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IN THE SUPREME COURT OF IOWA

No. 21-0760

MARY DENG,
Petitioner-Appellant,

vs.

FARMLAND FOODS, INC. and
SAFETY NATIONAL CASUALTY CORP.
Respondents-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR CRAWFORD COUNTY
HONORABLE JUDGE RODGER SAILER
Crawford County No. CVCV041545

RESPONDENTS-APPELLEES' FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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STATEMENT OF ISSUE PRESENTED FOR REVIEW

I. THE DISTRICT COURT PROPERLY AFFIRMED THE APPEAL DECISION OF THE IOWA WORKERS' COMPENSTATION COMMISSIONER FINDING THAT THE CLAIMANT'S INJURY SHOULD BE COMPENSATED AS A SCHEDULED MEMBER SHOULDER UNDER IOWA CODE SECTION 85.34(2)(N)

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Other Authority:

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ROUTING STATEMENT

Pursuant to Iowa R. App. P. 6.1101(2), retention of this case by the Iowa Supreme Court for decision would be appropriate. This case is an administrative appeal from a decision of the Iowa Workers' Compensation Commissioner involving the 2017 legislative changes to Iowa Code Chapter 85, specifically as it pertains to the addition of the shoulder to the list of scheduled members under Iowa Code section 85.34(2)(n).

The right of a worker to receive compensation for injuries sustained which arose out of and in the course of employment is statutory. *Graves v. Eagle Iron Works*, 331 N.W.2d 116 (Iowa 1983). The statute conferring this right can also fix the amount of compensation to be paid for different specific injuries, and the employee is not entitled to compensation except as provided by statute. *Id.* If it is found that the permanent physical impairment or loss of use is limited to a body member specifically listed in schedules set forth in one of the subsections of Iowa Code section 85.34(2)(a)-(t), the disability is considered a scheduled member disability and measured functionally. Iowa Code § 85.34(2); (*see also*, *Graves v. Eagle Iron Works*, 331 N.W.2d 116 (Iowa 1983); *Simbro v. DeLong's Sportswear*, 332 N.W.2d 886, 887 (Iowa 1983); *Martin v. Skelly Oil Co.*, 106 N.W.2d 95, 98 (1960); *Gilleland v.*

Armstrong Rubber Co., 524 N.W.2d 404, 407 (Iowa 1994)). If it is found that the permanent physical impairment or loss of use is to the body as a whole, the disability is unscheduled and measured industrially under Code subsection 85.34(2)(v). *Id.* at (v).

Prior to the 2017 legislative changes, injury to the shoulder was compensated as an unscheduled loss with disability measured under the industrial method. (*See*, 2008 Ia. Legis. Serv. Ch. 1032 (S.F. 2320)). The distinction between scheduled and unscheduled injuries is important because "the amount of compensation for an unscheduled injury is often much greater than for a scheduled injury." *Prewitt v. Firestone Tire & Rubber Co.*, 564 N.W.2d 852, 854 (Iowa Ct. App. 1997). And, the method for determining compensation is different. (*See Mortimer v. Fruehauf Corp.*, 502 N.W.2d 12 (Iowa 1993)).

Petitioner-Appellant asks the Court to find that an injury sustained to her infraspinatus is an unscheduled injury for the purposes of compensation under the Iowa Workers' Compensation Act. However, the Iowa Workers' Compensation Commissioner determined, as Respondents-Appellees maintain, that the injury is properly considered a shoulder injury and should be compensated as a scheduled loss pursuant to section 85.34(2)(n). Arb. Dec.

pp. 11-12. To resolve whether Claimant is entitled to benefits based on a scheduled member or industrial basis the Court is asked to determine what is meant by the term "shoulder" as enacted in section 85.34(2)(n). Accordingly, this case involves questions relating to substantial issues of first impression and presenting fundamental and urgent issues of broad public importance requiring prompt or ultimate determination by the Iowa Supreme Court.

STATEMENT OF THE CASE

This is an appeal from a final agency decision in a workers' compensation contested case proceeding with the Iowa Division of Workers' Compensation involving application of Iowa Code section 85.34(2)(n). Petitioner, Mary Deng ("Claimant"), filed an Original Notice and Petition with the Iowa Division of Workers' Compensation on 04/13/18 alleging she sustained a work-related injury to her left shoulder, left arm, and neck on 08/19/17. App. 57-58; Arb. Dec. p. 1. Farmland Foods, Inc. ("Farmland") is the named employer, and Safety National Casualty Corporation is the named insurance carrier (jointly "Defendants"). App. 57. Defendants filed their Answer on 04/30/18, and the matter proceeded to an arbitration hearing on 02/26/19. Arb. Dec. p. 1.

An Arbitration Decision was entered on 02/25/20. App. 58. The Parties

stipulated that the Claimant sustained an injury, which arose out of and in the course of her employment on 08/19/17. App. 58; Arb. Dec. p. 2. The issues presented included whether Claimant's injury is limited to the left shoulder as a scheduled member injury or extends beyond the left shoulder into the body as a whole as an unscheduled injury. App. 58; Arb. Dec. p. 3. The Deputy Commissioner found that Claimant sustained injuries to her infraspinatus muscle and labrum and noted that because the infraspinatus is proximal to the glenohumeral joint, the Claimant sustained an injury that extended beyond the left shoulder. App. 58. As a result, the Deputy Commissioner concluded Claimant's injury was not limited to the scheduled member shoulder and should be compensated as an unscheduled whole-body injury. App. 58; Arb. Dec. pp. 11-12.

On 03/13/20, Defendants filed Notice of Appeal to the Workers' Compensation Commissioner. App. 58. Defendants raised the issue of whether Claimant's injury to the rotator cuff involves the left shoulder and should be compensated as a scheduled member injury under section 85.34(2)(n) or involves an unscheduled injury under Iowa Code section 85.34(2)(v). App. 58; Arb. Dec. pp. 2-3. On 03/17/20, Claimant filed a Notice of Cross-Appeal. App. 59; Arb. Dec. p. 3. On cross-appeal, Claimant raised

the issue of whether a shoulder injury includes a rotator cuff injury. App. 59; Arb. Dec. p. 3. Amicus briefs were filed by the Workers' Compensation Core Group of Iowa Association for Justice ("IAJ") and also by the Iowa Association of Business and Industry ("ABI"). App. 67; Arb. Dec., p. 2.

The Commissioner performed a *de novo* review of the evidentiary record and arguments of the parties pursuant to Iowa Code sections 86.24 and 17A.15. App. 60; Appeal Dec. p. 2. On 09/29/20, the Commissioner issued an agency appeal decision affirming in part, modifying in part, and reversing in part the Arbitration Decision. App. 60. Specifically, the Commissioner reversed the Deputy's determination that Claimant's injury to her infraspinatus muscle was a whole body injury, finding instead that the injury should be compensated as a shoulder under section 85.34(2)(n). App. 60-61. The Commissioner modified the Deputy's award of permanent partial disability payments and affirmed the Deputy's finding for the commencement date for permanent partial disability benefits[1]. App. 60; Appeal. Dec., p. 11.

On 10/09/20, Claimant filed an Application for Hearing and Motion for Order *Nunc Pro Tunc* on the issues of the Commissioner's decision, including

[1] The issues of MMI date and commencement of benefits were not raised on appeal and will not be addressed herein.

his consideration of study bill language to discern legislative intent of Iowa Code section 85.34(2). App. 60. On 10/20/20, the Commissioner entered a Ruling on Claimant's Application for Rehearing and Order *Nunc Pro Tunc*. App. 60. The Commissioner ordered *Nunc Pro Tunc* granted to correct two scrivener's errors with regard to dates but denied the motion as to the remaining issues raised by Claimant. App. 60-61. In the Ruling, the Commissioner defended his review of legislative study bills in reaching his conclusions in the Appeal Decision, asserting that his use of study bills was proper and further noting that his consideration of the study bills was only one factor in his overall analysis. App. 61.

On 10/21/20, Claimant filed a Petition for Judicial Review from Final Agency Action. App. 61. Defendants subsequently filed an Answer to Claimant's Petition for Judicial Review and Cross-Petition for Judicial Review. App. 62. On appeal to the District Court, the Claimant argued the Commissioner committed an error of law when it determined that Claimant's rotator cuff injury was a "shoulder" injury. Claimant also argued that the Commissioner committed an error of law by considering study bills which were not considered by the Legislature. App. 61. Defendants answered the Petition on 11/19/20. App. 62. A hearing on the Petition for Judicial Review

was held before the Honorable Roger L. Sailer on 10/21/20. App. 57. Judge Sailer issued a Ruling on Petition for Judicial Review on 05/21/21 affirming the finding of the agency on appeal that Claimant's injury to her infraspinatus muscle should be compensated as a shoulder disability pursuant to section 85.34(2)(n). App. 85-86. Claimant filed her Notice of Appeal to the Iowa Supreme Court on 06/01/21. App. 90.

STATEMENT OF FACTS

During the 2017 session, the Iowa Legislature debated amendments to Iowa Code Chapter 85 within both chambers of congress. (*See*, H.F. 518 and S.F. 435, 87th G.A., Reg. Sess. (Iowa 2017)). On 02/27/17, a bill for an act relating to workers' compensation was first proposed by the House Committee on Commerce as House Study Bill 169. H. Study. B. 169, 87th G.A., Reg. Sess. (Iowa 2017). On 02/28/17, analogous legislation was proposed as Senate Study Bill 1170 in the Senate. S. Study B. 1170, 87th G.A., Reg. Sess. (Iowa 2017). House Study Bill 169 was recommended for passage by the committee, and on 03/03/17, the bill was introduced to the House of Representatives as House File 518 and placed on the calendar. H.F. 518, 87th G.A., Reg. Sess. (Iowa 2017). Senate Study Bill 169 was similarly recommended for passage by committee on 03/03/17 and introduced to the

Senate as Senate File 435 and placed on the calendar. S.F. 435, 87th G.A., Reg. Sess. (Iowa 2017).

In the weeks to follow, each bill proceeded to make its way through the respective chamber of origin before eventually being consolidated under the title of House File 518 in its final version. The relevant legislative history of both bills bears on the meaning and interpretation of the statutory provisions found within Iowa Code Chapter 85.34(2).

On 03/07/17, a Fiscal Note was issued by the Fiscal Services Division in connection with Senate File 435.[2] By way of background, the Fiscal Services Division provides analysis and evaluation of expenditures, revenues, and operations of state government and the potential impact of legislative proposals to state and local government.[3] During the legislative session, Fiscal Services provides analysis of the fiscal impact of legislative proposals through the issuance of fiscal notes. *Id*. In the 2017 legislative session, Fiscal Services provided Fiscal Notes in connection to the Legislature's amendment of 85.34(2). The Fiscal Note found that the bill "makes various changes to Iowa Code chapter 85 related to workers' compensation by reducing benefits,

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[2] *See* Fiscal Services Division, *Fiscal Note SF 435 – Workers' Compensation (LSB1691SV.1)*, LEGISLATIVE SERVICES AGENCY (Mar. 7, 2017), https://www.legis.iowa.gov/docs/publications/FN/855469.pdf.
[3] *Fiscal Services*, THE IOWA LEGISLATURE, https://www.legis.iowa.gov/agencies/nonpartisan/lsa/fiscalServices.

limiting benefits, changing the qualifications for benefits, and reducing the interest rate calculation." *Id.* The change to "Iowa Code section 85.34(2)(m) pertaining to injuries to shoulders was estimated to result in the reduction to benefit payments of 80.0% for those injuries, from an estimated payment equivalent of 125 weeks down to an estimated payment equivalent of 25 weeks." *Id.*

On 03/08/17, Amendment H-1170 to House File 518 was then introduced in the House and sought to establish a worker's compensation study committee with the stated purpose:

> To study health care costs, particularly as they relate to work-related injuries and illnesses, workers' compensation rates, workers' compensation insurance premiums, workers' compensation claims data, and the workers' compensation system as a whole in the state.

H-1170, 87th G.A., Reg. Sess. (Iowa 2017) (proposed amendment to H.F. 518).

On 03/09/17, Amendment H-1176 to House File 518 was filed in the House. H-1176, 87th G.A., Reg. Sess. (Iowa 2017) (proposed amendment to H.F 518). On March 13, 2017, Amendment S-3125 to Senate File 435 was filed in the Senate proposing the following changes to the language of Iowa Code § 85.34(2)(*m*):

> The loss of ~~two-thirds of~~ that part of an arm ~~between~~ including the shoulder joint ~~and~~ to the elbow joint shall equal the loss of an arm and the compensation therefor shall be weekly compensation during two hundred fifty weeks.

S-3125, 87th G.A., Reg. Sess. (Iowa 2017) (proposed amendment to S.F. 435).

On 03/13/17, Amendment H-1184 was filed in the House proposing the following new paragraph to Iowa Code section 85.34(2) adding the shoulder to the schedule and compensating "For the loss of a shoulder, weekly compensation during four hundred weeks." H-1184, 87th G.A., Reg. Sess. (Iowa 2017) (proposed amendment to the amendment, H-1176, to H.F. 518).

On 03/15/17, Amendment H-1211 was filed in the House proposing the following new paragraph to Iowa Code section 85.34(2): "For the loss of a shoulder, weekly compensation during four hundred weeks." H-1211, 87th G.A., Reg. Sess. (Iowa 2017) (proposed amendment to the amendment, H-1176, to H.F. 518). On 03/16/17, Amendment H-1211 to H-1176 was adopted by the House. Amendment H-1176, as amended, was adopted.[4]

H.F. 518 was put to a vote that day and received a constitutional majority passing the House. *Id.* at 6. House File 518 was then messaged to the

[4] *House Journal*, STATE OF IOWA 5 (Mar. 16, 2017), https://www.legis.iowa.gov/docs/publications/HJNL/20170316_HJNL.pdf#page=3.

Senate chamber for concurrence.

On 03/17/17, Senate File 435 was read for the first time in the House and attached to similar House File 518. That same day, House File 518 was read for the first time in the Senate and attached to similar Senate File 435.[5]

On, 03/20/17, a Fiscal Note from the Fiscal Services Division was issued in connection with House File 518 finding:

> [A]pproximately 180 State employees sustain **shoulder injuries** each year, approximately 60 of whom would qualify and participate in the Training Program. The change to Iowa Code section 85.34(2)(m) pertaining to injuries to shoulders will result in an estimated reduction to benefit payments of 68.0% ($760,000) for the estimated 176 State shoulder injuries each year.[6]

On 03/20/17, Amendment S-3172 to S.F. 435, was filed in the Senate proposing the following new paragraph to Iowa Code section 85.34(2): "For the loss of a shoulder, weekly compensation during four hundred weeks." S-3172, 87th G.A., Reg. Sess. (Iowa 2017) (proposed amendment to S.F. 435). The Amendment was adopted on March 27, 2017. *Id.*

On 03/20/17, Amendment S-3173 to House File 518 was filed proposing a change to Iowa Code section 85.64 to add "one shoulder" as a

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[5] *Senate Journal*, STATE OF IOWA 2 (Mar. 17, 2017), https://www.legis.iowa.gov/docs/publications/SJNL/20170317_SJNL.pdf#page=2.

[6] Fiscal Services Division, Fiscal Note HF 518 – Workers' Compensation (LSB1691HV.1), LEGISLATIVE SERVICES AGENCY (Mar. 20, 2017), https://www.legis.iowa.gov/docs/publications/FN/856169.pdf (emphasis added).

qualifying loss for purposes of Second Injury Fund benefits. S-3173, 87th G.A., Reg. Sess. (Iowa 2017) (proposed amendment to H.F. 518). On 03/27/17, the amendment was put to a vote in the Senate and lost.[7]

On 03/27/17, Amendment S-3125 to Senate File 435 was withdrawn. *Id.* That same day, House File 518 was substituted for House File 435. *Id.* House File 518 was then put to a vote in the Senate and passed with a constitutional majority. *Id.* at 21. The Senate messaged House File 518 to the House and withdrew similar Senate File 435. *Id.* at 22.

The bill in its final version was sent to the Governor as House File 518 on 03/29/17, and the Governor signed it into law on 03/30/17.[8] The legislation in relevant part provides that section 85.34, subsection 2, Code 2017, is amended by adding the following new paragraph: "*n*. For the loss of a shoulder, weekly compensation during four hundred weeks." The final version of subsection 85.34(2)(*m*.) states:

> The loss of two thirds of that part of an arm between the shoulder joint and the elbow joint shall equal the loss of an arm and the compensation therefor shall be weekly compensation during two hundred and fifty weeks.

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[7] *Senate Journal*, STATE OF IOWA 6 (Mar. 27, 2017), https://www.legis.iowa.gov/docs/publications/SJNL/20170327_SJNL.pdf#page=6.
[8] *House Journal*, STATE OF IOWA 3 (Mar. 31, 2017), https://www.legis.iowa.gov/docs/publications/HJNL/20170331_HJNL.pdf#page=3.

S-3125, 87th G.A., Reg. Sess. (Iowa 2017) (amendment to S.F. 435).

At the heart of this case is a dispute about anatomy: what is a "shoulder"? The facts underlying that question in this case are largely undisputed. This case involves an admitted work injury sustained by the Claimant on 08/19/17. App. p. 67. On that date, Claimant suffered an injury to her glenoid labrum and her infraspinatus muscle. App. 58. The parties agree that for the purposes of compensation, an injury to the glenoid labrum would constitute a "shoulder" injury under §85.34(2)(n). App. 71. However, the Claimant's injury to her rotator cuff serves as the primary source of contention in this matter. Specifically, whether an injury to the infraspinatus, a rotator cuff muscle located proximal to the glenohumeral joint, should be compensated a scheduled member shoulder or unscheduled loss under Iowa Code section 85.34(2). App. 71.

The Deputy Commissioner found Claimant's injury should be compensated as an unscheduled loss. App. 58; Arb. Dec., pp. 12-13. On Appeal, the Commissioner determined that Claimant's injury should be compensated as a scheduled-member shoulder, and held:

> The infraspinatus is part of the rotator cuff, and the rotator cuff's main function is to stabilize the ball-and socket joint. As noted by both Dr. Bansal and Dr. Bolda, the rotator cuff is generally proximal to

> the joint. However, because the rotator cuff is essential to the function of the glenohumeral joint, it seems arbitrary to exclude it from the definition of "shoulder" under section 85.34(2)(n) simply because it "originates on the scapula, which is proximal to the glenohumeral joint for the most part." In other words, being proximal to the joint should not render the muscle automatically distinct.
>
> Given the entwinement of the glenohumeral joint and the muscles that make up the rotator cuff, including the infraspinatus, and the importance of the rotator cuff to the function of the joint, I find the muscles that make up the rotator cuff are included within the definition of "shoulder" under section 85.34(2)(n). Thus, I find claimant's injury to her infraspinatus should be compensated as a shoulder under section 85.34(2)(n). The deputy commissioner's determination that claimant's infraspinatus injury is a whole body injury that should be compensated industrially under section 85.34(2)(v) is therefore respectfully reversed.

Appeal Dec., pp. 11-12.

The District Court reviewed the Commissioner's decision on appeal, and agreed that the Legislature may be presumed to be aware of the various rulings of the Agency and the courts with regard to classifying various body parts under the statue, which would include the proximal rule and the fact that because of the proximal rule, shoulder disabilities were considered whole-body injuries under section 85.34(2)(v). App. 82.

The District Court also noted that it may be presumed that the

Legislature was aware of the statutory interpretation of prior case law interpreting "loss" of a body part under section 85.34(2). App. 82. Taking all this into consideration, the District Court found:

> [T]he plain language of the statute makes clear that the intent of the Legislature, in enacting §85.34(2)(n), was to reclassify permanent disabilities that result from injuries which impair the function of the shoulder, changing such disabilities from whole-body industrial disabilities to scheduled disabilities and thereby limiting the compensation for such disabilities to weekly compensation during four hundred weeks.

App. 83.

The District Court specifically found no ambiguity in the general scope and meaning of the statute when all its provisions are examined, nor did it find any ambiguity in the meaning of any particular words in section 85.34(2), stating:

> The Court acknowledges that if the meaning of the statute were that *injuries* to the shoulder were scheduled disabilities, then the use of the generic term "shoulder" would be ambiguous because reasonable minds could disagree whether certain injuries, such as the infraspinatus injury in this case, were within the "shoulder" or not (thereby resulting in litigation such as this). However, the Court has determined herein that it is not the situs of the actual physical injury that is addressed by the statute, but rather the disability *caused* by such injury in the form of functional impairment. The Court finds that

> in this context, no ambiguity exists in the term "shoulder." The plain language, assigned its ordinary meaning, is clear as to what impairment of the shoulder means: the shoulder does not work as it should, or as it would be absent the disability.

App. 83. (emphasis in original).

Thus, the District Court declined to resort to the rules of statutory construction or any other examination of legislative intent outside the text enacted by the Legislature. App. 84. The District Court found substantial evidence in the record, even when evaluated under rules of statutory interpretation, to support the Commissioner's finding that Claimant's disability did not extend proximally beyond her shoulder. App. 84-85.

STANDARD OF REVIEW

Respondents-Appellees generally agree with Petitioner-Appellant's standard of review as cited within her brief. Judicial Review of a decision of an administrative agency is governed by Iowa Code Chapter 17A. The grounds upon which the reviewing court may interfere with an agency decision are set forth in Iowa Code section 17A.19 and include where the Agency decision is based on an erroneous interpretation of law or is not supported by substantial evidence in the record or is arbitrary, capricious, and unreasonable. The agency decision is not considered to be unsupported by

substantial evidence merely because inconsistent conclusions can be drawn from the same evidence. Iowa Code § 17A.19(10)(f); *IBP, Inc. v. Harpole*, 621 N.W.2d 410, 417 (Iowa 2001).

In this case, the Court is primarily asked to consider whether the Commissioner erred in finding that the Claimant's injury to her infraspinatus should be compensated as a scheduled member shoulder under Iowa Code section 85.34(2)(n). To the extent the Commissioner's decision reflects factual determinations that are "clearly vested by a provision of law in the discretion of the agency," the Court is bound by the Commissioner's findings of fact if they are supported by substantial evidence. *Schutjer v. Algona Manor Care Ctr.*,780 N.W.2d 549, 557 (Iowa 2010) (citation and internal quotation marks omitted); *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 219 (Iowa 2006). Further, the Commissioner's application of law to the facts as found by the Commissioner will not be reversed unless it is "irrational, illogical, or wholly unjustifiable." *Lakeside Casino v. Blue*,743 N.W.2d 169, 173 (Iowa 2007) (citation and internal quotation marks omitted).

On questions of law, the Court has stated that no deference is given to the Commissioner's interpretation of law because the "interpretation of the workers' compensation statutes and related case law has not been clearly

vested by a provision of law in the discretion of the agency." *Schutjer*, 780 N.W.2d at 558 (citation and internal quotation marks omitted). Shortly after *Schutjer*, the Court decided *Renda v. Iowa Civil Rights Comm'n* which clarified and refined the Court's approach to determining whether an agency has been delegated the authority to interpret a statute. 784 N.W.2d 8 (Iowa 2010). In *Renda*, the Court explained that "each case requires a careful look at the specific language the agency has interpreted as well as the specific duties and authority given to the agency with respect to enforcing particular statutes." *Id.* at 13. The Court gives deference to the agency's interpretation if the agency has been clearly vested with the discretionary authority to interpret the specific provision in question. *Id.* at 11.

If, however, the agency has not been clearly vested with the discretionary authority to interpret the provision in question, the Court will substitute their judgment for that of the agency if the Court concludes the agency made an error of law. *Id.* at 14–15. Deference may be given to an agency's interpretation in a specific matter or an interpretation embodied in an agency rule. *Sherwin–Williams Co. v. Iowa Dep't of Revenue*, 789 N.W.2d 417, 422–23 (Iowa 2010). Indications that the Legislature has delegated interpretive authority include "rule-making authority, decision-

making or enforcement authority that requires the agency to interpret the statutory language, and the agency's expertise on the subject or on the term to be interpreted." *Id.* at 423. (*See also IBP v. Harker*, 633 N.W.2d 322, 325 (Iowa 2001) (*citing Second Injury Fund v. Bergeson*, 526 N.W.2d 543, 546 (Iowa 1995)).

ARGUMENT

I. THE DISTRICT COURT PROPERLY AFFIRMED THE APPEAL DECISION OF THE IOWA WORKERS' COMPENSTATION COMMISSIONER FINDING THAT THE CLAIMANT'S INJURY SHOULD BE COMPENSATED AS A SCHEDULED MEMBER SHOULDER UNDER IOWA CODE SECTION 85.34(2)(N)

Preservation of Error: Respondents-Appellees agree with Petitioner-Appellant that error on this issue has been appropriately preserved. Respondent-Appellees also preserved error of this issue in intra-agency appeal briefs and upon filing of a Cross-Petition for Judicial Review to the District Court. App. 62. The Petitioner-Appellant now presents this issue to this Court pursuant to a timely Notice of Appeal. App. 90.

A. The Term "Shoulder" in Iowa Code Section 85.34(2)(n) is Unambiguous.

When interpreting a statute, the Court has stated it will not look beyond the express terms of the statute if the text of the statute is plain and its meaning

clear. *State v. Tesch*, 704 N.W.2d 440, 451 (Iowa 2005). The Court also states, "[U]nambiguous statutory language is the strongest evidence of the Legislature's intent. Under the pretext of construction, we may not extend a statute, expand a statute, or change its meaning." *In re J.C.*, 857 N.W.2d 495, 500–01 (Iowa 2014) (*citing McGill v. Fish*, 790 N.W.2d 113, 118 (Iowa 2010)) ("When the language is unambiguous, it expresses the intent of the Legislature that can otherwise be obscured by ambiguous language in a statute.") (*see also Bank of Am., N.A. v. Schulte*, 843 N.W.2d 876, 880 (Iowa 2014)). If the statute's language is clear and unambiguous, the Court applies a plain and rational meaning consistent with the subject matter of the statute. *City of Waukee v. City Dev. Bd.*, 590 N.W.2d 712, 717 (Iowa 1999)).

On analysis, almost any sentence can be read with multiple meanings which is why statutory interpretation is context dependent. Accordingly, the Court has repeatedly found that when the words of a statute are not defined by the Legislature, it may refer to "prior decisions of this court and others, similar statutes, dictionary definitions, and common usage." *Gardin v. Long Beach Mortg. Co.*, 661 N.W.2d 193, 197 (Iowa 2003); *Bernau v. Iowa Dep't of Transp.*, 580 N.W.2d 757, 761 (Iowa 1998); *Neal v. Annett Holdings, Inc.*,

814 N.W.2d 512, 519 (Iowa 2012).

i. Statutory interpretation and prior decisions of the Court support the District Court's finding that the term "shoulder" in Iowa Code section 85.34(2)(n) is unambiguous.

As noted by the District Court, Iowa Code section 85.34(2) provides a list of "scheduled" disabilities as follows: "For all cases of permanent partial disability compensation shall be paid as follows." App. 73 (*citing* Iowa Code §85.34). Each of the enumerated disabilities that follow, in sections 85.34(2)(a)-(u), is described as "the loss of" a specified limb or body part, such as "[f]or the loss of a thumb," or "[f]or the loss of a foot," or "[f]or the loss of an eye." *Id*. It must be further acknowledged that section 85.34(2)(m) includes the terms "shoulder joint" and "elbow joint," and section 85.34(2)(p) includes the terms "hip joint" and "knee joint." *Id.* In contrast, section 85.34(2)(n) provides for loss of a "shoulder," not of a "shoulder joint." *Id*.

Compensation for a scheduled-member part is limited to the functional impairment resulting from the injury. Iowa Code §85.34(2)(v). Iowa Code section 85.34(2) provides that "[c]ompensation for permanent partial disability shall begin when it is medically indicated that maximum medical improvement from the injury has been reached and that the extent of the loss

or percentage of permanent impairment can be determined…," and "[t]he compensation shall be based upon the extent of the disability…." App. 73 (*citing* Iowa Code §85.34(2)).

With this statutory framework in mind, determining the type of injury sustained is a crucial first step to evaluating compensability for disability. However, Claimant argues that the District Court misapplied pertinent case law as it relates to determining the anatomical situs of an injury for the purposes of compensation. Appellant Brief, p. 31. Claimant provides a lengthy analysis of case law addressing anatomical situs of an injury versus functional impact to "**other body parts**" caused by an injury. Appellant Brief, p. 31-33 (emphasis added). Claimant argues the District Court erred by classifying an injury solely by its impact on other body parts, an approach that has been rejected by the Court. Appellant Brief, p. 34. Respectfully, Claimant seems to misinterpret the prior precedent cited and the District Court's analysis in that regard.

On Judicial Review, the District Court specifically addressed the Claimant's arguments and noted that the Court's decision in *Barton v. Nevada Poultry Co.*, 110 N.W.2d 660 (Iowa 1961) addressed evaluation for compensation of scheduled injuries. App. 76-77. The District Court reviewed

this precedent and noted that in *Barton*, a claimant sustained an injury to her right foot and ankle, which then resulted in a circulatory ailment identified as "Causalgia" or "Sudeck's Atrophy," which left her totally disabled. App. 77 (*citing Barton*, 110 N.W.2d at 661). Barton was compensated for a scheduled injury but then appealed to the Commissioner claiming total disability. App. 77 (*internal citations omitted*). The case ultimately reached the Iowa Supreme Court, which examined the statutory language and stated: "the 'injury' contemplated under the Act, is 'something * * * that acts extraneously to the natural processes of nature, and thereby impairs the health, overcomes, injures, interrupts, or destroys some function of the body, or otherwise damages or injures a part or all of the body." App. 77 (*citing Barton*, 110 N.W.2d at 662).

The District Court noted that *Barton* then expressly distinguished "injury" from "disability," stating:

> The injury is the producing cause. The disability, which generally determines the extent of compensation payments, is the result of the cause (injury) upon the human body as it bears upon the ability of the injured person to earn wages. Disability is ordinarily an act question for the Commissioner, and the result may be any one of… three categories… dependent upon the evidence bearing thereon.

App. 77-78 (*citing Barton*, 110 N.W.2d at 663).

The District Court also noted that *Barton* specifically addressed permanent partial disability under the statute (which was at that time codified as section 83.35):

> Section 85.35… in addition to providing generally that the compensation for permanent partial disability shall be determined by the **extent of the disability**, goes further and provides that, where, as the **result of an injury**, the claimant has sustained the loss of specified parts of his body, such loss shall be compensable only to the extent therein provided. Thus, by legislative edict, where the **result of an injury causes the loss** of a foot, or eye, etc., such loss, together with its ensuing natural results upon the body, is declared to be a permanent partial **disability** and entitled only to the prescribed compensation. In such a case, the ability of the injured party to earn wages is not a factor to be determined, even though such ability may be entirely gone. It might be added that **the loss of the use of a foot, eye, etc., is deemed to be loss of the unit involved.**

App. 78 (*citing Barton*, 110 N.W.2d at 663) (*internal citations omitted*).

Barton and its progeny make clear that in determining whether an injury is scheduled or unscheduled, the Court looks beyond the situs of the original injury and considers the impact of the injury on all parts of the body. *Barton*, 110 N.W.2d at 663–64. The law limits disability resulting from a scheduled injury to the physiological or functional loss of the body part. *Simbro v.*

Delong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983).

To determine the impact of the injury, one must first define the parameters of the body part that has been injured. The Claimant misses this crucial point in her analysis. In her brief she argues, "Since it is the injury to the infraspinatus tendon which impacts articulation of the scheduled member, i.e., the shoulder, it is the infraspinatus tendon which determines the classification of the injury as unscheduled." Appellant Brief, p. 37. However, the Claimant's argument presumes that the infraspinatus is not part of the shoulder, and therefore constitutes a separate body part. This is inconsistent with the District Court's analysis, and inconsistent with principals of statutory interpretation advanced by the Court. App. 77-79.

Curiously, the Claimant acknowledges that the impact of the injury was to the infraspinatus, and by her own admission, states that the infraspinatus impacts the articulation or functionality of the shoulder. Appellant Brief, p. 37. Accordingly, a commonsense anatomical understanding of shoulder functionality, and a review of the *Fifth Edition of the AMA Guides to the Evaluation of Permanent Impairment* and past precedent, makes clear that the term "shoulder" within Iowa Code section 85.34(2)(n) includes the infraspinatus muscle and has a plain and rational meaning consistent with the

subject matter of the statute.

ii. A commonsense anatomical understanding of shoulder functionality supports the District Court's finding that Iowa Code section 85.34(2)(n) is unambiguous.

The right of a worker to receive compensation for injuries sustained which arose out of and in the course of employment is statutory. *Graves v. Eagle Iron Works*, 331 N.W.2d 116 (Iowa 1983). The statute conferring this right can also fix the amount of compensation to be paid for different specific injuries, and the employee is not entitled to compensation except as provided by statute. *Id.* In applying the statute, the Court is called to distinguish those principles that are meant to fix the intended meaning of the relational predicate 'part.' Broadly speaking, in English we can use 'part' to indicate any portion of a given entity. Iowa Code Chapter 85 limits disability compensation resulting from a scheduled injury to the physiological or functional loss of the body part. *Simbro v. Delong's Sportswear*, 332 N.W.2d 886, 887 (Iowa 1983). Iowa Code section 85.34(2) provides a list of "scheduled" disabilities and assigns value for the loss of various body parts.

A critical review of the structure of section 85.34(2) shows that the workers' compensation system operates under the assumption that all suitably related entities have an upperbound, and one must countenance the whole

along with its proper parts. For example, the hand serves as the upperbound of the phalanges and thumb. *See* Iowa Code § 85.34(2)(l). The arm serves as the upperbound of the hand. *See* Iowa Code § 85.34(2)(m). The shoulder serves as the upperbound of the arm. *See* Iowa Code § 85.34(2)(n).

This approach corresponds with the *AMA Guides to the Evaluation of Permanent Impairment* ("Guides") wherein the upper extremity is considered as a unit of the whole person and is divided into shoulder, elbow, wrist, and hand regions. Guides, p. 441. The Guides evaluate functional impairment of the upper extremity by assessing the impairment of each anatomic unit a value relative to the next larger unit:

> From distally to proximally, each anatomic unit is given a relative value to the next larger unit and, eventually, the whole person. By multiplying the appropriate percent, impairment of each unit can be converted sequentially to hand, upper extremity, and whole person impairment as indicated in Tables 16-1, 16-2, 16-3, and 16-4 and Figures 16-2 and 16-3.

Id.

Under the Guides, the whole person is the next larger unit proximal to the upper extremity. Since the shoulder is proximal to all constituent parts within the upper extremity, logic dictates that the shoulder is the upperbound of the upper extremity. Again, this reasoned and ordered approach to evaluation of the shoulder is consistent with the compensation methods set

forth within Iowa Code section 85.34 and supports the general principles underlying the relationships between the constituent parts of the body.

The Court has found there can be no recovery of benefits for industrial disability unless it is shown that a part of the body other than the scheduled part is impaired. *See e.g., Lauhoff Grain Co. v. McIntosh*, 395 N.W.2d 834 (Iowa 1986). For that reason, compensation for a shoulder injury must begin with an evaluation of the constituent parts of the shoulder that enable the shoulder's functionality *before* one can determine if an impairment to functionality extends beyond the shoulder.

In the case *sub judice*, Dr. Bolda testified that the Claimant sustained an injury to her infraspinatus which he described "as part of the shoulder musculature", and further defined as "one of the four muscles of the rotator cuff that wrap around the [*humeral*] head and whose main function is to stabilize the head and the glenoid, which is the socket of the shoulder." App. 71; Commissioner Appeal Dec., p. 10 [Def. Ex. A]. The shoulder has an incredible range of motion and flexibility, potentially greater than any other joint in the human body. App. 71; Arb. Dec., p. 5 [DE. A1, p. 27-28]. A primary reason for this is that the glenohumeral ball-and-socket joint provides extraordinary movement and motion. However, because this type of joint

provides such wide-ranging motions, it involves quite a bit of musculature, with its attendant ligaments and tendons, to ensure its stability. App. 5-8; Arb. Dec, p. 6; Commissioner Appeal Dec., p. 10. The expert opinions of Drs. Bolda and Bansal are also consistent with clinical summaries of shoulder anatomy and attendant conditions. The medical evidence underscores the fact that the glenohumeral head is contained within the glenoid which are components of the shoulder structure. Commissioner Appeal Dec., p. 11 [Def. Ex. A].

According to UpToDate, a database of physician-authored clinical decision resources designed to provide clinical decision support, the shoulder girdle is composed of three bones (clavicle, scapula, and proximal humerus) and four articular surfaces (sternoclavicular [SC], acromioclavicular [AC], glenohumeral, and scapulothoracic). [9] The glenohumeral joint, commonly referred to as the shoulder joint, is the principal articulation. The rotator cuff serves as the primary dynamic stabilizer.[10] As such, a primary function of the rotator cuff is to hold the humeral head within the glenoid ("socket") of the joint while enabling full mobility.[11] (*See also* App. 5-8).

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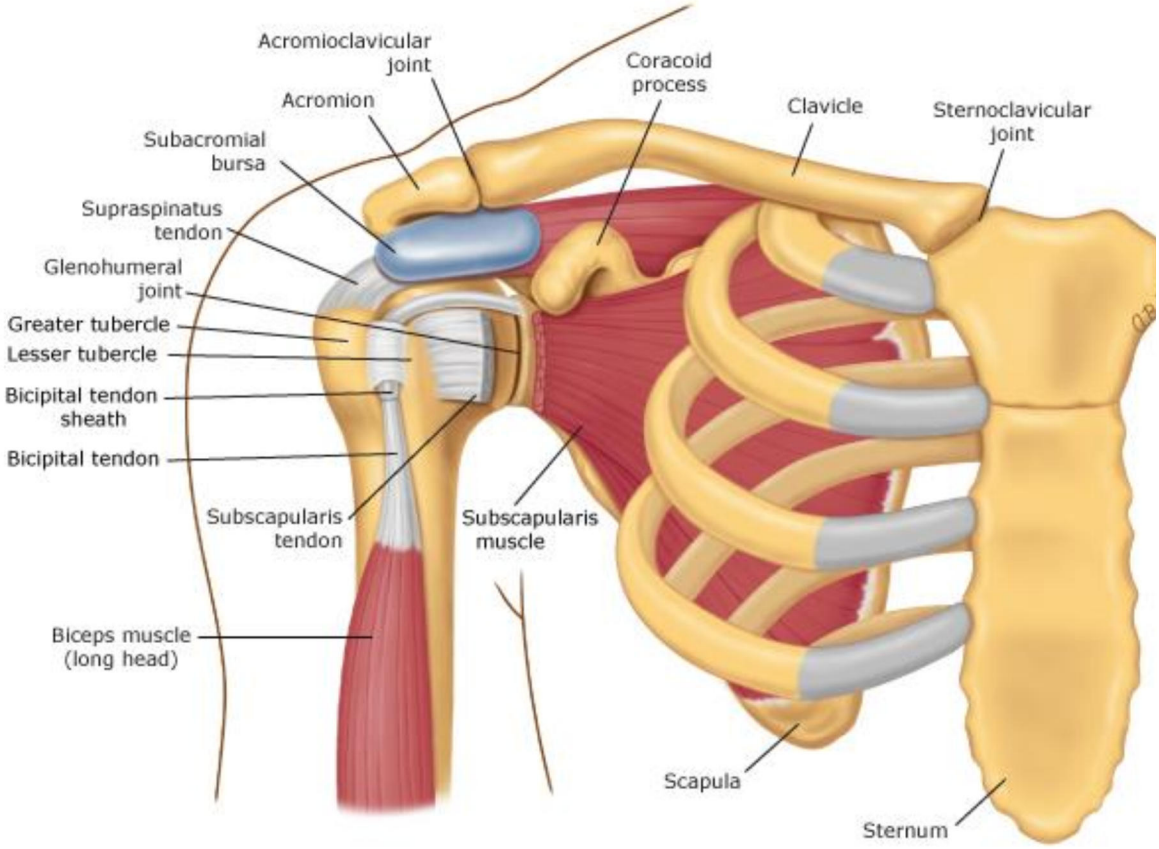
[9] STEVEN D. STOVITZ, MD, EVALUATION OF THE ADULT WITH SHOULDER COMPLAINTS, UpToDate (2018) (found in T.W. Post, K Fields, & J. Grayzel (Eds.)), https://www.uptodate.com/contents/evaluation-of-the-adult-with-shoulder-complaints

[10] STOVITZ, supra note 9, at Glenohumeral structures.

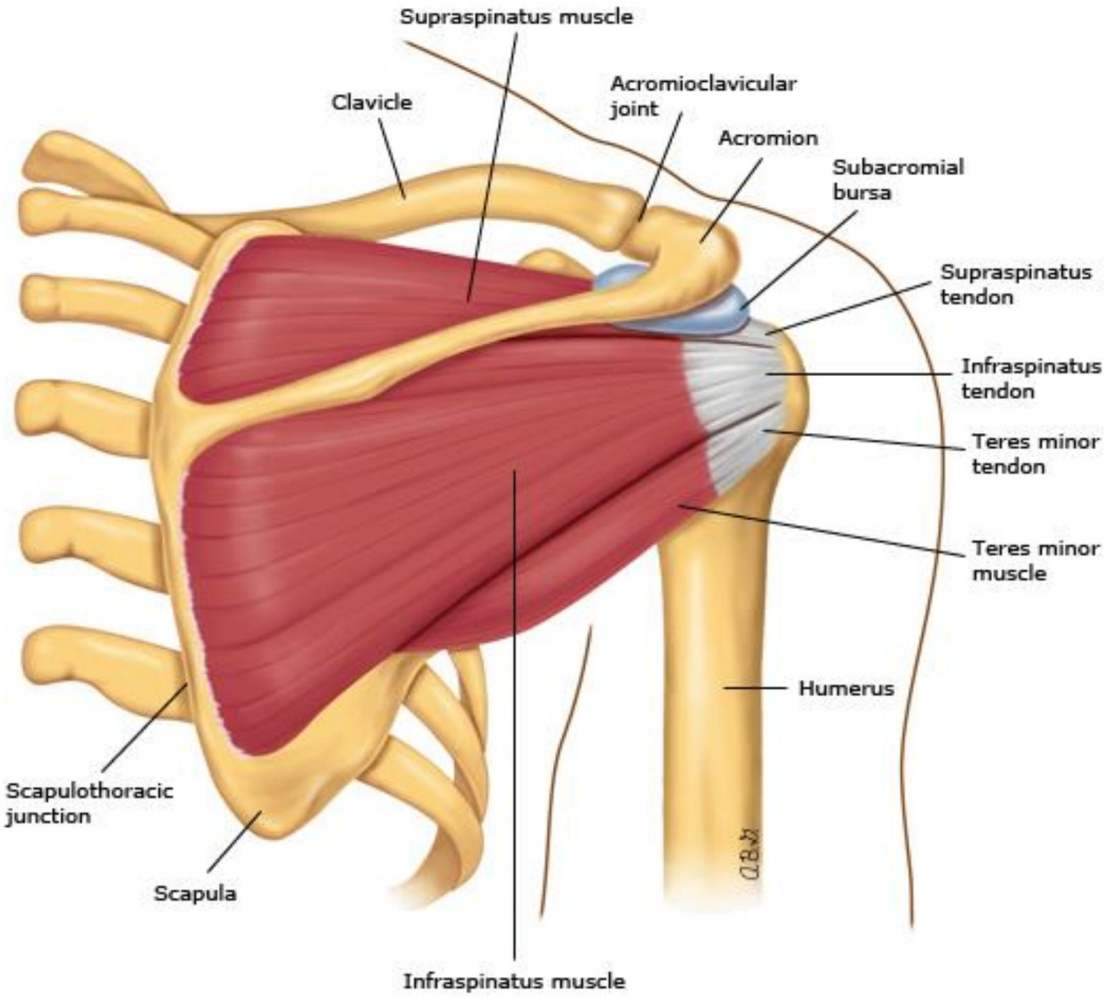
[11] *Id*. at Figures 2A-C.

Anterior view of shoulder anatomy[12]



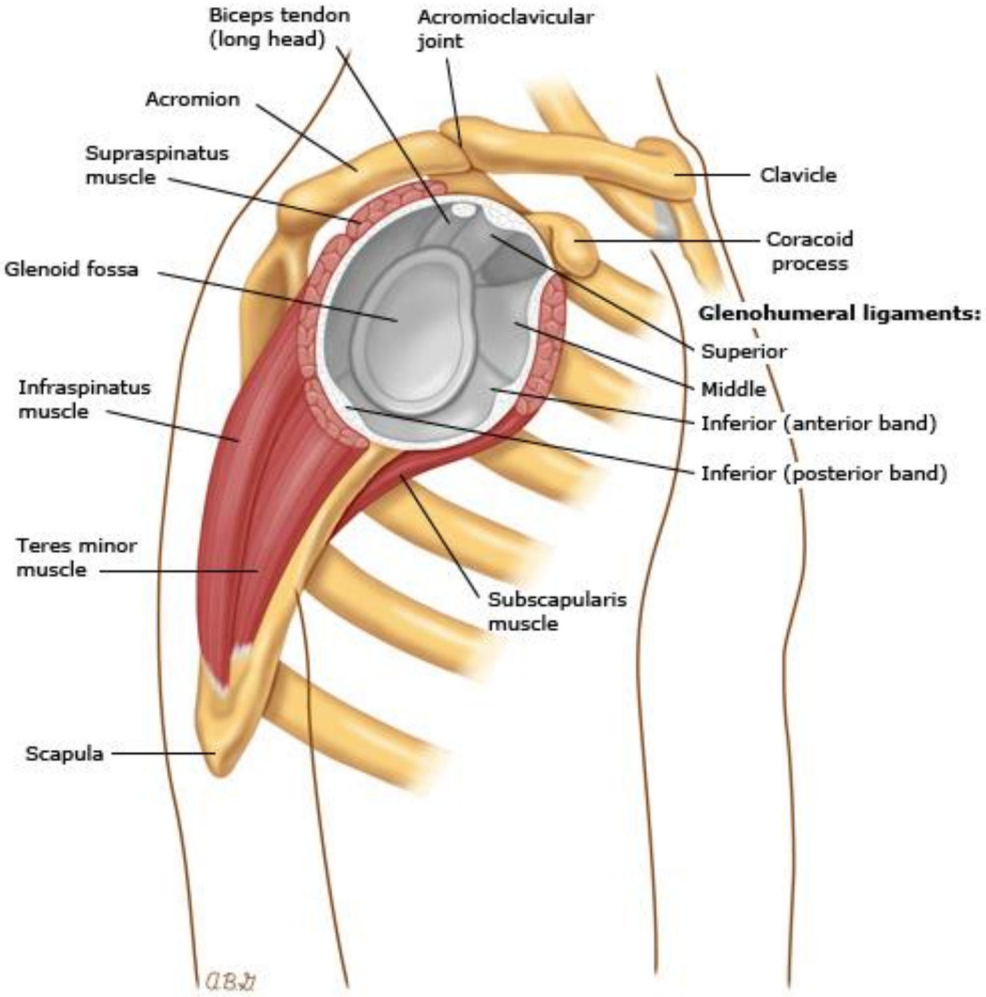
[12] *Id*. at Figure 2A.

Posterior view of shoulder anatomy[13]



[13] *Id*. at Figure 2C

Lateral view of shoulder anatomy[14]



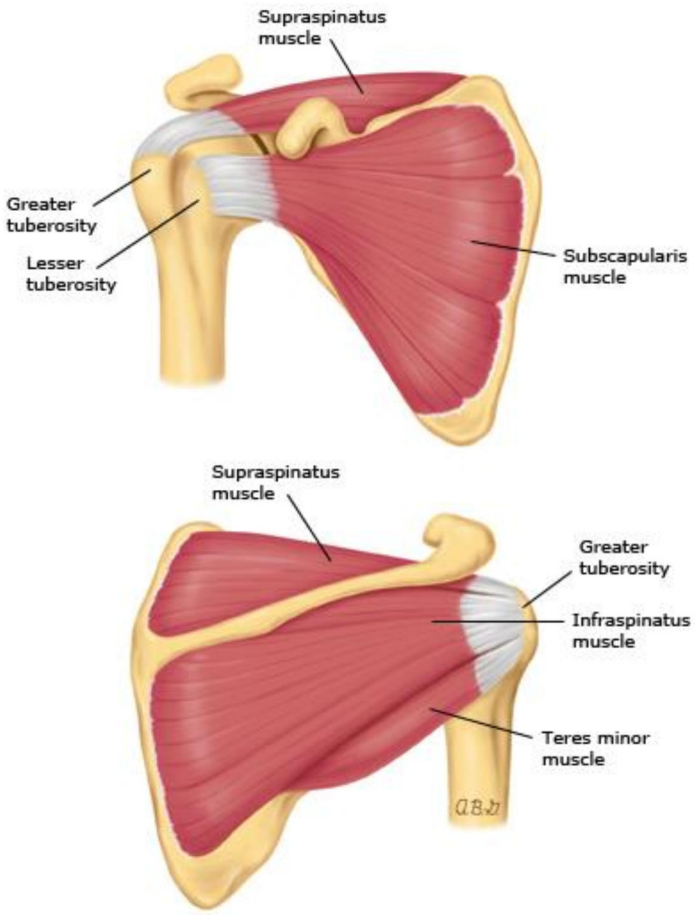
The rotator cuff is composed of four muscles (supraspinatus, infraspinatus, subscapularis, and teres minor) that form a cuff around the head of the humerus, to which these muscles attach.[15] *See also* App. 5-8;

[14] *Id*. at Figure 2B.
[15] *Id*. at Glenohumeral structures.

Commissioner Appeal Dec. , p. 11 [DE. A1, p. 27]. The rotator cuff muscles rotate the humerus internally (subscapularis) and externally (infraspinatus primarily and teres minor), and contribute to abduction (supraspinatus), along with the deltoid muscle.[16] The deltoid is the most superficial muscle overriding the glenohumeral area, and it acts as the primary shoulder abductor. It arises from the acromion and attaches to the midhumerus.[17] The rotator cuff compresses the humoral head in the glenoid fossa, thereby stabilizing the glenohumeral joint, and serves to counterbalance the elevating forces of the deltoid as well as the forces of other muscles acting on the humerus.[18] The infraspinatus arises from the infraspinatus fossa of the posterior scapula and inserts on the lateral humeral head (greater tuberosity), just posterior to the supraspinatus where their insertions blend.[19] (*See also* App. 5).

[16] *Id*.
[17] *Id*.
[18] *Id*.
[19] *Id*.

Rotator cuff muscles[20]



Shoulder motion is also dependent upon the AC and SC joints and the scapulothoracic articulation.[21] Together, they compensate significantly for decreased motion at the glenohumeral joint due to injury. Coordination between glenohumeral and scapulothoracic motion is particularly important for shoulder function.[22] Proper scapular motion and stability allows the

[20] *Id*. at Extraglenohumeral structures.
[21] *Id*.
[22] *Id*.

humeral head to remain properly seated in the glenoid during abduction, provides a solid base from which the rotator cuff muscles can move the humerus, and enables proper elevation of the coracoacromial arch.[23]

With this understanding of how the shoulder functions, it becomes clear that the anatomical functionality of the shoulder is dependent on the muscles and ligaments stabilizing the glenohumeral or shoulder joint. In this case, it is undisputed that Claimant sustained injury to her labrum and infraspinatus. App. 70. The record shows Claimant had inflammation of the infraspinatus tendon, which stabilizes the humeral head in the glenohumeral joint. App. 70; Commissioner Appeal Dec., p. 10-11, [DE. A1, pp. 6-7]. It extended from the infraspinatus muscle, one of the four muscles that make up the rotator cuff, to the humeral head, which is the "ball" in the shoulder's ball-and-socket joint. App. 70; Commissioner Appeal Dec., p. 10-11, [DE. A1, p. 7]. The labrum, which was torn, is the lining of the socket of the shoulder's ball-and-socket joint. *Id*. Specifically, the superior part of the labrum is where the biceps tendon attaches. *Id*. Thus, these two findings deal directly with the ball-and-socket joint where the humerus meets the clavicle. App. 5-8; Commissioner Appeal Dec., p. 10-11, [DE. A1, pp. 7-8]. Anatomically speaking, Claimant

[23] *Id*.

demonstrated pathology at two separate structures in her body, both of which are located within the anatomical situs of the shoulder, as verified by the 11/15/17 MRI. Arb. Dec., p. 4; [JE. 3, p. 51]

However, in a letter to Dr. Bansal Claimant's attorney asserted that a rotator cuff tear should be considered a body as a whole injury and that the only possible injury to the shoulder is a SLAP tear. The letter states:

> I believe the finder of fact will determine that only injuries which constitute SLAP tears (superior labrum anterior to posterior) are 'shoulder' injuries. This is because SLAP tears involve the biceps tendon, which attaches to the humerus, but the tendon actually goes beyond the humeral had and attaches to the labrum inside of the glenohumeral joint space. **Meanwhile, rotator cuff injuries, which are comprised of the infraspinatus, teres minor, supraspinatus, and subscapularis muscles, should be considered body as a whole injuries**. This is because while each muscle attaches to the humerus each muscle actually extends proximally to the glenohumeral joint to the scapula. This is a 'bright line' distinction which can be made between a shoulder injury (SLAP tear) and a body as a whole injury (Rotator Cuff Tear) and it makes logical sense because most people do not generally think of the scapula as the 'shoulder'.

[JE. 6, p. 81] (emphasis added).

Claimant's attorney also questioned Dr. Bolda extensively about what lies proximal to the glenohumeral joint at his deposition, further illustrating

her logic on this point. App. 10-11. Problematically, the "bright line" rule promulgated by Claimant creates absurd results upon application. Drawing a line through the center of where two bones meet and saying that anything proximal to that line is not part of that joint is, quite frankly, an affront to basic anatomy. Under the same logic, the Achille's tendon and malleolus are not part of the ankle, the patella is not part of the knee, the carpal tunnel is not part of the wrist, and the epicondyles are not part of the elbow, all simply because they lay on the proximal side of a joint.

Moreover, Claimant's own expert, Dr. Bansal, did not embrace the supposed "bright line" rule promulgated unilaterally within this letter, and instead reiterated that there were two distinct work injuries, and both were to Claimant's shoulder. App., pp. 5-8; [JE. 6, p. 86-87]. Limiting the "shoulder" under 85.34(2)(n) to the glenohumeral joint perverts its common and ordinary meaning and would lead to absurd results in application. Further, the suggestion that the scapula (the shoulder blade) is not actually part of the shoulder is confounding. Both the clavicle and the humerus meet the scapula in the shoulder's joint. Under the same logic, the femur is not part of the knee, and the humerus is not part of the elbow. The scapula's movement facilitates movement of the shoulder in essentially every direction. It would be beyond

science to suggest that the scapula is not part of the shoulder.

In this case, Defendants rely on the expert medical opinions concerning the situs of Claimant's injury. Those opinions show that Claimant's injury extends beyond the humeral head in the glenohumeral joint to Claimant's infraspinatus tendon—which is one of the four muscles that make up the rotator cuff, and all of which are within the anatomical situs of the shoulder. App. 10; [DE A1, p. 27-29]. Claimant's novel definition for the shoulder subverts an objective understanding of the human body, and for that reason, was properly rejected by the Commissioner and District Court.

Statutes should not be interpreted in a manner that leads to absurd results (Iowa Code § 4.4(3); *See also Iowa Ins. Inst. v. Core Grp. of Iowa Ass'n for Justice*, 867 N.W.2d 58 (Iowa 2015)), but an interpretation limiting the 'shoulder' to just the glenohumeral joint would result in precisely that outcome. Accordingly, the Commissioner's application of the term "shoulder" is supported by a common sense understanding of the anatomical function of the shoulder as well as credible expert opinion and should be affirmed by the Court.

iii. The Commissioner's application of Iowa Code section 85.34(2)(n) is consistent with the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition.

To determine the extent of disability within the Iowa workers' compensation system, our Legislature has statutorily mandated use of the *AMA Guides to the Evaluation of Permanent Impairment*, latest edition available, when deriving impairment ratings for injured workers. *See Westling v. Hormel Foods Corp.*, 797 N.W.2d 623 (Iowa Ct. App. 2011), *aff'd*, 810 N.W.2d 247 (Iowa 2012). Currently, the Commissioner has certified the *Fifth Edition of the AMA Guides to the Evaluation of Permanent Impairment* as the latest available edition, which must be utilized when deriving impairment ratings for injured workers. Iowa Admin. Code r. 876–2.4. As such, impairment ratings for workers' compensation purposes must be derived from the *AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition*. The Guides provide:

> The medical evaluation is the basis for determination of permanent anatomic impairment of the upper extremities. It must be accurate, objective, and well documented. Evaluation of the upper extremities requires a sound knowledge of the normal functional anatomy and would be incomplete without assessment of the general condition of the whole person.

Guides at 434.

The Guides further note:

> **The upper limb is considered as a unit of the whole person and is divided into shoulder, elbow, wrist, and hand regions**. The hand is further separated into digits and their parts. From distally to proximally, each anatomic unit is given a relative value to the next larger unit and, eventually, the whole person. By multiplying the appropriate percent, impairment of each unit can be converted sequentially to hand, upper extremity, and whole person impairment as indicated in Tables 16-1, 16-2, 16-3, and 16-4 and Figures 16-2 and 16-3.

Id. at 441 (emphasis added) (*see also* App. 10).

The Guides also discuss the methods for evaluation of the upper extremity:

> One method for recording results from a systematic examination is the use of the Upper Extremity Impairment Evaluation Record (Figures 16-1a and 16-1b).
>
> ***
>
> Part 2 is designed to assist impairment evaluation of the wrist, elbow, and shoulder due to abnormal motion or ankylosis, amputation, and "other" disorders, as well as those related to the peripheral nerve system, peripheral vascular system, and other disorders not included in regional impairments (eg, grip strength).
>
> ***
>
> Table 16-2 gives those from hand to upper extremity impairment. Regional impairments resulting from the hand, wrist, elbow, and shoulder

> regions are combined to provide the upper extremity impairment (see Section 1.4, Philosophy and Use of the Combined Values Chart, and the Combined Values Chart, p. 604). The upper extremity impairment is then converted to a whole person impairment by means of Table 16-3. When to add as opposed to combine impairments is discussed in Sections 16.1c and 16.1d and noted in Figure 16-1.

Id. at 434-35.

The Guides instruct that the impairment of a shoulder injury is measured based on affected range of motion of the shoulder with instruction to convert the upper extremity impairment to whole person impairment by means of Table 16-3. *Id.* at 435. The Guides state:

> When a given unit has more than one type of impairment (eg, abnormal motion, sensory loss, and partial amputation of a finger), the various impairments are combined to determine the total impairment of the unit (eg, finger) before conversion to the next larger unit (eg, hand). Similarly, **multiple regional impairments, such as those of the hand, wrist, elbow, and shoulder, are first expressed individually as upper extremity impairments and then combined to determine the total upper extremity impairment. The latter is finally converted to whole person impairment** (Table 16-3).

Id. at 438. (emphasis added).

Table 16-1 within the Guides provides conversion from digit to hand

impairment, and Table 16-2 gives those from hand to upper extremity impairment. *Id*. at 435. Regional impairments resulting from the hand, wrist, elbow, and shoulder are combined to provide the upper extremity impairment. *Id.* Multiple regional impairments, such as those of the hand, wrist, elbow, and shoulder, are first expressed individually as upper extremity impairments and then combined to determine the total upper extremity impairment. *Id.* at 438.

Figure 16-1b Upper Extremity Impairment Evaluation Record–**Part 2 (Wrist, elbow, and shoulder)** Side ☐R ☐L

Name_____ Age____ Sex ☐M ☐F Dominant hand ☐R ☐L Date_____

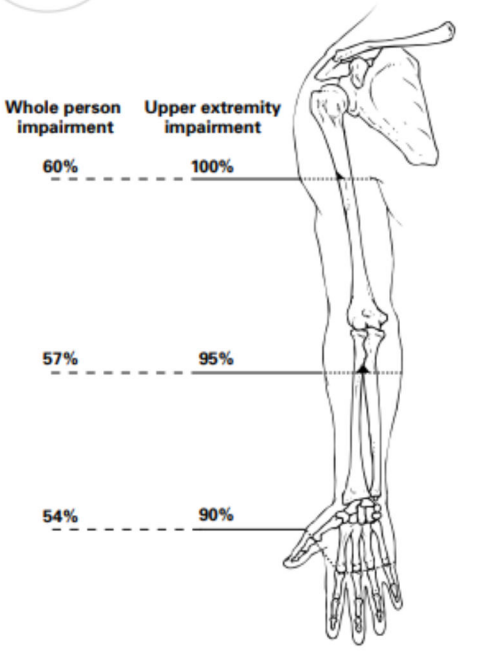
Occupation_____ Diagnosis_____

	Abnormal Motion					**Other Disorders**	**Regional Impairment %**	**Amputation**
	Record motion or ankylosis angles and impairment %					List type & impairment %	•Combine [1] + [2]	Mark level & impairment %
Wrist		Flexion	Extension	Ankylosis	Imp %			
	Angle°							
	Imp %							
		RD	UD	Ankylosis	Imp %			
	Angle°							
	Imp %							
	Add Imp % Flex/Ext + RD/UD =				[1]	**Imp % =** [2]		
Elbow		Flexion	Extension	Ankylosis	Imp %			
	Angle°							
	Imp %							
		Pronation	Supination	Ankylosis	Imp %			
	Angle°							
	Imp %							
	Add Imp % Flex/Ext + Pro/Sup =				[1]	**Imp % =** [2]		
Shoulder		Flexion	Extension	Ankylosis	Imp %			
	Angle°							
	Imp %							
		Adduction	Abduction	Ankylosis	Imp %			
	Angle°							
	Imp %							
		Int Rot	Ext Rot	Ankylosis	Imp %			
	Angle°							
	Imp %							
	Add Imp % Flex/Ext + Add/Abd + Int Rot/Ext Rot =				[1]	**Imp % =** [2]		**Imp % =**

I. Amputation impairment (other than digits)	=	%
II. Regional impairment of upper extremity •(Combine hand _____% + wrist _____% + elbow _____% + shoulder _____%)	=	%
III. Peripheral nerve system impairment	=	%
IV. Peripheral vascular system impairment	=	%
V. Other disorders (not included in regional impairment)	=	%

Total upper extremity impairment (•Combine I, II, III, IV, and V)	=	%
Impairment of the whole person (Use Table 16-3)	=	%

Figure 16-2 Impairment Estimates for Upper Extremity Amputation at Various Levels



Redrawn with permission from Swanson AB. Evaluation of impairment of function in the hand. *Surg Clin North Am.* 1964;44:925-940.

Table 16-4 Impairment Estimates for Upper Limb Amputation at Various Levels

	Impairment % of			
Amputation Levels	**Digit**	**Hand**	**Upper Extremity**	**Whole Person**
Scapulothoracic (forequarter)	—	—	—	70
Shoulder disarticulation	—	—	100	60
Arm: deltoid insertion and proximally	—	—	100	60
Arm/forearm: from distal to deltoid insertion to bicipital insertion	—	—	95	57
Forearm/hand: from distal to bicipital insertion to transmetacarpo-phalangeal loss of all digits	—	—	94-90	56-54
Hand: all digits at MP joints	—	100	90	54
Hand: all fingers at MP joints except thumb	—	60	54	32
Thumb ray at/or near:				
CMC joint	—	—	38	23
Distal third of 1st metacarpal	—	—	37	22
Thumb at:				
MP joint	100	40	36	22
IP joint	50	20	18	11
Index or middle finger at:				
MP joint	100	20	18	11
PIP joint	80	16	14	8
DIP joint	45	9	8	5
Ring or little finger at:				
MP joint	100	10	9	5
PIP joint	80	8	7	4
DIP joint	45	5	5	3

Compiled by G. de Groot Swanson, MD, Grand Rapids, Mich.

Claimant argues that the term shoulder is ambiguous because "medical terminology used to describe an area of the body is not always compatible with the statutory terminology used to describe an area of the body to classify a scheduled injury." Appellant Brief, p. 19 (internal citations omitted). However, if the "shoulder" is considered ambiguous because its plain meaning is medically evaluated and ultimately converted to an upper extremity impairment, then scheduled injuries to the "hand" and "arm" would be similarly ambiguous under the Guides.

Furthermore, the Guides specifically reference "shoulder instability" in the context of the glenoid labrum and surrounding capsuloligamentous and musculotendinous structures, stating:

> Shoulder instability, recurrent joint subluxation, or dislocation usually **occurs when the integrity of either the glenoid labrum and/or of the surrounding capsuloligamentous and musculotendinous structures becomes compromised** following either one or more acute traumatic dislocations, repetitive microtrauma, or arthritic conditions. Predisposing factors can include abnormal contour or alignment of the joint itself from either congenital or posttraumatic origins; congenital laxity of the capsuloligamentous structures (eg, Ehlers-Danlos syndrome); or musculotendinous imbalances. Shoulder instability can be classified by direction (anterior, posterior, or inferior), etiology (traumatic or atraumatic), or volition (voluntary or involuntary).

Id. at 503 (emphasis added).

This demonstrates that even in a medical context when evaluating shoulder disability, the plain meaning of shoulder includes functional impairment for trauma sustained to the glenoid labrum and surrounding ligament and muscle structures.

This point is further underscored when reviewing examples within the Guides provided to assist in a clinical evaluation of impairment to the shoulder. The Guides reference anatomical structures proximal to the glenohumeral joint within the examples provided to assist in the clinical evaluation of impairment for shoulder conditions. Example 16-72, within the Chapter for The Upper Extremities, has particular significance in this case and provides:

> **Example 16-72**
>
> **History:** An individual "pulled" his shoulder while sorting some lumber. A full-thickness tear of the rotator cuff was diagnosed on MRI. He failed to respond to conservative management and underwent open surgical repair.
>
> **Current Symptoms:** Currently works with restrictions due to shoulder weakness, easy fatiguability, and some pain with overhead movement. **Clinical Studies:** After optimal healing time and
> therapy, the MRI showed a healed rotator cuff

> with some scarring.
>
> **Physical Exam:** Full active range of shoulder rotation, extension, and adduction. Full active range of shoulder flexion and abduction against gravity with some resistance: grade 4 (Table 16-35).
>
> **Analysis:** Flexion weakness: 6% upper extremity impairment. Abduction weakness: 3% upper extremity impairment.
>
> **Impairment Rating:** 6% + 3% = 9% impairment of the upper extremity due to weakness about the shoulder.

Id. at 511. (emphasis in original).

The unavoidable conclusion that must be drawn from a review of the Guides is that the clinical understanding of shoulder disability includes injuries to the glenoid labrum and surrounding ligaments and rotator cuff muscles. For that reason, excluding the infraspinatus from the "shoulder" under 85.34(2)(n) would create unnecessary incongruity between legal and medical evaluations of shoulder impairment.

iv. <u>A review of case law supports a finding that the Legislature intended to compensate injuries to the rotator cuff as scheduled-member shoulder injuries under Iowa Code section 85.34(2)(n).</u>

Shoulder injuries have long been the subject of workers' compensation claims in this state, and the case law discussing shoulder injuries provides the foundation for an understanding of the plain and rational meaning of shoulder

that is consistent with the subject matter of the statute.

For example, in *Prewitt v. Firestone Tire & Rubber Co.*, the Iowa Court of Appeals evaluated whether an employee had sustained injury to his arm or shoulder. 564 N.W.2d 852, 854 (Iowa Ct. App. 1997). There, the Court of Appeals noted:

> Medical terminology used to describe an area of the body is not always compatible with the statutory terminology used to describe an area of the body to classify a scheduled injury. This can present a problem when distinguishing scheduled losses from unscheduled losses.

Id.

Upon review of the medical evidence, the Court found the claimant, "sustained an injury to his right shoulder […]. The injury was eventually diagnosed […] as impingement syndrome of the right shoulder. This syndrome results when the space around the rotator cuff and surrounding bursa is narrowed, causing irritation to the cuff." *Id.* (*See also Magana v, IBP.*, No. 96-1989 (Iowa Ct. App. 1998)). The Court of Appeals' interpretation of the shoulder in *Prewitt* is further consistent with discussions of other shoulder injuries in case law. (*See, e.g., Second Injury Fund of Iowa v. Nelson*, 544 N.W.2d 258, 269 (Iowa 1995) (as amended on denial of reh'g (Feb. 14, 1996)).

In fact, there is no case law to support the proposition of limiting shoulder injuries to just those sustained to the glenohumeral joint. And while it is true that the shoulder was not considered a scheduled member prior to 2017, injuries to the shoulder did exist prior to that time, and at a minimum, the durability of the previous interpretations must be acknowledged.

Moreover, the Legislature's decision to not include a definition limiting the term "shoulder" to the "shoulder joint" is further evidence that they did not seek to alter the existing conceptual framework and commonsense understanding of the shoulder. For that reason, Claimant's proposed "bright line" rule would undoubtedly cloud and destabilize the value of longstanding case law involving shoulder injuries and result in increased litigation—a consequence that was certainly not envisioned by the Legislature.

B. Assuming *Arguendo* that Iowa Code Section 85.34(2)(n) is Ambiguous, the Commissioner Still Appropriately Determined that the Claimant's Injury to Her Infraspinatus Constituted a Scheduled-Member Shoulder Injury for Purposes of Compensation.

The Court has stated that their first task in interpreting a statute is to determine whether the relevant language is ambiguous. *United Elec., Radio & Mach. Workers of Am. v. Iowa Pub. Emp. Rels. Bd.*, 928 N.W.2d 101, 109 (Iowa 2019) (*citing Iowa Ins. Inst. v. Core Grp. of Iowa Ass'n for Justice*, 867

N.W.2d 58, 71–73 (Iowa 2015)). When a statute is ambiguous, the Court next turns to "established methods of statutory interpretation." *Id*.

Claimant argues that the Commissioner committed an error of law by considering study bills when interpreting the legislative intent of Iowa Code Section 85.34(2). Appellant Brief, p. 44. Claimant specifically argues that Legislative study bills should not be used in this case "except in favor of Claimants." *Id*. However, a review of prior decisions of the Court demonstrates that study bills can be used to discern legislative intent – and that their use is not restricted to a particular party.

In the 2019 Supreme Court case of *United Electric Radio & Machine. Workers of America v. Iowa Pub. Employment Relations Board*, the Court sought to interpret the 2017 legislative amendments to the Public Employment Relations Act ("PERA") limiting the mandatory subjects of collective bargaining. *Id.* at 103. The Court specifically compared an original version of the PERA legislation, a house study bill, with the final version of the bill to infer the legislative intent of the statutory term at issue. *Id.* at 111. In doing so the Court used the statutory amendments themselves as guideposts, and specifically stating that "[a]nother interpretive tool is the legislative history." *Id*. at 110 (*citing* Iowa Code § 4.6(3); *Abbas v. Iowa Ins. Div.*, 893 N.W.2d

879, 890, 891 (Iowa 2017)).

Similarly, the Court in *Iowa Right to Life Committee, Inc. v. Tooker*, considered the prior versions of a bill allowing corporations to engage in express advocacy. *Iowa Right to Life Comm., Inc. v. Tooker*, 808 N.W.2d 417 (Iowa 2011) The Court looked at the restrictive nature of earlier proposed versions of statute when determining the legislative intent of the final version of legislation. *Id.* at 430 (Iowa 2011) (holding that the restrictions within the prior versions of legislation fell out of the final version of the legislation, but the reliance on section 68A.404 as the regulatory vehicle remained supporting the Court's determination of legislative intent).

In this case, a review of the proposed amendments to H.F. 518 and S.F. 435, makes clear that the Legislature took care to draw the line for compensation of each type of injury on the schedule with discernment. Most notably, the final version of 85.34(2)(n) omits the qualifying word "joint" when discussing shoulder injuries. The Legislature refused the proposed amendment to list the "shoulder joint" on the schedule and instead specifically placed the "shoulder" on the schedule. The Commissioner also recognized this issue with the Claimant's argument within the Appeal Decision and reiterated the same conclusion within his Ruling on Claimant's Motion for

Rehearing, wherein he states:

> I did as the Court instructed; I used the study bill to contrast what the Legislature actually said with what it should or might have said. While the full Legislature may not have debated the language in the study bill, the language in the study bill does reflect an intentional distinction between shoulder and shoulder joint. As I stated in the appeal decision, "had the Legislature intended to do what claimant suggests and limit the definition of 'shoulder' in section 85.34(2)(n) to only the joint, it could have simply maintained the original proposal in the study bill to include 'shoulder joint' in subsection (m), or it could have added the word "joint" to subsection (n)." (App. Dec., p. 6). But again, "that is not what the Legislature did." (Id.) I therefore conclude my consideration of the study bills was consistent with the rules and principles of statutory interpretation.
>
> Furthermore, my consideration of the study bills at issue in this case was also one factor in my analysis. I also considered several other principles of statutory interpretation, including the well-established presumption that workers' compensation statutes are to be liberally construed in favor of the worker, as their primary purposes is to benefit the worker. I was unable to ignore, however, that "several of the principles of statutory construction indicate the Legislature did not intend to limit the definition of 'shoulder' under section 85.34(2)(n) to the glenohumeral joint." (App. Dec., p. 11).

(Commissioner Ruling on Mot. for R'hrg., p. 3).

Had the Legislature meant to limit shoulder injuries to the "shoulder

joint" as Claimant argues, the Legislature would have placed the "shoulder joint" and not the "shoulder" on the schedule. Instead, the final version of 85.34(2) references the "shoulder joint" in subsection m. and "shoulder" in subsection n.

The second indication that the Legislature did not intend the word "shoulder" to be limited to the shoulder joint can be seen upon a review of the Fiscal Services Division's reports to the Legislature in connection with the proposed Senate File 435 and House File 815. To project the cost of shoulder injuries in the State of Iowa, the Fiscal Notes were based on statistical data of incidence rates for occupational "shoulder" injuries complied by the Bureau of Labor Statistics.[24] By way of context, the Injuries, Illnesses, and Fatalities (IIF) program produces a wide range of information about workplace injuries and illnesses. This data is collected and reported annually through the Survey of Occupational Injuries and Illnesses (SOII) and the Census of Fatal Occupational Injuries (CFOI).[25] The statistical data from the Bureau of Labor Statistics defines "shoulder" injuries as "shoulder(s), including clavicle(s), and scapula." *Id*. This demonstrates that at the time the Legislature considered

[24] *State Data for Nonfatal Occupational Injury and Illness Cases Requiring Days Away from Work for Musculoskeletal Disorders by Nature of Injury or Illness and Part of Body*, U.S. BUREAU OF LABOR STATISTICS (last modified Feb. 14, 2020), https://www.bls.gov/iif/msd_state.htm.
[25] *Injuries, Illnesses, and Fatalities*, U.S. BUREAU OF LABOR STATISTICS, https://www.bls.gov/iif/.

the fiscal impact of the proposed law changes, their evaluation of the cost of "shoulder injuries" included those injuries sustained to parts of the shoulder proximal to the humeral head.

If, as Claimant asserts, the shoulder is meant to only include injuries to the shoulder joint, then a cost projection of injuries to parts of the body proximal to the shoulder joint would not be useful to aid in that analysis. The logical conclusion that should be drawn from the legislative history of the statute at issue is that the Legislature intended for injuries to the rotator cuff to be compensated as shoulder injuries under the statute.

Furthermore, if the Legislature were solely concerned with injuries to the glenohumeral joint, they would have followed through with the proposed amendment to list the "shoulder joint" and not the "shoulder" on the schedule. The Legislature declined to do so, and instead discussions focused on the prevalence of shoulder injuries in the workplace,[26] minimizing litigation of shoulder injuries,[27] and previous compensation of shoulder injuries.[28] Absent

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[26] House Video, THE IOWA LEGISLATURE (Mar. 16, 2017), https://www.legis.iowa.gov/dashboard?view=video&chamber=H&clip=H20170316154402833&dt=2017-03-16&offset=210&bill=HF%20518&status=i (4:25:28 P.M. – 4:26:35 P.M.).

[27] House Video, THE IOWA LEGISLATURE (Mar. 16, 2017), https://www.legis.iowa.gov/dashboard?view=video&chamber=H&clip=H20170316154402833&dt=2017-03-16&offset=210&bill=HF%20518&status=i (4:47:03 P.M. – 4:47:55 P.M.).

[28] Senate Video, THE IOWA LEGISLATURE (Mar. 27, 2017), https://www.legis.iowa.gov/dashboard?view=video&chamber=S&clip=s20170327123534570&dt=2017-03-27&offset=3080&bill=HF%20518&status=r (3:26:40 P.M. – 3:27:28 P.M.; 3:29:20 P.M. – 3:31:09 P.M.).

from the record is any discussion differentiating various types of shoulder injuries that should be included or excluded from the schedule. Had the Legislature sought to uproot the longstanding conceptual framework of the anatomy of a shoulder as utilized within the workers' compensation system, one would think there would have been at least some debate was to what types of injuries would be subsumed under the newly constructed legal term for the shoulder. Yet, the legislative history is conspicuously silent in this regard—and this omission speaks volumes.

Finally, the Court has stated that it will "try to harmonize statutes so they can be obeyed and do not contradict themselves." *Id*. at 114 (*citing* Iowa Code § 4.4(4) ("A result feasible of execution is intended.")); *see also id*. §§ 4.7, .8, .11; *In re Estate of Sampson*, 838 N.W.2d 663, 671 (Iowa 2013) ("[W]e should read a statute as a whole and attempt to harmonize all its provisions."). Like in *United Electric & Machine Workers of America*, this requires a knowledge of what the Legislature choose to include and exclude before arriving at the final version of the statute.

In enacting changes to Iowa Code section 85.34, the Legislature rejected a proposal to compensate for the area of the body between the arm joint and shoulder joint in subpart m. That rejection is made all the more

poignant when analyzing the final versions of subsections m. and n. in conjunction. 85.34(2) states:

> Compensation for permanent partial disability shall begin when it is medically indicated that maximum medical improvement from the injury has been reached and that the extent of loss or percentage of permanent impairment can be determined by use of the guides to the evaluation of permanent impairment […] For all cases of permanent partial disability compensation shall be paid as follows:
>
> > m. The loss of two-thirds of that part of an arm between the **shoulder joint** and the elbow joint shall equal the loss of an arm and the compensation therefor shall be weekly compensation during two hundred fifty weeks.
> >
> > n. For the loss of a **shoulder**, weekly compensation during four hundred weeks.

Iowa Code § 85.34(2)(m)-(n) (emphasis added)

Had the Legislature intended to limit the "shoulder" to the "shoulder joint" in subsection n, then the inclusion of the word "joint" in subsection m. would be superfluous. Ultimately, a critical review of the statute as well as the legislative record, including the proposed amendments to House File 518 and Senate File 435, demonstrates that the Legislature did not intend to limit the shoulder to the glenohumeral joint. The Court should affirm the District Court and Commissioner's finding that the Claimant sustained a shoulder injury that

should be compensated pursuant to Iowa Code section 85.34(2)(n).

CONCLUSION

Iowa Code section 85.34(2)(n) plainly states that the shoulder is a scheduled member for purposes of compensation under Chapter 85. Claimant seemingly suggests that because the Legislature did not define the term "shoulder" it is rendered ambiguous. Claimant argues that "Even if 'shoulder' is a plain, ordinary word, intended to have a plain, ordinary meaning, it does not follow that it should be broadly construed, as the district court ruled." Appellant Brief, p. 22. Claimant asserts that a narrow, lay meaning is also available, and notes that even dictionary.com provides eighteen different definitions for the shoulder. *Id*.

However, a word is not necessarily rendered ambiguous simply because it has multiple definitions. For example, dictionary.com also provides numerous definitions for the word "is", and history has shown that defining a word into oblivion does not negate its commonly understood meaning. The shoulder has a plain meaning, and the meaning that the Claimant asks this Court to adopt, is inconsistent with the common understanding of the shoulder and longstanding case precedent.

Moreover, the "bright line" promulgated by the Claimant does not make

anatomical sense. Contrary to Claimant's assertion, Defendants do not seek to broaden the meaning of the shoulder, but rather assert that the plain meaning of the term "shoulder" applies to an anatomic situs that is greater than the shoulder joint. To borrow a phrase from Aristotle, "the whole is something besides the parts."[29] The shoulder consists of the glenoid labrum and surrounding capsuloligamentous and musculotendinous structures. For that reason, the Commissioner and District Court correctly determined that the Claimant's injury should be compensated as a scheduled member shoulder under Iowa Code section 85.34(2)(n).

WHEREFORE, Appellees ask that the Court affirm the decision of the District Court finding that there is no ambiguity in Iowa Code section 85.34(2)(n) and affirming the Commissioner's decision that Claimant sustained a scheduled member shoulder injury.

REQUEST FOR ORAL ARGUMENT

Appellees request the opportunity for oral argument.

/s/ Kathryn R. Johnson
Kathryn R. Johnson

[29] ARISTOTLE, Metaphysics (Book VIII, 1045a.8.10, 350 B.C.E.) (Translated by W. D. Ross in 1908).

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because it has been prepared in a proportionally spaced typeface using Time New Roman in 14-point font and contains 11,035 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Kathryn R. Johnson 09/01/21
Kathryn R. Johnson Date

CERTIFICATE OF ELECTRONIC FILING AND SERVICE

I, Kathryn R. Johnson, member of the Bar of Iowa, hereby certify that on September 16, 2021, I or a person acting on my behalf served the above Respondents/Appellees' Final Brief and Conditional Request for Oral Argument to the Petitioner/Appellant's attorney of record, Jennifer Zupp, via EDMS in full compliance with Rules of Appellate Procedure and Rules of Civil Procedure.

/s/ Kathryn R. Johnson
Kathryn R. Johnson