IN THE COURT OF APPEALS OF IOWA

No. 3-615 / 12-1729
Filed October 2, 2013

JEREMIE J. COOKSEY,
Petitioner-Appellant,

vs.

CARGILL, INC., CARGILL MEAT SOLUTIONS CORP., and CARGILL ANIMAL PROTEIN-WAPELLO COUNTY FACILITY,
Respondents-Appellees.

Appeal from the Iowa District Court for Polk County, Eliza J. Ovrom, Judge.

Claimant appeals the district court's decision affirming the agency's dismissal, without a hearing, of his application for alternate medical care pursuant to Iowa Administrative Code rule 876-4.48(7). **AFFIRMED.**

Philip F. Miller, West Des Moines, and Harry W. Dahl of Harry W. Dahl, P.C., Des Moines, for appellant.

Andrew T. Tice of Ahlers & Cooney, P.C., Des Moines, for appellees.

Heard by Vogel, P.J., and Danilson and Tabor, JJ.

DANILSON, J.

Jeremie Cooksey appeals the district court's decision affirming the Iowa Workers' Compensation agency's dismissal, without a hearing, of his application for alternate medical care pursuant to Iowa Administrative Code rule 876-4.48(7). He contends that his employer, Cargill Incorporated, was judicially estopped from denying its liability after failing to dispute it in previous hearings. He also claims the dismissal of his application without a hearing to determine liability was an interpretation of the rule which was arbitrary, capricious, and an abuse of discretion, and violated his right to due process. Because we conclude that Cargill was not judicially estopped from denying liability and there was no due process violation, we affirm.

I. Background Facts and Proceedings.

On December 30, 2008, Cooksey suffered an alleged injury while working for Cargill. At Cargill's recommendation Cooksey was treated by Dr. David Hatfield. Cooksey filed his first application for alternate medical care, pursuant to rule 4.48(7), on April 12, 2010. Cargill answered the petition and stated, "Respondents do not dispute liability on this claim at this juncture however discovery is continuing." A hearing was held, during which Cargill confirmed it did not dispute liability. However, during the hearing the parties came to an agreement that Cooksey could obtain a second medical opinion from Dr. Chad Abernathy for the purpose of future treatment recommendation. In response, Cooksey agreed to request dismissal of his application for alternate medical care.

On April 23, 2010, the deputy approved the request and the application was dismissed without prejudice and without a decision on the merits.

On July 16, 2010, Cooksey filed a second application for alternate medical care. Before Cargill responded, Cooksey filed a motion to dismiss without prejudice. The deputy sustained the motion on July 28, 2010. The order states Cooksey dismissed the application because Cargill authorized Dr. Donna Bahls to evaluate and treat Cooksey's back pain and complaints.

In February 2011, Cargill received reports from two physicians which questioned the causation of Cooksey's symptoms.[1] In August Cargill received a report, at its request, from Dr. Charles Wadle who had performed a mental health examination on Cooksey on August 12, 2011. In it he concluded that Cooksey had no identifiable psychiatric diagnosis.

On August 26, 2011, Dr. Bahls, the physician authorized by Cargill to treat Cooksey at the time, recommended continued treatment for the work-related injuries and advised it would be beneficial for Cooksey to receive alternate evaluation and care through the Spine Clinic of University of Iowa or Mayo Clinic. Soon after Cargill advised Dr. Bahls that she was no longer authorized to provide Cooksey medical treatment.

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[1] On February 4, 2011, Dr. Hatfield authored a report stating that he had considered the disputed symptoms to be a result of the alleged workplace injury and resulting medical treatment. However, he agreed that if any other medical records predated the reported injury, then the symptoms would instead represent a continuation of a pre-existing condition. On February 27, 2011, Dr. Abernathy reported that based on his observations the symptoms in question were a continuation of a pre-existing condition and were not related to the alleged December 30, 2008 incident. He further stated that medical records prior to the alleged work incident contained evidence of Cooksey's pre-existing condition which caused the disputed symptoms.

Cooksey then filed his third and final application for alternate medical care on February 28, 2012. In its answer Cargill disputed liability. The deputy commissioner then dismissed the application pursuant to rule 4.48(7).[2] In the order dismissing the application the deputy stated: "An application for alternative medical care is only available when defendants do not dispute liability for the medical condition for which care is sought. As defendants deny liability, the original notice and petition concerning claimant's application for alternate medical care must be dismissed." In the order the deputy also barred Cargill from asserting a lack of authorization defense in the future if Cooksey sought to recover costs incurred in obtaining medical care.

Following the dismissal Cooksey filed a request for findings of fact and specific ruling and an amended request based on denial of due process and judicial estoppel. The deputy denied both requests. Cooksey then filed a petition for new trial and hearing and was also denied. Pursuant to Iowa Code section 86.3, the deputy commissioner was delegated the authority to issue the final agency decision on the application.

Finally, Cooksey filed a petition for judicial review with the district court. The court affirmed the agency action. Cooksey appeals.

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[2] Rule 4.48(7) states:

> Employer liability. Application cannot be filed under this rule if the liability of the employer is an issue. If an application is filed where the liability of the employer is an issue, the application will be dismissed without prejudice. (Petitions for alternate care where liability of the employer is an issue should be filed pursuant to rule 4.1(85,85A,85B,86,87,17A).)

II. Standard of Review.

On appeal from judicial review, the standard we apply depends on the type of error allegedly committed. *Jacobson Transp. Co. v. Harris*, 778 N.W.2d 192, 196 (Iowa 2010). Our standard of review depends on the aspect of the agency's decision that forms the basis of the petition for judicial review. Iowa Code § 17A.19(10). If we reach the same conclusions as the district court we affirm, otherwise we reverse. *Neal v. Annett Holdings, Inc.*, 814 N.W.2d 512, 518 (Iowa 2012). Here, Cooksey raises three issues.

He first argues the agency should not have allowed Cargill to deny liability because it was judicially estopped from doing so after admitting liability in previous hearings. "A party challenging agency action bears the burden of proof of proving both the invalidity of the agency's action and resulting prejudice." *Winnebago Industries, Inc. v. Haverly*, 727 N.W.2d 567, 571 (Iowa 2006). We review for corrections of errors at law. *Tyson Foods, Inc. v. Hedlund*, 740 N.W.2d 192, 195 (Iowa 2007). We may reverse, modify, or grant other appropriate relief if the substantial rights of the petitioner have been prejudiced. *See Haverly*, 727 N.W.2d at 571.

Cooksey's second argument is that the agency's interpretation of rule 4.48(7) was beyond the authority delegated to it and arbitrary, capricious, and an abuse of discretion. *See* Iowa Code § 17A.19(10)(b),(n). The interpretation of workers' compensation statutes and related cases is not clearly vested by a provision of law in the agency. *See Finch v. Schneider Specialized Carriers, Inc.,* 700 N.W.2d 328, 331 (Iowa 2005). We are thus free to review the agency's

interpretation of law de novo. *See id*. Deference may be given to an agency's interpretation of an agency rule. *Annett Holdings, Inc.*, 814 N.W.2d at 518.

In a third and related argument, Cooksey argues the agency's interpretation of rule 4.48(7) violated his right to due process and, as such, is unconstitutional on its face or as applied. *See* Iowa Code § 17A.19(10)(a). It is the role of the judiciary to determine the constitutionality of legislation and rules enacted by other branches of government. *ABC Disposal Systems, Inc. v. Dep't of Natural Res.*, 681 N.W.2d 596, 605 (Iowa 2004). "When a party raises constitutional issues in an agency proceeding, our review is de novo." *See id.*

III. Discussion.

A. Alternate Medical Care.

This appeal revolves around Cooksey's applications for alternate medical care pursuant to Iowa Code section 85.27(1). Our supreme court has previously explained the purpose and the essence of an employee's right to alternate care and reimbursement for its cost:

> An alternate medical care claim brought by an injured worker prior to a final determination of liability of an employer has its roots in the statutory duty of an employer to provide medical care. This duty, however, is imposed only when the employer does not contest the compensability of the injury. *See* Iowa Code § 85.27 (1). This is an important proposition under the statute because it means the issue of compensability is totally removed from the alternate medical care process. Instead, the commissioner's role under section 85.27 at this stage is limited to determining the reasonableness and necessity of medical care sought by an employee as an alternative to the care furnished by the employer. Thus, if a compensability issue arises in the course of an alternate care dispute, the commissioner cannot order that the alternate care sought by the employee be furnished by the employer prior to a determination of the compensability of the injury in a contested case proceeding or some other proceeding. *See* Iowa Admin.

> Code. R. 876-4.48(7) ("Petitions for alternate care where liability of the employer is at issue should be filed pursuant to rule 4.1."). Administrative rule 4.48 is consistent with this approach. *See id.* r. 876-4.48.
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> On the other hand, in those cases where compensability of the injury is not at issue and the employer furnishes medical care to the employee, the commissioner is authorized to order the employer to provide alternate care if the employee establishes the alternate medical claim upon reasonable proof of necessity for the care. Iowa Code § 85.27(4); *see West Side Transp. v. Cordell*, 601 N.W.2d 691, 693-94 (Iowa 1999) (commissioner can order alternate care upon sufficient proof). If the commissioner orders alternate care, the employer is required to furnish the care. Of course, if the commissioner finds the employee has failed to establish the necessity for the alternate care, the employer has no responsibility to furnish or pay for such care. Nevertheless, such a finding by the commissioner does not mean the employee may not still choose to obtain the alternate care. It only means the employer will not be responsible for the expense of the care. If the employee chooses to obtain the alternate care after the commissioner has denied a petition for alternate care on its merits, the employee will be responsible for the expense. Thus, the employer's statutory "right to choose the care" under section 85.27(4), commonly referred to as the right to control and direct medical care, does not prevent an employee from obtaining alternate care against the directions of the employer. Instead, it enables the employer to assert an authorization defense in the event the employee later seeks to have the employer pay for the unauthorized care.

R.R. Donnelly & Sons v. Barnett, 670 N.W.2d 190, 196–97 (Iowa 2003).

B. Judicial Estoppel.

On appeal, Cooksey asserts the deputy commissioner erred in dismissing his third petition for alternate medical care on the basis that liability was disputed. Cooksey contends that the employer was judicially estopped from disputing liability and the deputy erred in determining the doctrine of judicial estoppel was inapplicable. In support of his contention, Cooksey notes that Cargill did not dispute its liability in either its written answer to or at the hearing for his first application for alternate medical care.

As observed by our supreme court, "judicial estoppel is a commonsense doctrine that prohibits a party who has successfully and unequivocally asserted a position in one proceeding from asserting an inconsistent position in a subsequent proceeding." *Hedlund*, 740 N.W.2d at 196. Its purpose is "to protect the integrity of the judicial process" and is applicable to administrative proceedings as well as court proceedings. *See id*.

However, judicial estoppel is only applicable when the party's inconsistent position was "judicially accepted" in the prior action. *See id*. Judicial acceptance means that the "previous, inconsistent assertion was material to the holding in the first proceeding." *Id*. at 197. Without judicial acceptance, the doctrine is unnecessary as there is "no risk of inconsistent, misleading results." *See id*. at 196.

As part of his argument, Cooksey maintains that his case is analogous to *Winnebago Industries v. Haverly*, 727 N.W.2d 569 (Iowa 2006). In *Haverly*, the claimant filed an application for alternate medical care and the employer did not dispute liability. 727 N.W.2d at 570–71. The deputy commissioner granted claimant's application and ordered the employer to provide surgery. *Id*. at 571. Approximately one year later, the claim proceeded to hearing. *Id*. The deputy determined that the issue of liability had been litigated and the prior decision was res judicata on the issue. *Id*. The supreme court ultimately concluded that res judicata did not apply, but the employer was precluded from denying liability nonetheless because of judicial estoppel. *Id*. at 572–75. The court found judicial estoppel precluded the employer from denying liability to receive the benefit of

controlling the medical care of the claimant in one hearing and then denying liability in the next. *Id*. at 575.

One court aptly summarized the applicable principles in stating:

> Indeed, to allow an employer to control the medical care of an employee while simultaneously allowing that same employer to free itself of any obligation to later pay for medical care or benefits is a contravention of justice and fairness. Such a result, as the Iowa Supreme Court related, "simply does not advance the policy goal of avoiding inconsistent and misleading results." *Hedlund*, 740 N.W.2d at 198. It does not respect judicial integrity. Generally, once an employer admits liability for a claim in an alternate medical care proceeding, it is bound by that assertion. *See Winnebago*, 727 N.W.2d at 575 (explaining that it would take a "significant change in the facts after the admission of liability" in order to later deny liability); *Hedlund*, 740 N.W.2d at 198–99 (describing the critical role that admitting liability plays in an alternate medical care proceeding). This is because "[l]iability is normally an important component of the course of an alternate medical care proceeding." *Hedlund*, 740 N.W.2d at 198. Without first admitting liability, the workers' compensation commissioner cannot hear the case. Iowa Admin. Code r. 876–48.7 ("Application cannot be filed under this rule if the liability of the employer is an issue."). "[T]he commissioner normally relies on [the admission of liability] in disposing of the application." *Hedlund*, 740 N.W.2d at 198.

Spencer v. Annett Holdings, Inc., 905 F.Supp.2d 953, 985 (S.D. Iowa 2012).

Contrary to Cooksey's claim, *Haverly* is dissimilar to the present facts. First, Cargill did not receive the benefit of controlling his medical care by admitting liability in one hearing. The parties came to a mutual agreement that Cooksey would see Dr. Abernathy for a second opinion. In fact, Cooksey moved to dismiss both of his first two applications for alternate medical after Cargill agreed to the medical treatment he had requested. Second, and more important, in *Haverly*, the deputy ruled on the claimant's application while relying on the employer's admission of liability as a necessary prerequisite to do so. *Haverly*,

727 N.W.2d at 575; *see also* Iowa Admin. Code R. 876-4.48(7). We distinguish the facts here because the deputy did not dispose of the application based on Cargill's admission of liability. Rather, the deputy dismissed the petition because of the agreement of the two parties that it was no longer necessary.

Our facts are more analogous to those of *Tyson Foods Inc. v. Hedlund*, 740 N.W.2d 192 (Iowa 2007). In *Hedlund*, the claimant filed an application for alternate medical care. 740 N.W.2d at 194. The employer admitted liability and a hearing was held. *Id*. At the hearing it became apparent that the claimant wrongly believed the employer was changing her treating physician rather than scheduling an independent medical examination, as was actually intended. *Id*. The deputy then dismissed the petition because "the basis for the application for alternate medical care no longer exist[ed]." *Id*. When the employer denied its liability in a separate hearing, the deputy commissioner determined it was precluded from doing so because of the doctrine of res judicata. *Id*. On appeal, the supreme court determined that neither res judicata nor judicial estoppel applied. *Id*. at 195–200. The court explained:

> . . . [The employer] clearly took a position on liability at the first hearing. However, the commissioner did not act in any way to dispose of the application based on that position. . . . The alternate medical care issue was rendered moot, and the proceeding was, as a result, a nonevent. The admission of liability by [the employer] played no role in the dismissal of the petition by the deputy commissioner. Consequently, judicial estoppel does not apply.

Id. at 199.

Similarly, judicial estoppel is not applicable in the present case. While it is true that Cargill admitted liability at the first hearing, there was no judicial

acceptance since the admission was not dispositive on the result. The deputy never ruled on the merits of the petition. The two parties came to an agreement independent of the admission and moved to dismiss the application before the deputy made a ruling on it. Although the deputy relied upon Cargill's admitted liability to the extent of beginning the hearing, the court did not rely upon the admission in ruling upon the first application for alternate medical care because the application was dismissed. *See id.* at 197 (judicial acceptance exists when "the previous, inconsistent assertion was material to the holding in the first proceeding").

C. Interpretation of Rule 4.48(7).

1. Arbitrary, Capricious, and an Abuse of Discretion.

On appeal, Cooksey contends the agency's interpretation of rule 4.48(7), insofar as it denied him due process, was beyond the authority delegated to it, and was arbitrary, capricious, and an abuse of discretion. *See* Iowa Code § 17A.19(10)(b),(n). Cooksey does not perform statutory construction and offers no argument based on the language of the statute or the rule. His argument otherwise overlaps with his argument regarding due process and we address his concerns in the next section. For the reasons to follow we conclude the agency did not interpret the rule in an arbitrary or capricious manner or abuse its discretion.

2. Due Process.

On appeal, Cooksey asserts that the agency's dismissal of his application for alternate medical care without a hearing violated his right to due process.[3] He argues he has been deprived of his interest in compensation benefits which is a property right that cannot be taken away without due process of law. His argument fails in two respects.

First, Cooksey has not lost a property right. In *Auxier v. Woodward State Hospital-School*, 266 N.W.2d 139, 142 (Iowa 1978), the supreme court did hold that a claimant's "interest in worker's compensation benefits is a property right which cannot be taken away without due process of law," and thus, "some opportunity must be accorded to protest and present proof." However, in *Darrow v. Quaker Oats, Co.*, 570 N.W.2d 649, 652 (Iowa 1997), the court made it clear that the property interest possessed by claimant was in benefits that had already been awarded. The court stated, "[B]enefits cannot be arbitrarily *terminated* without notice and opportunity to contest the termination. Because no entitlement to benefits has been established here, [claimant] is in no position to assert deprivation of a property interest." *Darrow*, 570 N.W.2d at 652 (citation omitted). Similarly, Cooksey has not yet been awarded benefits. The dismissal of his petition without a hearing did not constitute a deprivation of a property right.

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[3] The parties dispute whether the issue was preserved for appeal. The district court determined that the alleged error was waived because it was not supported by argument or legal authority in Cooksey's brief. However, the court did then decide the issue. Because Cooksey raised the issue on appeal and the district court decided it, albeit denying it was doing so, we will address the merits of the complaint.

Second, Cooksey still has a meaningful opportunity to be heard on his claim. The deputy dismissed Cooksey's petition for alternate medical care pursuant to rule 4.48(7) because the rule explicitly states that it is only applicable in situations where liability is not disputed. ("Application cannot be filed under this rule if the liability of the employer is an issue. . . . Petitions for alternate care where liability of the employer is an issue should be filed pursuant to rule 4.1"). His petition was dismissed without prejudice and can be appropriately filed as a contested case under the proper rule. *See* Iowa Admin. Code r. 876-4.1(14), *see also* Iowa Code § 85.27. Furthermore, in the order dismissing the third application for alternate care, the deputy explicitly barred Cargill from asserting the authorization defense[4] if Cooksey chooses to proceed with a contested hearing and "seeks to recover the charges incurred in obtaining care for the condition for which [Cargill] denies liability." Not only is Cooksey free to proceed with a contested hearing and have an unbiased party determine whether Cargill's denial of liability was valid, he is also free to seek medical care, make a claim for medical benefits covering such care, and is protected from debt collection on any related medical bills in the meantime. *See* Iowa Code § 85.27.

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[4] The authorization defense "is derived from the right of the employer to authorize medical care under section 85.27, and generally means an employer who is providing reasonable medical care to an employee is not responsible to pay for unauthorized medical care." *R.R. Donnelly & Sons v. Barnett*, 670 N.W.2d 190, 196 (Iowa 2003). "The denial of a petition for alternate care on the merits implies the employer has attained its qualified right under the statute to choose medical care." *Id*. at 197. However, here, there was not a denial of the petition on the merits and thus, the defense could not be asserted.

D. Conclusion

Because we find that Cargill was not judicially estopped from denying liability in response to Cooksey's third application for alternate care and Cooksey has not suffered a violation of his right to due process, we affirm.

AFFIRMED.