IN THE SUPREME COURT OF IOWA
Supreme Court No. 23-0182
Polk County No. CVCV064110

DEE DELANEY,

Petitioner-Appellant,

vs.

SECOND INJURY FUND OF IOWA,

Respondent-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE SAMANTHA GRONEWALD, JUDGE

APPELLEE SECOND INJURY FUND OF IOWA'S FINAL BRIEF

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he, or a person acting on his behalf, electronically filed one copy of Appellee Second Injury Fund of Iowa's Final Brief with the Clerk of the Iowa Supreme Court on the 26th day of May, 2023, through the electronic document management system. The following Counsel will be served by the electronic document management system:

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ROUTING STATEMENT

This matter involves two separate issues presented for review. As to the first issue, Appellee Fund believes there is no legal determination by the agency in conflict with existing Iowa Court of Appeals precedent. Appellee Fund believes this issue can be decided based on existing legal principles. As to the second issue, Appellee Fund believes the threshold question – whether Appellant correctly preserved error – can be decided based on existing legal principles. For these reasons, Appellee Fund believes transfer to the Iowa Court of Appeals is appropriate. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

The Claimant, Dee Delaney (hereinafter "Delaney"), asserted a workers' compensation claim against her former employer Nordstrom, and the Second Injury Fund of Iowa (hereinafter "Fund"). Delaney alleged she sustained an injury to her right lower extremity on 3/12/19 at Nordstrom, and alleged she injured her left lower extremity on 7/22/86 as her first qualifying loss for purposes of Fund benefits. Prior to the arbitration hearing, Delaney settled her 3/12/19 claim against Nordstrom for a 40% loss of her right lower extremity. Delaney's claim against the Fund was heard on 9/21/21 by Deputy Workers' Compensation Commissioner Erin Pals.

Deputy Pals issued an arbitration decision dated 2/11/22. Although the Fund conceded the alleged 7/22/86 left lower extremity injury was a first qualifying loss for purposes of Fund benefits, Deputy Pals concluded Delaney's alleged second qualifying injury of 3/12/19 to her right lower extremity constituted an injury to her body as a whole and therefore was ineligible for Fund benefits. Because Delaney failed to prove she sustained a second qualifying injury, Deputy Pals concluded Delaney failed to prove entitlement to Fund benefits. App. 129-130. Delaney did not file a motion for rehearing following the arbitration decision.

Delaney filed a notice of appeal to the Commissioner. On appeal, Delaney argued Deputy Pals incorrectly determined her 3/12/19 injury constituted an injury to her body as a whole, but also – for the first time – argued even if the 3/12/19 injury was an injury to the body as a whole, that Delaney should still be able to maintain a claim for benefits against the Fund. On 7/21/22, Iowa Workers' Compensation Commissioner Joseph Cortese filed an appeal decision affirming the arbitration decision in its entirety. App. 172-173. Commissioner Cortese's decision did not address Delaney's argument concerning Delaney's ability to assert a claim for benefits against the Fund in the event the 3/12/19 injury is a whole-body

injury. Delaney did not file a motion for rehearing following the Commissioner's appeal decision.

Delaney filed a petition for judicial review in the Iowa District Court for Polk County on 8/4/22. On 1/31/23, Judge Samantha Gronewald issued a ruling on judicial review. Judge Gronewald determined the issue of whether the 3/12/19 injury was an impairment to the body as a whole was a question regarding a finding of fact. Finding substantial evidence supported the Commissioner's factual findings, Judge Gronewald affirmed the Commissioner's decision in its entirety.

Judge Gronewald also found Delaney failed to preserve error concerning the issue of whether Delaney may still assert a claim against the Fund if the 3/12/19 injury is an injury to the body as a whole, and thus determined the issue could not be reviewed by the District Court. Delaney filed a notice of appeal to the Iowa Supreme Court on 2/2/23.

STATEMENT OF FACTS

Delaney began working at Nordstrom in February 2018 as a 'packer' in the packing department. App. 15 (Tr. p. 21, ll. 5-17). Her job duties generally involved working in the warehouse preparing orders for shipping. App. 15-16 (Tr. pp. 21, ll. 22-25; 22, pp. 1-12). Delaney was on her feet her entire shift except for breaks. App. 16 (Tr. p. 22, ll. 13-20). Delaney

estimated she stood 60% of the time and walked 40% of the time. App. 16 (Tr. p. 22, ll. 21-24). Delaney estimated she lifted boxes weighing anywhere from five to fifty pounds and may carry boxes as far as twenty to thirty feet. App. 17, 20 (Tr. p. 24, ll. 12-17; 28, ll. 8-12). Delaney estimated she may have worked as much as nine to ten hours per day, six days a week, during busy periods. App. 18 (Tr. p. 26, ll. 9-19).

Delaney sustained a cumulative injury while working for Nordstrom culminating on or about 3/12/19. This was an accepted injury as to the right knee/lower extremity by Nordstrom. Delaney eventually saw Dr. Nicolas Noiseux, an orthopedic surgeon at UIHC, on 5/21/19, who noted Delaney had grade 4 osteoarthritis in her right knee. App. 55-58. Dr. Noiseux performed a right knee total replacement on 8/2/19. App. 71-72.

On 10/3/19, Dr. Noiseux performed a manipulation of the right knee, after Delaney had complained of stiffness and lack of flexion in her right knee. App. 90, 95-97. At a follow-up appointment on 11/20/19, Delaney reported she was ready to get back to work at Nordstrom and planned to start with 5-hour shifts and increase up to 8-hour shifts within two weeks. App. 101. Dr. Noiseux then released Delaney to return to all activities as tolerated and did not assign work restrictions. App. 101.

Delaney returned to light duty work at Nordstrom the week before

Thanksgiving in 2019, and was released to full duty work, without restrictions, after the beginning of 2020. App. 25-26, 35 (Tr. p. 33, ll. 10-14; 34, ll. 1-3; 56, ll. 15-19). On 1/7/20, Dr. Noiseux opined Delaney had reached maximum medical improvement ("MMI") as of 1/2/20, and had sustained permanent impairment of 37% lower extremity, pursuant to a "good" result of the knee replacement. App. 54. Dr. Noiseux also reiterated Delaney had no work restrictions concerning her right knee. App. 54.

On 6/17/20, Delaney saw Dr. Dale Bieber at UIHC for concerns of swelling in her right foot, which had been going on for at least a month. App. 111. At hearing, Delaney clarified the swelling was more located in the right leg mid-calf down to the lower ankle and foot. App. 32-33 (Tr. p. 52, ll. 21-25; 53, ll. 1-3). Delaney noted her swelling was worse after standing for 8 hours a day at work. App. 111. Delaney had started back to work at her regular job at Nordstrom in early 2020, but her work had been interrupted for a period of time due to the COVID-19 pandemic. App. 31 (Tr. p. 51, ll. 1-10), 42, 111.

Dr. Bieber said the right leg swelling was likely due to "destruction of her lymph from the surgery," and noted no indication of an inflammatory process, or that there were other causes of general edema. App. 112. Dr. Bieber recommended Delaney use compression stockings. App. 112. In a

letter to a nurse case manager dated 8/4/20, Dr. Noiseux agreed with Dr. Bieber's diagnosis of post-surgical lymphedema resulting from the right knee surgery, explaining Delaney had swelling only in her right foot, and not the left. App. 41.

Delaney later followed up with Dr. Noiseux on 9/30/20. App. 106. Delaney reported she was "doing well overall," and that her right knee felt stable with no concerns. App. 106. Dr. Noiseux, in response to questions posed by Nordstrom, diagnosed Delaney's right foot swelling as postoperative swelling consistent with lymphedema, and causally related this to the knee replacement. App. 107. Dr. Noiseux did not recommend additional treatment for her right foot lymphedema beyond compression stockings. App. 107. There is no indication Dr. Noiseux was asked to opine whether Delaney had permanent impairment from lymphedema. As of the arbitration hearing, Delaney continued to wear compression stockings on both legs daily, and also used insoles and special "detox" patches at night to help her swelling. App. 28-29 (Tr. p. 36, ll. 3-25; p. 37, ll. 1-7), 34-35 (Tr. p. 55, ll. 15-25; p. 56, ll. 1-7). She also elevated her legs as much as possible in order to combat swelling. App. 35 (Tr. p. 56, ll. 8-14).

Delaney saw Dr. Farid Manshadi on 3/4/21 at the direction of her attorney for purposes of an independent medical examination ("IME").

App. 37-40. Dr. Manshadi concluded Delaney sustained 37% right leg permanent impairment from the knee replacement. App. 39. Dr. Manshadi further stated Delaney's right foot edema was lymphedema resulting from the knee replacement. App. 39-40. Dr. Manshadi assigned 3% whole person permanent impairment due to the lymphedema per Table 17-38 of the AMA Guides, 5th Edition. App. 40.

Concerning the right knee, Dr. Manshadi recommended work restrictions of avoiding any activities involving prolonged standing or walking, avoiding kneeling, and avoiding uneven surfaces. App. 39. Concerning restrictions for lymphedema, Dr. Manshadi recommended Delaney sit, stand and walk on an as needed basis. App. 40. Dr. Manshadi did not recommend further treatment for lymphedema beyond wearing compression hose. App. 40.

Prior to the arbitration hearing, Delaney and Nordstrom settled Delaney's claim against Nordstrom on an agreement for settlement basis. App. 43-50. The commissioner approved the settlement on 9/24/21. App. 50. Delaney and Nordstrom stipulated Delaney had sustained 40% impairment to the right leg as a result of the 3/12/19 injury. App. 43.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE AGENCY'S DETERMINATION THAT DELANEY'S 3/12/19 INJURY WAS AN INJURY TO HER BODY AS A WHOLE

Preservation of Error

The Fund believes this issue was properly raised and decided as an issue before the Agency and the District Court.

Standard of Review

Delaney alleges this issue should be reviewed for correction of errors at law. The Fund disagrees. Whether or not Delaney's second alleged injury is located in the body as a whole is a question of fact, not a question of law, as was found by the District Court. App. 184-185. The Iowa Legislature vested the Workers' Compensation Commissioner with authority to make factual findings. *See* Iowa Code §§ 86.14-24. The Court's review of this issue is for substantial evidence.

When the Court reviews factual findings made by the Commissioner, those findings carry the effect of a jury verdict. *Kostelac v. Feldman's Inc.*, 497 N.W.2d 853, 856 (Iowa 1993). The Court must broadly and liberally construe the Commissioner's findings to uphold, rather than defeat the Commissioner's decision. *Second Injury Fund of Iowa v. Bergeson*, 526 N.W.2d 543, 546 (Iowa 1995). "[F]actual findings regarding the award of

workers' compensation benefits are within the agency's discretion," so the Court is "bound by the agency's findings of fact if supported by substantial evidence." *Clark v. Vicorp Rest., Inc.*, 696 N.W.2d 596, 604 (Iowa 2005).

The Court can only reverse the Commissioner's factual findings if they are not supported by substantial evidence in the record as a whole. Iowa Code § 17A.19(8)(f). Evidence is substantial "if a reasonable mind would find it adequate to reach a conclusion. An agency's decision does not lack substantial evidence because inconsistent conclusions may be drawn from the same evidence." *Second Injury Fund of Iowa v. Shank*, 516 N.W.2d 808, 812 (Iowa 1994).

On appeal, the question is whether the evidence "supports the findings actually made," not whether the evidence could support a different finding. *St. Luke's Hosp. v. Gray*, 604 N.W.2d 646, 649 (Iowa 2000). "It is not the job of the district court … to determine what 'evidence 'trumps' other evidence or whether one piece of evidence is 'qualitatively weaker' than another piece of evidence' when it conducts a substantial evidence review of an agency decision." *Drake University v. Davis*, 769 N.W.2d 176, 182 (Iowa 2009) (*citing Arndt v. City of LeClaire*, 728 N.W.2d 389, 394 (Iowa 2007)). The Legislature left those determinations to the Agency. *Id*.

Delaney argues the standard of review should be for errors of law, and

in support references *Chavez v. MS Technology LLC*, 972 N.W.2d 662 (Iowa 2022). The Fund disagrees. *Chavez* involved a question of first impression concerning the interpretation of an amendment to Iowa Code § 85.34 in 2017 which changed the nature of a shoulder from an unscheduled injury to a scheduled injury. *Chavez*, 972 N.W.2d at 666-667. However, the Chavez Court had to engage in statutory construction due to an ambiguity in the amendment – specifically, what exactly is a "shoulder." *Id.* at 667.

In contrast, the Fund is unaware of any ambiguity in issue in this matter. Nor is this a case of first impression. The record is clear Delaney has lymphedema. The question of whether lymphedema, a vascular condition, should be classified as an unscheduled member under Iowa Code § 85.34 because the condition originates in a body system, is a factual question. Past appellate cases involving similar issues have been reviewed on a substantial evidence standard of review. *Collins v. Dept. of Human Services*, 529 N.W.2d 627 (Iowa Ct. App. 1995); *Architectural Wall Systems v. Towers*, 854 N.W.2d 74 (Table) (Iowa Ct. App. 2014), 2014 WL 3511892; *Blake v. Second Injury Fund of Iowa*, 967 N.W.2d 221 (Table) (Iowa Ct. App. 2021), 2021 WL 4304274. Substantial evidence is the correct standard of review.

Merits

The initial issue for consideration on judicial review concerns whether the agency correctly determined Delaney's 3/12/19 injury to her right lower extremity involved a sequela of lymphedema converting the injury to an injury to the body as a whole, and ineligible to qualify for benefits against the Fund. It is well-settled law that in order to invoke Fund liability, both the first and second injuries must be scheduled member injuries. *Second Injury Fund of Iowa v. Nelson,* 544 N.W.2d 258, 270 (Iowa 1995); *Hennigar v. Second Injury Fund*, 797 N.W.2d 621 (Table) (Iowa App. 2011), 2011 WL 222535. Where the second injury involves an unscheduled loss, implicating industrial disability due from the employer, the employer is fully responsible, and the Fund is not liable. *See Second Injury Fund of Iowa v. Braden*, 459 N.W.2d 467, 471 (Iowa 1990). Substantial evidence supports the agency's determination that due to Delaney's development of lymphedema, the 3/12/19 injury was an injury to her body-as-a-whole.

In the Arbitration Decision, Deputy Workers' Compensation Commissioner Pals provided an accurate statement concerning the agency's past decisions involving lymphedema:

> This agency has previously held that lymphedema constitutes an injury to the vascular system, and thus body as a whole. *See Derby v. The Dexter Co.*, File Nos. 1111978 et. al. (App. Dec. 3, 1999); *Barker v. Cedar Valley Corp.*, File No. 1153401 (Arb.

> Apr. 13, 2000); *see also Anderson v. Broadlawns Medical Center & Second Injury Fund of Iowa*, File No. 5064991 (Arb., Dec. 16, 2019). The Iowa Supreme Court has long considered vascular injuries to be whole body injuries that are to be compensated industrially. *See Blacksmith v. All-American, Inc.*, 290 N.W.2d 248 (Iowa 1980) (finding thrombophlebitis located in the left leg was a body-as-a-whole condition); *Architectural Wall Systems v. Towers*, 854 N.W.2d 74 (Table) (Iowa Ct App. 2014) (confirming deep vein thrombosis located in the right lower extremity constituted a body as a whole injury). This agency has held that vascular injuries, even those located in extremities are body as a whole injuries. *See Raymond v. Menard, Inc.*, File No. 5039009 (App. Dec. 18, 2013); *Briggs v. Second Injury Fund*, File No. 5024615 (App. Dec. 4, 2009); *Andrade v. IBP, Inc.*, File No. 5013872 (App. Aug. 29, 2006).

App. 129. A recent agency arbitration decision concerning lymphedema stated:

> Lymphedema is defined:
>
> Edema (swelling), usually of a limb or limbs, due to an abnormal accumulation of fluid in the tissues, which is the result of an obstruction of lymph vessels or lymph nodes.
>
> Schmidt's Attorney's Dictionary of Medicine, 1998 Volume 3, page L-213.

Anderson, 2019 WL 7759732, at *8. Another prior agency decision stated:

> [L]ymphedema is considered a vascular disorder and as such is to be rated as an impairment to the whole person. The injury in this case was to the claimant's lower extremities which are scheduled members, and also to his lymphatic system which is not a scheduled member but part of the body's vascular system. Non-scheduled parts of the body are consider[sic] to be part of the body as a whole.

Derby, 1999 WL 33619596, at *7. (*emphasis added*).

It is the anatomical situs of the injury which determines whether or not a claimant has a scheduled member injury or injury to the body as a whole. *Lauhoff Grain Co. v. McIntosh*, 395 N.W.2d 834, 840 (Iowa 1986); *Dailey v. Pooley Lbr. Co.*, 233 Iowa 758, 10 N.W.2d 549, 572 (1943). "The situs of an injury is determined by the anatomical or physiological location of the damage or derangement." *Spainhower v. Second Injury Fund*, File No. 1110759, 1999 WL 33619875 (Arb. Sept. 30, 1999); *Prewitt v. Firestone Tire*, File Nos. 87688, 931128, 1993 WL 13015946 (App. June 30, 1995) (stating "The anatomical situs of the impairment determines whether the disability is to the scheduled member or the body as a whole.").

Like diabetes, RSD/CRPS, and systemic conditions such as Graves' disease, a vascular condition such as lymphedema may manifest or produce symptoms in a particular part of the body, but – critically – the origin is in the *body system* – here, the *lymphatic system* – as a whole. *Rivers v. Second Injury Fund*, File No. 1253705, 2002 WL 32125606 (Arb. Mar. 4, 2002) (holding diabetes/peripheral neuropathy may manifest in a scheduled member but originates in the body as a whole); *see also Blacksmith*, 290 N.W.2d at 353 (finding vascular injury that affected the leg was an injury to the body as a whole); *Collins*, 529 N.W.2d at 629 (holding RSD is an injury

to the sympathetic nervous system even though claimant's hands were affected); *Blake*, 2021 WL 4304274 at *3 (holding Graves' disease is a body-as-a-whole condition even though claimant's eye was affected).

Substantial evidence supports both the agency's determination that the 3/12/19 injury involved lymphedema, and that it is an injury to the body-as-a-whole. In this matter, Dr. Bieber, a primary care physician, Dr. Noiseux, Delaney's treating orthopedic physician, and Dr. Manshadi, Delaney's hand-picked IME physician, each stated Delaney's right lower leg/foot condition constituted lymphedema. App. 39-41, 111-112. Moreover, each physician concluded Delaney's lymphedema was causally related to her right knee replacement surgery, and thus, a sequela of her 3/12/19 injury. App. 39-41, 111-112. No expert opinion in the record reached a contrary conclusion.

Dr. Manshadi concluded Delaney has permanent impairment of 3% to the ***whole person*** due to lymphedema. App. 40. Dr. Manshadi's impairment rating for lymphedema was derived from Table 17-38 of the AMA Guides, 5th Edition. App. 40. Dr. Manshadi provided the only opinion in the record as to whether Delaney had permanent impairment due to lymphedema.

As well, the record is replete with support for the basis for impairment. Delaney was required to make changes in her daily life to

control her lymphedema. She wears compression stockings on a daily basis, as was recommended by Dr. Bieber, Dr. Noiseux, and Dr. Manshadi. App. 28 (Tr. p. 36, ll. 1-15), 35, 40, 111-112. She also uses special insoles in her shoes and uses "detox patches" at night to help with swelling. App. 28-29 (Tr. p. 36, ll. 16-25; p. 37, ll. 1-7), 35. Delaney tries to elevate her legs as much as possible to combat swelling. App. 35 (Tr. p. 56, ll. 8-14). Lastly, Dr. Manshadi recommended Delaney follow permanent work restrictions of sitting, standing and walking on only an as needed basis due to her lymphedema. App. 40.

Delaney again argues, as she did at the agency level and upon judicial review, that injuries involving the vascular system cannot be considered, *per se*, injuries to the body as a whole and must be analyzed on a case-by-case approach. However, in support of this contention, Delaney does not cite a single case wherein the agency (or an appellate court) determined that a work-related injury resulting in development of lymphedema was *not* an injury to the body as a whole. Rather, Delaney cites cases involving injuries to the *skin* or *nerves* as support of her contention that her *lymphedema* injury should be limited to the schedule. Appellant's Brief, at pp. 17-18. The undersigned is unaware of any prior agency (or appellate) cases wherein it was determined the claimant developed *lymphedema* due to a work injury,

yet the injury was found to be limited to the schedule. Moreover, Delaney's contention seems to be confusing the issue, as the issue is whether Delaney's *lymphedema* – a vascular condition – and not a *skin* or *nerve* injury – is properly considered an injury to the body as a whole.

Delaney seeks to distinguish this case from appellate cases concerning vascular injuries in that the appellate cases have involved more "serious" injuries "manifesting in areas outside of an extremity." Delaney is again confusing the issue, as there has been no such requirement set forth in the applicable prior case law, and – even assuming there was – such a requirement would seem to create a *per se* requirement which is contrary to Delaney's argument for a case-by-case approach to such injuries.

Delaney further contends there is no evidence that Delaney suffers from a condition that manifests outside her right leg or has any risk of impact to her body as a whole. This contention seems to minimize the recommendations of Delaney's treating doctors and Dr. Manshadi. Taking the medical opinions in the record as a whole (including Delaney's own expert, Dr. Manshadi), Delaney has essentially been told to use compression stockings (*on both legs*), elevate her legs, and minimize her time on her feet, due to her lymphedema condition. Such recommendations are not as minimal as Delaney seems to portray.

Moreover, even if it were determined the effect of Delaney's lymphedema is minimal, one prior agency decision concluded that a claimant with work-related lymphedema in an ankle, albeit minimal enough to have little to no effect on earning capacity and thus not qualify for industrial disability benefits, still constituted an injury to the body-as-a-whole which would be compensated industrially by the employer. *See Barker*, 2000 WL 33992735, at *4-5. Further, it is not a requirement under agency case law that whole-person systems conditions must manifest or produce symptoms beyond a scheduled member or have a 'risk of impact' to the body-as-a-whole to constitute body-as-a-whole injuries. *See Rivers*, 2002 WL 32125606 at *3; *Collins*, 529 N.W.2d at 629; *Blake*, 2021 WL 4304274 at *3.

As was found by the District Court, substantial evidence supports the agency's determination that Delaney sustained a sequela injury of lymphedema, and that the condition of lymphedema converts the 3/12/19 injury to an injury to the body-as-a-whole, or an unscheduled member. Moreover, even if the proper standard of review for this issue is not substantial evidence, but for errors of law, for the reasons set forth above, the agency correctly interpreted existing and established law in its conclusion that Delaney's lymphedema is an injury to the body-as-a-whole.

Consequently, the agency correctly determined Delaney failed to prove a second qualifying injury for purposes of Fund benefits. These findings should be affirmed on appeal.

II. IF DELANEY'S 3/12/19 INJURY EXTENDS TO HER BODY AS A WHOLE, SHE IS UNABLE TO MAINTAIN A CLAIM AGAINST THE FUND

Preservation of Error

Delaney's second point of contention concerns the potential application of Supreme Court precedent – specifically, *Gregory v. Second Injury Fund of Iowa*, 777 N.W.2d 395 (Iowa 2010) – to Delaney's alleged 3/12/19 injury. The pertinent issue in question is whether under *Gregory* a claimant is able to assert a claim for benefits against the Fund using a second date of loss which has been determined to constitute an unscheduled injury, or an injury to the body as a whole, under applicable workers' compensation law. On judicial review, the District Court found Delaney failed to properly preserve this issue for appeal. App. 188. The Fund maintains its position that Delaney failed to preserve error and, consequentially, that this issue was not properly preserved on appeal.

The Iowa Supreme Court has previously held:

> "[w]hen an agency fails to address an issue in its ruling and a party fails to point out the issue in a motion for rehearing, we find that error on these issues has not been preserved. Our respect for agency processes in administrative proceedings is

> comparable to that afforded to district courts in ordinary civil proceedings. Just as we do not entertain issues that were not ruled upon by the district court and that were not brought to the district court's attention through a proper posttrial motion, *Meier v. Senecaut*, 641 N.W.2d 532, 540 (Iowa 2002), we decline to entertain issues not ruled upon by an agency when the aggrieved party failed to follow available procedures to alert the agency of the issue. *See Soo Line R.R. v. Iowa Dep't of Transp.*, 521 N.W.2d 685, 688 (Iowa 1994) (stating that the scope of administrative review is limited to questions that were actually considered by the agency); *Chi. & Nw. Transp. Co. v. Iowa Transp. Regulation Bd.*, 322 N.W.2d 273, 276 (Iowa 1982) (finding that an issue first raised in motion for rehearing and considered by the agency is preserved); *Charles Gabus Ford, Inc. v. Iowa State Highway Comm'n*, 224 N.W.2d 639, 647 (Iowa 1974) (discussing requirement of exhaustion of administrative remedies when agency has primary or exclusive jurisdiction over controversy).

KFC Corp. v. Iowa Dep't of Revenue, 792 N.W.2d 308, 329 (Iowa 2010) (*emphasis added*); *see also Menard, Inc. v. Jones*, 822 N.W.2d 122 (Table) (Iowa Ct. App. 2012), 2012 WL 3860449; *Meads v. Iowa Dep't of Social Servs.*, 366 N.W.2d 555, 559 (Iowa 1985) ("The district court may only review issues considered and decided by the agency.").

A recent Iowa Court of Appeals decision further clarified this issue as it pertains to administrative law proceedings, noting that only must an issue be raised and litigated before the agency, but also that the issue must be raised "*at the earliest possible opportunity*." *Schoenberger v. Zephyr Aluminum Products*, 2023 WL 2908622, at *2 (Table) (Iowa Ct. App. Apr. 12, 2023) (*emphasis added*); *see also Off. of Consumer Advoc. v. Iowa St.*

Commerce Comm'n, 465 N.W.2d 280, 283 (Iowa 1991). Further, this Court has stated the issue must merely have been raised or presented to the deputy commissioner – it is not imperative that the issue was actually ruled on by the deputy commissioner. *Boehme v. Fareway Stores, Inc.*, 762 N.W.2d 142, 146 (Iowa 2009).

The District Court correctly determined Delaney failed to preserve error on this issue. First, critically, Delaney failed to raise this as an issue for determination in either the pre-arbitration Hearing Report, or as an issue in her Post-Hearing Brief, despite being aware the Fund disputed the 3/12/19 injury was a scheduled member injury to the right leg. App. 9-10, 119-120. Second, following the issuance of the Arbitration Decision, Delaney did not file a Motion for Rehearing pursuant to Iowa Code § 17A.16 in order to raise this issue before the deputy commissioner. Since such issue was not raised before the deputy, this issue was not addressed or considered in the Arbitration Decision.

Instead, Delaney only first raised this issue on her appeal to the Commissioner. App. 141-142. However, the Commissioner's Appeal Decision did not address or consider this specific issue, and instead simply stated upon a de novo review he reached "the same analysis, findings, and conclusions as those reached by the deputy commissioner." App. 172.

Following the issuance of the Appeal Decision, Delaney again did not file an application for rehearing pursuant to Iowa Code § 17A.16 to request the Commissioner to address this issue, and instead filed her Petition for Judicial Review.

Based upon the previously set forth applicable law, Delaney's "earliest possible opportunity" to raise this issue was not on appeal to the commissioner. Rather the "earliest possible opportunity" for Delaney to raise this issue would have been either in the pre-arbitration hearing report, or in her post-arbitration hearing brief. However, Delaney did not raise this as an issue then, nor not even in a motion for rehearing following either the arbitration or appeal decision. Therefore, the District Court correctly found Delaney failed to properly preserve error concerning this issue.

Standard of Review

If the Court determines Delaney did properly preserve error on this issue, and that this issue was considered by the agency in the underlying Arbitration and Appeal Decisions, the Fund agrees this issue involves the interpretation of Iowa Code § 85.64 and existing Iowa Supreme Court law, and the Court reviews for "correction of errors at law made by the industrial commissioner and the district court." *Aluminum Co. of Am. v. Musal*, 622 N.W.2d, 476, 478 (Iowa 2001); *see also Meyer v. IBP, Inc.*, 710 N.W.2d

213, 219 (Iowa 2006).

Merits

Delaney's final contention concerns whether, even if the Commissioner correctly determined her right lower extremity injury constituted an injury to her body-as-a-whole due to lymphedema, she can still establish a qualifying claim against the Fund under prior Iowa Supreme Court precedent. In support of this contention, Delaney cites the cases of *Gregory*, 777 N.W.2d at 397, and *Second Injury Fund of Iowa v. George*, 737 N.W.2d 141 (Iowa 2007). This contention is wholly without merit and misstates well-established Iowa law.

In order to establish a claim against the Fund, Delaney must prove (1) she lost or lost the use of a hand, arm, foot, leg, or eye; (2) she sustained a loss or loss of use of another specified member or organ through a compensable work-related injury; and (3) both injuries resulted in permanent disability. *Shank*, 516 N.W.2d at 812. Simply stated, the key distinction is that, in contrast to this case, neither *Gregory* nor *George* involved an *unscheduled second injury* from which the Supreme Court held the claimant should be entitled to industrial disability benefits from both the employer/insurance carrier and the Fund for the exact same work injury.

Rather, the Iowa Supreme Court has long held that when the alleged second injury involves an unscheduled loss, this implicates industrial disability due from the employer, and the employer is fully responsible for the injured worker's industrial loss, and as a result, the injured worker is not eligible for Fund benefits. *See, e.g., Second Injury Fund of Iowa v. Braden*, 459 N.W.2d 467, 471 (Iowa 1990); *also see, Second Inj. Fund of Iowa v. Nelson*, 544 N.W.2d 258 (Iowa 1995), *as amended on denial of reh'g* (Feb. 14, 1996); *Larson v. Second Injury Fund of Iowa*, File No. 5033159, 2012 WL 1074075 (App. Mar. 27, 2012). Further, it is longstanding Iowa law that when an injury involves an injury to a "scheduled member and also to parts of the body not included in the schedule, *the resulting disability is compensated on the basis of an unscheduled injury*." *Mortimer v. Fruehauf Corp.*, 502 N.W.2d 12, 16 (Iowa 1993) (*emphasis added*).

The *George* Court simply interpreted the phrase "another such member or organ" in Iowa Code § 85.64, and ultimately held that "the bilateral nature of a second injury will not disqualify the second injury as a second loss under section 85.64." *George*, 737 N.W.2d at 147. George sustained a left leg first loss and a bilateral leg second loss. *Id.* at 144. Unlike the present case, George's second injury did not involve an *unscheduled* loss. *Id.* The *George* Court did not have to carve out a

scheduled member portion of George's second injury while ignoring the effects of other permanent injuries, since the entirety of George's second injury was Fund-eligible. There was also no concern for double-recovery as George did not receive industrial benefits from both the employer/insurance carrier and the Fund. *George* did not address whether an unscheduled second injury qualifies for Fund benefits.

The *Gregory* Court addressed the claimant's argument that Iowa Code § 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*, 777 N.W.2d at 399 (*emphasis added*). Gregory sustained a qualifying second injury confined to her right foot and pled a first qualifying loss to her left hand, although she also sustained unscheduled injuries to her bilateral shoulders in the same injury concerning the left hand. *Id.* at 396.

Contrary to Delaney's contention, the *Gregory* Court made clear its analysis was specific to first injuries, stating "[j]ust 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*). Once again, the entirety of Gregory's

second injury was Fund-eligible, and there was no assertion Gregory should be entitled to industrial benefits from both the employer/insurance carrier and the Fund for the same injury. Delaney's interpretation of *Gregory* is wholly inconsistent with well-established Iowa case law.

Delaney seeks to extend the holding in *Gregory* to her asserted second qualifying injury on the basis that a "double recovery" would not take place. While not binding authority upon this Court, shortly after the *Gregory* decision was issued, the agency was presented with the exact same question Delaney poses in this judicial review action concerning extending the holding in *Gregory* to asserted second qualifying injuries.

In *Larson*, 2011 WL 1901960 (Arb. May 17, 2011), *aff'd.* 2012 WL 1074075 (App. Mar. 27, 2012), the claimant Larson sustained a work injury on 2/21/09 to his left shoulder, left elbow, and left wrist.[1] Larson settled this claim against the employer on an agreement for settlement with full commutation of benefits but proceeded to arbitration hearing against the Fund, asserting only a left arm injury for his second qualifying loss as it pertained to the 2/21/09 injury. *Larson*, 2011 WL 1901960, at *2. The

[1] In 2009, a shoulder injury fell within the category of an 'unscheduled' member injury, and such injuries were evaluated under the traditional industrial disability analysis. In 2017, the Iowa Legislature reclassified shoulder injuries as scheduled member injuries. *See* Iowa Code § 85.34(2)(n).

presiding deputy commissioner declined to extend the holding in *Gregory* to apply to an asserted second qualifying loss against the Fund, stating:

> I believe the claimant is asking this agency to go to a bridge too far. Claimant would clearly receive a double recovery for an industrial loss caused by the 2009 injuries even if the loss assessment would not include the 2002 injuries. The Supreme Court has only modified *Nelson* in the ways set forth in *Gregory* and *Kratzer*, not further. Therefore, since the second injury is compensated industrially, claimant is not entitled to Fund benefits.

Id. at *3. In an appeal decision issued on 3/27/12, affirming the arbitration decision, then Commissioner Godfrey reasoned:

> There is no mechanism identified in either the Code section or in the court's analysis of the Code to apportion claimant's loss of earning capacity between an employer or the Second Injury Fund. Rather, for second qualifying injuries that are intertwined between scheduled and an unscheduled injury, the employer fully compensates the injured worker through application of the full responsibility rule. The Fund correctly notes that the holding in Gregory should not be extended to apply to a second qualifying injury because the full responsibility rule applies to the employer's liability for industrial disability resulting from second qualifying date of injury, herein the February 21, 2009 date of injury.

Larson, 2012 WL 1074075, at *2. (*emphasis added*).

In support of her position, Delaney cites to an agency appeal decision issued subsequent to the appeal decision in this matter, *Strable v. Second Injury Fund of Iowa*, File No. 1666216.03, 2022 WL 17490657 (App. Nov.

29, 2022).[2] In *Strable*, prior to initiating litigation against the Fund, the claimant entered into two significant settlements with her former employer. *Strable v. Second Injury Fund of Iowa*, File 1666216.03, 2022 WL 17078680 (Arb. Aug. 8, 2022), at *7. One of the settlements was on a full commutation basis,[3] and involved only Strable's left lower extremity; the other settlement was on a compromise settlement basis[4] and *purported* to be for a different injury date and body parts (mental health and back) than the settlement involving the left lower extremity. *Id.* at *7.

The deputy commissioner presiding over the arbitration hearing, who concluded Strable had not proven entitlement to Fund benefits, found Strable had in fact sustained only one singular injury with her former employer, that

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[2] *Strable* is presently pending on judicial review in Polk County District Court, Case No. CVCV064995.

[3] Workers' compensation settlements made pursuant to a full commutation basis are governed by Iowa Code § 85.45. Traditionally, claimants have been able to reach settlements on a full commutation basis with their employer and still proceed with a claim for benefits against the Fund under Iowa Code § 85.64 because commutation settlement documents require that the employer admit liability for the injury and also agree to a defined period for which benefits are being paid.

[4] Conversely, claimants who settle with their employer on a compromise settlement, pursuant to Iowa Code § 85.35(3), are unable to later proceed with a claim on that date of injury against the Fund. This is because an employer does not admit compensability (and extent thereof) of an injury in a compromise settlement, as is required under Iowa Code § 85.64. *See Housley v. Second Injury Fund of Iowa*, 964 N.W.2d 23, at *3-4 (Table) (Iowa Ct. App. 2021), 2021 WL 1400715; *see also Eaton v. Second Injury Fund of Iowa*, 723 N.W.2d 452, at *4 (Table) (Iowa Ct. App. 2006), 2006 WL 2560854.

being an injury to her left lower extremity, but with a sequela injury to her back and mental health. *Id.* at *8. Notably, the deputy stated:

> *All of the effects and disability* resulting from Ms. Strable's 2019 left leg injury evolve from and were generated by the left ankle. Her mental injuries were the *direct result* of her left leg injury. Development of low back pain was also the *direct result* of the left leg injury.

Id. at *7. (*emphasis added*). The deputy commissioner went on to state:

> [B]oth the mental injury and the low back pain *convert the left leg injury into an unenumerated injury*. The mental injury and low back pain are not separate body parts but rather inherently part of the left leg injury. As such, I conclude that Ms. Strable's 2019 injury involves the left leg, mental injuries, and low back. *As such, the 2019 injury is 'confined to an unenumerated part of her body.'*

Id. at *8. (*emphasis added*).

On appeal, Commissioner Cortese determined that – notwithstanding an explicit finding that Strable's 4/25/19 injury was not only to her left leg, but also to her back and mental health as sequela – under *Gregory*, Strable could still maintain a claim for benefits against the Fund. *Strable*, 2022 WL 17490657, at *7. The Commissioner went on to thereby conclude Strable had sustained an industrial disability of 70% due to the combined effects of her 4/25/19 left leg injury and a prior injury to her bilateral arms. *Id.* at *9. The amount of this award, after deduction of credits due to the Fund, was $196, 602.12. *Id.* at *10.

It is clear *Strable* was decided incorrectly for numerous reasons. First, the Commissioner's apparent interpretation of this Court's holding in *Gregory* is a confusing departure from the principles espoused in *Mortimer* and *Nelson*. For all intents and purposes this decision allows Strable's uncontroverted *unscheduled* injury to be compensated on an industrial basis *twice* – first through substantial settlements with her former employer, and secondly by the Fund.

Second, the Commissioner curiously declined to reconcile, let alone even acknowledge, the agency's prior precedent on the exact same issue which had been established in *Larson*. Interestingly, Commissioner Cortese has issued two appeal decisions involving the Fund subsequent to *Strable* which contain similar fact patterns concerning whether an asserted second injury is limited to a scheduled member or extends to the body as a whole. In each of these matters, the Commissioner found the asserted work injury did extend to the body as a whole, thereby implicating industrial disability against the employer, *yet found no liability existed against the Fund*. *See Kelly v. East Side Jersey Dairy, Inc. d/b/a Prairie Farms Dairy & Second Injury Fund of Iowa*, File No. 1621904.01, 2023 WL 2531054 (App. Mar. 7, 2023); *Oppman v. Eaton Corp. & Second Injury Fund of Iowa*, File No. 1649999.01, 2023 WL 2969333 (App. Apr. 6, 2023).

Third, the agency's interpretation of *Gregory*, as applied in *Strable*, is clearly diametrically opposed to longstanding principles concerning the avoidance of double recovery. *See Warren Properties v. Stewart*, 864 N.W.2d 307, 315-316 (Iowa 2015). Of note, the *Gregory* Court even took efforts to explicitly make clear that its holding *would not result* in a double recovery to the claimant. *Gregory*, 777 N.W.2d at 401 (stating "[o]ur interpretation of section 85.64 permitting a loss of an unenumerated member to qualify as a *first injury* for purposes of the Fund's liability notwithstanding the fact the injury was combined with disability to one or more unscheduled body parts for purposes of compensation under section 85.34(2)(u)[5] *will not result in a double recovery for Gregory*.") (*emphasis added*). The presiding deputy in *Strable* even explicitly noted his concern to that regard, stating "*I conclude the law disfavors double-recovery and that the intention of Iowa Code section 85.64 was not to permit a double-recovery to the claimant*, which is what would result under this factual scenario." *Strable*, 2022 WL 17171338, at *9. (*emphasis added*).

Delaney argues there is no double recovery concern here simply because she previously reached a settlement with Nordstrom for 40% of the right leg. This contention is not only incorrect, but further, it minimizes or

[5] At the time of the *Gregory* decision, Iowa Code § 85.34(2)(v) was known as § 85.34(2)(u).

entirely glosses over numerous complications that would result if Delaney's position was indeed the state of the law. It should be noted at the outset that Delaney *voluntarily elected* to settle her claim with Nordstrom before the arbitration hearing and proceed to hearing solely against the Fund to seek a potential industrial disability award. Delaney had every opportunity to instead to proceed to hearing against both Nordstrom and the Fund and seek an industrial award against one of the two defendants but did not.

Concerning Delaney's contention that she was not compensated for industrial disability by Nordstrom, this is simply incorrect. Both Delaney's treating physician Dr. Noiseux and her expert Dr. Manshadi, concluded she sustained 37% impairment to her right lower extremity pursuant to her total knee replacement. App. 39, 54. Dr. Manshadi additionally assigned 3% whole-person impairment due to Delaney's lymphedema. App. 40. There is no other basis for impairment in the record as it relates to the 3/12/19 injury.

Delaney's settlement with Nordstrom was for 40% impairment to the right lower extremity, which is obviously a greater amount than the 37% impairment rating given for her knee replacement. The only possible basis in the record upon which the additional 3% impairment could be based, therefore, is Dr. Manshadi's impairment rating for lymphedema. Delaney readily admits the settlement with Nordstrom for 40% to the right lower

extremity included the 'swelling' (i.e. lymphedema) being taken into account. Appellant's Brief, p. 27. That Delaney voluntarily limited her recovery against Nordstrom to this amount – *when taking into account the lymphedema* – should be of no consequence concerning her ability to still retain a claim against the Fund.

This is because it is quite simple to imagine a scenario where, if Delaney's position were the law, this would easily result in (and likely encourage) attempts by claimants to "double recover" for their injuries. Indeed, this is essentially what former Commissioner Godfrey contemplated in *Larson*, in declining to extend the holding in *Gregory* to asserted second qualifying injuries, and what actually took place in *Strable*.

As well, under the logic of Delaney's argument, a claimant could hypothetically sustain a simultaneous injury to their hip (an unscheduled member under Iowa law) and their leg (a scheduled member), settle the entire injury with the employer for an exaggerated or inflated impairment rating under the auspices of it being only a "leg" or "lower extremity" injury, and then be allowed to proceed with a claim against the Fund (or possibly even proceed to hearing against both the employer and Fund and seek two industrial disability benefit awards). Such a scenario in the above example, or as advanced by Delaney on judicial review, is clearly not in

concert with the full responsibility rule which dictates the *employer* is fully responsible for industrial disability benefits for unscheduled member injuries, as set forth in *Nelson*, 544 N.W.2d at 265.

In addition, extending the *Gregory* holding to second dates of loss will frustrate the statutory language in Iowa Code § 85.64(1), which states the Fund's liability commences after the "expiration of the full period provided by law" for the employer's liability. This would create confusing and likely contradictory outcomes given the potential for two possible industrial disability sources, especially in the event a claimant was rendered permanently and totally disabled by a work injury with scheduled and unscheduled components yet had an otherwise qualifying first date of loss for purposes of Fund benefits.

Lastly, extending the Court's holding in *Gregory* to asserted second dates of loss against the Fund will likely have the effect of shifting an employer's liability – and generally speaking, the industry which caused the injured worker's industrial disability – to the Fund. This would disregard the Court's consistent direction that Iowa Code § 85.64 is to be construed narrowly with application to only a limited number of cases, and that the Fund was not designed in order to relieve an employer of their statutory liability for an unscheduled injury. *See, e.g., Anderson v. Second Injury*

Fund, 262 N.W.2d 789, 791-792 (Iowa 1978); *Nelson*, 544 N.W.2d at 269-270; *Gregory*, 777 N.W.2d at 400-401.

To hold that a work injury involving both a scheduled member and unscheduled member component can now be compensated industrially by both the employer and the Fund will undoubtedly increase the overall liabilities of the Fund. This is because an entirely new class of work injuries – asserted second injuries involving both scheduled and unscheduled components – would now qualify for Fund benefits under Delaney's argument. This would, in turn, substantially increase the overall assessment made by the Iowa insurance commissioner upon employers and insurance carries, the entities which make payments into the Fund by way of periodic assessments. *See* Iowa Code § 85.65A.

Such a change would also unfairly punish employers with good safety records, and few work injuries, by increasing their total assessment, and forcing them to shoulder the burden of employers who traditionally have been fully responsible for unscheduled injuries. It is wholly unfair to allow an employer to divert their own substantial liability, or a significant portion thereof, to the Fund (and ultimately, the entire population of employers/insurance carriers who pay into the Fund via assessment), through procedural maneuvering or otherwise.

The above-stated concerns are simply not commensurate with the intended purpose of the Fund. The Fund was never intended to be a mechanism whereby the employer could relieve itself from statutory obligations to pay for a work injury. Rather, the Fund was created in order to provide additional compensation to a narrow class of injured workers who have sustained industrial disability due to the combined effect of two separate and distinct scheduled member injuries, as defined by the specifically enumerated body parts as set forth in Iowa Code § 85.64, and which otherwise would not qualify for industrial disability benefits.

For the reasons set forth above, this Court must find that the holding as set forth by the Iowa Supreme Court in *Gregory* does not extend to asserted second qualifying injuries against the Fund.

CONCLUSION

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

REQUEST FOR NONORAL SUBMISSION

Given the issues presented, 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:

- This brief has been prepared in a proportionally spaced typeface using Times New Roman in size 14 and contains 8220 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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