

IN THE COURT OF APPEALS OF IOWA

No. 1-280 / 10-1689
Filed May 25, 2011

SECOND INJURY FUND OF IOWA,
Petitioner-Appellant,

vs.

WAYNE ARMSTRONG,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Artis I. Reis, Judge.

The Second Injury Fund of Iowa appeals the district court's ruling on judicial review affirming the decision of the Iowa Workers' Compensation Commissioner that Wayne Armstrong is entitled to total disability benefits from the Fund. **AFFIRMED.**

Thomas J. Miller, Attorney General, and Joanne L. Moeller, Assistant Attorney General, for appellant.

Matthew D. Dake and Daniel J. Anderson of Wertz & Dake, Cedar Rapids, for appellee.

Heard by Eisenhauer, P.J., and Potterfield and Tabor, JJ.

POTTERFIELD, J.

The Second Injury Fund of Iowa (the Fund) appeals the district court's ruling on judicial review affirming the determination of the workers' compensation commissioner that Wayne Armstrong is entitled to total disability benefits from the Fund.

I. Background Facts and Proceedings.

In the 1980s, Armstrong underwent surgery on his left foot that resulted in a severed nerve between his toes. Armstrong was given no medical restrictions on the use of his foot, and he performed his job duties, including the requirement that he stand or walk during much of his shift, without accommodations. When Armstrong was examined in April 2008 for purposes of this litigation, his doctor assigned a four percent left lower extremity impairment sustained as a result of the previous surgical injury to his foot.

On June 23, 2005, Armstrong's left leg was crushed between a forklift and a rack of steel while he was at work. Armstrong's recovery was complicated by the necessity of a skin graft and the development of a hematoma and phlebitis. As a result of this injury, he was left with burning pain in his lower leg. He was ultimately diagnosed with sural and superficial peroneal neuropathy in his left leg.¹

Doctor Michael Emery performed the initial treatment for Armstrong in 2005. Dr. Emery anticipated physical therapy and return to work as a welder full-time by the end of September 2005. In October, Armstrong began working two

¹ "Peroneal" concerns the fibula. *Taber's Cyclopedic Medical Dictionary* 1451 (18th ed. 1997). "Neuropathy" refers to any disease of the nerves. *Id.* at 1294. "Sural" refers to the calf area of the leg. *Id.* at 1868.

hours per day on a daily basis. However, Armstrong used all of his leave allowed under the Family and Medical Leave Act before he was able to return to work full-time, and his employment was terminated.

Doctor Mark Taylor also worked with Armstrong. Dr. Taylor had Armstrong perform a functional capacity evaluation (FCE) on October 3 and 4, 2006. Limiting factors for Armstrong primarily included pain and weakness in his lower left leg, and high levels of pain in his left shoulder. The FCE report stated, "Based on his performance . . . Armstrong may perform work within the light category of work"

In November 2006 Dr. Taylor imposed several work restrictions on Armstrong, including a need to have "the ability to alternate walking/standing/sitting as needed for comfort." Dr. Taylor also completed a report on Armstrong's impairment rating. He assigned a fourteen percent lower extremity impairment based on range of motion impairment and nerve injuries. He also assigned a ten percent whole person impairment due to skin injury and scarring. He explained the skin section of the AMA Guides used only whole person impairments, which could not be assigned to the specific body part that was injured.

Dr. Taylor referred Armstrong to Doctor Craig Dove for "evaluation of his left lower extremity." Dr. Dove recommended that Armstrong alternate sitting and standing as needed for comfort. Dr. Dove concurred in the diagnosis of left sural and superficial peroneal neuropathy. As of September 2006, Dr. Dove determined Armstrong was at maximum medical improvement. In February 2009, he signed a statement saying he believed that to a reasonable degree of

medical probability, Armstrong's left lower extremity injury was "limited to and confined in his lower extremity and has not caused a systemic or whole person condition under the *AMA Guides*."

In an independent medical examination performed in January 2008 on behalf of Armstrong, Doctor John Kuhnlein assigned Armstrong a fourteen percent left lower extremity impairment and a seven percent whole person impairment with respect to scarring. Kuhnlein also recommended permanent restrictions for Armstrong, including that he "should sit or stand on an occasional basis, and change positions on an as need basis."

Barbara Laughlin, a vocational consultant, performed an employability assessment of Armstrong dated December 23, 2008. Armstrong's work experience consisted primarily of working as a welder, driving a semi truck, and for approximately the last seventeen years leading up to his June 2005 injury, as a welder for Highway Equipment. At the time of trial, Armstrong was employed as a school bus driver two to four hours per day during the school year. Laughlin reviewed work restrictions for Armstrong and found the restriction that Armstrong alternate sitting, standing, and walking as needed to be a "very limiting restriction." After considering Armstrong's age of sixty-four, his high school education, and work restrictions, Laughlin concluded, "Absent a decrease in his pain levels and an increase in his skills and abilities as well as his education, Mr. Armstrong's ability to sustain full time work has ceased."

On June 24, 2008, Armstrong filed a petition against the Fund alleging entitlement to benefits from the Fund because of a first loss in the 1980s affecting his left foot and a second loss affecting his left leg on June 23, 2005.

The matter was heard by a deputy workers' compensation commissioner who issued an opinion July 31, 2009, finding Armstrong was entitled to permanent total disability benefits from the Fund. The Fund appealed, asserting that Armstrong was not entitled to fund benefits because his injury extended beyond his leg into his body as a whole and that he was not permanently and totally disabled. The workers' compensation commissioner concluded the Iowa Supreme Court had recently overruled cases relied upon by the Fund to support its argument that injuries extending to the body as a whole are not qualifying injuries under Iowa Code section 85.64 (2007).

The Fund filed a petition for judicial review, alleging that the supreme court did not overrule this line of cases and that the deputy erred in finding Armstrong to be totally and permanently disabled. The district court ruled there was substantial evidence to conclude Armstrong had suffered a qualifying second injury and that case law cited by the Fund on this point was distinguishable. The district court also concluded there was substantial evidence in the record to support the commissioner's finding of permanent total disability.

The Fund appeals, arguing: (1) the supreme court did not overrule the line of cases holding an injury that affects the body as a whole is not a qualifying injury; and (2) the commissioner impermissibly included non-qualifying injuries in finding Armstrong was permanently and totally disabled.

II. Standard of Review.

This appeal is reviewed under standards described in Iowa Code chapter 17A. See Iowa Code § 86.26. "The agency decision itself is reviewed under the standards set forth in section 17A.19(10)." *Gregory v. Second Injury Fund of*

Iowa, 777 N.W.2d 395, 397 (Iowa 2010). We will reverse the agency's decision if a determination of fact by the commissioner is "not supported by substantial evidence in the record before the court when that record is viewed as a whole." Iowa Code § 17A.19(10)(f); *Arndt v. City of LeClaire*, 728 N.W.2d 389, 393 (Iowa 2007).

III. Second Injury Fund Liability.

Iowa Code § 85.64 governs Second Injury Fund liability stating:

If an employee who has previously lost, or lost the use of, one hand, one arm, one foot, one leg or one eye, becomes permanently disabled by a compensable injury which has resulted in the loss of use of another such member or organ, the employer shall be liable only for the degree of disability which would have resulted from the latter injury if there had been no pre-existing disability.

An employee must prove three things to trigger the liability of the Fund:

(1) that the employee has either lost, or lost the use of a hand, arm, foot, leg, or eye; (2) that the employee sustained the loss, or loss of use of another such member or organ through a work-related, compensable injury; and (3) that there is some permanent disability from the injuries. *Second Injury Fund of Iowa v. Bergeson*, 526 N.W.2d 543, 547–48 (Iowa 1995). Both the first and second injuries must be scheduled injuries to invoke Fund liability. *Second Injury Fund of Iowa v. Nelson*, 544 N.W.2d 258, 269 (Iowa 1996). The Fund does not contest in this appeal that the first surgical injury to the foot is a qualifying injury.

"Industrial disability includes an evaluation of the extent of functional disability, along with the employee's age, education, qualification, experiences and the injury-induced inability of the employee to engage in employment for which the employee is fitted." *Simbro v. DeLong's Sportswear*, 332 N.W.2d 886,

887 (Iowa 1983); see also *Second Injury Fund v. Shank*, 516 N.W.2d 808, 813 (Iowa 1994). Injuries to the body as a whole are unscheduled injuries and are not subject to Fund liability. *Nelson*, 544 N.W.2d at 269.

IV. Armstrong's Second Qualifying Injury to his Left Leg.

The Fund asserts Armstrong's second injury, which resulted in a diagnosis of neuropathy, implicated his body as a whole and therefore was not a qualifying injury under relevant case law. We conclude substantial evidence supports the commissioner's finding that Armstrong suffered from a qualifying second injury.

The Fund relies upon *Collins v. Department of Human Services*, 529 N.W.2d 627 (Iowa Ct. App. 1995), to support its argument that the Fund is not liable since Armstrong's injury was an injury to the body, rather than an injury to a scheduled member. We reject this argument, not because we agree with the commissioner that our supreme court has overruled *Collins*, but because we determine *Collins* is factually distinguishable from the present case.

In *Collins*, which is not a Second Injury Fund case, this court determined the employee suffered from reflex sympathetic dystrophy, a "dysfunction of the sympathetic nervous system." This court concluded the employee "suffered an injury to a scheduled member, her hands, and also to a part of the body not included in the schedule, her nervous system." *Collins*, 529 N.W.2d at 629. Collins's unscheduled injury, therefore, was compensable as a loss to the body as a whole. *Id.*

In the present case, Armstrong did suffer an injury to a scheduled member, his left leg, including the nerves in his left leg. We agree with the finding of the district court that "there is nothing in the record to support the

argument that Armstrong suffers from any systemic condition extending beyond his left lower leg.” Armstrong was diagnosed with neuropathy, but Dr. Dove specifically found this condition was limited to Armstrong’s lower extremity. Unlike in *Collins*, we cannot conclude that Armstrong suffered an injury to his entire nervous system. Substantial evidence supports a finding that Armstrong sustained a second injury to a scheduled member. We determine the line of cases involving systemic conditions affecting the body as a whole are not applicable here,² where Armstrong’s injury was confined to a scheduled member. See, e.g., *Barton v. Nevada Poultry Co.*, 253 Iowa 285, 287, 110 N.W.2d 660, 661 (1961) (“[A]s a result of the blow to the right foot, a circulatory ailment, . . . affecting her entire nervous system, has developed.”)

V. Determination of Permanent Total Disability.

The Fund asserts the commissioner considered impermissible factors—namely other, non-qualifying injuries—in finding Armstrong was entitled to permanent total disability. Contrary to Armstrong’s assertions that the Fund raised this argument for the first time in its appeal before the district court, we find this argument was properly raised before the commissioner and was preserved. The commissioner affirmed and adopted the deputy’s findings of fact and conclusions of law on this matter.

The Fund asserts pain in Armstrong’s shoulder, back, elbow, hip, and buttock were limiting factors in his FCE that should not have been considered in

² The district court did not address the Fund’s argument that the commissioner erred in stating the supreme court has overruled these cases. Because we find the *Barton* line of cases do not apply to Armstrong’s injury, we decline to address the issue of whether the Iowa Supreme Court overruled this line of cases in *Gregory* and *Second Injury Fund of Iowa v. Kratzer*, 778 N.W.2d 42 (Iowa 2010).

determining industrial disability. The Fund argues Armstrong is only entitled to benefits from the Fund for industrial disability caused by his first and second injuries. The Fund relies on the supreme court's instructions in *Gregory* that the commissioner consider the loss of earning capacity only as it related to the combined effect of the scheduled members affected in the two qualifying injuries, excluding any loss of earning capacity resulting from disability to other body parts arising from the same events. 777 N.W.2d at 401.

The Fund's reliance on *Gregory* here is misplaced. The qualifying first injury in *Gregory* resulted from an incident that also caused injury to an unscheduled body part, for which Gregory was compensated industrially under Iowa Code section 85.34(2)(u). *Id.* at 400. The court's directions that the commissioner consider only the extent to which the employee's capacity was diminished by the combined effect of her losses to enumerated extremities were aimed at eliminating double recovery since the employee had recovered separately for losses to unenumerated body parts. *Id.* *Gregory* is inapplicable to the present case because Armstrong has not been compensated industrially for any previous injuries. Nothing in the record suggests he ever was compensated for a previous unscheduled injury or that the compensation awarded here included disability from a previous unscheduled injury. Any non-qualifying injuries previously sustained by Armstrong had no effect on his ability to earn wages. There is nothing in the record to suggest Armstrong had sustained injuries, other than the two scheduled injuries, that resulted in industrial disability.

Although Laughlin's report references pain in Armstrong's shoulder, lower back, right elbow, and right hip, the commissioner did not reference these

symptoms in its decision. In determining that Armstrong could not work full-time, the commissioner appropriately considered the medical evidence regarding Armstrong's left leg injuries, Armstrong's age, and the restrictive limitation that he be permitted to alternate among sitting, standing, and walking. We decline the Fund's invitation to remand this case to the commissioner for a "clarification" of whether the pain symptoms in other parts of Armstrong's body were considered.

The Fund also asserts the agency erred in finding Armstrong to be totally and permanently disabled in spite of his ability to partially support himself. Because the Fund cites no authority in support of this issue, we deem it waived. See Iowa R. App. P. 6.903(2)(g)(3).

AFFIRMED.