

**IN THE SUPREME COURT OF IOWA**

**Appeal No. 24-0056**

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**SECOND INJURY FUND OF IOWA,**  
Petitioner-Appellee,

**-v-**

**REGENA STRABLE,**  
Respondent-Appellant.

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**ON APPEAL FROM THE IOWA DISTRICT COURT  
IN AND FOR POLK COUNTY**

**HONORABLE ROBERT B. HANSON, PRESIDING**

**LAW NO. CVCV064995**

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**APPELLANT'S FINAL BRIEF AND  
REQUEST FOR ORAL ARGUMENT**

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## CERTIFICATE OF FILING/SERVICE

I, Gregory M. Taylor, attorney for the Appellant, certify that a true and accurate copy of this instrument has been and will be filed electronically with the Clerk of the Iowa Supreme Court and forwarded to all counsel via the electronic filing system on this 19<sup>th</sup> of April, 2024, and by U.S. Mail for any party not registered to receive notice of filings via the ECF process.

By: /s/ Gregory M. Taylor  
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**STATEMENT OF THE ISSUES**

**A. THE COMMISSIONER CORRECTLY INTERPRETED IOWA CODE SECTION 85.64 IN CONCLUDING THAT STRABLE SUSTAINED A QUALIFYING SECOND LOSS**

Cases

*Blake v. Second Injury Fund of Iowa*, 967 N.W.2d 221 (Iowa Ct. App. 2021)

*Delaney v. Second Injury Fund of Iowa*, 998 N.W.2d 194, 2023 Iowa App. LEXIS 838 (Iowa Ct. App. 2023)

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Statutes

Iowa Code § 85.34

Iowa Code § 85.64

## ROUTING STATEMENT

This case should be transferred to the Iowa Court of Appeals under Iowa R. App. P. 6.1101(3) because whether the Workers' Compensation Commissioner correctly interpreted Iowa Code section 85.64 and Iowa Supreme Court precedent involves the application of existing legal principles.

In the final agency decision, the Commissioner ordered the Second Injury Fund of Iowa to pay Regena Strable workers' compensation benefits because her work injury on April 25, 2019 to her left ankle qualified as a second injury under Iowa Code section 85.64. (App. 31). The Commissioner concluded that whether the ankle injury was also a spill-over injury into other parts of her body was irrelevant so long as Strable suffered a permanent disability to an enumerated body part of section 85.64. *Id.*

The District Court reversed, holding that the Commissioner misinterpreted section 85.64 by concluding that an unscheduled injury under section 85.34(2) could trigger Fund liability under section 85.64. (App. 45). In doing so, the District Court misinterpreted the holding in *Second Injury Fund v. Nelson*, 544 N.W.2d 258 (Iowa 1995) and failed to follow Iowa Supreme Court precedent in *Second Injury Fund v. George*, 737 N.W.2d 141 (Iowa 2007) and *Gregory v. Second Injury Fund*, 777 N.W.2d 395 (Iowa 2010). Furthermore, the Iowa Court of Appeals recently addressed this very

issue and held that section 85.64 does not require the second injury to be a scheduled injury to invoke Fund liability. *Delaney v. Second Injury Fund of Iowa*, 998 N.W.2d 194, 2023 Iowa App. LEXIS 838 (Iowa Ct. App. Oct. 25, 2023) (Table). Rather, *Delaney* held that an unscheduled injury can qualify as a second loss under section 85.64, and the District Court’s conclusion otherwise was an erroneous interpretation of the law.

Because this issue can be resolved by the application of existing legal principles and case authority, Appellant believes a transfer to the Court of Appeals is appropriate.

### **STATEMENT OF THE CASE**

This is an appeal from a judicial review decision of a workers’ compensation case. On April 26, 2021, Respondent-Appellant (hereinafter “Strable”) filed a petition for arbitration seeking workers’ compensation benefits from Altoona Nursing & Rehabilitation Center (hereinafter “Altoona Nursing”) as a result of a work injury to her left lower extremity and body as a whole on April 25, 2019. (App. 5). In the petition, Strable also sought workers’ compensation benefits from the Second Injury Fund of Iowa (hereinafter “the Fund”) for a first qualifying injury in 2009. *Id.* Before the arbitration hearing, Strable settled her case against Altoona Nursing, so her claim proceeded to hearing against the Fund only. (App. 125-129).

In the arbitration decision, Deputy Commissioner William Grell concluded that because Strable's injury on April 25, 2019 also caused sequelae, or spill-over, injuries to her back and mental health, her injury was an unscheduled injury under section 85.34(2), and as an unscheduled injury, it could not trigger Fund benefits under section 85.64. (App. 22). In doing so, Deputy Grell acknowledged that his conclusion was contrary to *Gregory v. Second Injury Fund of Iowa*, 777 N.W.2d 395 (Iowa 2010), yet he believed a results-oriented decision was necessary to avoid a double recovery. *Id.*

The Workers' Compensation Commissioner reversed. (App. 31). The Commissioner analyzed the *George* and *Gregory* decisions and concluded that these cases required a finding that Strable's injury in April 2019 was a second qualifying loss under section 85.64. *Id.* The Commissioner determined Strable's permanent disability caused by the cumulative effects of her first and second qualifying injuries was 70 percent (350 weeks). (App. 33). He calculated the Fund's credit at 112.4 weeks, which was the sum of Strable's functional ratings to her 2009 upper extremity injury (20 weeks) and 2019 left leg injury (92.4 weeks). (App. 33-34). Accordingly, the Commissioner awarded Strable 237.6 weeks of permanent partial disability benefits from the Fund (350 weeks minus 112.4 weeks). (App. 34).



The Fund filed a Petition for Judicial Review on January 25, 2023. (App. 36-38). On October 18, 2023, the Honorable Judge Robert B. Hanson reversed the decision of the Commissioner, holding that an unscheduled injury can never be a second qualifying injury under section 85.64. (App. 46). On October 26, 2023, Strable filed a Rule 1.904(2) Motion to Reconsider and Amend Ruling, in part based on a recent decision by the Iowa Court of Appeals (*Delaney v. Second Injury Fund of Iowa*, No. 23-0182 (Iowa Ct. App. Oct. 25, 2023)) which held that, pursuant to *George and Gregory*, an unscheduled injury can be a second qualifying injury under section 85.64. (App. 49-52). On December 28, 2023, Judge Hanson denied Strable's motion. (App. 60-61). Strable filed a Notice of Appeal on January 11, 2024. (App. 62-63).

### **STATEMENT OF THE FACTS**

In 2009, Strable was diagnosed with bilateral carpal tunnel syndrome. (App. 92). Ultimately, her symptoms necessitated right carpal tunnel surgery in September 2009 and left carpal tunnel surgery in October 2009. (App. 93). Strable's evaluating expert in 2020, Dr. Sunil Bansal, opined that Strable's 2009 injury required permanent work restrictions of no lifting over 10 pounds with either hand, avoid frequent gripping with either hand, and avoid repetitive keyboarding. (App. 94). Dr. Bansal assigned permanent impairment

of 4 percent to the left upper extremity and 4 percent to the right upper extremity, for a combined rating of 4 percent to the whole person. *Id.* At arbitration, the parties stipulated that Strable sustained a first qualifying injury to her bilateral upper extremities on September 1, 2009, and that her functional loss for her first qualifying injury was 4 percent to the whole person, or 20 weeks (4 percent x 500 weeks = 20 weeks). (App. 9-13).

On April 25, 2019, Strable suffered a work-related injury to her left ankle at Altoona Nursing when she twisted, heard a pop in her ankle, and fell to the floor. (App. 83). An MRI on May 1, 2019 revealed an anterior talofibular ligament rupture, a partial sprain to the deltoid ligament, and bone marrow edema consistent with a bone contusion. (Ex. JE 1, p. 1). On June 21, 2019, Dr. Bryan Trout performed surgery on Strable's ankle consisting of a left ankle arthroscopy with synovectomy and debridement, debridement and repair of the peroneal tendon, and a lateral ankle stabilization. (App. 82). On March 17, 2020, Dr. Trout placed Strable at maximum medical improvement and referred her for a functional capacity evaluation ("FCE") to determine permanent restrictions. (App. 81). The results of the FCE indicated that Strable could only work part-time in a sedentary duty position. (App. 82). On April 14, 2020, Dr. Trout assigned permanent work restrictions of sedentary duty, part-time only. (App. 82; App. 99). Dr. Trout assigned permanent

impairment of 34 percent to the lower extremity based on the *AMA Guides to the Evaluation of Permanent Impairment*, Fifth edition. (App. 81).

On July 29, 2020, Dr. Bansal evaluated Strable for an independent medical examination pursuant to Iowa Code section 85.39(2). (App. 77). Dr. Bansal assigned 42 percent impairment to the lower extremity for the ankle injury. (App. 88). Dr. Bansal agreed that Strable's permanent restrictions should be sedentary duty, part-time only. (App. 89).

Before the arbitration hearing, Strable and Altoona Nursing entered into a settlement agreement for the April 2019 work injury. (App. 125). The parties settled the case for 34 percent to the left lower extremity (i.e., Dr. Trout's impairment rating) on a full commutation settlement agreement. *Id.* The parties also entered into a contested case settlement for Strable's allegations of a spill-over injury to her back, hip, and mental health. (App. 120). The parties used a date of injury of May 15, 2019 for the contested case settlement because May 15, 2019 was the date Strable believed she was terminated from Altoona Nursing, and she claimed that her termination had caused her severe emotional distress. (App. 157-159 (Tr. p. 73, Ll. 8-19; Tr. p. 74, Ll. 13-25; Tr. p. 75, Ll. 1-8)). The settlement specifically identified that "causation" was a disputed issue, that "Defendants deny Claimant sustained an injury arising out of [and in] the course and scope of her employment," that "the causal

relationship between the medical problem and the employment is disputed by credible medical evidence,” and that “[n]o payments herein shall be construed as payment of benefits under the Iowa Workers’ Compensation law.” (App. 120-123). Both settlements were approved by the Commissioner. (App. 124; App. 129).

## ARGUMENT

### **I. THE COMMISSIONER CORRECTLY INTERPRETED IOWA CODE SECTION 85.64 IN CONCLUDING THAT STRABLE SUSTAINED A QUALIFYING SECOND LOSS**

#### **A. Standard of Review**

This Court reviews decisions of the Workers’ Compensation Commissioner according to Iowa Code Chapter 17A of the Iowa Administrative Procedure Act. *Swiss Colony, Inc. v. Deutmeyer*, 789 N.W.2d 129, 133 (Iowa 2010). If the error is one of fact, this Court must determine whether the Commissioner’s findings are supported by substantial evidence. *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 219 (Iowa 2006). If the error is one of interpretation of law, this Court must determine whether the Commissioner’s interpretation is erroneous, and if so, the Court substitutes its judgment for that of the Commissioner. *Id.* If “the claim of error lies with the ultimate conclusion reached, 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.” *Id.*

The issue on appeal is whether the Commissioner erroneously interpreted Iowa Code section 85.64 in light of the Iowa Supreme Court’s holdings in *Gregory* and *George*. Accordingly, the challenge on appeal is for errors of law. When “the claim of error lies with the agency’s interpretation of the law, the question on review is whether the agency’s interpretation was erroneous, and [the reviewing court] may substitute [its] interpretation for the agency’s.” *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 2019 (Iowa 2006) (emphasis omitted).

### **B. Preservation of Error**

This issue was raised before Deputy Grell (App. 18), the Workers’ Compensation Commissioner (App. 25), and Judge Hanson (App. 42), and has been preserved for this Court’s review.

### **C. Argument**

The Commissioner correctly interpreted and applied Iowa Code section 85.64 in awarding Second Injury Fund benefits to Strable. According to the Fund and District Court, an unscheduled injury under section 85.34(2) can never be a second qualifying injury under Iowa Code section 85.64. This is a misstatement of the law.

To better understand the Commissioner’s decision and the parties’ positions, it is worthwhile to briefly discuss the Iowa Code and caselaw relative to how injuries are categorized and compensated under Chapter 85. Under *Iowa Code section 85.34*, there are two types of losses: “scheduled” and “unscheduled.” *Mortimer v. Fruehauf Corp.*, 502 N.W.2d 12, 15 (Iowa 1993). Scheduled losses are injuries to body parts identified in paragraphs (a) through (u) of section 85.34(2). Iowa Code § 85.34(2). Compensation for scheduled losses is determined by multiplying the employee’s functional impairment rating by the number of weeks on the “schedule” for that body part in sections 85.34(2)(a)-(u). Iowa Code § 85.34(2); *Second Injury Fund v. Shank*, 516 N.W.2d 808, 813 (Iowa 1994). Unscheduled losses, or injuries to the body as a whole, do not simply award compensation based on the functional impairment rating. *Id.* Instead, unscheduled losses measure the extent to which the injury has reduced the employee’s earning capacity. Iowa Code § 85.34(2)(v). Compensation for unscheduled injuries considers a number of factors, including but not limited to the employee’s “age, education, qualifications, experience, and the ability of the employee to engage in employment for which the employee is fitted.” *Second Injury Fund v. Shank*, 516 N.W.2d 808, 813 (Iowa 1994).

Under *Iowa Code section 85.64*, an entirely different classification is used to determine first and second injuries for purposes of Fund benefits. For Iowa Code section 85.64 to trigger Fund benefits, the employee need only establish that (1) she has previously lost, or lost the use of, one hand, one arm, one foot, one leg, or one eye (i.e., a first qualifying loss); (2) she sustained the loss, or loss of use of, another such member or organ through a compensable work-related injury (i.e., a second qualifying loss); and (3) she has sustained some permanent disability from the two injuries. *Second Injury Fund v. George*, 737 N.W.2d 141, 146 (Iowa 2007). Whether the first or second injuries were scheduled or unscheduled injuries is irrelevant. This was the holding in a very recent Iowa Court of Appeals decision, *Delaney v. Second Injury Fund of Iowa*, 998 N.W.2d 194, 2023 Iowa App. LEXIS 838 (Iowa Ct. App. Oct. 25, 2023) (Table), which is discussed in detail below.

The Fund and the District Court believe that if a loss is unscheduled under section 85.34(2), the loss cannot qualify as a second injury under section 85.64. This is not supported by the plain language of the statutes. The classification system for employer liability under section 85.34(2) is an entirely different and distinct classification system for Fund liability under section 85.64. Section 85.34(2) refers to thumbs, fingers, toes, hands, two-thirds of an arm between the shoulder joint and elbow joint, shoulders, feet,

two-thirds of a leg between the hip joint and knee joint, an eye, and hearing. Iowa Code § 85.34(2)(a)-(s). In contrast, section 85.64 refers to a hand, a foot, a leg, and an eye. Iowa Code § 85.64(1). The statutes refer to different body parts and compensate different disabilities. More importantly, the Fund's position is contrary to the holdings and rationale of *Second Injury Fund v. George*, 737 N.W.2d 141 (Iowa 2007) and *Gregory v. Second Injury Fund*, 777 N.W.2d 395 (Iowa 2010).

**1. *George* and *Gregory* do not require the injury to be a scheduled member injury to invoke Fund liability.**

In *George*, the claimant had a first qualifying injury to her left leg on May 3, 1996 and a second qualifying injury to both legs on June 21, 2000. *Id.* at 143-145. The Supreme Court held that even though the second injury involved more than one enumerated body part, it still qualified as a second injury under section 85.64:

A plain reading of the statute requires us to interpret the phrase “which has resulted in the loss of or loss of use of another such member or organ” to mean a loss to another such member ***regardless if the second loss includes other injuries***. This interpretation furthers the statute's legislative intent by imposing liability on the current employer only for the degree of disability caused by the current loss, and if the employee has previously been disabled, shifting the remaining liability for any remaining compensable disability to the Second Injury Fund.

*Id.* at 147 (emphasis added). The Court agreed with the Commissioner's conclusion that the bilateral nature of the second injury did not disqualify it



as a second loss under section 85.64 because “[i]n the present injury [George]’s right leg was also damaged and constitutes a qualifying loss.” *Id.* at 145, 147.

Three years later, the Court further clarified the contours of section 85.64 in *Gregory v. Second Injury Fund*, 777 N.W.2d 395 (Iowa 2010). There, the claimant sustained an unscheduled first injury in 2000 to four different body parts—both arms and both shoulders. *Id.* at 396. The claimant was assigned permanent impairment ratings of 2 percent to the left hand, 6 percent to the right hand, 10 percent to the right upper extremity, and 10 percent to the left upper extremity. *Id.* Then, the claimant sustained a second loss to her right foot in 2002. *Id.* She filed a petition against her employer and the Fund, asserting that her left arm disability from 2000 could qualify as a first injury under section 85.64 even though her first injury in 2000 was compensated under section 85.34(2) as an unscheduled injury. *Id.* at 397. The Commissioner denied her claim against the Fund, reasoning that because the first injury was an unscheduled injury under then-section 85.34(2)(u), it could not be a qualifying injury under section 85.64. *Id.*

The Iowa Supreme Court reversed. *Id.* at 401. The Court held that to be a qualifying loss under section 85.64, the loss did not have to be confined to an enumerated body part. *Id.* at 399. Pursuant to *Gregory*, as long as an

enumerated body part sustained a permanent disability in the injury, the loss qualified under section 85.64, even if other body parts were also injured in the same incident. *Id.* Except for the requirement that the second loss be compensable, the Court saw no reason for the first and second injuries to be treated any differently:

Although *George* interpreted only that part of section 85.64 which addresses the second qualifying injury, we believe its reasoning is relevant here. Liability of the Fund under 85.64 expressly turns on the *part(s) of the body* permanently injured in successive injuries. The focus of our analysis must therefore be on whether Gregory sustained a partial permanent loss of at least two enumerated members in successive injuries. She clearly did. Given our decision in *George* that a subsequent injury to an enumerated member is not disqualified as a second injury merely because it occurred simultaneously with an injury to another enumerated member, we believe it would be senselessly inconsistent to conclude a first qualifying injury cannot likewise occur simultaneously with an injury to another such member.

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).<sup>1</sup> The plain language of section 85.64 does not support the Fund's contention that it is significant to the determination of whether the 2000 injury is a first qualifying loss that *compensation* was calculated under "the schedule" found in Iowa Code section 85.34(2)(a)-(t), rather than under section 85.34(2)(u) as one of the factors bearing upon the nature and extent of an injured worker's industrial disability. Just as a first qualifying injury need not be a work-related injury, the method of calculating compensation for a first qualifying injury cannot be controlling on this issue.

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<sup>1</sup> Now Iowa Code section 85.34(2)(v).

*Id.* at 399-400 (emphasis in original). The Court said that to hold otherwise would be unfaithful “to the well-established principle that chapter 85 is to be liberally construed in favor of the injured employee.” *Id.* at 401. The Fund’s position “favor[ed] claimants with fewer previously disabled body parts over claimants with a more complex array of disabilities. Our rejection of the Fund’s interpretation conforms to our understanding that the General Assembly did not intend to disadvantage claimants with histories of more complex combinations of enumerated and unenumerated member injuries.” *Id.*

Here, the Commissioner correctly interpreted the Court’s holdings in *Gregory* and *George* in its award of benefits to Strable. The Commissioner interpreted *Gregory* as “instruct[ing] the agency to look at whether the alleged first qualifying injury caused an injury to an enumerated member (a hand, arm, foot, leg, or eye) 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.” (App. 31). “The fact that [Strable] also sustained permanent back and mental health injuries, unenumerated members, is of no consequence to her entitlement to Fund benefits under *Gregory*. [Strable] has established she sustained a first

qualifying loss and a second qualifying loss. Recovery against the Fund is limited to the two scheduled members, the 2009 upper extremity injury, and the 2019 left lower extremity injury.” *Id.*

The Fund has attempted to distinguish *Gregory* by arguing that its holding is limited to first injuries and does not extend to second injuries. However, the Court in *Gregory* described it as “senselessly inconsistent” to differentiate what is and is not a qualifying injury based on the injury’s order of occurrence. *Gregory*, 777 N.W.2d at 400. The only difference between the analysis of first and second qualifying injuries is that second injuries must be work-related. Otherwise, first and second injuries are determined the same way.

The parties have stipulated that Strable sustained a first qualifying injury to her bilateral upper extremities on September 1, 2019 with a total impairment rating of 4 percent to the whole person. (App. 9-13). The evidence is also clear that Strable sustained a second qualifying injury to her left ankle on April 25, 2019 while working at Altoona Nursing. Her ankle injury was permanent and compensable. Her permanent impairment for her ankle injury is discrete and identifiable. That Strable may have also sustained spill-over injuries to her back and/or mental health is irrelevant. According to *Gregory*, the plain language of section 85.64 does not require the injury to be a

scheduled member injury so long as it specifically involves a permanent disability to an enumerated body part.

**2. The Iowa Court of Appeals recently came to the same conclusion as the Commissioner in its interpretation of this very issue.**

Further evidence that the Commissioner did not misinterpret Iowa Code section 85.64 is the fact that the Iowa Court of Appeals was recently presented with this very issue and interpreted section 85.64 in the same manner as the Commissioner did here. In *Delaney*, the claimant sustained a first qualifying injury to her left leg in 1986 that resulted in 11 percent lower extremity impairment. *Delaney v. Second Injury Fund of Iowa*, 998 N.W.2d 194, 2023 Iowa App. LEXIS 838, at \*2-4 (Iowa Ct. App. Oct. 25, 2023) (Table). In 2019, the claimant sustained an unscheduled injury to her right leg and body as a whole. *Id.* at \*5. Her injury was unscheduled because she sustained a sequela, or spill-over, injury after developing lymphedema due to a complication from knee surgery. *Id.* at \*5. She was assigned 37 percent lower extremity impairment for her knee surgery and 3 percent whole person impairment for her lymphedema. *Id.* at \*2-4. The claimant settled her workers' compensation claim with her employer for 40 percent impairment to the right leg and sought an award of industrial disability from the Fund for her combined injuries to her left leg in 1986 and her right leg in 2019. *Id.* at \*4.

Like here, the Fund argued that the injury in 2019 could not be a qualifying injury which triggered Fund benefits under section 85.64 because it was an unscheduled injury under section 85.34(2). *Id.* at \*5. The Iowa Court of Appeals disagreed. *Id.* at \*5-7. The Court of Appeals held that nothing in section 85.64 requires the second injury to be limited to an enumerated body part. *Id.* at \*5. The Court noted, “A plain reading of [section 85.64] requires us to interpret the phrase ‘which has resulted in the loss of or loss of use of another such member or organ’ to mean a loss to another such member regardless if the second loss includes other injuries.” *Id.* at \*6-7 (citing *Second Injury Fund v. George*, 737 N.W.2d 141, 147 (Iowa 2007) (emphasis omitted)). The Court observed that their holding was supported by *Gregory v. Second Injury Fund*, 777 N.W.2d 395 (Iowa 2010), and that although *Gregory* involved a first qualifying injury and *George* involved a second qualifying injury, the reasoning of *George* was relevant to the reasoning of *Gregory*. *Id.* at \*7. The focus of the analysis is on whether the employee sustained a permanent loss of at least two enumerated members in successive injuries. *Id.* at \*7. The focus is not on whether either injury was unscheduled.

In the instant case, the District Court found that Strable could not be entitled to Fund benefits because her work injury in April 2019 was an unscheduled injury under section 85.34(2)(v). However, the District Court’s

ruling did not cite to or analyze *George*, nor did the ruling have the benefit of the *Delaney* decision because *Delaney* was issued seven days after the ruling. Instead, the District Court adopted the Fund’s argument that whenever a second injury is an unscheduled injury, the Fund has no liability. In other words, the focus of the District Court was on whether or not Strable’s *compensation* was calculated under the schedule in Iowa Code section 85.34(2). The Fund made this same argument in *Gregory*, which the Court expressly rejected. *See Gregory*, 777 N.W.2d at 399-400 (“The plain language of section 85.64 does not support the Fund’s contention that it is significant to the determination of whether the 2000 injury is a first qualifying loss that *compensation* was calculated under ‘the schedule’ found in Iowa Code section 85.34(2)(a)-[u]” . . .) (emphasis in original). The District Court’s ruling should be reversed, and the Commissioner’s decision affirmed, because the District Court made the same mistake that was reversed in *Delaney* by failing to follow the Court’s holdings in *George* and *Gregory*.

**3. *Nelson* did not hold that an injury must be scheduled to invoke Fund liability, or if it did, it was overruled by *Gregory*.**

The Fund and the District Court rely heavily on *Second Injury Fund v. Nelson*, 544 N.W.2d 258 (Iowa 1995) for their argument that an unscheduled injury can never be a second qualifying injury, but their reliance on *Nelson* is misplaced. *Nelson* was decided 12 years before *George* and 15 years before

*Gregory*. *Nelson* does not support the Fund’s position, and to the extent that it does, it was overruled by *Gregory*.

In *Nelson*, the claimant sustained a first qualifying injury to his knee in 1963 and a second injury to his shoulder (then an unscheduled injury under section 85.34(2)(u)) in 1988. *Id.* at 262. The claimant’s only injury in 1988 was to his shoulder; the claimant did not also injure his arm or another enumerated body part. The claimant argued that his shoulder injury should nevertheless qualify as a second loss under section 85.64 because his shoulder injury “affect[ed]” his arm, which was “another such member” in section 85.64. *Id.* at 269. ***The holding of Nelson was that an unscheduled injury which merely “affects” an enumerated body part does not trigger Fund liability.*** *Id.* at 269-70. Because the employee in *Nelson* did not suffer a specific and discrete injury to an enumerated body part (e.g., his arm), the Court was not tasked with deciding the issue in the present case—whether an injury to an enumerated body part that also involves other body parts making it an unscheduled injury invokes Fund benefits. Any language in *Nelson* that only scheduled member injuries can qualify for Fund benefits was dicta, as noted by the Commissioner in *Kratzer*. See *Kratzer v. Second Injury Fund*, File No. 5004866, 2005 IA Wrk. Comp. LEXIS 578 (App. Sept. 26, 2005) (distinguishing *Nelson* because the shoulder injury in *Nelson* did not also



damage the arm, whereas in *Kratzer*, the claimant’s injury involved separate, independent injuries to multiple distinct body parts, and an injury to one of the enumerated body parts of section 85.64 could qualify as a loss) (aff’d in *Second Injury Fund of Iowa v. Kratzer*, 778 N.W.2d 42 (Iowa 2010)).

*Nelson* is readily distinguishable. Strable had an independent and distinct injury to her ankle that resulted in a discrete and separate permanent partial disability. Her injury did not merely “affect” her leg; her injury was *to* her leg.

To the extent that *Nelson* held that an employee must have two scheduled member injuries to invoke Fund liability, *Nelson* was overruled by *Gregory* and *Second Injury Fund of Iowa v. Kratzer*,<sup>2</sup> 778 N.W.2d 42 (Iowa 2010). In *Nelson*, the Court said in dicta, “[w]e conclude section 85.64 requires two scheduled injuries to invoke Fund liability.” *Id.* at 270. However, the issue in *Nelson* was whether the claimant’s *shoulder injury* could be the loss of an arm under section 85.64 because the injury also affected the arm. *Id.* Nobody argued in *Nelson* that the claimant had also injured her arm. In contrast, *Gregory* and *Kratzer* specifically held in 2010 that an injury did *not* have to be a scheduled member injury to qualify as a loss under section 85.64.

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<sup>2</sup> In *Kratzer*, the Court concluded that the claimant’s injury to her right leg in 1994 could qualify as a first injury under section 85.64 and *Gregory*, even though the claimant also injured her left leg and low back in the accident in 1994, making it an unscheduled injury. *Second Injury Fund v. Kratzer*, 778 N.W.2d 42, 43-45 (Iowa 2010).

*Gregory*, 777 N.W.2d at 400; *Kratzer*, 778 N.W.2d at 46. The Fund’s reliance on *Nelson* is misplaced.

The District Court ruling cited to two opinions—*Second Injury Fund of Iowa v. Armstrong*, 801 N.W.2d 628 (Iowa Ct. App. 2011) (unpublished) and *Blake v. Second Injury Fund of Iowa*, 967 N.W.2d 221 (Iowa Ct. App. 2021) (unpublished)—to supports its interpretation of *Nelson*. However, those cases are both distinguishable and did not reach or analyze the issue presented here. In *Armstrong*, the Court found that the claimant’s second injury was limited to his left leg, so the Court did not need to decide whether an unscheduled injury could qualify as a second loss under section 85.64. *Armstrong*, at \*10. In *Blake*, the injury (Grave’s disease) was an injury to the body as a whole that merely affected an enumerated body part (eye). *Blake*, at \*7-8. Like *Nelson*, *Blake* concluded that an injury that merely affects an enumerated body part does not qualify for Fund benefits. *Id.* Neither case supports the Fund’s position that the second injury must be confined to an enumerated body part to invoke Fund liability.

**4. Any risk of a double recovery is minimal because section 85.64 and section 85.34 compensate different disabilities.**

The Fund’s concern about Strable receiving a double recovery is greatly overstated. The majority in *Gregory* addressed the dissent’s concern about a double recovery:

In determining the Fund's liability under section 85.64, the commissioner shall consider only the extent to which Gregory's earning capacity was diminished by the combined effect of the 2000 and 2002 losses to her *enumerated extremities*. This new bland discrete assessment by the commissioner of the loss of earning capacity for purposes of the Fund's liability shall consider only Gregory's disability to the left hand resulting from the 2000 injury and her disability to the right foot resulting from the 2002 injury. Accordingly, the assessment of the Fund's liability in this case will not provide additional compensation to Gregory for the loss of earning capacity resulting from any disability to other enumerated or unenumerated body parts arising from the injury in 2000.

*Gregory v. Second Injury Fund*, 777 N.W.2d 395, 401 (Iowa 2010) (emphasis in original). The Commissioner's application of section 85.64 was consistent with *Gregory*. The only disabilities the Commissioner considered for Fund liability were Strable's injuries to her wrists in 2009 and her injury to her ankle in 2019. Any impact her back or mental health conditions may have on her loss of earning capacity was not compensated by the Fund.

If the Fund's position was accepted, the Court would provide completely different outcomes based solely on the order of occurrence of the injury. For instance, let's assume an employee had the exact same injuries as Strable (bilateral carpal tunnel and an ankle injury with a low back and mental health sequela) but that the injuries were reversed—her ankle injury occurred in 2009 and her carpal tunnel injury occurred in 2019. Let's further assume that both injuries were work-related. Under *Gregory*, the ankle injury in 2009

would qualify for Fund benefits, notwithstanding the fact that the injury was combined with an unscheduled disability compensated by the employer. The claimant would also be compensated by her employer for her carpal tunnel injury in 2019. Then, the Fund would be liable for the loss of earning capacity caused by the combined effects of the ankle and carpal tunnel injuries, less their applicable credit. Arguably, this hypothetical claimant could be getting an overlap of permanent disability benefits paid by both her employer and the Fund for the 2009 injury, but that was allowed under *Gregory*. The Court in *Gregory* said this was not a double recovery because the employer and the Fund were compensating different disabilities. The same is true here.

Of course, there will be situations when the credits due to the Fund exceed the industrial disability caused by the two qualifying injuries. When that happens, the Fund has no liability. *See, e.g., Foley v. John Deere Dubuque Works*, File No. 19006793.01, 2023 IA Wrk. Comp. LEXIS 89, at \*27 (Arb. March 21, 2023). Unfortunately, there will also be times where the claimant's injury is so devastating to his or her employability that the permanent disability entitlement is greater than the sum of its parts. That is what happened here. Strable's injury in 2019 was devastating and life-altering. The Commissioner concluded she suffered a 70 percent loss of earning capacity caused by the combined effects of her carpal tunnel and ankle injuries. No part

of that 70 percent loss was due to any disability caused by her mental health or back conditions. The Fund received a credit of 112.4 weeks, which is a substantial credit. Any potential risk of permanent benefit overlap is offset by the fact that the purpose of the Act is to accomplish its humanitarian objective—namely, to benefit the injured worker and his or her dependents. *Dickenson v. John Deere Products Engineering*, 395 N.W.2d 644, 648 (Iowa Ct. App. 1986). The Commissioner properly interpreted Iowa Code section 85.64, *George*, and *Gregory* in a way that furthered this objective. If the Fund disagrees with *George* and *Gregory*, the change should be made by the Iowa legislature.

### **CONCLUSION**

For these reasons, the District Court’s ruling should be reversed and the Commissioner’s decision affirmed in its entirety.

### **REQUEST FOR ORAL SUBMISSION**

Appellant desires to be heard in oral argument upon submission of this case.

### **CERTIFICATE OF COST**

The undersigned certifies that the cost of printing the required copies of the Appellant’s Brief was \$0.00, as it was electronically filed.

By:  /s/ Gregory M. Taylor

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