IN THE SUPREME COURT OF IOWA

NO. 21-0490
Webster County No. CVCV321086

ALEVIA GREEN,

Plaintiff-Appellee,

v.

NORTH CENTRAL IOWA
REGIONAL SOLID WASTE AUTHORITY and IMWCA,

Defendants-Appellants.

APPEAL FROM THE WEBSTER COUNTY DISTRICT COURT,
LAW NO. CVCV321086
HONORABLE KURT L. WILKE, PRESIDING

FINAL APPEAL BRIEF OF APPELLANTS NORTH CENTRAL IOWA REGIONAL SOLID WASTE AUTHORITY and IMWCA

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ROUTING STATEMENT

This case presents issues that are appropriate for summary disposition and that involve the application of existing legal principles relating to the application and effect of res judicata. Accordingly, this case should be transferred to the Iowa Court of Appeals. *See* IOWA R. APP. P. 6.1101(3).

STATEMENT OF THE CASE

Initial Pleadings

Plaintiff Alevia Green (hereinafter "Plaintiff") filed an Original Notice and Petition in Arbitration with the Iowa Workers' Compensation Commissioner against North Central Iowa Regional Solid Waste Authority (NCIRSWA) and IMWCA (hereinafter "Defendants") on December 11, 2012. (Petition, p. 1, App. p. 7). Her Petition alleged a permanent work injury to her head and neck occurred on April 30, 2012 and continuing. (*Id.* at ¶¶ 5–8, App. p. 1). An Arbitration hearing was eventually held on October 6, 2014, at which time the following issues were addressed: temporary benefits; whether the work injury of April 30, 2012 caused any permanent disability, and if so, the

commencement date and extent of benefits; medical benefits; and penalties. (Arb. Dec'n., p. 1, App. p. 8).

In his decision, Deputy Workers' Compensation Commissioner Stan McElderry held that (1) Plaintiff "did not meet her burden of establishing that the work injury of April 30, 2012 caused any permanent impairment or loss of earnings capacity"; (2) there was "nothing in the record to support additional benefits being owed to the [Plaintiff] beyond those [already] paid"; (3) Plaintiff "did sustain an injury arising out of and in the course of employment, but the employer ha[d] reimbursed the [Plaintiff] for all reasonable medical expenses incurred in the treatment of the injury"; and (4) there was no evidence to support a penalty award. (*Id.* at pp. 5, 6, 8 (emphasis added), App. pp. 12, 13, 15). The Deputy Commissioner specifically reasoned that Plaintiff suffered no permanent impairment because "[t]he treating doctors almost without exception found symptom magnification, a mild (at most) brain injury that resolved quickly, and no objective measures of permanent physical injury." (*Id.* at p. 5, App. p. 12) (emphasis added).

Plaintiff's First Intra-Agency Appeal

Plaintiff appealed the Arbitration decision through the Agency, and in his decision filed April 11, 2016, Workers' Compensation Commissioner Joseph Cortese II affirmed the deputy commissioner's decision in all respects.

(Notice of Appeal 12/29/14, App. p. 17; Appeal Dec'n, p. 2, App. p. 19). Regarding permanent disability, Commissioner Cortese specifically held that Plaintiff did not carry her burden of proving she sustained permanent injuries to her brain, neck, back, or right shoulder. (Appeal Dec'n, p. 19, App. p. 36). He based this opinion on the fact that several of Plaintiff's doctors noted symptom magnification and non-physiological reports of symptoms. (*Id.*). Regarding medical benefits, Commissioner Cortese held that the defendants would not be responsible for any ongoing or future medical care or treatment; in fact, they were not responsible for any medical care or treatment beyond what had already been paid. (*Id.* at p. 20, App. p. 37).

First Judicial Review Proceeding

Following the Agency appeal, Plaintiff next sought judicial review of the Appeal Decision through the Iowa District Court in and for Webster County. (Ruling on Petition for Judicial Review ("Dist. Ct. Dec'n"), filed 5/1/17, p. 1, App. p. 39). The district court found that there was substantial evidence to support the Commissioner's determination that Plaintiff did not prove any permanent disability to her brain, neck, back, or right shoulder. (*Id.* at pp. 13–18, App. pp. 51—56). However, the district court found error in the Commissioner's determination that Plaintiff failed to meet her burden in establishing entitlement to medical benefits, stating that the Commissioner did

not adequately articulate the reasoning behind his decision that any care which was not paid or reimbursed was either unnecessary or unauthorized. Thus, the case was remanded to the Commissioner to conduct such analysis. (*Id.* at pp. 18–21, App. pp. 56—59).

On remand, the Commissioner conducted a thorough analysis to address the issue of whether there was a causal connection between Plaintiff's injury and her claimed medical expenses. (Remand Dec'n, pp. 4—8, App. pp. 64—68). The Commissioner ultimately ordered that the defendants were liable for the following charges: Trinity Regional Medical Center for date of service April 30, 2012; Iowa Clinic, UnityPoint Clinic, and Iowa Methodist Medical for date of service April 30, 2012 through May 2, 2012; and UnityPoint Clinic for date of service May 17, 2012. The defendants were not liable for any other charges. (*Id.* at pp. 7–8, App. pp. 67—68).

Review-Reopening Proceeding

Nearly six years following her injury, on June 4, 2018, Plaintiff filed her Review-Reopening Petition with the Iowa Workers' Compensation Commissioner against NCIRSWA and IMWCA. (Review-Reopening Petition, p. 1, App. p. 69). Plaintiff's Review-Reopening Petition alleged a dispute regarding the "extent"[1] of her disability from the April 30, 2012

[1] As is established below, Defendants assert the extent of Plaintiff's disability

alleged injury, and additionally alleged Iowa Code section 85.27 expenses with various providers. (*Id.* at p. 1, ¶¶ 4–10, App. p. 69). Plaintiff's Review-Reopening Petition alleged the same facts as in her original Petition regarding how the injury occurred and which areas of the body were affected. (*Compare id.* at p. 1, ¶¶ 4–5, App. p. 69 *with* Petition at ¶¶ 4–5, App. p. 1).

In response to the Review-Reopening Petition, Defendants filed a Motion for Summary Judgment on September 13, 2018, asserting they are entitled to judgment as a matter of law because res judicata principles prevented the Agency from reevaluating the issue of Plaintiff's alleged impairment. (*See* Ruling on Def's MSJ, pp. 1—2, App. pp. 156—57). On October 11, 2018, Deputy Workers' Compensation Commissioner Stephanie Copley (hereinafter "Deputy Copley") filed her Ruling, granting Defendants' Motion for Summary Judgment. (Ruling on Def's MSJ, p. 6, App. p. 161). In so ruling, Deputy Copley found that Plaintiff was precluded from bringing a review-reopening claim because she "was awarded no compensation that could be ended, diminished, or increased upon review-reopening", and such an award of compensation is a prerequisite to determining whether Plaintiff

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is not actually in dispute in the instant action, and any alleged worsening in Plaintiff's condition is irrelevant because Plaintiff is precluded, as a matter of law, from seeking review-reopening given the final Agency action and findings in the underlying Petition in Arbitration.

has sustained a change in her condition. (*Id.* at p. 4, App. p. 159). She agreed with Defendants that Plaintiff was precluded from seeking review-reopening due to res judicata principles. (*See id.* at pp. 3–6, App. p. 158—61).

Plaintiff's Appeal from Review-Reopening Decision

Plaintiff appealed the Ruling of Deputy Copley. (Notice of Appeal 10/22/18, App. pp. 165—66). On January 16, 2020, Iowa Workers' Compensation Commissioner Joseph S. Cortese II affirmed Deputy Copley's Ruling. (Review-Reopening App. Dec., p. 6, App. p. 172). Plaintiff then filed her Petition for Judicial Review with the Iowa District Court for Webster County on February 12, 2020, asking the Court to reverse the Commissioner's Review-Reopening Appeal Decision and remand the matter to the Agency. (*See* Order on Petition for Judicial Review, p. 3, App. p. 176).

Second Judicial Review Proceeding (Review-Reopening)

On January 20, 2021, the parties presented oral arguments to the district court regarding the issues in the Judicial Review proceeding. (Scheduling Order – Judicial Review, p. 1, App. p. 178). Ultimately, on March 3, 2021, the district court entered its Order on Petition for Judicial Review. (Order on Petition for Judicial Review, p. 1, App. p. 180). The district court found that there was no factual issue "as to the procedural history or disposition of Plaintiff's underlying claim" and, thus, affirmed the Commissioner's finding

that there was no genuine issue of material fact. (*See* Order on Petition for Judicial Review, p. 7, App. p. 186). However, the district court also concluded that "the Commissioner's conclusion that Green's lack of award renders it incapable of being increased is illogical" and that "[t]he conclusion that Green is precluded from bringing a review-reopening claim is erroneous". (*See id.* at p. 9, App. p. 188). Thus, the district court ordered that the Commissioner's decision was affirmed in part, reversed in part, and that the case should be remanded to the Commissioner. (*See id*. at p. 10, App. p. 189).

Pursuant to Iowa Rule of Civil Procedure 1.904, Defendants filed a Motion for Clarification, Enlargement and Modification (hereinafter "Rule 1.904 Motion") on March 12, 2021. (Rule 1.904 Motion, p. 1, App. p. 191). On March 29, 2021, the district court entered its order denying the Defendants' Rule 1.904 Motion, stating, in pertinent part, as follows:

> The plaintiff alleges that her review reopening claim is supported by a number of health care professionals. To deny the plaintiff a review reopening based not on causation, but solely on how the extent of the injuries appeared years ago would be to deny any possibility that the injuries could increase in disability. That is illogical and summary judgment based on res judicata is erroneous.

(Order on Rule 1.904 Motion, p. 2, App. p. 212). Defendants then timely filed their Notice of Appeal on April 14, 2021. (Notice of Appeal 4/14/21, App. p. 214).

STATEMENT OF THE FACTS

The parties agree that Plaintiff sustained an injury arising out of and in the course of her employment on April 30, 2012. Plaintiff was sorting newspapers at NCIRSWA's recycling center when she was struck from behind by the large door of a roll-off recycling truck that had swung open. (Tr., p. 23, ll. 18—25; p. 24, ll. 1—25, App. p. 246). At the Arbitration hearing, it was conclusively established that the door struck Plaintiff in her upper back and the back of her right shoulder, not on her head. (Tr., p. 24, ll. 12—24; p. 56, ll. 1—23, App. pp. 246, 248). When EMS arrived, Plaintiff was already alert and oriented. (Cl. Ex. 5, p. 8, App. p. 224). The emergency personnel documented that there was no laceration to Plaintiff's head (Cl. Ex. 4, p. 1, App. p. 218; *see also* Tr. p. 56, ll. 18—23, App. p. 248). She was transported by EMS to Trinity Regional Hospital. (Ex. 5, p. 1, App. p. 221)

Upon admission, Plaintiff denied any nausea, vomiting, or light-headedness (Cl. Ex. 5, p. 3, App. p. 222). The same was true the very next day, May 1, 2012. (Cl. Ex. 6, p. 20, App. p. 233). At that time, Plaintiff reported only a mild headache, with no other symptoms/complaints. (*Id.* at p.

20, App. p. 233). However, a CT scan of Plaintiff's head was questionable for a hemorrhage, so she was sent to Iowa Methodist Hospital, in Des Moines. (Cl. Ex. 5, p. 10, App. p. 225). Significantly, when she presented to Iowa Methodist on May 1, 2012, another CT scan of Plaintiff's head was performed. Importantly, this CT scan demonstrated Plaintiff had no hemorrhage or any other abnormality. (Cl. Ex. 6, p. 12, App. p. 231; Def. Ex. D, p. 62, App. p. 244) (emphasis added).

On May 2, 2012, Plaintiff was seen by neurologist, Dr. John Piper, who documented Plaintiff's normal head CT and lack of any cognitive problems/issues. (Cl. Ex. 6, p. 33, App. p. 234). Based upon the examinations and findings up to this time, it was determined that there was no need for Plaintiff to participate in Methodist's inpatient rehabilitation program for closed head injuries. (*Id.* at pp. 13, 46, App. pp. 232, 235). Consequently, by May 2, 2014, Plaintiff was discharged from the hospital, with the only recommendation being that she follow-up with Dr. Piper. (Ex. D, p. 61, App. p. 243).

After considering the entire record, the deputy commissioner in Arbitration, Commissioner on intra-agency Appeal, and district court on Judicial Review all found Plaintiff had failed to meet her burden of proving any disability caused by her work injury, aside from the temporary disability

for which she had already been compensated. (*See* Arb. Dec'n, pp. 5, 6, 8, App. pp. 12, 13, 15; Appeal Dec'n, p. 19, App. p. 36; Dist. Ct. Dec'n, pp. 13–18, App. pp. 51—56). Notably, in concluding Plaintiff failed to meet her burden of proving that her alleged injury caused any permanent disability or loss of earning capacity, the Commissioner on intra-agency Appeal gave the greatest weight to the opinions of Plaintiff's treating neurologist, Dr. Kitchell, finding as follows:

> As a neurologist, Dr. Kitchell is a highly-trained and reputable specialist who has more than 35 years of treating closed-head injuries on a regular basis. He is clear and consistent throughout his clinical notes, in his report, and in his deposition in this matter. **His report of March 31, 2014, leaves absolutely no doubt that his own observations and his own treatment of claimant have convinced him claimant did not sustain a permanent brain injury.** Dr. Kitchell's opinions are objectively supported by the three CT scans taken on April 30, 2012, the day of the injury, on May 1, 212, the day after the injury, and on May 17, 2012, less than three weeks after the injury. Dr. Kitchell's opinions are also objectively supported by the MRI of claimant's brain taken on June 25, 2013 [, more than one year after the injury].

(Appeal Dec'n, p. 18, App. p. 35) (internal citations omitted, emphasis added).

To wit, in his March 31, 2014 report, Dr. Kitchell noted that Plaintiff had a history of symptom exaggeration, fabrication, and over-reporting – not only with him, but with other doctors as well – and he concluded as follows:

> In conclusion, therefore, **there is simply no evidence that [Plaintiff] had anything more than a minor concussion with a brief loss of consciousness and a brief period of amnesia**. These types of minor concussions occur frequently in athletes and though we certainly want to avoid any further concussions in those cases, **they are certainly not an indication of any permanent neurological injuries**. There is simply no evidence that her head CT scan showed any abnormalities. The original scan simply showed artifact and the subsequent scans prove that there was no hemorrhage or contusional brain injury.

(*Id.* at p. 14, App. p. 31 (citing Def. Ex. C, pp. 58—59, App. pp. 240—41)). These opinions were reiterated in his deposition testimony as well. (*Id.* at pp. 15—16, App. pp. 32—33).

ARGUMENT

I. THE AGENCY'S CONCLUSION THAT DEFENDANTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW WAS NOT IRRATIONAL, ILLOGICAL, OR WHOLLY UNJUSTIFIABLE AND SHOULD HAVE BEEN AFFIRMED

Error Preservation. The issue of whether or not Defendants are entitled to judgment as a matter of law was first raised in Defendants' Motion for Summary Judgment before the Agency on September 10, 2018 and was initially ruled upon on October 11, 2018. (*See generally* Def's Motion for Summary Judgment, App. pp. 70—83; Ruling on Def's MSJ, App. pp. 156—62). The Ruling was affirmed on appeal before the Agency on January 16, 2020 and then reversed on judicial review before the district court on March

3, 2021. (Review- Reopening Appeal Dec'n, p. 6, App. p. 174; Order on Petition for Judicial Review, p. 10, App. p. 188). Defendants filed a Rule 1.904 Motion for Clarification, Enlargement, and Modification on March 12, 2021, which was denied on March 29, 2021. (Rule 1.904 Motion, App. pp. 191—203); Order on Rule 1.904 Motion, p. 2, App. p. 212). Defendants timely filed their Notice of Appeal on April 14, 2021. (Notice of Appeal 4/14/21, App. pp. 214—15). Accordingly, this issue is preserved for review by this Court.

Scope of Review. The district court's judicial review of the decision of the Workers' Compensation Commissioner was governed by Iowa Code chapter 17A. *See Neal v. Annett Holdings, Inc.*, 814 N.W.2d 512, 518 (Iowa 2012) (citing *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 463 (Iowa 2004)). When reviewing the district court's decision, this Court "appl[ies] the standards of chapter 17A to determine whether conclusions . . . reach[ed] are the same as those of the district court." *Neal*, 814 N.W.2d at 518. If this Court's ultimate conclusion is different from that of the district court, it will reverse. *Id.*

The issue before this Court is whether the district court incorrectly reversed the Agency's final ruling on Defendants' Motion for Summary Judgment. Importantly, the Iowa Supreme Court has stated that the reviewing

court, in reviewing a decision involving the Commissioner's application of the law to the facts, reviews the commissioner's decision for an "irrational, illogical, or wholly unjustifiable application of law to the facts". *See Meyer v. IBP, Inc.*, 710 N.W.2d 213, 218—19 (Iowa 2006) (citing Iowa Code § 17A.19(10)(c), (i), (j), (m)). As noted by the Iowa Supreme Court in *Sherwin-Williams Co. v. Iowa Dep't of Revenue*, "A decision is 'irrational' when it is not governed by or according to reason. A decision is 'illogical' when it is 'contrary to or devoid of logic.' A decision is 'unjustifiable' when it has no foundation in fact or reason." *Sherwin-Williams Co.*, 789 N.W.2d 417, 432 (Iowa 2012) (citation omitted).

The Iowa Supreme Court has recognized that this is a demanding standard for a petitioner to meet on judicial review. *Midwest Ambulance Serv. v. Ruud*, 754 N.W.2d 860, 865 (Iowa 2008). In addition, the legislature has stated as follows regarding judicial review of these types of errors:

> When an agency is delegated discretion in applying a provision of law to specified facts the scope of review appropriately applied by courts must be deferential because the legislature decided that the agency expertness justifies vesting primary jurisdiction over that matter in the discretion of the agency rather than in the courts.

Meyer, 710 N.W.2d at 219 (citation omitted) (emphasis added). Similarly, in the 2004 case of *Mycogen Seeds v. Sands*, the Iowa Supreme Court stated that

because "factual determinations in workers' compensation cases are 'clearly vested by a provision of law in the discretion of the agency'", the application of law to those facts is similarly "vested by a provision of law in the discretion of the agency." *Sands*, 686 N.W.2d at 465 (quoting Iowa Code § 17A.19(10)(f)). Again, in *Clark v. Vicorp Restaurants, Inc.*, this Court stated that, "[b]ecause factual determinations are within the discretion of the agency, so is its application of the law to the facts." *Clark*, 696 N.W.2d 596, 604 (Iowa 2005) (emphasis added).

Argument. Plaintiff has already failed to prove the causal relationship between her alleged work injury and any permanent disability or need for future medical care despite litigating this issue extensively – first in an arbitration hearing, then an intra-agency appeal, next in a judicial review proceeding, and finally on remand to the agency. Nonetheless, Plaintiff attempted to relitigate the issue of causation by filing a Review-Reopening Petition before the Agency on June 4, 2018. After Defendants filed their Motion for Summary Judgment on September 13, 2018, the Deputy Workers' Compensation Commissioner correctly granted Defendants' Motion, and the Deputy's decision was correctly affirmed on intra-agency appeal.

However, Plaintiff sought judicial review of the decision, and the decision was ultimately reversed by the district court. Defendants respectfully

assert the district court erred in reversing the final Agency decision. The Agency correctly concluded there were no genuine issues of fact which would preclude summary judgment and Defendants were entitled to judgment as a matter of law. Plaintiff cannot use a review-reopening petition as a vehicle to re-litigate causation issues and obtain relief from what she perceives to be an unsatisfactorily low award following arbitration. Therefore, Defendants respectfully request this Court to reverse the district court's decision and affirm the Agency's final decision in its entirety.

A. THE AGENCY CORRECTLY CONCLUDED THERE WAS NO GENUINE ISSUE OF MATERIAL FACT WHICH WOULD PRECLUDE SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS

The Agency concluded that there was no genuine issue of material fact which would preclude summary judgment in this case, reasoning as follows:

> In this case, [Plaintiff] does not allege a factual dispute regarding defendants' assertion that she is precluded from initiating a review-reopening proceeding given this agency's findings in her underlying claim. She does not dispute, for example, defendants' characterization of the procedural history and disposition of her underlying claim. In fact, **she acknowledges the commissioner found she failed to prove her entitlement to additional temporary benefits and that she failed to satisfy her burden to prove she sustained a permanent disability**. . . . Instead, [Plaintiff] leapfrogs this issue and alleges a factual dispute regarding whether her condition has

> worsened since her original hearing in October of 2014.
>
> **The issue at hand is not whether [Plaintiff's] recent treatment is causally related to her work injury or whether she has sustained a worsening in condition; the issue is whether [Plaintiff] is entitled to make a claim for review-reopening. In other words, the factual dispute identified by [Plaintiff] is not material to the determination of whether [Plaintiff] is precluded from bringing a review-reopening claim.** I therefore affirm the finding of the deputy commissioner that there are no genuine issues of material fact.

(Review-Reopening App. Dec., pp. 3—4 (emphasis added), App. pp. 169—70). On Judicial Review, the district court agreed with this conclusion, in part, stating as follows:

> The question of whether a review-reopening is permitted at this juncture is determined by how matters were resolved previously. To that extent, the parties are in agreement. In this regard, the Commissioner is correct. No factual issues exist as to the procedural history or disposition of Green's underlying claim. As a result, the Commissioner is affirmed as to the question of genuine issues of material fact; there are none.

(Order on Petition for Judicial Review, p. 7, App. p. 186). The district court correctly affirmed the Commissioner's conclusion that there are no genuine issues of material fact with respect to the procedural history. (*See id.*, App. p 186).

However, the district court ultimately concluded that the Commissioner erred in finding the Respondents were entitled to judgment as a matter of law. (*Id.* at p. 9, App. p. 188). In so holding, the district court stated as follows,

> The Commissioner presumes that if no compensable injuries were proven at the arbitration hearing, they can never be proven to have changed in condition. But the review-reopening presupposes a potential 'change in condition' (including from temporary to permanent). Such a change in condition may still be causally related to a work injury. On this matter, the parties have a difference of opinion as to the medical evidence produced on the present claim (whether a temporary injury has morphed into a permanent one). Such a difference of opinion as to a matter so consequential is a genuine issue of material fact. Because a fact issue exists, the Respondents[ ] are not entitled to summary judgment. Green's review-reopening claim is not barred by res judicata. The Commissioner's conclusion to the contrary was erroneous.

(*Id.*, App. p. 188).

Defendants respectfully assert that the district court incorrectly reversed the Commissioner's decision on this issue, as the Commissioner's decision was not irrational, illogical, or wholly unjustifiable. Here, Plaintiff very simply suffered no disability that could have been reviewed in a review-reopening proceeding. In her original Petition filed December 11, 2012, Plaintiff alleged an injury to her head and neck. (Petition at ¶¶ 5—8, App. p. 1). She indicated that the injury occurred when she was sorting newspapers at

the recycling center, during her employment with NCIRSWA. (Tr., p. 23, ll. 18—25; p. 24, ll. 1—25, App. p. 246). She alleged that a truck was unloading more paper from a dumpster when the dumpster door fell off and hit her in the head and right shoulder. (*Id.* at p. 24, ll. 1—25, App. p. 246).

Eventually, following an Arbitration hearing, the deputy commissioner held that **Plaintiff suffered no permanent injury or impairment related to the alleged injury.** (Arb. Dec. at p. 5, App. p. 12). He reasoned that almost all of Plaintiff's treating providers found she was magnifying her symptoms, and no objective findings supported her complaints. (*Id.*, App. p. 12). Thereafter, Plaintiff's entitlement to disability was reviewed in both an agency appeal and a judicial review of the agency decision. **Throughout each of these reviews, it was determined that substantial evidence supported the finding that Plaintiff suffered no permanent disability related to the alleged injury**. (Appeal Dec., p. 19, App. p.36; Dist. Ct. Dec., pp. 13—18, .App. pp. 51—56). Furthermore, the Defendants were not held liable for any future medical expenses. (Dist. Ct. Dec., pp. 18—21, App. pp. 56—59; Remand Dec., pp. 7—8, App. pp. 67—68).

Plaintiff has not alleged, and cannot allege, any new facts regarding *causation* for any permanent disability she may have. Therefore, the Agency had no authority to review and change Plaintiff's award, as res judicata

principles would bar any such review. *See Kohlhaas v. Hog Slat, Inc.*, 777 N.W.2d 387, 393 (Iowa 2009) (noting that res judicata principles apply to review-reopening proceedings, and "that **the agency, in a review-reopening petition, should not reevaluate an employee's level of physical impairment or earning capacity if all of the facts and circumstances were known or knowable at the time of the original action**" (emphasis added)). As the Commissioner concluded, any "difference of opinion" regarding Plaintiff's medical evidence and her alleged worsening of condition "is not material to the determination of whether [Plaintiff] is precluded from bringing a review-reopening claim." (*See id.*; *see also* Review-Reopening App. Dec., pp. 3—4, App. pp. 169—70). Thus, there is no genuine issue of material fact which would preclude summary judgment. In addition, as is discussed in further detail below, the Commissioner correctly concluded that defendants are entitled to judgment as a matter of law.

B. THE AGENCY CORRECTLY CONCLUDED THAT PLAINTIFF IS PRECLUDED FROM PROCEEDING UNDER REVIEW-REOPENING BECAUSE SHE FAILED TO PROVE ANY DISABILITY CAUSED BY HER WORK INJURY, ASIDE FROM THE TEMPORARY DISABILITY FOR WHICH SHE WAS ALREADY COMPENSATED, DESPITE HAVING THE OPPORTUNITY TO FULLY LITIGATE HER CASE

In determining that the Commissioner's conclusion was illogical, the district court stated as follows:

> The Commissioner concludes that if no compensation was awarded previously it cannot *inter alia* be 'increased' upon review reopening. This is plainly illogical. An award of 'zero' may obviously be increased. 'No award' may be philosophically distinguishable from 'zero'. However, the Iowa Supreme Court treats such terms as interchangeable. . . . Accordingly, the Commissioner's conclusion that Green's lack of award renders it incapable of being increased is illogical. The conclusion that Green is precluded from bringing a review-reopening claim is erroneous.

(Order on Petition for Judicial Review, pp. 8—9 (internal citation omitted), App. pp. 187—88). Defendants respectfully assert the district court misunderstood the conclusions of the Commissioner and the effects of the applicable law in this case. Thus, the district court incorrectly reversed the Commissioner's conclusion that Defendants are entitled to judgment as a matter of law. Defendants respectfully request this Court to reverse the

decision of the district court and affirm the final Agency decision in its entirety.

Defendants filed a Rule 1.904 Motion, seeking reconsideration of the district court's conclusion that they were not entitled to judgment as a matter of law. (*See* Rule 1.904 Motion, p. 12, App. p. 202). In the Order denying the Defendants' Motion, the Court reasoned as follows:

> The plaintiff alleges that her review reopening claim is supported by a number of health care professionals. To deny the plaintiff a review reopening **based not on causation, but solely on how the extent of the injuries appeared years ago** would be to deny any possibility that the injuries could increase in disability. That is illogical and summary judgment based on res judicata is erroneous.

(Order on Rule 1.904 Motion, p. 2 (emphasis added) App. p. 212). In fact, as is discussed further below, the Commissioner's decision that Plaintiff was not entitled to seek review-reopening *was* based upon causation – **summary judgment was granted because the issue of causation had already been litigated and decided adversely to the Plaintiff**. Therefore, summary judgment based upon res judicata *was not* illogical or erroneous here.

The issue before the Agency was whether Plaintiff had the right to file for, or seek, review-reopening where she failed, in the underlying case, to prove any disability *caused by* her work injury. **It was not a question of**

extent of disability, but one of proximate cause. Under the facts and law, the Agency correctly concluded Plaintiff did not have such right.

As Deputy Copley stated in her Ruling on Defendants' Motion for Summary Judgment, any argument relating to the causal relation of Plaintiff's current treatment to her work injury or an alleged worsening of physical condition is "putting the cart before the horse." (Ruling on Def's MSJ, p. 3, App. p. 158). Those issues could be determined in a hearing on review-reopening, but *only if* Plaintiff had the right to file the petition in the first place. *See Kohlhaas*, 777 N.W.2d at 393. Here, Plaintiff did not have such right.

As was noted in the final Agency decision, Plaintiff "failed to satisfy the prerequisite to the inquiry of whether she sustained a change in condition". (Review-Reopening App. Dec., p. 4, App. p. 170). Specifically, Plaintiff failed to meet her burden of proving there was an award of compensation "that could be ended, diminished, or increased upon review-reopening." (*Id.*, App. p. 170). In the Review-Reopening Appeal Decision, the Commissioner recognized that the worsening of a claimant's condition and/or the development of a temporary disability into a permanent disability "are recognized avenues for proving a change in condition" for purposes of review-reopening. However, "they cannot be utilized when, as in this case, the issues

of claimant's entitlement to future medical benefits and temporary and permanent disability **were previously ripe for determination and were decided adversely to claimant**." (Review-Reopening Appeal Dec., p. 4 (emphasis added), App. p. 170). In essence, one cannot re-start a race she has already lost.

In this case, a finding was made that Plaintiff was not entitled to any award of future medical benefits, any additional temporary benefits, or any permanent disability benefits, because she "failed to prove her work injury **caused** any temporary disability beyond that already paid by defendants or any permanent disability or loss of earning capacity." (*Id.* at p. 5. (emphasis added), App. p. 171). Importantly, it was also found that Plaintiff "**failed to prove the causal relationship** between her work injury and future medical care given that her injuries had resolved and her treating physicians and independent medical examination doctor were not recommending additional care." (*Id.*, App. p. 171) These findings were affirmed at each level of appeal through the Agency and the district court. . (*See* Arb. Dec'n, pp. 5, 6, 8, App. pp. 12, 13, 15; Appeal Dec'n, p. 19, App. p. 36; Dist. Ct. Dec'n, pp. 13–18, App. pp. 51—56).

Over a period of more than six years, Plaintiff had the opportunity to litigate the entirety of her case, first in an original arbitration, next on intra-

agency appeal, and finally on judicial review. **Each of those decisions found that Plaintiff had no permanent disability caused by her work injury**, that the work injury resulted only in temporary disability, and that she had already been compensated for her temporary disability. (*See* Arb. Dec'n, pp. 5, 6, 8, App. pp. 12, 13, 15; Appeal Dec'n, p. 19, App. p. 36; Dist. Ct. Dec'n, pp. 13–18, App. pp. 51—56). These findings were supported by the evidence in the record, which demonstrated that Plaintiff exhibited "symptom magnification, a mild (at most) brain injury that resolved quickly, and no objective measures of permanent physical injury." (Arb. Dec'n, p. 5, App. p. 12).

Importantly, the Commissioner also found that any need for future medical treatment **was not causally related** to Plaintiff's work injury, as "none of her authorized treating medical providers . . . indicated any need for additional medical treatment related to the work injury" and "[Plaintiff's] own IME doctor . . . made no recommendations for additional treatment necessitated by the work injury." (Appeal Dec'n, p. 20 (emphasis added), App. p. 37). **Thus, there was no prior award of compensation that could be subject to review on a petition for review-reopening.** Therefore, the Commissioner found Plaintiff was and is precluded from filing a review-reopening petition **because she already had the opportunity to fully litigate her case, and it has already been decided that she failed to prove a causal**

relationship to any alleged disability. (*See* Review-Reopening App. Dec., pp. 4—5, App. pp. 170—71). As is discussed below, this conclusion was not irrational, illogical, or wholly unjustifiable; in fact, it is well-supported by Iowa law.

A workers' compensation claimant cannot use a review-reopening proceeding as a vehicle to obtain relief from what she perceives to be an unsatisfactorily low award following arbitration. *Kirby v. Yeoman & Co.*, No. 03-0542, 2004 WL 434066, at *3 (Iowa Ct. App. Mar. 10, 2004) ("A review-reopening proceeding is not the proper vehicle for obtaining relief from what is perceived to be an unsatisfactory low award in an arbitration proceeding."). Similarly, a claimant who disagrees with the agency's findings cannot support a petition for review-reopening by simply rehashing evidence that might support a different decision. *See Hallett v. Bethany Life Communities*, No. 13-1591, 2014 WL 4230218, at *2 (Iowa Ct. App. Aug. 27, 2014) (noting that the claimant was attempting to rehash evidence that might support a different conclusion than that reached by the commissioner). Rather, there are five ways in which a claimant may correctly satisfy the requirements for a review-reopening:

> (1) a worsening of the claimant's physical condition; (2) a reduction of the claimant's earning capacity; (3) a temporary disability developing into a permanent disability; (4) a critical fact existed but

> was unknown or could not have been discovered by the exercise of reasonable diligence at the time of the prior settlement or award; or (5) a scheduled member injury later causes an industrial disability.

Verizon Bus. Network Servs. v. Mackenzie, No. 11-1845, 2012 WL 4899244, at * 6 (Iowa Ct. App. Oct. 17, 2012) (citing *Kohlhaas*, 777 N.W.2d at 392–93). A claimant will not receive a review-reopening award based merely on a difference of opinion between experts regarding the percentage of disability. *Id.*

Although a claimant will not be required to show that her current symptoms were not contemplated at the time of the original action, res judicata principles still apply in review-reopening proceedings. *Kohlhaas*, 777 N.W.2d at 393. **The agency cannot reevaluate the claimant's physical impairment level or earning capacity "if all of the facts and circumstances were known or knowable at the time of the original action."** *Id.* (emphasis added). To allow otherwise would defeat the purpose behind the legislature's enactment of the Workers' Compensation Act: "to avoid litigation, lessen the expense incident thereto, minimize appeals, and afford an efficient and speedy tribunal to determine and award compensation." *Id.* (citing *Stice v. Consol. Ind. Coal Co.*, 291 N.W. 452, 456 (Iowa 1940)). **Thus, after adjudication and absent appeal and remand, the commissioner has no authority to change compensation based upon the same or substantially same facts**

that were previously considered and determined. *Id.*

The Iowa Supreme Court in *Kohlhaas v. Hog Slat, Inc.* and *Rose v. John Deere Ottumwa Works* held that a claimant may seek review-reopening when he or she has sustained a temporary disability that later becomes a permanent disability. *Kohlhaas*, 777 N.W.2d at 382; *Rose*, 76 N.W.2d 756, 759 (Iowa 1956). However, to understand this holding, it is important to review the factual background of *Rose*, the case in which the Iowa Supreme Court first recognized this method of demonstrating a change in condition for purposes of review-reopening.

In *Rose*, the claimant injured his back while working for the employer. *Rose*, 76 N.W.2d at 758. As a result of the injury, he missed several weeks of work. *Id.* His employer voluntarily paid medical benefits and weekly benefits. *Id.* Importantly, before the claimant filed his review-reopening petition, there was no award or settlement agreement, and instead, the weekly benefits "were made for, and on the assumption there was only, temporary disability." *Id.* (emphasis added).

The claimant in *Rose* later filed a review-reopening petition, asserting that he suffered from permanent partial disability as a result of his work injury. *Id.* On review-reopening, the deputy commissioner found that the claimant had, in fact, suffered permanent partial disability as a result of his work injury.

Id. Importantly, this was the first time any analysis or decision had been made regarding whether the claimant's work injury had **caused** any permanent disability. *See id.* **Before the review-reopening petition was filed in *Rose*, the issue of causation for any permanent disability had not yet been conclusively determined. That is not true in the instant case. As was discussed above, it has already been conclusively determined that Plaintiff failed to prove any permanent disability caused by her work injury.**

In addition, the Agency correctly distinguished *Kohlhaas* from the instant case as follows:

> The court in Kohlhaas recognized review-reopening proceedings are intended to address 'future developments,' meaning changes that occur after the initial award or settlement, such as a claimant reaching MMI after an initial award of running healing period benefits, or a claimant sustaining a compensable diminution of earning capacity after an initial award of industrial disability. See Kohlhaas, 777 N.W.2d at 392. **However, given the court's holding that review-reopening proceedings are not to be used as a tool to relitigate causation issues that were decided in the initial award, the court's reference to 'future developments' was not an invitation to [Plaintiff] to take a 'second bite at the apple' regarding issues that have already been litigated and decided**.

(*See* Review-Reopening App. Dec., p. 6 (emphasis added), App. p. 172). **In other words, Plaintiff "cannot be allowed to resurrect her claims by simply seeking additional treatment after the initial award", when it has been conclusively established that "her condition resolved without any permanent disability, she sustained no temporary disability beyond what was already paid, and she is not entitled to future medical benefits."** (*See id*. (emphasis added), App. p. 172).

Plaintiff exhausted all available remedies in her underlying case, and now, through a review-reopening, she seeks to take one last "bite at the apple" and **relitigate** the very same causation issues that were already litigated and decided adversely to her. (*See* Review-Reopening App. Dec., p. 6, App. p. 172). To do so would be an impermissible use of a Review-Reopening proceeding under Iowa law. *See Hooper v. IBP, Inc.*, File No. 991925, 2001 WL 34111479, at *4 (Iowa Workers' Comp. Comm'n, May 11, 2001) (Appeal Decision) ("A proceeding in review-reopening is not simply an opportunity to re-try the original case using different tactics, procedures, or evidence than those which were used at the time of the original hearing."). Therefore, the Agency correctly concluded that Defendants are entitled to judgment as a matter of law, and the district court's ruling to the contrary should be reversed.

CONCLUSION

In sum, in finding that the Plaintiff's claim is barred by res judicata principles, and that Defendants are entitled to judgment as a matter of law, the Agency correctly applied the rule established by the Iowa Supreme Court that a claimant cannot use a review-reopening petition as a vehicle to re-litigate causation issues and obtain relief from what she perceives to be an unsatisfactorily low award following arbitration. Therefore, Defendants respectfully request the Court reverse the decision of the district court and affirm the Commissioner's decision in its entirety.

REQUEST FOR ORAL ARGUMENT

Appellants respectfully request to be heard orally upon the submission of this appeal.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that she electronically filed the foregoing Final Appeal Brief of Appellants on October 20, 2021, via EDMS.

The undersigned further certifies that on October 20, 2021, the foregoing Final Appeal Brief of Appellants was served via EDMS and email on all parties of record.

/s/ *Brittany N. Salyars* October 20, 2021
Signature Date

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR BRIEFS

1. This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

This brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 pt. font and contains 6,733 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ ***Ryan M. Clark*** Dated: October 20, 2021

/s ***Brittany N. Salyars*** Dated: October 20, 2021

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