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IN THE SUPREME COURT OF IOWA

Appeal No. 21-0777
Polk County CVCV060899
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 REPLY BRIEF

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of November, 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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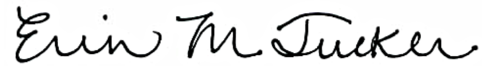

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ARGUMENT AND AUTHORITIES

I. SHOULDER MEANS SHOULDER JOINT

1. The "Shoulder" Statute is Ambiguous

The Iowa Legislature was presumed to know the definitions established in the law at the time of enacting the statute. During the legislative discussion, Representative Carlson referred to the shoulder as one of "our appendices." House Action/Video; Representative Carlson and Representative Olson, Time Stamp 4:25:28 P.M. – 4:26:35 P.M. Clearly, common sense alone tells us that shoulders cannot be categorized as "appendices" like arms, legs, hands, and

feet.[1] This statement is just one example why the legislative discussion cited by Defendant is not helpful to the Court in discerning the legislative intent and how the newly-enacted Iowa Code sections should be interpreted.

The hearing deputy in this case acknowledged that the legislature was aware that **"shoulder" was the glenohumeral joint**, and she therefore assigned it this definition. It is, in fact, a joint – not an appendix or appendage. It is the only joint now listed on the schedule. The deputy cited Second Injury Fund v. Nelson, 544 N.W.2d 258 (Iowa 1995) and Lauhoff Grain v. McIntosh, 395 N.W.2d 834 (Iowa 1986) 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." (Arb. Dec., p. 8). Since Claimant's injuries extended beyond the joint, the deputy properly concluded the injury was an industrial one under section 85.34(2)(v) (2017).

On appeal, the Commissioner agreed that the term shoulder is ambiguous. It is not "clear" as Defendant asserts. The District Court likewise found the statute to be ambiguous, noting the word shoulder "could refer only

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[1] Counsel believes Representative Carlson may have confused "appendices" with "appendages". Appendage is defined as "an external body part, or natural prolongation, that protrudes from an organism's body." Wikipedia, Appendage, October 18, 2021 (https://en.wikipedia.org/wiki/Appendage).

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)." Order on Judicial Review, p. 5. (Emphasis added).

Defendant must concede at this point that the statute is, in fact, ambiguous. Defendant rehearses in-depth legislative discussion which would be unnecessary if the statute were "clear" and unambiguous. Given the obvious ambiguity, the statute should be liberally interpreted in favor of the injured worker.

2. Ambiguous Statutes Should Be Construed In Favor Of the Injured Worker

Claimant understands that this canon of construction is not "without limits." But Claimant's interpretation is a reasonable one. One that was already applied by a reasonable and competent factfinder at the arbitration level. When the courts are faced with two reasonable interpretations, they must adopt the one which favors injured workers the most, in order to honor the beneficial purpose of the Workers' Compensation statutes. Past decisions instruct the court how to resolve equally-reasonable, but competing, arguments – in favor of the injured worker. For example, in Holstein Electric v. Breyfogle, the Iowa Supreme Court had to decide whether an injury to the

wrist was a “hand” or an “arm” injury, under Iowa Code. Upon finding a wrist injury was an injury to the “arm” (the most favorable to claimants), the court reminded Iowans that:

> The legislature enacted the workers’ compensation statutes 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’s beneficent purpose by reading something into it that is not there, or by a narrow or strained construction.

Holstein Electric, 756 N.W.2d 812, 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).

Claimant's interpretation of "shoulder" is equally, if not more, reasonable, and when 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).

3. Claimant's Interpretation Benefits The Injured Worker And Does Not Lead to Absurd Results

Defendant's recitation of the legislative discussion provides an example presented by Representative Johnson of injured worker Rick who sustained a work injury resulting in 90% loss of earning capacity. Representative Johnson explained how (if the statute was not applied broadly and liberally in favor of the injured worker), Rick's compensation could be reduced by a staggering 85 percent (70 weeks compared to 450 weeks). The reduction of benefits proposed by Defendant has a direct and drastic impact on Iowa's injured workers.

It is no surprise that applying the schedule is considered an arbitrary means of compensation. Mortimer v. Fruehauf, 502 N.W.2d 12, 15, 17 (Iowa 1993). When analyzing scheduled-member injuries, no considerations are made for the injured worker's occupation, experience, education, qualifications, etc. On the other hand, those factors **are** evaluated during an industrial disability analysis. Only injuries which do not qualify as

"scheduled" can be analyzed this way. An industrial disability analysis, applied by the courts in Iowa for decades, generally results in greater compensation to injured workers because it is personal to the specific worker and not merely based on an arbitrary formula. Industrial disability gives the worker the best chance at being successful in the competitive labor market. On the other hand, with arbitrary and drastically reduced awards, injured workers are more likely to become unable to work and seek governmental assistance.

The Legislative Discussion cited by Defendant does make one thing clear: The Legislature was interested in limiting litigation and incentivizing employers to retain injured workers. Claimant's interpretation honors this interest because the simultaneous passage of Iowa Code section 85.34(2)(v) incentivizes employers to retain employees who have unscheduled injuries. There is no incentive whatsoever for employers to retain workers with scheduled-member injuries. These workers have no avenue under the law to receive any additional compensation for their injuries when they are terminated.

Furthermore, a clear, bright-line rule results in less litigation. The Commissioner concluded that certain parts which are "important to" the function of the shoulder joint should be captured by the schedule. This

interpretation will lead to absurd results and significant litigation and will require expensive medical expertise to discern what is "important to" the function of the shoulder. On the other hand, the parties can easily discern the difference between an injury which is proximal (body side) to the glenohumeral joint, like a rotator cuff tear, and an injury which is entirely within the glenohumeral joint, like a labral tear.

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

The *AMA Guides to the Evaluation of Permanent Impairment* do not align exactly with Iowa Code. For example, the *AMA Guides* refer to the Iowa Code scheduled-members "hand", "arm", and (now) "shoulder" as all parts contained within the upper extremity, while the law evaluates each independently and based on its own interpretation. The hip is a comparable example. The *Guides* provide for rating the hip in the "lower extremities" category, but Iowa law does not consider the "hip" to be a "lower extremity" or "leg" injury just because the *Guides* do. Neither the law, nor the *Guides*, were written for the purposes of one another. As such, the Court should not rely on the *Guides* as persuasive interpretation of the law.

CONCLUSION

The record here is clear that the term "shoulder" is ambiguous. The deputy commissioner and the commissioner in two separate instances

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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