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

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Other Authorities:

- THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 108 (Columbia Law Review Ass'n et al. eds., 20th ed., 2015)

STATEMENT OF THE CASE

Defendants set forth their Statement of the Case in their opening Appeal Brief and will not repeat such Statement here. *See* IOWA R. APP. P. 6.903(4) (2021) (providing that an appellant's reply brief need not contain the Statement of the Case required in rule 6.903(2)(3)). However, Plaintiff's/Appellee's Appeal Brief provides a slight misstatement of the record in this case, which Defendants seek to clarify here. Plaintiff states that she "filed an amendment to her petition pursuant to IAC Rule 876 – 4.9(5) identifying the issues to include the extent of permanent disability; change in physical condition; change in disability from temporary disability to permanent disability." (*See* Plaintiff's Appeal Br., pp. 10—11). However, Plaintiff fails to mention that the Commissioner considered this "amendment" as a "motion to amend" and ultimately denied the motion.

To wit, Plaintiff filed her Amendment to Petition in the Review-Reopening proceeding on October 3, 2018. (Amend. Rev. Reop. Pet., filed 10/3/18; App. pp. 152—53). Defendants then filed their Answer to the Amendment to Petition on October 10, 2018. (Answer to Claimant's Amend. to Pet., filed 10/10/18, App. pp. 154—55). On October 12, 2018, Deputy

Workers' Compensation Commissioner Stephanie Copley ("Deputy Copley") issued a Ruling, first noting that the amendment would be treated as a motion to amend the petition. (Ruling on Motion to Amend, p. 1, App. p. 163). Deputy Copley then noted that, on October 11, 2018, the Defendants' Motion for Summary Judgment was granted. Given that ruling, which disposed of Plaintiff's claim, Deputy Copley order that Plaintiff's motion to amend was denied as moot. (*Id*, App. p. 153.).

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

Imagine Plaintiff competes in a one-time foot race and loses. After the race is over, Plaintiff hires a personal trainer to improve her running capabilities. She then returns to the race officials years later and demands that she be allowed to re-run the race. That is essentially what Plaintiff is trying to do here: re-run a race that she lost years ago, hoping to win as a result of unilateral actions and outside events that occurred after the race concluded. As was established in Defendants' opening Appeal Brief, the Commissioner correctly found that Petitioner was barred from re-litigating the issue of whether she met her burden of proving any permanent disability was caused by her work injury. Any facts relating to medical treatment Plaintiff sought on

her own, after she presented her case to the Agency and lost, are irrelevant and immaterial, and Plaintiff cannot rely on those facts in a second attempt to establish causation for any permanent injury. She does not get to start her case over or try again to meet her burden of proof. Therefore, the District Court's decision on Judicial Review, which reversed the Commissioner's findings, should be overruled.

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

The District Court, on judicial review, found that there was a difference of opinion between the parties regarding medical evidence produced on the issue of whether or not "a temporary injury has morphed into a permanent one." (Order on Petition for Judicial Review, p. 9, App. p. 188). Therefore, the District Court found that there was a genuine issue of material fact that precluded summary judgment. (*Id.*, App. p. 188). However, the District Court misstated the issue. The issue in this Appeal is whether the Commissioner correctly found that Defendants were entitled to judgment as a matter of law, based upon principles of res judicata. Specifically, the issue is whether the Commissioner correctly concluded that res judicata principles barred the Commissioner from reviewing and changing the prior award of benefits when there was already a conclusive finding that Plaintiff failed to prove a causal

connection between the injury in question and any permanent disability. With regard to this issue, there is no genuine issue of material fact that would preclude summary judgment.

Under Iowa law, a motion for summary judgment should be granted if "the pleadings . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Fjords North, Inc. v. Hahn*, 710 N.W.2d 731, 734 (Iowa 2005) (citation omitted, and emphasis added). An issue is genuine if "reasonable minds can differ on how the issue should be resolved." *Christy v. Miulli*, 692 N.W.2d 694, 699 (Iowa 2005). A fact is material only if its existence would affect the outcome of the suit. *Id.*

Plaintiff cannot present any facts which would create a genuine dispute on the issue of causation for any permanent disability she may have. Any facts regarding Plaintiff's medical treatment following the Arbitration Decision are simply immaterial and irrelevant to the issue of whether or not res judicata principles barred her claims in the Review-Reopening Petition. Plaintiff's medical treatment following the Arbitration Decision would be relevant if the Petition for Review-Reopening were allowed to proceed to litigation, as the issue at that point would be whether or not Plaintiff's temporary injuries have deteriorated to a point of permanent disability. However, as the Commissioner

correctly held, that is not the issue here. (Review-Reopening App. Dec., pp. 3—4, App. p. 169—70). Therefore, any facts relating to Plaintiff's medical treatment following the Arbitration Decision do not affect the outcome of this proceeding. As such, the Commissioner correctly found there was no genuine dispute of material fact which would preclude summary judgment in favor of the Defendants. *See Christy*, 692 N.W.2d at 699. (*See id.*).

B. THE AGENCY CORRECTLY DENIED THE PLAINTIFF A REVIEW REOPENING BASED ON THE APPLICATION OF RES JUDICATA PRINCIPLES TO THE ISSUE OF WHETHER OR NOT CLAIMANT MET HER BURDEN OF PROVING THAT THERE WAS A CAUSAL CONNECTION BETWEEN THE INJURY IN QUESTION AND ANY PERMANENT DISABILITY

Plaintiff asserts, and the district court incorrectly suggested, that this is a case in which there was an award of zero percent permanent impairment, which may be increased on a showing of a change in condition. However, a finding of zero percent permanent disability is not the same as a finding that plaintiff failed to prove a causal connection between her alleged injury and any permanent impairment. The latter is the case here.

To be clear, Defendants are not arguing, and the Commissioner did not hold, that there has to be an award or finding of permanent disability before there can be a review-reopening seeking increased permanency benefits. Instead, Defendants assert, and the Commissioner found, that Plaintiff cannot

relitigate the issue of causation. Plaintiff asserts that she "is not relitigating causation issues" and "[t]he causation issue is not before the Court", because "we are not relitigating whether there is an injury caused by [Plaintiff's] work activities." (*See* Plaintiff's Appeal Br., pp. 32, 35). In so stating, Plaintiff is conflating two separate issues: (1) the issue of whether Plaintiff sustained a work-related injury, and (2) the issue of whether the work-related injury was a cause of permanent disability. The first issue is not in dispute, but the second issue is one which was previously litigated and decided against the Plaintiff, and which she is attempting to relitigate here.

In all workers' compensation proceedings, the "injured employee has the burden of proving by a preponderance of the evidence that [the alleged injury] arose out of and in the course of his [or her] employment." *Quaker Oats Co. v. Ciha*, 552 N.W.2d 143, 150 (Iowa 1996). An injured employee also bears the burden of proving by a preponderance of the evidence that the injury at issue is a proximate cause of the disability on which the claim is based. *See, e.g.*, *George A. Hormel & Co. v. Jordan*, 569 N.W.2d 148, 153 (Iowa 1997) ("The burden rested upon [the worker], of course, to convince the agency by a preponderance of the evidence that his disability is causally related to injuries arising from his employment."); *Sanchez v. Blue Bird Midwest*, 554 N.W.2d 283, 285 (Iowa Ct. App. 1996) ("The claimant has the

burden of proving by a preponderance of the evidence the disability on which he now bases his claim is causally related to injuries arising out of and in the course of his employment."). In the underlying proceedings, it was repeatedly found that Plaintiff failed to meet her burden of proof on the issue of causation as to her alleged permanent disability, and this is the issue Plaintiff is attempting to relitigate through her Petition for Review-Reopening.

In his Arbitration Decision, dated December 19, 2014, Deputy McElderry found as follows:

> The claimant did not meet her burden of establishing that the work injury of April 30, 2012 caused any permanent impairment or loss of earnings capacity. The 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.

(Arb. Dec'n, p. 5, App. p. 12 (emphasis added)). Similarly, in his Appeal Decision, dated April 11th, 2016, Commissioner Cortese found as follows:

> This case involves a classic battle of expert witnesses. After reviewing all of the evidence, I affirm the deputy commissioner's finding that [Plaintiff] did not meet her burden of establishing that the work injury of April 30, 2012, caused any permanent disability or loss of earning capacity.

(Appeal Dec'n, p. 17, App. p. 34 (emphasis added)). The Commissioner based this conclusion on a number of factors, including symptom magnification and

non-physiological complaints that were observed by Drs. Rondinelli, Thoreson, Mooney, and Kitchell. He also found a lack of credibility with regard to Plaintiff's experts. (*Id.* at pp. 17—18, App. pp. 34—35).

Commissioner Cortese further clarified that that Plaintiff "did not meet her burden of proof that she has any permanent disability resulting from the injuries to her neck, back and right shoulder". (*Id.* at p. 19, App. p. 36 (emphasis added)). He again based this conclusion on the fact that "Drs. Rondinelli, Thoreson, Mooney and Kitchell all found symptom magnification and non-physiological reports of symptoms"; Dr. Mooney found no permanent physical disability upon evaluation; and Plaintiff's expert's conclusions were based on Plaintiff's subjective complaints, rather than any objective findings. (*Id.*, App. p. 36).

Finally, in the Ruling on Petition for Judicial Review, dated May 1, 2017, Chief District Court Judge Kurt Wilke found that substantial evidence supported the Commissioner's determination that Plaintiff failed to prove her stipulated injury caused a permanent injury to her brain, neck, back or right shoulder. (Ruling on Petition for Judicial Review, dated 5/1/17, pp. 14—18, App. pp. 52—56). Judge Wilke further found that, in reaching these conclusions, the Commissioner "properly applied the law to the facts" and, as

such, the Commissioner's decision "was not irrational, illogical, or wholly unjustifiable." (*Id.*, App. pp. 52—56).

Put simply, in the underlying proceedings, Plaintiff met her burden of proving by a preponderance of the evidence "that [her] [*temporary*] disability [was] causally related to injuries arising from [her] employment', but she failed to prove "that [her] [*permanent*] disability [if any] is causally related to injuries arising from [her] employment. *See Jordan*, 569 N.W.2d at 153 (emphases added). Plaintiff already had the opportunity to fully litigate the issue of whether any permanent disability was causally related to her alleged injuries, and it has already been conclusively decided that she failed to prove such a causal relationship. In light of the above, it is abundantly clear that the Commissioner correctly concluded Defendants were entitled to judgment as a matter of law, as res judicata principles barred Plaintiff from relitigating the issue of causation as to any permanent disability. This conclusion is far from illogical and is, in fact, in accord with Iowa Supreme Court precedent.

To wit, in *Kohlhaas v. Hog Slat*, the Iowa Supreme Court made clear that, "[w]hen an employee seeks an increase in compensation [through review-reopening], the employee bears the burden of establishing by a preponderance of the evidence that his or her current condition was proximately caused by the original injury." *Kohlhaas v. Hog Slat, Inc.*, 777

N.W.2d 387, 391 (Iowa 2009) (quotation omitted, emphasis added). Once that burden is met, the Commissioner must then evaluate "the condition of the employee, which is found to exist subsequent to the date of the award being reviewed." *Id.* (citing *Stice v. Consol. Ind. Coal. Co.*, 228 Iowa 1031, 1038, 291 N.W. 452, 456 (1940)). The Commissioner, on Review-Reopening does not "re-determine the condition of the employee which was adjudicated by the former award." *Id.* As discussed above, the issue of whether or not Plaintiff sustained any permanent disability that was proximately caused by her original injury has already been litigated and decided. Therefore, under *Kohlhaas*, the Commissioner could not "redetermine [Plaintiff's condition] which was adjudicated by the former award", as the principles of res judicata applied to bar such consideration. *Id.*

Plaintiff relies, in part, on *Beier Glass Co. v. Brundige* to support her argument that the District Court's decision, which reversed the final Agency decision, should be affirmed.[1] Importantly, *Beier Glass* involves facts and

[1] Plaintiff also relies primarily on *Kohlhaas v. Hog Slat, Inc.* and *Rose v. John Deere Ottumwa Works*. (*See* Plaintiff's Appeal Br., pp. 24—35). The distinguishing features of the *Rose* and *Kohlhaas* cases were discussed in detail in Defendants' opening Appeal Brief and those arguments will not be repeated here. (*See* Defs. Appeal Br., pp. 32—34). Of note, contrary to Plaintiff's contentions, Defendants do not suggest that the fact there was no award or settlement agreement in *Rose*, and instead that benefits "were made for, and on the assumption there was only, temporary disability", was important to the court's decision in *Rose*. (*See* Plaintiff's Appeal Br., p. 33).

issues that are entirely, and very materially, different from the case *sub judice*, and thus does not support Plaintiff's position. The issue in *Beier Glass* was "whether a workers' compensation arbitration award of solely medical benefits renders a subsequent petition for disability benefits subject to the three-year statute of limitations on review-reopening or the two-year limitation on original claims." *Beier Glass*, 329 N.W.2d 280, 281 (Iowa 1983). Here, Petitioner incorrectly suggests that the Commissioner found that her Review-Reopening Petition, seeking permanent disability benefits and additional medical benefits, was unsupported because the arbitration decision found she was only entitled to medical and temporary benefits.[2] In fact, the

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Rather, in their opening Appeal Brief, Defendants highlighted this important difference in the procedural history to clarify that, unlike in the case sub judice, in *Rose*, the issue of causation for permanent disability had not been litigated and decided before the Review-Reopening Petition was filed. (*See* Defs. Appeal Br., pp. 32—33).

[2] In the Arbitration Decision, the Deputy Commissioner actually found as follows regarding temporary benefits: "There [was] nothing in the record to support additional benefits being owed to [Plaintiff] beyond those paid. The temporary benefits were paid. The period sought is long after [Plaintiff's] temporary disability was resolved." (Arb. Dec'n, p. 5, App. p. 12 (emphases added)). The Deputy Commissioner also found that Plaintiff had already been reimbursed for all reasonable medical expenses incurred in treating her temporary injury (*See id.* at p. 6, App. p. 13). After intra-agency Appeal, a Petition for Judicial Review, and Remand to the Agency, the only additional benefits Defendants were ordered to pay were charges for medical treatment at Trinity Regional Medical Center on April 30, 2012; The Iowa Clinic, Iowa Methodist Medical Center, and UnityPoint Clinic for dates of service from April 30, 2012 to May 2, 2012; and UnityPoint Clinic date of service

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 permanent disability. In addition, unlike in *Beier Glass*, here Plaintiff was not awarded any benefits beyond those which had already been paid; thus, the Commissioner correctly concluded there was no award of benefits that could be subject to review in a review-reopening proceeding. Therefore, *Beier Glass* is simply not controlling authority for the particular issue before the Court.

As a final note, Plaintiff asserts that "NCIRSWA mistakenly relies on a number of unpublished opinions . . . . [that] do not involve motions for summary judgment or res judicata on causation." (*See* Petitioner's Appeal Br., p. 36). The cases mentioned by Plaintiff, including *Hallett*, *Kirby*, *Verizon*, and *Stice*, were not relied upon by Defendants for their procedural or factual similarities to the case at hand. (*See* Petitioner's Appeal Br., pp. 36—40). First, *Stice* was not discussed in any detail by the Defendants, but was simply

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May 17, 2012. (Remand Dec'n, pp. 7—8, App. pp. 67—68). Thus, Defendants were not found to be responsible for any future medical benefits and were not liable for any other charges. (*See id.*, App. pp. 67—68).

included in a citing parenthetical, as required by legal citation rules. (*See* Defs. Appeal Br., p. 31). [3]

In addition, *Hallett*, *Kirby*, and *Verizon* were merely cited as persuasive authority in support of the legal propositions set forth in Defendants' Appeal Brief. (*See* Defs. Appeal Br., pp. 30—31). While unpublished cases and decisions are not controlling, Iowa courts have held that "such cases may be cited in briefs and used as persuasive authority." *See State v. Goyette*, No. 07-0300, 2008 WL 4308213, at *1 (Iowa Ct. App. Sept. 17, 2008) (table opinion), *abrogated on other grounds by State v. Jenkins*, 788 N.W.2d 640, 645—57 (Iowa 2020); *see also State v. Stivers*, No. 16-0493, 2017 WL 936124, at *1 (Iowa Ct. App. Mar. 8, 2017) (noting that the district court had relied on a recent unpublished case from the Iowa Court of Appeals as persuasive authority). Furthermore, the Iowa Rules of Appellate Procedure provide that, "[a]n unpublished opinion or decision of a court or agency may be cited in a brief if the opinion or decision can be readily accessed electronically." IOWA R. APP. P. 6.904(2)(c) (2021) (emphasis added). When citing such decisions, the Rules simply require a party to include an electronic citation in order to

[3] *See* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 108 (Columbia Law Review Ass'n et al. eds., 20th ed., 2015) (Rule 10.6.2) ("When a case cited as authority itself quotes or cites another case for that point, a 'quoting' or 'citing' parenthetical is appropriate.").

indicate where the opinion may be accessed online, and Defendants provided such information in their opening Appeal Brief. *See id.*

CONCLUSION

In sum, for the reasons set forth above and in Defendants' opening Appeal Brief, the Agency correctly ruled in favor of the Defendants on their Motion for Summary Judgment, dismissing Plaintiff's Petition for Review-Reopening. There are no genuine issues of material fact on the question of whether Plaintiff's claims are barred by the principle of res judicata. The facts discussed by Plaintiff, regarding the medical treatment she sought on her own after the Arbitration Decision, are simply irrelevant and immaterial to this issue. The Commissioner correctly applied Iowa law to the facts of this case and found that Plaintiff's claims were barred, as she failed to prove any permanent disability caused by her work injury and could not use a Review-Reopening Petition as a vehicle to re-litigate the issue of causation. Therefore, the District Court's decision on Review-Reopening should be reversed, and the Commissioner's decision should be affirmed in its entirety.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

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

The undersigned further certifies that on October 20, 2021, the foregoing Final Reply 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 3,734 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

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