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

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**MICHAEL RIFE,**  
**Petitioner-Appellant,**

**vs.**

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

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**APPEAL FROM THE IOWA COURT OF APPEALS**  
**DECISION ISSUED JUNE 7, 2023**

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**RESPONDENTS'-APPELLEES' RESISTANCE TO**  
**APPLICATION FOR FURTHER REVIEW**

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### II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

#### A. Standard of Review.

Iowa Code § 17A.19

Evenson v. Winnebago Indus., Inc., 881 N.W.2d 360 (Iowa 2016)

IBP, Inc. v. Burress, 779 N.W.2d 210 (Iowa 2010)

Meyer v. IBP, Inc., 710 N.W.2d 213 (Iowa 2006)

**B. The Supreme Court Should Affirm the Court of Appeals Decision that Found the Claimant not Entitled to Reimbursement for his Independent Medical Evaluation.**

Iowa Code section 85.39(2)

Des Moines Area Reg'l Transit Auth. v. Young, 856 N.W.2d 383 (Iowa Ct. App. 2014)

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

Iowa Code section 85.34(7)

Roberts Dairy v. Billick, 861 N.W.2d 814, 820 (Iowa 2015)

### **III. STATEMENT OF THE CASE**

Michael Rife filed a Petition alleging an injury to the shoulders, torso, and body as a whole on August 6, 2018. Pet., p. 1; App. p. 5. P.M. Lattner Manufacturing Company accepted liability for the right shoulder injury, but denied liability for the other injuries. Ans., p. 2; App. p. 8. The case proceeded to Arbitration Hearing on September 21, 2020, before Deputy Commissioner Michael Lunn. Hrg. Rep., p. 1; App. p. 10.

Deputy Lunn issued an Arbitration Decision on August 20, 2021, and found the Claimant entitled to temporary total disability benefits from February 25, 2019, through June 13, 2020. Arb. Dec., p. 14; App. p. 283. The Deputy awarded 76 weeks of permanent partial disability and ordered the Defendants to reimburse the Claimant for the full cost of Dr. Kim's

independent medical evaluation and \$1,450 in costs. Arb. Dec., p. 14; App. p. 283. The Deputy found the Defendants were not entitled to any credit for the settlement paid for the Claimant's previous right shoulder injury. Arb. Dec., p. 10; App. p. 279. The Defendants appealed to the Commissioner. Not. of App., p. 1.

On January 21, 2022, the Commissioner affirmed the award of indemnity benefits, costs, and reimbursement for Dr. Kim's medical evaluation. App. Dec., p. 4; App. p. 288. The Commissioner found the Defendants were not entitled to a credit for the settlement paid for the Claimant's previous right shoulder injury. App. Dec., p. 3; App. p. 287. The Defendants filed a Petition for Judicial Review with the Iowa District Court for Polk County on February 9, 2022. Not. of Pet. for Jud. Rev. p. 1; App. p. 290. On August 15, 2022, Judge Michael Huppert issued a Ruling on Petition for Judicial Review and found the Claimant was not entitled to reimbursement for his independent medical evaluation. Rul. on Pet. for Jud. Rev., p. 24; App. p. 315. The Judge concluded the Commissioner's decision that the Petitioners were "not due a credit [for the full commutation settlement] is erroneous as it was based on flawed interpretation of Iowa Code 85.34(7), misstated caselaw, and failure to take consider[ation of] the full commutation agreement." Rul. on Pet. for Jud. Rev., p. 24; App. p. 315.

The Claimant filed a Notice of Appeal with the Iowa Supreme Court. Not. of App., p. 1; App. p. 318. The Iowa Court of Appeals issued a decision on June 7, 2023, affirming the District Court Ruling. Court of Appeals Decision, p. 8.

#### **IV. STATEMENT OF THE FACTS**

Prior to the accepted right shoulder injury that occurred on August 6, 2018, Mr. Rife underwent a right shoulder rotator cuff repair on March 20, 2009, to repair a partial tear of the infraspinatus tendon caused by a previous injury at P.M. Lattner Manufacturing Company. Ex. JE 1, pp. 1, 14; App. pp. 32, 45. Dr. Fred Pilcher issued an impairment rating of 14% to the right arm, or 8% to the body as a whole. Ex. JE 5, p. 80; App. p. 111. On May 25, 2010, Dr. Charles Buck issued an impairment rating of 12% to the right shoulder, or 7% to the body as a whole. Ex. B, p. 18; App. p. 226. On August 22, 2010, Dr. Sunny Kim issued an impairment rating of 15% to the right arm, or 9% to the body as a whole. Ex. 1, p. 7; App. p. 181.

Mr. Rife and his attorney entered into a Full Commutation Settlement with P.M. Lattner Manufacturing Company on September 10, 2010. Ex. B, p. 1; App. p. 209. The settlement consisted of \$40,000 in addition to permanent partial disability benefits for the impairment rating the Claimant already received; it represented a stipulated permanent disability of 29.6% to

the body as a whole. Ex. B, p. 1; App. p. 208. As part of the settlement, the employer received a credit for permanent impairment paid against any future injuries to the same shoulder. Hrg. Tr., p. 59; App. p. 28.

Mr. Rife reinjured his right shoulder at work on August 6, 2018. Ex. JE 5, p. 71; App. p. 102. On June 13, 2019, Dr. Matthew White performed a right shoulder arthroscopic extensive debridement of the labrum and rotator cuff, a capsular release, and a subacromial decompression. Ex. JE 2, p. 17; App. p. 48. Dr. White noted Mr. Rife “had an FCE [functional capacity evaluation] scheduled and did attend, but this was found to be invalid.” Ex. JE 5, p. 61; App. p. 92. After Dr. White observed Mr. Rife generated “failure of 7/7 validity criteria” in the functional capacity evaluation, he was “not able to provide long-term recommendations in regards to work restrictions and long-term function.” Ex. JE 5, p. 62; App. p. 93. Dr. White recommended a “repeat FCE done with full and consistent effort to better determine long-term function and work restriction.” Ex. JE 5, p. 62; App. p. 93.

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

3, p. 18; App. p. 193. After the Defendants notified Claimant's Counsel that Dr. White required a repeat functional capacity evaluation with E3 Work Therapy to issue an impairment rating because he could not rely on the evaluation done at Short Physical Therapy, given the therapist's assessment of restrictions for non-work-related conditions, the Claimant refused to attend a repeat evaluation. Ex. 5, p. 22; Ex. E, p. 2; App. pp. 196, 244.

The Claimant underwent a second independent medical evaluation performed by Dr. Sunny Kim on July 24, 2020, and he issued an impairment rating of 19% to the right upper extremity. Ex. 1, pp. 1, 3; App. pp. 176, 178. Dr. Kim did not address what part of the 19% impairment rating was apportioned to the Claimant's previous right shoulder surgery despite his previous issuance of a permanent impairment rating for Mr. Rife's right shoulder on August 22, 2010. Ex. 1, pp. 1, 6; App. pp. 176, 181.

## **V. ARGUMENT**

### **A. Standard of Review**

The Iowa Supreme Court reviews the Commissioner's legal findings for the correction of errors at law. IBP, Inc., v. Burress, 779, N.W.2d 210, 213 (Iowa 2010). The Court is bound by the Commissioner's fact findings as long as substantial evidence supports the findings. Evenson v. Winnebago Indus., Inc., 881 N.W.2d 360, 333 (Iowa 2016). The Iowa

Supreme Court applies the same standard of review utilized by the District Court, that if “the claim of error lies with the *ultimate conclusion* reached, then the challenge is to the agency’s application of law to the facts, and the question on review is whether the agency abused its discretion by, for example, employing wholly irrational reasoning or ignoring importation and relevant evidence.” Meyer v. IBP, Inc., 710 N.W.2d 213, 2019 (Iowa 2006) (citing Iowa Code § 17A.19(10)(i), (j)).

**B. The Supreme Court Should Affirm the Iowa Court of Appeals Decision that Found the Claimant not Entitled to Reimbursement for his Independent Medical Evaluation.**

The Appellees-Respondents preserved error on the issue of whether the Claimant was entitled to reimbursement for his independent medical evaluation because this issue was raised in the Petitioners’ Brief filed with the District Court, and the District Court addressed the issue of independent medical evaluation reimbursement in the Ruling on Petition for Judicial Review. Rul. on Pet. for Jud. Rev., p. 24; App. p. 315. In the Petitioners’ Brief to the Iowa District Court, they cited Iowa Code section 85.39(2), and argued “the District Court should find the Defendants are not liable for the *full cost* of Dr. Kim’s independent medical evaluation” (emphasis added). Therefore, the Appellees-Respondents maintained the Claimant was not entitled to reimbursement for any part of Dr. Kim’s evaluation.



Deputy Lunn ordered the Defendants to reimburse the Claimant for the full \$2,250 cost of Dr. Kim's evaluation and \$1,450 in costs; the Commissioner affirmed this award. Arb. Dec. p. 14; App. Dec. p. 4; App. pp. 283, 288. Iowa Code section 85.39(2) states the "employer is not liable for the cost of such an examination if the injury for which the employee is being examined is determined not to be a compensable injury." In the event the Claimant is awarded any benefits, the "determination of the reasonableness of a fee . . . shall be based on the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination is conducted." Iowa Code section 85.39(2). Dr. Kim's evaluation and Mr. Short's evaluation both addressed a non-work-related injury to the right ankle that was not alleged in the Petition. Ex. 1, p. 3; Ex. 2, p. 10; App. pp. 178, 185. Therefore, the Defendants should not be assessed the cost of any part of the evaluations that addressed the right ankle injury, much less the cost of the entire evaluations.

The Claimant produced no evidence of the typical fees charged by medical providers to perform impairment ratings; instead, he only produced Dr. Kim's invoice, and it does not specify what portion of the bill was to calculate the impairment rating. Ex. 1, p. 3; App. pp. 178. Because the Defendants fully accepted liability for the right shoulder injury, there was no

need for Dr. Kim to review all the medical records to issue an impairment rating; instead, he could have issued a rating based on the surgical report, a review of his previous evaluation in order to appropriately apportion the rating, and a physical evaluation of the Claimant. Therefore, the District Court and the Iowa Court of Appeals appropriately found the Defendants were not liable for the full cost of Dr. Kim's evaluation. Rul. on Pet. for Jud. Rev., p. 24; App. p. 315.

The Iowa District Court found Mr. Rife's "refus[al] to . . . attend petitioners requested FCE . . . was in direct violation of section 85.29" because the Iowa Code states that an employee shall submit for evaluation as often as reasonably requested. Rul. on Pet. for Jud. Rev., p. 9; App. p. 300. Des Moines Area Reg'l Transit Auth. v. Young, 856 N.W.2d 383, 843 (Iowa Ct. App. 2014), aff'd 867 N.W. 2d 839 (Iowa 2015). Furthermore, the District Court found the Claimant's pursuit of an independent medical evaluation with Dr. Kim was "also outside the prescribed process in section 85.39" because the Code section does not permit reimbursement for an evaluation unless the Claimant first obtains an impairment rating. Rul. on Pet. for Jud. Rev., p. 10; App. p. 301.

The District Court correctly concluded the Commissioner's reasoning in awarding reimbursement for Dr. Kim's evaluation "would seemingly

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

**C. The Supreme Court Should Affirm the Iowa Court of Appeals Decision Requiring Apportionment of Benefits Pursuant to Iowa Code Section 85.34(7).**

Deputy Lunn concluded the Claimant had 19% permanent partial disability for his right shoulder injury. Arb. Dec. p. 9; App. p. 278. The Deputy also concluded the Defendants were not entitled to any credit for the \$40,000 settlement representing 29.6% to the body as a whole that they paid

Mr. Rife for his previous right shoulder injury. Arb. Dec. p. 10; App. p. 279.

The Commissioner affirmed these findings. App. Dec. p. 4; App. p. 288.

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

Iowa Code section 85.34(7) states:

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

employer is not liable for compensating an employee's preexisting disability that arose out of and in the course of employment with a different employer or from causes unrelated to employment.

Deputy Lunn opined Iowa Code section 85.34(7) "provides no mechanism for apportioning the loss between the present injury and the prior injury." Arb. Dec. p. 9; App. p. 278. He also found "Iowa Code section 85.34 provides no guidance on apportioning a prior industrial disability award from a scheduled member impairment rating." Arb. Dec. pp. 9 – 10; App. pp. 278 – 279. The Deputy found because Iowa Code section 85.34(7) did not specify how he should apportion the two right shoulder injuries, the statute did not exist for the purposes of this claim. Arb. Dec. pp. 9 – 10; App. pp. 278 – 279. Iowa Code section 85.34(7) does not state it does not apply to shoulder injury claims; instead, it states the employer is not liable to compensate an injured employee to "the extent that the employee's preexisting disability has already been compensated under this chapter." Workers' compensation settlements are governed by Iowa Code section 85.35. The full commutation settlement states it was entered into under "Chapter 85, 85B, 86 and 87[.]" Ex. B, p. 1; App. p. 209. Therefore, pursuant to Iowa Code section 85.34(7), the Claimant was already compensated for his pre-existing right shoulder disability under chapter 85, and the Respondents-Appellees are entitled to a credit for that compensation.

The Iowa Court of Appeals agreed with this contention. Iowa Ct. App. Dec., p. 10.

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

Instead of granting a logically calculated credit, the Commissioner stated, “I agree with the [D]eputy [C]ommissioner that [D]efendants could arguably be entitled to a credit based solely upon the functional impairment attributable to the claimant’s preexisting shoulder injury—a credit for oranges against an award for oranges.” App. Dec. p. 3; App. p. 287. He concluded the Defendants “failed to prove that amount” because they “did not identify which impairment rating the parties adopted or agreed upon

when reaching their settlement[,]” apparently faulting the Defendants for not predicting the 2017 legal changes that did not exist at the time the full commutation was approved. App. Dec. p. 3; App. p. 287.

Dr. White opined he was unable to provide an impairment rating for Mr. Rife’s right shoulder injury because of the invalid result of his November 13, 2019, functional capacity evaluation. Ex. 3, p. 18; App. p. 193. Dr. White also observed he had “not been able to obtain what I would believe to be a truly representative exam in clinic.” Ex. 3, p. 18; App. p. 193. The Deputy stated the “Defendants essentially held the disability evaluation hostage when claimant refused to present for a repeat FCE with E3.” Arb. Dec. p. 13; App. p. 282. This finding is incorrect, as the physician opined he could not issue the rating without the repeat functional capacity evaluation; the Defendants had no control over Dr. White’s decision not to issue a rating. Ex. 3, p. 18; App. p. 193. The District Court agreed it would be inappropriate for the “respondent’s preference [to] initiate and guide the process instead of respondent following the process outlined by the legislature and reinforced in Iowa caselaw.” Rul. on Pet. for Jud. Rev., p. 12; App. p. 306.

Because Mr. Rife’s refusal to cooperate with Dr. White’s recommendations resulted in his inability to issue an impairment rating, this

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

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

The District Court noted that although the 2017 amendments "did reclassify shoulder injuries as a scheduled member, the court also note[d] the language against double compensation in section 7 remained." Rul. on Pet.



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

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

Commissioner omitted part of the case it cited in support of awarding no credit, as the Commissioner applied a case involving injuries with different employers to the current case involving injuries to the same body part with the same employer. Rul. on Pet. for Jud. Rev., p. 18; App. p. 309. The District Court therefore concluded the “[C]ommissioner’s conclusion [awarding no credit] is not supported in caselaw.” Rul. on Pet. for Jud. Rev., p. 18; App. p. 309. Because the District Court and the Iowa Court of Appeals found the Defendants are entitled to a credit for the full commutation settlement, the Appellees-Respondents ask this Court to affirm the Iowa Court of Appeals Decision remanding the case to the Commissioner to calculate a credit.

## **VI. CONCLUSION**

P.M. Lattner Manufacturing Company and Accident Fund Insurance Company established the Iowa Court of Appeals appropriately found Mr. Rife was not entitled to reimbursement for his independent medical evaluation. The Appellees-Respondents also established the Iowa Court of Appeals appropriately required apportionment of benefits. Therefore, this Court should affirm the Iowa Court of Appeals Decision in its entirety.

WHEREFORE, the Appellees-Respondents pray that this Court affirm the Iowa Court of Appeals Decision.

**VII. REQUEST FOR NON-ORAL SUBMISSION**

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

**VIII. CERTIFICATE OF COST**

Appellees-Respondents certify that the cost of electronically reproducing the Resistance to Application for Further Review was \$0.00.

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

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

this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 point font and contains 4,313 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1) or

this brief has been prepared in a monospaced typeface using \_\_\_\_\_ in \_\_\_\_\_ and contains \_\_\_\_\_ lines of text, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(2).

/s/ Laura J. Ostrander  
Signature

June 20, 2023  
Date

## X. CERTIFICATE OF SERVICE

The undersigned certifies a copy of Appellees-Respondents' Proof Brief was served on the 20<sup>th</sup> day of June, 2023, upon the following persons and upon the Clerk of the Iowa Supreme Court via electronic filing.

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