

IN THE SUPREME COURT OF IOWA
Supreme Court No. 24-0056
Polk County No. CVCV064995

SECOND INJURY FUND OF IOWA,

Petitioner-Appellee,

vs.

REGENA STRABLE,

Respondent-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE ROBERT B. HANSON, JUDGE

**APPELLEE SECOND INJURY FUND OF IOWA'S
FINAL BRIEF**

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CERTIFICATE OF SERVICE

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. WHETHER THE DISTRICT COURT CORRECTLY CONCLUDED STRABLE'S 4/25/19 UNSCHEDULED INJURY IS NOT A QUALIFYING SECOND LOSS UNDER IOWA CODE SECTION 85.64

Cases:

Anderson v. Second Inj. Fund, 262 N.W.2d 789 (Iowa 1978)
Blake v. Second Inj. Fund of Iowa, 967 N.W.2d 221 (Iowa Ct. App. 2021)
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Iowa Code § 17A.19

Iowa Code § 85.34

Iowa Code § 85.64

Iowa Code § 85.65A

Iowa R. Civ. P. 6.904

Iowa R. Civ. P. 6.1101

ROUTING STATEMENT

The Supreme Court should retain this case, as it presents a substantial question of changing legal principles and/or a substantial issue of first impression. Iowa R. Civ. P. 6.1101.

The Supreme Court has already held Second Injury Fund liability under Iowa Code section 85.64 “is not triggered when the second injury is unscheduled.” *Second Inj. Fund of Iowa v. Nelson*, 544 N.W.2d 258, 268 (Iowa 1995), *as amended on denial of reh'g* (Feb. 14, 1996). Years later, the Supreme Court held the loss of an enumerated scheduled member under Iowa Code section 85.64 may qualify as a *first injury* even if the injury was combined with disability to one or more unscheduled body parts. *Gregory v. Second Inj. Fund of Iowa*, 777 N.W.2d 395, 401 (Iowa 2010). Strable effectively argues the Supreme Court’s holding in *Gregory* regarding first injuries should also apply to second injuries under Iowa Code section 85.64.

It is the Fund’s position the *Nelson* holding regarding second losses remains good law. In the fourteen years since *Gregory* was decided, *Gregory* has never been interpreted to apply to second injuries, resulting in an award of Fund benefits, until the Iowa Court of Appeals’ recent unpublished opinion in *Delaney v. Second Inj.*

Fund of Iowa, No. 23-0182, 2023 WL 7014189 (Iowa Ct. App. Oct. 25, 2023). While the Fund contends *Delaney* contradicts the Supreme Court’s holding in *Nelson*, the Fund acknowledges the Supreme Court has never explicitly stated its holding in *Gregory* regarding first injuries does not extend to second injuries. To that end, this case presents a substantial question of changing legal principles and may also present a substantial issue of first impression.

In *Delaney*, the Court of Appeals addressed the same issue presented in this case—whether the *Gregory* holding regarding first injuries should also apply to second injuries under Iowa Code section 85.64. The Supreme Court granted further review of *Delaney* on 1/22/24 and assigned the case for non-oral submission on 4/10/24. If the Supreme Court resolves this issue in *Delaney*, transfer of this case to the Court of Appeals may be appropriate.

STATEMENT OF THE CASE

On 8/28/19, Regena Strable (hereinafter “Strable”) filed an original notice and petition against her former employer, Altoona Nursing & Rehabilitation Center (hereinafter “ANR”) alleging a 4/25/19 left ankle, left leg, hips, back, left arm, and mental health injury while performing work duties. App. 106. Strable did not assert

entitlement to benefits from the Second Injury Fund of Iowa (hereinafter “the Fund”) in her 8/28/19 petition. App. 106. Strable never filed a petition against ANR for an alleged 5/15/19 work injury. Before entering two settlements with ANR, Strable received \$38,653.50 in temporary total disability (hereinafter “TTD”) benefits and \$32,270.55 in voluntary permanent partial disability (hereinafter “PPD”) benefits. App. 125.

On 1/6/21, Strable settled her 4/25/19 work injury with ANR on a full commutation basis for a 34% loss to her left leg, entitling her to \$30,622.71 in additional benefits. App. 125-129. The next day, Strable entered a compromise settlement with ANR for \$369,377.29 to settle an alleged 5/15/19 left lower extremity, hips, left arm, back, and mental health injury. App. 120-124. The first report of injury for Strable’s alleged 5/15/19 work injury was not filed until 12/23/20—approximately two weeks before filing the 5/15/19 settlement documents. App. 119. In total, Strable received \$470,924.05 in workers’ compensation benefits from ANR in the three years following her work injury.

On 4/26/21, Strable filed an original notice and petition against the Fund alleging a 4/25/19 left lower extremity and body as a whole

second injury and an August or September 2009 bilateral upper extremity first injury. App. 5. In her brief, Strable erroneously asserts she filed a single petition against ANR and the Fund on 4/26/21. This is inaccurate, as Strable did not file a petition alleging entitlement to Fund benefits until after the Commissioner approved both settlements with ANR. App. 5 & 120-129.

Strable's Fund claim proceeded to arbitration hearing on 4/4/22 before Deputy Workers' Compensation Commissioner, William Grell. In an 8/8/22 arbitration decision, Deputy Grell rejected the legal fiction that Strable sustained two separate work injuries on 4/25/19 and 5/15/19, instead concluding Strable sustained a permanent left ankle, low back, and mental health injury on 4/25/19. App. 16-17. Deputy Grell further concluded the back and mental health injuries render Strable's 4/25/19 injury an unscheduled loss that should be compensated industrially by the employer under Iowa Code section 85.34(2)(v). App. 18. Deputy Grell therefore concluded Strable failed to prove a qualifying second injury and failed to prove entitlement to Fund benefits. App. 21. Strable filed a notice of appeal to the Commissioner. App. 24.

In an 11/29/22 appeal decision, the Commissioner explicitly held “[t]he record is clear, claimant sustained a permanent injury to her left lower extremity and she sustained permanent back and mental health injuries as a sequelae of her left lower extremity injury.” App. 31. Nevertheless, the Commissioner held that “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.” App. 31. He further concluded Strable sustained a 70% industrial disability due to the combined effect of the “left leg” portion of her 4/25/19 work injury and a prior 2009 bilateral arm injury. App. 33.

Upon calculating the Fund’s credit at 112.4 weeks, the Commissioner ordered the Fund to pay 237.6 weeks of PPD benefits at a rate of \$827.45, commencing on 12/26/21. App. 33-34. Notably, the Commissioner failed to determine ANR’s liability for Strable’s unscheduled work injury before calculating the Fund’s credit and commencement date. Adding the total Fund award of \$196,602.12 to the \$470,924.05 Strable received from ANR resulted in a total recovery of \$667,526.17 for her work injury. The Fund filed a petition for judicial review. App. 36-38.

In a 10/18/23 ruling on petition for judicial review, Judge Robert Hanson held Strable's 4/25/19 work injury is an unscheduled loss that does not qualify for Fund benefits. App. 45-46. On 10/26/23, Strable filed a motion to reconsider and amend ruling, in part requesting the district court reverse its decision based upon the Court of Appeals' unpublished decision in *Delaney*. App. 49-51. In a 12/28/23 order, Judge Hanson denied Strable's motion, noting the Court's ruling "is consistent with the operative facts and the applicable controlling law . . ." App. 60. Strable filed a notice of appeal to the Iowa Supreme Court on 1/11/24. App. 62-63.

STATEMENT OF FACTS

Strable was hired at ANR on 4/1/19. Less than one month later, Strable sustained permanent left leg, back, and mental health injuries on 4/25/19 when her left ankle popped while she was turning, causing her to fall to the floor. App. 65 & 106; App. 149-150 (Tr. 56, l. 23 - Tr. 57, l. 3). Strable attended authorized physical therapy, used a TENS unit, and used pain patches for back pain resulting from her 4/25/19 injury. App. 64 & 66-68; App. 150-151 (Tr. 57, ll. 12-15; Tr. 57, l. 22 - Tr. 58, l. 10). In his 1/13/20 report, Dr. Bansal opined

Strable sustained a permanent 5% whole person functional impairment in her back due to her 4/25/19 injury. App. 88.

Strable also was diagnosed with PTSD, depression, and chronic generalized anxiety disorder because of her 4/25/19 injury. App. 70-71; App. 151 (Tr. 58, ll. 17-21). Strable underwent a psychiatric evaluation with Dr. Gallagher regarding her 4/25/19 injury. App. 72. Dr. Gallagher diagnosed Strable with major depressive disorder and PTSD and opined there is “no doubt” her psychiatric predicament and chronic pain is related to her ankle injury. App. 74-76. Dr. Bansal also opined Strable sustained permanent mental health functional impairment due to her 4/25/19 injury. App. 89.

There are not any medical records or reports in evidence suggesting Strable sustained a separate injury on 5/15/19. For instance, Dr. Kessler’s 5/30/19 treatment note and Dr. Trout’s 6/17/19 second opinion note both list Strable’s date of injury as 4/25/19 and fail to mention an intervening 5/15/19 injury. App. 96-97. Likewise, LCSW Jennifer Embry’s 6/10/20 intake note discusses Strable’s 4/25/19 injury and does not mention an intervening 5/15/19 date of loss. App. 69.

The pleadings and discovery responses exchanged between Strable and ANR also reflect Strable sustained a single unscheduled injury to her left leg, back, and mental health on 4/25/19. On 9/30/19, Strable filed an application for alternative medical care seeking authorized mental health treatment for her 4/25/19 injury. App. 110-111. Strable's 10/1/19 interrogatory answers state she is receiving treatment at Vida Psychotherapy "for mental health and stress issues related to the 4/25/2019 work injury." App. 115-117. Her interrogatory answers further state she did not have any other work-related injuries after 4/25/19. App. 118.

On 11/15/19, ANR specifically admitted Strable's 4/25/19 injury "is an injury to the Claimant's body as a whole." App. 112-114. On 11/13/20, Strable filed a motion in limine seeking to admit mental health treatment records and reports as exhibits in her hearing against ANR, asserting "Ms. Embry and Dr. Gallagher are Claimant's authorized treating medical providers with respect to her work injury of April 25, 2019." App. 107-109. Strable further asserted ANR had "stipulated that Claimant's [4/25/19] disability is an industrial disability." App. 108. Finally, the payment activity report for Strable's full commutation reflects she received TTD benefits from 4/25/19 to

3/16/20, and therefore did not work on the date of her alleged 5/15/19 work injury. App. 128.

Strable alleges she entered a \$369,377.29 compromise settlement with ANR for an alleged 5/15/19 date of loss, because this is the date Strable believed she was terminated from ANR and her termination caused her severe emotional distress. This was actually one of several conflicting explanations Strable provided under oath as the basis for her alleged 5/15/19 date of loss at hearing. In addition to testifying she first learned of her termination on 5/15/19, Strable also testified (1) she did not have a work-related injury on 5/15/19 (App. 153 (Tr. 61, ll. 15-17)), (2) she injured her hips and mental health on 5/15/19 (App. 144 (Tr. 33, ll. 4-13); App. 146 (Tr. 42, ll. 5-8)), and (3) the 5/15/19 settlement was for “the mental stress” of her job at ANR. App. 155 (Tr. 69, ll. 6-14). Strable’s own interrogatory answers and termination paperwork reflect she was terminated in September of 2019—not on 5/15/19. App. 100 & 132. In addition, Strable only performed work for ANR from 4/1/19 to 4/25/19 and failed to indicate what significant mental stressors she allegedly experienced during this short time that warranted a \$369,377.29 settlement. App. 149 (Tr. 56, ll. 5-15).

Strable provided a similarly conflicting explanation regarding her 12/20/19 credit card fraud conviction. App. 101-103. During her deposition, Strable alleged under oath that these charges were reduced to “very minor misdemeanors” and suggested she did not know this specific charge was on her record until her attorney informed her. App. 131 (depo. p. 46, ll. 2-21). In reality, Strable was convicted of aggravated misdemeanor credit card fraud, paid a \$625 fine, and served probation until 2/2/21. App. 101-105; App. 148-149 (Tr. 55, l. 16 - Tr. 56, l. 3). While she repeatedly alleged she did not understand the criminal proceedings, she admitted she was represented by counsel she hired. App. 140-143 (Tr. 29, l. 18 - Tr. 32, l. 14); App. 148 (Tr. 55, ll. 13-19).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY CONCLUDED STRABLE’S 4/25/19 UNSCHEDULED INJURY IS NOT A QUALIFYING SECOND LOSS UNDER IOWA CODE SECTION 85.64

Preservation of Error

The Fund agrees this issue was raised and decided in the district court’s Ruling on Petition for Judicial Review, which was timely appealed.

Standard of Review

Strable's claim of error lies with the appropriate interpretation of Iowa Code section 85.64 and Iowa Supreme Court case law interpreting the same. "[P]roper interpretation of the workers' compensation statute is a question of law for this court." *Nelson*, 544 N.W.2d at 264. Therefore, the Fund agrees this Court should review the Commissioner's legal interpretation for errors at law and is not bound by the Commissioner's interpretation pursuant to Iowa Code sections 17A.19(10)(c) and (11)(b). Iowa Code Ann. § 17A.19 (West).

Merits

The only issue on appeal is whether a portion of Strable's unscheduled work injury may qualify as a valid second injury under Iowa Code section 85.64. Strable urges this Court to conclude that the Fund and the district court misinterpreted the law and controlling Iowa Supreme Court precedent in stating that unscheduled losses cannot qualify as second injuries under Iowa Code section 85.64. At the outset, it is important to note that if Strable believes the controlling case law stands for the proposition she now asserts, she would not have needed to settle the majority of her claim against ANR under the manufactured 5/15/19 date of loss to attempt to represent

to the Commissioner that her unscheduled 4/25/19 injury was confined to the left leg. Moreover, the Commissioner’s approval of a settlement “makes no determination as to the merits of any aspect of the claim” and is simply “an administrative decision that the settlement merely complies with the form and content for such agreements . . .” *Mirsad Grahovic*, No. FILE NUMBER: 5021995, 2009 WL 3382042, at *1 (Oct. 9, 2009).

Strable urges this Court to adopt the Commissioner’s ruling in the present claim, though the Commissioner has issued completely inconsistent decisions on this issue. In the appeal decision, the Commissioner held for the first time that a scheduled member portion of an unscheduled work injury may qualify as a valid second loss under Iowa Code section 85.64, specifically stating the Supreme Court’s holding in *Gregory* regarding first injuries also applies to second injuries. App. 31. This directly contradicted the former Commissioner’s decision in *Larson*, which explicitly states “[t]he holding in *Gregory* should not be extended to apply to a second qualifying injury. . .” *John Larson, Claimant*, No. FILE NUMBER: 5033159, 2012 WL 1074075 (Mar. 27, 2012).

After issuing his appeal decision in the present matter, the Commissioner changed course again and declined to award Fund benefits in both *Kelly* and *Oppman*, because the claimants' alleged second injuries were unscheduled. *Brian Kelly, Claimant*, No. FILE NUMBER: 1621904, 2023 WL 2531054, *2 (Mar. 7, 2023);¹ *Ray Oppman, Claimant*, No. FILE NUMBER: 1649999, 2023 WL 2969333, *1-*2 (Apr. 6, 2023).² In a 7/31/23 ruling on application for rehearing, the Commissioner again explicitly stated "The Supreme Court in Gregory indicated its holding, regarding Fund benefits, is only to be applied to a first injury, and not the second..." *Bernard Horne, Claimant*, No. FILE NUMBER: 2100507, 2023 WL 5696536, at *2 (July 31, 2023).

The Commissioner erroneously concluded the "left leg" portion of Strable's unscheduled 4/25/19 injury is a qualifying second loss. Consistent with longstanding Supreme Court precedent and the

¹ "... because claimant is entitled to receive industrial disability benefits from defendants for the work injury, claimant is not entitled to receive benefits from the Fund for the work injury."

² "... claimant met his burden of proof to establish he sustained a sequela injury to his low back caused by the stipulated January 23, 2018, work-related right knee injury. . . claimant is not entitled to receive benefits from the Fund because claimant did not sustain a second qualifying injury."

Legislature’s intent in creating the Fund, the district court appropriately reversed the Commissioner’s conclusion that a portion of an unscheduled work injury may qualify as a valid second loss.

a. Assessment of Fund Liability Under Iowa Code section 85.64 is Determined Using the Schedule in Iowa Code section 85.34(2)

The Second Injury Compensation Act is a subchapter of Iowa Code Chapter 85. *Tweeten v. Tweeten*, 999 N.W.2d 270, 277 (Iowa 2023). The Supreme Court has explicitly stated the authority given to the Commissioner under the Second Injury Compensation Act must be construed with the other provisions of Chapter 85. *Second Inj. Fund of Iowa v. Bergeson*, 526 N.W.2d 543, 549 (Iowa 1995). Citing only to the Court of Appeals’ unpublished opinion in *Delaney*, Strable asserts that there is an entirely different and distinct classification system for employer liability under Iowa Code section 85.34 and Fund liability under Iowa Code section 85.64. This is simply not accurate, as proof of a “compensable injury” under Iowa Code section 85.34 is a prerequisite to proof of Fund liability. *See, e.g., Second Inj. Fund of Iowa v. Braden*, 459 N.W.2d 467, 473 (Iowa 1990) (“[T]he Second Injury Fund’s obligation cannot be assessed until the employer’s liability is fixed.”). If Strable’s assertion were accurate, a

work injury theoretically could qualify as a valid second loss against the Fund under Iowa Code section 85.64 but not qualify as a compensable permanent injury against the employer under Iowa Code section 85.34.

In every Fund case, the Fund's total potential exposure, credit, and commencement date are fixed using the schedule set forth in Iowa Code section 85.34. More specifically, the Fund's liability for a claimant's industrial disability is calculated based upon a percentage of 500 weeks, pursuant to the compensation for unscheduled injuries set forth in Iowa Code section 85.34(2)(v).³ *See, e.g., Second Inj. Fund v. Neelans*, 436 N.W.2d 355, 357 (Iowa 1989). The Fund's liability for permanent and total disability benefits is also assessed pursuant to Iowa Code section 85.34(3). *Second Inj. Fund of Iowa v. Shank*, 516 N.W.2d 808, 814 (Iowa 1994).

The Fund's credit for the first and second losses likewise is calculated using the schedule in Iowa Code section 85.34(2). *See, e.g., Neelans*, 436 N.W.2d at 357; *Shank*, 516 N.W.2d at 816 ("The

³ The Iowa Legislature revised Iowa Code section 85.34(2) in 2017. Unscheduled losses were previously described in Iowa Code section 85.34(2)(u) and are currently described in Iowa Code section 85.34(2)(v).

commissioner should have allowed the Fund a credit for the ten percent impairment to the right leg pursuant to Iowa Code sections 85.34(2)(o) and 85.64.”). The Fund’s entitlement to credit is also subject to the requirements of Iowa Code section 85.34(2)(x). *Harrell v. Denver Findley & Sons, Inc.*, 986 N.W.2d 872, *1-3 (Iowa Ct. App. 2022). Finally, under the plain language of Iowa Code section 85.64, Fund benefits commence “after the expiration of the full period provided by law for the payments thereof by the employer . . .” Iowa Code Ann. § 85.64 (West).

Strable inaccurately asserts Iowa Code section 85.34 and Iowa Code section 85.64 “refer to different body parts.” Iowa Code section 85.64 explicitly lists the hand, arm, foot, leg and eye. *Id.* While Iowa Code section 85.34(2) includes additional body parts, the Iowa Supreme Court has explicitly recognized “[t]he members listed in section 85.34(2) include the . . . hands, feet, arms, legs, and eyes.” *Nelson*, 544 N.W.2d at 269.

b. Strable Did Not Sustain a Leg Injury as it is Defined in Iowa Code Chapter 85

Strable repeatedly asserts she sustained a work-related “leg” injury on 4/25/19. This is not accurate within the confines of Iowa Code Chapter 85. “Chapter 85 divides permanent partial disability

into a scheduled and unscheduled loss.” *Shank*, 516 N.W.2d at 813 (Iowa 1994); *also see, Nelson*, 544 N.W.2d at 269 (“We have consistently interpreted the workers’ compensation statute as making a clear distinction between scheduled and unscheduled injuries. . . We find nothing in section 85.64 that would cause us to blur that distinction here.” (internal citations omitted)). Scheduled losses are set forth in Iowa Code section 85.34(2)(a)-(u) and are compensated solely upon the basis of functional impairment. *Id.*; Iowa Code Ann. § 85.34 (West). In contrast, unscheduled injuries may be compensated based on functional or industrial disability as set forth in Iowa Code section 85.34(2)(v). *Id.* When a claimant sustains an unscheduled work injury, the claimant is compensated solely under Iowa Code section 85.34(2)(v) and does not receive additional compensation for the functional impairment of any affected scheduled members under Iowa Code section 85.34(2)(a)-(u). *See, e.g., Mortimer v. Fruehauf Corp.*, 502 N.W.2d 12, 16 (Iowa 1993). The Fund has no liability when the claimant’s second injury is an unscheduled loss. *Nelson*, 544 N.W.2d at 270.

Strable’s 4/25/19 work injury resulted in permanent impairment to her left leg, back, and mental health, rendering it an

unscheduled injury compensable solely under Iowa Code section 85.34(2)(v). App. 31. Strable would not have been eligible for additional benefits from ANR for the leg portion of her injury under Iowa Code section 85.34(2)(p). Therefore, Strable did not sustain a “leg” injury on 4/25/19 as it is defined in Iowa Code section 85.34, as she actually injured her body as a whole. Because her work injury is not an injury to a hand, arm, foot, leg or eye, she is not entitled to Fund benefits. Iowa Code Ann. § 85.64 (West).

**c. Neither *Gregory* nor *George* Address
Unscheduled Second Injuries**

Strable argues the Supreme Court’s decisions in *Gregory* and *George* entitle her to Fund benefits for her unscheduled work injury. Simply stated, neither *Gregory* nor *George* involved an unscheduled work injury compensable under Iowa Code section 85.34(2)(v).⁴ The Supreme Court has never held that a portion of an unscheduled work injury may constitute a valid second loss entitling a claimant to Fund benefits.

The Supreme Court addressed a narrow issue in *Gregory* that does not exist in the present matter. App. 45. The *Gregory* Court

⁴ Formerly Iowa Code section 85.34(2)(u).

analyzed the claimant’s assertion that Iowa Code section 85.64 “must be interpreted to include within the universe of qualifying *first losses* any disability to an enumerated body part whether or not it coexists with one or more disabilities simultaneously sustained in other enumerated or unenumerated body parts.” *Gregory v. Second Inj. Fund of Iowa*, 777 N.W.2d 395, 399 (Iowa 2010) (emphasis added). Gregory pled a first qualifying loss to her left hand, though she also sustained injuries to both shoulders in the same incident. *Id.* at 396. She sustained a second injury confined to her right foot. *Id.* Therefore, Gregory’s entire second injury was Fund-eligible, and the Court did not address whether a limited portion of her second injury could qualify for Fund benefits.

Strable inaccurately suggests the *Gregory* holding applies to any injury—whether first or second—under Iowa Code section 85.64. In actuality, the *Gregory* Court explicitly limited its holding to first injuries, stating:

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 . . . 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) . . . 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 . . .

Id. at 400 (emphasis added). The Supreme Court would not have repeatedly limited the *Gregory* holding to “first” injuries if it intended its holding to apply to second losses as well.

Strable further suggests the *Gregory* Court stated it is “senselessly inconsistent” to differentiate the requirements for valid first and second losses. This short quote is taken out of context. The Court more fully stated:

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*.

Id. at 400 (emphasis added). From there, the *Gregory* Court analyzed whether a *first injury* may occur simultaneously with an injury to an unenumerated body part. The Court noted *George* was not controlling on its analysis, as *George* only interpreted the part of Iowa Code section 85.64 which addresses second injuries, further highlighting that *Gregory* only interpreted the part of Iowa Code section 85.64 addressing first losses. *Id.* at 399-400.

Strable further suggests the *Gregory* Court held the method of compensation should not be controlling when deciding whether a claimant sustained a valid second injury. She more specifically argues the district court inappropriately considered Strable’s entitlement to benefits from ANR under Iowa Code section 85.34(2)(v) when concluding Strable did not sustain a valid second loss. Again, the *Gregory* Court limited its discussion regarding the method of compensation to first losses. *Id.* at 400 (“ . . . the method of calculating compensation for a first qualifying injury cannot be controlling on this issue . . .”). The *Gregory* Court did not suggest a claimant should be entitled to simultaneous industrial disability awards from the employer and the Fund for the same work injury.

The Supreme Court likewise addressed a narrow issue in *George* that does not exist in the present case. *George* addressed “[w]hether a bilateral injury will qualify as a second loss under section 85.64.” *Second Inj. Fund of Iowa v. George*, 737 N.W.2d 141, 147 (Iowa 2007). *George* sustained a scheduled member work injury confined to her bilateral legs—two enumerated members—that was compensable under Iowa Code section 85.34(2)(s).⁵ *Id.* at 144. *George*

⁵ Currently Iowa Code section 85.34(2)(t).

did not sustain an unscheduled work injury to her body as a whole. *Id.* *George* simply holds that “the bilateral nature of a second injury will not disqualify the second injury as a second loss under section 85.64.” *Id.* at 147. *George* does not hold that a portion of an unscheduled work injury compensable under Iowa Code section 85.34(2)(v) may qualify as a valid second loss. *Id.* Again, *George*’s entire second injury was Fund-eligible, the Fund received credit for the entirety of *George*’s bilateral leg second injury, and *George* was not entitled to industrial disability benefits from her employer for her second injury. *Id.*

Strable urges this Court to hold that a portion of her unscheduled work injury should qualify as a valid second loss by highlighting a single line of *George* out of context—namely that “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.” *Id.* at 147. Given the narrow scope of the issue the Supreme Court explicitly addressed, this single line cannot be read to extend the *George* holding beyond bilateral scheduled member injuries to unscheduled losses. Moreover, in

Gregory, the Supreme Court explicitly stated its decision in *George* holds 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 . . .*” *Gregory*, 777 N.W.2d at 400 (emphasis added).

In the present matter, the Commissioner stated the *Gregory* Court instructed the agency to determine “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 . . . *unscheduled injuries*” which is simply not accurate. App. 31 (emphasis added). The district court appropriately recognized *Gregory* is “distinct and not controlling” in the present claim, as its analysis was limited to first losses. App. 45. The district court’s ruling is consistent with existing Supreme Court case law, which has never held that a scheduled member portion of an *unscheduled work injury* is a valid second loss.

d. *Delaney* is Inconsistent with Binding Supreme Court Precedent

Strable further relies upon the Court of Appeals’ unpublished opinion in *Delaney* to support her proposed interpretation of *George* and *Gregory*. “Unpublished opinions or decisions shall not constitute

controlling legal authority.” Iowa R. Civ. P. 6.904. Moreover, the Supreme Court granted further review of *Delaney* on 1/22/24 and assigned the case for non-oral submission on 4/10/24.

In *Delaney*, the Court of Appeals did not analyze the Supreme Court’s opinions in *Mortimer* or *Nelson* before concluding Delaney sustained a work-related “leg” injury entitling her to Fund benefits. *Delaney v. Second Inj. Fund of Iowa*, No. 23-0182, 2023 WL 7014189, *3 (Iowa Ct. App. Oct. 25, 2023). Pursuant to *Mortimer*, Delaney did not sustain a “leg” injury as it is defined in Iowa Code Chapter 85, because Delaney’s post-surgical lymphedema requires classifying her work injury as an unscheduled injury to the body as a whole. *Mortimer*, 502 N.W.2d at 16. Delaney’s injury cannot be classified as both a “leg” injury and a “body as a whole” injury.

The *Delaney* Court further emphasized the same line from *George* that Strable urges this Court to focus on as well—that “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.” *Id.* Again, the *Gregory* Court clarified this single line in *George* cannot be read to extend the Court’s holding

beyond bilateral scheduled member injuries compensable under Iowa Code section 85.34(2)(t) to unscheduled injuries compensable under Iowa Code section 85.34(2)(v). *Gregory*, 777 N.W.2d at 400.

Here, Strable sustained permanent impairment to her left leg, back, and mental health. Her back and mental health injuries are not other enumerated members in Iowa Code section 85.64. Iowa Code Ann. § 85.64 (West). The *Delaney* Court did not properly interpret the limited holdings in *George* and *Gregory*, which both addressed narrow issues that are not present in this case. The *Delaney* Court also did not acknowledge or distinguish the Supreme Court’s holdings in *Mortimer* or *Nelson*.

Strable further asserts the district court did not “have the benefit of the *Delaney* decision” when deciding this case. This is not true. Following the district court’s 10/18/23 ruling on petition for judicial review, Strable filed a motion to reconsider and amend ruling on 10/26/23, in part requesting the district court reverse its decision based upon *Delaney*. App. 49-59. The district court denied Strable’s motion, holding its ruling “is consistent with the operative facts and the applicable controlling law . . .” App. 60. This Court likewise should decline to follow *Delaney*, as the district court’s ruling is

consistent with existing Supreme Court case law, holding unscheduled injuries cannot qualify as valid second losses under Iowa Code section 85.64.

e. *Nelson* Remains Good Law as to Second Injuries

Strable argues the Fund’s reliance on *Nelson* is misplaced, as *Nelson* was overruled by *Gregory* and *Kratzer*. The *Nelson* Court explicitly held “Fund liability is not triggered when the second injury is unscheduled . . .” *Nelson*, 544 N.W.2d at 268. Neither *Gregory* nor *Kratzer* involved an unscheduled second injury. Moreover, neither majority addressed *Nelson* nor stated it was overruling any past Supreme Court case law. At most, *Gregory* and *Kratzer* modified *Nelson* as to first injuries only.

Strable repeatedly represents that the analysis in *Gregory* and *Kratzer* regarding unscheduled injuries applies to first and second losses, when the applicable analysis in both cases is actually limited to first losses. *Gregory*, 777 N.W.2d at 400. *Kratzer* addressed whether “any disabling injury to an enumerated member, including one that was previously partially disabled, may qualify as a second injury so long as the member in question is not the same member upon which the claimant relies for proof of the first qualifying injury.” *Second Inj.*

Fund of Iowa v. Kratzer, 778 N.W.2d 42, 45-46 (Iowa 2010). Kratzer sought Fund benefits for a work-related second injury confined to her left leg and an earlier injury that also affected her left leg, along with her right leg and back. *Id.* at 43-44. *Kratzer* simply holds “any disabling injury to an enumerated member, including one that was previously partially disabled, may qualify as a second injury so long as the member in question is not the same member upon which the claimant relies for proof of the first qualifying injury.” *Id.* at 45–46 (Iowa 2010). Neither *Gregory* nor *Kratzer* conflict with or overrule *Nelson’s* holding that the Fund has no liability when the claimant’s second injury is unscheduled. *Nelson*, 544 N.W.2d at 270.

Strable attempts to distinguish *Nelson* from the present case by again asserting she sustained a scheduled member “leg” injury. As discussed in Section I(b), as it is defined within Iowa Code Chapter 85, Strable did not sustain a “leg” injury compensable under Iowa Code section 85.34(2)(p). Instead, just as Nelson sustained an unscheduled work injury, Strable also sustained an unscheduled second loss compensable solely under Iowa Code section 85.34(2)(v).

Strable criticizes the district court’s citations to the Court of Appeals’ unpublished opinions in *Armstrong* and *Blake*, arguing that

both are distinguishable from the present issue. Even if true, this argument does not support Strable's contention that *Nelson* is no longer good law as to second injuries. Armstrong ultimately received an award of Fund benefits because the Court of Appeals concluded his second injury was confined to an enumerated member and did not extend into the body as a whole. *Second Inj. Fund of Iowa v. Armstrong*, 801 N.W.2d 628, *4 (Iowa Ct. App. 2011). Blake did not receive Fund benefits because her alleged first loss was a whole body condition that merely affected an enumerated scheduled member. *Blake v. Second Inj. Fund of Iowa*, 967 N.W.2d 221, *3 (Iowa Ct. App. 2021). Neither case contradicts *Nelson* for the proposition that the Fund has no liability when the second injury is unscheduled. *Nelson* remains good law, and pursuant to *Nelson*, Strable's unscheduled injury is not a qualifying second loss.

f. The District Court's Decision is Consistent with the Legislature's Intent in Creating the Fund

There is no dispute Strable was entitled to an industrial disability award from ANR for her unscheduled work injury. The Commissioner's decision holds Strable is also entitled to a simultaneous industrial award from the Fund for her unscheduled work injury. Limiting Strable to a single industrial award for her work

injury cannot reasonably be interpreted to be detrimental to Strable or contrary to the Legislature's intent in creating the Fund.

The Fund was created to “provide a more favorable climate for the employment of persons injured through service in World War II” by encouraging employers to hire handicapped workers. *Neelans*, 436 N.W.2d at 358. This is achieved by holding the Fund liable for the combined disability resulting from a qualifying first injury and a qualifying work injury, after the employer fully compensates the employee for the work injury. *Anderson v. Second Inj. Fund*, 262 N.W.2d 789, 792 (Iowa 1978). The Legislature did not create the Fund to relieve an employer of liability or to compensate an employee twice for the same disability. *Id.* Instead, Iowa Code section 85.64 should be construed narrowly with application to only a limited number of cases. *Gregory*, 777 N.W.2d at 401.

In asserting the Fund has “greatly overstated” the risk of a double recovery, Strable argues she would have been entitled to Fund benefits if her injuries were both work-related and had been sustained in the opposite order. More specifically, she asserts she could claim the left leg portion of her unscheduled work injury as a first loss and her bilateral arm injury as a second loss. This argument

ignores that a bilateral arm injury is a Fund-eligible scheduled member loss compensable under Iowa Code section 85.34(2)(t)—not an unscheduled injury compensable under Iowa Code section 85.34(2)(v). Therefore, under the hypothetical Strable proposes, she would not have been entitled to simultaneous industrial awards from both the employer and the Fund for a bilateral arm second injury. Instead, she potentially would have been entitled to a single industrial award from her employer years prior due to an unscheduled left leg, back, and mental health injury and a single industrial award from the Fund currently for a bilateral arm second injury.

The Fund is primarily funded by surcharges on employers and insurance carriers. *See* Iowa Code Ann. § 85.65A (West). Allowing unscheduled work injuries to qualify for Fund benefits would substantially increase the Fund’s overall liability, necessitating larger and/or more frequent assessments on employers and insurance carriers. Moreover, employers and insurance carriers would effectively pay two industrial awards to the same claimant for a single work injury—once as the liable employer and again through Fund surcharges. This unfairly punishes employers who have good safety records and fewer work injuries.

Strable has already received \$470,924.05 from her employer for her unscheduled work injury, and alleges the district court failed to effectuate the Legislature's intent in holding she is not entitled to an additional \$196,602.12 in benefits from the Fund. The Fund was not created to enrich or provide a windfall to claimants whose work injuries are outside of the narrow class of cases contemplated by the Legislature in Iowa Code section 85.64. ANR should bear full responsibility for Strable's industrial loss due to her unscheduled work injury, and Strable should not be entitled to simultaneous industrial awards for her single work injury. Strable's unscheduled injury does not fall within the narrow class of work injuries the Legislature intended to qualify for Fund benefits.

Should this Court find Strable's argument persuasive and impose Fund liability, it remains necessary to remand to the Commissioner for an accurate determination of ANR's liability under Iowa Code section 85.34(2)(v). The Commissioner inaccurately asserted Strable's work injury resulted in a 42% loss to the left leg, when it actually resulted in an undetermined percentage of industrial loss. This omission is critical, as Fund liability cannot be determined until the employer's liability is fixed. *Braden*, 459 N.W.2d at 473. The

Commissioner determined the Fund's benefit commencement date and credit without determining ANR's industrial liability.

Fund benefits commence "after the expiration of the full period provided by law for the payments thereof by the employer." Iowa Code Ann. § 85.64 (West). The Commissioner did not make an accurate factual finding regarding ANR's liability for Strable's 4/25/19 injury, and by extension, failed to correctly determine when Fund benefits commence. Instead, the Commissioner calculated the Fund's commencement date as if ANR was liable for a 42% loss to Strable's left leg under Iowa Code section 85.34(2)(p). App. 34-35.

The Commissioner's order almost certainly would have resulted in both the Fund and ANR paying simultaneous PPD benefits to Strable. This would entitle Strable to non-taxable benefits of \$1654.90 per week when her weekly earnings before taxes were only \$1420.00 during the three and a half weeks she performed work for ANR. App. 10. The present holding may also entitle Strable to simultaneous checks for PPD benefits from one party and permanent total disability benefits from the other contrary to Iowa Code section 85.34(3)(b). Iowa Code Ann. § 85.34 (West).

Likewise, the Fund is liable for “the difference between the compensation for which the current employer is liable and the total amount of industrial disability from which the employee suffers, reduced by the compensable value of the first injury.” *Nelson*, 544 N.W.2d at 269. This reduction for each qualifying injury is referred to as the Fund’s “credit.” *See, e.g., Shank*, 516 N.W.2d at 816. The Commissioner did not make a finding regarding the full extent of ANR’s liability for Strable’s 4/25/19 injury, and therefore failed to accurately determine the Fund’s credit.

The Commissioner’s failure to properly assess ANR’s liability before calculating the Fund’s credit is especially problematic because it is possible Strable’s industrial loss from her unscheduled work injury would have exceeded her industrial loss from her alleged first and second injuries. The Fund has no liability when its credits exceed the total industrial award. *See, e.g., Jon Brones, Claimant*, No. FILE NUMBER: 5026833, 2013 WL 6919324, at *4 (Dec. 26, 2013). In addition, Strable may have been permanently and totally disabled due to her 4/25/19 injury, extinguishing the Fund’s liability for any PPD benefits. Iowa Code Ann. § 85.34 (West). Therefore, if this Court holds a portion of Strable’s unscheduled work injury may qualify as a

valid second loss, the Fund's liability cannot be assessed until the Commissioner makes a factual finding regarding ANR's liability under Iowa Code section 85.34(2)(v). The Commissioner thereafter must adjust the Fund's credit and commencement date accordingly.

CONCLUSION

For the foregoing reasons, the Second Injury Fund of Iowa respectfully requests this Court affirm the District Court's Ruling on Petition for Judicial Review in its entirety.

REQUEST FOR NONORAL SUBMISSION

The Fund does not believe oral argument is required. In the event oral argument is scheduled, the Fund asks to be heard.

CERTIFICATE OF COST

Because this case was submitted through the electronic document management system, there was no amount paid for printing or duplicating necessary copies.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(e)(1) and 6.903(1)(g)(1) or (2) because:

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