IN THE IOWA DISTRICT COURT FOR POLK COUNTY

IRIS RIVERA, Petitioner, vs. **SMITHFIELD FOODS, INC.** and **SAFETY NATIONAL CASUALTY CORP.**, Respondents.	**Case No. CVCV061267** **RULING ON PETITION FOR JUDICIAL REVIEW**

INTRODUCTION

Before the Court is a Petition for Judicial Review filed by Petitioner Iris Rivera on January 27, 2021, and a brief in support filed on July 9, 2021. Respondents filed their brief on September 10, 2021. Petitioner filed her reply on October 13, 2021. The Court held a hearing on October 22, 2021, at which the parties appeared virtually via ZoomGov. After hearing the arguments of counsel and reviewing the court file, including the briefs filed by both parties and the administrative record, the Court now enters the following ruling **DENYING** Petitioner's Petition for Judicial Review.

FACTUAL BACKGROUND

Petitioner Iris Rivera ("Rivera") filed a petition against her employer, Smithfield Foods, Inc., and its insurance carrier, National Casualty Corp., (collectively, "Respondents") seeking workers' compensation benefits for a left shoulder injury that occurred on March 2, 2018.[1] On December 13, 2019, the case proceeded to hearing before the Deputy Workers' Compensation Commissioner ("the Deputy"). *See* Admin. R. Part 1, pp. 105–92 (Hr'g Tr.). On April 14, 2020,

[1] The workers' compensation case involved additional matters, but only the left shoulder injury is relevant for the purposes of this judicial review.

the Deputy filed an arbitration decision finding in relevant part that Rivera sustained 40% permanent functional loss of her left shoulder and ordering Respondents pay Rivera 100 weeks of permanent partial disability benefits at the rate of $662.74 per week from July 18, 2019. *Id.* at pp. 216–17. Although the record included Dr. Sunil Bansal's six percent impairment rating and Dr. Bradley Lister's eight percent impairment rating, the Deputy found that "[t]he percentage impairment either doctor assigned for the left shoulder does not adequately match [Rivera's] restrictions."[2] *Id.* at p. 216. Instead, the Deputy concluded that "[b]ased on the restrictions assigned by Dr. Lister, [Rivera's] functional loss to her left shoulder is 40 percent." *Id.*

On April 16, 2020, Respondents filed a notice of appeal. Admin. R. Part 1, p. 202. On April 24, 2020, Rivera filed a Motion for Ruling Nunc Pro Tunc, asserting that the award of 100 weeks must have been a typographical error and requesting modification of the arbitration decision to order payment of permanent partial disability benefits for 160 weeks for her left shoulder injury. *Id.* at pp. 200–01. Respondents resisted the motion on May 1, 2020. The Deputy granted Rivera's motion and filed the order nunc pro tunc on May 13, 2020. *Id.* at pp. 92–93. In this ruling, the Deputy acknowledged that her finding of a 40% functional impairment was erroneous, but concluded that Respondents' previously filed notice of appeal precluded her from correcting the error. *Id.* Thus, the Deputy merely noted that ordering 100 weeks was a scrivener's error and modified the arbitration decision to order Respondents "pay unto claimant one hundred sixty (160) weeks of permanent partial disability benefits . . . ." *Id.*

On December 31, 2020, the Workers' Compensation Commissioner ("the Commissioner") filed an appeal decision affirming in part and reversing in part the Deputy's arbitration decision

[2] The Deputy found that based on the record, Rivera's "restrictions include no lifting over 20 pounds with the left shoulder, waist to chest level work only, no overhead or over shoulder work activities on the left and no repetitive pushing and pulling." Admin. R. Part 1, p. 216. The Deputy stated this "inability to repetitive [sic] push or pull, no lifting over 20 pounds with the left shoulder and waist to shoulder work only is functionally limiting." *Id.*

and the order nunc pro tunc. Admin. R. Part 1, p. 14. In relevant part, the Commissioner found the Deputy erred in her finding that Rivera sustained 40% disability. *Id.* at p. 13. Specifically, the Commissioner explained that the Deputy's conclusion did not comply with the legislature's 2017 amendments to Chapter 85 requiring "the extent of loss or percentage of permanent impairment [to] be determined solely by utilizing" the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (hereinafter, "the Guides" or "the AMA Guides"). *Id.* (quoting Iowa Code § 85.34(2)(x)). The Commissioner noted that the only impairment ratings in the record are Dr. Bansal's six percent rating and Dr. Lister's eight percent rating, both of which were determined using the Guides. *Id.* Therefore, the Commissioner made the following findings regarding the proper impairment ratings:

> Thus, pursuant to section 85.34(2)(x), I respectfully reverse the deputy commissioner's finding that claimant sustained 40 percent disability, as that rating was not determined solely by utilizing [the AMA Guides]. Instead, the deputy commissioner should have considered the two impairment ratings in the record that were determined using the Guides.
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> Like the deputy commissioner, I agree that the restrictions assigned by Dr. Lister support the higher of the two ratings. Defendants essentially concede that point in their brief on appeal. I therefore find claimant sustained eight percent impairment of her left shoulder, entitling her to receive 32 weeks of PPD benefits.

Id. Accordingly, the Commissioner ordered Respondents pay Rivera 32 weeks of permanent partial disability benefits at the weekly rate of $662.74 commencing on July 18, 2019. *Id.* at p. 14.

On January 27, 2021, Rivera filed the instant Petition for Judicial Review reasserting her argument before the Commissioner that Iowa Code section 85.34(2)(x) is unconstitutional. In his decision, the Commissioner properly acknowledged the agency does not have the authority to declare statutes unconstitutional and thus declined to address the merits of this argument. *Id.* The issue was sufficiently preserved and the Court considers it now on judicial review. Additional facts are set forth below as necessary.

LEGAL STANDARD

The Iowa Administrative Procedures Act codifies a court's judicial review of agency action in Iowa Code section 17A.19. Pursuant to this section, a district court has the power to "affirm the agency action or remand to the agency for further proceedings." Iowa Code § 17A.19(10). Additionally, "[t]he court shall reverse, modify, or grant other appropriate relief from agency action . . . if it determines that substantial rights of the person seeking judicial relief have been prejudiced because the agency action" falls within any of the categories enumerated in subsection 10, paragraphs "a" through "n." *Id.*

"District courts exercise appellate jurisdiction over agency actions on petitions for judicial review." *Christiansen v. Iowa Bd. of Educ. Exam'rs*, 831 N.W.2d 179, 186 (Iowa 2013) (citation omitted). "The burden of demonstrating the required prejudice and the invalidity of agency action is on the party asserting invalidity." Iowa Code § 17A.19(8)(a). "Because of the widely varying standards of review, it is essential for counsel to search for and pinpoint the precise claim of error on appeal." *Jacobsen Transp. Co. v. Harris*, 778 N.W.2d 192, 196 (Iowa 2010) (citation and internal quotations omitted). *See also Burton v. Hilltop Care Ctr.*, 813 N.W.2d 250, 256 (Iowa 2012) ("Under Iowa Code section 17A.19(10) . . . [the] standard of review depends on the aspect of the agency's decision that forms the basis of the petition for judicial review.").

Generally, on judicial review, the court's "decision is controlled in large part by the deference we afford to decisions of administrative agencies." *Cedar Rapids Cmty. Sch. Dist. v. Pease*, 807 N.W.2d 839, 844 (Iowa 2011). However, under section 17A.19(10)(a), the court "do[es] not give any deference to the agency with respect to the constitutionality of a statute or administrative rule because it is entirely within the province of the judiciary to determine the constitutionality of legislation enacted by other branches of government." *NextEra Energy Res.*

LLC v. Iowa Utils. Bd., 815 N.W.2d 30, 44 (Iowa 2012) (citation omitted). *See also* Iowa Code § 17A.19(11)(b). A petitioner is merely "required to raise constitutional issues, even though the agency lacks the authority to decide the issues, in order to preserve the constitutional issues for judicial review." *Endress v. Iowa Dep't of Hum. Servs.*, 944 N.W.2d 71, 83 (Iowa 2020) (citing *McCracken v. Iowa Dep't of Hum. Servs.*, 595 N.W.2d 779, 785 (Iowa 1999)).[3]

Under section 17A.19(10)(a), a court may grant relief from agency action if a person's substantial rights have been prejudiced because the agency action is "[u]nconstitutional on its face or as applied or is based upon a provision of law that is unconstitutional on its face or as applied." Iowa Code § 17A.19(10)(a). "When constitutional issues are raised . . . we must make an independent evaluation of the totality of the evidence and our review in such cases is de novo." *Simonson v. Iowa State Univ.*, 603 N.W.2d 557, 561 (Iowa 1999) (citation omitted). *See also Immaculate Conception Corp. v. Iowa Dep't of Transp.*, 656 N.W.2d 513, 515 (Iowa 2003) ("To the extent the appeal concerns issues of constitutional magnitude, we review the record de novo."); *Soo Line R.R. Co. v. Iowa Dep't of Transp.*, 521 N.W.2d 685, 688 (Iowa 1994) (same); *Adair Benevolent Soc'y v. State, Ins. Div.*, 489 N.W.2d 1, 3 (Iowa 1992) (same).

"Because statutes are cloaked with a strong presumption of constitutionality, a party challenging a statute carries a heavy burden of rebutting this presumption." *In re Morrow*, 616 N.W.2d 544, 547 (Iowa 2000). Iowa courts "will not overturn [statutes] unless they are clearly, palpably, and without doubt unconstitutional." *State v. Guardsmark, Inc.*, 190 N.W.2d 397, 400 (Iowa 1971). Additionally, if the challenged statute "is capable of being construed in more than one manner, one of which is constitutional," then Iowa courts "must adopt that construction." *AFSCME Iowa Council v. State*, 928 N.W.2d 21, 31 (Iowa 2019).

[3] *See* Admin. R. Part 1, p. 14 (Commissioner's decision noting Rivera raised the constitutional issue).

ANALYSIS

In 2017, the Iowa legislature amended the Iowa Workers' Compensation Act, including adding a new prohibition on using lay testimony and agency expertise to determine impairment resulting from an injury. Section 85.34(2)(x) provides the following:

> In all cases of permanent partial disability . . . the extent of loss or percentage of permanent impairment *shall be determined solely by utilizing the guides* to the evaluation of permanent impairment, published by the American medical association, as adopted by the workers' compensation commissioner by rule pursuant to chapter 17A. *Lay testimony or agency expertise shall not be utilized in determining loss or percentage of permanent impairment* . . . .

Iowa Code § 85.34(2)(x) (emphases added).[4] Therefore, "[t]he only evidence to be considered regarding the extent of impairment is impairment ratings under the AMA Guide, Fifth Edition." John Lawyer & James R. Lawyer, *Iowa Practice Series: Workers' Compensation*, § 13:5 (2020) (hereinafter, "Iowa Practice Series, § 13:5"). Although the AMA released a sixth edition of the Guides in 2008, the agency has officially adopted the fifth edition for determining the extent of loss or percentage of impairment for permanent partial disabilities. *See* Iowa Admin. Code § 876-2.4.

It is important to note that this amended section only applies to injuries occurring on or after July 1, 2017. Iowa Admin. Code § 876-2.4. *See also VanGetson v. Aero Concrete, Ltd.*, 949 N.W.2d 442 (Table), 2020 WL 4201233, *1 (Iowa Ct. App. July 22, 2020) ("The legislation provided the amendments to other statutory provisions would 'apply to injuries occurring on or after' the act's effective date – July 1, 2017 . . . ."). In other words, the Guides are "not binding on the commission for injuries occurring prior to July 1, 2017." Iowa Practice Series, § 13:5. As

[4] Iowa courts have determined that "[i]n a statute, the word 'shall' generally connotes a mandatory duty." *In re Detention of Fowler*, 784 N.W.2d 184, 187 (Iowa 2010) (citation omitted). The Iowa legislature has also explicitly stated that "[u]nless otherwise specifically provided by the general assembly . . . [t]he word 'shall' imposes a duty." Iowa Code § 4.1(30)(a).

Rivera sustained a March 2, 2018 injury to her left shoulder, the Commissioner noted that pursuant to section 85.34(2)(x), Rivera's percentage of permanent impairment must be determined solely by utilizing the AMA Guides. *See* Admin. R. Part 1, p. 13.[5]

Rivera asserts that application of section 85.34(2)(x) violates her rights under the Iowa Constitution, including but not limited to, Article I, sections 1, 2, 6, 9, and Article III, section 1. Pet'r's Br. p. 18. However, Rivera's brief and reply brief focus only on unconstitutional violations "of her right to due process under the law" and do not provide any equal protection arguments or authority. *See id.* at pp. 18–20; Pet'r's Reply Br. pp. 2–4. Rivera also briefly mentions that application of section 85.34(2)(x) constitutes an impermissible delegation of legislative authority to a non-governmental organization because that section mandates determination of the extent of loss or percentage of permanent impairment solely by using the AMA Guides. Pet'r's Br. pp. 4, 18. According to Rivera, section 85.34(2)(x) therefore "takes away from the administrative judge the ability to tailor a remedy to the specific circumstances of" her case. *Id.* at p. 19. Based on the absence of any elaboration or argument regarding the additional constitutional sections, the Court only addresses the allegations of violations of due process and the separation of powers doctrine.

A. Due Process

The Iowa Due Process Clause guarantees that "no person shall be deprived of life, liberty, or property, without due process of law." Iowa Const. art. 1, § 9.[6] "Courts have interpreted the Due

[5] The Commissioner also quoted the Deputy's acknowledgment in her order nunc pro tunc that "a functional disability is subject to Iowa Code section 85.34(2)(x) (2019)." Admin. R. Part 1, p. 12.

[6] Article I, section 9 of the Iowa Constitution "is 'nearly identical in scope, import and purpose" to the Federal Due Process Clause." *Planned Parenthood of the Heartland v. Reynolds ex rel. State*, 915 N.W.2d 206, 233 (Iowa 2018) (quoting *State v. Hernandez-Lopez*, 639 N.W.2d 226, 237 (Iowa 2002)). Thus, "absent an argument to the contrary, we generally decline to apply divergent analyses under the two constitutions." *Clayton v. Iowa Dist. Ct. for Scott Cnty.*, 907 N.W.2d 824, 827 (Iowa Ct. App. 2017). *See also State v. Baker*, 925 N.W.2d 602, 610 (Iowa 2019) ("When counsel does not advance a distinct analytical framework under a parallel state constitutional provision, [courts] ordinarily exercise prudence by applying the federal framework to . . . analysis of the state constitutional claim."). Although Rivera only raises her claims under the Iowa Constitution, Iowa cases cited by the Court quote from and cite to federal cases.

Process Clause to have both 'substantive' and 'procedural' components and have employed different frameworks of analysis as to each component." *Bowers v. Polk Cnty. Bd. of Supervisors*, 638 N.W.2d 682, 690 (Iowa 2002). Although Rivera does not specify whether section 85.34(2)(x) violates her substantive or procedural due process rights, the arguments made and case law cited indicate that she alleges a substantive due process violation. Rivera does not put forth any arguments regarding violations of her procedural due process rights, *i.e.*, notice and opportunity to be heard as party to an agency proceeding. *See Drake Univ. v. Davis*, 769 N.W.2d 176, 181 (Iowa 2009); *Carr v. Iowa Emp. Sec. Comm'n*, 256 N.W.2d 211, 214–15 (Iowa 1977). Regardless, any such claim of violation of her procedural due process rights is meritless. The Court therefore focuses on substantive due process.[7]

"Because statutes are cloaked with a strong presumption of constitutionality, a party challenging a statute carries a heavy burden of rebutting this presumption." *In re Morrow*, 616 N.W.2d 544, 547 (Iowa 2000).[8] "The challenger must show beyond a reasonable doubt that a statute violates the constitution." *Johnston v. Veterans' Plaza Auth.*, 535 N.W.2d 131, 132 (Iowa 1995). Furthermore, the challenging "party must negate every reasonable basis upon which the statute could be upheld as constitutional." *Morrow*, 616 N.W.2d at 547. The Iowa Supreme Court has also long recognized that "[a] substantive due process violation is not easy to prove" and agrees

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[7] The Court notes that Rivera occasionally contends "section 85.34(2)(x) is unconstitutional *on its face*, and as applied to Petitioner's case," but Rivera's substantive arguments are confined to the statute as applied to her case. *See, e.g.*, Pet. p. 4 (emphasis added). Therefore, the Court only addresses section 85.34(2)(x)'s constitutionality as applied in this ruling. However, the Court finds Rivera would not meet the high bar required for a facial challenge of section 85.34(2)(x): "Generally, to succeed on a facial challenge, the petitioner must prove a statute is 'totally invalid and therefore, incapable of any valid application.'" *Reynolds*, 915 N.W.2d at 232 (quoting *Santi v. Santi*, 633 N.W.2d 312, 316 (Iowa 2001)).

[8] *See also State v. Kingery*, 774 N.W.2d 309, 313 (Iowa Ct. App. 2009) ("In evaluating any statutory challenge, 'we must remember that statutes are cloaked with a presumption of constitutionality.'") (quoting *State v. Gonzalez*, 718 N.W.2d 304, 307 (Iowa 2006)).

with another court's observation that "substantive due process is reserved for the most egregious governmental abuses against liberty or property rights, abuses that shock the conscience or otherwise offend . . . judicial notions of fairness . . . ." *Blumenthal Inv. Trs. v. City of West Des Moines*, 636 N.W.2d 255, 265 (Iowa 2001) (internal quotation marks omitted) (quoting *Rivkin v. Dover Twp. Rent Leveling Bd.*, 143 N.J. 352, 366–67 (N.J. 1996)).[9]

"Substantive due process 'forbids the government [from infringing] certain "fundamental" liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.'" *Bowers*, 638 N.W.2d at 694 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)). In other words, such "[n]arrow tailoring is required only when fundamental rights are involved." *Id.*[10] Therefore, "[a] substantive due process analysis begins with an identification of the nature of the right at issue, as that determines the test to be applied." *State ex rel. Miller v. Smokers Warehouse Corp.*, 737 N.W.2d 107, 111 (Iowa 2007).[11]

Here, Rivera asserts an infringement on her permanent partial disability benefits, and the Iowa Supreme Court has held that a "claimant's interest in worker's [sic] compensation benefits is a property right which cannot be taken away without due process of law." *Auxier v. Woodward State Hosp.-Sch.*, 266 N.W.2d 139, 142 (Iowa 1978). "The right to sue for damages is not itself a

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[9] *See also Zaber v. City of Dubuque*, 789 N.W.2d 634, 640 (Iowa 2010) ("Generally speaking, substantive due process principles preclude the government from engaging in conduct that shocks the conscience or interferes with rights implicit in the concept of ordered liberty.") (internal citations and quotation marks omitted); *Blumenthal Inv. Trs.*, 636 N.W.2d at 265 ("With the exception of certain intrusions on an individual's privacy and bodily integrity, the collective conscience of [the court] is not easily shocked.") (citations omitted).

[10] "[S]ubstantive due process is most robust when fundamental interests are involved." *Behm*, 922 N.W.2d at 550 (citing *State v. Klawonn*, 609 N.W.2d 515, 519 (Iowa 2000)).

[11] *See also Reynolds*, 915 N.W.2d at 233 ("When Iowans bring claims alleging a deprivation of substance due process, [courts] employ a two-stage inquiry."); *McQuistion v. City of Clinton*, 872 N.W.2d 817, 832 (Iowa 2015) ("We have adopted a two-step analysis when presented with a substantive due process claim. The first step involves a determination of the nature of the right at stake. . . . The second step turns to an analysis of the appropriate level of scrutiny."); *Bowers*, 638 N.W.2d at 694 (stating the substantive due process analysis begins "with a careful description of the asserted right").

fundamental right." *Gilleland v. Armstrong Rubber Co.*, 524 N.W.2d 404, 407 (Iowa 1994). Therefore, a strict scrutiny analysis determining whether section 85.34(2)(x) "is narrowly tailored to serve a compelling state interest" is not required here.

Rather, "in evaluating government legislation that involves a life, liberty, or property interest, there must be a *reasonable fit* between the government purpose and the means chosen to advance that purpose." *Behm v. City of Cedar Rapids*, 922 N.W.2d 524, 550 (Iowa 2019) (emphasis added) (citing *Reno*, 507 U.S. at 305). *See also Bowers*, 638 N.W.2d at 694 (stating that impairment of an interest less than a fundamental right "demands no more than a 'reasonable fit' between governmental purpose . . . and the means chosen to advance that purpose"). "Evaluating this fit ordinarily involves application of the rational basis test." *Behm*, 922 N.W.2d at 550 (citing *Gardner v. City of Cleveland*, 656 F.Supp.2d 751, 761 (N.D. Ohio 2009)). "Under this level of scrutiny, the legislature need not employ the best means of achieving a legitimate state interest." *Hensler v. City of Davenport*, 790 N.W.2d 569, 584 (Iowa 2010) (citing *Sanchez v. State*, 692 N.W.2d 812, 818 (Iowa 2005)). "As long as the means 'rationally advances a reasonable and identifiable governmental objective, we must disregard the existence of other methods . . . that we, as individuals, perhaps would have preferred.'" *Id.* (quoting *Sanchez*, 692 N.W.2d at 818). Put another way, "the claimed state interest must be *realistically* conceivable." *Id.* (emphasis in original) (quoting *Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 7 (Iowa 2004)). *See also City of Sioux City v. Jacobsma*, 862 N.W.2d 335, 348 (Iowa 2018) (same).

Furthermore, "under substantive due process analysis, the state is given great leeway in achieving its legitimate goals . . . ." *Behm*, 922 N.W.2d at 554 (citations omitted). "The government is not required or expected to produce evidence to justify its action." *King v. State*, 818 N.W.2d 1, 28 (Iowa 2012) (citing *Ames Rental Prop. Ass'n v. City of Ames*, 736 N.W.2d 255, 259 (Iowa

2007)). Despite these principles and an understanding that "the rational-basis level of scrutiny is deferential to legislative judgment, it is not a toothless standard of review." *Hensler*, 790 N.W.2d at 584 (citing *Racing Ass'n of Cent. Iowa*, 675 N.W.2d at 9). "[T]there are judicial guardrails on legislative action even when applying a rational basis review." *Behm*, 922 N.W.2d at 548.

Respondents thoroughly outline the governmental purpose of section 85.34(2)(x) at pages eighteen through twenty-three of their brief, starting with the general purpose of the scheduled injury provisions of the Workers' Compensation Act. Resp'ts' Br. pp. 18–19. "The very purpose of the schedule is to make certain the amount of compensation in the case of specific injuries and to avoid controversies." *Dailey v. Pooley Lumber Co.*, 10 N.W.2d 569, 571 (Iowa 1943) (citing *Brugioni v. Saylor Coal Co.*, 197 N.W.2d 470, 471 (Iowa 1924) ("The very purpose of the Workmen's Compensation Act is to fix definite rules for the measuring of compensation for specific injuries.")). *See also Schell v. Central Engineering Co.*, 4 N.W.2d 399, 401 (Iowa 1942), *disagreed with on other grounds by Honeywell v. Allen Drilling Co.*, 506 N.W.2d 434 (Iowa 1993) ("One of the objects of the Workmen's Compensation Act was to avoid controversies in the adjustment of compensation for specific injuries by use of fixed schedules."). The Iowa Supreme Court has also commented on the interest in providing guidance to the Commissioner and avoiding controversies or unevenly applied discretion: "The statute was intended to be definite. It draws definite lines. A line is necessarily arbitrary. These lines are drawn for the specific guidance of the Industrial Commissioner. Its classifications do not purport to be subject to the discretion of the commissioner." *Starcevich v. Cent. Iowa Fuel Co.*, 226 N.W. 138, 140 (Iowa 1929).

Respondents next provide information on the governmental interest behind adding shoulder injuries to the list of scheduled injuries in 2017. Resp'ts' Br. pp. 20–22. Respondents focus on the 2017 bills amending Chapter 85 and Fiscal Notes issued by the Fiscal Services

Division providing an analysis of the potential fiscal impact of the proposed bills. *See* Resp'ts' Br. p. 22 (citing FISCAL NOTE S.F. 435, at 1–2 (analyzing the fiscal impact of Senate File 435, which included numerous revisions to section 85.34(2)); FISCAL NOTE H.F. 518, at 1–2 (same); NAT'L COUNCIL ON COMPENSATION INS., INC., IOWA WORKERS' COMPENSATION LAW-ONLY RATES AND RATING VALUES FILING, PROPOSED EFFECTIVE JULY 1, 2017 17 (May 1, 2017) (noting that the statutory changes require use of the AMA Guides and provide that lay testimony and expertise shall not be utilized in determining PPD, and finding that, as a result, determinations of PPD "would likely be more consistent and predictable, and it is anticipated to decrease system costs to some extent")).

Based on this information, Respondents identify the governmental interest/goal of the legislature in adopting section 85.34(2)(x) as making permanent partial disability determinations more consistent and predictable, and to decrease system costs to some extent – especially in shoulder injury cases:

> As is reflected in these legislative materials, the purpose behind the revisions to section 85.34(2), including the addition of the shoulder to the list of scheduled members, was clearly to save costs to the State and to employers and insurers. . . . These same legislative goals are met by Iowa Code section 85.34(2)(x)'s requirement that the extent of impairment for scheduled members be determined solely by use of the AMA Guides.

Resp'ts' Br. p. 22. "The fiscal interests of the government are routinely accepted as a rational basis for legislative activity that is viewed as a cost-saving measure for the public." *Iowa State Educ. Ass'n v. State*, 928 N.W.2d 11, 19 (Iowa 2019). *See also Adams v. Fort Madison Cmty. Sch. Dist.*, 182 N.W.2d 132, 141 (Iowa 1970) ("[T]he state has a compelling interest in seeing that [government] units are maintained in healthy financial condition.").

Regardless, the other governmental interest in making permanent partial disability determinations more consistent and predictable is more than "realistically conceivable,"[12] especially when coupled with the goal of using guidelines set forth by nonpartisan, medical experts as opposed to lay testimony and agency discretion. The AMA Guides are curated by "[a]n editorial panel comprised of knowledgeable physicians and advanced practice professionals,"[13] and some of the goals behind creation of the AMA Guides themselves include "reducing physician burden, advancing the science of impairment rating, and delivering the most equitable ratings for patients . . . ."[14] Additionally, the Workers' Compensation Commission has concluded that "an impairment rating based on the Guide . . . is considered best evidence of the extent of impairment." Iowa Practice Series, § 13:5. *See also Perkins v. Wilken & Sons Auto Wrecking*, File No. 5055189, p. 8 (App. June 27, 2018) ("While lay witness testimony is relevant and material, this agency has previously ruled that impairment ratings determined under the AMA Guides are the best evidence of the degree of scheduled member disability.").

Rivera's argument that section 85.34(2)(x)'s limitation of "her remedy to a mere rating pursuant to the AMA Guides" and subsequent removal of her "ability or right to have the decision-maker consider the specific facts of her case" is without merit. Pet'r's Br. p. 19. The procedure is not limited to the Deputy/Commissioner opening the Guides and locating the minimum, compulsory rating. By contrast, it is more frequently the case that physicians and other medical experts use the Guides to assign an impairment rating based on diagnosis or physical examination

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[12] *See Hensler*, 790 N.W.2d at 584 (citing *Racing Ass'n of Cent. Iowa*, 675 N.W.2d at 7).

[13] *AMA Guides FAQs*, AMA, https://www.ama-assn.org/delivering-care/ama-guides/ama-guides-faqs (last visited Mar. 22, 2022).

[14] *AMA Guides to the Evaluation of Permanent Impairment: An Overview*, AMA, https://www.ama-assn.org/delivering-care/ama-guides/ama-guides-evaluation-permanent-impairment-overview (last visited Mar. 22, 2022).

of the individual.[15] As such, claimants always have the opportunity to retain experts and enter their expert's impairment ratings into the record for the Deputy/Commissioner to consider. Here, there were two competing ratings from medical experts and the Commissioner found that the restrictions assigned by Dr. Lister based on Rivera's specific condition supported the higher of the two ratings. *See* Admin. R. Part 1, p. 13. Furthermore, in a recent case, the deputy commissioner determined that although section 85.34(2)(x) prohibits using lay testimony to determine the percentage of impairment, "lay testimony can be used to aid in determining credibility between two competing ratings." Iowa Practice Series, § 13:5 (citing *Streif v. John Deere Dubuque Works of Deere & Co.*, File No. 5068621 (App. July 10, 2020)).

Furthermore, Rivera's cited authorities are not persuasive. Rivera only cites two cases from the Kansas Court of Appeals in support of her assertion that removing the right to have the decision-maker consider the specific facts of her case and limiting her remedy to a rating pursuant to the AMA Guides denies her constitutional right to due process: *Johnson v. U.S. Food Serv.*, 427 P.3d 996 (Kan. Ct. App. 2018), *rev'd Johnson v. U.S. Food Serv.*, 478 P.3d 776 (Kan. 2021) and *Pardo v. United Parcel Serv.*, 422 P.3d 1185 (Kan. Ct. App. 2018). *See* Pet'r's Br. pp. 19–20; Pet'r's Reply Br. pp. 1–6. Rivera provides no other authority in her brief or reply brief. Although out-of-state cases are certainly not binding on this Court, "[w]e may look to the caselaw of other states, to dissenting opinions of state and federal courts, and to secondary materials for their persuasive power." *State v. Short*, 851 N.W.2d 474, 481 (Iowa 2014) (citing *State v. Baldon*, 829 N.W.2d 785, 792–800 (Iowa 2013) (considering secondary sources and court decisions from other states); *State v. Ochoa*, 792 N.W.2d 260, 276–87 (Iowa 2010) (discussing state caselaw, federal

[15] The creators of the Guides recommend that a physician complete a standard AMA Guides impairment rating. *See AMA Guides to the Evaluation of Permanent Impairment: An Overview*, AMA, https://www.ama-assn.org/delivering-care/ama-guides/ama-guides-evaluation-permanent-impairment-overview (last visited Mar. 22, 2022).

dissenting opinions, and academic commentary)). *See also State v. Sweet*, 879 N.W.2d 811, 832 (Iowa 2016) ("In the development of our own state constitutional analysis, we may look to decisions of the United States Supreme Court, dissenting opinions of the Supreme Court, cases from other states, and other persuasive authorities.").

In *Johnson*, the Court of Appeals found a provision of the Kansas Workers' Compensation Act "unconstitutional on its face because it resulted in lower impairment ratings thus depriving workers of their right to a remedy under" the Kansas Constitution's due process clause. *Johnson v. U.S. Food Serv.*, 478 P.3d 776, 778 (Kan. 2021). However, the Kansas Supreme Court reversed the court of appeals' conclusion, finding the statutory language ambiguous and thus relying on the doctrine of constitutional avoidance. *Id.* Specifically, the Kansas Supreme Court concluded that the provision referencing the Sixth Edition of the AMA Guides is constitutional because it "can reasonably be interpreted as a guideline rather than a mandate . . . ." *Id.* The court stated that the provision's discussion of using the Guides to measure permanent impairment for work injuries does not change the principle that "[t]he key fact – percentage of functional impairment – must always be proved by competent medical evidence." *Id.* at 780.

In *Pardo*, the claimant challenged a statute mandating that the Sixth Edition of the AMA Guides must be used in rating all work-related injuries after January 1, 2015 to determine a worker's amount of compensation. 422 P.3d at 1190. Pardo injured his shoulder in a 2013 work-related accident and injured the same shoulder in a March 2015 work-related accident. *Id.* "However, the Sixth Edition mandates that if an individual previously has received an impairment rating on a shoulder, then no subsequent impairment rating may be assessed on the same shoulder." *Id.* Therefore, Pardo was awarded nothing. *Id.* The court found that, as applied to Pardo,

"mandatory use of the Sixth Edition is unconstitutional as it denies him a remedy guaranteed by the Kansas Constitution." *Id.*

In identifying the issue, the *Pardo* court noted that the Sixth Edition's requirement regarding same-shoulder injuries "forced both doctors to issue a 0% impairment rating on Pardo's new and distinct shoulder injury even though they both testified that this was a medically inaccurate and insufficient rating for Pardo's new injury." 422 P.3d at 1190. This is consistent with the *Johnson* court's concern that the "percentage of functional impairment . . . must always be proved by competent medical evidence." 478 P.3d at 780. Here, there is no evidence that the eight percent impairment rating assigned to Rivera is medically inaccurate and insufficient or contrary to competent medical evidence. On the contrary, two medical experts used the Guides and assigned impairment ratings of six percent and eight percent. Admin. R. Part 1, p. 13. If any rating was medically inaccurate or not supported by competent medical evidence, it was the erroneous forty percent impairment rating determined by the Deputy relying on her "agency expertise." The Court finds neither of these Kansas opinions persuasive in the present case.

Furthermore, if the Court turns to case law from other states, there may be persuasive opinions in other jurisdictions finding that such workers' compensation provisions are constitutional.[16] For example, the Texas Supreme Court has also encountered the question of constitutionality regarding its Workers' Compensation Act when a claimant challenged the 1989 Act's requirement that the commissioner use the Guides to determine impairment. *Texas Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 524 (Tex. 1995). The Texas court "concluded that this requirement did not rise to the level of a constitutional violation." *Sherman*, 576 N.W.2d at 319

[16] Respondents cite a Colorado case in which the court upheld as constitutional a workers' compensation statute requiring physicians to use the Third Edition of the AMA Guides in determining impairment. Resp'ts' Br. p. 32 n. 11 (citing *City of Boulder v. Dinsmore*, 902 P.2d 925, 926–28 (Colo. App. 1995)).

(citing *Garcia*, 893 S.W.2d at 526). The Court declines to engage in a fifty-state survey in this area when it is otherwise clear that section 85.34(2)(x) passes the rational basis test and is not unconstitutional under the due process clause of the Iowa Constitution.

In analyzing whether there is a "reasonable fit between the government interest and the means utilized to advance that interest,"[17] the Court finds there is a reasonable fit between section 85.34(2)(x)'s requirement that the agency determine percentage of permanent impairment solely by using the AMA Guides and the interest in making permanent partial disability determinations more consistent and predictable. "No particular procedure violates [due process] merely because another method may seem fairer or wiser." *Bowers*, 638 N.W.2d at 691 (citation omitted). Therefore, the Court concludes Iowa Code section 85.34(2)(x) is not a violation of Rivera's due process rights and the Petition for Judicial Review is denied on this ground.

B. Separation of Powers & Legislative Authority

Rivera also asserts that section 85.34(2)(x) violates Article III, section 1 of the Iowa Constitution "and constitutes an impermissible delegation of legislative authority to a non-governmental organization or agency by mandating that only the *Guides* published by the AMA may be relied upon in determining the extent of disability . . . ." Pet'r's Br. pp. 4, 18. However, as Rivera's briefs do not provide authority on these arguments or elaborate much beyond this sentence, the Court's discussion is therefore brief.

Article III, section 1 is the Iowa Constitution's separation of powers provision, which states the following:

> The powers of the government of Iowa shall be divided into three separate departments - the legislative, the executive, and the judicial: and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted.

[17] *Hernandez-Lopez*, 639 N.W.2d at 238.

Iowa Const. art. 3, § 1. "On questions involving the separation of powers 'this court shall make its own evaluation, based on the totality of circumstances, to determine whether [a] power has been exercised appropriately.'" *State v. Tucker*, 959 N.W.2d 140, 147 (Iowa 2021) (quoting *Webster Cnty. Bd. of Supervisors v. Flattery*, 268 N.W.2d 869, 872 (Iowa 1978) (en banc)). The Iowa Supreme Court has recently explained that the separation-of-powers doctrine contains three general aspects:

> The separation-of-powers doctrine prohibits one department of the government from exercising powers that are clearly forbidden to it, prohibits one department of the government from exercising powers granted by the constitution to another department of the government, and prohibits one department of the government from impairing another in the performance of its constitutional duties.

Tucker, 959 N.W.2d at 148; *State v. Thompson*, 954 N.W.2d 402, 410 (Iowa 2021). *See also Schwarzkopf v. Sac Cnty. Bd. of Supervisors*, 341 N.W.2d 1, 5–6 (Iowa 1983); *State v. Ronek*, 176 N.W.2d 153, 155 (Iowa 1970). However, the doctrine also "has no rigid boundaries" and thus "[t]he demarcation between a legitimate exercise of power and an unconstitutional exercise of power is context specific." *Tucker*, 959 N.W.2d at 148 (citing *Klouda v. Sixth Judicial Dist. Dep't of Correctional Servs.*, 642 N.W.2d 255, 260 (Iowa 2002)).

Rivera contends that prior to section 85.34(2)(x)'s enactment by the legislature, "the Agency had the power as the adjudicator of workers' compensation cases to determine the extent of disability sustained in scheduled members cases free and clear of the AMA Guides . . . and could consider the circumstances of each respective scheduled injury . . . ." Pet'r's Br. p. 18 (citing *Soukup v. Shores Co.*, 268 N.W. 598, 601 (Iowa 1936)). Agencies such as the Workers' Compensation Commission fall within the executive branch. As previously mentioned, Rivera asserts section 85.34(2)(x) impermissibly delegates legislative authority to a non-governmental organization or agency, *i.e.*, the AMA. *Id.*

"The rules of approach which govern this court when confronted with a constitutional question are well established" and include that "[t]he legislature is supreme in the field of legislation[18] in the absence of clear constitutional prohibition with all reasonable presumptions being in favor thereof[.]" *Faber v. Loveless*, 88 N.W.2d 112, 114 (Iowa 1958) (citations omitted). Additionally, "neither the wisdom nor the advisability of any legislation presents a judicial question . . . ." *Id.* "Legislative power is the power to make, alter, and repeal laws and to formulate legislative policy. . . . Executive power is the power to put the laws enacted by the legislature into effect." *In Interest of C.S.*, 516 N.W.2d 851, 859 (Iowa 1994) (citations omitted).

First, the legislature is not delegating any kind of authority to the AMA, a non-government organization, by requiring the Deputy and Commissioner to use guides curated by the AMA in determining permanent impairment.[19] Second, enactment of section 85.34(2)(x) is not an *impermissible* delegation of legislative authority. The Iowa Supreme Court has long "recognize[d] that the legislature cannot delegate its purely legislative powers . . . [but] it may declare general rules as to functions and powers of boards, commissions and administrators of departments." *Wall v. Cnty. Bd. of Educ. of Johnson Cnty.*, 86 N.W.2d 231, 242 (Iowa 1957). "Authority as to details and promulgation of rules and regulations to carry out legislative directions and policies may be delegated." *Id. See also Thompson*, 954 N.W.2d at 414 ("[T]he legislative department has always established the rules for practice and procedure in Iowa's courts. Initially, the legislature did so

[18] *See* Iowa Const. art. 3, § 1 (2nd, "Legislative Department") ("The legislative authority of this state shall be vested in a general assembly, which shall consist of a senate and house of representatives . . . .").

[19] *See AMA Guides to the Evaluation of Permanent Impairment: An Overview*, AMA, https://www.ama-assn.org/delivering-care/ama-guides/ama-guides-evaluation-permanent-impairment-overview (last visited Mar. 22, 2022) ("More than 40 states and several countries rely on the *AMA Guides*® as the accepted authority to assess and rate permanent loss of function. . . . Impairment ratings and impairment rating reports produced using the AMA Guides are used extensively in the United States and abroad as a critical input to determining fair compensation for individuals with work related injuries."). *See also* Resp'ts' Br. p. 34 (providing data demonstrating that federal cases and a total of 40 states use an edition of the AMA Guides).

directly through statutes. More recently, the legislature has done so indirectly through delegation of the rulemaking power to this court subject to legislative oversight and amendment."); *State v. Rivera*, 149 N.W.2d 127, 130 (Iowa 1967) ("Thus, the legislature may delegate to boards and commissions the power to carry out the purposes of the statute provided proper guidelines are legislatively supplied."); *McLeland v. Marshall Cnty.*, 201 N.W. 401, 403 (1924) (stating "an executive or commission may be vested by the legislative branch of the government with discretion, within certain limits, in carrying out the provisions of a statute").

Here, section 85.34(2)(x) clearly acknowledges that the legislature is delegating to the agency the ability to choose which edition of the Guides to adopt:

> In all cases of permanent partial disability . . . the extent of loss or percentage of permanent impairment shall be determined solely by utilizing the guides to the evaluation of permanent impairment, published by the American medical association, *as adopted by the workers' compensation commissioner by rule* pursuant to chapter 17A.

Iowa Code § 85.34(2)(x) (emphasis added). In accordance with this section, the agency adopted rule 876-2.4, which provides in relevant part the following:

> The Guides to the Evaluation of Permanent Impairment, Fifth Edition, published by the American Medical Association are adopted for determining the extent of loss or percentage of impairment for permanent partial disabilities and payment of weekly compensation for permanent partial scheduled injuries under Iowa Code section 85.34(2) not involving a determination of reduction in an employee's earning capacity.

Iowa Admin. Code § 876-2.4. As previously noted, although the AMA released the sixth edition of the Guides in 2008, the agency has officially adopted and continues to use the fifth edition. "Agency rules are ordinarily given the force and effect of law, provided they are reasonable and consistent with legislative enactments." *Wallace v. Iowa State Bd. of Educ.*, 770 N.W.2d 344, 348 (Iowa 2009) (citations and internal quotations omitted).

Furthermore, the Iowa Supreme Court has clarified that workers' compensation benefits are purely statutory and within the province of the legislature:

> The right of a workman to receive compensation for injuries sustained by him growing out of and in the course of his employment is purely statutory. The statute conferring such right upon the workman can also fix the amount of compensation to be paid for different specific injuries, and the employee is not entitled to compensation except as provided by the statute. . . . It may be conceded that the Legislature, if it saw fit to do so, might make such a provision. As the law stands, however, no such provision has been made by the Legislature, and *it is not the province of the court to enact such a provision by what is sometimes referred to as judicial legislation*.

Soukup, 268 N.W. at 601 (emphasis added). Specifically, in scheduled injury cases, the court recognizes "the legislature's privilege to draw definite lines, which are necessarily arbitrary, to guide the [C]ommissioner" and that these "guidelines are not subject to discretion." Iowa Practice Series, § 13:5 (citing *Sherman v. Pella Corp.*, 576 N.W.2d 312, 319 (Iowa 1998); *Blizek v. Eagle Signal Co.*, 164 N.W.2d 84, 85–86 (Iowa 1969)).[20] *See Starcevich*, 226 N.W. at 140 ("The statute was intended to be definite. It draws definite lines. A line is necessarily arbitrary. These lines are drawn for the specific guidance of the Industrial Commissioner. Its classifications do not purport to be subject to the discretion of the commissioner."). The Iowa Supreme Court has also commented on the separation of powers issue specifically regarding the Workers' Compensation Act: "The statute is always subject to amendment by the Legislature. It is important that it be not amended by judicial construction." *Brugioni*, 197 N.W.2d at 471.

The Court concludes that section 85.34(2)(x) does not violate the separation of powers doctrine and its enactment does not constitute an impermissible delegation of legislative authority

[20] *Blizek*, 164 N.W.2d at 85–86 ("One of the major functions of our Workmen's Compensation Act is to provide prompt payment to a covered employee in the event of injury arising out of and in the course of employment. Such an award is necessitated by the statute upon the occurrence of a specific injury and is to be made in strict accordance with the payment schedule provided therefor. For such injuries *the statute does not purport to repose discretionary power in the industrial commissioner*.") (emphasis added).

to a non-governmental organization or agency. Accordingly, the Petition for Judicial Review is denied on this ground.

RULING

Based on the foregoing, the Court concludes Iowa Code section 85.34(2)(x) is not unconstitutional. Accordingly, Petitioners' Petition for Judicial Review must be **DENIED** and the agency's action is hereby affirmed in its entirety.

State of Iowa Courts

Case Number	**Case Title**
CVCV061267	IRIS RIVERA VS SMITHFIELD FOODS INC ET AL
Type:	OTHER ORDER

So Ordered

Scott D. Rosenberg

Scott D. Rosenberg, District Court Judge, Fifth Judicial District of Iowa

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