

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BERNARD HORNE,

Claimant,

vs.

UNITED TECHNOLOGIES CORP.,

Employer,

and

NEW HAMPSHIRE INSURANCE CO.,

Insurance Carrier,

and

SECOND INJURY FUND OF IOWA,
Defendants.

File No. 21005075.01

RULING ON APPLICATION

FOR REHEARING

Defendant Second Injury Fund of Iowa (the Fund), filed an application for rehearing (application). Claimant filed a resistance to the application. The Fund responded to the resistance. The application is considered.

This matter was heard in arbitration on August 25, 2022, by former Deputy Workers' Compensation Commissioner Heather Palmer. An arbitration decision was issued on February 3, 2023. In that decision, Deputy Palmer ruled, in part, that claimant had a permanent impairment of his right elbow and right arm, arising out of a single accident, which occurred on September 5, 2019. Deputy Palmer found claimant's right arm portion of the September 5, 2019, injury was a qualifying second loss entitling claimant to Fund benefits. (Arbitration Decision, page 22) Deputy Palmer found claimant had a ten percent industrial disability due to his first and second loss. Deputy Palmer ordered the Fund to pay claimant 40.6 weeks of permanent partial disability benefits after giving the Fund 4.4 weeks of credit for the stipulated right leg injury (first) and five weeks for the right arm injury (second). (Arb. Dec. pp. 21-22)

A June 29, 2023, appeal decision confirmed the arbitration decision.

Defendant Fund asserts that prior agency case law holds that permanent impairment of an arm and shoulder injury, arising out of a single incident, is not

compensable as a scheduled member injury, but is compensable under Iowa Code section 85.34(2)(v).

In Anderson v. Bridgestone Americas, Inc., File No. 5067475 (Arb. September 2, 2021), claimant sustained an injury to his right arm and shoulder caused by a single accident. The arbitration decision in Anderson found that claimant's permanent partial disability to two members from one injury did not fall into a subsection listed in Iowa Code section 85.34(2)(a-u), and therefore, could only be compensated under Iowa Code section 85.34(2)(v).

That decision was affirmed on intra-agency appeal on January 25, 2022.

Defendants in Anderson filed an appeal for judicial review. In an August 3, 2022, decision, the District Court affirmed the holding that claimant's injury to an arm and shoulder, caused by a single accident, was not a scheduled member and should be compensated under Iowa Code section 85.34(2)(v). Anderson, Case No. CV-063124, Polk County District Court (August 3, 2022).

As detailed above, Deputy Palmer also found claimant's right arm portion of his September 5, 2019, injury qualified as a second loss under Iowa Code section 85.64. In reaching that determination, Deputy Palmer relied on the decision in Gregory v. Second Injury Fund of Iowa, 777 N.W.2d 395 (Iowa 2010).

In Gregory, claimant pled a first qualifying injury to her left hand and bilateral shoulders, arising out of one injury. Claimant also pled a qualifying second injury to her right foot. Gregory, 777 N.W.2d at 396.

In finding that claimant had a qualifying first injury, the Iowa Supreme Court noted that "just as a **first** qualifying injury need not be a work-related injury, the method of calculating compensation for a **first** qualifying injury cannot be controlling on this issue." Id. at 400. (emphasis added)

In its decision, the court in Gregory confined its analysis regarding injuries to multiple body parts, to the first injury only, and not to the second injury.

In Larson v. Second Injury Fund, File No. 5033159 (App. March 27, 2012) this agency also held that the decision in Gregory should not be extended to apply to a second qualifying injury.

The District Court in Anderson found that a second injury to an arm and shoulder, caused by a single accident, was not a scheduled member. The Supreme Court in Gregory indicated its holding, regarding Fund benefits, is only to be applied to a first injury, and not the second. Agency case law in Larson indicates that the Gregory holding does not extend to the second qualifying injury.

For these reasons, the Fund's application is granted. Based on Anderson, Gregory and Larson, it is found that claimant, in this case, does not have a qualifying second injury for the purpose of Fund benefits.

The District Court in Anderson found that a claimant with an arm and a shoulder injury, caused by a single incident, should receive workers' compensation benefits

under Iowa Code section 85.34(2)(v). That should be the outcome for claimant in this case.

ORDER

THEREFORE IT IS ORDERED:

Defendant Fund's application for rehearing is granted.

It is found that claimant has failed to carry his burden of proof to establish he sustained a second qualifying injury for the purposes of Fund benefits.

The appeal decision filed on June 29, 2023, remains the same in all other aspects.

Signed and filed this 31st day of July, 2023.

A handwritten signature in black ink, reading "Joseph S. Cortese II", is written over a horizontal line.

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served, as follows:

Nate Willems (via WCES)

Emily Schott Hood (via WCES)

Lee Hook (via WCES)

Tyler Smith (via WCES)

Sarah Timko (via WCES)