IN THE COURT OF APPEALS OF IOWA

No. 2-381 / 11-2024
Filed June 13, 2012

FINLEY HOSPITAL,
Plaintiff-Appellant,

vs.

CHARLES STOKES,
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, D.J. Stovall, Judge.

An employer appeals the district court decision affirming the deputy workers' compensation commissioner's ruling authorizing alternate medical care. **AFFIRMED.**

Edward J. Rose of Betty, Neuman & McMahon, P.L.C., Davenport, for appellant.

Mark J. Sullivan of Reynolds & Kenline, L.L.P., Dubuque, for appellee.

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

DANILSON, J.

The employer, Finley Hospital, appeals the district court decision affirming the deputy workers' compensation commissioner's ruling authorizing alternate medical care for Charles Stokes. Because the deputy's finding that the employer failed to timely provide medical care was supported by substantial evidence, we affirm.

Under Iowa Code section 85.27(4) (2011), "the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care." The statute provides three exceptions: (1) when the employer and employee consent to alternative medical care; (2) when the employee establishes the right to seek alternative medical care in a proceeding before the agency; and (3) in an emergency, when the employer cannot be reached immediately. Iowa Code § 85.27(4);[1] *Bell Bros. Heating & Air*

[1] Section 85.27(4) reads, in part:

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. If the employer chooses the care, the employer shall hold the employee harmless for the cost of care until the employer notifies the employee that the employer is no longer authorizing all or any part of the care and the reason for the change in authorization. An employer is not liable for the cost of care that the employer arranges in response to a sudden emergency if the employee's condition, for which care was arranged, is not related to the employment. 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* [(1)] the employer and the employee *may agree* to alternate care reasonably suited to treat the injury. [(2)] 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. [(3)] *In an emergency*, the employee may choose the employee's care at the employer's expense, provided the employer or the employer's agent cannot be reached immediately. . . . .

(Emphasis added.)

Conditioning, Inc. v. Gwinn, 779 N.W.2d 193, 203-04 (Iowa 2010). The question before us is whether the employee established a right to alternate care as found by the deputy. The district court found support for the deputy's ruling—as do we.

I. Background Facts.

Here, on March 11, 2011, a deputy workers' compensation commissioner, Erica Elliot, denied Charles Stokes' earlier (February 28, 2011) application for alternative medical care because:

> Claimant [Stokes] did express dissatisfaction [with current care] in October of 2010, by way of letter from his counsel. Although unclear based upon the record as to the precise date, defendant [employer] extended the option of claimant returning to Dr. Pearson for evaluation. Although this is not what the claimant requested, defendant's offer is not unreasonable. [Employer] continued to offer care with Dr. Pearson throughout the filing of two alternate care proceedings, but was not contacted regarding scheduling an appointment. [Employer], by its own volition, then scheduled an appointment for claimant with Dr. Pearson on March 17, 2011. [Employer] is entitled to an evaluation by an authorized physician, abreast of the entire medical report, prior to being held responsible for additional care.
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> [Employer] represented at hearing that it would abide by Dr. Pearson's treatment recommendations. If his recommendation includes chiropractic care, the instant matter may prove unnecessary. If, as claimant fears, Dr. Pearson declines to offer treatment, claimant is free to file a petition for alternate medical care and present evidence that [employer] has refused to provide care.

Stokes filed another application for alternative medical care on April 14, 2011, which was heard by Deputy Elliott on April 26, 2011.

At the hearing, Stokes testified he attended the scheduled March 17, 2011 appointment with Dr. Pearson, who was unaware of the reason for the visit. After Stokes explained he had ongoing symptoms for which he had been seeing Dr. Tebbe for chiropractic relief, he asked Dr. Pearson for treatment and a

referral to Dr. Tebbe. Dr. Pearson suggested an MRI—but indicated he would need prior authorization from the employer's counsel before scheduling an MRI. Stokes testified Dr. Pearson stated he would not make a referral for chiropractic treatments, because "I don't treat pain." Dr. Pearson did not offer anything by way of treatment.

Stokes introduced correspondence between his counsel and counsel for Finley. An April 12 letter from Stokes' counsel states:

> I wrote to you on March 22, 2011, following my client's appointment with Dr. Pearson. I requested a copy of Dr. Pearson's notes or any written report he may have provided to you following that appointment. To date I have heard nothing from you and received nothing from you. Dr. Pearson has not provided any meaningful care to Mr. Stokes to address his ongoing symptoms. My client is clearly dissatisfied with this lack of care and we have previously conveyed that dissatisfaction to you to no avail.

On April 21, Finley's counsel replied to Stokes' counsel. In the letter, counsel noted the enclosure of Dr. Pearson's medical notes requested on March 22, and stated, "As you can see, Dr. Pearson specifically does not recommend chiropractic care and indicated Claimant can return as needed, which may include further testing."

Finley's counsel sent another letter to Stokes' counsel dated April 25, 2011—the day before the hearing on Stokes' application for alternate care—which stated in part,

> You will note Dr. Pearson has suggested that an additional MRI may take place to determine whether some other course of treatment would be appropriate. The employer in [sic] worker's compensation carrier are hereby authorizing this diagnostic task so that Mr. Stokes subjective complaints can be verified in a course of treatment prescribed. Obviously, neither of us are doctors and we would have to wait until Dr. Pearson has reviewed the diagnostic test.

Following the hearing, the deputy commissioner entered a written ruling authorizing alternate medical care. The deputy set out the employer's arguments and found them to "appear valid at first glance." But "the validity is lost when the arguments are considered in the light of the circumstances surrounding this action." The deputy found:

> Defendant is correct that it has not wholly abandoned care, as Dr. Pearson remains an available, authorized physician. However, Dr. Pearson has not offered claimant any active care. When a recommendation for a diagnostic test was made, Dr. Pearson did not order the test, but rather indicated he needed to get authorization. An authorized doctor without the ability to order diagnostic tests absent further authorization is not able to provide meaningful care.
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> . . . .
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> Defendant also makes the argument that care remains ongoing with Dr. Pearson and that any recommendation made by Dr. Pearson will be followed. With all due respect to the defendant, the undersigned is not persuaded. In the prior alternate care decision [March 11], defendant made the same assertion, that it would abide by the treatment recommendations of Dr. Pearson. Based in part upon that assertion, the undersigned required claimant to present to Dr. Pearson, assuming the defendant would provide Dr. Pearson with authorization to provide care. Instead, the claimant appeared to Dr. Pearson, who lacked knowledge of the reason for claimant's visit and then offered no care without further diagnostic testing. Dr. Pearson's need to request authorization from the defendant counsel for this diagnostic test is offensive to the spirit of the order in the prior alternate care decision. What is more offensive is that defendant failed to provide copies of claimant's medical records in a timely fashion and then failed to authorize the diagnostic test for over one month, conveniently until one day prior to the instant hearing. Defendant then offered essentially the same argument with regard to ongoing care being offered with Dr. Pearson in effort to again escape the granting of alternate care with Dr. Tebbe.
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> It is determined that defendant failed to timely provide medical care to the claimant. Claimant's request for continued chiropractic care with Dr. Tebbe is reasonable, as it has provided him with the only relief of his symptoms.

The employer filed a petition for judicial review in the district court. The alternate care ruling was affirmed. The district court observed that section 85.27(4) requires an employer furnish reasonable services to treat an injured employee and "[t]he treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee." The court found substantial evidence supported the deputy's findings that the care Finley offered Stokes through Dr. Pearson was not offered "promptly." The court also stated "[t]here was substantial evidence that the treatment made available to Stokes was not 'reasonably suited to treat the injury without undue inconvenience to the employee,'" as required by section 85.27(1). The employer now appeals.

II. Discussion.

In *Bell Brothers*, 779 N.W.2d at 204, the court noted the workers' compensation commissioner "may order alternative care paid by the employer following a prompt, informal hearing when the employee is dissatisfied with the care furnished by the employer and establishes the care furnished by the employer was unreasonable."

"Determining what care is reasonable under the statute is a question of fact." *Long v. Roberts Dairy Co.*, 528 N.W.2d 122, 123 (Iowa 1995). Where, as here, the agency has clearly been vested with the authority to make factual findings on a particular issue, a reviewing court can only disturb those factual findings if they are "not supported by substantial evidence in the record before the court when that record is reviewed as a whole." Iowa Code § 17A.19(10)(f);

see Burton v. Hilltop Care Ctr., ___ N.W.2d ___, 2012 WL 1557375, at *3 (Iowa May 4, 2012).

The deputy ruled the employee established a right to seek alternative medical care because, under the circumstances of this particular case and the commissioner's prior ruling, the care provided was not timely offered and therefore not reasonable. The district court found the finding supported by substantial evidence.

Finley challenges the deputy's decisions on several grounds. Finley first contends Stokes' counsel's letter dated October 27, 2010, did not convey any dissatisfaction of authorized care as required by Iowa Code section 85.27. However, the deputy's alternate medical care decision filed March 11, 2011, specifically found that, "Claimant did express dissatisfaction in October of 2010, by way of letter from his counsel." We also conclude the letter substantially complies with Iowa Code section 85.27.

Finley also contends their designated care provider, Dr. Pearson, remained available to provide care. After the deputy's decision filed March 11, 2011, Stokes was evaluated by Dr. Pearson. Although Dr. Pearson apparently was not informed for the need for the appointment, he performed an evaluation but made no recommendations for ongoing care. His medical notes indicate he would see Stokes "prn" and Stokes "may require further testing such as an MRI." Although his notes state he suspects Stokes suffers from degenerative discs or spinal stenosis, no care or current testing was recommended.

Finley also criticizes the deputy's decision by contending the decision penalizes Finley for Dr. Pearson's "legal ignorance" in believing that the doctor

needed the employer's authorization before ordering the MRI test. However, Dr. Pearson did not testify at either hearing before the deputy, and the record does not reflect whether Finley authorized the doctor to provide whatever treatment the doctor found necessary, nor does the record reflect that Dr. Pearson would have definitely ordered the MRI, if authorized. The testimony of Stokes and the medical notes of Dr. Pearson only suggest the MRI "may" be ordered.

After Stokes expressed his dissatisfaction with the care provided, nearly six months had expired, and three petitions for alternative care had been filed, although the first petition was dismissed. During that time the only ongoing care ultimately authorized by Finley was an MRI test. However, that authorization came one day before the hearing on the third petition and as noted, Dr. Pearson's medical notes only state that it "may" be needed.

We agree with the district court that the deputy's decision is supported by substantial evidence and therefore affirm. *See Evercom Sys., Inc. v. Iowa Utils. Bd*., 805 N.W.2d 758, 762 (Iowa 2011) ("We will apply the standards of section 17A.19(10) to determine whether we reach the same results as the district court.").

AFFIRMED.