IN THE SUPREME COURT OF IOWA

Appeal No. 21-0760
Crawford County CVCV041545
Iowa Division of Workers' Compensation 5061883

MARY DENG,
Claimant/Petitioner/Appellant
v.
FARMLAND FOODS, INC. and SAFETY NATIONAL
Defendants/Respondents/Appellees

APPEAL *from the* IOWA DISTRICT COURT *in and for*
CRAWFORD COUNTY

HONORABLE DISTRICT COURT JUDGE ROGER SAILER, *presiding*

APPELLANT'S PROOF BRIEF

ZUPP AND ZUPP LAW FIRM, P.C.

/s/ Jennifer M. Zupp AT0008789
1900 4th Ave. S., Ste. 2
Denison, Iowa 51442
Ph. 1-712-263-5551
Fax 1-712-248-8685
jennifer@zuppandzupp.com

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of August, 2021, I electronically filed this document with the Clerk of the Supreme Court using the Appellate EDMS system, which will send notification of such filing to the following:

Eric Lanham, Attorney for Appellees

Kathryn Johnson, Attorney for Appellees

/s/ Jennifer M. Zupp

TABLE OF CONTENTS

TABLE OF AUTHORITES

IOWA WORKERS' COMPENSATION ARBITRATION DECISIONS

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the District Court erred in holding that Claimant's rotator cuff injury was a "shoulder" injury under the newly enacted Iowa Code section 85.34(2)(n) (2017), rather than a whole body injury under Iowa Code section 85.34(2)(v) (2017)?

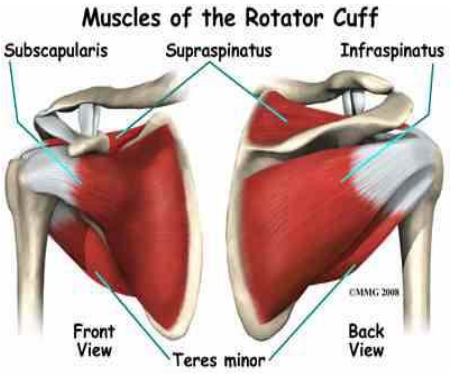
ROUTING STATEMENT

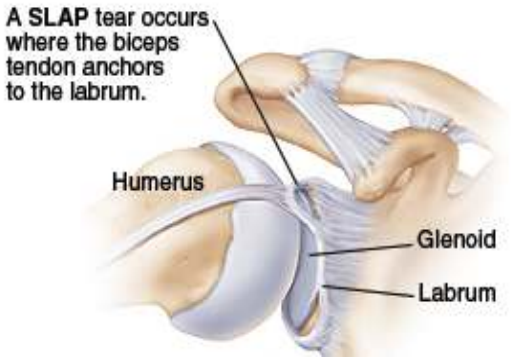
This case should be retained by the Iowa Supreme Court because it presents a substantial issue of first impression regarding amendments to Iowa's Workers' Compensation Act in 2017. It also presents an urgent issue of broad public importance requiring ultimate determination by the Iowa Supreme Court because it involves issues which exist not only in this case, but other cases, and these issues will continue to arise in future cases unless the matter is clearly decided by the Supreme Court. Iowa R. App. P. 6.1101(2)(c),(d).

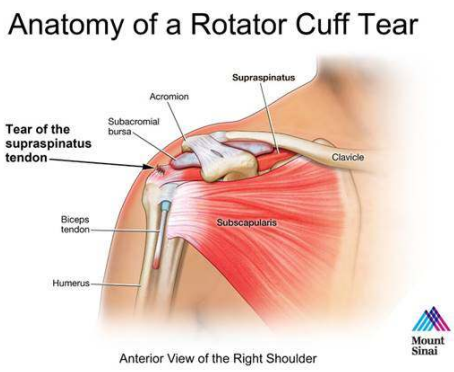
This case asks a simple, but extremely important question: "What is a shoulder?" In 2017, the Iowa Legislature amended Iowa Code section 85.34(2) to add a "shoulder" to the list of "scheduled member" injuries for which workers' compensation benefits are arbitrarily limited. Iowa Code §85.34(2)(n) (2017). Consistent with its historical practice, the Legislature did not define the word "shoulder". The new "shoulder" section says, "[f]or all cases of permanent partial disability compensation shall be paid as follows: (n) For the loss of a shoulder, weekly compensation during four hundred weeks." Iowa Code §85.34(2)(n) (2017).

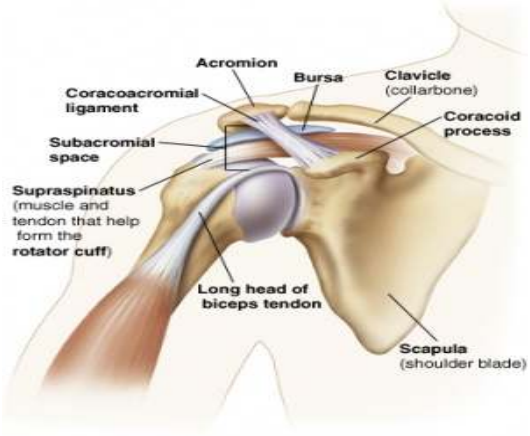
As a result of this amendment, parties to workers' compensation claims in Iowa involving permanent damage to structures surrounding the

area of the shoulder joint disagree as to the meaning of the word. And, rightly so. As the photos in the record below show, the shoulder area is a complex part of the human body. See Joint Ex. 6, p. 82-85 (photos).









Under Appellant's (hereinafter "Claimant") proposed, bright-line definition of "shoulder", only permanent injuries which are located at or within the "shoulder joint", also called the "glenohumeral joint," would be "shoulder" injuries. As depicted in pictures two and four, above, the glenohumeral joint is where the ball of the humeral head, which is the arm bone, meets with the socket, which is the glenoid. This interpretation would include, but not be limited to, injuries like labral tears, glenoid tears, bicep

tears and glenohumeral joint instability. It would not include a rotator cuff injury because every rotator cuff muscle attaches proximally-to the glenohumeral joint, as depicted in photos one and three.

By contrast, Appellees (hereinafter Defendants) contend that "shoulder" should be given a very broad meaning to include not only injuries to or within the glenohumeral joint, but also, permanent injury to structures located proximal to (closer to the trunk) the glenohumeral joint, such as rotator cuff tears, so long as the impact of the damage to the proximal structure is upon the function of the glenohumeral joint. As is evident from the first and third pictures above, this interpretation means a "shoulder" injury can extend all the way to the spine since the infraspinatus muscle, which is what Claimant injured, attaches itself on the scapula, which is next to the spine and actually forms a large part of the posterior thoracic cage. Accordingly, the parties' interpretations could not be more opposed.

The difference in classification of an injury is important in workers' compensation claims because, generally speaking, an injured worker whose injury is compensated as a "scheduled member" injury receives less benefits than an injured worker whose injury is compensated under Iowa Code section 85.34(2)(v) (2017). A "shoulder" injury will only get some percentage of 400 weeks of pay, based upon an impairment rating,

regardless of any actual economic impact to the worker. An 85.34(2)(v) injury, however, usually called a "whole body injury," is eligible not only for payment for the functional loss from the injury (i.e. the impairment rating) but also, additional compensation if the employer terminates the employee because of the injury. See Iowa Code §85.34(2)(v) (2017). Accordingly, proper classification of any injury in workers' compensation poses real-world financial concerns, not only for the injured worker and the worker's family, but also, society as a whole because it is often society, in the form of charity, social welfare or compounded suffering, which picks up the pieces left behind from injured, terminated employees.

Claimant won this purely legal issue at the Arbitration level. Arb. Dec'n., p.11-12. The primary rationale of the Deputy Commissioner was that Claimant's infraspinatus tendon injury was located proximally-to the glenohumeral joint, and therefore, under the same Deputy's recent analysis in Chavez v. MS Technology, LLC, File 5066270, p. 10 (2/5/20)(Arb. Dec'n., 2/15/20); reversed Chavez v. MS Technology, LLC, File 5066270 (Appeal Dec'n., 9/30/20), affirmed Chavez. V. MS Technology, LLC, CVCV060899 (Polk Co. Dist. Court, 9/30/20)(on appeal 21-0777), Claimant's infraspinatus tendon injury was an unscheduled injury under Iowa Code section 85.34(2)(v) (2017). Arb. Dec'n., p. 11-12.

On intra-agency appeal, the Commissioner agreed the "shoulder" statute was ambiguous but reversed the Deputy Commissioner's finding that the infraspinatus muscle was an unscheduled injury. The Commissioner reasoned that even though the infraspinatus muscle is proximal to the glenohumeral joint, because the infraspinatus muscle is "important to" the function of the glenohumeral joint, "excluding everything but the glenohumeral joint itself would lead to the absurd result of excluding injuries that are and have been commonly considered shoulder injuries." Appeal Dec'n., p. 10 (9/28/20).

The parties filed cross-appeals to the Crawford County district court, each essentially arguing the same as they had below. The district court took a different analytical approach than the Commissioner, but ultimately, affirmed the result of the Commissioner's appeal decision. Ruling on Petition for Judicial Review, p. 32 (5/21/21).

This case should be retained by the Supreme Court so that parties to a workers' compensation case involving injuries within and around the shoulder joint know how to evaluate, litigate and resolve those cases, and for carriers and self-insureds, how to set reserves for them, and for deputies, the Commissioner, and courts, how to decide them. Until this issue is firmly decided, parties to "shoulder area" workers' compensation cases in Iowa will

continue to have difficulty resolving them, which means more "shoulder area" cases have to be litigated to preserve error. This has created uncertainty for all and will burden the system needlessly until addressed by the Supreme Court. Even the Commissioner acknowledged that a broad interpretation would maintain uncertainty and result in increased litigation. Appeal Dec'n., p. 10. No one wants more litigation if less-litigation is possible. Claimant offers the Court a reasonable, scientifically based, policy-based, clear and bright-line definition while Defendants will struggle to define "shoulder" with their proposal. A decision directly from the Iowa Supreme Court would quickly solve this mounting and looming problem in the Iowa workers' compensation system.

STATEMENT OF THE CASE

This case involves an admitted work injury sustained by Claimant on 8/19/17. Arb. Dec'n., p. 2 (2/25/20) (stipulation #2). There was no dispute Claimant sustained a permanent injury to her left labrum and this injury was properly determined, by agreement of the parties, to be a "shoulder" injury under Iowa Code section 85.34(2)(n) (2017). Appeal Dec'n., p. 1 (9/28/20). The issue is whether Claimant's other permanent injury, left "infraspinatus tendinitis", is also a "shoulder" injury, because the impact of the derangement is to the function of the shoulder joint, or whether, because the

infraspinatus muscle, which is part of the rotator cuff, originates proximally-to the shoulder joint, it is an unscheduled, "whole body" injury, under Iowa Code section 85.34(2)(v) (2017) even if its only impact is upon the shoulder joint.

STATEMENT OF FACTS

On April 13, 2018, Claimant filed a Petition for benefits with the Iowa Workers' Compensation Commissioner. Ruling on Petition for Judicial Review, p. 1. An arbitration hearing was held on February 26, 2019 before Deputy Workers' Compensation Commissioner Michelle A. McGovern. Ruling on Petition for Judicial Review, p. 1. In her ruling, Deputy McGovern found that Claimant had two distinct, permanent injuries as a result of her work duties on 8/19/17. Ruling on Petition for Judicial Review, p. 2. One injury was to Claimant's left labrum and the other injury was to Claimant's left infraspinatus tendon. Ruling on Petition for Judicial Review, p. 2.

Deputy McGovern found that as a result of Claimant's injuries, she sustained an 8% impairment to her upper extremity under the 5th Edition of the AMA Guides to the Evaluation of Permanent Impairment (hereinafter "The Guides"). Since Deputy McGovern concluded that the infraspinatus tendon was a "whole body" injury under Iowa Code section 85.34(2)(v),

rather than a "shoulder" injury under Iowa Code section 85.34(2)(n), the 8% impairment rating was converted to a 5% whole body impairment rating, which is the proper conversion under the Guides. Ruling on Petition for Judicial Review, p. 2; Arb. Dec'n., p. 13. As such, Deputy McGovern ordered Defendants to pay Claimant twenty-five weeks of permanent partial disability benefits, with credit for ten weeks paid prior to hearing by Defendants. Arb. Dec'n., p. 18.

Defendants filed an intra-agency appeal on March 13, 2020. Ruling on Petition for Judicial Review, p. 2. Claimant filed a cross-appeal. Ruling on Petition for Judicial Review, p. 3. After the parties' final briefs were filed, the Iowa Association of Business and Industry and the Iowa Association for Justice both moved to join the matter and file an Amicus brief. The parties were permitted to file briefs responsive to the Amicus parties and the matter was considered fully submitted to the Commissioner on 8/24/20. Order Clarifying Briefing Deadlines, 7/31/20.

The Commissioner issued a decision affirming in part, modifying in part, and reversing in part. Ruling on Petition for Judicial Review, p. 4. Relevant to this appeal, the Commissioner found that "shoulder" is ambiguous as used in Iowa Code section 85.34(2)(n) (2017). Appeal Dec'n., p. 5. The Commissioner found that because the infraspinatus tendon is

"important to" the function of the shoulder joint, excluding injury to the tendon from the definition of "shoulder" would lead to the "absurd result" of excluding injuries that "are and have been commonly considered" shoulder injuries. Appeal Dec'n., p. 10. The Commissioner continued that because the rotator cuff is "essential to the function of the glenohumeral joint, it seems arbitrary to exclude it from the definition of 'shoulder' under section 85.34(2)(n) simply because it originates on the scapula, which is proximal to the glenohumeral joint for the most part." Appeal Dec'n., p. 10. In other words, an injury's location proximal to the joint "should not render the muscle automatically distinct." Appeal Dec'n., p. 10.

Claimant filed a Petition for Judicial Review in Crawford County District Court on October 21, 2020. Ruling on Petition for Judicial Review, p. 6. Respondents filed a cross-petition on November 19, 2020. Ruling on Petition for Judicial Review, p. 6. The parties submitted briefs and presented oral argument. See Transcript, 3/12/21. Like the Deputy Commissioner and Commissioner, the district court found, "the infraspinatus muscle and Deng's injury thereto are generally proximal to the glenohumeral joint itself…". Ruling on Petition for Judicial Review, p. 15. However, because the district court felt that section 85.34(2) consistently used plain, non-medical terms to list other scheduled member injuries, like

"hand" and "arm" and due to language from Barton v. Nevada Poulty Co., 110 N.W.2d 660 (Iowa 1961), the court found that,

> the plain language of the statute makes clear that the intent of the legislature, in enacting §85.34(2)(n) was to reclassify permanent disabilities that result from injuries which impair the function of the shoulder, changing such disabilities from whole-body industrial disabilities to scheduled disabilities…

Ruling on Petition for Judicial Review, p. 27 (5/21/21). The district court affirmed the Commissioner's factual finding that Claimant sustained an 8% impairment under The Guides and as such, ordered Defendants to pay thirty-two weeks of benefits to Claimant, less ten weeks credit, pursuant to Iowa Code section 85.34(2)(n). Ruling on Petition for Judicial Review, p. 31, 33. Claimant timely filed an appeal on 6/1/21. Notice of Appeal, 6/1/21. No cross appeal was filed.

ARGUMENT AND AUTHORITIES

I. CLAIMANT'S PERMANENT INFRASPINATUS TENDONITIS INJURY SHOULD BE DETERMINED TO BE A WHOLE BODY INJURY UNDER IOWA CODE SECTION 85.34(2)(v).

1. Claimant Preserved Error.

Claimant argued at the Arbitration level that her infraspinatus tendon injury was a whole body injury. See Claimant's Post-Hearing Brief, p. 8, 3/29/19. Claimant also briefed this issue in her intra-agency appeal briefs. See Claimant's Appeal Brief, p. 9, 6/2/2020; Claimant's Reply Appeal Brief,

pgs. 1-6, 6/23/20; See Claimant's Brief in Response to the Iowa ABI's and the Iowa Association for Justice Workers' Compensation Core Group's Amicus Briefs, pgs. 2-11, 8/24/20. On Judicial Review, Claimant also briefed the argument that her infraspinatus tendon injury was a whole body injury. See Petitioner's Judicial Review Brief, p. 13, 12/23/20; Petitioner's Reply Judicial Review Brief, 2/3/21. Claimant also raised the issue during oral argument before the district court. See Transcript, p. 4, 3/12/21. Accordingly, error has been adequately preserved.

2. The Standard of Review for Errors of Law Affords No Deference to the Agency.

The Supreme Court has repeatedly held that "the interpretation of workers' compensation statutes and related case law has not been clearly vested by a provision of law in the discretion of the agency. Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 769-70 (Iowa 2016); Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842, 850 (Iowa 2009)(citing Lakeside Casino v. Blue, 743 N.W.2d 169, 173 (Iowa 2007)); Meyer v. IBP, Inc., 710 N.W.2d 213, 219 (Iowa 2006). Accordingly, the Supreme Court should not defer to the Commissioner's interpretation of the law and may correct any errors by substituting its own judgment for that of the district court.

3. "Shoulder" is Ambiguous Because it Can Mean Something Different to Reasonable People.

When interpreting a statute, the Court's ultimate goal is to determine legislative intent. Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 770 (Iowa 2016). The Court looks to the language used by the legislature, rather than what the legislature might have said. Id. When there is no statutory definition, the court considers the statutory terms in context and gives each its ordinary and common meaning. Id. If reasonable people could disagree as to that meaning, the statute is ambiguous. Id. Ambiguity may also arise due to uncertainty concerning the meaning of particular words or upon examination of all the statute's provisions together in context. Id.

The Commissioner properly determined that Iowa Code section 85.34(2)(n) is ambiguous. Appeal Dec'n., p. 5. He recognized that "medical terminology used to describe an area of the body is not always compatible with the statutory terminology used to describe an area of the body to classify a scheduled injury." Appeal Dec'n., p. 5 (citing Prewitt v. Firestone Tire & Rubber Co., 564 N.W.2d 852, 854 (Iowa Ct. App. 1997). He acknowledged that the Legislature's past use of generic language had required the agency and courts to determine the specific meaning of words,

such as finger versus hand, hand versus arm, and leg versus whole body injuries. Appeal Dec'n., p. 5 (citing Lauhoff Grain Co. v. McIntosh, 395 N.W.2d 834 (Iowa 1986), Dailey v. Pooley Lbr. Co., 10 N.W.2d 569 (Iowa 1943) and Miranda v. IBP, File No. 5008521 (Appeal Dec'n., 8/2/05)). As a result, he found that while it would be nice to give shoulder an "ordinary" meaning, there is "no such agreed upon ordinary meaning. Instead, 'shoulder' is a legal term of art and susceptible to more than one reasonable interpretation." Appeal Dec'n., p. 5.

The district court erred when it reversed the Commissioner and held that, "[t]he Court finds no ambiguity from the general scope and meaning of the statute when all its provisions are examined. Nor does the Court find ambiguity in the meaning of any particular words in §85.34(2)(n)." Ruling on Petition for Judicial Review, p. 27. The district court's reasoning was that the other scheduled members listed in Iowa Code section 85.34(2) also contained "plain, ordinary, non-medical language", and therefore, the court ruled that "shoulder" should also be given a plain meaning, too. Ruling on Petition for Judicial Review, p. 26. As such, the court held, "the plain language of the statute makes clear that the intent of the legislature…was to reclassify permanent disabilities that result from injuries which impair the function of the shoulder…." Ruling on Petition for Judicial Review, p. 26.

While it is true that the words "shoulder," "arm," "hand," and "foot," etc., can be ordinary or plain terms when used colloquially, or for brevity's sake, or when the label really does not matter, this Court's jurisprudence shows that many of these "plain" words have already been found to be ambiguous, something the Legislature would have known about in 2017. For example, in Holstein Electric v. Breyfogle, this Court had to determine whether a "wrist" injury was an "arm" or "hand" injury because the definition of "arm" only extended distally to the elbow joint, which would not include the wrist, yet the common understanding of "hand" would also not include a wrist. 756 N.W.2d 812, 815-16 (Iowa 2008). Construing the ambiguity in favor of the injured worker, the Court determined that since the wrist injury was proximal to the hand, the injury was compensated as an "arm" injury. Id. at 816. In Lauhoff Grain Co. v. McIntosh, the Supreme Court had to decide whether a hip replacement, which only resulted in loss of function of the leg, was a "leg" or "whole body injury". 395 N.W.2d 834 (Iowa 1986). The court held that section 85.34(2)(o)(the "leg" subsection) did not include the hip joint. Lauhoff Grain Co., 395 N.W.2d at 839. In Stumpff v. Second Injury Fund, the Supreme Court had to decide whether a finger injury constituted a hand injury and affirmed prior holdings that the metacarpophalangeal joint, which is the most proximal joint of the fingers, is

the dividing line between the fingers and the hand. 543 N.W.2d 904, 907 (Iowa 1996). Accordingly, while it is true that the word "shoulder" could be given a lay, broad meaning, imposing this meaning on the word *because* the other scheduled member words were felt to be plain, ordinary words is an incorrect application of the Court's jurisprudence.

Even if "shoulder" is a plain, ordinary word, intended to have a plain, ordinary meaning, it does not follow that it should be broadly construed, as the district court ruled. A narrow, lay meaning is also available. Sources which might be used by lay people give both definitions. For example, dictionary.com gives "shoulder" eighteen different definitions. Number 1 is: "the part of each side of the body in humans, at the top of the trunk, extending from each side of the base of the neck to the region where the arm articulates with the trunk". https://www.dictionary.com/browse/shoulder. Number 2 on dictionary.com is: "**the joint** connecting the arm or the foreleg with the trunk". https://www.dictionary.com/browse/shoulder. (emphasis added). Thefreedictionary.com defines "shoulder" as: "1.a. **The joint** connecting the arm with the torso," but also offers, "1.b. The part of the human body between the neck and upper arm."

https://www.thefreedictionary.com/shoulder[2]. (emphasis added). If these plain, "lay" sources offer competing definitions, the district court should have found the statute to be ambiguous rather than default to a broad construction.

Even if the Supreme Court does not look to lay definitions of "shoulder" to demonstrate ambiguity, the specific evidence in this case from Dr. Bolda, MD, confirmed that there is no widely recognized medical definition of shoulder, either. He was asked, "[a]re you aware of a consensus definition of what is a shoulder in the field of orthopedics?" Defendants' Ex. 3, p. 25-26. He said,

> I'm not sure how to answer that. Because, like you said, it's somewhat arbitrary, where you draw a line. But you know, the shoulder is affected from the brain and all the way down to the fingertips. And it's artificial where you draw the lines to define what's the shoulder or not.

Defendants' Ex. 3, p. 26. When lay sources and medical evidence provide competing, but equally-plausible meanings of a word, the word should be found by the court to be ambiguous.

Finally, as the parties' briefs below demonstrate, there is ambiguity in the case law in terms of how the word "shoulder" is used and understood.

[1] This website boasts over twelve billion views to its page.
[2] This website boasts over twelve billion views to its page.

For example, in cases like Second Injury Fund of Iowa v. Nelson, the court wrote, "[w]e have previously held that **injury to a joint such as a** hip or a **shoulder** should be treated as an injury to the body as a whole, not as a scheduled injury." 544 N.W.2d 258, 269 (Iowa 1995)(emphasis added)(citing Lauhoff Grain Co.). The agency has also held, "[t]he wrist is the joint between the arm and the hand **just as a shoulder is the joint** between the arm and the trunk or the hip is the joint between the leg and the trunk." Miranda v. IBP, File 5008521, p. 4 (App. Dec'n., 8/2/05)(emphasis added); Burtnett v. Webster City Custom Meats, Inc., File 5001794, p. 6 (Arb. Dec'n., 2/4/2004)(noting that even if the wrist impairment only impacted the hand, it is still an arm injury). The agency has referred to the "shoulder" as the joint for over twenty years: "[s]econdly, the wrist is a joint between two scheduled members, namely, the arm and hand in much the same way that a shoulder is the joint between the arm and body trunk or the hip is the joint between the leg and trunk." Smith v. Giese Construction Co., File 1198841, p. 4 (Arb. Dec'n., 4/22/1999).

Even though Claimant agrees with Defendants that there are other cases where a Claimant's rotator cuff or other injury in the area of the shoulder joint was referred to loosely as a "shoulder," the point is that there is an undeniable ambiguity in the case law such that it was inaccurate for the

district court to hold that the Legislature was "clear," from the language used, that it meant to reclassify every injury which impacts the joint. Since the word "shoulder" is ambiguous, just like the words "arm" "hand" and "leg," have been found ambiguous, the district court should have proceeded with traditional rules of statutory construction. Had the district court done so, it would have ruled in Claimant's favor.

4. Ambiguous Statutes Should Be Construed in Claimants' Favor.

The Iowa Supreme Court has recognized time and time again that the purpose of Iowa's workers' compensation statutes is to benefit the injured worker. Griffen Pipe Products Co. v. Guarino, 663 N.W.2d 862, 864-865 (Iowa 2010); IBP, Inc. v. Harker, 633 N.W.2d 322, 325 (Iowa 2001); Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 14 (Iowa 1993); Bier Glass Co. v. Brundige, 329 N.W.2d 280, 283 (Iowa 1983). As a result, in cases of ambiguity, it has been the Court's longstanding policy to "broadly" and "liberally" construe workers' compensation statutes in favor of the injured worker. Id.; Gregory v. Second Injury Fund of Iowa, 777 N.W.2d 395, 399 (Iowa 2010). While this is not a *carte blanche* rule, of course, it is one the Legislature was surely aware of and as such, should be followed by the Court, if possible, while keeping in mind the object sought to be accomplished, the mischief to be remedied, and the purpose served by the

statute. Bier Glass Co., 329 N.W.2d at 283 (citing City of Mason City v. Public Employment Relations Board, 316 N.W.2d 852, 854 (Iowa 1982) and Peffers v. City of Des Moines, 299 N.W.2d 675, 678 (Iowa 1980)). If a liberal construction of a statute would lead to an "absurd" result, the Court should of course avoid the construction if a better one is available. Gregory, 777 N.W.2d at 399. However, where the result of a particular construction is rational and beneficial for injured workers, then it is a construction which should be adopted by the Court.

The Legislature's silence over the years with regard to the Court's practice of liberally and broadly construing other scheduled member terms like "finger," "hand," "arm," and "leg" justifies this Court's continued application of the doctrine. The Legislature is presumed to know the status of the law and case law when it enacts legislation and if the Legislature was dissatisfied by the Court's history of finding the "scheduled member" terms to be ambiguous, or the Court's procession to construe them liberally in favor of Claimants, the Legislature has had the power to correct the practice, but it has not. Richards v. Anderson Erickson Dairy Co., 699 N.W.2d 676, 682 (Iowa 2005)(holding statutes owe their existence to those who enact them and those who choose not to change them); Iowa Farm Bureau Federation v. Environmental Protection Com'n, 850 N.W.2d 403, 433-34

(Iowa 2014)(recognizing that the legislature is presumed to know the prior construction of terms of a statute as well as prior construction of the terms).

Under the competing definitions advanced in this case – shoulder joint versus anything else which impacts the shoulder joint, the former is the most-favorable to workers. Such an interpretation means that workers whose injuries are located proximally-to the glenohumeral joint will remain eligible for industrial disability compensation if their employment is terminated. Meanwhile, workers whose injuries are within the glenohumeral joint will be subject to the schedule for a "shoulder" injury. This is a rational, balanced result which by itself justifies adoption of Claimant's interpretation over Defendants'.

5. A Construction in Claimants' Favor Creates a Clear, Bright Line Which Can be Easily Applied.

Representative Carlson, who led the bill through the Iowa House, and was the only Republican Representative to make any comments about the "purpose" of the workers' compensation changes, said that one of the goals of the Legislature in making a "shoulder" injury a scheduled injury was so that benefits would be paid voluntarily by an employer/carrier and the claims would therefore take less time to resolve.[3] In other words, one desire was

[3] https://www.legis.iowa.gov/dashboard?view=video&chamber=H&clip=H20170316154402833&dt=2017-03-16&offset=210&bill=HF%20518&status=i (Rep. Carlson, closing remarks).

for less litigation.

Claimant's interpretation of "shoulder" is the only one which achieves this goal because it provides a clear, bright line in terms of what "is" a "shoulder" injury and what "is" a "whole body" injury, due to being proximal to the shoulder joint. By defining shoulder as the glenohumeral joint, claims adjusters can adjust claims quickly, thereby minimizing their odds of litigation. As picture number two, above, shows, there is almost no specialized skill or analysis involved in determining whether a permanent injury's situs is proximal to the glenohumeral joint or not. Almost all cases could be classified following a standard MRI because it will almost always show the location of the pathology which is responsible for the problems. Many times, the name of the diagnosis alone will be enough to justify payments as a "shoulder" or "whole body" in a claim. In a system which can be inherently complex, classifying an injury for compensability purposes should be made as simple as possible so that adjusters can voluntarily commence the proper amount of payments regardless of the type of injury the worker has. Defendants' and the court's construction ensures that adjusters will struggle to figure out what the type of injury even is. Calling a different body part a "shoulder" based upon whether it is "important to" or "essential to" the shoulder joint invites speculation and requires additional

expert opinions. This is inconsistent with expediency and cost savings. Claimant's construction furthers Representative Carlson's goal of lowering the number of claims that are likely to result in litigation and is therefore a reasonable construction in the face of competing constructions.

Instead of this simple approach, the Commissioner admitted in the Appeal Decision that defining shoulder more broadly than just the glenohumeral joint would "result in temporary uncertainty as Claimants litigate injuries to the various muscles, tendons, bones and surfaces surrounding the glenohumeral joint." Appeal Dec'n, p. 10. Instead of focusing on the site of the permanent injury, the Commissioner's analysis requires parties to start gathering evidence on the "purpose" of an injured proximal body part relative to the shoulder joint and evidence regarding how much the injured, proximal body part may or may not impact the shoulder joint's function. The Commissioner held:

> [a]s it relates specifically to this case, it is difficult to separate the infraspinatus from the glenohumeral joint given the muscle's primary purpose – to stabilize the socket of the shoulder. Put simply, the functionality of the shoulder is dependent on these surrounding anatomical parts. And as such, there is less of a clear distinction as it relates to the glenohumeral joint and the complex musculature that surrounds it.

Appeal Dec'n, p. 9. He continued that:

> [b]ecause of the importance of such muscles to the function of the joint, I find excluding everything but the glenohumeral joint

> itself would lead to the absurd result of excluding injuries that are and have been commonly considered shoulder injuries…Given the entwinement of the glenohumeral joint and the muscles that make up the rotator cuff, including the infraspinatus, and the importance of the rotator cuff to the function of the joint, I find the muscles that make up the rotator cuff are included within the definition of "shoulder" under section 85.34(2)(n).

Appeal Dec'n, p. 10-11. Purposefully choosing a definition which requires years of litigation for all parties under any combination of injury scenarios over a definition that can be applied in a matter of seconds is very detrimental for the workers' compensation system. Surely Representative Carlson was not envisioning decades-worth of litigation where parties would argue over whether a clavicle fracture was "essential to" or "intertwined with" the shoulder joint, or to what extent pectoralis muscles impact the joint. This type of evidence is a feeding frenzy for expert witnesses and will only drive-up costs of litigation for both parties, something which should be avoided, if possible.

A bright line definition avoids these problems while still accomplishing the goal of a net-reduction in the number of litigated claims. While the number of "whole body" cases in the area of the shoulder joint will not go down to zero with Claimant's interpretation, a fair number of claims will be reduced to the schedule and this furthers the Legislature's goal. However, following a bright line also avoids expensive expert reports,

lets adjusters adjust claims quickly, and protects workers' rights to a fair, rather than arbitrary, recovery as much as possible. As such, Claimant's interpretation should have been adopted by the district court.

6. A Construction in Claimants' Favor Better Honors Precedent.

The district court's opinion criticized Claimant for contending that the situs of the injury controls the analysis. However, it is the district court which misapplied the pertinent case law. Claimant is not arguing that the site of the initial injury, that is, the injurious event, always controls the compensability of the claim regardless of outcome. Indeed, a worker may have an injury to the worker's neck and arm at the same time and if the neck fully heals, but the arm does not, then permanency benefits would be awarded only for the arm, not the neck, because there is no permanent injury to the neck. In this sense, the situs of the injury controls and Claimant's reliance upon that line of case law for the proposition was more than proper. Meanwhile, if the impact of the same "arm" injury is only on loss of strength of the hand, the law has been clear that the injury would still be classified as an arm injury, rather than a hand injury.

Claimant agrees with the district court that in some cases, permanent injury to a scheduled member may result in, for example, CRPS, or a mental health sequela, and in these situations, the court is correct that the situs does

not control because the court will look beyond the scheduled member for evidence of permanent impairment. Prewitt v. Firestone Tire & Rubber Co., 564 N.W.2d 852, 854 (Iowa Ct. App. 1997)(citing Barton v. Nevada Poultry Co.. 110 N.W.2d 660, 663-64 (Iowa 1961)). Claimant does not dispute this. In these cases, it is true that the situs, *per se*, is not always controlling, however, this is only because a worker can prove greater harm to other areas of the body other than just to the scheduled member which really just means that another situs was damaged, too, whether it be to another scheduled member or the nervous system, for example. However, the undersigned has found no case where the fact finder ignored the situs of a permanent injury and classified the injury based only upon the functional loss of use of another body part, caused by former. That is what the Commissioner and district court did. The district court's decision to rely upon Barton for this methodology of classifying an injury by its impact was therefore erroneous.

Classifying an injury for compensability purposes solely by its impact on other body parts was a methodology specifically rejected in Lauhoff Grain Co. v. McIntosh. There, the Court had to determine whether injury to the acetabulum (hip joint) due to placement of an artificial joint constituted a "whole body" injury or a "leg" injury. 395 N.W.2d 834 (Iowa 1986). The Defendants' argument, which is the same argument Defendants advance in

this case, is that because the only "impact" of the hip injury was articulation of the leg, the injury should be determined to be an injury to the leg. Lauhoff Grain Co., 395 N.W.2d at 840. The Court clearly rejected this "impact" analysis and found that if there was permanent injury to the hip joint, then the injury would be to the whole body. Lauhoff Grain Co., 395 N.W.2d at 840-841(remanding to determine whether hip implant caused joint impairment).

Since Lauhoff Grain Co. was decided, the agency has had many opportunities to apply it. For example, in Cluney v. Reames Foods, File 945696 (Arb. Dec'n. 12/1/1993), the agency, citing Lauhoff Grain Co., concluded that,

> [i]f a part of the body has not been damaged it is not possible for it to be impaired. The ability to make full use of an undamaged part of the body can be lost if its function is dependent upon some other part of the body which has been damaged. When such a situation occurs, it is the damaged part that is impaired, not the undamaged part.

Cluney v. Reames Foods, File 945696, p. 4 (Arb. Dec'n., 1993)(affirmed by Cluney v. Reames Foods, File 945696, p. 7-8 (Appeal Dec'n., 5/31/1994). The agency, in Cluney, pointed out that in the cases of Hike v IBP, Inc., File No. 764571 (Appeal Dec'n., 10/23/1990) and Prewitt v. Firestone Tire & Rubber Co., File Nos. 931128 and 876686 (Appeal Dec'n, 8/12/1992), the Claimant's injury was to the shoulder girdle and there was no evidence of

injury to the scheduled member, the arm, itself. Id. at 8. Accordingly, it was clear to the agency that "if the loss of function of a scheduled member results from impairment of the function of the joint where the member attaches to the body and upon which it is dependent for its function, then the disability is to be evaluated and compensated industrially." Id. As such, the agency determined that since use of Claimant's arm was limited because of the result of damage to the shoulder joint, not from any damage to the arm *per se*, then the compensation was to be industrial. Id.

Classifying an injury solely by its impact on other body parts was also rejected in Dailey v. Pooley Lumber Co., a case cited, but not followed, by the Commissioner. In Dailey, the issue was whether Claimant's injuries to the femoral head (leg) and acetabulum (socket of the hip joint) were just "leg" injuries or "whole body" injuries. Dailey, 10 N.W.2d at 572. The Defendants argued that "even should the situs of the injury be without the schedule, the workman nevertheless is limited by the provisions of the schedule when the disability and incapacity flowing from the injury are manifested in and confined to the scheduled member." Id. at p. 573 (quoting Defendants' brief). The Court reviewed the medical evidence which showed that there was physical damage to an area of the body beyond the leg, namely, damage to the articular surface of the hip joint, a tilted pelvis and

some compensatory curvature of the sacroiliac and lumbosacral joints. Id. The Court bluntly held, "[a]s the injury suffered by appellee extended beyond the scheduled area, the schedule of course does not apply." Id. Since Claimant's acetabular injuries went beyond the leg, the case was compensated industrially, rather than as a "leg" case. Id. (awarding permanent and total disability).

The Commissioner himself has previously acknowledged that it is the situs of the injury which controls whether the injury is scheduled or unscheduled. See Peterson v. Parker Hannifin Corp., File 5043257, p. 2 (Appeal Dec'n, 9/24/15). In Peterson, the Claimant had a low back injury which resulted in leg impairment due to damage to the sciatic nerve. Id. The Commissioner ruled that, "[i]t is the anatomical situs of the permanent injury or impairment which determines whether the schedules in section 85.34(2)(a)-(t) are applied" and as such, declared the injury to be an industrial one rather than a leg one because the sciatic nerve was damaged within the lumbar spine. Id. The Commissioner did not hold that the sciatic nerve was "important to" leg function or "intertwined with" leg function, and so therefore it was a leg injury. In yet another case, Dickess v. Heartland Inns of America, LLC, the issue was whether or not a leg injury which resulted in gait problems became a "whole body" claim, or not. The

Deputy Commissioner held that it is the situs of the permanent injury which controls, rather than the situs of pain or impairment which governs whether or not to use the schedules. File 5034433, p. 7 (Arb. Dec'n., 9/9/11).

It is evident that classifying injuries based upon the situs of the damage, rather than by loss of function elsewhere caused by the former, is not a novel concept before the agency. It is also not novel that in some situations, compensability can be expanded off the schedule when the evidence shows permanent damage to a structure or bodily process which is not located within a body part which is on the schedule. These principals are long-standing, well-recognized, and should have been followed in this case. Accordingly, Claimant's citation-to and reliance-upon the cases cited below, and herein, was accurate and proper.

The district court's reliance upon Barton was sound, but for the wrong reason. In Barton, the Claimant had a permanent injury to her foot which was established by the parties in a settlement agreement. Barton v. Nevada Poultry Co. 110 N.W.2d 660, 661 (Iowa 1961). Claimant subsequently developed causalgia, or Sudek's atrophy, which is a chronic pain syndrome wherein the central nervous system is impaired. Id. The Commissioner found Claimant had developed this condition, but because the initial injury was to the right foot, the Commissioner limited compensation to the

schedule. Id. On appeal, the Supreme Court clarified that when an injury to a scheduled member develops into an injury outside of the scheduled member, namely, the central nervous system, the injury is no longer compensated by the schedule. Id. at 663.

Not only does Claimant agree with the holding in Barton, but Claimant contends it can, and should be, applied in this case. Here, Claimant contends that the "shoulder" was intended by the Legislature to mean the glenohumeral or shoulder joint, where the ball of the humeral head meets the socket, called the glenoid. Since Claimant's infraspinatus tendonitis is proximal to the glenohumeral joint, the injury should be classified as a whole body injury, per Dailey v. Pooley Lumber Co. and Lauhoff Grain Co v. McIntosh, even if its only resulting functional harm is to the shoulder joint. Since it is injury to the infraspinatus tendon which impacts articulation of the scheduled member, i.e. the shoulder, it is the infraspinatus tendon which determines the classification of the injury as unscheduled. By looking only at the resulting loss of function, the district court erred in its application of the applicable precedents and should be reversed.

7. A Construction in Claimants' Favor Avoids Litigation and Absurd Results.

Representative Carlson stated in his closing remarks during the House

debates why changes were needed in the Workers' Compensation Act.[4] He said one of the advantages of the workers' compensation system is that those things that have been identified as scheduled members are easier to understand and take far less time to litigate. The district court and Commissioner's analysis, however, breeds litigation. For example, should the thoracic muscles be included within the meaning of the word "shoulder" since they are "intertwined" with the shoulder joint to a certain extent and contribute to its function as well? Lay people might consider thoracic muscles to be the same thing as "shoulder" muscles, after all, since they are in the same general area. Should the clavicle be considered part of the "shoulder" even though the clavicle goes all the way to the base of the neck? Folks with a proximal clavicle fracture may very well consider that to be a neck injury. If "shoulder" stops short of the proximal clavicle, exactly where at on the clavicle would the "shoulder" stop and the "whole body" begin? More importantly, what is the textual reference for the dichotomy? If a proximal clavicle fracture results in a brachial plexus injury where the only residual impairment is to the hand, should that now be considered only a hand injury, using the same rationale as the district court? Should a "total

---

[4] https://www.legis.iowa.gov/dashboard?view=video&chamber=H&clip=H20170316154402833&dt=2017-03-16&offset=210&bill=HF%20518&status=i Starting at 4:45:15, Comments by Rep. Carlson.

shoulder replacement" be considered a "shoulder" injury? Afterall, the lay name for the procedure includes the word "shoulder" so it could make lay sense to consider the injury a "shoulder" one and certainly a shoulder replacement surgery is "important to" and "intertwined with" the shoulder joint. However, the agency has recently ruled that a total shoulder replacement is a whole body injury. See Bolinger v. Trillium Healthcare Group, LLC, File 5060856, p. 6 (Arb. Dec'n., 6/17/21). Should acromioclavicular joint separation be considered a "shoulder" injury? It is hard to imagine the acromioclavicular joint not being "important to" and "intertwined" with the shoulder joint. Yet, the agency has held that acromioclavicular joint separation was a whole body injury in Deleon v. Kingdom Cargo, LLC, File 19700319.01, p. 4 (Arb. Dec'n., 5/6/20)(not appealed). Meanwhile, in Persinger v. Mortenson Co., the agency recently found that an injury which resulted in a labral repair, capsulorrhaphy, rotator cuff repair, subacromial decompression and bursectomy was a "shoulder" injury. File 5068579, p. 6 (Arb. Dec'n., 11/23/20).

It is difficult to reconcile, from a "common" "plain" or "lay" perspective, how an acromioclavicular joint separation is not a shoulder injury, but a rotator cuff injury, which is further away from the shoulder joint than is the joint separation, is a shoulder, when both injuries result in

glenohumeral joint dysfunction. This, as well as the other examples, are absurd results which should be avoided by the Court, yet they are embraced with the adoption of a broad definition of "shoulder".

The district court's analysis creates breathing room for absurd results by focusing on the impact of a permanent injury, rather than on the location of the permanent injury which is causing the impact. As pointed out in Claimant's judicial review brief, which is bolstered by Dr. Bolda's testimony below, the glenohumeral joint can be impacted all the way from the brain down to the fingertips. A person may have an obvious cervical herniation with the only impact being upon function of the glenohumeral joint. Instead of compensating the claim as a "whole body" claim, the district court's analysis would classify a once-understood-to-be neck injury as a "shoulder" injury. This is inconsistent with the clear holdings from Dailey, Lauhoff Grain, and their progeny and is just one example out of hundreds that will arise with an overly broad definition, which is itself ambiguous. Claimant's proposed definition is much easier to understand and apply. Lay people can understand how they may receive less compensation for their shoulder joint dysfunction if the impairment is due to a labral tear within the joint than they would receive if their shoulder dysfunction was the result of a brain, neck, or here, a rotator cuff injury.

8. A Construction in Claimants' Favor Maintains Balance in the Workers' Compensation System.

Review of the other legislative changes made in conjunction with the addition of Iowa Code section 85.34(2)(n) demonstrates that a narrow construction of the word "shoulder" could have easily been contemplated by the Legislature. This is because the Legislature protected employers' primarily-financial interests elsewhere in Chapter 85 when it was making changes to the scheduled member subsection. The Legislature amended former section 85.34(2)(u) and it is now section 85.34(2)(v) (2017). The statute provides that when a worker has a whole body injury, so long as the employer keeps the employee employed, with the same or greater earnings than at the time of the injury, then the employee only receives the functional impairment rating as the basis of their compensation. See Iowa Code §85.34(2)(v) (2017). The result is that some workers' injuries which used to be considered whole body injuries, such as a labral tear or glenoid tear, will now be reduced to the schedule and other injuries, like rotator cuff tears, will remain whole body injuries, yet still only receive payment for the functional rating, so long as the worker remains sufficiently employed. There is nothing absurd about this. It is exactly the type of bargaining one would expect to occur at the Legislature when controversial changes are being proposed.

If one goal of the Legislature was to keep more people employed, and it seems generally from the debates that it was, construing the statute in such a way that will incentivize employers from terminating injured workers accomplishes that goal. If more injuries are considered "whole body" injuries than are not, it follows that employers will be less-likely to terminate those employees because termination bears financial consequences, namely, the traditional industrial disability analysis is applied and a worker can possibly receive more than the value of the impairment rating. Meanwhile, construing "shoulder" broadly virtually ensures that malevolent employers will terminate their injured workers who have "shoulder" injuries because there are almost no financial consequences to doing so. If statutes are read to incentivize employers to rid themselves of injured employees, the result is that more injured workers are on the streets, looking for work or drawing off of social welfare programs. A broad construction also means there are less incentives for employers to look for ways to reduce injuries to workers in the first place. Paying a small portion of 400 weeks of workers' compensation benefits to an injured employee and then terminating them may be seen as "better" (cheaper) than buying a hoist to help employees lift heavy loads. Workplace safety has never been a race to the bottom in Iowa, but Defendants' broad construction opens that door. This result is not what

Representative Carlson declared as his vision during the Legislature's debates, and in any case, is a result that should be avoided by the Court as contrary to public policy.

9. The Definition of "Arm" Can be Interpreted Harmoniously With "Shoulder" as the Glenohumeral Joint.

One of Defendants' arguments is that the definition of "arm" in Iowa Code section 85.34(2)(m) (2017) uses the words "shoulder joint" and so therefore, "shoulder" cannot mean "shoulder joint" because each word must have a meaning. Iowa Code section 85.34(2)(m) (2017) says, "The loss of two-thirds of that part of an arm between the shoulder joint and the elbow joint shall equal the loss of an arm…". While it is a good rule of construction to give each word a meaning, where possible, in this case, construing "shoulder" to mean "shoulder joint" does nothing to change the meaning of the word "arm". The arm still stops right before the shoulder joint starts. At the same time, construing "shoulder" as "shoulder joint" provides a clear and definite meaning for the word "shoulder" by giving it a starting point and an ending point, unlike the district court's and Defendants' interpretation which leave open many unanswered questions, most of which can only be answered with additional expert opinions. As this Court has noted, "[a]lthough we strive to give each word a meaning that does not render it superfluous…we will not do so when that meaning is inconsistent

with the structure and format of the text in which the word is located and when that meaning is otherwise unreasonable." Kibbee v. State Farm Fire & Cas. Co., 525 N.W.2d 866, 869 (Iowa 1994). Defendants' interpretation is unreasonable because it offers no clear proximal endpoint for the word "shoulder" and breeds inconsistent results.

Next, the Court should not forget that the definition of "arm" in Iowa Code section 85.34(2)(m) has already been interpreted beyond the plain meaning of the words used in the statute in the Holstein Electric "wrist" case so the idea that the Court needs to *now* pay unwavering deference to its precise language, while sacrificing every other principal of statutory construction, is fantastic. The Court can give each word (shoulder) and phrase (shoulder joint) meaning by finding that the words "shoulder" and "shoulder joint" simply mean the same thing. Lay people can understand this. Claimant's construction completely harmonizes the subsections and should have been adopted by the district court.

10. Legislative Study Bills Should Not be Used in This Case Except in Favor of Claimants.

The legislative history of the "shoulder" law should not be considered determinative, because if parties are being completely honest, it can be cut both ways. Initially, when legislative changes were being considered, the proposed amendments would have expanded the definition of "arm" to

include the "shoulder joint" meaning that "shoulder joint" injuries would be subject to a 250 week schedule, like arms were, rather than the 500 week schedule. See SSB 1170. Yet another proposal would have cut off permanent and total disability benefits at age sixty-seven. See SSB 1170. Another proposal would have made all changes effective upon enactment. See SSB 1170. Another proposal would have changed the burden of proof, making cases more-difficult to prove for Claimants. See SSB 1170.

Following the subcommittee hearings, the proposal to make "shoulder joint" injuries worth only a maximum of 250 weeks was scrapped and instead, a new "shoulder" section was added, giving workers with "shoulder" injuries a maximum of 400 weeks of pay. Since there is no record of any closed-door discussions held by any Legislators regarding the reason for these changes, and the meaning was never debated, it is impossible to know whether the Legislature, in scrapping the "arm" changes and creating a "shoulder" section, was intending to make "shoulder joint" injuries worth 400 weeks, instead of 250, which was still less than the prior, 500 week maximum, or whether the Legislature instead meant to differentiate between "shoulder joint" and "shoulder." No one will ever know the true intent because there is no record of any closed-door discussions, if any were held. On balance, it seems more-probable that the

Legislature intended to use the words "shoulder joint" and "shoulder" synonymously. Doctors do so and courts and the agency have done so; why wouldn't the Legislature? However, because it is impossible to know what the Legislature was thinking on this issue based upon the lack of discussion about it, resting statutory interpretation upon some parts of the legislative history, to the exclusion of others, to the detriment of injured workers, is speculative and should be avoided.

CONCLUSION

One cannot help but recall Iowa workers' compensation attorney Tom Palmer's statement to the Legislature that the word "shoulder" was "kinda vague"[5]. He cautioned that, "those darn lawyers, aggressive and otherwise, and judges, and deputies and the commissioner are going to spend the next three years sorting out what this language means."[6] Mr. Palmer was wrong about how long this would take but he was correct that the word would cause problems. The law was passed anyway, ambiguity and all. The importance to workers and other stakeholders cannot be overstated. If the district court's analysis is left to stand, those darn lawyers, judges, deputies,

[5] https://www.facebook.com/IowaSenateDemocrats/videos/10154328022826778/
[6] Id.

and the Commissioner, are going to spend the next decade fighting about what is a shoulder.

This Court can correct the problem now by ruling that "shoulder" in Iowa Code section 85.34(2)(n) (2017) means "shoulder joint" and since substantial evidence in the record, which was not challenged by Defendants, shows that Claimant has permanent injury to her infraspinatus tendon, which is located proximal to the shoulder joint, Claimant's injury should be classified as a whole body injury under section 85.24(2)(v) (2017). Since substantial evidence in the record demonstrates that Claimant's functional impairment rating was 8%, a finding which was affirmed by the district court and not appealed by Defendants, this rating should be converted to a 5% whole body impairment, under the Guides, and Defendants should be ordered to pay twenty-five weeks of PPD benefits, with credit for ten weeks paid prior to hearing. All other rulings, including MMI, penalty, mileage, and taxable costs, should be affirmed as neither party appealed from said rulings.

PRAYER FOR RELIEF

Based upon the foregoing, Claimant prays that the Ruling of the District Court be reversed, and judgment be entered in Claimant's favor with costs taxed to Defendants. Claimant prays for other, consistent relief.

REQUEST FOR ORAL ARGUMENT

Claimant requests the opportunity for oral argument in this matter.

CERTIFICATE OF COSTS

Claimant certifies that there were no costs incurred for printing or duplicating paper copies of briefs due to the EDMS filing system.

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because it has been prepared in a proportionally spaced typeface using Times New Roman in size 14 font and contains 8,877 words excluding parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Jennifer M. Zupp