IN THE SUPREME COURT OF IOWA
SUPREME COURT NO. 23-0182
POLK COUNTY NO. CVCV064110

SECOND INJURY FUND OF IOWA,

RESPONDENT-APPELLEE,

vs.

DEE DELANEY,

PETITIONER-APPELLANT.

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

APPLICATION FOR FURTHER REVIEW
(Iowa Court of Appeals Decision: October 25, 2023)

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QUESTION PRESENTED FOR REVIEW

Did the Agency and Courts Err by Determining Delaney's Injury was a Whole Body Injury and Not a Qualifying Injury to the Right Lower Extremity?

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STATEMENT SUPPORTING FURTHER REVIEW

This case and this question address an inconsistency between how a myriad of injuries to systems of the body are classified within the workers' compensation system and how, specifically, vascular injuries are classified. The Agency has a de facto per se rule that any injury to the vascular system is a whole body injury. This treatment is manifestly different from how injuries to the nervous system or skin, as examples, are treated. Agency precedent is at odds with the idea the location of the injury determines whether the injury is confined to a scheduled member or whole body. It is also inconsistent with Appellate precedent.

This question was presented to a panel of the Court of Appeals which left the question unaddressed. Thus, only the Iowa Supreme Court can address an apparent inconsistency between the manner in which the Agency regards vascular injuries within the workers' compensation system from other injuries impacting systems of the body.

STATEMENT OF THE CASE

Nature of the Case

This matter is an appeal of an agency workers' compensation decision. The worker's compensation commissioner, and district court on judicial review, concluded that Delaney's work injury with the employer was properly considered a whole body injury and not an injury to the lower extremity. The case was transferred to the Iowa Court of Appeals where a panel rendered no decision on this question but reversed the lower court on other grounds. Delaney seeks further review.

Statement of the Facts

Dee Delaney started full-time work at Nordstrom in February 2018. App. 36 (T. at 68 Ll. 21-24). In early 2019, Dee began to feel the onset of stiffening and difficulty in bending her right knee. App. 19 (T. p. 27 Ll. 13-17). It became difficult for Dee to walk quickly, and she started limping. App. 20 (T. p. 28 Ll. 17-19). To ease the amount of walking, Dee began taking breaks at her workstation instead of going to the break area. Id.

On March 12, 2019, Dee was working a busy shift in which she did not have a dedicated workstation; she was moving merchandise on carts from chutes to temporary workstations. App. 21 (T. p. 29 Ll. 8-21). Dee believes she hyperflexed her right knee in the course of this shift, as after

work she experienced new symptoms. She could not bend her right knee and had weakness in it. App. 22 (T. p. 30 Ll. 2-13). It took Dee ten minutes to get into the cab of her pickup. Id. On or about March 17, Dee reported the injury when it did not improve on its own. App. 23 (T. p. 31 Ll. 1-7).

Dee was initially seen by Dr. Portnoy on March 21, 2019. Dr. Portnoy assessed arthralgia of the right knee and placed Dee on restrictions. App. 51. An April 5, 2019 MRI found an extensive complex tear involving the posterior horn through the posterior root of the medial meniscus and a grade IV chondromalacia patella. App. 52-53.

Dee was referred to Dr. Noiseux at UIHC. App. 54-110. On May 21, 2019, Dr. Noiseux noted the medial meniscus root tear in addition to degenerative changes. App. 55. Dr. Noiseux recommended total right knee arthroplasty. App. 56. Dr. Noiseux found this was related to the work injury in March 2019. App. 57. Dr. Noiseux performed this procedure on August 2, 2019. App. 77. Dr. Noiseux also performed a right knee joint manipulation surgery on October 3, 2019. App. 95.

When Dee returned to work on light duty in November 2019, she was pleased with the result of her surgery. App. 25-26 (T. p. 33 L. 23-p. 34 L. 6). She felt she was almost able to walk normally with her right leg. App. 26 (T. at 34 Ll. 9-10)

By June 2020, nearly one year after her right knee surgery, Dee began struggling with pain and swelling from right mid-calf to right foot. App. 27 (T. at 35 Ll. 2-3). This was diagnosed as lymphedema and caused by her right knee replacement surgery. App. 107, 112. UIHC physicians recommended compression stockings. App. 112.

Dee has used compression stockings on both her right and left legs since 2020. App. 28 (T. at 36 Ll. 3-15). Additionally, on her own Dee acquired specialized shoe insoles for her tennis shoes and a type of natural bamboo vinegar detox patches. App. 28-29 (T. p. 36 L. 19-p. 37 L.7). Dee also continued to take Advil. App. 28 (T. at 36 L. 19).

On March 4, 2021 Dr. Manshadi examined Dee for an independent medical evaluation and produced a report. App. 37. Dr. Manshadi found Dee sustained a right leg injury on March 12, 2019. App. 39. He found Dee would have reached MMI from this injury on January 2, 2020, nearly six months before any swelling began. Id. Dr. Manshadi further concluded that Dee suffered from lymphedema as a complication of the right total knee arthroplasty. App. 40. Dr. Manshadi and Dr. Noiseux both agree there was 37 percent partial impairment to the right knee stemming from the total knee arthroplasty. App. 39, 54. Dr. Manshadi also finds a separate impairment based on lymphedema.

Shortly before hearing, the employer and Dee agreed to settle Dee's 2019 injury as a scheduled member injury. App. 43. This settlement was approved by the Iowa Workers' Compensation Commissioner.

ARGUMENT

1. THE AGENCY AND LOWER COURT(S) ERRED BY HOLDING DELANEY'S WORK INJURY IS A WHOLE BODY INJURY AND NOT AN INJURY TO THE LOWER EXTREMITY

A. Standard of Review

The question before the Court is whether the 2019 injury is a whole body/unscheduled injury and therefore not compensable under § 85.64 as a matter of law. This is a question of whether the 2019 injury is properly regarded falling under § 85.34(2)(p)—a leg—or § 85.34(2)(v)—unscheduled or whole body. The district court incorrectly concluded the Agency's determination of this issue is a question of fact.

There has never been any dispute that Claimant suffers from lymphedema which arose as a sequela of the knee surgery she received in the course of treating the right leg injury.

On the other hand, the determination of which subsection of § 85.34 applies to the 2019 injury is a question of law. This requires properly interpreting and applying both the statute and relevant appellate law. Indeed, in the most notable recent Iowa Supreme Court decision regarding §

85.34, the Court had to determine whether an injury was properly regarded as falling under § 85.34(2)(n) or § 85.34(2)(v). Chavez v. MS Technology LLC, 972 N.W.2d 662 (Iowa 2022). In rendering a decision, the Court had to engage in "statutory construction," "determine and effectuate the legislature's intent," ensure an "interpretation is harmonious with the statute as a whole," and find an interpretation which "avoids absurd results." Id. at 667-68 (internal citations omitted). This constituted a reevaluation of the Agency's decision and to correct, if needed, the Agency's determination of which section of the Iowa Code § 85.34 applied for the admitted injury. In short, was the injury in Chavez a shoulder or an unscheduled, whole body injury? Getting the statutory construction right was a review for errors at law.

Conversely, the question before the Court was not a matter of simple deference to the Agency provided the factual findings were supported by substantial evidence. Had the Chavez Court interpreted the question of whether an injury was a shoulder or unscheduled (whole body) injury as a review of the agency's findings of fact, there would have been no need to engage in statutory construction. The Court could have simply concluded that as a doctor had opined the claimant "incurred an acute injury of her

right shoulder," and the Agency found it was a shoulder injury, therefore there was no further analysis needed. Id. at 665.

In this case, Dee is not asking this Court "to determine what 'evidence trumps' other evidence or whether one piece of evidence is 'qualitatively weaker' than another piece of evidence." 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). Dee is asking the Court to interpret the statute to effectuate the legislature's intent in a manner harmonious with the statute as a whole which avoids absurd results. Chavez, 972 N.W.2d at 667-78. This is a review of interpretation of law, or the proper application of law to the facts, and the Court may substitute its interpretation for that of the Agency.

B. Agency Precedent with Respect to Vascular Injuries is Inconsistent with Appellate Precedent and Standard Workers' Compensation Principles of Classifying Injuries.

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., 10 N.W.2d 549, 572 (Iowa 1943). "The situs of the impairment is the anatomical location of the damage or derangement." Linden v. Tyson Foods, Inc., 856 N.W.2d 383 (Iowa Ct. App. 2014). It is undisputed that subsequent to total right knee arthroplasty, Dee began to

experience swelling and pain from right mid-calf to right foot. App. 27 (T. at 35 Ll. 2-3). For this and an arthritic condition, Dee uses compression stockings, shoe insoles, bamboo vinegar detox patches, and elevates her feet at night. App. 29, 34-35 (T. p. 37 Ll. 1-7, p. 55 L. 15-p. 56 L. 14). A primary care doctor diagnosed lymphedema. App. 106. The treating orthopedic physicians at UIHC stated, "She does have some postoperative lower extremity swelling. She is currently being treated with compression socks. This is first-line treatment and we do not recommend any further treatment." App. 107. There is only one additional record from June 2020 in which the UIHC physician stated there are "no indications that there is an inflammatory process . . . . This is not an infection . . . there is no indication for imaging, additional blood tests or pharmacotherapy." App. 112. Compression stockings were again recommended. Id. There is no evidence that Dee suffers from any condition which manifests outside her right leg nor does she require any treatment which impacts the body as a whole. Under a traditional anatomical situs of the injury analysis, the 2019 injury only resulted in damage or derangement to the right lower extremity.

Nonetheless, the Agency stated, "This agency has held that lymphedema constitutes an injury to the vascular system, and this is an injury to the body as a whole." App. 129. The deputy commissioner further

stated, "The Iowa Supreme Court has considered vascular injuries to be whole body injuries that are to be compensated industrially." Id. These statements do, largely, accurately state the Agency's rulings. On the other hand, these statements do not correctly characterize appellate court opinions. These statements overstate the law to the point of appearing to state that any vascular injury resulting in any degree of permanent impairment is, per se, a whole body injury. That is not the law.

Indeed, the Iowa Court of Appeals case cited by the original deputy commissioner decision took great pains to state that vascular injuries are not, per se, whole body injuries:

> This is not to say we agree that all DVT injuries are automatically or presumptively to the body as a whole. The commissioner relies upon a single Iowa Supreme Court case to conclude as such. See Blacksmith v. All–American, Inc., 290 N.W.2d 348 (Iowa 1980). In Blacksmith, the court examined a worker suffering from phlebitis of the left leg, an inflammation of the vein wall, which was compensated industrially. Id. at 353–55. The commissioner used this case to infer our supreme court would consider any similar vascular injury to the lower extremity to be an injury to the body as a whole. We do not necessarily agree Blacksmith lends itself to such a conclusion, however because we have found support for the commissioner's ultimate conclusion on another basis, we need not reach the issue.

Architectural Wall Systems v. Towers, 854 N.W.2d 74 slip op. at FN 5 (Iowa Ct. App. July 16, 2014). Thus, to the extent Agency cases cited by the deputy simply claim "lymphedema is considered a vascular disorder and as

such is to be rated as an impairment to the whole person," Iowa appellate courts do not support such a per se approach. Anderson v. Broadlawns Medical Center, 2019 WL 7759732 at 8, File No. 5064991 (Arb. Dec. December 16, 2019) (internal citations omitted).

Even the Agency, at times, has declined to follow a one-size-fits-all approach to vascular system injuries. In Nelson v. Artistic Waste Services, the Agency recognized certain conditions facially limited to a scheduled member have been compensated industrially, but went on to state, "these cases should not, however, be read as requiring that any damage to the *nervous system, vascular system, or skeletal system* is unscheduled because doing so would largely do away with the statutory schedule altogether." Nelson v. Artistic Waste Services, 2002 WL 32125502 at 5 (Arb. Dec. Sept. 4, 2002) (emphasis supplied).

The tendency within the Agency to equate vascular injuries with whole body injuries stands in stark contrast to the manner in which injuries to the nervous system or integumentary system, the skin, are treated. In the context of injuries to the skin, the analysis has focused on the facts of the individual circumstances. "The mere fact that the skin covers the entire body does not render an injury to the skin of the arm an injury to the body as a whole." Topete v. Global Food Processing, 1999 WL 33619689, File No.

1167910 (Arb. Dec. June 24, 1999). Burn injuries requiring skin grafting confined to the scheduled member are compensated as scheduled member injuries. Dikutole v. Tyson Foods, 2018 WL 2383236 at 13, File No. 5054404 (App. Dec. May 11, 2018).

In the context of injuries to nerves, the analysis has similarly focused on the facts of the individual circumstances. In Gates v. Jensen Transport. Inc., an injury to a leg and the peroneal nerve brought about peroneal neuropathy. Nonetheless, this was found to constitute an injury to the scheduled member and not the body as a whole. Gates v. Jensen Transport. Inc., File No. 1173121 at 7 (Arb. Dec. July 7, 2000). In Second Injury Fund v. Armstrong, the claimant suffered a foot injury which resulted in a severed nerve and a diagnosis of neuropathy in his left leg. Nonetheless, it was found to be a scheduled member because there was "nothing in the record to support the argument that [Claimant] suffers from any systemic condition extending beyond his left lower leg." Second Injury Fund v. Armstrong, 801 N.W.2d 628 slip op. at 4 (Iowa Ct. App. May 25, 2011). Appellate and agency caselaw establishes that skin or nerve injuries must be analyzed based on the individualized facts for evidence that the condition impacts the worker beyond the impaired scheduled member. When asking "what is the leg?" for skin or nerve injuries, the Agency applies the principle of it is the

anatomical situs of the injury which determines whether it is a leg or an unscheduled, whole body injury.

SIF may question the relevance of injuries to the nervous or integumentary systems. Also, SIF will presumably argue that vascular injuries should be treated differently than injuries to the nervous system or skin. The question is, why? There is no discernable reason to treat injuries to the vascular system differently than injuries to the nervous system or skin. Quite obviously, each of these are systems of the body which exist throughout or around the entire human body. However, it is possible to have a permanent injury to any of these systems which only manifests within a scheduled member and does not require treatment outside of that scheduled member. For skin injuries, the principle stated in Topete v. Global Food Processing was: "the mere fact that the skin covers the entire body does not render an injury to the skin of the arm an injury to the body as a whole." 1999 WL 33619689, File No. 1167910 (Arb. Dec. June 24, 1999). By analogy, is any injury to any part of the vascular system–here, below the knee–an injury to the body as a whole? Delaney simply has not found an explanation for this. Why does the principle in Topete not apply to a vascular injury confined to a scheduled member? The mere fact that Agency decisions on vascular injuries have happened to come down in the manner

they have does not articulate a legal rationale. Moreover, the manner in which the decisions cited by the Agency and the Fund treat all vascular injuries as whole body is inconsistent with appellate court precedent. Architectural Wall Systems v. Towers, 854 N.W.2d 74, slip op. at FN 5 (Iowa Ct. App. July 16, 2014).

The appellate cases on vascular injuries document injuries far more serious and manifesting in areas outside of an extremity. In Architectural Wall Systems, the claimant suffered from deep vein thrombosis (DVT), had undergone a surgery to remove a blood clot and had a filter surgically implanted outside his leg to prevent clots from moving to his heart or lungs. Architectural Wall Systems v. Towers, 854 N.W.2d 74 slip op. at 1. In Blacksmith, the claimant suffered from thrombophlebitis in his leg requiring a system-wide regime of anticoagulant medications. Blacksmith, 290 N.W.2d at 350. The record demonstrated that the thrombosis condition begins with a blood clot and the individual is at risk of a pulmonary embolism. Id. at 351-52. The treatment—an anticoagulant, or blood thinner—impacts the entire blood circulatory system, not just the blood in one leg. The claimants in Blacksmith and Architectural Wall Systems had vascular injuries which posed risk of death. The claimants in Blacksmith and Architectural Wall Systems received treatment which manifested in

parts of the body outside of the injured scheduled member (leg). The prior appellate cases documented vascular injuries requiring treatment which impacted the whole body and posed a risk of death to the claimant. This is a far cry from the "first-line treatment" of compression stockings, bamboo patches and foot elevation used by Dee. App. 107.

In sum, the weight of appellate legal authority does not support the idea that any vascular injury is a body as a whole body injury. Rather, Agency caselaw has expanded all vascular injuries to constitute whole body injuries on its own, without a basis in statute or appellate caselaw, and in a manner entirely inconsistent with the way the Agency handles injuries to the nervous or integumentary systems (skin). To the degree Dee has suffered a vascular injury, the record shows it to have a limited scope in comparison to the facts in appellate vascular cases. There is no evidence she suffers from a systemic condition outside the leg. There is no evidence of blood clotting. There is no concern for a potential embolism. There is no need for blood thinners. She simply requires compression stockings below her knee. In other words, if this very limited vascular injury is regarded as a whole body injury, then it is extraordinarily difficult to imagine a vascular injury which would ever be confined to a scheduled member.

To follow precedent which states it is the anatomical situs of an injury which controls whether it is a scheduled member injury or a whole person injury, to harmonize similar questions which arise with injuries to the nervous or integumentary systems, it seems logical that a vascular injury should only be considered a whole body injury when the injury itself or the treatment impacts other areas of the body outside the scheduled member (an arm or leg). However, where, as here, neither the injury nor the treatment impacts any portion of the body outside the leg, the injury should be regarded as falling under Iowa Code § 85.34(2)(p)—a leg—and not § 85.34(2)(v)—unscheduled.

CONCLUSION

Appellant respectfully requests this Court grant further review on this question and reverse the lower courts' ruling on judicial review.

REQUEST FOR ORAL ARGUEMNT

Appellant, through the undersigned counsel, states that it desires to be heard in oral argument.

Respectfully submitted,

/s/ Nate Willems

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PROOF OF SERVICE AND CERTIFICATE OF FILING

I certify that on November 14, 2023, I served this document on all other parties to this appeal electronically by EDMS to the following attorneys of record:

Jonathan Bergman

I further certify that on November 14, 2023, I have electronically filed this document with the Clerk of the Supreme Court, 1111 East Court Avenue, Des Moines, IA 50319.

/s/ Stephanie Collingwood

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This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(*d*) and 6.903(1)(*g*)(1) because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14-point font and contains 3370 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(*g*)(1).

/s/ Nate Willems November 14, 2023