

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 19, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 02-3212

Cir. Ct. No. 98-CV-441

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

MICHAEL KUBORN AND DIANA KUBORN,

PLAINTIFFS-APPELLANTS,

MIDWEST SECURITY INSURANCE COMPANIES,

**INTERVENING PLAINTIFF-
RESPONDENT,**

v.

COMPCARE HEALTH SERVICES INSURANCE CORPORATION,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Sheboygan County: TIMOTHY M. VAN AKKEREN, Judge. *Affirmed.*

Before Anderson, P.J., Brown and Snyder, JJ.

¶1 PER CURIAM. Michael and Diana Kuborn appeal from a judgment dismissing their claim that Compcare Health Services Insurance Corporation wrongfully denied Diana health insurance benefits. We affirm the dismissal of the Kuborns' complaint because the Kuborns did not undertake the correct process to challenge Compcare's decision and their circuit court action was barred on issue preclusion grounds.

¶2 As an employee of the State of Wisconsin, Michael Kuborn had insurance coverage with Compcare. Compcare had a contract with the State of Wisconsin Group Insurance Board (GIB) to provide health insurance to State employees.

¶3 In July 1996, on the advice of her treating physician, Diana Kuborn sought Compcare's authorization for a hysterectomy. Compcare deemed the procedure medically unnecessary and denied coverage for the procedure. Diana appealed Compcare's denial. Compcare's grievance committee upheld the denial of coverage. Diana sought another review by Compcare, but the result did not change.

¶4 The Kuborns then filed an administrative appeal with the Department of Employee Trust Funds (ETF). In June 1997, ETF found that Compcare did not breach the terms of its contract when it determined that the hysterectomy was not medically necessary. In September 1997, the Kuborns appealed the ETF decision to the GIB.¹

¹ Diana changed insurance carriers and underwent a hysterectomy in February 1997.

¶5 In August 1998, while the GIB appeal was pending, the Kuborns commenced an action in Sheboygan county against Compcare alleging breach of contract, breach of Compcare's duty of good faith and fair dealing, bad faith denial of health insurance benefits, and negligent infliction of emotional distress.² Compcare moved to dismiss on the grounds that the Kuborns' exclusive remedy was set forth in WIS. STAT. chs. 40 and 227, the Kuborns' GIB appeal was pending, and the GIB's final decision, when issued, was subject to judicial review in Dane county pursuant to WIS. STAT. § 40.08(12) (2001-02).³ The circuit court held the Kuborns' action in abeyance pending the GIB's decision.

¶6 In August 2001, the GIB ruled that under the Compcare-GIB contract, Compcare decides whether a procedure is medically necessary, and Compcare had a reasonable basis for its determination that a hysterectomy was not medically necessary. The GIB determined that Compcare complied with the contract's grievance procedure, did not deny Diana a benefit under the contract, and did not violate its contract with the GIB.

¶7 In light of the GIB's decision, Compcare moved the Sheboygan county circuit court to dismiss the Kuborns' action. The court compared the GIB's decision to the Kuborns' circuit court claims and applied issue preclusion to their breach of contract, breach of good faith duty, and bad faith denial of insurance benefits claims. The Kuborns appeal.

² The Kuborns do not appeal the dismissal of their negligent infliction of emotional distress claim.

³ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶8 We affirm the dismissal of the Sheboygan county action on two grounds: (1) the action is not authorized under the statutes and administrative code provisions governing a challenge to a denial of benefits; and (2) the GIB’s decision had a preclusive effect on the Kuborns’ Sheboygan county claims.

¶9 Initially, the Kuborns followed the correct procedure in pursuing Compcare’s internal grievance procedure and then seeking ETF review. ETF decisions are reviewed by the GIB. WIS. ADMIN. CODE § ETF 11.01(3). The GIB’s decision “shall be reviewable only by an action for certiorari” in the Dane county circuit court. WIS. STAT. § 40.08(12). However, the Kuborns elected to file their Sheboygan county action before the GIB issued its decision. This was contrary to the review scheme, and the circuit court properly dismissed the Sheboygan county action.

¶10 We agree with the circuit court that the GIB’s decision had a preclusive effect on the Kuborns’ Sheboygan county claims.⁴ It is a question of law whether issue preclusion should be applied to the GIB’s unreviewed determinations. *See Lindas v. Cady*, 183 Wis. 2d 547, 552, 515 N.W.2d 458 (1994). Issue preclusion limits relitigation of issues that have been actually litigated in a previous action. *Id.* at 558. We first determine “a) whether the agency was adjudicating a disputed issue of fact properly before it and b) whether the agency’s proceedings provided the parties an adequate opportunity to litigate.”

⁴ We do not review the correctness of the GIB’s decision because this appeal is not the statutorily required certiorari review of the GIB’s decision. Nevertheless, we must compare the GIB’s decision to the Kuborns’ Sheboygan county claims to review the circuit court’s determination that the GIB’s decision had a preclusive effect on the circuit court claims.

Id. at 554. If both of these conditions are met, we address whether, under state law, the agency's findings have preclusive effect. *Id.*

¶11 The GIB determined that Compare complied with the grievance procedure, Compare decides whether a procedure is medically necessary, and Compare had a reasonable basis for its determination that a hysterectomy was not medically necessary. The GIB further found that Compare did not deny Diana a benefit under the contract and did not breach its contract with the GIB. The GIB noted that its role is to determine whether Compare breached its contract with the GIB. The GIB does not independently weigh medical opinions or determine medical necessity. WIS. ADMIN. CODE § ETF 11.03(2)(c), (e).

¶12 In their Sheboygan county action, the Kuborns alleged breach of contract, breach of Compare's duty of good faith and fair dealing, and bad faith denial of health insurance benefits. All of these claims relate to Compare's refusal to provide coverage for a hysterectomy. Claims relating to the denial of benefits are appropriately brought before the GIB because the Compare-GIB contract specifies that the GIB addresses such disputes.

¶13 The Kuborns argue that their claims were properly brought in Sheboygan county because they challenge Compare's determination that the hysterectomy was not medically necessary. However, because the contract grants to Compare the medical necessity determination, questions regarding medical necessity are part and parcel of any breach of contract claim. Because the breach of contract claim had to be brought before the GIB, the medical necessity dispute was included in that claim.

¶14 The Kuborns argue that their claims of breach of duty of good faith and bad faith denial of health insurance benefits were not actually litigated before

the GIB. The GIB determined that Compcare did not breach the contract. Therefore, we fail to see how these claims survive the GIB's decision.⁵

¶15 The record indicates that the Kuborns had an adequate opportunity to litigate their claims before the GIB. For instance, the GIB held two hearings, and the Kuborns submitted evidence and a brief. *See Lindas*, 183 Wis. 2d at 554.

¶16 That the GIB's decision has a preclusive effect is not fundamentally unfair because the Kuborns had an incentive to challenge Compcare's denial of benefits, as evidenced by their appeals to ETF and the GIB. *See id.* at 561 (factors to consider in a "fundamental fairness" analysis include whether there was inadequate incentive to obtain a full and fair adjudication in the initial action).

¶17 Finally, it is undisputed that the Kuborns could have had review of the GIB's decision in Dane county circuit court. This factor also weighs in favor of applying issue preclusion to their Sheboygan county claims. *See id.*

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

⁵ Bad faith and breach of the duty of good faith and fair dealing are torts. *Jones v. Secura Ins. Co.*, 2002 WI 11, ¶¶11-12, 249 Wis. 2d 623, 638 N.W.2d 575. To prove bad faith, the Kuborns had to "show the absence of a reasonable basis for denying benefits of the policy." *Id.*, ¶13 (citation omitted). Here, however, the GIB found that Compcare had a reasonable basis to deny coverage and did not deny Diana a benefit under the contract.

