IN THE SUPREME COURT OF IOWA

Supreme Court No. 22-0471
Polk County Case No. CVCV061324

MID AMERICAN CONSTRUCTION LLC and
GRINNELL MUTUAL,
Petitioner-Appellants,

vs.

MARSHALL SANDLIN,
Respondent-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE SCOTT D. ROSENBERG, JUDGE

RESPONDENT-APPELLEE'S FINAL BRIEF

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CERTIFICATE OF FILING

I hereby certify that on the 15th day June, 2022, I, the undersigned party or person acting in my behalf, did file the Respondent-Appellee's Final Brief, with the Supreme Court by efiling.

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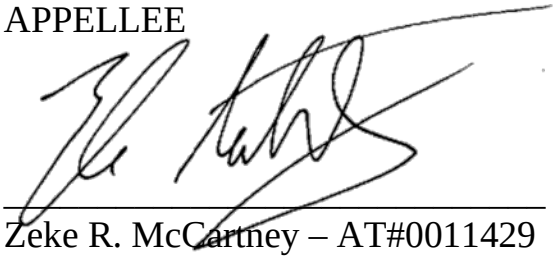
By: 

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PROOF OF SERVICE

I hereby certify that on the 15th day of June, 2022, I, the undersigned party or person acting on my behalf, did serve the Final Brief on all other parties to this appeal by efiling.

I hereby certify that on the 15th day of June, 2022, I mailed a copy of the Final Brief to client as follows:

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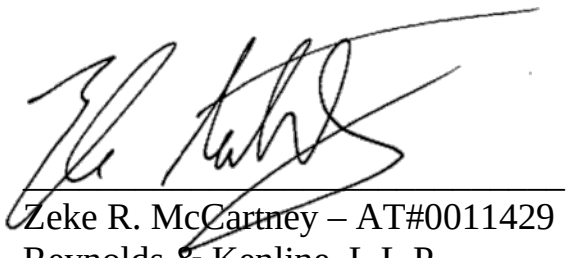
By: 

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ROUTING STATEMENT

Under the Iowa Rule of Appellate Procedure 6.1101, final orders and judgments involving the merits of a case are appropriate for review by the Supreme Court. This case is appropriate for transfer and review by the Court of Appeals because it involves questions of existing legal principal. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

This Matter comes on appeal regarding a claim for workers compensation benefits filed by Claimant-Respondent-Appellee Marshall Sandlin ("Sandlin" or "Claimant") against Defendant Employer, Mid-American Construction, L.L.C. ("Defendant" or "Employer"), arising out of an injury that occurred on September 6, 2017. Hearing Report. App. pgs. 6-14. The hearing in this matter occurred on September 6, 2019. Arbitration Decision (06/18/2020), App. pgs. 15-20.

Deputy Joseph Walsh issued his decision on June 18, 2020. Arbitration Decision. Deputy Walsh found that Claimant had sustained permanent impairment of 2% to the left leg. Arbitration Decision, 4, App. pg. 18. The Deputy further determined that Claimant was entitled to an Independent Medical Examination ("IME") under Iowa Code section 85.39.

The Deputy therefore ordered reimbursement of the IME Finally, the Deputy ordered costs. Arbitration Decision, 5-6. App. pgs. 19-20.

Defendant-Employer filed a motion for rehearing on July 2, 2020 arguing that any award should be for the foot and not the leg. Ruling on Defendant's Application for Rehearing (07/13/2020). App. pgs. 27-28. Defendant also argued that the IME should be denied. Rehearing Decision, 2. App. pgs. 28.

Deputy Walsh issued his ruling on Defendant's Application for Rehearing on July 13, 2020. Rehearing Decision. App. pgs. 27-28. Deputy Walsh granted Defendant's request pertaining to situs of the injury, thus amending his decision to award Claimant 2% functional disability to his left foot. Rehearing Decision, 2. App. pg. 28. Deputy Walsh denied the Defendant's motion with regards to the IME, thus sustaining his previous decision awarding IME reimbursement to Claimant. Rehearing Decision, 2. App. pg. 28.

Defendant appealed the Deputy's decision. On Appeal to the Commissioner, Defendant argued that Claimant did not suffer any permanent impairment to his foot, Claimant is not entitled to reimbursement for his IME, and alternatively if the Claimant is entitled to an IME all costs of Claimant's IME are unreasonable.

Commissioner Joseph Cortese II issued his decision on January 27, 2021. Commissioner Decision. Commissioner Cortese affirmed the Deputy's award on all grounds, including reimbursement of the IME.

Defendant filed this Petition for Judicial Review on February 10, 2021. Petition (2/10/2021). App.. pgs. 39-41. Defendant no longer contested the permanency finding but argue that (1) Claimant is not entitled to reimbursement for his IME, and (2) if Claimant is entitled to the IME, the costs thereof are unreasonable. *See generally* Petition for Judicial Review, App. pgs. 39-41.

On February 25, 2022, the Honorable Judge Scott D. Roseberg issued his decision on Review, denying Employer's Petition and affirming the Commissioner's ruling on all grounds. Ruling on Petition for Judicial Review ("District Court Decision"). App. pgs. 42-53.

STATEMENT OF FACTS

A. Background and Injury

In May of 2017, Claimant Marshall Sandlin began work for Defendant, Employer Mid-American. Claimant did maintenance as a general laborer, contractor, for Mid-American. Tr. 20:1-25. App. pg. 89. The presiding Deputy found Sandlin's testimony at Hearing to be "credible." Arbitration Decision. App. pgs. 15-20.

On September 6, 2017, Sandlin was working for Employer on a two-story deck, removing old boards getting it ready for new decking. Tr. 22:6-9. App. pg. 90. Claimant was working from a ladder. Tr. 22:13-14. App. pg. 90. Claimant was removing a trim board approximately ten feet off the ground when the bottom of his ladder kicked out from underneath. Tr. 22:16-22. App. pg. 90. This caused Sandlin to fall off the ladder onto the concrete floor. Tr. 22:21-22. App. pg. 90. During the fall on the way down, Claimant's left foot got tangled in the ladder. Tr. 23:1-2. App. pg. 91.

Sandlin tried to "walk it off," but his foot continued to hurt. As a result, Sandlin called his Employer and told Sandlin to put his tools away and go see him. Tr. 23:16-18. App. pgs. 91. Sandlin complied and went to go see his boss. The boss took a look at Sandlin's foot and told him to "go home and put ice on it, put it up." Tr. 24:1-2. App. pg. 92. Sandlin complied. Tr. 24:6-7. App. pgs. 92.

Unfortunately, Sandlin's foot continued to hurt over the next few days. As a result, Sandlin finally went to a doctor on Saturday, September 9th. Tr. 24:14-15. App. pg. 92. Between September 6th and September 9th, Sandlin repeated brought his foot up to his Employer, but the Employer kept telling him "just give it more time, just stay off work." Tr. 24:17-19. App. pg. 92.

Finally, Sandlin contacted Employer again Friday evening to indicate that he believed he needed to see a doctor. Tr. 24:20-21. App. pg. 92. On Saturday, September 9, Sandlin went to Medical Associates Acute Care because they were the *only facility* in town that was "open on Saturday." Tr. 25:10-12; Tr. 39:7-11 App. pgs. 93 & 100; *see also* Arbitration Decision, 2, App. pg. 16. Employer never told Sandlin he got to choose his own treatment or direct his own care. Arbitration Decision, 2. App. pg. 16.

B. Medical Summary

Claimant's first appointment occurred on September 9, 2017. Joint Exhibit ("JE") 2:4. App. pg. 57, Dr. Frederick Isaak of Medical Associates noted Claimant was suffering from pain and some bruising on the foot. Dr. Isaak ordered x-rays and ordered Claimant to ice and use over the counter medication. JE 2:5, App. pg. 58. The x-ray results came back the same day and showed a *non-displaced predominantly transverse fracture* within the proximal 5th metatarsal. JE 2:6, App. pg. 59.

While at Medical Associates on September 9, Sandlin had to fill out a "workman's comp. form." JE 2:4, App. pg. 57. This form indicated Sandlin's Employer was Mid-American Construction. Dr. Isaac placed Sandlin on restrictions of use of a cast or splint and crutches. JE 2:8. App. pg. 60.

Claimant visited D.P.M. Tracy Hughes at Medical Associates Podiatry on September 13, 2017. JE 3:11, App. pg. 63. Sandlin went to Medical Associates Podiatry on referral from Acute Care at Medical Associates. JE 3:11, App. pg. 63. However, the records infer that between the visits on September 9th and September 13th, Medical Associates was in contact with worker's compensation because D.P.M. Hughes issued a work note on September 11, 2017. JE 3:9, App. pg. 61. Also, in the note on the 11th, Ms. Hughes ordered a boot for Sandlin. JE 3:9, App. pg. 61.

On the 13th, Ms. Hughes indicated that Sandlin was still experiencing tenderness to palpitation at the area of the injury. JE3:11, App. pg. 63. Ms. Hughes ordered Sandlin to wear the boot at all times. JE 3:11, App. pg. 63. Ms. Hughes also ordered Sandlin to decrease activity even in the boot and ice periodically through the day. JE 3:11, App. pg. 63. Apparently, Sandlin had been having difficulty with work comp getting authorization for the crutches. Ms. Hughes authorized those crutches. JE 3:11, App. pg. 63.

Sandlin returned to Ms. Hughes on October 11, 2017. JE 3:14, App. pg. 65. Claimant was doing well with his walking boot. Ms. Hughes ordered Sandlin to *ice as needed* and indicated that in one-week Sandlin could return to work with "*a good supportive shoe/boot*." JE 3:14, App. pg. 65. X-rays

were ordered which showed the fracture line to be visible but with healing. JE3:15, App. pg. 66.

C. Impairment/IME

On December 14, 2017, Sandlin underwent an independent medical examination by Dr. Erin Kennedy at Tri-State Occupational Health. JE 4:19, App. pg. 67. Sandlin did not choose to go to Dr. Kennedy on his own volition. Tr. 44:1-5, App. pg. 105. Insurance directed Sandlin to Dr. Kennedy. Tr. 44:3-5, App. pg. 105. Sandlin did not choose Dr. Kennedy, nor had Sandlin ever even heard of Dr. Kennedy prior to the appointment. Tr. 50:5-18, App. pg. 106.

At hearing, in response to repeated questioning by Defendant's Counsel Sandlin testified:

> Q. Now you mentioned you saw Dr. Kennedy. How did you come to see Dr. Kennedy?
> A. Kennedy was the – if I remember correctly, was the doctor that the insurance company had directed me to see.
> Q. It looks like some of the documents in the exhibits talk about Dr. Hughes referring you there….
> A. That, I believe, was just memory. I may be mistaken on that. Because after looking at the files, I'm pretty sure that was all about the insurance company wanting to see Kennedy.
> Q. You think somebody from the insurance company called you up and said, " go see Dr. Kennedy this date," or "this time?"
> A. I believe they directed the calls through my attorney, if I remember correctly.

Tr. 44:1-19, App. pg. 105.

This testimony is supported by the medical records leading up to the Kennedy appointment. On November 15, 2017, the nurse case manager (MCM) and adjuster/representative for Grinnell Mutual discussed "a request to address MMI/disability." DE B:1, App. pg. 79; *see also* Commissioner Decision. Medical Associates staff then told Occupational Medicine (Tri-State) to *inquire* if Dr. Kennedy would address MMI/disability. DE B:1, App. pg.79. The MCM then *secured* the appointment with Dr. Kennedy, and *subsequently* informed the Undersigned counsel about the appointment. DE B:1, App. pg. 79 (emphasis added). Thus, Grinnell Mutual —the work comp carrier—initiated and secured the permanency examination with Dr. Kennedy—not Sandlin. This matches Sandlin's testimony at hearing.

At our request, Sandlin underwent an independent medical examination by Dr. Mark Taylor at Medix on June 19, 2018. Claimant's Exhibit ("CE"), 1, App. pgs. 70-75. Dr. Taylor spent between one half and one hour with Claimant. CE 1:3, App. pg. 70. Sandlin testified that unlike Dr. Kennedy, Dr. Taylor used a measuring tool to measure range of movement. Tr. 32:24-33:3, App. pgs. 97-98. Dr. Taylor also had Sandlin do walking, stretching, and bending over. Tr. 32:24-33:3, App. pgs. 97--98. Dr. Taylor had Sandlin remove his shoes to examine the foot without any support. Tr. 33:1-3, App. pg. 98.

Dr. Taylor noted Sandlin had an unremarkable gait other than when initially standing up. CE 1:6, App. pg. 73. Sandlin did exhibit mild discomfort when walking and with palpitation. CE 1:6, App. pg. 73. Similarly, the left foot and ankle range of motion was slightly diminished. CE 1:6, App. pg. 73. In addition, as with Dr. Kennedy, Dr. Taylor reported Sandlin suffered from mild discomfort that was increased by cold weather. CE 1:7, App. pg. 74.

Dr. Taylor recommended continued use of supportive shoes. CE 1:7, App. pg. 74. Dr. Taylor diagnosed the injury as a "foot" as opposed to an ankle or leg injury. CE1:7, App. pg. 74. Ultimately, Dr. Taylor assigned a 2% permanent impairment rating for the left lower extremity and placed Sandlin at maximum medical improvement on December 14, 2017.

Additional facts will be discussed as necessary.

ARGUMENT

I. CLAIMANT IS ENTITLED TO REIMBURSEMENT FOR THE COST OF HIS 85.39 INDEPENDENT MEDICAL EXAMINATION

Standard of Review

In its review of the Industrial Commissioner's decision, the standard is correction of errors of law. Iowa Code § 17A.19(8); *Vosberg v. A.Y. McDonald Manufacturing Co.*, 519 N.W.2d 405, 407 (Iowa Ct. App. 1994).

The reviewing Court gives "careful consideration" of the Commissioner's conclusions of law but is not bound by them. *Id.* (citing *Briar Cliff College v. Campolo*, 360 N.W.2d 91, 93 (Iowa 1984).

Regarding issues of fact, the agency's findings of fact have the effect of a jury verdict and are to be broadly and liberally applied to uphold the agency decision. *Id.* (citing *King v. City of Mt. Pleasant*, 474 N.W.2d 564, 565 (Iowa 1991). A reviewing court can only overturn the commissioner's findings of fact if the finding "is not supported by substantial evidence in the record before the court…" *Abbas v. Iowa Ins. Div.*, 893 N.W.2d 879, 891 (Iowa 2017). Under the substantial evidence standard, evidence is not unsubstantial merely because it would have supported contrary inferences. *Great Rivers Med. Ctr. V. Vickers*, 753 N.W.2d 570, 574 (Iowa Ct. App. 2008). Evidence is substantial when a reasonable mind could accept it as adequate to reach the same finding. *Id.*

Error Preservation

Appellee concedes Appellant has preserved error on the issue of IME reimbursement.

Merits

Under Iowa Code Section 85.39, after an evaluation and permanent disability has been made by a physician retained by the Employer and the

Employee believes this evaluation to be low, the "employee shall … be reimbursed by the Employer the reasonable fee for subsequent examination by a physician of the Employee's own choice…" Iowa Code § 85.39. It is undisputed that Dr. Erin Kennedy of Tri-State Occupational Health gave a permanency opinion by assigning Claimant a "0% total PPI or 0% WPPI". JE 4:19, App. pg. 67. However, Defendant has repeatedly tried to avoid this simple responsibility by arguing that Dr. Kennedy was not a "physician retained by the Employer" and instead was the result of Marshall Sandlin choosing Dr. Kennedy himself. *See generally* Defendant's Brief. However, this argument does not hold up.

In support of their position, Defendant's rely (exclusively) on the 2001 Supreme Court case of *I.B.P, Inc. v. Harker*, 633 N.W.2d 322, 326-327 (Iowa 2001). However, as Deputy Walsh, Commissioner Cortese, and Judge Rosenberg have all noted, *Harker* is factual distinguishable from the present matter. Rehearing decision, 2, App. pg. 28; Commissioner Decision 3-4, App. pgs. 34-35; District Court Decision, 8-9, App. pgs. 49-50.

The facts regarding the selection of treatment in *Harker* were undisputed. *I.B.P., Inc. vs. Harker*, 633 N.W. 2nd 322, 324 (Iowa 2001). The Claimant, Howard Harker was an Iowa resident injured at a Nebraska plant. *Id.* Initially Harker was advised that under Nebraska law, he could choose

his own physician. *Id.* Harker then sought treatment on his own, and *specifically chose* Dr. Merle Mueller. *Id.* (emphasis added).

Dr. Mueller then referred Harker to an orthopedist, Dr. Raymond Sherman. *Id.* Dr. Sherman in turn referred Harker to Dr. Leonel Herrera, a neurologist. *Harker*, 633 N.W. 2nd at 324. Harker continued to treat with both Dr. Sherman and Dr. Herrera. Eventually, Dr. Sherman and Dr. Herrera released Harker from their care indicating he had suffered no permanent impairment. *Id.* The workers compensation carrier paid for all treatment. *Id.* Both parties agreed that Harker chose to treat with Dr. Mueller, and the Defendant then acquiesced to the choice. *Id.*

In considering Iowa Code section 85.39, the *Harker* court indicated that under Iowa law an employer is given the right to choose who will provide treatment for an employee's injury. *Id* at 327; *see also* Iowa Code § 85.27. Further, the employer is allowed to subject the employee to reasonable medical examinations by other physicians. *Id.; see also* Iowa Code § 85.39. The Supreme Court found that the "quid pro quo" for these rights is the right of the employee…to have an IME conducted by a doctor of his own choice if the physician retained by the employer is given a disability rating unacceptable to the employee." *Id.* Further, the employer must pay for such an examination to help the "generally unequal financial

positions of the parties…" *Id.*; *see also Dodd v. Fleetguard, Inc.*, 759 N.W.2d 133, 139 (Iowa Ct. App. 2008).

Conversely, in *Harker*, the worker's compensation claim had begun as a *Nebraska* claim, where the *employee* directs care. *Harker*. 633 N.W.2d at 324 (emphasis added). The Court in *Harker* found that because Harker had specifically chosen "Drs. Mueller, Sherman, and Herrera, they were not physicians retained by the employer" and section 85.39 was not applicable. *Trumbo v. Johnston Comm'n School Dist.*, File No. 5047946, at *5 (June 13, 2016) (discussing *Harker*, 633 N.W.2d at 327)).

The present matter is factually distinct from *Harker*. First, the claimant in *Harker specifically* chose his medical providers and directed his own treatment. *Harker*, 633 N.W. 2nd at 324. The doctors who gave ratings—Drs. Sherman and Herrera—were treating doctors in the course of treatment chosen by the claimant. Conversely, Sandlin did not direct his own treatment. Instead, the Employer in this case drug their feet after Sandlin's injury. Sandlin repeatedly asked his employer to see a doctor and repeatedly asked his employer which doctor to go to. Tr. 24:20-21, 41:6-10, App. pgs. 92 & 102. Finally, after two days, the night of September 8th, Employer agreed for Sandlin to get medical care. However, the next day was a Saturday and the only place open —and thus the *only option* for treatment —

was the Medical Associates Acute Care Clinic. Tr. 25:10-12, Tr. 39:7-11, App. pgs. 93 & 100.

This one initial visit, where Sandlin had no other treatment options available, is the only "control" that Sandlin ever directed over his treatment. In *Harker*, the Claimant was specifically told he could choose his own treatment. *Id.* 324.[1] The claimant in that matter had control of his care throughout his treatment. *Id.* However, here, immediately following the initial visit, the workers compensation carrier and Medical Associates were in contact. Beginning on September 11, 2017, and throughout the remainder of Claimant's treatment, D.P.M. Theresa Hughes issued work restriction notes at the behest of workers compensation. *See e.g.* JE 3:9, 3:13, App. pgs. 61 & 64. This indicates that Ms. Hughes and workers compensation were in contact.

Secondly, and more importantly, unlike the situation in *Harker*, Sandlin had nothing to do with the eventual selection of Dr. Kennedy to perform the independent medical examination. In *Harker*, Claimant's choice of treatment led him to first Dr. Mueller, then Dr. Sherman, and then Dr. Herrera. *Harker*, 633 N.W.2d at 324. Dr.s Sherman and Herrera—treating

[1] Claimant was told he could direct his own treatment as the claim initiated under Nebraksa worker's compensation law. *Id.*

doctors—were the doctors who gave Harker a rating with no permanent impairment.

Conversely, in the present matter, Claimant had no treatment nor relationship with Dr. Kennedy whatsoever. Instead, the worker's compensation adjuster and MCM specifically sought out Dr. Kennedy for a "MMI/disability" determination.[2] Work comp then set up the appointment, and informed Claimant (through Counsel) that he was required to attend. DE B:1, App. pg. 79; Commissioner Decision, App. pgs. 32-38; District Court Decision, App. pgs. 42-53.

Claimant's testimony was consistent that work comp set up the appointment. At deposition, Claimant testified:

> Q: Just be real quick. Do you actually remember being evaluated by Dr. Kennedy?
> A: That was the one at Medical Associates.
> Q: Well that is why I ask you had –you –
> A. Oh okay. Was that the one that – I don't think I do remember. That is the one that kind of jogged my memory, is that the one that ***Grinnell Mutual*** had me see?

[2] Dr. Kennedy often performs independent medical evaluations and ratings at the behest of Defendant workers compensation insurance companies. *See e.g. Montanique Chambers v. Manor Care of Dubuque*, File No. 5038959 (September 26, 2013), *Laurie Torres v. A.Y. McDonald Mfg., Co.*, File No. 5053064 (October 9, 2017), *Aaron Peck v. A.Y. McDonald Mfg., Co.*, File 5053427 (May 22, 2017), *Gary Carlson v. Pattison Sand Company, L.L.C.*, File No. 5051757 (March 14, 2016), *Michael Schetgen v. Larson Tile Company*, File No. 5035527 (February 28, 2014), *Karla Reinhardt v. Dubuque Greyhound Park and Casino*, File No. 5029917 (February 16, 2012) (all discussing the opinion of Dr. Kennedy on the behalf of Defendant).

Q. Yeah.
A. Now that was down on – Elm Street?
Q. Elm Street, okay.
A. Vaguely, it is kind of coming back.
Q. Okay. You didn't go there voluntarily, you were sent by the insurance company?
A. Yeah. I was sent there, yes.

Defense Exhibit ("DE") G: 16:24-17:15[3], App. pgs. 85-86 (emphasis added).

Again at hearing, as referenced above, Sandlin was repeatedly questioned regarding the selection of Dr. Kennedy:

Q. Now you mentioned you saw Dr. Kennedy. How did you come to see Dr. Kennedy?
A. Kennedy was the – if I remember correctly, was the doctor that the insurance company had directed me to see.

Tr. 44:1-5, App. pg. 105. Finally, regarding any insinuation Dr. Kennedy was at all involved in Claimant's treatment:

Q: Mr. Sandlin, did you pick going to Dr. Kennedy for that evaluation?
A: No.
Q. Did you have any clue who Dr. Kennedy was?
A. Not at the time of the deposition.
Q. Prior to all - - prior to the injury, was Dr. Kennedy your treating physician?
A. No.
Q. Dr Kennedy has an office down on Elm Street; right?
A. Yes, that is correct.
Q. Have you ever been to that office at all?
A. No.

Tr. 50:5-18; *see also* Tr. 44:1-5, 51:3-8, App. pgs. 105-107.

[3] Tri-State Occupational Health is located at 1940 Elm Street, Dubuque, Iowa 52001. JE4:19, App. pg. 67

Claimant had nothing to do with the selection of Dr. Kennedy. The evidence clearly indicates the independent medical examination was arranged by workers compensation.

Also, to be perfectly clear, the clinic Sandlin walked into—Medical Associates Acute Care—does not have any obvious ties to Dr. Kennedy at Tri-State. Acute Care is a clinic located in the larger Medical Associates campus, the main office which is located at 15000 Associates Drive. *See* JE2:4, App. pg. 57. Tri-State Occupational Health is a separate clinic while partially owned by Medical Associates, is a stand-alone facility at 1940 Elm Street in Dubuque. JE 4:19, App. pg. 67; *see also* JE 5:22, App. pg. 69 (Dr. Kennedy's statement that Tri-State is a "joint venture between Medical Associate and Mercy Hospital").

Moreover, to be clear, contrary to the Defendants assertion, Dr. Hughes did not "refer" Claimant to Dr. Kennedy. Defendant argues that "Dr. Huges indicates that she sent the Claimant at Occupational Medicine . . . ." Defendant's Brief, 10. This is misstatement of the record. Instead, Dr. Huges indicated in an email to Defense counsel (long) after the fact,[4] that she does

[4] The correspondence from Dr. Hughes to Defense counsel occurred on July 12, 2019. DE A, App. pg. 78.

not perform PPI ratings, but her "normal process" is to send them to [Tri-State] Occupational health for work comp. JE 3:10, App. pg. 62.

However, in this case, there is no note or indication Dr. Hughes referred Claimant to Dr. Kennedy during his regular treatment. Instead, the MCM and adjuster for Grinnell Mutual arranged and secured an appointment with Dr. Kennedy after asking Medical Associates' *staff* for a recommendation. DE B:1, App. pg. 79. The selection of Dr. Kennedy—in the Employer's own case manager's words—went as follows:

> MCM contacted the medical provider with a request to address MMI/disability as indicated within the client's final office visit notes. Dr. Hughes, podiatrist, indicated she does not address MMI/disability related to workers' compensation claims. Medical Associates *staff recommended* MCM to contact [Tri-State] Occupational Medicine and inquire if Dr. Erin Kennedy would address MMI/disability. Dr. Kennedy requested Mr. Sandlin schedule a 30-minute consultation to address MMI. MCM *secured* an appointment per the physician's request after 12/09/2017 for Mr. Sandlin.

DE B:1, App. pg. 79.

Moreover, whether Dr. Hughes herself or hospital staff "recommended" Dr. Kennedy is not even material to this issue. A "recommendation" for a doctor in town who performs impairment ratings is not the same as a referral for treatment. The worker's compensation case manager asked staff for Medical Associates for a recommendation of a doctor where an impairment rating could be obtained. That doctor was Dr.

Kennedy. Employer (and its carrier) were free to heed the recommendation completely or not at all. As the District Court noted, nothing required Employer to follow the recommendation of Dr. Kennedy. District Court Decision, 10. It was the Employer's choice to retain Dr. Kennedy and send Sandlin there for an evaluation. District Court Decision, 8-9, App. pgs. 49-50. The Commissioner and District Court correctly noted this distinction in determining the Defendant's "chose to use Dr. Kennedy at the recommendation of the staff." Commissioner Decision, 4, App. pg. 35; District Court Decision, 10, App. pg. 51.

In addition, further indicating the insurance carrier set up the Kennedy evaluation, the defense insurance adjuster was clearly aware of their obligation to pay for an IME of Claimant's choosing. In a letter dated August 24, 2018, adjuster Debbie Miller agreed that "your client [Sandlin] is entitled to reimbursement of a reasonable fee for another impairment rating…". Defendant's Exhibit ("DE"), F:2, App. pt. 81. While Ms. Miller disagreed with the fee (which will be discussed below), she admitted Sandlin was in fact entitled to a section 85.39 examination.

Finally, and most obviously, Dr. Kennedy's report was *paid for* by Defendant. *See generally* Defendant's Brief (discussing payment to Dr. Kennedy).

Although this situation does not happen often, workers' compensation agency decisions have shown that *Harker* stands for a narrow proposition. For example, in *Jackie Trumbo v. Johnson Community School District*, File No. 5047946, the Claimant was injured and immediately went to the emergency room by ambulance to a hospital where she was evaluated by Dr. David Vittetoe. *Id* at *1. Claimant was discharged with instructions to follow up with Dr. Vittetoe and when Claimant did not return, she was told by workers compensation to go back to Dr. Vittetoe for an impairment rating. Eventually Dr. Vittetoe performed this rating. *Id.* at *5. The deputy ruled this invoked section 85.39, entitling Claimant to an IME at employer cost. *Id.*

The present matter is akin to *Trumbo.* In *Trumbo,* Claimant's initial choice was made by an ambulance driver. In this scenario, Claimant initial position was chosen by the fact it was the only available clinic in town. Ultimately, in *Trumbo,* the defense chose to obtain an impairment opinion by Dr. Vittetoe, in this matter ultimately workers compensation (and not Claimant) chose to obtain an opinion by Dr. Erin Kennedy.

Similarly, in *Levasseur v. New Start Financial, Inc.,* File No. 5048702 (June 8, 2015), Claimant sought his own doctors because Defendant denied responsibility for the injury from the outset. *Levasseur*, File No 5048702, 8.

More specifically, Claimant sought treatment from Dr. Inda Kensinger, and Dr. Antonopoulos. *Id.* Eventually Defendant obtained opinions from all three doctors indicating Claimant had not suffered a work-related injury. *Id.* at 10. Claimant subsequently sought his own IME from another doctor. *Id.* Ultimately, the presiding deputy determined that although the defendant had not selected the doctors, they had obtained opinions from those doctors and thus the requirements of §85.39 were met. *Id.* In doing so, the presiding deputy again found that because "worker's compensation laws are to be liberally construed in favor of the worker "that the opinions qualified as "employer's physicians." § 85.39. *Id.* This decision was upheld by the commission on appeal. *Levasseur v. New Start Financial, Inc.,* 5048702 (October 13, 2016). Thus, defendant was required to reimburse claimant for the full $2,495.00 IME. *Id.*

Moreover, in *Reagan Bill v. Ambassador Steele Corp*, File No. 5026746 (June 10, 2010). Claimant won an alt care hearing wherein his request for surgery to be performed by Dr. Scott Schemway was approved. *Bill v. Ambassador Steel Corp.,* File No. 5026746 at *1. Subsequently at the conclusion of treatment, defense requested a rating from Dr. Schemway. *Id.* Defense attempted to argue that they did not choose Dr. Schemway and instead Claimant himself chose to be treated by Dr. Schemway. However,

the Deputy concluded that it was still the Defendant's choice to seek a rating from Dr. Schemway thus entitling Claimant to an IME at employer costs. *Id.* at *4.

Section 85.39 is even more clearly applicable in this case than in Schemway. On Schemway, claimant actually took some part in the initial choice of his doctor. In this matter Sandlin had nothing to do with the choice of Dr. Kennedy. Again, ultimately it was the insurance company who chose to obtain an opinion from Dr. Kennedy and to instruct Sandlin to ultimately attend that opinion.

Finally, in cases of ambiguity, it has long been the law of Iowa that a statute should "be interpreted in favor of the injured worker." *Mortimer v. Fruehauf Corp.*, 502 N.W.2d 12, 14 (Iowa 1993) (quoting *Beier Glass Co. v. Brundige*, 329 N.W.2d 280, 283 (Iowa 1983)).

In the present case, Employer (and its carrier) is attempting to circumvent their responsibility to pay for a medical opinion of the Claimant's choosing using the Employers' own reluctance to allow Sandlin to obtain medical treatment from the get-go. *See* Rehearing decision, 2, App. pg. 28. It sets a dangerous precedent to allow employers (and insurance companies) to refuse medical treatment to a Claimant, force such a Claimant with no knowledge of the medical community, let alone workers

compensation law, to wander into the first medical facility he or she can find, and then use that uneducated decision as a basis to forever bar such a Claimant from obtaining an IME and rating from a physician of his choosing, which is the balance of "quid pro quo" of Iowa workers compensation law.

The facts and the law in this matter indicate that the workers compensation case manager and adjuster—not Claimant—sought out and obtained an examination and permanency opinion by Dr. Erin Kennedy. The Deputy, Commissioner, and District Court were all correct in ultimately determining this act—seeking out an appointment and permanency opinion with Dr. Kennedy—is "more than mere acquiescence." Commissioner Decision, 4. This appointment with Dr. Kennedy in turn, triggered Sandlin's right to an IME of his choosing under section 85.39. As a result, the decisions of Deputy Walsh, Commissioner Cortese, and Judge Rosenberg should be upheld, and Employer should be held responsible for reimbursing Claimant for his IME.

II. THE CHARGE FOR CLAIMANT'S IOWA CODE § 85.39 EXAM WAS REASONABLE

Standard of Review

Claimant maintains that whether the charge for his IME was "reasonable" is a substantial evidence issue. As referenced above, under the

substantial evidence standard, evidence is not unsubstantial merely because it would have supported contrary inferences. *Great Rivers Med. Ctr. v. Vickers*, 753 N.W.2d 570, 574 (Iowa Ct. App. 2008). Evidence is substantial when a reasonable mind could accept it as adequate to reach the same finding. *Id.*

To the extent statutory interpretation is involved, review is for errors of law. Iowa Code § 17A.19(8); *Vosberg v. A.Y. McDonald Manufacturing Co.*, at 407. The reviewing Court gives "careful consideration" of the Commissioner's conclusions of law but is not bound by them. *Id.*

Error Preservation

Appellee concedes the issue of Claimant's IME fee has been preserved by Appellant.

Merits

Defendant argues that the charge for Claimant's IME was "unreasonable" under Iowa Code section 85.39. *See generally* Defendant's Brief. Defendant's break the arguments into their brief into two sections, "scope" and "actual charge." Claimant disputes these are separate issues, as the only issue is whether the charge was "reasonable." However, for sake of a response, Claimant will address each point separately. Regardless, Defendant's arguments must fail.

A. The Scope of Claimant's IME was Reasonable

Defendant argues that the "scope" of Claimant's independent medical examination was unreasonable because, as they argue, Claimant should not seek any opinions beyond "just an impairment rating." Defendant's Brief. Defendant cites no authority for this proposition other than the "amended" section 85.39. *See generally*, Defendant's Brief. However, code section 85.39 was not so dramatically changed as Defendant seems to insinuate. More specifically, the key issue—"reasonableness"—was already a requirement even before 2017. The changes to the Code are as follows (changes are underlined):

> If 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, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination. The physician chosen by the employee has the right to confer with and obtain from the employer-retained physician sufficient history of the injury to make a proper examination. <u>An employer is only liable to reimburse an employee for the cost of an examination conducted pursuant to this subsection if the injury for which the employee is being examined is determined to be compensable under this chapter or chapter 85A or 85B. An employer is not liable for the cost of such an examination if the injury for which the employee is being examined is determined not to be a compensable injury. A determination of the reasonableness of a fee for an examination made pursuant to this subsection, shall be based on</u>

> the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination is conducted.

WORKERS COMPENSATION—INTOXICATION—COMPENSATION AND SALARIES, 2017 Ia. Legis. Serv. Ch. 23 (H.F. 518) (WEST).

Thus, it is clear from the Code that nothing has been changed regarding the examination itself, nor the reimbursement for costs thereof. The original language, which describes as IME as an "evaluation of permanent disability" not simply a "rating" remains the same. Iowa Code § 85.39. The only changes made were to include that the determination for "reasonableness" of the fee is based on the typical charge for a medical provider in the area. Iowa Code § 85.39.

Defendants argue section 85.39 allows for only a "mere impairment rating" and not additional evaluation and/or analysis. Defendant's Brief, 29. However, this is incorrect. This Court recently considered the "scope" of an IME under 85.39 in *Kern v. Fenchel, Doster & Buck, PLC*, 966 N.W.2d 326 (Iowa App. 2021). In *Kern*, the contention was whether or not an evaluation of causation by an Employer-retained physician prompted the claimant's right to an 85.39 examination by a doctor of his own choosing. *Kern*, 966 N.W.2d, 2021 WL 3890603 at *4. The *Kern* Court ultimately determined that such an opinion did trigger 85.39:

> If we read section 85.39 liberally to benefit the worker, the next logical step was for Kern to have an IME, seeking evidence of permanent disability, which can only be made if there is also a causation determination, typically done in the same examination. In fact, there can be no disability determination arising out of a disability evaluation without a determination there was causation. Kern's request that the employer pay for that evaluation is consistent with the statutory procedural requirements of section 85.39 and also promotes an appropriate balance of the interests of each party.

Kern, 2021 WL 3890603, at *4.

Thus, as *Kern* noted, an 85.39 evaluation also necessitates a causation determination (as it always has). Thus, contrary to Employer's assertion, section 85.39 includes a right to more than a "mere impairment rating." Further, a causation opinion necessarily involves more than a "diagnosis" and includes the review of medical records, along with opinions on restriction and necessary treatment.

Similarly, there is no indication in the legislative history that the amendment was intended to eliminate a full examination and report down to nothing more than an "impairment rating." *See generally* Iowa Legislation Summary, 2017 LE (indicating the section was amended to make the Employer responsible for reimbursement only if a compensable injury was found, and reasonableness is based on the typical fee charged in the local area).

Defendant invents a narrative, without authority to cite to, that the legislature amended the code to mitigate a "runaway 85.39 expense train." Defendant's Brief, 16. This argument is not only lacking in authority, it is a misconception of basic worker's compensation law interpretation. While worker's compensation insurance carriers have the resources to arrange bulk discount fees with providers, obtain as many expert opinions as they want, hire private investigators for surveillance, and engage in litigation to avoid IME bills, many claimants due not have such resources. Thus, the legislature has provided for a single opportunity for claimants to get an opinion of their own at the employer's cost.

This section 85.39 examination is—by itself—the balance in the statutory process to the employer's right to direct care and choose physicians at every other step along the way. *Des Moines Area Reg'l Transit Auth. V. Young*, 867 N.W.2d 839, 844 (Iowa 2015). A claimant's right to reimbursement for their own permanency evaluation and examination is their only opportunity to get a full opinion from a doctor of their own choosing. It stands to reason that such a permanency evaluation would involve not merely a "rating" but whether the Claimant is at MMI, whether treatment is appropriate, and whether the injury was causally related to the permanent condition.

Finally, again, in cases of ambiguity, it has long been the law of Iowa that a statute should "be interpreted in favor of the injured worker." *Mortimer* 502 N.W.2d at 14. In addition, when making statutory changes, the "legislature is deemed to have known and understood the status of the law, including any interpretations made by this agency and the Iowa Supreme Court as to existing statutes." *Roberts Dairy v. Billick*, 861 N.W.2d 814, 821 (Iowa, 2015). Thus, if the legislature intended to change the law regarding the scope of independent medical examinations, they would have clearly done with the 2017 code changes. The fact that they did not do clearly so indicates the law remains as is. As a result, the "scope" of Claimant's IME, as with the cost thereof, were reasonable.

B. The Fee Charged for Claimant's IME was Reasonable

Defendant is correct that the admitted version of section 85.39 does further define reasonableness to be based on the "typical fee charged by a medical provider to perform an impairment rating in the local area…". Iowa Code §85.39(2). However, as the Deputy and Commissioner both correctly found, in this matter Dr. Taylor's fees were reasonable. This is because Dr. Taylor opined his fees were reasonable considering the time spent with claimant, the time spent on the report, and the time reviewing claimant's

records, and further, Defendant was unable to provide sufficient evidence to rebut this. Arbitration Decision, Commissioner Decision.

Defendant centers much of its argument around the fact that they themselves paid Dr. Kennedy $174.25 for her IME. *See* Defendant's Brief. However, Defendant provide no context to this evidence nor evidence from any other physicians in the area as to regular charges for an independent medical evaluation and impairment rating. Instead, the difference in bill between Dr. Kennedy and Dr. Taylor highlights the unfortunate economic disadvantages that many Claimants face against defending insurance companies. Insurance companies like Grinnell Mutual have regular agreements with facilities such as Tri-State, to reduce claims. Individuals have no such arrangements. As the Commissioner noted (and District Court affirmed), Dr. Kennedy's fee breakdown is not an appropriate comparison and was an "incomplete picture" of her fee schedule without specific information regarding fee reduction practices. Commissioner Decision, 5, App. pg. 36; District Court Decision, 10, App. pg. 51.

Moreover, in the present case, Dr. Taylor opined that his fees were reasonable based on his training and certification as a board-certified specialist in occupational environmental medicine as well as an independent medical examiner by the American Board of Independent Medical

Examiners. CE 1:8, App. pg. 75. Similarly, Dr. Taylor spent more time with Sandlin than did Dr. Kennedy. Tr. 32:1-21, App. pg. 97 (about a half hour for Dr. Kennedy and one hour for Dr. Taylor). Further Dr. Taylor's examination was more thorough and use of measuring devices. Tr. 32-33:12, App. pg. 97.

Moreover, although no longer in dispute, there initially was a dispute of whether the injury was merely to the "foot," or included the ankle/leg as well. While Dr. Taylor found some limited mobility of the ankle, he nonetheless diagnosed only a foot injury. CE 1:7, App. pg. 74. Regardless, this involves additional examination that was performed by Dr. Kennedy.

Overall, Dr. Taylor accurately and thoroughly reviewed Sandlin's medical records and discussed Sandlin's medical history and injury with Sandlin himself during the examination. CE 1:3-5, App. pgs. 70-72. There is no indication how long or what attention (if any) Dr. Kennedy gave to Sandlin's medical history. JE 4:19, App. pg. 67.

Defendant argues Dr. Kennedy would have done "pretty much the same things as Dr. Taylor" in their respective IMEs. This is inaccurate. The very reason Sandlin's claim was ultimately successful (which Defendant no longer contests) is that the Deputy and Commissioner both determined Dr. Taylor's opinion was more thorough and more credible. Arbitration

Decision, App pgs. 15-20; Commissioner Decision, App. pgs. 32-38. Thus, it is undisputed that Dr. Kennedy *did not* do "pretty much the same thing" as Dr. Taylor. To accept Defendant's arguments would be to handicap a claimant's ability to obtain a quality independent examination—either the Claimant obtains a more thorough examination, but risks the IME not being paid for, or alternatively, the Claimant obtains a cheaper/less thorough examination and risks an inferior opinion.

Moreover, Defendant's argument concerning a $500.00 flat fee is illusory. Dr. Taylor clearly itemized his bill based on hourly work. CE 2, App. pgs. 76-77. Dr. Taylor's bill indicates the exam was shortly over an hour. Sandlin testified the exam was "around an hour." Tr. 30:21, App. pg. 95. Thus the bill matches the testimony.

Finally, Defendant attempts to argue Dr. Taylor's fee was unreasonable because Dr. Kennedy is in Dubuque while Dr. Taylor is in Ankeny. However, this is both a misstatement of the record, as well as the applicable statute. Dr. Taylor's examination occurred in Cedar Rapids. There is no requirement in the code regarding what defines "local area," thus no clear indication whether Cedar Rapids is too far away to be considered, or if so, what difference in prices there are between Dubuque and Cedar Rapids. Moreover, the code section analysis is not the "local area *of the*

original injury," it is the "local area *where the examination is conducted*." Iowa Code § 85.39. Thus, if anything, by Defendant's own logic, Dr. Kennedy's fees should have *no bearing whatsoever* on the reasonableness determination because her examination was in Dubuque but the examination under inquiry was in Cedar Rapids.

Defendant implicitly argues the legislature "intended" to base the reasonableness determination on the area of the injury (Dubuque). However, again, the legislature gave no clear indication that was the case. Further, again when making statutory changes, the "legislature is deemed to have known and understood the status of the law, including any interpretations made by this agency and the Iowa Supreme Court as to existing statutes." *Roberts Dairy*, 861 N.W.2d at 821. Thus, rather than engage in this analysis of whether fees are somehow different in Cedar Rapids than Dubuque, the issue is simply whether the evidence supports a finding that Dr. Taylor's were "reasonable." As to that question, Dr. Taylor himself opined the fees were reasonable, and the Deputy and Commissioner both found to be the case. Further the District Court found that the Commissioner applied "Facts to law" in determining that the exam fees were reasonable. No errors of law were made in these determinations. Thus, Defendant's argument must fail.

As a result, the rulings of the Deputy, Commissioner, and District Court as it pertains to reasonableness should be affirmed.

CONCLUSION

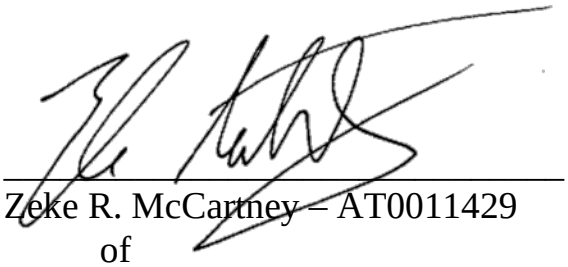
As discussed above, Employer sought and obtained a permanency evaluation from Dr. Erin Kennedy. Subsequently, Claimant, pursuant to Iowa Code section 85.39, sought and obtained his own examination and opinion from a physician of his choosing, Dr. Mark Taylor. Thus, as found by the Deputy, Commissioner, and District Court, the statutory process was followed and Claimant is entitled to reimbursement of his IME. Further, Dr. Taylor's report was more thorough and ultimately controlling, and his fees were reasonable, as again both the Deputy and Commissioner found to be. Therefore, this Appeal should be denied, and the Commissioner's rulings should be upheld with costs to Defendant.

REQUEST FOR NONORAL SUBMISSION

Appellee through Counsel does not believe oral arguments are necessary in this matter but would be pleased to provide oral argument if this Court believes it would be helpful.

Respectfully submitted this 15th day of June, 2022.

MARSHALL SANDLIN,
Respondent-Appellee;

By: 

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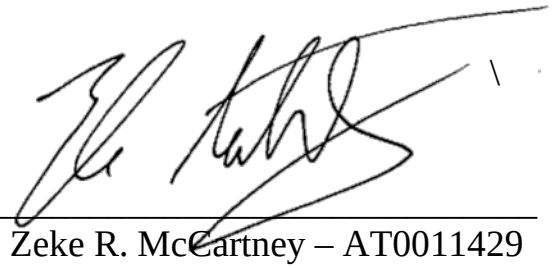
By: 

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