

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 BRIEF AND REQUEST FOR ORAL ARGUMENT
OF APPELLEE ALEVIA GREEN

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ISSUE PRESENTED FOR REVIEW

IOWA LAW ALLOWS FOR REVIEW REOPENING OF A WORKERS' COMPENSATION AWARD OF BENEFITS WHEN THERE IS A WORSENING OF CLAIMANT'S PHYSICAL CONDITION; OR A TEMPORARY DISABILITY DEVELOPS INTO A PERMANENT DISABILITY. DID THE DISTRICT COURT ERR IN REVERSING THE COMMISSIONER'S DECISION GRANTING DEFENDANTS' SUMMARY JUDGMENT BECAUSE OF RES JUDICATA ON CAUSATION BECAUSE IT WAS ILLOGICAL, IRRATIONAL AND WHOLLY UNJUSTIFIED?

ROUTING STATEMENT

This case presents the application of existing legal principles and should therefore be transferred to the Court of Appeals. *Iowa R. App. Proc. 6.1101(3)(a)*.

STATEMENT OF THE CASE

Ms. Green filed a Petition for Review Reopening pursuant to Iowa Code §§85.26(2) and 86.14(2) with the Iowa Workers' Compensation Commissioner seeking additional medical and permanent disability benefits because her physical condition has deteriorated, and her temporary injury has become a permanent injury. (App. pp. 69, 152).

There is no dispute that Alevia Green sustained an injury on April 30, 2012, arising out of and in the course of her employment with the Defendant, NCISRWA. (App. pp. 149, 12). The original arbitration decision found that Ms.

Green sustained a period of temporary disability from April 30, 2012, to August 8, 2012. (App. pp. 12, 149). After a hearing on October 6, 2014, Deputy McElderry’s arbitration decision of December 19, 2014, found Ms. Green had no permanent impairment or permanent disability. (App. pp. 11, 12).

This is not a case where there was a finding of some permanent disability that was not caused by a work – related injury. Instead, this case involves a review – reopening of the original arbitration decision that found that Ms. Green was entitled to temporary disability benefits and medical benefits through August 8, 2012, and there was no permanent impairment or disability. (App. pp. 11, 12).

The arbitration decision of December 19, 2014, states:

“On April 30, 2012, the claimant suffered a stipulated injury arising out of and in the course of her employment when the large metal door of a dumpster struck her on the right side of her back and neck. She was knocked to the ground and suffered a period of unconsciousness before being transported to Trinity Regional Medical Center in Fort Dodge, Iowa by ambulance. In the Emergency Room, her pain was noted, as was sensitivity to light. (App. p. 119). She reported upper back pain and headaches.” (App. p. 9).

The deputy found that Ms. Green suffered a “mild (at most) brain injury and some relatively minor physical injuries, all of which resolved without any permanency or loss of earnings capacity relatively quickly.” (App. pp. 11, 12). (emphasis added). The deputy found that Ms. Green was not entitled to any additional temporary disability benefits beyond those that were paid. (App. p. 12).

The review reopening petition before the Court does not present an attempt to relitigate whether the underlying injury to Ms. Green’s shoulder, neck back and headaches were caused by her work. The arbitration decision established that Ms. Green sustained an injury arising out of and in the course of her employment with the employer, NCIRSWA. That injury resulted in a finding of temporary disability. The finding by the deputy in the initial arbitration decision was that Ms. Green did not sustain “any permanency or loss of earnings capacity”. (App. pp. 11, 12). The deputy specifically found there was “no objective measures of permanent physical injury”. (App. p. 12). The deputy did not find permanency due to conditions unrelated to Ms. Green’s work injury.

In his appeal decision of April 11, 2016, the commissioner affirmed the deputy’s arbitration decision of December 19, 2014. (App. p. 172). Ultimately, the commissioner found that claimant did not have any permanent disability. (App. p. 36).

The District Court, in its ruling on petition for judicial review filed May 1, 2017, affirmed the commissioner’s appeal decision finding that Ms. Green did not have permanent impairment or disability. (App. pp. 55 – 56).

On February 24, 2016, Ms. Green began treating with Fort Dodge neurologist Dr. Shahnawaz Karim. (App. p. 100). Ms. Green had not treated with Dr. Karim before February 24, 2016. Dr. Karim found that Ms. Green was suffering

from headaches that started due to her work injury of April 20, 2012. (App. p. 100). Dr. Karim found that Ms. Green's headaches arose out of her work injury of April 30, 2012. (App. p. 100). She continued to treat with Dr. Karim until September 5, 2017, when he left Fort Dodge. (App. p. 101).

Beginning September 15, 2017, Ms. Green started to treat with Dr. Bushra Nauman at the Fort Dodge Pain Clinic for the injuries to her right shoulder and neck. (App. p. 102). Ms. Green had not been treated by Dr. Nauman prior to the arbitration hearing on October 6, 2014. Dr. Nauman found evidence of worsening of Ms. Green's injuries to her right shoulder, neck and back from the time of the Arbitration hearing on October 6, 2014. (App. p. 105). Dr. Nauman found that the condition in Ms. Green's right shoulder, neck and back caused by the work injury of April 30, 2012, had deteriorated so that additional treatment was required. (App. pp. 105 – 107, 108, 112 – 113, 117).

In January 2017, Ms. Green participated in two courses of physical therapy for her right shoulder, arm and neck at Highland Park Physical Therapy in Fort Dodge. (App. pp. 119, 130). The first course of physical therapy lasted from January through March 2017. (App. p. 119). The second course of physical therapy lasted from February 6, 2018, through March 20, 2018. (App. p. 130). The physical therapists found that the condition in Ms. Green's right shoulder and neck had deteriorated since the arbitration hearing of October 6, 2014, so that Ms. Green now

has a loss of function in the neck and right shoulder. (App. pp. 119 – 120, 121, 122, 123 – 126, 127, 128 – 129, 130 – 132, 133 – 135, 136 – 139, 140 – 144, 145 – 146, 147 – 148).

On June 4, 2018, Ms. Green filed an original notice and petition seeking review reopening of the previous decision finding no permanent impairment or disability on the grounds that her physical condition had deteriorated, and her injuries had morphed from temporary to permanent injuries. (App. p. 69). Ms. Green 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. (App. p. 152).

On September 10, 2018, NCIRSWA/IMWCA filed a Motion for Summary Judgment claiming they were entitled to judgment as a matter of law on the petition for review reopening based upon res judicata on the issue of causation. (App. p. 70). Ms. Green resisted the Motion for Summary Judgment on the grounds that re judicata does not bar her right to petition for review reopening to seek permanent disability benefits because the condition arising out of her injury of April 30, 2012, has deteriorated so that her temporary disability has developed into a permanent impairment and disability. (App. p. 84). There are genuine issues of material fact based upon medical treatment she received after the arbitration decision

on December 19, 2014, and, after the commissioner’s appeal decision of April 11, 2016, showing her condition worsened and her temporary disability has developed into a permanent disability. (App. p. 85).

On October 11, 2018, Deputy Workers’ Compensation Commissioner Stephanie J. Copley granted NCIRSWA/IMWCA’s Motion for Summary Judgment. (App. p. 156). Deputy Copley noted that the Deputy McElderry initially found “claimant suffered mild ‘at most’ brain injury and some relatively minor physical injuries, all of which resolved without any permanency,” in the December 19, 2014, arbitration decision. (App. pp. 156, 11)(emphasis added).

It is important to note that the original finding by Deputy McElderry on December 19, 2014, was that Ms. Green had no permanent loss of function or permanent loss of earning capacity. Deputy McElderry found an injury caused by work. He did not find that there was some permanent impairment, or permanent disability caused by something else, for instance; pre – existing conditions, unrelated health conditions, subsequent injuries or accidents, etc. Yet, Deputy Copley erroneously found that the review – reopening was an attempt to relitigate causation and granted Defendants’ Motion for Summary Judgment based on res judicata. (App. p. 161).

Ms. Green appealed Deputy Copley’s decision to the Workers’ Compensation Commissioner. (App. p. 165). On January 16, 2020, the

commissioner affirmed Deputy Copley’s grant of summary judgment, acknowledging that in the initial decision, it was found Ms. Green’s “condition resolved without any permanent disability, she sustained no temporary disability beyond what was already paid”. (App. p. 172).

Ms. Green appealed this Decision to the Iowa District Court for Webster County. (App. p. 174). On March 3, 2021, Chief Judge, Kurt L. Wilke, issued his order on petition for judicial review. (App. p. 180). Judge Wilke found that the conclusions of the commissioner that NCIRSWA was entitled to summary judgment based on res judicata was illogical and erroneous and, therefore reversed the commissioner’s decision and remanded the case for a hearing on the merits. (App. pp. 187 – 189). Judge Wilke stated:

The commissioner’s conclusion that Green’s award of medical and temporary benefits only renders it incapable of being increased is illogical. An award of ‘zero’ permanent impairment or disability may obviously be increased on a showing of a change in condition. (App. pp. 187 – 188). The conclusion that Green, is precluded from bringing a review – reopening claim is erroneous.” (App. pp. 187 – 188).

Turning to the question of res judicata, Judge Wilke found:

“The commissioner’s logic as to res judicata arguments is somewhat circular...[T]he 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 such 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." (App. p. 188).

NCIRSWA/IMWCA filed a Motion for Clarification, Enlargement and Modification of Judge Wilke's decision. On March 29, 2021, the Court issued its Order on the Motion for Clarification, Enlargement and Modification. The court noted that, "this court found that the commissioner's conclusion that plaintiff's 2014 lack of permanency award renders it incapable of being increased is illogical and the conclusion that plaintiff is precluded from bringing a review reopening claim is erroneous." (App. p. 212).

"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." (App. p. 212) (emphasis added).

The District Court found the commissioner erred in concluding NCIRSWA/IMWCA were entitled to judgment as a matter of law. (App. pp. 186 – 189). The District Court reversed the commissioner's decision that NCIRSWA/IMWCA were entitled to judgment as a matter of law because of res judicata is illogical and erroneous. (Id.).

STATEMENT OF FACTS

The procedural history of this case establishes as fact that there was an arbitration decision that found Ms. Green sustained injuries arising out of and in the course of her employment so that she was entitled to medical and temporary benefits. There was a finding of no permanent impairment or disability. Ms. Green seeks review reopening because the temporary condition has gotten worse, and she is entitled to permanent disability benefits. *Iowa Code §§85.26(2) and 86.14(2) (2021)*.

There is no dispute that Alevia Green sustained an injury on April 30, 2012, caused by her work, that is, arising out of and in the course of her employment with North Central Iowa Regional Solid Waste Agency (NCIRSWA). (App. p. 149). The initial arbitration decision found that Ms. Green was entitled to medical benefits and sustained a period of temporary disability from April 30, 2012, to August 8, 2012. (App. p. 12).

This is not a case where there was a finding of some permanent disability that was not caused by a work injury. Instead, Ms. Green's petition for review reopening is based upon the original arbitration decision finding that she had no permanent impairment or disability and she was entitled to medical benefits and temporary disability. (App. p. 69). She seeks review reopening because the

condition arising from her work injury has deteriorated so that the temporary disability is now a permanent disability. (App. pp. 69, 152).

The original arbitration decision found causation, that is, Ms. Green sustained an injury arising out of and in the course of her employment. She was entitled to medical and temporary disability benefits which were paid by the Defendants. (App. pp. 9, 11, 19) This is not an issue where causation of injury is being relitigated. Ms. Green's injuries to her right shoulder, back, neck and headaches have gotten worse so that she is entitled to additional medical benefits and permanent disability benefits.

On April 30, 2012, Ms. Green was taken via ambulance to the Trinity Regional Medical Center Emergency Room after being struck by the dumpster door at work. She was unconscious for a few minutes. (App. p. 224). She was complaining of a headache and pain in her upper back as well as light sensitivity. (App. p. 224). She was discharged to Iowa Methodist Medical Center by ambulance. (App. p. 223).

On arrival at Iowa Methodist Medical Center, Ms. Green had pain in her neck, upper back, posterior head and right shoulder. (App. p. 228). She was found to have sustained a concussion, so she was kept for observation. (App. pp. 229 – 230). On May 2, 2012, she was discharged to her home with outpatient therapies. (App. p. 227).

On August 8, 2012, after a course of treatment, Dr. Charles Mooney stated that Ms. Green had reached maximum medical improvement and that she could return to work without restrictions. (Ex. 9, pp. 9, 10). He did not anticipate any further follow up.

Ms. Green returned to work with her employer, NCIRSWA at the recycling center.

On August 30, 2012, Ms. Green was seen by Dr. Kitchell for her migraine headaches from the work injury of April 30, 2012. (App. p. 98). Dr. Kitchell found her headaches were resolving. (App. p. 98).

On February 15, 2013, Ms. Green was seen again by Dr. Mooney. (App. p. 96). Dr. Mooney found that Ms. Green continued to complain of headaches, neck pain and right shoulder pain. (App. p. 97). His previous opinions on maximum medical improvement and return to work were unchanged. (App. p. 97).

The initial arbitration hearing was October 6, 2014, before Deputy Workers' Compensation Commissioner Stan McElderry. On December 19, 2014, Deputy McElderry issued his arbitration decision and found that Ms. Green "did sustain an injury arising out of and in the course of her employment, but she was not entitled to any additional medical or disability benefits beyond those voluntarily paid through August 8, 2012." (App. p. 12). The deputy found that Ms. Green did not sustain any permanent impairment or disability. (App. pp. 11, 12).

On Appeal, the commissioner affirmed the deputy's findings. (App. pp. 34, 36). The commissioner found that the claimant had not sustained any permanent disability or loss of earning capacity based on Dr. Mooney's finding of no permanent brain injury or permanent physical injury. (App. pp. 34, 36). The commissioner also relied on Dr. Kitchell's finding of no permanent brain injury. (App. pp. 34 – 36).

On judicial review the court affirmed the commissioner's determination that Ms. Green sustained only a temporary injury and, no permanent injury or physical disability. (App. pp. 55, 56).

Ms. Green's condition in her shoulder, neck and back deteriorated. On February 24, 2016, Ms. Green began treating with Fort Dodge neurologist, Dr. Shahnawaz Karim. (App. p. 100). Dr. Karim found that Ms. Green was suffering from headaches that started due to her work injury of April 30, 2012. (App. p. 100). Ms. Green continued to treat with Dr. Karim for her work related headaches until September 5, 2017, when Dr. Karim left Fort Dodge. (App. p. 101). The headaches Dr. Karim was treating Ms. Green for arose out the condition of her work injury of April 30, 2012. (App. p. 100).

On September 15, 2017, Ms. Green sought treatment with Dr. Bushra Nauman, at the Fort Dodge Pain Clinic for the work injuries to her right shoulder and neck. (App. p. 102). Dr. Nauman found evidence of the worsening of Ms.

Green's condition in her right shoulder and neck since the time of the initial Arbitration Decision of December 19, 2014. (App. p. 102). Dr. Nauman found that the work injury of April 30, 2012, to Ms. Green's right shoulder, neck and back, had deteriorated and required additional treatment. (App. pp. 105 – 107, 108, 112 – 113, 117).

Beginning in January 2017, Ms. Green underwent two courses of physical therapy for her right shoulder and neck at Highland Park Physical Therapy in Fort Dodge as a result of the work injuries of April 30, 2012. (App. pp. 119, 130). The first course of physical therapy lasted from January through March 2017. (App. p. 119). The second course of physical therapy lasted from February 6, 2018, through March 20, 2018. (App. p. 130). The physical therapist found that Ms. Green lost function in her right shoulder and neck that developed after the arbitration hearing of October 6, 2014. (App. pp. 119 – 120, 121, 122, 123 – 126, 127, 128 – 129, 130 – 132, 133 – 135, 136- 139, 140, 144, 145 – 146, 147 – 148).

Ms. Green's claim for review reopening is based upon the condition of her initial injuries to her right shoulder, neck, back and her headaches worsening and morphing from temporary to permanent disability. Her claim is based on new evidence resulting from treatment beginning on February 24, 2016, which did not and could not exist at the time of the arbitration hearing on October 6, 2014.

Summary Judgment, on res judicata, was erroneous because, the statute

and longstanding Iowa case law allows for review reopening when the claimant's physical condition worsens, or a temporary disability becomes a permanent disability. The commissioner's finding that res judicata bars Ms. Greens' right to file a petition for review reopening when there was an initial award for temporary disability and a finding of no permanency is illogical, irrational and wholly unjustifiable so that its reversal by the District Court was necessary. The District Court's reversal of the commissioner's decision should be affirmed, and the case should be remanded to the commissioner for a hearing on the merits.

PROPOSITION I.

THE DISTRICT COURT CORRECTLY FOUND THAT THE COMMISSIONER'S GRANT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON RES JUDICATA WAS ERRONEOUS BECAUSE IT WAS IRRATIONAL, ILLOGICAL OR WHOLLY JUSTIFIABLE BECAUSE MS. GREEN'S REVIEW REOPENING PETITION IS BASED ON A CHANGE IN HER CONDITION SO THAT THE TEMPORARY DISABILITY HAS DETERIORATED AND SHE IS NOW ENTITLED TO PERMANENT DISABILITY BENEFITS.

PRESERVATION OF ERROR

Ms. Green agrees with Appellant's statement regarding preservation of error.

STANDARD OF REVIEW

The Appellate Court’s scope of review is for the correction of legal error. *Kohlhaas v. Hog Slat, Inc.*, 777 N.W. 2d 387, 390 (Iowa 2009). In evaluating the judicial review order, the Court applies the standards of Iowa Code §17A.19(10) to determine whether the conclusions the Supreme Court reaches are the same as those of the District Court. *Mercy Medical Center v. Healey*, 801 N.W. 2d 865, 870 (Iowa App. 2011). The District Court may grant relief if the agency action has prejudiced the substantial rights of a party, and the agency action meets one of the enumerated criteria contained in Iowa Code §17A.19(10)(a) through (n). *Verizon Business Network Services, Inc. v. McKenzie*, 823 N.W. 2d 418 (Iowa App. 2012).

The legislature delegated questions of fact to the Workers’ Compensation Commissioner and the Court can reverse the commissioner’s findings of fact if they are not supported by substantial evidence. *Iowa Code §17A.19(10)(f)* (2021).

The Court has previously found that the legislature did not delegate the interpretation of Chapter 85 to the Workers’ Compensation Commissioner. *Mycogen Seeds v. Sands*, 686 N.W. 2d 457, 464 (Iowa 2004). Thus, under Chapter 17A, the Court reviews the agency’s statutory interpretation for errors at law. *Iowa Code §17A.19(10)(c)*. When the commissioner exercises discretion based on an erroneous interpretation of the law, the Court is not bound by those “legal

conclusions but may correct misapplications of the law.” *Meyer v. IBP, Inc.*, 710 N.W. 2d 213, 219 (Iowa 2006).

Still, if there is no challenge to the commissioner’s finding of fact or interpretation of the law, but the claim of error lies with the ultimate conclusion reached, then the challenge is to the agency’s application of the law to the facts, and the question on review is whether the agency abused its discretion by, for example, employing wholly irrational reasoning or ignoring important and relevant evidence. *Id.*; See Iowa Code §17A.19(10)(i)(j) (2021).

ARGUMENT

The Workers’ Compensation Act provides:

“An award for payments or an agreement for settlement provided by §86.13 for benefits under this chapter or chapter 85A or 85B, where the amount has not been commuted, may be reviewed upon commencement of reopening proceedings by the employer or the employee...”. Iowa Code §85.26(2) (2021) (*emphasis added*).

Iowa Code §86.14(2) provides for review reopening prior decisions:

“In a proceeding to reopen an award for payments or agreement for settlement as provided by §86.13, inquiry shall be made into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded or agreed upon.” Iowa Code §86.14(2) (2021).

It is the longstanding rule declared by the Iowa Supreme Court that there shall be liberal construction of the Workers’ Compensation Statute in favor of the injured worker. *Beier Glass Co. v. Brundige*, 329 N.W. 2d 280, 286 (Iowa 1983).

See also *McSpadden v. Big Ben Coal*, 288 N.W. 2d 181, 188 (Iowa 1980). The Supreme Court recognizes the legislative goal of review reopening so that a worker is entitled to future compensation for injuries not immediately supportive of disability benefits. *Beier Glass Co.*, 329 N.W. 2d at 286 (Citing *Rose v. John Deere Ottumwa Works*, 247 Iowa 900, 906, 76 N.W. 2d 756, 759 – 60 (1956)).

The commissioner’s interpretation and application of law in this case, is narrow, illogical and erroneous. The District Court correctly reversed the commissioner’s decision because it would narrow review reopening only to cases when the initial award or agreement to pay the same type of benefits sought in review reopening. It is illogical to find that res judicata bars review reopening seeking permanent disability benefits of an initial award of temporary benefits based on the extent of disability, not the cause of the injury. Zero permanent disability can be increased on appropriate proof.

Iowa Code §85.26(2) and §86.14(2) do not limit a worker’s right to review reopening only if there is an initial award for like kind weekly benefits as argued by NCIRSWA. The legislature chose broad language to signify the condition triggering a right to review reopening; “an award for payments...for benefits under this chapter”. *Beier Glass Co.*, 329 N.W. 2d at 285 – 286; Iowa Code §85.26(2) (2021).

The Supreme Court in Beier Glass Co. v. Brundige, 329 N.W. 2d 280 (Iowa 1983) reviewed the legislative history and broad language of Iowa Code §85.26(2) when it held that an award of medical benefits only, is, within the scope of benefits the Commissioner may award through arbitration that will support a petition for review reopening seeking temporary and permanent disability benefits. Beier Glass Co., 329 N.W. 2d at 285 – 286.

The Court in Beier Glass Co. noted that the legislature chose broad language of “An award for payments...for benefits under this chapter...” instead of “weekly benefits” to make clear that while an “award for benefits” is necessary, it is sufficient that the award provide only for medical benefits in order to support a claim for review reopening seeking temporary and permanent disability benefits. Beier Glass Co., 329 N.W. 2d at 285. In so holding, the Court reasoned that medical benefits are subject to the requirement that the injury be compensable. Beier Glass Co., 329 N.W. 2d at 286.

The dispute in Beier Glass Co. is similar to the dispute in the case before the Court. In Beier Glass Co., Mr. Brundige sustained a back injury at work. In an arbitration decision, the commissioner initially found that Mr. Brundige was entitled to medical benefits only because the work injury “resulted in insufficient lost time to entitle claimant to compensation” of weekly benefits. Beier Glass Co., 329 N.W. 2d at 281. Mr. Brundige subsequently filed a petition for review reopening

seeking temporary and permanent disability benefits. *Beier Glass Co.*, 329 N.W. 2d at 281. The deputy commissioner ruled that although the initial arbitration decision established claimant's injuries arose out of and in the course of employment, the denial of benefits other than medical benefits would not support Mr. Brundige's petition for review reopening. *Beier Glass Co.*, 329 N.W. 2d at 281. The deputy commissioner found that the claimant's petition in *Beier Glass Co.* was therefore barred. *Beier Glass Co.*, 329 N.W. 2d at 281. On appeal, the commissioner ruled that the initial arbitration award of medical benefits only was sufficient to support review reopening. *Beier Glass Co.*, 329 N.W. 2d at 281. On judicial review, the District Court reversed the commissioner's ruling on grounds that an award of medical benefits only was insufficient to support review reopening seeking temporary and permanent benefits. *Beier Glass Co.*, 329 N.W. 2d at 281 – 282.

Finally, the Iowa Supreme Court, in *Beier Glass Co.* construed the language of Iowa Code §§85.26(2) and 86.14(2) and found that the words “an award” of “benefits” and “weekly benefits” in these code sections only requires that an arbitration award or memorandum of agreement for any type of benefits, assuming no commutation, will support a review reopening petition seeking further disability benefits. *Beier Glass Co.*, 329 N.W. 2d at 286.

In this case, the District Court is right. The commissioner erred in finding that even though Ms. Green's initial arbitration decision found that she

sustained an injury arising out of and in the course of employment, which entitled her to medical and temporary benefits, she does not have the right to review reopening seeking permanent disability benefits and additional medical benefits. (App. p. 172). After all, the Iowa Supreme Court has declared that an award of medical benefits only is sufficient to support review reopening for temporary and permanent disability benefits. *Beier Glass Co., 329 N.W. 2d at 286.*

The prerequisites necessary to support a petition for review reopening is arbitration award or agreement for settlement, which establishes the following elements: (1) Employer – employee relationship; and (2) Injury arising out of and in the course of employment. *Beier Glass Co., 329 N.W. 2d at 286.* It is the presence of an arbitration award or settlement agreement, not the nature of the benefits awarded or agreed upon, which is crucial to the initial proceedings before the commissioner. *Id.* “We hold an arbitration award for medical benefits [only] is sufficient to support review reopening under §85.26(2).” *Beier Glass Co., 329 N.W. 2d at 287.* The extent of disability is left for future determination through review reopening. *Beier Glass Co., 329 N.W. 2d at 286.*

The commissioner misapplied res judicata granting summary judgment on the issue of causation. It is clear from Iowa Code §85.26(2) that the issue of causation has to do with whether there is an award finding an injury was caused by work that is, the injury arose out of and in the course of employment entitling a

claimant to payment of benefits. The statutory provisions of Iowa Code §§85.26(2) and 86.14(2) alters the traditional application of res judicata. The legislature has made specific provision reviewing prior decisions by the workers' compensation commissioner if there is an award for benefits and a change in a worker's condition. *Iowa Code §§85.26(2) and 86.14(2) (2021).*

If the original arbitration decision from 2014 found that Ms. Green did not sustain an injury arising out of and in the course of employment so that she was not entitled to any benefits under Iowa Code Chapter 85, then, under Iowa Code §§85.26(2) and 86.14(2) res judicata on the issue of causation of injury would prohibit review reopening.

However, that is not the case before the Court. The 2014 arbitration decision found Ms. Green sustained an injury arising out of and in the course of employment and, that she was entitled to medical and temporary benefits. The code allows review reopening of this decision and, entitles Ms. Green to additional benefits if she can prove a worsening of her condition. *Iowa Code §§85.26(2) and 86.14(2) (2021).*

The commissioner's appeal decision granting summary judgment on res judicata, in favor of NCIRSWA is illogical, irrational and flies in the face of the law. The District Court correctly reversed the commissioner's decision. Once there is an award for any benefits under Chapter 85, the commissioner's conclusion that

Green's lack of award for permanency benefits renders it incapable of being increased is illogical. An award of zero permanency benefits can always be increased with the proper showing of a change of condition. (App. p. 187). "The conclusion that Green is precluded from bringing a review reopening claim is erroneous." (App. p. 188). *See also Iowa Code §17A.19(10)(c)(i)(n) (2021)*.

Ms. Green filed her petition for review reopening because the condition in her shoulder, back and neck from the original injury has deteriorated since the arbitration hearing on October 6, 2014. Iowa's workers' compensation law contemplates that future development, including the worsening of a physical condition or a reduction in earning capacity, should be addressed in review reopening proceedings. *Kohlhaas v. Hog Slat, Inc.*, 777 N.W. 2d 387, 392 (Iowa 2009); *Beier Glass Co. v. Brundige*, 329 N.W. 2d 280, 283 (Iowa 1983).

In a review reopening proceeding, the claimant need not prove that the current extent of disability was not contemplated by the commissioner in an arbitration award. *Kohlhaas*, 777 N.W. 2d at 392. Thus, awards by the commissioner may be adjusted pursuant to Iowa Code §§85.26(2) and 86.14(2) on the following grounds:

1. A worsening of the Claimant's physical condition. *Kohlhaas*, 777 N.W. 2d at 392; or
2. A worsening of Claimant's economic condition even without a deterioration of Claimant's physical capacity. *Kohlhaas*, 777

N.W. 2d at 392 (Citing Blacksmith v. All-American Inc., 290 N.W. 2d 348, 354 (Iowa 1980)); or

3. When a temporary disability later develops into a permanent disability. *Kohlhaas*, 777 N.W. 2d at 392; (citing, Rose v. John Deere Ottumwa Works, 247 Iowa 900, 906, 76 N.W. 2d 756, 759 (1956)); or
4. When critical facts existed but were unknown and could not have been discovered by the exercise of reasonable diligence at the time of the prior award. *Kohlhaas*, 777 N.W. 2d at 392; (citing, Gosek v. Garner & Stiles, 158 N.W. 2d 731, 735 (Iowa 1968)); or
5. Where an injury to scheduled member later causes an industrial disability. *Kohlhaas*, 777 N.W. 2d at 392 – 393 (citing, Mortimer v. Fruehauf Corp., 502 N.W. 2d 12, 13, 17 (Iowa 1993) (“A psychological condition caused or aggravated by a scheduled injury is to be compensated as an unscheduled injury.”)).

Thus, District Court correctly found that the commissioner’s decision was erroneous because it is illogical, irrational and wholly unjustifiable in finding that res judicata bars Ms. Green’s attempt to seek review reopening due to a worsening of her physical condition such that the temporary condition is now permanent. The commissioner erred by finding that the arbitration award which found that Ms. Green was entitled to medical benefits and temporary benefits was not sufficient to support a petition for review reopening as a matter of law. The commissioner’s decision is contrary to statute and the explicit holdings of the Iowa Supreme Court. *Iowa Code §§85.26(2) and 86.14(2) (2021); Kohlhaas*, 777 N.W. 2d at 392; Beier Glass Co., 329 N.W. 2d 280, 287 and Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W. 2d 756 (1956).

NCIRSWA and the commissioner erroneously suggests that the only way to pursue a claim for review reopening when there has been an award or agreement of temporary injury, which develops into a permanent condition is, if there is already a finding or award of permanent disability in the original arbitration decision or agreement for settlement. This is illogical and would result in the reversal of longstanding Supreme Court precedent such as *beier winn*; *Beier Glass Co.* and *Rose* by the commissioner. The Iowa Workers' Compensation Commissioner does not have the authority to overrule court precedent. *Winn v. Pella Corp.*, File No. 5027519, (*Work Comp. App. Dec. 10/16/2016*). Therefore, the District Court was correct in reversing the commissioner's appeal decision and remanding the case to the commissioner for hearing.

For example, under the commissioner's decision, there will be no more review reopening cases involving scheduled member disability that develops into a body as a whole disability since, the commissioner's decision would require an initial award of industrial disability benefits before a party could seek industrial disability benefits through review reopening effectively overruling *Kohlhaas*, 777 N.W. 2d at 392 – 393 and *Mortimer v. Fruehauf Corp*, 502 N.W. 2d 12 (Iowa 1993). (*Review reopening allowed for psychological condition caused or aggravated by a scheduled injury*). Also, there will be no review reopening for permanent disability benefits following an award or agreement for temporary benefits when claimant's

economic situation is worsened without a deterioration in physical capacity overruling Kohlhaas, 777 N.W. 2d at 392 and Blacksmith v. All-American Inc., 290 N.W. 2d 348 (Iowa 1980). And finally, no review reopening seeking temporary or permanent disability benefits after an initial award of medical benefits only. Beier Glass Co., 329 N.W. 2d 280 (Iowa 1983).

In Kohlhaas, the original injury was a scheduled injury to the claimant's foot. The petition for review reopening sought industrial disability benefits. The Court found that the petition for review reopening was not barred on grounds of res judicata, even though there was originally no finding of industrial disability. Kohlhaas, 777 N.W. 2d at 393.

While Iowa Code §86.14(2) “does not provide an opportunity to relitigate causation issues that were determined in the initial award or settlement.” Kohlhaas, 777 N.W. 2d at 393. The causation issue is whether or not there was an injury that was caused by work, that is, an injury arising out of and in the course of employment. Beier Glass Co., 329 N.W. 2d at 286.

If there was an award that found no injury arising out of and in the course of employment entitling a worker to any benefits, res judicata would bar a claim on review reopening. However, the broad language of the statute only requires “an award...of benefits”. Iowa Code §85.26(2) (2021).

Ms. Green is not relitigating causation issues. The causation issue is not before the Court. The original arbitration decision establishes causation that Ms. Green sustained an injury to her right shoulder, back, neck and head arising out of and in the course of employment so that she is entitled to medical and temporary benefits. Thus, causation is established in favor of review reopening. *Iowa Code* §85.26(2) (2021). Ms. Green simply seeks additional medical and permanency benefits because her original injuries have gotten worse since the arbitration hearing. Thus, under the plain language of the statute and Iowa Supreme Court precedent, she is entitled to review reopening. *Iowa Code* §§85.26(2) and 86.14(2); *Kohlhaas, supra, Beier Glass Co., supra, Rose, supra.*

Ms. Green has satisfied the prerequisite elements to proceed with a petition for review reopening: (1) A previous award which established employer-employee relationship; and (2) The previous award established an injury arising out of and in the course of employment; and (3) An award for payment of benefits under Chapter 85; (2). *Beier Glass Co., 329 N.W. 2d at 286 – 287; Iowa Code* §§85.26(2) and 86.14(2) (2021).

Therefore, res judicata does not bar Ms. Green's petition for review reopening seeking permanency and medical benefits. The District Court correctly reversed the commissioner's decision to the contrary because it is the product of

reasoning that is so illogical as to render it irrational and legally erroneous. *Iowa Code §17A.19(10)(c)(i)(n) (2021)*.

NCIRSWA mistakenly argues that the factual background of *Rose v. John Deere Ottumwa Works*, 247 Iowa 900, 76 N.W. 2d 756 (Iowa 1956) supports its position. NCIRSWA states “importantly, before the claimant filed his review reopening petition [in *Rose*], there was no award or settlement agreement and instead, the weekly benefits ‘made for, and on the assumption, there was only, temporary disability. *Id.*” (NCIRSWA Brf., p. 32). It is erroneous to suggest that this was important to the Court’s Decision in *Rose*. In *Rose*, the employer voluntarily paid medical and temporary benefits. *Rose*, 76 N.W. 2d at 758. The Court in *Rose* states:

“There is no suggestion this statute is not applicable here on the ground the compensation for the eleven (11) weeks, five (5) days may not have been paid under an award or agreement for settlement and such circumstance is entitled to no consideration. Of course, there may have been an award or settlement agreement not shown by the record.” *Rose*, 247 Iowa, 904 – 905, 76 N.W. 2d 758 – 759.

Thus, it is irrelevant if there is an award or agreement for settlement. It is sufficient for review reopening if benefits were voluntarily paid. *Id.* The statute allowing review reopening is applicable where there is some change in the employee’s condition as a result of the injury, since the award or payment was made. *Rose*, 247 Iowa, 905, 76 N.W. 2d 759.

Thus, review reopening “depends upon the condition of the employee found to exist subsequent to the date of the award under review.” *Id.* The Court in Rose declared “that increased incapacity of the employee, due to the original injury, subsequent to the making of the first award, entitles the employee to additional compensation under such statutes as Iowa Code §86.34¹”:

“The clear intent of the statute in such cases is that the injured employee shall be entitled to compensation for his permanent disability notwithstanding the fact that he may in the early stages of his injury have been granted an award only for temporary disability or may have been paid compensation voluntarily by his employer, ***. Rose, 247 Iowa 906, 76 N.W. 2d at 759 – 760.

Review reopening is appropriate where compensation is paid for temporary disability from a work injury, and it later develops that permanent partial disability results from the injury and an additional award may be made under Iowa Code §85.26(2) (2021). Rose, 247 Iowa 906, 76 N.W. 2d at 759.

Thus, Rose reveals the error of the commissioner that there must first be an award of permanency benefits before there can be a review reopening seeking increased permanency benefits. All that is required under Rose is an initial award or payment of benefits and proof of a worsening of Ms. Green’s injury so that her condition morphed from a temporary condition to a permanent condition. Summary judgment on res judicata of causation is not appropriate to foreclose a review

¹ Iowa Code §86.34 is the predecessor of Iowa Code §85.26(2).

reopening without resolution of the factual issue as to whether Ms. Green's condition has deteriorated so that she is entitled to permanency benefits based upon the treatment and medical information subsequent to the arbitration decision in this case.

Since the initial decision in this case awarding medical and temporary benefits will support a petition for review reopening under Iowa Code §§85.26(2) and 86.14(2). The District Court was correct in finding that the commissioner erred as a matter of law in granting NCIRSWA's Motion for Summary Judgment based on res judicata on causation. The statutes and case law specifically allow a claimant to seek permanent disability benefits on review of an initial award or medical or temporary benefits only. *Iowa Code §§85.26(2) and 86.14(2); Kohlhaas, Supra and Beier Glass Co., Supra.*

In review reopening proceedings, the commissioner is simply to determine whether there is, in fact, a change in Ms. Green's condition that "warrants an end to, diminishment of, or increase of compensation. *Iowa Code §§85.26(2) and 86.14(2).* Ms. Green's petition for review reopening is not based upon the same facts as those previously considered in the original arbitration decision, nor is it a "mere difference of opinion of experts". *Kohlhaas, 777 N.W. 2d at 393.* We are not relitigating whether there is an injury caused by Ms. Green's work activities. The issue before the Court is whether her injuries have deteriorated from temporary disability to a permanent disability.

The District Court was correct when it found that the commissioner's conclusion that the initial award finding Ms. Green had no permanent disability renders it incapable of being increased is illogical and the conclusion that Ms. Green is precluded from bringing a review reopening claim is erroneous. (App. pp. 187 – 189). Likewise, the District Court correctly found illogical the commissioner's decision that res judicata barred Ms. Green's review reopening. (Id.) To deny review reopening solely on the extent of the injuries years ago, not on causation, would deny any possibility that the work injuries could increase disability. (App. p. 212).

NCIRSWA mistakenly relies on a number of unpublished opinions. These unpublished opinions do not involve motions for summary judgment or res judicata on causation. The District Court Decision should be affirmed.

NCIRSWA mistakenly cites *Hallett v. Bethany Life Communities, No. 13-1591, 2014 WL 4230218 (Iowa Ct. App. Aug. 27, 2014)* to argue that Ms. Green is simply trying to rehash the evidence previously submitted. *Hallett* does not stand for that proposition. Instead, *Hallett's* Petition for Review Reopening was dismissed because she did not carry her burden of proof to show a change in her condition caused by her injury as a prerequisite to receiving additional compensation. After a hearing on the petition for review reopening, the commissioner in *Hallett* found the claimant's permanent disability could have been the result of preexisting conditions

unrelated to work. Also, claimant admitted that her neck condition remained basically unchanged since the time of the arbitration hearing. The Court found in Hallett that the commissioner's decision that Hallett's functional abilities had not changed since the time of the original arbitration hearing and that any change in condition were not caused by Hallett's work injury were supported by substantial evidence.

Furthermore, the decision in Hallett was that the claimant failed to carry her burden to prove a change in her condition after a hearing on the merits not that Defendants were entitled to summary judgment on res judicata on causation. Thus, Ms. Green is entitled to a hearing on the merits.

Likewise, NCIRSWA mistakenly relies on Kirby v. Yeoman & Co., No. 03-0542, 2004 WL 434066 (Iowa Ct. App. Mar. 10, 2004). First, Kirby was decided before Kohlhaas which removed the requirement that the change in condition not be anticipated at the time of the original hearing in order to support review reopening. Kirby sought review reopening claiming an increase in industrial disability because her accommodated employment ended. The issue in Kirby was whether the deputy's initial decision discounted the award because of the accommodated position provided by the employer. The Court in Kirby reaffirmed that a review reopening proceeding may be had if there is a change in economic condition without proof of change of physical condition. Also, industrial disability is the product of many

factors, one of which is functional disability stemming from industrial injury. McSpadden v. Big Ben Coal Co., 288 N.W. 2d 181, 192 (Iowa 1980); Blacksmith v. All-American, Inc., 290 N.W. 2d 348, 350 (Iowa 1980). However, the Court in Kirby said that since employer accommodations are not a factor in determining industrial disability, and there was no showing that accommodations resulted in a reduction of the initial disability determination, Kirby was not entitled to an increase in benefits. Kirby has nothing to do with summary judgment based on res judicata on causation.

Kirby is unlike Ms. Green's case because employer accommodation is not an issue. Furthermore, Ms. Green produced evidence of a deterioration of her physical condition arising from her work injuries subsequent to the arbitration hearing.

NCIRSWA also erroneously relies on Verizon Business Network Services v. Mackenzie, No. 11-1845, 2012 WL 4899244 (Iowa Ct. App. Oct. 17, 2012) to support its argument that Ms. Green's claim is barred because there is a difference of opinion between experts regarding her percentage of disability. Verizon does not help the defendant because that case involved a claim for review reopening because critical facts allegedly existed but were unknown and could not be discovered through reasonable diligence at the time of the prior hearing. Summary judgment on res judicata on causation was not an issue.

In Verizon, the Court stated that in review reopening, the commissioner must accept the former award as an assessment of claimant's physical condition and economic reality at the time it was issued and not attempt to evaluate now the conditions that existed back then. The issue for the commissioner in review reopening is whether there is in fact, a change that warrants end to, diminishment of, or increase of compensation previously awarded. *Iowa Code §86.14(2)*.

In Verizon, claimant's physical condition had not worsened, nor had her earning capacity changed since the initial arbitration decision. Also, unlike Ms. Green, the claimant in Verizon, claimed her back pain had actually improved since the initial arbitration and leg numbness remained unchanged. The claimant in Verizon failed to meet her burden to prove a change in her condition.

In this case, Ms. Green has submitted medical evidence that the condition in her right shoulder, back, neck and headaches have deteriorated since the initial arbitration award. Ms. Green is not asking the commissioner to re – evaluate the initial arbitration decision which was the case in Verizon. Instead, the initial arbitration decision sets a baseline from which to determine whether she is entitled to review reopening based upon a change in her condition. *See Kohlhaas, 777 N.W. 2d at 392 – 393.*

Finally, NCIRSWA erroneously rely on Stice v. Consolidated Indiana Coal Co., 228 Iowa 1031, 291 N.W. 452 (1940). Stice does not involve summary judgment on res judicata.

In Stice, there was an agreement that fixed the date of commencement of disability and the rate of compensation but left the period of disability and amount of compensation, other than the weekly rate, undetermined. Stice, 291 at 453. The claimant filed a petition for review reopening and after hearing, established that claimant's temporary disability did not extend beyond that which was paid and that he had a permanent partial impairment of 15% to his leg. Neither party appealed. Stice, 291 N.W. at 453 – 454. Claimant filed a second petition for review of the second award. The Court in Stice found that the earlier review reopening decision could be modified if evidence showed a change in condition in the claimant, since that award. Stice, 291 N.W. at 454 – 455. The Court went on to state that under the statute, the decision on review reopening depends upon the condition of the employee subsequent to the award being reviewed. Stice, 291 N.W. at 456. The Stice arbitration decision on the second review reopening in Stice, found that claimant failed to prove a change of condition after the first review reopening decision. Stice, 291 N.W. at 454.

Therefore, the District Court correctly reversed the commissioner's decision granting summary judgment in favor of NCIRSWA on the basis of res

judicata because the commissioner's interpretation of law and application of law to facts is illogical, irrational and wholly unjustifiable. *Iowa Code §17A.19(10)(c)(i)(l)(m) (2021)*.

CONCLUSION

Alevia Green respectfully requests that the Court affirm the District Court's reversal of the commissioner's decision which granted summary judgment in favor of North Central Iowa Regional Solid Waste Agency and IMWCA and remand the case for a hearing on the merits on Alevia Green's Petition for Review Reopening all at Appellants' cost.

REQUEST FOR ORAL ARGUMENT

Alevia Green respectfully requests to be heard in oral argument.

RESPECTFULLY SUBMITTED,

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ATTORNEY'S COST CERTIFICATE

I hereby certify that the cost of printing the foregoing Proof Brief and Request for Oral Argument was the sum of \$0.

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This brief complies with the typeface requirements and type – volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or, because this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 pt. font and contains 8,546 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that he electronically filed the foregoing Final Brief on October 18, 2021, via EDMS.

The undersigned further certifies that on October 18, 2021, the foregoing Final Brief was served via EDMS and email on all parties of record.

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