IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

JOHN WILLIAM BELGER, Plaintiff, vs. LIBERTY MUTUAL INSURANCE COMPANY, a Corporation, and UNITED PARCEL SERVICE, INC., a Corporation, Defendants.	**No. 3:08-cv-00013-JEG** **O R D E R**

This matter comes before the Court on Defendants' Motion for Summary Judgment. The Court held a hearing on the Motion on November 3, 2008. Patrick McNulty represented the Defendants; Steven Crowley represented the Plaintiff. The matter is now fully submitted and ready for disposition.[1]

I. BACKGROUND

On a motion for summary judgment, the Court must "view the evidence in the light most favorable to the nonmoving party." STL 300 N. 4th, LLC v. Value St. Louis Assocs., L.P., 540 F.3d 788, 792 (8th Cir. 2008) (Value).

Defendant United Parcel Service, Inc. (UPS), is an international shipping company and is self-insured for the purposes of Iowa workers' compensation benefits. At all times material to this action, Defendant Liberty Mutual Insurance Company (Liberty) was the claims administrator for UPS (UPS and Liberty collectively referred to as Defendants). On the morning of

[1] At the hearing the Court asked counsel if the impending decision of the Iowa District Court for Polk County reviewing the administrative ruling could impact this Court's ruling, to which both counsel replied in the negative. Upon further consideration, the Court concluded that, should the state court reverse the Commissioner's finding, such a result could impact the analysis. This Court therefore awaited that determination, which ultimately did not disturb the legal posture of the case. The Court concludes the recently filed appeal to the Iowa Supreme Court does not preclude completion of this Court's work on the pending motion and only affects the specific nature of the order.

February 20, 2006, Plaintiff John William Belger (Belger), a package-delivery driver for UPS in Des Moines, Iowa, was making a delivery when the spring on the overhead door on the back of his truck broke, causing the door to fall shut and strike Belger, knocking him to the ground. Belger sustained an injury to his shoulder, for which he filed an injury report.

Duane Hepker (Hepker) was Belger's manager at UPS. After receiving Belger's injury report, Hepker contacted UPS employee Cody Ferrill (Ferrill) and informed him that Belger had injured his shoulder. Ferrill then told Hepker that he had overheard Belger telling other employees that prior to the accident Belger had fallen down while running at night and was experiencing soreness in his shoulder and neck. Hepker stated that following the conversation, he felt like he would have to investigate Belger's claim that the injury was work related.

There are two accounts of what happened when Belger returned to UPS after the accident. Belger's account, which must be accepted for purposes of this Motion, see Value, 540 F.3d at 792, is that when Hepker confronted Belger with Ferrill's story, Belger admitted that he had fallen while running with his dog on January 23, 2006, but claimed he landed face first, receiving an abrasion above his eye, and did not injure his shoulder. Hepker's account is that, after being confronted, Belger confirmed that he had begun to experience shoulder pain after the fall on January 23. Hepker, however, made no contemporaneous notes of his conversation and did not ask Belger to write a statement. Hepker and Ferrill both testified that they had observed Belger loading packages at work without any sign of impairment or pain for the month preceding the February 20 accident.

Hepker authorized Belger to be treated by a company doctor, Dr. Buettner, M.D. (Dr. Buettner). Belger visited Dr. Buettner on February 21; however, earlier in the day Hepker sent Dr. Buettner's assistant, Cindy Carson (Carson), an email asking to speak with Dr. Buettner before Belger's appointment and stating both that Hepker had questioned Belger's integrity in the past and that Hepker felt Belger might lie about the cause of his current injury. It is disputed

whether Dr. Buettner or Carson were aware of the email before treating Belger. Ultimately, Dr. Buettner diagnosed Belger with a shoulder contusion and prescribed conservative care, including therapy and restrictions, and scheduled a follow-up appointment for February 23. Belger returned to work and was placed on restricted duty.

On February 22, Kim Gross (Gross), the UPS occupational health supervisor for the UPS Iowa district, emailed Hepker asking him to write up the substance of a previous, undocumented communication that they had had regarding Belger's report of his running injury. Gross sought this information so she could communicate it to Belger's physician when she met with him the following day. In his reply email, Hepker included the same information he had given to Carson but portrayed the alleged fall injury in a much severer manner.

On February 23, Belger had his follow-up appointment with Dr. Ricky Garrels, M.D. (Garrels), the company doctor who specialized in occupational medicine and worked with the same secretary (Carson) as Dr. Buettner. In his treatment notes, Dr. Garrels claimed that Belger reported having a prior injury and was experiencing pain down *both* shoulders, a claim that Belger denies and that was not present in the reports of Hepker, Ferrill, or Dr. Buettner. Dr. Garrels affirmed Dr. Buettner's assessment of a contusion and recommended continued conservative care of the shoulder.

At his follow-up appointment with Belger on March 9, 2006, Dr. Garrels indicated that Belger fell with arms outstretched while walking his dog, another detail that had not been previously noted in any record. When confronted about the addition of the new detail, Dr. Garrels admitted that Belger had not actually told him that, but rather Dr. Garrels had simply assumed that Belger had fallen with arms outstretched.

Dr. Garrels referred Belger to orthopedic specialist Dr. Robert Magnus, M.D. (Dr. Magnus). After examining Belger on April 3, 2006, Dr. Magnus diagnosed Belger with a contusion, which Dr. Magnus stated was consistent with an injury of the sort Belger claimed to

have sustained. Dr. Magnus also found it plausible that other injuries could have been inflicted when the door knocked Belger to the ground. Dr. Magnus opined that since Belger denied any right shoulder problems prior to the February 20 accident, the injuries were causally related to that accident, and he recommended continued work restrictions and surgery.

However, sometime after April 3 and before April 18, Robert Streff (Streff), a claims consultant for Liberty, received Dr. Magnus' opinion. Streff called Dr. Magnus and attempted to get him to change his opinion. Streff repeatedly sent Dr. Magnus additional information and records seeking to establish that the injury to Belger's shoulder was inflicted as a result of an accident while Belger was running with his dog.

On April 18, 2006, after receiving these communications with Streff, Dr. Magnus changed his opinion. In his new letter, he stated that it was obvious that Belger had problems with his right shoulder that preceded the February 20 accident. He also stated that it was of significance that no broken springs or abnormalities were found on Belger's truck, even though both parties acknowledge that the spring on Belger's truck door broke. His diagnosis regarding causation was that it was difficult to know with one hundred percent certainty when Belger sustained his injuries.

On May 9, 2006, Belger saw Dr. Theron Jameson, M.D. (Dr. Jameson). Dr. Jameson diagnosed Belger with mild cubital tunnel syndrome and scheduled him for surgery. During the surgery on May 12, 2006, Dr. Jameson performed arthroscopic surgery on Belger's shoulder and found evidence that indicated a direct impact upon Belger's shoulder. Furthermore, Dr. Jameson opined that Belger would not have been able to work without pain during the period from the jogging accident until the February 20 accident.

On April 10, 2006, Hepker telephoned Belger and informed him that UPS had terminated his employment. Belger filed a claim for workers' compensation, which Liberty denied as a result of the investigation. On June 2, 2006, Belger filed a petition for arbitration of his workers'

compensation claim and filed an amended petition on October 2, 2006. The case was filed before Deputy Workers' Compensation Commissioner Ron Pohlman (the Deputy Commissioner), who issued a decision on July 27, 2007, finding Belger's claim to be valid and awarding him healing benefits and payment of medical expenses.

The Deputy Commissioner ruled that the evidence, viewed objectively, unequivocally established that the injury was work related and that the Defendants made a bad-faith denial of Belger's claim. The Deputy Commissioner found that the Defendants forced Hepker's theory that Belger's injury was not work related upon the various medical providers in order to obtain medical opinions that would allow Liberty to deny Belger's claim for benefits. Consequently, in addition to awarding Belger compensatory benefits, the Deputy Commissioner also awarded Belger penalty benefits pursuant to Iowa Code § 86.13. Defendants appealed the Deputy Commissioner's decision to Commissioner Christopher Godfrey (the Commissioner).

Upon review, the Commissioner reversed the Deputy Commissioner's award of penalty benefits based on the Commissioner's interpretation of the Iowa Supreme Court's ruling in City of Madrid v. Blasnitz, 742 N.W.2d 77 (Iowa 2007). Specifically, the Commissioner drew on language from Blasnitz, stating that "[a] claim is 'fairly debatable' when it is open to dispute on any logical basis." Id. at 81 (quoting Bellville v. Farm Bureau Mut. Ins. Co., 702 N.W.2d 468, 473-74 (Iowa 2005)). While he did not overturn the Deputy Commissioner's determinations of fact, he found that the record contained evidence that, though "notably weak" and "border[ing] on the illogical," made Belger's claim "open to dispute on any logical basis." Pl. App. 6 at 1, 4-5. Consequently, the Commissioner ruled that the Defendants had sustained their burden of demonstrating they did not act in bad faith when they denied Belger's claim. Belger applied for a rehearing before the Commissioner, but the Commissioner denied his request.

Belger then appealed to the Iowa District Court for Polk County, which affirmed the Commissioner's ruling. Belger v. United Parcel Serv., No. CV-7294, slip op. at 14 (Iowa Dist.

Ct. Feb. 11, 2009). The district court agreed that the evidence the Defendants produced in denying Belger's claim was "weak and unconvincing" but said that the Commissioner had correctly stated the legal standard – that a claim is fairly debatable if it can be disputed on any logical basis – and could not say that the Defendants' reliance on the evidence was illogical. Id. at 13. Belger has subsequently appealed to the Iowa Supreme Court. Belger v. United Postal Serv., No. 09-0273 (Iowa 2009).

Belger comes before this Court asserting claims for (1) bad faith denial of workers' compensation benefits and (2) abuse of process.[2] Defendants have moved for summary judgment, arguing that the Commissioner's determination is preclusive and alternatively that they had a reasonable basis for denying Belger's claim, which in turn shows that they did not commit an abuse of process by litigating the claim. Belger resists, arguing (1) issue preclusion does not apply and (2) questions of fact remain as to whether the Defendants had a reasonable basis for denying his claim.

II. DISCUSSION

A. Standard for Summary Judgment

Summary judgment is properly granted when the record, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "In considering a motion for summary judgment the court does not weigh the evidence, make credibility determinations, or attempt to discern the truth of any factual issue." Thomas v. Corwin, 483 F.3d 516, 526-27 (8th Cir. 2007). Rather, the focus must be "on whether a genuine issue of material fact exists for trial – an issue of material fact is genuine if the evidence is sufficient to allow a reasonable jury

[2] Belger filed this action on February 11, 2008, while his workers' compensation claim was pending before the Commissioner.

verdict for the nonmoving party." Morris v. City of Chillicothe, 512 F.3d 1013, 1018 (8th Cir. 2008) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)).

On a claim for bad faith, the defendant is entitled to a judgment as a matter of law where "there is no evidence from which a reasonable juror could make a necessary finding." Chadima v. Nat'l Fid. Life Ins. Co., 55 F.3d 345, 349 (8th Cir. 1995).

B. Bad Faith Denial of Workers' Compensation Claim

Defendants seek summary judgment on Belger's claim for bad faith denial of his workers' compensation claim on the grounds that the state ruling in the workers' compensation claim precludes a finding that the Defendants acted in bad faith. The analysis begins with some preliminary discussion of the law governing bad faith denial of benefits claims and statutory penalties for delay in payment of workers' compensation.

1. Bad Faith Denial of Workers' Compensation Claim Under Iowa Law

Belger argues that, under Iowa law, the Defendants are guilty of making a bad faith denial of his claim for workers' compensation.

> Iowa law recognizes a common-law cause of action against an insurer for bad-faith denial or delay of insurance benefits. [The Iowa Supreme Court has] extended this common-law tort to workers' compensation cases. . . . To establish a claim for bad faith denial, a plaintiff must prove (1) that the insurer had no reasonable basis for denying benefits under the policy, and (2) the insurer knew, or had reason to know, that its denial was without basis. The first element is an objective one; the second element is subjective.
>
> A reasonable basis for denying insurance benefits exists if the claim is "fairly debatable" as to either a matter of fact or law. A claim is "fairly debatable" when it is open to dispute on any logical basis. Whether a claim is "fairly debatable" can generally be determined by the court as a matter of law. If the court determines that the defendant had no reasonable basis upon which to deny the employee's benefits, it must then determine if the defendant knew, or should have known, that the basis for denying the employee's claim was unreasonable.

Rodda v. Vermeer Mfg., 734 N.W.2d 480, 483 (Iowa 2007) (internal citations and quotations omitted).

2. State Statutory Penalties for Delay of Payment of Workers' Compensation Benefits

Belger filed a petition in arbitration seeking workers' compensation before the Iowa Workers' Compensation Commissioner. In addition to awarding workers' compensation benefits, the Commissioner is authorized to award penalty benefits "if a delay in commencement . . . of benefits occurs without reasonable or probable cause or excuse." Iowa Code § 86.13. "To receive a penalty benefit award under section 86.13, the claimant must first establish a delay in the payment of benefits. The burden then shifts to the employer to prove a reasonable cause or excuse for the delay." Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 334-335 (Iowa 2008). A reasonable cause or excuse exists if the workers' compensation claim is "fairly debatable," a standard the Iowa Supreme Court borrowed from the first element of the tort of bad-faith denial of insurance claims. See Gilbert v. USF Holland, Inc., 637 N.W.2d 194, 199 (Iowa 2001); Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 260 (Iowa 1996); see also Gilbert v. Constitution State Serv., Co., 101 F. Supp. 2d 782, 785-86 (S.D. Iowa 2000).

In overruling the Deputy Commissioner's award of penalty benefits in Belger's workers' compensation claim, the Commissioner found that, in that forum, the Defendants shouldered and ultimately sustained the burden of a minimal showing that the validity of the claim was fairly debatable.

3. Issue Preclusion

The Defendants argue that the Commissioner's holding – that the Defendants' denial of Belger's workers' compensation claim was fairly debatable – precludes Belger from asserting that the Defendants' denial was made in bad faith and therefore not fairly debatable. Defendants assert this Court's decision in Gilbert v. Constitution State Service, Co. is dispositive.

"Federal courts must give state court judgments the same preclusive effect as would a court of the state in which the judgment was entered." N. Star Steel Co. v. MidAm. Energy Holdings

Co., 184 F.3d 732, 737 (8th Cir. 1999). Under Iowa law, "[a] final adjudicatory decision of an administrative agency is regarded res judicata the same as if it were a judgment of the court." Hunter v. City of Des Moines Mun. Hous. Auth., 742 N.W.2d 578, 591 (Iowa 2007) (quoting Pinkerton v. Jeld-Wen, Inc., 588 N.W.2d 679, 680 (Iowa 1998)). Therefore, if the Commissioner's ruling in the workers' compensation arbitration would preclude Belger from asserting that the Defendants' denial was not fairly debatable in state court, it will preclude him from making a similar argument in this Court as well. Of course the record of state proceedings now includes the judgment of the Polk County District Court.

Iowa courts generally apply issue preclusion when four prerequisites are met:

> (1) the issue concluded must be identical;
> (2) the issue must have been raised and litigated in the prior action;
> (3) the issue must have been material and relevant to the disposition of the prior action; and
> (4) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment.

Id. at 584. The rule is intended both to "provid[e] fairness to the successful party in the first case and promot[e] efficient use of court resources by prohibiting repeated litigation over the same issue." Id.

However, "[e]ven when the requirements of the general issue preclusion rule are present, courts are required to consider if special circumstances exist that make it inequitable or inappropriate to prevent relitigation of the issue previously determined in the prior action." Id. The Iowa Supreme Court has identified five exceptions that constitute special circumstances. Id. at 585 (citing Restatement (Second) of Judgments § 28 (1982). The five exceptions where issue preclusion does not apply occur when

> (1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action; or
> (2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to

> take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws; or
> (3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or
> (4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action; or
> (5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

Restatement (Second) of Judgments § 28 (1982).

As noted, the common thread of the "fairly debatable" standard creates the precision necessary for preclusive effect. Two Iowa Supreme Court cases have dealt with whether a ruling in a workers' compensation benefits hearing before the Commissioner has a preclusive effect on a later bad faith claim.

In McIlravy v. North River Insurance Co., 653 N.W.2d 323 (Iowa 2002), the court held that the Commissioner's finding that a workers' compensation carrier had not met its burden of proving that its denial was "fairly debatable" did not establish the first element of a bad faith claim. See McIlravy, 653 N.W.2d at 328-330. The court said the reason that issue preclusion was not appropriate was because the fourth exception to issue preclusion applied, stating,

> In the [workers' compensation hearing], the burden was on [the workers' compensation carrier]. In this civil suit, [the workers' compensation claimant] has the burden. Given the different burdens of proof between the two different penalty mechanisms and the two different stages of the North River/McIlravy dispute, issue preclusion is inapplicable in this case.

See id. at 330. However, the fourth exception only applies when "[t]he party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in

the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action." The fourth exception does not apply here, as the burden of persuasion has shifted from the Defendants to Belger.

This conclusion is in accord with the other Iowa Supreme Court case to deal with the issue. In Wilson v. Liberty Mutual Group, 666 N.W.2d 163 (Iowa 2003), the court held that a workers' compensation claimant who had stipulated to the existence of a "bona fide dispute" in the arbitration hearing before the Deputy Commissioner was precluded from asserting that the workers' compensation carrier had no reasonable basis to deny him benefits in a bad faith suit, id. at 167. The court found that "[t]o prevail on his bad faith claim, [the claimant] would necessarily have to prove that [the carrier] had no reasonable basis to deny his claim," which would be "inconsistent" with the proceedings before the Commissioner. Id. Unlike McIlravy, which took issue with the differing burdens of proof, no such conflict existed in Wilson nor does it exist in this case.

Additionally, none of the other four recognized exceptions applies here. The first does not apply because Belger could and did obtain review of the Commissioner's decision in the Iowa District Court, where the Commissioner's decision was upheld. The second exception is inapplicable because the issues are closely related, with the standard for penalty benefits being derived from the first element of a bad faith denial claim, and there is no evidence that the laws are being inequitably applied.

The third exception also fails because Belger has not identified any differences in the quality or extensiveness of the procedures between the two fora that would make redetermination appropriate. This Court has previously noted the similarities between the two fora, stating,

> The Commissioner's ruling result[s] from an adversary proceeding governed by rules which are similar to those pertaining to judicial proceedings. In fact, the Iowa Rules of Civil Procedure are applicable to workers' compensation proceedings except when in conflict with statute. An evidentiary hearing [is] held

> before a Deputy Commissioner at which the parties ha[ve] an opportunity to present evidence. Both sides [have] the opportunity to appeal the Deputy Commissioner's decision to the Commissioner, and to seek judicial review by the Iowa District Court. In an administrative appeal the Iowa District Court sits in an appellate capacity to correct errors of law and pass on the sufficiency of the evidence under the substantial evidence standard.

Gilbert, 101 F. Supp. 2d at 786.

The fifth exception does not apply because it was sufficiently foreseeable that the Commissioner's decision would arise in the context of a bad faith claim, especially here where Belger is the party who brought both claims. Furthermore, Belger has not alleged that he lacked an adequate opportunity and incentive to pursue a full and fair adjudication before the Commissioner.

However, Belger argues that applying issue preclusion would foreclose the Court's consideration of an "issue of first impression" – whether a reasonable basis for denial exists when the defendant relies "upon evidence [allegedly] procured by fraud or misrepresentation" – and that having this Court resolve the issue is of public importance. Pl. Resist. 6.

When construing Iowa law, federal courts are bound to make decisions in accordance with how the Iowa Supreme Court would decide an issue. See Baker v. Gen. Motors Corp., 522 U.S. 222, 249 (1998). Therefore, it follows that this "issue of first impression," if it must be decided, is best decided by the Iowa Supreme Court.[3] As Belger has appealed the district court's decision, the matter now sits before the Iowa Supreme Court, which will dispose of it in due course. With that already pending appeal, this Court does not find that the issue Belger raises presents such a "clear and convincing" harm to the public interest that it requires this Court to forgo applying issue preclusion in this case. The Court will, however, endeavor to preserve Belger's ability to litigate his claim in the event of a change in the law.

Therefore, because the Commissioner's decision meets the prerequisites for the application of issue preclusion and no special circumstances exist, Belger is precluded from relitigating the

[3] In his Brief in Resistance to Defendants' Motion for Summary Judgment, Belger suggests the alternative of certifying this question to the Iowa Supreme Court. That approach is inherent in the combination of the pending appeal and this Court's order on the pending motion.

Commissioner's determination – as affirmed by the Iowa District Court – that the validity of his workers' compensation claim was fairly debatable. Because that ruling adversely determined an essential element of Belger's claim of bad faith denial of workers' compensation, the Defendants are entitled to summary judgment.

C. Abuse of Process

Belger has also brought a claim of abuse of process against the Defendants, asserting the factual basis for the claim of bad faith also provides the basis for abuse of process. Apparently because this second claim arises so totally from the operative facts in the first claim, the Defendants offer negligible argument on this issue, and Belger disregards it altogether.

Abuse of process is the use of legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it was not designed. Palmer v. Tandem Mgmt. Servs., 505 N.W.2d 813, 817 (Iowa 1993). The elements of abuse of process are (1) the use of legal process, and (2) its use in an improper or unauthorized manner. Id. The party claiming abuse of process must also suffer damages. Id.

The second element – improper or unauthorized use – is difficult to establish. The plaintiff must prove that the defendant "used the legal process primarily for an impermissible purpose or illegal motive." Hunter, 742 N.W.2d at 592 (quoting Wilson v. Hayes, 464 N.W.2d 250, 266 (Iowa 1990)). The Iowa Supreme Court has "taken a very restrictive view of this element in the interest of ready access to the courts." Johnson v. Farm Bureau Mut. Ins. Co., 533 N.W.2d 203, 208-09 (Iowa 1995) (citing Wilson, 464 N.W.2d at 267). "A prerequisite for recovery is evidence that the person committed some act in the use of process that was not proper in the regular prosecution of the proceeding." Grell v. Poulsen, 389 N.W.2d 661, 664 (Iowa 1986). "Proof of an improper motive or even malicious intent in the filing of a lawsuit" is insufficient to satisfy the second element. See Johnson, 533 N.W.2d at 209. "An abuse of process defendant 'is not liable if he has done no more than carry the process to its authorized conclusion, even with bad intentions.'" Id. (citing Wilson, 464 N.W.2d at 267).

Though the Commissioner and the Iowa District Court would appear to agree the Defendants' basis for denial was weak, they ultimately conclude it was legally permissible. Thus, even accepting as true Belger's allegations that the Defendants improperly influenced the medical review with bad intentions, the Court must conclude as a matter of law that the second element of abuse of process cannot be sustained. Therefore, summary judgment is also appropriate on Belger's abuse of process claim.

III. CONCLUSION

The legal argument that a claim cannot be "fairly debatable" if the debate is generated by improperly created information or data, together with the pending appeal before the Iowa Supreme Court, requires this Court to resolve the pending motion in favor of the Defendants under existing law while preserving any yet to be resolved rights of the Plaintiff. In accomplishing this goal, the Court borrows from Judge Walters' approach to similar circumstances. See Gilbert, 101 F. Supp. 2d at 788.

For the reasons stated above, the Defendants' Motion for Summary Judgment (Clerk's No. 13) must be **conditionally granted**. Entry of Judgment is **stayed** until determination of the appeal by issuance of procedendo in Belger v. United Postal Service, No. 09-0273. If the judgment of the Iowa District Court is affirmed, judgment and dismissal in this case will be entered by separate order. If the judgment of the Iowa District Court is reversed, this Court will entertain any appropriate further proceedings. Counsel are directed to advise this Court within ten (10) days after the appeal is concluded.

IT IS SO ORDERED.

Dated this 23rd day of March, 2009.

JAMES E. GRITZNER, JUDGE
UNITED STATES DISTRICT COURT