IN THE COURT OF APPEALS OF IOWA

No. 1-878 / 11-0890
Filed January 19, 2012

TOMLINSON CANNON and
UNITED FIRE & CASUALTY,
Petitioners-Appellants,

vs.

ANTOINE WHITED,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Karen A. Romano, Judge.

An employer and its insurer appeal from a district court judicial review ruling affirming the decision of the workers' compensation commissioner in an alternate care proceeding. **AFFIRMED.**

Katrina A. Nystrom and Chris J. Scheldrup of Scheldrup, Blades, Schrock, Smith & Aranza, P.C., Cedar Rapids, for appellants.

Emily Anderson and Pressley Henningsen of Riccolo & Semelroth, P.C., Cedar Rapids, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

VAITHESWARAN, P.J.

Our workers' compensation statute requires an employer to "furnish reasonable services and supplies to treat an injured employee." Iowa Code § 85.27(4) (2009). The statute gives the employer "the right to choose the care," subject to the employee's right to apply for alternate care under certain circumstances. *Id.* In this appeal, we are asked to review an agency decision on an employee's alternate care petition.

I. Background Facts and Proceedings

Antoine Whited fell from a ladder while working for Tomlinson Cannon. A neurologist, Dr. Richard F. Neiman, saw Whited at the emergency room for brain and spine injuries. Whited later attempted to receive continuing treatment from Dr. Neiman. When the employer resisted that attempt, Whited sought and obtained an order from the workers' compensation commissioner requiring the employer and its insurer to "provide to claimant continued care and treatment by neurologist, Richard Neiman, M.D. for his injuries."

Meanwhile, Whited also began complaining of right ankle pain. The employer authorized Whited to see an occupational medicine specialist named Dr. Michael Jackson, but Whited's attorney advised him not to attend the scheduled appointment. Dr. Neiman, who, as noted, had been designated Whited's treating physician, subsequently opined the ankle injury was work-related. He referred Whited to podiatrist George Sehl, but the employer refused to authorize this treatment.

Whited filed a second application for alternate medical care, which was also granted. A deputy commissioner specifically found:

> Reasonable care includes care necessary to diagnose the condition and defendants are not entitled to interfere with the medical judgment of its own treating physician.
>
> Dr. Neiman is an authorized treating physician. Dr. Neiman has made a specific referral for evaluation by podiatrist, Dr. George Sehl. The defendants are not entitled to interfere with the medical judgment of a treating physician.

(Citation omitted).

On judicial review of this agency decision, the district court affirmed. Tomlinson and its insurer appealed.

II. Analysis

The employer contends the agency "erred in ordering alternate care in the form of a referral to podiatrist George Sehl as [it] had already authorized reasonable treatment through Dr. Jackson which claimant refused."

Determining what care is reasonable is a question of fact subject to substantial-evidence review. *See* Iowa Code § 17A.19(10)(f); *Pirelli-Armstrong Tire Co. v. Reynolds*, 562 N.W.2d 433, 436 (Iowa 1997). "Substantial evidence" means the

> quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance.

Iowa Code § 17A.19(10)(f)(1). The Iowa Supreme Court recently reiterated that, although our review is to be "intensive" and we are not to "rubber-stamp" the agency, this standard is a highly deferential one. *See Cedar Rapids Cmty. School Dist. v. Pease*, ___ N.W.2d ___, ___ (Iowa 2011) ("Our decision is controlled in large part by the deference we afford to decisions of administrative

agencies."). With this construction of section 17A.19(10)(f)(1) in mind, we proceed to the merits.[1]

Iowa Code section 85.27(4), cited at the outset, more particularly 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.

The dispute in this case focuses on whether the treatment offered by Tomlinson was "reasonably suited" to treat Whited's injury. The burden was on Whited to show the care was unreasonable. *Pirelli-Armstrong Tire Co.*, 562 N.W.2d at 436.

Tomlinson argues Whited did not meet his burden because he presented no evidence the care to be offered by Dr. Jackson was "inferior or less extensive" than what would have been offered by Dr. Sehl. Whited responds that, under agency precedent, "[i]f an employer fails to follow the recommendation of an authorized physician, that alone is a failure to provide reasonable treatment under Iowa Code section 85.27."

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[1] Whited contends the issue is moot, as Dr. Jackson has since moved out-of-state. *See Grinnell Coll. v. Osborn*, 751 N.W.2d 396, 398–99 (Iowa 2008) (explaining mootness doctrine). But, as the employer notes, the

> issue rests on whether the employer can choose who provides the care under these circumstances, not whether Dr. Jackson specifically will provide the care. . . . If Dr. Jackson is moving his practice, the employer would send claimant to another occupational physician.

We agree with the employer and find the question is not moot.

The employer does not dispute the commissioner has interpreted section 85.27 in this fashion and does not challenge this agency interpretation.[2] It simply argues, "While the commissioner's interpretation of Iowa's alternate care statute generally holds that an authorized treating physician's referral to another doctor does not require the employer's consent, the facts of this case make this rule inapplicable." The employer notes that (1) its referral to Dr. Jackson came before Dr. Neiman's referral to Dr. Sehl and (2) Dr. Neiman did not state "that a podiatrist would provide better care than a physiatrist trained in occupational medicine."

We need not address the timing of the employer's referral, as that point is subsumed within the second point—the effectiveness of treatment by a podiatrist versus treatment by a practitioner of occupational medicine. On this second point, the employer ignores a letter authored by Dr. Neiman, which states:

> It is my opinion that Mr. Whited should be seen by a podiatrist regarding his right ankle injury. I recommend Mr. Whited be seen by Dr. George Sehl.
>
> . . . *To date, Mr. Whited's employer has not authorized a consult with a podiatrist*. *For Mr. Whited to receive fully effective care of his right ankle injury, it is my opinion that [he] needs a podiatry consult.* As an authorized treating physician, I frequently make these types of referrals.

[2] We recognize, however, that the "controlling legal standards are those set out in the workers' compensation statutes and in this court's opinions, not in prior agency decisions." *Finch v. Schneider Specialized Carriers, Inc.*, 700 N.W.2d 328, 332 (Iowa 2005); *accord Keystone Nursing Care Ctr. v. Craddock*, 705 N.W.2d 299, 304 n.2 (Iowa 2005) ("[T]he commissioner's final decision is judged against the backdrop of the workers' compensation statute and the Iowa appellate cases interpreting it, not previous agency decisions."). *But see* Iowa Code § 17A.19(10)(h) (authorizing reversal on "[a]ction other than a rule that is inconsistent with the agency's prior practice or precedents, unless the agency has justified that inconsistency by stating credible reasons sufficient to indicate a fair and rational basis for the inconsistency").

(Emphasis added.) Dr. Neiman's letter explicitly states that Whited needed to be seen by a podiatrist in order to receive effective treatment for his ankle injury. That letter amounts to substantial evidence in support of the agency's implicit finding that Dr. Jackson was not "reasonably suited" to treat Whited's ankle injury. Accordingly, we affirm the commissioner's decision to grant Whited's alternate care petition.

AFFIRMED.