IN THE SUPREME COURT OF IOWA

No.: 22-0471

Polk County No. CVCV 061324

MID AMERICAN CONSTRUCTION LLC AND GRINNELL MUTUAL,
Petitioners-Appellants,

vs.

MARSHALL SANDLIN,
Respondent-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
THE HON. SCOTT D. ROSENBERG, JUDGE

PETITIONERS-APPELLANTS' BRIEF AND REQUEST FOR ORAL ARGUMENT

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ROUTING STATEMENT

Pursuant to *Iowa R. App. P.* 6.1101(2), this case should be retained by the Iowa Supreme Court. This case involves the interpretation of *Iowa* Code § 85.39 and statutory amendments made to that section by the Iowa Legislature. Further, this case involves the interpretation of Iowa Supreme Court precedent and Iowa law relative to examinations pursuant to *Iowa Code* § 85.39. As this case will involve statutory interpretation of recent amendments, which are an issue of first impression, retention by the Iowa Supreme Court would be appropriate.

STATEMENT OF THE CASE

The Claimant, Marshall Sandlin (hereinafter "Claimant"), filed a Petition alleging an injury on September 9, 2017. (Petition, App. p. 5). The case proceeded on to hearing before Deputy Workers' Compensation Commissioner Joseph L. Walsh on September 5, 2019. At the time of the hearing it was stipulated that the alleged injury date was actually September 6, 2017. (Hearing Report, App. pp. 6-14). An Arbitration Decision was filed on June 18, 2020. (June 18, 2020 Arbitration Decision, App. pp. 15-20). The Arbitration Decision found that the Claimant had established a permanent impairment of 2% to his leg, and awarded the Claimant the costs associated with his independent medical examination pursuant to *Iowa Code* § 85.39. (June 18, 2020 Arbitration Decision, App. pp. 15-20). The Appellants filed a Motion for Rehearing on July 2, 2020 asserting that the Deputy Workers'

Compensation Commissioner had ignored a stipulation of the parties in regards to the situs of the disability at issue in the case, and that the Deputy Workers' Compensation Commissioner had failed to address the arguments and case precedent cited to by the Appellants in regards to the Claimant's examination with Dr. Taylor. (July 2, 2020 Motion for Rehearing, App. pp. 21-26). On July 13, 2020, Deputy Workers' Compensation Commissioner Joseph L. Walsh issued a Ruling on the Motion for Rehearing granting it in part and denying it in part. (July 13, 2020 Ruling Motion for Rehearing, App. pp. 27-28). The Ruling on the Motion for Rehearing granted the rehearing in regards to the situs of the disability, and amended the Arbitration Decision to find that the disability was one to the foot, and awarded 2% to the foot. (July 13, 2020 Ruling Motion for Rehearing, App. pp. 27-28). In regards to the examination with Dr. Taylor the Deputy Workers' Compensation Commissioner found that the case precedent cited was not applicable, and affirmed the award of the costs of the examination with Dr. Taylor. (July 13, 2020 Ruling Motion for Rehearing, App. pp. 27-28). The Appellants filed a Notice of Appeal on July 17, 2020 to the Iowa Workers' Compensation Commissioner. (July 17, 2020 Notice of Appeal, App. pp. 29-30). The Claimant filed a Notice of Cross Appeal on July 23, 2020. (July 23, 2020 Notice of Cross Appeal, App. p. 31). The Workers' Compensation Commissioner issued an Appeal Decision on January 27, 2021. (January 27, 2021 Appeal Decision, App. pp. 32-38). The Appeal Decision affirmed

the Arbitration Decision as modified in the Ruling on Motion for Rehearing. (January 27, 2021 Appeal Decision, App. pp. 32-38). The Appeal Decision also made a specific finding as to certain items of costs that were awarded associated with the litigation. (January 27, 2021 Appeal Decision, App. pp. 32-38). On February 10, 2021, the Employer and its Insurance Carrier filed a Petition for Judicial Review with the Polk County District Court. (February 10, 2021 Petition for Judicial Review, App. pp. 39-41). The Polk County District Court issued a Ruling on Petition for Judicial Review on February 25, 2022. (February 25, 2022 Ruling on Petition for Judicial Review, App. pp. 42-53). The Polk County District Court affirmed in its entirety the Iowa Workers' Compensation Commissioner's Appeal Decision. (February 25, 2022 Ruling on Petition for Judicial Review, App. pp. 42-53). The Employer and its Insurance Carrier filed a Notice of Appeal to the Iowa Supreme Court on March 11, 2022. (March 11, 2022 Notice of Appeal, App. pp. 54-56).

STATEMENT OF FACTS

The Claimant suffered a stipulated work injury to his left foot on September 6, 2017. (Hearing Report; App. p. 6). The Claimant testified that he picked up his tools and went to see the Employer after the incident occurred, and was told to go home and ice his foot. (Hrg. Tr. pp. 23-24, lines 10-21; App. pp. 91-92). The Claimant testified that the Employer was telling him not to go to the doctor, and it

was a minor problem. (Hrg. Tr. pp. 24-25, lines 6-12; App. pp. 92-93; Ex. G, Depo. p. 9, lines 12-19; App. p. 84).

Despite the Employer telling Claimant there was no need to see a doctor, the Claimant went to see a doctor on his own on Saturday with the injury itself occurring on the previous Wednesday. (Hrg. Tr. p. 25, lines 8-12; App. p. 93; Ex G, Depo. p. 9, lines 12-19; App. p. 84). The Claimant himself chose treatment at Medical Associates where he had previously gone for personal health care. (Hrg. Tr. pp. 25, lines 8-12; App. p. 93; pp. 38-41, lines 22-17; App. pp. 99-102; Ex. G, Depo. p. 9, lines 3-8; App. p. 84). The Claimant considered Medical Associates to be his personal family doctors. (Ex. G, Depo. p. 9, lines 3-8; App. p. 84).

The Claimant saw Dr. Isaak at Medical Associates on September 9, 2017. (Jt. Ex. 2, p. 4; App. p. 57). The Claimant was reporting pain in the area of the forefoot and bruising along the area of his toes and at the base of his left heel. (Jt. Ex. 2, p. 4; App. p. 57). The Claimant reported no other injuries. (Jt. Ex. 2, p. 4; App. p. 57). Dr. Isaak reviewed x-rays and was suspicious of a finding at the base of the fifth metatarsal which was suggestive of a fracture. (Jt. Ex. 2, p. 4; App. p. 57). Dr. Isaak made a referral to podiatry at Medical Associates for a suspected fifth metatarsal fracture. (Jt. Ex. 2, p. 5; App. p. 58).

The Claimant testified that the Employer did not make a referral to Medical Associates, nor to Dr. Isaak whom he had previously seen, and the Employer did not

make a referral to the Medical Associates' podiatrist, Dr. Hughes. (Hrg. Tr. pp. 25, lines 8-12; App. p. 93; pp. 39-43, lines 9-14; App. pp. 100-104). The Claimant also testified that he contacted the Insurance Carrier, and they did not direct him to Dr. Hughes. (Hrg. Tr. pp. 42-43, lines 15-15; App. pp. 103-104). The Insurance Carrier did not object to the doctor the Claimant was already seeing. (Hrg. Tr. pp. 42-43, lines 15-15; App. pp. 103-104). The Claimant had no real further contact with the Employer, other than shortly after his injury when he had told them that he was giving his two weeks' notice. (Hrg. Tr. pp. 38-39, lines 18-6; App. pp. 99-100). The Claimant left Mid American Construction as he was going to take a position with a new employer. (Hrg. Tr. p. 29, lines 8-18; App. p. 94). The Claimant testified that the Employer told him he could start his new position right away without the necessity of giving two weeks' notice. (Hrg. Tr. p. 39, lines 3-6; App. p. 100).

The Claimant was seen by Dr. Hughes on referral from Dr. Isaak in acute care for his left foot injury on September 13, 2017. (Jt. Ex. 3, p. 11; App. p. 63). The doctor advised the Claimant that the fracture would take a minimum of six weeks to heal. (Jt. Ex. 3, p. 11; App. p. 63).

The Claimant was seen by Dr. Kennedy on December 14, 2017. (Jt. Ex. 4, p. 19; App. p. 67). The Claimant was placed at maximum medical improvement, and Dr. Kennedy opined that the Claimant had not sustained any permanent impairment to his foot. (Jt. Ex. 4, p. 19; App. p. 67).

The Claimant attempted to testify at hearing that he believed the Employer's insurance company may have sent him to Dr. Kennedy. (Hrg. Tr. p. 44, lines 1-25; App. p. 105). However, this directly conflicts with the medical records from Dr. Hughes. Dr. Hughes indicates that she sent the Claimant to Dr. Kennedy at Occupational Medicine as she does not perform permanent impairment ratings, and her normal process is to refer patients for such purposes. (Ex. A, p. 1; App. p. 78). Dr. Kennedy has confirmed that her clinic is part of the Medical Associates network, as a joint venture between Medical Associates and Mercy Hospital. (Jt. Ex. 5, p. 21; App. p. 68). Dr. Kennedy has also confirmed that Dr. Hughes requested that she perform the impairment rating as Dr. Hughes does not perform impairment ratings. (Jt. Ex. 5, p. 22; App. p. 69). This is also confirmed by the nurse case manager who was involved in the Claimant's care. (Ex. B, p. 1; App. p. 79). In the end the Claimant testified that he did not remember how he ended up seeing Dr. Kennedy. (Hrg. Tr. p. 44, lines 1-25; App. p. 105).

Thus, Claimant, himself, chose Medical Associates, his personal doctors, to treat him. Indeed, at the time the Employer had even told Claimant not to go to a doctor. Claimant was thereafter treated and evaluated solely within Medical Associates or its network. This included Dr. Isaak, Dr. Hughes, and Dr. Kennedy.

STANDARD OF REVIEW APPLICABLE TO ALL ISSUES

Judicial Review of an administrative agency is governed by *Iowa Code* Chapter 17A. An agency decision shall be reversed or modified if the agency decision is unsupported by substantial evidence, affected by error of law or unreasonable, arbitrary or capricious. *Iowa Code* § 17A.19(8). To the extent a claim of error rests on statutory interpretation, the Court's review is for correction of errors of law. *Wilson v. IBP, Inc.*, 589 N.W.2d 729, 730 (Iowa 1999). The Iowa Supreme Court has determined that the Legislature has not delegated any special power to the Workers' Compensation Commissioner regarding statutory interpretation of *Iowa Code* Chapter 85, and as such, any interpretation of the statute will be reviewed for errors at law. *Waldinger Corp. v. Mettler, Inc.,* 817 N.W.2d 1, 4-5 (Iowa 2012). The Commissioner must state reasons for rejecting any evidence and detail the path to the decision. *Murillo v. Black Hawk Foundry*, 571 N.W.2d 16, 20 (Iowa 1997). Without this explanation, Appellate Courts have no way to determine whether the Commissioner acted arbitrarily or misapplied the law. *Id. Iowa Code* § 17A.19(10) provides in pertinent part:

> The Court may affirm the agency action or remand to the agency for further proceedings. The Court shall reverse, modify, or grant other appropriate relief from agency action, equitable or legal and including declaratory relief, if it determines that the substantial rights of the person seeking judicial relief have been prejudiced because the agency action is any of the following:
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> ***

> f. Based upon a determination of fact clearly vested by a provision of law in the discretion of the agency that is not supported by substantial evidence in the record before the Court when that record is viewed as a whole. For purposes of this paragraph, the following terms have the following meanings:
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> (1) "Substantial evidence" means the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance.

Iowa Code § 17A.19(10(f).

The reviewing Court may disregard the agency's conclusions if it decides, after reviewing the entire record, the direct and circumstantial evidence is so compelling that a reasonable mind would find the evidence inadequate to reach the same conclusions. *Ringland Johnson, Inc. v. Hunecke,* 585 N.W.2d 269, 272 (Iowa 1998). In terms of issues of substantial evidence the record before the Agency must be viewed as a whole to determine if there is substantial evidence to support the Workers' Compensation Commissioner's decision. *2800 Corp. v. Fernandez*, 528 N.W.2d 124, 126 (Iowa 1995). The Workers' Compensation Commissioner's application of law to fact is given a review that is a less differential than that under substantial evidence, and can reveal that the Agency decision is affected by other grounds for error. *Meyer v. IBP, Inc.,* 710 N.W.2d 213, 218-219 (Iowa 2006) (citing *Iowa Code* § 17A.19(10)(c), (i), (j), (m)). The Court will reverse the application of

law to fact if it is "irrational, illogical, or wholly unjustifiable". *Neal v. Annette Holdings, Inc.,* 814 N.W.2d 493, 518 (Iowa 2012) (quoting *Lakeside Casino v. Blue,* 743 N.W.2d 169, 173 (Iowa 2007)).

BRIEF POINT I

THE CLAIMANT WOULD NOT BE ENTITLED TO THE REIMBURSEMENT FOR THE COSTS OF AN *IOWA* CODE § 85.39 EXAMINATION AS THERE WAS NO RATING OF IMPAIRMENT BY A PHYSICIAN RETAINED BY THE EMPLOYER OR ITS INSURANCE CARRIER.

Preservation of Error: Error was preserved by the Appellants-Petitioners on this issue by filing a Petition for Judicial Review and briefing the issue to the District Court. The Petitioner sustained an adverse ruling by the Polk County District Court in the Ruling on Petition for Judicial Review filed on February 25, 2022. (February 25, 2022 Ruling on Petition for Judicial Review; App. pp. 42-53).

Argument

The Claimant submitted the independent medical examination of Dr. Taylor as his *Iowa Code* § 85.39 exam, and the Workers' Compensation Commissioner awarded the costs of this exam pursuant to *Iowa Code* § 85.39. The Claimant can trigger *Iowa Code* § 85.39, and his ability to get an examination, only "[i]f an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low . . ." *Iowa Code* § 85.39. In interpreting this statute, the Iowa Supreme Court has had the opportunity

to look at what it actually means for a physician to be one "retained by the employer." The Iowa Supreme Court has held that the term "retained" is not the same as paid by the employer and its insurance carrier. *IBP, Inc., v. Harker*, 633 N.W.2d 322, 326-327 (Iowa 2001). The instant case again presents the issue of the statutory interpretation of the phrase "retained by the employer".

Furthermore, while *Iowa Code* § 85.27 does give the Employer and its Insurance Carrier the right to direct Claimant's care, it does not necessarily require that they exercise this right. *Iowa Code* § 85.27(4). The *Code* only states that the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and would have the right to choose the care. *Id.* The *Code* then goes on to state that "[i]f the employer chooses the care . . .". *Iowa Code* § 85.27(4). The *Code* itself seems to indicate that, while the employer and its insurance carrier have the right to select care, they do not necessarily have to exercise that right so long as the Claimant receives the care necessary under the *Code*. So while the employer and its insurance carrier have a right to direct care, they do not have to exercise that right if they do not choose to do so. They can allow the injured worker to select his or her own physician.

Such interpretation would lead to much the same balancing of *Iowa Code* § 85.27 and *Iowa Code* § 85.39 as the Iowa Supreme Court arrived at in the *Harker* case. *IBP, Inc. v. Harker*, 683 N.W.2d at 326-327. The only difference would be

that the injured worker herein was allowed to select his own physician by acquiescence, as well as the employer and its insurance carrier choosing not to exercise their right under *Iowa Code* § 85.27, rather than under the mandates of Nebraska workers' compensation law as happened in *Harker*. In the end, there really is no difference as the injured worker in both instances got to select his own care. The result is the same. There can be no rational reason for a distinction. In the end, that is precisely what happened here. The Employer did not direct the Claimant anywhere, and the Claimant ended up selecting his own treatment.

In the *Harker* case, the Iowa Supreme Court found that the question presented was whether a physician that was chosen by the injured worker would qualify as one "retained by the employer" for purposes of *Iowa Code* § 85.39. *IBP, Inc., v. Harker*, 683 N.W.2d at 326. *IBP, Inc. v. Harker* is the controlling legal precedent interpreting the specific language of *Iowa Code* § 85.39 at issue. *IBP, Inc., v. Harker*, 633 N.W.2d 322 (Iowa 2001). In the *Harker* case, the claimant chose his own physicians, and subsequently there were several referrals made to other doctors who saw the claimant as a part of his care. *Id.* at 324. In the end, as the claimant chose his own initial treating doctor, who later made the referrals to the doctors offering the ratings, the claimant was not entitled to an examination pursuant to *Iowa Code* § 85.39. *Id.* at 326-327. The Iowa Supreme Court interpreted *Iowa Code* § 85.39 in terms of what it meant for a physician to be "retained by the employer." *Id.*

at 326. The Court determined that the word "retained" for purposes of *Iowa Code* § 85.39 would mean a physician chosen by the employer, and merely being paid by the employer was not adequate. *Id.* at 327.

Indeed, the instant case presents an issue very similar to that already addressed by the Iowa Supreme Court in *Harker*. In that case the injured worker chose to seek out treatment from a Dr. Muller, and his employer acquiesced in his decision. *Id. at 324.* Dr. Muller then referred the injured worker on to an orthopedist, who in turn referred the injured worker on to a neurologist. *Id.* It is those last two physicians that authored the ratings of permanent impairment. *Id.* In the *Harker* case the injured worker then attempted to seek out his own examination pursuant to *Iowa Code* § 85.39, but the Iowa Supreme Court held that he did not meet the requirements of having a rating from a physician "retained" by his employer. *Id.* at 326-327.

In the instant case, the Claimant selected Dr. Isaak at Medical Associates to be his treating physician. The Claimant has testified that when he called his Employer on the Friday before he went to the doctor, the Employer did not want to talk about going for treatment. (Hrg. Tr. p. 40, lines 2-23; App. p. 101). The Claimant related that his foot was still hurting, and that he would like to take the day off. (Hrg. Tr. p. 40, lines 2-23; App. p. 101). The Claimant then called the Employer later in the day and told him that he needed to go see a doctor, but the Employer did not tell him to go anywhere. (Hrg. Tr. p. 40, lines 2-23; App. p. 101). The Claimant

testified that he asked about going to Medical Associates, to which the Employer replied that he could go there, or whatever. (Hrg. Tr. p. 41, lines 1-3; App. p. 102). The Employer did not have any suggestions or comment. (Hrg. Tr. p. 41, lines 1-17; App. p. 102). The Claimant was clear, however, that the Employer did not pick Medical Associates. (Hrg. Tr. p. 41, lines 1-17; App. p. 102). The Claimant is the one who suggested going to Medical Associates. (Hrg. Tr. p. 41, lines 1-17; App. p. 102). Medical Associates was Claimant's personal doctors. (Hrg. Tr. pp. 25, lines 8-12; App. p. 93; pp. 38-41, lines 22-17; App. p. 99-102; Ex. G, Depo. p. 9, lines 3-8; App. p. 84).

Just as in *Harker*, the Claimant here chose his initial treating physician. In fact, Medical Associates is where the Claimant had previously gone for his own personal health care, and he considered them to be his personal family doctors. (Hrg. Tr. p. 25, lines 8-12; App. p. 93; pp. 38-41, lines 22-17; App. pp. 99-102; Ex. G, Dep. p. 9, lines 3-8; App. p. 84). Dr. Isaak then sent the Claimant to Dr. Hughes, also at Medical Associates. The Claimant testified that he did contact the Insurance Carrier, but they did not direct him to Dr. Hughes. (Hrg. Tr. p. 42, lines 8-14; App. p. 103). Again, this is much the same as the case in *Harker* where the initial treating doctor made a subsequent referral.

Just as in *Harker*, the doctor the Claimant chose (Dr. Isaak) then referred the Claimant to someone else. This was to Dr. Hughes, a podiatrist. The Claimant has

testified that he communicated with the Insurance Carrier after his initial treatment, and they did not direct him to go to Dr. Hughes. The Claimant offered that the Insurance Carrier did not object either. Essentially, the Insurance Carrier acquiesced in the choice that had already been made by the Claimant.

The Commissioner's Appeal Decision appears to agree that the initial physicians were not employer retained physicians for purposes of *Iowa Code* § 85.39. The Appeal Decision seems to find that it is when the Claimant saw Dr. Kennedy that the chain was broken. This is also where the District Court determined that Dr. Kennedy was selected by the Employer and its Insurance Carrier. The Appeal Decision finds that Dr. Hughes' staff recommended a referral to Dr. Kennedy which was arranged by the nurse case manager. This same involvement by the nurse case manager is what the District Court relied upon to affirm the agency. What the Workers' Compensation Commissioner does not explain is that Dr. Hughes does not perform impairment ratings. As a result, Dr. Hughes had to make an additional referral to perform the final evaluation of the Claimant. This referral was to Dr. Kennedy. Again, Dr. Hughes made the referral, and has confirmed this in the record. Whether Dr Hughes' staff was included in the scheduling process is not relevant. Dr. Kennedy was not chosen by the Appellants in this case. Dr. Kennedy was chosen by Dr. Hughes, Claimant's own chosen doctor.

The Workers' Compensation Commissioner seems to find that, because the Employer and its Insurance Carrier in this case requested an impairment rating from Dr. Hughes, they should also somehow be imputed as having chosen Dr. Kennedy. However, that ignores the law from *IBP, Inc., v. Harker*. To avail himself of *Iowa Code* § 85.39, the law is clear that the Appellants in this case would have had to, at a minimum, specifically chosen the doctor who performed the impairment rating.

There are no facts in this record indicating that Dr. Kennedy was chosen by the Appellants. There is no indication in the record that anyone from the Appellants directed the Claimant specifically to go to Dr. Kennedy. The Claimant testified that he thought that the Insurance Carrier may have selected Dr. Kennedy, but all of the facts are to the contrary. Claimant is simply mistaken. Even the Claimant had to admit in the end that he was not sure. Dr. Hughes has confirmed that she made the referral to Dr. Kennedy, and Dr. Kennedy has confirmed that she received the referral from Dr. Hughes. Merely because Dr. Hughes' staff may have recommended the referral does not change the fact that Dr. Hughes made the referral that brought the Claimant to see Dr. Kennedy. This is also consistent with what the nurse case manager has provided in the evidence. Therefore, there is nothing in the record that indicates that Dr. Kennedy was chosen by the Appellants to trigger *Iowa Code* § 85.39. Merely because Dr. Kennedy was paid by Appellants, does not mean she was "retained" under *Harker*.

The District Court, much as the Iowa Workers' Compensation Commissioner, seized upon the nurse case manager's involvement in setting the appointment with Dr. Kennedy as indicia of the Employer and its Insurance Carrier exercising a choice to select Dr. Kennedy. It does not appear that the District Court disputed the interpretation of the case law advanced by the Appellants. The District Court turns this into a factual issue about whether Dr. Kennedy was retained or not.

First the nurse case manager being involved is not something that would establish that Dr. Kennedy was retained or selected by the Appellants. The Iowa Supreme Court has examined some issues in regards to a nurse case manager in a workers' compensation case previous. *See Wilson v. IBP, Inc.*, 558 N.W.2d 132 (Iowa 1997). In the *Wilson* case the Iowa Supreme Court held that a nurse case manager would owe a fiduciary duty to the injured worker. *Id.* at 137-138. As a fiduciary relationship existed between the injured worker and the nurse case manager there was a duty for the nurse case manager to act or give advice for the benefit of the other person within the scope of that relationship. *Id.* The Iowa Supreme Court further noted that a confidential relationship would exist between those persons that would require the nurse case manager to act or advise the other with the injured person's interest in mind. *Id.* at 138. While the Iowa Supreme Court did hold that the existence of such a relationship would be evaluated on a case by case basis this does evidence that merely because a nurse case manager is involved

this does not mean that they are necessarily solely acting on behalf of an employer or insurance carrier. *Id.* In the *Wilson* case the Iowa Supreme Court noted that a medical case manager was responsible for directing and managing the care of the injured worker, the medical case manager contacted an injured worker's doctors regarding light duty assignments, and the medical case manager instructed the injured worker regarding attending doctors' appointments. *Id.* In this regard, the nurse case manager is acting also on behalf of the injured worker to facilitate the provision of medical treatment and care being recommended by the various providers.

It is in this respect that the analysis of the District Court is flawed. The District Court notes that the nurse case manager contacted the Insurance Carrier when informed by Dr. Hughes that she does not address disability. (Ex. B, p. 1; App. p. 79). It was noted that the Medical Associates staff recommended a referral to Occupational Health, and Dr. Kennedy. (Ex. B, p. 1; App. p. 79). The nurse case manager then contacted the Claimant's attorney to review her role and her involvement in this case. (Ex. B, p. 1; App. p. 79). The nurse case manager then secured the appointment with Dr. Kennedy. (Ex. B, p. 1; App. p. 79).

However, nothing in this shows that the Insurance Carrier specifically made direction to Dr. Kennedy. This also ignores the information provided in the record from Dr. Kennedy and Dr. Hughes. In short, Dr. Hughes made a referral for the final

evaluation, and would make that referral to Occupational Health. This is how the Claimant came to see Dr. Kennedy.

This is no different than the nurse case manager being involved in any other scheduling or referral made by a medical provider. The District Court seems to indicate that the Appellants could simply ignore the referral being made by Dr. Hughes. However, nothing about this indicates that the Appellants in this instance made an actual selection of Dr. Kennedy. Medical Associates recommended the referral within their own network, and that was Dr. Hughes' intention. This was merely followed through and facilitated by the nurse case manager.

Nothing in this record shows a specific selection of Dr. Kennedy which would be necessary under the case law cited in the foregoing for her to become a physician retained by the Appellants in this matter. Indeed, in finding otherwise the District Court and the Commissioner seems to have misinterpreted the case law set forth in the foregoing as to what it actually takes to retain a physician under *Iowa Code* § 85.39. The law states that to retain a physician there must be an actual selection of that physician by the Appellants in this matter. The Iowa Workers' Compensation Commissioner and the District Court do not actually talk about a specific selection which would satisfy this retention requirement as evidenced in the case law. In short, the District Court and the Iowa Workers' Compensation Commissioner have ignored the case holding, and are finding that Dr. Kennedy was retained merely because an

appointment was requested by Dr. Hughes, and the nurse case manager set up the referral that was requested. If the bar was set so low then any referral to a different physician would make that physician retained. This is not what happened in *Wilson,* and should not be what happens in this case.

In the end the care was paid for by the Insurance Carrier, but that is not enough to trigger the Claimant's ability to get an examination under *Iowa Code* § 85.39. *Id.* The Claimant's own selected treating physician in this case, Dr. Isaak, referred the Claimant on to a podiatrist, Dr. Hughes, who then in turn referred the Claimant on to Dr. Kennedy. Just as in the *Harker* case, this is an unbroken line of referrals from the Claimant's own selected treating physician. While the Claimant disputes the nature of the referrals, all of the doctors, Dr. Hughes and Dr. Kennedy, both agree that the referral to Dr. Kennedy was made by Dr. Hughes. The Claimant does not dispute that Dr. Isaak referred him to Dr. Hughes. Therefore, there has been no rating of impairment from a physician retained by the Employer and its Insurance Carrier.

Since Dr. Kennedy was not "retained" by the Employer and its Insurance Carrier, the Claimant is not entitled to an examination under *Iowa Code* § 85.39. This is consistent with the Iowa Supreme Court holding in *IBP, Inc., v. Harker* interpreting the very statutory language at issue in this case. There is no basis upon which to distinguish the authority, and no factual basis upon which to state that the

Employer and its Insurance Carrier in this matter retained Dr. Kennedy. Merely stating that the evaluation was pursued by the Employer and its Insurance Carrier does not address the legal question presented.

Therefore, the award of Dr. Taylor's *Iowa Code* § 85.39 examination should be reversed.

BRIEF POINT II

EVEN IF THE CLAIMANT IS ENTITLED TO AN *IOWA CODE* § 85.39 EXAM, THE COSTS OF THE EXAMINATION ARE UNREASONABLE PURSUANT TO *IOWA CODE* § 85.39.

Preservation of Error: Error was preserved by the Appellants-Petitioners on this issue by filing a Petition for Judicial Review and briefing the issue to the District Court. The Petitioner sustained an adverse ruling by the Polk County District Court in the Ruling on Petition for Judicial Review filed on February 25, 2022. (February 25, 2022 Ruling on Petition for Judicial Review; App. pp. 42-53).

Argument

This case falls under the new 2017 version of *Iowa Code* § 85.39. *Iowa Code* § 85.39 specifically provides that only the "reasonable" costs associated with an examination for an "impairment rating" are to be reimbursed. *The Code* now says "[a] determination of the reasonableness of a fee for an examination made pursuant to this subsection, shall be based on the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination occurred".

Iowa Code § 85.39(2) (Emphasis added). It is clear that the Legislature modified *Iowa Code* § 85.39 to limit the amount of fees that could be charged for *Iowa Code* § 85.39 medical examinations. The limitation is the actual cost of performing an impairment rating. This is not the same as the costs of an "independent medical examination" as the *Code* only states the charge is to be that of a medical provider to perform an impairment rating alone. *Iowa Code* § 85.39 does not cover additional costs to provide other opinions beyond impairment or even necessitate reviewing a great deal of records.

The agency and the District Court in this instance engaged in statutory interpretation of the new provisions of *Iowa Code* § 85.39. In reviewing statutory interpretation this Court will review for corrections of errors of law. *Wilson v. IBP, Inc.*, 589 N.W.2d 729, 730 (Iowa 1999). The Iowa Supreme Court has determined that the Legislature has not vested in the Workers' Compensation Commissioner authority to interpret the statutes, and the review of the Iowa Workers' Compensation Act and the interpretation of the statutes will be for errors of law. *Trujillo v. Quality Egg, L.L.C.*, 878 N.W.2d 759, 768-769 (Iowa 2016). In interpreting the Iowa Workers' Compensation Act, the goal is to determine and effectuate the Legislature's intent. *Id.* (citing *United Fire & Casualty Co. v. St. Paul Fire & Marine Insurance Co.*, 667 N.W.2d 755, 759 (Iowa 2004). *Id.* at 770. To determine the legislative intent, the Court will look to the language chosen by the

Legislature and not at what the Legislature might have said. *Id.* (citing *Schadendorf v. Snap-On Tools Corp.*, 757 N.W.2d 330, 337 (Iowa 2008)). Absent statutory definition, the Court will consider statutory terms in their context and give them their ordinary and common meaning. *Id.* (citing *Rojas v. Pine Ridge Farms, L.L.C.*, 779 N.W.2d 223, 235 (Iowa 2010)). If the statutory language is ambiguous, the words are to be reviewed in the statute as a whole to produce a harmonious result. *Id.* The Court will also presume that the Legislature included every part of the statute for a purpose, and will avoid any statutory construction that would make any portion redundant or irrelevant. *Id.* The Court will also avoid construing the statute in a way that will lead to an absurd result. *Id.*

The language of the new statute is clear that what is now provided for in *Iowa Code* § 85.39 is different than an independent medical examination which could touch on issues far beyond a simple impairment rating such as causation, diagnosis, treatment, restrictions, maximum medical improvement in addition to an impairment rating as well. It is clear that the Legislature has chosen to put some limit on the scope of an evaluation in enacting amendments to *Iowa Code* § 85.39, and the specific limitation is to define reasonable as the costs to perform an "impairment rating", alone. The *Code* does not include any additional opinions. In other words *Iowa Code* § 85.39 no longer allows reimbursement for a full independent medical examination. The Legislature could have stated that the reasonable cost was that of

performing an "independent medical examination", but chose to specify that it was the cost to perform an "impairment rating".

In interpreting the statute the District Court looks at the word "base". The District Court then goes on to point out that the statutory amendments did not exclude other things that could be in an independent medical examination. However, this completely ignores the language that was actually selected by the Iowa Legislature.

The Iowa Legislature specifically states that the determination of what is reasonable shall be based upon the costs to perform an impairment rating in the locality. The Legislature did not state that it was the cost to perform an independent medical examination, or to provide any other opinions. The only thing that the Legislature provided that the determination of reasonable would be based upon, the cost to provide a functional impairment rating. This is not to say that an injured worker could not obtain those other opinions, but the only thing that can get reimbursed as a reasonable charge under *Iowa Code* § 85.39 is the costs to provide a functional impairment rating. This is the limitation that has been put into *Iowa Code* § 85.39 by the new statutory amendments. The scope of the examination that can get reimbursed under *Iowa Code* § 85.39 has been limited in the definition of what is reasonable.

Essentially, the District Court in its interpretation has read this out of the *Code* by interpreting the statute to make the cost to obtain an impairment rating one such factor, and the Iowa Workers' Compensation Commissioner would be free to do as they have always done. If the Legislature intended it to be only one of the factors, there is no need to put in this language at all as that is what was done under *Iowa Code* § 85.39 before. This essentially makes the statutory change meaningless. Obviously, the Legislature intended it to do something. Indeed, the Iowa Supreme Court has held that when the Legislature amends a statute it will be presumed that it was intended to change the law. *Chavez v. MS Technology LLC*, 972 N.W.2d 662-670 (Iowa 2022) (citing *Colwell v. Iowa Dep't of Hum. Servs.*, 923 N.W.2d 225, 235 (Iowa 2019)).

The interpretation advanced by the Appellants is further supported by the original portions of *Iowa Code* § 85.39. Specifically, *Iowa Code* § 85.39 previously specified that the injured worker may only have an examination when there has been "an evaluation of permanent disability" by a physician that was retained by the employer, "and the employee believes this evaluation to be too low . . .". *Iowa Code* § 85.39(2). In short, an injured worker was getting an evaluation to rebut an impairment rating authored by an employer retained physician that is believed to be too low. In the 2017 amendments, the Legislature went further to define specifically

that workers only could get the reasonable costs of performing an "impairment rating".

A. Scope of exam unreasonable.

Essentially, the Claimant herein asked for the wrong thing of Dr. Taylor. The Claimant requested Dr. Taylor do a full independent medical examination including giving numerous opinions beyond just an impairment rating. A mere impairment rating would typically only involve measurements, or a diagnosis based evaluation under the *AMA Guides to the Evaluation of Permanent Impairment 5th Ed.* An impairment rating evaluation does not require the additional evaluations and/or analysis that might be necessary, or the review of additional records, to give opinions on causation, permanent restrictions, additional treatment, maximum medical improvement or a myriad of other issues beyond a functional impairment rating. While these additional opinions certainly would be desirable and beneficial to the Claimant at hearing, the Legislature has chosen to limit the reimbursable costs associated with an *Iowa Code* § 85.39 examination to just the cost of performing an impairment rating. Merely because an evaluation might also include an impairment rating, does not mean that under the *Code* the employer and its insurance carrier would be responsible for all the additional costs, analysis, examination, and review of records necessary to render numerous additional medical opinions. All that would be reimbursable under *Iowa Code* § 85.39 are the costs associated with the

examination needed to perform an impairment rating: The sole item that is considered to be the reasonable costs on *Iowa Code* § 85.39 exam.

This interpretation of the new *Iowa Code* § 85.39 amendments also makes sound policy sense as well. Injured workers have no incentive to try to contain the costs of an *Iowa Code* § 85.39 exam, and in this case Claimant used it to obtain additional opinions for litigation purposes beyond just an impairment rating. The Legislature has sought to narrow what can be covered under an *Iowa Code* § 85.39 exam. *Iowa Code* § 85.39 is a means by which an injured worker who is dissatisfied with an impairment rating authored by an employer retained physician, may get an impairment rating from a physician of his or her own choice. Section 85.39 is not a means to shift all of the costs of obtaining expert medical opinions for an eventual trial. Indeed the Iowa Supreme Court has even indicated that cost is a valid reason to choose between two reasonable courses of treatment under *Iowa Code* § 85.27 for an employer and its insurance carrier. *Long v. Roberts Dairy Co.*, 528 N.W.2d 122, 124 (Iowa 1995).

In 2017 the Legislature amended the *Code* to try to mitigate what had become a runaway *Iowa Code* § 85.39 expense train. The case law is overrun with *Iowa Code* § 85.39 expense awards into the many thousands of dollars. Yet Appellants suggest the instant case is merely one of many ongoing *Iowa Code* § 85.39 awards at the Workers' Compensation Commissioner's office showing "business as usual"

when it comes to assessment of *Iowa Code* § 85.39 costs despite the 2017 amendments. Appellants know of no instance in which the Workers' Compensation Commissioner has limited an *Iowa Code* § 85.39 reimbursement to the cost of an impairment rating. This case is just an illustration of a medical examiner charging thousands of dollars merely to evaluate a healed non-displaced metatarsal fracture. The charge at issue was for more than the 2% foot award to the injured worker. Providing claimants' exams has become its own little industry. This is exactly what the Legislature intended to limit with the 2017 amendments.

The amended language of the statute is clear, and unambiguous. *Iowa Code* § 85.39(2) is only triggered in response to an impairment rating, and now additionally only provides for the reimbursement of the costs of obtaining an impairment rating from a different physician. The Iowa Supreme Court has already determined that a statute dealing with costs is to be strictly construed. *Coker v. Abell-Howe Co.*, 491 N.W.2d 143, 151 (Iowa 1992). The 2017 amendments to *Iowa Code* 85.39 had to mean something. Appellants suggest the Workers' Compensation Commissioner and the District Court are ignoring the amendments or misinterpreting the amendments. Essentially, the interpretation of the District Court and the Commissioner ignores the tenet of statutory construction that it is presumed that when a statute is amended the intent was to change the law.

The Claimant requested numerous opinions beyond just an impairment rating, and an impairment rating would typically only involve measurements, or a diagnosis based evaluation under the *AMA Guides to the Evaluation of Permanent Impairment (5th Ed.)*. It does not require the additional evaluations that might be necessary, or the review of additional records, to get opinions on causation, permanent restrictions, additional treatment, maximum medical improvement or a myriad of other issues beyond a function impairment rating. While these opinions certainly would be beneficial to the Claimant at hearing, the Legislature has chosen to limit the costs associated with *Iowa Code* § 85.39 examination to just the cost of performing an impairment rating.

While it is true that the *Code* did provide that the injured worker would be reimbursed "the reasonable fee for a subsequent examination by a physician of the employee's own choice" the *Code* now goes on to specify what will be defined as reasonable. *Iowa Code* § 85.39(2). The reasonable costs are to perform an impairment rating. The Iowa Legislature did not choose to include language that it was the cost to perform an independent medical examination, but specifically chose to limit the language to the cost of performing an impairment rating. If reasonable still means what it has all along, then there was no need for the Iowa Legislature to include additional language specifically defining the term. In interpreting a statute, effect must be given to all of the language so that none of it becomes superfluous.

Trujillo V. Quality Egg, L.L.C., 878 N.W.2d 759, 770 (Iowa 2016). What the Claimant is arguing for is that this language is superfluous as it does nothing. Examining the statute all that was originally stated was that "[i]f an evaluation of permanent disability has been made by a physician retained by the employer" that the injured worker would be able to have an evaluation with a physician of their choice. *Iowa Code* § 85.39(2). This defined the triggering factor to get an examination. What it meant is that a rating would have to be provided for permanent disability by a physician chosen by the employer and its insurance carrier. In defining what the reasonable costs are, the Legislature chose to limit what could be a compensable examination under *Iowa Code* § 85.39 to the costs of performing an impairment rating. This makes it consistent with the triggering factor to get the exam in the first place.

The *Code* now also limits an *Iowa Code* § 85.39 examination only to situations where the injury for which the worker is being examined is determined to be compensable. *Iowa Code* § 85.39(2). Thus, if the injury being evaluated ends up not being a compensable one, the Claimant would receive nothing under *Iowa Code* § 85.39. This further supports an interpretation that the Legislature sought to limit what would be compensable under *Iowa Code* § 85.39. Not only to limit the reimbursement for expenses under *Iowa Code* § 85.39 only to compensable injuries, but only to an impairment rating. If the injured worker is seeking a full independent

medical examination, it would touch upon, at least potentially, issues such as the causal connection between the alleged injury or condition and the injured worker's employment. If the alleged condition ends up not being compensable, the injured worker would not have gotten anything under *Iowa Code* § 85.39 to pay for the examination. This would even be the case in the eventuality that a rating was authored by an employer retained physician. Which would have otherwise triggered *Iowa Code* § 85.39 before the 2017 Amendments. All of this read together with the original *Iowa Code* § 85.39(2) only further shows that the Legislature is intending to limit what is included, and the scope of an examination under *Iowa Code* § 85.39(2).

An *Iowa Code* § 85.39(2) examination is only triggered in response to a rating from an employer retained physician that the injured worker believes to be too low. *Iowa Code* § 85.39(2) is only triggered when a rating is authored by an employer retained physician, and the injured worker thinks that they should receive a higher rating of disability. Further, the *Code* now limits that the *Iowa Code* § 85.39 exam is only compensated if the injury itself that is being evaluated is compensable. This is regardless of whether *Iowa Code* § 85.39 would have been triggered anyway. Further, the *Code* now goes on to limit what is reasonable to the costs of performing an impairment rating. *Iowa Code* § 85.39(2). Nothing could be clearer in the language that the reasonable costs are now limited only to performing an impairment

rating. The *Code* does not state that it is to perform an independent medical examination, to obtain opinions on causation, restrictions, maximum medical improvement or any other issue that would be beneficial to the case. The *Code* specifically states that the reasonable cost is only to perform an impairment rating. The *Code* is clear and unambiguous about what is specified. This is consistent with the other language in the statute, and the other portions of the new Amendments to *Iowa Code* § 85.39. In short, the Claimant wants to argue for business as usual and ignore the new statutory language. However, the law is clear that language and statute should not be superfluous, and that this language should mean something. The language is clear by its own terms what it means.

B. Actual charge unreasonable.

While the Claimant would be the one to suffer the loss, and have the burden of proof in this matter, the Employer and Insurance Carrier have introduced into evidence the charges from Dr. Kennedy for performing her impairment rating in Dubuque, Iowa. This was $174.25. (Def. Ex. C, p. 1). In this particular case, the bill from Dr. Kennedy for performing an impairment rating in Dubuque, Iowa was reduced to $174.25. (Def. Ex. C, p. 1). This is the amount that was paid to Dr. Kennedy to perform an impairment rating "in the local area where the examination occurred". *Iowa Code* § 85.39(2).

Thus, the only evidence in the record of the cost of an impairment rating in the local area is the bill of Dr. Kennedy. Additionally, as with Dr. Taylor, Dr. Kennedy only saw Claimant once. Dr. Kennedy would have had to do pretty much the same things as Dr. Taylor to render her impairment rating for a foot injury.

The Appellants herein went even further also introducing the examination fee schedule of Dr. Taylor. Medex, the Ankeny clinic where Dr. Taylor is associated, cites a $500.00 flat fee to perform an impairment rating evaluation for one body part. (Def. Ex. E, p. 1; App. p. 80). This also includes the report. The Claimant's injury/disability was to one body part – the foot. Appellants submit Claimant herein merely requested the wrong evaluation of Dr. Taylor if he wished reimbursement under *Iowa Code* § 85.39.

Under the current definition in *Iowa Code* § 85.39 of what would be reasonable, it is clear that Dr. Kennedy only received $174.25 to perform a functional impairment examination. Medex's own fee schedule only provides $500.00 for the same purpose. The Claimant has testified that Dr. Taylor spent approximately 30 minutes with him during the course of the exam. Thus, the billing statement of Medex clearly reflects additional charges that are unreasonable. (Cl. Ex. 2, p. 13; App. 77). This case involved fairly little in the way of actual medical records, and Dr. Taylor only spent approximately 30 minutes with the Claimant. As such, even if the examination of Dr. Taylor is compensable under *Iowa Code* §

85.39, at most the fee that should be charged is $500.00, and more likely closer to $174.00.

In fact, the Appellants believe that the Claimant is the one who bears the burden of proof as the one who would suffer the loss if he does not establish what the reasonable fee for his exam would be. He has offered no evidence contrary to what the Appellants have placed in the record to show that the fees charged by Dr. Taylor were reasonable, even under the doctor's own published fee schedule. Therefore, Claimant should suffer the loss for not meeting his burden of proof.

The Commissioner's Appeal Decision finds that Dr. Taylor's charges are reasonable based upon a line in the report of Dr. Taylor wherein he self-servingly indicates that his fees are reasonable. However, what the report itself actually states is that "[t]he fees for this examination are reasonable based upon my training and certification in performing such examinations as a Board Certified specialist in Occupational and Environmental Medicine, as well as certification as an Independent Medical Examiner by the American Board of Independent Medical Examiners; the time spent with the examinee obtaining the history and performing the examination, the time spent in preparing the report, and the time spent by my staff preparing the file for use in preparing this report". (Cl. Ex. 1, p. 8; App. 75). Appellants suggest this is boiler plate used by Dr. Taylor. However, nothing in the quoted text indicates that this is the reasonable costs of just performing an

impairment rating in the locality of Dubuque, Iowa (Medex is in Ankeny). All this language states is that the examiner, himself, felt that his charges were reasonable for performing the examination and report he provided. However, the examination provided was not just an impairment rating evaluation, but a full independent medical examination. The Appeal Decision does not explain why that line would somehow overrule the actual fee schedule from Medex. Merely stating that the fees charged for an independent medical examination are reasonable is not the same thing as stating that the fees charged are the reasonable fees for performing an impairment rating in that locality.

The District Court compounds this error. The District Court rejects Dr. Kennedy's fee breakdown as not an appropriate comparison, but ignores the Medex fee schedule. Further, the *Code* specifically states what is reasonable under *Iowa Code* § 85.39. Nowhere in Dr. Taylor's boiler plate statement about his fees in the independent medical examination report does he articulate this standard. Nowhere does the statement from Dr. Taylor discuss the fees charged to perform an impairment rating in the locality where the examination occurred. The Claimant has not provided any evidence documenting what the fees charged for an impairment rating would be. The Claimant bears the burden of proof in this matter, and would have to show some type of comparison upon which this examination fee could be awarded. Neither the District Court nor the Iowa Workers' Compensation

Commissioner have a comparison directly in front of them to support the fee charged by Dr. Taylor.

All that is in the record is the evidence put there by the Appellants in this matter. This is the fee schedule from Medex for performing the various service identified in the *Code*. Essentially, Dr. Taylor states that his fees are reasonable for a full independent medical examination, but examining the fee schedule from Medex shows the reasonable fee charged to perform an impairment rating. Applying the appropriate interpretation of the *Iowa Code*, the evidence does not support the award of Dr. Taylor's full independent medical examination.

While the Appellants would argue that the evidence shows that the fees charged by Dr. Kennedy would be most appropriate, at the most the fees charged by Medex in their fee schedule could be awarded. Thus, the District Court and the Iowa Workers' Compensation Commissioner inappropriately applied the facts of this case to the applicable law. This is in addition to making a finding without any factual support in the record. Simply put, Dr. Taylor's statement does not articulate the standard that is in place in *Iowa Code* § 85.39 to support the award of his full examination fee.

The agency decision does not explain the contradiction between the line from Dr. Taylor's report about his fees being reasonable, and its conflict with Dr. Taylor's own fee schedule provided by his own clinic. In that regard, the decision is

irrational, illogical and wholly unjustifiable. Further, the finding is based upon a misinterpretation of *Iowa Code* § 85.39. In reality the only evidence in the record of the costs of performing a foot impairment rating in Dubuque, Iowa, is the bill of Dr. Kennedy, a Dubuque based doctor.

C. Summary.

In the end, the agency merely found that the Claimant was entitled to an independent medical examination, and that the costs that Dr. Taylor charged were reasonable. However, this does not address the 2017 changes that were made in *Iowa Code* § 85.39, and that were applicable to the findings regarding the reasonableness of the fees for Dr. Taylor's examination. In essence, the agency merely did what it has always done before in terms of assessing *Iowa Code* § 85.39 exams, but did not really address the issue regarding reasonableness as defined by the new *Iowa Code* provisions. In that regard, the agency has committed an error of law, as well as an error of application of law to fact.

Furthermore, the findings of the agency are without substantial evidence in the record as it appears that Dr. Taylor's own report does not state that his fees are reasonable for performing an impairment rating in the locality, but merely that they are reasonable for performing an independent medical examination. Claimant provided no evidence contrary to that submitted by the Appellants showing the costs

to perform a foot impairment rating in Dubuque. As such, there was no basis at all for the agency to find otherwise.

Therefore, based upon a proper interpretation of the law, a proper review of the facts, and a proper application of the law to the facts, the Claimant would not be entitled to the full costs of Dr. Taylor's evaluation even if the exam is reimbursable under *Iowa Code* § 85.39. More likely the appropriate costs would be the equivalent of $174.25 charged by Dr. Kennedy, or at the very most the $500.00 that Medex would have charged if the Claimant had actually requested an impairment rating be performed on one body part.

The finding of the Workers' Compensation Commissioner and the award of Dr. Taylor's charges under *Iowa Code* § 85.39 should be modified and/or reversed.

CONCLUSION

As to the impairment examination of Dr. Taylor, Dr. Kennedy is not a physician retained by the Employer to trigger *Iowa Code* § 85.39, and the award of Dr. Taylor's examination should be reversed. However, even if the examination is compensable under *Iowa Code* § 85.39, the charges of Dr. Taylor are unreasonable as they are not in line with the charges to perform an impairment rating in the locality, far in excess of Dr. Taylor's own published fee schedule, and far excessive for the exam time spent and the simplicity of the condition examined.

REQUEST FOR ORAL ARGUMENT

The Petitioners-Appellants, Mid American Construction LLC, and Grinnell Mutual, through the undersigned counsel, state that they desire to be heard in oral argument.

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of *Iowa Rs. App. P.* 6.903(1)(d) and 6.903(1)(g)(1) or (2) because it has been prepared in a proportionally spaced typeface using Time New Roman in 14 point font and contains 9,453 words, excluding the parts of the brief exempted by *Iowa R. App. P.* 6.903(1)(g)(1).

Christopher S. Spencer

6/17/22
Date

CERTIFICATE OF SERVICE

I, Christopher S. Spencer, member of the Bar of Iowa, hereby certify that on June 17, 2022, I or a person acting on my behalf served the above Petitioners-Appellants' Brief and Request for Oral Argument to the Respondent-Appellee's attorneys of record, Zeke R. McCartney, via EDMS in full compliance with *Rules of Appellate Procedure and Rules of Civil Procedure.*

Christopher S. Spencer

CERTIFICATE OF FILING

I, Christopher S. Spencer, hereby certify that I, or a person acting in my direction, did file the attached Petitioners-Appellants' Brief and Request for Oral Argument upon the Clerk of the Iowa Supreme Court via EDMS on this 17th day of June, 2022.

Christopher S. Spencer

ATTORNEY'S COST CERTIFICATE

The undersigned attorney does hereby certify that the actual cost of producing the foregoing Petitioners-Appellants' Brief and Request for Oral Argument was $0 because of service and filing via EDMS.

Christopher S. Spencer