IN THE COURT OF APPEALS OF IOWA

No. 8-754 / 06-2074
Filed November 13, 2008

BETTY BRINSON,
Petitioner-Appellant,

vs.

SPEE DEE DELIVERY SERVICE
AND CNA INSURANCE COMPANIES,
Respondents-Appellees.

Appeal from the Iowa District Court for Polk County, Don Nickerson, Judge.

Petitioner appeals the entry of a nunc pro tunc order in a workers' compensation decision. **AFFIRMED.**

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

Joseph A. Happe of Huber, Book, Cortese, Happe & Lanz, P.L.C., West Des Moines, for appellees.

Considered by Mahan, P.J., and Vaitheswaran, J., and Schechtman, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

SCHECHTMAN, S.J.

After a contested hearing, the deputy workers' compensation commissioner found compensability. The arbitration decision awarded temporary total disability, and further provided, "Defendants pay claimant outstanding medical costs related to services claimant received as a result of her injury and in the total amount of . . . $26,794.56."

There was no appeal. About two months later, the employer and insurance carrier (hereafter often referred to as the defendant), filed a motion for a nunc pro tunc order. Defendant recited that the claimant's group health insurer had paid $13,646.13 of the medical expenses and it would be improper to reimburse the claimant for the full amount. The claimant resisted, alleging (1) the arbitration decision is now a final decision, by operation of law, and the commissioner had lost any jurisdiction; (2) the group health insurer failed to assert any subrogation claim pursuant to Iowa Code section 85.38(2) (2005); (3) no credit was sought or requested by the defendant for any such claim; and (4) through an exchange of correspondence and voicemails, the attorneys had agreed to payment directly to the claimant, which bound the defendant.

The deputy workers' compensation commissioner, without opening the record, entered an "ORDER NUNC PRO TUNC", which read as follows:

> Defendants have requested an order expressly allocating payment as between reimbursement to claimant and . . . claimant's insurance carrier be entered nunc pro tunc in the arbitration decision . . . . Such an order is inappropriate. Payment is to be made to the medical providers. Any reimbursement issues are outside the purview of this division absent a showing that claimant actually made payments for which she is entitled to be reimbursed. . . .

> In the arbitration decision . . . through inadvertence the apostrophe and s were omitted from the word "claimant" . . . . The order regarding payment of medical expenses should read:
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> > "Defendants pay claimant's outstanding medical costs relating to services claimant received as a result of her injury and in the total amount of . . . $26,794.56."

The claimant filed a petition to enforce agency action in district court, asking that judgment for the full sum be entered for the claimant. The claimant, "out of an abundance of caution" also filed a petition for judicial review attacking the nunc pro tunc entry. These petitions were consolidated for trial. The district court's standard of review was under Iowa Code chapter 17A.

The district court dismissed the petition for judicial review, concluding that the nunc pro tunc order was appropriate, as being a clarification of the agency's decision that the medical expenses were to be paid directly to the providers, and not paid to the claimant, as she had not proven any payment from her own resources.[1]

I. Standard of Review

Our review is governed by the Iowa Administrative Procedure Act. Iowa Code ch. 17A. *Acuity Ins. v. Foreman*, 684 N.W.2d 212, 216 (Iowa 2004). We review the district court's decision by applying the standard of section 17A.19 to the agency action to determine if our conclusions are the same as those reached by the district court. *University of Iowa Hosps. & Clinics v. Waters*, 674 N.W.2d 92, 95 (Iowa 2004).

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[1] Though the district court ruled specifically on the petition for judicial review, the issues on the petition for enforcement of agency action were the same, and this appeal is directed at each, though still similar issues.

II. Nunc Pro Tunc Entry

Nunc pro tunc is a Latin phrase meaning "now for then." Black's Law Dictionary 1097 (7th ed. 1999). Such orders, though not found in a rule of civil procedure, are used to correct obvious errors or make an order conform to the judge's original intent. *Graber v. Iowa Dist. Court*, 410 N.W.2d 224, 229 (Iowa 1987).

Our supreme court has succinctly stated the use and scope of nunc pro tunc orders in *State v. Johnson*, 744 N.W. 2d 646, 648-49 (Iowa 2008):

> This court has emphasized that the function of a nunc pro tunc order is "to make the record show truthfully what judgment was actually rendered—'not an order now for then, but to enter now for then an order previously made.'" *Gen. Mills, Inc. v. Prall*, 244 Iowa 218, 225, 56 N.W.2d 596, 600 (1953) (quoting *Chariton & Lucas County Nat'l Bank*, 213 Iowa 1206, 1208, 240 N.W 740, 741 (1932)). A court may not use a nunc pro tunc order "for the purpose of correcting judicial thinking, a judicial conclusion or a mistake of law." *Headley v. Headley*, 172 N.W.2d 104, 108 (Iowa 1969). In reviewing a nunc pro tunc order, this court has declared that the intent of the trial judge is critical. *McVay v. Kenneth E. Montz Implement Co.*, 287 N.W.2d 149, 151 (Iowa 1980).

The nunc pro tunc order is a product of the court's inherent power to correct an evident mistake and is not lost by a lapse of time. *Freeman v. Ernst & Young*, 541 N.W.2d 890, 893 (Iowa 1995). "It is fundamental law that courts possess the inherent power to correct the record and enter judgments nunc pro tunc, and the lapse of time is no obstacle to the exercise of such power." *Yost v. Gadd*, 227 Iowa 621, 631, 288 N.W. 667, 673 (1939) (citations omitted).

The claimant does not contest the authority of the deputy commissioner to issue a nunc pro tunc entry in her briefs. She does contend that the entry does not alter the defendant's duty to pay the entire $26,794.56 to her.

It is clear that the deputy workers' compensation commissioner recognized the grammar employed in the arbitration decision could, to some readers, convey a meaning or purpose which was contrary to workers' compensation law as well as the deputy's intent. The insertion of an apostrophe and "s" changing the noun to the possessive case ("claimant" to "*claimant's*"), removed any doubt as to how the medical bills of the claimant were to be paid. This grammatical change was aligned with the record and the law. The commissioner does not award a judgment, but awards benefits. Iowa Code section 86.42 provides a summary procedure to reduce a workers' compensation award into an enforceable judgment. *See Rethamel v. Havey*, 715 N.W.2d 263, 266 (Iowa 2006). This section was apparently invoked by the claimant when she filed her petition to enforce agency action, which was consolidated with the petition for judicial review due to the similarity of their issues.

We conclude that the nunc pro tunc order was appropriate under these circumstances.

III. Application of Iowa Code section 85.38(2)

This section allows a credit for medical payments made by the employer's group insurance carrier for non-occupational injuries. This issue looms its head when, as here, there is a denial of benefits by the workers' compensation carrier, and the group health insurer forwards to the medical providers some portion of their bills, while the issue of compensability is pending.

In the pre-hearing report before the deputy commissioner, the employer noted that any "credits against any award" were "no longer in dispute." Further,

the defendant admits that no evidence was offered to the deputy commissioner of any payment of the claimant's medical bills by the healthcare provider pursuant to the relevant section relating to credit.

In *Caylor v. Employers Mutual Casualty Co.*, 337 N.W.2d 890, 894 (Iowa Ct. App. 1983), the claimant demanded payment for his medical bills that were paid by the employer's group insurance carrier. The court disagreed stating, "Claimant is not entitled to reimbursement for medical bills unless he shows that he paid them from his own funds." *Caylor*, 337 N.W.2d at 894.

Caylor was cited in *Krohn v. State*, 420 N.W.2d 463, 464 (Iowa 1988), wherein the State, as the employer, was directed to pay specified medical expenses totaling $9,151.63. The employee requested a judgment for that sum in district court, which was granted. *Krohn*, 420 N.W.2d at 464. The State moved to set that judgment aside as the claimant had not personally satisfied these medical bills, the bills had been paid by the health insurance plan, and the State had reimbursed the group insurance carrier after the commissioner's decision. *Id.* The employee responded that the State, as the employer, waived its right to any credit by indicating in a prehearing form that a section 85.38(2) credit was not involved. *Id.* at 465. The court vacated the judgment holding, "When an employer's obligation for medical and hospital services under the workers' compensation laws have been established, section 85.38(2) appears to provide a method by which the employer may act unilaterally to satisfy those liabilities." *Id*.

It is clear that Brinson, as the employee/claimant, did not offer any evidence of payment to any of the medical providers directly by her from her funds or sources,[2] and is not entitled to any judgment, payment or reimbursement for those medical bills allowed by the deputy in the arbitration decision. It is equally clear that the employer shall pay those providers directly, and may unilaterally reimburse the group health insurer for sums advanced by it to the medical providers to satisfy that portion of its obligation pursuant to the award of benefits.

IV. Alleged Post-Award Agreement by Attorneys

The contention by the claimant that an alleged agreement to pay the full amount to her between the attorneys for her and the employer/carrier, occurring after the deputy's decision, is without merit. It was inserted as a resistance to the issuance of the nunc pro tunc entry, as well as an affirmative request in the petition to enforce the agency decision. The subject was not before the deputy, so it would not be a source for corrective action by her in a nunc pro tunc order. Nor was it agency action to be a subject for a summary transformation of the award to a judgment under Iowa Code section 86.42. Lastly, the alleged agreement arose from correspondence and telephone calls by the attorneys, in an attempt to resolve disagreements concerning the intent of the deputy commissioner in making the award, which intent was resolved in its nunc pro

[2] *Midwest Ambulance v. Ruud*, 754 N.W.2d 860,867 (Iowa 2008), disallowed a credit to the employer for payments by its group health insurance carrier. The employee, Ruud, had received payments to her from that carrier during a period when she had exercised her COBRA rights by paying that premium from her own funds. *Midwest Ambulance*, 754 N.W.2d at 867. *Midwest Ambulance* is distinguished as Brinson paid no portion of the premium to the group health insurer.

tunc entry. It never matured into any contractual agreement approved by the deputy commissioner or district court.

The district court is affirmed and the petition for judicial review and petition for a judgment entry are each dismissed.

AFFIRMED.