BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

NESIBA FORIC, Claimant, vs. SAM'S CLUB, Employer, and NEW HAMPSHIRE INSURANCE CO., Insurance Carrier, Defendants.	File No. 19001835.02 ALTERNATE MEDICAL CARE DECISION Head Note No.: 2701

STATEMENT OF THE CASE

This is a contested case proceeding under Iowa Code chapters 85 and 17A. Claimant, Nesiba Foric, sustained a work injury in the employ of defendant Sam's Club and now seeks an award of alternate medical care under Iowa Code section 85.27 and rule 876 Iowa Administrative Code 4.48 from that employer and its insurance carrier, New Hampshire Insurance Co. Defendants argue that the current request should be dismissed as they contest liability.

The claim was heard and fully submitted via telephone conference call on January 6, 2020. The record consists of the claimant's exhibits 1 and 2.

The entire hearing was recorded via audio tape, which constitutes the official record of proceedings. Pursuant to standing order of the workers' compensation commissioner, the undersigned has been delegated authority to issue final agency action in the premises.

ISSUES

Whether claimant is entitled to receive care recommended by the authorized treating physician.

FINDINGS OF FACT

The parties agree claimant sustained a work related injury on March 10, 2019. Claimant sought a finding that she was permanently disabled as a result of this injury. Defendants maintained that the fall that occurred on March 10, 2019, resulted in a

temporary disability only. A decision was issued on November 4, 2020, which found claimant had suffered a total and permanent disability arising out of the March 10, 2019, injury.

On September 17, 2020, claimant was seen by an authorized treating physician, Todd Harbach, M.D. (CE 2) Claimant presented with severe low back pain that was aggravated by walking and alleviated by pain medications. Id. In the history section, it states as follows:

> Patient is a 61 year old woman who presents to clinic for a second opinion of her low back pain. She has an interpreter present for her visit. She had a fall last year at work and has been having continued pain since. She describes 80% low back pain with 20% bilateral lower extremity pain, left worse than right. She denies any problems with her bowel or bladder function. Her pain is the same both night and day. Standing and walking, prolonged sitting reproduces her pain. She has had 3 injections with a pain clinic. No routine aerobic activity. She has been to physical therapy and tries to do the exercises at home. History of Stage IV Lymphoma. She has tried several medications including diclofenac and Voltaren for pain relief.

(CE 2)

Dr. Harbach observed claimant walking with an antalgic gait and exhibiting some numbness diffusely of the bilateral lower extremities. Other tests were negative and there was a positive Waddell sign. (CE 2:3) Based on her history and the physical examination, Dr. Harbach recommended an EMG with a possible surgical consult depending on the results of the EMG. (CE 2:3) He went on to write that "her fall aggravated her pre-existing degenerative condition and aggravation should be temporary in nature. We discussed that a fall does not cause degeneration of lumbar disks." (CE 2:3)

CONCLUSIONS OF LAW

Responsibility for medical care is governed by Iowa Code section 85.27, which provides:

> [T]he employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may,

> upon application and reasonable proofs of the necessity therefor, allow and order other care.

In the present case, defendants are not arguing about the reasonableness of the care, but that they are entitled to deny responsibility and thus this case should be dismissed. Under Section 4.48, relief cannot be granted where liability is in dispute.

Claimant argues that liability has been determined previously as it relates to ongoing and permanent disability. The undersigned agrees. In the arbitration decision, the defendants raised the argument that claimant had sustained only a temporary aggravation. They presented the opinion of Dr. Boarini who opined that claimant's lumbar condition was degenerative. (See JE 5:63 of File No. 19001835.01)

The argument that claimant sustained only a temporary aggravation to her low back has been considered and ruled against.

In order to establish the bar under the doctrine of res judicata, the party asserting the bar must establish that the former case involved (1) the same parties or parties in privity; (2) the same cause of action; and, (3) the same issues.

The Iowa Supreme Court has also stated that a party who seeks to preclude another party from presenting a claim based upon claim preclusion must demonstrate that a prior adjudication has occurred in a prior suit between the same parties on the same claim. Israel v. Farmers' Mut. Ins. Ass'n of Iowa, 339 N.W.2d 143, 146 (Iowa 1983).

The Iowa Supreme Court recently discussed the doctrine of res judicata in a workers' compensation case.

> A. Claim preclusion.
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> "[C]laim preclusion" . . . mean[s] that further litigation on the claim is prohibited and "issue preclusion" . . . mean[s] that further litigation on a specific issue is barred.
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> Res judicata as claim preclusion applies when a litigant has brought an action, an adjudication has occurred, and the litigant is thereafter foreclosed from further litigation on the claim. An adjudication in a former suit between the same parties on the same claim is final as to all matters which could have been presented to the court for determination. A party must litigate all matters growing out of its claim at one time rather than in separate actions. . . . The right to join related causes of action does not bar subsequent litigation of a distinct cause of action that was not joined.

Israel v. Farmers Mut. Ins. Ass'n of Iowa, 339 N.W.2d 143, 146 (Iowa 1983) (citations omitted).

Snap-On argues that "the Commissioner considered all evidence running up through December 29, 1988 which is the same evidence that Weishaar will need to maintain the current actions." See B&B Ashpalt Co. v. T.S. MsShane Co., 242 N.W.2d 279, 287 (Iowa 1976) ("Our cases say identity of cause of action is established when the same evidence will maintain both actions.") However, "the right to joint related claims does not bar subsequent litigation of a distinct claim that was not joined." Leuchtenmacher v. Farm Bureau Mut. Ins. Co., 460 N.W.2d 858, 860 (Iowa 1990)

> "In general, the expression [transaction or a series of transactions] connotes a natural grouping or common nucleus of operative facts. Among the factors relevant to a determination whether the facts are so woven together as to constitute a single claim are their relatedness in time, space, origin, or motivation, and whether, taken together, they form a convenient unit for trial purposes. Though no single factor is determinative, the relevance of trial convenience makes it appropriate to ask how far the witnesses or proofs in the second action would tend to overlap the witnesses or proofs relevant to the first. If there is a substantial overlap, the second action should ordinarily be held to [be] precluded. But the opposite does not hold true; even when there is not a substantial overlap, the second action may be precluded if it stems from the same transaction or series."

Id. (quoting Restatement (Second) of Judgments § 24 cmt. b. (1982)).

Weishaar's original claim, brought in 1987, concerned a shoulder and back injury from an April 29, 1986 incident. In contrast, the first nine claims that she brought in the second action arose between September 1987 and October 1988. While the commissioner considered some of the same evidence in the two cases, they involved distinctly different injury dates. It is true that the claims in the second action and the shoulder/back claim in the first action arose because of Weishaar's work at Snap-On, but this does not mean that they are the same "'natural grouping or common nucleus of operative facts'" or are "'so woven together as to constitute a single claim.'" See Leuchtenmacher, 460 N.W.2d at 861 (quoting Restatement (second) of Judgments § cmt b). Claim preclusion does not apply, and the district court was correct in so ruling. (Emphasis added.)

. . . .

The prerequisites for issue preclusion are well established:

> (1) The issue concluded must be identical;
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> (2) The issue must have been raised and litigated in the prior action;
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> (3) The issue must have been material and relevant to the disposition of the prior action; and
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> (4) The determination made of the issue in the prior action must have been necessary and essential to the resulting judgment.
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> Israel, 339 N.W.2d at 146 (citing Aid Insurance Co. (Mut.) v. Chrest, 336 N.W.2d 437, 439 (Iowa 1983); Hunter v. City of Des Moines, 300 N.W.2d 121, 123 (Iowa 1981)).
>
> The issue that Weishaar "raised and litigated" in the present case was whether she suffered a cumulative injury to the whole body over a period of time. However, in the earlier proceeding, the commissioner adjudicated the issue of cumulative injury to the whole body that had allegedly occurred on a specific date, April 29, 1986. The specific issue in the present litigation, whether Weishaar incurred an injury to the whole body at other particular dates or as a cumulative injury to the whole body occurring between 1982 and 1991, is not the same.

Weishaar v. Snap-On Tools Corp., 582 N.W.2d 177, 180, 181 (Iowa 1998).

Like Weishaar, the present case has the following common elements between prior adjudication and the current proceeding. The claimant is the same. The defendants are the same. Claimant seeks benefits under the Iowa workers' compensation law. Claimant seeks benefits regarding a condition of the same area of the body. The only difference is the medical provider, but his opinion is not different than the one advanced in the previous arbitration.

Thus, defendants are barred from relitigating whether claimant's low back condition and the aggravation of a pre-existing degenerative condition arises out of and in the course of her employment.

An employer's right to select the provider of medical treatment to an injured worker does not include the right to determine how an injured worker should be diagnosed, evaluated, treated, or other matters of professional medical judgment. Assmann v. Blue Star Foods, File No. 866389 (Declaratory Ruling, May 19, 1988).

Dr. Harbach is an authorized treating physician who has recommended claimant be seen for an EMG. Claimant requests this referral for a diagnostic study be authorized. Based on the foregoing, claimant's request shall be granted.

THEREFORE, IT IS ORDERED:

Claimant's petition for alternate medical care is hereby granted.

Defendants shall authorize the EMG study as recommended by authorized treating physician, Dr. Harbach.

Signed and filed this _7th___ day of January, 2021.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Randall Schueller (via WCES)

Adam Bates (via WCES)