IN THE SUPREME COURT OF IOWA

No. 21-0777

ROSA CHAVEZ,
Claimant-Petitioner-Appellant,

vs.

MS TECHNOLOGY, LLC and WESTFIELD INSURANCE COMPANY,
Defendants-Respondents-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY,
HONORABLE JUDGE SARAH CRANE

APPELLEES' FINAL RESPONSE BRIEF

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CERTIFICATE OF FILING

I, Lori N. Scardina Utsinger, an attorney for Defendants-Respondents-Appellees herein, hereby certify that the foregoing Appellees' Final Response Brief was filed with the Iowa Supreme Court by electronically filing the same on November 2, 2021, pursuant to Iowa R. App. P. 6.901(1)(b).

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PROOF OF SERVICE

I, Lori N. S. Utsinger, Attorney for Defendants-Respondents-Appellees herein, hereby certify that the foregoing Appellees' Final Response Brief was served upon the attorney of record listed below by electronic filing and electronic delivery to the parties via the EDMS system on November 2, 2021, pursuant to Iowa R. App. P. 6.901(1)(c) and Iowa R. App. P. 6.701(3).

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Clark v. Vicorp Rests., Inc., 696 N.W.2d 596, 603-04 (Iowa 2005)

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STATEMENT OF THE CASE

This case proceeded to Arbitration Hearing on October 1, 2019 in Des Moines, Iowa before the honorable Deputy Commissioner Michelle McGovern. The primary disputed issue in the matter was the nature and extent of any permanent partial disability benefits. More specifically, the parties disputed over whether permanency should be paid based on the shoulder scheduled member or industrial disability.

On February 5, 2020, the Deputy filed an Arbitration Decision, holding that Appellant[1] was entitled to an industrial disability and awarded her functional impairment as she remained working with her employer at same or greater wages. MS Technology filed for intra-agency appeal of the Deputy Commissioner's Arbitration Decision. The Appeal Decision was issued on September 20, 2020 which reversed the Deputy Commissioner's Arbitration Decision and instead determined that Chavez's injury was to a shoulder scheduled member.

Chavez then filed a Petition for Judicial Review. On April 29, 2021, the Honorable Sarah Crane issued a Decision affirming the Commissioner's

[1] Appellant is hereinafter referred to in this Brief as "Chavez" and the Appellee is hereinafter collectively referred to in this Brief as "MS Technology."

appeal decision in that Chavez's injury was to her shoulder as a scheduled member.

Chavez then filed this pending appeal before the Iowa Supreme Court.

ROUTING STATEMENT

Pursuant to Iowa Rule of Appellate Procedure 6.1101(2)(c), (d), MS Technology respectfully requests that the Iowa Supreme Court retain this matter as it relates to the obligations under the Workers' Compensation Act. More specifically, this involves a matter of first impression in interpreting the shoulder as a scheduled member pursuant to the July 1, 2017 amendments to the workers' compensation act. Iowa Code §85.34(2)(n) (2017). As discussed in the opposing briefs, the parties greatly disagree as to what constitutes a shoulder under this statute. However, the parties do agree that a decision from the Iowa Supreme Court can provide essential guidance as to the interpretation of the shoulder as a newly designated scheduled member.

STATEMENT OF FACTS

MS Technology does not agree Chavez's Statement of Facts accurately depicts the facts and therefore submit the following additional facts in support of their Brief:

Chavez's Personal and Employment History

At the time of the arbitration hearing, Chavez was 61 years old. (Arb. Hrg. Trans. pg. 8 ln. 15). Also, at the time of the arbitration hearing, she was employed at MS Technology, specifically working in a seed lab as a lab technician. (Arb. Hrg. Trans. pg. 43 ln. 12; Appx. 27). She had been working there for the past 10 to 11 years. (Arb. Hrg. Trans. pg. 13 ln. 18-20; Appx. 26). She had been full-time in this position since approximately 2011. (Arb. Hrg. Trans. pg. 43 ln. 15-18). In this position, she would clean, sweep, mop, and do dishes. (Arb. Hrg. Trans. pgs. 11-12). Dishes are done twice a week. (Arb. Hrg. Trans. pg. 35 ln. 22). There are also various other jobs she would do which include blending bean or corn seeds, preparing test samples, grinding seeds in blenders, breaking corn, cutting beans, punching leaves, peeling beans, pouring beans into envelopes, and placing wooden boxes on racks. (Arb. Hrg. Trans. pgs. 11, 34-35, 44-45; Appx. 27). The job tasks will vary depending on the season. (Arb. Hrg. Trans. pg. 34 ln. 11-13). Job duties will rotate between employees. (Arb. Hrg. Trans. pg. 34 ln 14-16).

She remained an employee of MS Technologies after the work injury. (Arb. Hrg. Trans. pg. 33 ln. 20-22; Appx. 15). Her job duties did not change after the work injury. (Arb. Hrg. Trans. pg. 45 ln. 17-19). She remains in the same position. (Arb. Hrg. Trans. pg. 45 ln. 20-21). She had never asked

management for accommodations. (Arb. Hrg. Trans. pgs. 36 ln. 12-14). She worked overtime each week and generally works about 50 hours a week. (Arb. Hrg. Trans. pgs. 36 ln. 22-24; Appx. 12-13). She worked all available hours to her. (Arb. Hrg. Trans. pgs. 37 ln. 3-5). She had not been turned down for any overtime. (Arb. Hrg. Trans. pg. 46 ln. 7-9). She was not working different hours than her co-employees. (Arb. Hrg. Trans. pg. 47 ln. 14-18). There can be a fluctuation of overtime hours depending on the workload. (Arb. Hrg. Trans. pgs. 46-47). At the time of the work injury, she was earning $12.52 per hour. (Arb. Hrg. Trans. pg. 37 ln. 6-9). At the time of the hearing, she was earning $13.00 per hour which went into effect January 2019. (Arb. Hrg. Trans. pg. 48 ln. 19-21; Appx. 12-13). Another raise was anticipated for 2020. (Arb. Hrg. Trans. pg. 48 ln. 1-3). Chavez has not been turned down for any raise because of the work injury. (Arb. Hrg. Trans. pg. 48 ln. 9-11).

Chavez's Medical History

On February 8, 2018 Chavez sought medical treatment regarding her **right shoulder** pain following a pop in her shoulder when she was pushing down in a mop bucket. (Appx. 28)(emphasis added). She was referred to Dr. Peterson at that time. (Appx. 29).

Her first visit with Dr. Peterson occurred on April 12, 2018 and it was noted that she presented with "complaints of **right shoulder** pain..." (Appx.

31 pg. 37)(emphasis added). Given her continued pain, she was referred for an MRI of her right shoulder. (Appx. 31). She returned to Dr. Peterson on May 24, 2018 for review of the MRI. (Appx. 35). She was diagnosed at that time following the MRI of: (1) pain in the **right shoulder**; (2) impingement syndrome of the **right shoulder**; (3) secondary osteoarthritis of the **right shoulder**; and (4) complete rotator cuff tear or rupture of the **right shoulder**. (Appx. 35)(emphasis added). Surgery was recommended at that time. (Appx. 35)

Surgery was performed by Dr. Peterson on July 11, 2018 which involved a **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, and subacromial decompression. (Appx. 43)(emphasis added).

Chavez's last visit with Dr. Peterson's office occurred on November 8, 2018. (Appx. 37). It was noted that she was doing well 4 months status post **right shoulder** arthroscopy. (Appx. 37)(emphasis added). She reported that she was very happy and had no concerns. (Appx. 37). Dr. Peterson released Chavez without restrictions, and she has been working without restrictions

since that time. (Appx. 38; Arb. Hrg. Trans. pg. 33 ln. 17-19). She had not been back to Dr. Peterson's office since November 2018.

Dr. Peterson did confirm that Chavez was at maximum medical improvement as of November 8, 2018 and assessed her with 6% right upper extremity impairment. (Appx. 39-40).

Additionally, Chavez submitted for an independent medical evaluation with Dr. Ash whose reports discuss Chavez's right shoulder. (Appx. 5-11). Chavez submitted for an independent medical evaluation with Dr. Bansal. (Appx. 16-24) In the subjective history of Dr. Bansal's report, he noted that on February 5, 2018, Chavez "sustained an injury to her right shoulder." Dr. Bansal, throughout the discussion questions, states that Chavez had an injury to her right shoulder. More specifically, Dr. Bansal notes a diagnosis of:

> **RIGHT SHOULDER**
> **Right shoulder** rotator cuff and labral tearing. (Appx. 23)(emphasis added).

> **RIGHT SHOULDER**
> In my medical opinion, Ms. Chavez incurred an acute on chronic injury of her **right shoulder.** (Appx. 24)(emphasis added).

Also, Dr. Bansal assigns a rating for the **right shoulder**. (Appx. 23)(emphasis added). No other diagnoses or impairment ratings are provided, which includes no diagnoses or impairment ratings to the arm, neck, back or chest.

ARGUMENT

STANDARD OF REVIEW

The Court's review is governed by the Administrative Procedure Act, Iowa Code Ch. 17A. *Acuity Ins. v. Foreman*, 684 N.W.2d 212, 216 (Iowa 2004). The role of the Court reviewing an agency decision is threefold: (1) determine if the commissioner applied the proper legal standard or interpretation of the law; (2) determine if there was substantial evidence to support the commissioner's findings; and (3) determine if the commissioner's application of the law to the facts was irrational, illogical, or wholly unjustifiable. *Clark v. Vicorp Rests., Inc.*, 696 N.W.2d 596, 603-04 (Iowa 2005).

The Court shall reverse, modify, or grant other appropriate relief from agency action if the agency action was based upon a determination of fact clearly vested by a provision of law in the discretion of the agency that is not supported by substantial evidence in the record before the court when the record is viewed as a whole. Iowa Code 17A.19(10)(f). "Substantial evidence" means the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance. Iowa Code

17A.19(10)(f)(1). The adequacy of the evidence in the record to support a particular finding of fact must be judged in light of all the relevant evidence in the record including any determination of veracity by the presiding officer who personally observed the demeanor of the witnesses and the agency's explanation of why the relevant evidence in the record supports its material findings of fact. Iowa Code 17A.19(10)(f)(3); *Lange v. Iowa Dep't of Revenue*, 710 N.W.2d 242, 247 (Iowa 2006).

The Court shall also reverse, modify, or grant other appropriate relief from agency action if the agency action was based upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency. Iowa Code 17A.19(10)(C). "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." *Finch v. Schneider Specialized Carriers, Inc.*, 700 N.W.2d 328, 330 (Iowa 2005). The Court, therefore, need not give the agency deference with respect to the interpretation of a statute or case-law and is free to substitute its judgment for that of the Commissioner. *Clark v. Vicorp Restaurants, Inc.*, 696 N.W.2d 596, 604 (Iowa 2005). Thus, **"[r]eversal is appropriate when the agency has applied an erroneous interpretation of**

the law." *Griffin Pipe Prods. Co. v. Guarino*, 663 N.W.2d 862, 864 (Iowa 2003)(emphasis added).

Other grounds which mandate reversal, modification, or other appropriate relief from agency action are set forth in Iowa Code sections 17A.19(10)(a)-(n). In making a determination required by subsection 10, paragraphs "a" through "n", the Court shall not give deference to the view of the agency with respect to particular matters that have not been vested by a provision of law in the discretion of the agency. Iowa Code 17A.19(11)(b). However, appropriate deference is given when the contrary is true. Iowa Code 17A.19(11)(c). **The burden of demonstrating the required prejudice and the invalidity of agency action is on the party asserting invalidity**. Iowa Code17A.19(8)(a)(emphasis added). The court shall make a separate and distinct ruling on each material issue on which the Court's decision is based. Iowa Code 17A.19(9).

An agency action is "arbitrary" or "capricious" when the agency acts "without regard to the law or facts of the case." *Dico, Inc. v. Iowa Employment Appeal Bd.*, 576 N.W.2d 352, 355 (Iowa 1998). "An agency action is 'unreasonable' when it is 'clearly against reason and evidence.'" *Soo Line R.R. v. Iowa Dep't of Transp.*, 521 N.W.2d 685, 688-89 (Iowa 1986). "An abuse of discretion occurs when the agency action 'rests on grounds or

reasons clearly untenable or unreasonable.'" *Schoenfeld v. FDL Foods, Inc.*, 560 N.W.2d 595, 598 (Iowa 1997).

ISSUES PRESENTED BY APPELLEE IN RESPONSE TO APPELLANT

I. BROAD AND LIBERAL INTERPRETATION AND CONSTRUCTION OF THE WORKERS' COMPENSATION STATUTE IS NOT WITHOUT LIMITS.

As an introductory issue, in Chavez's brief, there is a lot of discussion on the liberal interpretation of the workers' compensation statute. This Court has spoken about interpretation of workers' compensation statutes and provided the following guidance:

> Workers' compensation law is statutory and certain well-recognized principles control its construction." The ultimate goal "is to ascertain and give effect to the intention of the legislature." We seek a reasonable interpretation that will best effectuate the purpose of the statute and avoid absurd results. We consider all parts of the statute together without attributing undue importance to any single or isolated portion. When we are reviewing the commissioner's interpretation of the statutes governing the agency, we defer to the agency's expertise, but reserve for ourselves the final interpretation of the law.
>
> Because the primary purpose of the workers' compensation statute is to benefit the worker, we liberally construe the statute in favor of the worker. However, there is one very important limitation on this rule of construction: We liberally construe the statute insofar as statutory requirements permit.
> *Grundmeyer v. Weyerhaeuser Co.*, 649 N.W.2d 744, 750 (Iowa 2002)(internal citations omitted).

Thus, while the workers' compensation statutes are liberally construed in favor of the Chavez, that does not give permission to carte blanche completely and blatantly disregard the language of a statute and the intent of the legislator.

Chavez admits and agrees that 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 v. Second Injury Fund of Iowa*, 777 N.W.2d 395, 399 (Iowa 2010). However, as will be discussed below, Chavez's interpretation of the workers' compensation statutes here would indeed lead to absurd results.

It is important to note, this is not a case where Chavez's injury has been denied. Chavez has an accepted shoulder injury, medical care was provided, she was compensated for time off work, and was compensated for permanency based on the shoulder scheduled member pursuant to Chavez's IME physician impairment rating.[2] She was provided the benefits under the statute. The

[2] Chavez's IME physician, Dr. Bansal, assigned functional impairment of 10% upper extremity which converts to 6% body as a whole. (Appx. 23). For permanency compensation based on Dr. Bansal's functional impairment, 6% body as a whole is 30 weeks whereas, 10% of a shoulder is 40 weeks. Thus, Claimant received 10 more weeks of permanency benefits pursuant to the Appeal Decision.

Commissioner and District Court were correct in their finding that her permanency was limited to the shoulder scheduled member is not contrary to the purpose and interpretation of the workers' compensation statutes.

II. THE COMMISSIONER'S FINDING THAT CHAVEZ'S INJURY WAS TO THE SHOULDER SCHEDULED MEMBER IS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD AND IS A PROPER APPLICATION AND INTERPREATION OF THE WORKERS' COMPENSATION STATUTE; THUS, WAS CORRECTLY AFFIRMED BY THE DISTRICT COURT.

First and foremost, the Commissioner's interpretation, as supported by the District Court of Iowa Code 85.34(2)(n)(2017) was correct, was consistent with the express language of the statute, and was consistent with legislative intent, and therefore was not erroneous in any manner. Chavez continues to ignore the express language of the statute, the legislative intent, and intends to rely on outdated case law.

A. The Iowa Legislature's clear intent was to place all shoulder injuries onto the list of scheduled members, including rotator cuff injuries, and not limited shoulder injuries solely to the glenohumeral joint.

This Court has provided guidelines on the interpretation of statutory language. That general guidance is as follows as outlined in the *Homan v. Branstad* decision:

When interpreting statutory provisions, we have previously stated, the goal of statutory construction is to determine legislative intent. We determine legislative intent from the words chosen by the Legislature, not what it should or might have said. Absent a statutory definition or an established meaning in the law, words in the statute are given their ordinary and common meaning by considering the context within which they are used. Under the guise of construction, an interpreting body may not extend, enlarge, or otherwise change the meaning of a statute. *State v. Dohlman*, 725 N.W.2d 428, 431 (Iowa 2006) (quoting *Auen v. Alcoholic Bevs. Div. of the Iowa DOC*, 679 N.W.2d 586, 590 (Iowa 2004) (citations omitted)).

Further, we have said, "legislative intent is derived not only from the language used but also from 'the statute's "subject matter, the object sought to be accomplished, the purpose to be served, underlying policies, remedies provided, and the consequences of the various interpretations."'" *Id.* (quoting *Cox v. State*, 686 N.W.2d 209, 213 (Iowa 2004)). We also give weight to explanations attached to bills as indications of legislative intent. *City of Cedar Rapids v. James Props., Inc.*, 701 N.W.2d 673, 677 (Iowa 2005).

We will not consider what the legislature "should or might have said" when it constructed a statute. Iowa R. App. P. 6.904(3)(*m*); *Marcus v. Young*, 538 N.W.2d 285, 289 (Iowa 1995). In determining legislative intent, we may also look to the maxim "expressio unius est exclusio alterius," meaning expression of one thing is the exclusion of another. *Marcus*, 538 N.W.2d at 289. It is an established rule of statutory construction that "legislative intent is expressed by omission as well as by inclusion, and the express mention of one thing implies the exclusion of others not so mentioned." *Id.*

Additionally, we aim to give meaning to the statutory changes the general assembly enacts. *Davis v. State*, 682 N.W.2d 58, 61 (Iowa 2004). "When an amendment to a statute adds or deletes words, a change in the law is presumed unless the remaining

> language amounts to the same thing." *Id.* When considering statutory amendments, we must assume that the general assembly "sought to accomplish some purpose" and the amendment "was not a futile exercise." *Id.* *Homan v. Branstad*, 887 N.W.2d 153, 166 (Iowa. 2016).

In fact, the Iowa Legislature understood its legislative intent was to be utilized for interpretation for the 2017 changes to the workers' compensation statute. Those discussions are readily available online. (Iowa Legislature; House Action/Video March 16, 2017, https://www.legis.iowa.gov/dashboard?view=video&chamber=H&clip=H20170316154402833&dt=2017-03-16&offset=210&bill=HF%20518&status=i and Iowa Legislature; Senate Action Video March 27, 2017; https://www.legis.iowa.gov/dashboard?view=video&chamber=S&clip=s20170327123534570&dt=2017-03-27&offset=3080&bill=HF%20518&status=r.). Through the discussions, it is clear that the Legislature intended to include all shoulder injuries on the schedule, not just those injuries limited to the shoulder joint/glenohumeral joint and distal to the joint only. One exchange between Representative Olson and Representative Carlson highlighted this, particularly in the context of the shoulder. The Representatives had the following discussion:

> Representative Carlson: I feel quite confident that an enactment date would be the critical date is when this would become effective.
>
> Representative Olson: And I appreciate that because often Judges will look at what they think the intent is for legislation and with you being the floor manager and you making that statement on the floor, we can always retrieve that if needed in the future. Having said that, is there a particular reason why you picked shoulder injuries to schedule? Is it because shoulder injuries are basically from what I have read the second leading injury that occurs at the workplace?
>
> Representative Carlson: I believe, I don't know whether the fact that you just stated, whether it's the second or third. I believe the shoulder makes sense to become a schedule member as our other appendices that we have on schedule and that the surrounding states also have the shoulder as a scheduled member and we believe it makes, is a proper adjustment to our system. (House Action/Video; Representative Carlson and Representative Olson, Time Stamp 4:25:28 P.M. - 4:26:35 P.M.).

In fact, Representative Carlson was adamant the shoulder should be placed on the schedule and in support of that stated as follows:

> We talked about the shoulder, putting the shoulder as a scheduled member at 400 weeks, and one on the advantages of our Workers' Compensation system is those things that have been identified on scheduled members generally take far less litigations, far easier to understand. Employers know what their obligation is and those employees who are injured know what the benefit level is. In many times on the scheduled benefits, the employers voluntarily begin to pay. Too many shoulder injuries today that have become body of a whole may have been eligible for 500 weeks. (House Action/Video; Representative Carlson, Time Stamp 4:47:03 P.M. - 4:47:55 P.M.).

In the Iowa Senate, there was also an in-depth discussion on placing the shoulder on the schedule. Senator Boulton, for example, wanted to keep the shoulder under the old law by keeping it as an industrial claim. (Senate Action/Video; Senator Boulton, Time Stamp 3:26:40 P.M.-3:27:28 P.M. and 3:29:20 P.M. – 3:31:09 P.M.). However, in response, Senator Breitbach countered by stating:

> Amendment 3172 addresses shoulder injuries. It addresses it by offering 400 weeks of compensation, it addresses it with allowing continuing education to retrain employees so they can return and be productive members in an employment situation. You know, nobody wants to go around saying oh I'm totally disabled, they don't want to introduce themselves like that. They want to be able to go out and get a job and if they retrained, senate file, or the amendment 3172 allows that to happen and **so I don't want to undo all of the changes that we've addressed, all the that changes we've made by taking the shoulder and putting back in as body as a whole.** (Senate Action/Video; Senator Breitbach, Time Stamp 3:29:20 P.M. – 3:31:09 P.M.)(emphasis added).

Chavez states that it is presumed that the Legislature knows the state of the law, including case law, at the time it enacts a statute. *Roberts Dairy v. Billick*, 861 N.W.2d 814, 821 (Iowa 2015), as amended (June 11, 2015). Chavez is correct on this standard; however, this standard supports MS Technology's position that the Commissioner was correct in determining Chavez's injury was a shoulder scheduled member. From these discussions,

it is evident that the Iowa Legislature was well aware that the changes to the law were going to remove the shoulder from the traditional industrial disability where loss of earning capacity is evaluated and instead would be placed on the scheduled member list. This was further confirmed because shoulder injuries were expressly addressed separately under a retraining vocational program.

Furthermore, the Iowa Legislature was aware that shoulder injuries are very common and that traditional shoulder injuries would now, under the new law, be compensated on the schedule. Representative Johnson gave the following example of a worker for suffered injuries to both of his shoulders when he was working at the University of Iowa putting a fire door on hinges:

> The other worker slipped and dropped his part of the weight of the door. When the weight came down Rick felt both his shoulders give way and he'd suffered **torn rotator cuffs in each of his shoulders**. Rick ended up with restrictions to not lift over 40 pounds and then only 6 times per hour, no extended reaching, no lifting overhead. A vocational assessor testified Rick had lost 90% of his ability to work and earn. The agency Deputy heard the 3-hour case. After reading all the paper evidence some 3 months later, the Deputy ruled that Rick was awarded 90% loss of earning capacity. That was 450 weeks of benefits for loss of earning capacity. Rick has applied for over 60 jobs and found only a part-time job driving a school bus. Under this new bill, House File 518, he had gotten 11% for his right shoulder, 3% for his left shoulder, equally 14% both shoulders...
>
> That's about 70 weeks. The 11% and 3% taken from the AMA Guides to the Evaluation of Impairment have no correlation with

> actual loss of earnings whatsoever and it leaves injured Iowa workers with nowhere to turn but Social Security Disability. (House Action/Video; Representative Johnson, Time Stamp 4:16:30 P.M. – 4:18:16 P.M.). (emphasis added).

Senator Boulton also provided a case example:

> Jerry Reeves vs. Seneca Corporation, file numbers 10543885 and 1144836. Jerry was an electrician. He sustained a shoulder injury. Again, we should pay very careful attention when we talk about shoulder injury cases going forward. He was given a 2% functional impairment. We talk about these functional impairments, in workers' compensation there's a green book that tells us as we check your range of motion and other factors, how to express in percentage terms losses of function to the body. So, based on his diagnosis and measurements, a doctor said you've lost 2% based on your shoulder injury. That would have resulted in about 7 weeks of permanency benefits being awarded. It was found that this worker was actually one who lost 2/3, approximately 60% of his earning capacity. We call it an industrial loss in workers' compensation. A loss of earning capacity means we take into account that individual, not only in terms of their functional losses, but we also factor in their age, education, background work history, and we determine what that functional loss percentage means to them when they look for a job on the open employment market. This was a decision that awarded significant benefits and it was confirmed by a Republican Branstad appointee in the appellate process. If we use the shoulder standard that this legislation would adopt, that individual worker would have had a percentage of 400 weeks awarded, 7 or 8 weeks of benefits, for a serious shoulder injury that disabled this worker from virtually any form of the employment available before the injury happened. (Senate Action/Video; Senator Boulton, Time Stamp 1:42:33 P.M. - 1:44:55 P.M.).

Notably, in the *Reeves* case, Chavez was diagnosed with impingement syndrome of the right shoulder and was treated via surgery. *Reeves v. Seneca Corp.*, File Nos. 1054385 and 1134836 (Arb. Dec. June 28, 1999).

Lastly, **the rules of statutory construction hold that when the legislature amends a statute, a presumption exists that the legislature intended to change the law**. *Colwell v. Iowa Dep't of Hum. Servs.*, 923 N.W.2d 225, 235 (Iowa 2019), reh'g denied (Mar. 8, 2019)(emphasis added).

As will be further discussed below, this case involved a rotator cuff tear. By the discussions in the Iowa Legislature, this was the precise type of injury that was contemplated to now be compensated as a shoulder scheduled member.

B. The shoulder anatomy is more complex than just the glenohumeral joint.

A great deal of discussion on shoulder anatomy has been done in this case. MS Technology adopts the Commissioner's and District Court's discussion of the shoulder anatomy, and also provide the following additional discussion on the integral anatomical structures of the shoulder.

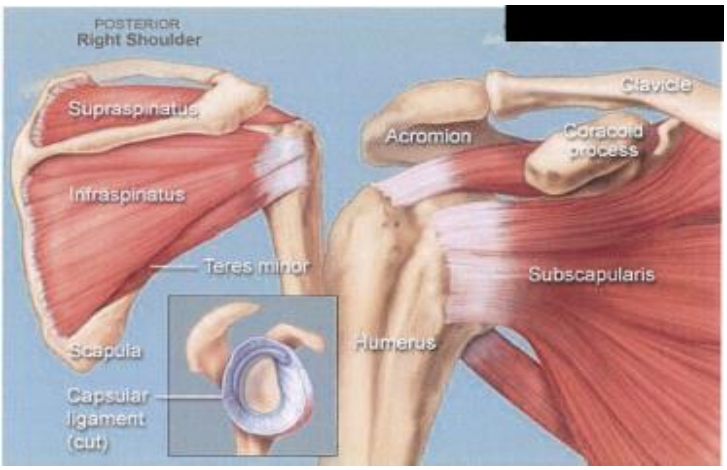
A joint at its simplest definition is a point of contact between elements of an animal skeleton with the parts that surround and support it. (Merriam-Webster Dictionary – Joint, https://www.merriam-

webster.com/dictionary/joint.). However, as that definition indicates, a joint must have muscles and tendons on each side to move, function, and support it. A shoulder is no different.

The shoulder is more complex and dynamic than a reference to just one component of the shoulder (i.e. the glenohumeral joint). The glenohumeral joint is a ball and socket joint that includes a **complex, dynamic, articulation** between the glenoid of the scapula and the proximal humerus. Lou-Ren Chang et. al, *Anatomy, Shoulder and Upper Limb, Glenohumeral Joint*, March 22, 2020, https://www.ncbi.nlm.nih.gov/books/NBK537018/) (emphasis added); see also, G.J. Romanes, *Cunningham's Textbook of Anatomy* pgs. 228-233; 318-322 (1981)); see also, (Merriam-Webster Dictionary – Shoulder, https://merriam-webster.com/dictionary/shoulder). Overall, the shoulder joint as a whole includes (1) the shoulder blade on the body (scapula), (2) the collar bone on the sternum (clavicle), (3) the collar bone on the scapula and (4) the glenohumeral joint which is the humerus bone on the socket bone. *Pack v. Firestone Trade and Rubber*, File No._865057 at *37 (Arb. Dec. Sept. 29, 1994).

In addition to the bony components, the rotator cuff is also an essential, functioning component of the shoulder, which allows the overall joint to have the complex and dynamic articulation. The rotator cuff is a group of tendons

and muscles surrounding the shoulder joint that includes the supraspinatus, the infraspinatus, the teres minor, and the subscapularis muscles and tendons. (Stanley Hoppenfeld et. al., *Orthopedic Dictionary*, Rotator Cuff pg. 340, (1994)); see also, (Merriam-Webster Dictionary – Rotator Cuff, https://www.merriam-webster.com/dictionary/rotator%20cuff). The rotator cuff muscles lock the humeral head into the glenoid and provide active abduction and rotation of the glenohumeral joint. *Id*. Simply put, the rotator cuff is the reason a person can raise and rotate their arm and provides stability to the glenohumeral joint.



Vijay Niels Permeswarn, *Understanding Mechanical Tradeoffs in Changing Centers of Rotation for Reverse Shoulder Arthroplasty Design*, May 2014, https://ir.uiowa.edu/cgi/viewcontent.cgi?article=5232&context=etd (shoulder anatomy and movement discussion and image pgs. 1-3).

Lastly, the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition ("Guides") is the standard in Iowa for the determination of permanent partial impairment, which is particularly useful for scheduled members. The Guides have specific tables and provision for the evaluation of shoulder motion impairment which include tables 16-38 through 16-46. You cannot evaluate shoulder motion without those muscles and tendons (i.e. the rotator cuff) that make the shoulder joint and arm move. In fact, Dr. Peterson and Dr. Bansal, in this case utilized tables in this section to evaluate Chavez's impairment. Some illustrations are pertinent from the Guides which show some of the shoulder movements evaluated.

Figure 16-38 Shoulder Flexion and Extension

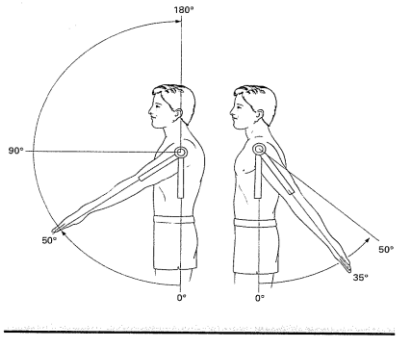


Figure 16-41 Shoulder Abduction and Adduction

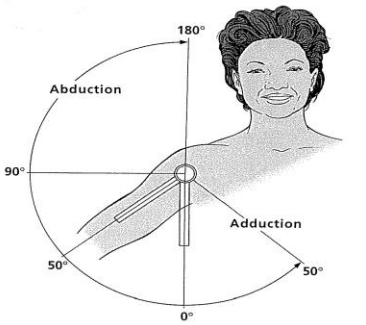
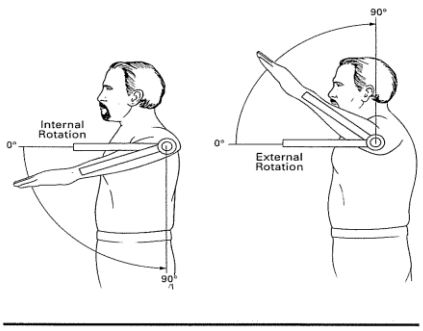


Figure 16-44 Shoulder External Rotation and Internal Rotation



American Medical Association, Guides to the Evaluation of Permanent Partial Impairment, 5th Edition, pgs. 474-479 (2001).

The *Haffner* decision (which is more fully discussed below), specifically utilized the Guides for evaluation of a claimant's shoulder injury, which occurred well before the July 1, 2017 amendments.

> Gray's Anatomy, page 134, defines the upper extremity as follows: "The bones of the upper extremity consist of those of the shoulder girdle, of the arm, the forearm, and the hand." **Thus, in medical terms the upper extremity extends from the tips of the fingers through the shoulder girdle.** This terminology of the upper extremity is further verified by the Guides to the Evaluation of Permanent Impairment, 3rd Edition (Revised) published by the American Medical Association, on page 15, figure 2, **where it shows the upper extremity to be the entire arm and the shoulder girdle**. This is why physicians rate arm injuries in terms of the upper extremity. Likewise, **they also rate shoulder injuries in terms of the upper extremity.** *Haffner v. Electrical Systems*, File No. 955542 (App. Dec. Feb. 25, 1994).

The current 5th Edition of the Guides describes the upper extremity as the upper limb, which is divided into the shoulder, elbow, wrist, and hand regions with impairment of each unit, which can be converted sequentially to hand, upper extremity, and whole person impairment as indicated in Tables 16-1, 16-2, 16-3 and 16-4. *American Medical Association, Guides to the Evaluation of Permanent Partial Impairment, 5th Edition*, pg. 437-440 (2001). These tables are in addition to tables 16-38, 16-41, 16-44, of which Dr. Peterson and Dr. Bansal used in their assessment of impairment for Chavez. *American*

Medical Association, Guides to the Evaluation of Permanent Partial Impairment, 5th Edition, pg. 475-478 (2001). Further sections of the Guides provide further guidance on the shoulder. When looking at Figure 16-1(b), it is clear the shoulder is more expansive than the glenohumeral joint itself. *American Medical Association, Guides to the Evaluation of Permanent Partial Impairment, 5th Edition*, pg. 437 (2001). This is further supported by Figure 16-2, but the Guides do not stop there. *American Medical Association, Guides to the Evaluation of Permanent Partial Impairment, 5th Edition*, pg. 441 (2001). The Guides then move on to provide examples of shoulder injuries. One of which includes a definition of shoulder instability. Shoulder instability, recurrent joint subluxation, or dislocation usually occurs when the integrity of either the glenoid labrum and/or of the surrounding capsuloligamentous and musculotendinous structures becomes compromised following either one or more acute traumatic dislocations, repetitive microtrauma, or arthritic conditions. *American Medical Association, Guides to the Evaluation of Permanent Partial Impairment, 5th Edition*, pg. 503 (2001). (emphasis added). One final example also provides utility to the case at hand. In this case, Chavez was twisting a mop when she felt a pop in her shoulder. She was ultimately diagnosed with a massive rotator cuff tear with

surgical intervention. The Guides provide a poignant example in Table 16-72:

Example 16-72

History: An individual "pulled" his shoulder while sorting some lumber. A full-thickness tear of the rotator cuff was diagnosed on MRI. He failed to respond to conservative management and underwent open surgical repair.

Current Symptoms: Currently works with restrictions due to shoulder weakness, easy fatiguability, and some pain with overhead movement.

Clinical Studies: After optimal healing time and therapy, the MRI showed a healed rotator cuff with some scarring.

Physical Exam: Full active range of shoulder rotation, extension, and adduction. Full active range of shoulder flexion and abduction against gravity with some resistance: grade 4 (Table 16-35).

Analysis: Flexion weakness: 6% upper extremity impairment. Abduction weakness: 3% upper extremity impairment.

Impairment Rating: 6% + 3% = 9% impairment of the upper extremity due to weakness about the shoulder.

American Medical Association, Guides to the Evaluation of Permanent Partial Impairment, 5th Edition, pg. 511 (2001)(emphasis added).

Thus, common sense dictates that the shoulder cannot be strictly limited to the glenohumeral joint itself. Rather it must be viewed to consider the supporting musculature and tendons that allows the dynamic shoulder to function account for the assessment of permanent partial impairment. Again, this would logically include all the muscles of the rotator cuff, including injuries to the rotator cuff which Chavez sustained in this case, as well as the acromion. (See App. Dec. pgs. 3-6).

C. **The Chavez's use of the glenohumeral joint as the definition for a shoulder is misguided, contrary to anatomy, and blatantly incorrect in the interpretation of the express language of Iowa Code §85.34.**

Chavez urges this Court to limit the shoulder scheduled member to the glenohumeral joint alone and that for any anatomical structure proximal to the glenohumeral joint should be deemed to be industrial disability. However, the Commissioner correctly noted that "several principles of statutory interpretation indicate the Legislature did not intend to limit the definition of the shoulder under section 85.34(2)(n) to the glenohumeral joint." (Ruling on App. for Rehearing). The Commissioner's opinion is well supported.

First, the shoulder needs to be put into context with another body part, the arm (upper extremity). The statute clearly defines an arm as "the loss of two-thirds of that part of an arm **between the shoulder joint and the elbow joint** shall equal the loss of an arm and compensation therefor shall be weekly compensation during two hundred and fifty weeks." Iowa Code 85.34(2)(m)(emphasis added). The statute then allows "for the loss of a shoulder, weekly compensation during four hundred weeks." Iowa Code 85.34(2)(n).

In an attempt to justify her reasoning, Chavez spends a great deal of time regurgitating case law which discussed prior agency decisions discussing

the shoulder. 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). However, each and every case cited was **before** the 2017 statutory changes and before Commissioner's appeal decisions interpreting the 2017 statutory changes. The cases discussed the dividing line between the arm and body as a whole, **not** the dividing lines between the arm, shoulder, and body as a whole in the context of the new statute. If the Legislature had wanted to limit shoulder injuries to those injuries which affect the glenohumeral joint and those distal to the joint only, it would have indicated as such by designating that specific joint in the schedule. In other portions of Iowa Code Section 85.34, the term "joint" is used. See Iowa Code 85.34(2)(m) and (o). However, the term "joint" is noticeably absent from subsection "n" in dealing with the shoulder. Instead, the Legislature utilized the larger encompassing term of "shoulder."

In taking a closer look, the *Haffner* and *Alm* cases, illustrate why the pre-July 1, 2017 are outdated. For example, Chavez cites to the *Haffner* case as an example that the dividing line for shoulder injuries should be at the glenohumeral joint, but the case expressly stated that the glenohumeral joint was the dividing line between **only the arm and the body as a whole**. More specifically, the *Haffner* decision noted the following:

> In *Alm v. Morris Barick Cattle Co.*, 240 Iowa 1174, 38 N.W.2d 161, (1949) defendants contended that a shoulder injury was an injury to the arm. The supreme court disagreed, citing *Dailey v. Pooley Lumber Company*, 233 Iowa 758, 763, 765, 10 N.W.2d 569, 573(1943) and stated that defendants' assumption that an injury to a shoulder is a scheduled member injury is unwarranted. **The court said that the arm section of the Code does not apply to the shoulder, nor is the shoulder designated as a scheduled member in any other section of the Code.** *Alm*, at page 1177. *Haffner v. Electrical Systems*, File No. 955542 (App. Dec. Feb. 25, 1994). (emphasis added).

The *Alm* decision dealt with a shoulder injury and if that shoulder injury was under the new law, it should be compensated based on the schedule. The shoulder is now designated as a scheduled member in the Code, as referenced by *Alm*, and injuries to the shoulder should be compensated based on that schedule making the prior case law obsolete. The Legislature was aware of the prior case law and set out to expressly change how a shoulder had been previously defined and treated. The Legislature's express action to place the

shoulder on the schedule should not be circumvented with old and outdated case law.

In *Deng*, the Commissioner addressed the pre and post July 2017 case law and further addressed the issue of proximal to the glenohumeral joint. In *Deng*, the Commissioner correctly analyzed, in pertinent part:

> Given the differences between this case and past cases in which the agency and court looked to the proximal body part to classify injuries, I do find these past holdings to be decidedly illustrative of the legislature's intent when drafting section 85.34(2)(n). This is not to say that consideration of whether a surrounding muscle, tendon, bone or surface is proximal to the glenohumeral may not be a useful tool when trying to determine what constitutes a "shoulder" under section 85.34(2)(n). But because of the distinctions between this case and the above-mentioned past cases, it cannot be assumed the legislature intended or even expected that the bright line "proximal" rule would be applied to section 85.34(2)(n).
>
> There are also hundreds of past decisions in which the agency and courts have referred to claimants' shoulders when determining whether to compensate injuries as arms under section 85.34(2)(m) or as unscheduled whole body injuries under former subsection (u) (now subsection (v)). The problem with relying on such cases or imputing these cases to the legislature's intent is that before July 1, 2017, it did not matter whether the injury was technically to the shoulder--all that mattered was whether the injury was to the scheduled member arm or extended beyond it. Before July 1, 2017, the shoulder was not a scheduled member - it was just part of the body as a whole. Thus, the agency and court's references to "shoulder" are often casual and based on a non-technical, layman's understanding of the term. In other words, the context of these references significantly lessens their persuasive weight when it comes to determining what the legislature intended when drafting section 85.34(2)(n).

Deng v. Farmland Foods. Inc., File No. 5061883 (App. Dec. Sept. 29, 2020).

Again, **the rules of statutory construction hold that when the legislature amends a statute, a presumption exists that the legislature intended to change the law**. *Colwell v. Iowa Dep't of Hum. Servs.*, 923 N.W.2d 225, 235 (Iowa 2019), *reh'g denied* (Mar. 8, 2019)(emphasis added).

Overall, the Commissioner correctly deemed that case law prior to July 1, 2017 was less persuasive and that the language of Iowa Code §85.34(2)(n), using correct principles of statutory interpretation correctly mean that the shoulder is not limited to the glenohumeral joint, and properly include other essential structures of the shoulder such as the rotator cuff, labrum, and acromion. (App. Dec. pgs. 2-4). This decision was well reasoned and not erroneous. It should be upheld by this Court as it was by the District Court.

D. In this case, the extent of Chavez's permanent disability is limited to the shoulder scheduled member.

The medical records are consistent. Chavez suffered an injury to her right shoulder. The medical records do not support an injury that extends beyond the shoulder. *Agee v. EFCO, Corp. Inc*., File No 5065304, 5064099 (Arb. Dec. Oct. 22, 2019); See also, *Hospodarsky v. Quaker Oats Company*,

File No. 5061912 (Arb. Dec. Oct. 30, 2019). The following medical evidence supports that this is a shoulder scheduled member case.

On February 8, 2018, Chavez went to Mercy with further complaints regarding her **right shoulder** pain following a pop in her shoulder when she was pushing down in a mop bucket. (Appx. 28)(emphasis added). She was referred to Dr. Peterson at that time. (Appx. 29).

Her first visit with Dr. Peterson occurred on April 12, 2018 and it was noted that she presented with "complaints of **right shoulder** pain." (Appx. 31)(emphasis added). Given her continued pain, she was referred for an MRI of her right shoulder. (Appx. 31). She returned to Dr. Peterson on May 24, 2018 for review of the MRI. (Appx. 35). She was diagnosed at that time following the MRI of: (1) pain in the **right shoulder**; (2) impingement syndrome of the **right shoulder**; (3) secondary osteoarthritis of the **right shoulder**; and (4) complete rotator cuff tear or rupture of the **right shoulder**. (Appx. 35)(emphasis added). Surgery was recommended at that time. (Appx. 35)

Surgery was performed by Dr. Peterson on July 11, 2018 which involved a **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, and subacromial decompression. (Appx. 43)(emphasis added). The overall shape of the tear is irrelevant as the tears were still to the rotator cuff. In sum, Dr. Peterson repaired 3 out of the 4 rotator cuff muscles in Chavez's right shoulder, repaired the labrum, cut the biceps tendon, and completed a subacromial decompression to relieve any impingement and allow for the smoother movement of the shoulder muscles and tendons (i.e. the rotator cuff). Notably, these shoulder conditions were very similar to the case examples cited by Representative Johnson and Senator Boulton as shoulder injuries that would be compensated on the schedule under the new law. (House Action/Video; Representative Johnson, Time Stamp 4:16:30 P.M. – 4:18:16 P.M..; Senate Action/Video; Senator Boulton, Time Stamp 1:42:33 P.M. - 1:44:55 P.M.; 3:26:40 P.M.-3:27:28 P.M.; 3:29:20 P.M. – 3:31:09 P.M.).

Chavez's last visit with Dr. Peterson's office occurred on November 8, 2018. (Appx. 37). It was noted that she was doing well 4 months status post **right shoulder** arthroscopy. (Appx. 37)(emphasis added). She reported that she was very happy and had no concerns. (Appx. 37). Dr. Peterson released Chavez without restrictions, and she has been working without restrictions since that time. (Appx. 38; Arb. Hrg. Trans. pg. 33 ln. 17-19). She has not been back to Dr. Peterson's office since November 2018.

Dr. Peterson did confirm that Chavez was at maximum medical improvement as of November 8, 2018 and assessed her with 6% right upper extremity impairment. (Appx. 39-40).

Additionally, Chavez submitted for an independent medical evaluation with Dr. Ash whose reports discuss Chavez's right shoulder. (Appx. 5-11). Chavez submitted for an independent medical evaluation with Dr. Bansal. (Appx. 16-24). In the subjective history of Dr. Bansal's report, he noted that on February 5, 2018, Chavez "sustained an injury to her right shoulder." Throughout the discussion questions, Dr. Bansal states that Chavez had an injury to her right shoulder. More specifically Dr. Bansal notes a diagnosis of:

> **RIGHT SHOULDER**
> **Right shoulder** rotator cuff and labral tearing (Appx. 23)(emphasis added).

> **RIGHT SHOULDER**
> In my medical opinion, Ms. Chavez incurred an acute on chronic injury of her **right shoulder.** (Appx. 24)(emphasis added).

Dr. Peterson, Dr. Ash, and Dr. Bansal all provide diagnoses to the shoulder. Dr. Peterson and Dr. Bansal provide impairment ratings to the shoulder. Even Chavez's own IME physician does not provide a diagnosis or impairment for these additional body parts. At all times, Dr. Bansal only provides opinions for Chavez's right shoulder.

This is a shoulder scheduled member case per the new law. All the medical evidence supports that Chavez, as causally related to the February 5, 2018 work injury, suffered only an injury to a scheduled member right shoulder. See also, *Agee v. EFCO, Corp. Inc*., File No 5065304, 5064099 (Arb. Dec. Oct. 22, 2019); see also, *Hospodarsky v. Quaker Oats Company*, File No. 5061912 (Arb. Dec. Oct. 30, 2019)("[t]he evidence supports a finding of a shoulder injury rather than a whole body. There are no expert opinions that support a finding that the November 1, 2017, injury extended beyond the shoulder.")

E. Impact on litigation is not a determining factor for analysis of the shoulder as a scheduled member, and any impact on litigation would be minimal.

The correct interpretation by the Commissioner, as upheld by the District Court will not result in an unreasonable amount of litigation. As with any new law, some litigation is expected. However, now that legal guidance has been given by the Commission, and now through the courts, litigation should be expected to level. More specifically, this was contemplated by the Legislature when discussing this new law. As stated above, Representative Carlson was adamant the shoulder should be placed on the schedule and in support of that stated as follows:

> We talked about the shoulder, putting the shoulder as a scheduled member at 400 weeks, and one on the advantages of our Workers' Compensation system is those things that have been identified on **scheduled members generally take far less litigations, far easier to understand**. Employers know what their obligation is and those employees who are injured know what the benefit level is. In many times on the scheduled benefits, the employers voluntarily begin to pay. Too many shoulder injuries today that have become body of a whole may have been eligible for 500 weeks. (House Action/Video; Representative Carlson, Time Stamp 4:47:03 P.M. - 4:47:55 P.M.)(emphasis added).

Under the old law, shoulders were routinely part of litigation because it involved the analysis and discussion of industrial disability and loss of earning capacity which is a multifaceted analysis. Now the shoulder is more definitive with functional impairment being the determining factor, which should simplify litigation.

Lastly, whether litigation is increased or decreased is irrelevant to the analysis of legislative intent. The Legislature has the ability and right to create and eliminate causes of actions as its sees fit.

F. Conclusion

Overall, the interpretation of Iowa Code 85.34(2)(n) was correct. There is no error. The Commissioner and District Court's Decisions were consistent with the express language of Iowa Code 85.34, consistent with legislative intent, consistent with statutory construction, and consistent with the facts and

medical evidence in the case. The Commissioner's and District Court's Decisions should not be disturbed.

III. THE COMMISSIONER'S FINDING THAT CHAVEZ WAS NOT ENTITLED TO INDUSTRIAL DISABILTY BENEFITS WAS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD IS A PROPER APPLICATION AND INTERPPREATION OF THE WORKERS' COMPENSATION STATUTE; THUS, WAS CORRECTLY AFFIRMED BY THE DISTRICT COURT.

A. The Commissioner was correct in finding that Chavez did not suffer a traditional industrial disability.

MS Technology continues to assert that the Commissioner was correct in finding that Chavez suffered an injury based on a shoulder scheduled member. However, in the event it is found that Chavez suffered an injury to her body as a whole/industrial disability pursuant to subsection "u", then Chavez is still only entitled to functional impairment as she continued to earn the same or greater wages with her employer.

The new statute states as follows:

> **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)(emphasis added).

The critical language under the new industrial disability statute when an employee returns to work following an injury is whether that employee receives the same or greater salary, wages, or earning than the employee received at the time of the injury.

Chavez also requests an interpretation of the statute based on a post-injury average weekly wage analysis which is not in the statutory language whatsoever. In support of this, Chavez cherry picks weeks immediately following her injury in which she was not yet even at maximum medical improvement post-surgery. Notably the statute does not require or even recommend that a post-injury 13-week representative average weekly wage be calculated to determine whether an injured employee earns same or greater wages. The discussion of an average weekly wage exists in a completely separate statutory section and requires an analysis of pre-injury earnings. A post-injury average weekly wage analysis for determining whether an employee returns to work at the same or greater wages is inappropriate. Thus, whether an employee same or greater salary, wages, or earnings should be based on the totality of evidence. This is supported by *McCoy v. Menard, Inc.*, File No. 1651840.01 (App. Dec. Apr. 9, 2021), a case cited by Chavez. In that case the Commissioner did state:

> I conclude a claimant's hourly wage, considered in isolation, is not sufficient to limit a claimant's compensation to functional disability.

However, the Commissioner then further clarified:

> Thus, I conclude a claimant's hourly wage must also be considered in tandem with the actual hours worked by that claimant or offered by the employer when comparing pre-and post-injury wages and earnings under section 85.34(2)(v). *McCoy v. Menard, Inc.*, File No. 1651840.01 (App. Dec. Apr. 9, 2021).

As part of her reasoning that she did not earn same or greater wages, Chavez states:

> 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. (Appellant Final Brief. Pg. 30)(emphasis added).

A claimant's permanent partial disability must be because of the work injury. To suggest otherwise is a direct contradiction to the purposes of the workers' compensation statute and would be an absurd result. It would disincentivize employees from returning to work.

Here, the evidence evinces that Chavez was earning same or greater wages. She remained an employee of MS Technologies after the work injury. (Arb. Hrg. Trans. pg. 33 ln. 20-22; Appx. 15). She still worked as a lab technician. (Arb. Hrg. Trans. pg. 43 ln. 10-12; Appx. 15, 27). Her job duties did not change after the work injury. (Arb. Hrg. Trans. pg. 45 ln. 17-19). She remains in the same position. (Arb. Hrg. Trans. pg. 45 ln. 20-21). She never

asked management for accommodations. (Arb. Hrg. Trans. pgs. 36 ln. 12-14). She worked overtime each week and generally works about 50 hours a week. (Arb. Hrg. Trans. pgs. 36 ln. 22-24; Appx. 12-13). She worked all available hours to her. (Arb. Hrg. Trans. pgs. 37 ln. 3-5). She had not been turned down for any overtime. (Arb. Hrg. Trans. pg. 46 ln. 7-9). She was not working different hours than her co-employees. (Arb. Hrg. Trans. pg. 47 ln. 14-18). There could be a fluctuation of overtime hours depending on the workload. (Arb. Hrg. Trans. pgs. 46-47). At the time of the work injury, she was earning $12.52 per hour. (Arb. Hrg. Trans. pg. 37 ln. 6-9). She was then earning $13.00 per hour which went into effect January 2019. (Arb. Hrg. Trans. pg. 47 ln. 19-21; Appx. 12-13). Another raise was anticipated in 2020. (Arb. Hrg. Trans. pg. 48 ln. 1-3). Chavez had not been turned down for any raise because of the work injury. (Arb. Hrg. Trans. pg. 48 ln. 9-11).

Thus, Chavez routinely worked overtime hours, worked all hours available to her, and earned more per hour than she did at the time of the work injury with another raise expected. Chavez was not treated different than any other employee. Chavez earned same or greater wages as contemplated by the new statute, and if industrial disability applies, she is only to be compensated for the functional impairment.

B. Chavez had an injury solely to her shoulder, and not an injury to her arm and body as a whole.

The Commissioner correctly found that "claimant failed to carry her burden to prove her biceps tear results in any permanent disability to her arm." (App. Dec. pg. 6). This argument is strictly in issue of fact which is in the purview of the Commissioner to determine and is subject to the substantial evidence standard. *Clark v. Vicorp Rests., Inc.,* 696 N.W.2d 596, 603-04 (Iowa 2005); Iowa Code 17A.19(10)(f)(1). The substantial evidence supports this finding.

In fact, the Commissioner utilized, in part, Chavez's own expert, Dr. Bansal, in determining Chavez did not meet her burden. (App. Dec. pg. 6). Dr. Bansal only diagnosed the shoulder, and all physicians only treated and issued an impairment rating to her shoulder injury. This was emphasized by the District Court as well:

> …there has been no development of whether that injury and procedure resulted in a permanent impairment to Chavez's right arm apart from the shoulder injury. Chavez did not present a separate permanent impairment rating for her arm from either Dr. Peterson or her expert Dr. Bansal. (See JE2-0057). Dr. Bansal's report is expressly limited to Chavez's right shoulder: "This examination should focus on her right shoulder." (CL1-0008). (Jud. Rev. Dec. pg. 10).

As indicated by the District Court, this also applies to Dr. Peterson. Prior to surgery Chavez had an MRI. She returned to Dr. Peterson on May 24, 2018

for review of the MRI. (Appx. 35). She was diagnosed at that time following the MRI of: (1) pain in the **right shoulder**; (2) impingement syndrome of the **right shoulder**; (3) secondary osteoarthritis of the **right shoulder**; and (4) complete rotator cuff tear or rupture of the **right shoulder**. (Appx. 35)(emphasis added). Surgery was performed by Dr. Peterson on July 11, 2018 which involved a **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, and subacromial decompression. (Appx. 43)(emphasis added). The biceps tenotomy is a procedure that takes place at biceps' attachment at the shoulder.

There is no credible medical evidence of any further injuries/diagnoses, or any permanency, to her arm, neck, chest, and back, including by Chavez's own IME physician. Those alleged injuries to her arm, neck, chest, and back, are noticeably absent from the medical records post-injury. The medical evidence is clear, Chavez injured her right shoulder, and her right shoulder alone.

Furthermore, Chavez did not suffer an injury to her arm. Chavez had a single injury to her shoulder. Chavez cannot have it both ways. She alleges an injury proximal to the shoulder joint when convenient but argues that distal to

the joint is the arm in the form of the biceps tenotomy, which occurred during the singular right shoulder arthroscopic surgery. That proves MS Technology's argument regarding the entire shoulder as the scheduled member. The glenohumeral joint is not the defining line for the shoulder because that would make the shoulder schedule member statute meaningless. Iowa Code 85.34(n) **does not** state "For the loss of a glenohumeral joint, weekly compensation during four hundred weeks." As stated above, if anything proximal to the glenohumeral joint is body as a whole and anything distal to the glenohumeral joint is the arm, then there are essentially no shoulder injuries, except to the ball and socket joint. Such an interpretation is a blatant and gross misinterpretation of the statute. The Legislature clearly utilized the broader term shoulder, and did not include shoulder joint, for the specific reason to encompass all shoulder injuries on the shoulder to avoid this cherry-picking approach in an attempt to circumvent subsection "n".

Furthermore, even if it was determined that Chavez suffered an injury to two scheduled members, which would include the arm and the shoulder, subsection "v" catchall does not apply as that has historically been found to apply for three scheduled members, not two. *Wallingford v. Atlantic Carriers*, File No. 5008405 (Arb. Dec., July 23, 2004). If two scheduled members are found, they should be compensated based on their individual scheduled

members per the statute as that would be consistent with the express language of the statute and the supporting case law.

In the end, Chavez did not suffer an injury to her arm and body as a whole. She has a singular injury to her right shoulder as a scheduled member. Each and every physician diagnosed her injury as a shoulder and both Dr. Peterson and Dr. Bansal assigned one impairment rating for her injuries. Subsection "v" simply does not apply. The Commissioner and District Court agreed Chavez did not meet her burden of proof on this issue; this was correct and should be affirmed.

CONCLUSION

The Commissioner correctly interpreted Iowa Code 85.34(2)(n) by finding Chavez's injuries were to the shoulder scheduled member. The District Court correctly and properly affirmed the Commissioner's Decision. Therefore, for the all the above reasons, Defendants/Respondents/Appellees respectfully request that this Court enter an Order consistent with the Arguments set forth herein with costs assessed to the Claimant/Petitioner/Appellant.

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REQUEST FOR ORAL ARGUMENT

Notice is hereby given that Defendants-Respondents-Appellees, MS Technology LLC and Westfield Insurance Company, desires to be heard orally upon submission of this case to the Iowa Supreme Court.

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CERTIFICATE OF COST

I hereby certify that costs paid for printing and/or duplicating Appellees' Final Brief was the sum of $0.00.

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Dated: November 2, 2021.

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