IN THE IOWA DISTRICT COURT FOR POLK COUNTY

SECOND INJURY FUND OF IOWA, **Petitioner,** **v.** **JANETTE CALIGIURI,** **Respondent-Claimant.**	**Case No. CVCV059228** **RULING ON JUDICIAL REVIEW**

This judicial review action came on for hearing on April 3, 2020. Amanda Rutherford represented petitioner Second Injury Fund of Iowa (the Fund). Randall Schueller represented respondent Janette Caligiuri (referred to as "claimant").

STATEMENT OF THE CASE

A. Case summary.

Claimant previously worked for The Bon Ton Stores d/b/a Younkers. On July 27, 2016, while at work, she fell off a stepladder and injured her left knee. There is no dispute that this was a workplace injury and that she qualified for workers' compensation benefits. The workers' compensation commission determined that claimant incurred a two percent permanent impairment to the knee and awarded 4.4 weeks of compensation. Neither party appealed that decision.

The fighting issue in this case concerns whether claimant had a prior injury that would qualify her for benefits from the Fund. The Fund is liable for the cumulative effect of an injury to an extremity (hand, arm, foot, leg, or eye) after a worker suffers a disability to a second extremity. Claimant argued that she permanently injured her arm during an auto accident in 2010. The Fund argued that the 2010 injury was to the shoulder, which is not considered an extremity. The agency found that the 2010 injury was a qualifying loss, entitling claimant to

industrial disability. The deputy workers' compensation commissioner found ten percent industrial disability. On review, the commissioner's designee increased the award to twenty-five percent industrial disability.[1] The Fund then filed this judicial review.

B. Evidence regarding the 2010 injury.

Claimant was in an auto crash on September 28, 2010. She was stopped at a stop sign when she was hit by another car at highway speed.[2] She testified that the crash hurt her neck, back, and her left shoulder, elbow and bicep. Following an MRI of the shoulder, her doctors diagnosed a rotator cuff tear. She was initially prescribed physical therapy to treat the rotator cuff tear. No treating physician diagnosed her with an injury to the elbow or bicep, nor did they recommend treatment particularly aimed at the elbow or bicep. Claimant alleged that she continued to suffer pain to the arm. She also claimed that the physical therapy was designed to treat the shoulder and arm. She maintained at the workers' compensation hearing that she continued have problems with her bicep and elbow. (Tr. 22-24, 63, 69-70, 75-76).

The medical records from the treating physicians uniformly diagnose claimant with a rotator cuff tear and no specified injury to the arm. Dr. Terry Falk made that diagnosis in his radiology report dated October 18, 2010. Dr. Jonathan Suddarth noted the same diagnosis in his medical note dated October 22, 2010. He stated that the tear did not appear amenable to repair and recommended physical therapy. Dr. Suddarth referred claiman to Dr. Stephen Ash, who concurred with the same diagnosis of rotator cuff tear. Dr. Ash opined that claimant might benefit from surgery, but he wanted her to see Dr. Igram regarding her neck before making a final decision. Claimant ultimately decided not to do the surgery. The only other treatment noted was through Dr. Michael Munhall, who recommended an injection to the shoulder and

[1] The parties stipulated that the Fund was entitled to a credit of 11.9 weeks.
[2] The auto crash was not work-related.

physical therapy. The doctors placed claimant on a lift restriction, directed her not to lift her left arm away from the body or over the shoulder, and told her to keep left elbow at her side during lifting and carrying. These restrictions were not specifically directed at the shoulder versus the elbow or arm. (Joint exhibits 2-4, 3-1, 4-1, 4-2, 5-1, 5-2).

The medical records show that claimant complained of arm pain to her doctors following the auto crash. On December 1, 2010, she complained of increasing pain while doing physical therapy. Dr. Suddarth noted that range of motion of the wrist and elbow were normal, and bicep and tricep bodies were normal to palpation. On January 7, 2011, claimant reported a tingling sensation running down her left arm. As of February 10, 2011, she was still reporting arm pain to Dr. Suddarth. (Joint exhibits 3-3, 3-6, 5-1).

Claimant was not diagnosed with an arm injury until after she filed her claim in this workers' compensation case. On July 3, 2018, she received an independent medical evaluation (IME) from Dr. Sunil Bansal. Dr. Bansal reviewed the medical records and conducted a physical examination. He found tenderness in the upper left arm and a strength deficit of twenty percent of the left versus the right arm. Dr. Bansal associated his findings on the arm to the 2010 car crash, as per claimant's report. He assigned an impairment of three percent to the left upper arm for loss of elbow flexion strength. He stated he would place a lift restriction on the left arm of no less than ten pounds. (Joint exhibit 11).

The Fund asked Dr. John Albright to review claimant's medical records to determine any documentation of an arm injury. He opined that claimant's September 28, 2010, injury was to the left shoulder and not the arm or the elbow. He also found that any impairment to the arm or elbow would not stem from the injury to her left shoulder rotator cuff tear. Dr. Albright did

personally examine claimant, so his opinions are solely based on the medical records. (Fund exhibit AA).

C. The workers' compensation commission decisions.

The deputy workers' compensation commissioner found that the 2010 auto crash created a first qualifying loss for second injury fund purposes because claimant suffered a permanent impairment to her left arm. The deputy based her decision on three primary pieces of evidence: 1) Dr. Bansal's opinion, 2) claimant's testimony about her injuries, and 3) the medical record's documentation of her complaints of pain in the left arm. The deputy expressly found that claimant testified credibly at the hearing. She noted that Dr. Albright, who is a professor of orthopaedic surgery for the Work Injury Recover Center at the University of Iowa, has "superior training" to Dr. Bansal, who is a doctor of occupational medicine for the Iowa Injury Institute. However, she found Dr. Bansal's opinion to carry more weight because he personally examined claimant as part of his conclusion that she had a strength deficit in the left arm. As a result, the deputy accepted Dr. Bansal's finding that claimant had a three percent impairment to the left arm.

Based on the finding of permanent impairment to two extremities, the deputy moved on to the question of claimant's earning capacity as part of an award of industrial disability. She noted that claimant was 64 years old at the time of the hearing, had limited education and computer skills, and had physical limits due to the injuries to her left arm and left knee. Claimant had a strong work history at several retail stores (among other jobs), but had recently taken a demotion at her current job (Lowe's) because she could not handle walking throughout the store in a management position. The deputy found that claimant had been accommodated at

Lowe's and was capable of additional job classes through retraining. She found industrial disability of ten percent.

The Fund appealed and claimant cross-appealed. The commissioner designated another deputy to decide the appeal. She affirmed the deputy's findings as to the first and second injuries. However, she applied the industrial disability factors differently for an increase to twenty-five percent industrial disability.

STANDARD OF REVIEW

Chapter 17A of the Iowa Code governs judicial review of administrative agency action. The district court acts in an appellate capacity to correct errors of law on the part of the agency. *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 219 (Iowa 2006). The court "may grant relief if the agency action has prejudiced the substantial rights of the petitioner, and the agency action meets one of the enumerated criteria contained in section 17A.19(10)(a) through (n)." *Burton v. Hilltop Care Cntr.*, 813 N.W.2d 250, 256 (Iowa 2012) (quoting *Evercom Sys., Inc. v. Iowa Utilities Bd.*, 805 N.W.2d 758, 762 (Iowa 2011)). Where an agency has been "clearly vested" with a fact-finding function, the appropriate "standard of review [on appeal] depends on the aspect of the agency's decision that forms the basis of the petition for judicial review"—that is, whether it involves an issue of 1) findings of fact, 2) interpretation of law, or 3) application of law to fact. *Burton*, 813 N.W.2d at 256.

Review of findings of fact: The courts use a substantial evidence standard when considering challenges to findings of fact in agency decisions. A reviewing court can only disturb factual findings if they are "not supported by substantial evidence in the record before the court when that record is reviewed as a whole." *Burton*, 813 N.W.2d at 256 (quoting Iowa Code § 17A.19(10)(*f*)). The Iowa Supreme Court has outlined the court's guidelines when reviewing

substantial evidence claims under the 17A.19 standard as follows:

> When reviewing a finding of fact for substantial evidence, we judge the finding 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. Our review of the record is fairly intensive, and we do not simply rubber stamp the agency finding of fact.
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> Evidence is not insubstantial merely because different conclusions may be drawn from the evidence. To that end, evidence may be substantial even though we may have drawn a different conclusion as fact finder. Our task, therefore, is not to determine whether the evidence supports a different finding; rather, our task is to determine whether substantial evidence, viewing the record as a whole, supports the findings actually made.

Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 845 (Iowa 2011) (internal citations and quotation marks omitted).

Review of interpretation of law: The courts traditionally have discretion to substitute their interpretations of law for that of the agency when legal challenges are made on review. *Meyer*, 710 N.W.2d at 219. However, the courts are required to give deference to an agency interpretation of law when the agency has been "clearly vested" with authority to interpret a provision of law. *Burton*, 813 N.W.2d at 256. If the legislature has not given the agency clear authority to interpret a provision of law, the courts may reverse the interpretation if erroneous. *Id*.

In *Burton*, the Iowa Supreme Court held the level of deference to the workers' compensation commissioner's interpretations will be determined on a case-to-case basis depending on the "particular phrase under consideration." *Id*. While this appears an arduous standard, the court provided the following guidance:

> When a term is not defined in a statute, but the agency must necessarily interpret the term in order to carry out its duties, we are more likely to conclude the power to interpret the term was clearly vested in the agency. This is especially true "when the statutory provision being interpreted is a substantive term within the special expertise of the agency." However, "[w]hen a term has an independent legal definition that is not uniquely within the subject matter expertise of the agency," or when the language to be interpreted is "found in a statute other than the statute the

> agency has been tasked with enforcing," we are less likely to conclude that the agency has been clearly vested with the authority to interpret that provision of the statute.

Id. at 256–57 (cites omitted).

Application of law to fact: When a party challenges the ultimate conclusion reached by the agency, then the challenge is to the agency's application of the law to the facts. In that event, the question on review is whether the agency abused its discretion by, for example, employing wholly irrational reasoning or ignoring important and relevant evidence. *Meyer*, 710 N.W.2d at 219. The court will only reverse the agency's application of law to the facts if it is irrational, illogical, or wholly unjustifiable. *Neal v. Annett Holdings, Inc.*, 814 N.W.2d 512, 518 (Iowa 2012).

CONCLUSIONS OF LAW

A. Whether the agency correctly applied the law when determining that claimant's 2010 auto crash constituted a first qualifying injury for Fund benefits.

The Second Injury Compensation Act was created to encourage employers to hire disabled persons.[3] *Second Injury Fund of Iowa v. Bergeson*, 526 N.W.2d 543, 547 (Iowa 1995) (*referencing* Iowa Code §§ 85.63 through 85.69). The Act does so by limiting an employer's workers' compensation liability for employees who have previously lost the use of a hand, arm, foot, leg, or eye, if the employee suffers a workplace injury to another such body part. *Id*. (*citing* Iowa Code § 85.64). In that event, the employer is only liable for the second injury as if there had been no preexisting disability. *Id*. Any remaining liability is paid by the Fund. *Id*.

[3] The purpose of the Fund has been debated. *See Gregory v. Second Injury Fund*, 777 N.W.2d 395, 342 (Iowa 2010) (Cady, J., dissenting). Justice Cady stated that the Fund was created to resolve basic fairness issues to employees and subsequent employers when a second injury causes greater harm than it would to a person without the first injury. The creation and implementation of the Fund resolved problems with inconsistent judgments when courts had to make a choice between either fully compensating the employee or limiting the liability of the employer.

Normally, an injury to an extremity such as an arm or a leg is paid as a scheduled injury. *Bergeson*, 526 N.W.2d at 547 (*citing* Iowa Code § 85.34). The statute provides a limit on the recovery for each listed extremity. *Id*. If the injury is to a part of the body not listed on the schedule, it is considered an injury to the body as a whole. *Id*. Injuries to the body as a whole are determined through industrial disability, which takes into account factors impacting the employees earning capacity, such as age, education, experience, and others. *Id*. For that reason, an employee who has an unscheduled injury often receives more benefits than one with a scheduled injury. *Id*.

An employee may also be able to prove industrial disability if the cumulative effect of two scheduled injuries amounts to a disability of the body as a whole. *Bergeson*, 526 N.W.2d at 548. For example, in *Bergeson*, the combination of two leg injuries barred the claimant from his prior occupation as a plumber. *Id*. While he was able to get other work, his earning capacity was impaired beyond the amount of the scheduled impairment. *Id*. The court held, in that event, the employer was only responsible to pay the scheduled amount of the second injury. *Id*. The Fund was responsible for the amount paid for industrial disability, after deducting the amounts for the two scheduled injuries. *Id*. at 547-48.

In the present case, the Fund argued that the first injury to claimant was not an injury to the arm, but rather, an injury to the shoulder. The Fund pointed to *Second Injury Fund v. Nelson*, 544 N.W.2d 258, 268-70 (Iowa 1995), which considered the same question. In *Nelson*, the claimant's first injury was to a knee and the second injury was to a shoulder. *Id*. The court held that an injury to a joint, such as a hip or shoulder, must be treated as an injury to the body as a whole rather than a scheduled injury. *Id*. at 269 (*cites omitted*). As a result, an injury to a shoulder could not be used to create liability against the Fund. *Id*. The court rejected the

agency's conclusion that a shoulder injury may qualify as a scheduled injury if it affects a scheduled member, such as an arm. *Id*. at 269-70.

Both parties relied on *Gregory v. Second Injury Fund* to support their respective positions. 777 N.W.2d 395 (Iowa 2010). In *Gregory*, the claimant's first injuries involved both hands and shoulders. *Id*. at 396. She was paid a lump sum settlement of $27,000 for these claims. *Id*. at 400, n. 4. The agency found the injuries in the first claim to be to the body as a whole because the impairment to the hands extended beyond the arm and into the body. *Id*. at 397. The Iowa Supreme Court reversed, holding that the hand injuries were distinguishable from the shoulder injuries, and the claim for Fund liability should not be barred because the hand and shoulder injuries were jointly settled. *Id*. at 400-01. The record reflected that the claimant had a two percent permanent impairment to one hand and a six degree impairment to the other, so there was factual support to show an independent injury. *Id*. at 396, 400, n. 4. The Fund argued that this holding is consistent with *Nelson*, because a claimant still has to show an independent injury to a scheduled member, even when the person also suffered an injury to the body as a whole. Claimant argued that *Gregory* stands for the proposition that an injury to the body as a whole can qualify if it impacts a scheduled member.

The dissent provides some clarification. It characterized the issue as whether the legislature intended the Fund to cover workers "with an existing disability that extended to both a specified and unspecified portion of the body." *Id*. at 404 (Cady, J., dissenting). This language shows that the dissent interpreted the majority decision to have found a disability to the hands and to the shoulders. The dissent believed that the statute was not met, because the statute required the value of the first scheduled injury to be deducted from the Fund liability. That could not be done in *Gregory* because the claimant's hand and shoulder injuries were compensated

jointly as a whole body injury. *Id*. at 404-05. The dissent believed this case fell outside the statutory intent underlying the Fund, which it found was intended to solely compensate workers for separate injuries to scheduled members and not injuries to the body as a whole.

I agree with the Fund that *Gregory* did not change the rule from *Nelson*. The claimant still has to show a permanent impairment to a scheduled member. It is not sufficient to show that a scheduled member is impacted by an injury to an unscheduled member, such as a shoulder or a hip. Shoulder injuries often impact the ability to use an arm. As discussed in *Nelson*, a finding to the contrary would violate the legislative intent to limit Fund awards to impairments to scheduled members. *Gregory* only applies when an employee has suffered injuries to a scheduled and unscheduled member. In that event, the employee may be able to establish Fund liability if the person can establish an impairment to the scheduled member, even though the employee may have received a whole body workers' compensation award.

With that said, the agency applied the correct standard. The deputy's decision correctly focused on the fact question whether claimant suffered a prior injury to her arm. While claimant clearly suffered an injury to her shoulder in the 2010 auto crash, that does not prevent her from also establishing an impairment to her arm. The deputy evaluated the evidence concerning whether claimant injured her arm during the crash. She ultimately found an impairment to the arm. That is a factual finding subject to the substantial evidence standard, which will be discussed below. The agency did not commit an error of law.

B. Whether the agency's finding that claimant suffered a permanent impairment to her arm in 2010 is supported by substantial evidence.

Substantial evidence claims do not usually fare well in workers' compensation cases. Cases that reach judicial review often involve a classic battle of experts. The courts have been steadfast in ruling that the commissioner, as the finder of fact, is responsible for determining the

weight to be given expert testimony. *See Cedar Rapids Cmty. Sch. Dist. v. Pease*, 807 N.W.2d 839, 850 (Iowa 2011) (cite omitted). The commissioner is free to accept or reject an expert's opinion in whole or in part. *Id*. On judicial review, the courts "are not at liberty to accept contradictory opinions of other experts in order to reject the finding of the commissioner." *Id*. (cites omitted). In the typical case, this means that, as long as the commissioner's decision is supported by a single expert opinion, the court is not at liberty to reverse regardless its view of the strengths and weaknesses of that opinion or the opposing opinions.

This case is not typical for at least two reasons. First, the injury or injuries resulting from the 2010 auto crash did not arise out of the workplace. The first injury does not need to be a workplace injury to qualify for Fund liability. However, if it had, and claimant had filed a workers' compensation claim, we might have the benefit of an impairment finding that is more contemporaneous to the causing event. Second, there is no treating physician who diagnosed claimant with an arm injury or any permanent impairment to the arm following her 2010 auto crash. Claimant made complaints of pain to her treating physicians, but none made any diagnosis of an arm injury. The only diagnosis of injury or permanent impairment to the arm came in 2018 after claimant was seen by Dr. Bansal for an IME after her knee injury in 2016. While it is not unusual for doctors conducting IMEs to disagree, there is usually some form of corroborating opinion from one of the treating physicians. This is particularly concerning because Dr. Bansal's opinion comes long-after claimant completed her course of treatment following the 2010 auto crash.

This case is a test of the judicial review standard. It is a weak case for Fund liability. The only medical opinion supporting a first injury comes from a claimant-retained IME eight years after the alleged causing event. However, our legal standards place trust in agency

decision-making. Deputy workers' compensation commissioners make these types of decisions on a daily basis. They are better able to evaluate a case in the context of other cases. In this instance, the deputy did not solely rely on Dr. Bansal's opinion. She found his opinion to be supported by claimant's testimony and by notes in her medical file. The deputy made express credibility findings. She explained why she ultimately followed Dr. Bansal's opinion. This is a close call, but it meets the substantial evidence standard.

RULING

The agency decision is affirmed. The Second Injury Fund is responsible for any court costs.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
CVCV059228	SECOND INJURY FUND OF IOWA VS JANETTE CALIGIURI

So Ordered

Jeffrey Farrell, District Court Judge,
Fifth Judicial District of Iowa