

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

STEVEN ELMER, Claimant, v. CLAYTON COUNTY RECYCLING, Employer, AMERICAN INTERSTATE INSURANCE COMPANY, Insurance Carrier.	FILE NO.: 5030948 COMPLIANCE NO.: 1479521 D/I: 8/13/08 DEFENDANTS' MOTION FOR RECONSIDERATION OF REMAND DECISION
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COME NOW the Defendants, the Employer and Insurance Carrier, by and through their counsel, and hereby Motion the Commissioner to reconsider his Remand Decision, and in support thereof, state as follows:

1. Defendants respectfully request that the Commissioner reconsider the dicta included in his recent Remand Decision in this matter.
2. The Commissioner correctly identifies in his Remand Decision that the *Deutmeyer* case at the Agency level involved the determination that there was a right to a credit against the current injury permanency benefits for the overpayment of temporary benefits (due to the rate variation) under Iowa Code 85.34(4). *Deutmeyer v. Swiss Colony, Inc.*, File No. 5019984, 2007 WL 2411126, *8 (Arb. dec. Aug. 23, 2007) (affirmed on appeal July 3, 2008).
3. The *Deutmeyer* case at the Agency level also determined that there was only a right to a credit against a future injury permanency benefits for the overpayment of the current injury's permanency benefits (due to the rate variation) under Iowa Code 85.34(5). *Id.*

4. The *Deutmeyer* defendants appealed the Agency's ruling to district court about three issues with the only one pertinent to this matter being their argument that they should get a right to a credit against the current injury permanency benefits for the overpayment of the current injury's permanency benefits due to the rate variation. The district court accepted their argument finding Iowa Code 85.34(5) inapplicable and allowing the credit for overpayment of permanency benefits to be applied towards the current injury permanency award. The district court based its finding on notions of equity and public policy. *Swiss Colony, Inc. v. Deutmeyer*, 789 N.W.2d 129, 133 (Iowa 2010).

5. As the Commissioner should see, the Agency's ruling regarding the credit for temporary benefits was never appealed and was never in front of the district court for interpretation or determination. *Id.*

6. After the district court ruling, both parties in *Deutmeyer* appealed to the Supreme Court bringing forth four errors, with only one pertinent to this matter: claimant argued the district court erred in allowing defendants credit against the current permanency for overpayment of the current injury's permanency benefits. *Id.* at 133 and 134.

7. It should be noted that the Supreme Court identified this issue on appeal initially in their opinion as "allowing Swiss Colony credit for overpayment of weekly benefits" which could potentially be interpreted to mean that the credits for both temporary and permanency benefits were being appealed. *Id.* at 134. In spite of this, it should be clear that such a meaning cannot be applied to that statement because claimant (nor defendants) ever appealed the Agency's determination regarding temporary benefits to the district court, so the temporary benefit issue is not something that the Supreme Court could address. *Id.* at 133.

8. The fact that the issue of credit for temporary benefits was not in front of the Supreme Court is further established in looking at the parties' arguments as identified by the Supreme Court. The Supreme Court notes, "Deutmeyer argues that section 85.34(5) is the exclusive remedy for the overpayment of permanency benefits by employers." *Id.* at 136. (emphasis added). The Supreme Court further notes, "Swiss Colony conversely asserts that the claimant is interpreting section 85.25(5) too expansively ... According to the employer, section 85.34(5) only applies where the employer has overpaid the total permanent disability award" *Id.* (emphasis added).

9. As identified in Defendants prior arguments on this matter, by the time the *Deutmeyer* case reached the district court and Supreme Court, the issue being argued was whether Iowa Code 85.34(5) should apply in the situation where a claimant was overpaid permanency benefits due to rate variation. The *Deutmeyer* claimant was arguing Iowa Code 85.34(5) applied regardless of whether the overpayment was due to rate variation or payment of additional weeks, and the *Deutmeyer* defendants were arguing overpayment of permanency benefits due to rate variation should not be handled under Iowa Code 85.34(5).

10. In the end, the Supreme Court agreed (rightfully so) with claimant's argument. *Id.* at 137.

11. The dicta in the Commissioner's remand decision demonstrates the belief that because the credit for temporary benefit issue was in front of the Agency, and the Supreme Court decision ruled against defendants, then "the holding of the Iowa Supreme Court overturned the credit which was set forth above," and "The overpayment of healing period benefits which were awarded as a credit against future permanent partial disability benefits in *Swiss Colony, Inc. v.*

Deutmeyer at the division level were expressly reversed and found to be improper under the holding by the Iowa Supreme Court.” (Remand Decision at p. 2).

12. The district court in this case recognized that the Commissioner has been in error in such belief, recognizing that the issue of credits for overpayments of temporary benefit was not in front of the Supreme Court in *Deutmeyer*. (Ruling on Petition for Judicial Review).

13. This is why the district court ruled in Defendants favor. This is why the district court’s ruling and the Commissioner’s Remand Decision in this matter does not conflict with the Agency’s prior rulings in *Deutmeyer* and the Supreme Court’s ruling in *Deutmeyer*. This is why this case and all others like it in the future should be ruled by Iowa Code 85.34(4) and not *Deutmeyer*.

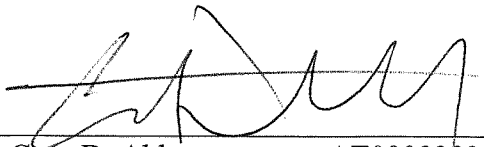
14. Defendants plead that the Commissioner re-examine this matter closely and reconsider the dicta in his Remand Decision that essentially rebukes the very well-reasoned findings of the Honorable Douglas F. Staskal. Such action will save all workers’ compensation claimants and defendants much time and resources in appeals on the Agency’s erred rulings on an erred interpretation of *Deutmeyer*.

15. In the end, *Deutmeyer* (the Supreme Court decision) only is applicable to cases involving credits for overpayments of permanency benefits, and it has no application to cases such as this current one and all others involving credits for overpayments of temporary benefits (which should be handled under Iowa Code 85.34(4)). The Commissioner’s dicta in this Remand Decision should establish such as the rule to be followed in this case and in the future as directed by the district court.

WHEREFORE, the Defendants, the Employer and Insurance Carrier, respectfully request that the Commissioner amend his Remand Decision to properly identify that the Iowa

Supreme Court's *Deutmeyer* decision has no application to cases involving issues of credits for overpayments of temporary benefits, or for such other relief as the Commissioner finds just.

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CERTIFICATE OF SERVICE

The undersigned certifies that this document was served upon all parties to the above cause to each of the attorneys of record or an unrepresented party herein at their respective addresses disclosed on this pleading on October 3, 2013.

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