

IN THE COURT OF APPEALS OF IOWA

No. 9-692 / 08-1893
Filed March 10, 2010

DEBRA A. SOLLAND,
Petitioner-Appellant,

vs.

SECOND INJURY FUND OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Winnebago County, Christopher C. Foy, Judge.

Employee appeals from the district court ruling affirming the denial of compensation from the second injury fund. **REVERSED AND REMANDED.**

Mark S. Soldat of Soldat & Parrish-Sams, P.L.C., West Des Moines, for appellant.

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

Considered by Sackett, C.J., and Vogel and Potterfield, JJ.

POTTERFIELD, J.

This appeal requires us to review Debra Solland's workers' compensation claim against the second injury fund for two successive bilateral injuries in light of recent supreme court statutory construction of Iowa Code section 85.64. Our court delayed this opinion pending the supreme court's ruling in *Second Injury Fund of Iowa v. Kratzer*, which was decided January 29, 2010. We reverse and remand.

I. Background Facts and Proceedings.

Debra Solland worked on the production line at Fleetguard, Inc. almost continuously from 1977 to April 2005. In 1995-96, she received medical treatment for work-related pain in both shoulders and arms, diagnosed as bilateral epicondylitis. In 2003, she was diagnosed with bilateral carpal tunnel syndrome conceded to be work-related. Solland sought recovery from the second injury fund.

In 2006, a deputy workers' compensation commissioner denied recovery concluding that the bilateral nature of her impairment to her elbows followed by her bilateral carpal tunnel syndrome disqualified recovery from the second injury fund.

On intra-agency appeal, a different deputy commissioner¹ did expressly find that Solland "does have some modest loss of use of her bilateral arms that is a residual of both her bilateral epicondylitis and her bilateral carpal tunnel syndrome." However, the deputy denied recovery because:

¹ The commissioner delegated authority to issue the final agency decision to deputy workers' compensation commissioner Helenjean Walleser.

Iowa Code section 85.64 requires a loss of “another member.” According to agency case law, this means that in order to trigger Second Injury Fund liability, a subsequent loss must include loss of a member that is not part of the previous loss.

Solland sought rehearing, relying upon *Second Injury Fund v. George*, 737 N.W.2d 141 (Iowa 2007), and again asked for express findings and conclusions that she sustained a two percent loss of her right arm as a result of her right epicondylitis and at least a two percent loss to the left arm as a result of cumulative bilateral carpal tunnel syndrome. In *George*, 737 N.W.2d at 147, the supreme court concluded that the bilateral simultaneous nature of a second injury will not disqualify the claimant from recovery under Iowa Code section 85.64. However, the ruling on Solland’s motion for rehearing upheld the earlier denial of recovery: “*George* clearly involved a second loss to another member. This claim clearly involves two losses to the same members, albeit losses that occurred on different occasions.”

Solland filed a petition for judicial review in the district court, which affirmed the agency interpretation of section 85.64. Solland appeals.

II. Discussion.

Following the district court’s ruling, our supreme court filed decisions in *Gregory v. Second Injury Fund*, ___ N.W.2d ___ (Iowa 2010), and *Second Injury Fund v. Kratzer*, ___ N.W.2d ___ (Iowa 2010), both of which addressed bilateral simultaneous first injuries. In *Gregory*, the supreme court opined:

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 [the claimant] sustained a partial permanent loss of at least two enumerated members in successive injuries. Given our decision in *George* that 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, we believe it would be senselessly inconsistent to conclude a first qualifying injury cannot likewise occur simultaneously with an injury to another such member.

Gregory, ___ N.W.2d at _____. And, in *Kratzer*, the court rejected the very interpretation adopted by the agency in these proceedings, concluding that the proper interpretation of the statutory phrase “the loss of or loss of use of another such member” “requires only that the subsequent disabling injury be to an enumerated member other than the member relied upon by the claimant to establish the first qualifying injury.” *Kratzer*, ___ N.W.2d at _____.

Because the district court and the agency’s decisions were based upon a misconception that the bilateral nature of a first injury automatically precluded recovery from the second injury fund for a bilateral second injury, we reverse and remand in order to permit the agency to re-evaluate the evidence applying the correct rule of law and to make specific findings as to Solland’s asserted qualifying injuries. *See McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181, 186 (Iowa 1980) (“Remand is also necessitated in order to permit the agency to re-evaluate the evidence, applying the correct rule of law, unless the reviewing court can make the necessary factual findings as a matter of law because the relevant evidence is both uncontradicted and reasonable minds could not draw different inferences from it.”).

III. Costs.

The first deputy workers’ compensation commissioner assessed the respective costs against each party. On intra-agency appeal, the deputy

commissioner assessed the appeal costs against Solland. The district court affirmed the commissioner and taxed the judicial review costs to Solland.

We review the district court's and workers' compensation commissioner's action in taxing costs for an abuse of discretion. *Robbennolt v. Snap-on Tools Corp.*, 555 N.W.2d 229, 238 (Iowa 1996). When reviewing the taxation of costs, we consider the success of the applicant on the issues raised on appeal as shown by the record. *Id.*

We reverse the district court's ruling approving the assessment of costs by the commissioner. We remand the assessment of costs to the commissioner for redetermination. Costs on appeal are assessed to both parties equally.

REVERSED AND REMANDED.