defense UPDATE

The Iowa Defense Counsel Association Newsletter Summer 2011 Vol. XIV, No. 2

CASE NOTE:
MARK PEAK v. *ELLIS ADAMS AND RACHEL ADAMS*

By Bruce L. Walker, Phelon Tucker Mullen Walker Tucker & Gelman LLP, Iowa City, IA

Bruce L. Walker

Mark Peak v. Ellis Adams and Rachel Adams, Iowa Supreme Court No. 09-1471, filed July 1, 2011.

The case decision written by Justice Waterman (formerly an editor of this magazine) decided an issue involving a **Release of all Claims** form signed by the plaintiff appellant, Mr. Peak, releasing U-Haul and Ellis Adams in exchange for payment of $20,000. Rachel Adams was not named in the release document. After suit was filed by Mr. Peak, the Adamses moved for summary judgment based on the release signed by Mr. Peak and the District Court granted the Motion for Summary Judgment. The Court of Appeals reversed based on factual questions concerning intent of the parties precluding summary judgment. On further appeal to the Iowa Supreme Court, the court granted summary judgment in favor of Ellis Adams based on the release, but precluded summary judgment against Rachel Adams based on fact issues.

The facts of the case involve an accident that took place on February 22, 2008, while plaintiff was helping defendants move furniture from their old residence into a new residence in Muscatine. The Adamses agreed that only Ellis Adams rented a U-Haul truck to move furniture and belongings to the Adamses new residence. While doing so, the truck became stuck in the snow. To help extricate the truck, Mr. Peak placed a plywood board under the tire. When Ellis Adams attempted to accelerate, the board shot into plaintiff's leg, which caused severe bone fractures, required surgery, and generated expenses exceeding $50,000 and required several months of recovery.

Apparently plaintiff's counsel began negotiating with both the insurer for the Adamses under the premises/homeowners policy as well as their auto policy. The plaintiff's counsel was also negotiating with the claims administrator for U-Haul. U-Haul's claims administrator determined that the policy limits of $20,000 should have been and was tendered subject to receipt of a Release of All Claims Form which, among other things, provided that:

". . . the undersigned Mark Peak, being of lawful age for the sole consideration of $20,000 receipt of which is hereby acknowledged, does hereby release, acquit and forever discharge Ellis Adams, U-Haul Company of Iowa, Republic Western Insurance Company, its parent and affiliated companies, employees and agents, each of the independent U-Haul dealers, and all of their employees, agents, principals, servants, successors, heirs, executors, administrators of each of those hereby released, and all other persons, firms, corporations, associations or partnerships, and any other persons, firms, or corporations involved in the design, manufacture, maintenance, ownership and any and all aspects of the rental or sale of the U-Haul equipment involved of and from any and all claims, actions, causes of action, which the undersigned now has or which may hereafter accrue resulting or to the result from the incident, casualty or event(s) which occurred on or about the 22nd day of February, 2008 at Muscatine, Iowa."

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The release was signed and dated October 17, and forwarded to the claims administrator on October 21. The $20,000 policy limits was paid on October 22, with an acknowledgment on the check that it was in full and final settlement of any and all claims. That check was then endorsed, deposited and the proceeds distributed.

At the point in time that the check was negotiated no one had disclosed to the U-Haul claims administrator that there was any intent to reserve claims against Ellis Adams or Rachel Adams personally or their insurer. The negotiations then broke down between the auto insurer for Ellis Adams and Rachel Adams. After the denial was received by Mr. Peak's counsel, he attempted to amend the release by striking a line through Ellis Adams' printed name and handwriting: "Ellis Adams is released under his contract with U-Haul Company of Iowa, Inc. to the extent of his coverage under his contract of $20,000. Ellis Adams is not individually released for claims against him in Iowa." The U-Haul claims administrator refused to accept the amendment. None of the settlement proceeds were ever returned to the claims administrator.

The Supreme Court affirmed summary judgment as to Ellis Adams since the settlement agreement unambiguously discharged Mr. Peak's claims against Ellis Adams, finding at most Mr. Peak had an undisclosed unilateral intent to reserve his right to pursue Mr. Ellis personally, or to collect from his insurer. Nothing in the record reflected that the U-Haul claims administrator was ever told of any intent to reserve claims against either Ellis Adams or Rachel Adams before the release was executed. Any attempt to unilaterally amend the release was ineffective and did not show a mutual intent shared by the claims administrator for U-Haul at the time its limits were paid. There was no reason for the claims administrator to settle the Peak claim without extinguishing the liability of the U-Haul customer, Ellis Adams, since U-Haul had no liability exposure to Mr. Peak, nor did it have any liability to Mr. Peak until a judgment was obtained by him and it had not been satisfied for the statutory period of time. The court found that there was little economic sense in settling the claim without obtaining a release against Ellis Adams as fully expressed in the settlement document signed by Mr. Peak.

The court also found no reparation entitlement because there was never any evidence that the claim administrator truly intended to pay its limits without a release of Ellis Adams personally. There was no mutual mistake of fact. There was at best a unilateral mistake of fact. The court found specifically if Iowa law permitted a party to void a release upon proof that one party was mistaken as opposed to both parties being mistaken, there would be little finality in any settlement.

On the issue raised by summary judgment on behalf of Rachel Adams, the court found that there was an issue of fact concerning the intent of the parties. As a result, summary judgment was not appropriate. Rachel Adams was not identified by name in the release. The release did expressly discharge the 'liability of persons who are agents or principals of those hereby released and persons involved in any and all aspects of the rental of the U-Haul equipment.' In this finding, the court relied on Iowa Code §668.7 which provides " . . .a release entered into by a claimant and the person liable discharges that person from all liability" but it does not discharge any other person liable upon the same claim unless it so provides. The court also referred to *Aid Ins. Co. v. Davis Cnty.*, 426 N.W.2d 631, 632-33 (Iowa 1988) which found a general designation such as "any other person, firm or corporation" would not sufficiently identify the tortfeasor to be discharged among other things.

The court did an analysis as to whether there was an agency relationship between Ellis Adams and Rachel Adams as a matter of law. The court found that generally agency is a question of fact.

The defendants' answer specifically denied the allegation that Ellis Adams and Rachel Adams jointly rented the U-Haul and, as a result, that issue was left in dispute. There was no evidence that Rachel Adams signed the U-Haul agreement along with Ellis Adams and, therefore, the district court erred in granting summary judgment on the basis of an agency relationship between Ellis Adams and Rachel Adams. The agency issue may later be decided by the trier of fact on remand.

The alternative argument made by the defendants contended that Rachel Adams was released because she was a person involved in any and all aspects of the rental or sale of the U-Haul equipment. That argument was rejected based primarily on the fact that the best evidence of the party's intent was that the release did specifically name Ellis Adams, but not Rachel Adams. This raised an inference that the drafter did not intend to discharge Rachel Adams' liability. The court was troubled by the vague nature of the language involved and any and all aspects of the rental which made the scope of the class of individuals released unclear. It also relied on *Village Supply Co. v. Iowa Fund, Inc.*, 312 N.W.2d 551, 555 (Iowa 1981) (citing Rector v. Alcorn, 241 N.W.2d 196, 202 (Iowa 1976)) which generally construes ambiguous boilerplate language against the drafter. It would appear that the more prudent practice would be to specifically name all persons to be released, or in the alternative, to reserve those potential claimants that are not intended to be released or claims to be reserved to avoid this problem in the future. ■

LEGISLATIVE REPORT - 2011

By: Legislative Counsel Scott Sundstrom and Brad Epperly

I. OVERVIEW OF THE 2011 IOWA LEGISLATIVE SESSION

The first session of the 84th Iowa General Assembly convened on January 10, 2011 (the Iowa Constitution requires the legislature to convene on the second Monday of January of each year). The legislature adjourned sine die on June 30, 2010, for a total of 172 days, which was 62 days after legislators' per diem expired. This made the 2011 session the third longest in Iowa history. The length of this session was especially striking given that the 2010 session lasted just 79 days, which was the shortest legislative session in decades.

In 2011 we monitored the following legislative activity for the Iowa Defense Counsel Association ("IDCA"):

- 1,708 bills and study bills (study bills are prospective committee bills)
- 136 resolutions
- 1,135 amendments (amendments can be as simple as changing a single word or number or can be the equivalent of lengthy complicated bills in themselves)

This year we registered on 148 bills, study bills and resolutions on behalf of the IDCA.

The 2010 elections brought significant changes to the legislature. Mirroring national trends, Republicans made big gains. Republican Terry Branstad defeated incumbent Chet Culver in the gubernatorial contest. Republicans picked up a net 16 seats and took control of the House by a 60 to 40 margin. Republicans also made big gains in the Senate, picking up a net 6 seats, but fell just shy of taking control, as Democrats maintained a slim 26 to 24 majority.

The governor had 30 days after the legislature adjourned sine die (i.e., July 30, 2011) to approve or veto legislation sent to him in the last three days before adjournment or sent to him after the legislature adjourns. If the Governor does not approve or disapprove a bill within the 30-day period after the legislature has adjourned it is a "pocket veto" and the bill does not become law. As of the time of this writing, the Governor has acted upon all legislation. Budget bills are subject to item vetoes, meaning the Governor may veto only parts of those bills. This report will state whether each bill included in it has been enacted. Unless otherwise noted, enacted bills took effect on July 1, 2011.

Bills that were not finally acted upon during the 2011 session carry over and are eligible for consideration during the 2012 session. The second session of the 84th Iowa General Assembly will convene on January 9, 2012.

With the split in control of the two chambers, very little partisan legislation was enacted this year. The impact of divided control was amply demonstrated in the areas we monitored for the IDCA. Plaintiff-friendly legislation generally received more favorable attention in the Senate, but little interest in the House. Conversely, while the House passed some bills more favorable to the defendants, the Senate did not take up such measures.

Despite this general rule, some legislation of interest to IDCA members was enacted in 2011. This report will first discuss bills that were enacted and then conclude with a discussion of significant legislation that was considered, but not enacted this year.

II. LEGISLATION OF INTEREST ENACTED IN 2011

The following legislation was enacted in 2011.

Scope of Duty of Insurance Agents. In late 2010, an Iowa Supreme Court decision significantly expanded the potential scope of duties insurance agents owe to their clients. The 2010 case, *Langwith v. American National General Insurance Company*, overruled a 1984 case, *Sandbulte v. Farm Bureau Mutual Insurance Co.*, that had set forth more limited duties of agents. The Independent Insurance Agents of Iowa led the fight to overturn *Langwith*. They initially began the fight with a stand-alone bill, but eventually secured an amendment to the Insurance Division's omnibus bill, SF 406, to restore Iowa law to what it was prior to the *Langwith* decision. This provision was very controversial, with the Iowa Association for Justice vigorously opposing the provision. The IDCA supported restoring prior Iowa law and was ultimately successful in gaining passage of language abrogating the *Langwith* decision in section 45 of SF 406.

As enacted, section 45 of SF 406 adds a new subsection 7 to Iowa Code section 522B.11 in the insurance producer licensing chapter. The new subsection states the following:

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NEW SUBSECTION. 7.

a. Unless an insurance producer holds oneself out as an insurance specialist, consultant, or counselor and receives compensation for consultation and advice apart from commissions paid by an insurer, the duties and responsibilities of an insurance producer are limited to those duties and responsibilities set forth in Sandbulte v. Farm Bureau Mut. Ins. Co., 343 N.W.2d 457 (Iowa 1984).

b. The general assembly declares that the holding of Langwith v. Am. Nat'l Gen. Ins. Co., (No. 08-0778) (Iowa 2010) is abrogated to the extent that it overrules Sandbulte and imposes higher or greater duties and responsibilities on insurance producers than those set forth in Sandbulte.

This will not be the last on this issue, however. The plaintiffs' lawyers are actively seeking legislation in 2012 to delete the phrase "apart from commissions paid by an insurer" from paragraph a. The goal is to weaken the second prong of the two-part test. If successful, deletion of those seven words could result in broader duties being imposed on Iowa insurance agents.

Indemnification Agreements in Construction Contracts. Championed by the Master Builders of Iowa, Senate File 396 was enacted to restrict the use of indemnification agreements in construction contracts. The concern was broad indemnity provisions that require a party to a construction contract to indemnify the other party for any claim, regardless of which party was at fault. Subject to narrow exemptions (principally involving obligations of insurance companies to insureds), the bill bans "a provision in a construction contract that requires one party to the construction contract to indemnify, hold harmless, or defend any other party to the construction contract, including the indemnitee's employees, consultants, agents, or others for whom the indemnitee is responsible, against liability, claims, damages, losses, or expenses, including attorney fees, to the extent caused by or resulting from the negligent act or omission of the indemnitee or of the indemnitee's employees, consultants, agents, or others for whom the indemnitee is responsible."

Iowa False Claims Act. In 2010, Iowa adopted a state False Claims Act (Iowa Code chapter 385) modeled very closely on the federal False Claims Act, 31 U.S.C. sections 3729-3733. The Iowa law was amended this year in Division XI of House File 649, the health and human services appropriations bill. All of the changes made to the Iowa law were to conform to changes made in the federal law in the last year and were not controversial. The Iowa Attorney General sought an additional change that was NOT included in the final version of HF 649: language stating that defendants in Iowa false claims actions are jointly and severally liable. While the federal law has been interpreted to impose joint and several liability, the federal law does not explicitly state that defendants are jointly and severally liable. Business interests expressed some concern with putting that language in the Iowa law, and the conference committee that ultimately wrote the final version of HF 649 agreed to leave the joint and several liability language out of the bill.

Recovery of Medicaid Payments in Medical Malpractice Suits. Section 85 of the health and humans services appropriations bill, HF 649, amends Iowa Code section 147.136. That section generally prohibits recovery of economic losses suffered by a medical malpractice claimant if such losses were paid for by insurance, governmental programs, or any other source other than the assets of the claimant or the claimant's immediate family. Section 85 of HF 649 adds another exception and allows recovery of amounts paid by the medical assistance program (i.e., Medicaid).

Release and Satisfaction of Judgments. Senate File 244, an Iowa Bar Association initiative, makes some changes to the process for the release and satisfaction of judgments. The bill provides that the court may order that, in lieu of posting a bond with the clerk of court to gain immediate release of a judgment lien against a homestead, the bond may be deposited in either an attorney's trust account or in a federally insured depository institution. The bill amends the law requiring a judgment creditor to acknowledge satisfaction of a judgment by allowing a judgment creditor to instead have the instrument acknowledging satisfaction of the debt notarized in the manner prescribed in Iowa Code chapter 9E. The bill increases the penalty for failing to acknowledge the satisfaction of the debt to from $100 to $400, but eliminates the recovery of attorney fees. The bill provides that the penalty may be recovered by a motion filed in the court that rendered the original judgment requesting that the payor of the judgment, if different from the judgment debtor, be subrogated to the rights of the judgment creditor, that the court determine the amount currently owed on the judgment, or any other relief as may be necessary to accomplish payment and satisfaction of the judgment. If the motion relates to a lien of judgment as to specific property, the motion may be filed by a person with an interest in the property. The bill also provides that upon the filing

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of an affidavit that a judgment creditor cannot be located or is unresponsive to requests to accept payment, and upon court order, payment upon a judgment may be made to the treasurer of state as provided in Iowa Code chapter 556 and the treasurer's receipt for the funds is conclusive proof of payment on the judgment. the bill provides that the district court sitting in small claims has concurrent jurisdiction of motions and orders relating to releases of judgments where the amount owing on the judgment, including interests and costs, is $5,000 or less.

Appointment of Judges. Senate File 326 makes a number of changes to the judicial appointment process. Among the changes are the following:

- For district court judicial nominating commissioners, the bill prohibits having more than one appointed commissioner from a county within a judicial election district unless each county within the judicial election district has an appointed or elected commissioner or the number of appointed commissioners exceeds the number of counties within the judicial election district. Currently sitting commissioners are not affected by the change.

- The Chief Justice may, for budgetary reasons, order delays in appointing new judges for up to one year for up to eight judicial openings.

- The Chief Justice may apportion a vacant judicial office to another judicial district if the Chief Justice finds, and a majority of the judicial council approves, that there is a substantial disparity in the allocation of judgeships and judicial workload between judicial election districts.

- District associate judges must be residents of the judicial election district (rather than the county) where they serve.

- Magistrates may be residents of a contiguous county to the one where they serve.

III. LEGISATION OF INTEREST THAT WAS NOT ENACTED

The following legislation received some consideration during the 2011 session, but was not enacted. Bills from the 2011 session remain eligible for consideration in 2012, so we may see some of the bills discussed below receive attention next year.

Workers' Compensation. The House considered several pro-employer workers' compensation bills this session. Two of them (House File 401, which would have clarified that injuries that occur after hours on an employer's premises that do not arise out of the employment relationship are not compensable and House file 523, which would have allowed employers a credit for overpayment) passed the House but died a swift death in the Senate. The Senate did not pass any workers' compensation legislation this session.

Wage Collection Payment Act. The Senate passed Senate File 311, which would have made substantial changes to the Wage Payment Collection Act. Among other provisions, the bill would have created a rebuttable presumption of illegal retaliation if a worker was the subject of an adverse work action within 90 days of making a wage payment claim. The bill also would have allowed liquidated damages in all wage payment cases, even where an employer did not intentionally violate the law. The bill received no consideration in the House.

Health Care Professional Lien Act. Legislation championed by the chiropractors, House File 540, would have created a lien in favor of licensed health care professionals for the unpaid amount of health care services the providers rendered to uninsured patients under certain circumstances. We had concerns that such a lien would significantly complicate the settlement of personal injury claims and opposed the bill. The bill was modeled on existing Iowa law (Iowa Code chapter 582) creating a lien in favor of hospitals for unpaid medical bills by patients. The bill passed the House, but did not receive committee approval in the Senate.

Certificate of Merit. For many years, the Iowa Medical Society has sought legislation to require a certificate of merit in medical malpractice suits. These bills have evolved over time. The version offered in 2011, House File 490, provided for enhanced expert witness disclosure requirements applicable to plaintiffs in medical malpractice cases. These disclosures would have been in addition to those required by Iowa Code section 668.11. The bill stated that within 180 days of a defendant's answer, the plaintiff would have been required to submit affidavits from each plaintiff expert who was expected to testify with respect to the issues of breach of standard of care or causation. The affidavits would need to state that the expert was familiar with the applicable standard of care, the expert's statement that the standard of care was breached by the health care provider named in the petition, the expert's statement of the actions that the health care provider should have taken or failed to take to have

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complied with the standard of care, and the expert's statement of the manner by which the breach of the standard of care was the cause of the injury alleged in the petition. Failure to provide the affidavit would be grounds for dismissal of the case. The bill passed the House, but was not considered in the Senate due to strong opposition from the plaintiffs' bar.

Trespassing on Agricultural Operations. A major initiative of the agricultural lobby this year was House File 589. The bill was meant to target animal rights groups that gain access to agricultural facilities to film farm or livestock operations for the purpose of showing animal abuse. The bill would have created new criminal penalties and a civil right of action for "animal facility tampering" and "animal facility interference." The bill was extremely broad and quite likely violated the First Amendment by putting severe restrictions on the ability of persons to disseminate images of animal abuse. The bill passed the House but was never brought up for debate in the Senate despite attempts by advocates for the legislation to substantially pare down the scope of the bill.

Retention of Private Attorneys by State Agencies. House File 563 would have put limits on the ability of executive branch agencies to retain private attorneys in lieu of (or in addition to) the state Attorney General's office. The bill was a somewhat belated reaction to the tobacco litigation that occurred in the 1990s where state Attorneys General retained private plaintiffs' counsel whol received huge fees as part of the settlement of that litigation. The bill passed the House unanimously, but was not taken up by the Senate.

Appointment of Iowa Supreme Court Justices. In light of the controversy over Iowa's Supreme Court justices, the 2010 retention vote, and the *Varnum* same-sex marriage decision, a number of bills and resolutions were filed to makes changes to the judicial nominating system in Iowa either through statutory changes or amendments to the Iowa Constitution (see, e.g., House File 343, Senate Joint Resolutions 6, 7, 11, and 13). None of these bills or resolutions received significant consideration. However, the issue was brought up during debate in the House on Senate File 326. As described above, SF 326, which makes relatively minor changes to the judicial nominating system, was enacted. While that bill was not particularly controversial, it did serve as the vehicle for an attempt by a group of conservative House members to change the judicial nominating process much more substantially. Because none of the stand-alone bills proposing significant changes to the judicial nominating system were debated, the group of legislators attempted to hang an amendment on SF 326 that would have scrapped the judicial nominating commission process and allowed the governor to appoint justices, subject to confirmation by the Senate. That amendment was ruled non germane to the bill and thus was not included in the final version of the bill.

IV. CONCLUSION

The discussions of bills in this legislative report are general summaries only. For those bills which were enacted, the enrolled bills themselves should be referred to for specifics. Enrolled bills can be found the General Assembly's website: www.legis.iowa.gov

In the interest of brevity we have focused on the most significant issues considered by the Legislature in 2011 which were of particular interest to the IDCA's members. ■

IDCA SCHEDULE OF EVENTS

September 15–16, 2011
47th Annual Meeting & Seminar
8:00 a.m. – 5:00 p.m. both days
West Des Moines Marriott, 1250 Jordan Creek Pkwy.,
West Des Moines, IA

IDCA WELCOMES NEW MEMBERS

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SUCCESSIVE DISABILITIES
THE END OF DOUBLE RECOVERIES

By Jordan Kaplan, Betty, Neuman & McMahon, P.L.C, Davenport, IA

Jordan Kaplan

Employers have good reason to celebrate Iowa Code section 85.34(7). Before its enactment on September 7, 2004, no credit existed for successive disabilities incurred by the same employee with the same employer. The consequence of not having a statutory credit in those cases was a double recovery wherein the employee was compensated for the successive disability in full without any offset for disability benefits previously paid to the employee by the same employer for the same disability. At the same time section 85.34(7) was enacted, however, section 85.36(9)(c), related to apportionment, was repealed. The result is that employees may now receive overlapping permanent partial disability benefits. While this may appear unfair, the Commissioner's decision in *Summerlin v. Tyson Foods, Inc.*, File Nos. 5025718, 5025719 (App. Dec. May 19, 2011) reveals that the credit under 85.34(7) precludes double recoveries, even when overlapping disability benefits are awarded.

The legislature repealed Iowa Code section 85.36(9)(c) on September 7, 2004. Said statute had been effective only with respect to successive injuries occurring before that date. It stated:

> In computing the compensation to be paid to any employee who, before the accident for which the employee claims compensation, *was disabled and drawing compensation under the provisions of this chapter*, the compensation for each subsequent injury shall be apportioned according to the proportion of disability caused by the respective injuries which the employee shall have suffered.

Iowa Code § 85.36(9)(c) (emphasis added).

Under section 85.36(9)(c), a worker was prohibited from receiving overlapping disability benefits. In other words, the overlapping disability benefits were apportioned such that the employee was only entitled to the higher of the overlapping disability benefit rates. The controlling question was whether the employee "was disabled and drawing compensation under the provisions of this chapter" before sustaining the successive injury. *Id*. In fact, even if the employee was not receiving disability benefits to which he or she was nonetheless entitled at the time the latter disability was sustained, the statute still applied and demanded apportionment because "benefits are retroactive to the date they are due." *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 466 (Iowa 2004) (citing *Excel*, 654 N.W.2d at 899)).

In *Mycogen Seeds*, the employee was already entitled to 200 weeks (40%) of permanent partial disability benefits beginning May 27, 1997, when he was injured in a second injury found to be permanently and totally disabling as of December 11, 1997. The question presented was whether the employee was entitled to 140% disability or 100% disability effectively commencing May 27, 1997. The Court affirmed the Commissioner's ruling that section 85.36(9)(c) required apportionment of the overlapping benefits. *Mycogen Seeds*, 686 N.W.2d at 468.

While Iowa Code section 85.36(9)(c) prohibited the overlapping or stacking of disability benefits, it did not provide employers a credit against successive disability awards when the prior disability had already been fully compensated at the time the successive injury was sustained. This scenario was presented in *Celotex Corp. v. Auten*, 541 N.W.2d 252 (Iowa 1995), wherein the employee had previously received workers' compensation benefits that ceased in 1984. He was later injured in 1987, entitling him to further disability benefits. Because the worker was not disabled and receiving such benefits at the time of his successive injury, no statutory authority existed to apportion disability benefits. The Court noted the legislature had created various credits, none of which were factually applicable. Therefore, the Court reasoned that the absence of a statutory credit under those facts demanded judicial restraint. *Id*. at 256. It declined the employer's request to apportion benefits or provide a credit without legislation permitting the same. *Id*.

Apportionment under Iowa Code section 85.36(9)(c), therefore, was conditioned on whether an employee's entitlement to successive disability benefits overlapped. *See SKW Biosystems/DeGussa Health and Nutrition v. Wolf*, 723 N.W.2d 448, *3 (Iowa Ct. App. 2006) (citing *Mycogen Seeds*, stating the apportionment rule of section 85.36(9)(c) applies where the disability periods overlap). Even when the periods of disability overlapped, Iowa Code section 85.36(9)(c) did not really provide a credit; it *apportioned* the benefits to prevent stacking. The temporal limitation inherent in section 85.36(9)(c), and the fact that no credit existed for successive disabilities incurred by the same employees with the same employers appear to have been primary motivating forces in the legislature's revision of the statutory framework relative to successive disabilities.

Section 85.34(7), entitled *Successive disabilities*, became effective September 7, 2004, and provides:

> a. An employer is fully liable for compensating all of an employee's disability that arises out of and in the course of the

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> employee's employment with the employer. An employer is not liable for compensating an employee's preexisting disability that arose out of and in the course of employment with a different employer or from causes unrelated to employment.
>
> b. (1) If an injured employee has a preexisting disability that was caused by a prior injury arising out of and in the course of employment with the same employer, and the preexisting disability was compensable under the same paragraph of subsection 2 as the employee's present injury, the employer is liable for the combined disability that is caused by the injuries, measured in relation to the employee's condition immediately prior to the first injury. In this instance, the employer's liability for the combined disability shall be considered to be already partially satisfied to the extent of the percentage of disability for which the employee was previously compensated by the employer.
>
> (2) If, however, an employer is liable to an employee for a combined disability that is payable under subsection 2, paragraph "u", and the employee has a preexisting disability that causes the employee's earnings to be less at the time of the present injury than if the prior injury had not occurred, the employer's liability for the combined disability shall be considered to be already partially satisfied to the extent of the percentage of disability for which the employee was previously compensated by the employer minus the percentage that the employee's earnings are less at the time of the present injury than if the prior injury had not occurred.

Iowa Code § 85.34(7)(a)-(b).

In an early case involving the new statute, *Quaker Oats Co. v. Main*, the employee sustained a successive disability shortly after the effective date of section 85.34(7), which states the amendment applies "to injuries occurring on or after that date." 779 N.W.2d 494, *4 (Iowa Ct. App. 2010) (Table) (citing Iowa Code section 85.34(7)). The employer had previously compensated the employee for 100 weeks (20% industrial disability) of permanent partial disability benefits under the same subsection of 85.34(2) for which the employee was awarded successive disability benefits.

At the agency level, the Commissioner held the employee had a combined disability of 50% industrial loss, and stated that while Quaker Oats proved "a credit for all industrial disability payments paid to this claimant… may be justified," recovery of the same was nonetheless denied as the effective date language was interpreted such that both the prior and successive disabilities must have occurred after September 7, 2004. *Id*. at *1. Since only the successive disability was incurred after the effective date, the Commissioner ruled no credit was due. *Id*.

Quaker Oats appealed and, ultimately, the Court of Appeals affirmed the district court's reversal of the Commissioner's ruling that both injuries must occur after the effective date of section 85.34(7) and remanded the case to the Commissioner for determination of the employer's credit. *Id*. at *5. On remand the Commissioner, noting the "general framework established to avoid double recoveries and double reductions in those instances where a worker sustains successive disabilities with the same employer," found Quaker Oats was entitled to a 20% credit for the 100 weeks of industrial disability benefits previously paid because "[b]oth prior disabilities and the present injury are compensable disabilities under the same paragraph of section 85.34(2)." *Id*, File No. 5017903 (Remand Dec. January 18, 2011) (citing *Steffen v. Hawkeye Truck & Trailer*, File No. 5022821 (App. Dec., September 9, 2009)).

The ruling in *Main* reflects the increased power of an employer's credit under section 85.34(7) as compared against apportionment under section 85.36(9)(c). It is no longer necessary that the successive disability arise at a time when the employee is already disabled and drawing compensation from a prior injury to reduce the employer's liability for permanent partial disability. In other words, liability for combined disability is reduced even though the prior period of disability does not overlap with the successive disability.

The question remained open until recently, however, whether section 85.34(7) would still protect an employer from awards of overlapping or stacking of disability benefits. Did the legislature jettison the protection against overlapping benefits while at the same time enhancing employers' abilities to take a credit against prior disabilities? According to the Commissioner, that is exactly what happened with the enactment of the new successive disabilities statutory framework. While overlapping disability benefits are now permitted, section 85.34(7) nonetheless protects against double recoveries by limiting an employer's liability to the *combined disability* caused by the successive injuries and providing a credit for "the extent of the percentage of disability for which the employee was previously compensated by the employer." Iowa Code § 85.34(7)(b)(1)&(2).

The Commissioner's recent ruling in *Summerlin v. Tyson Foods, Inc*., File Nos. 5025718, 5025719 (App. Dec. May 19, 2011), addresses the credit provided by section 85.34(7) in the context of overlapping periods of disability. The employee sustained a right shoulder injury on April 14, 2006, and a left shoulder injury on June 27, 2006. He was awarded 40% industrial disability

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benefits related to the right shoulder injury and 75% combined disability subsequent to the left shoulder injury. Both injuries were compensable under section 85.34(2)(u), which relates to loss of earning capacity under the industrial disability analysis. For purposes of this discussion, the relevant issues were (1) how to calculate the credit under 85.34(7)(b)(2)[1], and (2) whether the employee was entitled to recover overlapping periods of permanent partial disability benefits.

The injured employee argued Tyson Foods, Inc. was not entitled to a 40% credit for the prior right shoulder injury because it had only paid 12% disability benefits related thereto. The Commissioner, noting the Agency did not have "prior occasion to rule on a credit under Iowa Code section 85.34(7)(b)(2)," ultimately found Tyson Foods, Inc. was entitled to a credit of 40% industrial loss (related to the right shoulder injury) minus the percent reduction in earnings occasioned as a result of that prior injury. *Id*. Therefore, the Commissioner found the credit is calculated by subtracting the percent reduction in earnings from *the prior disability award* rather than a more technical calculation based upon how much of the prior award had already been paid.

The employee further sought overlapping permanent partial disability benefits related to the right and left shoulder injuries. Tyson Foods, Inc. argued such an award would result in a "double recovery" of benefits, which upsets the legislative intent behind section 85.34(7). The relevant House File states:

> *It is the intent of the general assembly that this division of this Act will prevent all double recoveries and all double reductions in workers' compensation benefits for permanent partial disability.* This division modifies the fresh start and full responsibility rules of law announced by the Iowa supreme court [sic] in a series of judicial precedents…. *The general assembly intends that an employer shall fully compensate all of an injured employee's disability that is caused by work-related injuries with the employer without compensating the same disability more than once….*

2004 Iowa Acts, 1st Extraordinary Session, Ch. 1001, Sec. 20. (Emphasis added).

The Commissioner noted that while overlapping of disability benefits had been historically prohibited, this is no longer the case given the legislative repeal of section 85.36(9)(c). *Summerlin*, File Nos. 5025718, 5025719. For instance, it was application of section 85.36(9)(c) in *Mycogen Seeds* that resulted in the determination that the employee was not entitled to an overlap of permanent partial and permanent total disability benefits. The Commissioner further recognized that when 85.34(7) was enacted upon the repeal of section 85.36(9)(c), no provision was made therein or elsewhere explicitly addressing or precluding *overlapping* disability benefits. *Summerlin*, File Nos. 5025718, 5025719.

In rejecting Tyson Foods, Inc.'s argument that an award of overlapping disability benefits would create a double recovery, the Commissioner reasoned:

> By receiving overlapping permanent partial disability payments, claimant is being compensated for *two separate and distinct disabilities* as envisioned by the statute. It is merely the closeness of the disabilities in this case that results in an overlap as to when the benefits are payable. A double recovery is meant to signify that the employer has to compensate the employee for the same injury more than once.

Id. (Emphasis added). Thus, the Commissioner affirmed the deputy's award of 40% permanent partial disability benefits for the right shoulder which overlapped with 75% combined disability benefits related to the successive injury less credit, under 85.34(7)(b)(2), for the prior disability. *Id*.

The Commissioner's analysis reveals the timing of the successive disabilities has no bearing on whether a credit is due. Had the employee's right shoulder injury occurred long enough before the successive injury such that all 40% of the benefits due therefor had been paid, the combined disability result would have been the same. All that matters under section 85.34(7) is that credit is given for the prior disability. The permanent disability benefits from the successive disabilities are each payable at the termination of the healing period regardless of whether they overlap.

In *Summerlin*, Tyson Foods, Inc. received the benefit of the entire 40% credit related to the prior disability rather than the 12% it had paid (less the percent reduction in earnings established by the employee). Under the Commissioner's analysis, the counterpart to the employer's credit is that overlapping or stacking of permanent partial disability benefits is now allowed. Although that result may sound like a double recovery at first blush, is it? Is overlapping or stacking synonymous with double recovery? The answer is clearly no, when credit for the prior disability is applied against the combined disability award. The overlap in such a circumstance is merely the byproduct of timing. Put simply, the overlap does not permit the employee to double-dip on permanency benefits because a credit has already been applied against the combined disability for the prior disability award. An employee is not entitled to any more permanent partial disability benefits when the successive disability periods overlap than if the periods for those benefits

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SUCCESSIVE DISABILITIES THE END OF DOUBLE RECOVERIES

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are separate and distinct. The only wrinkle in *Summerlin* that led to reducing the employer's credit further than past precedent had gone was application of subsection (b)(2),[1] which proportionally shrinks the credit with the percent of reduced earnings caused by the prior disability as of the time of the present injury.

These issues discussed in *Summerlin* have yet to be addressed by an appellate court on judicial review. Therefore, it remains to be seen whether the Commissioner's successive disability analysis under section 85.34(7)(b)(2) and the allowance of overlapping permanent partial disability benefits will be upheld. But the Commissioner is not alone in awarding overlapping permanent disability benefits under section 85.34(7).

In *Drake University v. Davis*, 769 N.W.2d 176 (Iowa 2009), the Supreme Court upheld the Commissioner's refusal to apportion overlapping permanent total disability and permanent partial disability benefits. The Court reasoned that the only benefits subject to apportionment under section 85.34(7) were permanent *partial* disability benefits awarded under section 85.34(2). *Id*. at 184-85. Permanent total disability benefits, however, are awarded under section 85.34(3). Therefore, it determined an employee receiving permanent partial disability benefits who sustains a successive injury deemed permanently and totally disabling is also entitled to overlapping benefits. *Id*. at 185.

This outcome was forbidden under section 85.36(9)(c). *See Mycogen Seeds*, 686 N.W.2d at 467-68. Likewise, it conflicts with the principle recognized by Larson that

> [t]here is both a theoretical and a practical reason for the holding that awards for successive or concurrent permanent injuries should not take the form of weekly payments higher than the weekly maxima for total disability. The theoretical reason is that, at a given moment in time, a person can be no more than totally disabled. The practical reason is that if the worker is allowed to draw weekly benefits simultaneously from a permanent total and a permanent partial award, it may be more profitable for him or her to be disabled than to be well–a situation which compensation law studiously avoids in order to prevent inducement to malingering.

Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 92.01[1] (2000). It is arguable the practical reason set forth above is applicable to the issue of whether overlapping permanent partial disability benefits should be permitted. If it was presented to and did not dissuade the Iowa Supreme Court, however, in *Drake University*, the merits of the same appear questionable in the context of overlapping permanent partial disability benefits.

A body of law is developing around section 85.34(7), and it remains uncertain how Iowa's appellate courts will decide the issues discussed herein when presented for review. For now, however, employers should expect a rise in claims for overlapping disability benefits and take solace from the fact that no double recovery results therefrom. Furthermore, employers should be on the lookout to guard against credit reductions under subsection (b)(2). ■

1 This article does not address the manner or merits of the Commissioner's credit calculation with respect to determining the percentage of reduced earnings under section 85.34(7)(b)(2).

MESSAGE FROM THE PRESIDENT

Stephen J. Powell

Another summer has come and gone, the kids are back in school and football is once again the hot topic. There is a new season approaching at the IDCA as well. The 2011 Annual Meeting is quickly approaching and by all accounts, President-Elect Greg Barnsten has put together an outstanding program that is sure to provide the attendees with quality speakers on timely issues, as well as a surprise or two which you will definitely not want to miss!

The IDCA Annual Board Meeting will take place in conjunction with the scheduled program and all members are welcome to attend. The new administration will be installed at the Annual Board Meeting and will be well represented by incoming President Barnsten, President-Elect Bruce Walker and Secretary Jim Craig. Noel McKibben returns for an encore performance as Treasurer.

One of the significant initiatives that will be undertaken by the new administration will be to encourage greater participation by all of the membership in the governance of our organization. In addition to the Board of Directors, there are a number of standing committees that provide will provide all members with the opportunity to participate in a meaningful way in the mission of our organization to provide the highest quality education and support to our members.

I know that time management is probably the biggest professional challenge that all of us deal with on a daily basis. The last thing most of us need is another project to juggle into our schedules. When we prioritize our respective schedules for the next year, I would encourage each of our members to consider volunteering some small portion of time to become more active in our organization. There are numerous areas of interest represented by the multiple committees and it is only through the willingness of our membership to participate that allows the IDCA to maintain its place as one of the preeminent trial organizations not only in the State of Iowa, but also on a national basis. Don't just think about giving some of your time to a great organization.....just do it!,

I hope to see you on September 15–16 at the West Des Moines Marriott. Help us get our new year off to a great start.

AGENDA

Thursday, September 15, 2011

7:00 a.m. – 5:00 p.m. **Registration Open**

7:00 – 7:45 a.m. **Exhibitor Set-Up**

7:00 – 8:00 a.m. **Continental Breakfast**

8:00 – 8:15 a.m. **Welcome & Legislative Update**
Stephen Powell, IDCA President
Greg Barntsen, Annual Meeting & Seminar Chair
Scott Sundstrom, IDCA Lobbyist

8:15 – 8:30 a.m. **Part I of Case Update II: Negligence and Torts,**
Carol J. Kirkley, Crawford, Sullivan, Read & Roemerman, P.C., Cedar Rapids, IA

8:30 – 9:15 a.m. **Rule 1.413(1) Sanctions: A Cure or a Curse?**
Michael P. Jacobs, Rawlings, Nieland, Killinger, Ellwanger, Jacobs, Mohrhauser & Nelson LLP, Sioux City, IA

9:15 – 10:15 a.m. **Creating a Winning First Impression – Mastering Your First Impression**
Anna Wildermuth, AICI CIM, Personal Images, Inc., Elmhurst, Ill.

10:15 – 10:30 a.m. **Exhibits Open & Networking Break**

10:30 – 11:30 a.m. **Creating a Winning First Impression – For Your Clients in the Courtroom**
Anna Wildermuth, AICI CIM, Personal Images, Inc., Elmhurst, Ill.

11:30 a.m. – 12:15 p.m. **A Different Way to View Restatement of Torts Third**
Justice David Baker, Cedar Rapids, IA

12:15 – 1:00 p.m. **Exhibits Open**
Lunch on Own

1:00 – 2:00 p.m. **Challenging Functional Capacity Evaluations**
Darrell Schapmire, X-RTS, Hopedale, Ill.

2:00 – 3:00 p.m. **Venus vs. Mars: From Depositions through Voir Dire, Trial and Appeal – Lessons from Iowa Women Trial Lawyers**
Megan M. Antenucci, Whitfield & Eddy, PLC, Des Moines, IA
Sharon S. Greer, Cartwright Druker & Ryden, Marshalltown, IA
Jaki K. Samuelson, Whitfield & Eddy, PLC, Des Moines, IA
Martha L. Shaff, Betty Neuman & McMahon PLC, Davenport, IA
Deborah M. Tharnish, Davis, Brown, Koehn, Shors & Roberts, PC, Des Moines, IA

3:00 – 3:15 p.m. **Annual Meeting & DRI Update**

3:15 – 3:30 p.m. **Exhibits Open & Networking Break**

3:30 – 4:15 p.m. **Protecting Medicare's Interest – An Update**
Jill Schroeder, Baylor, Evnen, Curtiss, Grimit & Wilt, LLP, Lincoln, Neb.

4:15 – 4:45 p.m. **Case Law Update I – Civil Procedure, Juries & Trial, Insurance, Judgment & Limitation of Actions**
Megan R. Dimitt, Lederer Weston Craig PLC, Cedar Rapids, IA

4:45 – 5:00 p.m. **IDCA Sponsor Showcase**

5:00 – 5:45 p.m. **IDCA Reception with Exhibitors**
Network with exhibitors and colleagues during the IDCA Reception held in the foyer at the West Des Moines Marriott. This reception with hosted bar is open to all attendees at no additional cost.

Keynote Program:

Creating a Winning First Impression with Anna Soo Wildermuth, AICI CIM

This program will focus on initial impressions, the importance of an appropriate professional appearance, interpreting body language, and communication skills required for positive interactions with jurors and opposing counsels. Attendees will learn about the visual and non-verbal cues they send to opposing counsel, clients and jurors, the "Engage Formula," the power of apparel, the nuances of win/win communications, and how clothing and body language can strengthen the presence of you and your clients.

Anna Wildermuth is the founder of Personal Images Inc. Her professional credentials include being Past President of the Association of Image Consultants International, the largest image consulting organization in the world; one of only eight Certified Image Masters in the world; a Toastmaster ATB; a member of the American Society of Training and Development (ASTD) and certified Platinum Rule® trainer and coach.

A seasoned image and communication specialist, trainer, and coach since 1983, Anna regularly conducts workshops, seminars, and presentations for corporations, including HSBC, Bank of Montreal, Northern Trust Company, Allstate Insurance Company, Humana, J.C. Anderson Company and General Electric Company; and not-for-profit organizations. She helps corporate executives and management teams enhance their credibility and relationship building skills by strategizing their professional image, and sensitizing them to the nuances of business/social etiquette and the issues prompted by diversity.

Approved for 12.0 Federal CLE File# 11-094 • Approved for 14.25 State CLE State ID# 79876 • Include 1.0 Ethics Hours

5:45 – 7:45 p.m.	**IDCA Dinner, Awards and Entertainment with "The Court Jester"** Continue networking and enjoy dinner and entertainment with "The Court Jester," Judge Novak. Judge Novak, a former University of Iowa point guard, is said to have made Don Nelson the Big Ten's leading rebounder while at U of I. He went on to preside in the Iowa District Court, while his former teammate went on to the NBA Hall of Fame. ***This event is open to all attendees at no additional cost.***

Friday, September 16, 2011

7:00 a.m. – 4:45 p.m.	**Registration Open**
7:00 a.m. – 3:30 p.m.	**Exhibits Open**
7:00 a.m. – 8:00 a.m.	**Continental Breakfast**
8:00 a.m. – 8:30 a.m.	**Moving the Courts Forward During Challenging Times** Chief Justice Mark S. Cady, Iowa Supreme Court, Des Moines, IA
8:30 – 9:30 a.m.	**Telling Stories: Closing Argument and the Talking Frog** Thomas J. Hurney, Jr., Jackson Kelly PLLC, Charleston, WV
9:30 – 10:30 a.m.	**Tough Clients, Tough Issues** Todd Scott, Minnesota Lawyers Mutual Insurance Co., Minneapolis, Minn.
10:30 – 10:45 a.m.	**Exhibits Open & Networking Break**
10:45 – 11:30 a.m.	**Federal Court Practice** Chief Magistrate Judge Tom Shields
11:30 – 11:45 a.m.	**Civil Justice Reform** Bruce L. Walker, Phelan Tucker Mullen Walker Tucker & Gelman LLP, Iowa City, IA
11:45 a.m. – 12:00 p.m.	**Part II of Case Update II: Negligence and Torts** Carol J. Kirkley, Crawford, Sullivan, Read & Roemerman, P.C., Cedar Rapids, IA
12:00 – 1:00 p.m.	**Exhibits Open** Lunch on Own
1:00 – 2:30 p.m.	**Injury Causation and Human Biomechanics** Dr. Richard Baratta, Rimkus Consulting Group, Inc., Houston, Texas
2:30 – 3:15 p.m.	**New Premises Liability Law: Slips, Trips, Falls** Thomas M. Braddy, Locher, Pavelka, Dostal, Braddy & Hammes, LLC, Council Bluffs, IA
3:15 – 3:30 p.m.	**Exhibits Open & Networking Break**
3:30 – 4:15 p.m.	**Economic Loss Doctrine** Jason T. Farley, Whitfield and Eddy PLC., Des Moines, IA
4:15 – 4:45 p.m.	**Part III of Case Update: Employment, Commercial, Contract** Carol J. Kirkley, Crawford, Sullivan, Read & Roemerman, P.C., Cedar Rapids, IA, Megan R. Dimitt, Lederer Weston Craig PLC, Cedar Rapids, IA

Hotel Information:

West Des Moines Marriott
1250 Jordan Creek Parkway
West Des Moines, Iowa 50266
Phone: (515) 267-1500
Toll-Free: (800) 228-9290

Hotel Reservations:
A block of rooms is reserved for September 14 – 15, 2011. Please call the West Des Moines Marriott directly to make your reservations. Mention the **Iowa Defense Counsel Association** to receive the group room rate.

You must make your reservations on or before **August 29, 2011**, to receive the group room rate. Reservations made after August 29, 2011, will not receive the group room rate.

Room Rate:
$109.00 plus tax (single/double)
Check-In: 3:00 p.m.
Check-Out: 12:00 p.m.

Parking is complimentary at the hotel.

Registering for the IDCA Annual Meeting

Registrations may be faxed to IDCA at (515) 243-2049 or mailed to: IDCA – P.O. Box 550, Des Moines, IA 50302.
Questions? Email at staff@iowadefensecounsel.org or call (515) 244-2847.

Registration Includes

Registration includes Thursday Continental breakfast, Thursday Reception with Exhibitors, Thursday Dinner, Awards and Entertainment, Friday Continental breakfast, and all morning and afternoon breaks on Thursday and Friday.

Speaker outlines will be provided on CD only. Outlines will be emailed as a PDF file to all attendees the week prior to the Annual Meeting & Seminar. Attendees may print and bring outlines to the Annual Meeting & Seminar. Printed materials will not be available.

Annual Meeting & Seminar Cancellation/Refund Policy

- If written cancellation is received by September 8, 2011, a full refund will be received.
- No refunds for cancellations after September 8, 2011.
- No refunds for No-Shows.

IOWA DEFENSE COUNSEL ASSOCIATION

Iowa Defense Counsel Association 47th Annual Meeting & Seminar

West Des Moines Marriott • 1250 Jordan Creek Parkway • West Des Moines, IA 50266

ATTENDEE REGISTRATION

September 15–16, 2011

Name: _____

Company/Firm: _____

Mailing Address: _____

City, State Zip: _____

Telephone: _____

Fax: _____

Email: _____

Spouse/Guest Badge Name (Thursday Reception and Dinner Only): _____

_____

Special Needs Requests (vegetarian meals, wheel chair access, etc.): _____

_____

Registration Fees: (Circle one)

	IDCA Member	Non-Member	
	$275	$375	_____
Young Lawyer Rate (Admitted to practice less than 2 years)	$175	$275	_____
Seminar Materials Only	$75	$125	_____
Spouse Guest Fee	$50	$50	

TOTAL $ _____

I am staying for the Thursday Evening Reception & Dinner ❑ Yes ❑ No

Dinner is included in registration for Attendee but it is necessary to indicate you are attending

Payment Information: (Deadline to Register: September 8, 2011)

❑ Enclosed please find a check made out to Iowa Defense Counsel Association (IDCA) for $_____

❑ Credit card payment: ❍ MasterCard ❍ Visa

Account #:_____ Exp. Date: _____

Name on Card: _____ Signature: _____

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IOWA DEFENSE COUNSEL ASSOCIATION

Return to:

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