

IN THE COURT OF APPEALS OF IOWA

No. 7-072 / 06-0542
Filed September 19, 2007

SECOND INJURY FUND OF IOWA,
Petitioner-Appellee/Cross-Appellant,

vs.

NANCY M. KRATZER,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Polk County, Richard G. Blane II,
Judge.

Appeal from judicial review of a workers' compensation award. **AFFIRMED.**

David A. O'Brien of Willey, O'Brien, L.C., Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, and Julie A. Burger, Assistant Attorney
General, for appellee.

Heard by Sackett, C.J., and Mahan and Miller, JJ.

SACKETT, C.J.

Claimant/appellant, Nancy Kratzer, appeals from the district court's reversal of an award of benefits from the appellee/cross-appellant, Second Injury Fund of Iowa ("fund"). She contends the district court, on judicial review, misconstrued Iowa law in reaching the erroneous conclusion she was not entitled to benefits from the fund. We affirm the district court.

I. Background Facts and Proceedings.

Claimant sustained an injury to both knees and her lower back in 1994. Her treating physician rated her impairment as twenty-five percent for the lower right extremity and twenty-five percent for the lower left extremity. Her employer's physician rated her impairment as eight percent for her lower left extremity and three percent for the whole body. The agency found a twenty percent industrial disability and awarded benefits on that basis. It also found a twenty-five percent impairment of the right leg and a fifteen percent impairment of the left leg.

Claimant sustained an injury to her left knee in 2002. Her employer's physician rated her impairment as an additional two percent for her lower left extremity. She eventually took early retirement because her employer could not accommodate her increased work restrictions. The agency found she "felt compelled to take early retirement due to her combined disability from her right and left legs." It found claimant "suffered a 100% loss of her earning capacities as a result of the combined effect of the first and second injuries." It awarded her permanent total disability payments under Iowa Code section 85.34(3) (2005).

On judicial review, the district court interpreted section 85.64 to require the second qualifying injury for fund purposes to "include a member that does not form

the basis for the first injury.” That is, “in order to trigger Second Injury Fund liability, the subsequent loss must include loss of a member that is not part of the previous loss.”

II. Scope and Standards of Review.

When a district court reviews agency action, it must do so under the Iowa Administrative Procedure Act. *IBP, Inc. v. Harpole*, 621 N.W.2d 410, 414 (Iowa 2001). We review a district court’s judicial review of agency action “to determine if we would reach the same result as the district court in our application of the Act.” *Arndt v. City of Le Claire*, 728 N.W.2d 389, 393 (Iowa 2007).

III. Merits.

Claimant contends both of her injuries are qualifying injuries for fund purposes and that she is permanently and totally disabled. The fund contends neither injury is a qualifying injury and she is not entitled to industrial disability benefits.

Claimant’s 1994 injury, involving both lower extremities and her lower back, was treated as an unscheduled injury and was compensated on an industrial disability basis. *Kratzer v. Rockwell Int’l Corp.*, No. 00-0382 (Iowa Ct. App. Dec. 13, 2000); see *Second Injury Fund v. Shank*, 516 N.W.2d 808, 813 (Iowa 1994). Claimant’s 2002 injury was to her left lower extremity. Iowa Code section 85.64 limits the benefits paid by the fund:

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 or 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. In addition to such compensation, and after the expiration of the full period provided by law for the payments thereof by the employer, the

employee shall be paid out of the “Second Injury Fund” created by this division the remainder of such compensation as would be payable for the degree of permanent disability involved after first deducting from such remainder the compensable value of the previously lost member or organ.

(Emphasis added). Thus, when a claimant sustains two scheduled losses, the fund pays for any industrial disability, less the benefits paid for the scheduled injuries.

Shank, 516 N.W.2d at 813; *Second Injury Fund v. Braden*, 459 N.W.2d 467, 471 (Iowa 1990).

The agency analyzed the 1994 injuries and concluded they

involved separate, independent injuries to multiple, distinct parts of her body. For workers’ compensation purposes it was compensated as unscheduled because of the back injury component but it nevertheless provided claimant with two potential qualifying first losses for Second Injury Fund purposes, namely twenty-five percent of the right leg and fifteen percent of the left leg. Neither leg disability had its basis in the back injury.

The fund argues it is not permissible to “piecemeal” the claims, separating the scheduled injuries from the unscheduled. A similar argument was resolved last month in *Second Injury Fund v. George*, ___ N.W.2d ___, ___ (Iowa 2007).

In *George*, claimant’s first injury was to her left leg. The second injury was to both legs. The agency determined the bilateral nature of the second injury did not disqualify the claimant from recovery from the fund. The supreme court analyzed the language of section 85.64, “‘loss of or loss of use of another such member or organ’ to mean a loss to another such member regardless if the second loss includes other injuries.” *Id.* at ___ (quoting Iowa Code § 85.64). The court considered the loss to the right leg, part of the bilateral injury, as a qualifying loss to “another such member.” *Id.*

In the case at hand, however, even if we consider the 1994 injuries to claimant's right and left legs as scheduled member injuries, the 2002 injury to her left leg is not an injury to "another" member. Instead, it is another injury to a member injured before.¹ Our conclusion on this issue is the same as the district court's. Consequently, we affirm the district court's reversal of fund benefits under section 85.64.

AFFIRMED.

¹ Appellant "requests leave of court to review, brief and argue the equal protection clause implications" of a decision that rejects fund benefits because the first injury was the bilateral injury, but permits them where the second injury is bilateral. This constitutional claim was not raised in or decided by the district court, so we do not consider it for the first time on appeal. See *Stammeyer v. Div. of Narcotics Enforcement*, 721 N.W.2d 541, 548 (Iowa 2006).