ELECTRONICALLY FILED NOV 28, 2022 CLERK OF SUPREME COURT

**IN THE SUPREME COURT OF IOWA**

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**APPEAL NO. 22-1328**

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**BRIDGESTONE AMERICAS, INC. and**
**OLD REPUBLIC INSURANCE COMPANY,**

**Petitioners/Appellants,**

**v.**

**CHARLES ANDERSON,**

**Respondent/Appellee.**

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

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# APPELLANTS' REPLY BRIEF

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## STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. **WHETHER THE DISTRICT COURT ERRED IN FINDING CLAIMANT MET HIS BURDEN ON CAUSATION**

II. **WHETHER THE DISTRICT COURT'S INTERPRETATION OF IOWA CODE SECTION 85.34 WAS AN ERROR OF LAW**

## ARGUMENT

### I. THE DISTRICT COURT ERRED IN FINDING CLAIMANT MET HIS BURDEN ON CAUSATION.

As the Claimant asserting a work injury, Mr. Anderson has the burden to prove by a preponderance of the evidence that his injuries arose out of and in the course of his employment. Iowa Code §85.3(1) (2008); *Quaker Oats Co. v. Ciha*, 552 N.W.2d 143, 150 (Iowa 1996). For the arm injury, Claimant relies upon medical records from 1988[1] speculating that there was a 10–20% chance of recurrence of carpal tunnel—which was occurring in the opposite arm at that time. This does not establish causation for a 2018 injury by a preponderance of the evidence. Claimant also relies on the fact that Bridgestone presented no witnesses at Hearing. But the employer is not required to submit evidence on causation—it is the Claimant's burden to establish the work-relatedness of their injury. Bridgestone cross-examined the Claimant, which revealed that Claimant had difficulty lifting his arm on October 31, 2018, and had experienced numbness and tingling symptoms for some time but decided "it was time to take care of both of them at the same time." (Tr. p. 76, Ln. 7–9, App. 251).

The Arbitration Decision and those adopting it relied upon the opinions of Dr. Stoken. Expert opinions with an incomplete or questionable history are not reliable

[1] These records were admitted for purposes of the claim against the Second Injury Fund, which is not at issue in this appeal.

or binding. *Cedar Rapids Comm. Sch. Dist. v. Pease*, 807 N.W.2d 839, 848–49 (Iowa 2011). At the onset of Dr. Stoken's involvement in Claimant's case, she was provided the history that Claimant had two "10/31/18 injuries" at work because he had pain in his right shoulder and numbness in his right hand. In other words, Dr. Stoken was operating with a history that there had been a work injury on October 31, 2018. During examination Claimant provided that he had hand numbness on 10/31/18 while cutting panels and continued having numbness and tingling from that day forward. (Cl. Ex. 7, App. 187). This is not consistent with the history in the medical records and Claimant's testimony. It appears Dr. Stoken merely attributes his conditions to an October 31, 2018 injury because she was told there was an October 31, 2018 injury. This is not a viable causation opinion.

Dr. Davick opined that there was no connection between the right shoulder and subsequent right carpal tunnel. Dr. Davick's opinion on shoulder causation states: "To my knowledge, he has not had any injury outside of work." (Jt. Ex. 3-73, App. 173). Lastly, Dr. Harrison provided at his first appointment with the Claimant that his shoulder "may be an overuse injury." This is not a causation opinion. (Jt. Ex. 2-20, App. 156). There is not substantial evidence in the record to support Claimant's burden of proof on causation.

## II. THE DISTRICT COURT'S INTERPRETATION OF IOWA CODE 85.34 IS AN ERROR OF LAW.

The parties agree that this issue of statutory interpretation can be resolved via plain language, but disagree on the application of the relevant language. Claimant asserts that the whole case rests on the presence of indefinite articles; that because "a" and "an" precede each member on the schedule, the entire scheduled scheme is therefore inapplicable. However, statutes are to be assessed in their entirety, rather than by isolated words, so to ensure the interpretation is "harmonious with the statute as a whole." *Chavez v. MS Tech.*, 972 N.W.2d 662, 667–68 (Iowa 2022). Even if there are compensable injuries to "a shoulder" and "an arm," those injuries are on the schedule respectively and can be valued and compensated accordingly. *See* Iowa Code § 85.34 (2)(m),(n) (2017).

The Deputy Commissioner stated that Claimant's injuries do not "fall into any *single* subsection listed." *See* Arbitration Decision. But the statute is devoid of any requirement that an injury fall into any "single subsection." The schedule is only prefaced that in "all cases of permanent partial disability compensation shall be paid as follows[.]" The schedule is then laid out, which includes a value of 250 weeks for an arm and 400 weeks for a shoulder. Iowa Code § 85.34 (2)(m),(n). Claimant was assigned impairment ratings for each member, which can be used to determine the amount of weeks to compensate each loss. (Jt. Ex. 3, p. 76, App. 174; Ex. 7, pp. 109–110 App. 191-192). This is how compensation works in practice.

Scheduled members are often compensated separately, and shoulders have been no exception. For example, injury to multiple fingers or to a foot and a finger would require rating of each member, and then adding together each of the weekly entitlements. *See, e.g., Frye v. IBP, Inc*., File No. 1269626, 2002 WL 35636088, at *4 (Arb. Dec. Sept. 4, 2002); *Irvin v. IBP, Inc.*, File No. 1169484, 1999 WL 33619697, at *2 (Arb. Dec. Jan. 5, 1999). The legislature was presumed to be aware of this method when adding the shoulder to the schedule. *Roberts Dairy v. Billick*, 861 N.W.2d 814, 821 (Iowa 2015).

Shoulder injuries in combination with other member injuries can be—and have been since 2017—compensated by this same method. In *Barry v. John Deere Dubuque Works of Deere & Company*, Deputy Commissioner Phillips determined that the Claimant had sustained injuries to two anatomical parts on the schedule: shoulders. No. 21003269.01, 2021 WL 5772644 (Arb. Dec., Nov. 29, 2021). It was determined that "[e]ach shoulder shall be addressed separately." *Id.* at *24. Since Claimant Barry had been assessed ten percent impairment of each, he was entitled to eighty weeks of compensation, or forty weeks for each shoulder. *Id.* at *25. Likewise, Deputy Commissioner Walsh compensated bilateral shoulder injuries via the 400 week schedule. *See Manuel v. Gannett Publishing Servs.*, No. 5067758, 2021 WL 2624648 (Arb. Dec., Feb. 18, 2021). *But see* 2021 WL 3353903 (App. Dec., July 22, 2021) (finding impairment to only one shoulder on appeal).

Additionally, Deputy Commissioner Lund has explained that "bilateral shoulder injuries are to be evaluated under Iowa Code section 85.34(2)(n)" and "separately assessed." *Lund v. Mercy Medical Center*, No. 5066398, 2021 WL 2624632 at *5 (Arb. Dec., March 9, 2021). The same analysis applies here. A shoulder and another scheduled member, such as an arm, should be no exception.

Appellants agree that subsection (t) is not applicable to this matter. *See id.* § 85.34 (2)(t). Claimant asserts that because "shoulder" is not listed in (t), compensation must be industrial. But subsection (t) has no bearing on this analysis. 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). For example, the loss of a leg is statutorily valued at 220 weeks each. *Id.* § 85.34 (2)(p). However, the legislature decided that the loss of two legs should be compensated on a larger schedule—500 total weeks rather than 440.

The legislature chose not to add the shoulder to this enhanced schedule, but rather added its own value of 400 weeks on the traditional schedule. The absence of shoulder in subsection (t) in no way changes the fact that any impairment from the alleged injuries fits squarely into sections (m) and (n). *See Lund* at *5 ("The lack of

inclusion of the shoulder in 85.34(2)(t) does not move the shoulder from a scheduled member loss to an industrial one.").

Rather, the Deputy resorted to the "catch all" provision, section 85.34 (2)(v), meant for "all cases of permanent partial disability *other than those described or referred to* in paragraphs 'a' through 'u'. . . ." Iowa Code § 85.34 (2)(v) (emphasis added). But shoulder and arm injuries are plainly described or referred to in the 'a' through 'u' schedule, and thus the catchall provision is not appropriate. *See id.* § 85.34 (2)(m),(n).

Claimant argues that if the catch all provision is not applied here, it will be meaningless. However, this is ignoring its applicability to the intended "cases of permanent partial disability other than those described or referred to" in the schedule. This includes injuries to the back, neck, ribs, head, and hip, in addition to mental injuries. Rather, Claimant's interpretation of subparagraph (v) diminishes the meaning of the schedule as a whole.

The plain language of Iowa Code Section 85.34 places any injury in this case within the scheduled framework. Subsection is (t) is inapplicable because the legislature did not place the shoulder in the amended and enhanced schedule. Additionally, subsection (v) is not applicable because it is meant for whole body injuries, not scheduled member injuries previously described in the schedule. Assessing the impairment to each member is the interpretation consistent with the

precedent, practice in the industry, the plain text of the statute, and its harmony as a whole. Therefore, if Claimant is found to have sustained a compensable injury to the shoulder and the arm, his impairment should be based on the loss sustained to each respective member.

## III. EVEN IF INDUSTRIAL DISABILITY WERE APPROPRIATE, THE DISTRICT COURT ERRED IN AFFIRMING THE FIFTY PERCENT AWARD.

Claimant asserts that "Bridgestone argues both sides of the work-disability issue," referring to the proximity to retirement and the motivation to work. However, these are two separate factors or considerations, each with distinct frames of measurement. Proximity to retirement is a statutorily directed consideration of "the number of years in the future it was reasonably anticipated that the employee would work *at the time of injury*." Iowa Code § 85.34(2)(v) (2017) (emphasis added). This asks: without the foresight of an injury or disability, how many years in the future would Claimant have worked? It may involve a subjective component of a claimant's testimony of their pre-injury plans, but also an objective component of a claimant's age, general retirement trends, and other considerations.

The latter factor of motivation is derived from case law. *See, e.g., Larson Mfg. Co. v. Thorson*, 763 N.W.2d 842 (Iowa 2009). This view is post-injury, and considers the Claimant's thoughts and actions—or lack thereof— surrounding returning to work.

No decision in this case has provided a detailed analysis behind the award of fifty percent loss of future earning capacity, but merely list the applicable factors. At the time of Hearing—2.5 years after the injury—Claimant was 68 years old and testified that he would "probably still be working." (Tr. 61, App. 243). The Deputy concluded that Claimant would retire around 8 years after the injury, which would place him at the age of 73. The record reflects that Claimant was fully eligible to retire at the time of injury. Additionally, there is evidence that post-injury he was actively seeking a job in his restrictions. (Tr. 67, App. 244). Claimant's own brief emphasizes his desire to be working. In fact, a functional capacity evaluation placed him in the light category of work clearance.

There is discretion to consider both the pre-injury estimation of working years, and the post-injury motivation, as distinct factors. Even considering these factors and the 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 evidentiary record does 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, Appellants respectfully request this Court reverse the district court ruling in its entirety, or modify it in the alternative.

Respectfully Submitted,

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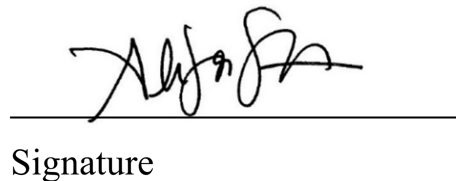
## CERTIFICATE OF COSTS

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 2,047 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

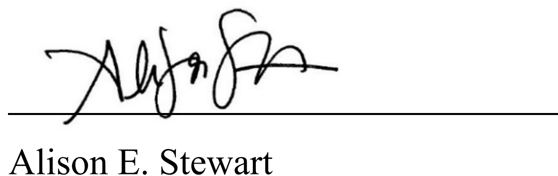


_____________________________ _*11/28/22*_____

Signature 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' Reply Brief to the Respondent/Appellee's attorney of record, via EDMS in full compliance with Rules of Appellate Procedure and Rules of Civil Procedure.



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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' Reply Brief upon the Clerk of the Iowa Supreme Court via EDMS on this 28th day of November, 2022.

Alison E. Stewart