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IN THE IOWA DISTRICT COURT FOR WOODBURY COUNTY

MELISSA GOSS, Petitioner, vs. SECOND INJURY FUND OF IOWA, Respondent.	NO. CVCV189850 ORDER

The above-captioned matter comes before the Court on a petition for judicial review of an agency action. Said petition was submitted on briefs and the agency record, without oral argument, on March 30, 2020. The Court, having considered the record before it, the arguments of the parties, and the applicable law, now rules as follows.

I.

Petitioner Melissa Goss initiated the agency action underlying the instant case by filing an application for Second Injury Fund benefits on April 3, 2017. Respondent Second Injury Fund of Iowa filed its answer to the Petitioner's petition on April 11, 2017.

The Petitioner's application came on for hearing before a deputy workers' compensation commissioner on May 15, 2018. The deputy workers' compensation commissioner issued an arbitration decision on July 24, 2018, which decision denied the Petitioner's application.

On August 2, 2018, the Petitioner timely filed a notice of appeal of the deputy commissioner's ruling to the Workers' Compensation Commissioner. In an appeal decision entered on November 27, 2019, the Workers' Compensation Commissioner affirmed the arbitration decision in its entirety.

E-FILED 2020 MAY 29 5:01 PM WOODBURY - CLERK OF DISTRICT COURT

The Petitioner, on December 17, 2019, timely filed the instant petition for judicial review of the appeal decision.

II.

This agency appeal arises from injuries which Petitioner Melissa Goss claims to have suffered arising out of, and in the course of, her employment as a phlebotomist at LifeServe Blood Center.

By way of background, Goss testified at the hearing before the deputy workers' compensation commissioner that she is a licensed practical nurse. Prior to her employment with LifeServe, she worked for a short time at two physically strenuous nursing jobs. Then in approximately 2004, she was hired by the Siouxland Community Blood Bank, which employer later merged with another entity to form LifeServe. Goss worked for the Siouxland Community Blood Bank, and then for LifeServe, through February 2018.

Goss also testified about her job titles and job duties at the Blood Bank and LifeServe. She was initially hired as a screener/phlebotomist; then she worked for a short time in registration; and then shortly thereafter began working as a phlebotomist. Eventually, Goss was made a team leader/supervisor. All of these jobs required near-constant, significant physical activity, including significant work with her hands.

Goss testified that she left LifeServe in February 2018, and took a job with Mercy Cardiology Clinic in March 2018, because on account of her claimed injuries, she was no longer physically able to perform her job at LifeServe, and because her new job at Mercy is less physically demanding. But Goss's new job at Mercy pays slightly less than her old job at LifeServe, and the benefits are not as good. Goss also testified that even at her

Received Time Jun. 2. 2020 11:21AM No. 7634

E-FILED 2020 MAY 29 5:01 PM WOODBURY - CLERK OF DISTRICT COURT

new job, the physical effects of her claimed injuries continue to cause her pain.

Goss also testified, at the hearing before the deputy commissioner, about the claimed injuries on which her application for benefits is based. She testified that she began having problems with her right arm in May 2014. Her problems consisted, at first, of burning and stinging, and sometimes stabbing pain, from her wrist to her elbow. Her discomfort was exacerbated by gripping. Goss reported this injury to her employer, and she treated for the injury with several medical providers. Goss's first treatment provider — Tracey Pick — administered cortisone shots to Goss's right arm, after which Goss was unable to use her right arm for forty-eight hours. A later provider — Dr. Russell DeGroote — placed Goss on one-arm duty, which means he restricted her to using only her left arm.

Initially, according to Goss's testimony before the deputy commissioner, she reported pain only in her right arm. But later, Goss testified, she began to have pain in her left arm, as well. As to the timing of the emergence of the problem with her left arm, Goss testified:

> Q. Okay. So at what point did you begin to have symptoms on the left side, if you know?
>
> A. From what I can recall, because of, you know, the restrictions I was under, I was now having to utilize my left arm constantly for everything. It was very difficult. So I would say probably a month or more later after the right side was reported first.

On cross-examination, Goss further testified that she first saw a provider about her right arm problems on May 8, 2014, and she was placed on right arm restrictions the same day. Thereafter, Goss continued working, and continued performing the same job, but using only her left arm. When asked whether she "quickly developed symptoms in

Received Time Jun. 2. 2020 11:21AM No. 7634

E-FILED 2020 MAY 29 5:01 PM WOODBURY - CLERK OF DISTRICT COURT

[her] left arm from doing that one-arm work," she answered in the affirmative, such that by July 23, 2014, she was having symptoms in both arms. Goss also testified that she injured both of her elbows performing the same type of work, and that she had generally the same symptoms in each elbow.

An MRI eventually revealed a large tear in a tendon in Goss's right arm, and a small tear in a tendon in her left arm. Goss thereafter underwent surgery on each arm, and was released to full duty by her surgeon. She last treated for her elbows in September 2016. But as mentioned above, Goss testified that problems with both arms persist, and she remained subject to restrictions on both arms — placed by another provider — at the time of the hearing before the deputy commissioner.

In addition to the issues with her elbows, Goss also confirmed, during her testimony, that in January 2015, she began treating for left shoulder pain. Another physician — Dr. Sunil Bansal — opined, after an independent medical examination, that Goss's shoulder injury was the result of overuse, arising from Goss's right arm restrictions.

Goss and LifeServe eventually entered into three settlements, relating respectively to the each elbow and her left shoulder. One of these settlement agreements, on its face, stated that it related to an injury Goss suffered to her "Left Upper Extremity" on May 7, 2014. Another stated that it related to an injury Goss suffered to her "Right Upper Extremity" on May 27, 2014. All of the settlement agreements were approved by the Workers' Compensation Commissioner.

In addition to Goss's testimony, the deputy commissioner received into the record certain of Goss's medical records.

Received Time Jun. 2. 2020 11:21AM No. 7634

E-FILED 2020 MAY 29 5:01 PM WOODBURY - CLERK OF DISTRICT COURT

As mentioned above, Dr. Sunil Bansal performed an IME on Goss. In the portion of his report titled "Subjective" and subtitled "Injury," Dr. Bansal wrote:

> [Goss's] right elbow became painful first, as she is right-handed. After she was seen by a physician and placed on work restrictions for her right upper extremity, she overcompensated with her left arm and quickly developed similar symptoms in her elbow, as well as her left shoulder.

Dr. Bansal also, apparently, copied and pasted the above-quoted language into the portion of his IME report in which he responded to the following question: "Was the injury the cause of any permanent impairment?"

In her application for Second Injury Fund benefits, and in the written argument she submitted in support of that application, Goss argued that she suffered an injury to her right elbow on May 7, 2014, and a subsequent work-related injury to her left elbow on May 27, 2014. For purposes of the instant judicial review, the primary fighting issue before the deputy commissioner was whether Goss had established that she had, in fact, suffered two separate injuries.

As mentioned in Part I, above, the deputy commissioner in the arbitration decision denied Goss's application for Second Injury Fund Benefits. In particular, the deputy commissioner concluded that Goss "failed to show entitlement to any benefits from the Second Injury Fund of Iowa," because she had "failed to establish by a preponderance of the evidence that she sustained two qualifying injuries."

In her findings of fact in support of this conclusion, the deputy commissioner found that the above-described settlements "are not accurate," because those settlement agreements "do not reflect the accurate body part," and further that the Second Injury Fund was not a party to those settlements and so is not bound by them.

With regard to the substance of the parties' primary disagreement, the deputy

Received Time Jun. 2. 2020 11:21AM No. 7634

E-FILED 2020 MAY 29 5:01 PM WOODBURY - CLERK OF DISTRICT COURT

commissioner found that Goss "sustained an injury to her right upper extremity as a result of the May 7, 2014 injury"; that "her left upper extremity symptoms naturally and proximately flowed from the first injury" to her right arm; and "that the left upper extremity is a sequela of the right upper extremity injury." The deputy commissioner expressly rejected Goss's argument contrary argument that, in the deputy commissioner's words, "it is purely speculation to conclude that the second tear, the second injury, must be due to one arm duty," and in support of her rejection of that argument, the deputy commissioner relied both on the above-quoted language of Dr. Bansal, and on the fact that Goss's "upper left extremity symptoms developed shortly after Ms. Goss had restrictions placed on her right upper extremity."

Accordingly, the deputy commissioner concluded, since "Goss's left upper extremity symptoms developed as a sequela of her right upper extremity condition," her left elbow injury "is compensable as part of her May 7, 2014 injury," pursuant to Iowa Code § 85.34(2)(t). And in light of that ruling, the deputy commissioner further concluded that all other issues raised by the parties were moot.

As explained above, Goss appealed the deputy commissioner's decision, and on November 27, 2019, the Workers' Compensation Commissioner issued an appeal decision affirming the arbitration decision. In the appeal decision, the Commissioner "reach[ed] the same analysis, findings, and conclusions as those reached by the deputy commissioner," and the Commissioner "affirm[ed] and adopt[ed] has the final agency decision those portions of the proposed arbitration decision filed on July 24, 2018, which relate to the issues properly raised on intra-agency appeal" the Commissioner further "affirm[ed] the deputy commissioner's findings of fact and illusions of law pertaining to" all

Received Time Jun. 2. 2020 11:21AM No. 7634

E-FILED 2020 MAY 29 5:01 PM WOODBURY - CLERK OF DISTRICT COURT

of the issues raised in the arbitration proceeding. In particular, the Commissioner "affirm[ed] the deputy commissioner's finding that claimant failed to carry her burden of proof to establish she sustained a first qualifying injury on May 7, 2014, and a second qualifying injury on May 27, 2014, for the purpose of receiving benefits from the Fund"; the Commissioner "affirm[ed] the deputy commissioner's finding that the alleged second qualifying injury which allegedly occurred on May 27, 2014, was actually a sequela injury of the May 7, 2014, injury"; the Commissioner "affirm[ed] the deputy commissioner's finding that claimant is not entitled to receive benefits from the Fund"; and the Commissioner "affirm[ed] the deputy commissioner's finding that all other issues raised in this matter [were there for] moot."

III.

A.

Iowa's Administrative Procedure Act provides a right of judicial review of the actions of executive-branch agencies, pursuant to which right "[a] person or party who has exhausted all adequate administrative remedies and who is aggrieved or adversely affected by any final agency action is entitled to judicial review thereof." Iowa Code § 17A.19(1). A district court's review of a decision by the Workers Compensation Commissions is, accordingly, governed by the Administrative Procedure Act. *See Mycogen Seeds v. Sands*, 686 N.W.2d 457, 463 (Iowa 2004).

The Administrative Procedure Act sets forth, at Iowa Code § 17A.19(10), the standard to be employed in the judicial review of an agency action:

> The court may affirm the agency action or remand to the agency for further proceedings. The court shall reverse, modify, or grant other appropriate relief from agency action, equitable or legal and including declaratory relief, if it determines that substantial rights of the person seeking judicial relief

Received Time Jun. 2. 2020 11:21AM No. 7634

E-FILED 2020 MAY 29 5:01 PM WOODBURY - CLERK OF DISTRICT COURT

have been prejudiced because the agency action is any of the following:

a. Unconstitutional on its face or as applied or is based upon a provision of law that is unconstitutional on its face was applied.

b. The only authority delegated to the agency by any provision of law or in violation of any provision of law.

c. Based upon an erroneous interpretation of a provision of law whose interpretation is not clearly been vested by a provision of law in the discretion of the agency.

d. Based on a procedure or decision-making process prohibited by law or is taken without following the prescribed procedure or decision-making process.

e. The product of decision-making undertaken by persons who were improperly constituted as a decision-making body, were motivated by an improper purpose, or were subject to disqualification.

f. Based upon a determination of fact clearly vested by provision of law in the discretion of the agency that is not supported by substantial evidence in the record before the court when the record is viewed as a whole. For purposes of this paragraph, the following terms have the following meanings:

(1) "Substantial evidence" means the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact that issue when the consequences resulting from the establishment of that factor understood to be serious and of great importance.

(2) "Record before the court" means the agency record for judicial review, as defined by this chapter, supplemented by any additional evidence received by the court under the provisions of this chapter.

(3) "When that record is viewed as a whole" means that the adequacy of the evidence in the record before the court to support a particular finding of fact must be judged in light of all the relevant evidence in the record cited by any party that detracts from that finding as well as all of the relevant evidence in the record cited by any party that supports it, including any determinations of veracity by the presiding officer who personally observe the demeanor of the witnesses in the agency's explanation of why the relevant evidence in the record supports its material findings of fact.

Received Time Jun. 2. 2020 11:21AM No. 7634

E-FILED 2020 MAY 29 5:01 PM WOODBURY - CLERK OF DISTRICT COURT

g. Action other than a rule that is inconsistent with the rule of the agency.

h. Action other than a rule that is inconsistent with the agency's prior practice or precedents, unless the agency has justified that inconsistency by stating credible reason sufficient to indicate a fair and rational basis for the inconsistency.

i. The product of reasoning that is so logical as to render it wholly irrational.

j. The product of a decision-making process in which the agency did not consider relevant and important matter relating to the propriety or desirability of the action question that a rational decision maker in similar circumstances would have considered prior to taking action.

k. Not required by law and its negative impact on the private rights affected is so grossly disproportionate to the benefits accruing to the public interest from that action that it must necessarily be deemed to lack any foundation in rational agency policy.

l. Based upon an irrational, illogical, or wholly unjustifiable interpretation of a provision of law whose interpretation has clearly been vested by provision of law in the discretion of the agency.

m. Based upon an irrational, illogical, or wholly unjustifiable application of law to fact that has been clearly vested by provision of law in the discretion of the agency.

n. Otherwise unreasonable, arbitrary, capricious, or an abuse of discretion.

Id. In making these determinations, a reviewing court:

a. Shall not give any deference to the view of the agency with respect to whether particular matters have been vested by a provision of law in the discretion of the agency.

b. Should not give any deference to the view of the agency with respect to particular matters that have not been vested by a provision of law in the discretion of the agency.

c. Shall give appropriate deference to the view of the agency with respect to particular matters that have been vested by a provision of law in the discretion of the agency.

Id. § 17A.19(11). "The validity of agency action must be determined," under this standard, "as applied to the agency action at the time that action was taken." *Id.* § 17A.19(8)(b).

Received Time Jun. 2. 2020 11:21AM No. 7634

E-FILED 2020 MAY 29 5:01 PM WOODBURY - CLERK OF DISTRICT COURT

In an action seeking judicial review of an agency action, "[t]he burden of demonstrating the required prejudice and the invalidity of agency action is on the party asserting invalidity." *Id.* § 17A.19(8)(a).

Where, as here, a party challenges an agency action on the ground that the action allegedly is not supported by substantial evidence, a reviewing court "must engage in a 'fairly intensive review of the record to ensure that the fact finding is itself reasonable.'" *Neal v. Annett Holdings, Inc.*, 814 N.W.2d 512, 525 (Iowa 2012) (quoting *Wal-Mart Stores, Inc. v. Caselman*, 657 N.W.2d 493, 499 (Iowa 2003). This "fairly intensive review" requires that a reviewing court "view the record as a whole" and consider "evidence supporting the challenged finding as well as evidence detracting from it." *Id.* But the reviewing court must not transform this "fairly intensive review" into "a scrutinizing analysis." Rather, "[a]n appellate court should not consider evidence insubstantial merely because the court may draw different conclusions from the record." *Arndt v. City of Le Claire*, 728 N.W.2d 389, 393 (Iowa 2007). Nor is evidence "insubstantial merely because a contrary inference is supported by the record." *Neal*, 814 N.W.2d at 525. Thus, "[j]ust because the interpretation of the evidence is open to a fair difference of opinion does not mean that the [agency]'s decision is not supported by substantial evidence." *Arndt*, 728 N.W.2d at 393.

B.

Iowa's Second Injury Fund Act is codified at Iowa Code §§ 85-63 through 85.69. The Second Injury Fund's liability is governed by Iowa Code § 85.64, which provides:

> 1. 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 to the

Received Time Jun. 2. 2020 11:21AM No. 7634

E-FILED 2020 MAY 29 5:01 PM WOODBURY - CLERK OF DISTRICT COURT

> 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 subchapter the remainder of such compensation as will 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.
>
> 2. Any benefits received by any such play, or to which the employee may be entitled, by reason of such increased disability from any state or federal funds were agency, to which said employee has not directly contributed, shall be regarded as a credit to any award made against the second injury fund as aforesaid.

Id. Thus, in order for a Second Injury Fund claimant to establish her entitlement to second injury fund benefits, the claimant must prove:

> (1) she has either lost, or lost the use of, a hand, arm, foot, leg, or eye;
>
> (2) she sustained the loss, or loss of use, of another such member or organ through a work related—that is, compensable—injury; and
>
> (3) there is some permanent disability from the injuries.

Second Injury Fund of Iowa v. George, 737 N.W.2d 141, 146 (Iowa 2007).

Iowa Code § 85.34 governs, among other things, a workers' compensation claimant's eligibility for compensation for permanent disabilities. In relevant part, § 85.34 provides:

> For all cases of permanent partial disability compensation shall be paid as follows:
>
> . . . .
>
> t. For the loss of both arms, or both hands, or both feet, or both legs, or both eyes, or any two thereof, caused by a single accident, shall equal five hundred weeks and shall be compensated as such; . . . .
>
> . . . .
>
> w. If it is determined that an injury has produced a disability less than that

Received Time Jun. 2. 2020 11:21AM No. 7634

E-FILED 2020 MAY 29 5:01 PM WOODBURY - CLERK OF DISTRICT COURT

> specifically described in the schedule described in paragraphs "a" through "u", compensation shall be paid during the lesser number of weeks of disability determined, as will not exceed a total amount equal to the same percentage proportion of said scheduled maximum compensation.

Id. § 85.34(2)(s), (v) (2017).[1]

IV.

A.

Goss argues, in her brief in support of the instant petition for judicial review, that the Workers' Compensation Commission's "determination that the left upper extremity injury is a sequela of the first injury is not supported by substantial evidence." In support of that argument, Goss contends that the agency's central factual findings amounts to nothing more than "an assumption that if [Goss's] left side symptoms developed after the first injury that she must have sustained those symptoms due to compensation for the first injury." But, according to Goss, substantial evidence does not support that finding.

Goss also cites, in support of her argument, the settlement agreements between her and LifeServe, and some of the undisputed medical evidence relating to her injuries. She argues:

> It is accepted that Melisa developed a tear on the right side as a result of her work at LifeServe Blood Center. It is also accepted that she has a smaller tear later on the left side as a result of her work at LifeServe Blood Center. Each injury resulted in permanent impairment and restrictions. She entered into agreements for settlement for each injury with LifeServe Blood Center and their workers' compensation carrier and was paid for 10.26 weeks of permanent partial disability for each upper extremity. Those facts satisfy her burden of proof that she has sustained qualifying losses for Second Injury Fund benefits. While the agreements for settlement are not binding determination on the Fund, those settlements **are evidence**. If the Fund wants to assert a different set of facts *they need to provide substantial evidence* to support a factual finding that supports their position that

1 Iowa Code § 85.34 has, since the latest possible date of injury in this case, been renumbered. The numbers here are consistent with the statute prior to that amendment.

Received Time Jun. 2. 2020 11:21AM No. 7634

E-FILED 2020 MAY 29 5:01 PM WOODBURY - CLERK OF DISTRICT COURT

> Mellissa has sustained one injury in a single accident affecting both upper extremities.

(first emphasis in original; second emphasis added).

By way of further evidence in support of her position that she suffered two separate injuries—first in her right elbow, and then later and separately in her left elbow—Goss notes that Dr. Gaffney found a large tear in a tendon in her right elbow, and he opined that that tear was "longstanding." But while Dr. Gaffney also found a tear on a tendon in her right elbow, that tear was small, and he did not opine that it was longstanding. This, according to Goss, satisfies her burden of proving two separate injuries.

Goss acknowledges those portions of the medical records, and of her own testimony, which expressly suggest that her left-elbow injury is the result of her primarily or exclusively using her left arm after she was placed on right-arm restrictions. But she describes those medical records as merely recounting what she reported, and so not consisting of medical opinion. Thus, since expert evidence is almost always necessary to prove medical causation, Goss contends, that the medical records reflect her non-expert beliefs about causation, does not mean that those records constitute substantial evidence in support of the agency's sequela finding. Likewise Goss's testimony about causation before the deputy commissioner. And in the absence of competent causation evidence, Goss argues, the agency's sequela finding amounts to impermissible speculation.

Goss further argues that the evidence in the record reflects that her job always required her to repetitively use both hands and both arms. She contends that "[t]o assume that her left arm injury was solely due to the additional use due to restrictions imposed for the right arm would ignore the uncontroverted testimony that Melissa's work was already

Received Time Jun. 2. 2020 11:21AM No. 7634

placing a strain on both arms so an injury could have developed on either side at any time regardless of whether she was under restrictions on one side."

In relation to the legal standard applicable in circumstances like those present here, Goss argues that because she "has produced *prima facie* evidence that she has sustained qualifying injuries the burden shifts to the Fund to prove there are not qualifying injuries." Since the Second Injury Fund never obtained a medical opinion to the effect that Goss's two elbow injuries were sustained in a single accident, according to Goss, the Second Injury Fund failed to satisfy its shifted burden.

Finally, Goss argues that the agency's decision here departs from the manner in which single accident issues and sequela issues alter workers' compensation law, in a way that disfavors workers:

> To claim this is a single accident pursuant to Iowa Code section 85.34(2)(s) would be a great stretch of how injury claims of this type are handled by insurance carriers and employers. Single accident should not lose its meaning in the statute just to find a way to keep injured workers from obtaining recovery from the Second Injury Fund. Sequelae theory belongs in the realm of cases where the later problems from an injury may not meet the arising out of and in the course of the test but do, in fact, flow from the original work injury. Single accident should remain applicable to injuries that arise at the same time. Failure to retain this meaning it changes the liability of defendants as cases of sequelae will suddenly become cases with liability limited to a schedule to potentially becoming cases with permanent total disability exposure for employers and insurance carriers.

B.

The Second Injury Fund, in its written argument,[2] cites cases holding that an

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2 The Second Injury Fund re-asserts, in this appeal, all three of the issues it raised before the agency. The agency, however, ruled on only one of those three issues, and concluded in light of that ruling that the other two issues were moot. Thus, even were the Court to agree with Goss on that issue, the Court would not reach the other two issues, but instead would remand to the agency for consideration of those issues. Accordingly, the Court recounts here only the Second Injury Fund's argument on the issue which the

E-FILED 2020 MAY 29 5:01 PM WOODBURY - CLERK OF DISTRICT COURT

employer is liable, under Iowa's workers' compensation law, for all of the consequences flowing from an injury which an employee sustains in the course of and arising out of his or her employment. The Second Injury Fund also cites those portions of the record on which the deputy commissioner expressly relied, in concluding that Goss's left elbow injury is a sequela of her right elbow injury. The Second Injury Fund argues that in light of this law, and in light of those portions of the record, Goss's arguments on appeal amount to a request that the Court reassess the evidence in the record, in contravention of the applicable standard of review. Finally, the Second Injury Fund argues that Goss failed to present sufficient causation evidence to carry her burden of proving two separate injuries.

V.

In resolving the issues presented by this appeal, the Court first considers two cases which, while not precisely on point, nonetheless are useful here.

The first of those two decisions is *Milbourne v. Second Injury Fund of Iowa*, 662 N.W.2d 374 (Table), 2003 WL 555872 (Iowa Ct. App. 2003). In that case, a workers' compensation claimant appealed a decision that the claimant was not entitled to Second Injury Fund benefits, because her claimed later injury was not separate from her earlier injury. *Id.* at *1. The Court of Appeals identified the issues presented by the appeal as whether the agency applied the correct legal standard in determining that the claimant's second injury was a sequela of her first injury; and whether substantial evidence supported that decision. *Id.*

In *Milbourne*, the claimant broke her left ankle while working. *Id.* After a lengthy

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agency actually decided.

Received Time Jun. 2. 2020 11:21AM No. 7634

E-FILED 2020 MAY 29 5:01 PM WOODBURY - CLERK OF DISTRICT COURT

recovery, she was cleared to return to work with no restrictions. *Id.* Then two years later, the claimant sought treatment for an injury to her right foot. She thereafter initiated an action against the Second Injury Fund. *Id.*

In her Second Injury Fund petition, the claimant claimed that her right-foot injury was caused by "[s]tress from favoring [her] left foot & leg." *Id.* Similarly, a medical provider who examined the claimant "found [that] her new injury resulted from her shifting her weight to her right foot to favor her injured left ankle." *Id.* The provider further concludes that the claimant's "new injury was a 'worsening, hastening, or deterioration of a preexisting condition." *Id.*

After a hearing, a deputy workers' compensation commissioner concluded that the claimant was not eligible for Second Injury Fund benefits. In so concluding, the deputy commissioner explained:

> This agency is frequently presented with similar issues, and has generally found a second injury of this nature a "sequela" of the original injury and compensated on that basis. The classic example is a leg or foot injury resulting in an altered gate that eventually causes injury to the hip or back. This fact pattern routinely results in a finding that the hip or back was part and parcel of the original insult. This is significant because the entire loss is then compensated industrially — that is, a loss of earning capacity — rather than according to the statutory schedule that would otherwise apply.
>
> The result in this case clearly convinces that [the claimant] sustained but one compensable injury: originally to the left leg, but resulting in the aggravation of a pre-existing condition in the right foot. As such, the requirement of a "second" injury requisite to fund liabilities not met. The Fund accordingly prevails.

Id.

The claimant sought judicial review, and the Court of Appeals affirmed the agency's decision. The *Milbourne* Court quoted the following expert testimony, which it held supported the agency's conclusion:

Received Time Jun. 2. 2020 11:21AM No. 7634

> The physical examination and review of the medical records indicates that the examinee developed a plantar fasciitis of the right lower extremity following the injury to her left lower extremity. On x-ray the examinee was found to have a calcaneal spur on the plantar aspect of the foot which would predispose her to development of plantar fasciitis. *Following the injury to her left lower extremity more weight bearing and therefore greater stress was transferred to the uninjured or normal right lower extremity. As a result the examinee's plantar fasciitis was permanently aggravated; that is, there was a worsening, hastening, or deterioration of a preexisting condition.*

Id. at *2 (emphasis added by the Court of Appeals).

The Court of Appeals also noted that "[t]he question of whether [the claimant]'s injury to her right foot was a new and separate injury or one aggravated by the previous injury is a judgment call," and "[j]udgment calls are to be left to the agency." *Id.* Thus, the Court affirmed the agency's decision that the claimant's second injury was a sequela of her first injury. *Id.*

Another somewhat similar case is *Second Injury Fund of Iowa v. Greenman*, 725 N.W.2d 658 (Table), 2006 WL 3017955 (Iowa Ct. App. 2006). In that case, a claimant's right arm was injured at work as a result of repetitive lifting. *Id.* at *1. After that injury, the claimant was placed on light duty by her employer, which consisted in part of writing and typing. Then less than five months after her first injury, the claimant suffered an injury to her right arm. *Id.* In her report of the new injury, the claimant opined that the new injury was the result of the claimant "doing everything with her left arm that she previously did with both arms." *Id.* The claimant eventually filed a claim seeking benefits from the Second Injury Fund based on these two injuries. *Id.*

At a hearing on the claimant's petition for Second Injury Fund benefits, evidence was presented consisting in part of an opinion of a medical provider that the claimant's "bilateral hand/arm problems did not occur over the same time period, but occurred

Received Time Jun. 2. 2020 11:21AM No. 7634

separately." *Id.* The Workers' Compensation Commissioner ultimately concluded that the claimant initially injured only her right arm; that "her left arm injury developed only after [she] was prompted by her right arm restrictions to overuse her left arm in the performance of her computer work for" her employer; that her "left arm was not injured by simple activities of daily living"; and thus that "the left arm injury [was] compensable in its own right primarily as a new injury even though it is somewhat in the nature of a sequela of the right arm injury because it probably would not have occurred if the right arm had not been injured." *Id.* The Commissioner thus found in the claimant's favor on the issue of Second Injury Fund liability. *Id.*

The Second Injury Fund sought judicial review of the agency's decision, and after the district court affirmed, appealed the district court's ruling to the Court of Appeals. *See id.* at *3. The Court of Appeals described the issue before it as whether "there was insufficient evidence for the agency to find two separate and distinct injuries." *Id.* In considering that issue, the Court noted that the right arm injury occurred approximately five months before the left arm injury; that a medical provider opined that the symptoms related to the claimant's left arm occurred later and to a lesser extent than those related to her right arm; and that there was no evidence that the claimant ever complained of a left arm injury at the time when she injured her right arm. *Id.* The Court also observed that the claimant "was performing entirely different duties at [her employer] when she injured her left arm than when she injured her right arm"; that "[t]he left arm injury was not just an increase in [the claimant]'s disability caused by aggravating work activities" but was "a separate and discrete injury to her left arm, subsequent to her right arm injury"; and that the claimant's "left arm was not injured by simple activities of daily living" but

Received Time Jun. 2. 2020 11:21AM No. 7634

E-FILED 2020 MAY 29 5:01 PM WOODBURY - CLERK OF DISTRICT COURT

rather "developed from subsequent work-induced trauma." *Id.* at *4.

Thus, as in *Milbourne*, the *Greenman* Court noted that "[w]hether [the claimant]'s injury to her left arm is a new and subsequent injury or one aggravated by the right arm injury is a judgment call, and judgment calls are to be left to the agency." *Id.* at *3. And, in light of the evidence described above, the Court held that the agency's judgment call in the claimant's favor was supported by substantial evidence. *Id.* at *4.

Milbourne and *Greenman*, of course, reach opposite conclusions. And these two cases are factually distinct in a few ways: in *Milbourne* the claimed second injury was an aggravation of a preexisting condition; while in *Greenman* there is no mention of a preexisting condition; in *Greenman*, the second injury was expressly found to have resulted from the claimant's work duties; whereas in *Milbourne* there is no express finding whether the claimed second injury was the result of work duties or of activities of daily living; in *Greenman*, the claimant suffered a second injury as a result of being assigned new and different work duties after her first injury; while there is no indication in *Milbourne* the claimant resumed work without restrictions prior to her claimed second injury; and in *Greenman* less than five months elapsed between the first and second injury; whereas in *Milbourne* two years separated the first injury and the claimed second injury.

But on careful consideration of these two cases, none of those factual distinctions appears to have been crucial to the appellate court's decision in either case, such that the distinctions, or any of them, are useful in determining which of those two cases is more similar to the facts here and so more useful in resolving the disputes presented by this appeal. Rather, the key portion of each case, in relation to the issues presented here, appears to the Court to be the recognition, by the Court of Appeals, that where there

Received Time Jun. 2. 2020 11:21AM No. 7634

E-FILED 2020 MAY 29 5:01 PM WOODBURY - CLERK OF DISTRICT COURT

exists substantial evidence on both sides of the question, "[w]hether [a claimant]'s injury to her left arm is a new and subsequent injury or one aggravated by the right arm injury is a judgment call, and judgment calls are to be left to the agency."

Turning, then, to the legal concepts which guide that substantial-evidence determination, as mentioned above, Iowa Code § 85.34(2)(s) provides for particular compensation when an employee incurs permanent disability in "both arms" which is "caused by a *single* accident." (emphasis added). And in determining what constitutes a single accident, the Court considers the general rule, applicable to workers' compensation cases, that "where an accident occurs to an employee in the usual course of his employment, the employer is liable for all consequences that naturally and proximately flow from the accident." *DeShaw v. Energy Mfg. Co.*, 192 N.W.2d 777, 780 (Iowa 1971). One particular aspect of that general rule which is implicated here is the concept of sequela. The workers' compensation commission has defined 'sequela' as 'an aftereffect or secondary effect of an injury,'" which definition has been cited favorably by the appellate courts of this State. *Huffey v. Second Injury Fund of Iowa*, No. 18-2055, 2020 WL 1548490, at *1 n.1 (Iowa Ct. App. Apr. 1, 2020) (quoting *Powers v. Trimark Physician's Grp.*, 2005 WL 8149431, at *5 (Iowa Workers' Comp. Comm'n Sept. 5, 2005)).

Here, there is more than ample evidence to support a finding by the agency that Goss's injury to her right arm is separate and distinct from her injury to her left arm, and thus that she is entitled to Second Injury Fund benefits. Indeed, the facts in this case are quite similar to, although not entirely indistinguishable from, the facts in *Greenman*.

But under the standard of review set forth above, this Court may not substitute its

Received Time Jun. 2. 2020 11:21AM No. 7634

E-FILED 2020 MAY 29 5:01 PM WOODBURY - CLERK OF DISTRICT COURT

preferred resolution of the factual issues here, if the agency's resolution of that issue, although different from what the Court would have done, is nonetheless supported by substantial evidence. And here, the Court concludes that the agency's above-described causation finding is supported by substantial evidence.

Most significant is the opinion of Dr. Sunil Bansal, set forth in the report of the IME that he performed on Goss. As noted above, in the portion of his report titled "Subjective" and subtitled "Injury," Dr. Bansal wrote:

> [Goss's] right elbow became painful first, as she is right-handed. After she was seen by a physician and placed on work restrictions for her right upper extremity, she overcompensated with her left arm and quickly developed similar symptoms in her elbow, as well as her left shoulder.

Significantly, Dr. Bansal also included the above-quoted language in the portion of his IME report in which he responded to the following question: "Was the injury the cause of any permanent impairment?" This conclusion, alone, constitutes substantial evidence sufficient to sustain the agency's factual causation finding.

Moreover, Dr. Bansal's causation opinion is supported, to varying degrees, by other evidence in the record. For example, in a "Work Injury/Work Illness Report" by Tracey Pick, ARNP, dated May 8, 2014, which document is contained in Joint Exhibit 2, the provider recommended that Goss "limit repetitious use of [right] arm." The provider further stated that "if [left] arm is used to substitute for the same, these issues will likely develop in other arm." And a report by Russell DeGroote, M.D., dated July 23, 2014, and contained in Joint Exhibit 3, states that Goss had had "bilateral tennis elbow since May 7." The report further indicates that although Goss stated at the time that "the right side is worse," after some physical therapy "the left side started to aggravate it due to compensatory nature of her job."

Received Time Jun. 2. 2020 11:21AM No. 7634

E-FILED 2020 MAY 29 5:01 PM WOODBURY - CLERK OF DISTRICT COURT

Also supportive of Dr. Sunil's opinion, although less directly so, is a report by Stacie Webner, dated January 30, 2015, and contained in Joint Exhibit 4, states that since Goss "ha[d] been unable to use [her] right arm due to injury," she "ha[d] been using [her] left hand/arm for everything since September 2014." With regards to Goss's complained-of left shoulder injury, which was the reason for her visit to Webner, Webner wrote that "it sounds as though this may be an over-use issue with [Goss] now having to rely on the left arm for ADLs and work tasks." Similarly, a report by Amir Andrawis, dated February 2, 2015, and also contained in Joint Exhibit 4, states that Goss was "only using [her] left arm at work and pain [in her left shoulder] is getting worse."

And Goss's own testimony before the deputy commissioner, quoted above, also supports the agency's reliance on Dr. Bansal's causation opinion, and the agency's resulting causation finding.

Goss counters this evidence, in her written argument, by asserting that her own opinion of the causation of her left arm injury is not competent to support the agency's finding, since medical causation can be proven only through expert testimony, and that where her medical records attribute her left arm injury to something like "overcompensation" resulting from her right arm injury, those records merely recount her own beliefs, as stated to her providers, and so those portions of her medical records do not constitute expert causation opinions. *Cf. Dunlavey v. Economy Fire & Cas. Co.*, 526 N.W.2d 845, 853 (Iowa 1995) (holding that medical causation "is essentially within the domain of expert testimony").

Goss's view of her medical records, described in the immediately preceding paragraph, appears to the Court to be a reasonable one. But her view is not the only

Received Time Jun. 2. 2020 11:21AM No. 7634

E-FILED 2020 MAY 29 5:01 PM WOODBURY - CLERK OF DISTRICT COURT

reasonable view. In particular, the fact that Dr. Bansal included the above-quoted language, relating to the causation of Goss's left arm injury, not just in the "Subjective" section of his IME report, but also in his response to Goss's express inquiry about causation, can reasonably be found to mean that Dr. Bansal intended to adopt, as his own expert causation opinion, Goss's lay causation opinion.

Goss is also correct in noting that the record here contains conflicting evidence on the issue of causation. For example, a report by Dr. Daniel Gaffney, dated April 1, 2015, states that Goss reported that she believes her left elbow pain and her right elbow pain "essentially began together," which is not consistent with the agency's finding that Goss's left arm injury resulted from her right arm injury. Also weighing against the agency's finding, as Goss contends, are the settlement agreements between Goss and LifeServe, which agreements reflect that at least for settlement purposes, Goss and LifeServe believed that she had suffered two distinct injuries.[3]

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3 Goss attacks the agency's conclusion that "the settlement documents are not accurate because," and argues that neither the deputy commissioner in making that finding, nor the commissioner in adopting it, explained the basis for the finding beyond stating that the settlement documents "do not reflect the accurate body part." Goss further argues that this finding was erroneous, because there exists a settlement relating to each of her arms. The Court understands Goss to argue that the agency's error in rejecting the settlement documents as evidence in support of her position was based on "inaccurate facts," and so the agency's findings about those documents do "not warrant the deference normally accorded" to agency findings. *Cf. Buttrey v. Second Injury Fund of Iowa*, 807 N.W.2d 296 (Table), 2011 WL 4578449, at *8 (Iowa Ct. App. 2011).

The Court, however, is not persuaded by Goss's argument, and concludes that the agency's finding as to the inaccuracy of the settlements is supported by substantial evidence. In particular, the settlement agreement relating to Goss's left arm states that she sustained an injury to that arm on May 7, 2014. And the settlement agreement relating to her right arm states that she sustained an injury to that arm on May 27, 2014. This is plainly inaccurate, in that it reverses the body parts allegedly injured on the two dates in question. Indeed, the settlement documents are inconsistent with Goss's own claim that she injured her right arm first, and then separately and later injured her left arm. The Court thus concludes that the agency's declination to rely on the settlement

Received Time Jun. 2. 2020 11:21AM No. 7634

E-FILED 2020 MAY 29 5:01 PM WOODBURY - CLERK OF DISTRICT COURT

But how to weigh the competing causation evidence was a matter for the agency to resolve, and this Court may not, under the applicable standard of review, disturb the agency's resolution of the conflicts in that evidence, so long as the agency's findings are supported by substantial evidence. Here, as stated above, Dr. Bansal's opinion in his IME report is substantial evidence sufficient to sustain the agency's causation finding, especially in combination with the other supporting evidence in the record, and so the agency had ample basis to rely on that opinion, and to reject evidence in the record to the contrary. *See Sherman v. Pella Corp.*, 576 N.W.2d 312, 321 (Iowa 1998) (stating that the workers' compensation commissioner, as fact finder, is responsible for determining the weight to be given to any expert testimony, and "may accept or reject expert opinion in whole or in part").

Accordingly, the Court concludes that the Workers' Compensation Commissioner's decision, which is the subject of this appeal, is supported by substantial evidence. The Court therefore further concludes that the decision of the Workers' Compensation Commission should be, and is, affirmed.

IT IS THEREFORE ORDERED:

1. All of the above.
2. The appeal decision of the Workers' Compensation Commissioner, entered on November 27, 2019, is affirmed in its entirety.
3. Costs of this appeal are taxed to the Petitioner.

SO ORDERED.

Clerk to notify.

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documents was not based on "inaccurate facts," and was not otherwise erroneous.

Received Time Jun. 2. 2020 11:21AM No. 7634

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State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
CVCV189850	GOSS, MELISSA VS. SECOND INJURY FUND OF IOWA

So Ordered

District Judge, Zachary Hindman
Third Judicial District of Iowa

Electronically signed on 2020-05-29 17:01:44 page 25 of 25

Received Time Jun. 2. 2020 11:21AM No. 7634