BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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| MICHAEL RIFE,<br><br>Claimant,<br><br>vs.<br><br>SECOND INJURY FUND OF IOWA,<br><br>Defendant. | File No. 1652412.04<br><br>ARBITRATION DECISION<br><br>Head Note Nos. 3201, 3202 |

## STATEMENT OF THE CASE

Claimant, Michael Rife, filed a petition for arbitration against the Second Injury Fund of Iowa. The hearing occurred before the undersigned on February 9, 2023. This case proceeded to a live video hearing via Zoom.

The parties filed a hearing report at the commencement of the hearing. In the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision, and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are bound by their stipulations.

The evidentiary record consists of Joint Exhibits 1 through 9, Claimant's Exhibits 1 through 6, and Defendant's Exhibits AA through FF. Claimant testified on his own behalf. No other witnesses were called to testify. The evidentiary record closed at the conclusion of the evidentiary hearing on February 9, 2023. The case was considered fully submitted upon submission of post-hearing briefs on March 27, 2023.

## ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant has established a compensable claim against the Second Injury Fund of Iowa, including whether claimant has established a qualifying first injury to the right leg;

2. If so, the extent of functional loss to the first qualifying injury;

3. Whether claimant has established a qualifying second injury to the right shoulder;

4. If so, the extent of functional loss to the second qualifying injury;

5. The commencement date of SIF benefits, if any are awarded;

6. The extent of claimant's entitlement, if any, to benefits from the Second Injury Fund of Iowa; and

7. The extent of defendant SIF's entitlement to a credit under Iowa Code section 85.64.

## FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Michael Rife, claimant, was 58 years old at the time of the evidentiary hearing. (Hearing Transcript, page 8) He did not graduate high school or sit for the General Education Development (GED) test. (Id.) His formal education is limited to the eleventh grade. (Id.) Claimant's employment history largely consists of work as a welder for P.M. Lattner Manufacturing Company, where he worked from November 18, 2002, to July 24, 2019. (*See* Ex. CC, p. 2) He obtained his welding certificate from Kirkwood Community College in 2004. (Hr. Tr., pp. 8, 10; *see* Ex. 1, p. 4)

On March 10, 2005, claimant suffered an injury to his right ankle when he fell off a barstool. (Hr. Tr., p. 10) According to claimant, he experienced an episode of atrial fibrillation and passed out while sitting on the barstool. Unfortunately, his right foot was trapped in a rung of the barstool and the fall "snapped" his ankle. (Id.)

David Hart, M.D. performed an open reduction and internal fixation of the medial malleolus, right ankle, and insertion of syndesmotic screw for a right ankle fracture on March 10, 2005. (JE3, p. 79; JE9, p. 183) On June 14, 2005, Dr. Hart removed the syndesmotic screw from claimant's right ankle. (JE9, p. 182) He then performed an arthroscopic chondroplasty of the right ankle with removal of hardware medial malleolus on August 30, 2005. (JE3, p. 75)

On November 17, 2005, Dr. Hart diagnosed claimant with probable post-traumatic osteoarthritis of the right ankle and referred him to Warren Verdeck, M.D. for a second opinion. (JE3, p. 74)

Claimant presented to Dr. Verdeck on January 12, 2006. (JE3, p. 73) He complained of ongoing pain over the lateral side of his right ankle and difficulty with walking. (Id.) After reviewing claimant's diagnostic imaging, Dr. Verdeck ordered an MR scan of the right ankle area and recommended consideration of an Arizona-type AFO. (Id.)

The MR scan revealed findings suggestive of avascular necrosis of the distal tibia with some articular collapse and fracture of subchondral bone and probable avascular necrosis of the talar dome or stress reaction. (*See* JE3, p. 72) As a result of these findings, Dr. Verdeck had claimant fitted for an Arizona AFO. (JE3, p. 72)

X-rays of the right ankle collected in April 2006 revealed collapse of the lateral half of the tibial plafond and cyst formation. (*See* JE3, p. 71) Dr. Verdeck considered the changes degenerative in nature and discussed possible surgical interventions with claimant, including a total ankle arthroplasty. (Id.) Dr. Verdeck then referred claimant to Hugh Macmenamin, M.D. for a second opinion. (Id.)

Claimant presented for a consultation with Dr. Macmenamin on May 11, 2006. (JE3, pp. 69-70) Dr. Macmenamin conducted a thorough evaluation of the claimant and diagnosed him with post-traumatic arthritis of the right ankle, accompanied by evidence of avascular necrosis (AVN) in the distal tibia. (JE3, p. 69) Despite considering various options, Dr. Macmenamin advised against opting for a total ankle arthroplasty. Instead, he suggested continuing with brace treatment for the time being while keeping the possibility of an ankle fusion as a potential option in the future. (Id.)

When x-rays collected on February 6, 2007, revealed further collapse of the tibiotalar joint and further arthritic change, Dr. Verdeck referred claimant to Annunziato Amendola, M.D. (Id.)

On February 22, 2007, Dr. Amendola evaluated the claimant and recommended an arthroscopy and anterior debridement as a potential solution to alleviate the claimant's anterior impingement symptoms, which would potentially improve his ability to tolerate his Arizona brace. (JE8, p. 150) Acting upon his recommendation, Dr. Amendola performed an arthroscopy and excised the anterior osteophytes on March 9, 2007. (JE8, pp. 165-166)

Claimant returned to Dr. Amendola on April 2, 2007, reporting that his anterior pain was almost entirely resolved. (JE8, p. 173) On May 7, 2007, claimant reported ongoing pain while bearing weight, although it was not as severe as before the surgery. (JE8, p. 176) During the appointment, Dr. Amendola discussed the natural progression of claimant's condition – characterized by "very severe osteoarthritis," and explored potential treatment options, including the choice between total ankle replacement and tibiotalar fusion. (JE8, p. 177)

Ultimately, Dr. Amendola released claimant back to work on July 2, 2007, noting he had a "poor ankle" that "would probably require an ankle arthrodesis." (JE8, p. 180)

As part of his case against the Fund, the claimant pursued an independent medical examination (IME) with Farid Manshadi, M.D. (Ex. 3) The examination took place on May 6, 2021. (Ex. 3, p. 23) Dr. Manshadi conducted a thorough medical records review and conducted a physical examination of claimant. (Id.) On examination, claimant demonstrated negative 6 degrees of dorsiflexion, 30 degrees of plantar flexion,

14 degrees of inversion, and 12 degrees of eversion. (Ex. 3, p. 24) Dr. Manshadi compared the range of motion in claimant's right and left ankles. (*See* id.) Utilizing the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition, Dr. Manshadi assigned nine percent right lower extremity impairment for claimant's reduced extension and inversion. (Id.)

Claimant continues to experience problems with his right ankle. He reports swelling and considerable pain when standing for prolonged periods. He further asserts there are instances where the pain in his ankle becomes so intense that walking becomes unbearable. (Hr. Tr., p. 12) In October 2018, claimant's ongoing pain led him to request work restrictions from his primary care provider that allowed him to sit 30 minutes of each hour. (JE7, pp. 136, 144)

I find claimant has carried his burden of proving permanent disability to the right leg as a result of the March 10, 2005, injury. I further find claimant carried his burden of proving he sustained a first qualifying injury on March 10, 2005.

In 2009, claimant suffered a work-related injury to his right shoulder. (*See* Hr. Tr., pp. 51-52) Fred Pilcher, M.D. performed a manipulation arthroscopy of the glenohumeral joint with minimal debridement of the subscapularis and supraspinatus, and an arthroscopic subacromial decompression on March 29, 2009. (Id. *see* JE3, p. 62) Sunny Kim, M.D. assessed claimant with 15 percent right upper extremity impairment, or 9 percent of the whole person, based on his loss of range of motion. (Ex. 5, p. 39) Claimant returned to work for P.M. Lattner following a period of recovery.

On August 6, 2018, claimant suffered another work-related injury to the right shoulder. (JE3, p. 67) While moving a blow-down separator, claimant heard a "pop" and felt a sharp pain in his right shoulder. (*See* id.) For reference, a blow-down separator is a large steel pipe that apparently requires a significant amount of welding to ensure it will not leak. At hearing, claimant testified that the pain started in the shoulder and eventually worked down towards the elbow. (Hr. Tr., pp. 18-19)

An August 17, 2018 MRI of the right shoulder revealed moderate superior rotator cuff tendinopathy without evidence of a partial or full-thickness tear and mild acromioclavicular joint degeneration. (JE5, p. 111)

Matthew White, M.D. of Physicians' Clinic of Iowa evaluated claimant on October 23, 2018. (JE3, p. 67) Dr. White reviewed claimant's diagnostic imaging and diagnosed adhesive capsulitis. (JE3, p. 68) When conservative care failed to alleviate claimant's pain, Dr. White recommended and performed an extensive debridement of the labrum and rotator cuff, along with capsular release, and a subacromial decompression. (JE1, pp. 22-24) The surgery occurred on June 13, 2019. (JE1, p. 22) Following surgery, claimant participated in several months of physical therapy. (JE4, pp. 80-110)

Claimant produced a letter to Dr. White on August 24, 2020. (Ex. 4, p. 26) In the letter, claimant provided several pre-written opinions to Dr. White and asked him to

"Agree" or "Disagree" with each. (Ex. 4, pp. 26-29) Dr. White responded to the letter on September 1, 2020. (Ex. 4, p. 29) In the response, Dr. White agreed with the statement, "The injury I treated is confined to the glenohumeral joint." (Id.) Dr. White did not issue an impairment rating; however, he opined that he would expect some level of impairment to remain following the procedures he performed on June 13, 2019. (Ex. 4, p. 28)

Daryl Short, DPT administered a functional capacity evaluation (FCE) with claimant on February 29, 2020. (Ex. 2) Mr. Short determined that claimant gave consistent effort throughout the evaluation. (Ex. 2, p. 16) Claimant demonstrated significant limitations with elevated work, reaching, stairs, lifting waist to/from floor up to 20 pounds, lifting waist to/from crown up to 5 pounds, and front carry up to 10 pounds up to 50 feet. (Ex. 2, p. 17) Mr. Short opined that due to claimant's decreased range of motion, strength, and endurance of his right ankle, he does not meet the capabilities of the sedentary category of physical demand. (Ex. 2, p. 18) Mr. Short recommended claimant limit material and non-material handling activities between shoulder and crown level to a rare basis and no overhead lifting with the right shoulder. (Id.)

Claimant sought a second independent medical examination (IME) with Dr. Kim on July 24, 2020. (Ex. 5) Dr. Kim explained that claimant's injury was confined to the glenohumeral joint and its supporting tissue, including the capsule and rotator cuff. (Ex. 5, p. 34) Dr. Kim opined that claimant achieved maximum medical improvement (MMI) on June 13, 2020. (Ex. 5, p. 35) He assessed claimant with 19 percent right upper extremity impairment, or 11 percent of the whole person, based on his loss of range of motion in the right shoulder. (Id.) In terms of restrictions, Dr. Kim recommended claimant avoid lifting more than 20 pounds with his right arm, and no pushing or pulling over 50 pounds. (Id.)

In an arbitration decision, filed on August 20, 2021, the undersigned found claimant sustained an injury to his right shoulder that did not extend into the body as a whole. The undersigned accepted the expert opinions of Dr. Kim and found claimant suffered 19 percent functional impairment to his right shoulder as a result of the August 6, 2018 work injury. Rife v. P.M. Lattner Mfg. Co., File No. 1652412.02 (Arb. August 20, 2021) Although the defendant employer appealed the arbitration decision, they did not appeal the above findings of fact.

In the matter at hand, claimant is seeking benefits under the Second Injury Compensation Act. Claimant asserts the August 6, 2018 work injury resulted in a loss of use of his right arm and qualifies as a second loss. The Fund asserts claimant suffered an injury to the right shoulder and, as such, the August 6, 2018, injury does not qualify as a compensable loss.

In support of his argument, claimant obtained an updated opinion from Dr. Kim. (*See* Ex. 5, pp. 31-32) In a letter dated September 9, 2022, claimant's counsel asked Dr. Kim to address whether the August 6, 2018, work injury caused a "loss of use" of claimant's right arm. (Ex. 5, p. 32) Dr. Kim responded to the letter on September 13,

2022. (Ex. 5, p. 31) According to Dr. Kim, the August 6, 2018 work injury caused a loss of use of claimant's right arm. He explained:

> The reason for this is that chronic residual pain and loss of ROM impairs the ability of the R shoulder to support the R arm. Without a sound basis of support, the R arm is unable to function optimally. Furthermore, chronic residual pain results in reflex inhibition of muscle groups above and below the level of injury. This is a natural protective reflex designed to prevent further injury.

(Ex. 5, p. 31) Dr. Kim did not assign any permanent impairment to the right arm. (*See* Ex. 5, pp. 31, 34-35)

Claimant also introduced a vocational report from Barbara Laughlin. (Ex. 1) Ms. Laughlin opined that claimant lost 99.7 to 100.00 percent of his access to the labor market using the restrictions outlined in Mr. Short's FCE report. (Ex. 1, p. 9) She further opined that claimant lost 99.4 to 100.00 percent of his access to the labor market using the restrictions at the light exertional level outlined by Dr. Kim. (Ex. 1, pp. 9-10) Lastly, she opined that claimant lost 99.1 to 100.00 percent of his access to the labor market using the restrictions at the medium exertional level outlined by Dr. Kim. (Ex. 1, p. 10)

I perceive no glaring errors in Ms. Laughlin's report. Ms. Laughlin appears to have gathered the applicable facts and her vocational analysis appears sound and reasonable. Defendant offered no competing vocational opinion and offered no specific bases of error in Ms. Laughlin's analysis.

The central dispute in this case is whether claimant's right shoulder injury, which affects his right arm, is a qualifying second injury for the purpose of Fund liability. There is no evidence that claimant sustained a distinct permanent loss or loss of use of the right arm. No expert, including Dr. Kim, assigned permanent impairment to the right arm. Instead, the evidentiary record shows claimant's second injury was confined to the right shoulder, an unenumerated part of the body. Therefore, I find it more likely than not that the August 6, 2018, work injury caused permanent disability to the shoulder and merely affected the right arm. For reasons that will be discussed in the Conclusions of Law section, I further find claimant failed to carry his burden of proving a second qualifying injury for purposes of Second Injury Fund liability.

## CONCLUSIONS OF LAW

On December 29, 2021, Rife filed a petition seeking benefits from the Second Injury Fund of Iowa alleging an injury to his "right leg" on March 10, 2005, and a second injury to his "right upper extremity" which occurred while he was employed with P.M. Lattner on August 6, 2018. Rife did not name P.M. Lattner as a party in the current legal action.

Iowa's version of a second injury fund is found in Iowa Code sections 85.63 through 85.69. The heart of the statutory scheme is found in section 85.64(1), which states:

> 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.

Before the Fund's liability is triggered, three requirements must be met. First, the employee must have lost or lost the use of a hand, arm, foot, leg, or eye. Second, the employee must sustain a loss or loss of use of another specified member or organ through a compensable injury. Third, permanent disability must exist as to both the initial injury and the second injury.

Other than the express requirement that the second loss be the result of permanent disability caused "by a compensable injury," the text of section 85.64(1) provides no basis from which to create different standards for what constitutes a qualifying loss to an enumerated body part based on whether it happened first or second in time. *See* Iowa Code section 85.64(1). Moreover, the Iowa Supreme Court held it would be "senselessly inconsistent" to apply different standards based on the order of occurrence. Gregory v. Second Injury Fund, 777 N.W.2d 395, 400 (Iowa 2010). Therefore, the case law delineating the contours of what constitutes a qualifying loss under the statute is generally applicable regardless of when such a loss took place. *See* Id.

The initial dispute mentioned in the Hearing Report is whether Rife has proven a qualifying first injury. Rife experienced an injury to his right ankle when he fell off a barstool in 2005. Despite undergoing multiple surgeries, claimant continues to have problems with his right ankle. The evidence indicates it is more likely than not that claimant sustained an injury to his right ankle that caused permanent impairment. Rife's testimony regarding the injury is accepted as accurate, and it is concluded that Rife has met the burden of proving a qualifying first injury on March 10, 2005.

The main issue in this case is whether claimant's right shoulder injury, which affects his right arm, is a qualifying second injury for the purpose of Fund liability.

As an initial matter, I note the Iowa legislature enacted significant amendments to the Iowa workers' compensation laws, which took effect in July 2017. As part of those amendments, the legislature specified that injuries to the shoulder should be

compensated as scheduled member injuries on a 400-week schedule. Iowa Code section 85.34(2)(n) (2017). Of particular relevance to this case, the legislature did not add the shoulder to the list of enumerated scheduled member injuries under Iowa Code section 85.64(1).

Claimant asserts that the legislature did not amend Iowa Code section 85.64 to include the term "shoulder" because it knew an injury to the shoulder producing loss of use to the arm could qualify for Fund benefits under established legal precedent. I do not find claimant's argument persuasive as it ignores the recent legislative history of Iowa Code section 85.64. In 2017, the legislature considered but failed to adopt a proposed amendment to Iowa Code section 85.64, which would have added the shoulder as a Fund-eligible injury. *See* id.; 2017 IA HF518, 87th General Assembly. On February 16, 2022, a bill was again introduced in the Senate seeking to amend Iowa Code section 85.64 to add the loss, or loss of use of, a shoulder as a compensable injury for Second Injury Fund benefits. 2022 IA SF2363, 89th General Assembly. There would be no need to reintroduce this proposal as recently as February 16, 2022 if the legislature already intended to include the shoulder as a Fund-eligible injury.

Because a shoulder injury is not one of the enumerated scheduled member injuries listed in Iowa Code section 85.64 – which triggers entitlement to benefits from the Fund – claimant cannot recover any benefits from the Fund based solely on his injury to the shoulder. West v. Second Injury Fund of Iowa, File No. 20001935.01 (App. Dec. April 21, 2022)

Alternatively, claimant contends he sustained a loss of use to the right arm as a result of the August 6, 2018 right shoulder injury, which entitles him to Second Injury Fund benefits. He relies on a single opinion from Dr. Kim, which provides the August 6, 2018, work injury caused a loss of use of the right arm because the shoulder injury impaired the ability of the right shoulder to support the right arm. (Ex. 5, p. 31) Both parties cite case law to support their positions.

In 1995, the Iowa Supreme Court addressed a similar situation in Second Injury Fund of Iowa v. Nelson, 544 N.W.2d 258 (Iowa 1995). In Nelson, the claimant sustained a first qualifying injury to his leg in 1963. Years later, he sustained an injury to his shoulder that impaired the functionality of his arm. The workers' compensation commissioner concluded the Fund was liable for claimant's cumulative industrial disability because the shoulder injury affected claimant's arm and "an injury which affects a scheduled member is all that is necessary." Id. at 264. The Iowa Supreme Court specifically rejected the commissioner's interpretation that an injury that "merely affects a[n enumerated] scheduled member is enough to qualify as an injury that triggers the Fund's liability. Id. at 269; *see* Blake v. Second Injury Fund of Iowa, 967 N.W.2d 221 (Iowa Ct. App. 2021) The Court further explained that Iowa Code section

85.64 requires two scheduled member injuries listed in the Iowa Second Injury Compensation Act to invoke Fund liability.[1]

To mitigate the impact Nelson has on his claim, claimant attempts to distinguish the case by arguing that the main issue in Nelson was "whether an unscheduled injury can trigger Second Injury Fund Liability" rather than whether a shoulder injury can qualify for Fund benefits. Additionally, Rife asserts that Nelson stands for the proposition that an injury to a body part that solely results in unscheduled disability cannot be a Fund injury. (Claimant's Brief, p. 5) However, since subsequent decisions support the finding that the outcome in Nelson was not solely dependent on the unscheduled status of the shoulder, I find this distinction unpersuasive.

One year after Nelson, the Iowa Supreme Court revisited section 85.64 in Stumpff v. Second Injury Fund of Iowa, 543 N.W.2d 904 (Iowa 1996). In Stumpff, the claimant suffered a severe fracture at the distal aspect of the proximal phalanx in his right index finger and received benefits for a seventy-three percent loss to his finger. Stumpff, 543 N.W.2d at 905. Following fractures to his wrists thirteen years later, the claimant sought benefits from the Fund. Id. at 905. The deputy commissioner found there was no independent disability of the hand arising from the injury to the index finger. Consequently, the deputy commissioner determined the loss of use of claimant's index finger failed to trigger the Fund's liability. The Iowa Supreme Court agreed with the agency that an injury to a finger (an unenumerated member) that also affected the hand (an enumerated member) did not constitute a qualifying injury under section 85.64. Stumpff, 543 N.W.2d 904, 906 (Iowa 1996). The Court reasoned that because Iowa Code section 85.34 explicitly identifies finger injuries and hand injuries as separate scheduled member injuries, the legislature's specific inclusion of "hand" in Iowa Code section 85.64 indicates its intention to exclude finger injuries from qualifying under that provision. The Court provided,

> The Iowa legislature chose to allow a hand injury to qualify as a first injury against the Fund but not allow an injury to a finger to qualify. *See* Harry W. Dahl, *The Iowa Second Injury Fund-Time for Change*, 39 Drake L.Rev. 101, 119 (1989-1990) ("The first loss must be to one scheduled part named in the Iowa Act, that is, one arm, one hand, one foot, one leg, or one eye."). We think the industrial commissioner has correctly allowed recovery for a hand injury when the site of the injury is at the point where the bones of the finger connect to the bones of the hand (phalangeal-metacarpal joint), Vogel v. Second Injury Fund, File No. 925720, p. 2 (App. Decision April 30, 1993), and also has correctly denied benefits where only the finger was injured, Clester v. Second Injury Fund, File No.

[1] In concluding section 85.64 requires two scheduled injuries to invoke Fund liability, the Court cited to a law review note, "observing that Iowa's second injury fund law provides "narrow coverage" because it does not cover all types of preexisting impairments, that Iowa's law "limit[s] coverage to specific 'schedule' losses" and that both the first and second injuries must "be to a scheduled part named in the Iowa Act[.]" In the law review note, the term "Iowa Act" refers to the Iowa Second Injury Compensation Act.

> 990938, p. 3 (Arb. Decision February 2, 1994). This interpretation is consistent with the clear language of the statute and our prior cases.

Id. at 906-07.

Rife makes an incorrect assertion, relying on the above paragraph, that Stumpff stands for the proposition that disabilities to the joint connecting an enumerated member to an unenumerated scheduled member qualify for Fund benefits when a loss of use of an enumerated member occurs. The issue of whether disabilities to the joint connecting an enumerated member to an unenumerated scheduled member qualify for Fund benefits when a loss of use of an enumerated member occurs was not before the Court. The statement claimant relies on from Stumpff is considered dicta and does not constitute binding precedent.

The Stumpff court also revisited its holding in Nelson, providing,

> In the recent case of Second Injury Fund v. Nelson, --- N.W.2d ---- (Iowa 1995), the claimant suffered a nonscheduled shoulder injury. He suggested the injury to his shoulder was also an injury to his arm. We rejected the suggestion that a shoulder injury that affects the arm is sufficient to make the Fund liable. . . Likewise, we reject Stumpff's argument that the injury to his finger should be treated as a loss or loss of use of his hand thus qualifying as a first injury for the purpose of Fund liability.

Stumpff, 543 N.W.2d at 907. In doing so, the Court made it clear that Stumpff and Nelson both stand for the proposition that an injury to a member not listed in section 85.64(1) that merely affects "to some extent" a listed member does not constitute a qualifying loss for the purpose of Fund liability. Stumpff, 543 N.W.2d at 906.

Citing Second Injury Fund of Iowa v. Gregory, 777 N.W.2d 395 (2010), Rife next asserts that disabilities producing permanent impairment to enumerated members qualify for Fund benefits regardless of whether an unenumerated part of the body is involved. However, the argument presented by claimant is incomplete. The Iowa Supreme Court has made it clear that for such a scenario, the injury to the enumerated member must also lead to a distinct permanent loss or loss of use of that specific enumerated member in order to be eligible for compensation under the Second Injury Compensation Act. *See* Gregory, 777 N.W.2d at 400-01; *see also* George, 737 N.W.2d at 146-47.

In George, the injured worker sustained an injury to her left leg in 1996. Id. at 144. In 2000, the worker sustained another work-related injury that caused disability to both of her legs. Id. The Fund contended George's 2000 right leg injury was not a qualifying second injury because her left leg was also injured in the same incident. Id. at 145. Affirming the commissioner's determination that the bilateral nature of the 2000 injury did not preclude its qualification as a second injury under section 85.64, the Iowa Supreme Court interpreted the phrase "loss of or loss of use of another such member" to mean a subsequent loss to another enumerated member notwithstanding more than

one enumerated member was disabled as a consequence of the same incident. Id. at 147. Three years later, the holding in George was reaffirmed in Gregory v. Second Injury Fund of Iowa, 777 N.W.2d 395, 396 (Iowa 2010).

In Gregory, the claimant sustained a left hand injury in 2000. She simultaneously sustained bilateral shoulder injuries and filed a workers' compensation claim for all three conditions. Given that shoulder injuries were involved, the work injury was considered industrial and the case was settled. Two years later, the claimant sustained an injury to her right foot. She subsequently filed a workers' compensation claim against the Second Injury Fund of Iowa. The claimant argued that, although she sustained other "unscheduled" injuries because of the 2000 injury, she clearly also sustained a qualifying injury to her left hand for the purpose of generating a Fund claim. The Iowa Supreme Court held that Gregory's left hand injury in 2000 was a first qualifying injury. The Court held, "The fact that Gregory combined in a single workers' compensation proceeding her claim for that scheduled loss with other scheduled and unscheduled injuries did not disqualify it as a first qualifying injury under section 85.64." Id. at 401. The Court went on to explain that its determination respects the General Assembly's choice of a comparatively narrow statute. The Court provided, "The 2000 injury to Gregory's left hand qualifies as a first injury only because it was situated in an enumerated member and was not confined to an unenumerated part of her body." Id. at 401.

Read together, these cases establish that a permanent injury to an enumerated member constitutes a qualifying injury even though the injury also causes impairment to another enumerated or unenumerated member. *See* George 737 N.W.2d 141 (Iowa 2007); Gregory, 777 N.W.2d 395 (Iowa 2010) In the matter at hand, we have the opposite situation – Rife has an impairment to an unenumerated member that he asserts causes impairment to an enumerated, scheduled member. This factual difference distinguishes George and Gregory and makes their holdings inapplicable to this case.

Moreover, the injured workers in George and Gregory underwent separate surgeries, received separate impairment ratings, and were assigned separate restrictions for each specific injury. In comparison, the undersigned previously found that claimant's 2018 injury was confined to the right shoulder. Rife did not sustain an injury to his right arm that can stand alone as a scheduled injury. His right arm was not injured in such a manner that he sustained trauma that is separately ratable or for which restrictions can be provided; rather, he sustained only an unenumerated, right shoulder injury. He underwent surgery, received impairment ratings, and received permanent restrictions solely for his right shoulder. No expert, including Dr. Kim, assigned permanent impairment to the right arm. Instead, Dr. Kim opined the August 6, 2018, work injury caused a loss of use of the right arm because the shoulder injury impaired the ability of the right shoulder to support the right arm. (Ex. 5, p. 31) Therefore, I found it is more likely than not the injury caused permanent disability to the shoulder and merely affected the arm.

Additionally, Rife did not establish P.M. Lattner's legal liability for permanent impairment to his right arm from the August 8, 2018, date of injury, which is a condition precedent to qualifying for Fund benefits under section 85.64.

The employer's liability for a right arm injury must be established directly against the employer and not collaterally in an action against the Fund only, because the employer is an actual party in interest and the employer is in a better position than the Fund to make an early and full investigation of the employee's claimed work injury. Eaton v. Second Injury Fund of Iowa, 723 N.W.2d 452 (Iowa Ct. App. 2006) Allowing the claimant to determine P.M. Lattner's liability for a right arm injury in an action filed and tried against a completely different party would raise questions of substantial fairness and due process.

Had Rife successfully brought a right arm claim against P.M. Lattner, the combined injuries to the right shoulder and arm would have been compensable under Iowa Code section 85.34(2)(v). Anderson v. Bridgestone Americas, Inc., File No. 5067475 (Arb. Jan. 25, 2022) In such a situation, P.M. Lattner, not the Fund, would be liable for the claimant's industrial disability.

Ultimately, I reject claimant's argument that the injury to his shoulder should be treated as a loss, or loss of use of his arm, thus qualifying as a second injury for the purpose of Fund liability. The correct application of the law would preclude a finding that the injury to the shoulder, which "merely affects" his arm, is a qualifying injury triggering entitlement to Fund benefits. As Rife failed to prove he sustained a second qualifying injury, he has not met his burden to establish the Fund's liability.

Having determined claimant failed to prove a second qualifying injury, I find the remaining issues are moot. Mr. Rife is not entitled to an award of benefits in this case.

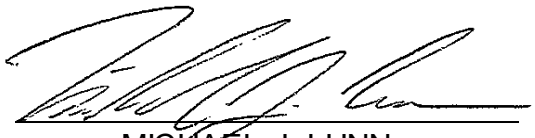
**ORDER**

THEREFORE, IT IS ORDERED:

Claimant shall take nothing from the Second Injury Fund of Iowa.

The parties shall each bear their own costs.

Signed and filed this 5th day of July, 2023.



MICHAEL J. LUNN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

Anthony Olson (via WCES)

Jennifer Beckman (via WCES)

**Right to Appeal:** This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.