IN THE SUPREME COURT OF IOWA

Appeal No. 21-0777
Iowa Division of Workers' Compensation 5066270

ROSA CHAVEZ,
Claimant/Petitioner/Appellant
v.
MS TECHNOLOGY, LLC and WESTFIELD INSURANCE COMPANY,
Defendants/Respondents/Appellees

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

HONORABLE DISTRICT COURT JUDGE SARAH CRANE, *presiding*

APPELLANT'S FINAL BRIEF

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of October 2021, I electronically filed the foregoing 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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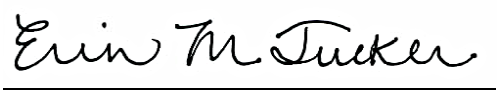

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STATEMENT OF ISSUE PRESENTED FOR REVIEW

The primary issue in this is case is whether the District Court erred in holding that Claimant's rotator cuff injury was a "shoulder" injury under the newly enacted Iowa Code section 85.34(2)(n) (2017), rather than a whole-body injury under Iowa Code section 85.34(2)(v) (2017). The remaining issues hinge on a determination of this primary issue.

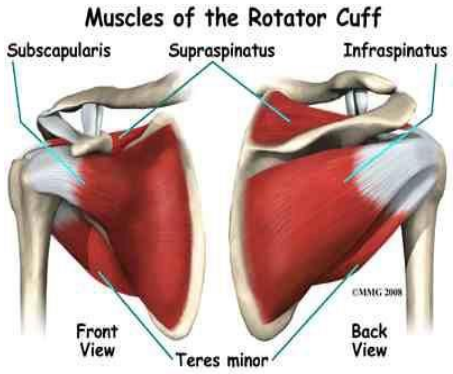
ROUTING STATEMENT

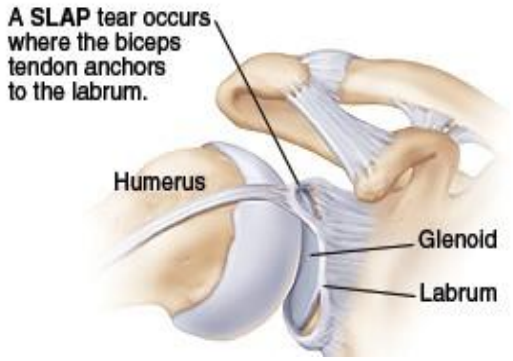
This case should be retained by the Iowa Supreme Court because it presents substantial issues of first impression regarding amendments to Iowa's Workers' Compensation Act in 2017.[1] As detailed in the brief below, interpretation of the 2017 legislative changes is an important issue effecting many pending and future cases. Iowa R. App. P. 6.1101(2)(c),(d).

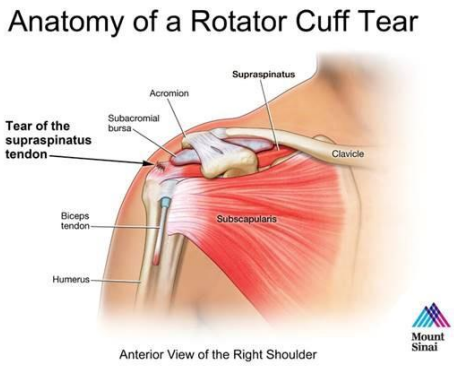
Primarily, this case presents the Iowa Supreme Court with an opportunity to answer a simple, but extremely important question: "What is a shoulder?" In 2017, the Iowa Legislature amended Iowa Code section 85.34(2) to add a "shoulder" to the list of "scheduled member" injuries for which workers' compensation benefits are arbitrarily limited. Iowa Code §85.34(2)(n) (2017). The Legislature did not define the word "shoulder". The new "shoulder" section states, "[f]or all cases of permanent partial disability compensation shall be paid as follows: (n) For the loss of a shoulder, weekly compensation during four hundred weeks." Iowa Code §85.34(2)(n) (2017).

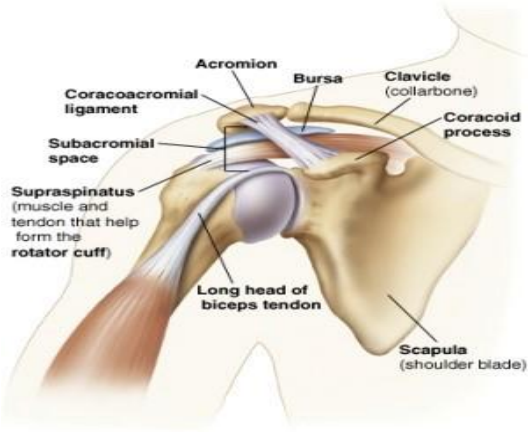
[1] This case was decided at the agency level by incorporation with Deng v. Farmland Foods, File 5061883 (Arb. Dec., Feb. 25, 2020); reversed Deng v. Farmland Foods, File No. 5061883 (App. Dec., Sept. 29, 2020), affirmed Deng v. Farmland Foods, CVCV041545 (Crawford Co. Dist. Court, May 21, 2021) (on appeal 21-0760). As such, parts of the Deng brief are incorporated herein.

As a result of this amendment, parties to workers' compensation claims in Iowa involving permanent damage to structures surrounding the area of the shoulder joint disagree as to the meaning of the word. And, rightly so. As the photos below show, the shoulder area is a complex part of the human body.









Under Appellant's (hereinafter "Claimant") proposed, bright-line definition of "shoulder", only permanent injuries which are located at or within the "shoulder joint", also called the "glenohumeral joint," would be "shoulder" injuries. As depicted above, the glenohumeral joint is where the ball of the humeral head, which is the arm bone, meets with the socket, which is the glenoid. Claimant's interpretation of scheduled "shoulder" injuries

would include, but not be limited to, injuries like labral tears, glenoid tears, bicep tears and glenohumeral joint instability. It would not include a rotator cuff injury because every rotator cuff muscle attaches proximally-to the glenohumeral joint, as depicted in visuals above.

By contrast, Appellees (hereinafter Defendants) contend that "shoulder" should be given a very broad meaning to include not only injuries to or within the glenohumeral joint, but also, permanent injury to structures located proximal to (closer to the trunk) the glenohumeral joint, such as rotator cuff tears, so long as the impact of the damage to the proximal structure is upon the function of the glenohumeral joint. As is evident from the visuals above, Defendants' interpretation means a "shoulder" injury can extend all the way to the spine since the infraspinatus muscle attaches to the scapula, which is next to the spine and forms a large part of the posterior thoracic cage. Accordingly, the parties' interpretations could not be more opposed.

The difference in classification of an injury is important in workers' compensation claims because, generally speaking, an injured worker whose injury is compensated as a "scheduled member" injury receives less benefits than an injured worker whose injury is compensated under Iowa Code section 85.34(2)(v) (2017). A "shoulder" injury will only get some percentage of 400 weeks of pay, based upon an impairment rating, regardless of any actual

economic impact to the worker. An unscheduled, whole-body injury pursuant to Iowa Code section 85.34(2)(v), however, is eligible not only for payment for the functional loss from the injury (i.e., the impairment rating) but also, additional compensation if the employee does not return to work earning the same or greater wages. See Iowa Code §85.34(2)(v) (2017). Accordingly, proper classification of any injury in workers' compensation poses real-world financial concerns, not only for the injured worker and the worker's family, but also, society as a whole because it is often society, in the form of charity, social welfare or compounded suffering, which picks up the pieces left behind from injured, terminated employees.

Claimant prevailed on this purely legal issue at the Arbitration level. Arb. Dec., p.13. The primary rationale of the Deputy Commissioner was that Claimant's injury was located proximally-to the glenohumeral joint, and therefore, it was an unscheduled injury under Iowa Code section 85.34(2)(v) (2017). Arb. Dec., p. 13.

On intra-agency appeal, the Commissioner agreed the "shoulder" statute was ambiguous but reversed the Deputy Commissioner's finding that Claimant's injury was an unscheduled injury. The Commissioner reasoned that even though Claimant's injury is proximal to the glenohumeral joint, because the rotator cuff is "important to" the function of the glenohumeral

joint, "excluding everything but the glenohumeral joint itself would lead to the absurd result of excluding injuries that are and have been commonly considered shoulder injuries." Deng Appeal Dec., p. 10 (9/28/20). Unlike in Deng, Claimant here also suffered a labral tear and a subacromial decompression. The Commissioner concluded that both of these conditions were either "closely entwined with the glenohumeral joint" or "crucial to the proper functioning of the joint" so that both were considered scheduled "shoulder" conditions. App. Dec., p. 4-5.

The parties filed cross-appeals to the Polk County District Court, each essentially arguing the same as they had below. The district court affirmed the result of the Commissioner's appeal decision. Ruling on Petition for Judicial Review, p. 32 (5/21/21).

This case should be retained by the Supreme Court so that parties to a workers' compensation case involving injuries within and around the shoulder joint know how to evaluate, litigate and resolve those cases, and for carriers and self-insureds, how to set reserves for them, and for deputies, the Commissioner, and courts, how to decide them. Until this issue is firmly decided, parties to "shoulder area" workers' compensation cases in Iowa will continue to have difficulty resolving them, which means more "shoulder area" cases have to be litigated to preserve error. This has created uncertainty for

all and will burden the system needlessly until addressed by the Supreme Court. Even the Commissioner acknowledged that a broad interpretation would maintain uncertainty and result in increased litigation. Deng Appeal Dec., p. 10. No one wants more litigation if less-litigation is possible. Claimant offers the Court a reasonable, scientifically based, policy-based, clear and bright-line definition while Defendants will struggle to define "shoulder" with their proposal. A decision directly from the Iowa Supreme Court would quickly solve this mounting and looming problem in the Iowa workers' compensation system.

STATEMENT OF THE CASE

This case involves an admitted work injury sustained by Claimant on February 5, 2018. There is no dispute Claimant sustained a permanent injury to some part of her body, but the parties disagree whether that injury is limited to her "shoulder" under Iowa Code section 85.34(2)(n) (2017) or whether Claimant's injury is an unscheduled, whole-body injury. Next, if Claimant's injury is unscheduled, is she entitled to an industrial disability analysis, in light of other legislative changes to Iowa Code section 85.34(2)(v) (2017)? Lastly, *in the alternative*, if Claimant's injury was considered a "shoulder" injury, does the simultaneous injury to her arm entitle her to industrial disability benefits under Iowa Code section Iowa Code §85.34(2)(t) (2017)?

STATEMENT OF FACTS

The Order on Petition for Judicial Review accurately summarizes the facts of this case as follows:

> Petitioner/Workers' Compensation Claimant Rosa Chavez sustained a work injury on February 5, 2018 while employed by MS Technology. She heard a pop and felt immediate pain in her right shoulder while wringing out a mop when the bucket's wringer system was broken. Chavez saw Dr. Peterson at Capital Orthopedics and was diagnosed after MRI with a "full thickness rotator cuff tear that has retracted to the level of the glenoid, severe AC arthrosis, tendonitis and tearing of the biceps tendon." (JE2-0042). Dr. Peterson recommended a shoulder arthroscopy with rotator cuff repair, biceps tenotomy, subacromial decompression, and distal claviculectomy." (Id.). Surgery was performed on 7/11/2018. (JE5-0069-70). The following procedures were performed: "Right shoulder arthroscopy with arthroscopic repair of the rotator cuff tendon of the supraspinatus, infraspinatus, and subscapularis tendons; extensive debridement of the labrum, biceps tendon, and subacromial space with biceps tenotomy, subacromial decompression," (JE5-0069). Dr. Peterson placed Chavez at MMI on 11/8/2018. (JE2-0057). He opined she had a permanent partial impairment of 6% in the right upper extremity. (Id.) Chavez obtained an IME from Dr. Bansal, who opined that Chavez "incurred an acute on chronic injury of her right shoulder and described it as "resulting in an acute injury to the labrum, rotator cuff and attached muscles." (CL1-0009). Dr. Bansal agreed with Dr. Peterson's identification of 11/8/2018 as the date of maximum medical improvement and placed Chavez at a 10% upper extremity impairment, which he stated is equal to a 6% impairment of the body as a whole. (CL1-0008). Chavez filed a workers' compensation claim alleging injuries to her "right shoulder, neck and right upper extremity." The Parties At hearing, the primary dispute was whether Chavez's injury resulted in an unscheduled industrial disability or a scheduled member injury to Chavez's shoulder, in light of 2017 amendments to the workers' compensation code at Iowa Code §§85.34(2)(n) that identify the "shoulder" as a scheduled member.
>
> After Arbitration Hearing, a Deputy Commissioner found an unscheduled injury to the body as a whole but limited recovery to a

> functional impairment rating after concluding Chavez had returned to work for the same or greater pay. MS Technology appealed and Chavez crossappealed [sic]. On Appeal, the Iowa Workers' Compensation Commissioner concluded Chavez's injury was a "shoulder" injury and limited to recovery based on functional loss of the scheduled member body part pursuant to Iowa Code §85.34(2)(n). The Commissioner issued a decision in Mary Deng v. Farmland Foods, File 5061883 (Arb. [sic] Dec., Sept. 29, 2020) on the same issue and incorporated its analysis and ruling in Deng into its ruling in this case. The Commissioner applied Dr. Bansal's 10% upper extremity impairment rating.
>
> Petitioner sought judicial review, asserting the injury should be treated as an unscheduled injury and, in the alternative, that Chavez suffered a combination of two injuries resulting in a body as a whole injury.

Order on Judicial Review, p. 1-3.

On Judicial Review, the parties submitted briefs and presented oral argument. See Transcript, 3/5/21. Like the Deputy Commissioner and Commissioner, the district court found, "the legislature's use of the word 'shoulder' is ambiguous." Order on Judicial Review, p. 5. However, because the district court felt that the legislative intent was to add injuries to the "shoulder structure" as scheduled member injuries, it affirmed the Commissioner's finding that Claimant's injury was a scheduled member "shoulder" injury only. Order on Judicial Review, p. 10. The merits of the remaining issues were not addressed. Claimant timely filed an appeal on May 28, 2021. No cross appeal was filed.

ARGUMENT AND AUTHORITIES

I. CLAIMANT'S INJURY IS A WHOLE-BODY INJURY UNDER IOWA CODE SECTION 85.34(2)(v)

1. Claimant Preserved Error

Claimant argued at the Arbitration level that her injury was a whole-body injury. See Claimant's Post-Hearing Brief, p. 4, 11/15/19. Claimant also briefed this issue in her intra-agency appeal briefs. See Claimant's Appeal Brief, p. 4-5, 5/28/2020; Claimant's Brief in Response to the Brief of Amicus Curiae Iowa Association of Business and Industry, p. 3, 9/23/20. On Judicial Review, Claimant also briefed the argument that her injury was a whole-body injury. See Petitioner's Brief on Petition for Judicial Review, p. 8, 1/8/21. Claimant also raised the issue during oral argument before the district court. See Transcript, p. 9, 3/5/21. Accordingly, error has been adequately preserved.

2. No Deference Should be Afforded to the Agency in its Interpretation of Law

The Iowa Supreme Court has repeatedly held that "the interpretation of workers' compensation statutes and related case law has not been clearly vested by a provision of law in the discretion of the agency. Ramirez Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 769-70 (Iowa 2016); Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842, 850 (Iowa 2009)(citing Lakeside

Casino v. Blue, 743 N.W.2d 169, 173 (Iowa 2007)); Meyer v. IBP, Inc., 710 N.W.2d 213, 219 (Iowa 2006). Accordingly, the Supreme Court should not defer to the Commissioner's interpretation of the law and may correct any errors by substituting its own judgment for that of the district court.

3. The Term "Shoulder" is Ambiguous

When interpreting a statute, the Court's ultimate goal is to determine legislative intent. Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 770 (Iowa 2016). The Court looks to the language used by the legislature, rather than what the legislature might have said. Id. When there is no statutory definition, the court considers the statutory terms in context and gives each its ordinary and common meaning. Id. If reasonable people could disagree as to that meaning, the statute is ambiguous. Id. Ambiguity may also arise due to uncertainty concerning the meaning of particular words or upon examination of all the statute's provisions together in context. Id. **The Commissioner properly determined that Iowa Code section 85.34(2)(n) is ambiguous**. Deng App. Dec., page 5. He recognized that "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." Id. (citing Prewitt v. Firestone Tire & Rubber Co., 564 N.W.2d 852, 854 (Iowa Ct. App. 1997). He acknowledged that the Legislature's past use of

generic language had required the agency and courts to determine the specific meaning of words, such as finger versus hand, hand versus arm, and leg versus whole-body injuries. Deng App. Dec., p. 5 (citing Lauhoff Grain Co. v. McIntosh, 395 N.W.2d 834 (Iowa 1986), Dailey v. Pooley Lbr. Co., 10 N.W.2d 569 (Iowa 1943) and Miranda v. IBP, File No. 5008521 (App. Dec., Aug. 2, 2005)). As a result, he found that while it would be nice to give shoulder an "ordinary" meaning, there is "no such agreed upon ordinary meaning. Instead, 'shoulder' is a *legal term of art and susceptible to more than one reasonable interpretation*." Deng App. Dec., p. 5. (Emphasis added).

Unlike Deng, **the district court here agreed the term "shoulder" was ambiguous**. Order on Judicial Review, p. 5.[1] However, applying the Meriam Webster definitions for "shoulder" and "rotator cuff" the court concluded that the definitions indicate the "ordinary interpretation of the word shoulder is the complex structure that includes the joint, tendons and muscles." Order on Judicial Review, p. 6. This general, bare-bones analysis is inconsistent with historical precedent used when determining whether or not a scheduled member applies. "It is the anatomical situs of the permanent injury or

[1] This is in stark contradiction to the Deng Judicial Review Ruling which concluded, "[t]he Court finds no ambiguity from the general scope and meaning of the statute when all its provisions are examined. Nor does the Court find ambiguity in the meaning of any particular words in §85.34(2)(n)." Deng, p. 27.

impairment which determines whether the schedules in section 85.34(2)(a)-(t) are applied." Lauhoff Grain Co. v. McIntosh, 395 N.W.2d 834 (Iowa 1986). This proposition is nothing new in the area of Workers' Compensation. It is also not novel that in some situations, compensability can be expanded off the schedule when the evidence shows permanent damage to a structure or bodily process which is not located within a body part enumerated on the schedule. These principals are long-standing, well-recognized, and should have been followed in this case.

The Commissioner has acknowledged numerous times that it is the situs of the injury which controls whether the injury is scheduled or unscheduled. See Peterson v. Parker Hannifin Corp., File 5043257, p. 2 (App. Dec., Sept. 24, 2015). In Peterson, the Claimant had a low back injury which resulted in leg impairment due to damage to the sciatic nerve. Id. The Commissioner ruled that, "[i]t is the anatomical situs of the permanent injury or impairment which determines whether the schedules in section 85.34(2)(a)-(t) are applied" and as such, declared the injury to be an industrial one rather than a leg one because the sciatic nerve was damaged within the lumbar spine. Id. The Commissioner did not hold that the sciatic nerve was "important to" leg function or "intertwined with" leg function, and so therefore it was a leg injury. In yet another case, Dickess v. Heartland Inns of America, LLC, the

issue was whether or not a leg injury which resulted in gait problems became a "whole-body" claim, or not. The Deputy Commissioner held that it is the situs of the permanent injury which controls, rather than the situs of pain or impairment which governs whether or not to use the schedules. File 5034433, p. 7 (Arb. Dec., Sept. 9, 2011).

In Barton v. Nevada Poultry Co. 110 N.W.2d 660, 661 (Iowa 1961), the Iowa Supreme Court clarified that when an injury to a scheduled member develops into an injury outside of the scheduled member, namely, the central nervous system, the injury is no longer compensated by the schedule. Id. at 663.

Furthermore, a long history of cases has created a definition of "shoulder" as the "glenohumeral joint" and everything distal to the joint is the "arm" and everything proximal to the joint is the "body as a whole." See Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995); 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., 233 Iowa 758, 10 N.W.2d 569 (1943); Nazarenus v. Oscar Mayer & Co., II Iowa Industrial Comm'r Report 281 (App. February 24, 1982); Godwin v. Hicklin G. M. Power, II Iowa Industrial Comm'r Rep 170 (App. August 7,

1981); Miranda v. IBP, File No. 5008521, (App. Dec. Aug. 2, 2005); See also, Haffner v. Electrical Systems, File No. 955542 (App. Dec. Feb. 25, 1994).

The legislature "is presumed to know the usual meaning ascribed by the courts to language and to intend that meaning unless the context shows otherwise." State v. Wilson, 287 N.W.2d 587, 589 (Iowa 1980); State v. Jones, 298 N.W.2d 296, 298 (Iowa 1980) (emphasis added).

Here, Claimant contends that the "shoulder" was intended by the Legislature to mean the glenohumeral or shoulder joint, where the ball of the humeral head meets the socket, called the glenoid as established by case law. Since Claimant's rotator cuff tendons are proximal to the glenohumeral joint, the injury should be classified as a whole-body injury, per Dailey v. Pooley Lumber Co. and Lauhoff Grain Co v. McIntosh. Since it is injury to the tendons which impact articulation of the scheduled member, i.e. the shoulder, it is the tendons which determine the classification of the injury as unscheduled. By looking only at the resulting loss of function, the district court erred in its application of the relevant precedent and should be reversed.

Since the Commissioner and the district court expressly found the term "shoulder" is ambiguous, the court erred by not interpreting the term in Claimant's favor.

4. Ambiguous Statutes Should Be Construed in Favor of the Injured Worker

The Iowa Supreme Court has reiterated for decades that the purpose of Iowa's Workers' Compensation statutes is to benefit the injured worker. Griffen Pipe Products Co. v. Guarino, 663 N.W.2d 862, 864-865 (Iowa 2010); IBP, Inc. v. Harker, 633 N.W.2d 322, 325 (Iowa 2001); Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 14 (Iowa 1993); Bier Glass Co. v. Brundige, 329 N.W.2d 280, 283 (Iowa 1983). As a result, in cases of ambiguity, it has been the Court's longstanding policy to "broadly" and "liberally" construe workers' compensation statutes in favor of the injured worker. Id.; Gregory v. Second Injury Fund of Iowa, 777 N.W.2d 395, 399 (Iowa 2010). While this is not a *carte blanche* rule, of course, it is one the Legislature was surely aware of and as such, should be followed by the Court, if possible, while keeping in mind the object sought to be accomplished, the mischief to be remedied, and the purpose served by the statute. Bier Glass Co., 329 N.W.2d at 283 (citing City of Mason City v. Public Employment Relations Board, 316 N.W.2d 852, 854 (Iowa 1982) and Peffers v. City of Des Moines, 299 N.W.2d 675, 678 (Iowa 1980)). If a liberal construction of a statute would lead to an "absurd" result, the Court should of course avoid the construction if a better one is available. Gregory, 777 N.W.2d at 399. However, where the result of a particular

construction is rational and beneficial for injured workers, then it is a construction which should be adopted by the Court.

The Legislature's silence over the years regarding the Court's practice of liberally and broadly construing other scheduled member terms like "finger," "hand," "arm," and "leg" justifies this Court's continued application of the doctrine. If the Legislature was dissatisfied by the Court's history of finding the "scheduled member" terms to be ambiguous, or the Court's procession to construe them liberally in favor of Claimants, the Legislature has had the power to correct the practice, but it has not. Richards v. Anderson Erickson Dairy Co., 699 N.W.2d 676, 682 (Iowa 2005) (holding statutes owe their existence to those who enact them and those who choose not to change them); Iowa Farm Bureau Federation v. Environmental Protection Com'n, 850 N.W.2d 403, 433-34 (Iowa 2014) (recognizing that the legislature is presumed to know the prior construction of terms of a statute as well as prior construction of the terms).

The Commissioner here improperly relied upon Legislative Study bills to clarify the noted ambiguity in Iowa Code section Iowa Code §85.34(2)(n). Using the Study Bills as determinative information was improper, because the study bills could be used to support a finding for both sides as set out in prior briefing. See Petitioner's Brief on Petition for Judicial Review, p. 13.

However, the Commissioner did not interpret the Study Bills in favor of the injured worker. See Deng App. Dec., p. 6.

Under the competing definitions advanced in this case – shoulder joint versus anything else which impacts the shoulder joint, the former is the most-favorable to workers. Such an interpretation means that workers whose injuries are located proximally-to the glenohumeral joint will remain eligible for industrial disability compensation if they are not offered, or return to, work at the same or greater pay. See Iowa Code section 85.34(2)(v) (2017). Meanwhile, workers whose injuries are within the glenohumeral joint will be subject to the schedule for a "shoulder" injury. This is a rational, balanced result which by itself justifies adoption of Claimant's interpretation over Defendants' interpretation.

5. A Narrow Interpretation of "Shoulder" Reduces the Need for Litigation and Strikes Balance Within the System

It is clear from the Legislative discussion cited by Defendants that the Legislature was interested in reducing the amount of litigation. Claimant's interpretation of "shoulder" achieves this goal because it provides a clear, bright line regarding which injuries fall within the "shoulder" schedule. By defining shoulder as the glenohumeral joint, claims adjusters can adjust claims quickly, thereby minimizing their odds of litigation. As depicted in the visual above, there is almost no specialized skill or analysis involved in determining

whether a permanent injury's situs is proximal to the glenohumeral joint or not. The majority of cases could be classified following a standard MRI because it will typically show the location of the pathology which is responsible for the problems. Many times, the name of the diagnosis alone will be enough to justify payments as a "shoulder" or "whole-body" claim. In a system which can be inherently complex, classifying an injury for compensability purposes should be made simple so that adjusters can voluntarily commence accurate payments. Defendants' and the court's construction ensure adjusters will struggle to determine whether an injury is scheduled or unscheduled. Calling a different body part a "shoulder" based upon whether it is "important to" or "essential to" the shoulder joint invites speculation and requires additional expert opinions. This will delay resolution of cases and increase costs. The Commissioner admitted in the Deng Appeal Decision that defining shoulder more broadly than just the glenohumeral joint would "result in temporary uncertainty as Claimants litigate injuries to the various muscles, tendons, bones and surfaces surrounding the glenohumeral joint." Deng Appeal Dec., p. 10. Instead of focusing on the site of the permanent injury, the Commissioner's analysis requires parties to start gathering evidence on the "purpose" of an injured proximal body part relative

to the shoulder joint and evidence regarding how much the injured, proximal body part may or may not impact the shoulder joint's function.

A bright line definition avoids these problems while still accomplishing the goal of a reduction in the number of litigated claims, avoids expensive expert reports, allows adjusters to adjust claims quickly, and protects workers' rights to a fair, rather than arbitrary, recovery.

Lastly, Claimant's interpretation strikes balance within the system. Review of the other legislative changes (discussed further below) made in conjunction with the addition of Iowa Code section 85.34(2)(n) supports a finding that a narrow construction of the word "shoulder" was contemplated by the Legislature. The Legislature protected employers' primarily-financial interests elsewhere in Chapter 85 when it made changes to the scheduled member subsection. As such, the district court erred by failing to adopt Claimant's interpretation.

II. CLAIMANT IS ENTITLED TO INDUSTRIAL DISABILITY BENEFITS DESPITE THE AMENDMENT TO IOWA CODE SECTION 85.34(2)(v)

1. Claimant Preserved Error

Claimant argued at the Arbitration level that she was entitled to an industrial disability analysis because she did not "return to work earning the same or greater wages" as articulated in the newly enacted Iowa Code section

85.34(2)(v) (2017). See Claimant's Post-Hearing Brief, p. 12. Claimant also briefed this issue in her intra-agency appeal brief. See Claimant's Appeal Brief 14. On Judicial Review, Claimant also briefed the argument that Claimant was entitled to industrial disability because the exclusionary paragraph in Iowa Code section 85.34(2)(v) (2017) did not apply. See Petitioner's Brief on Petition for Judicial Review, p. 19. The issue was also discussed during oral argument before the district court. See Transcript, p. 10.

Claimant argued at the Arbitration level, *in the alternative*, that she was entitled to an industrial disability analysis because of simultaneous injury to her shoulder and right arm. See Claimant's Post-Hearing Brief, p. 10, 11/15/19. Claimant also briefed this issue in her intra-agency appeal brief. See Claimant's Appeal Brief, p. 12, 5/28/2020. On Judicial Review, Claimant also briefed the argument that simultaneous injuries to her right shoulder and arm entitle her to industrial disability benefits. See Petitioner's Brief on Petition for Judicial Review, p. 15, 1/8/21. Claimant also raised the issue during oral argument before the district court. See Transcript, p. 10, 3/5/21.

The merits of both issues were largely disregarded due to the Commissioner, and later District Court, finding that Claimant's injury was a scheduled member injury only. Accordingly, error has been adequately preserved.

2. The Exclusionary Paragraph of Iowa Code Section 85.34(2)(v) (2017) Does Not Apply

In addition to the amendments discussed above, the legislature created new language within the "catch-all provision" of Iowa Code section 85.34(2)(v) (2017). The applicable portion of the statute states:

> If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive **the same or greater salary, wages, or earnings** than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity.

Iowa Code §85.34(2)(v) (2017). (Emphasis added).

It is undisputed that Claimant sustained a work injury on February 5, 2018. Subsequent to her work injury, she did return to work for Respondent. However, the exclusionary paragraph of Iowa Code section 85.34(2)(v) (2017) above is **not** triggered because she never returned to work at "the same or greater salary, wages, or earnings…"

This issue was briefly addressed in another agency decision in Smidt v. JKB Restaurant, LC, File No. 5067766 (Arb. Dec., May 6, 2020). The Deputy held that claimant was entitled to pursue industrial disability benefits because he "earned less **per week** at the time of trial than he did at the time of his injury…". (emphasis added). The same is true here. Claimant earned less **per**

week at the time of trial than she did just prior to her injury, as summarized in the prior briefing. See Claimant's Post-Hearing Brief, p. 13-15.

The Commissioner has subsequently addressed this issue in the case of McCoy v. Menard, Inc., File No. 1651840.01 (App. Dec., Apr. 9, 2021) (final agency decision – not being appealed). In McCoy, the Commissioner stated as follows:

> Unfortunately, the Iowa Legislature provided no guidance as to how or when to measure whether an employee is receiving or being offered the same or greater salary, wages, or earnings than what he or she was receiving at the time of the injury. The Legislature did not indicate when this comparison is supposed to take place, nor did the Legislature indicate how many weeks are to be considered in this comparison. Unlike Iowa Code section 85.36, which provides the number of weeks that are to be used when computing a claimant's rate of compensation, there is no instruction in section 85.34(2)(v) for how to take the post-injury "snapshot" of a claimant's salary, wages or earnings. There is also no indication from the Legislature as to whether to replace a week that does not reflect the employee's customary earnings, such as what is contained in section 85.36. See Iowa Code section 85.36(6). Id.

The Commissioner held that "…a claimant's hourly wage, considered in isolation, is not sufficient to limit a claimant's compensation to functional disability." Id.

Later, the Commissioner reiterated the McCoy analysis in Vogt v. XPO Logistics Freight, File No. 5064694.01 (App. Dec., June 11, 2021) (final agency decision - not being appealed), where he stated that, "[g]iven the lack

of guidance contained in this new provision of Iowa Code section 85.34(2)(v), I conclude there is an ambiguity in the statute pertaining to when and how claimant's post-injury salary, wages, or earnings are supposed to be measured." The Commissioner also stated that, "[f]rom the standpoint of logic and fairness, the post-injury 'snapshot' of claimant's salary, wages or earnings should occur at the time of the hearing, just as industrial disability is measured as the evidence stands at the time of the hearing." Id. However, the specific question here, i.e. how many weeks and hours to consider in the "snapshot" was not answered in Vogt.

The Commissioner makes clear application of the new language contained within Iowa Code section 85.34(2)(v) is frustrated by the fact that the legislature did not articulate how "the same or greater salary, wages, or earnings" was to be calculated or determined. The statute is also silent with regard to any particular reason an employee might earn a lesser salary, wage, or earnings after an injury. Applying the statute "broadly and liberally" in favor of the injured worker supports evaluating a comparison of the worker's gross average weekly earnings before the injury to those following the injury. Furthermore, reading into the statute a requirement (where one does not exist) that an employee must earn less ***because of*** the work injury is not a "broad and liberal" interpretation in favor of the injured worker. It is reasonable to

average out Claimant's before and after earnings to determine whether or not the exclusionary provision has been triggered. This approach is consistent with other portions of Chapter 35, using average weekly wage to determine the weekly rate of benefits, for example. See Iowa Code §85.36.

Here, it is undisputed that Claimant's gross average weekly earnings before her work injury was **$693.27**. (See Hearing Report, dated 9/17/19). Using only the 14 weeks following her work injury (detailed in prior briefing), Claimant's average weekly earnings equal only **$663.76**. **This amounts to a reduction in earnings of $29.51 per week**.

When examining the *entirety* of Claimant's available weekly earnings (detailed in prior briefing) following her work injury, the average earnings remains lesser than those prior to her work injury- even though her hourly wage increased at the end of 2018. Overall, ***she earned less, when averaged, after her work injury***. Her overall average earnings during the period of 2/24/18 through 7/27/19 equal **$649.12** per week.[1] **This is a reduction of $44.15 per week when compared to her pre-injury average weekly wage ($693.27)**.

[1] Angela Umthun, Respondent's Quality Control Director, testified at Hearing. Ms. Umthun admitted she was unaware of Ms. Chavez's average weekly earnings, and she had not compared any of Ms. Chavez's pre-injury earnings to her post-injury earnings. (Tr. 49:11-50:13).

Because Claimant sustained an unscheduled work injury, and she did not return to work earning the same or greater salary, wages, or earnings, *as of the time of hearing*, she is entitled to a traditional industrial disability analysis when Iowa Code section 85.34(2)(v) (2017) is properly interpreted in favor of the injured worker.

3. Simultaneous Injury to Claimant's "Shoulder" and "Arm" Entitle Her to an Industrial Disability Analysis

The Commissioner erred by concluding Claimant did not sustain a simultaneous right arm injury coupled with a scheduled "shoulder" injury.

Iowa Code section 85.34(2)(t) (2017) states:

> The loss of both arms, or both hands, or both feet, or both legs, or both eyes, or any two thereof, caused by a single accident, shall equal five hundred weeks and shall be compensated as such; however, if said employee is permanently and totally disabled the employee may be entitled to benefits under subsection 3.

There is no mention of "shoulder" in Iowa Code section 85.34(2)(t) so if an injured worker sustains a "shoulder" injury along with an injury to an arm, hand, foot, leg or eyes then Iowa Code section 85.34(2)(t) does not apply because it is not a combination of "any two thereof" injuries. Therefore, the catch-all provision in Iowa Code section 85.34(2)(v) applies, which also known as the industrial disability analysis:

> In all cases of permanent partial disability **other than those hereinabove described** or referred to in paragraphs "a" through

> "u" hereof, the compensation shall be paid during the number of weeks in relation to five hundred weeks as the reduction in the employee's **earning capacity caused by the disability** bears in relation to the earning capacity that the employee possessed when the injury occurred. [1]

Iowa Code §85.34(2)(v) (2017) (emphasis added).

The same conclusion has been reached by the agency when looking at *three* separate scheduled members - it is considered as a body as a whole injury under section 85.34(2)(v) and the permanency evaluated industrially. Martinez v. Pavlich, Inc., File No. 5063900 (App. Dec., July 30, 2020) ("The permanent disability of three separate scheduled members occurring in the same incident entitles a claimant to industrial disability benefits under section 85.34(2)(u) (now section 85.34(2)(v))"); Wallingford v. Atlantic Carriers, File No. 5008405 (Arb. Dec., July 23, 2004) ("Three or more scheduled member injuries in the same incident constitute a body as a whole injury. Subsection 85.34(2)(s) [now 85.34(2)(t)] of the Iowa Code applies only to injuries that involve an injury to two members. Subsection 85.34(2)(u) [now 85.34(2)(v)] is the "catch-all" provision."). See also, Bruce v. Hydecker and Zurich, File No. 5036473 (Arb. Dec., Jan. 10, 2013) ("The work injury in this case involves permanent injuries to three separate scheduled members and thus

[1] Aside from identifying the new paragraph "u," this quoted portion of §85.34(2)(v) remained unchanged in the 2017 amendments.

must be considered as a body as a whole injury and the permanency evaluated industrially").

The only way to "broadly and liberally" interpret the above for the benefit of the injured worker is to conclude that **a simultaneous injury to a "shoulder" and to an arm, hand, foot, leg or eye is to be evaluated under an industrial disability analysis pursuant to Iowa Code section 85.34(2)(v) (2017)**. The Commissioner, and later the District Court, erred by failing to address the merits of this argument.

Claimant suffered a large **bicep muscle tear**, revealed on MRI and confirmed by Dr. Peterson, as a result of her work injury. (JE2-0055-0056). On July 11, 2018, Dr. Peterson performed, among other things, a **biceps tenotomy**. (JE5-0069). The bicep muscle is defined as "the large flexor muscle of the front of the upper arm." Biceps, Definition of Biceps, Merriam-Webster, https://www.merriam-webster.com/dictionary/bicep.

If the shoulder injury was absent, this would clearly amount to (at minimum) an injury to Claimant's upper extremity (arm). See Swanson v. Pella Corporation, File. No. 5055114 (Arb. Dec., Aug. 23, 2017) (bicep tendon tear is an upper extremity injury).

The Commissioner determined it was unnecessary to address the merits of this argument, erroneously concluding that the measurements used by the

doctors to determine Claimant's impairment pertained to range of motion deficits in the "shoulder joint." (Appeal Dec., p. 6). After essentially concluding the "shoulder joint" has no place in the law, the Commissioner relied on its existence to find a way to limit Claimant to **only** the scheduled member "shoulder" and ignore the clear arm injury she also sustained.

The fact is, the treating physician tested Claimant's arm strength as a part of his evaluation to determine her permanent impairment, as well as performed range of motion testing. The Commissioner erroneously "presumed" the strength testing related to Claimant's "shoulder joint" and not her upper extremity. Ultimately, both impairment ratings assigned to Claimant were identified as impairments to her ***upper extremity***.[1]

Since the District Court concluded Claimant suffered a scheduled "shoulder" injury, then it erred by glossing over the clear medical evidence that Claimant also suffered simultaneous injury to her right arm, which makes her work injury and its resulting disability **unscheduled**, pursuant to Iowa Code section 85.34(2)(v). The District Court's failure to apply Iowa Code section 85.34(2)(v) is reversible error.

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[1] The AMA Guides to the Evaluation Permanent Impairment, 5th Ed., do not provide conversions for upper extremity ratings to shoulder ratings. Only conversions to body as a whole exist. Claimant is not appealing the application of Dr. Bansal's rating if only the rating is to be used. The Commissioner's finding of Dr. Bansal's rating superior to Dr. Peterson's is well justified.

CONCLUSION

The record here is clear that the term "shoulder" is ambiguous. The deputy commissioner and the commissioner in two separate cases disagreed as to the meaning of the word. The Legislature opted not to provide additional instruction or definition. The ambiguity should be construed in the injured workers' favor, in accordance with the law. A construction in the injured workers' favor requires applying a narrow definition of "shoulder" to include only the "shoulder joint." Expanding the definition to include "shoulder girdle" or "shoulder structure" is inappropriate. Because the uncontroverted evidence in this case shows Claimant's injury was proximal to her glenohumeral joint, it should be found she sustained a whole-body, unscheduled injury.

Next, the new language in Iowa Code section 85.34(2)(v) (2017) is also ambiguous. A construction in favor of the injured worker requires a finding that averaging wages is an appropriate method for determining whether the exclusionary language applies. Since Claimant's post-injury earnings were lower than her pre-injury earnings, the case should be remanded for an industrial disability analysis.

Lastly, *in the alternative*, the Legislature's failure to amend Iowa Code section 85.34(2)(t) to include the word "shoulder" requires a finding that

simultaneous injuries to an upper extremity and a "shoulder" results in an unscheduled injury.

PRAYER FOR RELIEF

Based upon the foregoing, Claimant prays that the Ruling of the District Court be reversed, and judgment be entered in Claimant's favor with costs taxed to Defendants. Claimant prays for other, consistent relief.

REQUEST FOR ORAL ARGUMENT

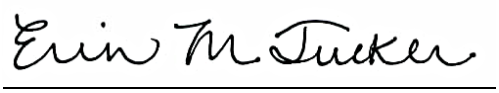
Claimant requests the opportunity for oral argument in this matter.

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 6,697 words excluding parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).



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