

**IN THE COURT OF APPEALS OF IOWA**

No. 8-597 / 07-0579  
Filed August 19, 2009

**SECOND INJURY FUND OF IOWA,**  
Petitioner-Appellant,

**vs.**

**PATSY NEER,**  
Respondent-Appellee.

---

Appeal from the Iowa District Court for Polk County, Arthur E. Gamble,  
Judge.

Petitioner appeals the district court's decision affirming the workers' compensation commissioner's ruling awarding respondent permanent total disability benefits from the Second Injury Fund. **AFFIRMED.**

Thomas J. Miller, Attorney General, and Joanne Moeller, Assistant  
Attorney General, for appellant.

Steven C. Jayne, Des Moines, for appellee.

Considered by Sackett, C.J., and Potterfield, J., and Robinson, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

**ROBINSON, S.J.****I. Background Facts & Proceedings**

Patsy Neer was employed as an assembly-line worker by Siemens-Furnas Controls. She received several work-related injuries that required medical treatment, including neck surgery in 1994, carpal tunnel surgery on her right arm in 1995, and surgery on her right shoulder for a torn rotator cuff in 1996. Neer entered into a settlement agreement with the employer under Iowa Code section 85.35 (2001), which was approved by the workers' compensation commissioner on September 10, 2001.<sup>1</sup>

Neer had additional carpal tunnel surgery on her right arm in 1999, and carpal tunnel surgery on her left arm later that year. Neer's employment ended on January 31, 2003, when the employer closed its plant, and she became employed at a part-time job at a library. Neer filed a claim against the Second Injury Fund on March 19, 2004. She sought permanent total disability benefits under the odd lot doctrine.

A deputy workers' compensation commissioner found Neer was "a credible witness in her own behalf." The deputy determined that in the settlement agreement Neer was compensated for loss to a scheduled member, and not compensated for an industrial loss of earning capacity. The deputy also found:

Neer is over 60 years old with limited education, experience mainly as a home health aide and factory production worker, and subject to ongoing symptoms and such medical restrictions as recommended by Dr. Koenig as to render her unable to consistently

---

<sup>1</sup> The settlement agreement applied to "any conditions, injuries or diseases" sustained between August 16, 1994, and July 10, 1995, arising out of Neer's employment.

remain self-supporting on any regular basis. She is accordingly entitled to permanent total disability benefits from the Fund.

The workers' compensation commissioner affirmed and adopted the deputy's decision.

The Fund filed a petition for judicial review. The district court affirmed the decision of the commissioner, finding substantial evidence to support the commissioner's determination that Neer suffered permanent total disability. The Fund has appealed the decision of the district court.

## **II. Standard of Review**

Our review is governed by the Iowa Administrative Procedure Act. Iowa Code ch. 17A (2005); *Acuity Ins. v. Foreman*, 684 N.W.2d 212, 216 (Iowa 2004). We review the district court's decision by applying the standards of section 17A.19 to the agency decision to determine if our conclusions are the same as those reached by the district court. *Univ. of Iowa Hosps. & Clinics v. Waters*, 674 N.W.2d 92, 95 (Iowa 2004).

## **III. First Injury**

In order to be entitled to benefits under the Second Injury Fund, an employee must show: (1) an injury to the hand, arm, foot, leg, or eye; (2) an injury to another such member or organ through a work-related injury; and (3) permanent disability from the injuries. Iowa Code § 85.64 (2003); *Second Injury Fund v. Shank*, 516 N.W.2d 808, 812 (Iowa 1994). The Fund is responsible for the difference between the compensation for which the current employer is liable and the total amount of industrial disability suffered by the employee, reduced by the compensable value of the first injury. *Second Injury Fund v. Nelson*, 544

N.W.2d 258, 270 (Iowa 1995). The Fund claims Neer is not entitled to benefits from the Second Injury Fund because under the settlement agreement she was compensated for disability to the body as a whole, and not for the loss of use of a scheduled member, such as a hand, arm, foot, leg, or eye. See *Second Injury Fund v. George*, 737 N.W.2d 141, 146 (Iowa 2007).

The district court looked at Neer's injuries to determine if any were a scheduled injury, instead of looking at how she was compensated for her injuries. The court concluded Neer's injury to her right arm, with resulting carpal tunnel surgery, was a qualifying first loss for purposes of the Second Injury Fund. We affirm the district court and the commissioner's findings that Neer had an injury to her right arm based on her carpal tunnel surgery in 1995, which qualified as the first loss. See *Haynes v. Second Injury Fund*, 547 N.W.2d 11, 13 (Iowa Ct. App. 1996) (noting carpal tunnel syndrome is a compensable scheduled member injury).

#### **IV. Loss of Use**

The Fund argues that Neer is not entitled to benefits because there was no loss of use causing or contributing to any industrial disability from the first injury to her right arm or second injury to her left arm. In order to receive Second Injury Fund benefits there must be some degree of permanent disability from both the first and second loss or loss of use. *Shank*, 516 N.W.2d at 814.

We determine there is substantial evidence to show permanent loss of use based on Neer's first qualifying injury to her right arm. After Neer had surgery on her right arm in 1995 she was given a six percent permanent impairment rating

for her arm. She was told to take sensible precautions and was accommodated by her employer with different job positions and assistance from co-employees.

There is also substantial evidence to show permanent loss of use due to the second qualifying injury to her left arm. She was given a ten percent permanent impairment rating for the upper left extremity. She was also placed on restrictions, including “no repetitive firm grasping, gripping, pinching, or torquing movements.”

#### **V. Permanent Total Disability**

The Fund contends the combination of industrial disability from the first and second injuries has not resulted in permanent total disability. The Fund states that it is being made responsible not only for the first and second injuries to Neer’s arms, but also her other injuries and medical conditions. This issue was not presented to the deputy. We do not consider issues that were not first presented to the deputy. See Iowa Admin. Code r. 876-4.28(7); *Boehme v. Fareway Stores, Inc.*, 762 N.W.2d 142, 146 (Iowa 2009). We conclude the issue has not been preserved for our review.

We affirm the decision of the district court and the workers’ compensation commissioner.

**AFFIRMED.**