IN THE SUPREME COURT OF IOWA

SUPREME COURT NO: 23-1402

DEN HARTOG INDUSTRIES and WEST BEND MUTUAL INSURANCE COMPANY,
Petitioners-Appellants,

vs.

TYLER DUNGAN,
Respondent-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
THE HONORABLE JEANNIE VAUDT

APPELLEE'S FINAL BRIEF and REQUEST FOR ORAL ARGUMENT

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ROUTING STATEMENT

This case requires resolution of an issue of first impression considering the statutory changes that were made by the legislature in 2017 to Iowa Code chapter 85, also known as the Iowa Workers' Compensation Act. Accordingly, retention is appropriate pursuant to Iowa R. App. P. 6.1101(2)(c).

STATEMENT OF THE CASE

Tyler Dungan filed a petition for workers' compensation benefits on March 21, 2021, alleging an injury to his back. App. p. 6. Defendants accepted liability in their answer filed on April 6, 2021. App. p. 7. An Arbitration Hearing was held on March 10, 2022, before Deputy Commissioner Ben Humphrey. App. p. 27. Deputy Humphrey issued his decision on September 30, 2022, finding that Tyler's separation from

employment was not addressed under the bifurcated litigation process set out in Iowa Code §85.34(2)(v), and as such, he was entitled to consideration of his industrial disability, which the deputy found to be 15%. App. pp. 41-47.

Defendants filed their notice of appeal to the agency on October 11, 2022. On January 13, 2023, the Commissioner filed an Appeal Decision affirming the deputy commissioner's decision in its entirety. App. pp. 64-66.

Defendants filed their Petition for Judicial Review on January 27, 2023. App. p. 67. The Honorable Jeannie Vaudt issued her ruling on August 8, 2023, affirming the Commissioner's decision in its entirety. App. p. 115. Defendants filed their notice of appeal to the Iowa Supreme Court on August 30, 2023. App. p. 117.

STATEMENT OF FACTS

Tyler sustained a *stipulated* injury to his back on July 24, 2019, while working for Den Hartog. App p. 9. Den Hartog manufactures plastic containers – from very tiny to extremely large. App. p. 228. Tyler's job at Den Hartog was outdoor loader/material handler. App. pp. 226-227. The job required Tyler to lift, push, pull and/or carry up to 75 pounds. App. p. 227.

It was while loading heavy product onto a truck that Tyler injured his back. App. pp. 232-233.

Tyler reported the injury to his employer that same day. App. pp. 233-234; 174. When chiropractic treatment failed, Tyler was referred to CNOS in Sioux City to see an orthopedic specialist. App. p. 236. While Dr. Klopper discussed potential surgery with Tyler, Tyler "was pretty scared" to have back surgery at the age of twenty-three. App. p. 239. Accordingly, Dr. Klopper ordered epidural steroid injections to address Tyler's back pain. App. p. 238. Initially, workers' compensation paid for the treatment received at CNOS.

Tyler continued to work at Den Hartog while treating for his injury; however, he missed "a fair bit of work" due to his injury. App. p. 242. Tyler separated from employment with Den Hartog in June of 2020 as he had just become a father and wanted to be closer to family. App. pp. 242-243. He secured a couple of transition jobs before landing at GOMACO as a welder. App. p. 244.

To obtain his job at GOMACO, Tyler had to convince Dr. Klopper to provide a full release and remove his 40-pound

weight restriction. App. pp. 131; 245. Tyler testified his work at GOMACO is much less physically demanding than his prior work at Den Hartog. App. p. 246.

All doctors agree Tyler's injury is permanent. Dr. Klopper, the authorized treating doctor, assigned a 5% rating for Tyler's injury. App. p. 132. Dr. Schmitz, hired by defendants to examine Tyler, agreed with Dr. Klopper, and assigned a 5% rating. App. p. 219. Dr. Broghammer, also hired by defendants to do a record review, also assigned a 5% rating. App. p. 220. Dr. Bansal assigned an 8% rating. App. p. 149.

STANDARD OF REVIEW AS TO ALL ISSUES

Iowa Code Chapter 17A governs review of this matter. *See,* Iowa Code §86.26 (1997). In reviewing a decision on appellate review, Iowa courts have applied the **substantial evidence standard**. *See, e.g.*, Long v. Roberts Dairy Corp., 528 N.W.2d 122 (Iowa 1995). Under this standard of review, the court is "obliged to broadly and liberally apply [the agency's] findings to uphold rather than defeat the commissioner's decision." Id. at 123 (citing Ward v. Iowa Dep't of Transp., 304 N.W.2d 236, 237 (Iowa 1991)).

The Commissioner's findings are binding on appeal unless a contrary result is compelled as a matter of law. Long v. Roberts Dairy Co., 528 N.W.2d 122, 123 (Iowa 1995). The Court is not free to interfere with the commissioner's findings where there is conflict in the evidence or when reasonable minds might disagree about the inferences to be drawn from the evidence whether disputed or not. Catalfo v. Firestone Tire & Rubber Co., 213 N.W.2d 506 (Iowa 1973). **Judicial review of the decision of the commissioner is not de novo and commissioner's findings have force of a jury verdict**. Holmes v. Bruce Motor Freight, Inc., 215 N.W.2d 296 (Iowa 1974). The burden of demonstrating the required prejudice and the invalidity of agency action is on the party asserting invalidity. Iowa Code §17A.19(8)(a) (2005).

As instructed in Meyer v. IBP, Inc., 710 N.W.2d 213, 218 – 19 (Iowa 2006):

> On judicial review, courts are bound by the commissioner's resolution of the first question-finding the operative facts from the evidence presented-if supported by substantial evidence in the record as a whole. *Excel Corp. v. Smithart,* 654 N.W.2d 891, 896 (Iowa 2002) (citing *IBP, Inc. v. Harpole,* 621N.W.2d 410, 414 (Iowa 2001)); *accord* Iowa Code §17A 19 (10) (f). In other words, the question on appeal is not whether the evidence supports a different finding than the finding made by the commissioner, but whether the evidence "supports the findings actually made." *St. Luke's Hosp. v. Gray,* 604 N.W.2d 646, 649 (Iowa 2000). On the other hand, the application of

the law to the facts - the second question - takes a different approach and can be affected by other grounds of error such as erroneous interpretation of law; irrational reasoning; failure to consider relevant facts; or irrational, illogical, or wholly unjustifiable application of law to the facts. *See* "*219 Iowa Code §17A.19(10)(c), *(i), (j),*(m). We allocate some degree of discretion in our review of this question, but not the breadth of discretion given to the findings of fact. *See* Arthur E. Bonfield, *Amendments to Iowa Administrative Procedure Act (1998) Chapter 17A, Code of Iowa (House File 667As Adopted)* 70 (1998) ("[W]hen an agency is delegated discretion in applying a provision of law to specified facts the scope of review appropriately applied by courts must be deferential because the legislature decided that the agency expertness justifies vesting primary jurisdiction over that matter in the discretion of the agency rather than in the courts."); *see also Clark v. Vicorp Rests., Inc.*, 696 N.W.2d 596, 604 (Iowa 2005) ("Because factual determinations are within the discretion of the agency, so is its application of law to the facts."); *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 465 (Iowa 2004) **("[G]iven that factual determinations in workers' compensation cases are 'clearly vested by a provision of law in the discretion of the agency,' it follows that application of the law to those facts is likewise 'vested by a provision of law in the discretion of the agency.'** " (citing Iowa Code §17A.19(10)(f)). (emphasis added)

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT TYLER'S SEPARATION FROM EMPLOYMENT WITH THE EMPLOYER TRIGGERED CONSIDERATION OF HIS INDUSTRIAL DISABILITY UNDER IOWA CODE §85.34(2)(v) AS STATUTORY CONSTRUCTION REQUIRES THE SENTENCES OF THAT SECTION BE READ TOGETHER.

Error Preservation. Tyler agrees Defendants preserved error by timely filing its Appeal of the District Court's Order on Judicial Review. The District Court decided this issue. App. pp. 112-114.

Argument. Tyler's stipulated injury to his back occurred on July 24, 2019. App. p. 9. Tyler was able to work at Den Hartog while receiving treatment for his injury though he did miss several shifts due to his injury. App. pp. 241-242. Due to having a new baby and a desire to be closer to family, Tyler and his family relocated, and he ended his employment with Den Hartog. App. p. 243. He secured a couple of jobs that varied in pay and eventually found a job at GOMACO after convincing his doctor to lift his restrictions. App. pp. 245-246. Tyler earns more at GOMACO as a welder than he did at Den Hartog, even though his work at GOMACO is much less physically demanding. App. p. 256.

Before 2017, permanent partial disability to an unscheduled body part was compensated by the industrial disability method which considered the loss of earning capacity. Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824, 831 (Iowa 1992). In 2017, the legislature created an exception to this general rule and instituted a mandatory bifurcated litigation process on the issue of permanent disability under certain circumstances. Iowa Code § 85.34(2)(v). That bifurcated litigation process is set out in the final two sentences of the statute as follows:

> If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity. Notwithstanding section 85.26, subsection 2, if an employee who is eligible for compensation under this paragraph returns to work with the same employer and is compensated based only upon the employee's functional impairment resulting from the injury as provided in this paragraph and is terminated from employment by that employer, the award or agreement for settlement for benefits under this chapter shall be reviewed upon commencement of reopening proceedings by the employee for a determination of any reduction in the employee's earning capacity caused by the employee's permanent partial disability.

Iowa Code § 85.34(2)(v).

Relying on this statutory language, the agency and the district court concluded Tyler was entitled to consideration of his reduction in earning capacity as he was no longer working at Den Hartog. App. pp. 65; 112-114. Defendants' contention that the agency and the district court both got it wrong is without merit.

> **The Defendants contend that in interpreting §85.34(2)(v), this Court should follow the first three sentences, and completely ignore the fourth sentence. That is not how statutory construction works.**

Iowa Code §85.34(2)(v) as amended contains four sentences. The first two sentences are not in dispute so both parties agree those two sentences are applicable to Tyler's case. It is the third and fourth sentences that are at issue.

Those final two sentences are quoted above. Of those two sentences, Defendants want this Court to consider only the first sentence and stop reading. As the deputy aptly noted, "the analysis of this statutory provision does not end with the punctuation at the end of this individual sentence." App. p. 43. The agency is correct. Our Supreme Court has consistently held that Iowa statutes are to be interpreted as a whole, not in part. Doe v. State, 943 N.W.2d 608, 610 (Iowa 2020).

Defendants are asking the Court to read the first three sentences of the statute and stop. The validation for the Court's consistent holding that statutes must be read as a whole and not in part can be illustrated with a simple example of how one sentence can greatly impact the penultimate sentence.

Example:

Janece is running. You can track her progress during the marathon by logging in online.

Janece is running. Please donate to her campaign generously.

Janece is running. Law enforcement indicated they expect to have her in custody shortly.[1]

The rules of statutory construction are clear in requiring the Court to read the statute as a whole. In considering both the final sentences of §85.34(2)(v), the legislature set up a bifurcated

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[1] None of these examples have any truth in substance but merely illustrate the significance of context and the reason the rules of statutory construction require reading the statute as a whole. Also, the Supreme Court recently noted the significance of reading sentences of a statute together in State v. Gordon, 998 N.W. 2d 859, 863 (Iowa 2023) when Justice McDermott stated for the Court that "We consider the entire statute when determining its meaning, "not just isolated words and phrases." (citing *Story Cnty. Wind, LLC v. Story Cnty. Bd. of Rev.*, 990 N.W.2d 282, 286 (Iowa 2023) (quoting *In re J.C.*, 857 N.W.2d 495, 500 (Iowa 2014)). The language in the definition of a deferred judgment that follows the portion that Gordon highlights states that a deferred judgment is "a sentencing option whereby both the *adjudication of guilt* and the *imposition of a sentence* are deferred by the court." Iowa Code § 907.1(1) (emphasis added). The definition identifies two fundamental features of a deferred judgment: (1) deferring a judgment adjudicating guilt, and (2) deferring a sentence. *Id.* These dual components are referenced again in a second sentence in the definition, which states: "The court retains the power to pronounce judgment *and* impose sentence subject to the defendant's compliance with conditions set by the court as a requirement of the deferred judgment." *Id.* (emphasis added)."

litigation process when a worker returns to work for the same or greater wages, and then after being paid their functional impairment, is later terminated. At that point, a review reopening procedure is available for consideration of additional compensation. As the Commissioner set out in Martinez v. Pavlich, Inc., File No. 5063900 (App. Dec., 7/30/2020),

> [W]hen the two new provisions . . . are read together, as they are set forth in the statute, it appears the legislature intended to address only the scenario in which a claimant initially returns to work with the defendant-employer or is offered work by the defendant-employer at the same or greater earnings but is later terminated by the defendant-employer.

Martinez, App. Dec., p. 5.

As such, Defendants' contention that the agency somehow "skipped a step" in analyzing §85.34(2)(v) is wrong. Def. Final Brief, p. 28. The agency and the district court simply did not stop reading after the third sentence. Rather, the agency and district court considered ALL the sentences of the statute together, as required by the rule of statutory construction that a statute must be read as a whole. When all four sentences are considered together, the agency and the district court were correct in concluding §85.34(2)(v) did not apply to Tyler's case.

That interpretation is also reinforced by the statutory construction principle of *expressio unius est exclusio alterious*, which holds that

legislative intent is expressed by exclusion and inclusion alike, with the express mention of one thing implying the exclusion of another. Kucera v. Baldazo, 745 N.W.2d 481, 487 (Iowa 2008). **Even Defendants concede that the statute does not address voluntary resignation.** Def. Final Brief, p. 42. Relying on the principle that what the statute does *not* say is just as important as what it *does* say, the deputy concluded:

> The statute contains no mention of any other circumstances that mandate a bifurcated litigation process to determine the extent of permanent disability. The legislature could have included such language in the statute but did not. **This choice implies that the requirement for a bifurcated ligation process only applies when the defendant-employer discharges the claimant after the agency issues an award or approves the parties' agreement for settlement on the question of permanent disability based on functional impairment.**

App. p. 44 (emphasis added).

With that principle in mind, **this Court cannot hear what the legislature did not say**. The statute is silent as to voluntary separation from employment. This Court is bound by the "words chosen by the legislature." State v. Childs, 898 N.W.2d 177, 184 (Iowa 2017) (quoting State v. Iowa Dist. Ct., 730 N.W.2d 677, 679 (Iowa 2007)); *see* Holland v. State, 115 N.W.2d 161, 164 (Iowa 1962) ("It is our duty to accept the law as the legislative body enacts it."). Again, the

Court cannot read words into the statute the legislature failed to write, and the legislature did not address voluntary separation when it amended §85.34(2)(v) to add the bifurcated litigation process.

Further, the Commissioner's interpretation is consistent with the Iowa Supreme Court's mandate to "**apply the workers' compensation statute broadly and liberally in keeping with its humanitarian objective**: the benefit of the worker and the worker's dependents." Xenia Rural Water Dist. v. Vegors, 786 N.W.2d 250, 257 (Iowa 2010). To interpret the statute as suggested by Defendants would not only be a detriment to the injured worker, but to the employer and the workers' compensation carrier as well. It would be detrimental to the employer in that it would incentivize the injured worker to be a bad or disruptive employee in hopes of getting terminated. It would be detrimental to the carrier as the bifurcated process keeps the file open to further review, which that review might not happen until decades later. And it would be detrimental to the injured worker in that it holds a worker hostage to their current employment. That scenario is particularly untenable when the physical requirements of the employment following a work injury simply do not match up with the

injured worker's residual physical abilities – an all-too-common scenario recognized by long-standing law.[2]

Case law further bolsters the Agency's and District Court's reading that the bifurcated process set out in §85.34(2)(v) is not applicable without a termination.

In almost every single case cited by Defendants to support their contention, the injured worker **continued to work for the same employer**. That significant factual difference distinguishes those cases from Tyler's case where there was a separation of employment.[3]

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[2] [W]e feel the legislature intended that, where factors or circumstances directly connected with employment result in illness or disease to an employee and make it impossible for him to continue therein because of serious danger to his health, termination of employment for this reason may correctly be said to be involuntary and for 'good cause attributable to the employer/ even though the employer be free from all negligence or wrongdoing in connection therewith." Raffety v. Iowa Employment Security Commission and Hyde-Vredenburg Company, 247 Iowa 896, 76 N.W.2d 787 (1956).

[3] In McCoy v. Menard Inc., File No. 1651840.01 (App. Dec., 4/9/2021), the question was whether McCoy was earning the "same or greater" wages while working for the **same** employer. The Commissioner found McCoy was consistently offered work by the employer for which he would have received the same wages or earnings as what he received at the time of the injury. As such, McCoy was compensated for his functional impairment.

In Vogt v. XPO Logistics Freight, File No. 5064694.01 (App. Dec., 6/11/21), Vogt continued to work for the **same** employer. However, Vogt experienced a wage loss as even though her hourly wage increased, her work hours were limited by her doctor's work restrictions, creating an overall wage loss from the date of injury.

In Clark v. Arconic Inc., File No. 5061553.01 (App. Dec., 6/28/2022), Clark continued to work for the **same** employer. And the crux of Clark was the interpretation of §85.34(x) (the exclusive use of the Guides and not agency expertise in determining impairment) rather than §85.34(2)(v).

In Zalazink v. John Deere Dubuque Works, File Nos. 5066386; 5067224 (App. Dec., 1/11/2022), the parties stipulated that Zalazink's injuries were limited to the functional impairment ratings, so while §85.34(2)(v) was cited, its applicability is limited given the parties' stipulations. Again, Zalazink was employed with the **same** employer.

In Tow v. Archer Daniel Midland Co., File No. 5068651 (Arb. Dec. 4/8/2021), the deputy found Tow continued to work for the **same** employer and earned more in wages than at the time of the injury. Accordingly, under §85.34(2)(v), Tow was limited to his functional impairment.

In Kish v. University of Dubuque, File No. 5066482 (App. Dec. 11/30/2021), Kish continued to work for the **same** employer and initially returned to her same job earning the same wages. At some point, Kish voluntarily elected to bid to a lower paying job for the same employer. Since Kish did not

In contrast, the following cases cited by Defendants demonstrate the agency's and the district court's correct position that §85.34(2)(v) only comes into play when there is a termination, not merely a separation from employment.[4]

In Till v. Windstar Lines, Inc., File No. 5067027 (Arb. Dec., 7/10/2020), Till was **terminated** from his employment as his restrictions precluded him from returning to his bus driving job. The deputy properly considered the termination and the fact the employer was not offering work at the same or greater wages in awarding 30% industrial disability. Till was correctly decided under §85.34(2)(v).

In Martinez v. Pavlich, Inc., File No. 5063900 (App. Dec., 7/30/2020), the Commissioner found that under §85.34(2)(v), a **voluntary separation** of employment was not addressed by the

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have any restrictions requiring her to change positions, the Commissioner found Kish limited to her functional impairment.

The cases cited involving shoulder claims are not instructive as shoulder claims are scheduled injuries and do not involve the question of industrial disability. See Deng v. Farmland Foods, 2020 WL 1183480, File No. 5061883 (Arb. Dec., 2/25/2020; Chavez v. MS Technology, 2020 WL 1183526, File No. 5066270 (Arb. Dec. 2/5/2020); and Rubalcava v. Siouxpreme Egg Products, Inc., File No. 5066865 (Arb. Dec., 6/23/2020).

[4] While not cited by the Defendants, the Commissioner has also held that an injured worker with a low back injury who quit his job was found to have sustained a 70% industrial disability. Gatewood v. Innkeeper and Berkshire Hathaway, File Nos. 19007309.01, 20000508.01 (App. Dec. 9/28/2022). Additionally, the Commissioner rejected the employer's argument that an injured worker was limited to a functional impairment award where the worker was offered work at the same or greater wages, but the injured worker was not physically capable of performing that work. Newburry v. Lutheran Home for the Aged Association, 2023 WL 31773143, File No. 21000314.02 (App. Dec., 4/20/23).

legislature when amending §85.34(2)(v). Id. at 4-5. As such, the Commissioner found that §85.34(2)(v) did not apply to the scenario where a worker had a voluntary separation from employment. Id. Martinez was taken up on judicial review. While a reader may try to make some inferences from that judicial review ruling, the bottom line is the district court DENIED the motion for judicial review challenging the Commissioner's ruling. Martinez, 2021 Iowa Dist. LEXIS 10 (Iowa Dist. Ct., 4/21/2021). As such, the legal result is that the Commissioner's decision stands as the law of the case.

Finally, we reach the "poster child" for §85.34(2)(v). In Cortez v. Tyson Foods, Inc., 2023 WL 8800115, File Nos. 20700573.02 & 20000903.02 (App. Dec., 12/13/2023), Cortez, a 25-year-plus employee, reached settlements for two work injuries based upon her functional impairments. Id. Those agreements were approved by the agency on July 6. 2021. Id. On July 22, 2021, the employer put Cortez on an "involuntary leave of absence" and required her to call in every week to check on job availability. Id. Cortez called in every week between July 2021, and the date of hearing in October 2022. Id. No offer of work was ever made. Id. The agency considered Cortez effectively **terminated** as of July 22, 2021. Id. A deputy determined Cortez was permanently and

totally disabled. Id. The Commissioner reduced that determination to 80%. Id.

The Cortez case plays out the intent as set out by the four sentences used by the legislature in amending §85.34(2)(v). A worker gets paid for their functional impairment by their employer and then is terminated.

In this case, Tyler was not terminated. Tyler separated from his employment with Den Hartog to be closer to family as a new father. App. pp. 242-243. As such, Iowa Code §85.34(2)(v) is not applicable.

Policy concerns also favor the District Court's interpretation.

In addition to the rules of statutory construction and the requirement to interpret and apply the workers' compensation statutes to the benefit of the injured worker, policy concerns also favor the District Court's interpretation of §85.34(2)(v).

First, there should be an incentive for workers – even injured workers - to better their circumstances and not be held hostage. That is a benefit to all Iowans.

Second, as mentioned above, the bifurcated process, if interpreted as Defendants desire, forces all parties to come to the table twice to determine compensation. That is hardly swift and speedy justice nor is it good for judicial economy.

Third, carriers want finality, not open files - particularly files that could remain open for decades until a worker is terminated or retires.

Fourth, employers want workers who want to work – not unscrupulous workers that are incentivized to try and get fired.

Fifth, injured workers want jobs they are physically capable of performing. Unscrupulous employers should not be incentivized to offer work at the same or greater wage for work which the injured worker cannot realistically perform.

Finally, Defendants' interpretation would discourage a terminated worker from seeking other employment at the same or greater wages. As the Commissioner noted in *Martinez*, "Certainly the legislature did not intend to discourage claimants from seeking gainful employment after a work injury." *Martinez*, App. Dec., p. 6.

Again, the statute must be read as a whole. *Is Janece running? And if so, what, or why is Janece running?* The district court's affirmance of the agency in applying Iowa Code §85.34(2)(v), relying in large part on the rules of statutory construction, should be affirmed.

II. THE DISTRICT COURT CORRECTLY FOUND SUBSTANTIAL EVIDENCE SUPPORTED THE COMMISSIONER'S DETERMINATION THAT TYLER SUSTAINED A 15% LOSS OF EARNING CAPACITY.

Error Preservation. Tyler agrees Defendants preserved error by timely filing its Appeal of the District Court's Order on Judicial Review. The District Court decided this issue on pages 7-8 of its Order on Judicial Review. App. pp. 114-115.

Argument. All doctors agree Tyler's injury is permanent. Dr. Klopper assigned a 5% rating for Tyler's injury. App. p. 132. Dr. Schmitz agreed with Dr. Klopper and assigned a 5% rating. App. p. 219. Dr. Broghammer also assigned a 5% rating. App. p. 220. Dr. Bansal assigned an 8% rating. App. p. 149.

In determining the extent of industrial disability, consideration must be given to the injured employee's functional impairment, age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980). In looking at the factors to consider in

addressing industrial disability, Tyler sustained an industrial disability in excess of the impairment ratings provided.

Permanent impairment. While Defendants dispute Tyler sustained a permanent injury (App. p. 9), there is not a scintilla of evidence to suggest Tyler's injury is anything but permanent in that all the doctors involved provided permanent impairment ratings.

Age. As amended in 2017, Iowa Code §85.34(2)(v) requires the agency to consider "the number of years in the future it was reasonably anticipated that the employee would work at the time of the injury." At the time of the injury, Tyler was 23. Tyler has decades of work years ahead of him.

Restrictions. While it is true Dr. Klopper provided a full release, the context of that release is significant. That release was provided at Tyler's insistence so he could start his job at GOMACO. App. p. 131. Tyler desperately needed the job. As he testified, "[the full release] was at [GOMACO's] request, but I really needed the job, so yeah, I requested [the release]." App. p. 246. Dr. Bansal's recommendations to restrict lifting to 30 pounds and limiting bending and twisting are much more in line with the realities of day-to-day living for Tyler. App. p. 150.

Prior health history. Before the injury at Den Hartog, Tyler testified "I was a machine." App. p. 248. He considered himself "the equipment" at work and capable of doing anything. Id.

Access to the labor market. When Tyler returned to work at Den Hartog following his injury, he was in "excruciating pain." App. p. 241. Tyler testified he would miss work due to his back. App. p. 242. Sometimes he was paid for time missed for his back yet sometimes he lost those wages. App. pp. 151-172; 262. Regardless, Tyler performed his work at Den Hartog much differently and with assistance following his injury. App. p. 258.

Tyler then left Den Hartog for family considerations and found other employment that was less physical, eventually landing a job as a welder at GOMACO. App. p. 244. GOMACO has been "quite accommodating" regarding Tyler's limitations due to his back. Id.

The loss of access to the labor market is of paramount importance in determining loss of earning capacity. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Bearce v. FMC Corp., 465 N.W.2d 531 (Iowa 1991). The essential element to be determined when determining industrial disability is the reduction in value of the *general* earning capacity of the person, rather than the loss of wages or

earnings, *or lack thereof*, in a specific occupation or for a specific employer. Myers v. F.C.A. Services, Inc., 592 N.W.2d 354 (Iowa 1999)(emphasis added).

In Weikert v. Direct Maytag, File No. 5000339, (App. Dec., January 24, 2004), the agency set forth the proper legal standard for determining loss of earning capacity.

> Loss of earning capacity is measured in relation to the competitive labor market as a whole and is not limited to the person's current position and employer. This is so because **the only certainty about the future is uncertainty**. Employees are forced into the competitive labor market when their employers go out of business, outsource their work, merge, or are acquired by other businesses. **It is for the reason that these unpredictable events occur that the measure of loss is in relation to the competitive labor market rather than a particular job with a particular employer.**

Id. (Emphasis added)

Tyler credibly testified that his current employer, GOMACO, has been "quite accommodating" regarding any lifting. App. p. 244. However, there are no guarantees regarding Tyler's continued, accommodated employment with GOMACO. In considering the labor market as a whole, rather than just Tyler's welding job with GOMACO, Tyler has lost access to a segment of that market due to his limitations in lifting, bending, and twisting.

Ongoing symptoms and treatment. Tyler continues to experience lower back pain that shoots down his right leg. App. p. 248. He needs further treatment, including an epidural shot at a minimum, which has been denied by work comp. App. pp. 248-249.

Motivation. Tyler is motivated to work. He went to Dr. Klopper to get a full release so he would be able to work at GOMACO. App. p. 131. In response to the deputy's questioning at hearing about the hiring process for GOMACO, Tyler testified "I need to pay my bills and I'm dedicated to taking care of me and my family. So whatever we can do to remedy the situation." App. p. 261.

Under current law, since Tyler has an injury to the body as a whole, has a permanent impairment related to that injury, and is no longer working for Den Hartog, his injury is to be evaluated industrially. In considering the industrial factors, his industrial loss exceeds his functional impairment. Substantial evidence supports the Commissioner's finding, and the district court's affirmance, of an industrial loss of 15%. The district court should be affirmed.

CONCLUSION

I. The district court should be affirmed in its interpretation of §85.34(2)(v) for the following reasons:

   a. Statutory construction requires the Court to read the statute as a whole. Not just one sentence. Not just a couple of sentences. But all four sentences.

   b. Legislative intent can only be ascertained by the words actually used by the legislature. It is also instructive as to what words the legislature omitted.

   c. Iowa Code §85.34(2)(v) does not address a separation from employment other than termination.

   d. Policy considerations for all constituencies involved favor the district court's interpretation to prevent stale and "forever" open claims and an engaged workforce.

II. The district court should be affirmed in relying on substantial evidence to support the agency's determination that Tyler sustained a 15% loss of earning capacity.

REQUEST FOR ORAL ARGUMENT

Tyler Dungan hereby requests Oral Argument to further discuss the issues on appeal.

Respectfully submitted,

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CERTIFICATE OF FILING

I, Ronica Poldervaart, an employee of Valentine Law Office, attorney for Tyler Dungan, certify the attached Final Brief and Request for Oral Arguments was filed with the clerk of the Iowa Supreme Court via electronic filing on this 29th day of January, 2024.

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CERTIFICATE OF SERVICE

I, Ronica Poldervaart, an employee of Valentine Law Office, attorney for Tyler Dungan, certify the attached Final Brief and Request for Oral Argument filed with the Clerk of the Iowa Supreme Court was forwarded to all counsel via the electronic filing system and email on this 29th day of January, 2024, and by U.S. Mail for any party not registered to receive notice of filings via the ECF process.

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