

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TYLER DUNGAN, Claimant, vs. DEN HARTOG INDUSTRIES, Employer, WEST BEND MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	File No. 21700246.01 ARBITRATION DECISION Headnotes: 1803
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I. STATEMENT OF THE CASE.

Claimant Tyler Dungan seeks workers' compensation benefits from the defendants, employer Den Hartog Industries (Den Hartog) and insurance carrier West Bend Mutual Insurance Co. (West Bend). The undersigned presided over an arbitration hearing on March 10, 2022. Dungan participated personally and through attorney Janece M. Valentine. Den Hartog participated by and through legal representative Brittany Van Wyk, a human resources employee with the company. Both defendants participated by and through attorney Lee P. Hook.

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 alleged injury?
- 2) Is Dungan entitled to alternate care under Iowa Code section 85.27?
- 3) Is Dungan entitled to recover the cost of an independent medical examination (IME) under Iowa Code section 85.39?

- 4) Is Dungan 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 Dungan and Den Hartog at the time of the injury.
- 2) Dungan sustained an injury on July 24, 2019, which arose out of and in the course of his employment with Den Hartog.
- 3) The injury is a cause of temporary disability during a period of recovery, but Dungan's entitlement to temporary or healing period benefits is no longer in dispute.
- 4) The commencement date for permanent partial disability (PPD) benefits, if any are awarded, is February 8, 2021.
- 5) At the time of the stipulated injury:
 - a) Dungan's gross earnings were six hundred ninety and 68/100 dollars (\$690.68) per week.
 - b) Dungan was single.
 - c) Dungan was entitled to one exemption.
- 6) Prior to hearing, the defendants paid to Dungan twenty-five (25) weeks of compensation at the rate of four hundred thirty-three and 30/100 dollars (\$433.30) per week.
- 7) The defendants are entitled to a credit under Iowa Code section 85.38(2) for payment of the medical expenses in Defendants' Exhibit B.

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 9;
- Claimant's Exhibits (Cl. Ex.) 1 through 3;

- Defendants' Exhibits (Def. Ex.) B through D and F through J; and
- Hearing testimony by Dungan and Brittany Van Wyk.

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

Dungan was twenty-six years of age at the time of hearing. (Jt. Ex. 1, p. 1; Hrg. Tr. p. 15) He was diagnosed with ADHD as a child and received special assistance with reading comprehension while in secondary school. (Hrg. Tr. p. 16) During high school, Dungan worked odd jobs and in restaurants as a fry cook and dishwasher. (Hrg. Tr. p. 16) He graduated from high school in 2016. (Hrg. Tr. p. 15)

Dungan's mother instilled in him the importance of chiropractor visits. (Hrg. Tr. p. 18) He seeks chiropractic treatment when he feels out of alignment and tries to stay up on adjustments. (Hrg. Tr. p. 18; Jt. Exs. 1, 2) Dungan was in a car crash that caused whiplash, for which he sought chiropractic care. (Hrg. Tr. p. 18)

Den Hartog is a company that specializes in manufacturing plastic containers of various sizes. (Hrg. Tr. p. 20) Some are small and some are large. (Hrg. Tr. p. 20) For example, during Dungan's employment, Den Hartog manufactured a plastic container for a customer in Las Vegas that used it for the world's largest margarita. (Hrg. Tr. p. 20)

On January 22, 2018, Den Hartog hired Dungan to be an outdoor loader and material handler. (Hrg. Tr. pp. 18–19; Def. Ex. D, p. 26) In Dungan's job, he helped fill orders. (Hrg. Tr. pp. 21–22) Den Hartog would receive an order and Dungan would help collect the product and prepare it for shipping. (Hrg. Tr. pp. 21–22) Preparing products for shipping sometimes included using hoops to secure them. (Hrg. Tr. p. 22) Some of the hoops have feet that allow them to be secured to a skid during shipping. (Hrg. Tr. pp. 22–23)

On July 24, 2019, Dungan was working to help prepare a tank weighing about seventy pounds for shipping. (Hrg. Tr. pp. 22, 24) He and a coworker noticed an issue with a hoop that was supposed to secure a tank. (Hrg. Tr. p. 23) The load was initially secured with hoops that had feet when it needed hoops without feet. (Hrg. Tr. p. 23)

Dungan and his coworker set out replacing the hoops, which necessitated lifting the tank. (Hrg. Tr. pp. 24–25) Dungan lifted the tank so they could remove the hoops with feet. (Hrg. Tr. pp. 24–25) After they removed two of the hoops, Dungan attempted to lift it again but the tank, the tank got caught on the trailer. (Hrg. Tr. pp. 24–25) This meant Dungan was effectively attempting to lift the trailer, not just the tank. (Hrg. Tr. p. 25) Dungan's failed attempt to lift the tank caused him to feel a sensation that felt like lightning from his mid-to-lower back into his leg and up to about his neck. (Hrg. Tr. p. 25)

The sensation dropped Dungan to a knee, where he attempted to gather himself. (Hrg. Tr. p. 25) He crawled down from the trailer and told his coworker that if he missed work the next day, it was because he just hurt his back. (Hrg. Tr. p. 25) Dungan's coworker advised him to inform a supervisor, so Dungan told his supervisor that he might have injured his back. (Hrg. Tr. pp. 25–26) Dungan missed three days of work before returning to work on Tuesday, July 30, 2019. (Def. Ex. D, p. 11) He performed the same job duties after returning to work as he performed before the injury. (Hrg. Tr. p. 41)

Dungan had treated at Kennedy Chiropractic earlier that year for back complaints he had before the work injury at Den Hartog. (Hrg. Tr. p. 27; Jt. Ex. 3, pp. 1–4) He returned after the work injury in hopes of getting some relief. (Hrg. Tr. p. 27; Jt. Ex. 3, pp. 4–7) Dungan then changed providers to Primghar Chiro Center because it was a shorter drive for him to receive care. (Hrg. Tr. p. 27; Jt. Ex. 4, pp. 1–3) Because the chiropractic care did not result in the relief Dungan sought, referred him to the Center for Neurosciences, Orthopaedics & Spine (CNOS) Morningside Clinic. (Hrg. Tr. p. 28; Jt. Ex. 4, p. 3; Jt. Ex. 5)

At the time of the work injury, Dungan was earning \$15.16 per hour at Den Hartog. (Hrg. Tr. p. 43) Dungan returned to work at Den Hartog after the injury. (Hrg. Tr. p.; Def. Ex. D, pp. 27–28) Working increased Dungan's pain, which interfered with his sleep and caused him to miss work. (Hrg. Tr. pp. 33–34; Def. Ex. D, pp. 27–28) Because Dungan was an hourly employee, the reduction in hours worked reduced his earnings. (Hrg. Tr. p. 34; Def. Ex. D, pp. 27–28)

Dungan had his first appointment at CNOS on September 19, 2019. (Jt. Ex. 5, p. 1) He underwent magnetic resonance imaging (MRI) of his lumbar spine, which showed mild multilevel degenerative changes including right paracentral disk herniation at L4-L5 causing moderate-to-severe lateral recess stenosis and an annular tear at L5-S1. (Jt. Ex. 5, pp. 3–5; Jt. Ex. 6, pp. 1–2) Dungan opted to undergo epidural steroid injection, which provided a couple of days of relief from his symptoms before they returned. (Hrg. Tr. pp. 30–31; Jt. Ex. 5, p. 6; Jt. Ex. 7, pp. 3–6)

On February 6, 2020, Dungan followed up at CNOS and then started physical therapy. (Jt. Ex. 5, p. 7; Jt. Ex. 7, pp. 9–12) He was experiencing reduced symptoms following the second injection. (Jt. Ex. 5, p. 8) Physical therapy helped reduce Dungan's symptoms "significantly," but it did not eliminate his back pain. (Hrg. Tr. p. 29; Jt. Ex. 5, p. 8; Jt. Ex. 7, pp. 13–19) At this time, Hendrik Klopper, M.D., gave Dungan the work restriction of no lifting over forty pounds. (Hrg. Tr. p. 42) Dungan continued to work in the same position at Den Hartog, performing duties while following his lifting restriction. (Hrg. Tr. p. 42)

On March 26, 2020, Dr. Klopper continued Dungan's physical therapy but opined he wanted to hold off on another injection so long as he was not experiencing leg pain. (Jt. Ex. 5, p. 9) Dr. Klopper continued Dungan's lifting restriction. (Jt. Ex. 5, p. 9) After Dungan experienced a worsening of his symptoms, his condition improved and he continued to see positive results from physical therapy. (Jt. Ex. 7, pp. 20–23) Because

of the progress Dungan made, he was discharged from physical therapy and given a home exercise program on April 24, 2020. (Jt. Ex. 7, p. 23)

Den Hartog gave Dungan a raise after the work injury. (Hrg. Tr. p. 43) After the raise, Dungan's hourly pay went up to \$15.50. (Hrg. Tr. p. 43) That was Dungan's hourly pay rate in June of 2020. (Hrg. Tr. p. 43)

Dungan and his fiancée decided to move for personal reasons unrelated to his employment at Den Hartog. (Hrg. Tr. pp. 34–35, 44) Dungan looked for a new job and ultimately accepted a position with Meridian as a welder. (Hrg. Tr. p. 35) On June 1, 2020, Dungan gave Den Hartog written notice of resignation, which was to take effect June 12, 2020. (Def. Ex. D, p. 25) On June 5, 2020, Dungan participated in a Physical Capacity Profile at the Buena Vista Regional Medical Center relating to his employment at Meridian, which showed he could physically perform the "Heavy Work" of "[e]xerting 50 to 100 pounds of force occasionally, and/or 25 to 50 pounds of force frequently, and/or 10 to 20 pounds of force constantly." (Def. Ex. H, p. 7)

The Physical Capacity Profile also noted Dungan "has a history of prior episodes of back pain." (Def. Ex. H, p. 8) Under the heading, "Conditions Determined by Functional Measurements or Medical History," the unidentified author utilized the Fifth Edition of the Guides to the Evaluation of Permanent Impairment (Guides) from the American Medical Association (AMA) to conclude Dungan had a job placement impairment of ten percent for each of his shoulder flexion strength difference, supination strength difference, and wrist flexion strength difference. (Def. Ex. H, p. 8) It also found Dungan's "[m]easured flexion angle of the back indicates an estimated minimum 10% impairment utilizing the [Guides]." (Def. Ex. H, p. 8)

It is unclear who performed the assessment that led to the Physical Capacity Profile and what that person's training was. There is also an insignificant basis in the evidence from which to determine how the cited measurements were made. The examination and report also pre-date Dungan reaching MMI, according to all the experts who offered opinions in this case. Consequently, the Physical Capacity Profile is not credible on the question of permanent disability.

Dungan has experience with stick welding MIG welding. (Hrg. Tr. p. 51) He does not have experience TIG welding. (Hrg. Tr. p. 51) Dungan worked for Meridian as a welder. (Hrg. Tr. p. 35)

Dungan went to work at Meridian, where he received pay increases during his first ninety days on the job. (Hrg. Tr. p. 44) After these pay increases, Dungan's hourly rate of pay was \$15.76 at Meridian. (Hrg. Tr. p. 44) Ultimately, Dungan's hourly pay at Meridian rose to \$17.48. (Hrg. Tr. p. 45)

On June 12, 2020, Dungan saw Dr. Klopper and complained of continued pain, including radiating pain in his right leg. (Jt. Ex. 5, p. 11) He opted to try another injection because they had provided some relief instead of surgery. (Jt. Ex. 5, pp. 11–12) Dungan received another injection at L4-5 on June 12, 2020. (Jt. Ex. 7, pp. 24–25)

During a telehealth visit on August 13, 2020, Dungan reported no leg pain but that he was experiencing discomfort in his back. (Jt. Ex. 5, p. 14) He requested another injection because of the positive results he had with previous injections and Dr. Klopper agreed. (Jt. Ex. 5, p. 14) On September 14, 2020, Dungan received an injection at L5-S1. (Jt. Ex. 8, p. 1–4) Dr. Klopper noted ten days later the injection was not at L4-L5, where Dungan had received his previous injections, and ordered an injection at L4-L5. (Jt. Ex. 5, p. 18)

In late 2020, Dungan left Meridian to work at Champion Ford of Carroll as a lube technician. (Hrg. Tr. pp. 35–36) He primarily changed oil there. (Hrg. Tr. p. 36; Def. Ex. F, p. 1) Dungan earned more at Champion than at Den Hartog. (Hrg. Tr. pp. 36, 47–48; Def. Ex. D, pp. ; Def. Ex. F, pp. 2)

Robert Broghammer, M.D., performed a records review at West Bend's request and issued a report dated January 29, 2021. (Cl. Ex. 3) He diagnosed Dungan with a remote history of lumbar sprain and aggravation of L4-L5 versus L5-S1 disc bulge. (Cl. Ex. 3, p. 19) Dr. Broghammer opined attempting to lift the tank while working for Den Hartog was a significant contributing factor to causing Dungan's injury and need for care. (Cl. Ex. 3, pp. 19–20) He further opined Dungan's then-current work restriction was appropriate and he did not anticipate any permanent work restrictions would be necessary. (Cl. Ex. 3, p. 20)

In February 2021, Dungan applied for a job as a welder with Gomaco. (Hrg. Tr. pp. 47–48) During the interview, Dungan spoke with Dan Skirvin, the head of human resources for Gomaco. (Hrg. Tr. pp. 54–55) Dungan informed the head of human resources that he had an open workers' compensation case during the interview. (Hrg. Tr. pp. 54–55) Skirvin expressed concern about the Gomaco medical personnel approving him to perform the job from a medical standpoint. (Hrg. Tr. pp. 54–55)

Dungan credibly testified that he attempted to reassure Skirvin, telling him something along the lines of:

I can still work, you know. Whether I'm going to enjoy it or not, that's not really what it's about. I need to pay my bills and I'm dedicated to taking care of my family. So whatever we can do to remedy the situation.

(Hrg. Tr. p. 55)

To address Skirvin's concerns, Dungan scheduled an appointment with Dr. Klopper at CNOS and requested a release from his work restrictions. (Hrg. Tr. p. 37; Jt. Ex. 5, pp. 21–22) On February 8, 2021, Dungan returned to Dr. Klopper, who noted no tenderness with palpation over the lumbar spine and:

Patient is here for follow-up for lumbar radiculopathy. Patient has a pending work comp case and is hopeful to start a job with a new employee. The patient needs . . . released to full duty before starting his new job. Patient states that his radicular symptoms have resolved. Does

have occasional low back pain that is worse in the morning. States he does better once he is up and moving. Denies any leg weakness. Denies any numbness and tingling in his lower extremities. Sounds like we will start a welding job tomorrow.

Patient radicular symptoms have resolved. Patient is neurologically intact on exam. No neurosurgical intervention is currently indicated. Patient was informed that he can return to work without restriction and was given a work note stating as such. From our standpoint the patient has reached [maximum medical improvement (MMI)]. Patient will follow up with us on as-needed basis.

(Jt. Ex. 5, p. 21)

After Dr. Klopper released Dungan to work without restriction, Gomaco hired Dungan to work as a welder. (Hrg. Tr. pp. 47–48) His starting rate of pay was \$17.00 per hour. (Hrg. Tr. p. 48; Def. Ex. G, p. 3) At the time of hearing, Dungan was still employed with Gomaco. (Hrg. Tr. p. 48)

After this appointment, West Bend asked Dr. Klopper to opine on the nature and extent of any permanent disability Dungan sustained from his work injury at Den Hartog. (Jt. Ex. 5, pp. 23–24) Dr. Klopper used Guides to assess Dungan's permanent functional impairment. (Jt. Ex. 5, pp. 23–24) He then issued a letter with his opinion, dated March 10, 2021. (Jt. Ex. 5, pp. 23–24)

In the March 10, 2021 letter, Dr. Klopper references Table 15-3 of the Guides to categorize Dungan's injury as Diagnosis-Related Estimates (DRE) Lumbar Category II and assigned a five percent permanent partial impairment to the body as a whole. (Jt. Ex. 5, p. 24) Dr. Klopper's March 10, 2021 letter does not identify or discuss any of the symptoms, signs, or tests from Box 15-1 or specific criteria from Table 15-3 for DRE Category II. (Jt. Ex. 5, p. 24)

Dungan underwent an MRI of his lumbar spine on July 15, 2021. (Jt. Ex. 8, pp. 6–8) Aaron Hurlbut, M.D., interpreted the MRI to show:

1. L5-S1 small posterior disc protrusion which abuts but does not significantly displace the traversing bilateral S1 nerve roots[,] right greater than left. Mild L5-S1 spinal canal stenosis.
2. L4-L5 small posterior disc protrusion with annular tear resulting in mild spinal canal stenosis and approaches the bilateral traversing L5 nerve roots.

(Jt. Ex. 8, p. 8)

Dr. Klopper saw Dungan on July 19, 2021, to go over the MRI results, which he interpreted to demonstrate “resolution of the right-sided disc herniation at L4-5” and “moderate lateral recess stenosis at L4-5 bilaterally.” (Jt. Ex. 5, p. 25) Dr. Klopper noted, “He has been going to the chiropractor and actually feels better.” (Jt. Ex. 5, p. 25) Dr. Klopper instructed Dungan to contact his office if the symptoms worsened. (Jt. Ex. 5, p. 25)

Dungan’s back pain continued so he requested that the defendants authorize another epidural steroid injection. (Jt. Ex. 5, p. 27) In response, defense counsel sent Dr. Klopper a check-box letter dated August 24, 2021, inquiring as to whether Dungan’s work injury at Den Hartog was a substantial factor in causing his current complaints and need for ongoing care. (Jt. Ex. 5, pp. 27–28) The check-box letter did not ask about how Dungan’s ongoing symptoms might impact the permanent impairment rating Dr. Klopper provided in March. (Jt. Ex. 5, p. 27) Dr. Klopper responded by checking a box to indicate Dungan’s work injury at Den Hartog was a substantial factor in causing his ongoing symptoms and need for care. (Jt. Ex. 5, p. 27) Dr. Klopper signed and dated his response August 30, 2021. (Jt. Ex. 5, pp. 27–28)

Defense counsel arranged for Dungan to undergo an IME with Trevor Schmitz, M.D., on November 19, 2021. (Def. Ex. I) As part of the IME, Dr. Schmitz performed a physical examination of Dungan. (Def. Ex. I, pp. 22–) At hearing, Dungan credibly testified that his visit with Dr. Schmitz lasted about fifteen minutes. (Hrg. Tr. p. 32) Dr. Schmitz asked Dungan some questions and tickled the top of both of Dungan’s feet, but Dungan did not feel it on his right foot. (Hrg. Tr. pp. 32–33)

Dr. Schmitz also review records relating to Dungan’s injury and the care for it. (Def. Ex. I, pp. 22) With respect to records relating to Dr. Klopper’s care, Dr. Schmitz’s summary states, “Final note, I reviewed with Dr. Klopper was from March 10, 2021, at which time he did give Mr. Dunga[a]n a 5% whole person impairment rating.” (Def. Ex. I, p. 25) Under the heading, “Diagnostic Imaging,” Dr. Schmitz discusses only the September 27, 2019 MRI and makes no mention of the July 15, 2021 MRI. (Def. Ex. I, p. 26) Thus, Dr. Schmitz did not review all of the medical records relating to Dungan’s care, including those from Dr. Klopper’s care after March 10, 2021, for ongoing symptoms and the July 15, 2021 MRI.

Dr. Schmitz opined that after Dungan underwent physical therapy and injections, “I believe he got back to his baseline status. As such, I would state that he may have had a temporary aggravation of his underlying lumbar degenerative changes on MRI.” (Def. Ex. I, p. 27) Dr. Schmitz then agreed with Dr. Klopper’s March 10, 2021 opinion on permanent impairment and assigned no work restrictions. (Def. Ex. I, p. 27)

Claimant’s counsel arranged for an IME with Sunil Bansal, M.D., because Dungan felt the permanent disability rating provided by Dr. Klopper was too low. (Cl. Ex. 1) Dr. Bansal prepared a report based on review of medical records and a physical examination of Dungan. (Cl. Ex. 1)

Dr. Bansal performed a physical examination of Dungan on January 31, 2022. (Cl. Ex. 1, pp. 9–10) He noted tenderness to palpation over the lumbar back with guarding. (Cl. Ex. 1, p. 9) With respect to Dungan's right lower extremity, Dr. Bansal noted, "Using a two-point discriminator, there is loss of sensory discrimination over the lateral lower leg." (Cl. Ex. 1, p. 9) Dr. Bansal noted Dungan's left SLR was negative and his right SLR was positive. (Cl. Ex. 1, p. 9) He also noted Dungan complained of ongoing low back pain that radiates down his right leg and foot, is able to stand comfortably, use stairs, sit fairly comfortably, experiences pain when standing from a seated position, and has difficulty with bending and lifting. (Ex. Ex. 1, p. 9)

Dr. Bansal responded to questions posed by claimant's counsel. (Cl. Ex. 1, pp. 10–11) He diagnosed Dungan with L4-5 disc protrusion and used the Guides to opine on the extent of permanent impairment as follows:

Referring to Table 15-3 of the [Guides], Mr. Dungan's impairment can be classified as having meeting a DRE Lumbar Category II, and some from Category III. He has an L4-L5 disc protrusion with radiculopathy. Therefore, he is assigned an 8% impairment of the whole body.

(Cl. Ex. 1, p. 10)

Dr. Bansal assigned permanent work restrictions of no lifting of more than thirty pounds and no frequent bending or twisting. (Cl. Ex. 1, p. 11) He also suggested intermittent epidural injections for maintenance and possible surgical decompression if Dungan's symptoms worsened. (Cl. Ex. 1, p. 11)

Defense counsel asked Dr. Broghammer to review and respond to Dr. Bansal's IME report. (Def. Ex. J, pp. 6–7) There is no indication Dr. Broghammer personally examined Dungan; rather, he reviewed medical records, including Dr. Bansal's IME report and records relating to Dr. Klopper's care up to and including the check-box letter response signed and dated August 30, 2021. (Def. Ex. J, pp. 1–4) Dr. Broghammer authored a letter dated March 30, 2022, in which he answered questions posed by defense counsel. (Def. Ex. J)

Defense counsel asked if Dr. Broghammer agreed with Dr. Bansal's opinion that Dungan's work injury caused an eight percent permanent impairment to the whole body and he responded:

No. In this regard, I would agree with Dr. Klopper that the worker qualifies for a 5% impairment of the whole person. Dr. Klopper in [his] last evaluation of the worker in July of 2021 noted the worker's pain had resolved, and he had no further lumbar radicular complaints. Given this, the appropriate impairment rating would be 5% of the whole person pursuant to the [Guides], specifically referencing Table 15-3 and looking under II under the DRE Category. A 5% impairment is for an individual who had a clinically significant radiculopathy on the side of expected symptoms consistent with MRI findings but no longer has the

radiculopathy. Mr. Dungan no longer had radiculopathy as of the July 2021 visit with Dr. Kloppe and, therefore, the appropriate impairment rating would be 5% to the whole person and not 8%.

(Def. Ex. J, p. 4) Dr. Broghammer also opined that he disagreed with Dr. Bansal's assignment of permanent lifting restrictions because Dungan "was noted to be asymptomatic at his last visit with Dr. Kloppe," who "provided the worker a full and unrestricted release to return to regular and customary activities without restrictions or limitations." (Def. Ex. J, p. 4)

The Gomaco job description lists lifting requirements of being able to lift fifty pounds frequently and seventy-five pounds occasionally, but Dungan does not have to perform those duties because the company has accommodated his functional limitations. (Hrg. Tr. p. 36) He gets help with lifting and has overhead hoists for heavier objects. (Hrg. Tr. pp. 36–37) Dungan described his work as a welder for Gomaco as less physically demanding than his work at Den Hartog. (Hrg. Tr. p. 38) Dungan was working for Gomaco at the time of hearing.

Dungan credibly testified that he continued to experience back and right-leg pain. (Hrg. Tr. p. 40) Day to day, he experiences discomfort when standing and sitting and severe discomfort when walking and sleeping. (Hrg. Tr. pp. 39–40) Walking causes worsened shooting pain in his right leg. (Hrg. Tr. p. 40) Dungan's pain when laying down is significant enough that it impacts his ability to sleep. (Hrg. Tr. p. 39)

Chapter 15 of the Guides addresses the assessment of disability to the spine. The chapter's introduction advises, "Before using the information in this chapter, the *Guides* user should become familiar with Chapters 1 and 2 and the Glossary." Guides at 374. The Glossary provides in pertinent part:

Disability Alteration of an individual's capacity to meet personal, social, or occupational demands or statutory or regulatory requirements because of an impairment. Disability is a relational outcome, contingent on the environmental conditions in which activities are performed.

Functional limitations The inability to completely perform a task due to an impairment. In some instances, functional limitations may be overcome through modifications in the individual's personal or environmental accommodations.

Impairment A loss, loss of use, or derangement of any body part, organ system, or organ function.

Impairment evaluation A medical evaluation performed by a physician, using a standard method as outlined in the *Guides*, to determine permanent impairment associated with a medical condition.

Impairment percentages or ratings Consensus-derived estimates that reflect the severity of the impairment and the degree to which the impairment decreases an individual's ability to perform common activities of daily living as listed in Table 1-2

Id. at 600–01.

Chapter 1, “Philosophy, Purpose, and Appropriate Use of the Guides,” provides:

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.

Id. at 4 (emphasis in original). Table 1-2 shows the activities of daily living as follows:

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 stairs
Sensory function	Hearing, seeing, tactile feeling, tasting, smelling
Nonspecialized hand activities	Grasping, lifting, tactile discrimination
Travel	Riding, driving, flying
Sexual function	Organs, ejaculation, lubrication, erection
Sleep	Restful, nocturnal sleep pattern

Table 1-3 contains a list of scales for the measurement of instrumental activities of daily living and activities of daily living. Id. at 6–7.

The Guides also explain why work is not considered in their framework for assessing impairment based on the decrease in ability to perform ADL:

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. [. . .]

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 go on to emphasize:

Impairment percentages derived from the *Guides* criteria should not be used as direct estimates of disability. Impairment percentages estimate the extent of the impairment on the whole person functioning and account for basic activities of daily living, not including work. The complexity of work activities requires individual analyses. Impairment assessment is a necessary *first step* for determining disability.

Id. at 13 (emphasis in original).

Chapter 15 of the Guides addresses disability to the spine with impairments within a Diagnosis-Related Estimate (DRE) categories that “encompass a range, with adjustments of up to 3%.” Guides, Ch. 15, p. 373. Section 15.3 provides:

The DRE method has eight diagnosis-related categories for each of the three spinal regions. In assigning the individual to the correct DRE category, one of two approaches is used. The first is based on symptoms, signs, and appropriate diagnostic test results. The second is based on the presence of fractures and/or dislocations with or without clinical

symptoms. If a fracture is present that places the individual into a DRE category, no other verification is required.

Guides, § 15.3, p. 381. Box 15-1 lists the following symptoms, signs other than fractures, and tests used to assist DRE categorization: muscle spasm, muscle guarding, asymmetry of spinal motion, nonverifiable radicular root pain, reflexes, weakness and loss of sensation, atrophy, radiculopathy, electrodiagnostic verification of radiculopathy, alteration of motion segment integrity, causa equina syndrome, and urodynamic tests. Id. at pp. 382–83.

Table 15-3, entitled “Criteria for Rating Impairment Due to Lumbar Spine Injury” and referenced by each physician who opined on Dungan’s permanent impairment, lists each DRE category and the criteria for it. Id. at p. 384. “Apart from category I, each category includes a range to account for the resolution or continuation of symptoms and their impact on the ability to perform [activities of daily living (ADL)].” Id. The Guides provide:

If the individual had a radiculopathy caused by a herniated disk or lateral spinal stenosis that responded to conservative treatment and currently has no radicular symptoms or signs, he or she is placed in category II, since at MMI there is no radiculopathy. Category III is for individuals with a symptomatic radiculopathy, either after medical or surgical treatment, or for individuals who have a history of previous radiculopathy caused by disk herniation or lateral spinal stenosis but have improved or become asymptomatic following surgery.

Id. at p. 383.

Under Table 15-3, an individual who qualifies for categorization under DRE Lumbar Category II has between a five and eight percent impairment of the whole person. Id. Since this case does not deal with any fractures, the criteria listed for DRE Lumbar Category II are:

Clinical history and examination findings are comparable with a specific injury; findings may include significant muscle guarding or spasm observed at the time of the examination, asymmetric loss of range of motion, or nonverifiable radicular complaints, defined as complaints of radicular pain without objective findings; no alteration of the structural integrity and no significant radiculopathy

or

individual had a clinically significant radiculopathy and has an imaging study that demonstrates a herniated disk at the level and on the side that would be expected based on the previous radiculopathy, but no longer has the radiculopathy following conservative treatment

Id. at 384. (bold face and italics in original).

The Guides also provide examples to illustrate how to apply the criteria for DRE lumbar categories. Id. at pp. 385–88. For DRE Lumbar Category II, it describes a 25-year-old man who sustained an injury while lifting on the job that caused low back and left thigh pain. Id. at 385. A test confirmed a herniated disc, most of his symptoms resolved with conservative treatment, he was able to perform all activities of daily living (ADL), and he also returned to work. Id. at 385. His symptoms at the time of examination were no pain at rest or numbness in the lower extremities, no evidence of residual radiculopathy, and some back pain after heavy activity. Id. The Guides advise a five percent impairment of the whole person under these findings. Id.

The parties dispute whether Dungan has radiculopathy. The defendants contend Dungan is entitled to the five percent whole body impairment rating for which they have paid permanent partial disability (PPD) benefits because he had a herniated disk with radiculopathy that healed and he no longer has radiculopathy. Dungan contends his impairment is higher because of his ongoing symptoms.

The Guides define radiculopathy as “significant alteration in the function of a nerve root or nerve roots and is usually caused by pressure on one or several nerve roots.” Guides, Box 15-1, p. 382. They also provide guidance on how to evaluate such, including the straight leg raising test (SLR). Id. at 375. As discussed above, Dr. Bansal’s IME report shows he performed the SLR on Dungan and found his right leg positive. In contrast, there is an insufficient basis in the evidence from which to conclude either Dr. Klopper, Dr. Schmitz, or Dr. Broghammer performed the SLR on Dungan because their opinions do not reference the test or its results. This makes Dr. Bansal’s opinion more persuasive.

Further, Dr. Bansal’s IME report reflects the fact he tested for and found loss of sensory discrimination over the lateral lower leg. There is an insufficient basis in the evidence from which to find Dr. Klopper, Dr. Schmitz, or Dr. Broghammer tested for the same. This weighs in favor of adopting Dr. Bansal’s findings.

Further, Dr. Bansal’s report reflects his discussion with Dungan of his present symptoms, which included complaints of ongoing low back pain that radiates down his right leg and foot, pain when standing from a seated position, and difficulty with bending and lifting. There is an insufficient basis in the evidence from which to conclude Dr. Schmitz or Dr. Broghammer engaged in such a discussion with Dungan. Further, Dr. Klopper opined that Dungan’s ongoing complaints from July 2021 were related to his work injury at Den Hartog. In fact, no doctor has opined that Dungan’s symptoms at the time of the IME performed by Dr. Bansal and which he credibly described during testimony as his day-to-day symptoms at the time of hearing are unrelated to the work injury at Den Hartog. The weight of the evidence establishes Dungan continues to experience symptoms caused by the work injury and has ongoing radiculopathy.

Because of Dungan’s ongoing symptoms, Dr. Schmitz’s opinion in this case is based on an incomplete understanding of Dungan’s ongoing treatment and symptoms.

He did not review or address Dungan's care after March 10, 2021, or his ongoing symptoms. Dr. Schmitz's opinion is therefore not persuasive.

Likewise, Dr. Broghammer's opinion does not address the fact that Dungan had ongoing symptoms such that he requested an injection, which prompted defense counsel to send a check-box letter to Dr. Klopper asking if the ongoing complaints were related to his work injury at Den Hartog. (Jt. Ex. 5, pp. 27–28) Dr. Klopper opined that Dungan's ongoing complaints were the result of the work injury. (Jt. Ex. 5, pp. 27–28) This undermines the foundation of Dr. Broghammer's opinions on permanent impairment and the need for permanent work restrictions—that “the worker's pain had resolved” and he was “asymptomatic”—and renders them unpersuasive. Reinforcing this conclusion is Dungan's credible testimony about his ongoing pain from the work injury.

For these reasons, the weight of the evidence shows Dungan experienced ongoing radiculopathy caused by the work injury. Dungan's ongoing symptoms and the physical limitations he has in ADL and working support adoption of Dr. Bansal's work restrictions as well. The weight of the evidence establish it is more likely than not Dungan's sustained an impairment of eight percent to the whole body from the work injury he sustained at Den Hartog.

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, File No. 5067766 (App. Dec. 11, 2020).

A. Bifurcated Litigation Process.

Dungan earned more working for Den Hartog after the work injury than he did at the time of it. He then voluntarily quit his job because he and his family moved away. 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.

The parties dispute how these facts impact Dungan's entitlement to PPD benefits under Iowa Code section 85.34(2)(v), as amended in 2017. The defendants contend they limit Dungan to PPD benefits for only the functional impairment caused by the work injury. Dungan argues he is entitled to PPD benefits for the industrial disability caused by the work injury. The nature and extent of the permanent disability for which Dungan is entitled compensation hinges on the interpretation of section 85.34(2)(v).

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 “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). Under Iowa Code section 85.34(2), the method of compensating permanent partial disability caused by a work injury is generally based on whether the injury is to a body part itemized in the statutory schedule. Gilleland v. Armstrong Rubber Co., 524 N.W.2d 404, 407 (Iowa 1994). “Scheduled permanent partial disabilities . . . are ‘arbitrarily’ compensable according to the classifications of section 85.34(2) without regard to loss of earning capacity.” Id. (quoting Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 14–15 (Iowa 1993)).

Before 2017, permanent partial disability to an unscheduled body part caused by a work injury was “compensated by the industrial disability method which takes into account the loss of earning capacity.” Id. (citing Mortimer, 502 N.W.2d at 14–15); see also Mannes v. Fleetguard, Inc., 770 N.W.2d 826, 830 (Iowa 2009) (quoting Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824, 831 (Iowa 1992)). An industrial disability analysis was used regardless of whether the injured employee returned to work with the defendant-employer or the level of earnings at the time of hearing relative to the date of injury. Mannes v. Fleetguard, Inc., 770 N.W.2d 826, 830 (Iowa 2009) (quoting Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824, 831 (Iowa 1992)); see also Quaker Oats Co. v. Cihā, 552 N.W.2d 143, 158 (Iowa 1996); Arrow-Acme Corp. v. Bellamy, 500 N.W.2d 92, 95 (Iowa App. 1993). With the 2017 amendments, the legislature carved out an exception to this general rule and a mandatory bifurcated litigation process on the issue of permanent disability under certain circumstances. See 2017 Iowa Acts ch. 23, § 8 (now codified at Iowa Code § 85.34(2)(v)). The statute now articulates an exception and the circumstances triggering the bifurcated litigation process as follows:

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 reduction in the employee’s earning capacity caused by the employee’s permanent partial disability.

Iowa Code § 85.34(2)(v).

Thus, the 2017 amendments changed the statute so that its text expressly incorporates the agency's review-reopening process to create a mandatory bifurcated litigation process when certain criteria are met. See, e.g., Garcia v. Smithfield Foods, File No. 1657969.01 (Arb. February 16, 2022). Under Iowa Code section 86.14(2), review-reopening is a process by which a determination of compensation is revisited due to a change in the claimant's condition. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 391–95 (Iowa 2009). The bifurcated litigation process created in section 85.34(2)(v) allows a claimant to seek a new agency determination of permanent disability using an industrial disability analysis when the defendant-employer terminates the claimant's employment after the initial agency award or approval of the parties' agreement for settlement. Presumably, this is because the defendant-employer's discharge of the claimant after the award or agreement for settlement creates a potential change in the claimant's condition that could trigger reopening the determination of permanent disability. See id.

The parties dispute whether section 85.34(2)(v) requires Dungan to follow the bifurcated litigation process to obtain a determination of what, if any, industrial disability he has sustained due to his unscheduled work injury. The defendants believe Dungan must follow it because he returned to work with Den Hartog at the requisite earnings level and has earned more than he did at the time of the work injury in subsequently employment, including his job at the time of hearing as a welder. Dungan disagrees because he quit his job with Den Hartog.

The legislature has not empowered the agency to interpret the Iowa Workers' Compensation Act, but the agency necessarily must do so when performing its quasi-judicial function as tribunal for workers' compensation contested case proceedings. 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); Martinez, File No. 5063900. To determine Dungan's entitlement to PPD benefits in this case, it is necessary to first determine whether he must use the bifurcated litigation process under the statute given the timing of him quitting his job at Den Hartog. Therefore, this decision must interpret section 85.34(2)(v).

The defendants ask the agency to use only one sentence of section 85.34(2)(v). Read alone, this sentence states that an injured employee is entitled only to PPD benefits for functional impairment if the employee "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." Iowa Code § 85.34(2)(v). The sentence contains no express requirement that the injured worker remain employed after returning to work at the requisite earning level. But the analysis of this statutory provision does not end with the punctuation at the end of this individual sentence.

Iowa statutes are interpreted as a whole, not in part. See, e.g., Doe v. State, 943 N.W.2d 608, 610 (Iowa 2020). When interpreting the text of a provision in the Iowa Code, we must "take into consideration the language's relationship to other provisions

of the same statute and other provisions of related statutes.” *Id.* Therefore, the entirety of section 85.34(2)(v) and its interplay with the rest of the Iowa Workers’ Compensation Act must be considered. The next sentence states an injured employee who “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” may seek reopening of the agency award or an agreement for settlement on the question of permanent disability.

The Commissioner considered the interplay of these two new sentences in Martinez v. Pavlich, Inc., File No. 5063900 (App. July 30, 2020). In Martinez, the claimant voluntarily quit employment with the defendant-employer and accepted a position with a different employer at higher pay. *Id.* While the nature of the employment separation differs from the one in this case, Martinez is nonetheless guiding. *Id.* The Commissioner considered how the two sentences cited by the parties in this case should be construed and opined:

[W]hen the two new provisions . . . 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.

Id. (emphasis added). Put otherwise, the statute requires a bifurcated litigation process on permanent disability only under the circumstances its text expressly details.

Reinforcing the Commissioner’s reading is the traditional statutory construction principle of *expressio unius est exclusio alterius*, 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). In section 85.34(2)(v), the text expressly requires a bifurcated litigation process only when the claimant returns to employment with the defendant-employer or is offered work by the defendant-employer at the requisite earnings level and is then discharged after an agency award of permanent disability or an agreement for settlement with respect to permanent disability. The statute contains no mention of any other circumstances that mandate a bifurcated litigation process to determine the extent of permanent disability. The legislature could have included such language in the statute but did not. This choice implies that the requirement for a bifurcated litigation process only applies when the defendant-employer discharges the claimant after the agency issues an award or approves the parties’ agreement for settlement on the question of permanent disability based on functional impairment.

Relatedly, the Iowa Workers’ Compensation Act “is not to be expanded by reading something into it that is not there.” Downs, 481 N.W.2d at 527 (citing Cedar Rapids Cmty. Sch. Dist. v. Cady, 278 N.W.2d 298 (Iowa 1979)). Because the statutory text does not include an express requirement for a bifurcated litigation process when the defendant-employer terminates the claimant’s employment before hearing, it would be legal error to expand the circumstances under which section 85.34(2)(v) requires such a

process by reading something into its text that is not there. Compounding the legal error that such an interpretation would constitute is the fact it would undermine an important purpose of the Iowa Workers' Compensation Act.

In Zomer v. West River Farms, Inc., 666 N.W.2d 130 (Iowa 2003), the Iowa Supreme Court considered the Commissioner's authority to reform a workers' compensation insurance policy. Even though this opinion construed the scope of the Commissioner's authority under section 85.21, its reasoning applies here. Id. at 132–33. The court drew on longstanding precedent as the foundation of its holding:

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.”

Id. at 133 (quoting Flint v. City of Eldon, 183 N.W. 344, 345 (1921) (citation omitted)).

The court concluded a “bifurcated litigation process” that is drawn out “is a far cry from the efficient and speedy remedy envisioned by the general assembly when it adopted the workers' compensation act.” Id. at 133–34. The court held it would be erroneous “to read into the statute a limitation on the [C]ommissioner's authority to decide claims for compensation, particularly when to do so would defeat one of the primary purposes of the statute—the provision of a prompt and adequate remedy.” Id. Applying Zomer here, expanding the mandatory bifurcated litigation process under section 85.34(2)(v) requires reading something into the statutory text that is not there and would result in a more drawn-out process that would hinder the agency's ability to provide a prompt and adequate remedy, which would defeat one of the primary purposes of the Act.

Lastly, reading the requirement for a bifurcated litigation process to apply only under the circumstances expressly stated in section 85.34(2)(v) is also consistent with Iowa Supreme Court precedent requiring the agency and courts to “apply the workers' compensation statute broadly and liberally in keeping with its humanitarian objective: the benefit of the worker and the worker's dependents.” Xenia Rural Water Dist. v. Vegors, 786 N.W.2d 250, 257 (Iowa 2010). Applying the statute as written allows a claimant to receive a final determination on permanent disability when the issue is ripe for determination. Getting such a determination via a single contested case proceeding before the agency means the claimant will receive payment of all PPD benefits to which the claimant is legally entitled sooner in time and without having to go through litigation

of a second contested case proceeding. Therefore, the result of adhering to the statutory text is beneficial to the injured worker and the worker's dependents.

In Martinez, the Commissioner specifically considered on appeal whether the statute mandates a bifurcated litigation process when the claimant quits employment with the defendant-employer and then gets a higher-paying job with a different employer. File No. File No. 5063900 (App. July 30, 2020). The Commissioner held reading the statute to require a bifurcated litigation process when the claimant quits employment with the defendant-employer and obtains a new job at higher earnings before hearing would cause absurd results:

For example, [such an] interpretation would seemingly “reset” claimant's entitlement to benefits and limit them to functional loss any time a claimant returns to work or is offered work at the same or greater wages by any employer. This would make it virtually impossible for defendants to know when to volunteer benefits using the industrial disability method. Furthermore, using claimant's interpretation, a claimant entitled to benefits under subsection 85.34(2)(v) (2019) might be better off not seeking employment after being terminated by a defendant-employer because he or she would potentially risk entitlement to benefits under the industrial 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.

Id. The Commissioner then concluded, “though claimant in this case was earning greater wages at the time of the hearing than he was when he was injured, I conclude his earlier voluntary separation from defendant-employer removed claimant from the functional impairment analysis and triggered his entitlement to benefits using the industrial disability analysis.” Id.; see also Raley v. Securitas Sec. Services of USA, File No. 5067169 (Arb. Mar. 26, 2021).

On judicial review, the district court disagreed with the Commissioner's holding. See Pavlich Inc. et al v. Martinez, Ruling on Petition for Judicial Review, Case No. CVCV060634 (Iowa D. Ct. Polk Co., Apr. 21, 2022). Nonetheless, the district court affirmed the Commissioner determination of permanent disability. See id. Thus, the district court's analysis of whether section 85.34(2)(v) mandates a bifurcated litigation process when the claimant quits employment with the defendant-employer and obtains a job with higher earnings before the hearing is *obiter dicta* and does not control in this case on the question of whether Dungan must go through the bifurcated litigation process outlined in section 85.34(2)(v). See Nixon v. State, 704 N.W.2d 643, 648 n. 5 (Iowa 2005) (citing Boyles v. Cora, 232 Iowa 822, 847, 6 N.W.2d 401, 413 (1942)). As Deputy Grell persuasively concluded, “[U]ntil a definitive interpretation is provided by the Iowa appellate courts, [a presiding deputy is] bound by the precedent of this agency found in Martinez.” Dague v. Unisys Corporation, File No. 1645503.02 (Arb., Mar. 28, 2022).

For these reasons, the text of section 85.34(2)(v) does not require a bifurcated litigation process when the claimant quits employment with the defendant-employer before the hearing. In such circumstances, the statute therefore allows a determination of the extent of industrial disability. Because Dungan quit his job with Den Hartog before the hearing in this case, this decision will determine what, if any, industrial disability he sustained because of the stipulated work injury.

B. Permanent Disability.

The amount of compensation for an unscheduled injury resulting in permanent partial disability is based on the employee's earning capacity." Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 526 (Iowa 2012) (citing Broadlawns Med. Ctr. v. Sanders, 792 N.W.2d 302, 306 (Iowa 2010)). The assessment of a claimant's earning capacity is based on multiple factors: functional disability, age, education, qualifications, work experience, inability to engage in similar employment, earnings before and after the injury, motivation to work, personal characteristics of the claimant, the claimant's inability, because of the injury to engage in employment for which the claimant is fitted, and the employer's inability to accommodate the claimant's functional limitations. Id.; IBP, Inc. v. Al-Gharib, 604 N.W.2d 621, 632–33 (Iowa 2000); Ehlinger v. State, 237 N.W.2d 784, 792 (Iowa 1976).

Age 26 at the time of hearing, Dungan is a young man with decades of work ahead of him. He has not obtained a postsecondary degree but has training and works as a welder. Dungan has an eight percent functional impairment to the whole body resulting from the work injury.

Dungan is highly motivated to work and support his family. The work injury and resulting physical limitations have not prevented him from getting three jobs since quitting at Den Hartog, earning more at each than he was at the time of injury. At Gomaco, Dungan is able to work as a welder without heavy lifting.

Nonetheless, Dungan would more likely than not be unable to return to work as physically demanding as his day-to-day duties at Den Hartog made that job. This means that his work injury and the physical limitations it has caused has impacted his earning capacity in the sense that they limit the jobs for which he can realistically perform. That being said, Dungan has earned more since the injury, largely due to his skill as a welder.

Dungan has met his burden of proof. The evidence establishes he has sustained lost earning capacity because of the work injury. Taken together, these factors establish Dungan has sustained a fifteen percent industrial disability because of the work injury he sustained while work at Den Hartog. Fifteen multiplied by five hundred equals seventy-five, which means Dungan is entitled to seventy-five weeks of permanent partial disability benefits.

C. Rate.

The parties stipulated Dungan's gross earnings on the stipulated injury date were six hundred ninety and 68/100 dollars per week. They also stipulated he was single and entitled to one exemption at the time. Based on the parties' stipulations, Dungan's workers' compensation rate is four hundred thirty-nine and 89/100 dollars per week.

D. Care.

Iowa Code section 85.27(1) requires the defendants to furnish, for Dungan's work injury, "reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies therefor" and "reasonably necessary transportation expenses incurred for such services." The defendants did so in this case by authorizing Dr. Klopper as the treating physician for Dungan's work injury to his back. However, it is more likely than not that the defendants have not authorized additional care with Dr. Klopper for Dungan's ongoing symptoms. The defendants must provide reasonable care for the stipulated work injury moving forward with Dr. Klopper under the statute.

E. IME.

Iowa Code section 85.39(2) requires the defendants to reimburse Dungan for the cost of an IME with the doctor of his choice because the injury is compensable. The defendants are liable for the reasonable cost of the IME. Under section 85.39(2), "A determination of the reasonableness of a fee for an examination . . . 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."

The defendants contend the use of "impairment rating" in the sentence on reasonableness limits the amount they must reimburse Dungan for Dr. Bansal's IME. However, the subsection must be considered as a whole. Reading section 85.39(2) makes clear that "impairment rating" is used interchangeably with "examination" and therefore encompasses the review of records, examination, and report that are necessarily part of the IME process, as the agency has long-held. See Minar v. Pella Corp., File No. 5022947 (App. Jun. 27, 2012). To read the provision otherwise would undermine the balance of interests struck by the legislature regarding the provision of care for work injuries and doctor assessments of permanent disability. See Des Moines Area Reg'l Transit Auth. v. Young, 867 N.W.2d 839, 843–44 (Iowa 2015). The 2017 amendment to section 85.39(2) simply articulates the standard used to determine what constitutes a "reasonable fee" and does not reduce the scope of what such a reimbursable fee may cover. Therefore, the defendants must reimburse Dungan two thousand nine hundred seventy-seven and 00/100 dollars under the law.

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 Dungan prevailed on the disputed issues of permanent disability, care, and IME reimbursement, the following costs are taxed against the defendants:

- Thirteen and 90/100 dollars for the cost of service of the original notice and subpoenas, 876 IAC 4.33(3); and
- One hundred three and 00/100 dollars for the filing fee, including convenience fee incurred by using the payment gateway on the Workers’ Compensation Electronic System (WCES), 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 Dungan seventy-five (75) weeks of permanent partial disability benefits at the rate of four hundred thirty-nine and 89/100 dollars (\$439.89) per week from the stipulated commencement date.
- 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.
- 5) The defendants shall furnish reasonable care with Dr. Klopfer for Dungan’s work injury.
- 6) The defendants shall file subsequent reports of injury as required by Rule 876 IAC 3.1(2).
- 7) The defendants shall pay to Dungan the following amounts for the following costs:
 - a. One hundred three and 00/100 dollars (\$103.00) for the filing fee; and
 - b. Thirteen and 90/100 dollars (\$13.90) for the cost of service of the original notice and petition.

- 8) The defendants shall reimburse Dungan two thousand nine hundred seventy-seven and 00/100 dollars (\$2,977.00) for Dr. Bansal's IME.

Signed and filed this 30th day of September, 2022.



BEN HUMPHREY
Deputy Workers' Compensation Commissioner

The parties have been served, as follows:

Janece M. Valentine (via WCES)

Lee P. Hook (via WCES)

Christopher Spencer (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.