

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

 REGENA STRABLE,

Claimant,

vs.

SECOND INJURY FUND OF IOWA,

Insurance Carrier,
Defendants.

File No. 1666216.03

ARBITRATION DECISION

Head Note Nos.: 2907, 3202

 STATEMENT OF THE CASE

Regena Strable, claimant, filed a petition for arbitration against the Second Injury Fund of Iowa. Claimant reached a full commutation agreement with the employer stipulating between those parties that claimant sustained an injury to her left leg as a result of work duties on April 25, 2019. Claimant also entered into a compromise settlement the day following her full commutation agreement in which she resolved alleged injuries to her left hip, back, and mental injuries under a purported date of injury of May 15, 2019. The Iowa Workers' Compensation Commissioner approved both the full commutation and the compromise settlement and copies of those documents are in evidence as Second Injury Fund Exhibits EE and FF.

The case against the Second Injury Fund of Iowa came before the undersigned for an arbitration hearing on March 31, 2022. Due to the ongoing pandemic in the state of Iowa and pursuant to an order of the Iowa Workers' Compensation Commissioner, this case was tried using the CourtCall videoconference platform.

The parties filed a hearing report before the scheduled hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 8, Claimant's Exhibits 1 through 2, and Second Injury Fund Exhibits AA through II.

Claimant testified on her own behalf. No other witnesses testified at the hearing. The evidentiary record closed at the conclusion of the March 31, 2022 hearing.

However, counsel for the parties requested an opportunity to file post-hearing briefs. This request was granted and both parties filed briefs simultaneously on May 6, 2022. The case was considered fully submitted to the undersigned on that date.

STATEMENT OF THE ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained a compensable and qualifying second injury to the left leg as a result of a work injury on April 25, 2019.
2. The extent of claimant's permanent functional loss, if any, as a result of the alleged April 25, 2019 work injury.
3. The extent of industrial disability, if any, sustained as a result of the first and second qualifying injuries.
4. The extent of the credit to which the Second Injury Fund of Iowa is entitled pursuant to Iowa Code section 85.64.
5. The proper commencement date for Second Injury Fund benefits, if any.
6. Whether costs should be assessed against the Second Injury Fund of Iowa and, if so, in what amount.

FINDINGS OF FACT

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

Regena Strable is a 59-year-old woman who lives in Hot Springs, Arkansas. The parties stipulated that she sustained a qualifying first injury, which involved bilateral carpal tunnel syndrome in 2009. (Hearing Report) The parties also stipulated that, as a result of the 2009 bilateral carpal tunnel syndrome, Ms. Strable sustained permanent impairment equivalent to four percent of the whole person. (Hearing Report)

Ms. Strable began working at Altoona Nursing and Rehabilitation on April 1, 2019. On April 25, 2019, while performing work duties at Altoona Nursing and Rehabilitation, Ms. Strable turned, felt a pop in her left ankle, experienced immediate pain, and fell to the floor. The Second Injury Fund acknowledges that the left ankle injury occurred on April 25, 2019. Medical records also document the left ankle injury. It is essentially undisputed that the left ankle injury occurred, and I find that Ms. Strable sustained a left ankle injury on April 25, 2019 as a result of her work duties at Altoona Nursing and Rehabilitation.

Claimant's left ankle injury on April 25, 2019, required orthopaedic evaluation. Dennis A. Kessler, DPM evaluated Ms. Strable on May 30, 2019. He diagnosed her with left peroneal tendinosis, a sprain of two ligaments in the left ankle, as well as a rupture of the anterior talofibular ligament in the left ankle. Dr. Kessler recommended surgical intervention but recommended claimant obtain a second opinion before proceeding with surgery. (Joint Ex. 7, pp. 53-55)

Bryan M. Trout, DPM, evaluated claimant for that recommended second opinion on June 17, 2019. Dr. Trout diagnosed claimant with a tear of the peroneal brevis tendon and recommended surgical intervention as well. (Joint Ex. 7, pp. 56-57) Dr. Trout performed a left ankle arthroscopy with synovectomy, debridement, and repair of the peroneal tendon on June 21, 2019. (Joint Ex. 6, p. 39)

Post-operative treatment included physical therapy. Claimant required a cast on her left foot and ankle. By July 11, 2019, claimant was reporting that the heavy foot cast was causing her to develop pain in the left hip. (Joint Ex. 3, p. 4) On July 15, 2019, claimant's therapist noted that she had irritation in the left hip area after her left ankle injury. (Joint Ex. 3, p. 4)

Ultimately, Ms. Strable developed pain into her low back. She reported to her independent medical evaluator, Sunil Bansal, M.D., that she continued to have low back pain at his evaluation on July 29, 2020. Ms. Strable reported that her low back pain worsened with walking and driving. She also reported that her low back pain radiated down into her left hip and leg. (Joint Ex. 6, p. 41) Dr. Bansal provided an un rebutted diagnosis of sacroiliitis and opined that it "has progressively worsened in intensity from the altered gait secondary to her left ankle pathology." (Joint Ex. 6, p. 44) Dr. Bansal's diagnosis is not rebutted in this record and is accepted. I find that claimant sustained sacroiliitis as a result of her altered gait resulting from the April 25, 2019 left ankle injury at work.

Dr. Bansal assigned a five percent permanent functional impairment rating for claimant's low back as a result of the April 25, 2019 work injury. (Joint Ex. 6, p. 45) Again, that permanent impairment rating is not challenged in this record. I accept Dr. Bansal's impairment rating. I find that claimant sustained a five percent permanent impairment of the whole person as a result of a low back injury that developed as sequela of the April 25, 2019 left ankle injury at work.

As a result of the left ankle injury, Ms. Strable also developed mental injuries. Ms. Strable attempted to parse out her mental health and low back injuries and claimed a different date of injury for those conditions. I reject the notion that there were separate dates of injury. Instead, Ms. Strable sustained a left ankle injury at work on April 25, 2019. As a direct result of the left ankle injury, Ms. Strable developed low back pain and a permanent injury to the low back. She also developed mental injuries as a direct result of the April 25, 2019 ankle injury at work. In fact, claimant essentially admitted at the arbitration hearing that her low back, hip, and mental health issues were caused by the April 25, 2019 left ankle injury at work. (Tr., pp. 56-60, 68-69, 80-81)

Ms. Strable required mental health counseling performed by Jennifer Embry, LCSW. Ms. Embry noted on June 11, 2020 that Ms. Strable "experiences severe anxiety related to this [left ankle] injury." (Joint Ex. 4, p. 10) Ms. Embry noted that claimant experiences anxiety, flashbacks, and panic attacks, which she opined were all related to the left ankle injury. (Joint Ex. 4, p. 11) Ms. Embry further opined that claimant experiences "depression related to decline in functioning post-injury." (Joint Ex. 4, p. 11) Ultimately, Ms. Embry offered diagnoses that include post-traumatic stress

disorder and generalized anxiety disorder and opined that “her mental issues (PTSD and Anxiety) were the direct result of her injury, that her mental anguish and severity were currently considered long-term and permanent.” (Joint Ex. 4, pp. 20, 22)

Ms. Strable also sought evaluation and treatment with a psychiatrist, James L. Gallagher, M.D. Dr. Gallagher performed his evaluation on November 1, 2019. He opined, “I don’t think there is doubt that her current psychiatric predicament and chronic pain are related to the injury at work.” (Joint Ex. 5, p. 31) Dr. Gallagher reiterated and confirmed that “causation belongs to the ankle injury and pain as regards the development of a severe mood disorder.” (Joint Ex. 5, p. 31)

Dr. Bansal also weighed in on claimant’s mental health issues. He opined that Ms. Strable required ongoing mental health counseling and medication management for her mental health issues. (Joint Ex. 6, p. 47) Dr. Bansal also opined that claimant qualified for mild to marked impairment for various mental health issues. (Joint Ex. 5, p. 46) The opinions of Dr. Gallagher, Dr. Bansal, and Ms. Embry are not disputed or rebutted pertaining to claimant’s mental health issues. I find that Ms. Strable sustained a permanent mental health injury as a result of the effects of her April 25, 2019 left ankle injury.

Ms. Strable submitted to a functional capacity evaluation (FCE) on March 20, 2020. The FCE indicated that claimant was unable to work a full day and would be limited to part-time work. She was placed on limitations that require nothing more than sedentary demand level work. (Joint Ex. 6, pp. 39-40) The full FCE is not included within the evidentiary record and specific limitations on claimant’s lifting, carrying, squatting, kneeling, work at heights, etc., is unknown in this record. Dr. Bansal adopts the FCE recommendations without specifying what is included within those restrictions.

Therefore, in the record presented in this case, I am unable to determine precise work restrictions. Moreover, I am unable to determine if specific restrictions exist for the left ankle, the low back, or mental issues related to those conditions. Instead, I find that the effects of the left ankle, low back, and mental health issues are intertwined in this situation and not easily parsed out to determine the effect each injury may have on claimant’s future earning capacity, if any.

CONCLUSIONS OF LAW

Ms. Strable seeks an award of benefits from the Second Injury Fund of Iowa. Iowa Code section 85.64 governs Second Injury Fund liability. Before liability of the Fund 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. Iowa Code section 85.64; Gregory v. Second Injury Fund of Iowa, 777 N.W.2d 395, 397-298 (Iowa 2010).

The Second Injury Fund Act exists to encourage the hiring of handicapped persons by making a current employer responsible only for the amount of disability related to an injury occurring while that employer employed the handicapped individual as if the individual had had no preexisting disability. See Anderson v. Second Injury Fund, 262 N.W.2d 789 (Iowa 1978); 15 Iowa Practice, Workers' Compensation, Lawyer, section 17:1, p. 211 (2014-2015).

The Second Injury Fund is responsible for the industrial disability present after the second injury that exceeds the disability attributable to the first and second injuries. Section 85.64; Second Injury Fund of Iowa v. Braden, 459 N.W.2d 467 (Iowa 1990); Second Injury Fund v. Neelans, 436 N.W.2d 355 (Iowa 1989); Second Injury Fund v. Mich. Coal Co., 274 N.W.2d 300 (Iowa 1979).

The Second Injury Fund concedes and stipulates that claimant sustained an initial qualifying injury. However, the Second Injury Fund disputes whether the claimant has proven a qualifying second injury. It is clear in this record that claimant sustained a work-related injury to her left leg on April 25, 2019. The Second Injury Fund does not argue to the contrary. Instead, the Second Injury Fund contends that the left ankle injury caused claimant's permanent back injury and permanent mental injuries. Indeed, I found that the undisputed expert evidence establishes the April 25, 2019 left leg injury caused permanent injury to claimant's back as well as permanent mental injuries.

The mental injuries claimant sustained as a result of the left leg injury clearly convert that injury into an unscheduled injury for which claimant was entitled to be compensated industrially by the employer. Iowa Code section 85.34(2)(v); Mortimer v. Fruehauf Corp., 502 N.W.2d 12, 14 (Iowa 1993); Collins v. Department of Human Services, 529 N.W.2d 627 (Iowa App. 1995). Similarly, the back injuries resulting from the left ankle injury also convert the left leg injury into an unscheduled injury that would be compensated by the employer on an industrial disability basis. Iowa Code section 85.34(2)(v).

The legal question that must be answered in this case is whether the left leg injury should be considered "independent" of the low back and mental injuries such that it is a qualifying second scheduled member injury. Claimant offers no specific argument on the issue in her post-hearing brief. The Second Injury Fund contends that the injury converts to an unscheduled injury and is not a qualifying second injury.

The Iowa Supreme Court pondered a similar issue in 2007. See Second Injury Fund of Iowa v. George, 737 N.W.2d 141 (Iowa 2007). In George, the claimant had a clear qualifying first injury. However, the Second Injury Fund disputed whether the second alleged injury qualified because it involved bilateral knee injuries. The Iowa Supreme Court held that the work injury was a qualifying injury for purposes of Second Injury Fund benefits even though it was bilateral in nature.

In 2010, the Iowa Supreme Court again pondered a similar situation in Gregory v. Second Injury Fund of Iowa, 777 N.W.2d 395 (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 2000 work injury (as a combined whole) was considered industrially and the case was settled with the employer.

Nevertheless, Ms. Gregory pursued a claim against the Second Injury Fund of Iowa and argued that, although she sustained other "unscheduled" injuries as a result of the 2000 injury, she clearly also sustained a qualifying "scheduled" injury to her left hand for purposes of generating a Second Injury Fund claim. The Second Injury Fund argued that the 2000 injury was considered and compensated as an unscheduled injury on an industrial basis. Therefore, the Second Injury Fund contended that the 2000 left hand injury was not a qualifying first injury. Id. at 399.

The Iowa Supreme Court issued a decision that was split four justices to three and included a dissenting opinion. The majority of the Court held that Gregory's left-hand injury in 2000 was a first qualifying injury. Specifically, 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 dissent in Gregory raised concerns that the majority's approach would result in a double-recovery by the claimant. The dissent argued:

As a result, if the Second Injury Fund statute is interpreted to include first injuries or disabilities that extend to the back, neck, shoulder, or hip, then the handicapped worker with such a disability will be compensated twice for a portion of the first injury or disability, or will be compensated for a nonwork-related disability. This clearly could not have been the intent of the legislature.

Gregory, 777 N.W.2d at 405.

The majority in Gregory responded to that concern, or critique, by directing, "In determining the Fund's liability under section 85.64, the commissioner shall consider only the extent to which Gregory's earning capacity was diminished by the combined effects of the 2000 and 2002 losses to her *enumerated extremities*." Id. at 401 (emphasis in original). The majority of the Court held, "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.

In this case, the outcome turns on what the Iowa Supreme Court meant in Gregory when it indicated that Gregory's left hand qualifies as a first injury "because it was situated in an enumerated member and was not confined to an unenumerated part of her body." Id. Clearly, Ms. Strable sustained an injury to her left leg, an enumerated member under Iowa Code section 85.64. On the other hand, the left leg injury directly

resulted in permanent mental injuries and a permanent back injury. Both of these conditions are not enumerated parts of the body for purposes of a Second Injury Fund claim and convert the left leg injury from a scheduled member to an unscheduled injury. Iowa Code section 85.34(2)(v); Iowa Code section 85.64.

Unlike the situation in Gregory, it is difficult to parse out the effects of the enumerated injury versus the unenumerated injury in this case. In Gregory, the claimant asserted injuries to three separate body parts. One (the hand) was an enumerated injury while the second and third injuries (bilateral shoulders) constituted unenumerated injuries. Under the Court's analysis in Gregory, this agency should make a finding as to the permanent disability caused solely by the 2000 hand injury and essentially ignore the effects of the bilateral shoulder injuries when rendering a Second Injury Fund award.

In this case, however, all of the effects and disability resulting from Ms. Strable's 2019 left leg injury evolve from and were generated by the left ankle. Her mental injuries were the direct result of her left leg injury. Development of low back pain was also the direct result of the left leg injury.

Parsing out, or ignoring, portions of the injury for purposes of trying to determine a Second Injury Fund award would be much more difficult in this type of situation. Rather, Ms. Strable's development of mental injuries, as well as any disability resulting therefrom, is directly related to her left ankle injury. The development of low back pain, as well as any disability resulting therefrom, is also directly related to Ms. Strable's 2019 left ankle injury.

Ms. Strable ultimately settled a claim for her low back and mental injuries. Although the parties utilized a compromise settlement to resolve that claim, Ms. Strable received a significant sum of money that would likely exceed any scheduled member injury. Ms. Strable had an opportunity to fully litigate the claims for her low back and mental injuries. She elected to settle these claims and received a significant settlement from the employer. To now set up a legal fiction that the low back pain and mental injuries are not present likely permits claimant to use procedural tactics to settle claims and pursue a Second Injury Fund claim such that she likely receives a double-recovery for her injuries.

In an effort to rectify the concerns of the dissent in Gregory with the holding of the majority, I interpret the majority's decision in Gregory to apply to situations in which there are two or more separate and distinct body parts involved with an otherwise qualifying injury. For instance, in Gregory, the hand injury could be separated out and considered an "enumerated" body part despite the fact that there were also separate unenumerated body parts (bilateral shoulders) injured at the same time. In this sense, Gregory's left-hand injury qualified "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.

In this case, however, Ms. Strable's left leg injury has direct impact upon her

mental injury and the development of a permanent low back injury and low back pain. Both the mental injury and the low back pain convert the left leg injury into an unenumerated injury. The mental injury and low back pain are not separate body parts but rather inherently part of the left leg injury. As such, I conclude that Ms. Strable's 2019 injury includes the left leg, mental injuries, and low back. As such, the 2019 injury is "confined to an unenumerated part of her body." Id. I conclude that the 2019 work injury is not a qualifying second injury.

In reaching this conclusion, I acknowledge potential contrary authority from the Iowa Workers' Compensation Commissioner. In Roth v. Second Injury Fund of Iowa, File No. 5064881 (Appeal May 2022), the Iowa Workers' Compensation Commissioner adopted and affirmed an arbitration decision by another deputy commissioner without additional analysis or comment. In the Roth arbitration decision, the deputy commissioner held, "an injury to a listed body part may constitute a qualifying loss even if the injury causes impairment to the whole body so long as the listed body part sustained some permanent impairment."

Ultimately, the deputy commissioner and commissioner did not have to attempt to parse out disability between enumerated and unenumerated body parts in Roth because claimant failed to prove the enumerated body part sustained permanent functional impairment. As such, the deputy and commissioner in Roth were also not faced with the prospect of delineating permanent disability between an enumerated injury and intertwined injuries, including the low back and mental injuries. Nor were the deputy commissioner or commissioner tasked with trying to address or rectify the prediction of a double-recovery in the Gregory dissent.

In another arbitration decision issued by this agency, a deputy commissioner held that a second injury involving bilateral arm injuries and a shoulder injury was a qualifying second injury. However, in that case, the combination of injuries converted the injury to an unscheduled injury and the employer was ordered to pay industrial disability benefits. The deputy commissioner concluded that no additional Second Injury Fund benefits were owed because "there is no loss caused by her [second qualifying] work injury in addition to that for which Allsteel is liable under section 85.34(2)(v)." Bailey v. Allsteel, Inc., File No. 19004619.01 (Arbitration April 2022). In other words, the employer was obligated to pay the industrial disability for the second qualifying injury such that the Second Injury Fund bore no additional liability.

The practical result of the Bailey decision would be to place no further liability upon the Second Injury Fund of Iowa if an unscheduled second injury is fully compensated by the employer. That is a reasonable result for such injuries. Yet, under the rationale applied in Bailey, injuries that were not compensated by the employer fully would at least hypothetically result in additional Second Injury Fund liability.

If that is the case, the Bailey decision set up a very strange dichotomy in which no Second Injury Fund liability exists if the employer proceeds to trial and is ordered to pay the full industrial disability. However, if the claimant reaches a settlement with the

employer (in this case under an injury date that really is inaccurate and/or fictitious), then the claimant may pursue and recover Second Injury Fund benefits. In other words, with some creative procedural gimmicks and gamesmanship, a claimant could settle for approximating full liability with the employer on a compromise settlement basis under a fictitious injury date and then pursue the Second Injury Fund for further liability that does not consider the unscheduled portions of injuries. This would set up the double-recovery scenario predicted by the dissent in Gregory. Moreover, the practical application of the Bailey (which I acknowledge draws directly from Gregory) analysis would permit the claimant to determine whether the Second Injury Fund had additional liability and would be a procedural maneuver over which the Second Injury Fund has no input or defense. This seems fundamentally unfair and contrary to the purpose of Iowa Code section 85.64.

In this case, the prediction of a double-recovery offered by the Gregory dissent is squarely before the agency. Double-recovery appears very likely if claimant is permitted to receive a substantial compromise settlement for the low back and mental injuries from the employer under a fictitious injury date and also pursue Second Injury Fund benefits for the same intertwined injury. Presumably, claimant would be compensated by the employer using industrial disability for the back and mental injuries. Any industrial disability analysis of those injuries would necessarily consider the functional loss of the left leg and resulting left leg restrictions. Therefore, claimant would necessarily receive full recovery for her left leg injury as part of an industrial disability analysis and settlement. She would then pursue the Second Injury Fund claim and receive additional industrial disability benefits for the left leg injury through a Second Injury Fund award.

Ultimately, I conclude the claimant's left ankle injury at work directly caused her permanent back injury and permanent mental injuries and that the disability resulting from that injury is not confined to the enumerated body part but spills over and is intertwined with the low back and mental injuries, both unenumerated or unscheduled injuries. I conclude the law disfavors double-recovery and that the intention of Iowa Code section 85.64 was not to permit a double-recovery to the claimant, which is what would result under this factual scenario. Therefore, while recognizing the potentially contrary authority, I conclude that claimant failed to prove a qualifying second injury. Having concluded that Ms. Strable did not establish a qualifying second injury, the remainder of the legal issues and factual issues in dispute are moot.

Finally, claimant requests that her costs be taxed against defendant. Costs are taxed at the discretion of the agency. Iowa Code section 86.40. However, costs statutes are construed strictly. Coker v. Abell-Howe Co., 491 N.W.2d 143, 151 (Iowa 1992). In this instance, I conclude that claimant failed to establish a compensable Second Injury Fund claim. Therefore, claimant's request for costs is denied.

ORDER

THEREFORE, IT IS ORDERED:

Claimant takes nothing from the Second Injury Fund of Iowa.

All parties shall bear their own costs.

Signed and filed this 8th day of August 2022.

A handwritten signature in black ink, reading "William H. Grell", is written over a horizontal line.

WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Robert Gainer (via WCES)

Sarah Timko (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.