IN THE SUPREME COURT FOR THE STATE OF IOWA
No. 22-1421

MICHAEL RIFE,
Petitioner-Appellant,

vs.

P.M. LATTNER MANUFACTURING COMPANY AND ACCIDENT FUND GENERAL INSURANCE COMPANY,
Respondents-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY,
HONORABLE MICHAEL HUPPERT

RESPONDENTS'-APPELEES' PROOF BRIEF

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III. ROUTING STATEMENT

Pursuant to Iowa Rule of Appellate Procedure 6.1101(3)(*a*), this case should be transferred to the Iowa Court of Appeals because it presents the application of existing legal principles.

IV. STATEMENT OF THE CASE

Michael Rife filed a Petition alleging an injury to the bilateral shoulders, torso, and body as a whole on August 6, 2018. Pet., p. 1; App. p. 5. P.M. Lattner Manufacturing Company accepted liability for the right shoulder injury, but denied liability for the alleged left shoulder and torso injury and asserted the 90-day notice defense with regard to the latter body parts. Ans., p. 2; App. p. 8. The case proceeded to Arbitration Hearing on September 21, 2020, before Deputy Commissioner Michael Lunn. Hrg. Rep., p. 1; App. p. 10. The issues presented at hearing were as follows:

1. Whether Mr. Rife sustained an injury to the left shoulder and torso arising out of or in the course of employment;

2. Whether the Claimant reported the alleged injury to the left shoulder or torso within 90 days of the date alleged;

3. The extent of entitlement to scheduled member benefits for the accepted right shoulder injury and the Defendants' entitlement to a credit for a settlement paid for the Claimant's previous right shoulder injury;

4. Whether the Claimant was entitled to additional temporary total disability benefits after he refused light duty work; and

5. Whether the Claimant was entitled to reimbursement for his independent medical evaluation.

Deputy Lunn issued an Arbitration Decision on August 20, 2021, and found the Claimant was entitled to temporary total disability benefits from February 25, 2019, through June 13, 2020. Arb. Dec., p. 14; App. p. 283. The Deputy also awarded 76 weeks of permanent partial disability and ordered the Defendants to reimburse the Claimant for the full $2,250 cost of Dr. Kim's independent medical evaluation and $1,450 in costs. Arb. Dec., p. 14; App. p. 283. The Deputy found the Defendants were not entitled to any credit for the settlement paid for the Claimant's previous right shoulder injury. Arb. Dec., p. 10; App. p. 279. The Defendants timely appealed to the Commissioner. Not. of App., p. 1.

On January 21, 2022, the Commissioner affirmed the award of temporary total and permanent partial disability benefits, reimbursement of the Claimant's costs in the arbitration proceeding, and reimbursement for the cost of Dr. Kim's independent medical evaluation. App. Dec., p. 4; App. p. 288. The Commissioner also found the Defendants were not entitled to a credit for the settlement paid for the Claimant's previous right shoulder injury. App. Dec., p. 3; App. p. 287. The Defendants timely filed a Petition for Judicial Review with the Iowa District Court for Polk County on February 9, 2022. Not. of Pet. for Jud. Rev. p. 1; App. p. 290. On August 15, 2022, Judge Michael Huppert issued a Ruling on Petition for Judicial

Review and found the Claimant was not entitled to reimbursement for his independent medical evaluation. Rul. on Pet. for Jud. Rev., p. 24; App. p. 315. The Judge also concluded the Commissioner's decision that the Petitioners were "not due a credit [for the full commutation settlement] is erroneous as it was based on flawed interpretation of Iowa Code 85.34(7), misstated caselaw, and failure to take consider[ation of] the full commutation agreement." Rul. on Pet. for Jud. Rev., p. 24; App. p. 315. The Claimant filed a Notice of Appeal with the Iowa Supreme Court appealing the issues of independent medical evaluation reimbursement and the credit owed to the Defendants for the full commutation settlement. Not. of App., p. 1; App. p. 318.

V. STATEMENT OF THE FACTS

Prior to the accepted right shoulder injury that occurred on August 6, 2018, Mr. Rife underwent a right shoulder rotator cuff repair on March 20, 2009, to repair a partial tear of the infraspinatus tendon. Ex. JE 1, p. 1; App. p. 32. Dr. Fred Pilcher performed a manipulation arthroscopy of the glenohumeral joint with minimal debridement of the subscapularis and supraspinatus and an arthroscopic subacromial decompression. Ex. JE 2, p. 27; App. p. 58. The right shoulder surgery was the result of a work-related injury at P.M. Lattner Manufacturing Company that occurred when the

Claimant pulled on a part at work that was attached to a crane. Ex. JE 1, p. 14; App. p. 45. Following the surgery, Mr. Rife exhibited slow progress and "severe pain" at times; he reported he was unable to shoot his bow. Ex. JE 5, p. 89; App. p. 117. Dr. Pilcher issued an impairment rating of 14% to the right arm, or 8% to the body as a whole. Ex. JE 5, p. 80; App. p. 111. On May 25, 2010, Dr. Charles Buck opined the Claimant had an impairment rating of 12% to the right shoulder, or 7% to the body as a whole. Ex. B, p. 18; App. p. 226. Dr. Buck issued permanent restrictions of no significant use of the right arm above shoulder height. Ex. B, p. 18; App. p. 226.

Dr. Sunny Kim evaluated Mr. Rife at an independent medical evaluation on August 22, 2010. Ex. 1, p. 6; App. p. 181. He issued an impairment rating of 15% to the right arm, or 9% to the body as a whole. Ex. 1, p. 7; App. p. 181. He recommended permanent restrictions of no lifting more than 40 pounds overhead and avoiding repetitive overhead lifting. Ex. 1, p. 7; App. p. 181. Following the first surgery, the Claimant underwent a functional capacity evaluation with WorkWell Systems, Inc., and he was placed in the light to medium physical demand category. Ex. JE 2, p. 22; App. p. 53. The therapist determined he was able to lift 25 pounds occasionally waist to floor level and 20 pounds occasionally waist to overhead level. Ex. JE 2, p. 23; App. p. 57.

Dr. Pilcher issued permanent restrictions limiting any type of work at shoulder level or above, and he "doubted whether [the Claimant] would be able to return to his regular job without those restrictions." Ex. JE 5, p. 80; App. p. 111. Following the first right shoulder injury and surgery, Mr. Rife entered into a Full Commutation Settlement with P.M. Lattner Manufacturing Company on September 10, 2010, through legal representation by an attorney. Ex. B, p. 1; App. p. 209. The settlement consisted of $40,000 in addition to permanent partial disability benefits for the impairment rating the Claimant already received; it represented a stipulated permanent disability of 29.6% to the body as a whole. Ex. B, p. 1; App. p. 208. As part of the settlement, the employer received a credit for permanent impairment to Mr. Rife's shoulder against any future injuries to the same shoulder. Hrg. Tr., p. 59; App. p. 28.

Mr. Rife reinjured his right shoulder on August 6, 2018, moving a pipe at his work bench. Ex. JE 5, p. 71; App. p. 102. Dr. Matthew White performed a right shoulder intra-articular cortisone injection that provided relief for one to two days. Ex. JE 5, p. 73; App. p. 104. On August 17, 2018, the Claimant underwent an MRI of the right shoulder that revealed moderate superior rotator cuff tendinopathy without evidence of a partial or full-thickness tear and mild acromioclavicular joint degeneration. Ex. JE 8,

p. 127; App. p. 158. Dr. White diagnosed right shoulder adhesive capsulitis and recommended physical therapy. Ex. JE 5, p. 74; App. p. 105. After Mr. Rife reported no improvement with physical therapy, Dr. White recommended right shoulder surgery on May 1, 2019. Ex. JE 5, pp. 71 – 72; App. pp. 102 – 103. Dr. White instructed Mr. Rife that post-operative physical therapy was "mandatory and significantly impacts his long-term outcome and return to work." Ex. JE 5, p. 72; App. p. 103. Throughout treatment, Mr. Rife complained to his physicians and other providers that he had to work despite his injury, and he repeatedly asked to be taken off work. Ex. JE 5, p. 75; App. p. 106.

On June 13, 2019, Dr. White performed a right shoulder arthroscopic extensive debridement of the labrum and rotator cuff along with a capsular release and subacromial decompression. Ex. JE 2, p. 17; App. p. 48. Dr. White diagnosed right shoulder adhesive capsulitis, a partial thickness rotator cuff tear, a partial thickness labral tear, and impingement. Ex. JE 2, p. 17; App. p. 48. Both prior to and following the second shoulder surgery, Mr. Rife skipped extensive physical therapy appointments. Ex. JE 4, pp. 46 – 51; App. pp. 77 – 82. At hearing, Mr. Rife claimed the physical therapy appointments listed as "missed" in OneCall Care Physical Therapy records were appointments he rescheduled. Hrg. Tr., p. 45; App. p. 26. However,

OneCall Care confirmed Mr. Rife was not rescheduling visits because he "missed multiple visits and [wa]s hesitant to engage in exercise during therapy." Ex. JE 4, p. 52; App. p. 83.

OneCall observed Mr. Rife gave many reasons for missing physical therapy, including picking up a step-grandchild and missing an entire week of therapy "due to illness though he did attend work every day . . . and drove 2 h[ou]rs to go out of town that same weekend." Ex. JE 2, p. 53; App. p. 84 Mr. Rife's therapist observed his range of motion measurements were "inconsistent at times at each re-evaluation (sometimes more, sometimes less)[.]" Ex. JE 7, p. 96; App. p. 127. As of October 4, 2019, the therapist recommended a discharge from physical therapy because he had plateaued. Ex. JE 7, p. 96; App. p. 127. At hearing, Mr. Rife described the physical therapy he was asked to complete as follows: "I just thought it was a joke." Hrg. Tr., p. 45; App. p. 26.

Dr. White confirmed Mr. Rife "had inconsistent PT[,]" and he "had an FCE [functional capacity evaluation] scheduled and did attend, but this was found to be invalid." Ex. JE 5, p. 61; App. p. 92. After Dr. White observed Mr. Rife generated "failure of 7/7 validity criteria" in the functional capacity evaluation, he was "not able to provide long-term recommendations in regards to work restrictions and long-term function." Ex. JE 5, p. 62; App.

p. 93. Dr. White recommended a "repeat FCE done with full and consistent effort to better determine long-term function and work restriction." Ex. JE 5, p. 62; App. p. 93. Dr. White emphasized the importance of physical therapy to Mr. Rife and said he needed to comply with a home exercise program. Ex. JE 5, p. 63; App. p. 94.

Despite Dr. White's repeated recommendations that the Claimant comply with physical therapy, Mr. Rife reported to his therapist that he was "unsure if therapy [wa]s even worth his time[,]" and he "had a very poor attitude during therapy." Ex. JE 7, pp. 97 – 98; App. pp. 128 – 129. His therapist noted he was "very agitated" and required extra motivation during therapy "due to complaints of 'not wanting to[.]'" Ex. JE 7, p. 108; App. p. 139. Mr. Rife reported increased shoulder pain after an injury at home tripping over a rug and falling on his right shoulder. Ex. JE 7, p. 100; App. p. 131. He also delayed scheduling his initial therapy evaluation and failed to show up for an appointment with physical medicine and rehabilitation. Ex. E, p. 1; App. p. 243. Despite Mr. Rife's lack of cooperation with therapy, the therapist observed he had "good progression in his [passive range of motion] to near full [range of motion]." Ex. JE 7, p. 111; App. p. 142.

The Claimant underwent a functional capacity evaluation with E3 Work Therapy Services on November 13, 2019. Ex. G, p. 2; App. p. 258. The overall classification of effort was invalid due to Mr. Rife performing inconsistently during repeated measures protocol. Ex. G, p. 2; App. p. 258. Mr. Rife failed seven out of seven validity criteria during the hand strength assessment, and there was a 34% change between lifting unmarked steel bars and corresponding lifting with a lever arm. Ex. G, p. 2; App. p. 258. There was also breakaway and cogwheeling present during manual strength testing. Ex. G, p. 2; App. p. 258. During the evaluation, Mr. Rife engaged in "repeated questioning as to why he had to do it." Ex. G, p. 10; App. p. 266. He also terminated lever arm lifts, "stating that he didn't like it and that it did not feel right doing it." Ex. G, p. 10; App. p. 266. Despite his failure to give maximum voluntary effort, the therapist found he met the material handling demands for at least a medium demand vocation. Ex. G, p. 2; App. p. 258.

Dr. White opined he was unable to provide an impairment rating for Mr. Rife's right shoulder injury because of the invalid functional capacity evaluation. Ex. 3, p. 18; App. p. 193. Dr. White also observed he had "not been able to obtain what I would believe to be a truly representative exam in clinic" while he was treating Mr. Rife. Ex. 3, p. 18; App. p. 193. Dr. White

concluded he would expect some level of permanent impairment, but he "would not anticipate any impairment secondary to weakness." Ex. 3, p. 18; App. p. 193. Even after the Defendants notified Claimant's Counsel in writing that Dr. White required a repeat functional capacity evaluation with E3 Work Therapy in order to issue an impairment rating because he could not rely on the evaluation done at Short Physical Therapy, given the therapist's assessment of restrictions for non-work-related conditions, the Claimant still refused to attend a repeat evaluation. Ex. 5, p. 22; Ex. E, p. 2; App. pp. 196, 244.

On June 16, 2020, Dr. Lisa Coester referred the Claimant for a second functional capacity evaluation with E3 Work Therapy Services for his right shoulder injury. Ex. JE 5, p. 57; App. p. 88. Mr. Rife refused to attend this evaluation. See Defendants' Motion to Compel FCE on file herein; Ex. E, p. 2; App. p. 244. On January 8, 2020, the Claimant reported to Dr. Coester he had left shoulder pain that had "been going on for about a year and a half . . . as the results of work comp." Ex. JE 5, p. 58; App. p. 89. Mr. Rife stated, "as he was recovering from an injury to the right shoulder he would light [sic] on his left shoulder more and that's when the symptoms started." Ex. JE 5, p. 58; App. p. 89. Dr. Coester opined an x-ray of the left shoulder done on December 17, 2019, was normal. Ex. JE 5, pp. 59 – 60; App. pp. 90

– 91. Mr. Rife also told his physical therapist on July 20, 2019, that both shoulders were bothering him, and he and his attorney wanted to ensure that the therapist noted this in writing. Ex. JE 7, p. 103; App. p. 106. Despite the allegation in the Petition of a left shoulder injury, however, Mr. Rife definitively testified at hearing that he was only claiming an injury to his right shoulder. Hrg. Tr., p. 42; App. p. 25.

Bill Parks, the President of P.M. Lattner Manufacturing Company, provided a written statement on August 13, 2019, that he had no knowledge of Mr. Rife reporting any injury to his left arm or shoulder within the past year. Ex. D, p. 9; App. p. 241. Dake Dietrich, the Plant Manager, also provided a written statement on August 13, 2019, that he had no knowledge of Mr. Rife reporting any injury to his left arm or shoulder within the past year. Ex. D, p. 10; App. p. 242. Mr. Rife presented no written injury reports indicating he ever reported an injury to the left shoulder or torso to his employer. See Claimant's exhibits on file herein; App. pp. 176 – 190.

The Claimant's attorney solicited a functional capacity evaluation report from Short Physical Therapy, PLLC, on February 29, 2020. Ex. 2, p. 9; App. p. 184. Mr. Rife testified this evaluation was done at a "motel off of 380 and Collins Road." Hrg. Tr., p. 51; App. p. 27. Physical Therapist Daryl Short opined Mr. Rife "demonstrated consistent performance as

indicated by his reproducible activities throughout the lifting and carrying test items with changes in heart rate, increased body perspiration and adjustments to his body mechanics." Ex. 2, p. 9; App. p. 184. Mr. Short observed the Claimant was unable to use proper body mechanics during the FCE due to his "right ankle decreased range of motion, strength and endurance." Ex. 2, p. 10; App. p. 185. Mr. Short concluded the Claimant did not meet the capabilities of the sedentary category of physical demand "due to his decreased range of motion, strength and endurance of his right ankle." Ex. 2, p. 11; App. p. 186. No right ankle injury has been alleged in the Petition. Pet., p. 1; App. p. 5. Despite the fact that Mr. Rife lifted substantially heavier weights during the E3 functional capacity evaluation than in the evaluation performed by Mr. Short, he claimed at hearing that Mr. Short was "having [him] do probably a little more than" the E3 evaluator. Ex. G, p. 2; Hrg. Tr., p. 35; App. pp. 258, 23.

Robert Townsend, a clinical consultant at Bardavon Health Innovations, LLC, and an expert in functional capacity evaluations, reviewed the functional capacity evaluation completed by Mr. Short and provided a detailed critique referencing citations to multiple research articles. Ex. F, p. 1; App. p. 248. Mr. Townsend concluded there was "a lack of evidence that Mr. Rife provided a full effort when displaying

function limits as reported in the FCE performed by Mr. Short." Ex. F, p. 1; App. p. 248. Mr. Townsend opined there were numerous occasions where Mr. Rife demonstrated the ability to meet or exceed the sedentary physical demand category despite Mr. Short's findings that he did not meet the capabilities of the sedentary category. Ex. F, p. 1; App. p. 248. Mr. Townsend criticized Mr. Short's use of increased body perspiration as a factor proving valid effort because conditions such as obesity abnormally increase perspiration; at the time of the FCE, Mr. Rife weighed 400 pounds. Ex. F, pp. 5 – 6; App. pp. 252 – 253. According to Mr. Townsend, the FCE performed by Mr. Short contained "essentially no built-in cross-validation methods to ensure the internal validity of the lifting data." Ex. F, p. 7; App. p. 254.

The Claimant underwent a second independent medical evaluation performed by Dr. Sunny Kim on July 24, 2020. Ex. 1, p. 1; App. p. 176. Dr. Kim diagnosed right shoulder pain with loss of range of motion due to symptomatic rotator cuff tendinopathy following an arthroscopic debridement and capsular release. Ex. 1, p. 2; App. p. 177. He recommended permanent restrictions for the right shoulder of no repetitive overhead reaching, no lifting more than 20 pounds with the right arm, and no pushing or pulling more than 50 pounds. Ex. 1, p. 3; App. p. 178. Dr. Kim

did not diagnose any left shoulder or torso injury in the July 24, 2020, evaluation. Ex. 1, p. 2; App. p. 177. He also did not issue any permanent restrictions for injuries to the left shoulder or torso. Ex. 1, p. 2; App. p. 177. Claimant's Counsel's letter to Dr. Kim referenced only a right shoulder injury and a non-work-related right ankle injury. Ex. 1, p. 4; App. p. 179. Dr. Kim opined Mr. Rife was at maximum medical improvement on June 13, 2020, and he issued an impairment rating of 19% to the right upper extremity. Ex. 1, p. 3; App. p. 178. Dr. Kim did not offer any opinion addressing what part of the 19% impairment rating was apportioned to the Claimant's previous right shoulder surgery despite his previously issuance of a permanent impairment rating for Mr. Rife's right shoulder on August 22, 2010. Ex. 1, pp. 1, 6; App. pp. 176, 181.

Prior to the August 6, 2018, injury, Mr. Rife was coached multiple times for excessive absenteeism. Ex. D, pp. 3 – 4; Hrg. Tr., p. 59; App. p. 235, 236, 29. He received a warning on April 17, 2019, that he could be terminated for his continued excessive absenteeism. Ex. D, p. 6; App. p. 238. Plant Manager Dake Dietrich testified that on June 28, 2019, the employer made an offer of light duty work in writing. Ex. D, p. 7; Hrg. Tr., p. 58; App. p. 239. The offer of work specifically stated that "I understand that if I decline the modified duty work then my temporary benefits will be

suspended pursuant to Iowa Code 85.33(3)." Ex. D, p. 7; App. p. 239. Mr. Rife refused to accept the light duty work that was offered and refused to sign the offer of work. Ex. D, p. 7; Hrg. Tr., p. 58; App. pp. 239, 29. He provided no explanation in writing for why he refused the offer of work. Ex. D, p. 7; Hrg. Tr., p. 58; App. p. 239, 29. He was terminated after refusing the light duty work and accumulating additional absences. Ex. D, p. 8; Hrg. Tr., pp. 58 – 59; App. pp. 240, 29. Mr. Dietrich testified Mr. Rife did not provide doctors' notes or any explanation for the absences that occurred immediately prior to his termination. Hrg. Tr., p. 60; App. p. 29. At hearing, Mr. Rife claimed he was not offered light duty work despite the written offer of light duty work that was admitted as an exhibit without objection from Claimant's Counsel. Hrg. Tr., p. 46; App. p. 26.

After Mr. Rife was terminated for refusing light duty work offered by P.M. Lattner Manufacturing Company, he applied for work with only two named employers, Skin Worthy Tattoo and Time Out Lounge. Ex. C, p. 2; App. p. 232. He also claimed he applied for work with "various painting contractors." Ex. C, p. 2; App. p. 232. At hearing, he was not able to identify any other employers where he applied for work aside from Casey's. Hrg. Tr., p. 48; App. p. 29. Mr. Rife testified he received unemployment

benefits for four to five months after he was terminated. Hrg. Tr., p. 48; App. p. 26.

VI. ARGUMENT

A. Standard of Review

The District Court's review is governed by Iowa Code chapter 17A (2013). Mike Brooks, Inc. v. House, 843 N.W.2d 885, 888 (Iowa 2014). Under chapter 17A, the District Court acts in an appellate capacity to correct errors of law. Id. The District Court is bound by the Commissioner's findings of fact as long as those findings are supported by substantial evidence. Evenson v. Winnebago Indus., Inc., 881 N.W.2d 360, 333 (Iowa 2016). Substantial evidence is "the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance." Iowa Code § 17A.19(10)(f)(1).

When reviewing an Agency action, the District Court may only reverse or modify if the Agency's decision is erroneous under one of the provisions set forth in Iowa Code section 17A.19(10), and a party's substantial rights were prejudiced. Gits Mfg. Co. v. Frank, 855 N.W.2d 195, 197 (Iowa 2014). Therefore, the District Court may reverse "upon a

showing that the commissioner's application of law to the facts of this case meets the demanding 'irrational, illogical, or wholly unjustifiable' standard of section 17A.19(10)(m)." Midwest Ambulance Serv. v. Ruud, 754 N.W.2d 860, 865 (Iowa 2008).

"If the findings of fact are not challenged, but the claim of error lies with the agency's interpretation of the law, the question on review is whether the agency's interpretation was erroneous, and [the district court] may substitute [their] interpretation for the agency's." Meyer v. IBP, Inc., 710 N.W.2d 213, 219 (Iowa 2006) (citing Iowa Code § 17A.19(10)(c)). In addition, if "the claim of error lies with the ultimate conclusion reached, then the challenge is to the agency's application of the law to the facts, and the question on review is whether the agency abused its discretion by, for example, employing wholly irrational reasoning or ignoring important and relevant evidence." Id. (citing Iowa Code § 17A.19(10)(i), (j)). "[T]he commissioner as the fact finder has the responsibility for determining credibility of witnesses," and the District Court is "bound by the commissioner's findings if supported by substantial evidence." Sherman v. Pella Corp., 576 N.W.2d 312, 320 (Iowa 1998).

The Iowa Supreme Court reviews the Commissioner's legal findings for the correction of errors at law. IBP, Inc., v. Burress, 779, N.W.2d 210,

213 (Iowa 2010). The Court is bound by the Commissioner's fact findings as long as substantial evidence supports the findings. Evenson v. Winnebago Indus., Inc., 881 N.W.2d 360, 333 (Iowa 2016). The Iowa Supreme Court applies the same standard of review utilized by the District Court, that if "the claim of error lies with the *ultimate conclusion* reached, then the challenge is to the agency's application of law to the facts, and the question on review is whether the agency abused its discretion by, for example, employing wholly irrational reasoning or ignoring importation and relevant evidence." Meyer, 710 N.W.2d at 219 (citing Iowa Code § 17A.19(10)(i), (j)).

B. The Supreme Court Should Affirm the District Court Order that Found the Claimant not Entitled to Reimbursement for his Independent Medical Evaluation.

The Appellees-Respondents preserved error on the issue of whether the Claimant was entitled to reimbursement for his independent medical evaluation because this issue was raised in the Petitioners' Appeal Brief filed with the District Court, and the District Court addressed the issue of independent medical evaluation reimbursement in the Ruling on Petition for Judicial Review. Rul. on Pet. for Jud. Rev., p. 24; App. p. 315. In the Petitioners' Appeal Brief to the Iowa District Court, they specifically cited Iowa Code section 85.39(2), and they argued "the District Court should find

the Defendants are not liable for the *full cost* of Dr. Kim's independent medical evaluation" (emphasis added). Therefore, the Appellees-Respondents maintained the Claimant was not entitled to reimbursement of any part of Dr. Kim's independent medical evaluation.

Deputy Lunn ordered the Defendants to reimburse the Claimant for the full $2,250 cost of Dr. Kim's independent medical evaluation and $1,450 in costs; the Commissioner affirmed this award. Arb. Dec. p. 14; App. Dec. p. 4; App. pp. 283, 288. 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, p. 3; Ex. 2, p. 10; App. pp. 178, 185. Therefore, the Defendants should not be assessed the cost of any part of the evaluations that addressed the right ankle injury, much less the cost of the entire evaluation.

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. Ex. 1, p. 3; App. pp. 178. 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 District Court appropriately found the Defendants were not liable for the full cost of Dr. Kim's independent medical evaluation. Rul. on Pet. for Jud. Rev., p. 24; App. p. 315.

The Iowa District Court found that Mr. Rife's "refus[al] to schedule and attend petitioners requested FCE . . . was in direct violation of section 85.29" because the Iowa Code section mandates that an employee shall submit for evaluation as often as reasonably requested. Rul. on Pet. for Jud. Rev., p. 9; App. p. 300. Des Moines Area Reg'l Transit Auth. v. Young, 856 N.W.2d 383, 843 (Iowa Ct. App. 2014), aff'd 867 N.W. 2d 839 (Iowa 2015). Furthermore, the District Court found the Claimant's pursuit of an

independent medical evaluation with Dr. Kim was "also outside the prescribed process in section 85.39" because the Code section does not permit reimbursement for an evaluation unless the Claimant first obtains an impairment rating. Rul. on Pet. for Jud. Rev., p. 10; App. p. 301.

The District Court correctly concluded that the Commissioner's reasoning in awarding reimbursement for Dr. Kim's independent medical evaluation "would seemingly force petitioners to determine an impairment rating using an evaluation of respondent's choosing without having first determined a rating through their own" expert. Rul. on Pet. for Jud. Rev., p. 12; App. p. 303. The Court also correctly found "Section 85.39 places petitioners under no such obligation." Rul. on Pet. for Jud. Rev., p. 12; App. p. 303. Therefore, the Court concluded the "[C]ommissioner's reasoning in granting respondent reimbursement for Dr. Kim's IME [was] wholly against the language and interpretation of section 85.39 as well as completely unsupported in the record." Rul. on Pet. for Jud. Rev., p. 12; App. p. 303. Because the District Court correctly interpreted the applicability of Iowa Code section 85.29, this Court should affirm the Ruling on Petition for Judicial Review. Rul. on Pet. for Jud. Rev., p. 12; App. p. 303.

C. The Supreme Court Affirm the District Court Order Requiring Apportionment of Benefits Pursuant to Iowa Code Section 85.34(7).

Deputy Lunn concluded the Claimant had 19% permanent partial disability for his right shoulder injury. Arb. Dec. p. 9; App. p. 278. The Deputy also concluded the Defendants were not entitled to any credit at all for the $40,000 settlement representing 29.6% to the body as a whole that they paid Mr. Rife for his previous right shoulder injury. Arb. Dec. p. 10; App. p. 279. The Commissioner affirmed these findings. App. Dec. p. 4; App. p. 288.

Following Mr. Rife's first right shoulder injury and surgery, he entered into a Full Commutation Settlement with P.M. Lattner Manufacturing Company on September 10, 2010. Ex. B, p. 1; App. p. 209. The settlement consisted of $40,000 in addition to the permanent partial disability benefits that had already been paid to the Claimant, and it represented a stipulated permanent disability of 29.6% to the body as a whole. Ex. B, p. 1; App. p. 209. As part of the settlement, the employer received a credit for permanent impairment to Mr. Rife's shoulder against any future injuries to the same shoulder; the employer and insurance carrier paid a substantial premium to retain this credit against any future injury to the right shoulder. Hrg. Tr., p. 59; App. p. 29. Full commutation settlements function to provide a credit to the employer for impairment paid for injuries to the same body part; therefore, the Appellees-Respondents are

entitled to a credit of 29.6% to the body as a whole that was paid for Mr. Rife's previous right shoulder injury.

Iowa Code section 85.34(7) states as follows:

> 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.

Deputy Lunn opined Iowa Code section 85.34(7) "provides no mechanism for apportioning the loss between the present injury and the prior injury." Arb. Dec. p. 9; App. p. 278. He also found "Iowa Code section 85.34 provides no guidance on apportioning a prior industrial disability award from a scheduled member impairment rating." Arb. Dec. pp. 9 – 10; App. pp. 278 – 279. Essentially, the Deputy concluded that because Iowa Code section 85.34(7) did not specify how he should apportion the two right shoulder injuries, the statute did not exist for the purposes of this claim. Arb. Dec. pp. 9 – 10; App. pp. 278 – 279. Iowa Code section 85.34(7) does not state it does not apply to shoulder injury claims; instead, it states the

employer is not liable to compensate an injured employee to "the extent that the employee's preexisting disability has already been compensated under this chapter." Workers' compensation settlements are governed by Iowa Code section 85.35. The full commutation settlement clearly states it was entered into under "Chapter 85, 85B, 86 and 87[.]" Ex. B, p. 1; App. p. 209. Therefore, pursuant to Iowa Code section 85.34(7), the Claimant was already compensated for his pre-existing right shoulder disability under chapter 85, and the Respondents-Appellees are entitled to a credit for that compensation.

The Deputy stated an "argument could be made that defendants are entitled to a credit based upon the impairment ratings attributed to the first injury; however, in this case, it is unclear which impairment rating the parties adopted as part of the 2010 settlement." Arb. Dec. p. 10; App. p. 279. The Full Commutation consisted of $40,000 new money, and it represented a stipulated permanent disability of 29.6% to the body as a whole. Ex. B, p. 1; App. p. 209. Therefore, it is logical to conclude the parties based the settlement on the highest rating issued by Dr. Kim of 15% to the right upper extremity. Ex. B, p. 1; Ex. 1, p. 7; App. pp. 209, 182. The Commissioner should have found the Defendants were at least entitled to a

credit for 15% to the right shoulder based upon Dr. Kim's previous impairment rating. Ex. 1, p. 7; App. p. 182.

Instead of granting a logically calculated credit, the Commissioner stated, "I agree with the [D]eputy [C]ommissioner that [D]efendants could arguably be entitled to a credit based solely upon the functional impairment attributable to the claimant's preexisting shoulder injury—a credit for oranges against an award for oranges." App. Dec. p. 3; App. p. 287. He concluded the Defendants "failed to prove that amount" because they "did not identify which impairment rating the parties adopted or agreed upon when reaching their settlement[,]" apparently faulting the Defendants for not being prescient enough to predict the changes in the law that would be made in 2017, changes in the law that did not exist at the time the full commutation was agreed upon by all the involved parties. App. Dec. p. 3; App. p. 287.

Dr. White opined he was unable to provide an impairment rating for Mr. Rife's right shoulder injury because of the invalid result of his November 13, 2019, functional capacity evaluation. Ex. 3, p. 18; App. p. 193. Dr. White also observed he had "not been able to obtain what I would believe to be a truly representative exam in clinic" while he was treating Mr. Rife. Ex. 3, p. 18; App. p. 193. The physician concluded he would expect

some level of permanent impairment, but he "would not anticipate any impairment secondary to weakness." Ex. 3, p. 18; App. p. 193. Even after the Defendants notified Claimant's Counsel in writing that Dr. White required a repeat FCE with E3 Work Therapy in order to issue an impairment rating because he could not rely on the FCE done at Short Physical Therapy, given the therapist's assessment of restrictions for non-work-related conditions, the Claimant still refused to attend this repeat FCE. Ex. 5, p. 22; Ex. E, p. 2; App. pp. 196, 244.

The Deputy stated the "Defendants essentially held the disability evaluation hostage when claimant refused to present for a repeat FCE with E3." Arb. Dec. p. 13; App. p. 282. This finding is incorrect, as the physician himself opined he could not issue the rating without the repeat functional capacity evaluation; the Defendants had absolutely no control over Dr. White's decision not to issue an impairment rating. Ex. 3, p. 18; App. p. 193. The District Court agreed it would be inappropriate for the "respondent's preference [to] initiate and guide the process instead of respondent following the process outlined by the legislature and reinforced in Iowa caselaw." Rul. on Pet. for Jud. Rev., p. 12; App. p. 306.

Because Mr. Rife's refusal to cooperate with Dr. White's recommendations resulted in this physician's inability to issue an

impairment rating, this Court should find he is entitled to minimal, if any, permanent impairment for the right shoulder injury. Ex. 3, p. 18; App. p. 193. In the alternative, this Court could revisit the previous Ruling on Defendants' Motion to Compel FCE, compel Mr. Rife to cooperate with the functional capacity evaluation ordered by Dr. White, and award only the properly apportioned impairment rating Dr. White will issue following the completed evaluation.

The Appellees-Respondents assert this Court should not rely on Dr. Kim's second impairment rating because this physician improperly failed to apportion his impairment rating to account for the previous right shoulder injury. Ex. 1, p. 3; App. p. 178. Therefore, this Court should reverse the award of 19% to the shoulder and award only minimal impairment for Mr. Rife's second right shoulder injury taking into account the credit owed to the Defendants for the previous injury. This Court also retains the option of affirming the District Court's decision to remand the case to the Commissioner for a determination of "what, if any, credit is due after the application of the correct law and facts as" set forth by the District Court. Rul. on Pet. for Jud. Rev., p. 25; App. p. 316.

The District Court noted that although the 2017 amendments to Iowa workers' compensation laws "did reclassify shoulder injuries as a scheduled

member, the court also note[d] the language against double compensation in section 7 remained." Rul. on Pet. for Jud. Rev., p. 13; App. p. 304. The Court also noted the "statues on commutations also remain unchanged by the legislature." Rul. on Pet. for Jud. Rev., p. 13; App. p. 304. The District Court opined the Iowa Code section pertaining to double compensation would "prevent all double recoveries and all double reductions in workers' compensation benefits for permanent partial disability[,]" and this section was added with the intent to prevent double recovery "specifically in cases where a claimant had previously been compensated for the injury by the same employer." Roberts Dairy v. Billick, 861 N.W.2d 814, 820 (Iowa 2015); Rul. on Pet. for Jud. Rev., pp. 15 – 16; App. pp. 308 – 309. The Court also noted the 2017 statutory changes did not remove or prohibit apportionment or a credit for successive injuries with the same employer. Rul. on Pet. for Jud. Rev., p. 16; App. p. 307.

The District Court concluded the Iowa legislature intended to permit credits and apportionment to prevent double recovery "in cases of past compensation with the same employer." Rul. on Pet. for Jud. Rev., p. 17; App. p. 308. Therefore, the District Court found the "[C]ommissioner's conclusion [the Defendants were entitled to no credit was] based on faulty interpretation of the statute and therefore, unsupported in statute." Rul. on

Pet. for Jud. Rev., p. 17; App. p. 308. According to the District Court, the Commissioner omitted part of the case it cited in support of awarding no credit, as the Commissioner attempted to apply a case involving injuries with different employers to the current case involving injuries to the same body part with the same employer. Rul. on Pet. for Jud. Rev., p. 18; App. p. 309. The District Court therefore concluded the "[C]ommissioner's conclusion [awarding no credit] is not supported in caselaw." Rul. on Pet. for Jud. Rev., p. 18; App. p. 309. Because the District Court found the Defendants are entitled to a credit for the full commutation settlement, the Appellees-Respondents ask this Court to affirm the Ruling on Petition for Judicial Review remanding the case to the Commissioner to calculate and grant a credit.

VII. CONCLUSION

P.M. Lattner Manufacturing Company and Accident Fund Insurance Company have established the District Court appropriately found Mr. Rife was not entitled to reimbursement for his independent medical evaluation. The Appellees-Respondents also established the District Court appropriately required apportionment of benefits pursuant to Iowa Code Section 85.34(7). Therefore, this Court should affirm the District Court's Ruling on Petition for Judicial Review in its entirety.

WHEREFORE, the Appellees-Respondents pray that this Court affirm the District Court Order granting the Petitioners' Petition for Judicial Review.

VIII. REQUEST FOR NON-ORAL SUBMISSION

Appellees-Respondents hereby waive oral arguments and request non-oral submission of the case to the Iowa Court of Appeals.

IX. CERTIFICATE OF COST

Appellees-Respondents certify that the cost of electronically reproducing the Proof Brief and Appendix was $0.00, although the Appellees-Respondents incurred $63.33 in additional attorney fees amending the final brief and resubmitting it based on the Court's rejection of Appellant's first incorrectly numbered Appendix.

X. CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION.

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(*d*) and 6.903(1)(*g*)(1) or (2) because:

> [X] this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 point font and contains 6,881 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(*g*)(1) or
>
> [ ] this brief has been prepared in a monospaced typeface using _____ in _____ and contains _____ lines of text, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(*g*)(2).

/s/ Laura J. Ostrander
Signature

December 12, 2022
Date

XI. CERTIFICATE OF SERVICE

The undersigned certifies a copy of Appellees-Respondents' Proof Brief was served on the 12th day of December, 2022, upon the following persons and upon the Clerk of the Iowa Supreme Court via electronic filing.

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