**IN THE SUPREME COURT OF IOWA**

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**Supreme Court No. 23-1402**

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**DEN HARTOG INDUSTRIES and WEST BEND MUTUAL INSURANCE COMPANY,**

**Appellants,**

**vs.**

**TYLER DUNGAN,**

**Appellee.**

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**APPEAL FROM THE IOWA DISTRICT COURT**
**IN AND FOR POLK COUNTY**
**THE HONORABLE JEANIE VAUDT, JUDGE**
**Polk County No. CVCV065006**

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# APPELLANTS' APPLICATION FOR FURTHER REVIEW OF THE JANUARY 9, 2025 DECISION OF THE IOWA COURT OF APPEALS AND BRIEF IN SUPPORT OF APPLICATION

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## QUESTIONS PRESENTED FOR REVIEW

I. DID THE IOWA COURT OF APPEALS CORRECTLY INTERPRET AND APPLY IOWA CODE SECTION 85.34(2)(v) AS IT RELATES TO FUNCTIONAL VERSUS INDUSTRIAL DISABILITY WHEN AN EMPLOYEE HAS VOLUNTARILY RESIGNED?

II. SHOULD THE SUPREME COURT DETERMINE THAT INDUSTRIAL DISABILITY WAS WARRANTED UNDER IOWA CODE SECTION 85.34(2)(v), DID THE IOWA COURT OF APPEALS ERR IN AFFIRMING THAT APPELLEE SUSTAINED A FIFTEEN PERCENT REDUCTION IN EARNING CAPACITY?

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Page**

**Cases:**



**Statutes:**

**Other Authority:**

## STATEMENT SUPPORTING FURTHER REVIEW

Pursuant to Iowa R. App. P. 6.1103, this matter comes before the Iowa Supreme Court for Further Review of a claim for workers' compensation benefits filed by Claimant-Appellee, Tyler Dungan (hereinafter "Claimant"), against Employer-Appellant, Den Hartog Industries (hereinafter "Employer" or "Den Hartog") and its insurer, West Bend Mutual Insurance Company (hereinafter "Insurer") (collectively, "Defendants"), arising out of an injury that occurred on July 24, 2019. Defendants seek Further Review of the January 9, 2025 Decision of the Iowa Court of Appeals, which affirmed the Agency action of the Workers' Compensation Commissioner. *Den Hartog Industries v. Dungan*, No. 23-1402, 2025 WL 52449 at *4 (Iowa Ct. App. Jan. 9, 2025).

In support of this Application, Defendants state that Further Review is appropriate as the Court of Appeals has decided a case where there is an important question of changing legal principles, as well as an issue of broad public importance; specifically, whether a workers' compensation claimant is entitled to functional disability or industrial disability under Iowa Code § 85.34(2)(v) when they return to work at the same or greater earnings than they were earning at the time of their injury. Iowa R. App. P. 6.1103(1)(b)(3)-(4).

Defendants respectfully request that the Iowa Supreme Court grant Further Review given the substantial impact that Iowa Code § 85.34(2)(v), as amended, has

had and will continue to have on the overall handling of workers' compensation claims in Iowa, as section 85.34(2)(v) must be interpreted and applied every time a claimant suffers an unscheduled work injury—and their compensation for the same hinges on how that statute is interpreted. As evidenced by the Court of Appeals' split Decision, there is ongoing debate as to what the proper statutory directive to be taken from section 85.34(2)(v) is, and, in light of the frequency in which that section must be interpreted and applied, the parties, as well as the Iowa workers' compensation system as a whole, are in need of settled law and direction from the Supreme Court as it relates to the interpretation and application of Iowa Code § 85.34(2)(v). Because this case presents an important question of law that has not yet been settled by the supreme court, Further Review is further warranted pursuant to Iowa R. App. P. 6.1103(1)(b)(2).

## STATEMENT OF THE CASE

### Nature of the Case

This case proceeded to arbitration hearing on March 10, 2022 before Deputy Commissioner Humphrey and the Arbitration Decision was entered on September 30, 2022. (App. 27).

Defendants filed an intra-agency Notice of Appeal on October 11, 2022. (App. 51). On January 13, 2023, the Commissioner issued an Appeal Decision, affirming the Deputy's decision in its entirety; no additional analysis was provided. (App. 64).

On January 27, 2023, Defendants filed a Petition for Judicial Review in Polk County District Court and oral argument was held on June 9, 2023. (App. 67; App. 108). The Judicial Review Decision by Judge Vaudt was entered on August 8, 2023, and affirmed the final Agency decision in its entirety. (App. 115).

Defendants filed a timely Notice of Appeal to the Iowa Supreme Court on August 30, 2023. (App. 117). The Iowa Supreme Court transferred the case to the Iowa Court of Appeals on March 4, 2024. Oral argument was held before a three-member panel of the Iowa Court of Appeals on October 8, 2024 and the Decision was issued on January 9, 2025.

Defendants seek further review of the Iowa Court of Appeals Decision in this matter, which affirmed the Agency action of the Commissioner. *Dungan*, 2025 WL 52449 at *4. The majority on the Court of Appeals panel concluded that Iowa Code

§ 85.34(2)(v) was ambiguous and thus must be interpreted "broadly and liberally" to "the benefit of the worker." *Dungan*, 2025 WL 52449 at *3 (quoting *Xenia Rural Water Dist. v. Vegors*, 786 N.W.2d 250, 257 (Iowa 2010)). The majority further found that the Agency's assessment of 15% industrial disability was supported by substantial evidence. *Dungan*, 2025 WL 52449 at *4. The dissent found that the plain and unambiguous text of Iowa Code § 85.34(2)(v) mandated that Claimant "be compensated based only upon [his] functional impairment resulting from the injury, and not in relation to [his] earning capacity." *Dungan*, 2025 WL 52449 at *4, (Langholz, J., dissenting) (quoting Iowa Code § 85.34(2)(v)). Further, that the District Court and Agency's contrary interpretation of the statute should be reversed and the case remanded for the Commissioner for an award based only on Claimant's functional impairment. *Dungan*, 2025 WL 52449 at *8 (Langholz, J. dissenting).

**Statement of Facts**

As noted in the Court of Appeals Decision, attached hereto, pursuant to Iowa R. App. P. 6.1103(1)(c)(5), the facts are mostly undisputed. *Dungan*, 2025 WL 52449 at *1. The Arbitration Decision, Appeal Decision (at the Agency level), and the District Court's Ruling, are also attached hereto, pursuant to Iowa R. App. P. 6.1103(1)(c)(6). The attached Decisions offer a complete outline of the factual findings of the Agency. By way of brief overview, the pertinent facts are as follows:

Den Hartog manufactures varying sizes of plastic containers. (Tr. 20:15-23,

App. 228). Claimant began working for Den Hartog on January 22, 2018 as an outdoor loader/material handler. (Tr. 18:23-19:1, 41:16-21, App. 226-227, 249). This position involved loading product orders onto trailers. (Tr. 21:19-22:1, App. 229-230). At the time he was hired in 2018, Claimant earned $14.50 per hour. (App. 178).

On July 24, 2019, Claimant sustained an unscheduled injury to his back while working for Den Hartog. (App. 6; App. 7; App. 9-10; App. 28). Claimant testified that on that date, he was loading a plastic tank—which is generally secured onto a semi-trailer by hoops placed over the tank. (Tr. 20:24-23:9, App. 228-231). While lifting a hoop weighing approximately 70 pounds, it became hooked on the trailer and Claimant experienced pain in his mid and low back that went down his leg and up toward his neck. (Tr. 24:11-25:15, App. 232–233).

Immediately following the July 24, 2019 injury, Claimant missed work on July 25, July 26, and July 29, 2019. (App. 161). He returned to work on July 30, 2019. (App. 160). He continued in his regular position as a loader, even while under a 40-pound weight restriction. (Tr. 42:4-16, App. 250). Notwithstanding the few days following the injury and medical appointments, Claimant returned to working his regular hours. (App. 176-178).

On the date of injury, Claimant earned $15.16 per hour. (App. 178; Tr. 43:1-5, App. 251). Starting January 22, 2020, Claimant's pay at Den Hartog increased to

$15.50 per hour. (App. 178). On June 1, 2020, Claimant voluntarily resigned from his employment with Den Hartog, to be effective June 12, 2020, as he was moving and needed to find a job closer to his new home. (App. 175; Tr. 45:22-25, App. 253). Up until the time of his resignation, Claimant had been working his normal pre-injury position and hours, including overtime. (Tr. 46:1-8, App. 254; App. 176-178).

Before resigning from Den Hartog, Claimant secured a job at Meridian as a production welder. (Tr. 35:8-15, 46:12-15, App. 243, 254; App. 175; App. 214). On June 5, 2020, before starting his job at Meridian, Claimant underwent a "physical capacity profile" at Meridian's request. (App. 207; Tr. 46:21-47:3, App. 254-255). He performed in the "heavy work" category, demonstrating the ability to exert 50 to 100 pounds of force occasionally, 25 to 50 pounds of force frequently, and 10 to 20 pounds of force constantly. (App. 207).

Claimant's starting pay at Meridian was $15.76 per hour ($0.26 cents more per hour more than he was earning at the time he resigned from Den Hartog and $0.60 cents more per hour than he was earning at the time of injury). (App. 201-205; App. 214; Tr. 44:23-45:6, App. 252-253). Claimant received three pay increases within 30 days of starting at Meridian, and on August 9, 2020, his pay was increased to $17.48 per hour based on performance. (Tr. 44:19-22, App. 252; Tr. 46:16-20, App. 254; App. 206). While employed at Meridian, Claimant worked a minimum of 40 hours per week, 12 hours per day, with occasional overtime. (Tr. 47:13-21, App.

255).

Claimant had no issue completing the work at Meridian. (Tr. 47:4-6, App. 255). He testified that there were some language barriers with co-workers, and he did not otherwise enjoy the position. (Tr. 47:7-12, App. 255).

In February 2021, Claimant secured a job at GOMACO as a production welder. (Tr. 47:22-48:7, App. 255-256). On February 8, 2021 Claimant returned to treating physician, Dr. Klopper, to request a release to full duty work before starting his new job at GOMACO. (App. 131). Dr. Klopper placed Claimant at MMI on that date and released him to return to work without restrictions as requested. (App. 131). Claimant's starting pay at GOMACO was $17.00 per hour, and by December 2021, he was earning $20.15 per hour. (App. 199; Tr. 48:14-22, App. 256). He consistently works overtime hours. (Tr. 48:23-25, App. 256; App. 181–200). At the time of the arbitration hearing, Claimant was still employed with GOMACO. (Tr. 48:8-9, App. 256).

**Ultimate Medical Opinions**

On July 15, 2021, Claimant underwent a repeat MRI of the lumbar spine which revealed the right-sided disc herniation at L4-5 had resolved. (App. 133). Dr. Schmitz evaluated Claimant for purposes of an IME on November 19, 2021. (App. 218). Dr. Schmitz noted Claimant's preexisting history of low back pain and opined that he sustained a temporary aggravation of underlying degenerative changes. (App.

219). Dr. Schmitz agreed with Dr. Broghammer that pursuant to the *Guides to the Evaluation of Permanent Impairment* ("AMA Guides"), 5th Edition, Claimant was entitled to 5% impairment due to a radiculopathy that improved with conservative care. (App. 219). Consistent with the opinions of Dr. Klopper and Dr. Broghammer, Dr. Schmitz stated that no work restrictions were reasonable or appropriate. (App. 219).

Dr. Bansal performed an IME on January 31, 2022 at Claimant's request. (App. 140). Dr. Bansal assigned 8% impairment to the body as a whole based on an L4-L5 disc protrusion with radiculopathy and recommended a 30-pound lifting restriction and avoiding frequent bending and twisting. (App. 149-150).

Dr. Broghammer provided a supplemental report after reviewing Dr. Bansal's report and stated that he agreed with Dr. Klopper that Claimant sustained 5% functional impairment and expressly disagreed with the impairment rating provided by Dr. Bansal. (App. 220). Dr. Broghammer—like Dr. Schmitz and Dr. Klopper—opined that no permanent restrictions were appropriate. (App. 220).

## ARGUMENT

The plain and unambiguous language of Iowa Code § 85.34(2)(v) mandates that Claimant's compensation in this case be based only upon the functional impairment that resulted from the July 24, 2019 work injury. The evidentiary record has established that, after the July 24, 2019 injury, Claimant returned to

work at Den Hartog at the same rate of pay and hours, and subsequently received a raise before voluntarily moving on to obtain higher paying employment with other employers. Given the established facts, the statutory text of Iowa Code § 85.34(2)(v) directs that Claimant "*shall* be compensated based only upon . . . functional impairment resulting from the injury, and not in relation to . . . earning capacity." *Id.* (emphasis added). This statutory direction is not affected by a voluntary resignation. As such, the award of industrial disability compensation—especially an unwarranted 15%—rather than compensation based only upon functional impairment is in direct contradiction with the plain language of the statute and is reversible error.

## I. THE COURT OF APPEALS' INTERPRETATION AND APPLICATION OF IOWA CODE § 85.34(2)(v) WAS AN ERROR AT LAW, AS THE LANGUAGE USED BY THE LEGISLATURE DIRECTS FUNCTIONAL DISABILITY COMPENSATION BECAUSE CLAIMANT RETURNED TO WORK WITH THE SAME OR GREATER EARNINGS.

Defendants argued at the Arbitration level that because the Claimant returned to work and received the same or greater earnings as he did at the time of his unscheduled injury on July 24, 2019, the provisions of Iowa Code § 85.34(2)(v) mandated that his compensation be based only upon his functional impairment as a result of the injury. (App. 21-24). Additionally, Defendants asserted error on the Deputy's interpretation and application of Iowa Code § 85.34(2)(v) in their Appeal Brief to the Commissioner, Brief in Support of Judicial Review to the District Court,

and in their Final Brief to the Iowa Supreme Court. (App. 58-62; App. 75-82; Appellants' Final Brief pp. 19-43 (Jan. 24, 2024)).

A party "adversely affected by an action of the workers' compensation commissioner is entitled to judicial review under the Iowa Administrative Procedures Act (IAPA)." *Coffey v. Mid Seven Transp. Co.*, 831 N.W.2d 81, 88 (Iowa 2013). Iowa Code § 17A.19(10) "governs judicial review of administrative agency decisions." *Id.* A decision should be reversed or modified if a party is prejudiced because the Agency action was "[b]ased upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency." Iowa Code § 17A.19(10)(c). Because the legislature has not clearly vested the Agency with interpretive authority over Chapter 85 generally, this Court reviews the Commissioner's interpretation of § 85.34 for correction of errors at law and will not defer to the Agency's interpretation. *Bridgestone Americas, Inc. v. Anderson*, 4 N.W.3d 676, 681-82 (Iowa 2024) (citations omitted).

Prior to July 1, 2017, permanent partial disability to an unscheduled body part was compensated exclusively by the industrial method, which focuses on a loss of earning capacity. As part of the 2017 legislative changes, the General Assembly amended Iowa Code § 85.34(2)(v) which changed the method for determining

compensation for nonscheduled injuries. *Loew v. Menard*, 2 N.W.3d 880, 884 (Iowa 2024).

### A. The Court of Appeals Diverted from the Legislature's Clear Statutory Direction

This matter can be resolved on the face of the statute—where all statutory interpretation begins. *See Doe v. State*, 943 N.W.2d 608, 610 (Iowa 2020) ("Any interpretive inquiry thus begins with the language of the statute at issue."). When the legislature amended § 85.34(2)(v) in 2017, it retained the only existing sentence and added three new sentences to the end of the subsection; the statute is now comprised of a total of four sentences.

The first two sentences of § 85.34(2)(v) provide a default rule for compensating nonscheduled injuries—that is, such injuries are to be compensated based on the reduction in the employee's earning capacity (also referred to as "the industrial method" or "industrial disability"). Iowa Code § 85.34(2)(v). This was the default rule prior to the 2017 amendment of this statute. There is no dispute between the parties as to the first two sentences of Iowa Code § 85.34(2)(v). The dispute presented herein pertains to the legislature's addition of the third and fourth sentences of Iowa Code § 85.34(2)(v). Together, the third and fourth sentences provide:

> **[3]** 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. **[4]** 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). [1]

The Agency interpreted that the third and fourth sentences together constituted a "bifurcated litigation process" that only applies "when a worker returns to work for the employer *and* is later terminated by the same employer." *Dungan*, 2025 WL 52449 at *2. Pursuant to that reasoning, the Agency determined that the functional impairment exception contained in the third sentence did not apply to Claimant because he voluntarily separated from Den Hartog rather than being terminated, thereby entitling him to compensation based on his loss of earning capacity. *Id.* This finding was erroneous and is not supported by the plain and unambiguous language contained in § 85.34(2)(v), as each sentence has distinct meanings and consequences which must be given consideration. *See Maguire v. Fulton*, 179 N.W.2d 508, 510 (Iowa 1970) ("Effect must be given, if possible, to

[1] Henceforth, references will be made to the numerical designation of the individual sentences of the statute (as identified in bolded brackets).

every word, clause and sentence of a statute. It should be construed so that effect is given to all its provisions and no part will be inoperative or superfluous, void or insignificant.").

**i. The Third Sentence's Functional-Impairment Exception Dictates that Claimant Shall be Compensated Based Only Upon his Functional Impairment.**

A plain reading of the third sentence of § 85.34(2)(v) informs the reader that employees with unscheduled injuries *shall* be compensated based *only* on the functional impairment resulting from the injury *if* they return to work or are offered work for which they would receive the same or greater earnings than were being received at the time of injury. Iowa Code § 85.34(2)(v) (emphasis added).

"In construing statutes, the court searches for the legislative intent as shown by what the legislature said, rather than what it should or might have said." Iowa R. App. P. 6.904(3)(m). The Court is to "enforce the terms of a statute as written." *In re Marshall*, 805 N.W.2d 145, 160 (Iowa 2011). The Court "may not—under the guise of statutory construction—enlarge or otherwise change the terms of a statute as the legislature adopted it." *State v. Miller*, 590 N.W.2d 45, 47 (Iowa 1999).

It was established at the arbitration hearing that Claimant earned more working for Den Hartog after the July 24, 2019 work injury than he did at the time of it, that Claimant voluntarily quit his job at Den Hartog because his family decided to move for personal reasons unrelated employment, and that since leaving Den

Hartog, Claimant has worked multiple jobs at which he has earned more, and continues to earn more, than he was making while working for Den Hartog. (App. 31; App. 41). These facts, in conjunction with the plain language of the third sentence's functional impairment exception, unambiguously dictate that Claimant *shall* be compensated based *only* on the functional impairment sustained as a result of the work injury, rather than by the default industrial disability method. *See* Iowa Code § 85.34(2)(v).

**ii. The Fourth Sentence's Review-Reopening Right is Conditional and is Inapplicable to Claimant.**

Despite the straightforward interpretation and application of the statute's third sentence, the Agency focused heavily on the fourth sentence and found that, when read together with the third sentence, indicated that the legislature created "a bifurcated process for assessing industrial disability cases where an injured worker returns to work for the employer and then is later terminated by the employer." (App. 112). It was found that because Claimant was not terminated by Den Hartog, the "bifurcated process" did not apply, and therefore entitled Claimant to industrial disability. However, this interpretation essentially ignores the third sentence in its entirety, making it as if the statute had never been amended as applied to many workers who sustain unscheduled injuries. This reading is contrary to the legislature's purpose of "limit[ing] the scenarios under which industrial disability

benefits are owed." *McCoy v. Menard, Inc.*, 2021 WL 2624688, File No. 1651840.01 at *2 (App. Dec. Apr. 9, 2021).

Defendants have been criticized as ignoring the last sentence of (2)(v). (App. 112 ("DHI asks the reviewing court to consider only the first sentence and then stop reading.")). Rather, Defendants were pointing out that the review-reopening right of the fourth sentence is not always triggered—but this does not render the functional impairment exception of the third sentence inapplicable. In other words, the fourth sentence is predicated on the third sentence previously applying and directing functional compensation, but the third sentence can apply and direct functional compensation on its own, without the conditions of the fourth sentence ever being triggered. This is not isolating the third sentence in terms of legislative interpretation, but rather, reading the statute as a whole and applying the textual portion applicable to the facts of the case.

Defendants' interpretation of the last sentence is most consistent with the legislative text and purpose. This sentence addresses a narrow subset of circumstances that *could* follow once the third sentence is established and directs functional compensation. This is supported by the conditional language used in the fourth sentence: it only applies "**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 . . . **and** is terminated from employment *by that employer* . . ." Iowa Code § 85.34(2)(v) (emphasis added).

It is clear by a plain reading of the fourth sentence that the legislature intended to preserve the review-reopening process for employees who were previously compensated based on their functional impairment (pursuant to the third sentence), and who are later terminated by the defendant-employer.

### iii. The Third and Fourth Sentences are Separate and Distinct and the Third Sentence Applies to a Broader Universe of Employees.

There are clear distinctions in the statutory language used by the legislature which indicate that the third sentence's functional impairment exception must be applied to a broader set of employees than those specified in the fourth sentence's review-reopening right.

Notably, the fourth sentence applies only to employees who "return to work with the same employer." Iowa Code § 85.34(2)(v). The third sentence contains no such requirement that the work be "with the same employer." *Id.* The use of materially different terms indicates that the scopes of the two sentences are not coextensive and that "different meanings are intended" for each. *Teig v. Chavez*, 8 N.W.3d 484, 493 (Iowa 2024) ("If the drafters intended the two concepts to be coextensive, different words would not have been used."). *See also* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012) ("[W]here the document has used one term in one place, and a materially different

term in another, the presumption is that the different term denotes a different idea."). The Agency's interpretation—that the third sentence's functional impairment exception would apply only when the fourth sentence's narrower condition of returning to the same employer is also satisfied—"fails to give meaning to these differences and thus flouts the statutory text." *See Dungan*, 2025 WL 52449 at *6 (Langholz, J., dissenting).

Additionally, the functional impairment exception of the third sentence also directs that it applies when employees are merely "offered work." Iowa Code § 85.34(2)(v). The Agency's interpretation would strike these words from the statute, as an employee who is offered work but does not return to work with the same employer could never be terminated by that employer, and, therefore, the review-reopening right of the fourth sentence could never apply—making it so the third sentence's functional impairment exception could never be applied to those "offered work." *See Dungan*, 2025 WL 52449 at *6 (Langholz, J., dissenting). *See also United States v. Butler*, 297 U.S. 1, 65 (1936) ("These words cannot be meaningless, else they would not have been used.").

The distinctions in the language used by the legislature in the third and fourth sentences defeat Claimant's arguments that the third sentence's functional impairment exception only applies when the fourth sentence's review-reopening right applies, and this Court, in faithfully giving meaning to each sentences'

distinctions, must: (1) interpret the third sentence to require compensation based on functional impairment when that employee returns to work or is offered work at the same or greater pay as before the injury; and (2) interpret the fourth sentence as moderating the consequences of the third sentence's functional impairment exception for those who return to work for the same employer, had an award or agreement for settlement based only on the functional impairment method required by the third sentence, and were subsequently terminated by that same employer, as, when such is the case, those employees are granted the right to bring a review-reopening action and seek a redetermination of their compensation based on their loss of earning capacity. *See Dungan*, 2025 WL 52449 at *6 (Langholz, J., dissenting).

**B. Voluntary Resignation Does Not Alter the Analysis Under § 85.34(2)(v).**

The Court of Appeals majority found the statute ambiguous and therefore concluded that it must be interpreted "broadly and liberally" to "the benefit of the worker." *Vegors*, 786 N.W.2d at 257. However, legislative purposes, such as "the purpose of helping workers" do not give the Court "leave to ignore the plain language of the statute." *Bridgestone*, 4 N.W.3d at 683. When properly focusing on the plain meaning of the text of the statute, there is no ambiguity that would permit the Court from defaulting to the Court of Appeals' erroneous interpretation of the statute simply because it benefits workers.

In finding the statute ambiguous, the Court of Appeals noted that the statute did not expressly address two categories of workers: "those who voluntarily do not return to work or those who return to work but leave voluntarily." *Dungan*, 2025 WL 52449 at *3. This is not true. While it is true that the fourth sentence does not grant the review-reopening right to either aforementioned category of workers, the third sentence's functional impairment exception does expressly apply: (1) for those who voluntarily do not return to work—so long as the employee was *offered work* for which they would receive the same or greater earnings than received at the time of the injury, then the functional impairment exception contained in the third sentence of the statute would apply; and (2) for those who return to work but leave voluntarily—so long as the employee, upon their return, was receiving the same or greater earnings than received at the time of the injury, the functional impairment exception contained in the third sentence of the statute would again apply. *Dungan*, 2025 WL 52449 at *7 (Langholz, J., dissenting).

### C. "Additional Industrial Disability" is Never Due Under § 85.34(2)(v).

The Court of Appeals majority held:

> In our view, we find the statutory language recognizes two categories under section 85.34(2)(v) with different bases for calculation compensation: (1) if the employee returns to work at the same or greater pay, then they are compensated for their functional impairment; and (2) if the employee does not return to work at the same or greater pay, then the industrial disability calculation applies. The statute provides for those involuntarily moved from the first category to the second with a bifurcated process to seek additional industrial disability compensation.

*Dungan*, 2025 WL 52449 at *3 (internal citations omitted).

This holding, that "those involuntarily moved from the first category to the second with a bifurcated process to seek additional industrial disability compensation[,]" is incorrect. When an employee who receives compensation based on their functional impairment pursuant to the third sentence and is then involuntarily moved to the second category by being terminated by the defendant-employer, that moment is the first occasion for that employee to receive *any* industrial disability, as they would have previously been compensated based on their functional impairment only. Under the plain language of 85.34(2)(v), no employee would ever be eligible to receive *additional* industrial disability.

## II. SHOULD THIS COURT DETERMINE THAT INDUSTRIAL DISABILITY WAS WARRANTED, THE COURT OF APPEALS ERRED IN AFFIRMING AN AWARD OF FIFTEEN PERCENT.

Defendants argued at the Arbitration level that Claimant had sustained no loss of earning capacity as a result of this incident. (App. 24). Defendants asserted error on the Deputy's assessment of a 15% industrial disability award in their Appeal Brief to the Commissioner, Brief in Support of Judicial Review to the District Court, and in their Final Brief to the Iowa Supreme Court. (App. 62-63; App. 83; Appellants' Final Brief pp. 44-45 (Jan. 24, 2024)).

Iowa Code § 17A.19(10) "governs judicial review of administrative agency decisions." *Coffey*, 831 N.W.2d at 88. Reversal is appropriate when a determination

vested in the discretion of the Agency is not supported by substantial evidence in the record. Iowa Code § 17A.19(10)(f). "Substantial evidence" is defined as the "quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences . . . are understood to be serious and of great importance." *Id.* § 17A.19(10)(f)(1).

The Court of Appeals affirmed the Agency's determination that Claimant sustained 15% industrial disability as a result of the July 24, 2019 work injury. However, considering all established facts, the record does not support this determination.

As evidenced by the medical records, Claimant's prior disc herniation had resolved. (App. 133). Claimant no longer experiences radicular pain or requires treatment. (App. 131). Following the injury, Claimant has worked in various physically demanding jobs without limitation or complication. He is now working in a more skilled position as a welder and earns higher wages. The Deputy determined that Claimant is highly motivated to work. (App. 47). Consideration of these facts does not lead to the conclusion that Claimant sustained 15% loss in earning capacity as affirmed by the Court of Appeals. Recently, in *Loew v. Menard*, the Iowa Supreme Court reiterated that "A claimant may suffer a functional disability but have no industrial disability if the functional disability does not impede his ability to perform the duties of his employment." *Loew*, 2 N.W.3d at 889.

In light of the undisputed evidence revealing Claimant's motivation to work, ability to work in various physically demanding jobs without limitation or complication, and continued ability to work increasingly skilled jobs and earn higher wages, the weight of the evidence supports the notion that Claimant sustained no industrial disability as a result of the July 24, 2019 work injury, as it has not impeded his ability to perform the duties of employment.

## CONCLUSION

In this case, it is undisputed that Claimant returned to work and received the same or greater earnings upon his return to work as he did at the time of his unscheduled injury on July 24, 2019. The plain and unambiguous text of Iowa Code § 85.34(2)(v) therefore dictates that Claimant "be compensated based *only* upon [his] functional impairment resulting from the injury, and not in relation to [his] earning capacity." Iowa Code § 85.34(2)(v) (emphasis added). Finding otherwise is not only an error of law, but would also undermine the clear statutory language, the intent behind the statutory scheme as a whole, and traditional workings of the compensation system.

For the reasons set forth above, Defendants respectfully request that the Iowa Supreme Court grant Further Review to correct the Court of Appeals erroneous interpretation of Iowa Code § 85.34(2)(v) and subsequent award of 15% industrial disability.

Respectfully Submitted,

**PEDDICORD WHARTON, LLP**

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## CERTIFICATE OF COMPLIANCE

This Application complies with the typeface and type-volume requirements of Iowa R. App. 6.1103(5) because this Application has been prepared in a proportionally spaced typeface using Times New Roman in size 14 and contains 5,180 words, excluding parts of the Application exempted by Iowa R. App P. 6.1103(5)(a).

**01/29/2025** — Date

***/s/ Morgan R. Todd Borron*** — Morgan R. Todd Borron

## CERTIFICATE OF SERVICE

I, Morgan R. Todd Borron, a member of the Bar of Iowa, hereby certify that on January 29, 2025, I or a person acting on my behalf served the above Application for Further Review to all counsel of record via EDMS in full compliance with Rules of Appellate Procedure and Rules of Civil Procedure.

***/s/ Morgan R. Todd Borron***
Morgan R. Todd Borron

## CERTIFICATE OF FILING

I, Morgan R. Todd Borron, hereby certify that I, or a person acting in my direction, did file the attached Application for Further Review upon the Clerk of the Iowa Supreme Court via EDMS on this 29th day of January 2025.

***/s/ Morgan R. Todd Borron***
Morgan R. Todd Borron