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 COURT OF APPEALS JUNE 7, 2023
RULING ON APPELLANT'S APPEAL, CASE NO. 22-1421

APPELLANT'S APPLICATION FOR FURTHER REVIEW

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. THE COURT OF APPEALS ERRED IN FINDING IOWA CODE § 85.34(7) TO PERMIT APPORTIONMENT BETWEEN CLAIMANT'S CURRENT SCHEDULED-MEMBER DISABILITY AND A PRIOR INDUSTRIAL DISABILITY.

TABLE OF CONTENTS

STATEMENT SUPPORTING FURTHER REVIEW

The Iowa Supreme Court should grant Appellant's Application for Further Review because this case presents an important and unsettled question of broad public importance. At its heart, this case raises a fundamental problem created by the 2017 legislative changes to the Iowa Workers' Compensation Act. In specific, the Court should address the question of whether a pre-2017 industrial disability, which included a right shoulder component, can be apportioned out of a post-2017 right shoulder scheduled member disability. The necessitates an examination of changes to both Iowa Code § 85.34(2) and § 85.34(7), which relate to permanent partial disabilities and apportionment of successive disabilities.

This issue is particularly important in light of the legislative recategorization of shoulder injuries from industrial disability to scheduled disability. These different forms of disability are compensated by methods distinctly alien to one another. Scheduled disabilities are compensated on a functional basis, a purely mathematical formula derived by application of the impairment rating to the appropriate schedule of benefits. *Floyd v. Quaker Oats*, 646 N.W.2d 105, 109 (Iowa 2002). Industrial disability, on the other hand, is derived by assessing an injured worker's loss of earning capacity without specific regard to the impairment rating. *Id.* In this assessment, a

multitude of factors may be considered, including age, permanent impairment, education, actual impact on earnings, experience, permanent restrictions, and other skills or qualifications possessed by the Claimant. *See McSpadden v. Big Ben Coal Co.,* 288 N.W.2d 181, 192 (Iowa 1980). The rating has no controlling value in determining the loss, and such loss of earning capacity may be equal to, greater than, or less than the functional impairment. James R. Lawyer, *Iowa Practice Series: Workers' Compensation*, § 13:6 at 174 (Vol. 15 2021-2022). Particularly problematic, the legislature has not seen fit to provide a method for calculating apportionment of these disparate forms of disability compensation, a failing the Supreme Court has repeatedly recognized as indicative of intent not to apportion. *See Roberts Dairy v. Billick*, 861 N.W.2d 814, 824-25 (Iowa 2015); *Celotex Corp. v. Auten*, 541 N.W.2d 252, 256 (Iowa 1995).

To date, no Supreme Court decision has addressed apportionment in the context of the 2017 legislative changes. However, the Supreme Court has recognized apportionment as a "fertile area of statutory review." *Warren Properties v. Stewart*, 864 N.W.2d 307, 312 (Iowa 2015). In part, this is due to the ever-changing nature of the apportionment statute. The legislature has, once again, made significant alterations to the language of § 85.34(7), which should be addressed by the Court.

STATEMENT OF THE CASE

Claimant suffered a stipulated permanent right shoulder disability on August 6, 2018. App. 10. On August 23, 2019, Claimant filed an original notice and petition for workers' compensation benefits, naming Appellees as Defendants. App. 2. Defendants sought apportionment under Iowa Code § 85.34(7) for a 2009 right shoulder disability. App. 278. On September 21, 2020, hearing was held before the deputy workers' compensation commissioner. App. 267. The deputy determined that apportionment could not be made pursuant to Iowa Code § 85.34(7) because the Code provided no mechanism for apportionment and because Defendants failed to obtain an expert opinion apportioning impairment between the two injuries. App. 278-79. Reaching this conclusion, the deputy considered the competing shoulder impairment ratings contemplated in the full commutation. App. 279. The deputy also awarded Claimant the costs of his independent medical examination (IME) pursuant to Iowa Code § 85.39, finding the cost reasonable because Dr. Kim opined that the cost of his report was reasonable and customary in his geographic area and because he did not address or assign impairment for unrelated injuries. App. 282-83.

Defendants appealed and the commissioner affirmed. App. 285-89. On appeal, Defendants argued for a reduction in the reimbursement amount

awarded Claimant under § 85.39 for IME costs, and for apportionment pursuant to § 85.34(7). App. 286-87. The commissioner affirmed the cost of Claimant's IME, finding it reasonable because Dr. Kim did not take any measurements of Claimant's right ankle range of motion and offered no opinions unrelated to the stipulated 2018 injury. App. 288. The commissioner pointedly did not address the deputy's analysis or rationale regarding the triggering of § 85.39 because Defendants had not argued or asserted the issue. *Id.* He also denied Defendants' request for apportionment, finding the requested apportionment under § 85.34(7) to be the proverbial "apples to oranges" scenario, and again noting Defendants' failure to obtain a competing impairment rating. App. 287. Considering the effect of the full commutation, the Commissioner held Defendants had failed to prove the amount of Claimant's preexisting functional impairment. App. 287.

Defendants filed notice of a petition for judicial review of the commissioner's decision on February 9, 2022. App. 290. Before the district court, Defendants 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.

On June 7, 2023, the Court of Appeals filed a decision affirming in part, reversing in part, and remanding to the commission. Appeal Dec. p. 11. The Court of Appeals reversed the district court's determination that § 85.39 had not been triggered because Defendants had not raised the issue. Appeal Dec. p. 6. Nevertheless, the Court remanded for a determination of IME costs pertaining solely to the right shoulder and for calculation of apportionment credit under § 85.34(7), finding that the plain language of the statute permitted apportionment of industrial disability and scheduled disability for an injury to the same body part. Appeal Dec. p. 7, 10.

STATEMENT OF FACTS

Claimant Michael Rife is a welder. App. 18; Tr. 14, ln. 3-8. In 2002, Rife began employment with Defendants 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 Defendants from liability for injuries to Claimant'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. THE COURT OF APPEALS ERRED IN FINDING IOWA CODE § 85.34(7) TO PERMIT APPORTIONMENT BETWEEN CLAIMANT'S CURRENT SCHEDULED-MEMBER DISABILITY AND A PRIOR INDUSTRIAL DISABILITY.

The Court of Appeals erred in determining Iowa Code § 85.34(7) allows Defendants a credit against the present scheduled member disability for prior compensation paid on an unscheduled disability. At the outset, it is important to note that no statutory definition of disability has been provided by the legislature, nor has a method of calculating been provided, and therefore some interpretation of the statute is required. The Court searches for legislative intent as shown by what the legislature said, rather than what is should or might have said, when construing statutes. 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 the 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 Code does not permit an unscheduled industrial disability to offset a scheduled functional disability because the previous compensation requirement of the statute is not met and the lack of a mechanism for apportioning unrelated disabilities reflects a legislative intent to limit apportionment to the same disability. Therefore, no credit can be given for a loss of earning capacity disability compensated under Iowa Code § 85.34(2)(u) (2009) to offset a scheduled shoulder disability compensated under Iowa Code § 85.34(2)(v) (2017), an entirely different form of disability.

Apportionment is governed by Iowa Code § 85.34(7) (2017)

> 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.

(emphasis added). The default, then, is compensability for disabilities arising out of an in the course of employment. The second sentence creates an exception to compensation, "**to the extent the preexisting disability from a prior injury has already been compensated.**" The question becomes, what did the legislature mean here?

Claimant submits the second sentence of § 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. Just as a left hand disability is not apportioned from a right hand disability, an industrial shoulder disability cannot be apportioned out of a functional disability to the same shoulder.

For example, apportionment has been allowed[1] where the prior injuries involved the right shoulder and right hip and the subsequent injury

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

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 industrial disabilities against other unscheduled industrial disabilities, this Court permitted apportionment of disabilities to the same scheduled members, each causing functional disability, in *Floyd v. Quaker Oats*, 646 N.W.2d 105 (2002). This is because, again, the disability was the same: functional disability to the same leg. *Id* at 106-7.

By comparison, our Court previously denied the apportionment of differing types of disability: 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. Under then § 85.34(7), 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 explicitly limited apportionment to disabilities "compensable under the same paragraph of section 85.34, subsection 2." *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. Under prior enactments, the legislature made clear that apportionment should only apply where the impairment results in disability under the same paragraph of § 85.34(2), i.e. a hand for the same hand, or a leg for the same 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 apportionment of disabilities compensable under differing paragraphs of § 85.34(2). This is because 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 effect of *Drake University* was to permit injured workers to collect both permanent partial and permanent total disability benefits concurrently.[2] *See Drake University,* 769 N.W.2d at 185.

Taking into consideration the changes to § 85.34 on whole, the legislature's need to revise § 85.34(7) becomes apparent. The Code now terminates permanent partial disability upon commencement of permanent

[2] Notably, just a few short months before the 2017 legislative changes, *JBS Swift & Co. v. Ochoa*, 888 N.W.2d 887 (Iowa 2016) shut the door on further argument that permanent partial and permanent total disability benefits could be owed concurrently.

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 reflects the legislature's intent 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) remains unchanged, because permanent total and permanent partial disability are not compensated under the same paragraph. In effect, the legislature redrew the lines distinguishing disabilities to lump permanent partial industrial disabilities and permanent total disabilities, both of which compensate for the same disability: loss of earning capacity.

Further support for precluding apportionment comes from *Roberts Dairy v. Billick* and *Celotex Corp. v. Auten.* These decisions reflect past precedent of refusing apportionment absent explicit statutory authority for doing so. For example, the Court previously denied apportionment despite findings that a considerable part of the Claimant's disability arose from prior injuries that were previously compensated. *Celotex*, 541 N.W.2d at 252-53; 256. Similarly, the Court denied apportionment where the statute did not expressly spell out the method of calculating the requested apportionment. *Roberts Dairy*, 961 N.W.2d at 861. Conversely, the Court permitted

apportionment of industrial disabilities between subsequent employers in *Warren Properties v. Stewart*, 864 N.W.2d 307 (Iowa 2015), where the statute provided no specific mechanism for the apportionment. In that case, the Claimant held two jobs, and sustained successive disabilities at each. *Warren Properties* at 309-11. The Court determined apportionment could occur because the formula provided for apportionment of disabilities with the same employer could be applied to a concurrent employer. *Id* at 317-18. This was, again, the same type of disability: industrial. It sheds no light on how or whether two distinctly separate disabilities might be apportioned.

While an argument might be made that the proper method of apportionment was outlined by the *Floyd* Court, this approach fails. In order to apportion under *Floyd,* the preexisting injury must have independently produced a degree of disability that is both (1) discreet, and (2) ascertainable. *Floyd,* 646 N.W.2d at 110. Clarifying, this Court stated: "it must be shown that particular percentage of permanent disability would have resulted from the prior event acting alone." *Id.* This requirement cannot be met under the facts of this case because Defendants chose not to obtain an impairment rating of their own. Had Defendants been so inclined, they could have had Claimant evaluated by a physician of their own choosing

under Iowa Code § 85.39. They could have obtained an impairment rating from Dr. White. However, they made a strategic choice not to do so.

Likewise, using one of the various impairment ratings assessed in 2010 carries only superficial appeal. There is no indication which, if any, impairment rating was used. The impairment ratings were nearly a decade stale at the time of Claimant's 2018 injury. It cannot be stated, with any degree of confidence, what degree of functional impairment to Claimant's shoulder existed immediately prior to his 2018 work injury. As the Commissioner pointed out, Defendants failed to prove a particular percentage of functional impairment immediately prior to the work injury.

This leaves only an interpretation of § 85.34(7) that permits direct apportionment between functional and industrial disabilities. Industrial disabilities commonly result in greater compensation than functional disabilities. *Chavez v. MS Technology*, 972 N.W.2d at 667 (Iowa 2022). Allowing direct apportionment in this manner would create an untenable situation where individuals suffer an injury without a remedy. In this case Claimant was previously compensated for a 29.6 % loss of earning capacity. App. 209. This equates to 148 weeks of benefits. Iowa Code § 86.34(2)(u) (2009). He has now suffered a 19% loss of the shoulder. App. 178. This equates to 76 weeks of benefits. Iowa Code § 85.34(2)(v) (2017).

Permitting a direct offset totally eliminates Claimant's entitlement to permanent disability benefits despite the fact he has sustained a stipulated permanent disability as a result of the 2018 work injury. Construing 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.").

In this case, there are two injuries involving the right shoulder. However, there are not two of the same disabilities. The undisputed facts demonstrate Claimant suffered an industrial disability to his whole body (BAW) in 2009, and a scheduled disability in 2018. There is an unscheduled industrial disability and a scheduled member disability. In this sense, there is no double recovery because Claimant has not been compensated for a prior functional disability.

A review of our workers' compensation statute, as a whole, reveals the numerous forms of disability that may result from an injury: functional scheduled, functional unscheduled, industrial, permanent partial, permanent total, etc. 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 nor are they even compensated in the same manner, they are not the same disability and cannot "[have] already been compensated." 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.

CONCLUSION

For the reasons stated above, Claimant respectfully requests the Court grant his Application for Further Review and reverse the Court of Appeals decision, reinstating the determination of the Workers' Compensation Commissioner.

REQUEST FOR ORAL ARGUMENT

Claimant respectfully requests oral argument.

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ATTORNEY'S COST CERTIFICATE

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

6/15/23
DATE

Anthony J. Olson

CERTIFICATE OF COMPLIANCE

I, the undersigned, certify that this Proof Brief complies with the typeface requirements of Iowa R. App. P. 6.1103 because it has been prepared in a proportionally spaced typeface using Times New Roman font, size 14 and the number of words is 3,938.

6/15/23
DATE

Anthony J. Olson

PROOF OF SERVICE AND CERTIFICATE OF FILING

I certify that on June 15, 20 23, I served this document on all other parties to this appeal electronically by EDMS to the following attorney of record:

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I further certify that on June 15, 20 23, I electronically filed this document with the clerk of the Supreme Court, 111 East Court Ave., Des Moines, IA 50319.

/s/ Stephanie M. Collingwood
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IN THE COURT OF APPEALS OF IOWA

No. 22-1421
Filed June 7, 2023

P.M. LATTNER MANUFACTURING CO. and ACCIDENT FUND GENERAL INSURANCE CO.,
Plaintiffs-Appellees,

vs.

MICHAEL RIFE,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Michael D. Huppert, Judge.

A claimant appeals a district court order following judicial review of his action for workers' compensation benefits. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Anthony J. Olson of Rush & Nicholson, P.L.C., Cedar Rapids, for appellant.

Laura Ostrander, Office of the General Counsel Accident Fund Holdings, Inc. d/b/a AF Group, Lansing, Michigan, for appellees.

Heard by Schumacher, P.J., and Chicchelly and Buller, JJ.

SCHUMACHER, Presiding Judge.

Michael Rife appeals the district court's order following judicial review of his workers' compensation claim. He contends the district court improperly found he was not entitled to reimbursement for an independent medical examination (IME). He also alleges the district court wrongly remanded to the commissioner to determine what credit Lattner Manufacturing and its workers' compensation insurance carrier, Accident Fund General Insurance Co., (collectively Lattner) is entitled to for benefits paid for a prior injury sustained by Rife. We determine the district court erred by finding Rife was not entitled to any reimbursement for the IME, as this issue was not preserved. We remand to the commissioner to determine the fee related to the impairment rating for his right shoulder rather than the examination as a whole. We conclude the court properly remanded for the commissioner to determine what credit Lattner was entitled to for compensating Rife's prior injury. Accordingly, we affirm in part, reverse in part, and remand to the workers' compensation commissioner.

I. Background Facts & Proceedings

Rife began work as a welder at Lattner in 2002. He injured his right shoulder on February 4, 2009. Following several evaluations[1] and treatment, the parties resolved the injury via a full commutation of benefits, which was approved by the commissioner in September 2010. That commutation established Rife suffered a permanent disability equal to 29.6% of the body as a whole.[2] Lattner paid Rife a

[1] Various evaluations gave Rife an impairment rating for his right upper extremity of 12%, 14%, and 15% for the 2009 injury.
[2] At the time, Rife's shoulder injury did not qualify as a scheduled injury under Iowa Code chapter 85 (2010).

lump sum of $40,000. As part of the settlement, Lattner received a credit for permanent impairment to Rife's shoulder against any future injuries to the same shoulder.

Rife suffered another workplace injury to his right shoulder on August 6, 2018. Following surgery, the employer-authorized physician, Dr. Matthew White, recommended physical therapy. A functional capacity evaluation (FCE) was conducted November 13, 2019, at E3 Work Therapy, but was deemed invalid due to poor effort by Rife. Based on the invalid FCE, Dr. White opined that he was unable to provide recommendations for work or function. Dr. White recommended another FCE be conducted in February 2020. That subsequent evaluation never occurred.

Rife undertook his own FCE with Daryl Short, DPT, in February. In July, Rife obtained an impairment rating from Dr. Sunny Kim. Dr. Kim gave the rating after conducting an independent exam and reviewing Rife's medical records. Dr. Kim gave Rife a 19% impairment rating to the right upper extremity, or 11% of the body as a whole. Dr. Kim noted that Rife inquired about an impairment rating to his right ankle based on a separate incident from 2005. Dr. Kim declined to provide a rating for that injury.

Rife filed an original notice and petition for workers' compensation benefits on August 23, 2019. Following hearing, the deputy commissioner issued an arbitration decision on August 20, 2021. As relevant here, the deputy found Lattner was required to reimburse the full cost of Dr. Kim's IME. And the deputy determined Lattner was not entitled to credit for the payment made for the 2009 injury because the apportionment statute did not provide a formula for apportioning

the benefits and it was unclear what impairment rating was being compensated at the time. Lattner appealed to the commissioner. After some independent analysis of the issues, the commissioner affirmed the decision of the deputy.

Lattner then petitioned for judicial review, claiming the commissioner wrongly found Lattner was liable for the full cost of the IME and did not deserve credit for the 2009 injury. The district court found Rife had not complied with the statutory requirements found in section 85.39 (2018) that delineated the process by which a claimant can be reimbursed for an IME. As such, the district court determined that Rife was not entitled to any reimbursement. And the court found the commissioner wrongly ignored the commutation agreement and relevant law when it denied Lattner credit for the 2009 injury. The district court remanded the case to the commissioner to reconsider the matter of apportionment between the 2009 and 2019 injuries. Rife appeals.

II. Standard of Review

Our review is governed by chapter 17A. *See Larson Mfg. Co. v. Thorson*, 763 N.W.2d 842, 850 (Iowa 2009). "It is well settled that '[t]he interpretation of workers' compensation statutes and related case law has not been clearly vested by a provision of law in the discretion of the agency.' We therefore do not defer to the commissioner's interpretation of the law." *Id.* (internal citation omitted)

We defer to the commissioner's factual determinations if they are supported by substantial evidence. *Id.* Evidence is substantial if it "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).

We will only reverse the commissioner's application of law to the facts if it was "irrational, illogical, or wholly unjustifiable." *Larson*, 763 N.W.2d at 851.

III. Independent Medical Examination

Rife contends the district court improperly found he was not entitled to reimbursement for the costs of the IME Dr. Kim conducted. The district court found that because Rife refused to meaningfully participate in Lattner's requested evaluations, he was not entitled to reimbursement for his IME under section 85.39. Upon our review, we determine the district court improperly reversed the commissioner on this issue because the matter was not properly preserved for the district court's review.

"It is well-settled that judicial review of administrative action is limited to questions considered by the agency." *Pruss v. Cedar Rapids/Hiawatha Annexation Special Loc. Comm.*, 687 N.W.2d 275, 284 (Iowa 2004); *see also Cargill, Inc. v. Conley*, 620 N.W.2d 496, 500 (Iowa 2000) ("It has long been the law in Iowa that claims not raised before the industrial commissioner will not be considered by the courts on judicial review.").

Lattner did not contest whether Rife triggered the reimbursement provision in section 85.39. Instead, while before the deputy commissioner, Lattner merely claimed, "[T]he Defendants should not be assessed the cost of any part of the evaluations that addressed the right ankle injury." Similarly, the matter was not raised or decided by the commissioner. In their appeal brief to the commissioner, Lattner identified the issue as follows: "Whether the Claimant's IME expense was limited to the typical fee charged by a provider to provide an impairment rating in the area where the examination is conducted." Lattner did not claim Rife was not

entitled to any reimbursement, they only contested the amount. The commissioner found, "On appeal, defendants do not take issue with the deputy's analysis or rationale in finding that the reimbursement provisions of Iowa Code section 85.39 were triggered in this case, so I will not address or disturb that portion of the arbitration decision in this appeal decision." The commissioner was clear that it was not considering whether Rife triggered section 85.39.

Because Lattner did not contest whether Rife triggered the reimbursement provision found in section 85.39 to the deputy commissioner or the commissioner, error on whether section 85.39 was triggered was not preserved. We reverse the district court with respect to such determination. But our analysis does not end here.

Lattner argued they should not have to pay the portion of Rife's examination that related to a non-work-related injury and the costs should be limited to the typical fee charged by a provider to provide an impairment rating in the area where the examination is conducted. The legislature set forth clear language in changes to Iowa Code section 85.39(2) in 2017, which reads:

> An employer is only liable to reimburse an employee for the cost of an examination conducted pursuant to this subsection if the injury for which the employee is being examined is determined to be compensable under this chapter or chapter 85A or 85B. An employer is not liable for the cost of such an examination if the injury for which the employee is being examined is determined not to be a compensable injury. A determination of the reasonableness of a fee for an examination made pursuant to this subsection, shall be based on the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination is conducted.

We have previously held that section 85.39(2) provides for reimbursement for an impairment rating rather than the cost of an examination. *See MidAmerican*

Const. LLC v. Sandlin, No. 22-0471, 2023 WL 2148754, at *4 (Iowa Ct. App. Feb. 22, 2023). Lattner is not responsible to reimburse costs from the examination that did not relate to the impairment rating of the compensable—that is, work-related—injury to Rife's right shoulder. The commissioner's determination that Lattner had to reimburse the full costs of the examination was erroneous under the 2017 changes in the law.

That said, it is unclear from the record before us what portion of Dr. Kim's fee related to the impairment rating for his right shoulder rather than the examination as a whole. The amount of the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination is conducted is absent from this record. So we remand to the commissioner to determine what portion of Dr. Kim's examination related to the impairment rating of Rife's right shoulder.

IV. Successive Injury Credit

Rife contends the district court erred by finding the commissioner failed to apportion benefits between the 2009 and 2019 injuries. The deputy commissioner found that it could not apportion benefits between the injuries because the code did not provide a means to apportion between scheduled and unscheduled injuries. And the deputy commissioner indicated it was unclear what impairment rating the 2010 agreement used for the shoulder itself, rather than the body as a whole. The commissioner affirmed, and added to the deputy's analysis by noting that benefits for industrial disability include factors other than functional impairment—requiring a false comparison to apportion between the 2009 rating of 29.7% to Rife's body as a whole and the 2019 shoulder injury's 19% impairment rating. The district

court found both the deputy and commissioner misapplied the statute, section 85.34(7). Moreover, the court determined the deputy and commissioner failed to consider the effect of the 2010 agreement. Thus, the court remanded for a decision by the district court as to how to apportion benefits between the injuries and what credit Lattner was entitled to for benefits already paid in 2010.

When considering whether section 85.34(7) supports apportionment in this case, both parties highlight the legislative history of chapter 85. But, "[a]ny interpretive inquiry . . . begins with the language of the statute at issue." *Doe v. State*, 943 N.W.2d 608, 610 (Iowa 2020). "If the 'text of a statute is plain and its meaning clear, we will not search for a meaning beyond the express terms of the statute or resort to the rules of construction.'" *Id.* (quoting *In re Estate of Voss*, 553 N.W.2d 878, 880 (Iowa 1996)). Therefore, we only turn to other tools of statutory interpretation, such as examining legislative history, if the terms of the text are ambiguous. *Id.*

So we turn to the text of section 85.34(7). That section provides:

> 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.

Iowa Code § 85.34(7) (emphasis added).

Rife contends a distinction must be made between industrial disabilities, which are governed by what is now section 85.34(2)(v), and scheduled injuries, found in the rest of section 85.34(2). According to Rife, section 85.34(7) only gives credit to the employer for similar injuries—scheduled and scheduled, or unscheduled and unscheduled. But the statute does not provide for that interpretation. Instead, it is unambiguous: an employer is not liable for an employee's "preexisting disability." The statute makes no distinction between the type of disability the employee incurred. We cannot create ambiguity where there is none. Because the statute unambiguously directs that employers are not liable for an employee's preexisting disability incurred through a work-place injury with the same employer, thereby prohibiting double recovery for the same injury, the deputy and commissioner misinterpreted section 85.34(7).

Rife contends the statute is inoperative because it does not provide a means to apportion benefits between industrial disabilities and scheduled disabilities. In support of that contention, Rife cites *Roberts Dairy v. Billick*, 861 N.W.2d 814 (Iowa 2015). In that case, our supreme court found a prior version of section 85.34(7) was ambiguous because, in part:

> Iowa Code section 85.34 provides no mechanism for apportioning the loss between the present and previous employers. This is in direct contrast to Iowa Code section 85.34(7)(b), which explains exactly how the offset is to be calculated when an employee suffers successive injuries while working for the *same* employer. If the legislature wanted to require a credit or offset of disability benefits in cases of successive unscheduled injuries with different employers, it logically would have prescribed how it should be determined.

Roberts Dairy, 861 N.W.2d at 822 (emphasis in original). Rife contends that *Roberts Dairy* requires an express method of apportionment.

We believe Rife's reading of *Roberts Dairy* takes the court's reasoning too far. First, that quoted language above was used to explain that the statute, as written in 2015, was ambiguous. *Id.* It did not establish that a statute must expressly provide a formula for apportioning benefits between injuries. Moreover, just a couple of months after *Roberts Dairy*, our supreme court decided another similar case. In *Warren Properties v. Stewart*, the court explained, "We recognize the legislature did not establish a specific method of apportionment for successive disabilities with different employers when no market reevaluation has taken place, as it did for successive disabilities with the same employer." 864 N.W.2d 307, 317 (Iowa 2015). Despite that, the court found, "[A]lthough a specific method of apportionment was not established, the legislature did not intend to exclude from apportionment successive disabilities with different employers when no market reevaluation has occurred."[3] *Id.* In line with *Warren Properties*, the lack of express means to apportion benefits does not preclude the application of section 85.34(7).

And here we are dealing with benefits paid by the same employer. Rife was previously compensated under chapter 85 by Lattner for his first shoulder injury via the 2010 commutation agreement. *See* Iowa Code §§ 85.45; 85.47 (defining the method of obtaining a commutation and basis for a commutation, respectively). Thus, pursuant to section 85.34(7), Lattner is entitled to a credit for the payment of benefits for that injury.

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[3] The court concluded: "The compensation formula provided by the legislature in section 85.34(2)(u) [now section 85.34(2)(v)], used for all successive disabilities with separate employers, can be used in conjunction with the rule in section 85.34(7)(a) to apportion the loss in earning capacity when a market reevaluation has not occurred." *Warren Props.*, 864 N.W.2d at 317.

Still, the question remains: how much to credit to Lattner? We cannot decide that question on the record before us. "When the commissioner fails to consider all the evidence, the appropriate remedy is 'remand for the purpose of allowing the agency to re-evaluate the evidence' unless the facts are established as a matter of law.'" *JBS Swift & Co. v. Hedberg*, 873 N.W.2d 276, 281 (Iowa Ct. App. 2015) (citation omitted). The commissioner ignored the 2010 commutation agreement when it found the benefits Lattner paid via that agreement for an industrial disability was proverbial apples to oranges for purposes of apportioning between it and the recent scheduled injury. But, as described above, that conclusion is not supported by section 85.34(7). Thus, we affirm the remand to the commissioner to determine what credit Lattner is entitled to given the benefits Lattner paid pursuant to the 2010 commutation agreement.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

IOWA APPELLATE COURTS

State of Iowa Courts

Case Number	**Case Title**
22-1421	P.M. Lattner Manufacturing Co. v. Rife

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IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

P.M. LATTNER MANUFACTURING COMPANY, Employer, **ACCIDENT FUND GENERAL INSURANCE COMPANY,** Insurer/Petitioners, vs. **MICHAEL RIFE,** Respondent.	Case No. **CVCV063141** **RULING ON PETITION FOR JUDICIAL REVIEW**

This matter was brought before the court on July 1, 2022, for hearing on Petitioner's Request for Judicial Review. Attorney Laura J. Ostrander appeared on behalf of Petitioners P.M. Lattner Manufacturing Company and Accident Fund General Insurance Company (Petitioners). Attorney Tony Olsen appeared on behalf of Respondent, Michael Rife (Respondent). The court having heard the arguments of counsel, reviewed the file, and being fully advised in the circumstances, finds as follows.

BACKGROUND FACTS AND PROCEEDINGS

The case has a long factual history that was set forth in detail in the both the Arbitration and Appeal Decisions. Accordingly, the court need not repeat such in detail here. The court refers to the findings of fact as stated in the deputy commissioner's decision and will discuss the portions relevant to the court's ruling.

Respondent as the original claimant experienced his first right-shoulder injury in March 2009. The injury was determined to be a permanent functional impairment with an impairment

rating of 14 percent to the right arm or 8 percent to the body as a whole. In September 2010, respondent and petitioner entered into a full commutation which calculated a permanent disability of 29.6 percent to the body as a whole. Cert. Agy. Rec. Part 1, p. 332-337. As per the full commutation, respondent received a lump sum payment of $40,000 for the right shoulder injury. *Id.* The commutation was approved by the Iowa Workers' Compensation Commissioner on September 15, 2010. *Id.*

In July 2017, the Iowa Legislature made amendments to Iowa Code section 85.34 which changed the compensation for shoulder injuries from body as a whole (BAW) to scheduled member injuries. In August 2018, respondent sustained another injury to the right shoulder for which he received medical treatment and care. In the arbitration decision, the deputy commissioner found respondent had sustained a second injury to his right shoulder that did not extend into his body as a whole. The second right shoulder injury was to be compensated as a scheduled member injury pursuant to the section 85.34 amendments. The deputy commissioner adopted the impairment rating of Sunny Kim, M.D., and found respondent sustained 19 percent impairment of his right upper extremity. Cert. Agy. Rec. Part 1, p. 55. The deputy commissioner found respondent was entitled to 19 percent of 400 weeks, which calculates to 76 weeks of permanent partial disability (PPD) compensation, commencing on June 14, 2020, the date of maximum medical improvement (MMI). Id.

Petitioners argued they were due a credit of the compensation they had paid respondent for his first shoulder injury and the full commutation agreement the parties had entered into for the first injury. The deputy commissioner found petitioners were not entitled to a credit against PPD benefits owed for a "prior settlement" because respondent was compensated for industrial disability resulting from an unscheduled injury. Id. at 56.

The deputy commissioner found respondent did not refuse an offer of suitable work, meaning he was entitled to healing period benefits from July 24, 2019, the date of his termination, through June 13, 2020, when he reached MMI. Id. at 57. The deputy commissioner also found petitioners are responsible for reimbursement of the entirety of Dr. Kim's charge for his independent medical examination (IME). Id. at 59. Lastly, the deputy commissioner awarded a portion of respondent's costs of the arbitration proceeding. Id. at 60. On appeal, the commissioner affirmed and adopted the deputy commissioner's findings and arbitration decision. Id. at 61.

Petitioners brought this action for judicial review on the commissioner's decision filed on January 21, 2022. Petitioners assert the commissioner erred in finding they are not entitled to a credit for past benefits paid. Petitioners also asserted the commissioner erroneously awarded healing period benefits and reimbursement for the entirety of Dr. Kim's IME. Respondent asserts the commissioner's decision should be affirmed in its entirety.

STANDARD OF REVIEW

The Iowa Administrative Procedure Act, Iowa Code chapter 17A, governs the scope of the Court's review in workers' compensation cases. Iowa Code § 86.26 (2011); Meyer v. IBP, Inc., 710 N.W.2d 213, 218 (Iowa 2006). "Under the Act, we may only interfere with the commissioner's decision if it is erroneous under one of the grounds enumerated in the statute, and a party's substantial rights have been prejudiced." Meyer, 710 N.W.2d at 218. A party challenging agency action bears the burden of demonstrating the action's invalidity and resulting prejudice. Iowa Code § 17A.19(8)(a). This can be shown in a number of ways, including proof the action was ultra vires; legally erroneous; unsupported by substantial evidence in the record when that record is viewed as a whole; or otherwise, unreasonable, arbitrary, capricious, or an abuse of discretion. See Id. § 17A.19(10). The district court acts in an appellate capacity to correct errors of law on the part of

the agency. Grundmeyer v. Weyerhaeuser Co., 649 N.W.2d 744, 748 (Iowa 2002).

"If the claim of error lies with the agency's findings of fact, the proper question on review is whether substantial evidence supports those findings of fact" when the record is viewed as a whole. Meyer, 710 N.W.2d at 219. Factual findings regarding the award of workers' compensation benefits are within the commissioner's discretion, so the court is bound by the commissioner's findings of fact if they are supported by substantial evidence. Mycogen Seeds v. Sands, 686 N.W.2d 457, 464-65 (Iowa 2004). Substantial evidence is defined as evidence of the quality and quantity "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); Mycogen, 686 N.W.2d at 464. The application of the law to the facts is also an enterprise vested in the commissioner. Mycogen, 686 N.W.2d at 465. Accordingly, the court will reverse only if the commissioner's application was "irrational, illogical, or wholly unjustifiable." Id.; Iowa Code § 17A.19(10)(l). This standard requires the court to allocate some deference to the commissioner's application of law to the facts, but less than it gives to the agency's findings of fact. Larson Mfg. Co. v. Thorson, 763 N.W.2d 842, 850 (Iowa 2009).

LAW AND ANALYSIS

The Commissioner's Finding of a Right-Shoulder Injury

The first issue before the court is petitioners' request to affirm the commissioner's conclusion of a right-shoulder injury and not a left-shoulder, BAW injury which arose in and out of the course of employment. As the court finds the record supports this determination and respondent has raised no argument against the determination, the court concludes this determination is supported by substantial evidence.

The second issue is informed by the first; as respondent was concluded to have sustained a right-shoulder injury, it is not necessary for the court to conduct a 90-day notice analysis. Moreover, the commissioner's decision contains no ruling on the 90-day notice argument. In contested cases, the court's review is limited to those questions considered by the administrative agency. General Tel. Co. v. Iowa State Commerce Comm'n, 275 N.W.2d 364, 367 (Iowa 1979). Accordingly, to the extent the argument was not adjudicated at the agency level, such issues are not properly before this court and cannot be addressed by it here.

Commissioner's Conclusion to Award Temporary Total Disability Benefits

Petitioners next request a reversal of commissioner's conclusion that respondent was entitled to additional temporary total disability benefits. Petitioners hold that because respondent allegedly refused an offer of light duty work, he is not entitled to benefits. Petitioners are correct that pursuant to Iowa Code section 85.33, a refusal of light work is a bar to benefits under the chapter. Nonetheless, the court concludes the commissioner's reasoning in this instance is supported by substantial evidence in the record. Section 85.33 requires:

> The employer shall communicate an offer of temporary work to the employee in writing, including details of lodging, meals, and transportation, and shall communicate to the employee that if the employee refuses the offer of temporary work, the employee *shall* communicate the refusal and the reason for the refusal to the employer in writing and that during the period of the refusal the employee will not be compensated with temporary partial, temporary total, or healing period benefits, unless the work refused is not suitable.

Iowa Code § 85.33 (emphasis added)

Here, petitioners submit they offered respondent light work in the form of a letter dated June 29, 2019. Cert. Agy. Rec. Part 1, p. 362. The letter makes a general offer of "modified duty" that can "accommodate the work conditions." Id. It instructs to mark options, sign and return to petitioner. Respondent did not sign or return the form. Petitioner contends this constitutes a refusal

an offer of light duty work.

The commissioner found respondent did not refuse an offer of light duty work because there was no refusal in writing, and respondent did return to work on July 1, 2019. Cert. Agy Rec. Part 1, p. 57. While the statute dictates the offer must be made in writing, it also instructs the refusal shall also be communicated in writing. Iowa Code § 85.33. The record shows petitioner did not receive any refusal in writing from respondent and confirms the commissioner's finding that respondent returned to work on July 1, 2019. Id. Accordingly, the court finds the commissioner's finding on this issue is supported by substantial evidence in the record.

Commissioner's Conclusion Respondent is Due Reimbursement for Dr. Kim's IME

The commissioner concluded respondent was due full reimbursement of his independent medical examination (IME) with Dr. Kim. This was largely based on the commissioner's finding that petitioners' physician, Dr. White, actively withheld and refused to provide respondent with an impairment rating or disability evaluation. Petitioners contend respondent is not due full reimbursement of Dr. Kim's IME because there was no such withholding, and the IME contained reference to a right ankle injury which is not included in the petition or the subject of these proceedings pursuant to Iowa statute. The court examines the relevant statute. Iowa Code section 85.39 states in part:

> After an injury, the employee, if requested by the employer, *shall* submit for examination at some reasonable time and place and *as often as reasonably requested*, to a physician or physicians authorized to practice under the laws of this state or another state.
>
> If an evaluation of permanent disability has been made by a physician retained by the employer *and the employee believes this evaluation to be too low*, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination.

(Emphasis added).

Iowa courts have consistently held the process prescribed in the statute must be followed for reimbursement. "The statutory process balances the competing interests of the employer and employee and permits the employee to obtain an independent medical examination at the employer's expense." Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 844 (Iowa 2015) (citing IBP, Inc. v. Harker, 633 N.W.2d 322, 327 (Iowa 2001)). "An employer, however, is not obligated to pay for an evaluation obtained by an employee outside the statutory process." Id. "The IME for which recovery is being sought was obtained before DART's [employer's] physician had made any impairment rating, contrary to the provisions of Iowa Code section 85.39." Des Moines Area Reg'l Transit Auth. v. Young, 856 N.W.2d 383 (Iowa Ct. App. 2014), aff'd, 867 N.W.2d 839 (Iowa 2015). "We agree with the commissioner and the district court that Iowa Code section 85.39 does not expose the employer to liability for reimbursement of the cost of a medical evaluation *unless the employer has obtained a rating* in the same proceeding *with which the claimant disagrees*." Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 394 (Iowa 2009) (emphasis added). The Iowa Supreme Court has also strongly emphasized the importance of adhering to the statutory process for reimbursements to employees for an IME.

> [S]ection 85.39 is the sole method for reimbursement of an examination by a physician of the employee's choosing . . . Our legislature established a statutory process to govern examinations . . . Neither courts, the commissioner, nor attorneys can alter that process by adopting contrary practices. If the injured worker wants to be reimbursed for the expenses associated with a disability evaluation by a physician selected by the worker, the process established by the legislature *must* be followed.

867 N.W.2d at 846–47. (emphasis added).

The process for reimbursement is set out clearly in the statute. The employee must first attend an evaluation at the employer's choosing, "as often as reasonably requested," and obtain an

evaluation rating of permanent disability. Iowa Code § 85.39. Due to the strict construing of section 85.39 in Iowa caselaw, the court concludes practices outside of the process are not contemplated by the statute and are not due reimbursement.

Commissioner's Application of Section 85.39 to the Facts in the Instant Case

To determine whether the commissioner's conclusion is in conformity with the above-reference statute and caselaw, the court briefly reviews the record surrounding the examination in the instant case. The record establishes Respondent initially attended a functional capacity evaluation (FCE) with E3 Work Therapy Services, scheduled by petitioner on November 13, 2019. Cert. Agy. Rec. Part 1, pgs. 381-385. Petitioner's physician, Dr. White, informed respondent the FCE was invalid due to inconsistent performance and no maximum effort given on the part of respondent. Id. Dr. White stated an impairment rating could not be reached based on the initial FCE and ordered a second FCE with E3 to gain a valid rating. Id.

In February 2020, petitioners made considerable attempts to schedule the second FCE, but respondent refused to schedule it on the basis that he objected to the XRTS (Cross-Reference Testing System) method of testing used by E3 in the evaluation. Id. at 367-369. Petitioners also filed two motions to compel functional capacity examinations which were both denied by the commissioner. Cert. Agy Rec. Part 2, pgs. 28-41. Respondent continued to refuse the second FCE with E3 and instead, procured his own FCE with Short Physical Therapy (Short FCE) on February 29, 2020. Cert. Agy. Rec. Part 1, pgs. 405, 164.

In March 2020, petitioners had Robert Townsend, an expert in functional capacity evaluations review the Short FCE report and found it lacked evidence of respondent's full effort. Id. at 371-379. Upon request to Dr. White for a rating, Dr. White acknowledged petitioners were looking to schedule a new FCE with E3. Id. at 160-163. In July 2020, having still not been able

to schedule the second FCE, petitioners plainly set forth Dr. White was not able to issue a rating without the second FCE. Id. at 165. Respondent then procured an independent medical evaluation (IME) with Dr. Kim for which he seeks reimbursement in this action. Id. p. 146.

Respondent's Refusal to Schedule A Second FCE: Shortly after the first FCE was found invalid in November 2019, petitioners determined a second FCE was needed and initiated attempts to complete it with respondent. By including the language, "as often as requested," the legislature demonstratively contemplated the potential necessity of multiple FCEs. Iowa Code § 85.39. As such, the court finds this was not unreasonable to schedule an additional FCE for the purposes of obtaining an accurate impairment rating. Additionally, there was no unreasonable delay in petitioners' attempts to schedule the second FCE as respondent's first documented refusals began less than 60 days later. Cert. Agy. Rec. Part 1, pgs. 367-369.

The court finds in refusing to schedule and attend petitioners requested FCE, respondent was in direct violation of section 85.39. The statute dictates employees, "*shall* submit for examination . . . *as often* as reasonably requested." Iowa Code § 85.39. "[A]n injured worker is *required* to submit to an examination by a physician selected by the employer at the employer's expense *as often as reasonably required.*" Des Moines Area Reg'l Transit Auth., 867 N.W.2d at 843 (emphasis added). The statute also states, "[t]he refusal of the employee to submit to the examination shall forfeit the employee's right to any compensation for the period of the refusal." Iowa Code § 85.39.

Despite respondent's strong disapproval or distrust of the XRTS evaluation method, section 85.39 does not afford respondent any option to refuse petitioners' FCE method when seeking reimbursement. On the contrary, by using the word "shall," the legislature very clearly obligates respondent to first attend petitioners' FCE and gain an impairment rating. Moreover, the

statute does not obligate petitioners to conform to respondent's desired method of evaluation for the FCE. "If injured workers believe the battle favors the employer, the change sought must come from the legislature. We cannot interpret the statutory process to undermine or defeat the intent of the legislature." Des Moines Area Reg'l Transit Auth., 867 N.W.2d at 847. Due to this, the court finds respondent's actions in refusing petitioners' reasonably requested second FCE is outside of the statutory process and contrary to section 85.39.

Respondent's Seeking the Short FCE and Dr. Kim IME Without Impairment Rating from Petitioners: In addition to refusing the second FCE, respondent took the further step of scheduling the Short FCE and then the IME with Dr. Kim. Cert. Agy. Rec. Part 1, p. 164, 146. The court finds this is also outside of the prescribed process in section 85.39. Here again, for the purposes of reimbursement, section 85.39 does not afford respondent the option to seek out his own evaluations without first gaining an impairment rating from petitioners FCE. Pursuant to section 85.39, the only option respondent has for reimbursement is to first gain an impairment rating from petitioners' FCE, then seek his own FCE, and apply to the commissioner for reimbursement. That did not happen here as respondent sought his own FCE before a rating could be gained by petitioners. Due to this, the court finds respondent's actions in seeking his own evaluations without an initial impairment rating from petitioners to be outside of the statutory process and contrary to 85.39.

Commissioner's Finding Petitioners Withheld Impairment Rating: The commissioner concluded respondent was due reimbursement for Dr. Kim's IME. Cert. Agy. Rec. Part 1, p. 59. This was mainly supported with the commissioner's finding that petitioners purposefully withheld the impairment rating and could have used the Short FCE or the Kim IME to come to an impairment rating.

> Defendants [petitioners] essentially held the disability evaluation hostage when claimant refused to present for a repeat FCE with E3 . . . defendants did not want Dr. White to 'rely on the FCE done at Short Physical Therapy [when assessing claimant's] [respondent] disability assessment . . . This, despite the fact Dr. White could have assessed claimant's permanent impairment on any number of other factors,

Id. The commissioner stated respondent, therefore, "met his burden of establishing entitlement to reimbursement . . . pursuant to Iowa Code section 85.39." Id.

Even though petitioners had no impairment rating to withhold due to respondent refusing the second FCE, the commissioner attempts to support his reasoning with the following quote. "If an employer unduly delays in *seeking an examination* under section 85.39, or fails to obtain an examination, the employee may request the commissioner to appoint an independent physician to examine the employee and make a report." Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 847 (Iowa 2015).

The court first notes, as stated previously, petitioners had an initial FCE and promptly attempted to schedule a second one when the first one was found to be invalid. Cert. Agy. Rec. Part 1, pgs. 381-385. As established, petitioner made several attempts, including two motions to compel, to schedule the second FCE and it was respondent who refused to submit to the exam, in violation of section 85.39. Id. at 164, 405; Cert. Agy. Rec. Part 2, pgs. 28-41. Had respondent submitted to the second FCE when petitioners were trying to schedule it, the evaluation would likely have been done and respondent would have been free to agree or disagree with the resulting disability rating. The court finds no indication of undue delay in scheduling on the part of petitioner and further finds that any delay in scheduling an FCE was predominantly due to respondent's efforts in refusing.

Notwithstanding respondent's violations of section 85.39, the commissioner's reasoning 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 FCE. It would have respondent's preferences initiate and guide the process instead of respondent following the process outlined by the legislature and reinforced in Iowa caselaw. It would also have petitioners obligated to conform to respondent's preferences instead of the process in Section 85.39.

The court rejects such reasoning and finds Section 85.39 places petitioners under no such obligation. Indeed, the statute authorizes petitioners to first sponsor an FCE and determine a rating before reimbursement to respondent can even be considered. The statute contains no language which permits respondent to dictate or initiate the FCE process, nor force petitioners to use his preferred evaluation method, or provide a basis for how petitioners determine rating. In this circumstance, the only option section 85.39 affords respondent for reimbursement is to first obtain a rating from petitioners, then procure his own evaluation and rating, and apply to the commissioner for reimbursement. Iowa Code § 85.39. "A medical evaluation pursuant to section 85.39 is a means by which an injured employee can rebut the employer's evaluation of disability. It is not a way for the employee to initiate proceedings." Des Moines Area Reg'l Transit Auth. v. Young, 856 N.W.2d 383 (Iowa Ct. App. 2014), aff'd, 867 N.W.2d 839 (Iowa 2015).

The court finds the commissioner's reasoning in granting respondent reimbursement for Dr. Kim's IME wholly against the language and interpretation of section 85.39 as well as completely unsupported in the record. For these reasons, the court concludes the commissioner's conclusion that respondent is due reimbursement under section 85.39 is erroneous.

Commissioner's Conclusion Petitioners Are Not Due a Credit

The overarching issue before the court is whether petitioners are due a credit for their previous compensation of respondent's prior right-shoulder injury. Largely due to changes in Iowa Code section 85.34, the commissioner concluded petitioner was not entitled to a credit. The court

assesses the issue in view of those changes and the full commutation the parties entered into.

Determining whether a credit is due under the statute involves the 2017 amendments to Iowa Code section 85.34. As mentioned in the facts, prior to July 2017, a shoulder injury was not considered to be a scheduled member. The 2017 amendments reclassified the shoulder as a scheduled member. As a result, injuries to the shoulder occurring after July 1, 2017 have been compensated as a scheduled member.

This case is unique because respondent's first shoulder injury occurred prior to the 2017 amendments and the second shoulder injury occurred after the amendments. Under other circumstances, the second injury would likely be compensated according to the new legislation and any potential credit would be calculated based on established past compensation. However, in this case, there is not only the change in the law, but also a full commutation agreement to consider. Cert. Agy. Rec. p. 332-337.

In supporting the decision against a credit, the commissioner focused strongly on the change in the designation of a shoulder injury to a scheduled member. While the court agrees the amendments did reclassify shoulder injuries as a scheduled member, the court also notes the language against double compensation in subsection 7 remained. Iowa Code § 85.34(7). Additionally, the statutes on commutations also remain unchanged by the legislature. Iowa Code § 85.45; Iowa Code § 85.47.

Thus far, there have been no cases decided in Iowa on how to potentially compensate a second shoulder injury with the same employer in the face of a full commutation and the 2017 amendments. Hence, this is an issue of first impression for the court. With regard to the new legislation and the full commutation, the primary task is to determine the impact on any benefits to respondent and potential credit, if any, to petitioners.

Interpretation of the 2017 Amendments to Section 85.34

In order to properly determine whether petitioners are due a credit, section 85.34 and its amendments must be interpreted to ascertain the legislature's intent in making the changes. "When determining legislative intent, we look first to the language of the statute." State v. Soboroff, 798 N.W.2d 1, 6 (Iowa 2011). "We determine legislative intent from the words chosen by the legislature, not what it should or might have said." Reg'l Util. Serv. Sys. v. City of Mount Union, 874 N.W.2d 120, 124 (Iowa 2016). "Absent a statutory definition or an established meaning in the law, words in the statute are given their ordinary and common meaning by considering the context within which they are used." Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 136–37 (Iowa 2010). We also look to the purpose of the statute for aid in gleaning legislative intent. State v. Hensley, 911 N.W.2d 678, 682 (Iowa 2018).

In the context of compensation cases, the court acknowledges that while it "is correct that we interpret workers' compensation statutes in favor of the worker, we still must interpret the provisions within the workers' compensation statutory scheme 'to ensure our interpretation is harmonious with the statute as a whole.'" Chavez v. MS Tech. LLC, 972 N.W.2d 662, 668 (Iowa 2022) quoting Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 770 (Iowa 2016). "Our supreme court has determined the legislature has not vested the commissioner with the authority to interpret section 85.34(7)." Polaris Indus., Inc. v. Hesby, 881 N.W.2d 471 (Iowa Ct. App. 2016); See Roberts Dairy v. Billick, 861 N.W.2d 814, 817 (Iowa 2015). "Therefore, we review the commissioner's statutory interpretation 'to correct errors of law on the part of the agency.'" Polaris quoting Teleconnect Co. v. Iowa State Commerce Comm'n, 404 N.W.2d 158, 161 (Iowa 1987).

Purpose and Language of 2017 Amendments to Iowa Code § 85.34: Besides the relatively straightforward change in the designation of shoulder injuries from BAW to scheduled member

injuries in subsection 2(n), the 2017 amendments also changed subsection 7, labeled "Successive Disabilities." Iowa Code § 85.34(7). This subsection is particularly relevant in determining whether a credit is due to petitioner under chapter 85. As such, the court discusses the intent and language of the amendments to subsection 7.

Initially, subsection 7 was added in 2004 as a completely new subsection during previous amendments to Iowa Code section 85.34. 2004 Iowa Acts 1st Extraordinary Sess. ch. 1001, § 11. Importantly, this preceding and original version of subsection 7 included a formula for how apportionment or credit should be calculated for successive injuries with the same employer:

> 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.*

Iowa Code § 85.34(7)(a)(b) (pre-2017 amendments) (emphasis added).

The insertion of this first subsection 7 was helpfully accompanied by a statement which unambiguously set forth the legislative intent behind the 2004 amendments. "[T]he statement explained the statutory changes would '*prevent all double recoveries* and all double reductions in workers' compensation benefits for permanent partial disability.'" Roberts Dairy v. Billick, 861 N.W.2d at 820, as amended (June 11, 2015) quoting 2004 Iowa Acts 1st Extraordinary Sess. ch. 1001, § 20 (emphasis added).

From the plain language in the legislature's statement, it is clear subsection 7 was added with the intent to extinguish opportunities for double recovery, specifically in cases where a claimant had previously been compensated for the injury by the same employer.

In furtherance of its stated goal to prevent double recovery in such cases, the original subsection included language which allowed for partial satisfaction of compensation, "to the extent of the percentage . . . for which the employee was previously compensated by the employer." Id. After the 2017 amendments, the subsection now reads, in part:

> 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.

Iowa Code § 85.34(7) (post-2017 amendments) (emphasis added).

In evaluating the language of the amended subsection, the court notes the legislature removed the language providing a set formula for calculating a credit, yet preserved language asserting that an employer is not liable "to the extent that the employee's preexisting disability *has already been compensated* under this chapter." Id. (emphasis added). The court also notes the legislature retained the language which prohibits compensation for a disability arising out of and in the course of employment with a different employer. As well as the language the legislature kept, the court further observes the amendments contain no supplemental language frustrating, removing, or prohibiting apportionment or credit for successive injuries with the same employer.

The court finds no language in the statute which prohibits or could be interpreted to intend

to prohibit credit or apportionment. Thus, the 2017 amendments' principal change to subsection 7 is merely the removal of a set formula for calculating a credit. Although there may be multiple reasons for this removal, the court need only discern whether the legislature intended to rescind its original objective of preventing double recovery by permitting apportionment or credit for past compensation with the same employer.

Due to the legislature's unequivocal statement of intent behind subsection 7 and keeping the provision for credit or apportionment, the court concludes the legislature intended to permit credit and apportionment to prevent double recovery in cases of past compensation with the same employer. Moreover, the commissioner's conclusion that subsection 7 does not support credit and apportionment is in direct contrast with the legislature's stated intent. Consequently, the court concludes the commissioner's conclusion is based on faulty interpretation of the statute and therefore, unsupported in statute.

Caselaw Affirmed in Commissioner's Decision is Misstated and Unsupportive: The commissioner concluded subsection 7 does not contemplate a credit for past compensation because, "Iowa Code section 85.34 provides no guidance on apportioning a prior industrial disability award from a scheduled member impairment rating." Cert. Agy. Rec. Part 1, p. 55-56. As justification for this conclusion, the commissioner states the following:

> Importantly, Iowa Code section 85.34 provides no mechanism for apportioning the loss between the present *injury* and the prior *injury*. This is in direct contrast to prior apportionment statutes, which explained how the offset was to be calculated when an employee suffers successive injuries while working for the *same* employer.

Id. (emphasis added).

Although not cited in the commissioner's decision, this language is taken directly from the Roberts Dairy case. 861 N.W.2d at 822 (Iowa 2015). Here, the case is misstated, as it actually

refers to a prior and present "employer," and not a prior and present "injury" as set forth by the commissioner. Id. The unaltered excerpt reads as follows:

> [I]importantly, Iowa Code section 85.34 provides no mechanism for apportioning the loss between the present and previous *employers*. This is in direct contrast to Iowa Code section 85.34(7)(*b*), which explains exactly how the offset is to be calculated when an employee suffers successive injuries while working for the *same* employer.

Id. (emphasis added).

In further support of his conclusion, the decision goes on to quote, "[i]f the legislature wanted to require a credit or offset of disability benefits . . . it logically would have prescribed how it should be determined." Cert. Agy. Rec. Part 1, p. 55. The court identifies this as another misstatement of the caselaw. The portion omitted by the ellipses, again, establishes the case is discussing a previous employer and not previous and present injury. Without the omission, the complete citation reads, "[i]f the legislature wanted to require a credit or offset of disability benefits in cases of successive unscheduled injuries *with different employers*, it logically would have prescribed how it should be determined." Roberts Dairy, 861 N.W.2d at 822. (emphasis added).

The alteration and omission in these quotes significantly change the meaning to seemingly support the commissioner's interpretation of subsection 7. In contrast, the unmodified citations demonstrate the Roberts Dairy case, is substantively distinct from the instant case. Unlike the case before the court, Roberts Dairy involves injuries with different employers instead of the same employer and there is no full commutation in the case to consider. As such, the court finds this caselaw does not support the commissioner's conclusion. Because this is the caselaw which is mainly cited and relied upon in the conclusion that subsection 7 does not contemplate a credit, the court concludes the commissioner's conclusion is not supported in caselaw.

The Parties' Full Commutation Agreement

The parties entered into a full commutation agreement (full commutation) for the first right shoulder injury in 2010. Cert. Agy. Rec. Part 1, p. 332-337. In order to further determine the impact of the full commutation on the issue of credit in this case, commutation statutes, caselaw, and terms of the commutation must be analyzed.

Settlement and Commutation Agreements in Iowa Workers' Compensation

The court first finds it relevant to note the Iowa Division of Workers' Compensation (IDWC) makes a clear distinction between a commutation and a settlement agreement. According to the IDWC, a settlement agreement resolves the amount and extent of compensation payment currently due, as well as preserves the employee's future rights to benefits. Conversely, while a commutation can be included as a part of a settlement, a commutation settles payment of *future* benefits and stands after the award is made.[1] Indeed, Iowa Code distinguishes settlements from commutations statutorily as well with settlements being governed by Iowa Code section 85.35 and commutations being governed by sections 85.45 and 85.47. The court will focus on the commutation statutes as that is what is presented in the record.

The IDWC defines a commutation as a lump sum payment of future benefits. It designates two types of commutations: a partial commutation and a full commutation. A partial commutation is "a lump sum payment of a *portion* of the remaining future benefits," while a full commutation is defined as "a lump sum payment of *all* remaining future benefits."[2]

Full commutations include all future benefits of payments and medical benefits which have been commuted to a decided-upon, present-worth lump sum. Iowa Code § 85.45. A full commutation can be gained upon petition and approval by the commissioner. Id. Once approved, a commutation is normally seen as having settled the matter and is not undone without the

[1] https://www.iowaworkcomp.gov/workers-compensation-settlement-explanations
[2] https://www.iowaworkcomp.gov/workers-compensation-settlement-explanations

establishment of fraud or deceit. "The approval of the commutation and order for lump sum payment, like a judgment, are final and conclusive in the absence of fraud or some other equitable ground for disturbing them." Scheel v. Superior Mfg. Co., 89 N.W.2d 377, 382 (1958). "When such agreement was signed and duly approved, it would seem that the agreement meant what it said, and that it was the distinct understanding, that the commuted settlement would become a *legal bar against any further recovery*." Tischer v. City of Council Bluffs, 3 N.W.2d 166, 172–73 (1942) (emphasis added). Generally, a full commutation releases the employer from any liability stemming from agreed-upon current and future injuries:

> Upon the 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 the filing of the release, the liability of the employer under any agreement, award, finding, or judgment shall be discharged of record.

Iowa Code § 85.47 (emphasis added).

The Full Commutation Agreement's Impact on Petitioner's Claim for Credit

As stated in the facts above, petitioner and respondent entered into a full commutation agreement for the first right-shoulder injury. Cert. Agy. Rec. Part 1, p. 332-337. The full commutation was approved and filed by the commissioner on September 15, 2010. Id. Given the finality and absoluteness with which approved full commutations are treated in Iowa, the court concludes the impact and terms of the full commutation must be considered when determining if compensation or credit is due for a second right-shoulder injury. As such, the court briefly highlights the significant portions of the full commutation.

Terms of the Full Commutation: The agreement is titled "Original Notice and Petition and Order for Commutation of All Remaining Benefits of 10 Weeks or More." Cert. Agy. Rec. Part 1, p. 332-337. As required for any credit under Iowa Code Section 85.34(7), the commutation was entered into under Chapter 85. "You are notified that an action for commutation of all remaining

benefits have been commenced . . . under Iowa Code Chapter 85, 85A, 85B, 86, and 87." Id. The key language of the terms are:

> Defendants agree to waive discount and pay an additional $170.15 for a lump sum settlement amount of $40,000 new money in exchange for Claimant's agreement to the Additional Terms,
>
> [Additional Terms Include] Claimant releases and discharges the above employer and insurance carrier and all other released parties from *all liability* including liability under the Iowa Workers' Compensation Law for *all injury or injuries to his right shoulder, right upper extremity*, back, chest, bilateral lower extremities, left flank, lungs, cardiovascular system, respiratory system and any and all pain radiating therefrom.
>
> I am the person entitled to workers compensation benefits . . . 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. I consent to the degree of disability and the granting of the commutation. In the event the employer consents to the commutation, I waive any provision concerning contested cases as provided in Chapter 17A or otherwise.

Id. (emphasis added). The full commutation was signed by petitioners and respondent. It was approved by the commissioner on September 15, 2010. The court finds the terms instructive on several points.

First, the title and language of the terms are exact and unambiguous. There is no mistake it is a commutation of all remaining benefits for respondent's right-shoulder injuries. Respondent received a lump sum, and the full commutation has gone unchallenged since it was approved. The terms also expressly release petitioners from *all liability for all injury* to the "right shoulder, right upper extremity, back, chest, bilateral lower extremities, left flank," and etc. Id. (emphasis added). The terms pointedly encompass release of all liability under all Iowa Workers Compensation law "now in existence *or may exist in the future* on account of the indicated injury." Id. (emphasis added).

In evaluating the language of these agreed-upon terms, it is apparent the full commutation was created to commute all remaining benefits on any injury to the right shoulder. It is also apparent the full commutation anticipated and encompassed future changes in the law. As concluded previously, the court finds these terms should be considered when determining whether a credit is due to petitioners.

Application of Subsection 7 Statutes and the Terms to the Facts: Applying subsection 7 to the instant case, it is evident these circumstances fit the parameters of when a credit or apportionment should be considered as described in the statute. Subsection 7 outlines that 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." Iowa Code § 85.34(7). Respondent's right-shoulder injury is a successive injury which arose out of the course of employment with petitioner and a prior injury to the right shoulder with petitioner. As established by the full commutation, the prior injury has been compensated by petitioner under chapter 85A.

With regard to a potential credit, this is all the statute requires in order for a credit to be considered. In the language of the statute, the court finds no bar to apportionment or compelled negation of an approved full commutation due to a change in the categorization of an injury. Indeed, subsection 7 contains no additional criteria regarding how the prior injury was designated in order for a credit to be considered. Stated another way, under subsection 7, prior injuries which have previously been compensated by the same employer under Chapter 85A, 85B, or 86 qualify for the commissioner to consider credit or apportionment. The 2017 amendments contain no language which compel the denial of a credit due to the change in the designation of a shoulder

injury. In view of the caselaw surrounding commutations discussed above, this seems especially true in cases where the past compensation was given under the terms of a full commutation agreement, as in the case at hand.

Commissioner's Application of Subsection 7 on Full Commutation: Despite the approved full commutation being presented in its entirety as the basis of petitioners' claim for credit, the commissioner's decision does not discuss commutations nor does it include an analysis of the terms the parties entered into. The commissioner performed no examination of the impact, if any, of the full commutation on respondent's request for benefits or petitioners' request for credit. Aside from stating the existence and date in the facts, the full commutation is mentioned nominally throughout the commissioner's decision. In the few instances where it is mentioned, it is referred to as a settlement rather than a full commutation. As discussed in detail above, a settlement is distinct from a commutation and generally has different consequences on future injuries.

In addition to minimal discussion of the full commutation, statements in the decision suggest the commissioner justified the denial of a credit on the basis of the impairment rating and the amendments with little to no assessment or application of the full commutation. "Claimant's compensation . . . is limited only to the extent of loss or permanent impairment of the shoulder itself. There is *no consideration of anything* but what the American Medical Association's Guides to the Evaluation of Permanent Impairment prescribe." Cert. Agy. Rec. Part 1, p. 9. "Thus, if defendants . . . were entitled to a credit . . . they would receive an unfair excel credit for considerations and factors that are *not applicable* to claimant's current injury." Id. (emphasis added). "If the undersigned accepted defendants' position on the matter, it would be difficult to imagine a scenario in which injured workers with successive shoulder injuries – assuming one of the shoulder injuries occurred prior to the 2017 amendments – would receive any additional

compensation." Id.

The commissioner's stated reasoning is observably closed to applicability of the full commutation. In general, the commissioner's reliance on factors such as the change in injury categorization, altered, unsupportive caselaw, and misinterpretation of subsection 7 disregard all the commutation statutes and caselaw as well as the stated legislative intent to prevent double recovery for a successive injury to the same body part with the same employer. "When the commissioner fails to consider all the evidence, the appropriate remedy is to remand for the commissioner to re-evaluate the evidence unless the facts are established as a matter of law." The court therefore finds the commissioner's denial of a credit erroneous and remands for the commissioner to reevaluate the issue of the credit taking into consideration: the intent and language of subsection 7; the full commutation statutes, caselaw, and terms in accordance with this ruling.

CONCLUSION

The court concludes the commissioner's decision on the issues of respondent's right shoulder injury, and the temporary disability benefits are supported by substantial evidence. However, the court concludes commissioner's decision on whether a respondent is due reimbursement for Dr. Kim's IME is erroneous as it is wholly contrary to the statute and Iowa caselaw. The court further concludes the commissioner's decision that petitioners are not due a credit is erroneous as it was based on flawed interpretation of Iowa Code 85.34(7), misstated caselaw, and failure to take consider the full commutation agreement. As such, the court affirms the commissioner's decisions on all issues except the reimbursement which the court reverses, and the credit issue which the court remands for determination of whether a credit is due after a proper application of law and facts and if so, the calculation of such credit in accordance with the holdings in this ruling.

IT IS THEREFORE ORDERED that the Workers' Compensation Commissioner's Decision is **AFFIRMED IN PART** on the issues of the determination of respondent sustaining a right-shoulder injury and respondent's being entitled to temporary disability benefits, and as such the Petition for Judicial Review is **DENIED** on these issues.

IT IS FURTHER ORDERED that the Workers' Compensation Commissioner's Decision is **REVERSED IN PART** as to the reimbursement to respondent for Dr. Kim's IME and the decision regarding the entitlement to a credit for the prior commutation. The case is **REMANDED IN PART** for a determination by the commissioner what, if any, credit is due after the application of the correct law and facts as discussed herein.

IT IS FURTHER ORDERED that the costs of these proceedings are assessed to the respondent.

In addition to all other persons entitled to a copy of this order, the Clerk shall provide a copy to the following:

Workers' Compensation Commissioner
1000 E. Grand Ave.
Des Moines, IA 50319-0209
Re: File No. 1652412.02

State of Iowa Courts

Case Number	**Case Title**
CVCV063141	PM LATTNER MANUFACTURING CO ET AL VS MICHAEL RIFE
Type:	OTHER ORDER

So Ordered

Michael D. Huppert, District Court Judge,
Fifth Judicial District of Iowa

Electronically signed on 2022-08-15 09:14:14

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MICHAEL RIFE, Claimant, vs. P.M. LATTNER MANUFACTURING COMPANY, Employer, and ACCIDENT FUND GENERAL INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 1652412.02 A P P E A L D E C I S I O N Head Notes: 1402.40; 1802; 1803; 1806; 2502; 2907, 5-9999

Defendants P.M. Lattner Manufacturing Company, employer, and its insurance carrier, Accident Fund General Insurance Company, appeal from an arbitration decision filed on August 20, 2021. Claimant Michael Rife responds to the appeal. The case was heard on September 21, 2020, and it was considered fully submitted in front of the deputy workers' compensation commissioner on October 23, 2020.

In the arbitration decision, the deputy commissioner found claimant sustained an injury to his right shoulder that did not extend into his body as a whole. The deputy commissioner adopted the impairment rating of Sunny Kim, M.D., and found claimant sustained 19 percent impairment of his right upper extremity. The deputy commissioner found claimant reached maximum medical improvement (MMI) on June 13, 2020, meaning the commencement date for permanent partial disability (PPD) benefits is June 14, 2020. The deputy commissioner found defendants are not entitled to a credit against PPD benefits owed for a prior settlement in which claimant was compensated for industrial disability resulting from an unscheduled injury.

The deputy commissioner found claimant did not refuse an offer of suitable work, meaning claimant was entitled to healing period benefits from July 24, 2019, the date of his termination, through June 13, 2020, when he reached MMI. The deputy commissioner found defendants are responsible for reimbursement of the entirety of Dr. Kim's charge for his independent medical examination (IME). Lastly, the deputy commissioner awarded a portion of claimant's costs of the arbitration proceeding.

On appeal, defendants assert the deputy commissioner erred in finding defendants are not entitled to a credit for past benefits paid. Defendants also assert the deputy commissioner erroneously awarded healing period benefits and reimbursement for the entirety of Dr. Kim's IME.

Claimant asserts on appeal that the arbitration decision should be affirmed in its entirety.

Those portions of the proposed arbitration decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 86.24 and 17A.15, the arbitration decision filed on August 20, 2021 is affirmed with additional analysis.

Regarding apportionment, I affirm the deputy commissioner's finding that defendants failed to prove their entitlement to a credit, but I offer the following additional analysis:

Not only is there no mechanism in the statute for apportioning past compensation for industrial disability against compensation for a scheduled member, as noted by the deputy commissioner, but the statute, as amended, does not support such an apportionment. The post-July 1, 2017, amendments provide that 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 same employer, to the extent that the preexisting disability has already been compensated under this chapter." Iowa Code § 85.34(7) (emphasis added).

Because claimant's prior shoulder injury occurred before the legislature's 2017 overhaul of chapter 85, it was not compensated as a scheduled member. Instead, claimant's pre-existing disability was compensated under former Iowa Code section 85.34(2)(u) (now subsection (2)(v)), which is the section for unscheduled losses that provides compensation based on a reduction in earning capacity.

In determining a claimant's reduction of earning capacity, functional impairment is an element to be considered, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). Before the 2017 amendments, this agency stated in countless decisions over several decades that "[t]here are no weighting guidelines that indicate how each of the industrial disability factors is to be

considered." See, e.g., Logan v. ABF Freight System, Inc., File No. 5047979 (App. April 25, 2018).

In this case, the parties agreed upon a settlement for claimant's prior right shoulder injury. (Defendants' Exhibit B) While part of the settlement was certainly for claimant's functional impairment, the agreed-upon compensation exceeded what would have been payable for claimant's functional impairment alone. In other words, the parties considered other industrial disability factors when arriving at their settlement.

Claimant's current right shoulder injury, however, is a scheduled member under the newly added Iowa Code section 85.34(2)(n). Claimant's compensation under this section is limited only to the extent of loss or permanent impairment of the shoulder itself. See Iowa Code § 85.34(2)(n), (x). There is no consideration of anything but what the American Medical Association's Guides to the Evaluation of Permanent Impairment prescribe. See id.

Thus, if defendants in this case were entitled to a credit for the entirety of their settlement, which was for industrial disability, against claimant's current scheduled member injury, they would receive an unfair excess credit for considerations and factors that are not applicable to claimant's current injury. Put differently, their credit would be for apples against an award for oranges.

I agree with the deputy commissioner that defendants could arguably be entitled to a credit based solely upon the functional impairment attributable to claimant's preexisting shoulder injury—a credit for oranges against an award for oranges. Unfortunately, in this case, defendants failed to prove that amount. They did not identify which impairment rating the parties adopted or agreed upon when reaching their settlement, for example, nor did they offer any evidence (expert opinions or otherwise) to shed light on which of the impairment ratings was more persuasive than the others. Thus, defendants failed to show how much of the settlement was attributable to the functional impairment of claimant's right shoulder and not to other factors.

As a result, with this additional analysis, I affirm the deputy commissioner's finding that defendants failed to prove their entitlement to a credit under the amended version of Iowa Code section 85.34(7).

I affirm the deputy commissioner's finding that claimant is entitled to healing period benefits from July 24, 2019, through June 13, 2020. I affirm the deputy commissioner's findings, conclusions and analysis regarding this issue in its entirety.

The final issue on appeal is whether claimant is entitled to reimbursement for the entirety of Dr. Kim's IME charge. Defendants' only argument on appeal is that they should not be assessed any portion of the costs associated with Dr. Kim's evaluation of claimant's non-work-related right ankle injury.

Defendants are correct that Iowa Code section 85.39, as amended in 2017, provides that defendants are only responsible for reimbursement relating to examinations of compensable, work-related injuries. See Iowa Code § 85.39(2). And defendants are likewise correct that claimant's counsel asked Dr. Kim to address whether claimant had any permanent disability relating to his non-work-related right ankle injury. (Claimant's Ex. 1, p. 5)

Dr. Kim, however, did not review any records relating to claimant's right ankle injury, he did not take any measurements of claimant's right ankle range of motion like he did with claimant's right shoulder, and he offered no opinions regarding claimant's right ankle. (See Cl. Ex. 1, p. 5 for medical records given to Dr. Kim to review; Cl. Ex. 1, pp. 2-3) Instead, Dr. Kim indicated he would defer to claimant's treating surgeon or a foot/ankle specialist. (Cl. Ex. 1, p. 3) As a result, I do not find any of the costs of Dr. Kim's exam to be associated with claimant's right ankle injury.

On appeal, defendants do not take issue with the deputy commissioner's analysis or rationale in finding that the reimbursement provisions of Iowa Code section 85.39 were triggered in this case, so I will not address or disturb that portion of the arbitration decision in this appeal decision.

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on August 20, 2021, is affirmed with the above-stated additional analysis.

Defendants shall pay healing period benefits from February 25, 2019, through June 13, 2020, at the stipulated weekly rate of five hundred four and 58/100 dollars ($504.58).

Defendants shall pay claimant seventy-six (76) weeks of permanent partial disability benefits commencing on June 14, 2020, at the stipulated weekly rate of five hundred four and 58/100 dollars ($504.58).

Defendants shall pay accrued weekly benefits in a lump sum together with interest payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent, as required by Iowa Code section 85.30.

Defendants shall reimburse claimant for Dr. Kim's IME charge pursuant to Iowa Code section 85.39 in the amount of two thousand two hundred fifty and 00/100 dollars ($2,250.00).

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding as set forth in the arbitration decision, and defendants shall pay the costs of the appeal, including the cost of the hearing transcript.

Pursuant to rule 876 IAC 3.1(2), defendants shall file subsequent reports of injury as required by this agency.

Signed and filed on this 21st day of January, 2022.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Anthony Olson (via WCES)

Laura Ostrander (via WCES)

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MICHAEL RIFE, Claimant, vs. P.M. LATTNER MANUFACTURING COMPANY, Employer, and ACCIDENT FUND GENERAL INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 1652412.02 ARBITRATION DECISION Head Note Nos: 1402.40, 1802, 1803, 1806

STATEMENT OF THE CASE

Claimant, Michael Rife, filed a petition for arbitration against P.M. Lattner Manufacturing Company, as the employer and Accident Fund General Insurance Company, as the insurance carrier. The hearing occurred before the undersigned on September 21, 2020. This case was scheduled to be an in-person hearing occurring in Des Moines, Iowa. However, due to the outbreak of a pandemic in Iowa, the Iowa Workers' Compensation Commissioner ordered all hearings to occur via video means, using CourtCall. Accordingly, this case proceeded to a live video hearing via CourtCall

The parties filed a hearing report at the commencement of the hearing. In the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision, and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are bound by their stipulations.

The evidentiary record consists of Joint Exhibits 1 through 11, Claimant's Exhibits 1 through 5, and Defendants' Exhibits A through G. Claimant testified on his own behalf. Dake Dietrich testified on behalf of defendants. The evidentiary record closed at the conclusion of the evidentiary hearing on September 21, 2020. The case was considered fully submitted upon submission of post-hearing briefs on October 23, 2020.

ISSUES

The parties submitted the following disputed issues for resolution:

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, 2020;

2. Whether defendants are entitled to 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 benefits, 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.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Claimant Michael Rife was born on December 9, 1964, making him 55 years old as of the date of the evidentiary hearing. (Hearing Transcript, page 13) Mr. Rife resides in Cedar Rapids, Iowa. (Id.) According to Mr. Rife, he never graduated from high school; however, he did obtain a welding certificate from Kirkwood Community College. (Hr. Tr., p. 16)

Claimant's employment history largely consists of working as a welder for the defendant employer. He worked for the defendant employer from November 18, 2002, to July 24, 2019. (Hr. Tr., p. 14) Any employment history that existed prior to November 18, 2002, is not covered in the evidentiary record.

Claimant has a significant medical history that includes a prior surgical repair of the right rotator cuff. (Joint Exhibit 1, p. 1) Fred Pilcher, M.D. performed a manipulation arthroscopy of the glenohumeral joint with minimal debridement of the subscapularis and supraspinatus, and an arthroscopic subacromial decompression on March 20, 2009. (JE 2, p. 27) The right shoulder surgery was the result of a work-related injury that occurred when claimant pulled on a part that was attached to a crane. (JE 1, p. 14)

After recovering from this first surgery, claimant underwent a functional capacity evaluation (FCE). The FCE results placed claimant in the light to medium physical demand category. (JE 2, p. 22)

The prior work injury resulted in permanent functional impairment. Dr. Pilcher issued an impairment rating of 14 percent to the right arm, or 8 percent to the body as a whole. (JE 5, p. 80) Dr. Pilcher issued permanent restrictions limiting any type of work at shoulder level or above. (JE 5, p. 80) Charles Buck, M.D. opined claimant had an impairment rating of 12 percent to the right shoulder, or 7 percent to the body as a whole. (Ex. B, p. 18) Dr. Buck issued permanent restrictions of no significant use of the right arm above shoulder height. (Id.) Sunny Kim, M.D. issued an impairment rating of 15 percent to the right arm, or 9 percent to the body as a whole. (Ex. 1, p. 7) He recommended permanent restrictions of no lifting more than 40 pounds overhead and avoiding repetitive overhead lifting. (Id.)

Mr. Rife entered into a Full Commutation Settlement with the defendant employer on September 10, 2010. (Ex. B, p. 1) The settlement represented a stipulated permanent disability of 29.6 percent to the body as a whole. (Id.)

In spite of his prior injuries, claimant returned to work for the defendant employer. (See Hr. Tr., pp. 30-31)

Shifting gears to the current injury, claimant sustained an admitted injury while working at P.M. Lattner Manufacturing Company on August 6, 2018. (Hearing Report) While moving a blow-down separator, claimant heard a "pop" and felt a sharp pain in his right shoulder. (Hr. Tr., pp. 19-20) For reference, a blow-down separator is a large steel pipe that apparently requires a significant amount of welding to ensure it will not leak. He reported the injury immediately thereafter and the employer directed claimant to MercyCare South. (Hr. Tr., pp. 20-21)

Claimant first presented for medical treatment on August 7, 2018, with Andrew Patterson, M.D. (JE 3, p. 43) Claimant described the pain he had experienced in his right shoulder following his shift the day prior. After observing marked tenderness in the right anterior and lateral shoulder, Dr. Patterson diagnosed claimant with a right shoulder strain, provided claimant with a sling, and took him off work until his next appointment. (JE 3, p. 44; Hr. Tr., p. 21) Claimant would continue to treat with the physicians at MercyCare South until September 10, 2018. (JE 3, p. 31)

An August 17, 2018, MRI of the right shoulder revealed moderate superior rotator cuff tendinopathy without evidence of a partial or full-thickness tear and mild acromioclavicular joint degeneration. (JE 8, p.127)

Matthew White, M.D. of Physicians' Clinic of Iowa evaluated claimant on October 23, 2018. (JE 5, p. 78) Claimant described his work injury to Dr. White and relayed that the injury was associated with loss of range of motion, weakness, and discomfort. (Id.) He denied experiencing any numbness or tingling. Claimant's prior rotator cuff surgery is discussed, and it is noted that claimant had not been having any issues within his shoulder since that time. (Id.) Dr. White reviewed claimant's diagnostic imaging and diagnosed adhesive capsulitis. (JE 5, p. 79) Dr. White administered a cortisone injection and prescribed physical therapy. (Id.)

When conservative care failed to alleviate claimant's pain, Dr. White recommended and performed an extensive debridement of the labrum and rotator cuff, along with capsular release, and a subacromial decompression. (JE 2, p. 17) The surgery occurred on June 13, 2019. (Id.) Postoperatively, Dr. White diagnosed adhesive capsulitis, partial-thickness rotator cuff tear, partial thickness labral tear, and impingement. (Id.) Dr. White scheduled claimant for additional sessions of physical therapy; however, claimant missed several appointments. Of the appointments claimant did attend, he was hesitant to engage in the exercises. (See JE 4, p. 52)

Claimant ultimately attended an FCE on November 13, 2019, with E3. (Ex. G, p. 2) The FCE was deemed invalid due to claimant "performing inconsistently during a repeated measures protocol." (Id.) Claimant failed 7 of 7 validity criteria during the hand strength assessment. (Id.) Nevertheless, it is noted that claimant met the material handling demands for a Medium demand vocation. (Id.)

Dr. White reviewed the November 13, 2019, report, and recommended a repeat FCE. (Ex. 3, p. 18) Defendants attempted to schedule claimant for a repeat FCE with E3; however, claimant's attorney disagreed with the scheduling of the same. (See Ex. E) Claimant's attorney would later obtain a statement from Dr. White, providing he recommended an FCE be performed by a different provider after receiving the November 13, 2019, FCE report. (Ex. 3, p. 18)

Daryl Short, DPT administered an FCE with claimant on February 29, 2020. (Ex. 2, p. 9) Mr. Short determined that claimant gave consistent effort throughout the evaluation. Claimant demonstrated significant limitations with elevated work, reaching, lifting more than 20 pounds from waist-to-floor, 5 pounds from waist-to-crown, and front carrying up to 10 pounds. (Ex. 2, p. 10) Mr. Short opined that due to claimant's decreased range of motion, strength, and endurance "of his right ankle," he does not meet the capabilities of the sedentary category of physical demand. (Ex. 2, p. 11) Mr. Short recommended claimant limit material and non-material handling activities between shoulder and crown level to a rare basis and no overhead lifting with the right shoulder. (Id.)

Robert Townsend, a Clinical Consultant at Bardavon Health Innovations, LLC, reviewed the functional capacity evaluation completed by Mr. Short and provided a detailed critique with citations to multiple research articles. (Ex. F, p. 1) 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." (Id.) 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. (Id.) 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, and at the time of the FCE, Mr. Rife was 400 pounds. (Ex. F, pp. 5-6) 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)

On April 6, 2020, defendants sent an electronic correspondence to Dr. White. (Ex. 5, p. 23) In response to the e-mail, Dr. White asked defendants if they would like for him to provide an impairment rating based on Mr. Short's FCE report. (Id.) Dr. White did not issue an impairment rating based on Mr. Short's FCE report; however, he eventually opined that he would expect some level of impairment to remain following the procedures he performed on June 13, 2019. (Ex. 3, p. 18)

After being released by Dr. White, claimant sought an independent medical examination (IME), performed by Sunny Kim, M.D., on July 24, 2020. (Ex. 1) As stated earlier, Dr. Kim previously assessed claimant following his February 4, 2009, work injury. Dr. Kim opined that claimant achieved maximum medical improvement (MMI) for his current injury on June 13, 2020. Dr. Kim assessed claimant with 19 percent right upper extremity impairment, or 11 percent of the whole person. (Ex. 1, p. 3) Dr. Kim did not distinguish between the 2009 and 2018 right shoulder injuries when assessing claimant's permanent impairment. Lastly, Dr. Kim recommended claimant avoid lifting more than 20 pounds with his right arm, and no pushing or pulling over 50 pounds. (Id.)

Defendants terminated claimant's employment on July 24, 2019, for excessive absenteeism. (Ex. D, p. 8) Claimant asserts his absenteeism was attributable to his work injury. Claimant applied for and received unemployment benefits following his termination from the defendant employer. (Hr. Tr., p. 47) Claimant subsequently applied for and received social security disability benefits. (See Hr. Tr., p. 41)

The initial disputed factual issue for me to decide is whether claimant is entitled to temporary total disability (TTD), temporary partial disability (TPD), or healing period benefits from July 24, 2019, to June 13, 2020. Claimant asserts entitlement based on the fact he was terminated on July 24, 2019, while working light duty, and he did not achieve maximum medical improvement until June 13, 2020.

Dake Dietrich testified that on June 28, 2019, the employer made an offer of light duty work to claimant in writing. (Hr. Tr., p. 58) The letter is dated June 28, 2019, and can be found at Exhibit D, page 7. The letter does not actually provide what light duty work claimant would be performing for the defendant employer. (See Ex. D, p. 7)

Contrary to defendants' assertion, there is no evidence that claimant refused the light duty work that was offered to him. In fact, the evidence in the record suggests just the opposite. Claimant returned to work on July 1, 2019, as instructed in the June 28, 2019, letter. Mr. Dietrich confirmed the same on cross-examination. (Hr. Tr., p. 60) Mr. Rife was then terminated for excessive unexcused absenteeism on July 24, 2019. (Ex. D, p. 8; Hr. Tr., pp. 58-59) There is no indication that claimant refused an offer of light duty work; rather, he simply refused to sign the June 28, 2019, letter. His actions in returning to work on July 1, 2019, demonstrate an acceptance of light duty work. I find claimant did not expressly or inadvertently refuse an offer of light duty work or suitable employment. I further find claimant did not return to work and was not medically capable of returning to substantially similar employment between July 24, 2019, and June 13, 2020.

The next disputed factual issue is whether the claimant's stipulated August 6, 2018, work injury should be compensated with permanent disability benefits as a scheduled member injury to the right shoulder, or as an unscheduled injury. For reasons that will be discussed in the Conclusions of Law section, I find claimant's injury is properly compensated as a scheduled member, right shoulder injury.

The parties stipulate that the right shoulder injury is a cause of permanent disability. The only physician to assess claimant's permanent disability is Dr. Kim. Dr. Kim placed claimant at MMI on June 13, 2020, and assessed claimant with 19 percent right upper extremity impairment, or 11 percent of the whole person. (Ex. 1, p. 3) Given that the parties stipulate that the right shoulder injury is a cause of permanent impairment, and the fact Dr. Kim is the only physician to assign an impairment rating, I accept Dr. Kim's opinions regarding permanency and find claimant sustained 11 percent whole person impairment as a result of the August 6, 2018, work injury.

The credit owed to defendants, if any, will be addressed in the Conclusions of Law section.

The parties dispute the commencement date of permanent partial disability (PPD) benefits. Rife correctly asserts a commencement date of June 14, 2020. For injuries occurring on or after July 1, 2017, the commencement date for permanent partial disability benefits is the date of maximum medical improvement.

Claimant asserts he is entitled to reimbursement for the fees associated with Dr. Kim's IME. On March 25, 2020, claimant's attorney asked defendants if they would be requesting an impairment rating from Dr. White. (Ex. 5, p. 24) Defendants replied, "The Defendants will request a rating." (Id.) I find claimant properly requested an impairment rating from defendants prior to seeking an impairment rating of his own. It was only after defendants held the impairment rating hostage that claimant obtained his own IME report. Defendants never obtained an impairment rating from an authorized treating physician or an independent expert physician.

Finally, claimant asserts that defendants unreasonably denied or delayed payment of temporary benefits to which he was due. Claimant further asserts that defendants unreasonably denied or delayed payment of weekly benefits to which he was due. Unfortunately, claimant did not raise the issue of penalty benefits on the hearing report or at the evidentiary hearing. Claimant first raised the issue in his post-hearing brief. The issue of penalty benefits must be pled. It was not. As such, I decline to address claimant's entitlement to penalty benefits in this case.

Costs will be discussed in the Conclusions of Law section.

CONCLUSIONS OF LAW

The fighting issue in this case is primarily a legal one. It involves the 2017 legislative changes to Iowa Code Chapter 85 which added the "shoulder" to the list of scheduled members in Iowa Code section 85.34(2) (2019). The specific issue in this

case is whether claimant's disability is a scheduled disability to his "shoulder" under Iowa Code section 85.34(2)(n) or an unscheduled disability under Section 85.34(2)(v).

Since this case was heard, the Commissioner filed two appeal decisions which are controlling on the legal issue. The first was Deng v. Farmland Foods, Inc., File No. 5061883 (Appeal September 29, 2020). In Deng, the Commissioner held that the 2017 amendments to Chapter 85 were ambiguous as to the definition of the shoulder. He therefore undertook an effort to construe the statute by looking to the intent of the legislature. Id. at 5. He ultimately concluded the following:

> I recognize the well-established standard that workers' compensation statutes are to be liberally construed in favor of the worker, as their primary purposes is to benefit the worker. See Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 842 (Iowa 2015) (citations omitted); see also Jacobson Transp. Co. v. Harris, 778 N.W.2d 192, 197 (Iowa 2010); Xenia Rural Water Dist. v. Vegors, 786 N.W.2d 250, 257 (Iowa 2010) ("We apply the workers' compensation statute broadly and liberally in keeping with its humanitarian objective...."); Griffin Pipe Prods. Co. v. Guarino, 663 N.W.2d 862, 865 (Iowa 2003) ("[T]he primary purpose of chapter 85 is to benefit the worker and so we interpret this law liberally in favor of the employee."). This liberal construction, however, cannot be performed in a vacuum. As discussed above, several of the principles of statutory construction indicate the legislature did not intend to limit the definition of "shoulder" under section 85.34(2)(n) to the glenohumeral joint. For these reasons, I conclude "shoulder" under section 85.34(2)(n) is not limited to the glenohumeral joint.
>
> Claimant's injury in this case was to the infraspinatus muscle. As discussed, the infraspinatus is part of the rotator cuff, and the rotator cuff's main function is to stabilize the ball-and-socket joint. As noted by both Dr. Bansal and Dr. Bolda, the rotator cuff is generally proximal to the joint. However, because the rotator cuff is essential to the function of the glenohumeral joint, it seems arbitrary to exclude it from the definition of "shoulder" under section 85.34(2)(n) simply because it "originates on the scapula, which is proximal to the glenohumeral joint for the most part." (Def. Ex. A, [Depo. Tr., 27]). In other words, being proximal to the joint should not render the muscle automatically distinct.
>
> Given the entwinement of the glenohumeral joint and the muscles that make up the rotator cuff, including the infraspinatus, and the importance of the rotator cuff to the function of the joint, I find the muscles that make up the rotator cuff are included within the definition of "shoulder" under section 85.34(2)(n). Thus, I find claimant's injury to her infraspinatus should be compensated as a shoulder under section 85.34(2)(n). The deputy commissioner's determination that claimant's infraspinatus injury is a whole body injury that should be compensated industrially under section 85.34(2)(v) is therefore respectfully reversed.

Deng, at 10-11.

The second is Chavez v. MS Technology, LLC, File No. 5066270 (App. September 30, 2020), which was filed the day after Deng. In Chavez, the Commissioner affirmed his legal holding in Deng and applied his interpretation to the various impairments and disabilities sustained by the claimant in that case:

> Again, as explained in Dr. Peterson's operative note, claimant's subacromial decompression was performed to remove scar tissue and fraying between the supraspinatus and the underside of the acromion. As discussed above, the acromiom [*sic*] forms part of the socket and helps protect the glenoid cavity, and as such, I found it is closely interconnected with the glenohumeral joint in both location and function. And as discussed in Deng, I found the supraspinatus - a muscle that forms the rotator cuff - to be similarly entwined with the glenohumeral joint. Thus, claimant's subacromial decompression impacted two anatomical parts that are essential to the functioning of the glenohumeral joint; in fact, the procedure was actually performed to improve the function of the joint. As such, I find any disability resulting from her subacromial decompression should be compensated as a shoulder under section 85.34(2)(n).
>
> I therefore find none of claimant's injuries are compensable as unscheduled, whole body injuries under section 85.34(2)(v). The deputy commissioner's finding that claimant sustained an injury to her body as a whole is therefore respectfully reversed.

Chavez, at 6.

The key holdings of Deng and Chavez are (1) The definition of a "shoulder" is ambiguous in Section 85.34(2)(n); (2) There is no "ordinary" meaning of the word shoulder; (3) The appropriate way to interpret the statute is to examine at the legislative history; (4) The well-established history of "liberal construction" of workers' compensation statutes is inapplicable here because to do so would be to ignore the legislature's intent to limit compensation to injured workers in the 2017 amendments; and (5) The legislature did not intend to limit the definition of a "shoulder" to the glenohumeral joint. Rather, the legislature intended to include the entwinement of the glenohumeral joint and the muscles that make up the rotator cuff. Deng, at 4-11.

Applying this interpretation of the facts of this case, I find the claimant suffered an injury to his "shoulder" under Iowa Code section 85.43(2)(n). As such, his disability shall be assessed as a scheduled member disability.

For injuries occurring on or after July 1, 2017, Iowa Code § 85.34(2)(x) disallows lay witness testimony and agency expertise from being considered as evidence of impairment. The only evidence to be considered regarding the extent of impairment is impairment ratings under the AMA Guide, Fifth Edition. Iowa Code section 85.34(2)(x)

Having reviewed the record as a whole, I find that the claimant has suffered 19 percent functional impairment to his right shoulder, as assigned by Dr. Kim. As such, claimant is entitled to 19 percent of 400 weeks or 76 weeks of compensation commencing on June 14, 2020, the date of MMI. Iowa Code section 85.34(2) ("Compensation for permanent partial disability shall begin when it is medically indicated that maximum medical improvement from the injury has been reached. . . ")

Defendants seek an apportionment of disability pursuant to Iowa Code section 85.34(7) for the February 4, 2009, and August 6, 2018, injuries. The apportionment statute in effect at the time of the injury is controlling. Brown v. Star Seeds, Inc., 614 N.W.2d 577, 581 (Iowa 2000)

Iowa Code section 85.34(7) provides:

> 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.

Importantly, Iowa Code section 85.34 provides no mechanism for apportioning the loss between the present injury and the prior injury. This is in direct contrast to prior apportionment statutes, which explained how the offset was to be calculated when an employee suffers successive injuries while working for the same employer. Iowa Code section 85.34(7)(b) (2016) (". . . 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.")

With respect to apportionment statutes, the Iowa Supreme Court has previously stated, "If the legislature wanted to require a credit or offset of disability benefits . . . it logically would have prescribed how [the credit or offset of disability benefits] should be determined." Roberts Dairy v. Billick, 861 N.W.2d 814, 822 (Iowa 2015)

In this instance, defendants assert that they are entitled to a credit of 29.6 percent to the body as a whole for Mr. Rife's prior right shoulder injury. However, Iowa Code section 85.34 provides no guidance on apportioning a prior industrial

disability award from a scheduled member impairment rating. Further, defendants provide little to no argument as to why they should receive a credit equivalent to 29.6 percent to the body as a whole. Defendants failed to obtain an impairment rating for the current right shoulder injury or an expert opinion apportioning the two right shoulder injuries.

With this in mind, claimant asserts it would be absurd to provide defendants a credit against a scheduled award for prior industrial disability benefits paid. I agree. If the undersigned accepted defendants' position on the matter, it would be difficult to imagine a scenario in which injured workers with successive shoulder injuries – assuming one of the shoulder injuries occurred prior to the 2017 amendments – would receive any additional compensation.

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. (See Ex. B) Dr. Pilcher issued an impairment rating of 14 percent to the right upper extremity. (JE 5, p. 80) Dr. Buck opined claimant had an impairment rating of 12 percent to the right upper extremity. (Ex. B, p. 18) Dr. Kim issued an impairment rating of 15 percent to the right upper extremity; however, it does not appear as though Dr. Kim's impairment rating was attached to the settlement documents. (Ex. 1, p. 7; see Ex. B, pp. 7-22) Moreover, Dr. Kim did not establish whether the impairment rating assigned in the July 24, 2020, report was in addition to, or inclusive of, the impairment rating assigned in the March 22, 2010, report.

The evidence does not establish that defendants are entitled to a credit for the loss of earning capacity assigned to claimant for his February 4, 2009, work injury under the version of Iowa Code section 85.34(7) that is now in effect.

The next issue to be addressed is claimant's alleged entitlement to additional temporary benefits. Claimant asserts he is entitled to additional healing period benefits. More specifically, claimant asserts he is entitled to additional healing period benefits from July 24, 2019, to June 13, 2020.

Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981).

The central dispute on this issue is whether claimant is entitled to healing period benefits following his termination on July 23, 2019, up through Dr. Kim's placement of claimant at MMI on June 14, 2020. Defendants assert claimant refused an offer of light duty work by failing to sign the offer of light duty work.

I found claimant did not expressly or inadvertently refuse an offer of light duty work or suitable employment on June 28, 2019. There is no indication that claimant refused an offer of light duty work; rather, he simply refused to sign the June 28, 2019, letter. Iowa Code section 85.33(3)(b) does not prescribe the ways in which an employee can accept an offer of light duty work. Claimant's actions in returning to work on July 1, 2019, demonstrate an acceptance of light duty work.

Although not specifically argued by defendants, I find claimant's discharge for excessive absenteeism is not tantamount to a refusal of suitable work. An employee working with restrictions is not entitled to act with impunity toward the employer and the employer's interests. Nevertheless, not every act of misconduct justifies disqualifying an employee from workers' compensation benefits even though the employer may be justified in taking disciplinary action. Franco v. IBP, Inc., File No. 5004766 (App. February 28, 2005).

I found claimant did not return to work and was not medically capable of returning to substantially similar employment between July 24, 2019, and June 13, 2020. As such, I find claimant is entitled to healing period benefits from July 24, 2019, to June 13, 2020. Iowa Code section 85.34(1)

Mr. Rife seeks reimbursement for Dr. Kim's independent medical evaluation charges. Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

The Iowa Workers' Compensation Commissioner has noted that the Iowa Supreme Court adopted a strict and literal interpretation of Iowa Code section 85.39 in Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015). See Cortez v. Tyson Fresh Meats. Inc., File No. 5044716 (Appeal December 2015). The Commissioner has taken a similar strict interpretation of the pre-requisites set forth in Iowa Code section 85.39. See Reh v. Tyson Foods, Inc., File No. 5053428 (Appeal March 2018).

Prior to the court's decision in Young, this agency had held that a release to full-duty work coupled with the failure to expressly opine as to impairment produces an inference that the employer-retained physician did not believe the injured worker sustained permanent impairment related to the injury. Countryman

v. Des Moines Metro Transit Authority, File No. 5009718 (App. March 16, 2006); Kuntz v. Clear Lake Bakery, Inc., File No. 1283423 (Rehearing July 13, 2004).

The supreme court's decision in Young, as well as several recent appeal decisions, support a finding that said inference is no longer applicable to open the door for injured workers to obtain a section 85.39 examination. Instead, there must be a definitive permanent impairment rating rendered by a physician selected by the defendants before the injured worker qualifies for an independent medical evaluation pursuant to Iowa Code section 85.39.

In cases where defendants have denied liability, the commissioner has concluded that medical opinions or reports obtained for the purposes of determining causation, regardless of whether they are obtained from a treating or expert physician, are not the equivalent of an impairment rating for purposes of Iowa Code section 85.39. See Reh, File No. 5053428 (App. March 2018); Soliz v. Farmland Foods, Inc., File No. 5047856 (App. March 2018).

In cases where defendants have accepted liability but have not obtained an impairment rating, the commissioner has concluded that a release to full-duty work and placement at MMI, coupled with a failure to expressly opine as to impairment, is not the equivalent of an impairment rating for purposes of Iowa Code section 85.39. Sainz v. Tyson Fresh Meats, Inc., File No. 5053964 (App. September 2018).

If defendants unduly delay in seeking an examination under section 85.39, or fail to obtain an evaluation of permanent impairment altogether, the supreme court has held that the injured worker's recourse is a request to the commissioner to appoint an independent physician to examine the injured worker and make a report. See Young, 867 N.W.2d 839, 845 (Iowa 2015); Iowa Code section 86.38. In practice, the looming threat of penalty benefits for failure to investigate the extent of permanent impairment, once communicated, should encourage timely action.

If an injured worker wants to be reimbursed for the expenses associated with a disability evaluation by a physician selected by the worker, the process established by the legislature must be followed. This process permits the employer, who must pay the benefits, to make the initial arrangements for the evaluation and only allows the employee to obtain an independent evaluation at the employer's expense if dissatisfied with the evaluation arranged by the employer. Young, at 847 (citing Iowa Code § 85.39)

In this case, no employer-retained physician specifically evaluated the extent of claimant's permanent disability before Dr. Kim's IME took place on July 24, 2020. There is no indication claimant sought authorization from defendants for an 85.39 examination. However, there is evidence that claimant requested an impairment rating or disability evaluation from Dr. White, prior to seeking his own. (Ex. 5, p. 24) Defendants agreed to request an impairment rating on March 25,

2020. (Ex. 5, p. 24) Defendants subsequently requested an impairment rating from Dr. White as early as April 6, 2020; however, no impairment rating was ever provided. (See Ex. 5, p. 23) Defendants essentially held the disability evaluation hostage when claimant refused to present for a repeat FCE with E3. (Ex. 5, p. 22) More specifically, defendants did not want Dr. White "to rely on the FCE done at Short Physical Therapy [when assessing claimant's permanent impairment], given the physical therapist's assessment of restrictions for non-work-related conditions." This, despite the fact Dr. White could have assessed claimant's permanent impairment on any number of other factors, including the surgery performed and claimant's loss of range of motion.

This case is distinguishable from Sainz, as claimant definitively requested a disability evaluation from defendants prior to seeking his own independent evaluation; he was not simply released by his authorized treating physician. Claimant's counsel actively participated in attempting to secure an impairment rating from Dr. White. (See Ex. 3, p. 20) Defendants agreed to obtain an impairment rating but never followed through on the same. Defendants cannot actively withhold an impairment rating or disability evaluation, and then assert claimant is not entitled to reimbursement under Iowa Code section 85.39 because they did not first obtain an impairment rating. This is particularly true given the 2017 amendments emphasis on the need for an impairment rating to assess permanent disability. Iowa Code section 85.34(2)(x)

As such, I conclude claimant met his burden of establishing entitlement to reimbursement of Dr. Kim's independent medical examination fees pursuant to Iowa Code section 85.39. I decline defendants' invitation to reduce the amount of the reimbursement. Dr. Kim opined the cost of the report is reasonable and customary in his geographical area. Dr. Kim did not address or assign impairment to claimant's left shoulder or right ankle.

In his post-hearing brief, claimant asserts a claim for penalty benefits. If penalty is claimed, it should be pled. Allen v. Tyson Fresh Meats, Inc., 913 N.W.2d 275 (Iowa Ct. App. 2018) In Allen v. Tyson Fresh Meats, although the claimant had raised the issue of entitlement to penalty benefits in answers to interrogatories, penalty was not pled, and the court concluded that since 876 IAC 4.2 states that "entitlement to denial or delay benefits provided in Iowa Code Section 86.13 shall be pled," the language was mandatory and required actual pleading of entitlement to penalty benefits.

Claimant's failure to plead entitlement to penalty benefits defeats any claim to the same. As such, this decision will not address claimant's entitlement to penalty benefits.

The final issue for determination is a specific taxation of costs pursuant to Iowa Code section 86.40 and rule 876 IAC 4.33. Claimant requests taxation of the cost of the filing fee ($100.00), the cost of Mr. Short's report ($900.00), and the cost of Dr. White's report ($1,000.00).

The cost of the filing fee is appropriate and assessed pursuant to 876 IAC 4.33(7).

Agency rule 4.33(6) permits the assessment of the reasonable costs of "obtaining no more than two doctors' or practitioners' reports." The agency has previously determined this administrative rule permits assessment of the cost of FCE expenses and vocational expert reports. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009); Pastor v. Farmland Foods, File No. 5050551 (Arb. April 2016); Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010). However, the Iowa Supreme Court has held that only the cost of drafting the expert's report is permissible in lieu of testimony. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 845-846 (Iowa 2015).

Claimant's Motion for Taxation of Costs provides that Mr. Short attributed $350.00 to the cost of drafting the FCE report. This is the only portion of the FCE report that is reimbursable. Claimant's motion further provides Dr. White charged $1,000.00 for the cost of a telephone conference and subsequent report. I find the costs of Mr. Short's FCE report and Dr. White's consultation and report are appropriate and assessed pursuant to 876 IAC 4.33(6).

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay healing period benefits from February 25, 2019, through June 13, 2020, at the stipulated weekly rate of five hundred four and 58/100 dollars ($504.58).

Defendants shall pay claimant seventy-six (76) weeks of permanent partial disability benefits commencing on June 14, 2020, at the stipulated weekly rate of five hundred four and 58/100 dollars ($504.58).

Defendants shall pay accrued weekly benefits in a lump sum together with interest payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent, as required by Iowa Code section 85.30.

Defendants shall reimburse claimant for Dr. Kim's independent medical evaluation pursuant to Iowa Code section 85.39 in the amount of two thousand two hundred fifty and 00/100 dollars ($2,250.00).

Defendants shall pay costs of one thousand four-hundred fifty and 00/100 dollars ($1,450.00).

Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 20th day of August, 2021.

MICHAEL J. LUNN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Anthony Olson (via WCES)

Laura Ostrander (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.