's tarping a load on a flatbed, that's a work comp injury. But sometimes the injuries aren't quite so common or straightforward. Let's take a brief look at some that give pause:

PHYSICAL-MENTAL INJURIES:

A physical mental injury occurs when a physical injury leads to a mental condition. Lawyer & Higgs, Iowa Workers' Compensation – Law and Practice (3rd ed.), §4-6. An easy example is the worker that loses his arm and due to the loss of the arm, slumps into a chronic depression. The physical injury results in a mental injury as well. If the medical testimony – and it's best to rely on the testimony of a psychiatrist – causally connects the mental injury and treatment to the physical injury, your client has sustained a compensable physical-mental injury. Mental injuries are compensated as a body as a whole. As such, you would want to know how the mental injury affects your client's ability to function in the work place.

CUMULATIVE MENTAL INJURIES:

Purely non-traumatic mental injuries are also compensable under Iowa law. Dunlavey v. Economy Fire and Casualty Co., 526 N.W.2d 845 (Iowa 1995). However, the burden of proving such injuries is extremely high. To prove a purely mental injury, both medical and legal causation must be established. Of the two, typically medical causation is easier to prove.

To prove medical causation a medical provider (typically a psychiatrist) must connect the mental injury to the employment. Assuming medical causation is established, then legal causation must also be proven. To prove legal causation, you must show that the mental injury was caused by work place stress of greater magnitude than day-to-day mental stress experienced by other workers employed in the same or similar jobs, regardless of their employer.

To show legal causation, then, one is best situated if there is ample evidence and testimony from similarly situated individuals to illustrate how this one individual was "singled out" in a manner that was extraordinarily different from them. Fleming v. Humboldt Comm. School Dist., 603 N.W.2d 759 (Iowa 1999). Presumably, by adding this second requirement of legal causation, the court attempted to thwart claims solely on the basis of personality disagreements, as well as perceived or actual stress that accompanies most any employment.

As a practical matter, you should understand these cases are tough to prove.

TRAUMATIC MENTAL INJURIES:

Just recently, the Iowa Supreme Court acknowledged that the onerous standards established in Dunlavey should not apply to all mental injuries. In Brown v. Quik Trip Corp., No. 3 / 00-0868, filed February 27, 2002, Iowa Supreme Court, Toby Brown was an employee of Quik Trip Corporation, working at a gas station/convenience store. While working alone in the early morning, Brown observed an altercation between customers. One of the customers was shot in the leg. Six days after the shooting incident, Brown, again working alone, was the victim of a robbery at a different Quik Trip at approximately 1 a.m. Following these two events, Brown began suffering from

shakiness, upset stomach, tight chest, nervousness, and jumpiness. Brown was diagnosed as suffering from delayed posttraumatic stress disorder, attributable to the 1994 incidents at the Quik Trip stores. The workers' compensation commissioner concluded Brown did not meet his burden to prove legal causation for his claim for a mental/mental injury (a mental injury caused merely by psychological stress or trauma without an accompanying physical injury) arising out of and in the course of his employment because he did not show his stress was greater than that of other workers employed in the same or similar jobs. Brown sought judicial review, and the district court affirmed. On appeal the court of appeals reversed and remanded the case to the commissioner to determine anew whether Brown had established legal causation. The Supreme Court granted further review.

The Supreme Court found that when the event or events giving rise to the claim for mental/mental injury are readily identifiable, the appropriate test for legal causation is not whether the stress is greater than that experienced by similarly situated employees, as we required in Dunlavey v. Economy Fire & Casualty Co., 526 N.W.2d 845 (Iowa 1995). Rather, the legal-causation test is met when a claim is based on a manifest happening of a sudden traumatic nature from an unexpected cause or unusual strain. The two violent events occurring in Brown's employment with Quik Trip satisfied this test. The Supreme Court vacated the court of appeals decision, reversed the district court judgment, and remanded to the commissioner to determine the extent of Brown's disability.

HEART ATTACKS:

These cases are not for the faint of heart (pun intended). Simply having a heart attack at work does not satisfy the burden of proof of establishing a compensable work injury. The difficulty in proving the necessary causal connection makes many of these cases non-compensable.

The question that must be answered in these cases is whether the work environment contributed, exacerbated, or accelerated the heart condition. Lawyer & Higgs, Iowa Workers' Compensation – Law and Practice (3rd ed.), §4-5. Obviously, there are lots of folks running around out there with bad hearts, clogged arteries, and/or high blood pressure that don't even know it. There must be something "extra-exertional" about the work environment to reach compensability.

IDIOPATHIC INJURIES:

Idiopathic injuries consist of injuries that are personal to the claimant. An injury that is personal is not compensable. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000). But what is a condition "personal to the claimant?" Is arthritis? Degenerative disc disease? Tripping over one's own feet?

Larson, the "guru" on work comp, categorizes injuries into 3 types: 1) risks distinctly associated with the employment; 2) risks personal to the claimant; and 3) risks having not particular employment or personal character. Workmen's Compensation Law §7.00, at 3-12. Injuries falling under category one are universally compensable. Injuries in category two are typically non-compensable. Injuries in the third category are subjected to further scrutiny.

In Iowa, that further scrutiny for category three injuries consists of determining whether the employment setting created an increased risk or actual risk of injury. By way of example:

Turning one's neck – Turning one's neck to respond to a co-worker does arise out of the course of employment and is compensable. Alesch v. Wilson Foods, No. 1021206, App. Dec. filed July 17, 1996.

Walking across smooth floor – Injury to knee resulting from knee giving way while walking across work floor is compensable. It matters little whether a similar trauma could have produced the same injury at some other time or place. With no pre-existing condition, the agency concludes the injury to be compensable. McIlravy v. Ace Construction, No. 1169232, App. Dec. filed December 1999.

Prolonged sitting in airport – After sitting 6-7 hours due to a layover at an airport, Claimant stood and felt a sharp, piercing pain in his back. The evidence demonstrated that Claimant had a pre-existing condition that was "lit up" by sitting on a hard, chair. Injury was compensable. Heitland v. Workforce Development, No. 1167654, App. Dec. filed February 2000.

Getting up out of a chair – Claimant used a chair to be seated while performing a work-related task. Upon rising from the chair, she felt a popping sensation and felt immediate pain. The use of the chair and getting out of the chair caused claimant's injury. Van Scoy v. Okoboji Bar and Grill, No. 1166754, App. Dec., filed December 7, 2001.

Stumbling while descending stairs – Cocktail waitress stumbled while going down stairs at place of employment. Stairs are inherently more dangerous. When a

required part of the job, injuries resulting from falling on stairs are compensable. Blue v. Lakeside Casino, No. 1283108, Arb. Dec., filed January 25, 2002 (currently on intra-agency appeal).

Tripping over one's feet on smooth floor – Where employee reported that she tripped over her feet on a level, dry and unobstructed floor, the injury was found to be personal to the Claimant and not compensable. Bartle v. Sidney Care Inc., No. 1234789, App. Dec., filed February 28, 2002.