IN THE SUPREME COURT OF IOWA
NO. 22-1421
POLK COUNTY NO. CVCV063141

P.M. LATTNER MANUFACTURING CO. AND ACCIDENT FUND GENERAL INSURANCE CO.

PETITIONER-APPELLEE,

vs.

MICHAEL RIFE,

RESPONDENT-APPELLANT,

APPEAL FROM THE IOWA DISTRICT COURT

FOR POLK COUNTY

THE HONORABLE MICHAEL HUPPERT

FINAL BRIEF OF RESPONDENT-APPELLANT (AMENDED)

ANTHONY J. OLSON
Rush & Nicholson, P.L.C.
115 First Avenue SE, Suite 201
P.O. Box 637
Cedar Rapids, IA 52406-0637
Telephone (319) 363-5209
Facsimile (319) 363-6664
tony@rushnicholson.com

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CERTIFICATE OF COMPLIANCE

I, the undersigned, certify that this Proof Brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) & (g) because it has been prepared in a proportionally spaced typeface using Times New Roman font, size 14. The number of words is 10,744. The length is 48 pages.

12/12/22
DATE


Anthony J. Olson

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. WHETHER THE DISTRICT COURT ERRED IN REVERSING THE COMMISSIONER'S ORDER OF REIMBURSEMENT PURSUANT TO IOWA CODE § 85.39 WHEN APPELLEE CONCEDED THE ISSUE AND AN EVALUATION OF PERMANENT DISABILITY WAS MADE BY A PHYSICIAN OF APPELLEE'S CHOOSING.

Brewer-Strong v. HNI Corp., 913 N.W.2d 235 (Iowa 2018)
Chavez v. MS Technology, LLC, 972 N.W.2d 662 (Iowa 2022)
Christensen v. Snap On Tools Corp., 554 N.W.2d 254 (Iowa 1996)
Iowa R. App. P. 6.101
Iowa R. App. P. 6.102
Wilson v. Liberty Mutual Group, 666 N.W.2d. 163 (Iowa 2003)
Metz v. Amoco Oil Co., 581 N.W.2d 597 (Iowa 1998)
Hill v. Fleetguard, Inc., 705 N.W.2d 655 (Iowa 2005)
Meier v. Senecaut, 641 N.W.2d 532 (Iowa 2002)
Rick v. Boegel, 205 N.W.2d 713 (Iowa 1973)
Copeland v. Stewart, 203 N.W.2d 195 (Iowa 1972)
Garwick v. Iowa Dept. of Transportation, 611 N.W.2d 286 (Iowa 2000)
Teleconnect Co. v. Iowa State Commerce Commission, 366 N.W.2d 515 (Iowa 1985)
Cargill, Inc. v. Conley, 620 N.W.2d 496 (Iowa 2000)
McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980)
Drake University v. Davis, 769 N.W.2d 176 (Iowa 2009)
Polson v. Meredith Publishing Co., 213 N.W.2d 520 (Iowa 1973)
Iowa Code § 85.39
Iowa R. Civ. P. 1.904
Des Moines Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015)
Kolhaas v. Hog Slat, Inc., 777 N.W.2d 387 94 (Iowa 2009)
IBP, Inc. v. Harker, 633 N.W.2d 322 (Iowa 2001)
Kern v. Fenchel, Doster & Buck, P.L.C., 966 N.W.2d 326 (Iowa Ct. App. 2021)
Iowa Code § 135.1
IBP, Inc. v. Al-Gharib, 604 N.W.2d 621 (Iowa 2000)
Pestel v. American College Testing, File No. 1535181 (Arb Dec. March 16, 2012)

II. WHETHER THE DISTRICT COURT ERRED IN FINDING § 85.34(7) REQUIRED AN APPORTIONMENT OF BENEFITS WHEN APPELLEE HAD NOT PREVIOUSLY COMPENSATED APPELLANT FOR A SCHEDULED-MEMBER SHOULDER DISABILITY.

Brewer-Strong v. HNI Corp., 913 N.W.2d 235 (Iowa 2018)
Chavez v. MS Technology, LLC, 972 N.W.2d 662 (Iowa 2022)
Christensen v. Snap On Tools Corp., 554 N.W.2d 254 (Iowa 1996)
Iowa R. App. P. 6.101
Iowa R. App. P. 6.102
Iowa Code § 85.34
Iowa R. App. P. 6.904
JBS Swift & Co. v. Ochoa, 888 N.W.2d 887 (Iowa 2016)
Iowa Code § 85.61
Polaris Industries, Inc. v. Hesby, 881 N.W.2d 471 (Iowa Ct. App. 2016)
Floyd v. Quaker Oats, 646 N.W.2d 105 (2002)
Drake University v. Davis, 769 N.W.2d 176 (Iowa 2009)
Roberts Dairy v. Billick, 861 N.W.2d 814 (Iowa 2015)
Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015)
Celotex Corp. v. Auten, 541 N.W.2d 252, 256 (Iowa 1995)
McSpadden v. Big Ben Coal, 288 N.W.2d 181 (Iowa 1980)
Iowa Code § 86.14
Cargill, Inc. v. Conley, 620 N.W.2d 496 (Iowa 2000)
Iowa Code §85.45
Iowa Code § 85.47
McCollough v. Campbell Mill & Lumber Co., 406 N.W.2d 812 (Iowa 1987)

ROUTING STATEMENT

This case seeks review of the district court's application of existing legal principles to the facts in the records, and therefore is properly transferred to the Court of Appeals pursuant to Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

This appeal is from judicial review by the district court of a final agency action of the workers' compensation commissioner in a contested case. On appeal, the district court reversed the commissioner's award of independent medical examination costs to Appellant pursuant to Iowa Code § 85.39 and reversed and remanded the commissioner's denial of an apportionment to Appellee pursuant to Iowa Code § 85.34(7).

On August 23, 2019, Appellant filed an original notice and petition for workers' compensation benefits, naming Appellees as defendants. App. 2. On September 21, 2020, hearing was held before the deputy workers' compensation commissioner. App. 267. At hearing, issues presented were:

1. Whether Claimant is entitled to temporary total disability (TTD), temporary partial disability (TPD), or healing period benefits from July 24, 2019 to June 13, 2019;
2. Whether Defendants are entitled to a credit for overpayment of temporary disability benefits in the amount of $756.04;
3. Whether the Claimant's stipulated August 6, 2018, work injury should be compensated with permanent disability benefits as a scheduled member injury to the shoulder, or as an unscheduled injury;
4. The extent of Claimant's entitlement to permanent disability, if any;
5. The commencement date for permanent disability, if any;
6. Whether claimant is entitled to reimbursement to some or all of his independent medical evaluation fee pursuant to Iowa Code Section 85.39;
7. Whether costs should be assessed against either party and, if so, in what amount.

App. 271. Relevant to the present appeal, the deputy awarded Appellant the costs of his independent medical examination pursuant to Iowa Code § 85.39 because Appellee actively withheld an impairment rating. App. 282-83. The deputy also determined that apportionment could not be made pursuant to Iowa Code § 85.34(7) because the Code provided no mechanism for apportionment and because Appellees failed to obtain an expert opinion apportioning impairment between the two injuries. App. 278-79

Appellee appealed and the commissioner affirmed. App. 285-89. On appeal, Appellee argued for a reduction in the reimbursement amount awarded Appellant under § 85.39, and for apportionment pursuant to § 85.34(7). App. 286-87. The commissioner pointedly did not address the deputy's analysis or rationale regarding the triggering of § 85.39 because Appellee had not argued or asserted that issue. App. 288. The commissioner also denied Appellee's request for apportionment, finding the requested apportionment under § 85.34(7) to be the proverbial "apples to oranges" scenario, and again noting Appellant's failure to obtain a competing impairment rating. App. 287.

Appellee filed notice of a petition for judicial review of the commissioner's decision on February 9, 2022. App. 290. Before the district court, Appellee argued for a reduction in the award of examination costs

pursuant to § 85.39 and an apportionment of benefits pursuant to § 85.34(7). On appeal, the district court reversed the commissioner, holding § 85.39 had not been triggered under the facts of the case. App. 303. The district court also reversed the commissioner's denial of an apportionment under § 85.34(7) and remanded the case to the commissioner for determination of the impact of a full commutation. App. 313-16. The Ruling on Petition for Judicial Review was filed August 15, 2022. App. 317. Appellant's notice of appeal was filed on August 31, 2022. App. 318.

STATEMENT OF FACTS

Appellant Michael Rife is a welder. App. 18; Tr. 14, ln. 3-8. In 2002, Rife began employment with Appellee PM Lattner Manufacturing. App. 18; Tr. 14, ln. 13-14. Rife sustained a right shoulder injury arising out of and in the course of his employment with Lattner on February 4, 2009. App. 181; App. 22; Tr. 29, ln. 14-21. He underwent a surgical repair of his shoulder, was placed at maximum medical improvement, and was given a rating of 14% right upper extremity or 8% whole person. App. 111. Rife's then-attorney obtained another evaluation, which provided for 15% right upper extremity or 9% whole body. App. 181. Yet another physician offered a rating of 7% whole body. App. 227. The parties resolved the 2009 injury with a full commutation of benefits for a 29.6% BAW (body as a whole)

industrial disability, which was approved by the commission on September 15, 2010. App. 209-13. The full commutation released defendant from liability for injuries to Appellant's "right shoulder, right upper extremity, back, chest, bilateral lower extremities, left flank, lungs, cardiovascular system, respiratory system, and any and all pain radiating therefrom" sustained in the February 4, 2009 injury. App. 213.

Rife returned to work with PM Lattner Manufacturing. App. 22; Tr. 30, ln. 6-23. He resumed his normal duties without exception, and felt he was 100%. *Id.* On August 6, 2018 he suffered an admitted work injury to his right shoulder. App. 10. Rife sought medical care from his employer, who authorized treatment. App. 200. One of the physicians authorized by his employer was Dr. White. *Id.* Dr. White offered conservative care, and recommended surgery when that failed. App. 103. Dr. White performed an extensive debridement of the labrum and rotator cuff, capsular release, and subacromial decompression on June 13, 2019. App. 48.

On October 8, 2019, Dr. White recommended additional physical therapy, and scheduled a six-week follow-up. App. 94. Rife attended a functional capacity evaluation on November 13, 2019 with E3 Work Therapy. App. 258. The evaluation was performed by a physical therapy assistant and was deemed invalid. App. 257-59. On December 10, 2019,

Rife presented to Dr. White for an assessment of permanent disability. App. 93. Dr. White stated he was unable to provide long term recommendations for work restrictions and long-term function in light of the invalid FCE. *Id.*

After receiving the November 13, 2019 functional capacity evaluation, Dr. White recommended an evaluation be performed by a **different** provider. App. 193. In February, 2020, Employer representatives contacted Rife to schedule a repeat FCE with E3. App. 245-46. Rife underwent his own functional capacity evaluation with Daryl Short, DPT, on February 29, 2020. App. 184. On April 20, 2020, Dr. White offered to use the Short report in responding to Lattner's rating request. App. 197. On June 16, 2020, a colleague of Dr. White, Dr. Coester, wrote a referral for a repeat functional capacity evaluation to "E3 per WC." App. 88. On July 7, 2020, Lattner represented that Dr. White did not want to use the functional capacity evaluation he had previously offered to use in assessing permanent disability. App. 197.

Rife obtained an impairment rating from Dr. Sunny Kim on July 24, 2020. App. 176-78. After performing an independent medical examination and reviewing Rife's medical records, Dr. Kim authored a report. App. 176-78. In the report, he opined that the cost of his report was reasonable and customary in his geographic area. App. 178. He also declined to evaluate

Rife's right ankle, indicating he would simply defer to a specialist. *Id.* Ultimately, Dr. Kim offered an impairment rating of 19% right upper extremity or 11% whole body. App. 178.

ARGUMENT

I. WHETHER THE DISTRICT COURT ERRED IN REVERSING THE COMMISSIONER'S ORDER OF REIMBURSEMENT PURSUANT TO IOWA CODE § 85.39 WHEN DEFENDANT DID NOT RAISE THE ISSUE AND AN EVALUATION OF PERMANENT DISABILITY WAS MADE BY A PHYSICIAN OF APPELLEE'S CHOOSING.

A. Standard of Review.

The standard of review set forth in Iowa Code Chapter 17A guides judicial review of agency decision making to determine whether the Court's conclusion is the same as that made by the district court. *Chavez v. MS Technology, LLC*, 972 N.W.2d 662, 666 (Iowa 2022)(*citing Brewer-Strong v. HNI Corp.*, 913 N.W.2d 235, 242 (Iowa 2018)). The commissioner's interpretation of Iowa Code Chapter 85 is reviewed for correction of errors at law. *Id.* However, the commissioner's findings of fact are accepted when supported by substantial evidence. *Chavez*, 972 N.W.2d at 666 (Iowa 2022)(*citing Gumm v. Easter Seal Soc. Of Iowa, Inc.*, 943 N.W.2d 23, 28 (Iowa 2010)). A district court decision rendered in an appellate capacity is examined for correction of errors at law applying the standards of § 17A.19. *Christensen v. Snap On Tools Corp.*, 554 N.W.2d 254, 257 (Iowa 1996).

The district court may properly grant relief if the agency action prejudiced the substantial rights of the petitioner. *Brewer-Strong,* 913 N.W.2d at 242.

B. Preservation Statement.

Appellant preserved error by filing a timely notice of appeal in conformity with Iowa R. App. P. 6.101 and 6.102. Prior to the district court's decision, all issues addressed by Appellant had been resolved in Appellant's favor.

C. The issue of Claimant's entitlement to reimbursement under Iowa Code § 85.39(2) was not properly before the district court.

The district court erred in reversing the commissioner's decision to award the cost of Appellant's examination under Iowa Code § 85.39 because Appellee had not previously raised the issue. As the issue was not litigated. argued, or advanced before the commission, it cannot be disturbed on appeal.

Fundamental tenets of appellate review require that issues be both raised and decided before they can be the subject of appeal. *Wilson v. Liberty Mutual Group*, 666 N.W.2d. 163, 167 (Iowa 2003); *Metz v. Amoco Oil Co.*, 581 N.W.2d 597, 600 (Iowa 1998). When a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal. *Hill v. Fleetguard, Inc.*, 705 N.W.2d 655, 671 (Iowa 2005); *Meier v.*

Senecaut, 641 N.W.2d 532, 537 (Iowa 2002). Even though a brief states an alleged error or proposition, the court will not give it consideration unless it is supported by written argument in the brief. *Rick v. Boegel,* 205 N.W.2d 713, 715 (Iowa 1973); *Copeland v. Stewart,* 203 N.W.2d 195, 197 (Iowa 1972). Even issues of constitutional magnitude will not be addressed if not presented to the trial court. *Garwick v. Iowa Dept. of Transportation*, 611 N.W.2d 286, 288 (Iowa 2000). A district court reviewing agency action exercises only appellate jurisdiction. *Teleconnect Co. v. Iowa State Commerce Commission*, 366 N.W.2d 515 (Iowa 1985). In workers' compensation cases, appellate review is limited to those matters raised and litigated before the commissioner. *Cargill, Inc. v. Conley*, 620 N.W.2d 496 (Iowa 2000); *McSpadden v. Big Ben Coal Co.,* 288 N.W.2d 181, 184 (Iowa 1980); *Polson v. Meredith Publishing Co.,* 213 N.W.2d 520, 523 (Iowa 1973); *see Drake University v. Davis*, 769 N.W.2d 176, 185 (Iowa 2009).

In *Cargill, Inc. v. Conley*, the Supreme Court reiterated the long-standing rule that claims not raised before the industrial commissioner must not be considered by the court on judicial review. 620 N.W.2d 496 (Iowa 2000)(*citing Klein v. Furnas Elec. Co.*, 340 N.W.2d 370, 375 (Iowa 1986); *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181, 184 (Iowa 1980); *Paveglio v. Firestone Tire & Rubber Co.*, 167 N.W.2d 636, 639 (Iowa

1969)). At hearing, the deputy commissioner entered an award of industrial disability, or loss of earning capacity, benefits that considered the employer's refusal to allow the employee to work jobs offering a higher rate of pay. *Id* at 499. This was affirmed on appeal to the commissioner, but the district court reversed and held the workers' compensation commission "could not consider… anything that is specifically part of [the employee's] discrimination claim" when assessing loss of earning capacity. *Id.* In deciding the case, the Supreme Court first determined the issue of how industrial disability should be assessed had not been raised by the employer. *Cargill*, 620 N.W.2d at 502. Of overriding significance to the Court was the fact that at no time in the proceedings at the agency level did the employer argue that the agency could not consider the employer's restriction of job opportunities on the issue of industrial disability. *Id* at 501. Finding that the employer had not raised the issue upon which the district court based its decision, the Supreme Court reversed and remanded to the district court for an order affirming the commissioner's decision. *Id* at 503.

Nearly thirty years before the Court's holding in *Cargill*, the Court examined a similar issue in *Polson v. Meredith Pub. Co.,* 213 N.W.2d 520 (Iowa 1973). In that case, the injured worker filed several actions in the workers' compensation commission. *Polson v. Meredith*, 213 N.W.2d at

522-523. First, the injured worker made a claim for benefits, and was awarded three weeks of temporary disability. *Id.* The injured worker then filed a review reopening petition seeking additional payments, but was denied further compensation. *Id.* Unsatisfied, the injured worker filed a second review reopening petition, and was again denied further compensation. *Id.* On appeal of the second review reopening petition, the injured worker raised a new claim, asserting that the unilateral termination of benefits prior to the first review reopening petition was an unconstitutional denial of due process. *Id.* Initially, the Court noted that the argument was both new and interesting. *Id* at 523. However, the Court recognized the rule that appellate review of workers' compensation cases is limited to issues raised and litigated before the commissioner, and so refrained from entertaining the argument, stating:

> It is obvious from what we have already said that plaintiff's challenge at this late date on grounds not urged before the commissioner at the time of the 1968 hearing must be rejected.

Polson v. Meredith Pub. Co., 213 N.W.2d 520, 523 (Iowa 1973).

In the present case, Appellee never argued against Claimant's entitlement to reimbursement for independent medical examination costs under Iowa Code § 85.39. Appellee did not make this argument in its brief before the deputy commissioner. Appellee did not make this argument in its

brief before the commissioner. Nor did Appellee make this argument in its brief before the district court. In the Commission and the lower court, Appellee only raised the issue of whether the cost of Appellant's independent medical examination was reasonable. Specifically, Appellee argued that the cost of Appellant's report was unreasonable because, purportedly, (1) it addressed issues unrelated to the claim, (2) evidence of the typical charges for the examination was insufficient, and (3) the examining doctor could have reviewed fewer records. Appellee's argument was virtually identical in each of its briefs, and is set forth in its substantial entirety below:

> Iowa Code section 85.39(2) states the "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." In the event the Claimant is awarded any benefits, the "determination of the reasonableness of a fee… 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." Iowa Code section 85.39(2). Dr. Kim's independent medical evaluation and Mr. Short's functional capacity evaluation both addressed a non-work related injury to the right ankle that was not alleged in the petition in addition to the accepted right shoulder injury. Ex. 1, pg. 3; Ex. 2, pg. 10. **Therefore, the Defendants should not be assessed the cost of any *part* of the evaluations that addressed the right ankle injury.**
>
> The Claimant produced no evidence of the typical fees charged by medical providers to perform impairment ratings; instead, he only produced Dr. Kim's invoice, and it does not specify what portion of the bill was to calculate the impairment rating.

> Because the Defendants fully accepted liability for the right shoulder injury, there was no need for Dr. Kim to review all of the Claimant's medical records to issue an impairment rating; instead, he could have issued a rating based upon a review of the surgical report, a review of his previous independent medical evaluation in order to appropriately apportion the rating, and a physical evaluation of the Claimant. **Therefore, the Agency should find the Defendants are not liable for the *full* cost of Dr. Kim's independent medical evaluation.**

Certified Agency Record pp. 75-76 (Defendant's Post Hearing brief p. 14-15); Certified Agency Record pp. 39-40 (Defendant's Appeal Brief p. 16-17); Petitioner's Appeal Brief p. 19. (emphasis added).

Appellee's argument referred to neither the statutory language nor the case law the district court cited. The closest Appellee comes to raising arguments upon which the district court relied is contained in the first sentence of the first paragraph, above, where the Defendant correctly states that an employer is not liable for the cost of an examination if the injury for which the employee is being examined is not determined to be a compensable injury. Read in context, Appellee is clearly presenting an argument for partial abrogation of the award of Dr. Kim's examination, and is not presenting an argument that Appellant had no right to an examination. This can be discerned from two key facts. First, Appellee specifically states that it accepted Appellant's right shoulder injury as compensable, implying that Appellant was entitled to an examination. Second, Appellee specifically

identified the relief sought, and it is merely a reduction in the amount of the examination cost.

Not only was there no reference to the triggering mechanism of § 85.39(2) in the Appellee's briefing, but the commissioner specifically identified that the argument was not made when deciding the intra-agency appeal: "On appeal, defendants do not take issue with the deputy commissioner's analysis or rationale in finding that the reimbursement provisions of Iowa Code sections 85.39 were triggered in this case, so I will not address or disturb that portion of the arbitrations decision in the appeal decision." App. 288. Despite this, Appellee did not make any motion or request for reconsideration to address the issue of whether Appellant's right to an independent medical examination under § 85.39 was triggered in the first place. Instead, the district court raised the issue and reversed the commissioner's decision on grounds that had not been properly asserted, briefed, researched, or argued. Had Appellee raised the issue and felt that the issue was not addressed by the commissioner, Appellee could have filed a motion to reconsider, enlarge, or amend the commissioner's decision pursuant to Iowa Rule of Civil Procedure 1.904. Indeed, this motion would likely have been required for the issue to be presented on appeal. *Meier v. Senecaut*, 641 N.W.2d 532, 539 (2002)("[W]e have repeatedly said that a

rule 179(b) motion is necessary to preserve error "when the district court fails to resolve an issue, claim, or other legal theory properly submitted for adjudication").

Raising and relying upon an issue that was neither advanced nor litigated by any party breaks with long-standing precedent and presents serious risks that the issue will be decided without the full benefit of having been thoroughly examined or developed. As the issue was not presented or preserved for review, the ruling of the district court should be reversed.

D. Appellant was entitled to reimbursement under § 85.39(2).

Assuming, arguendo, that the issue of whether Appellant is entitled to reimbursement under Iowa Code § 85.39 was properly before the district court, the court erred in reversing the commissioner because it erroneously interpreted Iowa Code § 85.39 and substituted its own factual determinations for that of the commissioner. Contrary to the decision on judicial review, the commissioner was correct in awarding the cost of Appellant's examination pursuant to Iowa Code § 85.39(2) because Appellee obtained an evaluation of permanent disability and Appellee's purposeful failure to obtain an impairment rating is the equivalent of a "zero" impairment rating triggering Appellant's right to an examination.

Iowa Code § 85.39(2) governs an employee's right to reimbursement for an examination by a physician of his choosing. Iowa Code § 85.39 is the sole method for reimbursement of an examination by a physician of the employee's choosing. *Des Moines Regional Transit Authority v. Young,* 867 N.W.2d 839, 846-847 (Iowa 2015). Similarly, reimbursement of the cost of medical reports is available to injured workers. *See* Iowa Code § 86.40; *Des Moines Regional Transit Authority*, 867 N.W.2d at 844.

When interpreting the Workers' Compensation Act, we look to the object to be accomplished, the mischief to be remedied, or the purpose to be served and place on the statute a reasonable or liberal construction which will best effect, rather than defeat, the legislature's purpose. *Kolhaas v. Hog Slat, Inc.*, 777 N.W.2d 387, 394 (Iowa 2009). To ascertain legislative intent, we look to what the legislature said rather than speculating as to probable legislative intent outside the words used in the statute. *IBP, Inc. v. Harker*, 633 N.W.2d 322, 325 (Iowa 2001). Ambiguity in a statute may arise from either the meaning of particular words, or from the general scope and meaning of the statute when all its provisions are examined. *IBP, Inc. v. Harker,* 633 N.W.2d at 325. The primary purpose of the workers' compensation statute is to benefit the injured worker and his or her dependents, insofar as the statutory requirements permit. *Id.* A medical

evaluation pursuant to § 85.39 is a means by which the employee can rebut the employer's evaluation of disability. *Kolhaas v. Hog Slat, Inc.*, 777 N.W.2d 387, 394 (Iowa 2009). The purpose of Iowa Code § 85.39(2) is to allow an employee to obtain a disability rating from a physician of his own choice when the physician chosen by the employer gives a disability evaluation that is unsatisfactory to the employee. *Id* at 327.

At the outset, there is a certain level of ambiguity in the statute. Indeed, our Supreme Court has previously substituted "impairment rating" for "evaluation of permanent disability," when addressing other issues. *See e. g. Kolhaas v. Hog Slat, Inc.*, 777 N.W.2d 387, 394 (Iowa 2009). However, that is not the language used by the legislature. A review of the plain language of Iowa Code § 85.39 makes clear the prerequisites for an employee's reimbursement under the Code section:

> 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**... A determination of the reasonableness of a fee for 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.

(*emphasis added*). Simply put, an "evaluation of permanent disability" triggers an employee's ability to obtain an independent medical examination, and so the employee is able to obtain reimbursement for such an examination if he is dissatisfied. Notably, the statute draws a distinction between an "evaluation of permanent disability" and an "impairment rating." Specifically, the legislature only uses the term "impairment rating" as a starting point comparison cost for determination of the reasonableness of the employee's examination. If the legislature had intended for the evaluation of permanent disability to require an impairment rating, it would logically have used that term rather than "evaluation of permanent disability." Neither does use of the subjective term, "too low" narrowly limit the meaning of "disability evaluation." Our Supreme Court has already examined the purpose of § 85.39(2) and determined that it is available to rebut an evaluation of disability if the evaluation is unsatisfactory to the employee. *Kolhaas v. Hog Slat,* 777 N.W.2d at 394.

In keeping with this intent, our Court of Appeals previously determined that an impairment rating was not a prerequisite to triggering an injured worker's right to reimbursement for an examination under Iowa Code § 85.39 in *Kern v. Fenchel, Doster & Buck, P.LC.*, 966 N.W.2d 326 (Iowa Ct. App. 2021)(Table Dec). Reversing the decision of the

commission and lower court, which denied the workers' request for reimbursement of examination costs, the Court of Appeals held that § 85.39 required only a "disability evaluation." *Kern v. Fenchel, Doster and Buck, P.L.C.*, No. 20-1206 at 4. In doing so, the court first recognized the legislative balancing of interests in the selection of medical care and independent medical examinations, insofar as the employee's right to an examination is intended to balance the employer's right to select the doctors rendering medical care. *Id* at 3-4. Viewing the issue through that lens, the Court determined that the "no causation" opinion of the employer's chosen doctor satisfied the statutory requirements of § 85.39 despite the fact that no rating was attributed to the claimed injury. *Id* at 4-5.

No prior Supreme Court precedent requires an impairment rating. In 2015, the Supreme Court examined the right of injured workers to reimbursement for examinations and reports in *Des Moines Area Regional Transit Authority v. Young,* 867 N.W.2d 839 (Iowa 2015). The injured employee sought reimbursement for an examination by a physician of her choosing, which occurred on March 18, 2010. *Des Moines Area Regional Transit*, 867 N.W.2d at 841. It was not until May, 2010, that the employer obtained an evaluation of permanent disability. *Id.* The commission awarded the cost of the $2,800 examination pursuant to Iowa Code § 86.40.

Id. The employer appealed and the Court of Appeals reversed the commissioner's decision. *Id.* Affirming the Court of Appeals, the Supreme Court concluded § 85.39 to be the sole method for reimbursement of an examination by a physician of the employee's choosing. *Des Moines Area Regional Transit*, 867 N.W.2d at 846-847. In reaching this decision, the Court reasoned that an interpretation of § 86.40 which allowed the commission to assess the cost of an examination outside the confines of the statutorily prescribed process contained in § 85.39 would, in effect, nullify § 85.39, and the legislature would not have written one statute to supersede another. *Id.* Accordingly, the Court held § 85.39 to be the only mechanism by which injured workers may obtain reimbursement for independent medical examinations from employers. *Id.*

Unlike the employee in *Des Moines Regional Transit*, and much like the employee in *Kern*, Appellant submitted to an evaluation of permanent disability with a physician of the employer's choosing before obtaining his own examination when he attended an appointment with the Appellee's chosen physician on December 10, 2019. Dr White's inability or unwillingness to offer an impairment rating or restrictions at that time was tantamount to a zero-impairment evaluation because it called into question the validity of Appellant's symptoms and claims, much like the no-causation

opinion in *Kern*. Implicit in the physical therapist's invalid functional capacity examination is a determination that Appellant was not offering a genuine effort, or that he was malingering. Thus, Appellant was dissatisfied with the evaluation of permanent disability, and sought his own within the parameters of § 85.39.

To the extent Appellees were dissatisfied by the fact that Dr. White's evaluation did not produce an impairment rating, Appellee had ample opportunity to obtain an impairment rating. They simply chose not to do so. Appellee could have asked Dr. White to provide an impairment rating using the functional capacity evaluation of Daryl Short, DPT. In fact, Dr. White indicated that he had recommended the functional capacity evaluation be performed by a different provider after receiving the invalid result of Appellee's examiner. App. 193. Consistent with his recommendation, Dr. White offered to provide an impairment rating based on the Short report:

> Good morning! This is the response I got from Dr. White. "The FCE in the chart is the one that was sponsored by patient's attorney. It looks like work comp was scheduling a different FCE with E3. I guess it depends on if work comp wants to use the FCE from the attorney or get another opinion from E3." How would you like to proceed?

App. 197. Appellant offered to attend another functional capacity evaluation. App. 245. Appellee, not Dr. White, demanded Appellant return to E3. App. 87-88; App. 244-46. Not only could Appellee have obtained a

rating from Dr. White, but they also could have selected a physician that did not require a functional capacity evaluation to assess permanent disability, as regularly occurs in workers' compensation cases.

Nor was it necessary for Appellant to submit to a functional capacity evaluation under § 85.39(2). The repeat functional capacity evaluation sought by Appellees was to be performed by the same physical as performed the initial evaluation. App. 244; App. 257; App. 197. A physical therapist is not a physician as contemplated by § 85.39(2). Iowa Code § 135.1(4); *See IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 631 (Iowa 2000)(recognizing the distinction between a psychologist and physician); *Pestel v. American College Testing*, File No. 1535181 (Arb Dec. March 16, 2012)(recognizing agency precedent distinguishing between physicians and psychologist). Accordingly, there is no obligation to attend an evaluation by a physical therapist pursuant to Iowa Code § 85.39.

The district court erred in reversing the commission's award of Dr. Kim's examination cost because Appellant's right to an independent medical examination was triggered on December 10, 2019 when Appellant submitted to an evaluation of a permanent disability with Dr. White, the physician chosen by Appellees. Dr. White performed an evaluation of Appellant's permanent disability. It is irrelevant whether Dr. White assigned a

numerical impairment rating or permanent restrictions in the analysis of whether Appellant's right to an examination under § 85.39(2) is triggered. Instead, it is sufficient that an evaluation by a physician of the employer's choosing occurred.

II. WHETHER THE DISTRICT COURT ERRED IN FINDING § 85.34(7) REQUIRED AN APPORTIONMENT OF BENEFITS WHEN APPELLEE HAD NOT PREVIOUSLY COMPENSATED APPELLANT FOR A SCHEDULED-MEMBER SHOULDER DISABILITY.

A. Standard of Review.

The standard of review set forth in Iowa Code Chapter 17A guides judicial review of agency decision making to determine whether the Court's conclusion is the same as that made by the district court. *Chavez v. MS Technology, LLC*, 972 N.W.2d 662, 666 (Iowa 2022)(*citing Brewer-Strong v. HNI Corp.*, 913 N.W.2d 235, 242 (Iowa 2018)). The commissioner's interpretation of Iowa Code chapter 85 is reviewed for correction of errors at law. *Id.* However, the commissioner's findings of fact are accepted when supported by substantial evidence. *Chavez*, 972 N.W.2d at 666 (Iowa 2022)(*citing Gumm v. Easter Seal Soc. Of Iowa, Inc.*, 943 N.W.2d 23, 28 (Iowa 2010)). The district court may properly grant relief if the agency action prejudiced the substantial rights of the petitioner. *Brewer-Strong,* 913 N.W.2d at 242.

B. Preservation Statement.

Appellant preserved error by filing a timely notice of appeal in conformity with Iowa R. App. P. 6.101 & 6.102. Prior to the district court's decision, all issues addressed by Appellant had been resolved in Appellant's favor.

C. No apportionment of disability can occur between scheduled and unscheduled disabilities under the plain meaning of the statute.

The district court erred in determining Iowa Code § 85.34(7) allows Appellee a credit against the present scheduled member disability for prior compensation paid on an unscheduled disability. Interpreting the statute to allow apportionment between unscheduled and scheduled disabilities is unsupported by the language of § 85.34(7). No case law supports a credit, and such an approach would yield absurd results contrary to the purpose and intent of the Iowa Workers' Compensation Act. Rather, the plain language of § 85.34(7) prohibits any attempt to apportion unscheduled and scheduled disabilities.

Iowa Code § 85.34 (2017) governs permanent disabilities. The various subsections address issues ranging from temporary compensation during a recuperative healing period to permanent and total disability. Code § 85.34(7) (2017), addresses apportionment of in successive disability cases:

> 7. Successive disabilities. An employer is liable for compensating only that portion of an employee's disability that arises out of and in the course of the employee's employment with the employer and that relates to the injury that serves as the basis for the employee's claim for compensation under this chapter, or chapter 85A, 85B, or 86. An employer is not liable for compensating an employee's preexisting disability that arose out of and in the course of employment from a prior injury with the employer, to the extent that the employee's preexisting disability has already been compensated under this chapter, or chapter 85A, 85B, or 86. An employer is not liable for compensating an employee's preexisting disability that arose out of and in the course of employment with a different employer or from causes unrelated to employment.

In construing statutes, the court searches for the legislative intent as shown by what the legislature said, rather than what is should or might have said. Iowa R. App. P. 6.904(3)(m). Absent a statutory definition, statutory terms are considered in the context in which they appear and given their ordinary meaning. *JBS Swift & Co. v. Ochoa*, 888 N.W.2d 887, 896 (Iowa 2016). The court will also consider legislative history of a statute, including prior enactments, to determine intent. *Id.* Finally, we must look for an interpretation that is reasonable and avoids absurd results. *Chavez v. MS Technology LLC,* 972 N.W.2d. 662, 668 (Iowa 2022).

The plain meaning of Iowa Code § 86.34(7) does not permit an unscheduled disability to offset a scheduled disability. For this reason, no credit can be given for a loss of earning capacity disability compensated under Iowa Code § 85.34(2)(u) (2009) to offset a shoulder disability

compensated under Iowa Code § 85.34(2)(v) (2017), an entirely different form of disability. Parsing the language of Iowa Code § 85.34(7) is illuminating:

> **An employer is liable for compensating … disability that arises out of … the employee's employment … and that relates to the injury that serves as the basis for the employee's claim …**
>
> **An employer is not liable for compensating an employee's preexisting disability from a prior injury with the employer, to the extent that the employee's preexisting disability has already been compensated …**
>
> **An employer is not liable for… preexisting disability that arose out of and in the course of employment with a different employer or from causes unrelated to employment.**

At the outset, we can ignore the third sentence of the code section, as it applies only to disability arising from causes unrelated to employment with the Appellee, facts not present here.

A close reading of the first sentence demonstrates that employers are responsible for (1) only **disability** that (2) relates to **the injury** that serves as the basis for the employee's claim- in this case, the stipulated August 6, 2018 work injury to Appellant's right shoulder. The second sentence then creates an exception to compensation, **to the extent the preexisting disability from a prior injury has already been compensated.** Thus, if an injury and disability are separate and distinct terms, rather than used

interchangeably, § 85.34(7) cannot be invoked unless an employee first sustains an injury producing a disability, receives compensation for that disability, then sustains a new injury producing the same disability as had already been compensated.

For example, apportionment has been allowed[1] where the prior injuries involved the right shoulder and right hip and the subsequent injury involved the left shoulder and left hip, each resulting in industrial disability. *See e.g. Polaris Industries, Inc. v. Hesby*, 881 N.W.2d 471 (Iowa Ct. App. 2016)(Table Dec). This is because both injuries to differing parts of the body resulted in the same disability: industrial.

In addition to permitting apportionment of unscheduled disabilities against other unscheduled disabilities, our Supreme Court permitted apportionment of injuries to the same scheduled members in *Floyd v. Quaker Oats*, 646 N.W.2d 105 (2002). In that case, the Supreme Court indicated that scheduled injuries could be apportioned out where it was shown that the preexisting injury independently produced a discrete and ascertainable degree of disability. *Floyd* at 110. Expert testimony was produced in *Floyd* stating: "…with respect to the 15% work-related

[1] Pursuant to Iowa Code § 85.34(7) (2004), which differs from the language of the 2017 version of the statute, as discussed below.

functional disability of claimant's leg, seventy-five percent of that impairment was attributable to the September 1993 injury. The balance of the functional disability, i.e. 3.75% was attributed to a cumulative trauma… subsequent to September 3, 1993." *Id* at 107.

The *Floyd* Court relied upon specific expert testimony addressing the very topic of apportionment, something not present in this case. However, it should be noted that the apportionment of scheduled disabilities as presented in *Floyd* was a fact issue rather than an issue addressed by § 85.34(7). Likewise, the resulting disabilities would have been compensated in the same manner: as a scheduled member.

In comparison, our court has previously denied the apportionment of permanent partial disability and permanent total disability. In *Drake University v. Davis,* 769 N.W.2d 176 (Iowa 2009), the Court addressed the issue of whether differing disabilities could be apportioned. Addressing the version of Iowa Code § 85.34(7) then in effect, the Court refused to permit apportionment between permanent partial and permanent total disabilities based upon the plain language of the statute. At that time, the language of the statute read:

> If an injured employee has a preexisting disability that was caused by a prior injury arising out of and in the course of employment with the same employer, and *the preexisting disability was compensable under the same paragraph of*

> *section 85.34, subsection 2,* as the employee's present injury, the employer is liable for the combined disability that is caused by the injuries, measured in relation to the employee's condition immediately prior to the first injury.

Drake Univ. v. Davis, 769 N.W.2d at 184 (Iowa 2009)(*citing* §85.34(7)(2004). Thus, where the injuries sought to be apportioned were compensable under § 85.34(2)(u) and § 85.34(3), no apportionment could occur.

Reviewing *Drake University* supports a conclusion that Appellant's present disabilities should not be apportioned when considering the prior enactment (*JBS Swift & Co. v. Ochoa*, 888 N.W.2d 887, 896 (Iowa 2016) ("We also consider the legislative history of a statute, including prior enactment, when ascertaining legislative intent.")) Under prior enactments, the legislature made clear that appointment should only apply where the impairment results in disability under the same paragraph of § 85.34(2), i.e. a hand for a hand, or a leg for a leg.

Although the quoted language has since been removed from § 85.34(7) removal does not reflect a legislative intent to reverse course and permit such an apportionment. Consider that it must be presumed the legislature is aware of the case law when it enacts a statute. *Roberts Dairy v. Billick*, 861 N.W.2d 814, 821 (Iowa 2015)(*Citing Mallory v. Paradise*, 173 N.W.2d 264, 266 (Iowa 1969). The practical effect of *Drake University* was

to permit injured workers to collect both permanent partial and permanent total disability benefits concurrently. *See Drake University,* 769 N.W.2d at 185. Consider also, the 2017 legislative changes to § 85.34 in whole. The Code now terminates permanent partial disability upon commencement of permanent total disability. § 85.34(2)(y). Another subsection of the Code now prohibits receipt of permanent partial disability at the same time as permanent total disability benefits are paid. § 85.34(3)(b). This new language strongly indicates a desire of the legislature to eliminate the receipt of permanent partial and permanent total disability benefits at the same time. This is a problem under *Drake University* if the language of § 85.34(7) referencing apportionment under former § 85.34(7) remains because permanent total and permanent partial disability are not compensated under the same paragraph.

In this case, there are two right shoulder injuries. However, there is an unscheduled industrial disability and a scheduled member disability. The undisputed facts demonstrate the Appellant suffered an industrial disability to his whole body (BAW) in 2009, and a scheduled disability in 2018. Whether the first injury is to the shoulder and the second injury is to the same shoulder, or the first injury is to the neck and the second injury is to the hip matters not. Injury within its plain meaning, and the meaning of §

85.34(7) simply means the cause of the disability. The focus must instead be on the resultant disability. At the time of Claimant's 2009 injury the Code did not contemplate a shoulder disability as defined by § 85.34(2)(n), as the section had not been enacted. Rather the disability compensated was under then § 85.34(2)(u) (now codified under § 85.34(2)(v)). Because the disabilities are not compensated under the same Code section, they are not the same disability and cannot "[have] already been compensated."

An interpretation of § 85.34(7) that permits apportionment between scheduled and industrial disabilities would yield absurd results. Industrial disability commonly results in greater compensation than scheduled disability. *Chavez v. MS Technology*, 972 N.W.2d at 667 (Iowa 2022). Allowing offsets through apportionment would create the untenable situation where individuals suffering an industrial disability for a prior injury receive zero compensation despite suffering new and completely different permanent disability to an entirely unrelated body part. Construing ambiguity in the statute to create situations where new disability is not compensated is simply absurd when considering the purpose of the statute is to benefit the worker. *Des Moines Area Regional Transit Authority v. Young*, 867 N.W.2d 839, 842 (Iowa 2015)("the primary purpose of the

workers' compensation statute is to benefit the injured worker and his or her dependents, insofar as the statutory requirements permit.").

Reviewing the statute as a whole, in light of the plain meaning of the terms used and in the context of the 2017 changes as a whole, it is apparent that the legislature does not intend for apportionment of disabilities compensable under differing paragraphs of § 85.34. Rather, the 2017 changes reflect only an intent to prohibit receipt of both permanent partial and permanent total disability benefits at the same time. Appellant was previously compensated for an industrial disability. Appellant has not been previously compensated for a preexisting scheduled shoulder disability because the Code did not contemplate scheduled shoulder disabilities.

D. No apportionment can occur because no method for apportionment is provided by the statute.

Even were the clear language of the statute to permit an apportionment between scheduled and unscheduled disabilities, it does not provide any guidance or method for the apportionment. In short, there is no translation of functional disability rating to an industrial disability. Our Court has previously required the legislature to specifically spell out the mechanism for apportionment before allowing it to occur. *See Roberts Dairy v. Billick*, 861 N.W.2d 814, 824-825 (Iowa 2015); *Celotex Corp. v. Auten*, 541 N.W.2d 252, 256 (Iowa 1995).

Addressing a similar problem, our Supreme Court has previously determined apportionment only occurs when there is an explicit mechanism for doing so. *Roberts Dairy v. Billick,* 861 N.W.2d 814, 822 (Iowa 2015). Examining this issue, the Court was faced with the 2004 amendments to Iowa Code § 85.34(7):

> a. An employer is fully liable for compensating all of an employee's disability that arises out of and in the course of the employee's employment with the employer. An employer is not liable for compensating an employee's preexisting disability that arose out of and in the course of employment with a different employer or from causes unrelated to employment.
>
> b. If an injured employee has a preexisting disability that was caused by a prior injury arising out of and in the course of employment with the same employer, and the preexisting disability was compensable under the same paragraph of section 85.34, subsection 2, as the employee's present injury, the employer is liable for the combined disability that is caused by the injuries, measured in relation to the employee's condition immediately prior to the first injury. In this instance, the employer's liability for the combined disability shall be considered to be already partially satisfied to the extent of the percentage of disability for which the employee was previously compensated by the employer.
>
> If, however, an employer is liable to an employee for a combined disability that is payable under section 85.34, subsection 2, paragraph "u," and the employee has a preexisting disability that causes the employee's earnings to be less at the time of the present injury than if the prior injury had not occurred, the employer's liability for the combined disability shall be considered to be already partially satisfied to the extent of the percentage of disability for which the employee was previously compensated by the employer minus the percentage

> that the employee's earnings are less at the time of the present injury than if the prior injury had not occurred.

Roberts Dairy, 861 N.W.2d at 819-820. At the time of those changes, the legislature included a statement of intent to "modify" rather than eliminate the fresh start and full responsibility rules it sought to address. *Id* at 820. Noting that paragraph "a" did not provide a mechanism for apportionment, whereas paragraph "b" explained exactly how the offset was to be calculated, the Court concluded there could be no apportionment between successive employers under the Code: "[T]he 2004 amendments to section 85.34 prescribed a formula for apportioning only disability arising from successive injuries in the course and scope of employment with the same employer." *Roberts Dairy*, 861 N.W.2d at 824.

Similarly, the commissioner in *Celotex Corp. v. Auten* refused to apportion the Claimant's disability despite finding that a considerable portion of the disability was attributable to prior work injuries that had been previously compensated. *Celotex*, 541 N.W.2d at 252-53. In that case, the employee was injured while working for his employer, Celotex, in 1977, 1982, and 1987. *Id* at 251. The employee received benefits for the injuries sustained in 1977 and 1982. *Id.* When the commissioner determined the employee was totally disabled by the 1987 injury, the employer argued entitlement to the apportionment since prior settlements evidenced the extent

of prior disability, and further claimed that failure to apportion the benefits was illogical and unjust. *Id* at 252-253. Noting that the legislature stopped short of allowing apportionment to all successive work-related injuries, the Court rejected defendant's argument. *Id* at 526. In so holding, the Court reasoned that the legislature did not explicitly spell out the circumstances or methodology for the claimed apportionment, and therefore none was permitted. *See Celotex* at 256

Similar to *Roberts Dairy* and *Celotex*, there is no statutory method or explanation of how disability benefits can be apportioned in the present case. The language our Supreme Court found lacking is functionally the equivalent of the language used in the current statute:

> An **employer is not liable for** compensating an employee's **preexisting disability that arose out** of and in the course of **employment with a different employer or** from **causes unrelated to employment.** § 85.34(7)(a) (2004)
>
> An **employer is not liable for** compensating an employee's **preexisting disability** from a prior injury with the employer, to **the extent that the employee's preexisting disability has already been compensated** … § 85.35(7)(2017).

Both indicate that preexisting disability is not the responsibility of the employer. The highlighted addition to the 2017 version limits the apportionment to circumstances where the worker has previously been compensated. What it does not do, however, is explain how that

apportionment functions. This is in direct contrast to the 2004 version of the Code, which offers specific instruction on disability compensable under either the same subsection of § 85.34(2) or successive disabilities under § 85.34(2)(u) (industrial disabilities).

The lack of a statutory method of apportionment is glaringly apparent when considering how different disabilities are compensated. Shoulder injuries incurred prior to 2017 are considered unscheduled industrial disabilities. Since 2017, the shoulder has become a scheduled disability. In the context of the workers' compensation statute, our Court has long recognized a distinction of disabilities in the form of scheduled and industrial disabilities. If it is found that the permanent physical impairment is limited to a body member specifically listed in the schedules set forth in one of the subsections of § 85.34(2), the disability is considered a **scheduled-member disability** and is compensated based upon the degree of functional impairment shown to exist. *Floyd v. Quaker Oats*, 646 N.W.2d 105, 109 (Iowa 2002). On the other hand, if the disability results from the impairment of the body not involving a member not specifically identified in section 85.34(2), compensation is based upon a test of **industrial disability** by assessing loss of earning capacity. *Id.* When determining industrial disability, the Commissioner must consider age, education, qualification,

experience, loss of earnings, motivation, work restrictions, and a variety of other factors in addition to functional disability. *McSpadden v. Big Ben Coal*, 288 N.W.2d 181, 192 (Iowa 1980). Functional disability ratings are a consideration, but not the final criterion. *Id.* In fact, there is substantial history to support the conclusion industrial disability can be less than, equal to, or greater than functional impairment. James R. Lawyer, *Iowa Practice Series: Workers' Compensation*, § 13:6 at 174 (Vol. 15 2021-2022).

Appellant was previously compensated for a 29.6% industrial disability[2]. App. 209-210. Over the course of his claim, multiple competing impairment ratings were offered by various providers. However, Appellant was not compensated for a functional impairment to his shoulder because the Code section permitting this to occur did not exist. No finding of fact established a permanent impairment rating. Nor was there an agreed upon rating. Even had there been, any such rating would have been more than ten years old at the time of the hearing held in this matter and would hold little value. *Roberts Dairy*, 861 N.W.2d at 823 (Physical and mental injuries sometimes heal over time, and rehabilitation sometimes restores functional capacity, at least in part.); *Celotex Corp v. Auten*, 541 N.W.2d 252, 254

[2] Although the commutation documents reference "BAW" this is a common acronym for "Body as a whole," the term used to denote benefits paid under what is now § 85.34(2)(v) (2017)

(Iowa 1995)("The capacities of a human being cannot be arbitrarily and finally divided and written off by percentages. The fact that a man has once received compensation as for 50% of total disability does not mean that ever after he is in the eyes of compensation law but half a man…"(quoting Larson, *The Law of Workers' Compensation*)); *see* Iowa Code § 86.14(2) (Permitting proceedings to reopen an award or settlement of benefits for a determination of whether a change in condition warrants and end to, diminishment of, or increase of compensation awarded or agreed upon).

Despite the long history of distinction between scheduled and unscheduled disabilities no citation to any authority permitting this has yet been presented. The court is faced with the unanswerable question of how one might apportion between an industrial disability and scheduled disability Our Supreme Court has refused to permit apportionment under circumstances where the precise method of doing so is not statutorily prescribed. This failure precludes apportionment under Iowa Code 85.34(7).

E. The district court erred in raising the commutation and finding the commutation altered the rights of the parties under § 85.34(7).

The district court erred in determining the prior full commutation has any effect on the present case. The commutation entered into by the parties

following the 2009 injury is limited in scope to the injury for which the commutation was made, as is clearly reflected by the record.

As an initial matter, Appellee never raised the concern that the commutation would function as a bar to Appellant's claim before the deputy, commissioner, or district court. Instead, Appellee maintained a position that Appellant was entitled to "a minimal scheduled member award." Defendant's Appeal Brief; Petitioner's Brief on Judicial Review. In workers' compensation cases, appellate review is limited to those matters raised and litigated before the commissioner. *Cargill, Inc. v. Conley*, 620 N.W.2d 496 (Iowa 2000). As discussed above, the District Court erred raising a new issue not advanced by the parties or addressed by the commission.

Regardless, commutations are governed by Iowa Code. § 85.45 outlines the conditions under which a commutation may occur, while § 85.47 provides the basis for a commutation. A commutation may only occur when (1) the period during which compensation is payable can be definitely determined and (2) the commutation is in the best interest of the person entitled to compensation, or periodic payment will result in undue expense, hardship or inconvenience for the liable employer. § 85.45(1). The Code further provides:

> Upon payment of such amount the employer shall be discharged from all further liability ***on account of the injury*** or death, and be entitled to a duly executed release, upon filing which the liability of the employer under any agreement, award, finding, or judgment shall be discharged.

§ 85.47. An agreement to compromise unknown injuries and future damages is valid and enforceable if the parties intended such result at the time of the settlement. *McCollough v. Campbell Mill & Lumber Co.,* 406 N.W.2d 812, 815 (Iowa 1987)(*citing Stetzel v. Dickenson*, 174 N.W.2d, 438, 443 (Iowa 1970)),

It simply cannot be said the parties intended, or did, release all claims for new injuries that could potentially occur in the future when they entered into a full commutation in 2010. A review of the commutation documents compels this conclusion. First, the commutation documents identify a specific injury and date for benefits being commuted. App. 209. Second, the commission's form documents for a commutation, filed in this case, specifically limit the release:

> I am the person entitled to workers' compensation benefits ***on account of the indicated injury or death***. I have read the foregoing and attachments. Upon receipt of the indicated sums and approval by the workers' compensation commissioner, I release and discharge the named employer and insurance carrier from all liability under the Iowa Workers' Compensation Law which is now in existence or may exist in the future ***on account of the indicated injury***.

App. 210. The terms "on account of the indicated injury" inarguably limit the scope of the release filed and approved by the commissioner. The indicated injury is the injury occurring on February 4, 2009. It does not indicate any other injury.

Similarly, the addendum to the commutation specifically limits the commutation to the 2009 injury:

> Defendants agree to pay the Claimant a lump sum of $40,000. ***Claimant agrees that the payment of $40,000 is acceptable*** to Claimant ***as a full and final*** compromised ***settlement***, satisfaction, and final discharge ***of all claims and demands that may exist against*** PM Lattner Manufacturing Co. and Accident Fund and all of their agents, employees, subsidiaries, parent companies, and affiliates (hereinafter referred to as "released parties"), ***by reason of his employment with PM Lattner Manufacturing Co and by reason of all injuries or damages sustained by Claimant on or about February 4, 2009 through his association with released parties.***

App. 213. Again, the reference to the specific injury date limits the commutation to the injury that is specifically identified. These repeated references to the specific 2009 injury date make clear the parties intended only to commute benefits for the 2009 right shoulder injury. Had Appellee believed that all future claims were compromised by entering into the full commutation, it could easily have averted the entirety of these proceedings by simply filing a motion for summary judgment. Appellee could have raised and litigated the issue prior to the Court's decision. The fact that the

Appellee never asserted this claim evinces the fact that the parties simply did not intend for the prior commutation to serve as a complete bar to all future claims for injury arising after the commutation.

Reviewing the statutory language governing commutations, it is clear that a full commutation acts a bar to future recovery only *for benefits under the claim that is commuted*. No reasonable interpretation of the statute would result in foreclosing each and every new claim against an employer before it accrued. This cannot occur, because such an interpretation could not satisfy the requirement of § 85.45(1)(a)- the requirement that the period during which compensation is payable can be definitely determined. Any future new injury with an employer is inherently speculative, and there is simply no way to determine the period during which benefits are payable for an injury that has yet to occur. Nor is it likely such a settlement would satisfy the requirements of § 85.45(1)(b), as no settlement foreclosing rights against an employer for an injury that has yet to occur would be in the best interest of the employee. Indeed, permitting a commutation that forecloses rights to benefits for injuries that have not occurred would certainly not be in the best interest of the employee. Finally, the language of § 85.47 specifically forecloses liability "on account of the injury," as opposed to on account of "all injuries." The use of the singular read in the context of the

statute makes clear that the statute contemplates only a discharge of liability for the specific injury that is the subject of the commutation.

CONCLUSION

For the reasons stated above, Respondent-Appellant respectfully requests the Court enter an Order REVERSING the findings of the Court and remanding for entry of an order affirming the agency decision.

REQUEST FOR ORAL ARGUMENT

Appellant hereby requests oral argument.

ATTORNEY'S COST CERTIFICATE

I hereby certify that the actual cost for printing the forgoing brief is $0.00.

12/12/22
DATE

Anthony J. Olson

ANTHONY J. OLSON, AT0010514
RUSH & NICHOLSON, P.L.C.
115 First Avenue SE, Suite 201
P. O. Box 637
Cedar Rapids, IA 52406-0637
Telephone (319) 363-5209
Facsimile (319) 363-6664
tony@rushnicholson.com
ATTORNEY FOR APPELLANT

PROOF OF SERVICE AND CERTIFICATE OF FILING

I certify that on December 12, 2022, I served this document on all other parties to this appeal electronically by EDMS to the following attorney of record:

Laura J. Ostrander
Accident Fund Holdings, Inc.
P.O. Box 40785
Lansing, MI 48901-7985
Laura.ostrander@accidentfund.com

I further certify that on December 12, 2022, I electronically filed this document with the clerk of the Supreme Court, 111 East Court Ave., Des Moines, IA 50319.

Stephanie M. Collingwood
Signature