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IN THE SUPREME COURT OF IOWA

Appeal No. 21-0760
Crawford County No. CVCV041545
Iowa Division of Workers' Compensation No. 5061883

MARY DENG,
Claimant/Petitioner/Appellant
v.
FARMLAND FOODS, INC. and SAFETY NATIONAL,
Defendants/Respondents/Appellees

APPEAL *from the* IOWA DISTRICT COURT *in and for* CRAWFORD COUNTY

HONORABLE DISTRICT COURT JUDGE ROGER SAILER, *presiding*

APPELLANT'S FINAL REPLY BRIEF

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ARGUMENT AND AUTHORITIES

I. "SHOULDER" MEANS SHOULDER JOINT.

A. The "Shoulder" Statute is Ambiguous.

In Chavez v. MS Technology, which is currently on appeal to this court, the hearing deputy reasoned that the legislature was aware that "shoulder" was the glenohumeral joint, and she therefore assigned it this definition. Chavez v MS Technology, LLC, File 5066270, p. 10 (Arb. Dec'n., 2/5/20). The deputy cited Nelson v. Second Injury Fund and Lauhoff Grain v. McIntosh for the understanding, in the law, that "[t]he wrist is the joint between the arm and the hand just as a *shoulder is the joint* between the arm and the trunk or the hip is the joint between the leg and the trunk." Id. at 8. (emphasis added). Since the Claimant's injuries extended beyond the joint, the deputy concluded the injury was an industrial one under section 85.34(2)(v) (2017). Id.

In Smidt v. JKB Restaurants, LC, another hearing deputy analyzed examples of why and how the word "shoulder" was ambiguous in the case law. Smidt v. JKB Restaurants, LC, File 5067766, p. 10-17 (Arb. Dec'n., 5/6/2020). Since the meaning of the word could be argued both ways, the deputy found the statute to be ambiguous. The deputy concluded that the legislature's choice to use "relatively generic language" combined with the

rule that the laws are interpreted in Claimants' favor in cases of doubt, led to the "logical conclusion" that "the legislature in 2017 knew that any body parts proximal to the 'shoulder' joint would result in an injury being compensated to the whole person yet chose not to incorporate or specifically include rotator cuff injuries as "shoulder" injuries." Smidt, File 5067766, p. 13-14 (Arb. Dec'n., 5/6/20)(reversed on appeal).

In the intra-agency appeal decisions for this case, Chavez and Smidt, Commissioner Cortese did not have any problem concluding that the language employed by the legislature was ambiguous. He decided this case, first, and then incorporated the Deng analysis in Chavez and Smidt. Appeal Dec'n., p. 4; Chavez v. MS Technology, File 5066270, p. 2-3 (Appeal Dec'n., 9/30/2020)(incorporating analysis from Deng's appeal decision and following same); Smidt v. JKB Restaurants, LC, File 5067766, p. 3 (Appeal Dec'n., 12/11/2020)(same). He correctly noted below that when the legislature amended section 85.34(2) to add shoulder to the list of scheduled members, no definition was included and the legislature did not delineate specifically which anatomic parts of the body it intended to fall under the umbrella of the section and because of this, there was uncertainty with regard to the meaning of the word. Appeal Dec'n., p. 4. He bolstered the conclusion by noting that Dr. Bolda was asked whether there was a

consensus definition for "shoulder" in the field of orthopedics and he said it depends on how one wants to define it. Appeal Dec'n., p. 4. The Commissioner also noted that medical terminology is often incompatible with statutory terminology which has often required the agency and courts to interpret the meaning, particularly when generic language has been employed by the Legislature. Appeal Dec'n., p. 4-5. As such, the Commissioner held that "shoulder" is a legal term of art, susceptible to more than one reasonable interpretation. Appeal Dec'n, p. 5. Accordingly, he found it ambiguous.

Finally, the district court, in Chavez v. MS Technology, found that the shoulder statute was ambiguous. Chavez v. MS Technology, CVCV060899, p. 5 (Order on Judicial Review, 4/29/2021). The court noted the word shoulder "could refer only to the glenohumeral joint (as urged by Chavez) or the word should [sic] could include reference to the tendons and muscles connected to the joint (as urged by Defendants and found by the Commissioner)." Id.

Below, the district court's basis for concluding that the statute was not ambiguous was because "shoulder" was a "plain and ordinary" word and the other scheduled members listed in section 85.34(2) were "plain and ordinary". App. p. 83. Defendants fail to address the main problem with

this analysis. The Iowa Supreme Court has already had to give these other "plain and ordinary" words meaning, too. The court has had to decide what is a finger versus hand, hand versus arm, arm versus whole body, foot versus leg, and leg versus whole body. Holstein Elec. v. Breyfogle, 756 N.W.2d 812, 815 (Iowa 2008)(finding Iowa Code section 85.34(2)(m) ambiguous and declaring a "wrist" injury to be an "arm" injury); Lauhoff Grain Co., N.W.2d at 839 (ruling "leg" does not include hip even if AMA Guides treat "hip" as a "lower extremity"); Stumpff v. Second Injury Fund of Iowa, N.W.2d at 905 (fracture of distal end of proximal phalanx, which impacts the hand, is only a finger injury).

Not only has the court had to provide meaning to these other "plain and ordinary" words, but in fact, many parts of the Workers' Compensation Act have required the court's interpretation. See Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842, 859 (Iowa 2009)(finding the words "after the injury" ambiguous); Andover Volunteer Fire Dept. v. Grinnell Mut. Reinsurance Co., 787 N.W.2d 75, 81-82 (Iowa 2010)(finding the phrase "summoned to duty" ambiguous with regard to volunteer firefighters); McGill v. Fish, 790 N.W.2d 113, 119 (Iowa 2010)(relying on Webster's Third New International Dictionary and www.macmillandictionary.com as sources to determine the meaning of an undefined word in co-employee

gross negligence statute); IBP v. Harker, 633 N.W.2d 322, 325-26 (Iowa 2001)(finding the phrase "retained by the employer" to be ambiguous); Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 519-520 (Iowa 2012)(finding the phrase "suitable and consistent with the employee's disability" ambiguous); Waldinger Corp. v. Mettler, 817 N.W.2d 1, 9 (Iowa 2012)(construing section 85.33 to allow for multiple healing periods); Gregory v. Second Injury Fund of Iowa, 777 N.W.2d 395 (Iowa 2010)(finding 85.64 ambiguous as to whether Claimant "lost or lost use of" a scheduled member for second injury fund purposes); Staff Management v. Jimenez, 839 N.W.2d 640, 649 (Iowa 2013)(construing 85.61(11) to hold that an undocumented worker is not excluded from the definition of "worker" or "employee").

Despite this court advising on so many occasions that Chapter 85 has ambiguous words and phrases, the Legislature chose to employ ambiguous language anyway. Since there is room for argument about the Legislature's intent, the court should, once again, default to an interpretation favorable to workers. Consistent with the court's historical practice in giving meaning to words in the Workers' Compensation Act, the court should give the word as clear of boundaries as possible so that as with fingers, hands, arms, feet, and legs, individuals know exactly where a shoulder starts and where it stops. Only Claimant offers the court this opportunity.

Defendants argue the word "shoulder" is unambiguous, but their first argument in support of that position is reference to case law. If the court has to look to case law for a definition, it means the statute is ambiguous. If, case law is used, however, the Supreme Court's dicta in Nelson that the "shoulder" is the joint, which is what Deputy McGovern looked to in Chavez, would be controlling over the Court of Appeals' dicta in Prewitt not only due to being a higher authority, but also, due to recency.

The remainder of Defendants' brief is hard evidence that the word "shoulder" is ambiguous. Resorting to legislative history and definitions used by the Bureau of Labor Statistics demonstrates unequivocally that the word "shoulder" is capable of several different, reasonable meanings depending upon who is asked. Were "shoulder" clear and unambiguous, no one would have to look further than the plain text of the statute to determine its meaning and there wouldn't be disagreement amongst the parties, deputies, the commissioner, and district courts. As such, this court should have no trouble coming to the legal conclusion, like the agency did, and like the district court in Chavez did, that the statute, as written, is ambiguous.

B. Ambiguous Workers' Compensation Laws are Construed in Favor of Injured Workers.

Defendants completely failed to argue this canon of construction in their brief and the omission speaks volumes. When interpreting statutes, the

court presumes the Legislature is familiar with the status of the law, holdings of the Supreme Court, and other case law. Roberts Dairy v. Billick, 861 N.W.2d 814, 821 (Iowa 2015). If the courts interpret the law in a manner the Legislature feels is improper, then the Legislature will state its intention with additional legislation. Mallory v. Paradise, 173 N.W.2d 264, 266 (Iowa 1969). It is not the court's role, or duty, to rule according to what the Legislature *might have said* and instead, the court must rule according to the legal meaning of what the Legislature has said and done. State ex rel. Fenton v. Downing, 155 N.W.2d 517, 519 (Iowa 1968).

Since "shoulder" never existed in Chapter 85 prior to 2017, the courts have never directly interpreted the word. However, past decisions instruct this court in *how* to resolve equally-reasonable, but competing arguments - in favor of the injured worker. Case law is replete with examples of this policy. For example, in Holstein Electric, the Iowa Supreme Court had to grapple with the issue of whether an injury to the wrist was a "hand" injury under then-existing Iowa Code section 85.34(2)(l) or whether a wrist injury was an "arm" injury under then-existing Iowa Code section 85.34(2)(m). In determining that an injury to the wrist was an injury to the "arm", a ruling favorable to Claimants, the Court reminded Iowans that:

> [t]he legislature enacted the workers' compensation statute primarily for the benefit of the worker and the worker's

> dependents. Cedar Rapids Cmty. Sch. v. Cady, 278 N.W.2d 298, 299 (Iowa 1979). Therefore, we apply the statute broadly and liberally in keeping with the humanitarian objective of the statute. We will not defeat the statute' beneficent purpose by reading something into it that is not there, or by a narrow or strained construction.

Id. at 815-816; see also Griffin Pipe Products Co. v. Guarino, 663 N.W.2d 862, 864-865 (Iowa 2003)(construing Iowa Code section 85.36(6) to exclude two weeks-worth of wages when the plant was shut down, and Claimant earned no wages, from the average weekly wage calculation even though the plant shut down was a regular, anticipated occurrence); IBP, Inc. v. Harker, 633 N.W.2d 322, 325-327 (Iowa 2001)(construing Iowa Code section 85.39 to allow Claimant an independent medical examination even though the physician which provided the first, "low" impairment rating was not "chosen" by the employer, but was nevertheless "paid" by the employer, and therefore "retained" by the employer); Caterpillar Tractor Co. v. Shook, 313 N.W.2d 503, 507 (Iowa 1981)(concluding that a person paid by the company, who was injured while *en route* to union negotiations, for which he was not paid, was an "employee" pursuant to Iowa Code section 85.61(2)); Irish v. McCreary Saw Mill 175 N.W.2d 364, 369 (Iowa 1970)(construing "loss of use" in Iowa Code section 85.64 to mean any loss of use, not "total" loss of use, to

trigger "Second Injury Fund" benefits); Second Injury Fund v. Kratzer, 778 N.W.2d 42, 46 (Iowa 2010) (construing Iowa Code 85.64 "as it must be" in favor of the injured worker and holding that a second injury is qualifying as long as it is not the same member which was previously injured); Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842, 859-860 (Iowa 2009)(construing Iowa Code section 85.32 to permit temporary compensation for periods of time during which an employee was absent from work due to their injury, even though the injury had not manifested itself as a cumulative injury yet because doing so was "faithful to the well-established rule that chapter 85 is liberally construed in favor of the employee, with *any doubt* in its construction being resolved in the employee's favor.")(emphasis added); Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 770-775 (Iowa 2016)(acknowledging the primary purpose of workers' compensation law is to benefit the worker and construing Iowa Code 85.27(4) to require the employer to pay for unauthorized medical care when the employer failed to advise Claimant that ongoing care was not authorized).

It is curious that Defendants do not even mention this long, broad tradition in their brief or offer the court any legitimate means by

which to disregard it now. Instead, Defendants unfairly expect this court to ignore the policy for the simple reason that Defendants have offered the court *a* reasonable interpretation of the law. The problem for Defendants, which they gloss over, is that Claimant's interpretation is equally, if not more, reasonable, and when the competing arguments are in equipoise, or when there is even "*any doubt"*, it is the court's policy of ruling in favor of injured workers which must prevail. Larson Mfg. Co., Inc., 763 N.W.2d at 859-860 (emphasis added on quotation). The Legislature is no doubt aware of the Court's policy, and even if it wasn't, this court presumes it is. Accordingly, if the court is convinced that both parties offer reasonable, but competing arguments, or the court finds there is any doubt about the meaning, the Claimant's interpretation should prevail.

C. Claimant's Interpretation of "Shoulder" is Favorable to Injured Workers

While both parties offer reasonable arguments as to why "shoulder" should be interpreted their way, Claimant's proposal to define "shoulder" narrowly benefits injured workers because it means that more workers' injuries will stay "off the schedule". The Supreme Court has recognized that injuries which are compensated as "scheduled member" injuries are compensated arbitrarily. Mortimer

v. Fruehauf Corp., 502 N.W.2d 12, 15, 17 (Iowa 1993). Even though a worker's "scheduled member" injury may actually result in a permanent and total disability, or a significant industrial loss, a worker with a "scheduled member" injury is only allowed to recover what is provided for in the "schedule". By contrast, a worker whose injury is "unscheduled," is eligible for "industrial disability". Simbro v. Delong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983). Compensating an employee who is injured based upon the employee's industrial disability is less-arbitrary because the fact-finder considers the work injury's actual impact on the employee's ability to earn wages in light of their age, education, qualification, experiences, and other relevant factors. Id.

"Arbitrary" compensation does not sound like a big deal, until you are the one who is injured. As set forth in LULAC-Iowa's brief, the statistical/financial significance to workers cannot be over-stated. The workers impacted by the legislation are often-times elderly, low-skilled, uneducated individuals, many of whom do not speak English, and would struggle, along with their families, if they lost their job and were "arbitrarily" compensated. The wrong result from this court means that these injured workers will get a few thousand dollars of

pay, and then they are on their own. As described in LULAC-Iowa's brief, the workers' compensation system was set up based upon a recognition that the ones who toil, and become injured, should not thereafter be made to bear, themselves, the significant consequences of their injuries. Instead, this is a cost to be borne by, and spread out by, the system. The wrong result threatens this underpinning and ensures that workers with significant and severe rotator cuff, and similar injuries, are left to solely bear the consequences of their injuries.

The legislators were clear during the debates that they wanted employers to retain injured workers. The "shoulder" statute was not passed in isolation. When it was passed, the Legislature also revised former Iowa Code section 85.34(2)(u), now Iowa Code section 85.34(2)(v). Section 85.34(2)(u) used to award any worker with an "unscheduled" claim industrial disability benefits, even if the worker was still working for the same employer, making the same or even greater earnings. The theory was that even though the worker still has this particular job, because of his or her injuries, the worker still has a loss of access to the job market generally if he or she were to leave the job.

The Legislature amended the law to say that if a worker with an "unscheduled" injury remains working with the employer and is earning the same or greater earnings, the injured worker only gets compensated based upon the functional loss to the injured "whole body" part. See Iowa Code §85.34(2)(v). In other words, a worker with a whole-body injury is compensated the same way workers with a scheduled member injury are compensated unless the worker with a whole-body injury is no longer employed by the employer; then the worker can obtain industrial disability benefits, based upon traditional industrial disability analysis. Id. This provision should be read by the court along with the "shoulder" section. Simply, it is "okay," post-enactment, if more injuries in the area of the shoulder joint, like a rotator cuff, are still considered "whole body" injuries because the employer only has exposure beyond payment of the impairment rating if the employee is no longer working with the employer. On its face, this makes for good policy and can be presumed to be something the legislature would have supported.

Defendants' interpretation fails to address the legitimate concern that if rotator cuff injuries are "shoulder" injuries, meaning

their compensation is limited, employers will lose incentive to retain or retrain them. It is hard to imagine many employers keeping an uneducated, non-English speaking, sixty-year-old worker, who can only lift five pounds due to his or her rotator cuff injury, employed long-term if all the employer has to do is pay them a few weeks-worth of benefits for their "scheduled" injury and then dismiss them. It is equally hard to imagine a majority of Iowa's legislators actually voting for a law which would produce that result when the goal was to keep folks employed. By contrast, if Claimant's interpretation of "shoulder" is adopted, an employer which chooses to terminate an employee with a rotator cuff injury still has the choice to do so, but it will pay the worker more-fairly, or less-arbitrarily, because the worker's compensation will be based upon the actual loss of the employee's ability to earn wages, and that is consistent with the foundational concepts of Iowa's workers' compensation laws. There is nothing "absurd" about this; in fact, it makes perfect sense.

D. Defendants' Interpretation of "Shoulder" is Unfavorable and Ambiguous.

The legislature was fairly clear during the limited debates it had that another one of the goals of the new legislation was to reduce litigation. As the Commissioner acknowledged in his decision,

> Claimant is correct that expanding the definition of "shoulder" to parts other than the glenohumeral joint will result in temporary uncertainty as claimants litigate injuries to the various muscles, tendons, bones and surfaces surrounding the glenohumeral joint. Claimant is also correct that for the short term, this will result in increased litigation as these questions are addressed by this agency and the courts.

Appeal Dec'n., p. 10. Despite acknowledgement of the years-worth of protracted litigation which is brought on through a broad, and still ambiguous definition of "shoulder", the Commissioner found that because the infraspinatus tendon was "important to" the function of the shoulder joint, excluding it would lead to the "absurd result" of excluding injuries that "are and have been commonly considered" shoulder injuries. Appeal Dec'n., p. 10.

While understanding the difference between an injury which is proximal to the glenohumeral joint, like a rotator cuff tear, and an injury which is entirely within the glenohumeral joint, like a labral tear, may be difficult for some to understand as a lay matter, as a legal matter, the workers' compensation system is well-suited to receive and address medically-sophisticated arguments and does so all the time. Indeed, often times, location of pathology requires no sophistication. As acknowledged by the Iowa Supreme Court in

Holstein Electric, the "wrist" case, in the past, when faced with analogous situations, the Court has looked to the proximal point of the joint to classify an injury under the workers' compensation statutes. 756 N.W.2d at 816 (citing Lauhoff Grain Co. v. McIntosh, 395 N.W.2d 834, 839-40 (Iowa 1986)(finding injury to the hip joint is a whole-body injury but remanding for factual finding); Second Injury Fund v. Nelson, 544 N.W.2d 258, 269-70 (Iowa 1995)(finding an injury to the shoulder joint is compensated as a whole body injury). The courts have never said that classification of an injury includes not only the body part injured, but also, any body part near to it which happens to impact it. The exact opposite analysis was adopted by the Iowa Supreme Court in Dailey v. Pooley Lumber Co., 10 N.W.2d 569 (Iowa 1943). Practitioners, adjusters, doctors, deputies, employers, and some Claimants, already have familiarity with the concept of looking at joint lines and very specific parts of human anatomy to determine the proper legal classification for an injured body part.

The Commissioner's and district court's analysis upsets this historical nicety by expanding the definition of "shoulder" to include anything that happens to impact upon the joint or be somewhat close to it. This means the door is open to argument and opinion as to

whether and how much an injured body part impacts the shoulder joint. This, in turn, opens the door to inconsistent results which naturally breeds litigation. Rhetorically, is there any part of the human body which does not have some degree of secondary or tertiary impact upon other parts of the human body, and how does a court determine, as a matter of law, or would it be fact, which nearby structures impact upon other structures *just enough* to be considered one-in-the-same, and which do not? What are the guideposts for deputies, and parties, to use to determine whether a threshold showing of "impact" or "proximity" or "entwinement" has been met? There are none given by the Commissioner, which is a big problem, and Defendants don't offer the court a definition, either.

The problem becomes apparent when one considers a typical neck injury case. A disc herniation in the cervical spine (neck) which causes C3-C5 radiculopathy (radiating pain or weakness) can secondarily affect the function of the musculature surrounding the glenohumeral joint. However, C3, C4, or C5 pathology which causes secondary problems around the glenohumeral joint and glenohumeral joint pathology which itself causes the problems around the glenohumeral joint are distinct medical conditions. The C5

radiculopathy would traditionally be considered a "neck" injury and therefore, a "whole body" or "industrial" injury, rated under the Spine chapter of the Guides. Under the Commissioner's "important/essential/entwined" analysis, however, a neck injury which causes glenohumeral joint dysfunction could now be called a "shoulder" injury because the "impact" of the neck injury is to the glenohumeral joint. Meanwhile, the same neck injury which does not cause radiculopathy which impacts the joint would still be a "neck" injury. This "impact analysis" will cause inconsistent results for individuals who have the same primary pathology – a disc herniation. This makes no sense and unnecessarily complicates what is otherwise, usually, the "easy part" of every case – classifying the injury.

By way of further example, the distal clavicle (arm side of the collar bone) is often excised (shaved down) when there is an injury in the area of the shoulder joint because doing so can help alleviate some impingement, thereby allowing more, or less-painful, range of motion of the arm within the joint. Under the Commissioner's analysis, since the excision of the clavicle helped to secondarily improve range of motion within the glenohumeral joint, and the distal clavicle is close to the shoulder joint, the clavicle would likely be considered a

“shoulder” injury. However, this narrow focus ignores that another purpose of the clavicle is to protect the neurovascular structures which run under it, like the brachial plexus. If a brachial plexus injury is sustained as a result of a clavicular fracture, it could be that the only residual impairment from the brachial plexus injury is hand numbness, or arm numbness, which has nothing to do with the shoulder joint, yet, if a clavicle injury sometimes can impact the glenohumeral joint function, by alleviating impingement, under the Commissioner’s analysis, the clavicle injury should be a called a “shoulder” injury even though the damage is to the nerves, which only impact the hand or arm. This makes no sense and will breed inconsistent agency rulings and really confuse lay people. The thought of Claimants’ or defense counsel having to explain this dichotomy to clients, with confidence or clarity, is shuddering. If the goal is to avoid absurd or inconsistent results and decrease litigation, Claimant’s interpretation of “shoulder” is unquestionably better than Defendants’.

Despite Defendants’ protestations, there is nothing new or absurd about the law expecting parties in a workers’ compensation proceeding to identify the location of their primary, permanent pathology, rather than the location of the impact of their primary

pathology, in order to determine whether a claim is on or off the schedule. Dikutole v. Tyson Foods, Inc., File 5054404, p. 9 (App. Dec'n., 5/11/18)(citing Lauhoff Grain v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Dailey v. Pooley Lumber Co., 10 N.W.2d 569 (1943); Soukup v. Shores Co., 268 N.W. 598 (1936). The location of the permanent injury determines its classification while the impact of the injury is a gauge of its extent. There is no good reason to depart from this analysis.

E. The *AMA Guides* Do Not Dictate What Constitutes a "Shoulder Injury.

Defendants contend that since the *AMA Guides to the Evaluation of Permanent Impairment*, 5th Edition, evaluates the *extent* of permanent impairment from a rotator cuff injury as an "upper extremity" injury, that the court should take this to mean the "shoulder" is not a whole body injury. However, the same argument was made and rejected in Lauhoff Grain Co. Lauhoff Grain Co., 395 N.W.2d at 839-840. There, the court took note that the AMA Guides included the "hip" as a "lower extremity" injury, but Iowa law did not. Id. Despite the "disharmony" parties have managed for the last thirty-five years since Lauhoff Grain Co. was decided. In addition, the

argument fails to recognize that Iowa Code section 85.34(2) now has a "shoulder" and an "arm" section and the AMA Guides call them both "upper extremities". Iowa does not have an "upper extremity" compensation schedule.

A bird's eye view shows there are many examples in Iowa law where the *Guides* do not align with Iowa Code. For example, the *Guides* have a method for rating impairment due to "skin" injuries, such as may exist following a burn injury. Even though "skin" is not listed as a "scheduled member" in the Code, and even though "skin" impairment is rated in an entirely separate chapter in the *Guides* than an "arm" injury, for example, the law, in Iowa, considers skin impairment which is confined to an arm to be only a scheduled member injury, rather than a "whole body" skin injury. Dikutole, File 5054404, p. 8-12 (App. Dec'n, 5/11/18)(digesting "skin" cases and holding skin impairment which is limited to an extremity is compensated on the schedule) The hip is another good example. The *Guides* provide for rating the hip in the "lower extremities" chapter. However, Chapter 85 does not consider the "hip" to be a "lower extremity" or "leg" injury just because the *Guides* do. Instead, Iowa law considers a hip injury a "whole body" injury. As such, while it

would be nice, in a vacuum, if Iowa law aligned perfectly with the Guides, the fact is that it never has and likely never will. The Guides were not written for Iowa law, nor does the law appear to have been written to match the Guides. It is a red herring to vote in favor of Defendants based upon an ideal which is itself fantasy. There is no need for this court, or Iowa law generally, to defer to the Guides.

F. Legislative Fiscal Notes Support Claimant's Argument.

Defendants argue that because the Legislative Services Agency's Fiscal Services Division prepared a Fiscal Note for the Legislature regarding the potential economic impact of the law's changes and because the Fiscal Services Division relies upon records from the Bureau of Labor Statistics, which tracks "shoulder injuries" and because the Bureau of Labor Statistics defines "shoulder injuries" as "shoulder, including clavicle and scapula," that the Legislature must have therefore known, and intended, that the meaning of the word "shoulder" in Iowa Code section 85.34(2)(n) would include anatomy which is proximal to the glenohumeral joint, because the Bureau of Labor Statistics does. This is a proverbial mouthful. Setting aside the multiple assumptions the court must take to reach the same conclusion, it is curious why Defendants left out of their argument the fact that the Iowa House did <u>not</u> have the 3/20/17 Fiscal Note available to it at the time it voted

the bill out of the House. The House debate was on 3/16/17, four days prior to the second Fiscal Note's preparation. In fact, Representative Meyer (D-Polk) complained during the House floor debates that there had not been a new Fiscal Note prepared based upon the changes, including section 85.34(2)(n)'s "shoulder" provision, which had been made within days prior to the debate. Accordingly, the court can be confident that the House did not rely upon the 3/20/17 Fiscal Note when it adopted the statutory changes because it did not exist at the time.

Another problem with looking to Fiscal Notes is that if one takes Defendants' argument to be true – that the Fiscal Services Division looks to the Bureau of Labor Statistics' definitions to assess fiscal impacts, one must wonder why the Fiscal Services Division would use the same Bureau of Labor Statistics' definition of "shoulder" to prepare both sets of Fiscal Notes if, in fact, as Defendants contend, the Legislature intended to change the scope of injuries covered by the changes between the proposed amendment to the "arm" section and the addition of the "shoulder" section. If the words were to have different meanings, as Defendants contend, it would not make any sense for the Fiscal Services Division to use the same data set, yet, that is what it did according to Defendants. Perhaps the Fiscal Services Division believed that it could use the same data it used before because it knew the

intent of the legislature was to still capture "shoulder joint" injuries, but simply make them worth more than 250 weeks maximum. Moreover, when changes were initially proposed to the "arm" subsection, which used the words "shoulder joint" it would not make sense to use data from the Bureau of Labor Statistics for a cost estimate when, in fact, the Bureau's definition was more-broad than the Legislature's because the Bureau's data included clavicle and scapula and the plain language of the proposed amendment to the "arm" subsection did not. Defendants have no answer for these anomalies.

Worse is Defendants' conclusory allegation that the Fiscal Notes were based on the statistical data of incidence rates for occupational "shoulder" injuries compiled by the Bureau of Labor Statistics. This problem was raised in the district court briefing and remains unaddressed by Defendants. Defendants' contention does not appear to be supported by fact, or if it is, it requires the court to speculate about it, which it should not have to do when things are clear. The Fiscal Note from 3/20/17[1], lists its "sources" on page three of the Note and the sources do not include the Bureau of Labor Statistics; nor does the first Fiscal Note. According to the Legislative Service Agency's online publication, "Fiscal Note Guide", p. 5, it says,

[1] https://www.legis.iowa.gov/docs/publications/FN/856169.pdf

"[t]he fiscal note *shall specify the source of the information*."[2] If the Legislative Services Agency was following its own practices as set forth in its own online "Guide to Fiscal Notes", and the Notes *both* fail to mention the Bureau of Labor Statistics as a "source" of the data, one has to question how Defendants are able to make this contention, other than to say it is so. See Appellees' Brief, p. 61.

Even presuming Defendants' allegation that the Bureau of Labor Statistics' data was actually used to prepare the Fiscal Note/s, the Bureau's "definition" of the word "shoulder" actually helps Claimant's argument. According to Defendants, the Bureau defines "shoulder" as: "shoulder(s), including clavicle(s), and scapula." Defendant's Brief, p. 37. If "shoulder" naturally included parts of the shoulder girdle proximal to the glenohumeral joint like clavicle and scapula, as Defendants contend, the Bureau would not have had to specifically include the words "scapula" or "clavicle" because it would be redundant to do so. If, however, the Bureau's intent is to include structures proximal to the glenohumeral joint as a "shoulder" it is worth noting that the Bureau's definition of the word "shoulder" does not include the rotator cuff. This omission could be taken to mean that the Bureau does not consider rotator cuff injuries to be shoulder injuries, but it does consider

[2] https://www.legis.iowa.gov/docs/lsaReports/FiscalNotes/Fiscal%20Note%20Guide.pdf

scapular or clavicular injuries to be "shoulders". No one knows the intent of the Bureau or the Fiscal Services Division because it isn't their job to define or interpret Iowa law.

Finally, looking to the Fiscal Note/s in this case presumes that any of the Legislators actually looked at them, relied upon them, or construed the statute the same way the Legislative Services Agency may have. There is no reference to the second Fiscal Note in the Senate debates, even though it was available, so it is questionable what role, if any, the Note had in fixing legislative intent. Ultimately, this case should not come down to a Fiscal Note, or, if it does come down to that, considering both parties can argue Fiscal Notes at least equally, the arguments favoring Claimants should be adopted by the court.

G. Study Bills Support Claimant's Argument.

Claimant is not arguing that the court should *never* consider Study Bills. Indeed, both parties have cited cases where the court has done so. The question is whether it is appropriate for the court to consider a Study Bill when its language was completely different from what was actually adopted by the Legislature, and if so, how? As briefed heretofore, the original Study Bills, which were identical in the House and Senate committees, had proposed amending former section 85.34(2)(m), governing

"arm" claims, by including an injury from the "shoulder joint" to the elbow joint, which made these injuries worth a 250 week maximum, rather than 500. When the legislators saw that they were not going to get enough votes to take shoulder joint injuries down from a 500 week schedule to a 250 week schedule, they decided to keep the arm section the same. Instead, they created a new provision for "shoulders", and put them on a 400 week schedule.

Here is the problem: it can be reasonably argued that when the legislators passed the "shoulder" section, they still had the same idea in mind – capture "shoulder joint" injuries, pay them less than 500 weeks, but more than 250 weeks. Or it can be argued that the Legislature's amendments to the Study Bills were instead focused on the precise pathology they were devaluing, by attaching more interpretive significance to the word "joint". There is no way to know which is true.

If the Study Bills in this case are to have any meaning, they should be construed in Claimants' favor because other Amendments to the Study Bills were also made in Claimants' favor. For example, the Study Bills had said that permanent total disability benefits would be cut off entirely when a worker reached age sixty-seven. See SSB 1170 (changes to Iowa Code 85.34(3)). The final version of the law removed this harmful language.

Another provision of the Study Bills would have changed the causation standard by saying the employee's work must be "the predominant" factor in causing an injury. See SSB 1170 (changes to Iowa Code 85.61)). The final version changed the language from "the predominant" to "a substantial" factor, which essentially codified then-existing law. Yet another proposal from the Study Bills said that the changes would take effect "upon enactment". See SSB 1170. This language was also amended and provided that the changes would only apply to injuries which occurred after 7/1/17. In other words, post-introduction of the Study Bills, all of the changes that were made were favorable to Claimants, so it makes sense to construe the addition of section 85.34(2)(n) favorably to Claimants as well.

Defendants' interpretation, however, is worse for workers than the initial Study Bill would have been. If the language from SSB 1170 was left-alone, thereby making injuries through the "shoulder joint" worth the same as "arm" injuries, fewer numbers of Claimants' claims would have lost value compared to their value prior to July 1, 2017. However, if the Amendment which added the "shoulder" section is construed broadly, a greater number of claims are devalued. An interpretation which harms even more workers than the initial version of the bill doesn't make sense when all the other Amendments to the Study Bills gave workers more protections.

When there is no direct or specific legislative history to indicate precisely what the legislators meant when they scrapped proposed changes to the "arm" section and added a "shoulder" section, and when the intent can be argued both ways, the Study Bills should not be used to glean legislative intent. To do so is to speculate. If there were fifteen related study bills, how would a court determine which of them had interpretive significance and which do not vis-à-vis the final bill? Should a court look at study bills proposed in prior legislative sessions? Digging too deeply into study bills should be avoided by any court because it invites too much speculation. Instead, the court should follow traditional rules of statutory construction and determine that "shoulder" should have a narrow construction, to benefit workers, and if the Legislature is dissatisfied, the Legislature will act. It is not the court's duty or role to add words to a statute which do not exist, nor to fix problems it did not create.

CONCLUSION

Plato, Aristotle's teacher, once said that, "[t]he measure of a man is what he does with power." In reaching a decision in this case, Claimant implores the court to think about the thousands of Iowa workers and their families, now and in the future, whose lives will be impacted by the court's decision. It is not the court's job to do the dirty work of the Legislature by

minimizing workers' entitlements further than the law clearly dictates. If the Legislature wants to minimize entitlements further, let it clearly speak. Until then, the court should find that Iowa Code section 85.34(2)(n) is ambiguous, and as a result, "shoulder" means "shoulder joint/glenohumeral joint". Since Claimant's permanent injury is found proximal to the glenohumeral joint, it should be determined to be compensable under Iowa Code section 85.34(2)(v) (2017).

CERTIFICATE OF COSTS

Claimant certifies that there were no costs incurred for printing or duplicating paper copies of briefs due to the EDMS filing system.

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 Times New Roman in size 14 font and contains 6,443 words excluding parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1)(table of contents, authorities, statement of the issues, certificates do not count).

/s/ Jennifer M. Zupp

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of September, 2021, I electronically filed this document with the Clerk of the Supreme Court using the Appellate EDMS system, which will send notification of such filing to the following:

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