BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CHRISTOPHER WILLIAMS, Claimant, vs. CHUNKEE, INC. a/k/a CATCH-UP LOGISTICS, Employer, and AMERICAN HOME ASSURANCE INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5033820 APPEAL DECISION Head Notes: 1402.40; 1402.60; 1803 2905, 2907

Claimant Christopher Williams appeals from a review-reopening decision filed on August 28, 2018. Defendants, Chunkee, Inc. a/k/a Catch-up Logistics, employer, and its insurer, American Home Assurance Insurance Company, respond to the appeal. The case was heard on April 17, 2018, and it was considered fully submitted in front of the deputy workers' compensation commissioner on May 8, 2018.

On February 17, 2004, claimant sustained a work-related injury to his right shoulder when his hand slipped off of a heavy object he was pushing. In the underlying arbitration decision, filed on September 6, 2011, it was found claimant established he sustained permanent impairment as a result of the work injury. The deputy commissioner found claimant sustained 70 percent industrial disability, which entitled claimant to receive 350 weeks of permanent partial disability (PPD) benefits commencing on January 5, 2007. The September 6, 2011, arbitration decision was affirmed on appeal to the commissioner on January 23, 2013

On March 6, 2017, claimant filed a review-reopening petition which proceeded to hearing on April 17, 2018.

On August 28, 2018, the deputy workers' compensation commissioner issued a decision, finding claimant was entitled to review-reopening against defendants. The deputy commissioner found claimant carried his burden of proof to establish he experienced a physical change of condition following the September 6, 2011, arbitration

decision. More specifically, the deputy commissioner found claimant sustained a change of physical condition in the right shoulder and right hip. Based on the finding of a change in condition, the deputy commissioner awarded claimant an additional ten percent industrial disability. The deputy commissioner found claimant was barred from asserting a mental health claim. The deputy commissioner also found claimant failed to carry his burden of proof to establish entitlement to payment by defendants for unauthorized medical expenses. Lastly, the deputy commissioner ordered defendants to pay claimant's costs of the review-reopening proceeding in the amount of $1,606.59.

On appeal, claimant asserts the deputy commissioner erred in finding claimant is not permanently and totally disabled. Claimant asserts the deputy commissioner erred in declining to accept the permanent restrictions assigned to claimant's right hip. Claimant asserts the deputy commissioner erred in finding claimant reached maximum medical improvement (MMI) on August 14, 2016. Claimant asserts the deputy commissioner erred in finding claimant could not pursue a mental health claim. Claimant asserts the deputy commissioner erred in finding claimant failed to prove entitlement to reimbursement or payment of various medical expenses. Lastly, claimant asserts the deputy commissioner erred in awarding $1,500.00 for the cost of Sunil Bansal, M.D.'s IME report.

Defendants assert the review-reopening decision should be affirmed in its entirety.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

I performed a de novo review of the evidentiary record and the detailed arguments of the parties. Pursuant to Iowa Code sections 17A.5 and 86.24, the proposed review-reopening decision filed on August 28, 2018, is affirmed in part, and modified in part.

I find the deputy commissioner provided a well-reasoned analysis of all issues raised in the review-reopening proceeding. I affirm the deputy commissioner's findings of fact and conclusions of law pertaining to those issues. I affirm the deputy commissioner's finding that claimant is entitled to review-reopening against defendants in this matter because I affirm the deputy commissioner's finding that claimant carried his burden of proof to establish he sustained a physical change of condition to his right shoulder and hip following the September 6, 2011, arbitration decision. I affirm the deputy commissioner's rejection of Dr. Bansal's opinion that claimant requires permanent work restrictions as a result of the sequela injury to claimant's right hip. I affirm the deputy commissioner's finding that claimant's mental health claim is barred as res judicata. I affirm the deputy commissioner's finding that claimant reached MMI on August 14, 2016. I affirm the deputy commissioner's finding that claimant's industrial disability increased from 70 percent to 80 percent following the filing of the arbitration decision on September 6, 2011. I affirm the deputy commissioner's finding that claimant is entitled to receive reimbursement from defendant for a portion of the cost of

Dr. Bansal's IME report, however, I modify the amount awarded from $1,500.00 to $3,000.00. I affirm the deputy commissioner's order that defendant pay claimant's costs of the review-reopening proceeding in the amount of $106.59.

I affirm the deputy commissioner's findings, conclusions and analysis regarding those issues with the following additional analysis:

In the underlying arbitration action, claimant established he sustained a compensable right shoulder injury on February 17, 2004. Claimant now asserts he sustained a worsening of that work-related injury such that the September 6, 2011, arbitration decision should be reconsidered and additional benefits awarded. Specifically, claimant asserts subsequent surgical interventions worsened his right shoulder condition and produced a sequela injury to his right hip. Claimant further asserts a subsequent work-up demonstrated a material aggravation of his underlying depression and anxiety. As I have affirmed the deputy commissioner's finding that claimant carried his burden of proof to establish a physical change of condition occurred in claimant's right shoulder and hip following the September 6, 2011, arbitration decision, this appeal decision will focus on the alleged material aggravation of claimant's mental health injury.

Claimant filed a petition in arbitration in August 2010, with a date of injury of February 17, 2004, indicating claimant sustained an injury to his right shoulder when a heavy box fell onto his right shoulder. As a result of that injury, claimant underwent several surgical procedures. Despite multiple surgeries, claimant continued to experience significant pain.

The case proceeded to an evidentiary hearing in August 2011. Between the date of injury and the evidentiary hearing, claimant received treatment for anxiety and depression, which he related to his right shoulder injury. Despite testifying to his depression at the evidentiary hearing and during his deposition, asserting in interrogatories that the depression was related to his work injury, and reporting a causal connection between his depression and his work injury to multiple physicians and his vocational expert, claimant did not assert a mental health component to his injury at hearing.

The evidentiary record submitted at the time of the August 2011 hearing included numerous medical records in which claimant sought treatment for substance abuse, anxiety, and depression. Additional medical records were submitted as part of the review-reopening proceeding to support a finding that claimant's mental health injury was known or knowable to claimant at the time of the August 2011 hearing.

On September 13, 2005, claimant presented to Genesis Health Group with complaints of depression. (Arb. Ex. 10, p. 4) The medical record indicates claimant had recently started taking the antidepressant medication Lexapro. The medical record associates claimant's symptoms of depression with his work injury, and the secondary effects thereof. It is noted claimant was "very down and depressed regarding his

prognosis and his shoulder continues to have problems. His concentration is decreased. Appetite is decreased." Claimant reported suicidal ideations. The acting physician diagnosed claimant with "Adjustment disorder with depression related to [Right shoulder pain, related to work injury]." (Id.) At claimant's request, the acting physician discontinued claimant's Lexapro in favor of Effexor and Xanax. (Id.)

On February 10, 2006, Mr. Williams was hospitalized following an attempted overdose. (See Arb. Ex. 16, pp. 1-5) It is noted claimant's parents found him unconscious and unresponsive. (Arb. Ex. S, p. 102) The ambulance records document claimant had experienced a devastating divorce. (Arb. Ex. 16, p. 3) Previous medical records provide claimant's wife had become frustrated with his inability to work and had filed for divorce. (See Arb. Ex. 10, p. 4)

Days later, on February 15, 2006, claimant was again hospitalized following an attempted overdose. (Arb. Ex. R, pp. 74-77; Arb. Ex. S, pp. 102-03) Again, the medical records provide claimant had been depressed over his divorce. It is noted claimant had been off work for approximately 30 months due to the right shoulder injury. (Arb. Ex. R, p. 74) The acting physician recommended a psychological evaluation and admission to an inpatient psychiatric facility. (Arb. Ex. R, p. 75)

Gary Ludwig, Ph.D. conducted a psychological evaluation of claimant during claimant's hospitalization. (Arb. Ex. R, p. 76) Claimant reported a one-year history of a depressed mood. (Id.) After conducting his evaluation, Dr. Ludwig discussed the possibility of psychiatric hospitalization with claimant. Claimant became agitated and uncooperative. He reported he would not be cooperative with treatment. Security was eventually called, and Dr. Ludwig initiated the involuntary hospitalization process. (Arb. Ex. R, p. 77)

Thereafter, claimant was transferred to Trinity Medical Center for persistent suicidal ideation. (Arb. Ex. S, p. 102) The medical staff obtained a list of stressors that had been troubling claimant, which included the work injury and resulting disability. It is noted claimant was pessimistic about his ability to return to the workforce. Claimant provided the small compensation he receives from workers' compensation made it impossible for him to continue living his previous lifestyle. Claimant recalled that shortly after his first surgery he developed difficulty falling asleep and staying asleep with depressed affect and anhedonia. (Arb. Ex. S, p. 102) It is noted claimant had been prescribed antidepressant medication several months prior. It is also noted that claimant had suicidal ideations on occasion, and he would use alcohol and cocaine in an attempt to make himself feel better. (Id.) Medical stressors, unemployment, financial stressors, and recent divorce were listed as claimant's psychosocial and environmental issues. (Arb. Ex. S, p. 104)

Claimant presented for a pre-operative clearance evaluation at Genesis Medical Center on March 22, 2006 or March 23, 2006. (See Arb. Ex. 10, p. 1) After discussing claimant's medical history, the record provides, "He has significant pain in his shoulder that has led to some problems with depression." (Id.) The medical record summary

provides, "He also has [...] adjustment disorder with depression related to his shoulder injury." (Arb. Ex. 10, p. 3) The medical record indicates claimant was still being prescribed Effexor and Xanax for symptoms of depression and anxiety. (Id.)

On August 6, 2007, claimant presented to Trinity Medical Center/Robert Young Center requesting treatment for his cocaine use. (Joint Exhibit 9, p. 6) Claimant reported he was experiencing "a lot of depression." Claimant's inability to work due to his right shoulder injury was listed as one of claimant's stressors. (Id) The examining social worker diagnosed claimant, in part, with major depressive disorder, recurrent, and generalized anxiety disorder. (Id.) She recommended claimant undergo a psychiatric evaluation. (JE9, p. 12) There are no medical records in evidence to show whether claimant followed through with the social worker's recommendations.

Emergency Room records demonstrate claimant continued to take Xanax for anxiety in February 2008. (Arb. Ex. R, p. 78; Jt. Ex 5, p.1)

In August 2008, claimant was hospitalized following an apparent overdose. (Arb. Ex. N, pp. 57-64) The medical record notes claimant had been admitted to Illini Hospital several times with similar problems. (Arb. Ex. N, p. 57) Claimant's drug screen came back positive for cocaine and benzodiazepines. (Id.) Claimant was put in an iatrogenic coma. (Arb. Ex. N, p. 58) The medical records provide claimant had a history of substance abuse and depression. (Arb. Ex. N, p. 61) Claimant signed out against medical advice on August 7, 2008. (Id.)

Later that day, claimant was transferred to psychiatric intensive care in accordance with a substance abuse petition filed by his family. (Arb. Ex. N, p. 62) Claimant's then current psychosocial stressors included health issues, living with his parents, undergoing multiple surgeries, and caring for his sister's children. (Id.) Claimant reported that he had previously received outpatient treatment at Robert Young Center, but no in-patient psychiatric treatment. He was taking Xanax at the time. (Id.) On examination, claimant's speech was slurred, his attitude was described as belligerent, and it is noted claimant yelled throughout the course of the interview. (Arb. Ex. N, p. 63)

Claimant presented for a hearing, pursuant to the substance abuse petition, on August 12, 2008. (See Arb. Ex. N, pp. 63, 64) The magistrate agreed with the treatment plan developed by Genesis Medical Center, and ordered claimant to attend outpatient treatment at RICCA. (Arb. Ex. N, p. 64)

Upon admission to RICCA, claimant reported problems with anxiety, depression, and substance abuse. (Arb. Ex. O, p. 65) In total, claimant attended only two group sessions at RICCA. (Id.) According to their notes, claimant called on September 29, 2008, and reported he was in the hospital. He did not call or present for group therapy thereafter. Claimant's discharge summary provides, "Client may require a higher level care to deal with multiple problems." (Id.)

Medical records provide claimant continued to take Effexor in September 2008. (Arb. Ex. R, p. 87) Medical records from November and December 2008 note claimant was taking Celexa and Xanax for anxiety and depression. (See Arb. Ex. R, pp. 89-91; JE14)

Claimant continued to experience depression throughout 2009. Medical records from Genesis reveal claimant was taking Celexa in January 2009. (Arb. Ex. Q, p. 71) Claimant testified to experiencing depression at his deposition in April 2009. (Arb. Ex. V, Deposition Transcript, page 24) Medical records from Hampton Township Clinic provide claimant was referred to "RYC," believed to be Robert Young Center (See JE9, p. 14; "Client's RYC history"), for depression on November 10, 2009. (Arb. Ex. 22, p. 9) Medical records from UIHC provide that claimant continued to receive treatment for his depression in December 2009. (Arb. Ex. 11, p. 3)

The evidentiary record contains few medical records from 2010. The majority of claimant's 2010 medical records come from Hampton Township Clinic. (Arb. Ex. 22) Unfortunately, all of the medical records are handwritten and illegible. (See Id.)

Claimant complained of anxiety and depression in the weeks and months leading up to the August 2011 evidentiary hearing. On April 15, 2011, claimant presented to Trinity Medical Center reporting headache, dizziness, depressed mood, anxiety, and memory difficulty. (Arb. Ex. S, p. 111) He was prescribed Xanax for anxiety. (Arb. Ex. S, p. 113) In May 2011, it is noted claimant was frustrated with financial issues and anxiety. (Arb. Ex. T, p. 116) His primary care physician wrote him a script for Lexapro on May 4, 2011. (Arb. Ex. T, p. 115) In June 2011, claimant had an appointment with his vocational consultant, Roger Kromphardt. Claimant reported to Mr. Kromphardt that he experienced depression because of his shoulder injury. (Arb. Ex. 5, p. 1)

Again, despite indicating on numerous occasions that he considered his mental health conditions to be associated with his work injury, claimant did not allege a mental health injury in the original arbitration proceeding. As such, the deputy commissioner did not make any findings related to claimant's mental health. The deputy commissioner found claimant was entitled to 70 percent industrial disability as a result of his right shoulder injury only.

Claimant sought to have his workers' compensation case reopened in March 2017, asserting his February 2004 work injury had caused him additional permanent disability subsequent to the August 2011 evidentiary hearing. As part of his argument, claimant asserted that his mental health conditions had been materially aggravated at some point after the August 2011 evidentiary hearing. Defendants asserted claimant's mental health claim was barred by the principles of res judicata and judicial estoppel. The matter was heard by a deputy workers' compensation commissioner in April 2018, and on August 28, 2018, the deputy commissioner filed her review-reopening decision finding, in part, claimant could not bring a claim for his anxiety and depression as the conditions predated the arbitration decision in this case, and the mental health claim is therefore barred by the principles of res judicata.

Claimant now appeals the deputy commissioner's review-reopening decision. Among other issues addressed above, claimant asserts the deputy commissioner erred in finding his mental health claim is barred by the principles of res judicata.

Claimant first asserts on appeal the same argument he put forth in his post-hearing brief, which is that defendants waived the defense of res judicata by not pleading it as an affirmative defense in the hearing report. Instead, under the "other issues" section of the hearing report, defendants asserted the affirmative defense of judicial estoppel. (See Hearing Report, p. 2)

It is important to note the doctrines of res judicata and judicial estoppel are different doctrines. Judicial estoppel prohibits a party from asserting a position or argument contrary to a position or argument it has successfully advocated before a court or administrative agency in a prior legal proceeding. Winnebago Industries, Inc. v. Haverly, 727 N.W.2d 567, 573 (Iowa 2006) The main objective of applying judicial estoppel is to protect the integrity of the judicial process by preventing deliberately inconsistent and potentially misleading assertions from being urged in succeeding tribunals or proceedings. Id. Because judicial estoppel is intended to protect the integrity of the fact-finding process by administrative agencies and courts, it may properly be raised by courts, even on appeal, on their own motion. See Tyson Foods, Inc. v. Hedlund, 740 N.W.2d 192 (Iowa 2007)

A fundamental feature of judicial estoppel is the requirement of proof that the inconsistent position has been successfully asserted in a prior decision. Wilson v. Liberty Mut. Group, 666 N.W.2d 163, 166 (Iowa 2003) (quoting Vennerberg Farms, Inc. v. IGF Ins. Co., 405 N.W.2d 810, 814 (Iowa 1987)) Judicial estoppel is not applicable to this case as claimant's mental health claim was not successfully or unsuccessfully asserted in the arbitration decision. There is no risk of inconsistent or misleading results.

Res judicata, on the other hand, is a generic term that includes claim preclusion and issue preclusion. Iowa Coal Mining Co. v. Monroe County, 555 N.W.2d 418, 440-41 (Iowa 1996) It prevents a party from relitigating a claim or issue that has already been determined by a final judgment. See George v. D.W. Zinser Co., 762 N.W.2d 865, 868 (Iowa 2009) Res judicata aims to protect the finality of a court's judgment and to preserve scarce judicial resources by preventing the repetitive relitigation of claims that were, or should have been, decided at a prior trial. Claim preclusion, which is the focal point of this decision, prevents piecemeal litigation by requiring a party to try an entire claim or defense in the case at trial. To that end, claim preclusion applies not only to matters the earlier action actually determined but also to relevant matters that could have been determined had they been raised. Penn v. Iowa State Board of Regents, 577 N.W.2d 393, 398 (Iowa 1998)

Defendants confused the concepts of res judicata and judicial estoppel at the time of the review-reopening hearing. The applicable doctrine in this matter is res judicata, not judicial estoppel.

Regardless of the fact defendants asserted the wrong doctrine, it is clear from the hearing report and transcript that claimant was aware of defendants' intent to dispute whether claimant could assert a mental health claim for the first time on review-reopening. (See Hearing Report; see also Hearing Transcript, pages 7-15) Claimant cannot claim he was unfairly surprised by the issue of res judicata when it is well established that the principles of res judicata apply in review-reopening matters. Moreover, it cannot be said that defendants waived the defense of res judicata insomuch as it relates to the findings of the underlying arbitration decision. The Iowa Supreme court has held that the principles of res judicata apply in review-reopening proceedings:

> Although we do not require the claimant to demonstrate his current condition was not contemplated at the time of the original settlement, we emphasize the principles of res judicata still apply - 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. As this court has explained,
>
> A contrary view would tend to defeat the intention of the legislature [[:] ... "The fundamental reason for the enactment of this legislation is to avoid litigation, lessen the expense incident there to, minimize appeals, and afford an efficient and speedy tribunal to determine and award compensation under the terms of this act."

Kohlhaas v. Hog Slat, Inc., 777 N.W. 2d at 393.

In Kohlhaas, the doctrine of res judicata was discussed to form the baseline from which this agency must determine whether there has been an increase or change in the level of impairment. As such, it is not necessary for defendants to plead res judicata as an affirmative defense with respect to the findings of the underlying arbitration decision. The court has instructed this agency against reevaluating an injured worker's level of physical impairment or earning capacity if all facts and circumstances were known or knowable at the time of the original action.

Review-reopening proceedings address a different period of time than an arbitration proceeding. The original arbitration decision, which was affirmed on appeal, is res judicata as to claimant's original injury. The arbitration decision establishes that a work injury occurred to the right shoulder, and that claimant's condition at that point in time, was caused by the work injury. A different question is presented, and a different period of time is examined, in a review-reopening proceeding. It is well established that a review-reopening proceeding cannot re-litigate issues already determined in the arbitration phase. The arbitration decision is final as to all issues that were known or knowable at the time.

Given the above analysis, and noting this is a review-reopening proceeding, I affirm the deputy commissioner's finding that the doctrine of res judicata is applicable to the matter at hand.

The doctrine of res judicata includes both claim preclusion and issue preclusion. Colvin v. Story County Board of Review, 653 N.W.2d, 345, 348 (Iowa 2002). The general rule of claim preclusion provides a valid and final judgment on a claim and precludes a second action on that claim or any part of it. The rule applies not only as to every matter which was offered and received to sustain or defeat the claim or demand, but also as to any other admissible matter which could have been offered for that purpose. Claim preclusion, as opposed to issue preclusion, may foreclose litigation of matters that have never been litigated. It does not, however, apply unless the party against whom preclusion is asserted had a "full and fair opportunity" to litigate the claim or issue in the first action. A second claim is likely to be barred by claim preclusion where the "acts complained of, and the recovery demanded are the same or where the same evidence will support both actions." A plaintiff is not entitled to a second day in court by alleging a new ground of recovery for the same wrong. Arnevik v. Univ. of Minn. Bd. of Regents, 642 N.W.2d 315, 319 (Iowa 2002)

A party is not entitled to bring a second action simply by alleging a new theory of recovery for the same wrong. An action between the same parties involving the same claim that has been adjudicated by the court is final as to all issues that could have been presented to the court. Woods v. Young, 732 N.W.2d 39 (Iowa 2007)

Larson's Workers' Compensation Law provides:

> If the claimant sustained injuries at the time of the original action which he or she knew about at the time of the claim but for some reason failed to include in the claim, the claimant cannot for the first time assert disability from these injuries in a petition based on "change of condition." But if the claimant does not know of the other injuries at the time of the original claim, he or she is not barred from asserting them in the reopening petition.

Larson's, Section 131.03(2)(b), p. 131-35.

When considering claim preclusion, courts look to three factors: (1) whether the parties in the first and second action were the same; (2) whether the claim in the second suit could have been fully and fairly adjudicated in the prior case; and (3) whether there was a final judgment on the merits in the first action. Pavone v. Kirke, 2011 WL 6129356 (Iowa 2011)

Claimant argues that his pre-existing mental health conditions were not materially aggravated by his right shoulder injury prior to August 2011. Claimant essentially asserts that the treatment he received related to his anxiety and depression prior to the August 2011 evidentiary hearing would not establish that he had suffered permanent

disability or permanent aggravation of a pre-existing condition when the case was originally heard in August 2011. In this respect, claimant appears to assert a sequela injury to his mental health occurred subsequent to the arbitration proceeding. I disagree.

The evidentiary record supports a finding that claimant knew he was suffering from anxiety and depression, which he related to the work injury, prior to the original evidentiary hearing. The evidentiary hearing occurred on August 9, 2011. Medical records show claimant was suffering from anxiety and/or depression as far back as 1998. (See Arb. Ex. R, p. 73) In September 2005, claimant presented to Genesis Health Group with symptoms of depression. (Arb. Ex. 10, p. 4) Medical records at the time associated claimant's symptoms of depression with his work injury, and the secondary effects thereof. (Id.) Sadly, claimant twice attempted suicide in February 2006. (See Arb. Ex. 16, pp. 1-5; Arb. Ex. R, pp. 74-77) In a mental health evaluation conducted in the days that followed his suicide attempt, claimant reported a one-year history of a depressed mood. (Arb. Ex. R, p. 76) At a pre-operative clearance appointment in March 2006, medical records note claimant had significant pain in his shoulder that led to some problems with depression. (Arb. Ex. 10, p. 1) He was diagnosed with adjustment disorder with depression related to his shoulder injury. (Id.) As discussed in detail above, claimant continued to treat for anxiety and depression between 2007 and August 2011. (See JE9, p. 6; Arb. Ex. N, pp. 61-64; Arb. Ex. 11, p. 3; Arb. Ex. T, pp. 115-116)

Moreover, claimant definitively associated his mental health conditions with his work injury in answers to interrogatories provided in discovery, as well as in his discussions with his vocational specialist just prior to the arbitration hearing. (Arb. Ex. 18, p. 6; Arb. Ex. 5, p. 1) The above information certainly evidences, had the mental health conditions been related to his injury, claimant could have litigated it as a part of his initial arbitration action.

Claimant submitted no evidence comparing his anxiety and depression before and after the August 2011 arbitration hearing. In fact, claimant's counsel specifically asked Dr. Bansal, Richard Kreiter, M.D., and Lawrence Curtiss, ARNP, to assume claimant did not receive any mental health treatment on an ongoing or regular basis between the date of injury and the date of the arbitration hearing. (Ex. 7, p. 2; Ex. 2, p. 3; Ex. 14, p. 1) None of the three expert opinions submitted at the review-reopening hearing address claimant's complaints of anxiety and depression prior to August 2011, however, all three agree claimant's chronic pain – which existed both before and after the August 2011 evidentiary hearing – aggravated his underlying mental health conditions. (Ex. 10, p. 39; Ex. 4, p. 1; Ex. 14, p. 1)

In support of his argument that his mental health condition was not materially aggravated prior to the August 2011 evidentiary hearing, claimant asserts he did not receive mental health treatment on an ongoing or regular basis between the date of injury and the evidentiary hearing. Such an argument is contrary to the medical evidence. Moreover, such an argument ignores the fact claimant has associated his

anxiety and depression with his work injury since at least 2005. (Arb. Ex. 10, p. 4) This is not a situation in which claimant had no knowledge or appreciation for the work-relatedness of his mental health conditions until sometime after the August 2011 evidentiary hearing. See Gosek v. Garmer & Stiles Company, 158 N.W.2d 731, 735 (Iowa 1968). Rather, the matter at hand is similar to the case of Brinck v. Siouxland Mental Health Ctr., wherein the claimant knew of his condition at the time of entering into an agreement for settlement, but failed to assert causation. 924 N.W.2d 536 (Iowa Ct. App. 2018) It is incumbent upon injured workers to assert any and all conditions, known or knowable, related to a work injury at the arbitration level. A party must litigate all matters growing out of its claim at one time rather than in separate actions. See B & B Asphalt Co. v. T.S. McShane Co., 242 N.W.2d 279, 286 (Iowa 1976)

This agency is sympathetic to claimant's mental health issues. However, the principles of res judicata apply in review-reopening proceedings. It is clear from the evidentiary record, including claimant's own testimony, that claimant causally connected his mental health condition to his work injury prior to the August 2011 arbitration hearing. Claimant had the opportunity to litigate his anxiety and depression as part of the arbitration hearing. He did not. As such, his claim for his anxiety and depression is barred by res judicata.

The deputy commissioner did not err in finding that the mental health claim is barred by res judicata because claimant could have litigated the issue at the time of the original arbitration proceeding but did not. Accordingly, I affirm the deputy commissioner's ruling denying claimant's petition for review-reopening with respect to the mental health claim.

The next issue to be determined on appeal is whether the deputy commissioner erred in finding claimant failed to carry his burden of proving defendants are responsible for the medical expenses submitted at hearing under Iowa Code section 85.27. The deputy commissioner's finding that defendants are not responsible for the medical expenses submitted at hearing is modified. I provide the following additional analysis for modification of this finding:

On appeal, claimant asserts entitlement to reimbursement for several medical expenses submitted at hearing. Defendants assert all unpaid medical expenses are related to unauthorized or unrelated medical treatment. Claimant argues defendants' failure to offer any medical care after Sanjay Sundar, M.D., discharged claimant for a failed drug test should be treated as an abandonment of care.

On March 31, 2017, claimant's counsel sent a letter to defendants' counsel requesting additional care for claimant. (Ex. 17, p. 1) More specifically, claimant requested that defendants authorize a new pain management physician. The evidentiary record does not include a response from defendants. The evidentiary record does not include any additional requests from claimant for additional medical care. The evidentiary record does not indicate claimant filed an alternate medical care petition with this agency subsequent to the March 31, 2017, letter.

Claimant's appeal brief only addresses one medical bill for treatment claimant received after March 31, 2017. On April 18, 2017, claimant presented to UnityPoint Health – Trinity Emergency Department for chronic right shoulder pain. (JE4, p. 31) Given that defendants had not scheduled claimant for additional medical treatment, or communicated a denial to claimant, I find that as of claimant's April 18, 2017, appointment with UnityPoint – Trinity, defendants were offering no medical treatment to claimant.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Iowa Code section 85.27; Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975)

However, when an injured worker abandons the statutory framework and seeks unauthorized care, the employer is only held liable for the unauthorized medical expenses if the medical treatment is reasonable and beneficial under the totality of the circumstances, meaning that the unauthorized medical care provides "a more favorable medical outcome than would likely have been achieved by the care authorized by the employer." Brewer-Strong v. HNI Corp., 913 N.W.2d 235, 248 (Iowa 2018) (quoting Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, 206 (Iowa 2010)) The Iowa Supreme Court has referred to this evidentiary standard as a significant burden. Bell Bros., 779 N.W.2d at 206.

In this case, the treatment claimant received at UnityPoint – Trinity Emergency Department was not authorized. As such, claimant bears the burden to establish the treatment received provided a more favorable outcome than could have been achieved by the care authorized by the provider.

At the time of claimant's unauthorized visit, claimant was requesting and seeking authorization for similar treatment through defendants; however, defendants failed to offer any such treatment. I therefore find claimant's treatment at UnityPoint – Trinity Emergency Department, which resulted in prescription medication in an attempt to manage claimant's ongoing symptoms, provided a more favorable outcome than what was being authorized by defendants. I therefore find defendants are responsible for the medical expenses associated with the April 18, 2017, medical appointment at UnityPoint Trinity – Emergency Department.

Claimant also seeks a specific order be issued finding defendants responsible for any outstanding and unpaid medical expenses incurred at the Mayo Clinic. Exhibit EE provides defendants agreed to pay any actual unpaid bills from the Mayo Clinic for authorized treatment. In light of Exhibit EE, and defendants' obligations under Iowa Code section 85.27, further clarification of defendants' responsibility for any past

expenses incurred for causally related medical treatment at the Mayo Clinic is not necessary.

On appeal, claimant asserts the deputy commissioner erred in ordering defendants to pay $1,500.00 of a possible $4,123.00 for the cost of Dr. Bansal's IME report. The deputy commissioner limited claimant's recovery because a portion of Dr. Bansal's report addressed claimant's mental health claim. I agree Dr. Bansal's fees would have been lower had he not spent time addressing claimant's mental health conditions. I affirm the deputy commissioner's finding that defendants should be taxed a portion of Dr. Bansal's fee; however, I modify the amount taxed to defendants. Dr. Bansal did not summarize the vast majority of claimant's mental health records. (See Ex. 10, pp. 1-33) Moreover, less than half of the questions posed to Dr. Bansal required an analysis of claimant's mental health condition. As such, I exercise my discretion and order defendants to pay $3,000.00 as a proportional cost of Dr. Bansal's IME report under 876 IAC 4.33(6).

ORDER

IT IS THEREFORE ORDERED that the review-reopening decision filed on September 27, 2018, is affirmed in part, and modified in part.

Pursuant to the prior arbitration and appeal decisions, permanent disability benefits shall be paid at the weekly rate of three hundred eleven and 26/100 dollars ($311.26).

Defendants shall pay an additional fifty (50) weeks of permanent partial disability benefits commencing on August 14, 2016.

Defendants shall be entitled to credit for all weekly benefits paid to date.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

Defendants shall pay claimant's requested past medical expenses as set forth above.

Pursuant to rule 876 IAC 4.33, defendant shall pay claimant's costs of the review-reopening proceeding as set forth above, and the parties shall split the costs of the appeal, including the cost of the hearing transcript.

Pursuant to rule 876 IAC 3.1(2), defendants shall file subsequent reports of injury as required by this agency.

Signed and filed on this 17th day of February, 2020.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Michael T. Hines Via WCES

Aaron T. Oliver Via WCES