

IN THE SUPREME COURT OF IOWA

Supreme Court No. 22–1328

BRIDGESTONE AMERICAS, INC. and OLD REPUBLIC INSURANCE
COMPANY,
Petitioners-Appellants,

v.

CHARLES ANDERSON,
Respondent-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT FOR
POLK COUNTY
CVCV063124
THE HONORABLE CELENE GOGERTY

The Iowa Association of Business and Industry’s Amicus Curiae Brief

TERRI C. DAVIS AT0001920
TERESA K. BAUMANN AT0000755
SHUTTLEWORTH & INGERSOLL, P.L.C.
115 3rd Street SE, Suite 500
P.O. Box 2107
Cedar Rapids, IA 52406-2107
(319) 365-9461
tcd@shuttleworthlaw.com
tkb@shuttleworthlaw.com

ATTORNEYS FOR THE IOWA
ASSOCIATION OF BUSINESS AND
INDUSTRY, AMICUS CURIAE

TABLE OF CONTENTS

TABLE OF AUTHORITIES	4
STATEMENT OF THE IDENTITY AND INTEREST OF THE AMICUS CURIAE	6
STATEMENT OF AUTHOR AND CONTRIBUTION RULE 6.906(4)(d)	8
ARGUMENT	9
I. This Court should give no deference to the Workers’ Compensation Commissioner’s interpretation of the statute in this case, because the Commissioner made an error of law in finding that a shoulder injury and an arm injury should be compensated industrially under the “catch all” provision	9
II. The Iowa Legislature added “loss of shoulder” to the list of enumerated, scheduled injuries in 2017 to increase certainty and decrease litigation in the Workers’ Compensation System.....	10
A. Iowa’s two-class system for injuries: Scheduled and Unscheduled.....	11
1. Since July 1, 2017, shoulder injuries have been scheduled injuries subject to the predictable functional disability compensation method.....	12
2. Prior to July 1, 2017, shoulder injuries were compensated under the unpredictable industrial disability scheme	13
B. The Iowa Legislature sought to decrease litigation and increase certainty for workers with shoulder injuries	15
III. This Court should follow the lead of three Deputy Workers’ Compensation Commissioners who have determined the plain statutory language mandates shoulder injuries be compensated under the schedule, regardless of whether they are coupled with a second scheduled injury	16
IV. The only interpretation of the Iowa Workers’ Compensation Act in this case that is harmonious with the statute as a whole is an interpretation which keeps all shoulder injuries in the functional disability method	23

A. Other provisions in the 2017 legislation were designed to minimize litigation and maximize predictability.....23

B. The Respondent’s proposed statutory interpretation is not in harmony with precedent25

CONCLUSION29

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements31

Certificate of filing and service.....32

TABLE OF AUTHORITIES

Cases

<i>Bd. of Water Works Trs. of City of Des Moines v. Sac Cnty. Bd of Supervisors</i> , 890 N.W.2d 50 (Iowa 2017).....	28
<i>Blake v. Second Injury Fund</i> , 967 N.W.2d 221, 2021 Iowa App. LEXIS 789 (Iowa Ct. App. Sept. 22, 2021)	14
<i>Cedar Rapids Cmty. Sch. Dist. v. Pease</i> , 807 N.W.2d 839 (Iowa 2011)	13
<i>Chavez v. MS Tech. LLC</i> , 972 N.W.2d 662 (Iowa 2022)	11, 14, 17, 23
<i>Dailey v. Pooley Lumber Co.</i> , 10 N.W.2d 569 (1943)	15
<i>Dowell v. Wagler</i> , 509 N.W.2d 134 (Iowa Ct. App. 1993)	28
<i>Floyd v. Quaker Oats</i> , 646 N.W.2d 105 (Iowa 2002)	27
<i>Gilleland v. Armstrong Rubber Co.</i> , 524 N.W.2d 404 (Iowa 1994)	12, 15
<i>Honeywell v. Allen Drilling Co.</i> , 506 N.W.2d 434 (Iowa 1993)	28
<i>Hoyt v. Wendling Quarries</i> , No. 14-0800, 2015 Iowa App. LEXIS 144 (Iowa Ct. App. Feb. 11, 2015)	16
<i>JBS Swift & Co. v. Ochoa</i> , 888 N.W.2d 887 (Iowa 2016).....	24
<i>Masterbrand Cabinets, Inc. v. Simons</i> , 967 N.W.2d 224, 2021 Iowa App. LEXIS 814 (Iowa Ct. App. Sept. 22, 2021)	10
<i>Miller v. Lauridsen Foods</i> , 525 N.W.2d 417 (Iowa 1994)	27
<i>Mortimer v. Fruehauf Corp.</i> , 502 N.W.2d 12 (Iowa 1993).....	13, 14, 28
<i>Neal v. Annett Holdings, Inc.</i> , 814 N.W.2d 512 (Iowa 2006)	9, 10, 16
<i>Pella Corp. v. Winn</i> , 2019 Iowa App. LEXIS 44 (Iowa Ct. App. Jan. 9, 2019).....	24
<i>Renda v. Iowa Civil Rights Comm’n</i> , 784 N.W.2d 8 (Iowa 2010)	9, 10
<i>Second Injury Fund of Iowa v. Nelson</i> , 544 N.W.2d 258 (Iowa 1995)	13, 14
<i>Swiss Colony, Inc. v. Deutmeyer</i> , 789 N.W.2d 129 (Iowa 2010)	13

Statutes

Iowa Code § 85.34	6, 11, 14
Iowa Code § 85.34(2)(a)	25
Iowa Code § 85.34(2)(a)–(u)	11, 17, 23, 29
Iowa Code § 85.34(2)(b), (c), (d), and (e)	25
Iowa Code § 85.34(2)(f) and (g)	25
Iowa Code § 85.34(2)(h)	12

Iowa Code § 85.34(2)(h), (i), (j), and (k).....	26
Iowa Code § 85.34(2)(i).....	12
Iowa Code § 85.34(2)(m).....	6, 17
Iowa Code § 85.34(2)(n).....	6, 7, 12, 16, 17, 19, 20, 25
Iowa Code § 85.34(2)(s)	26
Iowa Code § 85.34(2)(t).....	6, 13, 17, 18, 20, 25, 26, 27, 28
Iowa Code § 85.34(2)(v).....	6, 7, 11, 14, 18, 19, 21, 22, 23, 26, 28, 29
Iowa Code § 85.34(2)(x).....	23, 24
Iowa Code § 85.34(3)(b).....	24

Other Authorities

2017 Iowa Acts ch. 23, HF 518	11, 15, 16
2017 Iowa Acts, ch. 23, HF 518, § 10	24
2017 Iowa Acts, ch. 23, HF 518, § 9	23

Rules

Iowa R. App. P. 6.906(4)(d)	8
-----------------------------------	---

Administrative Decisions

<i>Carmer v. Nordstrom, Inc.</i> , No. 1656062.01, 2021 IA Wrk. Comp. LEXIS 309 (Iowa Workers' Comp. Comm'r, Arb. Sept. 13, 2021)	19
<i>Harrell v. Denver Findley & Sons, Inc.</i> , 2022 Iowa App. LEXIS 548 (Iowa Ct. App. July 20, 2022)	24
<i>Lund v. Mercy Med. Ctr. & Indem. Ins. Co. of N. Am.</i> , No. 5066398, 2021 IA Wrk. Comp. LEXIS 65 (Iowa Workers' Comp. Comm'r, Arb., Mar. 9, 2021)	21, 22
<i>Manual v. Gannett Publ'g Servs. and Nat'l Union Fire Ins. Co.</i> , No. 506758, 2021 IA Wrk. Comp. LEXIS 241 (Iowa Workers' Comp. Comm'r, Appeal Decision, July 22, 2021)	20, 21
<i>Manuel v. Gannett Publ'g Servs. and Nat'l Union Fire Ins. Co.</i> , No. 5067758, 2021 IA Wrk. Comp. LEXIS 90 (Iowa Workers' Comp. Comm'r, Substituted and Amended Arb., Feb. 18, 2021).....	20, 22

STATEMENT OF THE IDENTITY AND INTEREST OF THE AMICUS CURIAE

The Iowa Association of Business and Industry (“the ABI”) is the largest business network in State, representing over 1,500 business members that employ more than 330,000 Iowans. The ABI’s members come from all 99 counties and all industry sectors, including manufacturers, retailers, insurance companies, financial institutions, health care organizations, and educational institutions.

This appeal involves a question of vital concern to the business community, namely,

If substantial evidence supports a conclusion that a workers’ compensation claimant has two permanent conditions, including a permanent shoulder condition and a permanent condition to another scheduled member, whether permanent partial disability benefits should be awarded under the Iowa Code subsections for the respective member injuries (§ 85.34(2)(n) for a shoulder, § 85.34(2)(m) for an arm, for example), the subsection pertaining to the loss of two of certain body parts (§ 85.34(2)(t)), or the catch-all provision (§ 85.34(2)(v))?

The Court’s answer to this question will have an economic impact on the business community and this State as a whole, therefore, the ABI’s members have a significant interest in the Court’s decision.

This appeal involves the Iowa Workers’ Compensation Commission’s interpretation of portions of Iowa Code section 85.34—the statute which provides permanent disability benefits to individuals who sustain job-related injuries. In this appeal of a judicial review, the Deputy Commissioner, Commissioner, and District

Court all sought to interpret a provision of the statute that was changed effective July 1, 2017. The ABI was at the fore of lobbying the legislature for statutory changes at that time. In 2016 and 2017, the ABI lobbied on behalf of its members for a legislative change which would include a change in the way Iowa's workers' compensation system compensated shoulder injuries.

This case is of particular concern to the ABI's members, because it is a matter of first impression. It involves two alleged work-related injuries, including one to the shoulder. Analogous situations arise frequently for the ABI's members' employees. The ABI's members are impacted negatively by the instant decision below because the Commissioner and District Court did not follow the plain language of the statute or the legislative intent of the 2017 amendments to the statutory scheme. The ABI urges the Court to consider the 2017 legislative process and the legislature's intent that claimants who have injuries to two scheduled members—including when one or both of them is a shoulder injury—should receive an award through calculations under section 85.34(2)(n) and the scheduled/functional method, rather than pursuant to section 85.34(2)(v)'s catch-all, unscheduled/industrial method.

STATEMENT OF AUTHOR AND CONTRIBUTION RULE 6.906(4)(d)

Pursuant to Iowa Rule of Appellate Procedure 6.906(4)(d), the undersigned indicates no counsel of record of any party authored this brief or contributed money to fund its preparation or submission. The ABI is the only entity or person that contributed money to fund the preparation or submission of the brief.

ARGUMENT

The ABI's members urge the Court now, as they urged the legislature in 2016 and 2017, to treat shoulder injuries as scheduled injuries, regardless of whether a shoulder injury is a workers' only substantiated injury, or if it is coupled with another scheduled injury. Shoulder injuries are a common injury suffered by Iowa workers and, as such, the treatment of such injuries has a significant economic impact on Iowa's employers. Because the legislature determined in 2017 to move shoulder injuries from the unscheduled class of permanent partial disabilities to the scheduled class, the Court should find that shoulder injuries should be compensated using the functional method.

I. This Court should give no deference to the Workers' Compensation Commissioner's interpretation of the statute in this case, because the Commissioner made an error of law in finding that a shoulder injury and an arm injury should be compensated industrially under the "catch all" provision

This Court should review de novo the Workers' Compensation Commissions' interpretation of the Iowa Workers' Compensation Act and related cases, because this Court has long-held that such questions of law are not clearly vested by a provision of law in the discretion of the agency. *See Neal v. Annett Holdings, Inc.*, 814 N.W.2d 512, 519 (Iowa 2006) (citing *Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8 (Iowa 2010)); *see also Masterbrand Cabinets, Inc. v. Simons*, 967 N.W.2d 224, 2021 Iowa App. LEXIS 814, *2 (Iowa Ct. App. Sept.

22, 2021) (“When the claimed error is the commissioner’s interpretation of law, we review for errors of law.” (citing *Neal*, 814 N.W.2d at 518-19)). This Court has found that “the legislature has made no explicit grant of interpretive authority to the [Workers’ Compensation C]ommission.” *Neal*, 814 N.W.2d at 519 (citing *Renda*, 784 N.W.2d at 11). Therefore, if this Court finds the agency made an error of law, then it gives “no deference to the interpretation of the commissioner” and substitutes its judgment for that of the agency. *Id.* (citing *Renda*, 784 N.W.2d at 14-15).

Here, the Court should find an error of interpretation of law was committed and substitute its judgment finding that, if benefits are awarded in this shoulder injury case, the calculation should be made under the functional method for scheduled injuries.

II. The Iowa Legislature added “loss of shoulder” to the list of enumerated, scheduled injuries in 2017 to increase certainty and decrease litigation in the Workers’ Compensation System

The legislative change that went into effect in 2017 demands that this Court and future decisions made by the Workers’ Compensation Commission and lower courts, treat shoulder injuries as scheduled injuries when alone or when coupled with a second, scheduled member injury. A bit of background on the Workers’ Compensation system and changes thereto will assist in illustrating the importance

of this statutory interpretation question to the ABI's business and industry members.

A. Iowa's two-class system for injuries: Scheduled and Unscheduled

Since its inception in 1913, the Iowa Workers' Compensation Act has always divided permanent partial disabilities into two classes:

(1) scheduled member injuries (Iowa Code § 85.34(2)(a)–(u)) and

(2) unscheduled injuries or injuries to the body as a whole (Iowa Code § 85.34(2)(v)).

“Under section 85.34, the classification of a workers' compensation claimant's injury as either scheduled or unscheduled determines the extent of the claimant's entitlement to permanent partial disability benefits.” *Chavez v. MS Tech. LLC*, 972 N.W.2d 662, 666 (Iowa 2022) (citation omitted).

On July 1, 2017, a newly updated statutory scheme for workers' compensation benefits went into effect. *See* 2017 Iowa Acts ch. 23, HF 518 (codified at Iowa Code § 85.34 (2018)) (hereafter “HF 518”). Prior to the 2017 change, shoulder injuries were unscheduled. Now, they are scheduled. The question in the instant case pertains to whether a shoulder injury remains a scheduled injury when it is coupled with a second, scheduled member injury, like an arm injury. The ABI's members urge that the legislature intended that shoulder injuries be treated as scheduled injuries, regardless of whether the shoulder is the

only injury or one of two injuries. The very reason for the legislative change was to make the outcome for similar shoulder injuries more predictable and less expensive.

1. Since July 1, 2017, shoulder injuries have been scheduled injuries subject to the predictable functional disability compensation method

Benefits for scheduled member losses are calculated based upon the maximum number of weeks for that body part which is provided explicitly in the statute. *See, e.g.*, Iowa Code § 85.34(2)(h) (“For the loss of a great toe, weekly compensation during *forty weeks*.” (emphasis added)). “Scheduled permanent partial disabilities . . . are . . . compensable according to the classifications of section 85.34(2) without regard to loss of earning capacity.” *Gilleland v. Armstrong Rubber Co.*, 524 N.W.2d 404, 407 (Iowa 1994). When the Commissioner determines disability this way, that is, by “looking only to the impairment of the employee’s body function[,]” it is called the “functional disability method.” *Id.* Benefits for *two* scheduled member losses are also calculated using the same functional disability method. Subsection (t) provides a so-called “enhanced” scheduled system for certain double-member losses, because it permits a greater period of weeks (500) than the subsections for single member losses, which range from 15 weeks for the loss of a toe to 400 weeks for the loss of a shoulder. Iowa Code § 85.34(2)(i) (toe); *id.* § 85.34(2)(n) (shoulder); *id.*

§ 85.34(2)(t) (“The loss of both arms, or both hands, or both feet, or both legs, or both eyes, or any two thereof, caused by a single accident, shall equal five hundred weeks and shall be compensated as such . . .”).

2. Prior to July 1, 2017, shoulder injuries were compensated under the unpredictable industrial disability scheme

The second class of permanent partial disabilities is “unscheduled injuries,” which are also referred to as “injuries to the body as a whole.” *Second Injury Fund of Iowa v. Nelson*, 544 N.W.2d 258, 270 (Iowa 1995), as amended on denial of reh’g (Feb. 14, 1996). Unscheduled injuries are compensated by determining a person’s “industrial disability” which involves determining impact that the work injury has had on the employee’s earning capacity. *Mortimer v. Fruehauf Corp.*, 502 N.W.2d 12, 14–15 (Iowa 1993); *Cedar Rapids Cmty. Sch. Dist. v. Pease*, 807 N.W.2d 839, 852 (Iowa 2011) (“Industrial disability is determined by an evaluation of the employee’s earning capacity.”). The evaluation of earning capacity, in turn, focuses on the claimant’s ability to be gainfully employed and involves several factors, including the claimant’s functional disability, age, education, qualifications, experience, and ability to engage in similar employment. *Swiss Colony, Inc. v. Deutmeyer*, 789 N.W.2d 129, 137–38 (Iowa 2010). In other words, when decision-makers arrive at industrial disability, functional disability is just one factor in the determination juxtaposed to it being the only factor in the scheduled or functional disability method. *Mortimer*, 502 N.W.2d at 14–15

(contrasting functional disability and industrial disability methods). The amount of benefits can vary “radically” depending on whether an injury is scheduled or unscheduled. *Id.* at 15.

Prior to the change in 2017, shoulder injuries were compensated using this more expensive and less predictable “industrial disability” or loss-of-earning-capacity method for unscheduled injuries pursuant to what is now Iowa Code Section 85.34(2)(v), formerly Section 85.34(2)(u). *See Nelson*, 544 N.W.2d at 270 (providing that a “shoulder injury is not a scheduled injury”); *Blake v. Second Injury Fund*, 967 N.W.2d 221, 2021 Iowa App. LEXIS 789, *5, n.3 (Iowa Ct. App. Sept. 22, 2021) (“In 2017, the legislature amended Iowa Code section 85.34 to change a shoulder injury to a scheduled injury.”); *Chavez*, 972 N.W.2d at 667 (explaining that “claimants typically receive greater compensation for unscheduled whole body injuries than they would for scheduled member injuries”).

Under the industrial disability system, the determination of permanent partial disability benefits for a shoulder injury were extremely varied, because the benefit amount varied depending not only on the medical provider’s functional impairment rating, but also on the individual deputy commissioner’s subjective determination of the workers’ lost future earning capacity. In March 2017, one of the sponsors of the legislation explained that there was no “certainty” in the statutory scheme, and he read from a November 2016 statement of a Deputy

Workers' Compensation Commissioner who told litigants to present their arguments but stated: "your guess is as good as mine" as to the outcome. Hearing of HF 518, available at <https://www.legis.iowa.gov/legislation/BillBook?ga=87&ba=HF518> at House Video Archive 03/16/2017, 1:12:10 PM (Rep. Cownie). Due, in part, to such cries for help from those who worked with the statutory scheme each day, the ABI's members desired to have shoulder injuries moved to the predictable "scheduled" system, and the legislature agreed.

B. The Iowa Legislature sought to decrease litigation and increase certainty for workers with shoulder injuries

Almost 80 years ago, the Iowa Supreme Court explained that "[t]he very purpose of the schedule is to make certain the amount of compensation in the case of specific injuries and to avoid controversies." *See Dailey v. Pooley Lumber Co.*, 10 N.W.2d 569, 571 (1943); *see also Gilleland v. Armstrong Rubber Co.*, 524 N.W.2d 404, 407 (Iowa 1994) (stating the legislative purpose for creating the statutory schedule is to "reduce controversies through certainty of compensation"). When controversies, unpredictability, uncertainty, and protracted litigation became the norm in shoulder injury cases, the legislature responded by making statutory changes, including by adding the shoulder to the schedule. *See* Hearing of HF 518, available at <https://www.legis.iowa.gov/legislation/BillBook?ga=87&ba=HF518> at House Video Archive 03/16/2017, 10:22:20 AM (Rep. Carlson) (introducing HF 518); 10:23:17 AM (Rep. Carlson) (stating that Iowa workers' compensation

system was established so that employees would have “certain and easy process to follow in case of a work injury” and it was established “to specifically stay out of the courtroom” but it had resulted in protracted legislation and uncertainty, and HF 518 was drafted to address those issues). In attempting to bring certainty to the workers’ compensation scheme five years ago, the legislature determined that, when a claimant has a shoulder injury, the functional disability method of calculating benefits is appropriate. *See* Iowa Code § 85.34(2)(n).

III. This Court should follow the lead of three Deputy Workers’ Compensation Commissioners who have determined the plain statutory language mandates shoulder injuries be compensated under the schedule, regardless of whether they are coupled with a second scheduled injury

When interpreting a statute, the Court does “not look beyond the express terms of the statute if the text of the statute is plain and its meaning is clear.” *Hoyt v. Wendling Quarries*, No. 14-0800, 2015 Iowa App. LEXIS 144, *4 (Iowa Ct. App. Feb. 11, 2015) (quoting *Neal v. Annett Holdings, Inc.*, 814 N.W.2d 512, 519 (Iowa 2012)). The legislative purpose of the workers’ compensation law is to benefit the worker, but “[t]he obligation to interpret the workers’ compensation law consistent with its legislative purpose does not give [the court] leave to ignore the plain language of the statute.” *Id.* (citations omitted).

Here, the plain language at issue is Iowa Code § 85.34(2)(n) which provides that permanent partial disability benefits should be paid for 400 weeks of

compensation “[f]or the loss of a shoulder[.]” Iowa Code § 85.34(2)(n). Also, the plain language provides that 250 weeks of compensation should be paid for an arm injury. Iowa Code § 85.34(2)(m). These two provisions were placed in the middle of the list for scheduled member injuries. *Chavez*, 972 N.W.2d at 666 (“Paragraphs (a) through (u) of section 85.34 govern permanent partial disability payments for injuries to specific members of the body and provide a schedule of benefits for injuries to those specific members.”). There is nothing ambiguous about the number of scheduled weeks of compensation for each member injury, and the statutory language is clear that the shoulder and the arm are each a scheduled member injury.

Arguably, ambiguity exists at the next step of the analysis due to omission. If a claimant has both a shoulder injury and a second scheduled injury that were caused by a single accident, the statute is silent about how to compensate such disabilities. For example, the phrase “two shoulders” does not appear in section 85.34(2)(t), which provides for 500 weeks of compensation for the loss of “both arms, or both hands, or both feet, or both legs, or both eyes, or any two thereof, caused by a single accident.” Iowa Code § 85.34(2)(t). Even if the legislature had added “two shoulders” to that provision, however, the injuries would still be compensated under the functional method. Given all of this, three Deputy Commissioners who have considered the issue have looked to legislative intent and

determined that a shoulder injury plus another scheduled member injury must be treated as separate scheduled injuries. Neither the catch-all provision (§ 85.34(v)) nor the industrial disability method apply.

In one of the three cases mentioned above, Deputy Commissioner Andrew M. Phillips correctly found that, where a claimant had proven bilateral shoulder injuries, each shoulder injury was properly compensated as a separate scheduled injury. In *Barry v. John Deere Dubuque Works of Deere & Co.*, the Deputy Commissioner found that the claimant had sustained both a right shoulder and a left shoulder injury. No. 21003269.01, 2021 IA Wrk. Comp. LEXIS 427, *55 (Iowa Workers' Comp. Comm'r, Arb. Nov. 29, 2021). Deputy Phillips also explicitly found the claimants' injuries "involve the shoulders and not the body as a whole." *Id.* at *55-*56. Deputy Phillips in *Barry* noted that, when the statutory revisions were made, "the Iowa Legislature did not include language as to how an injury to both shoulders, caused by a single accident, should be compensated." *Id.* at *56. He noted that, when the statutory revisions were made in 2017, the legislature did not add "shoulder" or "both shoulders" to Iowa Code section 85.34(2)(t) which provides for compensation for the loss of both arms, hands, feet, legs, eyes "or any two thereof, caused by a single accident." *Id.* at *56. Therefore, the Deputy in *Barry* found that section 85.34(t) "does not apply to injuries involving permanent disability to the bilateral shoulders." *Id.* at *56. The Deputy

noted, though, that the compensation for injuries under that section “continues to be functional in nature, and is not based upon industrial disability or loss of earning.” *Id.* at *56. Importantly, the Deputy went on to explain that bilateral shoulder injuries remained scheduled and did not automatically get pushed into the industrial disability scheme:

This does not mean that the permanent disability is then interpreted as an industrial disability. Each shoulder shall be addressed separately.

Id. at *56; *but see Carmer v. Nordstrom, Inc.*, No. 1656062.01, 2021 IA Wrk. Comp. LEXIS 309, *49 (Iowa Workers’ Comp. Comm’r, Arb. Sept. 13, 2021) (Deputy Commissioner Heather L. Palmer) (finding that, because the statute does not contain a provision addressing the case where a person sustains an injury to one shoulder and a sequela injury to the other caused by the effects of the original injury, the injury “must be compensated industrially under Iowa Code section 85.34(2)(v)”). In *Barry*, the Deputy Commissioner found the claimant entitled to 40 weeks of compensation for each shoulder under section 85.34(2)(n) due to the impairment ratings provided which stated that the claimants’ bilateral shoulders were each 10 percent impaired. *Barry*, at *57.

Prior to *Barry*, another Iowa Workers’ Compensation Deputy Commissioner interpreted the statute similarly in another case where the claimant sustained injuries to both shoulders as the result of a single accident. *See Manuel v. Gannett Publ’g Servs. and Nat’l Union Fire Ins. Co.*, No. 5067758, 2021 IA Wrk. Comp.

LEXIS 90 (Iowa Workers' Comp. Comm'r, Substituted and Amended Arb., Feb. 18, 2021) (Deputy Joseph L. Walsh) [hereafter "*Manual Arb.*"], *aff'd and modified, Manual v. Gannett Publ'g Servs. and Nat'l Union Fire Ins. Co.*, No. 506758, 2021 IA Wrk. Comp. LEXIS 241 (Iowa Workers' Comp. Comm'r, Appeal Decision, July 22, 2021) (Commissioner Joseph S. Cortese II) [hereafter "*Manual Appeal*"]. In Deputy Commissioner Joseph L. Walsh's Arbitration Decision in *Manuel*, the parties stipulated that the claimant incurred a workplace injury to his right shoulder, and the Deputy found the claimant sustained a sequela condition to his left shoulder. *Manuel Arb.*, at *11 & *17. Thus, the claimant had an injury to each of his shoulders under section 85.34(2)(n) and "[b]oth disabilities arose out of the same injury." *Id.* at *19. The Deputy Commissioner determined that the claimant's "disability shall be assessed as a scheduled disability[.]" *Id.* Deputy Walsh made clear that Manuel's disability was "not a bilateral scheduled injury under Iowa Code Section 85.34(2)(t)." *Id.* at *21. The Deputy found that claimant was entitled to 92 weeks of benefits for the right shoulder (based on a calculation of 23 percent of 400 weeks) and 68 weeks of benefits for the left shoulder (based on a calculation of 17 percent of 400 weeks), and that the benefits should be paid consecutively so the claimant received a total of 160 weeks of benefits. *Id.* at *21-22.

In the concise appeal decision in *Manuel*, the Commissioner affirmed Deputy Walsh’s findings that Claimant Manuel sustained work-related injuries to both shoulders. *Manuel Appeal*, at *3. The Commissioner modified the Deputy’s findings, however, because the Commissioner disagreed with the Deputy’s determination of the extent of the claimant’s permanent disability. *Id.* at *3. The Commissioner found that the claimant sustained no permanent impairment of the left shoulder, and that he sustained only a six percent right shoulder impairment. *Id.* at *6. At the end of the day, the Commissioner did not make a decision on the issue at hand in the instant case, because the Commissioner found only one shoulder was impaired. Without any discussion of the statute or the Deputy’s analysis of the schedule, the Commissioner assigned the six percent rating and determined Manuel was entitled to 24 weeks of permanent partial disability benefits. *Id.* at *6-7.

The case of *Lund v. Mercy Medical Center and Indemnity Insurance Company of North America*, is the third case decided correctly by Deputy Commissioners on the issue at hand. No. 5066398, 2021 IA Wrk. Comp. LEXIS 65 (Iowa Workers’ Comp. Comm’r, Arb., Mar. 9, 2021) (Deputy Jennifer S. Gerrish-Lampe). In *Lund*, Deputy Commissioner Jennifer S. Gerrish-Lampe rejected the claimant’s argument that the bilateral shoulders must fall under the catch-all provision of Iowa Code section 85.34(2)(v) because such an argument “is

not consistent with the intent of the legislature.” *Id.* at *10. Just as the Deputy Commissioners reasoned in *Barry* and *Manuel*, the Deputy Commissioner in *Lund* explained:

The intent of the legislature was to carve out the shoulder as a specific scheduled member injury. 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. The lack of inclusion means bilateral shoulder injuries are to be evaluated under Iowa Code section 85.34(2)(n). Each shoulder shall be separately assessed pursuant to Iowa Code section 85.34(2)(n).

Lund, at *10. The Deputy went on to calculate a total benefit of 64 weeks of permanent partial disability benefits based on a six percent impairment to the right shoulder (24 weeks) and a ten percent impairment to the left shoulder (40 weeks). *Id.* at *11 & *12.

Just as the Deputy Commissioners found in *Barry*, *Manuel*, and *Lund*—cases involving claims of bilateral shoulder injuries—this Court should find that, where there is a finding of a single accident causing a shoulder injury and a second scheduled injury, the plain language of the statute prohibits a finding that such disabilities are compensated under section 85.34(2)(v), the catch-all industrial disability provision. The Court should find that the plain statutory language instructs that a shoulder injury and an arm injury are each scheduled injuries, and each should be assessed for compensation separately using the functional method.

IV. The only interpretation of the Iowa Workers’ Compensation Act in this case that is harmonious with the statute as a whole is an interpretation which keeps all shoulder injuries in the functional disability method

Earlier this year, the Court in *Chavez* found ambiguity in the word “shoulder” in the workers’ compensation statute, and it explained its rules of statutory construction. The Court assesses “the statute in its entirety rather than isolated words or phrases to ensure our interpretation is harmonious with the statute as a whole.” *Chavez v. MS Tech. LLC*, 972 N.W.2d 662, 667-68 (Iowa 2022) (quotation omitted). It emphasized the need for harmony: it stated it “interprets the provisions within the workers’ compensation statutory scheme to ensure our interpretation is harmonious with the statute as a whole.” *Id.* at 668 (quotations and citations omitted).

A. Other provisions in the 2017 legislation were designed to minimize litigation and maximize predictability

In looking at the statutory scheme as a whole, the Court should consider how other provisions added by the 2017 legislation were designed to minimize litigation and maximize predictability for the worker, the employer, and the insurer. The following are two of several examples of other changes that were made in 2017.

One example is Section 9 of HF 518 which outlawed the use of “[l]ay testimony or agency expertise” in determining loss or percentage of impairment when determining functional disability under Sections 85.34(a) through (u) and (v). *See* Iowa Code § 85.34(2)(x); *see also* HF 518, § 9. The elimination of lay

testimony and agency expertise in the functional disability determination creates more certainty in the process and leaves less room for “guess work” by the Commission. *See Harrell v. Denver Findley & Sons, Inc.*, 2022 Iowa App. LEXIS 548, *6 (Iowa Ct. App. July 20, 2022) (finding the claimant’s “own testimony” was “the very ‘lay testimony’ forbidden by section 85.34(2)(x)”).

A second example of the legislature seeking to reduce litigation is the part of the 2017 legislation that addressed claimants who seek permanent partial disability benefits while already receiving permanent total disability benefits. In 2019, the Court of Appeals noted the Supreme Court’s prior analysis of the apportionment language in chapter 85 applicable to the pre-2017 injuries before it: “Section 85.34(3)(b), on its face, does not prohibit [the employee] from drawing compensation for permanent partial disability and permanent total disability concurrently, so long as the benefit awards do not arise from the same injury.” *Pella Corp. v. Winn*, 2019 Iowa App. LEXIS 44, *16, n.8 (Iowa Ct. App. Jan. 9, 2019) (quoting *JBS Swift & Co. v. Ochoa*, 888 N.W.2d 887, 899 (Iowa 2016) (modification in *Ochoa*)). The Court of Appeals also noted, however, that Section 85.34(3)(b) was amended in 2017 to “explicitly prohibit an employee from receiving ‘compensation for permanent partial disability if the employee is receiving compensation for permanent total disability.’” *Winn*, 2019 Iowa App. LEXIS 44, at *16, n.8 (citing HF 518, § 10).

Each of these “new” provisions that became law when 85.34(2)(n) was added to the statutory scheme show the legislature’s focus on leaving less for the Commissioner and Courts to decide. Just as workers and employers now know that workers may no longer receive compensation for permanent partial disability if the worker already receives permanent total disability benefits, workers and employers should be permitted to rely on the predictable fact that any shoulder injury—even if bilateral and even if it is in addition to another scheduled injury—will be compensated under the scheduled, functional system.

B. The Respondent’s proposed statutory interpretation is not in harmony with precedent

The Respondent’s proposed statutory interpretation is not in harmony with the entire statutory scheme or decades of case law. For years, this Court has affirmed workers’ compensation permanency awards when a claimant has injuries to two or more scheduled members which are not included in section 85.34(2)(t) and where the benefits are calculated using the functional method.

The list of scheduled members in section 85.34(2)(t) does not include all of the scheduled members listed in section 85.34(2)(a) through (s). Subsection 2(t), for example, does not list injuries to

- the thumb (§ 85.34(2)(a)),
- fingers (§ 85.34(2)(b), (c), (d), and (e)),
- certain portions of the thumb or any finger (§ 85.34(2)(f) and (g)),

- the toe, great toe, or portion thereof (§ 85.34(2)(h), (i), (j), and (k)),
and
- hearing loss (§ 85.34(2)(s)).

If the argument proposed by the Respondent is adopted, the result would be in stark conflict with Iowa's long-standing treatment of other injuries to these many members that are not included in the short list in section 85.34(2)(t).

Respondent argues that his alleged shoulder injury (scheduled but not listed in § 85.34(2)(t)) combined with his alleged arm injury (scheduled and listed in § 85.34(2)(t)) must be compensated using the industrial method via § 85.34(2)(v)'s catch-all provision. Extending the Respondent's arguments for the shoulder to these other members produces an absurd result that are in direct conflict with precedent. Say, for example, a claimant sustains a compensable injury to the (1) great toe, and (2) the arm. Just like in the instant case where there is one scheduled injury that is not included in subsection (2)(t) and one that is, in the hypothetical, the great toe is not listed in section 85.34(2)(t), but the arm is listed. In such cases, the two scheduled injuries have always been treated as just that—scheduled injuries. There is no precedent supporting moving such injuries into the industrial disability system.

The legislature created section 85.34(2)(t) to provide enhanced additional scheduled member benefits whenever two of the major scheduled body parts listed

are injured in a single accident. The fact that the legislature did not add shoulders to this list simply means that it did not intend to include shoulders in the list of body parts that received enhanced scheduled member awards. Instead, such injuries would need to be compensated according to the specific functional rating for each injury, just as two toes are compensated as separate scheduled member injuries based on their functional rating.

This Court explained long ago: “*If* an employee suffers both an injury to a scheduled member and also to part of the body not included in the schedule, *then* the resulting injury is compensated on the basis of an unscheduled injury.” *Miller v. Lauridsen Foods*, 525 N.W.2d 417, 420 (Iowa 1994) (emphasis added; citations omitted). Conversely: “If it is found that the permanent physical impairment is limited to a body member specifically listed in schedules set forth in one of the subsections to Iowa Code § 85.34(2), the disability is considered a scheduled-member disability and is compensated based on the degree of functional impairment shown to exist.” *Floyd v. Quaker Oats*, 646 N.W.2d 105, 109 (Iowa 2002). There is no law which provides that if one scheduled member is listed in subsection (2)(t) and a second scheduled member is not, then both scheduled members must be compensated on the basis of unscheduled injuries. That is not the law in this State.

Moreover, physical injuries to an arm and a shoulder are not akin to the type of injuries that are compensable under section 85.34(2)(v)'s catch all. For example, phantom pain syndrome or phantom limb syndrome (pain which sometimes occurs after a limb amputation) has been held to be compensable under section 85.34(2)(v) (formerly § 85.34(2)(u)) as an unscheduled injury. *Dowell v. Wagler*, 509 N.W.2d 134, 138 (Iowa Ct. App. 1993). This Court has held that a psychological condition that results from or is aggravated by a scheduled injury can be compensable as an unscheduled section 85.34(2)(v) injury. *Honeywell v. Allen Drilling Co.*, 506 N.W.2d 434, 437 (Iowa 1993); *Mortimer v. Fruehauf Corp.*, 502 N.W.2d 12, 17 (Iowa 1993). In so finding, this Court said, “[w]hether the spill over effects are physical or mental, the result is the same: disability.” *Mortimer*, 502 N.W.2d at 17. Here, there is no spill-over. Even if proven, there are simply two separate scheduled injuries.

This Court should decline any invitation to find industrial disability compensation applicable here, including based on the fact that there is one scheduled injury that is listed in section 85.34(2)(t) and one that is not. Such a finding would violate the doctrine of stare decisis. *See generally Bd. of Water Works Trs. of City of Des Moines v. Sac Cnty. Bd of Supervisors*, 890 N.W.2d 50 (Iowa 2017) (explaining how the Court “guards” the doctrine of stare decisis and

requires “the highest possible showing that a precedent should be overturned before taking such a step” (citations omitted)).

CONCLUSION

For all of the reasons stated herein, the Court should conclude that the Commissioner committed an error of law in reverting to section 85.34(2)(v)’s unscheduled, uncertain industrial disability method for determining benefits in this case where the Commissioner affirmed a finding that the claimant sustained compensable injuries to (1) his right arm, and (2) his right shoulder. The Commissioner erred in adopting the finding that this “catch all” provision (and the industrial disability method) applied here.

The Iowa Association of Business and Industry respectfully requests that this Court reverse the findings of the District Court, remand for further proceedings, and order the Commissioner to utilize the Iowa Code sections pertaining to scheduled body parts (§ 85.34(2)(a)-(u)), rather than the “catch-all” industrial disability provision (§ 85.34(2)(v)) in cases where substantial evidence supports a conclusion that a claimant has two permanent conditions, including a permanent shoulder condition and a permanent condition to another scheduled member.

/s/ Teresa K. Baumann

TERRI C. DAVIS AT0001920

TERESA K. BAUMANN AT0000755

SHUTTLEWORTH & INGERSOLL, P.L.C.

115 3rd Street SE, Suite 500

Cedar Rapids, IA 52401

(319) 365-9461

tcd@shuttleworthlaw.com

tcb@shuttleworthlaw.com

ATTORNEYS FOR THE IOWA
ASSOCIATION OF BUSINESS AND
INDUSTRY, AMICUS CURIAE

**CERTIFICATE OF COMPLIANCE WITH 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) or (2) because:

this brief contains 5,393 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1) or

this brief uses a monospaced typeface and contains _____ lines of text, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(2).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type style requirements of Iowa R. App. P. 6.903(1)(f) because:

this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14 point, or

this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

/s/ Heather A. Bertch
Signature

October 13, 2022
Date

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies this Amicus Curiae Brief was electronically filed and served on the 13th day of October, 2022, upon the following persons and upon the Clerk of the Supreme Court using the Electronic Document Management System, which will send notification of electronic filing:

Alison E. Schroder
1307 W. 50th Street
West Des Moines, IA 50266

William Timothy Wegman
6800 Lake Drive Suite 125
West Des Moines, IA 50266

Channing Dutton
1415 Grand Avenue
West Des Moines, IA 50265

Clerk of the Iowa Supreme Court
Iowa Judicial Branch Building
1111 East Court Avenue, 4th Floor
Des Moines, IA 50319

Pursuant to Iowa Rule 16.315, this constitutes service for purposes of the Iowa Court Rules.

/s/ Heather A. Bertch

NAME