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 REPLY 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

ATTORNEYS FOR PETITIONER-APPELLANT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

ISSUES PRESENTED

I. Whether 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.

CASES
Architectural Wall Systems v. Towers, 854 N.W.2d 74 (Iowa Ct. App. 2014)
Blacksmith v. All-American, 290 N.W.2d 348 (Iowa 1980)
Blake v. Second Injury Fund of Iowa, 967 N.W.2d 221 (Iowa Ct. App. 2021), 2021 WL 4304274
Chavez v. MS Technology LLC, 972 N.W.2d 662 (Iowa 2022)
Collins v. Dept. of Human Services, 529 N.W.2d 627 (Iowa Ct. App. 1995)

AGENCY DECISIONS
Kalkas v. Featherlite Manufacturing, File No. 5004767, 2005 WL 2438531 (App. Dec. Sept. 21, 2005)
Magana v. IBP, File No. 5043257, 1999 WL 1031284 at 3-4 (Arb. July 23, 1999
Peterson v. Parker Hannifin, File No. 5043257, 2015 WL 5677077, at *2 (App. Dec. Sep. 24, 2015)

STATUTES
Iowa Code § 85.34

II. Whether the Agency and District Court Erred in Failing to Allow Dee to Bring a Section 85.64 Claim Against Second Injury Fund Even if the Right Lower Extremity Injury Extends to the Whole Body.

CASES
Gregory v. Second Injury Fund, 777 N.W.2d 395 (Iowa 2010)
Olson v. Goodyear Service Stores, 125 N.W.2d 251 (Iowa 1963)
Schoenberger v. Zephyr Aluminum Products, 2023 WL 2908622 at 2 (Iowa Ct. App. 2023)
Staff Management v. Jimenez, 839 N.W.2d 640 (Iowa 2013)

AGENCY DECISIONS
Horne v. United Technologies, File No. 21005075.01, 2023 WL 1943590 (Arb. Feb. 3, 2023)
Kelly v. East Side Jersey Dairy and Second Injury Fund, File No. 1621904.01, 2023 WL 2531054 (App. Mar. 7, 2023)
Oppman v. Eaton Corp. and Second Injury Fund, File No. 1649999.01, 2023 WL 2969333 (App. Apr. 6, 2023)
Strable v. Second Injury Fund, File No. 1666216, 2022 WL 17490657

STATUTES
Iowa Code § 85.34
Iowa Code § 85.64

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.

Standard of Review

The Fund appears to concede that the Supreme Court evaluated the Agency's determination in Chavez v. MS Technology LLC for errors of law when the Court considered the proper component of Iowa Code § 85.34 to classify the claimant's injury. Appellee Brief at 20. The Fund dismissed this as involving a question of first impression and stated this is not a case of first impression. Appellee Brief at 21. That is not exactly true. Blacksmith v. All-American is the only Supreme Court decision which has contemplated whether a vascular injury results in a whole-body injury. As noted in earlier briefing, the Court of Appeals disagreed with the Agency's presumption that all DVT

(blood clot) injuries are body as a whole injuries while referencing Blacksmith; the Agency had solely relied on Blacksmith. Architectural Wall Systems v. Towers, 854 N.W.2d 74 slip op. at FN5 (Iowa Ct. App. 2014). The question in this litigation—whether a vascular injury which does not manifest outside a scheduled member must be a whole-body injury—has never been considered by the Supreme Court.

The Fund also mischaracterizes the standard of review utilized in Collins v. Dept. of Human Services. In Collins, the appellate court reversed the Agency by making a legal determination that Reflex Sympathetic Dystrophy (RSD) is a body-as-a-whole injury. Collins v. Dept. of Human Services, 529 N.W.2d 627 (Iowa Ct. App. 1995). Similarly, in Blake v. Second Injury Fund, the appellate court also reviewed the Agency decision for errors at law. Blake v. Second Injury Fund, 967 N.W.2d 221 (Table) (Iowa Ct. App. 2021), 2021 WL 4304274.

Argument

The Fund claims it agrees with the principle, "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" then proceeds to contradict itself. Appellee Brief at 23. The Fund accuses Delaney of "confusing the issue" by pointing out the fact that prior appellate cases on vascular injuries were injuries

which manifested in areas outside a scheduled member. Appellee Brief at 26-27. The Fund goes on to say there is no requirement that a vascular injury impact the body outside of a scheduled member to be regarded as a whole-body injury. Appellee Brief at 27. This well captures the inconsistency Delaney seeks to have addressed.

There is an inconsistency when an undisputed principle states, "it is the anatomical situs of the injury which determines . . . " but the Agency has held any vascular injury can be considered body-as-a-whole. There is an inconsistency when the Court of Appeals specifically declined to state all DVT injuries are "automatically or presumptively to the body as a whole."[1] Architectural Wall Systems v. Towers, 854 N.W.2d 74 slip op. at FN 5 (Iowa Ct. App. 2014).

There is also a contradiction when the Fund claims the Agency does not require an injury manifest or produce symptoms beyond a scheduled member to constitute a body-as-a-whole injury. Appellee Brief at 28. This is contradicted by Peterson v. Parker Hannifin, File No. 5043257, 2015 WL 5677077, at *2 (App. Dec. Sep. 24, 2015) (citing Blacksmith v. All-American, Inc., 290

[1] Again, contrary to individuals in Blacksmith and Architectural Wall Systems, Delaney does not suffer from DVT, does not suffer from a life-threatening condition and has not been placed on blood-thinning medication.

N.W.2d 348 (Iowa 1980)). This incorrect notion was also contradicted by Magana v. IBP, File No. 5043257, 1999 WL 1031284 at 3-4 (Arb. July 23, 1999) (citing Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980)). The Agency further stated, "the situs of the impairment is the anatomical location of the physical damage or derangement. It is not controlled by the impairment rating or activity restrictions." Kalkas v. Featherlite Manufacturing, File No. 5004767, 2005 WL 2438531 (App. Dec. Sept. 21, 2005). The Fund contradicts itself; the Fund claims to believe the anatomical situs controls except when it does not. Agency decisions which might legitimize the Fund's positions solely with respect to vascular injuries are inconsistent with appellate decisions and inconsistent with the overriding principle that the situs of the injury controls. Appellant contends such a principle presumably ought to consistently exist for all workers' compensation injuries.

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

Issue Preservation

The Fund appears to argue that Staff Management v. Jimenez has been limited by Schoenberger v. Zephyr Aluminum Products. The manner in which the Fund is attempting to utilize the Court of Appeals decision in Schoenberger

is entirely incompatible with the Supreme Court decision in Jimenez. The Fund argues that in workers' compensation proceedings an issue must be raised "at the earliest possible opportunity." Appellee Brief at 30, citing Schoenberger v. Zephyr Aluminum Products, 2023 WL 2908622 at 2 (Iowa Ct. App. 2023). First, the Schoenberger Court reversed and remanded the matter to the Agency for a determination on the merits, finding the claimant had made a sufficient argument before the deputy commissioner. Schoenberger, 2023 WL 1908622 at 3. However, the "earliest possible opportunity" aspect of Schoenbeger conflicts with Jimenez.

In Jimenez, the employer "raised the issue that Jimenez was an undocumented worker for the first time in its intraagency appeal." Staff Management v. Jimenez, 839 N.W.2d 640, 647 (Iowa 2013). The background facts stated, "On January 22, 2008, Staff Management terminated Jimenez. Jimenez's manager stated that Staff Management terminated Jimenez because she did not have authorization to work in the United States." Jimenez, 839 N.W.2d at 645. So, there can be no argument that the employer in Jimenez might have learned about the claimant's immigration status after the hearing before a deputy commissioner but before the intraagency appeal. The Jimenez Court was fully aware the employer could have raised the issue before the deputy commissioner but only raised the issue on intraagency appeal. Instead,

the issue was properly preserved as it was raised before the Agency and the opposing side had the opportunity to respond. Jimenez, 839 N.W.2d at 648.

Moreover, from a perspective, Appellant may have raised this issue even before the earliest opportunity. The Agency adopted precisely the position Appellant advocates on November 29, 2022. Strable v. Second Injury Fund, File No. 1666316, 2022 WL 17490657, at 7 (Iowa Workers' Comp. Com'n Nov. 29, 2022). Appellant first made this argument in this matter in an intraagency appeal brief April 7, 2022. App. 141. Stemming from the Strable decision in November 2022, any claimant in Appellant's situation ought to raise a legal argument based on Gregory v. Second Injury Fund as applied by Strable. On the other hand, given the change in Agency precedent stemming from Strable, it is illogical to dismiss Appellant's argument which is based, in part, on Strable when Strable had not been decided until November 2022.

Argument

The Fund argues the Agency has contradicted itself since issuing its decision in Strable v. Second Injury Fund. This is incorrect. In Kelly v. East Side Jersey Dairy, the claimant simply argued there was an injury which caused permanent impairment to both the upper extremity and the shoulder. Kelly v. East Side Jersey Dairy and Second Injury Fund, File No. 1621904.01, 2023 WL 2531054 (App. Mar. 7, 2023). There was no issue of a sequela nor any issue of

unenumerated body parts; the question simply concerned one injury to two different enumerated body parts under the schedule in Iowa Code § 85.34. Oppman v. Eaton Corp. is a case where a knee injury led to a finding of permanent, total disability. Oppman v. Eaton Corp. and Second Injury Fund, File No. 1649999.01, 2023 WL 2969333 (App. Apr. 6, 2023). Neither decision addresses either Strable v. SIF or Gregory v. Second Injury Fund. Additionally, in both cases the claimant had sought an industrial disability decision against the employer; in contrast, this Appellant is seeking an industrial disability determination against the Fund based on the combination of a 1986 left leg injury and a 2019 right leg injury.

On the other hand, a recent decision in Horne v. United Technologies Corp. demonstrated that the claimant is entitled to recover against the Fund even when the new work injury could be regarded as unscheduled. Horne v. United Technologies, File No. 21005075.01, 2023 WL 1943590 (Arb. Feb. 3, 2023). The claimant suffered permanent impairment to both the right arm and right shoulder; however, the Claimant was permitted to bring the combination of a prior right leg injury with the new right arm injury to recover against the Fund. Id. at *18-20.

Appellant previously articulated that there is no concern for a double recovery more than satisfying the standard set in Gregory. Appellant Proof

Brief at 27; Gregory, 777 N.W.2d at 400. The Fund is incorrect in its assertion Appellant was compensated for industrial disability by the employer. Appellant has merely been compensated for her functional loss. "Disability * * * as defined by the Compensation Act means industrial disability, although functional disability is an element to be considered . . . . In determining industrial disability, consideration may be given to the injured employee's age, education, qualifications, experience and his inability, because of the injury, to engage in employment for which he is fitted." Olson v. Goodyear Service Stores, 125 N.W.2d 251, 257 (Iowa 1963). Appellant's receipt of 40 percent permanent partial disability of a lower extremity stemming from the 2019 work injury compensated her for her functional loss, not for industrial disability.

Instead, Appellant had made the determination it was the combination of both her 1986 and 2019 injuries which better reflected her loss of earnings capacity, or industrial disability. The Fund takes the position that the combination of the right leg injury and resulting mild lymphedema is the only manner in which Appellant is entitled to have her injuries assessed industrially. It is undisputed that in 1986 Appellant suffered a trimalleolar fracture to the left ankle resulting in reduced range of motion and permanent impairment. App. 4. The Fund takes the position that whatever negative impact on capacity to earn a living this 1986 injury may have had on Appellant, it is irrelevant and may not

be considered. As articulated in prior briefing and utilizing the holdings of Gregory v. Second Injury Fund and Strable v. Second Injury Fund, Appellant does not agree with the Fund's position. At its root, this dispute centers on the decision Appellant made to pursue a claim for industrial disability—from the Fund—stemming from the combination of a preexisting left leg injury combined with a new right leg injury. "The Fund was created in order to provide additional compensation to a narrow class of injured workers who have sustained industrial disability due to the combined effect of two separate and distinct scheduled member injuries." Appellee Brief at 45-46. Appellant's injuries are perfectly in line with the purpose of the Second Injury Fund.

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.

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 Reply 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 1,908 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Linda J. Dean — Signature

5/26/23 — Date