

**IN THE IOWA SUPREME COURT**

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**APPEAL NO. 22-1894**

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**JUSTIN LOEW,**

**Petitioner-Appellant,**

**v.**

**MENARD, INC., and  
XL INSURANCE AMERICA,**

**Respondents-Appellees.**

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**APPEAL FROM THE IOWA DISTRICT COURT  
IN AND FOR POLK COUNTY  
HONORABLE SAMANTHA GRONEWALD  
Polk County No. CVCV063592**

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**PETITIONER-APPELLANT'S FINAL REPLY BRIEF**

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## ARGUMENT

**I. A CASE DECIDED UNDER THE 2004 VERSION OF 85.34(2) IS NOT APPLICABLE IN DETERMINING WHETHER MENARD AND ITS INSURANCE CARRIER ARE DUE A CREDIT PURSUANT TO THE 2017 AMENDMENT OF 85.34(2) FOR PREVIOUS COMPENSATION OF MR. LOEW'S 2015 LOWER BACK INJURY.**

In its brief, Menard relies on a single case - *Polaris Industries, Inc. v. Hesby*, 881 N.W.2d 471 (Table), 2016 WL 541081 (Iowa Ct. App. 2016) - in support of its position that it is entitled to a credit for Mr. Loew's prior award of 30 percent industrial disability. This reliance is misplaced.

*Hesby* involved an injured worker who had sustained several work injuries with the same employer. The worker was awarded 30 percent industrial disability for a left shoulder injury. The employer sought credit for previous payments for other injuries, including 30 weeks which it maintained had been paid for a prior right shoulder injury. *Id.* at \*2. Since these injuries took place before 2017, the 2004 version of Section 85.34(7) applied.

The court noted the issue presented was not *how* to calculate the credit, rather the question was *whether* there was sufficient evidence in the record of entitlement to the credit. *Id.* at \*5. The court determined a remand was necessary since the Commissioner had failed to consider relevant

evidence of prior permanent partial disability payments for the right shoulder injury. *Id.*

There are two basic reasons why *Hesby* is not applicable. First, it involved the 2004 version of 85.34(7) rather than the 2017 amendment. As noted by the court, 85.34(7)(b)(1) explained *exactly* how the credit was to be calculated. The 2017 amendment to 85.34, however, does not provide any method by which the credit is to be determined. Moreover, 85.34(2)(v), another change to Section 85.34 as a result of the 2017 amendments, provides that the injured worker “shall” be compensated for his functional impairment. This provision, of course, was not present in the 2004 version of 85.34(7).

Second, *Hesby* involved successive injuries that were compensable as industrial disability injuries (left shoulder, right shoulder, hip). Mr. Loew’s successive injuries were compensated as an industrial injury (his 2015 back injury) and functional impairment only (his 2018 and 2019 injuries).

Whether a credit is to be applied in such a case, and whether there is a precise or exact method by which the credit is to be determined – the crucial issues in the present case involving Mr. Loew - were not issues considered by the court in *Hesby*.

## CONCLUSION

The ruling of the District Court should be reversed and this Court should enter an order that Menard is to pay Mr. Loew for the eight percent functional impairment resulting from his 2018 and 2019 injuries.

Respectfully Submitted,

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### **CERTIFICATE OF COSTS**

Appellant certifies that no costs were incurred in printing or duplicating paper copies of briefs.

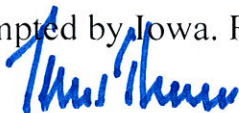


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Paul Thune

### **CERTIFICATE OF COMPLIANCE**

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. 6.903(1)(d) and (1)(g)(1) and (2) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 and contains 405 words, excluding the parts of the brief exempted by Iowa. R. App. P. 6.903(1)(g)(1).



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Paul Thune

February 27, 2023

### **CERTIFICATE OF SERVICE**

I, Paul Thune, member of the Bar of Iowa, hereby certify that on February 27, 2023, I or a person acting on my behalf served the above Petitioner-Appellant's Final Reply Brief to Respondents-Appellees' attorneys of record, via EDMS in full compliance with Rules of Appellate Procedure and Rules of Civil Procedure.



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Paul Thune

## **CERTIFICATE OF FILING**

I, Paul Thune, hereby certify that I, or a person acting in my direction, did file the attached Petitioner-Appellant's Final Reply Brief upon the Clerk of the Iowa Supreme Court via EDMS on this 27<sup>th</sup> day of February, 2023.



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Paul Thune