IN THE SUPREME COURT OF IOWA

APPEAL NO. 22-1328

BRIDGESTONE AMERICAS, INC. and
OLD REPUBLIC INSURANCE COMPANY,

Petitioners/Appellants,

v.

CHARLES ANDERSON,

Respondent/Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
HONORABLE CELENE GOGERTY
Polk County No. CVCV063124

APPELLANTS' FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

Timothy W. Wegman AT0008303
Alison E. Stewart AT0009304
Jordan R. Gehlhaar AT0015254
PEDDICORD WHARTON, LLP
Email: tim@peddicord.law; alison@peddicord.law
6800 Lake Drive, Ste. 125
West Des Moines, IA 50266
Phone: (515) 243-2100; Fax: (515) 243-2132
ATTORNEYS FOR APPELLANTS

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ROUTING STATEMENT

The Iowa Supreme Court should retain this matter. It presents a substantial issue of first impression. Iowa R. App. P. 6.1101(2)(c). Importantly, the issue has been raised before this Court and the Workers' Compensation Agency on multiple occasions, but neither has had the opportunity to address it. *See Chavez v. MS Technology LLC*, 972 N.W.2d 662, 670–71 (Iowa 2022); *Carmrer v. Nordstrom, Inc*., 2021 WL 4243190, File No. 1656062.01 (Arb. Dec., Sep. 13, 2021). Additionally, this case presents an opportunity for enunciating or changing legal principles; namely, interpretation of the 2017 legislative changes in Iowa's statutory workers' compensation system. Iowa R. App. P. 6.1101(2)(f). Lastly, issues of broad public importance are implicated by the decision. Iowa R. App. P. 6.1101(2)(d).

STATEMENT OF THE CASE

This is an appeal from a final agency decision in a workers' compensation contested case proceeding. Charles Anderson ("Claimant"), filed an Original Notice and Petition with the Iowa Workers' Compensation Commissioner on February 26, 2019, alleging an injury to the right shoulder and right arm occurring on October 31, 2018. (Pet. p. 1, App. 6). Bridgestone Americas, Inc. is the named employer, and Old Republic Insurance Company

is the named insurance carrier ("Defendants"). (Pet. p. 1, App. 6). Defendants filed an answer on March 6, 2019, denying liability for the alleged injury. (Def. Answer, App. 8) Subsequently, on February 21, 2020, Claimant filed an Amended Petition.[1] (Am. Pet. p. 1, App. 10).

An arbitration hearing was held on April 1, 2021, before Deputy Workers' Compensation Commissioner Erin Q. Pals. The relevant issues in dispute were: (1) whether the Claimant sustained an injury that arose out of and in the course of employment, (2) whether the alleged injury was the cause of any temporary or permanent disability, and (3) whether any benefit entitlement would be functional or industrial in nature. (Arb. Dec. p. 2, App. 33). The Arbitration Decision was entered on September 2, 2021. (Arb. Dec. p. 1, App. 32). Deputy Pals found the Claimant sustained compensable injuries to his right arm and right shoulder, and that each injury resulted in permanent disability. (Arb. Dec. p. 12, App. 43). As to benefit entitlement, the Deputy determined the "catch all" provision of Iowa Code Section 85.34(2)(v) was appropriate, and therefore industrial disability applied. (Arb. Dec. p. 13, App. 44). Finally, the Deputy found Claimant sustained a 50

[1] Claimant added the Second Injury Fund as Defendant in his Amended Petition. His appeal on that issue was voluntarily dismissed and is not at issue in this proceeding.

percent loss of future earning capacity, equaling 250 weeks of industrial disability benefits. (Arb. Dec. p. 14, App. 45)

On September 14, 2021, Defendants filed a Notice of Appeal to the Workers' Compensation Commissioner as to all portions of the Arbitration Decision. (Def. Notice of Appeal, App. 50) Claimant filed a Notice of Cross-Appeal as to the extent of industrial disability. (Cl. Notice of App., App. 52) Pursuant to Iowa Code Sections 17A.15 and 86.24, an agency Appeal Decision was entered by Workers' Compensation Commissioner Joseph Cortese II on January 25, 2022, affirming the Arbitration Decision in its entirety, without further analysis. (App. Dec. p. 1–3, App. 71-73)

Defendants petitioned for judicial review on February 7, 2022, arguing the Commissioner erred in finding Claimant met his burden on causation, awarding compensation based on an unscheduled injury, and awarding 50 percent industrial disability. (Pet. for Jud. Rev. p. 1, App. 75). Claimant filed a Cross-Petition for Judicial Review, which was dismissed prior to hearing. (Resp. Cross Pet., App. 78)

On June 28, 2022, a hearing on the Petition for Judicial Review was held before the Honorable Celene Gogerty. (Ruling on Pet. for Jud. Rev. p. 1, App. 103). Judge Gogerty affirmed the Commissioner Appeal Decision. (Ruling on Pet. for Jud. Rev. p. 15–16, App. 117-118). Defendant-Appellants

(hereinafter "Appellants") filed a Notice of Appeal to the Iowa Supreme Court on August 10, 2022, from all adverse rulings below. (Not. of Appeal, App. 120)

STATEMENT OF FACTS

Claimant was 68 years old at the time of hearing. He is a high school graduate. (Tr. p. 21, App. 210). For three years following high school, he worked as a concrete laborer, laid telephone cable, and was an apprentice electrician. (Tr. p. 22, App. 211). He began working for Firestone in 1974 as a stock cutter. (Tr. p. 22, 29, App. 211, 215). In 1984, his position changed to a tire builder. (Tr. p. 29, App. 215). He continued in this position until the alleged date of injury on October 31, 2018.

Claimant testified that on the alleged date of injury, he was building tires. While reaching up to hit a switch, he realized he could not get his arm past shoulder height. He described this as "locking up." He continued to work and was able to reach as needed, but testified his work was affected. (Tr. p. 47, App. 232). Claimant went to medical at Firestone to see Dr. Troll. He reported his hand had been going numb and waking him at night for approximately one month prior. (Tr. p. 48, App. 233). Claimant stated certain activities tended to cause shoulder pain. (Jt. Ex. 1, p. 4, App. 149). Additionally, he reported that approximately one week prior, he had increased

pain in his right shoulder. (Jt. Ex. 1, p. 4, App. 149). He denied any specific injury on the job.

Upon exam, he had full range of motion, but experienced discomfort in the right shoulder at approximately 90 degrees abduction. (Jt. Ex. 1, p. 5, App. 152). He was referred to Firestone's physical therapist for an exercise program. (Jt. Ex. 1, p. 5, App. 152). Dr. Troll noted "some wear and tear degenerative changes in his right shoulder," finding "the activities he does in his job tend to exacerbate this non-work-related issue." (Jt. Ex. 1, p. 5, App. 152). Dr. Troll recommended claimant seek further evaluation with his primary physician for possible carpal tunnel syndrome. (Jt. Ex. 1, p. 6, App. 153). They discussed bidding into a different, more suitable job position, but claimant said he did not want to do that. (Jt. Ex. 1, p. 6, App. 153). Dr. Troll provided a medical pass for the remainder of the work day. (Cl. Ex. 14, p. 185, App. 208).

Claimant testified that the following day, he returned to Firestone and could not do his job well, so he returned to Dr. Troll and asked if he could see his own physician. Dr. Troll affirmed that he could. (Tr. p. 49, App. 234). Claimant went to his physician, Dr. Harrison, on November 5, 2018, reporting pain in the right shoulder for the previous two weeks with no acute injury. (Jt.

Ex. 2, p. 19, App. 155) He was referred to Dr. Davick at Des Moines Orthopedic Surgeons (DMOS). (Tr. 51, App. 235; Jt. Ex. 2, p. 20, App. 156).

Upon initial evaluation with Dr. Davick, Claimant reported—for the first time—feeling a "pop" in his shoulder. (Jt. Ex. 3, p. 56, App. 167). An MRI of the right shoulder was ordered, which revealed moderate to advanced supraspinatus tendinosis with near full thickness bursal-sided tear. (Jt. Ex. 4, p. 77, App. 176). On February 2, 2019, Dr. Davick performed a right shoulder arthroscopy with a subacromial decompression, distal clavicle excision, and open rotator cuff repair. (Jt. Ex. 5, p. 79, App. 179). Postoperative physical therapy was successful. (Jt. Ex. 6, p. 86, App. 182).

Dr. Davick opined that Claimant reached maximum medical improvement (MMI) for the right shoulder as of August 5, 2019. At this appointment, Dr. Davick assessed an eight percent impairment to the shoulder, utilizing the AMA Guides, 5th Edition. Dr. Davick opined there was no causal connection between the right shoulder surgery and the subsequent right carpal tunnel surgery. (Jt. Ex. 3, p. 73, App. 173).

At a follow up for his shoulder with Dr. Davick, Claimant requested a referral for right hand and finger numbness. (Jt. Ex. 3, p. 61, App. 168). Upon initial evaluation with Dr. Rodgers at DMOS, Claimant reported numbness in his right small finger and partial ring finger had been occurring for some time,

and had remained constant since July 2019. (Jt. Ex. 3, p. 62, App. 169). Claimant had a history of left carpal tunnel release in 1989. (Jt. Ex. 5, p. 78, App. 178). Dr. Rodgers ordered an EMG, which revealed right ulnar neuropathy with denervation, and right median neuropathy. (Jt. Ex. 3, p. 65, App. 170) On October 8, 2019, Dr. Rodgers performed carpal tunnel and cubital tunnel release. (Jt. Ex. 5, p. 81, App. 180).

At a follow up appointment on November 4, 2019, Claimant reported that sometime prior to his surgery with Dr. Rodgers, while reaching under a fence to pick a tomato, he experienced pain in his right shoulder. Dr. Davick considered this an aggravation of the rotator cuff, without concern of re-tear. Claimant was instructed to resume exercises. (Jt. Ex. 3, pp. 67, 73, App. 171 173). On February 12, 2020, Dr. Davick again stated Claimant was at MMI for the shoulder and stated the previous rating was unchanged. (Jt. Ex. 3, p. 70, App. 172).

On July 8, 2020, Claimant underwent an independent medical evaluation (IME) with Dr. Stoken at the request of Claimant's counsel. This was her first evaluation of the Claimant. (Tr. 84, App. 259). The history provided to Dr. Stoken was that Claimant injured his shoulder while cutting panels at work, which resulted in hand numbness and inability to lift the arm. (Cl. Ex. 7, p. 100, App. 189). Dr. Stoken opined "the 10/31/18 injuries" are

causally linked to his employment at Firestone. Under this opinion, she stated he was doing repetitive work grasping and pinching, and developed symptoms while working which continued as he worked throughout the day at Firestone. (Cl. Ex. 7, p. 109, App. 191). Dr. Stoken found a combined 42 percent impairment to the right upper extremity for the right shoulder, carpal tunnel and cubital tunnel conditions. (Cl. Ex. 7, p. 110, App. 192).

At the arbitration hearing, Claimant testified that he can lift his right arm. After shoulder surgery, he experiences weakness when holding objects away from his body. (Tr. 54–55, App. 236-237). He avoids leaning on his right elbow and experiences some numbness "at the end" of his "little fingers." (Tr. 56, App. 238).

Claimant retired on May 1, 2020. He testified that he did so to retain his insurance benefits. (Tr. 59, App. 241). Under Firestone's policies, an employee who is unable to return after they have exhausted their leave is classified as a "voluntary quit." (Cl. Ex. 13, p. 173, App. 197). Claimant testified that prior to the alleged date of injury, he was eligible to retire, but his plan to retire depended on his wife's retirement. (Tr. 61, App. 243).

As of the date of hearing, Claimant had not formally applied for any jobs, specifically due to the Covid-19 pandemic. (Tr. 87, App. 262). However, he was confident he could get a job at Goode's Greenhouse, stating "I found

the perfect one, but it's just not the time yet." (Tr. 67–68; 88, App. 244-245; 263). He had spoken to a friend who is a foreman there about the possibility of being hired within his restrictions. (Tr. 67–68, App. 244-245).

ARGUMENT

I. CLAIMANT FAILED TO PROVE A CAUSALLY RELATED WORK INJURY TO THE SHOULDER OR THE ARM.

Petitioner argued at the Arbitration level that Claimant failed to meet his burden of proof on causation. (Def. Post Hearing Brief, Point I, App. 26-28). Additionally, Appellants asserted error on the finding of causation in their in their Brief in support of Judicial Review. (Petitioners' Jud. Rev. Brief, Point II, App. 98-100).

Causation of an alleged work injury is a question of fact. Therefore, the court reviews for substantial evidence in the record to support the findings below. *Cedar Rapids Comm. Sch. Dist. v. Pease*, 807 N.W.2d 839, 844–45 (Iowa 2011). Evidence is substantial when its "quantity and quality . . . would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue." Iowa Code §17A.19(10)(f)(1) (2017).

Workers' compensation extends only to injuries arising out of and in the course of employment. Iowa Code §85.3(1) (2008). This burden falls upon the injured employee to establish entitlement by a preponderance of the

evidence. *Quaker Oats Co. v. Ciha*, 552 N.W.2d 143, 150 (Iowa 1996). It is not enough for an injury to coincidentally surface while at work. *Koehler Electric v. Wills*, 608 N.W.2d 1, 3 (Iowa 2000) (citing *Miedema v. Dial Corp.*, 551 N.W.2d 309, 311 (Iowa 1996)).

Claimant has not met his burden for compensability of his claimed injuries. The histories in Claimant's medical records are inconsistent with each other, and inconsistent with his testimony. When Claimant first reported to Dr. Troll on the alleged date of injury, he reported increased pain approximately one week prior. (Jt. Ex. 1, p. 5, App. 152). He denied any specific injury on his job. He stated that certain activities caused him pain such as tearing stock. (Jt. Ex. 1, p. 5, App. 152). Just five days later, Claimant reported to Dr. Harrison that he had right shoulder pain for the previous two weeks with no acute injury. (Jt. Ex. 2, p. 19, App. 155).

On November 28, 2018, Claimant reported to Dr. Davick that he felt a "pop" in his right shoulder while at work, describing this specifically in the anterolateral aspect of the shoulder. (Jt. Ex. 3, p. 56, App. 167). This is clearly inconsistent with his reports to the prior two providers that he experienced pain for weeks prior to October 31, 2018, which simply increased on that date.

At his deposition, when asked if there was a specific incident giving rise to his shoulder complaints, Claimant testified: "You know, I can't—I

can't really tell you that it was a certain time, but when it happened is I couldn't lift my arm up. You know, it got stuck." (Def. Ex. B, p. 4, 14:7–9, App. 186, 187). This is inconsistent with the treatment record on that date, in which Claimant reports only pain and exhibited full range of motion on exam. At trial, Claimant testified that he did not remember telling Dr. Troll or Dr. Harrison that there was no specific work injury. (Tr. p. 77–78, App. 252-253). He testified that he presented to Dr. Troll on November 31, 2021, simply because "That's when [he] couldn't lift [his] arm." (Tr. p. 78, Ln. 1, App. 253). The logical explanation is that of Dr. Troll: that Claimant had a non-work-related right shoulder issue which made his job activities difficult.

The inconsistent evidence in the record is not substantial enough to support a finding of causation or meet Claimant's burden to prove a work-related shoulder injury. This Court reversed a finding of causation based on strikingly similar inconsistencies in *Arndt v. City of Le Claire*, 728 N.W.2d 389, 395 (Iowa 2007). In making its determination, the Court found it significant that there were inconsistent timeline reports regarding the date of injury, a medical provider noted a separate mechanism of injury than other records (which each history came from the employee), and the employee's testimony was inconsistent with other evidence. *Id.* The employee in *Arndt* even had an employer representative testify to the report of the incident and

his belief that the employee was truthful. *Id.* at 393–94. This was not enough to overcome the "too many inconsistencies" for which the Commissioner overlooked. *Id.* at 392.

It is likewise unclear when the arm injury arose. What is clear is that the shoulder condition and carpal tunnel syndrome are not associated with each other whatsoever. Numbness in the right hand was mentioned by Dr. Troll on the alleged date of injury. However, Claimant testified that since he was reporting the shoulder complaints, "it was time to take care of both of them at the same time" so he requested they both be in the medical report. (Tr. p. 76, Ln. 7–9, App. 251). Subsequently, Claimant reported both to Dr. Harrison and Dr. Rodgers that he experiences numbness and tingling in the right hand, especially when mowing his lawn. (Jt. Ex. 2, p. 35, App. 158; Jt. Ex. 3, p. 65, App. 170). No mechanism of injury or even approximate dates of symptomology were provided by Claimant. Dr. Davick later opined there is no causal connection between the right shoulder and subsequent right carpal tunnel surgeries. (Jt. Ex. 3, p. 73, App. 173)

II. EVEN IF SUSBTANTIAL EVIDENCE SUPPORTS THAT CLAIMANT SUSTAINED A COMPENSABLE INJURY TO THE SHOULDER, ARM, OR BOTH, CLAIMANT MUST BE COMPENSATED FUNCTIONALLY BY THE SCHEDULE AS DIRECTED BY THE LEGISLATURE.

Petitioners argued post-hearing that any injury found in this case should be compensated under the schedule, as the legislature directed. (Def. Post-Hearing Brief, Point II, App. 28-29). Each of Petitioners' Appeal Briefs, as well as their oral argument to the District Court, present that it was error to award industrial disability. (Def. App. Brief, Point I, App. 62-66; Petitioners' Jud. Rev. Brief, Point I, App. 94-98; Dist. Ct. Tr. p. 4–6, App. 266-268) Accordingly, error is preserved.

It is well established that interpretation of Iowa's workers' compensation statutes and related case law has not been clearly vested in the discretion of the agency. *Ramirez Trujillo v. Quality Egg, L.L.C.*, 878 N.W.2d 759, 769–70 (Iowa 2016); *Neal v. Annett Holdings, Inc*., 814 N.W.2d 512, 518 (Iowa 2012); *Meyer v. IBP, Inc*., 710 N.W.2d 213, 219 (Iowa 2006). Accordingly, this Court performs a *de novo* review, giving no deference to the Commissioner's interpretation of the law, and freely substituting its independent judgment for that of the court below.

A. Shoulder Injuries and Arm Injuries Fit Plainly in the Legislative Schedule.

Any statutory interpretation begins with a textual inquiry of the plain language, read in context of the entire statute. *State v. Doe*, 903 N.W.2d 347, 351 (Iowa 2017). Regardless of the combination of injuries found compensable in this case, the plain language of Iowa Code Section 85.34 directs the Claimant's compensation on a scheduled basis. *See generally* Iowa Code §85.34 (2017). As such, it was erroneous to ignore the scheduled system and defer to the "catch-all" provision. *Id.* §85.34(v).

Workers' compensation is a wholly statutory system. *See generally* Iowa Code 85–87. Under this system, when a worker is determined to be maximally improved from the injury and permanent impairment can be assessed, temporary benefits cease and a worker is entitled to compensation if they experience permanent disability resulting from the injury. Iowa Code §85.34. Specifically, the system divides permanent disabilities into two classes: (1) scheduled member injuries, of which there are a myriad of defined possibilities, and (2) injuries to the body as a whole/unscheduled injuries. *See* (scheduled); Iowa Code section 85.34(2)(v) (unscheduled).

Permanency benefits for scheduled member losses are calculated by taking the percentage of functional impairment assigned by a medical provider (utilizing the AMA Guides), times the maximum number of weeks

the legislature has assigned for that body part. *See generally* AMERICAN MEDICAL ASSOCIATION GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT, 5th Ed. (2000). For example, if a worker is assigned ten percent impairment following a foot injury, they would receive fifteen weeks of compensation (10% x 150 maximum weeks assigned to the foot). Iowa Code §85.34(2)(o). Subsection (t) provides an altered—but still scheduled—classification; It is a list of scheduled members for which the legislature determined that rather than compensating the value of each member separately, the impairments should be combined into one percentage, taken times five hundred weeks. *Id.* § 85.34(2)(t).

In contrast, when the loss is to body parts *not on the schedule*—such as the back, neck, or head—the worker is compensated based on either their reduction in earning capacity in relation to five hundred weeks, or their total functional impairment. *Id.* §85.34(2)(v). In such a case, the trier of fact makes a judgment based upon on a number of factors and comparison of pre-injury and post-injury evidence. *St. Luke's Hospital v. Gray*, 604 N.W.2d 646, 653 (Iowa 2000).

Even with each injury being accounted for on the schedule, the Claimant here was awarded industrially disability benefits. (Arb. Dec., App.

32) The Deputy Commissioner's step-by-step analysis[2] started out on the right path, but lost footing after step two.

First, the Deputy opined that Claimant sustained an arm injury which falls under the statutory schedule at two hundred and fifty weeks of compensation. Iowa Code §85.34(2)(m). Next, it was determined that Claimant sustained a shoulder injury, which falls under the schedule at four hundred weeks. *Id.* §85.34(2)(n). The analysis diverges from the statutory text when the Deputy opined that since there was an additional loss, *neither* subsection could be appropriate. (Arb. Dec., pp. 12–13, App. 43-44).

The analysis should stop at each member being accounted for, and for which compensation can easily be calculated. Rather, the path continued on a search for an alternate fit. Section (2)(t) was next examined, which includes the loss of a combination of arms, hands, feet, legs, or eyes caused by a single accident. Iowa Code §85.34(2)(t). The Deputy correctly states that the shoulder is not included in this subsection. Even if it were, Claimant's injuries were not caused by "a single accident." *See* Argument Point I above. However, this step was improper, as the arm and shoulder already fit plainly into the legislative schedule, and could be compensated accordingly.

[2] The Deputy's analysis is referenced given that the Commissioner and District Court adopted it entirely.

Ultimately, the path of analysis ended at the "catch all" provision; although at this point, the losses had already been caught, so to speak. (Arb. Dec., p. 14, App. 45); Iowa Code §85.34(2)(v). The legislature provided this section for the unscheduled injuries discussed above, or "all cases of permanent partial disability *other than those described or referred to in paragraphs 'a' through 'u'* . . ." *Id.* (emphasis added). Claimant's asserted injuries were already described and referred to in the preceding paragraphs, because they fell under an arm and a shoulder, respectively.

To find otherwise would ignore the plain language of the statute or render the highlighted language in the "catch all" provision superfluous. Statutes should not be construed in a way that renders any part superfluous unless *no other* construction is reasonably possible. *In re G.J.A.*, 574 N.W.2d 3, 6 (Iowa 1996) (quoting *Iowa Auto Dealers Ass'n v. Iowa Dept. of Revenue*, 301 N.W.2d 760, 765 (Iowa 1981)). Defendant's interpretation is not only reasonable and possible, but it is consistent with the plain language of the statute, and legislative intent.

B. The Legislature Intended Shoulder Injuries be Compensated as a Scheduled Injury with Reduced Litigation.

Even when statutory language might seem clear on its face, the context of the words can create ambiguity. *Iowa Ins. Institute v. Core Group of Iowa Ass'n for Justice*, 867 N.W.2d 58, 72 (Iowa 2015). The Court's goal when

interpreting the statutory provisions of Chapter 85 of the Iowa Code is to determine and effectuate the legislature's intent. *Ramirez-Trujillo v. Quality Egg, LLC*, 878 N.W.2d 759, 770 (Iowa 2016). The goal is achieved by adopting the interpretation that "is reasonable, best achieves the statute's purpose, and avoids absurd results." *State v. Bower*, 725 N.W.2d 435, 442 (Iowa 2006).

The legislature's purpose for creating the statutory schedule is to "reduce controversies through certainty of compensation." *Gilleland v. Armstrong Rubber Co.,* 524 N.W.2d 404, 407 (Iowa 1994). This method is clear, predictable, and simple for both workers and their employers. Without it, each and every work injury, no matter how swiftly recovered, would go through the process utilized for unscheduled/body as a whole injuries—industrial disability analysis.

This process often results in protracted litigation with associated time and cost concerns, and less predictability. This is certainly a reason why the legislature added one of the commonly injured members to the schedule—the shoulder.[3] *See* Iowa Code § 85.34(2)(n) (2017); *see also Chavez*, 972 N.W.2d

[3] *See* Hearing on H.F. 518 (statement of Rep. Cownie at 1:11:30) (stating the bill's purpose is to address uncertainty and quoting a Deputy stating "your guess is as good as mine" regarding benefit entitlement) https://www.legis.iowa.gov/dashboard?view=video&chamber=H&clip=H20

at 670 (treating shoulder injuries "as whole body injuries would still require litigation in almost every case to determine the disability rating for compensation purposes."). Prior to the 2017 amendment, shoulder injuries were always to the body as a whole. The legislature then added the shoulder to the schedule at the maximum weeks of any member: four hundred weeks. Iowa Code §85.34(2)(n) (2017). The drafters of this amendment stated that adding the shoulder as a scheduled member would "take far less litigation," be "far easier to understand" for all parties, and result in more and faster compensation for workers because "employers begin to voluntarily pay" and employees don't have to "engage counsel" and share their compensation.[4]

Finding a whole body injury in this context is not only contrary to the plain language, but undermines the purpose of the legislative change in 2017, and the statutory schedule as a whole. The purpose would be frustrated if in every case of a shoulder and any other member, the scheduled assignment is lost and the entire case is compelled into litigation for individualized assessment.

170316120116097&dt=2017-03-16&offset=733&bill=HF%20518&status=i at 1:10

[4] *See* Hearing on H.F. 518 (Rep. Carlson, closing remarks at 4:47–4:48) https://www.legis.iowa.gov/dashboard?view=video&chamber=H&clip=H20170316154402833&dt=2017-03-16&offset=210&bill=HF%20518&status=i

Following the Claimant's interpretation, if a worker sustained an injury to the right hand, and a distinct injury to the right thumb, then industrial disability would be appropriate. This is not how classification works in practice. *See, e.g., Stowe v. Second Injury Fund of Iowa*, No. 16-0599, 2017 WL 362002 at *3 (Iowa Ct. App. 2017); *Pichente v. IBP, Inc*., File No. 1168659, 1999 WL 33619295, at *5 (Arb. Dec. Nov. 23, 1999) (injury to a hand and thumb compensated as scheduled injuries under sections (l) and (a), respectively).

How the loss of fingers is calculated is instructive: "This agency for almost 20 years has been simply separately determining impairment to each finger under the schedules in Iowa Code section 85.34(2). The agency then adds together each of the weekly entitlements and awards the total number of weeks." *Frye v. IBP, Inc*., File No. 1269626, 2002 WL 35636088, at *4 (Arb. Dec. Sept. 4, 2002). *See also Irvin v. IBP, Inc.*, File No. 1169484, 1999 WL 33619697, at *2 (Arb. Dec. Jan. 5, 1999) (injury to an index finger and foot compensated under sections 85.34(2)(b) and (n), respectively since two body parts were not listed in former subsection (s), now (t)). The same can be done here. The loss of "an arm" and "loss of a shoulder" can be compensated by their respectively weekly entitlements. Iowa Code §85.34(2)(m)-(n). Holding otherwise would open the opportunity for industrial disability in a myriad of

simple, scheduled injury cases. For example, an injury to the eye and the pinky—with a maximum combined value of only one hundred sixty weeks—will be argued to be industrial, requiring significant litigation. *See id.* § (2)(e), (q). This is contrary to legislative intent and would make a substantial impact on the system as a whole.

It is presumed the legislature is aware of the state of the law and holdings of the courts when crafting new statutes. *Roberts Dairy v. Billick*, 861 N.W.2d 814, 821 (Iowa 2015). It can therefore be presumed that the legislature which added the shoulder to the schedule was aware that scheduled members were added together, and the shoulder would follow this logic. Accordingly, it is not dispositive that the shoulder is not included in subsection (t). *See* Iowa Code § 85.34(2)(t). The legislature's language and intent is clear on the face of subsection (m): to make the shoulder a scheduled member at four hundred weeks of compensation. Industrial analysis any time another scheduled member injury is asserted is in direct contradiction to this bedrock presumption of statutory interpretation.

The story is different when a worker proves a shoulder injury and an inherently unscheduled body part injury, such as the back. *See, e.g., Bolinger v. Trillium Healthcare Group,* 2021 WL 2624176, File No. 5060856 (Arb. Dec., June 17, 2021) (unique shoulder procedure involving the upper back).

But that is not the case here. The legislature defined shoulder compensation to be in relation to four hundred weeks, and arm compensation to be in relation to two hundred fifty weeks. Therefore, application of the "catch all" provision is improper, and compensating the Claimant industrially undermines this direction and its primary intent.

Benefit entitlement in this case can be easily determined on the face of the statute. Plain language of Section 85.34 encompasses any injury in this case on a scheduled compensation basis. Finding otherwise is a direct contradiction to bedrock statutory interpretation principles and opens opportunity for substantial litigation in the system as a whole. Additionally, the intention of the legislature with adding the shoulder to the schedule, and the scheduled scheme as a whole, are undermined and contradicted by affirming an industrial award.

III. Even if Compensated Industrially, such Injury did not Substantially Reduce the Claimant's Earning Capacity.

The determination of the extent of industrial disability is an application of the law to the facts. *Neal*, 814 N.W.2d at 526. As such, this Court will reverse when the determination is irrational, illogical, or wholly unjustifiable. Iowa Code § 17A.19(10)(3)(m) (2017).

Should this Court find industrial disability appropriate, the assessment of fifty percent assessment of loss of earning capacity should be reversed.

Industrial disability measures the employee's loss of earning capacity as a result of the injury. There is no formula to determine this loss, but factors to be considered include "functional impairment, age, education, work experience, qualifications, ability to engage in similar employment, and adaptability to retraining." *Clark v. Vicorp Restaurants, Inc.*, 696 N.W.2d 596, 605 (Iowa 2005). Importantly, the focus is not entirely on what the employee can and cannot do, but rather the ability to be gainfully employed." *Myers v. F.C.A. Servs.*, 592 N.W.2d 354, 356 (Iowa 1996).

The Deputy in this case did not provide detailed analysis behind the award of fifty percent loss of future earning capacity, but stated the award was grounded in all factors set forth by this Court. (Arb. Dec., p. 14, App. 45) One such factor directed from the legislature is "the number of years in the future it was reasonably anticipated the employee would work at the time of injury." Iowa Code § 85.34(2)(v).

Claimant testified that at the time of injury, he was fully eligible for retirement any day. (Tr. 61, App. 243) He was the second highest seniority worker in the entire plant. (Tr. p. 43, App. 229) At the hearing, Claimant estimated that he would "probably still be working" simply because his wife was still working. However, this does not take into account how the

Claimant's injury and retirement would affect that familial decision surrounding her retirement. (Tr. 61, App. 243)

Another factor to consider is the motivation that an employee possesses to return to work post-injury. (Tr. p. 33, App. 219). Early in his treatment, Dr. Troll suggested Claimant bid into a more suitable position, but he wanted to continue. (Jt. Ex. 1, p. 6, App. 153). Claimant testified that he had spoken to someone he knew who was a foreman at Goode's Greenhouse about the possibility of a job there within his restrictions. (Tr. 67, App. 244). Claimant was confident the individual would hire him because they preferred "the older guys" who were reliable." (Tr. 68, App. 245). Regarding the work duties he could perform, Claimant stated he could "handle a flat of plants and not have any trouble." (Tr. 68:5, App. 245).

The parties agree that Claimant cannot return to his position as a tire builder, but Claimant is cleared to work in the light category of work. The highest restrictions suggested for Claimant are to avoid working above shoulder level, avoid lifting more than ten pounds on a frequent basis or more than twenty pounds on an occasional basis. (Cl. Ex. 7, p. 110, App. 192). He testified that he is strong with his elbows in but weaker with his arms outstretched. (Tr. 55, App. 237).

Claimant is a high school graduate who has had a long and successful career. At the time of his injury he was retirement eligible. Even considering post-injury restrictions, there is not substantial evidence supporting his loss of future earning capacity reaching fifty percent, and it was unjustifiable error to assess the same.

CONCLUSION

The inconsistencies on the record do not amount to substantial evidence in support of a work-related injury in this case and therefore Claimant fell short of his burden on causation. Any compensable injury found in this case would fall squarely under the statutory schedule and should be compensated as such. Finding otherwise is not only an error of law, but would undermine clear statutory language, the intent behind the statutory scheme as a whole, and traditional workings of the compensation system. Established statutory interpretation principles support compensation of a shoulder and an arm injury in relation to their respective weeks. If industrial disability is awarded, review of the relevant factors informs a loss of earning capacity below the fifty percent assessed.

Accordingly, Petitioners respectfully request this Court reverse the district court ruling in its entirety, or modify it in the alternative.

REQUEST FOR ORAL ARGUMENT

Petitioners respectfully request that this matter be set for oral argument before the Court.

Respectfully Submitted,

PEDDICORD WHARTON, LLP

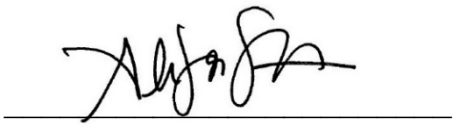
Timothy W. Wegman AT0008303
Alison E. Stewart AT0009304
Jordan R. Gehlhaar AT0015254
tim@peddicord.law ; alison@peddicord.law
jordan@peddicord.law
6800 Lake Drive, Ste. 125
West Des Moines, IA 50266
Phone: (515) 243-2100
Fax: (515) 243-2132
ATTORNEYS FOR APPELLANTS

CERTIFICATE OF COSTS

Petitioners certify that no costs were incurred in printing or duplicating paper copies of briefs.

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and (1)(g)(1) or (2) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 and contains 5,593 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).



Signature

11/28/22

Date

CERTIFICATE OF SERVICE

I, Alison E. Stewart, member of the Bar of Iowa, hereby certify that on November 28, 2022, I or a person acting on my behalf served the above Petitioners'/Appellants' Final Brief and Request for Oral Argument to the Respondent/Appellee's attorney of record, via EDMS in full compliance with Rules of Appellate Procedure and Rules of Civil Procedure.

Alison E. Stewart

CERTIFICATE OF FILING

I, Alison E. Stewart, hereby certify that I, or a person acting in my direction, did file the attached Petitioners'/Appellants' Final Brief and Request for Oral Argument upon the Clerk of the Iowa Supreme Court via EDMS on this 28th day of November, 2022.

Alison E. Stewart