IN THE SUPREME COURT OF IOWA
NO. 23-0182
POLK COUNTY NO. CVCV064110

DEE A. DELANEY,

PETITIONER-APPELLANT,

vs.

SECOND INJURY FUND OF IOWA,

RESPONDENT-APPELLEE.

APPEAL FROM THE IOWA DISTRICT COURT

FOR POLK COUNTY

THE HONORABLE SAMANTHA GRONEWALD

FINAL BRIEF OF PETITIONER-APPELLANT

Nate Willems
Rush & Nicholson, P.L.C.
115 First Avenue SE, Suite 201
P.O. Box 637
Cedar Rapids, IA 52406-0637
Telephone (319) 363-5209
Facsimile (319) 363-6664
nate@rushnicholson.com

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ROUTING STATEMENT

This case seeks review of the Agency's interpretation of law in conflict or inconsistent with Iowa Appellate Courts and may be appropriate for retention by the Iowa Supreme Court pursuant to Iowa R. App. P. 6.1101(2)(b). One legal determination by the Agency is in conflict with the Iowa Court of Appeals in Architectural Wall Systems v. Towers, 854 N.W.2d 74 slip op. at FN5 (Iowa Ct. App. July 16, 2014) (relying on Blacksmith v. All-American, 290 N.W.2d 348 (Iowa 1980)). One legal determination by the Agency is in conflict with the Iowa Supreme Court in Gregory v. Second Injury Fund, 777 N.W.2d 395, 400 (Iowa 2010).

STATEMENT OF THE CASE

Petitioner-Appellant Dee Delaney ("Dee") brought workers' compensation claims against both her employer, Nordstrom, and the Second

Injury Fund ("SIF"). Dee seeks to recover benefits under Iowa Code § 85.64 from a combination of a 1986 injury to her left leg and a 2019 injury to her right leg. To recover, Dee must demonstrate one pre-existing injury causing permanent impairment to a body part enumerated in § 85.64 and a subsequent work injury causing permanent impairment to a different body part enumerated in § 85.64.

The 2019 right leg injury was settled with the employer prior to a hearing. The claim against the Second Injury Fund ("SIF") was heard by a deputy workers' compensation commissioner on September 21, 2021. SIF concedes the 1986 injury caused permanent impairment to the left leg.

The 2019 work injury caused a need for replacement of the right knee. Right knee replacement caused permanent impairment to the right leg. However, subsequent to the surgery Dee suffered from some lymphedema, swelling, below the right knee. The deputy workers' compensation commissioner ruled that lymphedema transforms the right leg and joint replacement injury into an unscheduled, or whole-body, injury and, therefore, Dee could not establish a second qualifying injury under § 85.64 as a matter of law. The deputy commissioner ruled that lymphedema development transformed the 2019 knee injury from falling under § 85.34(2)(p) to § 85.34(2)(v), and as such, no longer could constitute a second qualifying injury

under § 85.64. Having made this finding, the deputy found remaining issues moot.

On June 21, 2022 the Agency affirmed the deputy's decision without further analysis.

On January 23, 2023 the district court affirmed the Agency's ruling on the substantive decision. Additionally, the court found the Agency's determination the injury is whole-body, and not scheduled, to be a finding of fact and therefore entitled to a deferential standard of review—whether substantial evidence in the record supports those findings of fact.

There is no dispute Dee was diagnosed with and suffers from some lymphedema below her right knee. The Agency position is that lymphedema constitutes an injury to the vascular system which is, therefore, a whole-body injury. This Agency position is inconsistent with Iowa appellate caselaw. This Agency position cannot be reconciled with the law surrounding injuries to the nervous system or the skin, or integumentary system of the body. Dee believes the situs of the injury must control and asks for an analysis of her case based on the situs of her injury.

Moreover, even if the Agency and district court were correct on the legal question, a line of cases stemming from Gregory v. Second Injury Fund allows Dee to bring her claim against SIF; she is allowed to carve out her knee injury

from a whole-body injury for purposes of a SIF claim. Dee has not waived any right to appeal this issue.

Finally, the district court erred in reviewing the Agency decision at issue as a finding of fact. Courts must engage in statutory construction to determine under which portion of Iowa Code § 85.34 the 2019 injury falls. Recent appellate consideration of a similar question in Chavez v. MS Technology, LLC, demonstrates this is not a mere factual determination.

STATEMENT OF FACTS

Dee Delaney started full-time work at Nordstrom in February 2018. App. 36 (T. at 68 Ll. 21-24). In early 2019, Dee began to feel the onset of stiffening and difficulty in bending her right knee. App. 19 (T. p. 27 Ll. 13-17). It became difficult for Dee to walk quickly, and she started limping. App. 20 (T. p. 28 Ll. 17-19). To ease the amount of walking, Dee began taking breaks at her workstation instead of going to the break area. Id.

On March 12, 2019, Dee was working a busy shift in which she did not have a dedicated workstation; she was moving merchandise on carts from chutes to temporary workstations. App. 21 (T. p. 29 Ll. 8-21). Dee believes she hyperflexed her right knee in the course of this shift, as after work she experienced new symptoms. She could not bend her right knee and had weakness in it. App. 22 (T. p. 30 Ll. 2-13). It took Dee ten minutes to get into

the cab of her pickup. Id. On or about March 17, Dee reported the injury when it did not improve on its own. App. 23 (T. p. 31 Ll. 1-7).

Dee was initially seen by Dr. Portnoy on March 21, 2019. Dr. Portnoy assessed arthralgia of the right knee and placed Dee on restrictions. App. 51. An April 5, 2019 MRI found an extensive complex tear involving the posterior horn through the posterior root of the medial meniscus and a grade IV chondromalacia patella. App. 52-53.

Dee was referred to Dr. Noiseux at UIHC. App. 54-110. On May 21, 2019, Dr. Noiseux noted the medial meniscus root tear in addition to degenerative changes. App. 55. Dr. Noiseux recommended total right knee arthroplasty. App. 56. Dr. Noiseux found this was related to the work injury in March 2019. App. 57. Dr. Noiseux performed this procedure on August 2, 2019. App. 77. Dr. Noiseux also performed a right knee joint manipulation surgery on October 3, 2019. App. 95.

When Dee returned to work on light duty in November 2019, she was pleased with the result of her surgery. App. 25-26 (T. p. 33 L. 23-p. 34 L. 6). She felt she was almost able to walk normally with her right leg. App. 26 (T. at 34 Ll. 9-10)

By June 2020, nearly one year after her right knee surgery, Dee began struggling with pain and swelling from right mid-calf to right foot. App. 27 (T.

at 35 Ll. 2-3). This was diagnosed as lymphedema and caused by her right knee replacement surgery. App. 107, 112. UIHC physicians recommended compression stockings. App. 112.

Dee has used compression stockings on both her right and left legs since 2020. App. 28 (T. at 36 Ll. 3-15). Additionally, on her own Dee acquired specialized shoe insoles for her tennis shoes and a type of natural bamboo vinegar detox patches. App. 28-29 (T. p. 36 L. 19-p. 37 L.7). Dee also continued to take Advil. App. 28 (T. at 36 L. 19).

On March 4, 2021 Dr. Manshadi examined Dee for an independent medical evaluation and produced a report. App. 37. Dr. Manshadi found Dee sustained a right leg injury on March 12, 2019. App. 39. He found Dee would have reached MMI from this injury on January 2, 2020, nearly six months before any swelling began. Id. Dr. Manshadi further concluded that Dee suffered from lymphedema as a complication of the right total knee arthroplasty. App. 40. Dr. Manshadi and Dr. Noiseux both agree there was 37 percent partial impairment to the right knee stemming from the total knee arthroplasty. App. 39, 54. Dr. Manshadi also finds a separate impairment based on lymphedema.

Shortly before hearing, the employer and Dee agreed to settle Dee's 2019 injury as a scheduled member injury. App. 43. This settlement was approved by the Iowa Workers' Compensation Commissioner.

ARGUMENT

I. The Agency and District Court Erred by Determining Delaney's Injury Was a Whole-Body Injury and Not a Qualifying Injury to the Right Lower Extremity.

Issue Preservation

Appellant is unaware of any dispute as to whether this issue has been preserved for appellate review.

Standard of Review

On judicial review of agency action, the district court functions in an appellate capacity to apply the standards set forth in Iowa Code § 17A.19. The district court's scope of review is strictly limited. The review is only for the correction of errors of law, not de novo. Bergen v. Iowa Veterans Home, 577 N.W. 629, 630 (Iowa 1998); Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433, 436 (Iowa 1997).

The court may affirm agency decision or remand to the agency for further proceedings. Iowa Code § 17A.19(10). The court "shall reverse, modify, or grant other appropriate relief from agency action, equitable or legal and including declaratory relief, if it determines that substantial rights of the person

seeking judicial relief have been prejudiced" for any of the grounds listed under Iowa Code § 17A.19(10). Id.

The applicable standard of review depends upon the nature of the error claimed in the petition. If the petitioner claims the error lies with the agency's findings of fact, the proper question on review is whether the substantial evidence supports those findings. Meyer v. IBP, 710 N.W.2d 213, 219 (Iowa 2006). If the petitioner does not challenge the agency's findings of fact but rather claims the error lies with the agency's interpretation of the law, the question on review is whether the agency's interpretation was erroneous and the court may substitute its interpretation for that of the agency. Id. (citations omitted). Finally, if the petitioner does not challenge the agency's findings of fact or interpretation of the law but claims the error lies with the ultimate conclusion reached, then the challenge is to the agency's application of the law to the facts. In that case, the question on review is whether the agency abused its discretion. The application of the law to the facts can be affected by other grounds of error such as erroneous interpretation of law, irrational reasoning, failure to consider relevant facts, or irrational, illogical, or wholly unjustifiable application of law to fact. Meyer, 710 N.W.2d at 218-19; *see* Iowa Code § 17A.19(10)(c), (i), (j), (m). The court allocates some degree of discretion to the

agency in its review of this question, but not the breadth of discretion given to the agency's findings of fact. Id. at 219 (citation omitted).

The question before the Court is whether the 2019 injury is a whole-body/unscheduled injury and therefore not compensable under § 85.64 as a matter of law. This is a question of whether the 2019 injury is properly regarded falling under § 85.34(2)(p)—a leg—or § 85.34(2)(v)—unscheduled or whole body. The district court incorrectly concluded the Agency's determination of this issue is a question of fact.

There has never been any dispute that Claimant suffers from lymphedema which arose as a sequela of the knee surgery she received in the course of treating the right leg injury.

On the other hand, the determination of which subsection of § 85.34 applies to the 2019 injury is a question of law. This requires properly interpreting and applying both the statute and relevant appellate law. Indeed, in the most notable recent Iowa Supreme Court decision regarding § 85.34, the Court had to determine whether an injury was properly regarded as falling under § 85.34(2)(n) or § 85.34(2)(v). Chavez v. MS Technology LLC, 972 N.W.2d 662 (Iowa 2022). In rendering a decision, the Court had to engage in "statutory construction," "determine and effectuate the legislature's intent," ensure an "interpretation is harmonious with the statute as a whole," and find an

interpretation which "avoids absurd results." Id. at 667-68 (internal citations omitted). This constituted a reevaluation of the Agency's decision and to correct, if needed, the Agency's determination of which section of the Iowa Code § 85.34 applied for the admitted injury. In short, was the injury in Chavez a shoulder or an unscheduled, whole-body injury? Getting the statutory construction right was a review for errors at law.

Conversely, the question before the Court was not a matter of simple deference to the Agency provided the factual findings were supported by substantial evidence. Had the Chavez Court interpreted the question of whether an injury was a shoulder or unscheduled (whole-body) injury as a review of the agency's findings of fact, there would have been no need to engage in statutory construction. The Court could have simply concluded that as a doctor had opined the claimant "incurred an acute injury of her right shoulder," and the Agency found it was a shoulder injury, therefore there was no further analysis needed. Id. at 665.

In this case, Dee is not asking this Court "to determine what 'evidence trumps' other evidence or whether one piece of evidence is 'qualitatively weaker' than another piece of evidence." Drake University v. Davis, 769 N.W.2d 176, 182 (Iowa 2009) (citing Arndt v. City of LeClaire, 728 N.W.2d 389, 394 (Iowa 2007). Dee is asking the Court to interpret the statute to

effectuate the legislature's intent in a manner harmonious with the statute as a whole which avoids absurd results. Chavez, 972 N.W.2d at 667-78. This is a review of interpretation of law, or the proper application of law to the facts, and the Court may substitute its interpretation for that of the Agency.

Argument

It is the anatomical situs of the injury which determines whether or not a claimant has a scheduled member injury or injury to the body as a whole. Lauhoff Grain Co. v. McIntosh, 395 N.W.2d 834, 840 (Iowa 1986); Dailey v. Pooley Lbr. Co., 10 N.W.2d 549, 572 (Iowa 1943). "The situs of the impairment is the anatomical location of the damage or derangement." Linden v. Tyson Foods, Inc., 856 N.W.2d 383 (Iowa Ct. App. 2014). It is undisputed that subsequent to total right knee arthroplasty, Dee began to experience swelling and pain from right mid-calf to right foot. App. 27 (T. at 35 Ll. 2-3). For this and an arthritic condition, Dee uses compression stockings, shoe insoles, bamboo vinegar detox patches, and elevates her feet at night. App. 29, 34-35 (T. p. 37 Ll. 1-7, p. 55 L. 15-p. 56 L. 14). A primary care doctor diagnosed lymphedema. App. 106. The treating orthopedic physicians at UIHC stated, "She does have some postoperative lower extremity swelling. She is currently being treated with compression socks. This is first-line treatment and we do not recommend any further treatment." App. 107. There is only one

additional record from June 2020 in which the UIHC physician stated there are "no indications that there is an inflammatory process . . . . This is not an infection . . . there is no indication for imaging, additional blood tests or pharmacotherapy." App. 112. Compression stockings were again recommended. Id. There is no evidence that Dee suffers from any condition which manifests outside her right leg nor does she require any treatment which impacts the body as a whole. Under a traditional anatomical situs of the injury analysis, the 2019 injury only resulted in damage or derangement to the right lower extremity.

Nonetheless, the Agency stated, "This agency has held that lymphedema constitutes an injury to the vascular system, and this is an injury to the body as a whole." App. 129. The deputy commissioner further stated, "The Iowa Supreme Court has considered vascular injuries to be whole body injuries that are to be compensated industrially." Id. These statements do, largely, accurately state the Agency's rulings. On the other hand, these statements do not correctly characterize appellate court opinions. These statements overstate the law to the point of appearing to state that any vascular injury resulting in any degree of permanent impairment is, per se, a whole-body injury. That is not the law.

Indeed, the Iowa Court of Appeals case cited by the original deputy commissioner decision took great pains to state that vascular injuries are not, per se, whole body injuries:

> This is not to say we agree that all DVT injuries are automatically or presumptively to the body as a whole. The commissioner relies upon a single Iowa Supreme Court case to conclude as such. See Blacksmith v. All–American, Inc., 290 N.W.2d 348 (Iowa 1980). In Blacksmith, the court examined a worker suffering from phlebitis of the left leg, an inflammation of the vein wall, which was compensated industrially. Id. at 353–55. The commissioner used this case to infer our supreme court would consider any similar vascular injury to the lower extremity to be an injury to the body as a whole. We do not necessarily agree Blacksmith lends itself to such a conclusion, however because we have found support for the commissioner's ultimate conclusion on another basis, we need not reach the issue.

Architectural Wall Systems v. Towers, 854 N.W.2d 74 slip op. at FN 5 (Iowa Ct. App. July 16, 2014). Thus, to the extent Agency cases cited by the deputy simply claim "lymphedema is considered a vascular disorder and as such is to be rated as an impairment to the whole person," Iowa appellate courts do not support such a per se approach. Anderson v. Broadlawns Medical Center, 2019 WL 7759732 at 8, File No. 5064991 (Arb. Dec. December 16, 2019) (internal citations omitted).

Even the Agency, at times, has declined to follow a one-size-fits-all approach to vascular system injuries. In Nelson v. Artistic Waste Services, the Agency recognized certain conditions facially limited to a scheduled member

have been compensated industrially, but went on to state, "these cases should not, however, be read as requiring that any damage to the *nervous system, vascular system, or skeletal system* is unscheduled because doing so would largely do away with the statutory schedule altogether." Nelson v. Artistic Waste Services, 2002 WL 32125502 at 5 (Arb. Dec. Sept. 4, 2002) (emphasis supplied).

The tendency within the Agency to equate vascular injuries with whole-body injuries stands in stark contrast to the manner in which injuries to the nervous system or integumentary system, the skin, are treated. In the context of injuries to the skin, the analysis has focused on the facts of the individual circumstances. "The mere fact that the skin covers the entire body does not render an injury to the skin of the arm an injury to the body as a whole." Topete v. Global Food Processing, 1999 WL 33619689, File No. 1167910 (Arb. Dec. June 24, 1999). Burn injuries requiring skin grafting confined to the scheduled member are compensated as scheduled member injuries. Dikutole v. Tyson Foods, 2018 WL 2383236 at 13, File No. 5054404 (App. Dec. May 11, 2018).

In the context of injuries to nerves, the analysis has similarly focused on the facts of the individual circumstances. In Gates v. Jensen Transport. Inc., an injury to a leg and the peroneal nerve brought about peroneal neuropathy.

Nonetheless, this was found to constitute an injury to the scheduled member and not the body as a whole. Gates v. Jensen Transport. Inc., File No. 1173121 at 7 (Arb. Dec. July 7, 2000). In Second Injury Fund v. Armstrong, the claimant suffered a foot injury which resulted in a severed nerve and a diagnosis of neuropathy in his left leg. Nonetheless, it was found to be a scheduled member because there was "nothing in the record to support the argument that [Claimant] suffers from any systemic condition extending beyond his left lower leg." Second Injury Fund v. Armstrong, 801 N.W.2d 628 slip op. at 4 (Iowa Ct. App. May 25, 2011). Appellate and agency caselaw establishes that skin or nerve injuries must be analyzed based on the individualized facts for evidence that the condition impacts the worker beyond the impaired scheduled member. When asking "what is the leg?" for skin or nerve injuries, the Agency applies the principle of it is the anatomical situs of the injury which determines whether it is a leg or an unscheduled, whole-body injury.

SIF may question the relevance of injuries to the nervous or integumentary systems. Also, SIF will presumably argue that vascular injuries should be treated differently than injuries to the nervous system or skin. The question is, why? There is no discernable reason to treat injuries to the vascular system differently than injuries to the nervous system or skin. Quite obviously, each of these are systems of the body which exist throughout or around the

entire human body. However, it is possible to have a permanent injury to any of these systems which only manifests within a scheduled member and does not require treatment outside of that scheduled member. For skin injuries, the principle stated in Topete v. Global Food Processing was: "the mere fact that the skin covers the entire body does not render an injury to the skin of the arm an injury to the body as a whole." 1999 WL 33619689, File No. 1167910 (Arb. Dec. June 24, 1999). By analogy, is any injury to any part of the vascular system–here, below the knee–an injury to the body as a whole? Delaney simply has not found an explanation for this. Why does the principle in Topete not apply to a vascular injury confined to a scheduled member? The mere fact that Agency decisions on vascular injuries have happened to come down in the manner they have does not articulate a legal rationale. Moreover, the manner in which the decisions cited by the Agency and the Fund treat all vascular injuries as whole body is inconsistent with appellate court precedent. Architectural Wall Systems v. Towers, 854 N.W.2d 74, slip op. at FN 5 (Iowa Ct. App. July 16, 2014).

The appellate cases on vascular injuries document injuries far more serious and manifesting in areas outside of an extremity. In Architectural Wall Systems, the claimant suffered from deep vein thrombosis (DVT), had undergone a surgery to remove a blood clot and had a filter surgically implanted

outside his leg to prevent clots from moving to his heart or lungs. Architectural Wall Systems v. Towers, 854 N.W.2d 74 slip op. at 1. In Blacksmith, the claimant suffered from thrombophlebitis in his leg requiring a system-wide regime of anticoagulant medications. Blacksmith, 290 N.W.2d at 350. The record demonstrated that the thrombosis condition begins with a blood clot and the individual is at risk of a pulmonary embolism. Id. at 351-52. The treatment—an anticoagulant, or blood thinner—impacts the entire blood circulatory system, not just the blood in one leg. The claimants in Blacksmith and Architectural Wall Systems had vascular injuries which posed risk of death. The claimants in Blacksmith and Architectural Wall Systems received treatment which manifested in parts of the body outside of the injured scheduled member (leg). The prior appellate cases documented vascular injuries requiring treatment which impacted the whole body and posed a risk of death to the claimant. This is a far cry from the "first-line treatment" of compression stockings, bamboo patches and foot elevation used by Dee. App. 107.

In sum, the weight of appellate legal authority does not support the idea that any vascular injury is a body as a whole-body injury. Rather, Agency caselaw has expanded all vascular injuries to constitute whole-body injuries on its own, without a basis in statute or appellate caselaw, and in a manner entirely inconsistent with the way the Agency handles injuries to the nervous or

integumentary systems (skin). To the degree Dee has suffered a vascular injury, the record shows it to have a limited scope in comparison to the facts in appellate vascular cases. There is no evidence she suffers from a systemic condition outside the leg. There is no evidence of blood clotting. There is no concern for a potential embolism. There is no need for blood thinners. She simply requires compression stockings below her knee. In other words, if this very limited vascular injury is regarded as a whole-body injury, then it is extraordinarily difficult to imagine a vascular injury which would ever be confined to a scheduled member.

To follow precedent which states it is the anatomical situs of an injury which controls whether it is a scheduled member injury or a whole-person injury, to harmonize similar questions which arise with injuries to the nervous or integumentary systems, it seems logical that a vascular injury should only be considered a whole-body injury when the injury itself or the treatment impacts other areas of the body outside the scheduled member (an arm or leg). However, where, as here, neither the injury nor the treatment impacts any portion of the body outside the leg, the injury should be regarded as falling under Iowa Code § 85.34(2)(p)—a leg—and not § 85.34(2)(v)—unscheduled.

II. The Agency and District Court Erred in Failing to Allow Dee to Bring a Section 85.64 Claim Against SIF Even If the Right Lower Extremity Injury Extends to the Whole Body.

Issue Preservation

On appeal to the Workers' Compensation Commissioner, Dee argued the application of Gregory v. Second Injury Fund, and related cases, established a basis for recovery from SIF even if the vascular injury stemming from the 2019 leg injury was regarded as a whole-body injury. App. 141. SIF responded to this argument in its briefing to the Agency. App. 161. Dee again went into further detail in her argument in a reply brief to the Agency. App. 168-170. Nonetheless, the Agency affirmed the deputy commissioner's decision in its entirety.

Dee renewed this argument on appeal before the district court. The district court declined to consider any of Dee's arguments related to Gregory and its progeny stating, "issues must ordinarily be both raised and decided by the lower tribunal before they can be decided on appeal." Meier v. Senecaut, 641 N.W.2d 532, 537 (Iowa 2002). While this general rule may be accurate, the district court erred in applying it in this context of an administrative law case.

> The rule is different for administrative law cases. The final agency action in a workers' compensation case is not the deputy's decision, but the decision of the commissioner. We have held a

> party preserves error on an issue before an agency if a party raises the issue in the agency proceeding before the agency issues a final decision and both sides have had an opportunity to address the issue.

Staff Management v. Jimenez, 839 N.W.2d 640, 647 (Iowa 2013). The Jimenez Court specifically noted the Meier holding cited by the district court and found it not applicable in an appeal of a workers' compensation case such as this. Id. Plainly, Dee raised the issue before the Agency, and SIF responded to Dee's arguments. In this type of proceeding, a contested workers' compensation case, Jimenez makes clear it was not necessary for Dee to file an application for a rehearing from the Commissioner because the Commissioner's prior ruling was insufficiently detailed. Dee has done all that is necessary to preserve this issue on appeal.

Standard of Review

Appellant incorporates and restates her earlier standard of review arguments.

Argument

Even if the Agency should find that the lymphedema in Dee's right leg transforms the injury into a whole-body injury, or injury under § 85.34(2)(v), there is Supreme Court precedent which allows for Dee to bring her Second Injury Fund claim in the manner which has occurred. In Gregory v. Second

Injury Fund, a claimant brought first qualifying injuries to her bilateral arms which extended to the whole body. Gregory v. Second Injury Fund, 777 N.W.2d 395, 397 (Iowa 2010). The Court emphasized that "liability of the Fund under section 85.64 expressly turns on the *part(s) of the body* permanently injured in successive injuries." Id. at 400 (emphasis in the original). The Court further stated, "the fact that Gregory [claimant] combined in a single workers' compensation proceeding her claim for that scheduled loss with other scheduled and unscheduled injuries did not disqualify it as a first qualifying injury under section 85.64." Id. at 401. The fact that a scheduled injury which causes permanent impairment to body parts enumerated in section 85.64 also extends to unscheduled body parts does not extinguish the injured worker's ability to bring a Fund claim based on first and second qualifying injuries to different body parts identified in section 85.64.

Moreover, recently the Agency restated these principles in allowing a worker in a similar factual scenario to bring a claim against SIF. In Strable v. Second Injury Fund, the Agency stated,

> The record is clear, claimant sustained a permanent injury to her left lower extremity and she sustained permanent back and mental health injuries as sequelae of her left lower extremity injury. The court in Gregory instructed the agency to look at whether the alleged first qualifying injury to an enumerated member . . . and whether the alleged second qualifying injury caused an injury to another enumerated member that was caused by claimant's

> employment regardless of whether the injuries caused other enumerated scheduled injuries, or other nonenumerated or unscheduled injuries.

Strable v. Second Injury Fund, File No. 1666216, 2022 WL 17490657, at 7 (Iowa Workers' Comp. Com'n Nov. 29, 2022). In a similar manner, it is not disputed that Dee experienced some lymphedema below the knee as a sequelae of the admitted workplace right leg injury. For our purposes, the facts of Strable are identical. The Agency's decision in Strable reaches the opposite legal conclusion now in comparison to when it affirmed the deputy commissioner's ruling in this matter.

No doubt SIF will point out that Strable has been appealed or that in Gregory it was the first injury which extended into unenumerated parts of the body rather than the second. 777 N.W.2d 395 (Iowa 2010). This is true, but no aspect of the Gregory decision states an injured worker cannot bring a section 85.64 claim if the second injury to a section 85.64 enumerated extremity extends to unscheduled body parts.

On the other hand, Gregory not only cites approvingly but bases its rationale on earlier Supreme Court precedent in George v. Second Injury Fund. 737 N.W.2d 141 (Iowa 2007). In George, the claimant's first injury resulted in impairment to the left leg; the second, or work injury, resulted in bilateral leg impairment. Gregory, 777 N.W.2d at 399 (citing George, 737 N.W.2d at 144).

The Court concluded that a claimant could bring a Fund claim, as the bilateral nature of the second injury did not preclude its qualification under section 85.64. Gregory, 777 N.W.2d at 399 (citing George, 737 N.W.2d at 147). The Gregory Court stated, "although George interpreted only that part of section 85.64 which addresses the second qualifying injury, we believe its reasoning is relevant here." Gregory, 777 N.W.2d at 400. Far from articulating any principle that its holding can only apply when a first qualifying injury is not confined to impairment to a single, enumerated section 85.64 body part, Gregory supports the idea that it can just as well be the second injury which is not confined to an enumerated section 85.64 body part and there still be a Fund claim.

Additionally, there is no concern Dee could achieve some type of double recovery. Dee and her employer entered into an agreement for settlement on the loss to the right lower extremity. App. 43-50. There is no risk for some type of double industrial disability recovery, as the current injury with the employer has been settled as a scheduled member loss. Contrast this with the Gregory claimant: The Court stated, "our determination that Gregory's 2000 left hand injury qualifies as a first injury under section 85.64 is not affected by the fact that the incident also caused bilateral shoulder impairment and was therefore compensated as an unscheduled injury under Iowa Code section

85.34(2)(u)." Gregory, 777 N.W.2d at 400. Dee is seeking to have the combination of her injuries assessed on the basis of industrial disability once. The Gregory claimant was allowed to seek industrial disability benefits twice: from a first date of injury against the employer—which also was an unscheduled injury—and a second claim for industrial disability after a second date of injury against the Fund.

Thus, in this case it is undisputed Dee suffered a first qualifying injury for purposes of the Fund. App. 129. The evidence in the record establishes Dee suffered a 37 percent impairment to the lower extremity after a total knee arthroplasty. App. 39, 54. This later modestly increased to 40 percent when the swelling was taken into account. App. 39-40. Dee and her employer entered into an agreement for settlement on the loss to the right lower extremity. App. 43-50. There is no risk for some type of double industrial disability recovery, as the current injury with the employer has been settled as a scheduled member loss.

CONCLUSION

For all of the above and foregoing reasons, Appellant Dee Delaney respectfully asks the Court reverse the district court decision, determine this type of injury may be brought by Dee pursuant to § 85.64, and remand to the

Agency with direction to adjudicate this claim in a manner consistent with this decision.

REQUEST FOR ORAL ARGUMENT

Notice is hereby given that Appellant wishes to be heard orally at the submission of this case to the Iowa Supreme Court or Iowa Court of Appeals.

Respectfully submitted,

NATHAN WILLEMS, AT0009260
RUSH & NICHOLSON, P.L.C.
115 First Avenue SE, Suite 201
P. O. Box 637
Cedar Rapids, IA 52406-0637
Telephone (319) 363-5209
Facsimile (319) 363-6664
nate@rushnicholson.com
ATTORNEY FOR APPELLANT
DEE A. DELANEY

PROOF OF SERVICE AND CERTIFICATE OF FILING

I certify that on May 26, 2023, I served this document on all other parties to this appeal electronically by EDMS to the following attorney of record:

Jonathan Bergman
Jonathan.Bergman@ag.iowa.gov

I further certify that on May 26, 2023, I have electronically filed this document with the Clerk of the Supreme Court, 1111 East Court Avenue, Des Moines, IA 50319.

ATTORNEY'S COST CERTIFICATE

I hereby certify that the true and actual cost for printing the foregoing Final Brief of Petitioner-Appellant was $-0-.

Certificate of Compliance with Typeface Requirements and Type-Volume Limitation

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) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14-point font and contains 5,519 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Signature

5/26/23
Date