BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MICHAEL KEHRLI, Claimant, vs. OVERHEAD DOOR CO. OF WATERLOO, INC., Employer, GRINNELL SELECT INSURANCE CO., Insurance Carrier, Defendants.	File No. 1653327.01 ARBITRATION DECISION Headnote: 1803

I. STATEMENT OF THE CASE.

Claimant Michael Kehrli seeks workers' compensation benefits from the defendants, employer Overhead Door Co. of Waterloo, Inc. (Overhead Door) and insurance carrier Grinnell Select Insurance Co. (Grinnell). The undersigned presided over an arbitration hearing on July 28, 2022, held using internet-based video by order of the Commissioner. Kehrli participated personally and through attorney Joseph G. Lyons. Mason Moore served as the legal representative of Overhead Door. Both defendants participated by and through attorney Aaron T. Oliver.

II. ISSUES.

Under rule 876 IAC 4.19(3)(*f*), the parties jointly submitted a hearing report defining the claims, defenses, and issues submitted to the presiding deputy commissioner. The hearing report was approved and entered into the record via an order because it is a correct representation of the disputed issues and stipulations in this case. The parties identified the following disputed issues in the hearing report:

1) What is the nature and extent of permanent disability, if any, caused by the stipulated work injury?

2) What is the commencement date for permanent partial disability benefits, if any are awarded?

3) Is Kehrli entitled to a penalty under Iowa Code section 85.60?

4) Is Kehrli entitled to taxation of the costs against the defendants?

III. STIPULATIONS.

In the hearing report, the parties entered into the following stipulations:

1) An employer-employee relationship existed between Kehrli and Overhead Door at the time of the stipulated work injury.

2) Kehrli sustained an injury on July 20, 2018, which arose out of and in the course of his employment with Overhead Door.

3) The alleged injury is a cause of temporary disability during a period of recovery, but Kehrli's entitlement to temporary or healing period benefits is no longer in dispute.

4) The alleged injury is a cause of permanent disability.

5) At the time of the stipulated injury:

    a) Kehrli's gross earnings were one thousand eighty-four and 00/100 dollars ($1,084.00) per week.

    b) Kehrli was married.

    c) Kehrli was entitled to two exemptions.

6) Prior to hearing, the defendants paid to Kehrli four and 4/10 (4.4) weeks of compensation at the rate of six hundred ninety-six and 6/100 dollars ($696.06) per week.

The parties' stipulations in the hearing report are accepted and incorporated into this arbitration decision. The parties are bound by their stipulations. This decision contains no discussion of any factual or legal issues relative to the parties' stipulations except as necessary for clarity with respect to disputed factual and legal issues.

IV. FINDINGS OF FACT.

The evidentiary record in this case consists of the following:

- Joint Exhibits (Jt. Ex.) 1 through 5;
- Claimant's Exhibits (Cl. Ex.) 1 through 8;
- Defendants' Exhibits (Def. Ex.) A through G; and
- Hearing testimony by Kehrli and Mason Moore, president of Overhead Door.

After careful consideration of the evidence and the parties' post-hearing briefs, the undersigned enters the following findings of fact.

Kehrli was 67 years old at the time of hearing. (Hrg. Tr. p. 12) He grew up on a farm near Manchester, Iowa, where his family rarely had enough money to afford treatment by a doctor and they took care of themselves. (Hrg. Tr. pp. 12, 23) Kehrli is a high-school graduate. (Hrg. Tr. p. 12)

Kehrli had a brother who underwent back surgery. (Hrg. Tr. p. 25) He ultimately required multiple procedures. (Hrg. Tr. p. 25) After the surgeries, he had to use a wheelchair for mobility. (Hrg. Tr. p. 25)

On September 17, 1983, Kehrli married his wife, Michelle. (Hrg. Tr. pp. 12–13) In or around 1999, Michelle sustained a torn meniscus. (Hrg. Tr. pp. 12, 51) She underwent surgery, which the treating physician described to them as "common." (Hrg. Tr. p. 49) Unfortunately, Michelle developed an infection after surgery, ultimately underwent four surgeries, and has experienced significant permanent mobility limitations as a result. (Hrg. Tr. pp. 24–25, 50) Michelle uses a cane to aid her mobility and continues to take pain medication because of the ongoing issues she experiences due to the complications of undergoing surgery on her torn meniscus. (Hrg. Tr. pp. 24–25)

Later, Kehrli broke his left ankle and wound up seeing the same doctor who performed the surgery that resulted in Michelle's infection. (Hrg. Tr. pp. 25–26; Jt. Ex. 1, pp. 1–9) After the doctor explained that the surgery involved inserting screws into his broken bones, he refused to go through with it out of fear that it would result in complications like what his wife experienced and that would negatively impact his ability to work for a living. (Hrg. Tr. p. 27; Jt. Ex. 1, p. 9) Kehrli chose to have a cast put on his ankle instead of the surgery. (Hrg. Tr. p. 28)

Kehrli is not against all surgeries. (Hrg. Tr. p. 28) He has had his gallbladder removed and underwent hemorrhoid surgery when he was younger. (Hrg. Tr. p. 28) Kehrli is skeptical of surgeries to his joints. (Hrg. Tr. p. 29) Because of what his brother and wife have endured, he does not want to become a burden on his family because of complications that arose out of a surgery. (Hrg. Tr. p. 28)

Kehrli believes that many medications do more harm than good. (Hrg. Tr. p. 49) Consequently, he does not take every medication recommended by a physician. Kehrli takes medicine for high blood pressure but does not take medication for diabetes. (Hrg. Tr. pp. 48–49; Jt. Ex. 2, p. 14)

In 1984, Overhead Door hired Kehrli to work on the installation and repair of residential and commercial garage doors. (Hrg. Tr. pp. 13–14, 64) He worked there for almost four decades before the injury at the center of this case. (Hrg. Tr. p. 63)

On Friday, July 20, 2018, Kehrli was working for Overhead Door. (Hrg. Tr. pp. 14–15) He was driving an Overhead Door work van when he injured his right knee.

(Hrg. Tr. p. 15) While Kehrli was driving the van in reverse, the van struck a pole. (Hrg. Tr. p. 15; Jt. Ex. 3, p. 26; Def. Ex. A, p. 2) Kehrli was not sure what the van had hit so he jammed the brake pedal hard with his right foot. (Hrg. Tr. p. 15; Jt. Ex. 3, p. 26; Def. Ex. A, p. 2)

Kehrli worked the rest of the day. (Hrg. Tr. pp. 16–17) Kehrli used a sledgehammer to beat the damaged bumper down so that one could open and close the rear doors of the van and reported his injury after that, within about thirty minutes of it occurring. (Hrg. Tr. p. 16) Kehrli completed his assigned jobs for the day, working through the pain caused by his injury. (Hrg. Tr. pp. 16–17)

Kehrli took it easy over the weekend and iced his knee, but his pain was worse on Monday than it was on Friday. (Hrg. Tr. pp. 17–18; Jt. Ex. 3, pp. 27–28) The defendants arranged care at Allen Hospital in Waterloo. (Hrg. Tr. p. 18; Jt. Ex. 3, pp. 26–29) Kehrli saw Kenneth McMains, M.D., an occupational medicine specialist, who placed him on light duty and prescribed medication. (Hrg. Tr. pp. 18–19; Jt. Ex. 3, pp. 30–31) Ultimately, Dr. McMains referred Kehrli to an orthopedic specialist after his symptoms did not improve. (Hrg. Tr. p. 20; Jt. Ex. 3, p. 41)

On August 27, 2018, Kehrli saw Thomas Gorsche, M.D., for the first time. (Hrg. Tr. p. 20; Jt. Ex. 4, pp. 44–47) Dr. Gorsche administered an injection to Kehrli's knee that provided no relief. (Hrg. Tr. p. 21; Jt. Ex. 4, p. 47) In fact, Kehrli's pain worsened so he returned to Allen Hospital and saw Robert Bartelt, M.D., because Dr. Gorsche was out of the office. (Hrg. Tr. p. 21; Jt. Ex. 4, pp. 50–51) After an examination, Dr. Bartelt took Kehrli off work, ordered crutches, and requested magnetic resonance imaging (MRI) for a suspected meniscus tear. (Hrg. Tr. pp. 21–22; Jt. Ex. 4, pp. 50, 52)

The MRI showed a medial tear of the meniscus in Kehrli's right knee. (Hrg. Tr. pp. 22–23; Jt. Ex. 4, p. 54; Jt. Ex. 5, pp. 75–78) Dr. Gorsche discussed the MRI with Kehrli, who voiced opposition to having surgery. (Jt. Ex. 4, p. 54) He refused to undergo surgery because of his upbringing on his family farm and the negative experiences and results close family members had with surgery; in particular, according to Kehrli's credible hearing testimony, he was concerned after the complications his wife endured after sustaining a torn meniscus. (Hrg. Tr. p. 50) Kehrli did not want to undergo a procedure in which his joint would be opened up and exposed because of the potential for complications. (Hrg. Tr. p. 29) Dr. Gorsche continued Kehrli's medications, use of crutches, and work restrictions. (Hrg. Tr. p. 4; Jt. Ex. 4, pp. 54–57)

On October 3, 2018, Kehrli returned to see Dr. Gorsche, who authorized him to return to work on October 15, 2018, with restrictions of no squatting or kneeling. (Hrg. Tr. p. 29; Jt. Ex. 4, pp. 58–59) Kehrli saw Dr. Gorsche again on November 1, 2018. (Hrg. Tr. p. 30; Jt. Ex. 4, pp. 61–62) At that time, Dr. Gorsche released him to return to work with no permanent restrictions effective November 19, 2018. (Hrg. Tr. pp. 30, 58; Jt. Ex. 4, p. 63)

Dr. Gorsche then authored a letter dated November 28, 2018, to Joanne Philbin, the Grinnell claims adjuster assigned to Kehrli's case. (Jt. Ex. 4, pp. 65–66) Dr. Gorsche

did not include an opinion on permanent functional impairment in this letter. (Jt. Ex. 4, pp. 65–66) With respect to Kehrli's refusal to have surgery, Dr. Gorsche stated:

> As you know, Mr. Kehrli does not want to undergo surgery at this time. You ask if there would be further damage to the knee that wouldn't have occurred if he had surgery now. That is difficult to answer. I would say it is more likely than not that he will not have any further significant injury to the knee if he does not have surgery at this time. You also ask if there is a higher risk of permanent impairment if Mr. Kehrli puts off surgery. It is possible but not probable.
>
> In summary, if Mr. Kehrli elects not to undergo surgery and becomes asymptomatic, then in my opinion, no surgical procedure would be recommended or needed. It is possible to have an asymptomatic meniscal tear where it is much more common to have symptoms when one does have a meniscal tear. Hopefully this has answered your questions.

(Jt. Ex. 4, p. 65)

Kehrli returned to work at Overhead Door after his medical release and resumed his duties as a service technician. (Hrg. Tr. pp. 29–30, 58) His symptoms remained consistent, and he received no additional treatment for his injured leg for a time. (Hrg. Tr. pp. 31–32) Kehrli did not sustain another injury to his right leg between the date of the stipulated work injury and the time of hearing. (Hrg. Tr. p. 32) Kehrli did not miss any work at Overhead Door because of the stipulated work injury between his release to return to full-duty work and the date of hearing. (Hrg. Tr. p. 58)

Familiar with statutes of limitations, Kehrli reached out to Grinnell about additional care in June of 2020 because the two-year anniversary of his work injury was approaching, and his symptoms were ongoing. (Hrg. Tr. pp. 32–33; Cl. Ex. 5, p. 33) Grinnell arranged for care with Dr. Gorsche, who saw Kehrli on July 8, 2020. (Hrg. Tr. p. 33; Jt. Ex. 4, pp. 67–70; Cl. Ex. 5, p. 33) Dr. Gorsche examined Kehrli's leg manually, without using any instruments. (Hrg. Tr. pp. 33–34; Jt. Ex. 4, pp. 69–70)

Dr. Gorsche then issued a second letter to Philbin, dated July 27, 2020. (Jt. Ex. 4, p. 71) In it, Dr. Gorsche opined Kehrli reached maximum medical improvement (MMI) and used Table 17-33 of the Fifth Edition of the American Medical Association's (AMA) *Guides to the Evaluation of Permanent Impairment* (*Guides*) to find that Kehrli sustained a two percent impairment to his right leg due to the injury. (Hrg. Tr. p. 34; Jt. Ex. 4, p. 71) The defendants then paid Kehrli four and four-tenths weeks of permanent partial disability benefits based on this rating. (Cl. Ex. 3, p. 34)

Table 17-33, "Impairment Estimates for Certain Lower Extremity Impairments," contains a list of regions and conditions with a corresponding impairment percentage. *Guides*, pp. 546–47. For the knee, Table 17-33 lists "meniscectomy, medial *or* lateral" as a condition. Id. at p. 546. A meniscectomy is assigned a two percent functional impairment. Id. A meniscectomy is defined as, "Excision of a meniscus, usually from the

knee joint." Stedman's Medical Dictionary 541610 (Nov. 2014) (accessed using Westlaw on Nov. 30, 2022). Table 17-33 assigns a two percent functional impairment to the lower extremity following such an excision. Thus, the evidence shows Dr. Gorsche rated Kehrli's permanent functional impairment based on the percentage for a surgical excision Kehrli did not undergo.

Claimant's counsel arranged for an IME with Farid Manshadi, M.D., on September 3, 2021. (Hrg. Tr. pp. 34–35; Cl. Ex. 1, pp. 1–4) Dr. Manshadi reviewed records and performed a physical examination as part of the IME process. (Cl. Ex. 1, pp. 1–4) The examination included measuring Kehrli's range of motion in his leg and observing him walk. (Hrg. Tr. p. 35; Cl. Ex. 1, p. 3)

Dr. Manshadi noted in his IME report, "Right knee active range of motion using goniometer was from -7 degrees to only 47 degrees of flexion." (Cl. Ex. 1, p. 3) He placed Kehrli at MMI as of the date of the IME. (Cl. Ex. 1, p. 4) On the question of permanent functional impairment, Dr. Manshadi opined:

> In regard to the right lower extremity, I used the [*Guides*], Chapter 17, Page 537 and under Table 17-10 I assigned ten (10) percent impairment of the right lower extremity. The reason I used Table 17-10 is that as a result of the medial meniscus tear, now Mr. Kehrli has developed a locked knee.

(Cl. Ex. 1, p. 4)

In a follow-up letter dated June 1, 2022, Dr. Manshadi opined that he made a mistake in the IME report and that Kehrli fell under the "severe" category and had a thirty-five percent impairment to the right leg. (Cl. Ex. 1, p. 5) Table 17-10 includes a "mild," "moderate," and "severe" category for knee impairment. *Guides*, p. 537. An individual with flexion of less than sixty degrees is considered "severe" with a thirty-five percent impairment. Id. at p. 537. Dr. Manshadi measured Kehrli's flexion using a goniometer at forty-seven degrees of flexion, which makes the revised thirty-five percent impairment rating under the "severe" category in line with the *Guides*. Id.

Defense counsel shared Dr. Manshadi's IME report with Dr. Gorsche and requested a response, which the latter provided in a letter dated June 24, 2022. (Def. Ex. E, p. 9) In the letter, Dr. Gorsche opined:

> I previously had treated Mr. Kehrli back in the fall of 2018. I recommended arthroscopic surgery, and he declined that and did not want to have surgery for a number of reasons. In my medical opinion, based on a reasonable degree of medical certainty, if Mr. Kehrli had had arthroscopic surgery and excision of the medial meniscal tear, he would not have lost the motion in his knee which led to his increased impairment rating.

(Def. Ex. E, p. 9)

Chapter 2 of the *Guides* is entitled, "Practical Application of the *Guides*." Section 2.5g is entitled, "Adjustments for Effects of Treatment or Lack of Treatment," and states in pertinent part:

> A patient may decline surgical, pharmacologic, or therapeutic treatment. If a patient declines therapy for a permanent impairment, that decision neither decreases nor increases the estimated percentage of the individual's impairment. However, the physician may wish to make a written comment in the medical evaluation report about the suitability of the therapeutic approach and describe the basis of the individual's refusal. The physician may also need to address whether the impairment is at maximal medical improvement without treatment and the degree of anticipated improvement that could be expected with treatment.

Guides, p. 20. Neither Dr. Gorsche nor Dr. Manshadi reference this part of the *Guides*.

Dr. Gorsche's opinion is based on a table that assigns an impairment rating for a procedure Kehrli did not undergo and is therefore speculative at best. Dr. Manshadi's opinion is based on measurements with a goniometer in accordance with Figure 17-4 and Table 17-10. It therefore more accurately reflects Kehrli's permanent functional impairment caused by the stipulated work injury and is adopted.

At the time of hearing, Kehrli experienced ongoing symptoms. (Hrg. Tr. pp. 35–37) He experienced constant pain and rated his typical pain level at three or four on a scale of zero to ten. (Hrg. Tr. p. 37) Kehrli's pain becomes worse if he walks a lot or carries additional weight. (Hrg. Tr. pp. 36–37) Such activities increase Kehrli's pain level to as high as a nine out of ten. (Hrg. Tr. p. 37)

The injury has limited Kehrli's ability to function. He cannot straighten his right leg like he could before the injury or in the same way he can his left leg. (Hrg. Tr. pp. 35, 37) When using stairs, Kehrli takes a step with one leg and then steps with the other leg to that same step so that both feet are on it before stepping with one leg to the next stair and repeating the process. (Hrg. Tr. p. 37)

Kehrli attempts to preemptively mitigate his symptoms by not using his leg as often as he did before the injury. (Hrg. Tr. p. 38) Nonetheless, Kehrli's injured leg occasionally swells, and he experiences increased pain with use. (Hrg. Tr. pp. 37–38) He treats his injured leg with ice, over-the-counter medications, Aspercreme, and a warming pad. (Hrg. Tr. p. 38)

Because of Kehrli's physical limitations caused by the work injury, he has given up work that allowed him to earn money in addition to his pay at Overhead Door. (Hrg. Tr. pp. 44–45) Kehrli used to grow tomatoes and sell them to Fareway but he has stopped doing that because of the physical limitations and pain the injury caused. (Hrg. Tr. pp. 39–40) Before the injury, Kehrli performed carpentry work such as building decks outside his employment with Overhead Door. (Hrg. Tr. pp. 45–46) However, he no

longer is physically capable of performing such work because of the standing, stooping, bending, and carrying the work requires. (Hrg. Tr. p. 46)

Moore's family has owned the Overhead Door business for three generations. (Hrg. Tr. p. 62) Generally, Overhead Door service technicians perform work at residential and commercial sites. Moore credibly testified with respect to Kehrli's ability to physically perform the work Overhead Door assigns him. (Hrg. Tr. pp. 63–64) Moore explained that Overhead Door funnels residential work to Kehrli, he is able to perform the work on short ladders, and the arrangement works well for both parties. (Hrg. Tr. p. 64)

V. CONCLUSIONS OF LAW.

In 2017, the Iowa legislature amended the Iowa Workers' Compensation Act. See 2017 Iowa Acts, ch. 23. The 2017 amendments apply to cases in which the date of an alleged injury is on or after July 1, 2017. Id. at § 24(1); see also Iowa Code § 3.7(1). Because the injury at issue in this case occurred after July 1, 2017, the Iowa Workers' Compensation Act, as amended in 2017, applies. Smidt v. JKB Restaurants, LC, App. Decision, File No. 5067766, 2020 WL 7489048 (Iowa Workers' Comp. Comm'r, Dec. 11, 2020).

A. Permanent Disability.

The defendants contend that Kehrli's refusal of the meniscectomy recommended by Dr. Gorsche constitutes a failure to undergo reasonable care and his entitlement to permanent partial disability benefits should therefore be reduced. Kehrli contends the 2017 amendments to the Iowa Workers' Compensation Act preclude the agency from reducing its determination of the extent of permanent functional disability because the injured employee refused surgery. In the alternative, Kehrli asserts that if the failure to mitigate remains a viable affirmative defense after the 2017 amendments, the defendants did not plead it in their answer and therefore waived it.

The defendants rely on agency caselaw and an Iowa Court of Appeals case in support of their argument. All of the cases pre-date the 2017 amendments to the Iowa Workers' Compensation Act. None of the cases involve a scheduled member injury.

1. Statutory Construction.

a. Agency Authority.

"Iowa first enacted a workers' compensation system in 1913." Baker v. Bridgestone/Firestone, 872 N.W.2d 672, 676 (Iowa 2015) (citing 1913 Iowa Acts ch. 147 and Hansen v. State, 249 Iowa 1147, 1150, 91 N.W.2d 555, 556 (1958)). This agency is the tribunal tasked with administering the exclusive remedy for employees and employers with respect to injuries arising out of and in the course of employment. See Flint v. City of Eldon, 191 Iowa 845, 183 N.W. 344, 345 (1921)); see also Thayer v. State, 653 N.W.2d 595, 599 (Iowa 2002). Nonetheless, the legislature has not expressly

vested the Commissioner with the power to interpret the Iowa Workers' Compensation Act. See Iowa Code §§ 85, 86 (2022).

In 1974, the legislature enacted the Iowa Administrative Procedure Act (IAPA) to govern judicial review of agency decisions. 1974 Iowa Acts ch. 1090 (codified at Iowa Code ch. 17A). Under the IAPA, the Iowa Supreme Court gave limited deference to the Commissioner's interpretation of the Iowa Workers' Compensation Act while reserving the ultimate power to interpret provisions of the Act for the courts. See Second Injury Fund v. Nelson, 544 N.W.2d 258, 264 (Iowa 1995) (citing Second Injury Fund v. Braden, 459 N.W.2d 467, 468 (Iowa 1990). However, in 1998, the legislature amended the IAPA, which changed the legal terrain with respect to judicial review of agency interpretations of statutes within their purview. See 1998 Iowa Acts ch. 1202; see also Arthur E. Bonfield, *Amendments to Iowa Administrative Procedure Act, Report on Selected Provisions to Iowa State Bar Association and Iowa State Government* 62 (1998) (hereinafter *Bonfield*). In the court's initial application of the IAPA, as amended in 1998, to workers' compensation cases, it concluded the legislature did not vest the Commissioner with the authority to interpret any provision of an Iowa workers' compensation statute and that the agency's interpretation of them was therefore entitled to no deference. P.D.S.I. v. Peterson, 685 N.W.2d 627, 633 (Iowa 2004); Rojas v. Pine Ridge Farms, L.L.C., 779 N.W.2d 223, 221 (Iowa 2010).

In 2010, the court issued its seminal holding Renda v. Iowa Civil Rights Commission, 784 N.W.2d 8 (Iowa 2010), a case in which the court considered the effect of the legislature's 1998 IAPA amendments on the level of deference afforded to an administrative agency's interpretation of a statute. Id. at 10–15. The court specifically addressed the deference it had given to agency interpretations of statutes under the IAPA as it existed before the 1998 amendments and held, "The 1998 amendments more clearly circumscribe the circumstances in which deference is owed by courts, substituting the specific inquiry whether a matter has been clearly vested in the agency in place of the more nebulous inquiry of whether the matter is within the agency's expertise. Id. at 15 n. 3 (citing Locate.Plus.Com, Inc. v. Iowa Dep't of Transp., 650 N.W.2d 609, 613 (Iowa 2002) and Iowa Code § 17A.19(10)) The court concluded that under the amended IAPA it "must . . . determine, after reviewing 'the precise language of the statute, its context, the purpose of the statute, and the practical considerations involved, that the legislature actually intended (or would have intended had it thought about the question) to delegate to the agency interpretive power with the binding force of law over the elaboration' of the terms." Id. at 14 (quoting *Bonfield*).

The court revisited its pre-Renda conclusion that the Commissioner was never entitled to deference with respect to the agency's interpretation of a provision of a workers' compensation statute. Andover Volunteer Fire Dep't v. Grinnell Mut. Reinsurance Co., 787 N.W.2d 75, 80 n. 3 (Iowa 2010). After applying the Renda standard, the court walked back the blanket rule it articulated before Renda and concluded that because the legislature did not expressly grant the agency authority to interpret the Iowa Workers' Compensation Act, the level of deference to be afforded the Commissioner's interpretation of a workers' compensation statute must be determined

on a case-by-case basis. Burton v. Hilltop Care Ctr., 813 N.W.2d 250, 256 (Iowa 2012); Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 769 (Iowa 2016). Since adopting the case-by-case method, the court has not found the legislature vested the Commissioner with the authority to interpret any provision of an Iowa workers' compensation statute, expressly concluding it did not give the agency authority to interpret any provision of the Iowa Workers' Compensation Act. See Waldinger Corp. v. Mettler, 817 N.W.2d 1, 7 (2012); see also Ramirez-Trujillo v. Quality Egg LLC, 878 N.W.2d 759, 771 (Iowa 2016); Burton, 813 N.W.2d at 260–61; Xenia Rural Water Dist. v. Vegors, 786 N.W.2d 250, 253 (Iowa 2010); Andover Volunteer Fire Dep't, 787 N.W.2d at 80; Swiss Colony, Inc. v. Deutmeyer, 789 N.W.2d 129, 133 (Iowa 2010); Westling. v. Hormel Foods Corp., 810 N.W.2d 247, 251 (Iowa 2012); Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 519 (Iowa 2012); Staff Mgmt. v. Jimenez, 839 N.W.2d 640, 648 (Iowa 2013); Iowa Ins. Inst. v. Core Group of Iowa Ass'n for Justice, 867 N.W.2d 58, 65 (Iowa 2015); Roberts Dairy v. Billick, 861 N.W.2d 814, 817 (Iowa 2015); Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 844–45 (Iowa 2015); Brewer-Strong v. HNI Corp., 913 N.W.2d 235, 243 (Iowa 2015); JBS Swift & Co. v. Ochoa, 888 N.W.2d 887, 892–93 (Iowa 2016); Chavez v. MS Tech. LLC, 972 N.W.2d 662, 666–67 (Iowa 2022).

Iowa Code section 85.34, the provision at issue in this case, is among the provisions of the Iowa Workers' Compensation Act that the Iowa Supreme Court has found the legislature did not empower the agency to interpret. Billick, 861 N.W.2d at 817; see also Chavez, 972 N.W.2d at 666–67. Nonetheless, the agency necessarily must interpret the Act when performing its statutory responsibility to provide the exclusive remedy under the Act as the tribunal for workers' compensation contested case proceedings in Iowa. See Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 518–19 (Iowa 2012); see also Iowa Ins. Inst. v. Core Group of Iowa Ass'n for Justice, 867 N.W.2d 58, 68 (Iowa 2015). To determine Kehrli's entitlement to PPD benefits in this case, it is necessary to first determine whether the agency may consider evidence under section 85.34(2), as amended in 2017.

b. General Principles.

The Iowa Supreme Court recently discussed the principles of statutory interpretation in Doe v. State:

> [I]n questions of statutory interpretation, "[w]e do not inquire what the legislature meant; we ask only what the statute means." Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 419 (1899). This is necessarily a textual inquiry as only the text of a piece of legislation is enacted into law. Any interpretive inquiry thus begins with the language of the statute at issue. See [State v. Doe, 903 N.W.2d 347, 350. (Iowa 2017).] Using traditional interpretive tools, we seek to determine the ordinary and fair meaning of the statutory language at issue. See State v. Davis, 922 N.W.2d 326, 330 (Iowa 2019) ("We give words their ordinary meaning absent legislative definition."); In re Marshall, 805 N.W.2d 145, 158 (Iowa 2011) ("We should give the language of the statute its fair

> meaning, but should not extend its reach beyond its express terms."); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 33 (2012) [hereinafter Scalia & Garner, *Reading Law*] (defining "fair reading method" as "determining the application of a governing text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued"). In determining the ordinary and fair meaning of the statutory language at issue, we take into consideration the language's relationship to other provisions of the same statute and other provisions of related statutes. *See* Iowa Code § 4.1(38) ("Words and phrases shall be construed according to the context and the approved usage of the language ...."); Doe, 903 N.W.2d at 351 (stating we consider the "relevant language, read in the context of the entire statute"). If the "text of a statute is plain and its meaning clear, we will not search for a meaning beyond the express terms of the statute or resort to rules of construction." In re Estate of Voss, 553 N.W.2d 878, 880 (Iowa 1996); see State v. Richardson, 890 N.W.2d 609, 616 (Iowa 2017) ("If the language is unambiguous, our inquiry stops there."). If the language of the statute is ambiguous or vague, we "may resort to other tools of statutory interpretation." Doe, 903 N.W.2d at 351.

943 N.W.2d 608, 610 (Iowa 2020).

c. Iowa Workers' Compensation Act.

In Iowa, workers' compensation is "a creature of statute." Darrow v. Quaker Oats Co., 570 N.W.2d 649, 652 (Iowa 1997). This means an injured employee's "right to workers' compensation is purely statutory." Downs v. A & H Const., Ltd., 481 N.W.2d 520, 527 (Iowa 1992). And "it is the legislature's prerogative to fix the conditions under which the act's benefits may be obtained." Darrow, 570 N.W.2d at 652.

The Iowa Supreme Court has held:

> The legislature enacted the workers' compensation statute primarily for the benefit of the worker and the worker's dependents. Therefore, we apply the statute broadly and liberally in keeping with the humanitarian objective of the statute. We will not defeat the statute's beneficent purpose by reading something into it that is not there, or by a narrow and strained construction.

Gregory v. Second Inj. Fund, 777 N.W.2d 395, 399 (Iowa 2010) (quoting Holstein Elec. v. Breyfogle, 756 N.W.2d 812, 815–16 (Iowa 2008) (citations omitted)).

"Although the workers' compensation statute is to be liberally construed in favor of the worker, the statute is not to be expanded by reading something into it that is not there." Downs v. A & H Const., Ltd., 481 N.W.2d 520, 527 (Iowa 1992) (citing Cedar Rapids Community School Dist. v. Cady, 278 N.W.2d 298 (Iowa 1979)). "To determine

legislative intent, we look to the language chosen by the legislature and not what the legislature might have said." Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, (Iowa 2016) (citing Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 337 (Iowa 2008)). The "broad purpose of workers' compensation" is "to award compensation (apart from medical benefits), not for the injury itself, but the disability produced by a physical injury." Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, (Iowa 2010) (citing 4 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 80.02, at 80–2 (2009)).

"One of the major functions of our Work[ers']Compensation Act is to provide prompt payment to a covered employee in the event of injury arising out of and in the course of employment." Blizek v. Eagle Signal Co., 164 N.W.2d 84, 85 (Iowa 1969). Iowa Code "chapter 85 encourages employers to compensate employees who receive workplace injuries promptly and provides a forum for efficient resolution of workplace-injury claims with minimal litigation." Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 770 (Iowa 2016) (citing Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 847 (Iowa 2015)); see also Bell Bros. Heating & Air Condition v. Gwinn, 779 N.W.2d 193, 202 (Iowa 2010); Flint v. City of Eldon, 191 Iowa 845, 847, 183 N.W. 344, 345 (1921)).

> The fundamental reason for the enactment of this legislation is to avoid litigation, lessen the expense incident thereto, minimize appeals, and afford an efficient and speedy tribunal to determine and award compensation under the terms of this act.
>
> "It was the purpose of the legislature to create a tribunal to do rough justice—speedy, summary, informal, untechnical. With this scheme of the legislature we must not interfere; for, if we trench in the slightest degree upon the prerogatives of the commission, one encroachment will breed another, until finally simplicity will give way to complexity, and informality to technicality."

Zomer v. West River Farms, Inc., 666 N.W.2d 130, 133 (Iowa 2003) (quoting Flint v. City of Eldon, 183 N.W. 344, 345 (1921) (citation omitted)). The legislature has sought to achieve this goal by codifying "'definite rules for the measuring of compensation for specific injuries.'" Blizek v. Eagle Signal Co., 164 N.W.2d 84, 86 (Iowa 1969) (quoting Starcevich v. Cent. Iowa Fuel Co., 226 N.W. 138, 140 (Iowa 1929)).

2. Iowa Code section 85.34.

At issue in this case is the effect of the legislature's 2017 amendments to the Iowa Workers' Compensation Act. These amendments made multiple changes to the text of Iowa Code section 85.34, "Permanent disabilities," some of which this decision addresses below. While the legislature made multiple substantive changes, it left in place the general framework governing entitlement to PPD benefits for a work injury. These unchanged provisions create a useful backdrop for considering the 2017 amendments.

The Iowa Workers' Compensation Act provides, "Compensation for permanent disabilities . . . shall be payable to an employee as provided in [section 85.34]." Iowa Code § 85.34 (2022). Every employer covered by the Act "shall provide, secure, and pay compensation according to the provisions of [chapter 85] for any and all personal injuries sustained by an employee arising out of and in the course of employment." Id. at § 85.3(1). "The compensation shall be based upon the extent of the disability and upon the basis of eighty percent per week of the employee's average spendable weekly earnings," but within the maximum and minimum weekly benefit rates established by the statute. Id. at § 85.34(2).

a. Before 2017.

The legislature did not define "disability" for purposes of benefits under the Iowa Workers' Compensation Act. See 1913 Iowa Acts ch. 154. Because the legislature did not codify such a definition, the Iowa Supreme Court filled the void. The court read into what is now section 85.34(2) two different definitions of "disability" for purposes of an injured worker's entitlement to permanent partial disability benefits. For body parts listed as scheduled members, the term means "functional disability" or the loss of use of the particular member. Schell v. Cent. Eng'g Co., 232, Iowa 421, 425, 4 N.W.2d 399, 401 (1942). And with respect to unscheduled injuries to the body as a whole, it means "industrial disability," which measures the loss of earning capacity. See Diederich v. Tri-City Ry. Co. of Iowa, 219 Iowa 587, 258 N.W. 899, 901–02 (1935).

As jurisprudence under the Iowa Workers' Compensation Act grew, the Iowa Supreme Court sometimes used "functional impairment" with respect to expert opinions and agency findings. See Wichers v. McKee Button Co., 223 Iowa 853, 273 N.W. 892, 894 (1937); see also Dailey v. Pooley Lumber Co., 233 Iowa 758, 763, 10 N.W.2d 569, 572 (1943); Catalfo v. Firestone Tire & Rubber Co., 213 N.W.2d 506, 509 (Iowa 1973); Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174, 179 (Iowa 1979). When discussing permanent disability for purposes of entitlement to benefits, however, the court's practice was to remain anchored to the statutory text and use the term "functional disability." See Diederich v. Tri-City Ry. Co. of Iowa, 219 Iowa 587, 258 N.W. 899, 901–02 (1935); Oldham v. Scofield & Welch, 222 Iowa 764, 266 N.W. 480, 482 (1936); Wichers, 273 N.W. at 894; Dailey, 10 N.W.2d at 765; Rose v. John Deere Ottumwa Works, 247 Iowa 900, 907, 76 N.W.2d 756, 760 (1956); Henderson v. Iles, 248 Iowa 847, 855, 82 N.W.2d 731, 736 (1957); Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960); Barton v. Nevada Poultry Co., 253 Iowa 285, 290, 110 N.W.2d 660, 663 (1961); Yeager v. Firestone Rubber & Tire Co., 253 Iowa 369, 374, 112 N.W.2d 299, 302 (1961); Nicks v. Davenport Produce Co., 254 Iowa 130,135, 115 N.W.2d 812, 815 (1962); Engman v. City of Des Moines, 255 Iowa 1039, 1049,125 N.W.2d 235, 241 (1963); Williams v. Larsen Const. Co., 255 Iowa 1149, 1152–53, 125 N.W.2d 248, 249–50 (1963); Olson v. Goodyear Serv. Stores, 255 Iowa 1112, 1120, 125 N.W.2d 251, 256 (1963); Wright v. Peterson, 259 Iowa 1239, 1249, 146 N.W.2d 617, 622 (1966); Blizek v. Eagle Signal Co., 164 N.W.2d 84, 87 (Iowa 1969); Deaver v. Armstrong Rubber Co., 170 N.W.2d 455, 458 (Iowa 1969); Irish v. McCreary Saw Mill, 175 N.W.2d 364, 366 (Iowa 1970).

In 1959, the legislature amended the Iowa Workers' Compensation Act. See 1959 Iowa Acts ch. 103. Among the changes to the statute was to the provision governing permanent disability to the body as a whole. See id. at § 6. The legislature repealed Iowa Code section 85.35 (1958), which had governed permanent partial disabilities and made no mention of the "body as a whole," and enacted in lieu thereof what is now section 85.34(2), including language addressing injuries to body parts not listed in the schedule. See id. The new provision did not contain any reference to industrial disability or earning capacity, stating, "In all cases of permanent partial disability other than those described in [the schedule], the compensation shall be paid during the number of weeks in relation to five hundred (500) weeks as the disability bears to the body of the injured employee as a whole." Id. The 1959 amendments also did not include any reference to functional disability or impairment. See id. at ch. 103.

The Iowa Supreme Court's use of terminology with respect to an injured employee's entitlement to workers' compensation benefits began to change in 1980 when it deployed the term "functional impairment" while discussing permanent disability under chapters 85 and 85A. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 192 (Iowa 1980). The McSpadden opinion appears to use "functional impairment" as a synonym for "functional disability," with "claimant's functional ability to perform his work" the apparent meaning. See id. In decisions that followed, the court continued to use "functional impairment" as a synonym for "functional disability." See Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980); see also Graves v. Eagle Iron Works, 331 N.W.2d 116, 117–18 (Iowa 1983); Simbro v. Delong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983). And the Iowa Court of Appeals followed suit. See Caylor v. Employers Mut. Cas. Co., 337 N.W.2d 890, 892–93 (Iowa Ct. App. 1983).

The appellate courts' use of "functional impairment" then branched out. Instead of its traditional practice of using the term "functional disability" when itemizing the factors used to determine industrial disability, the Iowa Supreme Court began using "functional impairment." Doerfer Div. of CCA v. Nicol, 359 N.W.2d 428, 437–38 (Iowa 1984); see also Klein v. Furnas Elec. Co., 384 N.W.2d 370, 374 (Iowa 1986); Mortimer, 502 N.W.2d at 14–15. Not long after, the Court of Appeals started doing the same. See Oscar Mayer Foods Corp. v. Wuebker, 456 N.W.2d 226, 228 (Iowa Ct. App. 1990); see also Lithcote Co. v. Ballenger, 471 N.W.2d 64, 68 (Iowa Ct. App. 1991); Arrow-Acme Corp. v. Bellamy, 500 N.W.2d 92, 93–95 (Iowa Ct. App. 1993).

During the intervening decades, our courts have continued to use the term "functional impairment" when discussing the facts of cases, the agency decision on judicial review, permanent partial disability of a scheduled member, and the factors used in the determination of industrial disability. On occasion, the Iowa Supreme Court has expanded on what these terms mean under the court's construction of section 85.34(2). These opinions help inform the court's earlier opinions and provide a backdrop against which to assess the language of the Iowa Workers' Compensation Act, as amended in 2017.

In Mortimer v. Fruehauf Corp., the Iowa Supreme Court discussed in relatively greater depth the functional and industrial methods of determining an employee's

permanent partial disability under section 85.34(2), 502 N.W.2d 12, 14–15 (Iowa 1993). The court opined, "Functional disability is arrived at by determining the impairment of the employee's body function. This disability is limited to the loss of the physiological capacity of the body or body part." Id. at 14. It further provided that "this "determination [of] impairment of the body function—that is, functional disability—is just one factor" used when determining lost earning capacity under the industrial method. Id. at 14–15.

The court reiterated this the next year in Miller v. Lauridsen Foods, Inc., stating, "Functional disability is arrived at by determining the impairment of the employee's bodily function and is limited to the loss of the physiological capacity of the body or body part." 525 N.W.2d 417, 421 (Iowa 1994). The Miller holding is also guiding in the current case because it addressed whether the Commissioner erred in excluding lay witness testimony as a sanction. Id. at 420–21. On this question, the court held the agency had erred because:

> It is a fundamental requirement that the commissioner consider all evidence, both medical and nonmedical. Lay witness testimony is both relevant and material upon the cause and extent of injury. Expert medical testimony may be buttressed by supportive lay testimony. We have considered lay witness testimony in determining an employee's disability and functional impairment.

Id. at 421 (internal citations and quotations marks omitted).

In Brant v. Bockholt, the court reiterated and expanded on what constitutes "functional impairment" under its construction of "permanent disability" as used in section 85.34(2), opining, "The element of loss of function of the body is broadly inclusive of various physical injuries. We are convinced, however, that this element of damage relates to functional impairment as opposed to structural impairment of the body." 532 N.W.2d 801, 804 (Iowa 1995).

An injured worker challenged the constitutionality of the statutory schedule for workers' compensation in Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). The worker relied on a case in which the Texas Supreme Court found the provision of a workers' compensation statute unconstitutional because it required a functional impairment under the *Guides* of at least fifteen percent and had no rational basis for doing so. Id. at 318–19 (discussing Texas Workers' Compensation Comm'n v. Garcia, 893 S.W.2d 504 (Tex.1995)). The Iowa Supreme Court relied on the agency rule in place at the time that adopted the *Guides* "as a guide for determining permanent partial disabilities" for scheduled members to hold, "In contrast to the Texas Workers' Compensation Act, the Iowa Workers' Compensation Act does not mandate that functional impairment for scheduled injury purposes be determined solely from the *Guides*." Id. at 319 (quoting 876 IAC 2.4 (1998)). The court concluded that because neither section 85.34(2) nor agency rules mandated use of the *Guides* to determine permanent impairment, the statute was constitutional. Id.

In 2004, the legislature revisited the provision of section 85.34(2) governing compensation for permanent partial disability to the body as a whole. See 2004 Iowa Acts ch. 1001, § 6. The legislation struck "body of the injured" and "as a whole" from the provision. See id. As amended, the sentence of the statutory provision reads as it does today, mandating that cases of permanent partial disability not described in the statutory schedule "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." See id. (codified at Iowa Code § 85.34(2)(*u*) (2005); see also Iowa Code § 85.34(2)(*v*).

The 2004 amendment effectively codified the longstanding construction articulated by the Iowa Supreme Court. Compare Iowa Code § 85.34(2) (2022) with Diederich v. Tri-City Ry. Co. of Iowa, 219 Iowa 587, 258 N.W. 899, 901–02 (1935) (articulating how industrial disability is determined). Consequently, Iowa Supreme Court decisions applying this provision of the Iowa Workers' Compensation Act have relied on precedent pre-dating the 2004 amendment along with the statutory text itself. See Westling v. Hormel Foods Corp., 810 N.W.2d 247, 253 (Iowa 2012) (quoting Iowa Code § 85.34(2)(*u*) and citing McSpadden, 288 N.W.2d at 192; Olson, 255 Iowa at 1121, 125 N.W.2d at 257; Mortimer, 502 N.W.2d at 14; Simbro, 332 N.W.2d at 887); see also Chavez v. MS Tech. LLC, 972 N.W.2d 662, 666–67 (Iowa 2022) (citing Floyd v. Quaker Oats, 646 N.W.2d 105, 109 (2002); Second Inj. Fund v. Nelson, 544 N.W.2d 258, 269 (Iowa 1995)).

b. 2017 Amendments.

In 2017, the legislature enacted a series of amendments to Iowa Code chapters 85 and 86. See 2017 Iowa Acts ch. 21. Before 2017, the Iowa Workers' Compensation Act did not include the term "impairment." See Iowa Code ch. 85 (2016). The term only came into use with respect to workers' compensation in our state by way of Iowa Supreme Court opinions as discussed above. The text of the Iowa Workers' Compensation Act before 2017 contained only the term "disability." See Iowa Code §§ 85.33, 85.34(2), 85.34(3), 85.34(7) (2016). As part of a series of amendments enacted during the 2017 session, the legislature added "impairment" to the Act as follows:

- The legislature changed how to determine the commencement date for PPD benefits to "when it is medically indicated that maximum medical impairment from the injury has been reached and that the extent of loss or percentage of permanent impairment can be determined by use of the [*Guides*]." 2017 Iowa Acts ch. 23, § 6 (now codified at Iowa Code § 85.34(2) (2022)).

- The legislature changed how entitlement to PPD benefits is determined if the employer sustains a permanent disability to the body as a whole and returns to or is offered work at the same or higher earnings with the defendant-employer so that it is "based only upon the employee's functional impairment resulting from the injury," subject to review under reopening proceedings if the

employer later terminates the employee. Id. at § 8 (now codified at Iowa Code § Iowa Code § 85.34(2)(*v*)).

- The legislature added the requirement that, in cases of permanent partial disability, "when determining functional disability and not loss of earning capacity, the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the [*Guides*]" and without consideration of lay testimony or agency expertise. Id. at § 9 (now codified at Iowa Code § Iowa Code § 85.34(2)(*x*)).

- The legislature added the requirement that the determination of the reasonableness of the fee for an independent medical examination (IME) under section 85.39 "shall be based on the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination is conducted." Id. at § 15 (now codified at Iowa Code § 85.39(2)).

In this case, the parties agree by stipulation in the hearing report on the commencement date for PPD benefits under section 85.34(2), so this provision is not implicated. The reasonableness of any IME fee is also not in dispute, which means section 85.39(2) is not at issue. The parties also agree that the work injury and permanent disability is limited to a scheduled member, which means section 85.34(2)(*v*) is not applicable.

The parties agree that the stipulated working injury and resulting permanent disability is limited to the leg, a scheduled member. They disagree with respect to the extent of disability. Their dispute stems from the new requirement under section 85.34(2)(*x*) that "when determining functional disability and not loss of earning capacity, the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the [*Guides*]" and not lay testimony or agency expertise.

c. Impairment and Disability Under the *Guides*.

After the 2017 amendments, section 85.34(2) mandates use of the *Guides* as adopted by the Commissioner under the IAPA. The Commissioner has adopted the Fifth Edition of the *Guides* for use in determining permanent impairment in cases before the agency. See 876 IAC 2.4 (2022). In the *Guides*, the AMA sets forth the definition of "impairment" as follows:

> The *Guides* continues to define **impairment** as **"a loss, loss of use, or derangement of any body part, organ system, or organ function."** This definition of impairment is retained in this edition. A medical impairment can develop from an illness or injury. An impairment is considered permanent when it has reached **maximal medical improvement (MMI)**, meaning it is well stabilized and unlikely to change substantially in the next year with or without medical treatment. The term *impairment* in the *Guides* refers to **permanent impairment**, which is the focus of the *Guides*.

> An impairment can be manifested objectively, for example, by a fracture, and/or subjectively, through fatigue and pain. Although the *Guides* emphasizes objective assessment, subjective symptoms are included within the diagnostic criteria. According to the *Guides*, determining whether an injury or illness results in permanent impairment requires a medical assessment performed by a physician. An impairment may lead to functional limitations or the inability to perform the activities of daily living.

Guides, p. 2 (bold-face and italics in original).

The *Guides* further provide:

> In evaluating impairment, the *Guides* considers both anatomic and functional loss. Some chapters place a greater emphasis on either anatomic or functional loss, depending upon common practice in that specialty. *Anatomic loss* refers to damage to the organ system or body structure, while *functional loss* refers to a change in function for the organ or body system. An example of an anatomic deviation is development of heart enlargement; functional loss includes a loss in ejection fraction or the ability of the heart to pump adequately. Anatomic loss receives greater emphasis in the musculoskeletal system, as in measures such as range of motion. Functional considerations receive greater emphasis in the mental and behavioral section.

Id. at 4 (emphasis in original).

Thus, by incorporating the *Guides* as the sole basis for determining "extent of loss or percent of permanent impairment" in section 85.34(2)(*x*), the legislature has rejected the definition read into the statute by the Iowa Supreme Court of being "assessed solely by determining the impairment of the body function of the employee," Simbro, 332 N.W.2d at 887, and "limited to the loss of the physiological capacity of the body or body part," Miller, 525 N.W.2d at 421, in favor of the broader definition adopted by the medical experts who participated in AMA's creation of the *Guides*, which considers both anatomical and functional loss. *Guides*, at 4.

Moreover, the legislature's incorporation of the *Guides* as the sole source for determining "extent of loss or percent of permanent impairment" makes "functional impairment" no longer a synonym for "functional disability," as it has been under Iowa Supreme Court precedent. The *Guides* expressly provide:

> **Impairment percentages** or **ratings** developed by medical specialists are consensus-derived estimates that reflect the severity of the medical condition and the degree to which the impairment decreases an individual's ability to perform common **activities of daily living (ADL)**, *excluding* work. Impairment ratings were designed to reflect functional limitations and not disability. The **whole person impairment percentages** listed in the *Guides* estimate the impact of the impairment

> on the individual's overall ability to perform activities of daily living, *excluding work*, as listed in Table 1-2.

Guides, at 4 (bold-face and italics in original). Table 1-2, entitled "Activities of Daily Living Commonly Measured in Activities of Daily Living (ADL) and Instrumental Activities of Daily Living (IADL) Scales," from Page 4 of the *Guides*, is recreated below.

Activity	**Example**
Self-care, personal hygiene	Urinating, defecating, brushing teeth, combing hair, bathing, dressing oneself, eating
Communication	Writing, typing, seeing, hearing, speaking
Physical activity	Standing, sitting, reclining, walking, climbing
Sensory function	Hearing, seeing, tactile feeling, tasting, smelling
Nonspecialized hand activities	Grasping, lifting, tactile, discrimination
Travel	Riding, driving, flying
Sexual function	Orgasm, ejaculation, lubrication, erection
Sleep	Restful, nocturnal sleep pattern

The *Guides* further explain their approach to impairment in pertinent part:

> The medical judgment used to determine the original impairment percentages could not account for the diversity or complexity of work but could account for daily activities common to most people. Work is not included in the clinical judgment for impairment percentages for several reasons: (1) work involves many simple and complex activities; (2) work is highly individualized, making generalizations inaccurate; (3) impairment percentages are unchanged for stable conditions, but work and occupations change; and (4) impairments interact with such other factors as the worker's age, education, and prior work experience to determine the extent of work disability. For example, an individual who receives a

> 30% whole person impairment due to pericardial heart disease is considered from a clinical standpoint to have a 30% reduction in general functioning as represented by a decrease in the ability to perform activities of daily living. For individuals who work in sedentary jobs, there may be no decline in their work ability although their overall functioning is decreased. Thus, 30% impairment rating does not correspond to a 30% reduction in work capability. Similarly, a manual laborer with this 30% impairment rating due to pericardial disease may be completely unable to do his or her regular job and, thus, may have a 100% work disability.
>
> As a result, impairment ratings are not intended for use as direct determinants of work disability. When a physician is asked to evaluate work-related disability, it is appropriate for a physician knowledgeable about the work activities of the patient to discuss the specific activities the worker can and cannot do, given the permanent impairment.

Id. at 5. "The *Guides* impairment ratings reflect the severity and limitations of the organ/body system impairment and resulting **functional limitations**." Id. at p. 9 (bold-face in original).

The *Guides* use "impairment" and "disability" as two distinct terms, each with its own meaning. While "impairment" encompasses ADLs and excludes work,

> The *Guides* continues to define **disability as an alteration of an individual's capacity to meet personal, social, or occupational demands or statutory or regulatory requirements because of an impairment.** An individual can have a disability in performing a specific work activity but not have a disability in any other social role. Physicians have the education and training to evaluate a person's health status and determine the presence or absence of an impairment. If the physician has the expertise and is well acquainted with the individual's activities and needs, the physician may also express an opinion about the presence or absence of a specific disability. For example, an occupational medicine physician who understands the job requirements in a particular workplace can provide insights on how the impairment could contribute to a workplace disability.

Id. at p. 8 (bold-face in original).

The *Guides* further elaborate on impairment versus disability. Under the *Guides*, "The impairment evaluation . . . is only one aspect of disability determination." Id.

> The *Guides* is not intended to be used for direct estimates of work disability. Impairment percentages derived according to the *Guides* criteria do not measure work disability. Therefore, it is inappropriate to use the *Guides*' criteria or ratings to make direct estimates of work disability.

Id. at p. 9.

d. Permanent Impairment and Disability Under Section 85.34(2), as Amended in 2017.

The legislature may act as its own lexicographer. P.M. v. T.B., 907 N.W.2d 522, 540 (Iowa 2018) (quoting In re J.C., 857 N.W.2d 495, 500 (Iowa 2014)). Definitions codified by the legislature for purposes of a statute are dispositive on the question of what a statutory term means. Id. (quoting In re J.C., 857 N.W.2d at 500). While the legislature has statutorily prescribed meanings for some terms used in the Iowa Workers' Compensation Act, it has not defined impairment or its permutations for purposes of the Act. See Iowa Code §§ 85.34, 85.61 (2022). This creates ambiguity as to the meaning of "permanent impairment," "functional impairment," and "impairment" in the statute. See Chavez, 972 N.W.2d at 667.

As discussed above, the Iowa Supreme Court read impairment into the statutory-prescribed framework for assessing permanent disability under section 85.34(2). The court had even gone so far as to define the term. Initially, the court used the definition "claimant's functional ability to perform his work." McSpadden, 288 N.W.2d at 192. It then expanded the definition, opining it is "limited to the loss of the physiological capacity of the body or body part" and to exclude structural impairment. Mortimer, 502 N.W.2d at 14; Brant, 532 N.W.2d at 804. This case law precedent had applied to workers' compensation cases in Iowa for decades before the enactment of the 2017 amendments.

The Iowa Supreme Court has held that when considering an amendment to the Iowa Workers' Compensation Act, the agency and courts must assume that at the time the legislature amended the statutory provision, it was familiar with the existing case law on how disability must be evaluated. Simbro, 332 N.W.2d at 889; see also Billick, 861 N.W.2d at 821. This assumption informs the related principle that if the legislature had wished a different standard from that articulated in case law to apply under the statute, "it would have so indicated." Id.; see also Billick, 861 N.W.2d at 821. Relatedly, the legislature has previously added the Iowa Supreme Court's construction of permanent partial disability for purposes of benefits to the Act, 2004 Iowa Acts ch. 1001, § 6, which demonstrates the legislature knows how to codify a definition read into the Iowa Workers' Compensation Act by the Iowa Supreme Court when it wants to do so. See Rhoades v. State, 880 N.W.2d 431, 448 (Iowa 2016).

At the time the legislature enacted the 2017 amendments, it was aware of the decades-old Iowa Supreme Court precedent reading impairment into the Iowa Workers' Compensation Act and the court-created definition for the term. If the legislature had wanted the court-created definition to govern, it had two alternative paths from which to choose: (1) Take no action because the court's precedent would continue to apply; or (2) Add impairment to the statute and codify the court-created definition for it. The legislature chose to do neither, which suggests it did not intend to codify the court-created definition. This reading is buttressed by the text the legislature included to

create a mandate for how impairment must be determined as part of the process for determining permanent disability and entitlement to benefits.

Moreover, the legislature's decision not to codify the court-created definition does not stand alone. The legislature made the choice to amend the statute to add the term impairment to the statutory text and expressly require that "the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the [*Guides*]." 2017 Iowa Acts ch. 23, (now codified at Iowa Code § 85.34(2)(*x*)). Thus, the legislature did not include the more restrictive definition of impairment that emerges from caselaw. The decision to include "loss of use" as an alternative to "percentage of permanent impairment" adheres closely to the definition in the *Guides*—"a loss, loss of use, or derangement of any body part, organ system, or organ function," *Guides*, at p. 2—which makes sense since the same sentence mandates the use of only the *Guides* when determining the percentage of permanent impairment. It would be nonsensical to require use of only the *Guides* when determining permanent impairment and then define impairment to mean something different than what the *Guides* define the term to mean. See Chavez, 972 N.W.2d at 668 (holding that statutory interpretation must "'avoid[] absurd results'") (quoting Holstein Elec. v. Breyfogle, 756 N.W.2d 812, 815 (Iowa 2008)).

It necessarily follows that the changes made by the 2017 legislation alter how impairment and disability must be determined under the Iowa Workers' Compensation Act. The process is now more formalized. With the 2017 amendments, the legislature rolled back the court-created framework and replaced it with the AMA-created framework.

This conclusion is reinforced by the traditional principle of statutory interpretation of *expressio unius est exclusio alterious*, which holds that legislative intent is expressed by exclusion and inclusion alike with the express mention of one thing implying the exclusion of another. Kucera v. Baldazo, 745 N.W.2d 481, 487 (Iowa 2008). The legislature did not codify the definition the Iowa Supreme Court articulated in its opinions for impairment. Rather, it codified the express requirement that "loss of use or percentage of permanent impairment shall be determined solely by utilizing the [*Guides*]." The express mention of the *Guides* coupled with the decision not to codify the court-created definition implies the exclusion of the court-created definition when determining permanent impairment and the extent of permanent disability.

Thus, under the Iowa Workers' Compensation Act, as amended in 2017, impairment means "a loss, loss of use or derangement of any body part, organ system, or organ function." *Guides*, at p. 2 (internal emphasis omitted). "The *Guides* impairment ratings reflect the severity and limitations of the organ/body system impairment resulting functional limitations." Id. at p. 9 (internal emphasis omitted). "Impairment percentages derived according to the *Guides* criteria do not measure work disability." Id. at 9.

With respect to determining the extent of permanent disability, as required under the Act, the *Guides* make clear that "[t]he impairment evaluation . . . is only one aspect of disability determination." Id. at 9. The language codified by the legislature using the

2017 amendments is carefully crafted to reflect the two-step process set forth in the *Guides*. Under section 85.34(2)(*v*), "In all cases of permanent partial disability . . ., when determining functional disability and not loss of earning capacity, the extent of loss or percentage of permanent impairment shall be determined solely by the using the [*Guides*]" and not lay testimony or agency expertise. After using only the *Guides* to determine "extent of loss or percentage of permanent impairment," the agency must then consider the evidentiary record as a whole to determine the extent of permanent disability—"alteration of an individual's capacity to meet personal, social, or occupational demands or statutory or regulatory requirements because of an impairment," *Guides*, p. 8—and entitlement to PPD benefits.

This two-step process is reflected in rule 876 IAC 2.4, which the agency amended to reflect the changes the legislature made to the Iowa Workers' Compensation Act via the 2017 amendments. The rule mandates use of the *Guides* "for determining the extent of loss or percentage of impairment for permanent partial disabilities." 876 IAC 2.4 (2022). It further provides:

> Nothing in this rule shall be construed to prevent the presentations of other medical opinions or other material evidence for the purpose of establishing that the degree of permanent disability to which the claimant would be entitled would be more or less than the entitlement indicated in the *Guides to the Evaluation of Permanent Impairment*, Fifth Edition, when the reduction in earning capacity for all other permanent partial and permanent total disabilities is determined.

876 IAC 2.4 (2022).

Moreover, the new two-step process for determining the extent of permanent disability makes Iowa's statutory scheme more equitable for injured employee and employer alike. The Iowa Supreme Court has recognized the arbitrary nature of the statutory schedule governing benefits. See Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404, 407 (Iowa 1994); see also Mortimer, 502 N.W.2d at 15. Rather than eliminate the schedule, the legislature has refined its application by requiring use of the framework created by medical experts. This allows for the determination of the extent of permanent disability on a basis more individualized to the injured employee—as the *Guides* explain:

> For example, an individual who receives a 30% whole person impairment due to pericardial heart disease is considered from a clinical standpoint to have a 30% reduction in general functioning as represented by a decrease in the ability to perform activities of daily living. For individuals who work in sedentary jobs, there may be no decline in their work ability although their overall functioning is decreased. Thus, 30% impairment rating does not correspond to a 30% reduction in work capability. Similarly, a manual laborer with this 30% impairment rating due to pericardial disease may be completely unable to do his or her regular job and, thus, may have a 100% work disability.

Guides, at p. 5.

For these reasons, under section 85.34(2) and rule 876 IAC 2.4, the agency must engage in the following two-step process to determine the extent of permanent disability for purposes of an injured employee's entitlement to permanent partial disability benefits:

1) Determine permanent impairment solely by utilizing the Fifth Edition of the *Guides* and without consideration of lay testimony or agency expertise; and

2) Determine permanent disability based on the entirety of the evidentiary record and using agency expertise.

Applying this framework to the current case makes Kehrli's argument that the *Guides* control on the question of permanent *disability* under section 85.34(2)(*x*) unavailing. Under the plain text of section 85.34(2)(*x*) and agency rule 876 IAC 2.4, the *Guides* control only when determining "the extent of loss or percentage of permanent *impairment*." (emphasis added). And the *Guides* expressly caution they are not to be used to determine permanent disability. *Guides*, at 9. Moreover, rule 876 IAC 2.4 expressly allows parties to present "other medical opinions or other material evidence for purpose of establishing that the degree of permanent disability to which the claimant would be entitled would be more or less than the entitlement indicated by the [*Guides*]." This rule is in line with the framework in the *Guides*, which state that an injured employee's permanent *disability* may be more or less than the employee's permanent *impairment*. Id. at 5.

The agency precedent the defendants ask the agency to apply stems from an appeal decision that pre-dates the 2017 amendments by decades. It allows the agency to reduce the amount of an injured employee's permanent disability based on the employee's unreasonable refusal to undergo recommended surgery. This string of agency caselaw is in line with the framework for determining permanent disability required under section 85.34(2), as amended. Expert medical opinions with respect to the likely extent of permanent impairment had the injured employee undergone the recommended care constitutes "other medical opinions . . . for the purpose of establishing that the degree of permanent disability to which the claimant would be entitled would be . . . less than the entitlement indicated by the [*Guides*]," under rule 876 IAC 2.4. Neither the defendants' argument nor the evidence in support of it is precluded by law after the 2017 amendments.

As discussed above, the legislature adopted the framework in the *Guides* by mandating their use for determining loss of use or percentage of permanent impairment in workers' compensation cases. In Section 2.5g, "Adjustments for Effects of Treatment or Lack of Treatment," the *Guides* state in pertinent part:

> A patient may decline surgical, pharmacologic, or therapeutic treatment of an impairment. If a patient declines therapy, that decision neither decreases nor increases the estimated percentage of the individual's

> impairment. However, the physician may wish to make a written comment in the medical evaluation report about the suitability of the therapeutic approach and describe the basis of the individual's refusal. The physician may also need to address whether the impairment is at maximal medical improvement without treatment and the degree of anticipated improvement could be expected with treatment.

Guides, at p. 20.

Thus, the *Guides* do not mandate that a patient undergo any procedure. See id. They recognize that an injured employee may decline surgery as Kehrli did in this case. Id. While the *Guides* expressly state the patient declining *therapy* does not increase or decrease the impairment rating, it makes no such statement regarding the decision to refuse surgery. Id. Rather, it suggests that the examining physician may wish to include the physician's opinion regarding the suitability of the recommended care and the patient's basis for denial, whether the impairment is at MMI without the care in question, and the degree of anticipated improvement that could be expected with the recommended treatment. Id. Thus, the *Guides* expressly allow a patient to refuse surgery and an examining physician to opine as to how the refusal of recommended surgery has impacted the patient's recovery.

Such an expert opinion is in harmony with the framework for determining the extent of permanent disability under section 85.34(2) and rule 876 IAC 2.4. An expert's opinion following the suggested framework in the *Guides* for use when a patient refused treatment would fall under the category of "other medical opinions . . . for the purpose of establishing that the degree of permanent disability to which the claimant would be entitled would be . . . less than the entitlement indicated by the [*Guides*]," under rule 876 IAC 2.4. It is appropriate under the law for the agency to consider such an opinion with the other evidence in the record when determining the extent of permanent disability.

3. Affirmative Defense.

Having concluded the 2017 amendments do not preclude consideration of the affirmative defense that an injured employee's unreasonable refusal of care may reduce the extent of the employee's permanent disability, it is appropriate to consider the law regarding the affirmative defense in this case.

> An affirmative defense is "'one resting on facts not necessary to support plaintiff's case.'" Bond v. Cedar Rapids Television Co., 518 N.W.2d 352, 355 (Iowa 1994) (quoting Erickson v. Wright Welding Supply, Inc., 485 N.W.2d 82, 86 (Iowa 1992)). "Thus, any defense which would avoid liability although admitting the allegations of the petition is an affirmative defense." Erickson, 485 N.W.2d at 86.

Smith v. Smith, 646 N.W.2d 412, 415 (Iowa 2002).

Rule 876 IAC 4.35 makes the Iowa Rules of Civil Procedure applicable in cases before the agency unless a provision of a rule is in conflict with a provision of 876 IAC chapter 4 or a provision of a workers' compensation statute. Under Iowa Rule of Civil Procedure 1.421,

> Every defense to a claim for relief in any pleading must be asserted in the pleading responsive thereto, or in an amendment to the answer made within 20 days after service of the answer, or if no responsive pleading is required, then at trial.

Nothing in this rule conflicts with a provision of an Iowa workers' compensation statute or agency rule, so it governs.

The agency considered the failure to mitigate issue in Coale v. Barr-Nunn Transportation, Inc., File No. 5064468. Coale does not address whether the statute, as amended in 2017, allows for the reduction of the injured employee's permanent disability because of an unreasonable refusal to undergo recommended treatment because the issue was not brought up by the parties. But the case is nonetheless guiding here on the requirements for asserting the affirmative defense.

In Deputy Grell's arbitration decision, he concluded the defendants' argument regarding the claimant's failure to take prescription medicine was in effect an assertion of the failure-to-mitigate affirmative defense that was not properly asserted in the pleadings and therefore barred. Id., 2020 WL 7091549 *10–*11 (Iowa Workers' Comp. Comm'r, Nov. 18, 2020) (citing De Long v. Highway Comm'n, 229 Iowa 700, 295 N.W. 91 (1940); R.E.T. Corp. v. Frank Paxton Co. Inc., 329 N.W.2d 416, 422 (Iowa 1983); Grittmann v. John Deere Waterloo Works, Arb., File No. 1198868, 2001 WL 34111176 *8 (Iowa Workers' Comp. Comm'r, May 7, 2001)). Deputy Grell further concluded, in the alternative, that even if the defendants' failure-to-mitigate argument was not an affirmative defense precluded by the failure to plead it, the weight of the evidence did not support their argument. Id. On appeal, the Commissioner affirmed Deputy Grell's decision in its entirety without additional analysis. See id., 2021 WL 2624236 (Iowa Workers' Comp. Comm'r, May 5, 2021).

The undersigned applies Coale and Rule 1.421 here. In a case before the agency, failure to mitigate is an affirmative defense that the defendants must plead and have the burden to prove. Here, the defendants did not plead the affirmative defense in their answer or assert it in the hearing report. Because the defendants in this case did not assert the defense in their answer, they are precluded from raising it after the hearing in their briefing.

4. Extent.

The parties' dispute the extent of functional disability the stipulated work injury has caused Kehrli. As found above, Dr. Gorsche's opinion on permanent functional impairment is based on that which the *Guides* provide for a meniscectomy. Kehrli did

not undergo a meniscectomy. Therefore, his impairment rating is not correct under the Guides.

Dr. Manshadi measured Kehrli's knee function with a goniometer in accordance with the *Guides*. Based on that measurement, Dr. Manshadi assigned thirty-five percent permanent functional impairment using Table 17-10 of the *Guides*. Dr. Manshadi determined Kehrli's permanent partial disability resulting from the stipulated work injury solely by utilizing the *Guides* to measure his functional impairment.

For these reasons, Kehrli has satisfied his burden of proof. The weight of the evidence establishes it is more likely than not the stipulated work injury caused a permanent partial disability to his right leg of thirty-five percent. To conclude otherwise would require speculation.

Two hundred twenty multiplied by thirty-five percent is seventy-seven. Kehrli is entitled to seventy-seven weeks of permanent partial disability benefits. The defendants are entitled to a credit in the stipulated amount for permanent partial disability benefits previously paid.

B. Rate.

The parties stipulated Kehrli's gross earnings on the stipulated injury date were one thousand eighty-four and 00/100 dollars ($1,084.00) per week. They also stipulated he was married and entitled to two exemptions at the time. Based on the parties' stipulations, Kehrli's workers' compensation rate is six hundred ninety-six and 06/100 dollars ($696.06) per week.

C. Commencement Date.

Under Iowa Code section 85.34(2), the commencement date for permanent partial disability benefits occurs when:

1) The claimant has reached maximum medical improvement (MMI) from the work injury; and

2) The extent of any permanent impairment caused by the work injury can be determined using the Guides.

"[T]he persistence of pain may not itself prevent a finding that the healing period is over, provided the underlying condition is stable." Myers v. F.C.A. Servs., Inc., 592 N.W.2d 354, 359 (Iowa 1999) (citing Pitzer v. Rowley Interstate, 507 N.W.2d 389, 391 (Iowa 1993)). "[N]either maintenance medical care nor a claimant's persistent symptoms will necessarily prolong the healing period when [the] claimant's condition is stable." Ruby v. Gannett Pub. Serv. d/b/a Des Moines Register, File No. 5058620, 2020 WL 1183536 *4 (Iowa Workers' Comp. Comm'r, Feb. 11, 2020). "If . . . it is not likely that further treatment of continuing pain, however soothing to the claimant, will decrease the extent of permanent industrial disability, then continued pain management should not

prolong the healing period." Pitzer v. Rowley Interstate, 507 N.W.2d 389, 392 (Iowa 1993).

Here, Kehrli stopped receiving care for the work injury on November 1, 2018. On that date, Dr. Gorsche released Kehrli to return to work without restriction effective November 19, 2018. Kehrli did so and did not seek any additional care until the summer of 2020. At that time, he requested additional care because of his ongoing pain and fear of the statute of limitations.

The defendants arranged an appointment with Dr. Gorsche, whose examination of Kehrli found him stable. The weight of the evidence supports adopting November 19, 2018, as Kehrli's MMI date because Kehrli returned to full-duty work that day, and because he refused surgery, he received only maintenance care to address his ongoing and permanent symptoms after that date. Dr. Gorsche could have opined as to his permanent disability on that date but did not do so for reasons left unclear by the record.

D. Penalty.

"Because penalty benefits are a creature of statute, our discussion begins with an examination of the statutory parameters for such benefits." Keystone Nursing Care Ctr. v. Craddock, 705 N.W.2d 299, 307 (Iowa 2005). Under Iowa Code section 86.13(4)(a)

> If a denial, a delay in payment, or a termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.

This provision "codifies, in the workers' compensation insurance context, the common law rule that insurers with good faith disputes over the legal or factual validity of claims can challenge them, if their arguments for doing so present fairly debatable issues." Covia v. Robinson, 507 N.W.2d 411, 412 (Iowa 1993) (citing Dirks v. Farm Bureau Mut. Ins. Co., 465 N.W.2d 857, 861 (Iowa 1991) and Dolan v. Aid Ins. Co., 431 N.W.2d 790, 794 (Iowa 1988)). "The purpose or goal of the statute is both punishment and deterrence." Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229, 237 (Iowa 1996).

The legislature established in Iowa Code section 86.13(4)(b) a burden-shifting framework for determining whether penalty benefits must be awarded in a workers' compensation case. See 2009 Iowa Acts ch. 179, § 110 (codified at Iowa Code § 86.13(4)(b)); see also Pettengill v. Am. Blue Ribbon Holdings, LLC, 875 N.W.2d 740, 746–47 (Iowa App. 2015) as amended (Feb. 16, 2016) (discussing the burden-shifting required by the two-factor statutory test). The employee bears the burden to establish a prima facie case for penalty benefits. See Iowa Code § 86.13(4)(b). To do so, the employee must demonstrate a denial, delay in payment, or termination of workers'

compensation benefits. Iowa Code § 86.13(4)(b)(1). If the employee fails to prove a denial, delay, or termination, there can be no award of penalty benefits and the analysis stops. See id. at § 86.13(4)(b); see also Pettengill, 875 N.W.2d at 747. However, if the employee makes the requisite showing, the burden of proof shifts to the employer. See id. at § 86.13(4)(b); see also Pettengill, 875 N.W.2d at 747.

To avoid an award of penalty benefits, the employer must "prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits." Iowa Code§ 86.13(4)(b)(2). An excuse must meet all of the following criteria to be "a reasonable or probable cause or excuse" under the statute:

> (1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.
>
> (2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.
>
> (3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

Id. § 86.13(4)(c).

> This paragraph creates a mandatory timeline for the employer to follow in showing it had a "reasonable or probable cause or excuse" for the termination of benefits. Iowa Code § 86.13(4)(c)(1)-(3). First, the employer's excuse for the termination must have been *preceded* by an investigation. *Id.* § 86.13(4)(c)(1). Second, the results of the investigation were "*the actual basis ... contemporaneously*" relied on by the employer in terminating the benefits. Third, the employer "*contemporaneously* conveyed the basis for the ... termination of benefits to the employee *at the time of the ... termination.*" *Id.* § 86.13(4)(c)(3)

Pettengill, 875 N.W.2d at 747 (emphasis in original). "An employer cannot unilaterally decide to terminate an employee's benefits without adhering to Iowa Code section 86.13; to allow otherwise would contradict the language of that section." Id.

"A 'reasonable basis' for denial of the claim exists if the claim is 'fairly debatable.'" Keystone Nursing Care Ctr., 705 N.W.2d at 307 (quoting Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 260 (Iowa 1996)). A claim may be fairly debatable because of a good faith legal or factual dispute. See Covia, 507 N.W.2d at 416 (finding a jurisdictional issue fairly debatable because there were "viable arguments in favor of either party"). "[T]he reasonableness of the employer's denial or termination of benefits does not turn on whether the employer was right. The issue is whether there

was a reasonable basis for the employer's position that no benefits were owing." Keystone Nursing Care Ctr., 705 N.W.2d at 307–08.

If the employee establishes a "reasonable or probable cause or excuse," no penalty benefits are awarded. However, if the employer fails to meet its burden of proof, penalty benefits must be awarded. The following factors are used in determining the amount of penalty benefits:

- The length of the delay;
- The number of the delays;
- The information available to the employer regarding the employee's injuries and wages; and
- The prior penalties imposed against the employer under section 86.13. Robbennolt, 555 N.W.2d at 238.

1. Delay in Initial Payment of Permanent Partial Disability Benefits.

The weight of the evidence establishes Kehrli reached MMI on November 19, 2018. That was the date he returned to work without any restrictions, and he did not receive any additional care to address his injury after that. The defendants did not contemporaneously convey to Kehrli the reason they were denying or delaying payment of benefits at that time. It was only after Kehrli requested a follow-up appointment a year and a half later that the defendants requested an opinion from Dr. Gorsche on the question of permanent partial disability. There is no evidence in the record showing the defendants have a basis for denying Kehrli payment of permanent partial disability benefits between November 19, 2018, and August 14, 2020, the date the defendants paid him permanent partial disability benefits or that they contemporaneously communicated such to Kehrli. A penalty is therefore appropriate.

The delay was about twenty-two and one-half months. That is just under two years. The payment would have been for four and 4/10 weeks of benefits, which likely would have been in four or fewer installments had it been made. The defendants knew Kehrli had elected not to undergo surgery, Dr. Gorsche released him to return to full-duty work, and Dr. Gorsche released him from care. It is unclear based on the record how many previous penalties the agency has assessed against the defendants. The length of the delay is such that a fifty percent penalty is appropriate. The defendants shall pay to Kehrli a penalty of one thousand thirty-one and 34/100 dollars ($1,031.34) for the delay in payment of permanent partial disability benefits.

2. Payment of Additional Permanent Partial Disability Benefits.

There is a reasonable basis for the defendants to refuse to pay Kehrli permanent partial disability benefits in addition to those paid in accordance with Dr. Gorsche's opinion. The defendants relied on agency caselaw regarding an injured employee's

refusal to undergo recommended care. While this caselaw has no foundation in the statutory text of the Iowa Workers' Compensation Act—before or after the 2017 amendments—there is nonetheless a legitimate good-faith argument to be made it should apply in this case. Consequently, Kehrli has failed to establish entitlement to a penalty with respect to permanent partial disability benefits in addition to those paid in accordance with Dr. Gorsche's opinion.

E. Medical Expenses.

For all injuries and conditions compensable under the Iowa Workers' Compensation Act, section 85.27(1) requires the employer to "furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies therefor and shall allow reasonably necessary transportation expenses incurred for such services." Here, the defendants accepted liability for the stipulated work injury and provided care as required under the Act. However, the parties dispute whether the defendants paid for crutches that cost fifty-eight dollars ($58.00) and two prescription refills costing a combined forty-one and 03/100 dollars ($41.03).

The defendants have submitted a spreadsheet that appears to show payment for the crutches and the medication refills. However, this conclusion is reached by deduction, matching the costs assigned by Kehrli to the spreadsheet, which has no additional information that would allow the undersigned to conclude that either of the bills for twenty and 53/100 dollars ($20.53) were for prescription medication or that the bill for fifty-eight dollars ($58.00) was for crutches. Consequently, there is an insufficient basis based in the record from which to conclude the defendants have paid these expenses. If the defendants have not paid these expenses, they must do so.

F. Costs.

"All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commission." Iowa Code § 86.40. "Fee-shifting statutes using 'all costs' language have been construed 'to limit reimbursement for litigation expenses to those allowed as taxable court costs.'" Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 846 (Iowa 2015) (quoting Riverdale v. Diercks, 806 N.W.2d 643, 660 (Iowa 2011)). Statutes and administrative rules providing for recovery of costs are strictly construed. Id. (quoting Hughes v. Burlington N. R.R., 545 N.W.2d 318, 321 (Iowa 1996)).

Because Kehrli prevailed on the disputed issues of entitlement to permanent partial disability benefits and penalty, the following costs are taxed against the defendants:

- One hundred three and 20/100 dollars ($103.20) for the costs associated with a certified shorthand reporter to be present at a deposition and the transcription costs related thereto under rules 876 IAC 4.33 (1) and (2);

- One hundred and 00/100 dollars ($100.00) for the reasonable costs of obtaining a supplemental report from Dr. Manshadi under 876 IAC 4.33(6); and

- One hundred three and 00/100 dollars ($103.00) for the filing fee and convenience fees incurred by using the payment gateway on the Workers' Compensation Electronic System (WCES) under 876 IAC 4.33(7).

VI. ORDER.

Based on the above findings of fact and conclusions of law, it is ordered:

1) The defendants shall pay to Kehrli seventy-seven (77) weeks of permanent partial disability benefits at the rate of six hundred ninety-six and 06/100 dollars ($696.06) per week from the commencement date of November 19, 2018.

2) The defendants shall pay accrued weekly benefits in a lump sum.

3) The defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

4) The defendants are to be given the credit for benefits previously paid for the stipulated amount of four point four (4.4) weeks of compensation at the rate of six hundred ninety-six and 06/100 dollars ($696.06) per week.

5) The defendants shall pay to Kehrli a penalty of one thousand thirty-one and 34/100 dollars ($1,031.34) for the delay in payment of permanent partial disability benefits.

6) The defendants shall file subsequent reports of injury as required by Rule 876 IAC 3.1(2).

7) If not already paid, the defendants shall pay the following medical expenses:

    a) Fifty-eight dollars ($58.00) for crutches; and

    b) Forty-one and 06/100 dollars ($41.06) for medication.

8) The defendants shall pay to Kehrli the following amounts for the following costs:

    a) One hundred three and 20/100 dollars ($103.20) for the costs associated with a certified shorthand reporter to be present at a deposition and the transcription costs related thereto;

    b) One hundred and 00/100 dollars ($100.00) for the reasonable cost of obtaining a supplemental report from Dr. Manshadi; and

c) One hundred three and 00/100 dollars ($103.00) for the filing fee and convenience fees incurred by using the payment gateway on the WCES.

Signed and filed this 19th day of January, 2023.

BEN HUMPHREY
Deputy Workers' Compensation Commissioner

The parties have been served, as follows:

Joseph G. Lyons (via WCES)

Aaron T. Oliver (via WCES)

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