IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

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

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

BACKGROUND FACTS AND PROCEEDINGS

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

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

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

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

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

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

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

STANDARD OF REVIEW

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

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

"If the claim of error lies with the agency's findings of fact, the proper question on review is whether substantial evidence supports those findings of fact" when the record is viewed as a whole. Meyer, 710 N.W.2d at 219. Factual findings regarding the award of workers' compensation benefits are within the commissioner's discretion, so the court is bound by the commissioner's findings of fact if they are supported by substantial evidence. Mycogen Seeds v. Sands, 686 N.W.2d 457, 464-65 (Iowa 2004). Substantial evidence is defined as evidence of the quality and quantity "that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance." Iowa Code § 17A.19(10)(f)(1); Mycogen, 686 N.W.2d at 464. The application of the law to the facts is also an enterprise vested in the commissioner. Mycogen, 686 N.W.2d at 465. Accordingly, the court will reverse only if the commissioner's application was "irrational, illogical, or wholly unjustifiable." Id.; Iowa Code § 17A.19(10)(l). This standard requires the court to allocate some deference to the commissioner's application of law to the facts, but less than it gives to the agency's findings of fact. Larson Mfg. Co. v. Thorson, 763 N.W.2d 842, 850 (Iowa 2009).

LAW AND ANALYSIS

The Commissioner's Finding of a Right-Shoulder Injury

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

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

Commissioner's Conclusion to Award Temporary Total Disability Benefits

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

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

Iowa Code § 85.33 (emphasis added)

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

an offer of light duty work.

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

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

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

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

(Emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Notwithstanding respondent's violations of section 85.39, the commissioner's reasoning would seemingly force petitioners to determine an impairment rating using an evaluation of

respondent's choosing without having first determined a rating through their own FCE. It would have respondent's preferences initiate and guide the process instead of respondent following the process outlined by the legislature and reinforced in Iowa caselaw. It would also have petitioners obligated to conform to respondent's preferences instead of the process in Section 85.39.

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

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

Commissioner's Conclusion Petitioners Are Not Due a Credit

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

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

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

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

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

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

Interpretation of the 2017 Amendments to Section 85.34

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

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

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

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

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

> a. An employer is fully liable for compensating all of an employee's disability that arises out of and in the course of the employee's employment with the employer. An employer is *not liable* for compensating an employee's preexisting disability that arose out of and in the course of employment *with a different employer* or from causes unrelated to employment.
>
> b. If an injured employee has a preexisting disability that was caused by a prior injury arising out of and in the course of employment with the *same* employer, and the preexisting disability was compensable under the same paragraph of section 85.34, subsection 2, as the employee's present injury, the employer is liable for the combined disability that is caused by the injuries, measured in relation to the employee's condition immediately prior to the first injury. In this instance, the employer's liability for the combined disability shall be considered to be already *partially satisfied to the extent of the percentage of disability for which the employee was previously compensated by the employer*.

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

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

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

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

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

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

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

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

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

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

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

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

Id. (emphasis added).

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

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

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

Id. (emphasis added).

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

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

The Parties' Full Commutation Agreement

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

Settlement and Commutation Agreements in Iowa Workers' Compensation

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

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

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

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

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

> Upon the payment of such amount, the employer *shall* be discharged from *all further liability* on account of the injury or death, and be entitled to a duly executed release. Upon the filing of the release, the liability of the employer under any agreement, award, finding, or judgment shall be discharged of record.

Iowa Code § 85.47 (emphasis added).

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

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

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

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

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

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

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

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

Application of Subsection 7 Statutes and the Terms to the Facts: Applying subsection 7 to the instant case, it is evident these circumstances fit the parameters of when a credit or apportionment should be considered as described in the statute. Subsection 7 outlines that an employer, "is not liable for compensating an employee's preexisting disability that arose out of and in the course of employment from a prior injury with the employer, to the extent that the employee's preexisting disability has already been compensated under this chapter, or chapter 85A, 85B, or 86." Iowa Code § 85.34(7). Respondent's right-shoulder injury is a successive injury which arose out of the course of employment with petitioner and a prior injury to the right shoulder with petitioner. As established by the full commutation, the prior injury has been compensated by petitioner under chapter 85A.

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

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

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

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

compensation." Id.

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

CONCLUSION

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

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

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

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

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

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

State of Iowa Courts

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

So Ordered

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

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