IN THE COURT OF APPEALS OF IOWA

No. 2-031 / 11-1032
Filed March 28, 2012

DOUGLAS SPENCER,
Petitioner-Appellee,

vs.

ANNETT HOLDINGS, INC.,
Respondent-Appellant.

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

Employer appeals from a district court judicial review ruling reversing the decision of a deputy workers' compensation commissioner in an alternate care proceeding. **REVERSED.**

Sasha L. Monthei of Scheldrup Blades, Cedar Rapids, for appellant.

Christopher Spaulding of Berg, Rouse, Spaulding & Schmidt, P.L.C., Des Moines, for appellee.

Heard by Danilson, P.J., Bower, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

DANILSON, 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*. Here, the deputy commissioner determined the employer is entitled to choose an alternate provider upon the retirement of its chosen treating physician. The district court reversed, concluding the retiring physician's referral did not require the employer's permission. Because the employer is entitled to choose the provider in the first instance, and the worker did not prove that care was unreasonable, we reverse the district court's ruling reversing the deputy's denial of the alternate care petition.

I. Background Facts and Circumstances.

The facts are not in dispute. Douglas Spencer sustained a work-related injury. His employer-selected treating physician, Dr. Anthony P. Dalton, "due to . . . retirement," referred Spencer to Dr. J. Thomas McClure. The employer, Annett Holdings, Inc., learned of Dr. Dalton's retirement upon Dr. McClure's request for payment for services performed. Annett designated Dr. Blake Garside as the authorized treating physician.

Spencer filed a petition for alternate care, contending "once a physician is authorized, . . . reasonable and necessary referrals from that authorized treating physician then become authorized medical care." Annett resisted, contending it is the right of the employer to choose medical care upon the resignation of its treating physician.

On June 11, 2010, a deputy commissioner denied the application, concluding:

> The retiring doctor here was not referring for additional care such as a specialist for which defendants would be bound, but was recommending his own replacement. The defendants are merely exercising their right to choose the primary provider when the primary provider retired, as opposed [to] interfering in care or attempting to direct the care provided.
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> Therefore the claimant has not met his burden of proof that the care authorized by the defendant is not designed to be effective in managing his medical problems resulting from his work injury.

On June 29, 2010, Spencer filed a motion for reconsideration of the agency's ruling.

On July 19, 2010, Spencer filed a petition for judicial review in the district court.

Annett filed a motion dismiss the petition as untimely filed. Spencer resisted the motion to dismiss, asserting his motion for rehearing was deemed denied twenty days after its filing or July 19 and his petition for judicial review was filed within thirty days of that deemed denial. Annett responded:

> 1. Respondent acknowledges that if Petitioner filed an Application for Rehearing of the Alternate Medical Care Decision pursuant to Iowa Code section 17A.16 and Iowa Administrative Code 876-4.24, Petitioner likely filed his Petition for Judicial Review within the statutory time period.
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> 2. Nevertheless, neither Petitioner nor Agency served Respondent with said Application for Reconsideration.
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> 3. According to Iowa Code section 17A.16(2), "[a] copy of the application for rehearing shall be timely mailed by the presiding agency to all parties of record not joining in the application."
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> 4. According to Iowa Admin Rule 876-4.24, "[a]ny party may file an application for rehearing of a proposed decision in any contested case by a deputy commissioner or a decision in any contested case by the workers' compensation commissioner within 20 days after the issuance of the decision. A copy of such application shall be timely mailed by the applicant to all parties of record not joining therein."

> 5. Because Respondent did not receive proper service of such Application for Rehearing, the Application was never completely filed and the Petition for Judicial Review is still late.
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> 6. If either Petitioner or Agency can show Respondent did receive proper service, Respondent will withdraw its Motion to Dismiss.

Spencer in turn submitted a file-stamped copy of his motion for reconsideration, which included a notation that a copy was mailed to counsel for Annett, as well as an affidavit verifying mailing a copy to defense counsel. Annett, however, continued to assert the appeal was untimely for lack of certificate of service.

The district court ordered a limited remand to the deputy commissioner to address (1) whether the motion for reconsideration "was properly filed with the Workers' Compensation Commission" and (2) whether the commissioner considered the motion and "chose not to respond" or "refused to consider Claimant's Motion because it did not contain a certificate of service."

On December 9, 2010, the deputy issued a remand decision stating, "The motion for reconsideration was considered, and deemed denied without comment pursuant to Iowa Code Section 17A.16(2)."

On June 28, 2011, after receiving arguments, the district court ruled in pertinent part:

> The deputy erred in concluding the "defendants are merely exercising their right to choose the primary provider when the primary provider retired, as opposed to interfering in care or attempting to direct the care provided." [footnote omitted] Finding that Dr. Dalton referred Spencer to Dr. McClure, but then concluding that Annett Holdings was not bound by the referral because the referral was to another orthopedic surgeon upon Dr. Dalton's retirement is not in line with the general principles set forth in prior agency rulings. Under agency law, which the court finds to be persuasive authority, "[a]n 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." . . .
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> . . . As Spencer's authorized treating physician, Dr. Dalton managed Spencer's medical treatment and provided for its continuation upon his (Dr. Dalton's) retirement. Spencer followed his authorized treating physician's instructions by treating with Dr. McClure. The referral from Dr. Dalton made Dr. McClure Spencer's authorized treating physician.

The district court ruled the "authorized treating physician made a valid referral to Dr. McClure" and reversed the deputy's denial of the application for alternate medical care.

Annett appeals, contending the district court erred (1) in failing to dismiss the judicial review petition as untimely and (2) in ruling a retiring physician can name a replacement.

II. Scope and Standard of Review.

Our supreme court recently summarized our scope and standard of review stating:

> We review an appeal of a workers' compensation decision under the standards set forth in chapter 17A of the Iowa Code. We apply the standards "to determine whether the conclusions we reach are the same as those of the district court." If we reach the same conclusion as the district court, we affirm, but if we reach a different conclusion, we reverse.

Westling v. Hormel Foods Corp., ___ N.W.2d ___, ___ (Iowa 2012) (citations omitted).

III. Discussion.

A. Petition was timely filed. Annett first argues the district court erred in failing to dismiss Spencer's petition for judicial review because it was not timely filed. *See Sharp v. Iowa Dep't of Job Serv.*, 492 N.W.2d 668, 669 (Iowa 1992)

("A timely petition for judicial review to the district court is a jurisdictional prerequisite for review of final agency action."); *but see Fed. Am. Int'l, Inc. v. Om Namah Shiva, Inc.*, 657 N.W.2d 481, 484 (Iowa 2003) (distinguishing between subject matter jurisdiction and authority to hear a particular case). Because the petition for judicial review was timely, we disagree.

Spencer filed a "motion for reconsideration" with the workers' compensation commissioner on June 29, 2010. Technically, the "motion" was an application for rehearing pursuant to Iowa Code section 17A.16(2) ("Except as expressly provided otherwise by another statute referring to this chapter by name, any party may file an application for rehearing, stating the specific grounds for the rehearing and the relief sought, within twenty days after the date of the issuance of any final decision by the agency in a contested case.").[1] The workers' compensation commissioner was deemed to have denied Spencer's motion when it was not granted within twenty days of its filing. *See id*. ("An application for rehearing shall be deemed to have been denied unless the agency grants the application within twenty days after its filing.").

Spencer filed a petition for judicial review on July 19, 2010, well within thirty days of the date his application for rehearing was deemed denied. *See id*. § 17A.19(3) ("If a party files an application under section 17A.16, subsection 2, for rehearing with the agency, the petition for judicial review must be filed within

[1] An earlier version of section 17A.16(2) stated in pertinent part that "[a] copy of such application shall be timely mailed *by the applicant* to all parties of record not joining therein." (Emphasis added.) A 1986 amendment changed the requirement that "applicant" mail a copy of the application to a requirement that the "presiding agency" mail a copy of the application as part of the state reorganization act. *See* 1986 Acts, ch. 1245, § 518.

thirty days after that application has been denied or deemed denied."); *Fee v. Emp't Appeal Bd.*, 463 N.W.2d 20, 21 (Iowa 1990) (noting "any party who petitions for rehearing is accorded an extension of time for filing a petition for judicial review").

Annett's contention that Spencer's judicial review petition was untimely is based upon its claim that because Spencer's motion for rehearing did not contain a certificate of service, we must conclude it was not served by Spencer. This is contrary to the record evidence showing Spencer did place a copy of the motion in the mail addressed to Annett's counsel. Substantial compliance with the administrative service rule was sufficient. *See Brown v. John Deere Waterloo Tractor Works*, 423 N.W.2d 193, 194, 196 (Iowa 1988) (stating substantial compliance "means actual compliance in respect to the substance essential to every reasonable objective of the statute" and finding substantial compliance with service requirements was sufficient and no prejudice resulted).

Moreover, while an administrative rule states "[a] copy of such application shall be timely mailed by the applicant,"[2] and there *is* record evidence that the applicant did timely mail the application to Annett, Iowa Code section 17A.16(2)

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[2] Administrative Code rule 876-4.24 provides:

> Any party may file an application for rehearing of a proposed decision in any contested case by a deputy commissioner or a decision in any contested case by the workers' compensation commissioner within 20 days after the issuance of the decision. A copy of such application *shall be timely mailed by the applicant* to all parties of record not joining therein. An application for rehearing shall be deemed denied unless the deputy commissioner or workers' compensation commissioner rendering the decision grants the application within 20 days after its filing. For purposes of this rule, motions or requests for reconsideration or new trial or retrial or any reexamination of any decision, ruling, or order shall be treated the same as an application for rehearing.

(Emphasis added.)

squarely places the duty to mail a copy of the application for rehearing upon "*the presiding agency*." Iowa Code §17A.16(2) ("A copy of the application for rehearing shall be *timely mailed by the presiding agency* to all parties of record not joining in the application." (emphasis added)).[3] The plain provisions of a statute cannot be altered by administrative rule.[4] *Schmitt v. Iowa Dep't of Soc. Servs.*, 263 N.W.2d 739, 745 (Iowa 1978); *Nishnabotna Valley Rural Elec. Coop. v. Iowa P. & L. Co.*, 161 N.W.2d 348, 352 (Iowa 1968); *see also Wallace v. Iowa State Bd. of Educ.*, 770 N.W.2d 344, 348 (Iowa 2009) ("Agency rules are ordinarily given the force and effect of law, *provided they are reasonable and consistent with legislative enactments*." (internal quotations and citations omitted) (emphasis added)).[5]

In any event, the motion for reconsideration extended the time for filing a petition for judicial review, and Spencer's petition for judicial review was timely filed.

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[3] We compare section 17A.16(2) concerning a motion for rehearing, with section 17A.19 concerning judicial review. Iowa Code section 17A.19(2) provides:

> Within ten days after the filing of a petition for judicial review *the petitioner shall serve* by the means provided in the Iowa rules of civil procedure for the personal service of an original notice, or shall mail copies of the petition to all parties named in the petition and, if the petition involves review of agency action in a contested case, all parties of record in that case before the agency. Such personal service or mailing shall be jurisdictional.

(Emphasis added.)

[4] We acknowledge the statute and regulation could be combined to read dual duties upon the applicant and the agency to mail a copy to Annett, but requiring duplicitous service upon Arnett is illogical and unreasonable. We believe it is more likely that the agency simply has not amended its regulation since section 17A.16(2) was amended.

[5] We note, too, that under the chapter 86 of the Iowa Code governing workers' compensation proceedings, "process and procedure in contested case proceedings or appeal proceedings within the agency under this chapter . . . *shall be as summary as practicable consistent with the requirements of chapter 17A*." Iowa Code § 86.18(1) (emphasis added).

B. Reasonableness of care. Iowa Code section 85.27(4) 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.

Under this provision, the employer is entitled to "choose the care." Iowa Code § 85.27; *Pirelli-Armstrong Tire Co. v. Reynolds*, 562 N.W.2d 433, 436 (Iowa 1997).

By seeking alternate care, the employee assumes the burden of proving the authorized care is unreasonable. *Pirelli-Armstrong*, 562 N.W.2d at 436. "Reasonableness, of course, is a fact question." *Id.* Our review of the agency's findings of fact is subject to substantial evidence review. *See* Iowa Code § 17A.19(10)(f); *Pirelli–Armstrong Tire Co.*, 562 N.W.2d at 436. "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). Though our review is to be "intensive," this standard is a highly deferential one. *See Cedar Rapids Cmty. Sch. Dist. v. Pease*, 807 N.W.2d 839, 844 (Iowa 2011) ("Our decision is controlled in large part by the deference we afford to decisions of administrative agencies.").

Our supreme court has stated that

> when evidence is presented to the commissioner that the employer-authorized medical care has not been effective and that such care is "inferior or less extensive" than other available care requested by the employee, the commissioner is justified by section 85.27 to order the alternate care.

Pirelli-Armstrong, 562 N.W.2d at 437 (quoting *Long v. Roberts Dairy Co.*, 528 N.W.2d 122, 124 (Iowa 1995)). The commissioner's interpretation of Iowa's alternate care statute generally holds the employer is not entitled to interfere with the medical judgment of its own treating physician, and referral by an authorized physician to another practitioner does not require the employer's consent. *See id.* at 435 (declining to address the employer's objection to the deputy's finding doctor's statement had been a referral); *see, e.g.*, *Hoskey v. Kinze Mfg.*, 2010 WL1730016 (Iowa Workers' Comp. Comm'n April 29, 2010) ("Referral by an authorized physician to another physician is generally found to be authorized treatment.").[6] The deputy concluded, however, Dr. Dalton was not making a referral, but was "recommending his own replacement." Because the employer has the right to choose care, the deputy concluded Spencer had failed to prove the care authorized by the employer was unreasonable. We agree.

"[A]s a general rule the employer, not the employee, is permitted to choose the medical care to be furnished." *Pirelli-Armstrong*, 562 N.W.2d at 436. We reject the district court's characterization of the issue as a "referral" by an

[6] We recognize, however, 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").

authorized treating physician.[7] We have no doubt a retiring physician might be well-situated to suggest a replacement, but the rule remains that the employer is permitted to choose the medical care. If, however, the employee can prove the authorized treatment is not "reasonably suited to treat the injury without undue inconvenience to the employee," Iowa Code § 85.27(4), the commissioner can authorize alternate care.

Spencer did not prove, or even assert, treatment by Dr. Garside was not reasonably suited to treat his injury or it was unduly inconvenient. The district court erred in reversing the deputy's denial of alternate care.

REVERSED.

[7] One source defines a "referral" as "[t]he sending of a patient to another physician for ongoing management of a specific problem, with the expectation that the patient will continue seeing the original physician for coordination of total care." http://medical-dictionary.thefreedictionary.com/referral (citing Segen's Medical Dictionary (2011)). Another provides: "The sending of a Pt to another physician for ongoing management of a specific problem, with the expectation that the Pt will continue seeing the original physician for coordination of total care." *Id*. (citing McGraw-Hill Concise Dictionary of Modern Medicine (2002)).