IN AND BEFORE THE IOWA SUPREME COURT

SUPREME COURT NO. 21-0777

ROSA CHAVEZ,
Appellant,

v.

MS TECHNOLOGY, L.L.C. and
WESTFIELD INS. CO.,
Appellees.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
HONORABLE SARAH CRANE PRESIDING

BRIEF FOR AMICUS CURIAE THE WORKERS' COMPENSATION CORE GROUP OF THE IOWA ASSOCIATION FOR JUSTICE

JASON D. NEIFERT AT0005681
Neifert, Byrne & Ozga, P.C.
1441 29th Street, Suite 111
West Des Moines, IA 50266
PH: (515) 226-2117
FAX: (515) 226-2497
email: JNeifert@nbolawfirm.com
CORE GROUP CHAIR AND ATTORNEY
FORTHE WORKERS' COMPENSATION
CORE GROUP OF THE IOWA
ASSOCIATION FOR JUSTICE

Certificate of Filing

I, Jason D. Neifert, attorney for the Workers' Compensation Core Group of the Iowa Association for Justice, certify that I electronically filed this brief with the Clerk of the Iowa Supreme Court via EDMS on September 3, 2021.

Jason D. Neifert AT0005681
Neifert, Byrne & Ozga, P.C.
1441 29th Street, Suite 111
West Des Moines, IA 50266
PH: (515) 226-2117
FAX: (515) 226-2497
Email: jneifert@nbolawfirm.com
CORE GROUP CHAIR AND ATTORNEY FOR THE WORKERS' COMPENSATION CORE GROUP OF THE IOWA ASSOCIATION FOR JUSTICE

Certificate of Service

I, Jason D. Neifert, attorney for the Workers' Compensation Core Group of the Iowa Association for Justice, certify that on September 3, 2021, I served this brief on all parties to this appeal via EDMS.

Jason D. Neifert AT0005681
Neifert, Byrne & Ozga, P.C.
1441 29th Street, Suite 111
West Des Moines, IA 50266
PH: (515) 226-2117
FAX: (515) 226-2497
Email: jneifert@nbolawfirm.com
CORE GROUP CHAIR AND ATTORNEY FOR THE WORKERS' COMPENSATION CORE GROUP OF THE IOWA ASSOCIATION FOR JUSTICE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. Common Law Authority

I. Statement of Interest

The Workers' Compensation Core Group of the Iowa Association for Justice (Core Group) is a group of twelve Iowa attorneys practicing in the area of workers' compensation on behalf of employees seeking workers' compensation benefits. Core Group is the leadership segment of the Workers' Compensation Section of the Iowa Association for Justice. In this capacity, Core Group is charged with promoting the administration of our workers' compensation laws for the public good, upholding the honor and dignity of the profession of law, and advancing the cause of injured workers who seek redress under Iowa's workers' compensation laws.

Individual members of Core Group represent injured workers who have experienced "shoulder" injuries on a regular basis and will continue to do so into the future. Core Group believes that its members, and the injured workers they represent, have a direct interest in other cases that will be materially affected by the outcome of the present case.

This brief is the work product of the undersigned Attorney for the Iowa Association for Justice Workers' Compensation Core Group. Pursuant to Iowa R. App. P. 6.906(4)(d), I certify that neither party's counsel, nor any or other person or group, was involved in writing any portion of this brief. I further certify that neither

party's counsel, nor any other person or entity, made a monetary contribution to fund the preparation of this brief.

II. Statement of the Issue Presented for Review

WHETHER THE NARROW DEFINITION OF "SHOULDER" ADOPTED BY THE DEPUTY COMMISSIONER SHOULD BE ADOPTED BY THIS COURT AS IT IS THE ONLY DEFINITION THAT IS CONSISTENT WITH THE SPIRIT AND INTENTION OF IOWA'S WORKERS' COMPENSATION SYSTEM, AND IT PROVIDES THE ONLY WAY FOR EFFICIEINTLY ADMINISTERING FUTURE CLAIMS INVOLVING THE SHOULDER.

Baker v. Bridgestone/Firestone & Old Republic Insurance, 872 N.W.2d 672 (Iowa 2015).

Bidwell Coal Co. v. Davidson, 187 N.W. 809, 174 N.W. 592 (1919).

Ganske v. Spahn & Rose Lumber Co., 580 N.W.2d 812 (Iowa 1998).

McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 188 (Iowa 1980).

Rish v. Iowa Portland Cement Co., 186 Iowa 443, 170 N.W. 532 (1919).

Sherman v. Pella Corp.,576 N.W.2d 312 (Iowa 1998).

Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

Tunnicliff v. Bettendorf, 204 Iowa 168, 214 N.W. 516 (Iowa 1927).

III. ARGUMENT

THE NARROW DEFINITION OF "SHOULDER" ADOPTED BY THE DEPUTY COMMISSIONER SHOULD BE ADOPTED BY THIS COURT AS IT IS THE ONLY DEFINITION THAT IS CONSISTENT WITH THE SPIRIT AND INTENTION OF IOWA'S WORKERS' COMPENSATION SYSTEM, AND IT PROVIDES THE ONLY WAY FOR EFFICIEINTLY ADMINISTERING FUTURE CLAIMS INVOLVING THE SHOULDER.

Our workers' compensation system is entirely a creature of statute. Soukup v. Shores Co., 222 Iowa 272, 278, 268 N.W. 598 (1936). It is a statutory framework that is premised upon a trade-off between employees and employers. A trade-off that was deemed necessary by the authors of that system in order to make sure that the costs of work injuries were absorbed by the industries that produced them, and that the employers within those industries were insulated from costly civil suits associated with those injuries:

> It is of the very spirit of the Workmen's Compensation Act--the fundamental idea that is its basis--that the disability of a workman resulting from an injury arising out of and in the course of his employment is a loss that should be borne by the industry itself, as an incident of operation--in a sense an item of the cost of production--and as such, passed on to the consumer of the product, and not suffered alone by the workman or the employer, according to the individual fault or negligence.

Tunnicliff v. Bettendorf, 204 Iowa 168, 171, 214 N.W. 516, 518 (1927).

The Deputy Commissioner's decision recognizes the worthy objectives to be accomplished by this trade-off and provides the best foundation for protecting the integrity of the system moving forward. By limiting the definition of "shoulder" to

only those injuries involving the glenohumeral joint (the shoulder joint), the Deputy Commissioner gave meaning to the change the legislature intended to accomplish by amending Iowa Code §85.34(2)(n), while at the same time limiting the impact of that change in a balanced manner that continues to provide protection for employees and employers.

A. The Deputy Commissioner's Narrow Definition of Shoulder is Consistent with the History and Development of Iowa Workers' Compensation System.

Prior to the creation of Iowa's workers' compensation system in 1913, obtaining compensation for workplace injuries was left to the courts. This was a cumbersome proposition for employees and their employers. While injured employees had the right to a jury trial, and the attendant ability to obtain significant civil damages through a successful verdict, they were forced to prove that their employer had done something wrong to cause their injuries. They also faced the substantial hurdles of comparative fault and assumption of the risk even if they could prove negligence.

And while employers had the ability to avoid liability for some injuries, they faced the prospect of paying substantial tort damages in the event that they were deemed responsible. In addition, regardless of the outcome at trial, employees and employers alike were forced to incur the considerable expenses associated with a trial. Our system was, thus, created as a compromise method of resolving disputes

over workplace injuries without the need for traditional litigation. Conrad v. Midwest Coal Co., 251 Iowa 53, 64, 300 N.W. 721, 725 (1941).

As a part of this compromise, injured workers gave up the prospect of pressing tort lawsuits in exchange for a system designed to provide compensation benefits and medical services promptly, without protracted and expensive litigation. Baker v. Bridgestone/Firestone & Old Republic Ins., 872 N.W.2d 672, 677 (Iowa 2015). And employers received immunity from potentially large tort lawsuits and jury verdicts on the condition that they paid compensation benefits for injuries arising out of and in the course of employment without regard to fault. Id.; see also, Ganske v. Spahn & Rose Lumber Co., 580 N.W.2d 812, 814 (Iowa 1998)("The legislature has plainly tried by the foregoing statutes to protect employers from facing tort suits brought by injured employees."); Reid v. Automatic Electric Washer Co., 189 Iowa 964, 975, 179 N.W. 323 (1920)("[A] radical change was made, with reference to the matter of evidence, and that the purpose of the act was to provide a system whereby employers and employed might escape the evils of personal injury litigation, etc.")

Since the inception of our system, the Iowa Supreme Court has applied the statutes governing our system in a liberal fashion with an eye towards protecting injured workers. Rish v. Iowa Portland Cement Co., 186 Iowa 443, 448, 170 N.W. 532, 534 (1919). ("[T]he tendency of the courts in all jurisdictions where similar

acts are in force is to give a broad and liberal construction to the provisions thereof.") The primary purpose of the workers' compensation system is to benefit the worker and the worker's dependents so far as the statute permits. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 188 (Iowa 1980). Thus, the statute is to be interpreted liberally with an eye toward that objective. Irish v. McCreary Saw Mill, 175 N.W.2d 364, 368 (Iowa 1970); see also, Denison Mun. Utils. v. Iowa Workers' Comp. Comm'r, 857 N.W.2d 230, 235 (Iowa 2014)("To that end, we liberally construe the workers' compensation statute in favor of the worker.")

The Court has also long recognized that the fundamental reasons for the creation of our system were to "avoid litigation, lessen the expense incident thereto, minimize appeals, and afford an efficient and speedy tribunal to determine and award compensation under the act." Flint v. Eldon, 191 Iowa 845, 847, 183 N.W. 344, 345 (1921). It was the purpose of the legislature to create a system that provides "rough justice" in a speedy and summary fashion that is not encumbered with the technicalities, delays and expenses associated with traditional litigation. Id.; see also, Marovec v. PMX Indus., 693 N.W.2d 779, 787 (Iowa 2005)("It was the purpose of the legislature to create a tribunal to do rough justice---speedy, informal, untechnical.")

B. Understanding the methods of Compensating Permanent Disability.

The change at issue deals solely with the manner in which a worker with a permanent "shoulder" injury is to be compensated for the permanent impact of that injury. In order to understand the implications of that change, it is important to understand how compensation for permanent work injuries is determined. In Iowa, the permanent impact of a work injury is compensated based upon the type of injury sustained. And those injuries are divided into two categories: Scheduled member injuries and unscheduled injuries.

(i) Scheduled Member Injuries

For injuries to body parts outside of the trunk of the body, a permanent injury is compensated in accordance with a "schedule" of benefits set out in Iowa Code §§85.34(2)(a)-(u). For each of the body parts on this schedule of benefits, there is a designated maximum value. And the compensation owed for scheduled member injuries is a straight mathematical formula that does not take into account the impact of the injury on the injured worker's ability to return to work. See, Simbro v. Delong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983)("Functional disability is limited to the loss of the physiological capacity of the body or body part.")

Once the injured worker has finished healing, the extent of permanent physical impairment caused to the scheduled member is determined based upon a

rating derived from the American Medical Association's Guides to Permanent Impairment, 5th Edition.[1] As an example, the arm has an assigned value of 250 weeks. Iowa Code §85.34(2)(m)(2017). So, if it is determined that an injured worker has suffered a 10% impairment to the arm based upon the Guides, then that worker is entitled to 25 weeks of compensation to make up for the permanent effects of the work injury. And that level of compensation remains true regardless of whether the worker in question is an office worker who can easily return to the job in spite of the work injury, or the worker is a lifetime construction worker who has lost the ability to return to that profession as a result of the work injury. In other words, the amount of compensation available for a scheduled member injury does not---and statutorily cannot---take into account the impact of the injury on the worker's ability to engage in competitive employment.

(ii) Unscheduled Injuries

For permanent injuries to the trunk of the body, such as the back, the neck, the hips---and prior to 2017 the shoulders---there are two important differences in the manner of compensation. The first is that such injuries are compensated on a 500-week schedule regardless of the body part that was injured. Iowa Code §85.34(2)(v)(2017). The second is that the compensation for such injuries takes

[1] Prior to 2017 there was some limited room for deviation from the Guides. See, e.g., Lauhoff Grain Company v. McIntosh, 395 N.W.2d 834, 840 (Iowa 1986). However, the 2017 amendments added Iowa Code §85.34(2)(x) which removed that potential and limits the assessment of permanent impairment to the numbers provided by the Guides.

into account the impact of the injury on the injured worker's earning capacity. Second Injury Fund v. Nelson, 544 N.W.2d 258, 266 (Iowa 1995).

The physical impairment rating associated with permanent injuries to the trunk of the body---often referred to as "body as a whole" injuries---is only one of many factors to be taken into account. Other factors that need to be considered are the injured workers' age, education, work experience, permanent work restrictions, and the worker's ability to return to the type of employment for which the worker would otherwise suited to perform. Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998). For these reasons the compensation that is owed for "unscheduled" injuries is typically much greater than that which is owed for "scheduled" injuries. Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993)(The difference in the amount of compensation between scheduled and unscheduled injuries makes the stakes high.)

C. Consequences of the 2017 Amendment to Iowa Code §85.34(n).

The legislature changed the compensation owed for injuries to the "shoulder" with one simple sentence: "For the loss of a shoulder, weekly compensation during four hundred weeks." Iowa Code §85.34(n)(2017). This change created a new set of injuries that are no longer going to be compensated as unscheduled injuries. It did not change the definition or manner of compensation for "scheduled" arm injuries that exist on one side of the shoulder; and, it did not

change the definition or manner of compensation for "unscheduled" injuries on the other side of the shoulder. It simply created a new scheduled member, the shoulder, that exists between the arm and the body as a whole.

The implications of this change are twofold. First, it decreased the maximum available weeks of compensation for a shoulder injury from 500 weeks to 400 weeks. Second, it changed the manner in which compensation is paid from shoulder injuries from the unscheduled method to scheduled member method. Both of these changes effectively decreased the amount of compensation owed for shoulder injuries. See, Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 15 (Iowa 1993).

The parties have spent a considerable amount of trying to determine what the legislature intended to do with this change. The focus, however, should be on what the legislature actually did. And what they did was very simple: They limited the amount of permanent disability compensation available for shoulder injuries. The task of this court in implementing this change is to give it some meaning, but to do so in such a way that remains true to the concept of liberal construction and maintains the integrity of our system. Bidwell Coal Co. v. Davidson, 187 N.W. 809, 812, 174 N.W. 592, 595 (1919)("The statute is to be liberally construed, so as to get it within the spirit, rather than within the letter of the law.")

D. The Narrow Definition of Shoulder Adopted by the Deputy Commissioner is Consistent With the Spirit and Intention of Iowa's Workers' Compensation System.

(i) The Narrowest Definition of Shoulder is Consistent with Liberal Construction.

No legislative intent was provided within the language of §85.34(n) or along with it. The only thing that we know is that the legislature created a new category of injuries that should be compensated as "scheduled member" injuries. So, we are required to resort to the principles of statutory construction set out above, and the overriding principle that the law is to be construed in favor of the injured worker in order to determine what injuries should be included in that category. And those principles dictate the narrow application adopted by the Deputy Commissioner in this case.

When the legislature adopted §85.34(2)(n), it was aware that the law is supposed to be construed in a manner that is more favorable to injured workers. Iowa Farm Bureau Fed'n v. Envtl. Prot. Comm., 850 N.W.2d 403, 434 (Iowa 2014)("The legislature is presumed to know the state of the law, including case law, at the time it enacts a statute.") The legislature was also aware that a more restrictive definition of the scope of injuries that would no longer be eligible for unscheduled disability compensation would be more favorable to injured workers, so a more restrictive interpretation would be the default position. It was, therefore,

incumbent on the legislature to have used more expansive language if the legislature wanted to overcome this default position. Having failed to do so, it must be assumed that the legislature wanted the more restrictive definition to be applied.

(ii) The Narrowest Definition of Shoulder is Consistent with the System of Rough, Speedy Justice.

Determining the amount of permanent disability compensation owed for an injury to the arm is very simple. Once the injured worker has achieved maximum medical improvement and an impairment rating has been assigned, that rating is applied to the 250-week maximum value owed for an arm injury, and that is the amount to which the injured worker entitled.

If the definition of "shoulder" adopted by the Deputy Commissioner is utilized, the amount of permanent disability compensation owed for a shoulder injury can be just as simple. The first issue is to identify where the permanent, residual damage of a work injury is located with respect to the shoulder joint. If that damage is on the proximal side of the joint, then it is an unscheduled injury; if that damage is on the distal side of the joint, then it is an arm injury; and, if the damage is within the shoulder joint, then it is a shoulder injury. If it is determined to be a shoulder injury, an impairment rating can then be obtained and applied to the 400-week maximum value owed for a shoulder injury, and that is the amount to which the injured worker is entitled.

In contrast, if the less defined approach to shoulder injuries chosen by the Commissioner is adopted, then the first step will be much more complex. Under that approach, the starting point for shoulder injuries will continue to be easy to identify, as that will be where "arm" injuries end at the distal side of the shoulder joint. The ending point, however, will be much more difficult. From a medical standpoint, the "shoulder" is an expansive concept including multiple bones and multiple connective tissues that extend from the middle of the arm to deep inside the trunk of the body. So, if there is an injury to one of the various muscles and tendons within the structures that connect the arm to the rest of the body as a whole, where on that muscle or tendon does it stop being a back injury, or a hip injury, or a neck injury, or some other undefined injury that extends well beyond the shoulder joint and impacts the body as a whole? Is an injury to the proximal end of the clavicle, or an injury to the sternoclavicular joint (both of which are within the anatomical definition of "shoulder" but are far removed from the "shoulder joint") now to be considered shoulder injuries as opposed to body as a whole? If so, per what guidance or direction from the legislature? If not, then where should the dividing line be drawn?

These are not questions that will need to be litigated if the narrow definition of shoulder adopted by the Deputy Commissioner is adopted. And that lack of litigation is precisely the type system of compensation that originators of our

workers' compensation system intended to create. Flint v. Eldon, 191 Iowa 845, 847, 183 N.W. 344, 345 (1921).

IV. Conclusion and Request for Relief

Rosa Chavez's claim represents an opportunity for this Court to make the administration of future shoulder claims very simple and efficient or very complicated and expensive. Absent any contrary directive from the legislature, it is the simple and efficient approach—the approach that is most in keeping with the intention and purpose of the workers' compensation system—that should be followed.

WHEREFORE the Workers' Compensation Core Group of the Iowa Association for Justice respectfully request that this Court enter an order reversing the decision of the District Court and adopting the definition of "shoulder" utilized by the Deputy Commissioner for future cases.

Jason D. Neifert AT0005681
NEIFERT, BYRNE & OZGA, P.C.
1441 – 29th St., Suite 111
West Des Moines, IA 50266
Telephone: 515-226-2117
Facsimile: 515-226-2497
CORE GROUP CHAIR AND ATTORNEY FOR THE WORKERS' COMPENSATION CORE GROUP OF THE IOWA ASSOCIATION FOR JUSTICE

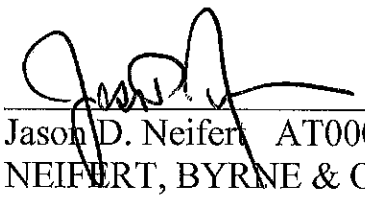
Certificate of Compliance with Iowa R. App. P. 6.903(1)

I, Jason D. Neifert, attorney for the Workers' Compensation Core Group of the Iowa Association for Justice, hereby certify that this brief complies with the Court's type volume limitation, typeface requirements, and type style requirements:

1. This brief complies with the type volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because it contains 4,101 total words.

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) because it has been prepared in proportionally spaced typeface using Microsoft Word 10.

3. This brief complies with the type style requirements of Iowa R. App. P. 6.902(1)(f) because it has been prepared in Times New Roman 14-point font.



Jason D. Neifert AT0005681
NEIFERT, BYRNE & OZGA, P.C.
1441 – 29th St., Suite 111
West Des Moines, IA 50266
Telephone: 515-226-2117
Facsimile: 515-226-2497
Email: JNeifert@nbolawfirm.com
CORE GROUP CHAIR AND ATTORNEY FOR THE WORKERS' COMPENSATION CORE GROUP OF THE IOWA ASSOCIATION FOR JUSTICE