

**IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY**

DEE A. DELANEY,  Petitioner,  v.  SECOND INJURY FUND OF IOWA,  Respondent.	Case No. CVCV064110   RULING ON PETITION FOR JUDICIAL  REVIEW
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On December 9, 2022, the above-captioned matter came before this Court for hearing. Petitioner, Dee A. Delaney (Delaney), appeared through Attorney Nate Willems. Respondent, Second Injury Fund of Iowa (Fund), appeared through Assistant Attorney General Jonathan D. Bergman. After hearing the arguments of Counsel and reviewing the court file, including the briefs filed by the parties and the Certified Administrative Record, the Court now enters the following ruling.

**I. BACKGROUND FACTS AND PROCEEDINGS.**

Delaney filed a petition in arbitration with the Iowa Workers' Compensation Commission seeking workers' compensation benefits from the Fund as a result of an alleged first injury on July 22, 1986, and an alleged second injury on March 12, 2019. Certified Record (CR), Part 1, p. 59. An Arbitration Decision was filed by Deputy Commissioner Pals on February 11, 2022. *Id.* at 62.

At the time of the arbitration hearing, the parties were disputing whether the July 22, 1986 injury was a proper prior qualifying loss. *Id.* at 59. However, during the post-hearing briefs, the Fund stipulated that the July 22, 1986 injury was a proper prior qualifying injury. *Id.* The Deputy accepted this stipulation in full. *Id.*

Deputy Pals also accepted the parties' stipulation that Delaney sustained an injury, which arose out of and in the course of her employment with Nordstrom, Inc. (Nordstrom), on March 12, 2019. *Id.* Delaney and Nordstrom entered into an Agreement for Settlement wherein they stipulated that Delaney sustained a work-related injury to her right lower extremity resulting in permanent partial disability of a 40 percent loss of her right leg. *Id.* Deputy Pals found that the Fund was not a part of the Agreement for Settlement and, thus, was not bound by the terms of the settlement. *Id.*

After the March 2019 work injury, Delaney eventually had an MRI of her right knee performed. *Id.* After her MRI, Delaney was referred to Dr. Noiseux, an orthopedic surgeon at the University of Iowa Hospitals and Clinics (UIHC). *Id.* Dr. Noiseux believed that the March 2019 work injury substantially aggravated Delaney's underlying right knee osteoarthritis. *Id.* Accordingly, in August 2019, Dr. Noiseux's performed a total right knee arthroplasty on Delaney. *Id.* Following the surgery Delaney was restricted from returning to work until approved. *Id.*

Dr. Noiseux determined that Delaney was at maximum medical improvement (MMI) on January 2, 2020. *Id.* at 60. He assigned a 37 percent impairment rating to Delaney's right lower extremity and released her to return to work without restrictions. *Id.* However, in June 2020 Delaney began to experience pain and swelling in her right foot. *Id.* She saw Dr. Beiber at UIHC, who diagnosed her with post-surgical lymphedema. *Id.* Dr. Beiber opined that the cause of the lymphedema was likely due to the destruction of Delaney's lymph during her total right knee arthroplasty. *Id.*

In August 2020 Dr. Noiseux agreed with Dr. Beiber's diagnosis of right foot swelling due to post-surgical lymphedema from the August 2019 total knee replacement. *Id.* Delaney underwent an independent medical examination (IME) in March 2021 with Dr. Manshadi. *Id.* Dr. Manshadi

performed an examination on Delaney and reviewed the medical records provided to him. *Id.* Dr. Manshadi opined that Delaney's total knee replacement was causally related to her March 2019 work injury. *Id.*

Furthermore, using the American Medical Association's Guides to the Evaluation of Permanent Impairment (AMA Guides), 5<sup>th</sup> edition, he assigned Delaney a 37 percent impairment rating to her right lower extremity. *Id.* He also diagnosed Delaney's right foot edema and pain as lymphedema. *Id.* With regard to the lymphedema, he opined that it was a complication of the right total knee arthroplasty. *Id.* Dr. Manshadi placed Delaney at MMI on January 2, 2020, and opined that she has permanent partial impairment due to the lymphedema. *Id.* Using the AMA Guides, 5<sup>th</sup> edition, he assigned Delaney a 3 percent impairment of her whole person due to the lymphedema. *Id.* Delaney began using compression stockings to help with the lymphedema. *Id.* Delaney continued to have right leg soreness and left ankle pain and stiffness. *Id.*

As it relates to the lymphedema, Deputy Pals found the opinions of Drs. Beiber, Noiseux, and Manshadi persuasive. *Id.* Furthermore, Deputy Pals found that the lymphedema was the result of Delaney's right total knee replacement and right total knee replacement was a result of the March 2019 work injury. *Id.* As such, the Deputy found that the lymphedema was a sequela of the March 2019 work injury. *Id.* Furthermore, based on Dr. Manshadi's opinion, Deputy Pals further concluded that Delaney's lymphedema resulted in impairment to her body as a whole. *Id.* As a result, the Deputy concluded that the March 12, 2019 work injury was not limited to a scheduled member and, thus, Delaney failed to demonstrate entitlement to benefits from the Fund. *Id.* Deputy Pals then concluded all other issues were moot and did not rule on them. *Id.*

Delaney filed a Notice of Appeal with the Iowa Workers' Compensation Commissioner on February 16, 2022, appealing Deputy Pals' February 11, 2022 Arbitration Decision. *Id.* at 57. The

Commissioner filed an Appeal Decision on July 21, 2022. *Id.* at 10. The Commissioner adopted all parts of the Arbitration Decision not on appeal as part of his Appeal Decision. *Id.* at 9. The Commissioner additionally adopted the same analysis, findings, and conclusions in full as those reached by the Deputy on the appealed issues. *Id.* at 9-10.

Specifically, the Commissioner affirmed that Delaney failed to prove that she is entitled to receive benefits from the Fund because of her failure to establish a second qualifying injury. *Id.* at 10. The Commissioner also affirmed that all other issues were moot due to Delaney's failure to establish a second qualifying injury. *Id.* He also ordered Delaney to pay the appeal costs, including the hearing transcript. *Id.* Delaney filed her Petition for Judicial Review (Petition) on August 4, 2022.

On appeal to the Commissioner, Delaney raised the issue of whether she could recover from the Fund even if her second injury extended into her body as a whole. *Id.* at 39-54. However, the Commissioner did not address this argument in his Appeal Decision. *Id.* at 9-10. Rather, the Commissioner affirmed the Arbitration Decision in full on a de novo review. *Id.* Delaney did not file an application for re-hearing so that her argument could be addressed by the Commissioner.

## **II. SCOPE AND STANDARDS OF REVIEW.**

The Iowa Administrative Procedure Act (IAPA), Iowa Code Chapter 17A, governs the scope of the Court's review in workers' compensation cases. Iowa Code § 86.26 (2022); *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 218 (Iowa 2006). The Court's review of final agency action is "severely circumscribed." *Sellers v. Emp. Appeal Bd.*, 531 N.W.2d 645, 646 (Iowa Ct. App. 1995). Nearly all disputes are won or lost at the agency level; the cardinal rule of administrative law is that judgment calls are within the province of the administrative tribunal, not the courts. *See id.*

“Under the [IAPA], we may only interfere with the commissioner’s decision if it is erroneous under one of the grounds enumerated in the statute, and a party’s substantial rights have been prejudiced.” *Meyer*, 710 N.W.2d at 218. The party challenging agency action bears the burden of demonstrating the action’s invalidity and resulting prejudice. Iowa Code § 17A.19(8)(a). This can be shown in a number of ways, including proof the action was ultra vires; legally erroneous; unsupported by substantial evidence in the record when that record is viewed as a whole; or otherwise, unreasonable, arbitrary, capricious, or an abuse of discretion. *See id.* § 17A.19(10). The district court acts in an appellate capacity to correct errors of law on the part of the agency. *Grundmeyer v. Weyerhaeuser Co.*, 649 N.W.2d 744, 748 (Iowa 2002).

“If the claim of error lies with the agency’s findings of fact, the proper question on review is whether substantial evidence supports those findings of fact” when the record is viewed as a whole. *Meyer*, 710 N.W.2d at 219. Factual findings regarding the award of workers’ compensation benefits are within the Commissioner’s discretion, so the Court is bound by the Commissioner’s findings of fact if they are supported by substantial evidence. *Clark v. Vicorp Rest., Inc.*, 696 N.W.2d 596, 604 (Iowa 2005). Substantial evidence is defined as evidence of the quality and quantity “that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance.” Iowa Code § 17A.19(10)(f)(1); *Cedar Rapids Cmty. Sch. Dist. v. Pease*, 807 N.W.2d 839, 850 (Iowa 2011). The burden on the movant to prove there is not substantial evidence in the record is a heavy one. *See McComas-Lacina Constr. v. Drake*, 884 N.W.2d 225 (Table), 2016 WL 2744948, at \*1 (Iowa Ct. App. May 11, 2016) (“A case reversing final agency action on the ground the agency’s action is unsupported by substantial

evidence . . . is the Bigfoot of the legal community - an urban legend, rumored to exist but never confirmed.”)

The application of the law to the facts is also vested in the commissioner. *Larson Mfg. Co. v. Thorson*, 763 N.W.2d 842, 850 (Iowa 2009). Accordingly, the Court will reverse only if the commissioner’s application was “irrational, illogical, or wholly unjustifiable.” *Id.*; Iowa Code § 17A.19(10)(l). This standard requires the Court to allocate some deference to the commissioner’s application of law to the facts but less than it gives to the agency’s findings of fact. *Larson*, 763 N.W.2d at 850. “[I]f the claimed error pertains to the agency’s interpretation of law, then the question on review was whether the agency’s interpretation was wrong.” *Tripp v. Scott Emergency Comm’n Ctr.*, 977 N.W.2d 459, 464 (Iowa 2022) (citing *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 219 (Iowa 2006)).

### III. MERITS.

#### A. Did The Agency Correctly Conclude That Delaney Failed To Prove A Qualifying Second Injury?

In her Petition, Delaney alleges that the Iowa Workers’ Compensation Commission’s Appeal Decision was in violation of Iowa Code sections 17A.19(10)(a)-(n). Delaney seeks reversal of the Appeal Decision filed by Commissioner Cortese on July 21, 2022. However, in her Brief on Judicial Review (Brief), Delaney asserts that “The sole issue on judicial review is whether the lymphedema Dee [Delaney] suffered transforms the 2019 injury into a whole-body injury not compensable under § 85.64.” Brief, p. 3. Delaney further asserts that she is not contesting the Commissioner’s findings of fact but, rather, is contesting the agency’s interpretation of the law. Accordingly, Delaney contends that de novo review is warranted. *Id.* at 7.

In support of her assertions, Delaney argues that the Commissioner erred by finding an injury to the vascular system is an injury to the body as a whole and, as such, she suffered a second qualifying injury under Iowa Code section 85.64. Delaney also cites to various Iowa cases wherein the injuries ranged from injuries to the skin, nerves, and vascular system. In essence, Delaney argues that these cases do not permit a blanket determination that any vascular system injury is an injury to the body as a whole. As such, Delaney asserts that a case-by-case review must be done and, in her case, her vascular system injury is not to her whole body.

Delaney also notes that while Agency precedent does support a whole-body impairment due to a vascular system injury, there is no appellate court cases on this. As such, Delaney argues that the weight of authority does not support the idea that any vascular system injury is an injury to the body as a whole.

The Fund asserts that the Commissioner correctly concluded that Delaney failed to prove a second qualifying injury because her March 2019 injury was an injury to the body as a whole. In support of their assertion, the Fund contends the decision was correct because: 1) the Agency's factual findings are supported by substantial evidence in the record; 2) under Iowa Code section 85.64, body-as-a-whole conditions are not qualifying for Fund benefits even if they caused symptoms in a scheduled member; and 3) the Iowa Supreme Court's holding in *Gregory v. Second Injury Fund of Iowa* does not apply to the facts of this case. 777 N.W.2d 395 (Iowa 2010).

The Fund also argues that Delaney's assertion that the proper standard of review in this case is for correction of errors at law is wrong. The Fund contends the proper standard of review is whether the substantial evidence supports the Commissioner's finding of fact that her injury is to her body as a whole.

The Fund cites various Agency precedent which supports its contention that lymphedema is considered an injury to the vascular system, which, in turn, is considered an injury to the body as a whole. In addition to the Agency precedent cited, the Fund points to all expert opinions in this case. Specifically, the Fund points out that Drs. Beiber, Noiseux, and Manshadi all concluded that Delaney's right lower leg/foot condition was lymphedema causally related to her total right knee replacement. Furthermore, the Fund asserts that Dr. Manshadi is the only doctor who provided an impairment rating for Delaney's lymphedema and in doing so he used the AMA Guides, 5<sup>th</sup> edition, table for peripheral vascular disease, which provides that impairment should be rated to the whole person.

The Fund also points out the changes Delaney had to make in her daily life due to her lymphedema. Specifically, she wears compression stockings on both her legs, she uses special insoles in her shoes, and uses detox patches at night to help with the swelling. Furthermore, Delaney tries to elevate her legs as much as possible, and Dr. Manshadi recommended permanent work restrictions for her. These restrictions include sitting, standing, and walking only on an as-needed basis because of her lymphedema.

The Fund also addressed the various cases Delaney cited. The Fund asserts that Delaney failed to find one case wherein someone with lymphedema was not injured to their body as a whole. Furthermore, the Fund asserted that even if the standard of review was for correction of errors of law, the Commissioner did not commit an error of law because they correctly interpreted existing and established law in its conclusion that Delaney's lymphedema is an injury to the body as a whole.

In her Reply Brief, Delaney argues that the Fund's standard of review is incorrect. In support of her assertion, Delaney contends that the question is whether her 2019 injury falls under



Iowa Code section 85.34(2)(p), a leg, or whether it falls under Iowa Code section 85.34(2)(v), an unscheduled or whole-body injury. Thus, she asserts that this is a question of law. Delaney also asserts the Fund has exaggerated her lymphedema and the differences between lymphedema and the conditions at issue in the cases she cited. In essence, Delaney contends that the cases she cited concern more serious conditions that were not automatically considered an injury to the body as a whole and, thus, lymphedema, a less serious condition, can also not automatically be considered an injury to the body as a whole.

The first question for this Court to decide is which standard of review applies. The issue at hand is whether the Commissioner correctly found that Delaney's lymphedema was an impairment to her body as a whole. Thus, this is a question regarding a finding of fact, and the proper standard of review is whether the substantial evidence supports the Commissioner's finding of fact, when the record is viewed as a whole. *Meyer*, 710 N.W.2d at 219.

The three expert opinions in this case all concluded that the pain and swelling in Delaney's right foot is due to lymphedema. CR, Part 1, p. 60; p. 197-200; p. 214; CR, Part 2, p. 45-48. Furthermore, the three expert opinions in this case all also concluded that the lymphedema is causally related to Delaney's total right knee replacement, which is causally related to her March 2019 work injury. *Id.* Dr. Manshadi was the only doctor to assign an impairment rating to Delaney for her lymphedema. He determined that under AMA Guides, 5<sup>th</sup> edition, she has a 3 percent impairment to the body as a whole. CR, Part 1, p. 200.

There are no other expert opinions nor evidence in this case contrary to the above expert opinions. Furthermore, Deputy Pals found all three experts to be persuasive and afforded their opinions weight. *Id.* 60. Commissioner Cortese also had the same findings as Deputy Pals. *Id.* at 10.

The Court concludes that the record, when viewed as a whole, contains evidence of the quality and quantity that is “[D]eemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance.” Iowa Code § 17A.19(10)(f)(1); *Pease*, 807 N.W.2d at 845. The Commissioner’s determination that Delaney’s lymphedema extends to her body as a whole is supported by substantial evidence. *Id.* As such, the Commissioner correctly concluded that Delaney failed to prove a qualifying second injury.<sup>1</sup>

Furthermore, because Delaney’s brief limited the scope from 17A.19(10)(a)-(n) to an issue of the agency’s interpretation of law, which the Court has concluded is a question of the agency’s findings of fact, the Court will not address the remaining subsections of Iowa Code section 17A.19(10)(a)-(n) not already addressed above.

**B. Can Delaney Recover From The Fund Even If Her Injury Is To The Body As A Whole?**

Delaney asserts that even if the lymphedema causes an injury to her body as a whole, she should still be able to recover from the Fund. The Fund asserts that this issue is not properly on Judicial Review. Specifically, the Fund asserts that Delaney did not raise this issue before Deputy Pals during the arbitration proceedings. Rather, Delaney raised this issue on appeal before Commissioner Cortese. Further, the Fund asserts that Commissioner Cortese did not address this issue in his Appeal Decision, nor did Delaney file an application for re-hearing to have the issue addressed. In sum, although raised on appeal before Commissioner Cortese, it was not decided on appeal, and Delaney made no attempts to have the Commissioner address the issue. Thus, the Fund asserts it is not properly on Judicial Review.

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<sup>1</sup> This determination is specific to the facts of this case and should not be construed as a blanket ruling that all lymphedemas cause an injury to the body as a whole.

The Court's appellate jurisdiction in this matter limits it to addressing only such arguments as were raised and addressed by the Agency. In contested cases, the Court's review is limited to those questions considered by the administrative agency. *General Tel. Co. v. Iowa State Com. Comm'n*, 275 N.W.2d 364, 367 (Iowa 1979).

An appellate court will consider only such questions as were raised and reserved in the lower court. The same principle . . . applies on review by courts of determinations of administrative agencies so as to preclude from consideration questions or issues which were not properly raised in the proceedings before the agency.

*Chicago and Northwestern Transp. v. Iowa Transp. Regul. Bd.*, 322 N.W.2d 273, 276 (Iowa 1982) (quoting 2 Am.Jur.2d *Administrative Law* § 724, at 624 (1962) with footnotes deleted). A party is precluded from raising issues in the district court that were not raised and litigated before the agency. *Interstate Power Co. v. Iowa State Com. Comm'n*, 463 N.W.2d 699, 701 (Iowa 1990). It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the lower tribunal before they can be decided on appeal. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). A failure to properly preserve an issue leaves nothing for the appellate court to review. Our error preservation rules serve the salutary purpose of giving notice to the Court and opposing counsel what is being challenged. *State v. Johnson*, 476 N.W.2d 330, 334 (Iowa 1991).

Accordingly, to the extent Delaney attempts to raise any arguments on judicial review that were not raised and adjudicated at the agency level, such issues are not properly before this Court and cannot be addressed by it here. In addition, this Court only reviews final agency action on judicial review, Iowa Code § 17A.19(1), and the decision of the workers' compensation commissioner is the final agency action. *See* Iowa Code § 86.24(5); *see also Myers v. F.C.A. Servs., Inc.*, 592 N.W.2d 354, 358 (Iowa 1999) (“[D]eputy . . . commissioner’s proposed findings are not a consideration on judicial review. Only final agency action is subject to judicial review.”). Thus, the Court is only reviewing what was specifically raised and litigated before the commissioner.

This Court has reviewed the record, including the Appeal Decision issued by Commissioner Cortese on July 21, 2022, and finds no mention of Delaney's assertion that even if the lymphedema causes an injury to her body as a whole, she should still be able to recover from the Fund. Furthermore, the Court finds no application for re-hearing within the record. Accordingly, the Court concludes that Delaney's assertion that even if the lymphedema causes an injury to her body as a whole, she should still be able to recover from the Fund is not properly on appeal, and the Court cannot review the issue.

#### **IV. CONCLUSION AND DISPOSITION.**

For all the reasons set forth above, the Court concludes Petitioner's Petition for Judicial Review must be **DENIED**. The Commissioner's decision is **AFFIRMED** in its entirety.



State of Iowa Courts

**Case Number**  
CVCV064110  
**Type:**

**Case Title**  
DEE DELANEY VS SECOND INJURY FUND OF IOWA  
ORDER FOR JUDGMENT

So Ordered

A handwritten signature in cursive script, reading "Samantha Gronewald".

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Samantha Gronewald, District Court Judge  
Fifth Judicial District of Iowa

Electronically signed on 2023-01-31 09:33:35