

IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

<p>ROSA CHAVEZ,</p> <p style="text-align: center;">Petitioner,</p> <p>v.</p> <p>MS TECHNOLOGY LLC & WESTFIELD INSURANCE COMPANY,</p> <p style="text-align: center;">Respondents.</p>	<p>CVCV060899</p> <p>ORDER ON JUDICIAL REVIEW</p>
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This is a petition for judicial review from a final decision of the Iowa Workers' Compensation Commission. Hearing was held through GoToMeeting videoconference system on 3/5/2021. The Parties appeared through counsel.

I. PROCEDURAL POSTURE AND FACTUAL BACKGROUND.

Petitioner/Workers' Compensation Claimant Rosa Chavez sustained a work injury on February 5, 2018 while employed by MS Technology. She heard a pop and felt immediate pain in her right shoulder while wringing out a mop when the bucket's wringer system was broken.

Chavez saw Dr. Peterson at Capital Orthopedics and was diagnosed after MRI with a "full thickness rotator cuff tear that has retracted to the level of the glenoid, severe AC arthrosis, tendonitis and tearing of the biceps tendon." (JE2-0042). Dr. Peterson recommended a shoulder arthroscopy with rotator cuff repair, biceps tenotomy, subacromial decompression, and distal claviclectomy." (*Id.*). Surgery was performed on 7/11/2018. (JE5-0069-70). The following procedures were performed: "Right shoulder arthroscopy with arthroscopic repair of the rotator cuff tendon of the supraspinatus, infraspinatus, and subscapularis tendons; extensive debridement of the labrum, biceps tendon, and subacromial space with biceps tenotomy, subacromial decompression," (JE5-0069). Dr. Peterson placed Chavez at MMI on 11/8/2018. (JE2-0057). He

opined she had a permanent partial impairment of 6% in the right upper extremity. (Id.) Chavez obtained an IME from Dr. Bansal, who opined that Chavez “incurred an acute on chronic injury of her right shoulder and described it as “resulting in an acute injury to the labrum, rotator cuff and attached muscles.” (CL1-0009). Dr. Bansal agreed with Dr. Peterson’s identification of 11/8/2018 as the date of maximum medical improvement and placed Chavez at a 10% upper extremity impairment, which he stated is equal to a 6% impairment of the body as a whole. (CL1-0008).

Chavez filed a workers’ compensation claim alleging injuries to her “right shoulder, neck and right upper extremity.” The Parties At hearing, the primary dispute was whether Chavez’s injury resulted in an unscheduled industrial disability or a scheduled member injury to Chavez’s shoulder, in light of 2017 amendments to the workers’ compensation code at Iowa Code §§85.34(2)(n) that identify the “shoulder” as a scheduled member.

After Arbitration Hearing, a Deputy Commissioner found an unscheduled injury to the body as a whole but limited recovery to a functional impairment rating after concluding Chavez had returned to work for the same or greater pay. MS Technology appealed and Chavez cross-appealed.

On Appeal, the Iowa Workers’ Compensation Commissioner concluded Chavez’s injury was a “shoulder” injury and limited to recovery based on functional loss of the scheduled member body part pursuant to Iowa Code §85.34(2)(n). The Commissioner issued a decision in Mary Deng v. Farmland Foods, File 5061883 (Arb. Dec., Sept. 29, 2020) on the same issue and incorporated its analysis and ruling in Deng into its ruling in this case. The Commissioner applied Dr. Bansal’s 10% upper extremity impairment rating.

Petitioner sought judicial review, asserting the injury should be treated as an unscheduled injury and, in the alternative, that Chavez suffered a combination of two injuries resulting in a body as a whole injury.

II. ANALYSIS AND CONCLUSIONS OF LAW.

A. Standard of Review.

This Court's review of a workers' compensation action is governed by Iowa Code chapter 17A. Grundmeyer v. Weyerhaeuser Co., 649 N.W.2d 744, 748 (Iowa 2002); see Iowa Code § 86.26. The commissioner's factual determinations are "clearly vested by a provision of the law in the discretion of the agency" and this Court will defer to those factual determinations if they are based on "substantial evidence in the record before the court when that record is viewed as a whole." Schutjer v. Algona Manor Care Ctr., 780 N.W.2d 549, 557 (Iowa 2010) (quoting Iowa Code § 17A.19(10)(f)).

If a party challenges the commissioner's ultimate conclusion, "then the challenge is to the agency's application of the law to the facts, and the question on review is whether the agency abused its discretion by, for example, employing wholly irrational reasoning or ignoring important and relevant evidence." Meyer v. IBP, 710 N.W.2d 213, 219 (Iowa 2006); Iowa Code § 17A.19(10)(i), (j).

If a challenge is to the interpretation of law, the standard of review depends upon whether interpretation of the provision of law at issue has been clearly vested in the discretion of the agency. Compare Iowa Code §17A.19(c) with §17A.19(l). The Iowa Supreme Court has repeatedly found the Iowa Workers' Compensation Commission is not vested with authority to interpret Iowa's workers' compensation statutes. See e.g. Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 769 (Iowa 2016) (finding legislature did not vest commission with authority to interpret

provision at issue and noting the Court has declined to defer to the commissioner's interpretations of various provisions in recent years). Therefore, review is for correction of errors at law. Id. at 768; Iowa Code §17A.19(c) (court reviews whether agency action was “based upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency.”)

B. Whether Chavez's Injury Is Considered a Scheduled or Unscheduled Injury.

Iowa workers' compensation law classifies permanent partial disabilities as either scheduled or unscheduled. A scheduled disability is evaluated under the functional method, which provides a schedule of benefits for injuries to specific members of the body. Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). An unscheduled disability is an injury to body parts other than those listed and is considered an injury to the body as a whole and evaluated according to the industrial method. Id.; see also Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983). “It is the anatomical situs of the permanent injury or impairment which determines whether the schedules in section 85.34(2)(a-t) are applied.” Sandberg v. Rubbermaid Home Prod., 760 N.W.2d 210 (Iowa Ct. App. 2008).

In 2017, the Iowa legislature amended Iowa Code §85.34 to add “shoulder” to the list of scheduled injuries. Iowa Code section 85.34(2)(n) provides: “For the loss of a shoulder, weekly compensation during four hundred weeks.” The argument in this case surrounds whether section 85.34(2)(n) applies to Chavez's injury. Chavez argues that because her injury is to the proximal side of her shoulder, it should be compensated as unscheduled. MS Technology argues that Chavez's injury is to her shoulder and, therefore, the scheduled compensation as provided in section 85.34(2)(n) applies.

In addressing the 2017 amendments, the Deputy Commissioner relied on prior caselaw to find that an injury to the muscle on the proximal side of the shoulder joint, should be considered part of the body as a whole. The Commissioner reversed, finding that although the legislature's use of the word "shoulder" was ambiguous, the legislative intent was to include more than just injuries to the glenohumeral joint itself as a scheduled "shoulder" injury.

This Court must first "determine whether the language of the statute is ambiguous before engaging in statutory construction." Holstein Elec. V. Breyfogle, 756 N.W.2d 812 (Iowa 2008). Here, the legislature's use of the word "shoulder" is ambiguous. The Iowa legislature did not include a definition of "shoulder" when it amended section 85.34(2)(n). The word shoulder could refer only to the glenohumeral joint (as urged by Chavez) or the word should could include reference to the tendons and muscles connected to the joint (as urged by Respondents and found by the Commissioner).

The goal of statutory construction is to determine legislative intent. Auen v. Alcoholic Beverages Div., Iowa Dep't of Com., 67 N.W.2d 586, 590 (Iowa 2004). Iowa courts "look for an interpretation that is reasonable, best achieves the statute's purpose, and avoids absurd results." Holstein Elec. V. Breyfogle, 756 N.W.2d 812 (Iowa 2008) (quoting State v. Bower, 725 N.W.2d 435, 442 (Iowa 2006)). Absent a statutory definition or an established meaning in the law, words in the statute are given their ordinary and common meaning by considering the context within which they are used. Auen v. Alcoholic Beverages Div., Iowa Dep't of Com., 679 N.W.2d 586, 590 (Iowa 2004).

Here, this Court finds the Iowa legislature's intent was to add injuries to the shoulder structure as a scheduled member, not just injuries to the glenohumeral joint itself. Merriam Webster defines shoulder and rotator cuff in ways that support the interpretation that shoulder is

not limited to the joint itself. Shoulder is defined as: “the laterally projecting part of the human body formed of the bones and joints with their covering tissue by which the arm is connected with the trunk.” (<https://merriam-webster.com/dictionary/shoulder>). Rotator cuff is defined as: “a supporting and strengthening structure of the shoulder joint that is made up of the capsule of the shoulder joint blended with tendons and muscles as they pass to the capsule or across it to insert on the head of the humerus.” (<https://www.merriam-webster.com/dictionary/rotator%20cuff>). Both of these definitions indicate the ordinary interpretation of the word shoulder is the complex structure that includes the joint, tendons, and muscles.

Notably, the Iowa legislature refers to a “shoulder joint” at another point in the same code section, but chose to use only the word “shoulder” here. Compare Iowa Code §85.34(2)(n) with §85.34(2)(m) (“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 ...”). “When the legislature includes specific language in one section but omits it from another, we presume the legislature intended the omission.” *In re Myers*, 874 N.W.2d 679, 682 (Iowa Ct. App. 2015). In addition, the Commissioner noted a proposed amendment to section 85.34(m) would have made the shoulder joint and everything on the arm side of the joint compensable as an arm. *See* H.S.B. 169, 87th G.A. §7 (2017) (“The loss of ~~two-thirds of~~ that part of an arm ~~between~~ including the shoulder joint to the elbow joint shall equal the loss of an arm ...”) The legislature chose not to enact that change and, instead, enacted current 85.34(n), which makes the shoulder a scheduled member.

Chavez relies on prior Iowa caselaw that looked to “the proximal point of the joint to classify an injury under the workers’ compensation statute.” *Holstein Elec. V. Breyfogle*, 756 N.W.2d 812, 816 (Iowa 2008) (holding an injury to the wrist is to be compensated as an injury to

the arm – the proximal side); Lauhoff Grain Co. v. McIntosh, 395 N.W.2d 834, 839-40 (Iowa 1986) (an injury to the hip joint is compensated as an injury to the body as a whole); Second Injury Fund v. Nelson, 544 N.W.2d 258, 269-70 (Iowa 1995) (an injury to the shoulder joint is compensated as an injury to the body as a whole).

This caselaw is unpersuasive under the amended code section. Previously, the commission and the courts had been required to determine whether joint injuries would be considered part of the proximal (body-side) or distal (point further from the body) side for purposes of applying workers' compensation statutes. For example, whether a shoulder joint injury was part of the arm or body as a whole. This prior caselaw specifically relied on the fact that a shoulder injury was not scheduled. Alm v. Morris Barick Cattle Co., 38 N.W.2d 161, 163 (Iowa 1949) (“Subsection 13 does not apply to a shoulder injury, nor is such an injury scheduled in any other subsection of section 85.35.”) (applying prior version of workers' compensation statute). Now, however, the legislature has amended the workers' compensation statute to specifically provide that a shoulder injury is a scheduled injury. “Our rules of statutory construction hold that when the legislature amends a statute, a presumption exists that the legislature intended to change the law.” Colwell v. Iowa Dep't of Hum. Servs., 923 N.W.2d 225, 235 (Iowa 2019), reh'g denied (Mar. 8, 2019).

The exact parameters of a scheduled shoulder injury within the meaning of section 85.34(n) may need to develop through additional caselaw. However, with regard to application of the facts of this case to Iowa Code section 85.34(2)(n), the Commissioner's decision did not contain an erroneous interpretation of law and was not an abuse of discretion, wholly irrational, or ignorant of important and relevant evidence. Meyer v. IBP, 710 N.W.2d 213, 219 (Iowa 2006); Iowa Code § 17A.19(10)(i), (j).

Here, the medical records repeatedly note that the injury, treatment, and impairment are to Chavez's right shoulder. Chavez sought medical attention with "complaints of right shoulder pain." (JE2-0038). A "Right Shoulder MRI" indicated "full thickness rotator cuff tear that has retracted to the level of the glenoid, severe AC arthrosis, tendonitis and tearing of the biceps tendon." (JE2-0042). Dr. Peterson recommended surgery of "shoulder arthroscopy with rotator cuff repair, biceps tenotomy, subacromial decompression, and distal clavivulectomy." (Id.). At her appointment two-weeks post operation, Chavez's "right shoulder was evaluated." (JE2-0053). Dr. Bansal, who provided an IME at the request of Petitioner, described the injury as: "Ms. Chavez incurred an acute on chronic injury of her right shoulder." (CL1-0009). He further explained: "The shoulder is a ball and socket joint. However, the socket is very shallow, making it quite susceptible to injury. The shoulder itself has a relatively immobile scapula and clavicle and a mobile humeral head interface at the shoulder joint. Consequently, the humeral head may move suddenly in relation to the rest of the shoulder joint, especially from the forceful wringing of the mop, requiring her shoulder to be in an abducted and rotated position, resulting in an acute injury to the labrum, rotator cuff, and attached muscles." (CL1-0009).

It is clear from these medical records, that the treating physician and expert witness considered Chavez's injury and impairment to be part of the ordinary meaning of the word shoulder. Notably Dr. Bansal distinguished between the "shoulder joint" and "shoulder" when explaining the mechanism of the injury.

In addition, the Commissioner found that none of Chavez's injuries could be considered injuries to the whole body, but instead injuries to the shoulder. (See Appeal Decision at 4-6 addressing labral tear and subacromial decompression). On judicial review, Chavez has only argued that the interpretation of section 85.34(2)(n) be limited to the shoulder joint itself. Chavez

has not argued that her particular injuries should be considered outside of the shoulder even if the Court finds “shoulder” includes the complex and intertwined structure of the shoulder and not just the joint. (see 1/8/2021 Petitioner’s Brief on Judicial Review at 13). Therefore, the Court finds the Commissioner correctly concluded that Chavez suffered a scheduled injury under Iowa Code section 85.34(2)(n).

C. Whether Chavez sustained an injury to two separate scheduled members.

Chavez also argues the Commissioner erred in failing to find industrial disability due to two scheduled member injuries: her right shoulder and right arm. Chavez argues that even if the shoulder injury was treated as a scheduled member, she also suffered a second scheduled injury to her arm. Iowa Code section 85.34(2)(t) applies to an injury to two scheduled members. However, the language listing those members—“the loss of both arms, or both hands, or both feet, or both legs, or both eyes, or any two thereof, caused by a single accident, shall equal five hundred weeks”—was not updated to include a reference to the shoulder. Therefore, Chavez argues an injury to her right arm and right shoulder should fall under a catch-all provision in section 85.34(2)(v) (“In all cases of permanent partial disability other than those hereinabove described or referred to in paragraphs “a” through u” hereof..”).

The Commissioner did not reach the issue of statutory construction because the Commissioner held Chavez had failed to prove she sustained an injury to her arm under section 85.34(2)(m). Chavez had the burden to prove by a preponderance of the evidence that she suffered a permanent partial disability to her arm under section 85.34(2)(m). See e.g. George A. Hormel & Co v. Jordan, 56 N.W.2d 148 (Iowa 1997). The Commissioner’s determination that she failed to meet her burden is reviewed for substantial evidence.

The Commissioner's determination is supported by substantial evidence. Chavez was diagnosed with a "tearing of the biceps tendon" and her surgery included a biceps tenotomy. (JE2-0042, JE5-0069). However, there has been no development of whether that injury and procedure resulted in a permanent impairment to Chavez's right arm apart from the shoulder injury. Chavez did not present a separate permanent impairment rating for her arm from either Dr. Peterson or her expert Dr. Bansal. (See JE2-0057). Dr. Bansal's report is expressly limited to Chavez's right shoulder: "This examination should focus on her right shoulder." (CL1-0008). Dr. Bansal's physical examination noted a 40% loss of abduction and 20% flexion strength loss in Chavez's right shoulder as compared to the left shoulder. The only assessment that seems to reference the arms is "upper extremity reflexes," which notes the same result for right and left of +2. Therefore, the Court affirms the Commissioner's determination that Chavez did not meet her burden to show permanent partial disability to her arm under section 85.34(2)(m).

IT IS HEREBY ORDERED that the Appeal Decision issued by the Workers' Compensation Commissioner in this matter is AFFIRMED. Costs are assessed to Petitioner.



State of Iowa Courts

Case Number
CVCV060899

Case Title
ROSA CHAVEZ VS MS TECHNOLOGY AND WESTFIELD
INS CO
OTHER ORDER

Type:

So Ordered

Sarah Crane, District Court Judge
Fifth Judicial District of Iowa

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