IN THE SUPREME COURT OF IOWA

APPEAL NO. 23-1402

DEN HARTOG INDUSTRIES and
WEST BEND MUTUAL INSURANCE COMPANY,

Appellants,

v.

TYLER DUNGAN,

Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
HONORABLE JEANNIE VAUDT
Polk County No. CVCV065006

APPELLANT'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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ROUTING STATEMENT

The Iowa Supreme Court should retain this matter. It presents a substantial issue of first impression: interpretation of a recently amended provision of the Iowa Code. Iowa R. App. P. 6.1101(2)(c). Additionally, this case presents an opportunity for enunciating or changing legal principles; namely, interpretation of the 2017 legislative changes in Iowa's statutory workers' compensation system. Iowa R. App. P. 6.1101(2)(f). Lastly, issues of broad public importance are implicated by the decision. Iowa R. App. P. 6.1101(2)(d). The decision substantially affects a large subset of employers and injured workers and the overall handling of workers' compensation claims in the State of Iowa.

STATEMENT OF THE CASE

This is an appeal from a final agency decision in a workers' compensation contested case proceeding. Tyler Dungan ("Claimant") filed an Original Notice and Petition with the Iowa Workers' Compensation Commissioner on March 12, 2021, alleging injury to his back occurring on July 24, 2019. (Petition p. 1, App. 6). Den Hartog Industries is the named employer, and West Bend Mutual Insurance Company is the named insurance carrier ("Defendants"). (Petition p. 1, App. 6). Defendants filed an Answer on

April 6, 2021, accepting liability for the alleged injury. (Def. Answer, App. 7).

An arbitration hearing was held on March 10, 2022, before Deputy Workers' Compensation Commissioner Ben Humphrey. (Arb. Dec. p. 1, App. 27). Among the issues were the nature and extent of Claimant's permanent disability, including whether he was entitled to functional disability compensation versus industrial disability compensation. (Arb. Dec. p. 1, 15, App. 27, 41). The Arbitration Decision was entered on September 30, 2022. (Arb. Dec. p. 1, App. 27).

Deputy Humphrey stated that entitlement "hinges on the interpretation of section 85.34(2)(v)." (Arb. Dec. p. 15, App. 41). The Deputy opined that the section created a "mandatory bifurcated litigation process" which is only triggered when a defendant-employer terminates a claimant after an award or agreement for settlement. (Arb. Dec. p. 16–17 App. 42–43). Deputy Humphrey determined that the "process" of section 85.34(2)(v) is not required when a claimant quits employment prior to hearing. Thus, since Dungan had voluntarily quit, he was awarded industrial disability rather than functional disability compensation. (Arb. Dec. p. 21, App. 47). Claimant was awarded fifteen percent industrial disability. (Arb. Dec. p. 21, App. 47).

The employer and insurance carrier filed a Notice of Appeal on October 11, 2022. (Notice of Appeal, App. 51). On January 13, 2023, the Workers' Compensation Commissioner issued an Appeal Decision, affirming the Deputy's decision in its entirety; no additional analysis was provided by the Commissioner. (App. Dec., App. 64).

On January 30, 2023, the employer and insurance carrier filed a Petition for Judicial Review in Polk County District Court. (Pet. for Jud. Rev., App. 67). Oral argument was held on June 9, 2023. (Order on Jud. Rev. p. 1, App. 108). The Judicial Review Decision by Judge Vaudt was entered on August 8, 2023, affirming the final agency decision in its entirety. (Order on Jud. Rev. p. 8, App. 115). The Appellants filed a timely Notice of Appeal to the Iowa Supreme Court on August 30, 2023, from all adverse rulings below. (Notice of Appeal, App. 117).

STATEMENT OF FACTS

Tyler Dungan was 23 years old on the date of injury and 24 years old at the time of Hearing. He is a high school graduate of 2016. (Tr. 15, App. 223). Claimant's employment history includes restaurant staff, laser technician, forklift operator, loader, and both a stick and MIG welder. (Tr. 16, 51, App. 224, 257).

Den Hartog Industries manufactures varying sizes of plastic containers, such as tanks. (Tr. 20, App. 228). Claimant began working for Den Hartog on January 22, 2018. (Tr. 18, 41, App. 226, 249; Ex. D-26, App. 176). At the time of hire he earned $14.50 per hour, and at the time of injury he was earning $15.16 per hour. (Ex. D-26, App. 176). He was employed as an outdoor loader/material handler. (Tr. 18–19, App. 226–227). This position involved loading product orders onto trailers. (Tr. 21–22, App. 229–230).

Claimant testified that on July 24, 2019, he was loading a tank; these are generally secured with hoops placed over the tank. (Tr. 21, App. 229). While lifting a hoop weighing approximately 70 pounds, the hoop got hooked on the trailer and Claimant experienced pain in his mid and low back that went down his leg and up toward his neck. (Tr. 24–25, App. 232–233).

A lumbar MRI was performed on September 27, 2019, showing impingement of the L5 nerve root in the L4-5 bilateral subarticular recess and disc protrusion. (JE 6, App. 134-135). Physician Assistant Ramos recommended an L4-L5 epidural steroid injection. (JE 5-5, App. 123). That procedure was performed on October 25, 2019. (JE 7-3, App. 136). The injection provided temporary relief, but symptoms returned, radiating down into his right leg to his shin. He had no left leg symptoms, nor lower extremity weakness. (JE 5-6, App. 124). PA Ramos recommended another L4-L5

epidural steroid injection as well as physical therapy, and placed Claimant on a 40-pound lifting restriction; a second injection was performed on February 24, 2020. (JE 5-7, App. 125; JE 9-7, App. 139).

Claimant reported to Dr. Klopper on March 26, 2020 that the epidural injection was very helpful and that he had no leg pain. (JE 5-9, App. 127). Dr. Klopper recommended holding off on another epidural steroid injection. (JE 5-9, App. 127). It was Dr. Klopper's opinion that his patient was not yet at MMI. He continued the 40-pound lift restriction. (JE 5-9, App. 127). On April 3, 2020, Mr. Dungan contacted CNOS and advised that he had gone to the chiropractor and physical therapy, did some stretching, and "feels a lot better now." (JE 5-10, App. 128).

Immediately following the July 24, 2019 injury, Claimant missed work on Thursday and Friday, July 25 and 26, as well as Monday July 29, 2019. (Ex. D-11, App. 161). He returned to work on Tuesday, July 30. (Ex. D-11, App. 161). He continued in his regular position as a loader, even while under a 40-pound weight restriction. (Tr. 41–42, App. 249-250). Notwithstanding the few days following the injury and medical appointments, Claimant returned to his regular hours. (Ex. D-27, App. 177).

On the date of injury Mr. Dungan was earning $15.16 per hour. (Ex. D-28, App. 178). Starting January 22, 2020, Claimant's pay at Den Hartog

increased to $15.50 per hour. (Ex. D-28, App. 178; Tr. 43, App. 251). On June 1, 2020, Claimant voluntarily resigned from his employment with Den Hartog, to be effective June 12, 2020. (Ex. D-25; App. 175). He quit due to a relocation and need for a job closer to his new home. (Ex. D-26, App. 176; Tr. 45, App. 253). Up until the time of his resignation, Claimant had been working his normal pre-injury position and hours, including overtime. (Ex. D-27; App. 177).

The Claimant earned greater wages and salary at Den Hartog after his work injury than he was earning before his injury. In 2018 he earned $34,620.00, an average of $665.77 per week. (D-26, App. 176). Pre-injury, from January 4, 2019 through July 19, 2019, the Claimant earned $20,126.19—an average weekly income of $694.01. (Ex. D-27, App. 177). Post-injury, commencing July 25, 2019 through December 27, 2019, (23.143 weeks) the Claimant earned an average of $748.26 per week. (Ex. D-27; App. 177). From January 3, 2020 through June 5, 2020—Mr. Dungan's last full week of work—he earned $16,436.93. (Ex. D-27, 28, App. 177, 178). That sum equates to $714.65 per week over the 23 weeks worked.

Before resigning at Den Hartog, Claimant had secured a job at Meridian. (Tr. 35, App. 243; Ex. D-25, App. 175). Meridian employed Mr. Dungan as a tradesman—a production welder. (Tr. 43, 47, App. 251, 255).

His starting pay at Meridian was $15.76 per hour, which is 26 cents per hour more than he was earning at the time of his resignation at Den Hartog and 67 cents per hour more than he was earning at the time of injury. (Ex. D-25, App. 175; Ex. H-1, App. 201; Tr. 43, 44, App. 251-252). The Claimant received three pay increases within 30 days after starting his employment at Meridian. As of September 4, 2020, Mr. Dungan was earning $17.48 per hour. (Ex. H-5, App. 205). He worked 12 hours per day with occasional overtime. (Tr. 47, App. 255; Ex. H, App. 201–217).

On June 5, 2020, before starting his job at Meridian, Claimant underwent a "physical capacity profile" at Meridian's request. (Ex. H-7, App. 207; Tr. 46, App. 254). He performed in the "heavy work" category, having the ability to exert 50 to 100 pounds of force occasionally, 25 to 50 pounds of force frequently, and 10 to 20 pounds of force constantly. (Ex. H-7, App. 207). On June 12, 2020, Claimant underwent another epidural injection and on June 13, 2020 he returned to Dr. Klopper reporting that he was doing well and had started his new job at Meridian. He reported to Dr. Klopper that he had no leg pain and that his back pain had responded well to the epidural steroid injection. (JE 7-25, App. 137; JE 5-14, App. 129). The Claimant requested another epidural. (JE 5-14, App. 129). This was administered on September 14, 2020 but at the L5-S1 level as opposed to the L4-5 level. (JE 8-1, App.

138). At the time of follow up on September 24, 2020, Dr. Klopper recommended another injection at the L4-5 level with an anticipated follow up two weeks post-injection; Claimant did not undergo this recommended treatment. (JE 5-18, App. 130).

Mr. Dungan had no issue completing the work at Meridian. (Tr. 47, App. 255). He testified that there were some language barriers with co-workers, and he did not otherwise enjoy the position. (Tr. 47, App. 255). Claimant quit his job at Meridian and began working for Champion Ford for a short period. (Tr. 47, App. 255). In February of 2021, Claimant secured a job at GOMACO as a production welder. (Tr. 48, App. 256). He returned to Dr. Klopper on February 8, 2021 requesting a medical release after GOMACO expressed concern over the open workers' compensation case. (Tr. 54–55, App. 260–261; JE 5-21, App. 131). Radicular symptoms had resolved; Claimant was placed at MMI and released to return to work without restriction. (JE 5-21, App. 131).

At GOMACO, Mr. Dungan's starting pay was $17.00 per hour. (Tr. 48, App. 256). As of December 2021, he earned $20.15 per hour. (Ex. G-21, App. 199; Tr. 48, App. 256). He consistently works overtime hours. (Tr. 48, App. 256; Ex. G, App. 179–200). At the time of Hearing, Claimant was still employed with GOMACO. (Tr. 48, App. 256).

On July 15, 2021, Respondent underwent a repeat MRI of the lumbar spine. This revealed the right-sided disc herniation at L4-5 had resolved. (Jt. Ex. 5-25, App. 133). Orthopedic surgeon Trevor Schmitz evaluated the Respondent on November 19, 2021. (Ex. I-22, App. 218). Dr. Schmitz noted the Respondent's preexisting history of low back pain and opined that Mr. Dungan sustained a temporary injury of underlying degenerative changes. He stated: "I do not feel as though he had any significant material aggravation from the alleged work injury . . . I feel [the back] may have been temporarily aggravated." (Ex. I-27, App. 219). Dr. Schmitz agreed with Dr. Broghammer that pursuant to the *Guides to the Evaluation of Permanent Impairment* ("AMA Guides"), 5th Edition, the Respondent was entitled to 5% impairment due to a radiculopathy that improved with conservative care. (Ex. I-27, App. 219). Consistent with the opinion of Dr. Klopper and Dr. Broghammer, Dr. Schmitz stated that no work restrictions were reasonable or appropriate. (Ex. I-27, App. 219).

Dr. Bansal performed an independent medical evaluation (IME) on January 31, 2022 at Claimant's request. Dr. Bansal assigned 8% impairment to the body as a whole based on an L4-L5 disc protrusion with radiculopathy. (Ex. 1-10, App. 149). A 30-pound lift restriction and no frequent bending or twisting were recommended by Dr. Bansal. (Ex. 1-11, App. 150).

On March 30, 2022 Dr. Broghammer provided a supplemental report after reviewing the IME report of Dr. Bansal. Dr. Broghammer agreed with Dr. Klopper that Claimant sustained 5% functional impairment after reviewing the July 2021 MRI showing resorption of the L4-L5 disc protrusion and noting that Mr. Dungan no longer experienced radiculopathy. (Ex. J-4, App. 220). Specifically, 5% was determined from Table 15-3 under II and DRE category of the AMA Guides. (Ex. J-4, App. 220). Dr. Broghammer—like Dr. Schmitz and Dr. Klopper—further opined that no permanent restrictions were appropriate: "Dr. Klopper provided the worker a full and unrestricted release to return to regular and customary activities without restrictions or limitations. In this regard I would agree with the opinions of the treating surgeon." (Ex. J-4, App. 220).

ARGUMENT

The plain language of Iowa Code section 85.34(2)(v) directs compensation be based upon Claimant's functional impairment. Post-injury, Den Hartog "offered work for which the [Claimant] would receive the same or greater salary, wages, or earnings than [he] received at the time of injury..." Iowa Code §85.34(2)(v) (2017). The record is clear that Mr. Dungan returned to work at the same rate of pay and hours, and subsequently received a raise with Den Hartog and higher paying employment with other employers. Given

this set of facts, statutory text directs that Mr. Dungan "*shall* be compensated based only upon . . . functional impairment resulting from the injury, and not in relation to . . . earning capacity." *Id.* (emphasis added). This statutory direction is not affected by a voluntary resignation. As such, the award of industrial disability compensation—especially an unwarranted fifteen percent—rather than functional impairment is in direct contradiction to statute and is reversible error.

I. THE DISTRICT COURT'S INTERPRETATION AND APPLICATION OF IOWA CODE SECTION 85.34(2)(v) WAS AN ERROR AT LAW, AS THE LEGISLATURE DIRECTS FUNCTIONAL DISABILITY COMPENSATION, RATHER THAN INDUSTRIAL, FOR MR. DUNGAN BECAUSE HE RETURNED TO WORK WITH GREATER EARNINGS.

The Appellants have preserved error on this issue by raising it in their Post Hearing Brief to the Deputy, their Appeal Brief to the Commissioner, and during oral argument and briefing to the district court. (Def. Post Hearing Brief, App. 14-26; Def. Appeal Brief, App. 53-63; Dist. Ct. Tr., App. 85-107; Jud. Rev. Brief, App. 69–84). Each Notice of Appeal filed by the employer and insurance carrier cited the adverse ruling of industrial disability. (10/11/22 Notice of Appeal, App. 51; 8/30/23 Notice of Appeal, App. 117).

This Court is guided by the provisions of Chapter 17A when comparing the district court's review of agency decisions with its own. *See* Iowa Code §

17A.19 (2017). A decision should be reversed or modified if a party is prejudiced by one of the enumerated grounds, including when a decision is "[b]ased upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency." *Id.* § 17A.19(10)(c). It is well established that interpretation of Iowa's workers' compensation statutes and related case law has not been clearly vested in the discretion of the agency. *Ramirez Trujillo v. Quality Egg, L.L.C.*, 878 N.W.2d 759, 769–70 (Iowa 2016); *Neal v. Annett Holdings, Inc*., 814 N.W.2d 512, 518 (Iowa 2012); *Meyer v. IBP, Inc*., 710 N.W.2d 213, 219 (Iowa 2006). Thus, this Court reviews for correction of errors at law and does not defer to the Commissioner's interpretation. *Chavez v. MS Tech. LLC*, 972 N.W.2d 662, 666 (Iowa 2022) (citing *Brewer-Strong v. HNI Corp.*, 913 N.W.2d 235, 242 (Iowa 2018)).

This matter can be resolved on the face of the statute—section 85.34(2)(v)— where all statutory interpretation begins. *See Doe v. State*, 943 N.W.2d 608 (Iowa 2020) ("Any interpretive inquiry thus begins with the language of the statute at issue."). If the statutory text is plain and clear, the court will not search for meaning beyond the express terms. *Id.* Subsection 85.34(2)(v) contains four sentences. While they are related and can work

together, not every sentence must apply for the subsection to hold merit. The district court failed to recognize this important distinction.

Workers' compensation is a statutory system. *See generally* Iowa Code Chapters 85–87. Under this system, when a worker is determined to be maximally improved from the injury and permanent impairment can be assessed, temporary benefits cease and a worker is entitled to compensation if they experience permanent disability resulting from the injury. *See generally* Iowa Code § 85.34. Specifically, the system divides permanent disabilities into two classes: (1) scheduled member injuries, and (2) injuries to the body as a whole/unscheduled injuries. *See Id*. §§ 85.34(2) (a–u) (scheduled); 85.34(2)(v) (unscheduled). Under either scenario, a percentage of functional impairment is determined by a medical provider utilizing the AMA Guides. *See generally* AMERICAN MEDICAL ASSOCIATION GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT, 5th Ed. (2000). Losses to body parts not listed on the schedule—including the back—fall under the "catch all" provision of 85.34(2)(v).

Prior to July 1, 2017, the "catch all" or unscheduled injury provision read, in its entirety:

> u. In all cases of permanent partial disability other than those hereinabove described or referred to in paragraphs "a" through "t" hereof, the compensation shall be paid during the number of weeks in relation to five hundred weeks as the reduction in the

> employee's earning capacity caused by the disability bears in relation to the earning capacity that the employee possessed when the injury occurred.[1]

It is undisputed that this subsection applies as Mr. Dungan sustained a permanent injury to his back, which is not a scheduled injury. The dispute stems from how the amended text of the provision is to be applied, and what form of compensation it directs.

As of July 1, 2017, the legislature retained the above language, but added three additional sentences to the subsection:

> A determination of the reduction in the employee's earning capacity caused by the disability shall take into account the permanent partial disability of the employee and the number of years in the future it was reasonably anticipated that the employee would work at the time of the injury. If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity. Notwithstanding section 85.26, subsection 2, if an employee who is eligible for compensation under this paragraph returns to work with the same employer and is compensated based only upon the employee's functional impairment resulting from the injury as provided in this paragraph and is terminated from employment by that employer, the award or agreement for settlement for benefits under this chapter shall be reviewed upon commencement of reopening proceedings by the employee for a determination of any

[1] From July 1, 2008 to June 20, 2017, this provision was Iowa Code section 85.34(2)(u). In 2017 the legislature added a scheduled member and this subsection became 85.34(2)(v).

> reduction in the employee's earning capacity caused by the employee's permanent partial disability.[2]
> Iowa Code § 85.34(2)(v).

The dispute concerns these latter three sentences of subsection (2)(v). It is the Employer and Insurance Carrier's position that the third sentence applies and mandates Mr. Dungan to receive functional disability, and that the fourth or last sentence—which applies in limited situations to trigger adjustment to reduction in earning capacity—does not apply. Although the last sentence is inapplicable, functional analysis is still appropriate and remains the statutory directive.

A. The District Court Diverted from the Legislature's Clear Statutory Direction.

The first sentence of subsection (2)(v) lays out the general rule—which was the only rule prior to 2017—that whole body or unscheduled injuries are to be compensated based on the reduction in the employee's earning capacity, i.e., industrial disability analysis. In such a case, the trier of fact makes a determination of the claimant's reduction in earning capacity based upon on a myriad of factors and comparison of pre-injury and post-injury evidence. *St. Luke's Hospital v. Gray*, 604 N.W.2d 646, 653 (Iowa 2000). Sentence two of subsection (2)(v) sets forth mandatory factors that the legislature directs to be

[2] For sake of clarity, Appellants will refer to the sentences of the current statute by their numerical designation in chronological order throughout its argument.

considered in this determination. Iowa Code § 85.34(2)(v). There is no dispute as to these sentences.

The third sentence of section 85.34(2)(v) provides:

> If an employee who is eligible for compensation under this [unscheduled injury] paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity.

i. The Text of the Third Sentence in section 85.34(2)(v) Unequivocally Mandates Mr. Dungan be Compensated Based Only Upon His Functional Impairment from the Injury, and not in Relation to His Earning Capacity.

Addition of the third sentence altered the general rule applicable prior to July 1, 2017 by taking whole body injuries from an automatic entitlement to industrial disability, to a qualified entitlement to industrial disability. In other words, the legislature added a consideration prerequisite to reaching the final determination when faced with a whole body injury. Now, the method of compensation will be determined by reviewing post-injury earnings of the claimant.

In *Deng v. Farmland Foods, Inc*., the Deputy referred to this third sentence in (2)(v) as the "crucial language" that resulted in functional impairment compensation, even though shoulder injuries were found to be

whole body injuries at the time. 2020 WL 1183480, File No. 5061883 (Arb. Dec., Feb. 25, 2020). The same crucial language is dispositive in this case. The Workers' Compensation Commissioner has recognized that with this crucial language, "the Legislature clearly intended to limit the scenarios under which industrial disability benefits are owed." *McCoy v. Menard, Inc.,* 2021 WL 2624688 at *2, File No. 1651840.01 (App. Dec. April 9, 2021). That scenario where functional applies is when an employee returns to work at the same or greater earnings or is offered work for which they would receive the same or greater earnings. *See* Iowa Code § 85.34(2)(v). In essence, the legislature determined that injured workers are not entitled to reduction in earning capacity when their post-injury earnings are actually inflated, not reduced. Mr. Dungan fits this scenario and as such, his compensation is statutorily directed to be functional.

The Commissioner has outlined the process of analyzing post injury earnings to determine whether compensation of an injury falling under 85.34(2)(v) should be via the functional or industrial method. *See Vogt v. XPO Logistics Freight*, 2021 WL 2627240, File No. 5064694.01 (App. Dec., June 11, 2021). This determination involves analysis of both the hourly wage, as well as the number of hours worked to determine if functional impairment is appropriate. As stated by the Commissioner, "a claimant's hourly wage must

also be considered in tandem with the actual hours worked by that claimant or offered by the employer when comparing pre- and post-injury wages and earnings under section 85.34(2)(v).” *Id.* at *3.

When applied to the facts of this case, the analysis results in Mr. Dungan being compensated based on his functional disability. He was offered work by Den Hartog Industries for which he would receive the same or greater earnings and accepted that offer by returning to work. He continued to work the same number of hours. Subsequently, Claimant received a raise from Den Hartog. At the time of hearing Claimant had numerous hourly wage increases with various employers and continued to earn more than he did prior to the injury.

The Workers’ Compensation Commissioner, as well as five Deputy Commissioners, have interpreted the plain text of this relevant provision to limit workers’ compensation claimants such as Mr. Dungan to functional impairment compensation. In *Clark v. Arconic, Inc.,* the claimant was compensated based upon functional loss even though she sustained a mental injury to the body as a whole, because her earnings increased following the work injury. 2022 WL 4595899, File No. 5061553.01 at *2, 11 (App. Dec. June 28, 2022). *See also Zalazink v. John Deere Dubuque Works*, 2022 WL

265682, File Nos. 5066386; 5067224 (App. Dec., Jan. 11, 2022) (reversing industrial disability due to stipulated increased earnings).

Before the definition of shoulder was clarified by this Court to include muscles and tendons, shoulder tear injuries found to be to the body as a whole were limited to functional impairment where the claimant had higher earnings post injury. *See Chavez v. MS Technology*, 2020 WL 1183526, File No. 5066270 (Arb. Dec. 2020) (found to be a scheduled injury on appeal); *Deng v. Farmland Foods, Inc.* 2020 WL 1183480, File No. 5061883 (Arb. Dec. Feb. 25, 2020)*; Rubalcava v. Siouxpreme Egg Products, Inc.*, 2020 WL 3487595, File No. 5066865 (Arb. Dec. June 23, 2020).

When a claimant was found to be earning more per hour and more per week when returning after the injury, the Deputy found he was "statutorily limited . . . to the functional impairment resulting from his injury" under 85.34 (2)(v). *Tow v. Archer Daniels Midland Co.*, 2021 WL 2627226, File No. 5068651 at *14 (Arb. Dec., April 8, 2021). Mr. Dungan is no exception and the district court exceeded this statutorily directed limitation.

The same result has been reached where the claimant returns to work at the same wage as the time of injury, and then voluntarily transfers to a different, lower paying position. *See Kish v. University of Dubuque*, 2021 WL 3477414, File No. 5066482 (Arb. Dec., July 29, 2021). Kish returned to her

previous position at the same wage and hours, but subsequently voluntarily bid into a different position paying $1.00 per hour less. *Id.* at *8. The Deputy determined she should be compensated functionally under subsection (2)(v). *Id.* In contrast, industrial disability still applies and the claimant "shall not be compensated based only upon functional impairment" when they are not offered work for which they would receive the same or greater earnings. *See, e.g., Till v. Windstar Lines, Inc.*, 2020 WL 5775388, File No. 5067027 (Arb. Dec. July 10, 2020).

It is undisputed that Claimant returned to work and received greater earnings than he received at the time of injury. *See* Arb. Dec. p. 15 ("Dungan earned more working for Den Hartog after the work injury . . . After quitting employment with Den Hartog, Dungan has worked multiple jobs at which he earns more than he was earning working for Den Hartog at the time of the work injury.") This finding alone should be dispositive given the current text of the statute. *See Kish,* 2021 WL 3477414 at *10.

In contrast, the commissioner and the district court erred by failing to conduct the analysis outlined in *Vogt*, and instead skipping to the last sentence of the subsection and finding that since it does not apply, Claimant must be awarded industrial disability. This took the focus off the earnings and employed additional requirements that are not in the text of the statute. As

stated above, the automatic entitlement in the pre-amendment rule has been replaced with the prerequisite analysis outlined, and it was reversible error to ignore the same.

ii. The Last Sentence of 85.34(2)(v) is Conditional and Inapplicable, but its Inapplicability Does Not Affect the Mandate of Functional Disability.

The fourth and last sentence of the relevant subsection states:

> Notwithstanding section 85.26, subsection 2, if an employee who is eligible for compensation under this paragraph returns to work with the same employer and is compensated based only upon the employee's functional impairment resulting from the injury as provided in this paragraph and is terminated from employment by that employer, the award or agreement for settlement for benefits under this chapter shall be reviewed upon commencement of reopening proceedings by the employee for a determination of any reduction in the employee's earning capacity caused by the employee's permanent partial disability. Iowa Code § 85.34(2)(v).

The district court—like the commissioner—focused heavily on this provision and found that with amended 85.34(2)(v) as a whole, the legislature "creates a bifurcated process for assessing industrial disability cases where an injured worker returns to work for the employer and then is later terminated by the employer." Jud. Rev. Order p. 5. The court found that since Mr. Dungan had not been terminated by Den Hartog, the section as a whole did not apply. This ignores sentence three and essentially applies section 85.34(2)(v) as if it were never amended. This reading would also be contrary to the legislature's

purpose of "limit[ing] the scenarios under which industrial disability benefits are owed." *See McCoy,* 2021 WL 2624688 at *2.

The Employer's interpretation of the last sentence is most consistent with the legislative text and purpose. This sentence addresses a subset of circumstances that *could* follow once the third ("same or greater") sentence is established and directs functional compensation. This is supported by the conditional language used. It only applies "**if** an employee who is eligible for compensation under this paragraph returns to work with the *same employer* **and** is compensated based only upon the employee's functional impairment . . . **and** is terminated from employment *by that employer* . . ." Iowa Code § 85.34(2)(v) (2017) (emphasis added).

Statutory interpretation requires assessment of the statute in its entirety rather than assessing isolated words or phrases. *State v. Pettijohn*, 899 N.W.2d 1, 16 (Iowa 2017). This ensures that the interpretation is "harmonious with statute as a whole." *Id.* The district court stated that the employer and insurer were ignoring the last sentence of (2)(v). *See* Order on Jud. Rev. p. 5 ("DHI asks the reviewing court to consider only the first sentence and then stop reading.") Rather, the employer and insurer were pointing out that the last sentence is not always triggered, but this does not render the "same or greater" earnings analysis inapplicable. In other words, the fourth sentence is

predicated on the third sentence previously applying and directing functional compensation, but the third sentence can apply and direct functional compensation on its own, without the conditions of the fourth sentence ever being triggered. This is not isolating the third sentence in terms of legislative interpretation, but rather, reading the statute as a whole and applying the textual portion applicable to the facts of the case.

While statutes are to be considered as a whole, the latter two sentences of 85.34(2)(v) do have distinct meanings and consequences. Sentence three involves the method outlined in *McCoy* and *Vogt*: comparing the pre-injury and post-injury hours and wages of a worker with a whole body injury to determine if they are to be compensated functionally or industrially.

Next, *if* that claimant is determined to have received an offer or returned at the same or greater earnings and thus compensated functionally *and then* they are later terminated after being compensated as such, then the so-called "bifurcated litigation process" is triggered. *But see Draper v. Menard, Inc.*, 2019 WL 4452333, File No. 5061657 (Arb. Dec., Aug. 6, 2019) (finding functional compensation is still appropriate where the termination is in no way related to the injury). Essentially, in this limited circumstance, the claimant can initiate a review-reopening to determine compensation industrially rather than functionally. This makes logical sense because it prevents an employer

from benefitting from an award or settlement based upon functional disability (which often is lower than industrial disability), and then terminating the injured worker's employment after the order or after a claim for industrial disability benefits is time-barred pursuant to Iowa Code section 85.26, subsection 2. *See* Iowa Code § 85.26(2). But this is all predicated upon prior functional disability compensation because of the third sentence.

A prime example where the last sentence would affect the analysis comes from *Cortez v. Tyson Foods, Inc.*, File Nos. 20700573.02, 20000903.02 (Review-Reopening Dec., May 10, 2023). Ms. Cortez had two compensation claims from a neck injury and occupational asthma—both whole body injuries falling under section 85.34(2)(v). Since she returned to work at the same or greater earnings, the parties' settlement agreement was based on functional disability findings rather than industrial disability. *Id.* at *3. However, sixteen days after the settlement was approved, the employer removed her from her post-injury position and told her there was no work that could accommodate her restrictions. *Id.* Ms. Cortez was instructed to call each week to check for accommodating work offers and did so for over a year to no avail. *Id.*

The Deputy in *Cortez* correctly set forth the analysis at that stage of litigation: "Thus, the test created in subsection (v) is relatively straightforward. The first issue is whether the employee was compensated

based only upon the functional impairment resulting from the injury. If so, then once the employee is 'terminated' she or he is entitled to have their disability evaluated industrially." *Id.* at *5. The settlement was the functional compensation. The Deputy found there was no reasonable likelihood she would be recalled to work, and found she was terminated. Thus, it was concluded that "claimant has met both tests to qualify for a reassessment of her industrial disability under subsection (v)." *Id.*

Just because the situation in *Cortez* did not occur here does not mean that a functional award cannot be reached under subsection (2)(v). That would render the underlying settlement in *Cortez* improper, as well as all of the cases cited above where functional awards were ordered for a whole body injury. *See, e.g., Clark*, 2022 WL 4595899; *Zalazink* 2022 WL 265682; *Rubalcava,* 2020 WL 3487595; *Tow*, 2021 WL 2627226. The second sentence does not contain the termination language, yet was applied in all of these cases. The district court's interpretation—that section (2)(v) cannot direct functional compensation because Dungan was not terminated—would render the third sentence superfluous. Statutes should not be construed in a way that renders any part superfluous unless *no other* construction is reasonably possible. *In re G.J.A.*, 574 N.W.2d 3, 6 (Iowa 1996) (quoting *Iowa Auto Dealers Ass'n v. Iowa Dept. of Revenue*, 301 N.W.2d 760, 765 (Iowa 1981)). Rendering a

portion of the statute superfluous is not harmonious with the statue as a whole. *Pettijohn*, 899 N.W.2d at 16.

The so-called bifurcated litigation process consists of two sets of litigation: the arbitration proceeding and the review-reopening proceeding. The "same or greater" earnings analysis is to be employed at the arbitration level. If that analysis directs a functional award, and then the employee is terminated following that award, then the second half of the bifurcation may occur. There has to be something to review or reopen, or a functional award to consider altering to industrial. But the Commissioner never even reached the initial earnings determination at the arbitration level because his analysis of the statute avoided it.

Reading the subsection as a whole still results in a functional award. In a more visual, step-by-step view, the analysis for whole body injuries starts with the premise of industrial compensation based on reduction in earning capacity, and then under 85.34(2)(v) proceeds as follows:

1. Has the employee returned to work or been offered work for which they would receive the same or greater earnings than they received at the time of the injury?
   a. Yes = compensation based on functional impairment.
   b. No = compensation based on reduction in earning capacity.
2. *If* the employee was compensated functionally (because the answer to #1 was "yes"), was the work/earnings with the same employer *and* did that employer subsequently

terminate the employee?

a. Yes = the employee is entitled to review-reopening to determine the reduction in their earning capacity caused by the injury.
b. No = functional impairment still applies.

Here, the Commissioner did not reach the first determination based on the statutory text but directed the analysis straight to the second step, determining it was inapplicable. However, the Deputy's conclusions show that if step one were applied to Mr. Dungan, it would have directed his compensation based on functional impairment rather than industrial disability. The district court erred by failing to recognize the missed step.

The last sentence of subsection (2)(v) would only be applicable if Claimant had continued working for Den Hartog, was awarded functional compensation based on the "same or greater earnings" provision, and then Den Hartog terminated him due to the work injury. Such is not the case here. In fact, sentence three could never be triggered. The plain text still directs that Claimant "shall be compensated based only upon [his] functional impairment resulting from the injury."

B. Voluntary Resignation Does Not Alter the Analysis Under Section 85.34(2)(v).

The district court and the commissioner focused on the fact that Claimant voluntarily resigned to support their finding that subsection

85.34(2)(v) does not apply to direct functional compensation. They reason that since Den Hartog did not terminate Mr. Dungan's employment, then the so-called "bifurcated litigation process" is inapplicable and industrial disability must be appropriate. Again, this misses the fact that only one step of litigation (arbitration), or settlement can occur, compensating claimant for functional disability under the third sentence of the statute. However, this also misinterprets the "termination" portion of the statute.

The text of section 85.34(2)(v) does not address resignation. In terms of the end of an employment relationship, it only addresses termination by the employer who was the worker's employer at the time of the injury. In effect, the only way that an employee with higher earnings would *not be limited* to functional disability is if that employee is fired by the defendant-employer after a functional award. When following the statutory text, voluntary resignation has no effect.

i. No case law has Addressed Voluntary Resignation in Relation to Amended Section 85.34(2)(v), Except an Agency Opinion that was Rejected by a Reviewing Court Prior to the Commissioner's Decision in this Case.

The Employer and Insurance Carrier concede that none of the above-referenced cases interpreting the amended section involve the Claimant resigning from employment. The only case where that occurred was the case

of *Martinez v. Pavlich*, *Inc*., which later resulted in the appellate proceedings of *Pavlich Inc. v. Martinez*. *See Martinez v. Pavlich*, *Inc*., 2019 WL 7759791, File No. 5063900 (Arb. Dec., Nov. 19, 2020) (hereinafter "*Martinez Arbitration*"*)*; *Martinez v. Pavlich*, *Inc*., 2020 WL 5412838, File No. 5063900 (App. Dec., July 30, 2020) (hereinafter "*Martinez Appeal*"); *Pavlich, Inc. v. Martinez,* 2021 Iowa Dist. LEXIS 10 (Iowa Dist. Ct., April 21, 2021) (hereinafter "*Pavlich District Court*").[3]

Claimant Martinez sustained injuries in a work-related motor vehicle accident, and subsequently returned to his full duty position with the defendant-employer. *Martinez Arbitration*, 2019 WL 7759791 at *3. Eventually, Claimant voluntarily resigned from Pavlich, Inc., to enroll in an apprenticeship program. *Id.* at *5. The Deputy combined Claimant's functional disability ratings and awarded based on what is now section 85.34(2)(t), for loss to two or more scheduled members in a single accident. *See* Iowa Code § 85.34(2)(t). On appeal, the Commissioner modified this finding, based on the new language added in section (2)(v). *Martinez Appeal*, 2020 WL 5412838 at *3. The Commissioner stated:

> While neither party disputes that claimant at the time of the hearing had returned to work for the same or greater earnings

[3] Appellants note that the district court decision in *Pavlich* is not available in popular platform, Westlaw. For the convenience of the court, the Lexis decision is attached to this brief and cited throughout.

> than what he was receiving at the time of the injury, the work he was performing was for a different employer . . . It appears this scenario has not been considered by this agency after the legislature made its changes to the statute in 2017 . . . when the two new provisions cited by each party are read together, as they are set forth in the statute, it appears the legislature intended to address only the scenario in which a claimant initially returns to work with the defendant-employer or is offered work by the defendant-employer at the same or greater earnings but is later terminated by the defendant-employer. In other words, I do not accept claimant's interpretation in this case that the new provisions apply when a claimant voluntarily separates his or her employment with the defendant-employer and then initiates employment with a new employer at the same or greater wages than the claimant was earning at the time of the injury. *Id.* at *4–5.

The Commissioner's finding in *Martinez Appeal* was relied upon heavily by Deputy Humphrey in this case and was also cited by the district court. However, neither tribunal recognized the opinions by the district court which followed. This is true even though the district court decision was entered over one year prior to the arbitration decision. The employer and insurance carrier petitioned for judicial review. *See generally Pavlich District Court*, 2021 Iowa Dist. LEXIS 10 (Iowa Dist. Ct., April 21, 2021). Judicial Review was ultimately denied; however, the district court provided thirteen pages of opinion and made a finding on each issue. The reason for denying

judicial review was that changing the method of compensation would not have altered the ultimate dollar amount awarded to claimant.[4] *Id.* at *31.

District Court Judge Paul D. Scott stated the first sentence of section 85.34(2)(v) was a description of its applicability. *Id.* at *27. The court then set forth the third sentence and stated:

> This section is conditional. Martinez initially meets this condition as he returned to work at the same or higher wages, which would entitle him to a functional impairment analysis only. Notice that this section does not specify by *whom* the employee is offered work at greater or equal earnings. Notice also that Martinez accepted work as a lineman for higher or equal wages. Given Martinez's current, more profitable employment, his disability calculations should follow the functional method. *Id.* at *28.

Next the district court set forth the last sentence of (2)(v), highlighting the text of "same employer" and "terminated from employment by that employer." The court stated:

> Here, Pavlich correctly points out that Martinez voluntarily left its employment, which would not trigger this condition for an industrial earning capacity adjustment. The law is silent on this current situation where an employee under functional impairment voluntarily leaves for a better earning job.

[4] The Deputy awarded the functional ratings, which combined to equal twenty percent. The Commissioner on appeal found Claimant sustained twenty percent industrial disability. Both figures are taken times 500 weeks equals 100 weeks of compensation at the stipulated rate.

> Martinez's subsequent employment at higher wages is relevant here. Under this section, an employee who meets the injury criteria defaults to an industrial disability analysis. If the worker then finds a new position, where the worker receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment. Martinez left Pavlich for a position that paid him the same or greater salary, wages or earnings than the position he had at the time of injury. Given Martinez's injuries and the lack of specificity within the law of who needs to offer the better position, a functional impairment analysis is proper here. *Id.* at *29.

The district court ultimately agreed with the calculation of benefits, but found that under section 85.34(2)(v), claimant was entitled to the same amount of benefits *under a functional impairment analysis and not under industrial disability*." *Id.* at *31 (emphasis added).

Appellants recognize that case law binding on the agency would have been decisions of this Court, or published decisions of the Iowa Court of Appeals. However, it is questionable that even after raising it in briefing, all three tribunals failed to recognize or address the points posited by the district court in *Pavlich* and continued to cite the Commissioner's opinion in *Martinez*—especially given the similarities in the facts. It is Appellants' position that the district court's interpretation is the correct interpretation of the statutory text and this Court is still entitled to give it weight as it sees fit.

The decision is particularly persuasive given that it is the case with the most similar facts and decided by the highest reviewing court thus far under the same standard of review.

The *Kish* case is also particularly persuasive here. *See Kish v. University of Dubuque*, 2021 WL 3477414, File No. 5066482 (Arb. Dec., July 29, 2021). The claimant was awarded functional disability compensation because she returned to her same position as a lead custodian at the same rate of pay with the same hours. *Id.* at *7. She then voluntarily bid into a regular custodian position that paid $1.00 per hour less, which she won by seniority. *Id.* at *8. The Deputy found:

> Claimant testified that she was making $14.79 per hour as a lead custodian on the date of injury. On the date of hearing, she was making $14.31 per hour as a regular custodian. As such, I find that claimant was earning less at the time of hearing than she was on the date of injury. However, I also find that claimant returned to work after the date of injury as lead custodian, making the same wages she earned on the date of injury. Although claimant later bid into and transferred to a regular custodial position at the University, *her decision was voluntary*. *Id.* (emphasis added).

Like the Claimant in *Kish*, Mr. Dungan returned to work at the same or greater earnings and his decision to change employment was voluntary. Unlike in *Kish*, Mr. Dungan's subsequent employment came with higher pay. Section 85.34(2)(v) should be applied as it was in *Kish*.

ii. The Text of Section 85.34(2)(v) Does Not Define Whom the Wages or Offer Must Come From, Nor Address Voluntary Resignation.

The district court held that section (2)(v) only "applies to the scenario where an injured worker is terminated and does not apply when a worker voluntarily separates from employment with the employer . . ." This does not comport with the text of the statute. Aside from missing a step in the analysis, this holding is flawed for two additional reasons.

First, the text of the statute does not address voluntary resignation. Thus, by stating voluntary resignation alters the analysis of the statute, the court was doing exactly what it claims the Appellants were doing: expanding the statute by reading something into it that was not there. The only severance of an employment relationship included in the text is in the last sentence, which as discussed above, only applies in limited situations. The last sentence only addresses "terminat[ion] from employment by that employer," i.e., firing by the employer who was liable for the work injury. The third sentence does not direct consideration of severance of an employment relationship. It simply directs: "If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee *shall* be compensated based

only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity." Iowa Code § 85.34(2)(v) (emphasis added).

Secondly, the district court's holding implies that the employer referred to throughout all portions of the subsection is the defendant-employer who was the worker's employer at the time of the injury. As recognized by Judge Scott, the statute does not address by whom the work or the offer of work must come from. The only requirement is the earnings offered be equal to or greater than those earned prior to the injury. The last sentence contains the language: "*if* an employee . . . returns to work *with the same employer* . . . and is terminated from employment *by that employer* . . ." *Id.* The inclusion of "if" implies that an employer in the preceding sentence could be an employer beyond the "same employer"/defendant-employer.

The focus of the amendment is on post-injury earnings and disallowing reduction in earning capacity awards for claimants who do not have reduced earnings. Neither the district court nor the agency focused on earnings, and the interpretation does not accomplish the stated goal or follow the text as written.

II. SHOULD THIS COURT DETERMINE THAT INDUSTRIAL DISABILITY WAS WARRANTED UNDER IOWA CODE SECTION 85.34(2)(V), THE DISTRICT COURT ERRED IN AFFIRMING FIFTEEN PERCENT REDUCTION IN EARNING CAPACITY.

Appellants preserved this issue by arguing it at each stage of litigation. *See* Post-Hearing Brief, App. 14-26; Appeal Brief, App. 53-63; Judicial Review Brief, App. 69-84. In reviewing the district court's decision, this Court applies the standards of section 17A.19(8). *IBP, Inc. v. AI-Gharib*, 604 N.W.2d 621, 627 (Iowa 2000); Iowa Code § 17A.19 (2017). Reversal is appropriate when a determination vested in the discretion of the agency is not supported by substantial evidence in the record. Iowa Code § 17A.19(10)(f). "Substantial evidence" is defined as the "quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences . . .are understood to be serious and of great importance." *Id.* § 17A.19(10)(f)(1). In other words, a reasonable person must be able to accept the determinations as adequate to reach the same conclusion. *Dodd v. Fleetguard, Inc.*, 759 N.W.2d 133, 137 (Iowa 2008).

Even if the Commissioner's interpretation of 85.34(2)(v) were not reversible error, the Commissioner still erred when determining Claimant

sustained fifteen percent loss of earning capacity as a result of the July 24, 2019 injury.

The prior disc herniation has resorbed and resolved itself. (Ex. J-4, App. 220; JE 5-25, App. 133). Claimant no longer experiences radicular pain or requires treatment. Following the injury, he has been able to work various job positions, all physically demanding, with no limitation or complication. He is now working in a more skilled position as a welder and earning higher wages. The Deputy determined he is highly motivated to work. *See* Arbitration Decision, p. 21, App. 47. Considering all established factors, the record does not support a fifteen percent loss of earning capacity.

CONCLUSION

The plain and unambiguous language of Iowa Code section 85.34(2)(v) directs compensation based upon functional impairment. It is undisputed that Claimant returned to work at the same or greater earnings than at the time of injury. This is all that the statute requires to mandate functional impairment compensation. The termination provision is a rare circumstance that could trigger review-reopening *after* functional compensation. The district court's focus on this provision and failure to employ the directed earnings analysis is an error at law.

Accordingly, Appellants respectfully request this Court reverse the district court ruling in its entirety, or modify it in the alternative.

REQUEST FOR ORAL ARGUMENT

Appellants respectfully request that this matter be set for oral argument before the Court.

Respectfully Submitted,

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CERTIFICATE OF COSTS

Petitioners certify that no costs were incurred in printing or duplicating paper copies of briefs.

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and (1)(g)(1) or (2) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 and contains 8,562 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Jordan Reed
_____
Signature

01/24/24
_____
Date

CERTIFICATE OF SERVICE

I, Jordan R. Reed, member of the Bar of Iowa, hereby certify that on January 24, 2024, I or a person acting on my behalf served the above Petitioners' Proof Brief and Request for Oral Argument to the Appellee's attorney of record, via EDMS in full compliance with Rules of Appellate Procedure and Rules of Civil Procedure.

Jordan Reed
_____

CERTIFICATE OF FILING

I, Jordan R. Reed, hereby certify that I, or a person acting in my direction, did file the attached Petitioners'/Appellants' Proof Brief and Request for Oral Argument upon the Clerk of the Iowa Supreme Court via EDMS on this 24th day of January, 2024.

Jordan Reed

_____

Pavlich Inc. v. Martinez

District Court of Iowa, Polk County

April 21, 2021, Filed

Case No. CVCV060634

Reporter
2021 Iowa Dist. LEXIS 10 *

PAVLICH INC., NATIONAL INTERSTATE INS., Petitioners, v. ZACHARY MARTINEZ, Respondent/ Cross Petitioner

Core Terms

impairment, benefits, workers' compensation, industrial disability, disability, injuries, percent, permanent partial disability, earning capacity, lower extremity, time of injury, claimant, wages, commissioner's findings, assigned, earnings, personal jurisdiction, upper extremity, terminated, driver, return to work, compensated, reduction, reckless, substantial evidence, calculation, bilateral, freight, vested, truck

Judges: **[*1]** Paul D. Scott, District Court Judge.

Opinion by: Paul D. Scott

Opinion

RULING ON PETITION FOR JUDICIAL REVIEW

On February 25, 2021, the above captioned matter came before the Court. Abigail A. Wenninghoff and Kalli P. Gloudemans represented the Petitioner. Tom L Drew appeared for the Respondent. After hearing the arguments of counsel and reviewing the court file, including the briefs filed by both parties and the Certified Administrative Record, the Court now enters the following ruling.

STATEMENT OF THE CASE

Zachary Martinez ("Martinez") filed a Petition seeking workers' compensation benefits from his employer, Pavlich Inc. ("Pavlich") and its insurance carrier, National Interstate Insurance. Martinez alleges injuries to his right upper extremity, bilateral lower extremities, back, and head as a result of a motor vehicle accident on April 16, 2018. On November 19, 2019, Deputy Workers' Compensation Commissioner Michael J. Lunn ("Deputy") ordered that Pavlich pay Martinez 100 weeks of permanent partial disability benefits commencing on July 17, 2018, at the weekly rate of $594.94 and described the manner of payment.

Pavlich appealed, and on July 30, 2020, Workers' Compensation Commissioner Joseph S. Cortese **[*2]** II ("Commissioner") affirmed nearly all rulings set forth by the Deputy but modified the basis of Martinez's entitlement. On August 27, 2020, Pavlich filed a Petition for Judicial Review pursuant to *Iowa Code sections 17A.19* and *86.26* for review of the final agency action by the Commissioner. Martinez answered the Petition for Judicial Review on September 14, 2020.

BACKGROUND FACTS

Zachary Martinez was born in July 1990 and is a resident or Arkansas. At the time of the injury, Martinez lived in Smithfield, Missouri.[1] He is a high school graduate.[2] Martinez obtained a

[1] Hr. Tr. pp. 14, 51.

[2] *Id.*, p. 16.

commercial driver's license (CDL) in 2008 and became a certified emergency medical technician (EMT) in 2012.[3] Martinez became EMT certified in hopes of becoming a firefighter.[4] His work experience is primarily working in construction or as a truck driver.[5]

Martinez was hospitalized from October 6, 2010, to October 18, 2010 as a result of non-work related motorcycle crash.[6] Martinez suffered from multiple facial fractures a traumatic brain injury, cognitive deficits, right upper extremity weakness, and multiple fractures throughout the thoracic spine.[7] Fortunately, Martinez made an excellent recovery and was released from care in November 2010.[8]

Martinez's medical history also includes mental health treatment related to attention deficit disorder.[9] Most of the medical record focuses on Martinez's inability to focus, but the reports also note that Martinez was experiencing two to three headaches a week.[10]

Pavlich hired Martinez as a semi-truck driver on August 2017.[11] Martinez presented his application to the Pavlich location in Kansas City, Kansas to submit his application.[12] Martinez's role as a driver for Pavlich was to haul freight throughout the Midwest.[13] Martinez was required at times to carry, load, and unload freight in Iowa.[14]

Pavlich is a nonresident employer; it is headquartered and incorporated in Kansas. Pavlich does not have any physical locations in Iowa.[15] Additionally, Pavlich does not pay taxes in the state of Iowa.[16] Pavlich does conduct business in Iowa.[17]

Pavlich is a regional hauling company. Jim Pavlich, the owner of Pavlich Inc., testified that Martinez regularly hauled freight through the state of Iowa in the course and scope of his employment.[18] Furthermore, Mr. Pavlich agreed that Martinez had driven over 4000 miles in Iowa over the course of his employment.[19] Between August 2017 and March 2018, only **[*4]** 4.42 percent of all driving done by Pavlich drivers was in Iowa.[20] While in Iowa, Pavlich's drivers make various stops at Iowa gas stations for fuel. Pavlich drivers are also bound by Iowa traffic laws while travelling through the state.

Pavlich's contacts include driving, picking up, and unloading freight in the state of Iowa. Martinez picked up loads with materials from towns in Iowa like Muscatine, Davenport, and Wilton.[21]

Pavlich's contract for hire includes a jurisdictional provision that provides anyone who suffered an injury "shall be subject to this Workers' Compensation laws of the State of Kansas and jurisdiction shall be solely within the State of Kansas regardless of the location of any-on-the-job accident or where your contract of employment

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[3] *Id.*

[4] *Id.*

[5] Ex. 5, p. 40

[6] Joint Exhibit "JE" 1, pp. 1-2

[7] *Id.* p. 9.

[8] *Id.* ***[*3]***

[9] JE 2, p. 15.

[10] *Id.*

[11] Hr. Tr. P. 18; *See* Ex. B.

[12] Hr. Tr., p. 51

[13] *Id.*, pp. 19-22.

[14] *Id.* at 22.

[15] *Id.* at 98.

[16] *Id.*

[17] *Id.* at 86-87.

[18] Hr. Tr., pp. 83, 85-86, 90.

[19] Hr. Tr., pp. 97.

[20] Ex. H, p. 1.

[21] Hr. Tr. pp 21-24.

may be deemed made."[22]

On April 16, 2018, Martinez was hauling freight in southeastern Iowa when he was involved in a motor vehicle accident.[23] The parties do not dispute that Martinez was using his cellphone moments before the motor vehicle accident; they do dispute whether Martinez was using his cellphone to text or for GPS.[24] When Martinez looked up from his cellphone, he noticed that the vehicle in front of him had slowed. Martinez swerved **[*5]** and ended up turning his truck over.[25] As a result, Martinez was pinned inside the truck.[26] He sustained injuries to his bilateral lower extremities, right wrist, and back.

Martinez was life-flighted to the University of Iowa Hospital, where he was hospitalized for some days. Once his condition improved, he was transferred to a hospital closer to his Missouri home.[27] Martinez received surgery for a right comminuted intra articular distal radius fracture with open reduction and internal fixation on April 25, 2018.[28] Jeffrey Bradley, M.D. recommended physical therapy to assist with Martinez's range of motion.[29] Martinez had an excellent recovery following his wrist surgery, however the continued to complaint about weakness in his right hand.[30]

Dr. Bradley released Martinez back to full-duty work, without restrictions on July 9, 2018.[31] Dr. Bradley opined that Martinez had reached maximum medical Improvement ("MMI") as of July 2, 2018.[32] Dr. Bradley assigned a six percent impairment to the right wrist based on the American Medical Association (AMA) Guides, Sixth Edition.

Martinez's left calf was found to have an infected hematoma and degloving injury as a result of the vehicle accident. **[*6]** Martinez's right thigh had a closed Morel lesion.[33] Martinez had surgery on his left lower extremity to remove a portion of his muscle on April 26, 2018.[34] Following this first surgery, Martinez needed to go through a second surgery in his left lower extremity due to an infection. Zachary Roberts, M.D. later placed his left lower extremity in a wound Vacuum-Assisted Closure (VAC). The hematoma on Martinez's right thigh became infected and required draining on June 11, 2018. Martinez's right lower extremity was also placed in a wound VAC.[35]

Dr. Roberts released Martinez back to full-duty work, on July 24, 2018.[36] Dr. Roberts opined Martinez had reached MMI as of March 4, 2019.[37] Roberts assigned a seven percent impairment to the left lower extremity and two percent to the right lower extremity. Both of those impairment ratings were calculated pursuant to AMA Guides, Sixth Edition.[38]

The Commissioner found that there is little evidence that Martinez developed a traumatic brain injury as a result of the accident. He denied having a head injury when he spoke to Dr. Bradley on April 24, 2018.[39] He denied experiencing

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[22] Ex. B p. 5.

[23] Hr. Tr. p. 31.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] Hr. Tr. p. 35.

[28] JE 4 pp. 24-26.

[29] *See* JE 5.

[30] JE 5, p. 55.

[31] *Id.* at p. 62.

[32] *Id.* at p. 67.

[33] JE, p. 51.

[34] JE 4. p. 33.

[35] JE 5, p. 58.

[36] *Id.*, p. 64.

[37] *Id.*, p. 68.

[38] *Id.*

[39] JE 5, p. 46.

depression, memory loss, or other effects when speaking to Dr. Bradley and Dr. **[*7]** Roberts. He also denied experiencing headaches, dizziness, and other symptoms when he attended an orthopedic consultation with S. Allan Enriquez, M.D.[40]

Martinez completed an essential functions test for Pavlich.[41] He passed all requirements, including the tests that required him to lift between 25 to 55 pounds, up to three times.[42] Martinez also underwent a grip test, which revealed that his left hand had a significantly stronger grip than the right hand.[43]

Martinez returned to work for Pavlich about three months after the date of injury.[44] Martinez was required to undergo a physical examination.[45] Martinez answered "yes" in regards to "head/brain injuries or illnesses" he provided explanations to the head injuries with his 2010 accident but did not list his work injury as a cause of head/brain injuries.[46]

Martinez continued to work for Pavlich up until September 2018, when he voluntarily left Pavlich to enroll in an apprenticeship program in the construction industry.[47] As of the date of the agency hearing, Martinez worked as a lineman for Chain Electric and builds power lines on a fullduty basis without restrictions.[48] His job duties include setting poles, repairing damaged poles, operating **[*8]** a deer truck, a bucket truck, and shoveling.[49] Martinez works roughly 45 hours a week and lifts up to 50 pounds multiple times per day without accommodations.[50] As of the time of his deposition, Martinez was earning 24 dollars per hour. He also claims that his new job is more physically demanding.

Martinez received an independent medical examination (IME), performed by Jaqueline Stoken, M.D., on February 25, 2019.[51] Dr. Stoken assigned 14 percent impairment to the right upper extremity due to deficits in range of motion, loss of strength, and loss of grip strength. Dr. Stoken assigned five percent impairment to the whole body due to chronic pain, which formed a limp. Dr. Stoken assigned three percent impairment for post-concussive headaches. Dr. Stoken assigned five percent total person impairment due to skin disfigurement and impairment on the right thigh hematoma. Dr. Stoken also assigned nine percent impairment to the whole person due to skin disfigurement and loss of muscle mass. Dr. Stoken assigned 26 percent impairment to the whole person as a result of Martinez's injuries. Dr. Stoken assigned permanent work restrictions to avoid lifting more than 10 pounds on a frequent basis **[*9]** due to the alleged strength deficit in the right upper extremity.[52]

In the Arbitration Decision, the Deputy did not accept Dr. Stoken's assessment as to Martinez's alleged brain injury and lower back.[53] The Deputy held that Dr. Stoken's assessments as related to the brain and lower back were conclusory and lacked objective medical evidence to support those impairments.[54] Finally, the Deputy did agree with Dr. Stoken's impairment ratings as related to

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[40] JE 4, p. 28.

[41] Ex. 3, p. 23.

[42] *Id.*

[43] *Id.*

[44] Hr. Tr., pp. 37-38.

[45] *See* Ex. E, pp. 1-10.

[46] *Id.*

[47] Hr. Tr., pp. 41-42.

[48] *Id.* at 7.

[49] Ex. G, p. 6.

[50] *Id.* at 32.

[51] Ex. 1 p. 1.

[52] *Id.*, pp. 13-14.

[53] Arb. Dec. p.6.

[54] *Id.*

Martinez's extremities and held them as more persuasive than the opinions of Drs. Bradley and Roberts.[55] The Deputy reached that conclusion because Dr. Stoken's ratings used the Fifth Edition of the AMA guides whereas as Dr. Bradley and Roberts used the Fourth and Sixth Editions. Based on a preponderance of the evidence, the Deputy concluded Martinez carried his burden to demonstrate that he sustained a permanent disability because of the stipulated work injury.[56]

The Deputy ordered that Petitioners pay Martinez 100 weeks of permanent partial disability benefits commencing on July 17, 2018, at the weekly rate of $594.94. Petitioners were to pay accrued benefits in a lump sum together with interest at an annual rate equal to one-year treasury **[*10]** constant maturity published by the Federal Reserve in the most recent H15 report settled as of the date of injury, plus two percent. The Deputy further ordered Pavlich to pay for Martinez's future medical care for all treatment causally related to his right upper extremity and bilateral lower extremity injuries among other things.[57]

On July 30, 2020, the Commissioner issued an Appeal Decision finding the following:

> I affirm the deputy commissioner's findings that this agency has both subject matter jurisdiction and personal jurisdiction over [Respondent]. I affirm the deputy commissioner's finding that defendants failed to carry their burden to prove [Martinez's] claim is barred by the application of *Iowa Code section 85.16(1)*. I affirm the deputy commissioner's finding that claimant is entitled to receive temporary benefits from April 16, 2018, through July 16, 2018. I affirm the deputy commissioner's finding that [Martinez] failed to satisfy his burden to prove he sustained causally related disability to his head or low back. I affirm the deputy commissioner's finding that claimant is entitled to payment for all causally related medical expenses. I affirm the deputy commissioner's finding that claimant is entitled **[*11]** to future medical care at [Respondent's] expense for all treatment causally related to claimant's right upper extremity and bilateral lower extremity injuries. I affirm the deputy commissioner's finding that claimant is not entitled to receive penalty benefits from [Respondent]. I affirm the deputy commissioner's order that [Respondent] pay Martinez's costs of the arbitration proceeding.[58]

The Commissioner affirmed the Deputy's findings of fact and conclusions of law pertaining to the above issues.[59]

The Commissioner ultimately determined that Pavlich should pay Martinez 100 weeks of permanent partial disability at the weekly rate of $594.94. He maintained the total amount of payments but instead held that Martinez was entitled to industrial disability as opposed to functional impairment.

STANDARD OF REVIEW

On judicial review of agency action, the district court functions in an appellate capacity to apply the standards of *Iowa Code Section 17A.19*.[60] The court shall reverse, modify, or grant other appropriate relief from agency action if the agency action was based upon a determination of fact clearly vested by a provision of law in the discretion of the agency that is not supported by substantial evidence in the **[*12]** record before the court when that record

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[55] *Id.*

[56] *Id.*

[57] Arb. Dec. p 21.

[58] App. Dec. p. 2.

[59] *Id.*

[60] *Iowa Planners Network v. Iowa State Commerce Comm'n, 373 N.W.2d 106, 108 (Iowa 1985)*.

is viewed as a whole.[61] "'Substantial evidence' means the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance."[62]

> Evidence is substantial when a reasonable person could accept it as adequate to reach the same findings. Conversely, evidence is not insubstantial merely because it would have supported contrary inferences. The ultimate question is not whether the evidence supports a different finding but whether the evidence supports the findings actually made.[63]

The court shall also reverse, modify, or grant other appropriate relief from agency action if such action was based upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency.[64] The court shall not give deference to the view of the agency with respect to particular matters that have not been vested by a provision of law in the discretion of the agency.[65] However, appropriate deference is given **[*13]** when the contrary is true.[66] The agency's findings are binding on appeal unless a contrary result is compelled as a matter of law.[67]

Finally, a reviewing court must also reverse, modify, or grant other appropriate relief when the agency's decision is "[b]ased upon an irrational, illogical, or wholly unjustifiable application of law to fact that has clearly been vested by a provision of law in the discretion of the agency."[68] "In order to determine an employee's right to benefits, which is the agency's responsibility, the agency, out of necessity, must apply the law to the facts."[69] Because the agency has been entrusted with the responsibility of applying the law to the facts, the "agency's application of the law to the facts can only be reversed if we determine such an application was 'irrational, illogical, or wholly unjustifiable.'"[70]

MERITS.

I. Whether the Iowa Workers' Compensation Commission had Jurisdiction over Pavlich.

Pavlich's first argument is that the Commissioner erred in finding that the Iowa Workers' Compensation Commission had subject matter and personal jurisdiction over a nonresident Respondent to hear the claim. Errors regarding subject matter jurisdiction are reviewed **[*14]** for errors at law.[71] Pavlich claims that the statutory requirements of *Iowa Code section 85.3* are not satisfied, as Martinez was not performing services for it within the state of Iowa at the time of the accident. *Iowa Code section 85.3(2)* reads:

> In addition, every corporation, individual, personal representative, partnership or association that has the necessary minimum contact with this state shall be subject to the jurisdiction of the workers' compensation commissioner, and the workers' compensation commissioner shall hold such corporation, individual, personal representative, partnership, or association amenable to suit in this state in

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[61] *Iowa Code § 17A.19(10)(f)*.

[62] *Iowa Code § 17A.19(10)(f)(1)*.

[63] *Reed v. Iowa Dept of Transp., 478 N.W.2d 844, 846 (Iowa 1992)*.

[64] *Iowa Code § 17A.19(10)(c)*.

[65] *Iowa Code § 17A.19(11)(b)*.

[66] *Iowa Code § 17A.19(11)(c)*.

[67] *Ward v. Iowa Dept. of Transp., 304 N.W.2d 236, 238 (Iowa 1981)*.

[68] *Iowa Code § 17A.19(10)(m)*.

[69] *Mycogen Seeds v. Sands, 686 N.W.2d 457, 465 (Iowa 2004)*.

[70] *Id.* (*citing* *Iowa Code § 17A.19(10)(m)*).

[71] *Ortiz v. Loyd Rolling Constr., 928 N.W.2d 651,653 (Iowa 2019)*.

every case not contrary to the provisions of the Constitution of the United States.

Pavlich is a nonresident employer. The corporation is headquartered and incorporated in Kansas. Pavlich does not have any physical locations in the state of Iowa.[72] The corporation does not pay taxes in Iowa.[73] However, Pavlich does conduct business in the state of Iowa.[74] The Deputy found, and the Commissioner affirmed, that Pavlich did have the necessary minimum contacts under *Iowa Code section 85.3*. They based their findings on the testimony of Pavlich's owner, Jim Pavlich. Pavlich claims that Martinez was not performing services for Pavlich **[*15]** at the time of the injury, however, Mr. Pavlich testified that Martinez has regularly hauled freight through Iowa through the course and scope of this employment.[75] Furthermore, the parties stipulated that Martinez's injury arose out of and in the course of his employment. Martinez's April 16, 2018 accident took place in Iowa and on a road maintained by the state of Iowa.

The Court finds that the Iowa Worker's Compensation Commission did have the subject matter jurisdiction necessary to hear this case. The driver logs indicate that Martinez spent the majority of his shift in Iowa on the date of the accident. Martinez was not merely passing through, he also loaded and unloaded his vehicle while in Iowa.[76] According to his deposition, Martinez was driving down the road and looking at the GPS at the time of the accident.[77] He deposed that he was looking for a place to park his truck and rest for the day. The Commissioner reviewed the record and concluded that Martinez was within the scope his employment at the time of the accident. The Court, through its own review of the record affirms the findings of the Commissioner. There is substantial evidence from the logs and Martinez's testimony **[*16]** to conclude that he was working on behalf of Pavlich at the time of the accident.

With regard to personal jurisdiction, a court may exercise personal jurisdiction over a nonresident defendant when it has "certain minimum contacts" with the forum state and it does not offend "traditional notions of fair play and substantial justice."[78] Under this two-step analysis, the Court has found that the Iowa Worker's Compensation Commission has already met the first prong as it was authorized by *Iowa Code section 85.3(2)* for the reasons explained above.

The remaining prong for personal jurisdiction is whether "the assertion of personal jurisdiction would comport with fair play and substantial justice."[79] Pavlich claims that the Commissioner erred in his finding that personal jurisdiction was proper. "[F]air play and substantial justice" requires a consideration of "the burden on the defendant", "the forum State's interest in adjudicating the dispute", "the plaintiff's interest in obtaining convenient and effective relief", "the interstate judicial system's interest in obtaining the most efficient resolution of controversies", and the "shared interest of the several States in furthering fundamental substantive social policies." **[*17]** [80]

Pavlich's claims that there is no "fair play and substantial justice" as Martinez contractually agreed to a jurisdictional provision where worker's compensation claims would be subject to the laws

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[72] Hr. Tr., p. 98.

[73] *Id.*

[74] *Id.* pp. 86-87.

[75] *Id.* pp. 83, 85-86, 90.

[76] Ex. H at 12.

[77] Ex. G at 18.

[78] *Shams v. Hassan, 829 N.W.2d 848 (Iowa 2013)*; *Int'l Shoe v. Washington, 326 U.S. 310, 316 (1945)*.

[79] *Capital Promotions, L.L.C. v. Don King Productions, Inc., 756 N.W.2d 828, 834 (Iowa 2008)*; *Burger King Corp v. Rudzewicz, 471 U.S. 462, 476 (1985)*.

[80] *Shams, 829 N.W.2d at 857*(quoting *Burger King, 471 U.S. at 477*).

of the state of Kansas.[81] Furthermore, Pavlich alleges that it already had to defend itself against a claim in Kansas and now has to defend itself in Iowa for the same accident.[82]

"No contract, rule, or device whatsoever shall operate to relieve the employer, in whole or in part, form any liability created by this chapter except as herein provided"[83] Iowa's Workers' Compensation law unequivocally forbids agreements slating to extinguish the jurisdiction of Iowa courts to relieve employers of liability and voids such agreements as void against public policy.[84] Pavlich alleges that it is unfair that it has to defend itself in Iowa when it supposedly already defended itself in Kansas. However, the record does not support Pavlich's assertion that it already litigated these claims in Kansas. The only thing on the record that mentions the workers compensation claim in Kansas is an insurance company opinion denying benefits to Martinez. The insurance company is not a judicial or quasi-judicial entity, it **[*18]** is not correct to characterize the insurance company's opinion as any form of adjudication on the merits.[85] Because there is nothing on the record that indicates a lack of "fair play and substantial justice," the Court finds that it does have personal jurisdiction over Pavlich.

II. Whether Martinez's Claim Was Barred by Application of *Iowa Code 85.16(1)*.

Pavlich claims that the Deputy and the Commissioner applied the wrong standard in determining whether Martinez acted with willful intent at the time of the accident. Compensation is not allowed for injuries caused "[b]y the employee's willful intent to injure the employee's self or to willfully injure another." *Iowa Code section 85.16(1)*. Pavlich admits, and the Court acknowledges, that the Iowa Court of Appeal and Iowa Supreme Court applied *section 85.16(1)* primarily to fact patterns where suicides occurred and never to facts similar these.[86]

Pavlich argues that Martinez's acts of looking at this phone and exchanging text messages while driving is reckless behavior and tantamount to intent to injure himself. Pavlich supports this assertion through *Holmes v. Homes Animal Clinic*, File No. 500143 (App. Dec. 2003). The Commissioner in *Holmes* mentions: "mere negligence is not a defense. Conduct that **[*19]** manifests intentional self-injury is required. Conduct that is so reckless as to be tantamount to intentional self-injury is sufficient."[87] Pavlich's reliance on *Holmes* is misguided. First, the Iowa Workers' Compensation Commission lacks the legislature's expressly vested authority to interpret workers' compensation statutes.[88] "[W]e have declined to defer to the commissioner's interpretations of various provisions of chapter 85 in recent years"[89]

Although the Court is not required to, it does agree with part of the Commissioner's interpretation of *section 85.16(1)* in *Holmes*. "Workers' compensation law recognizes human imperfection and compensates injuries that occur as a result of the employee's personal negligence. To do so otherwise would cause many injuries to go without compensation with all the adverse consequences that befall society when an injury is

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[81] Ex. B at 6.

[82] Petitioners' Judicial Review Brief ("Pavlich Brief") at 18.

[83] *Iowa Code section 85.18*

[84] *Springer v. Weeks and Leo Co., Inc., 429 N.W.2d 558,560-61 (Iowa 1998)*.

[85] Ex. 2, p. 21.

[86] *See Humboldt Community Schools v. Fleming*, N.W.2d 759 (Iowa 1999); *Kostelac v. Feldman's Inc., 479 N.W.2d 853 (Iowa 1993)* (cases that dealt with suicide as a form of willful intent to harm oneself).

[87] *Id* at *1.

[88] *Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W. 2d 759, 770 (Iowa 2016)*.

[89] *Id.*

uncompensated."[90] Furthermore, it is the law of Iowa to interpret statutory provisions in the Iowa Workers' Compensation Acts liberally in favor of the injured worker.[91]

The Court declines to undertake the recklessness analysis proposed by Pavlich. It found above that Martinez was within the scope of his employment at the time the alleged reckless conduct **[*20]** occurred. It will not expand the definition of "willful intent" to include reckless conduct as it goes against the directives to interpret the Workers' Compensation Acts liberally in favor of the injured worker. If the Court expands the definition of "willful intent" to reckless conduct, it would necessitate future analysis on whether a worker acting within the scope of his or her employment was acting merely negligently or recklessly. Such an interpretation would go against the humanitarian mission of the Iowa Workers' Compensation, it would open the door the negligence arguments closed by the Act, but now instead disguised as recklessness arguments. For this reason, the Court affirms the Commissioner's finding that *Iowa Code section 85.16(1)* does not apply here.

III. Whether the Commissioner erred in finding Martinez was entitled to industrial disability benefits under *Iowa Code section 85.34(2)(v)*.

The Commissioner ultimately found substantial evidence that Martinez sustained permanent injuries to his right upper extremity and bilateral lower extremities.[92] The Commissioner and Pavlich agree that Martinez sustained injuries amounting to 20 percent of the whole person and 100 weeks of permanent partial disability benefits.[93] Furthermore, Pavlich **[*21]** and the Commissioner agree that the catch all provision, *Iowa Code section 85.43(2)(v)* applies here.

> In all cases of permanent partial disability other than those hereinabove described or referred to in paragraphs "a" through "u" hereof, the compensation shall be paid during the number of weeks in relation to five hundred weeks as the reduction in the employee's earning capacity caused by the disability bears in relation to the earning capacity that the employee possessed when the injury occurred. A determination of the reduction in the employee's earning capacity caused by disability shall take into account the permanent partial disability of the employee and the number of years in the future it was reasonably anticipated that the employee would work at the time of the injury.[94]
>
> If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of injury, the employee shall be compensated based *only* upon the employee's functional impairment resulting from the injury and *not* in relation to the employee's capacity.[95]
>
> Notwithstanding section 85.26, subsection 2, if an employee **[*22]** who is eligible for compensation under this paragraph returns to work with the same employer and is compensated only upon the employee's functional impairment resulting from the injury as provided in this paragraph and is *terminated from employment by employer*, the award or agreement for settlement for benefits under this chapter shall be reviewed upon commencement of reopening proceedings by the employee for a determination of any reduction in the

[90] *Holmes*, File No. 500143 at *1.

[91] *Bluml v. Dee Jay's Inc., 920 N.W.2d 82, 91 (Iowa 2018)*; *Xenia Rural Water Dist. v. Vegors, 786 N.W.2d 250, 257 (Iowa 2010)*.

[92] Arb. Dec., p. 17; App. Dec., p. 3.

[93] Pet. at 27; Arb. Dec. at *6; App. Dec. at *6.

[94] *Iowa Code § 85.43(2)(v)*.

[95] *Id.* (emphasis added).

> employee's earning capacity caused by the employee's permanent partial disability.[96]

Moreover, the difference between functional impairment and industrial disability is as follows:

> The two methods used to evaluate a disability, functional and industrial, are dissimilar. Functional disability is assessed solely by determining the impairment of the body function of the employee; industrial disability is gauged by determining the loss to the employee's earning capacity. Functional disability is limited to the loss of physiological capacity of the body or body part. Industrial disability is not bound to the organ or body incapacity, but measures the extent to which the injury impairs the employee in the ability to earn wages. Criteria for **[*23]** the test of industrial disability include the extent of functional disability, along with the employee's age, education, qualification, experiences, and the injury-induced inability of the employee to engage in employment for which the employee is fitted.[97]

The facts in this case appear to differ from the scenarios contemplated by *Iowa Code section 85.43(2)(v)*. In this case, Martinez returned to work at Pavlich with the same or greater salary. Based on this section, Martinez would only be entitled to functional impairment benefits resulting from the injury. However, Martinez later voluntarily resigned from Pavlich and found employment as a lineman for higher wages than his position at Pavlich. Pavlich did not terminate its employment relationship with Martinez in any form.

The Commissioner found that under such a scenario, a claimant would be entitled to benefits under an industrial disability analysis. He reasoned that if a claimant received only a functional disability analysis under that scenario, it would lead to unreasonable outcomes.

> . . . [M]ight be better off not seeking employment after being terminated by a defendant-employer because her or she would potentially risk entitlement to benefits under the industrial **[*24]** disability analysis should a different employer offer the same or greater earnings than the claimant was receiving at the time of the injury. Certainly the legislature did not intend to discourage claimants from seeking gainful employment after a work injury.[98]

To reiterate, the Commissioner's decision to adopt the industrial method calculation was in line with Pavlich's contentions on appeal.[99] The Commissioner ultimately decided that Martinez sustained a 20 percent industrial disability and was entitled to 100 weeks of permanent partial disability benefits, which is the amount Pavlich now contends Martinez is entitled to in its Petition.[100] However, Pavlich now alleges for the first time that Martinez should be compensated according to only functional impairment.[101]

Pavlich takes issue with the Commissioner's interpretation of 85.43(2)(v). In summary, it posits that the Commissioner's interpretation would make an inevitability that a claimant would be entitled to industrial disability benefits at some point. Pavlich argues that at some point, an employee's employment will end through either voluntary resignation, layoff or being fired; and then at that point the employee would be entitled **[*25]** industrial disability benefits. Pavlich complains that the Commissioner's interpretation would have the effect of delaying the timing of industrial benefits

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[96] *Id.*

[97] *Simbro v. Delong's Sportswear, 332 N.W.2D 886,887 (Iowa 1983)* (citing *Graves v. Eagle Iron Works, 331 N.W.2d 116, 117-18 (Iowa 1983)*).

[98] Arb. App. at *6.

[99] Pavlich Appeal from the Arbitration Decision of November 19, 2019 at 8.

[100] Pet. at 27.

[101] *Id.*

for some indeterminate amount of time. It claims that under that logic, an employer would be better off simply terminating the injured employee and paying industrial disabilities rather than waiting for such exposure to happen.[102] Pavlich contends that the proper interpretation of *Iowa Code section 85.43* is:

> . . . An employee is entitled to industrial disability benefits only if the defendant-employer terminates the employment relationship, then it incentivizes the employer to return the injured employee back to work, or at least offer such employment, at the same or greater wages as the time of injury [. . .] However, if an employee is the one who terminates the employment relationship or is terminated for reasons unrelated to the injury, such as attendance or misconduct, then the defendant-employer should not be punished with additional exposure. *Id.*

The Iowa Supreme Court has repeatedly stated that the Iowa Workers' Compensation Commission does not have the legislature's expressly vested authority to interpret workers' compensation statutes.[103] When **[*26]** the plain language of the statute is clear as to its meaning, courts apply the plain language and do not search for legislative intent beyond its express terms of the statute.[104]

Statutes should be read as a whole, rather than looking at specific words or phrases in isolation.[105] When making statutory changes, the legislature is deemed to have known and understood he status of the law, including any interpretation made by the agency and the Iowa Supreme Court as to existing statutes.[106]

The Commissioner's statutory interpretation is reviewed for errors of law.[107] The Court also considers the statute's "subject matter, the object sought to be accomplished, the purpose to be accomplished, the purpose to be served, underlying policies, remedies provided and the consequences of the various interpretations.[108] Finally, when a statute leaves ambiguity as to its meaning or intent, it has long been the law of Iowa that a statutory provision in the Iowa Workers' Compensation acts should be interpreted liberally in favor of the injured worker.[109] Therefore, the Court will analyze at the subsection of *section 85.43(2)(v)* separately to determine if the Commissioner committed an error of law.

> In all cases of permanent partial disability **[*27]** other than those hereinabove described or referred to in paragraphs "a" through "u" hereof, the compensation shall be paid during the number of weeks in relation to five hundred weeks as the reduction in the employee's earning capacity caused by the disability bears in relation to the earning capacity that the employee possessed when the injury occurred. A determination of the reduction in the employee's earning capacity caused by disability shall take into account the permanent partial disability of the employee and the number of years in the future it was reasonably anticipated that the employee would work at the time of the injury.[110]

This section begins with a description of its

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[102] *Id.*

[103] *Ramirez-Trujillo, 878 N.W.2d at 770*.

[104] *Denison Municipal Utilities v. Iowa Workers' Compensation Com'r, 857 N.W.2d 230, 235 (Iowa 2014)*.

[105] *Iowa Ins. Institute v. Core Group of Iowa Ass'n for Justice, 867 N.W.2d 58, 72 (Iowa 2015)*

[106] *Roberts Daily v. Billick, 861 N.W.2d 814, 821 (Iowa 2015)*.

[107] *Westling v. Hormel Foods Corp., 810 N.W.2d 247, 251 (Iowa 2012)*.

[108] *Cox v. State, 686 N.W.2d 209, 213 (Iowa 2004)*.

[109] *Bluml, 920 N.W.2d at 91*.

[110] *Iowa Code § 85.43(2)(v)*.

applicability. If an injured worker is found to have permanent partial disabilities other than in sections "a" through "u" of the law, then the determination of benefits shall take into account the employee's earning capacity and the permanent partial disability of the employee's earning capacity. In other words, this section proscribes an industrial disability analysis to an injured employee. Given that, the Court holds that Martinez suffered injuries to his right upper extremity and bilateral lower extremities, **[*28]** his disability analysis starts here.

> **If** an employee who is eligible for compensation under this paragraph returns to work **or** is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of injury, the employee shall be compensated based **only** upon the employee's functional impairment resulting from the injury and **not** in relation to the employee's capacity.[111]

This section is a conditional. Martinez initially meets this condition as he returned to work for Pavlich at the same or higher wages, which would entitle him to a functional impairment analysis only. Notice that this section does not specify by *whom* the employee is offered work at greater or equal earnings. Notice also that Martinez accepted work as a lineman for higher or equal wages. Given Martinez's current, more profitable employment, his disability calculations should follow the functional method.

> Notwithstanding section 85.26, subsection 2, if an employee who is eligible for compensation under this paragraph returns to work with the **same employer and** is compensated only upon the employee's functional impairment resulting from the injury as provided in this paragraph **[*29]** and is **terminated from employment by employer**, the award or agreement for settlement for benefits under this chapter shall be reviewed upon commencement of reopening proceedings by the employee for a determination of any reduction in the employee's earning capacity caused by the employee's permanent partial disability.[112]

Here, Pavlich correctly points out that Martinez voluntarily left its employment, which would not trigger this condition for an industrial earning capacity adjustment. The law is silent on this current situation where an employee under functional impairment voluntarily leaves for a better earning job.

Martinez's subsequent employment at higher wages is relevant here. Under this section, an employee who meets the injury criteria defaults to an industrial disability analysis. If the worker then finds a new position, where the worker receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment. Martinez left Pavlich for a position that paid him the same or greater salary, wages or earnings than the position he had at **[*30]** the time of injury. Given Martinez's injuries and the lack of specificity within the law of who needs to offer the better position, a functional impairment analysis is proper here.

The Court notes the hypothetical situations warned by the Commissioner, namely that where a person leaves employment for a job that pays less to change the calculation on purpose, or where workers are deterred from looking for employment in fear that they would risk entitlement benefits under the industrial disability analysis. However, these are not the facts that this Court was presented, and therefore it cannot and will not further address them.

Regardless of the calculation, the Commissioner and the parties agree that a 20 percent impairment rating or 100 weeks of pay is appropriate here.

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[111] *Id.* (emphasis added).

[112] *Id.* (emphasis added).

Given that there is substantial evidence that Martinez suffered injuries to three scheduled members, he should be remunerated for the permanent disabilities he sustained.

RULING AND DISPOSITION

For all of the reasons set forth above, the Court concludes there was substantial evidence in the record to support the Commissioner's findings of fact. Additionally, the Commissioner correctly stated and applied the law when he **[*31]** held that (1) The Iowa Workers' Compensation Commission did have jurisdiction over Pavlich and (2) *Iowa Code 85.16(1)* did not apply to this case. The Court also agrees with the overall calculation of benefits to be paid by Pavlich, but finds that under *Iowa Code section 85.43(2)(v)* Martinez is entitled to the same amount of benefits under a functional impairment analysis and not under industrial disability. The Court further concludes none of the Commissioner's application of the law to these factual findings was irrational, illogical, or wholly unjustifiable. Accordingly, Petitioners' Petition for Judicial Review is hereby **DENIED**.

So Ordered

/s/ Paul D. Scott

Paul D. Scott, District Court Judge

Fifth Judicial District of Iowa

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