

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
THE HONORABLE SAMANTHA GRONEWALD, JUDGE

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

BRENNA BIRD
Attorney General of Iowa

JONATHAN D. BERGMAN
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-3113
jonathan.bergman@ag.iowa.gov

ATTORNEYS FOR RESPONDENT-APPELLEE

QUESTION PRESENTED FOR FURTHER REVIEW

Delaney sought workers' compensation benefits from the Second Injury Fund of Iowa. The Iowa Workers' Compensation Commissioner concluded Delaney was ineligible for benefits because her asserted second injury was an unscheduled injury resulting in impairment to her right leg and lymphatic system. The District Court affirmed the Commissioner's decision on judicial review.

The Iowa Court of Appeals ruled that because Delaney's asserted second injury involved her right leg, the scheduled member portion of her injury could constitute a qualifying injury under Iowa Code § 85.64, and accordingly reversed and remanded.

Did the Iowa Court of Appeals correctly interpret Iowa Code § 85.64 in concluding an unscheduled injury may qualify as a second injury in a claim against the Second Injury Fund?

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STATEMENT SUPPORTING FURTHER REVIEW

In 2010, this Court addressed a question of first impression in Iowa workers' compensation law: whether a workers' compensation claimant's asserted *first* injury could qualify as a prior loss for purposes of a claim against the Second Injury Fund of Iowa (hereinafter "the Fund") if the injury extended to the whole body and was not limited to an enumerated scheduled member as set forth in Iowa Code § 85.64.

The Court answered this question in the affirmative in *Gregory v. Second Injury Fund*, 777 N.W.2d 395 (Iowa 2010). This was a significant change in Iowa law as it relates to the Fund. Thirteen years have elapsed since *Gregory*. During this time, this Court has not been confronted with the question of whether the holding in *Gregory* can also apply to an injury asserted as the *second* date of loss against the Fund.

That is, until now. In a decision dated 10/25/23, an Iowa Court of Appeals panel opinion reversed both the Iowa Workers' Compensation Commissioner and the District Court's decisions and concluded this Court's holding in *Gregory* can be extended to apply to a second injury, or loss, asserted against the Fund.

Delaney asserted a right leg injury on 3/12/19 for purposes of a qualifying second injury in her claim against the Fund. The Fund

contended Delaney's injury resulted in permanent impairment to her body as a whole and asserted her injury was unscheduled. The commissioner concluded Delaney's claim was ineligible for Fund benefits because her asserted second injury included permanent impairment to her body as a whole. The commissioner concluded Delaney's 3/12/19 injury was an unscheduled injury compensable only under Iowa Code § 85.34(2)(v) and could not qualify for Fund benefits since it was not an injury to an enumerated member as articulated in Iowa Code § 85.64.

On judicial review, the district court affirmed the commissioner, concluding substantial evidence supported the commissioner's finding that Delaney's second injury was unscheduled, and thus ineligible for Fund benefits. Additionally, the district court found Delaney failed to preserve error as to the question of whether her injury – if unscheduled – could still qualify as a second loss for purposes of a claim against the Fund, under *Gregory*.

In its 10/25/23 decision, a panel of the Court of Appeals (1) did not address a threshold question of whether Delaney's alleged second injury was an unscheduled member injury or was limited to her right lower extremity; (2) concluded Delaney preserved error on her alternative argument; and (3) concluded Delaney could still maintain her claim of a second qualifying

injury against the Fund even if the injury was unscheduled and not limited to an enumerated member under Iowa Code § 85.64. Following this decision, both Delaney and the Fund filed petitions for rehearing with the Court of Appeals. The Court of Appeals took no further action following the parties' respective motions for rehearing.

Further review of the panel's opinion is warranted for several reasons. First, the panel's decision is in direct conflict not only with prior decisions of this Court, and the Iowa Code. Second, the panel's decision concerns an important question of law that this Court has not addressed since *Gregory* was decided in 2010. Last, it appears the panel failed to appreciate the substantial financial impact this significant change in exposure will have upon the Fund, and in turn Iowa businesses moving forward.

The panel's decision paints a clear path to enable workers to double recover for their unscheduled work injuries – injuries which would previously never have qualified for Fund benefits – first from their employer and then from the Fund. This will both frustrate the purpose of the Fund and will lead to rising costs for employers and insurance carriers in Iowa. Accordingly, this case presents this Court with imperative questions of changing legal principles in Iowa workers' compensation law which are a matter of broad public importance and should be decided by this Court.

Therefore, the Iowa Supreme Court must grant further review to revisit and clarify its holding in *Gregory* in the context of asserted second injuries, and to alleviate further confusion, inconsistent decisions, and absurd results in future workers' compensation litigation.

STATEMENT OF THE CASE

Nature of the Case

This matter is an appeal of an agency workers' compensation decision. The workers' compensation commissioner, and district court on judicial review, concluded Delaney was not entitled to benefits from the Fund. Delaney appealed from the district court. The case was transferred to the Iowa Court of Appeals, where a panel reversed the district court, finding the agency and district court erroneously interpreted Iowa Code § 85.64, and concluded Delaney's claim should be remanded to the commissioner for further proceedings. The Fund seeks further review.

Statement of the Facts

Delaney sustained a work injury with her former employer Nordstrom culminating on 3/12/19. (App. 8). Delaney eventually treated with Dr. Noiseux, an orthopedic surgeon. (App. 55-58). Dr. Noiseux performed a right knee total replacement on 8/2/19. (App. 71-72). On 1/2/20, Dr. Noiseux opined Delaney had reached maximum medical improvement

(“MMI”) and had sustained 37% permanent impairment to her right lower extremity, pursuant to her knee replacement. (App. 54).

On 6/17/20, Delaney saw Dr. Bieber for concerns of swelling in her right foot. (App. 111). Dr. Bieber opined Delaney’s foot swelling was likely due to “destruction of her lymph from the surgery.” (App. 112). In a letter dated 8/4/20, Dr. Noiseux agreed with Dr. Bieber’s diagnosis of post-surgical lymphedema resulting from the right knee surgery. (App. 41). Later, on 9/30/20, Dr. Noiseux stated Delaney’s right foot swelling was consistent with lymphedema, and causally related the lymphedema to Delaney’s right knee replacement. (App. 107). Dr. Noiseux did not address whether Delaney had permanent impairment from lymphedema.

Delaney saw Dr. Manshadi on 3/4/21, at the direction of her attorney for purposes of an independent medical examination. (App. 37-40). Dr. Manshadi agreed Delaney sustained 37% right leg permanent impairment from her knee replacement, but also concluded Delaney’s right foot edema was lymphedema resulting from the knee replacement and assigned 3% whole person permanent impairment due to lymphedema. (App. 39-40).

On 7/28/20, Delaney filed a Petition with the Iowa Workers’ Compensation Commissioner against Nordstrom and the Fund alleging entitlement to workers’ compensation benefits. (App. 6). Comprising part

of her claim against the Fund, Delaney asserted a prior injury to her left leg in July 1986 as her first qualifying injury. (App. 6).

Prior to the arbitration hearing, Delaney settled her claim against Nordstrom, and this settlement was approved by the commissioner on 9/24/21. (App. 43-50). In their settlement, Delaney and Nordstrom stipulated Delaney sustained 40% permanent impairment to her right leg under Iowa Code § 85.34(2)(p) due to the 3/12/19 injury. (App. 43).

Delaney's claim against the Fund proceeded to arbitration hearing. The presiding deputy workers' compensation commissioner concluded Delaney was ineligible for benefits from the Fund because her asserted second injury was an unscheduled injury and not limited to a scheduled member. The workers' compensation commissioner affirmed without further analysis. The district court affirmed the agency's decision, and additionally found Delaney failed to preserve error as to the question of whether Delaney could still maintain a claim against the Fund if her second injury was an unscheduled injury.

Delaney appealed from the district court. The appeal was transferred to the Iowa Court of Appeals. A panel found the workers' compensation commissioner and district court erroneously interpreted Iowa Code § 85.64 and that Delaney could maintain a claim against the Fund regardless of

whether her second injury was an unscheduled injury because Delaney's right leg was involved in the injury.

Following this decision, both Delaney and the Fund filed petitions for rehearing. The Court of Appeals took no further action following the parties' respective motions for rehearing. The panel's opinion will be the focus of the Fund's argument.

ARGUMENT

I. The Court's holding in *Gregory* must not be extended to apply to asserted second injuries against the Fund.

The panel opinion was erroneous in four aspects. First, in concluding Delaney may proceed with a claim against the Fund when her second injury is an unscheduled injury, the panel ignored conflicting Supreme Court precedent and the plain language of Iowa Code § 85.34. Next, the panel's decision is contrary to both the avoidance of double recovery and the purpose of the Fund and will lead to confusing and inconsistent outcomes and absurd results in future Iowa workers' compensation law practice.

Third, the panel did not address a threshold question of whether Delaney's asserted second injury, which includes lymphedema, should be classified as an injury to her leg compensable under Iowa Code § 85.34(2)(p), or as an unscheduled injury under Iowa Code § 85.34(2)(v). Last, the panel incorrectly concluded Delaney preserved error on the issue of

whether pursuant to *Gregory* she may assert a ‘carved out’ portion of an unscheduled injury as a second injury against the Fund.

A. When applied to second injuries, the holding in *Gregory* cannot be reconciled with Iowa Supreme Court precedent and Iowa Code § 85.34

The panel’s opinion concluded Delaney could assert a claim for benefits against the Fund because her asserted second injury *involved* her right leg. *Delaney v. Second Injury Fund of Iowa*, __ N.W.2d __ (Iowa Ct. App. 10/25/23), 2023 WL 7014189 at *3. In concluding so, the panel engaged in statutory interpretation of Iowa Code § 85.64 through cherrypicked language from this Court’s prior decisions in *Gregory* and *Second Injury Fund v. George*, 737 N.W.2d 141 (Iowa 2007). The panel’s opinion on this issue is flawed for numerous reasons.

First, the panel incorrectly framed Delaney’s 3/12/19 injury (or a portion thereof) as a “leg” injury.¹ *Delaney*, 2023 WL 7014189, at *2. This is inaccurate. Due to lymphedema, Delaney’s 3/12/19 injury converted to an unscheduled injury compensable only under Iowa Code § 85.34(2)(v).

¹ As is addressed herein, the panel failed to address the threshold question of whether the 3/12/19 injury is properly categorized as a leg injury or an unscheduled injury. Since the panel’s opinion saw fit to address the question of whether an unscheduled injury may still qualify as a second injury for purposes of a Fund claim, it is assumed the panel *impliedly* concluded Delaney’s 3/12/19 injury was in fact an unscheduled injury.

Classifying the 3/12/19 injury as a “leg” injury is incongruent with well-established case and statutory law.

Iowa Code § 85.34(2) provides the various methods for compensating permanent disabilities. Under Iowa law, work injuries are classified as either scheduled or unscheduled losses. *Sherman v. Pella Corp.*, 576 N.W.2d 312, 320 (Iowa 1998). Scheduled losses are set forth in Iowa Code §§ 85.34(2)(a)-(u) and are compensated solely based on functional impairment.² *Id.*; Iowa Code § 85.34. Conversely, unscheduled losses are governed by Iowa Code § 85.34(2)(v) and are instead compensated by assessing the resulting industrial disability or loss of earning capacity caused by the injury. *See Floyd v. Quaker Oats*, 646 N.W.2d 105, 109 (Iowa 2002).

This Court has stated when a work injury causes permanent impairment 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.12, 16 (Iowa 1993) (emphasis added). Stated differently, when a work injury

² The Iowa Legislature made substantial changes to Iowa Code Chapter 85 in 2017, including changes to section 85.34(2). More specifically, scheduled losses are currently described in Iowa Code § 85.34(2)(a)-(u), and unscheduled losses are currently described in Iowa Code § 85.34(2)(v). Scheduled losses were previously described in Iowa Code § 85.34(2)(a)-(t), and unscheduled losses were previously described in Iowa Code § 85.34(2)(u). No changes were made to any aspect of the Second Injury Compensation Act in 2017, or since.

involves both scheduled and unscheduled body parts or conditions, the employee is compensated solely based upon industrial loss under Iowa Code § 85.34(2)(v) and does not receive additional compensation based upon functional impairment for any affected scheduled members under Iowa Code § 85.34(2)(a)-(u). *Id.* Historically, the Fund is not liable where a claimant's *second* injury constitutes an unscheduled loss, because the claimant must sustain two scheduled injuries to qualify for Fund benefits. *Second Injury Fund of Iowa v. Nelson*, 544 N.W.2d 258, 264 (Iowa 1995), *as amended on denial of reh'g* (Feb. 14, 1996) (stating “Fund liability is *not triggered when the second injury is unscheduled*”) (emphasis added).

The facts in this matter are undisputed: Delaney's second injury resulted in permanent impairment to not only her right leg but also to her whole body due to a sequela condition of lymphedema. As was concluded by the agency and district court, the sequela condition of lymphedema rendered Delaney's injury an unscheduled injury compensable solely under Iowa Code § 85.34(2)(v). This conclusion was not reversed by the panel.

Therefore, it was incorrect for the panel to say Delaney sustained a “leg” injury on 3/12/19 as it is defined in Iowa Code § 85.34. Due to the development of lymphedema, Delaney's injury became an injury to her body as a whole and, accordingly, compensable under Iowa Code § 85.34(2)(v),

and not Iowa Code § 85.34(2)(p). Delaney’s injury cannot be classified as both a “leg” injury compensable under Iowa Code § 85.34(2)(p) and a “body as a whole” injury compensable under Iowa Code § 85.34(2)(v). Because Delaney’s second injury is not an injury to a hand, arm, foot, leg or eye as required under Iowa Code § 85.64, the panel incorrectly concluded Delaney’s second injury could qualify for benefits from the Fund.

Second, the panel erred by misconstruing language from prior Supreme Court case law as applicable to this matter. Specifically, the panel’s opinion emphasized language from *George*, 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*.

Delaney, 2023 WL 7014189, at *3, *citing George*, 737 N.W.2d. at 147.

(emphasis added). The panel also placed emphasis on language from *Gregory*, specifically:

Although *George* interpreted only that part of section 85.64 which addresses the second qualifying injury, we believe its reasoning is relevant here. Liability of the Fund under section 85.64 expressly turns on the *part(s) of the body* permanently injured in successive injuries. The focus of our analysis must therefore be on whether Gregory sustained a partial permanent loss of at least two enumerated members in successive injuries.

Delaney, 2023 WL 7014189, at *3, *citing Gregory*, 777 N.W.2d at 400.

(emphasis added). The panel’s focus on the above language is misplaced.

George and *Gregory* both contain a crucial distinction from this matter – neither *George* nor *Gregory* involved an *unscheduled second* injury.

In *George*, this Court narrowly framed the issue addressed as “[w]hether a bilateral injury will qualify as a second loss under section 85.64.” *George*, 737 N.W.2d at 147. *George*’s second injury was limited to a scheduled member injury to her bilateral legs – two enumerated scheduled members. *Id.* at 144. *George* did not sustain an unscheduled loss to her body as a whole.

In addition, the Fund received credit for the entirety of *George*’s second injury, and *George* would not have been entitled to industrial disability benefits from her employer for her work injury because the second injury was limited to enumerated scheduled members. *Id.* at 147. Given the narrow scope of the issue this Court explicitly addressed in *George*, the holding cannot be read to extend beyond its conclusion that bilateral scheduled member injuries compensable under Iowa Code § 85.34(2)(t) may qualify as second injuries for purposes of Fund benefits.

Similarly, in *Gregory*, the issue addressed by this Court was a narrow issue that is not at issue in this matter. Specifically, the *Gregory* Court analyzed whether 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). The *Gregory* Court explicitly and repeatedly noted its holding was limited to asserted 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. (emphasis added). Surely the *Gregory* Court would not have repeatedly limited its holding to first injuries, if it intended its holding to apply to *any* injury – whether first or second – as defined in Iowa Code § 85.64.

Further, the *Gregory* Court noted *George* was not controlling on its analysis, as *George* only interpreted the part of Iowa Code § 85.64 which addresses second injuries, further highlighting that *Gregory* only interpreted the part of Iowa Code § 85.64 addressing first losses. *Id.* at 399-400. The *Gregory* Court even clarified *George* simply holds “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* . . .” *Id.* at 400 (emphasis added).

Additionally, the panel’s opinion is inconsistent with prior Supreme Court precedent in *Mortimer*, *Floyd*, and *Nelson* – cases not discussed in the panel’s opinion – which mandate unscheduled injuries are to be compensated under Iowa Code § 85.34(2)(v). Further, neither *George* nor *Gregory* stated they were *overruling* the prior precedent of *Nelson*. Rather, again, *Gregory* and *George* simply do not address the question of whether *unscheduled second* injuries may qualify for Fund benefits, and thus do not conflict with *Nelson*.

Therefore, by misconstruing the Supreme Court’s holdings in *George* and *Gregory*, and disregarding *Mortimer*, *Floyd*, and *Nelson*, the panel’s opinion is an extreme deviation from existing Supreme Court case law. This Court has never held a claimant may be entitled to industrial disability benefits from both the employer and the Fund for the exact same work injury, yet this is what the panel’s opinion appears to conclude. For this reason alone, further review is warranted.

B. Extending *Gregory*'s holding to apply to second injuries under Iowa Code § 85.64 will lead to double recovery and frustration of the purpose of the Second Injury Fund

The panel's opinion is also contrary to this Court's longstanding view that double recoveries should be avoided, as well as the purpose behind the Fund's implementation and existence. If left unaddressed, the panel's opinion will inevitably lead to double recovery by workers' compensation claimants. This is inconsistent with past decisions by this Court, which have repeatedly noted an intent to avoid double recoveries. *See Warren Properties vs. Stewart*, 864 N.W.2d 307, 315-317 (Iowa 2015) (discussing the Iowa Legislature's intent to prevent double recoveries in workers' compensation in the context of apportionment); *Toomey v. Surgical Services, P.C.*, 558 N.W.2d 166, 168-170 (Iowa 1997) (reconciling Iowa Code § 85.22 with Iowa Code § 147.136 in an attempt to avoid potential double recovery). In fact, the majority in *Gregory*, in response to the late Justice Cady's dissent, took pains to make clear its holding *would not* result in a double recovery to the claimant. *Gregory*, 777 N.W.2d at 401.

Unlike *Gregory*, where this Court considered double recovery in the context of asserted *first* injuries, the same reasoning simply does not hold true here. This is because, under the panel's opinion, if an asserted second injury is an *unscheduled* injury, an injured worker will inevitably recover

twice for the same injury: first for industrial disability benefits against their employer based upon effect of the work injury, and second for additional industrial disability benefits against the Fund based upon the combined effect of a separate asserted first injury, and then a ‘carved out’ scheduled member component of the unscheduled second injury. This nuance was discussed in a recent judicial review decision in *Second Injury Fund v. Strable*, CVCV064995 (Oct. 18, 2023):

As the issue of double recovery and Second Injury Fund is not triggered until there is a second qualifying injury, an analysis and holding dedicated to the first qualifying injury does not assist with the issue before the Court. There was no danger of double recovery because the second injury in *Gregory* was not at issue regarding eligibility for Second Injury Funds. Unlike the instant case, the claimant was not seeking compensation from the Second Injury Fund after also being compensated for the same injury by the employer. Moreover, the claimant in *Gregory* did not enter into a full commutation and settlement for the same injury for which she was claiming eligibility from [the Fund].

Id. at 7; *see also Larson v. Second Injury Fund of Iowa*, File No. 5033159, 2012 WL 1074075 (App. Mar. 27, 2012) (former Commissioner Godfrey declining to apply *Gregory* to an asserted second injury which was unscheduled and noting in second injuries involving scheduled and unscheduled components the employer fully compensates the worker through the full responsibility rule so that double recovery does not occur). While *Strable* and *Larson* are not binding on this Court, both decisions

contain a more thorough analysis, underscoring a key concern the panel failed to appreciate when interpreting *Gregory*.

Notably, the panel's opinion *did not* reverse the agency and district court's conclusions that Delaney's asserted second injury involved lymphedema. Therefore, under the panel's holding, in addition to recovery from the Fund, Delaney would have been entitled to an industrial disability award from Nordstrom for the 3/12/19 injury had she not elected to settle that claim,³ and instead proceeded to arbitration hearing against Nordstrom along with the Fund. The panel's opinion paves a clear path for claimants to double recover for the same injury through receipt of industrial disability benefits from both an employer and the Fund.

The panel's opinion is also inconsistent with past interpretation of Iowa Code § 85.64 when discussing the purpose of the Fund. This Court has stated, “[i]n interpreting the workers’ compensation statute, our ultimate goal is to determine and effectuate the intent of the legislature.” *Aluminum Co. of Am. v. Quinones*, 522 N.W.2d 63, 65 (Iowa 1994) (internal citations omitted). This Court has consistently stated Iowa Code § 85.64 is to be

³ The Fund is not bound by representations made between a claimant and employer in settlement documents, as the agency has explicitly recognized the potential benefit to the claimant of entering a strategic settlement with the employer to establish a more valuable claim against the Fund. See *Grahovic v. Second Injury Fund of Iowa*, File No. 5021995, 2009 WL 3382042, at *1 (App. Oct. 9, 2009).

construed narrowly with application to only a limited number of cases, and that the Fund was not designed to relieve an employer of its liability for an unscheduled injury or to compensate an employee twice for the same disability. *See, e.g., Anderson v. Second Injury Fund*, 262 N.W.2d 789, 791-792 (Iowa 1978) (stating (“[a]n employer hiring handicapped persons must provide full worker’s compensation benefits for a handicapped employee”)); *Nelson*, 544 N.W.2d at 269-270; *Gregory*, 777 N.W.2d at 400-401; *see also Lorenzen v. Second Injury Fund*, File No. 5024990, 2016 WL 771145, at *9 (Arb. Feb. 24, 2016) (“the purpose of the Second Injury Fund is to minimize an employers’ liability for prior injuries. Its purpose was not to transfer an employers’ liability for a work injury to the Fund.”). The idea that a claimant should not receive two industrial disability awards from a single work injury cannot reasonably be interpreted to be detrimental.

Also, extending *Gregory*’s holding to second injuries frustrates 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 nuance would create confusing and likely contradictory outcomes given the potential for two possible industrial disability sources. This Court has previously stated “the primary end sought to be achieved by the enactment of second injury fund legislation is to

encourage the employment of handicapped persons . . .” *Anderson*, 262 N.W.2d at 792; *see also Second Injury Fund v. Neelans*, 436 N.W.2d 355, 358 (Iowa 1989). The Fund was not created to enrich or provide a windfall to claimants whose work injuries fall outside the narrow class of cases contemplated by the Legislature in Iowa Code § 85.64.

Finally, an outcome where an entire new class of injuries – unscheduled work injuries – may be eligible for Fund benefits will substantially increase the Fund’s overall liabilities and lead to absurd results. This will in turn necessitate larger and/or more frequent assessments on Iowa employers and insurance carriers, the primary contributors of monies into the Fund by way of surcharge. *See* Iowa Code § 85.65A. Moreover, Iowa employers and insurance carriers will now effectively pay two industrial awards to the same claimant for a single work injury—once as the actual liable employer and again through Fund surcharges.

This unfairly punishes employers who have good safety records and fewer work injuries by increasing their total assessments and forcing them to shoulder the burden of employers who have traditionally been responsible for more unscheduled losses. This could also lead to placing Iowa employers at a competitive disadvantage in comparison to neighboring states

due to higher assessments, an outcome cautioned against by Justice Cady in the *Gregory* dissent. *Gregory*, 777 N.W.2d at FN 6.

Delaney's unscheduled work injury is not within the narrow class of work injuries the Legislature intended to qualify for Fund benefits. Nordstrom should bear full responsibility for Delaney's industrial loss due to her unscheduled work injury, and Delaney should not be entitled to an award from the Fund as well as Nordstrom. This outcome is inconsistent with the intended purpose of the Fund, promotes double recovery, and for these reasons warrants further review by this Court.

C. The panel prematurely addressed *Gregory* before first addressing the threshold question of whether Delaney's 3/12/19 work injury was an unscheduled injury or a scheduled member injury

Notwithstanding the prior arguments, the panel's opinion also failed to address an important threshold question: did lymphedema convert Delaney's 3/12/19 injury into an unscheduled injury? This question was the primary focus of Delaney's appeals to the commissioner, district court, and Court of Appeals, yet confusingly the panel's opinion did not address this issue.⁴

If the panel had found Delaney's 3/12/19 injury was improperly classified as an unscheduled injury, and instead should have been classified

⁴ Delaney filed a Petition for Rehearing with the Iowa Court of Appeals on 11/1/23 concerning this issue. No rehearing decision was issued.

a leg injury, it would have been unnecessary for the panel to address further issues. This is because if Delaney's 3/12/19 injury was indeed limited to her right leg, then her injury would be compensable under Iowa Code § 85.34(2)(p) and would qualify for Fund benefits as a second injury under Iowa Code § 85.64. It was error for the panel not to address this threshold question in its opinion.

D. The panel incorrectly found Delaney preserved error concerning the question of whether *Gregory* may apply to second injuries under Iowa Code § 85.64

Finally, the panel mistakenly concluded Delaney preserved error concerning whether she may assert a claim against the Fund based upon an unscheduled second injury. On judicial review, and again on appeal to the Court of Appeals, the Fund asserted Delaney failed to preserve error on this issue. In its opinion, the panel merely stated “The Fund contends this claim is not properly preserved because it was not raised in the district court. We are not convinced by the Fund's assertion Delaney's claim somehow morphed beyond her claim that she had a second qualifying injury.”

Delaney, 2023 WL 7014189, at *3.

The panel's analysis in this regard is not only confusing, but also is incorrect. The Fund did not argue error preservation based upon Delaney's failure to raise this issue in the *district court*. The Fund's argument is based

upon Delaney's failure to raise the issue and request consideration of the same at the *agency level* in a motion for rehearing following either the initial arbitration decision, or the commissioner's appeal decision. Since Delaney did not request rehearing on this issue, the agency made no finding on this specific question.

This Court has previously stated “[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.” *KFC Corp. v. Iowa Dep’t. of Revenue*, 792 N.W.2d 308, 329 (Iowa 2010); *see also Soo Line R.R. v. Iowa Dep’t. of Transp.*, 521 N.W.2d 685, 688 (Iowa 1994) (stating the scope of administrative review is limited to questions that were actually considered by the agency).

The specific question at issue is whether under *Gregory* an unscheduled second injury may still qualify for benefits against the Fund. The agency did not address this question in their decisions, therefore there was no finding or conclusion by the agency on this issue. Accordingly, Delaney did not preserve this issue for judicial review. The panel's opinion incorrectly concluded the opposite. Further review is warranted.

CONCLUSION

The Second Injury Fund of Iowa respectfully requests this Court grant further review, vacate the Court of Appeals panel opinion, and affirm the District Court's ruling on judicial review.

REQUEST FOR ORAL ARGUMENT

The Second Injury Fund of Iowa, through the undersigned counsel, states that it desires to be heard in oral argument.

Respectfully submitted,

BRENNA BIRD
Attorney General of Iowa

/S/ JONATHAN D. BERGMAN
JONATHAN D. BERGMAN
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-3113
Jonathan.Bergman@ag.iowa.gov

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.1103(4) because:

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/s/JONATHAN D. BERGMAN
JONATHAN D. BERGMAN
Assistant Attorney General
Hoover State Office Building, 2nd FL
Des Moines, Iowa 50319
(515) 281-3113
Jonathan.Bergman@ag.iowa.gov

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 Application for Further Review with the Clerk of the Iowa Supreme Court on the 14th day of November, 2023, through the electronic document management system. The following Counsel will be served by the electronic document management system:

Nate Willems
Rush & Nicholson, P.L.C.
nate@rushnicholson.com

/S/ JONATHAN D. BERGMAN
JONATHAN D. BERGMAN
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-3113
Jonathan.Bergman@ag.iowa.gov