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 APPLICATION FOR FURTHER REVIEW

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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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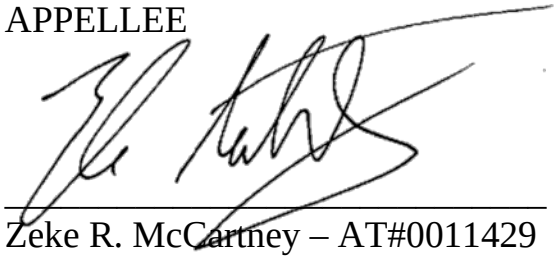
By: 

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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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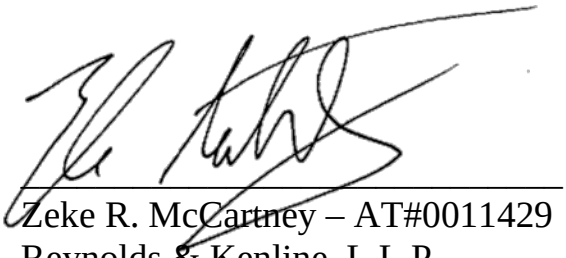
By: 

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QUESTION PRESENTED FOR REVIEW

1. DID THE COURT OF APPEALS ERR BY FAILING TO LEND APPROPRIATE WEIGHT TO THE COMMISSIONER'S FACTUAL FINDINGS REGARDING THE REASONABLENESS OF A SECTION 85.39 EXAMINATION FEE?

2. DID THE COURT OF APPEALS ERR REFUSING TO ALLOW REIMBURSEMENT FOR A FULL EXAMINTION UNDER SECTION 85.39, AND INSTEAD LIMITING REIMBUSEMENT TO ONLY AN "IMPAIRMENT RATING?"

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COMES NOW Appellee Marshall Sandling and hereby submits this Application for Further Review to the Supreme Court:

STATEMENT IN SUPPORT OF FURTHER REVIEW

Applicant respectfully request Further Review for the following reasons:

(1) The Court of Appeals entered a decision in conflict with a decision of this Court on an important matter by failing to consider and uphold a decision of the worker's compensation Commissioner's office under a "substantial evidence" standard, wherein the Commissioner specifically found that the evidence indicating the 85.39 was "reasonable" was more persuasive than the evidence submitted—or lack thereof—indicating the examination was not "reasonable." Iowa R; App. P. 6.1103(1)(b)(1); *Larson Mfg. Co., Inc. v. Thorson*, 763 N.W.2d 842, 850 (Iowa 2009).

(2) The Court of Appeals has decided a case where there is an important question of changing legal principles, and an issue of broad public importance; specifically, a worker's compensation claimant's right to reimbursement for an independent medical examination under Iowa Code section 85.39, and what exactly that examination entails. Iowa R; App. P. 6.1103(1)(b)(3)-(4); Iowa Code § 85.39; *Des Moines Area Regional Transit Authority v. Young*, 687 N.W.2d 839 (Iowa 2015).

STATEMENT OF THE CASE

This Matter comes for Further Review regarding a claim for workers compensation benefits filed by Claimant-Appellee Marshall Sandlin ("Sandlin" or "Claimant") against Employer-Appellant, 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. Sandlin seeks further review of the Court of Appeals decision in this matter, wherein the Court reversed the Commissioner and District Court in determining that Sandlin was not entitled to full reimbursement of his Independent Medical Examination under Iowa Code section 85.39. *MidAmerican Construction LLC v. Sandlin*, 2023 WL 2148754 at *4 (Iowa Ct; App. 2023).

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 full reimbursement of the IME. More specifically, Commissioner Cortese found that not only was Sandlin entitled to the IME, the fee

of the IME was "reasonable," and thus Employer was responsible for full reimbursement.

Defendant a 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. Again, the District Court found that not only was Sandlin entitled to the IME, but the full fee was "reasonable," and thus, Sandlin was entitled to full reimbursement; App. pgs. 42-53. Employer appealed.

The Court of Appeals issued its decision on February 22, 2023. The Court found that "substantial evidence" supported the Commissioner's determination that Sandlin was entitled to reimbursement for his IME, and thus affirmed the decisions of the agency and District Court on the reimbursement issue. *Sandlin*¸ 2023 WL 2148754 at *3. Conversely, however, the Court determined that the exam fee of $2020 was not "reasonable," and thus reversed and remanded for entry of a

reimbursement award of $500. *Id.* at *4. In doing so, the Court indicated it found that the IME doctor, Dr. Mark Taylor, "charged separately for preparing an IME and for preparing an impairment rating …" *Id.* The Court further indicated its decision was based on evidence Dr. Taylor's fee structure included $500 for an impairment rating. Of note, the Court did not indicate whether it was reviewing the facts under a "substantial evidence" standard, or in general what standard it was reviewing the case under.

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. Sandlin was working from a ladder, but fell and his leg got tangled up during the fall. Tr. 22:13-14; App. pg. 90-91.

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

Sandlin'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

which 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.

Sandlin 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.

Following the examination, Dr. Taylor sent an invoice for his examination and report, totaling $2020. CE 2:13; App. 77. The invoice included four entries: (1) "IME Exam 1st hour;" (2) "IME Exam time greater than 1 hour," (3) "IME report 1st hour," and 4 "IME Report time greater than 1 hour." CE 2:13; App. 77. In the

report itself, Dr. Taylor opined that the "feees for this examination are reasonable…" CE 1:8; App. 75.

At hearing, Employer submitted a separate document titled "Examination Fees 7/1/2015 – Present." DE E:1; App. 80. The document did not include any date, evidence or explanation indicating where it came from. The document was not authored by Dr. Taylor specifically but listed "Medix" at the top, and the doctors at Medix under. The document indicated that there was a "$1400 Base Fee" for an Independent Medical Exam," and also that physician time was billed at "$95 per 15-minute increment." DE E:1; App. 80. The document also included several other entries including a "Rush IME Report," priced at $750/$600 and an "Impairment Rating/Restrictions Exam" for $500. DE E:1; App. 80.

Additional facts will be discussed as necessary.

ARGUMENT

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

Standard of Review

Factual determinations are "clearly vested y a provision of law in the discretion of the agency." *Larson Mfg. Co., Inc. v. Thorson*, 763 N.W.2d 842, 850 (Iowa 2009). As a result, Sandlin maintains that whether the charge for his IME was "reasonable" is a substantial evidence issue. 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.*

Further, as it pertains to the application of law to facts, a reviewing court should only reverse the Commissioner if it determines the Commission's application was "irrational, illogical, or wholly unjustifiable" *Thorson*, 763 N.W.2d at 850; Iowa Code § 17A19(10)(l).

Error Preservation

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

Merits

As discussed above, the Court of Appeals reversed the agency and District Court in finding that Dr. Taylor's fee was "unreasonable." *Sandlin*, 2023 WL 2148754 at *4. However, Sandlin further maintains the Court of Appeals erred by failing to consider the "reasonableness" of the IME fee under a substantial evidence standard.

Under the Iowa worker's compensation system, the employer/insurance company get to direct care during the course of a claimant's injuries. To balance this, the legislature provides an opportunity under Iowa Code section 85.39 for a claimant to obtain an "*examination* by a physician of the employee's own choice"

and be reimbursed for the "reasonable fee" of that "examination." Iowa Code section 85.39. The Code further defines the "reasonableness" of a fee to be "based on the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination is conducted. Iowa Code § 85.39. However, the statute indicates that it is an "examination" and not merely an "impairment rating" which the employee is entitled to.

In the present case, the Court of Appeals acknowledged that Sandlin was entitled to an independent medical examination under section 85.39. However the Court did not lend appropriate weight to the specific factual findings made by the Commission in this matter. The Court indicated early in its decision, that it was reviewing "factual determinations made by the commissioner for substantial evidence." *Id.* at *2. However, nowhere in the Court's discussion regarding the "reasonableness" of the fee does the Court mention "substantial evidence," nor the weight it was giving to the findings of the agency. *See generally Id.* at *3-4.

In fact, the Court completely fails to even discuss or acknowledge the findings of the agency as it pertains to the "reasonableness" of the fee. *See Id.* Thus, it is clear that the Court failed to consider whether the evidence support the "findings actually made," and instead viewed the evidence to considered whether it "support(ed) different findings than those made by the commissioner." *Thorson*, 763 N.W.2d at 850.

Further, as it pertains to the application of law to facts, a reviewing court should only reverse the Commissioner if it determines the Commission's application was "irrational, illogical, or wholly unjustifiable" *Id,*; Iowa Code § 17A19(10)(l). Again, the Court of Appeals clearly failed to apply the correct standard. Nowhere in its discussion regarding "reasonableness," does it discuss how the finding of the Commissioner was "irrational, illogical, or wholly unjustifiable." Again, the Court does not even mention the findings of the Commission or the application of those findings to the statute at hand.

The Court of Appeals was corrected that the current version of Iowa Code section 85.39 defines 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. However, the Court failed to recognize that substantial evidence supported the Commissioner's finding that the fee in this matter was in fact "reasonable."

More specifically, the Commissioner found the fee was reasonable 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. Arbitration Decision; App. 36-37; Commissioner Decision; App. 18. Of note, the Commission specifically found that Dr. Taylor's report and accompanying bill "outweighed" the "exam fee" sheet that Employer submitted at hearing. App. 36-37. Further the Commissioner found Employer did not submit "persuasive"

evidence sufficient to rebut the statement by Dr. Taylor that his fees were "reasonable." The Court of Appeals completely failed to acknowledge the Commissioner's balancing of the separate evidence and instead simply accepted the "fee sheet" as gold.

Further supporting the Commissioner's findings is the complete lack of context or evidence surrounding this "fee sheet" Employer submitted which the Court of Appeals used to determine that $500 was the correct fee. Employer did not submit any statements from Dr. Taylor or otherwise explaining if if an "impairment rating" was separate from a full examination (and if so, how), or whether such an "impairment rating" would have been an option for Sandlin. Further, Employer does not even submit any evidence as to whether the "fee sheet" was even current. In fact, if anything the evidence indicates the "fee sheet" was not current because there is no way to reconcile the actual bill submitted with the fee sheet. Specifically, the bill sets out specific entries for preparation of the report, which is not addressed whatsoever in the fee sheet. Further, the time entries are not easily divisible by $95, which according to the fee sheet, is the billable rate per 15 minutes. *Cf* CE 2:13; App. 77, DE E:1; App. 80.

It is possible that the Court of Appeals misunderstood the "fee sheet" and believed that it was submitted as part of the bill. However, to be clear, this was a separate document submitted by Employer and was not attached to the IME bill

submitted by Sandlin. *See* App. 77 (indicating Claimant Exhibit) and App. 80 (indicating Employer exhibit).

In summary, the Court of Appeals failed to apply the proper standard in reviewing the "reasonableness" of Sandlin's IME fee. As discussed above, substantial evidence supported the Commissioner's determination that the full fee in this matter was reasonable. Further, the Court of Appeals failed to demonstrate how Commissioner's application of the evidence at hand to Iowa Code section 85.39 was "irrational, illogical, or wholly unjustified." As a result, Further Review is appropriate.

II. THE COURT OF APPEALS ERRED BY IMPOPERLY LIMITING SANDLIN'S EXAMINATION

Standard of Review

Again, Sandlin 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, reviewing courts look to the intent of the legislature based on the words used and what interpretation will best effect the purpose of the statute. *Des Moines Transit Authority v. Young*, 867

N.W.2d 839, 842 (Iowa 2015). It is "well-established" that reviewing courts "liberally construe workers' compensation statute in favor of the worker…because 'the primary purpose of the workers' compensation statute is to benefit the worker and his or her dependents…" *Id.*

Error Preservation

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

Merits

As discussed above, the Court of Appeals reversed the Commissioner in finding that Employer did not have to reimburse Sandlin for his full IME cost, but instead only $500. This was based on a document produced by Employer purporting to be a general fee sheet for Dr. Taylor and his colleagues. In its decision, the Court of Appeals indicated that it could not allow reimbursement for more than $500 because to do so would "authorize payment for an expanded examination, report, and intensive review of medical records..." *Sandlin*, 2023 WL 2148754 at *4. However, this view of section 85.39 is both illogical and in contradiction to the requisite case-law.

First, this restriction of 85.39 is illogical because to give an "impairment rating," a doctor must perform an "examination" and "intensive review of medical records." A rating without review and examination would essentially be a pulling a

number out of thin air. Further, the "impairment rating" means nothing without a "report."

Second, the caselaw support a full examination. This Court did an extensive dive into section 85.39 in *Des Moines Area Reg'l Transit Auth. v. Young*, 867 N.W.2d 839, 843-44 (Iowa 2015). *Young* clearly indicates that section 85.39 provides an avenue for reimbursement for not merely an "examination," but also an accompanying "report." *Id.* (discussing the requirements for reimbursement for an examination and/or a report). Nothing in the 2017 amended statue, nor its legislative history, discussed (or negated) the score or length of the examination or report.

Similarly, in *Kern v. Fenchyl, Doster & Buck, PLC*, 966 N.W.2d 326 (Iowa App. 2021), the Iowa Court of Appeals considered the scope of an examination under section 85.39. More specifically, 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 the Court of Appeals' assertion in this matter, 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.

More specifically, the entire point of the code section—"examination"—and its qualifier—"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</u>

> compensable injury. 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 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 an impairment rating from medical provider in the area. Iowa Code § 85.39. There is nothing in the change that limits the examination or report.

In addition, in considering any ambiguity in the statute, the Court should liberally construe the statute in favor of the worker. *Young*, 867 N.W.2d at 842. The statute at issue clearly provides for a full "examination" and nothing in the statute clearly restricts that examination from its case-law.

Finally, as discussed above, there is ample evidence in the record indicating the examination fee charged by Dr. Taylor was reasonable based on his training and certification as a board-certified specialist in occupational environmental medicine as well as an independent medical

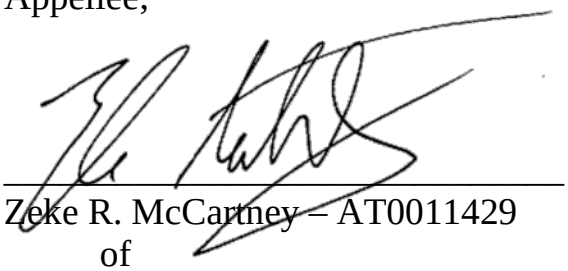
examiner by the American Board of Independent Medical Examiners. CE 1:8, App. pg. 75.

As a result, the Court of Appeals incorrectly limited reimbursement in this matter and Further Review is appropriate.

CONCLUSION

As discussed above, substantial evidence supports the proposition that fees for Sandlin's 85.39 were "reasonable." However, the Court failed to lend the proper weight to the Commissioner's findings as it pertains to the evidence submitted, the reasonableness of the fee, and the application of section 85.39 to the facts and evidence submitted. Further, the Court failed to follow precedent and incorrectly limited the scope of section 85.39 examinations. As a result, Claimant-Appellee Marshall Sandlin respectfully requests Further Review.

MARSHALL SANDLIN, Respondent-Appellee;

By: 

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CERTIFICATE OF COMPLIANCE

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