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

APPELLANT'S RESISTANCE TO APPLICATION FOR FURTHER REVIEW

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GROUNDS FOR FURTHER REVIEW

The Second Injury Fund recognizes the Supreme Court's prior holding and analysis in *Gregory v. Second Injury Fund* was a significant change in Iowa law as it relates to the Fund. 777 N.W.2d 395 (Iowa 2010). A logical reading of *Gregory*, combined with the reasoning of *Second Injury Fund v. George* expressly utilized by the *Gregory* Court, and a plain reading of the underlying statutory language in § 85.64, provide a firm basis for the decision by the Court of Appeals which needs no further review by the Supreme Court.

STATEMENT OF FACTS

The Court of Appeals decision and the Fund's Application for Further Review state most of the relevant facts. Additionally, in 1986 Dee Delaney suffered a left ankle trimalleolar fracture which necessitated casting for eight months and then a walking boot. App. at 38. This injury led to degenerative arthritis, pain and stiffness in the left ankle up to present day. *Id.* She uses a brace for walking on the left and a shoe insert. *Id.*

Subsequent to the 2019 work injury and total right knee replacement, Delaney experienced some right leg swelling below the knee which was treated with compression socks. App. at 107. The UIHC physician

characterized Delaney's care stating, "this is first-line treatment and we do not recommend any further treatment." *Id.*

ARGUMENT

I. The Court of Appeals Correctly Applied Supreme Court Precedent in Allowing Delaney to Bring Her § 85.64 Claim.

A. The Court of Appeals Correctly Characterized Delaney as Suffering a Leg Injury, and its Ruling Harmonizes Relevant Cases.

Delaney strongly contests the Agency and district court finding, left unresolved by the Court of Appeals, that the 2019 work injury is an unscheduled injury rather than a leg injury. There is an inconsistency between the manner in which the Agency regards vascular injuries – lymphedema in this case – and the Appellate Courts. The Agency appears to regard any vascular injury as unscheduled, while the Court of Appeals specifically declined to do so even when an individual suffered from deep vein thrombosis. *Architectural Wall Systems v. Towers*, 854 N.W.2d 74 slip op. at FN 5 (Iowa Ct. App. 2014).

Moreover, the Agency's treatment of vascular injuries is inconsistent with the principle that it is the anatomical situs of the injury which should control. *Linden v. Tyson Foods, Inc*., 856 N.W.2d 383 (Iowa App. 2014). There is no allegation that Dee Delaney experiences any symptoms or received treatment outside of the right leg.

The Agency's treatment of vascular injuries is also inconsistent with its treatment of injuries to other systems of the body. Injuries to the nervous system require some finding the injured worker is impacted outside of the scheduled member. *Second Injury Fund v. Armstrong*, 801 N.W.2d 628 slip op. at 4 (Iowa Ct. App. 2011). Injuries to the skin, confined to the scheduled member, are scheduled member injuries. *Dikutole v. Tyson Foods*, 2018 WL 2383236 at 13, File No. 5054404 (App. Dec. May 11, 2018). Delaney simply does not see, and no rationale has been articulated, as to why injuries to the vascular system are treated differently from injuries to the nervous or integumentary systems. In this situation where a vascular injury has resulted in minimal treatment – compression stockings and foot elevation – the Fund and the Agency cannot offer a logical basis for categorizing Delaney's injury as unscheduled, rather than an injury to the leg.

Turning to the Fund's second argument, the Court of Appeals correctly interpreted and utilized *Second Injury Fund v. George*. The *George* Court found "a plain reading of the statute requires us to interpret the phrase 'which has resulted in the loss or loss of use of another member or organ' to mean the loss to another such member regardless if the second loss includes other injuries." *Second Injury Fund v. George*, 737, N.W.2d 141, 147 (Iowa 2007). *George* clearly articulates that for § 85.64 liability

purposes it is appropriate to apportion aspects of the current work injury as the Court of Appeals has endorsed in this case.

The Court of Appeals did not err in misconstruing Supreme Court case law. *Second Injury Fund v. Nelson* and *Gregory v. Second Injury Fund* can be harmonized without difficulty. In *Nelson*, the worker suffered a rotator cuff injury with the employer. *Second Injury Fund v. Nelson*, 544, N.W.2d 258, 262 (Iowa 1995). There was no injury in the record to the arm other than the rotator cuff tear. Prior to 2017, at the time of *Nelson*, an arm was considered a scheduled member injury, and the present § 85.34(2)(n) had not yet been created. IOWA CODE § 85.34(2) (2015). Accordingly, the *Nelson* Court stated "we have previously held that an injury to a joint such as a . . . shoulder should be treated as an injury to the body as a whole, not as a scheduled injury." *Nelson*, 544 N.W.2d at 269. The Court then concluded that as *Nelson* did not have a scheduled injury, but rather an unscheduled injury, there was no § 85.64 liability. *Id.* at 270.

Fifteen years later in *Gregory*, the Second Injury Fund, as today, argued § 85.64 should constitute a "narrow" regime for providing benefits to injured workers. *Gregory v. Second Injury Fund*, 777 N.W.2d 395, 400 (Iowa 2010). The Court respected the "choice of a comparatively narrow statute" as "Gregory's left hand qualifies as a first injury only because it was

situated in an enumerated member and was not confined to an unenumerated part of the body." *Id.* at 401. Had *Nelson* brought his claim with a rotator cuff tear as an alleged first qualifying injury, the *Gregory* Court would have ruled against him because the shoulder is not an enumerated member under § 85.64. However, by using the words contained in a statute, § 85.64, "in their ordinary and usual sense with the meaning commonly attributed to them," the *Gregory* Court acknowledged that the injured worker's hand injury was a hand within the meaning of § 85.64.

As applied to Dee Delaney, it is undisputed she suffered a 2019 work injury which led to a total right knee replacement. Fund Brief at 9. The Fund argues that an injury to a knee necessitating total knee replacement does not constitute "loss of use of another such member [leg]." IOWA CODE § 85.64 (2023). The Fund's position is incompatible with a plain reading of § 85.64. Moreover, there is no inconsistency with *Nelson* as Delaney has an injury to an enumerated member even if it can be said the post-surgical lymphedema later emerged as a vascular injury in addition to a leg injury.

Finally, the Fund seeks to construe or limit *Gregory* and *George* in a slanted manner. The Fund repeatedly attempts to characterize the *Gregory* Court as limiting its analysis and holding to a first qualifying injury under § 85.64. A more accurate characterization of the *Gregory* ruling is the Court

used language which was descriptive and stemmed from the particular facts of that case. Just because the *Gregory* Court accurately described *Gregory* as bringing a first qualifying injury which included both an enumerated member and unscheduled injuries, it does not mean the Court was implicitly stating its analysis and holding would be different if Gregory's injury in dispute was a second qualifying injury.

Also, the Fund seems to want to minimize the relationship between the opinions in *Gregory* and *George*. In fact, *Gregory* states *George* "is instructive." *Gregory*, 777 N.W.2d at 399. It goes on to say, "Although *George* interpreted only that part of section 85.64 which addresses the second qualifying injury, we believe its reasoning is relevant here." *Id.* at 400.

Thus, when the Fund attempts to inflate an allegedly important distinction between *Gregory* having suffered a first qualifying injury which extended from an enumerated member to unenumerated body parts, whereas Delaney suffered a second qualifying injury which arguably extended to unenumerated body parts, a fair reading of these two cases sees this as a distinction without much of a difference. Again, *Gregory* notes the reasoning of *George* pertains to a second qualifying injury and then explicitly says the reasoning of *George* is relevant to a first qualifying

injury. *Id.* How is it that Supreme Court reasoning on Iowa Code § 85.64 applied to a second qualifying injury is relevant to a first qualifying injury, but then not again relevant to a second qualifying injury?

B. The Purpose of the Second Injury Fund is Promoted by the Court of Appeals Decision, and Concerns for Double Recovery are Unfounded.

The Court of Appeals decision is perfectly in line with the purpose of the Second Injury Fund. The Fund was created in the wake of World War II to incentivize employers to hire people with a pre-existing impairment. *Gregory*, 777 N.W.2d at 398 (internal citations omitted). It does this "by making the current employer responsible only for the disability the current employer causes." *Second Injury Fund v. Shank*, 516 N.W.2d 808, 812 (Iowa 1994). This dovetails with § 85.34(7) which states, "an employer is not liable for compensating an employee's preexisting disability that arose… from causes unrelated to employment." IOWA CODE §85.34(7) (2023). The employer compensated Delaney, in a settlement, for the loss of 40 percent of her right leg. App. at 43. To the extent that the combination of the 2019 right leg injury and a 1986 left leg injury reduce Delaney's earnings capacity, the purpose of the Fund has been to relieve the employer of the entirety of that liability.

There is no concern for alleged double recovery. Delaney has been compensated by the employer on a scheduled member basis, not an

industrial disability basis. App. at 43. § 85.64 limits the Fund's liability to "the remainder of such compensation as would be payable for the degree of permanent disability . . . ." IOWA CODE § 85.64 (2023). In other words, as the employer paid 40 percent permanent impairment of a leg to Delaney in a settlement, the Fund gets a credit for that amount. The hypotheticals over which the Fund expresses concern are not present in these facts.

However, the concern for double recovery expressed by the Fund is far less than the potential for double recovery endorsed by the Court in *Gregory*. In *Gregory*, a 2000 injury resulted in injuries to the hand, arm, and shoulder and surgeries to both distal clavicles. *Gregory*, 777 N.W.2d at 396. The *Gregory* claimant was free to bring this claim for industrial disability against the employer stemming from the 2000 injury and also bring a claim for industrial disability pursuant to § 85.64 after a 2002 injury utilizing an aspect of the 2000 injury as a first qualifying injury. *Id. at* 397. Dee Delaney is merely seeking to have the combination of her injuries assessed on the basis of industrial disability once, whereas the *Gregory* claimant was allowed to have different combinations of disabilities assessed industrially twice.

The Fund does not articulate how it envisions this alleged double recovery taking place in practice. Without a prior opportunity at an

industrial disability recovery here, as it is undisputed the first qualifying injury from 1986 was confined to the scheduled member, the industrial disability recovery could only come from the new injury before the Agency. Does the Fund envision the Agency will in the same contested case, simultaneously make an industrial disability award against an employer and the Fund? That seems like an untenable outcome. Even if there were concerns about that potential outcome, the Court is perfectly free to rule that no single contested case may result in industrial disability liability to both an employer and the Fund.

Perhaps the Fund is worried there could be a double recovery if an injured worker settles with an employer on a whole body or industrial basis, but then goes to hearing against the Fund seeking a different industrial disability award. Again, these are not the facts of this case. However, the solution to this concern seems easy and apparent. Where a claimant and an employer enter into a settlement in which the parties restrict the recovery to partial permanent disability for a scheduled member, the claimant can bring a claim for § 85.64 benefits against the Fund. App. at 43. If the injured worker and employer enter into a settlement agreement pursuant to § 85.34(2)(v), unscheduled injury, the claimant cannot simultaneously seek § 85.64 benefits against the Fund. In short, nothing in the Court of Appeals

decision prevents the Agency or reviewing courts from conducting a comprehensive analysis of how an injury, or combination of injuries, have been compensated in the past or contemporaneously, and whether the § 85.64 benefits sought from the Fund constitute some type of illegitimate double recovery.

C. Delaney Also Asked the Court of Appeals to Find the 2019 Work Injury to Constitute a Scheduled Member Injury.

Delaney agrees with the Fund that the Court of Appeals failed to address whether the 2019 right leg injury was transformed into an unscheduled injury by the post-surgical lymphedema.

D. Delaney Preserved Error.

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 Delaney has done all that is necessary to preserve this issue on appeal.

CONCLUSION

Dee Delaney respectfully requests the Court deny further review or, in the alternative, affirm the Court of Appeals.

Respectfully submitted,

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PROOF OF SERVICE AND CERTIFICATE OF FILING

I certify that on November 21, 2023, I served this document on all other parties to this appeal electronically by EDMS to the following attorney of record:

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I further certify that on November 21, 2023, I have electronically filed this document with the Clerk of the Supreme Court, 1111 East Court Avenue, Des Moines, IA 50319.

/s/ Linda J. Dean

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