IN THE COURT OF APPEALS OF IOWA

No. 8-885 / 08-0582
Filed November 26, 2008

RICHARD MICHAEL,
Plaintiff-Appellant,

vs.

NUCKOLLS CONCRETE SERVICES, INC., d/b/a/ AMERICAN CONCRETE PRODUCTS, INC., and LIBERTY MUTUAL COMPANY, Jointly and Severally,
Defendants-Appellees.

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

Plaintiff appeals the district court's ruling granting defendant insurance company's motion for summary judgment on the ground that plaintiff could not establish a claim for bad faith since plaintiff's workers' compensation claim was "fairly debatable" as a matter of law. **AFFIRMED.**

Linda Channon Murphy of The Law Office of Linda Channon Murphy, P.L.C., Des Moines, for appellant.

Patrick J. McNulty & Allison J. Doherty of Grefe & Sidney, P.L.C., Des Moines, for appellees.

Considered by Sackett, C.J., and Eisenhauer and Doyle, JJ.

SACKETT, C.J.

Plaintiff, Richard Michael (Michael), appeals from the district court's grant of summary judgment in favor of defendant insurance company, Liberty Mutual (Liberty), on the ground that Michael could not establish his claim of bad faith against the company since it had a reasonable basis to deny Michael's workers' compensation claim as a matter of law. We affirm.

I. BACKGROUND AND PROCEEDINGS. On August 12, 2004, Michael sustained an injury while working in the scope and course of his employment as a cement truck driver. The injury occurred when another person became angry and hit Michael over the head on top of Michael's hard hat. Michael reported the injury and received medical treatment through his employer's workers' compensation insurer, defendant Liberty Mutual. Liberty authorized Michael to receive treatment from Dr. Daniel McGuire, a physician with Iowa Spine Care. Dr. McGuire treated Michael from August 19, 2004 to December 15, 2004, generally seeing Michael once every two weeks, but occasionally more frequently. He diagnosed Michael as having myofascial aches and pains and a sprain of the neck and lower back. Dr. McGuire prescribed regular physical therapy, pain relievers, and work restrictions. On December 15, 2004, McGuire saw Michael for the last time and released Michael to work full-time without restrictions. His report from this visit states in part:

> Neck is going to bother him off and on during the winter. It is safe for him to continue to work.
> He is at [maximum medical improvement] as of today. I am not going to assign any permanent lifelong restrictions as a result of this freak accident. I am not going to assign any permanent lifelong impairment. He will return to see us on an as-needed basis.

Michael continued to work for American driving a cement truck but requested additional treatment and a second opinion. Liberty agreed to pay for Michael to obtain a second opinion from Dr. Cassim Igram, an orthopaedic surgeon. Dr. Igram evaluated Michael on March 17, 2005. He diagnosed Michael also with myofascial neck pain and reported:

> I have reviewed Dr. McGuire's notes. His treatment seems to be perfectly appropriate. I would really have nothing further to add at this time.
> . . .
> As far as additional treatment is concerned, I think ongoing therapy is appropriate. He can certainly continue with his current course of treatment. I do not anticipate surgical treatment at this time.
> . . .
> If further treatment is desired at this office, I would suggest one of our physiatrists or a pain management specialist since again I do not believe surgery is going to be appropriate for this patient.

He also noted that he was unable to predict whether Michael would have chronic disabling pain or be susceptible to further injury. Michael continued to work for American until he was terminated on April 27, 2005.

On May 5, 2005, Michael's attorney sent Liberty a letter requesting approval for Michael to have "ongoing therapy" and see a physiatrist as recommended by Dr. Igram. Liberty responded that no further treatment would be approved given that Dr. McGuire released Michael for full duty work. Michael's attorney responded on May 17, 2005, explaining that a second opinion had been obtained that recommended continued treatment. Liberty did not respond and Michael's attorney sent a follow up letter on August 9, 2005, requesting a new treating physician be named since Michael was still in pain

from the work-related injury even though Dr. McGuire prescribed no further treatment.

Michael filed a petition for arbitration with the Iowa Workers' Compensation Commissioner on September 27, 2005. After learning that an attorney would be representing Liberty regarding the claim, Michael's attorney sent letters on October 21 and December 20, 2005, requesting authorization for Michael to receive treatment. On January 6, 2006, Michael filed a petition for alternate care. Liberty's attorney sent a letter on January 19, 2006 stating that Liberty would allow Michael to see Dr. McGuire again for another evaluation to determine whether Michael should receive additional therapy. Purportedly in reliance on this letter, Michael dismissed his petition for alternate care. However, Michael's attorney sent a letter to Liberty's attorney on February 17, 2006, requesting Liberty authorize Michael to see a different physician besides Dr. McGuire and again asking for additional treatment.

Liberty insisted on another evaluation by Dr. McGuire prior to approving additional treatment. Michael then scheduled an appointment to see Dr. McGuire on March 8, 2006. Dr. McGuire cancelled the appointment on that day and refused to see Michael again. Michael's attorney advised Liberty's attorney of this problem and again requested authorization for Michael to see other physicians and obtain physical therapy. No response to this letter appears in the record; however on June 21, 2006, Liberty's attorney forwarded Michael's attorney a report from Dr. McGuire. It was written on May 25, 2006, and stated in relevant part:

> I see no reason for ongoing medical care. There is no surgical lesion. Passive and active modalities at home, mixed with some [anti-inflammatories] are appropriate care at this point.
>
> Considering his occupation and lack of hard findings on physical examination and diagnostic studies I would not recommend a pain management consultation and I would not recommend evaluation by a [physiatrist] as a result of the 2004 work incident.

Michael independently obtained an evaluation by Dr. Kuhnlein on July 7, 2006. This doctor reviewed Michael's medical records and examined him. Dr. Kuhnlein diagnosed Michael with a pre-existing degenerative disc disease that was aggravated by the August 2004 injury and caused chronic cervical pain. He assigned Michael a five percent impairment rating due to the injury. On November 8, 2006, a deputy workers' compensation commissioner awarded Michael benefits from this injury but found Michael was not entitled to penalty benefits under Iowa Code section 86.13 (2005). This decision was not appealed.

On February 22, 2007, Michael filed a petition alleging, among other things, that he was entitled to damages due to Liberty's bad faith denial of continued medical care. Liberty filed a motion for summary judgment. Liberty urged that Michael was required to pursue remedies for the denial of medical care through the workers' compensation claims procedures provided in Chapter 85. It alternatively claimed that it was entitled to a judgment as a matter of law because it had a reasonable basis to deny Michael's request for additional care. The motion was initially denied as the court found the workers' compensation statutes did not provide the exclusive remedy for Michael's claim and because genuine issues of material fact existed. After Liberty filed a motion to reconsider,

the district court granted the motion concluding there were no genuine issues of material fact because Michael's claim was fairly debatable as a matter of law. The court's order reiterated that its prior ruling on the exclusivity of remedies would stand. Michael appeals.

II. STANDARD OF REVIEW. Our review of a ruling granting a party's motion for summary judgment is for errors at law. Iowa R. App. P. 6.4; *Green v. Racing Ass'n of Cent. Iowa*, 713 N.W.2d 234, 238 (Iowa 2006). The motion should be granted if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 1.981(3). If the dispute is over facts that may affect the suit's outcome under the applicable law, the issue of fact is "material." *Weddum v. Davenport Cmty. Sch. Dist.*, 750 N.W.2d 114, 117 (Iowa 2008). "[A] 'genuine' issue of fact means the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Wallace v. Des Moines Indep. Cmty. Sch. Dist. Bd. of Dirs.*, 754 N.W.2d 854, 857 (Iowa 2008).

We must view the facts in a light most favorable to the party resisting the motion and the moving party bears the burden of proving there is no genuine issue of material fact. *Rodda v. Vermeer Mfg.*, 734 N.W.2d 480, 483 (Iowa 2007). If the conflict only concerns the legal consequences flowing from undisputed facts, summary judgment is appropriate. *Kragnes v. City of Des Moines*, 714 N.W.2d 632, 637 (Iowa 2006).

III. ANALYSIS. Michael contends genuine issues of material fact exist regarding whether Liberty had a reasonable basis to deny the treatment and thus the

court's grant of summary judgment was error. Liberty counters that summary judgment was proper because (1) Michael needed to litigate his bad faith claim during the workers' compensation proceedings under Chapter 85, and (2) the record undisputedly shows Michael's claim was "fairly debatable."

A. Exclusivity of Remedies. Our courts recognize a tort claim against workers' compensation insurance carriers for bad faith conduct in the administration of benefits. *Boylan v. Am. Motorists Ins. Co.*, 489 N.W.2d 742, 744 (Iowa 1992). However, it is uncertain whether a bad faith claim will lie in the specific circumstances before us. The law is unsettled as to whether a workers' compensation insurer can be liable in tort for bad faith conduct in the furnishing of care to an employee seeking treatment for a work-related injury.

Michael argues his claim is not precluded under *Tallman v. Hanssen*, 427 N.W.2d 868, 870 (Iowa 1988), which stated that the exclusivity principle of the workers' compensation scheme "is limited to matters surrounding a job-related injury and does not extend to subsequent dealings during which a tort may arise by reason of bad faith on the part of an employer's insurer." Tallman's claim alleged the workers' compensation insurer, among other things, failed to provide a physician. *Tallman*, 427 N.W.2d at 470. Liberty asserts this case is more akin to *Kloster v. Hormel Foods Corp.*, 612 N.W.2d 772, 774-75 (Iowa 2000), where the court found Kloster's claim was preempted by the workers' compensation statutes because his claim in essence expressed a dissatisfaction with medical care, an issue directly addressed by Iowa Code section 85.27. In this case, the district court found Michael's claim of bad faith was not precluded because it

concerned conduct outside the workers' compensation laws of chapter 85. It reasoned the claim concerned not only Michael's dissatisfaction with medical care, but also concerned Liberty's mishandling of the claim by purportedly breaking promises to authorize treatment.

The Eighth Circuit discussed this very issue in *Petrillo v. Lubermens Mut. Cas. Co.*, 378 F.3d 767 (8th Cir. 2004). Petrillo sued her employer's workers' compensation insurer for bad faith "failure to monitor and direct the medical treatment being furnished" to her. *Petrillo*, 378 F.3d at 768. She argued the insurer "acted in bad faith by not having her sent to a physician, rather than a physical therapist" which resulted in aggravating her injury. *Id.* at 769. The court explained that under Iowa Code section 85.27, "'the employer is obliged to furnish reasonable services . . . to treat an injured employee, and has the right to choose the care.'" *Id.* (quoting Iowa Code § 85.27(4)). Petrillo argued that case dicta and workers' compensation regulations established that there was a joint obligation between employers and insurers to provide suitable care. *Id.* The court disagreed "that the insurer has a duty to supervise and control an employer exercising its right under § 85.27(4) to choose the medical provider." *Id.* It declined to "consider whether the insurer could be liable in bad faith if the policy delegated the employer's right to choose the care to the insurer, or if the insurer in fact chose the medical provider in a particular case." *Id.* at 770. The court stated that in such a case, the question would remain whether such claim would lie for an employee that failed to file a petition for alternate care, the statutory

remedy available under Iowa Code section 85.27 for when an employee is dissatisfied with the care offered. *Id.*

We cannot determine from the record whether the employer chose the medical provider in this case or delegated this duty to the insurer. Although this information would aid our analysis of whether section 85.27 provides the exclusive remedy for this type of complaint, due to our analysis of the bad faith claim, we need not decide the issue on the record before us. Even if section 85.27 was not the exclusive remedy and Liberty could be liable in tort for bad faith conduct in failure to authorize medical care, such claim can only survive a motion for summary judgment if the record shows a genuine issue of material fact disputed by the parties. We need not decide the exclusivity issue since we conclude no such dispute exists.

B. Bad Faith Claim. We review rulings on a motion for summary judgment in bad-faith claims the same as other types of cases. *Rodda v. Vermeer Mfg. & EMC Risk Servs., Inc.*, 734 N.W.2d 480, 483 (Iowa 2007); *Galbraith v. Allied Mut. Ins. Co.*, 698 N.W.2d 325, 328 (Iowa 2005). "[T]o succeed on such motions the insurer must demonstrate that a reasonable trier of fact could not determine that the insurer lacked a reasonable basis for denying or for delaying payment of the claim." *Gailbraith*, 698 N.W.2d at 328. There is a reasonable basis to deny benefits if the claim is fairly debatable on an issue of fact or law. *Bellville v. Farm Bureau Mut. Ins. Co.*, 702 N.W.2d 468, 473 (Iowa 2005); *Christensen v. Snap-On Tools Corp.*, 554 N.W.2d 254, 260 (Iowa 1996). If the claim can be disputed on any logical basis, the "fairly debatable" standard

is met. *City of Madrid & EMC Ins. Co. v. Blasnitz*, 742 N.W.2d 77, 82 (Iowa 2007); *Bellville*, 702 N.W.2d at 473.

This issue can be decided by the court in ruling on a motion for summary judgment because "[w]here an objectively reasonable basis for denial of a claim *actually exists*, the insurer cannot be held liable for bad faith as a matter of law." *Bellville*, 702 N.W.2d at 473; *Gardner v. Hartford Ins. Accident & Indem. Co.*, 659 N.W.2d 198, 206 (Iowa 2003). Yet we can only decide the issue as a matter of law "when the evidence is undisputed and only one inference can be drawn from the evidence." *McIlravy v. North River Ins. Co.*, 653 N.W.2d 323, 333 (Iowa 2002). In making this determination, we do not weigh the evidence that was before the insurer, rather we only decide "whether evidence existed to justify denial of the claim." *Bellville*, 702 N.W.2d at 474 (citation omitted). Since Michael complains of Liberty's conduct over a period of time, we will consider whether Liberty initially had a reasonable basis to deny further treatment after releasing Michael on December 15, 2004, and if so, whether Liberty continued to have a reasonable basis to deny further treatment. *See McIlravy*, 653 N.W.2d at 331 (stating that the entire time period must be considered in cases where the dispute "focuses on the point in time at which a court should look to determine the reasonableness of an insurer's actions in denying benefits in light of the evidence in its possession.").

Michael argues summary judgment should not have been granted because the evidence relied on by Liberty in denying the claim was based on disputed facts and was susceptible to multiple inferences, some of which favored

authorizing more treatment for Michael. He notes that though Dr. McGuire's December 15, 2004 report released Michael for full work duty and placed him at maximum medical improvement, it also stated that Michael's neck would continue to bother him throughout the winter and that he would return for additional treatment "as needed." Michael also contends McGuire's statement, that he would not assign any permanent impairment rating since the injury was caused by a "freak accident," could not be used as a reasonable basis to deny further care. Michael contends any reasonable basis for denying further care ceased after Liberty received the second opinion report from Dr. Igram.

We fail to see how Dr. McGuire's December 15, 2004 report indicates Liberty's bad faith refusal to provide care after this date. First, even if McGuire's "freak accident" statement expressed a bias against awarding Michael workers' compensation benefits, it pertained to an impairment rating, not further treatment.[1] We agree that Dr. McGuire's recommendations of placing Michael at maximum medical improvement and releasing him to full work duty could be viewed as inconsistent with his prescription that Michael return on an as-needed basis.[2] However, the record does not show any evidence that Liberty refused further treatment at this stage. The record shows when Michael requested

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[1] Liberty concedes that employees can and do obtain workers' compensation benefits when injured in "freak accidents" related to their work.

[2] This is because "maximum medical improvement" is "[t]he point at which an injured person's condition stabilizes, and no further recovery or improvement is expected, even with additional medical intervention." Black's Law Dictionary 1000 (8th ed. 2004). Therefore, it would be inconsistent for Dr. McGuire to both place Michael at MMI and order Michael to return on an as-needed basis.

further treatment, they authorized him to obtain a second opinion from Dr. Igram. Only after they received Dr. Igram's report was further care denied.

Dr. Igram's report was consistent with Dr. McGuire's. Dr. Igram found Dr. McGuire's treatment plan "appropriate." His prescription for on-going therapy is not inconsistent with Dr. McGuire's since Dr. McGuire acknowledged Michael could be seen on an "as-needed" basis. Dr. Igram suggested consultation with a physiatrist or pain specialist "if desired."

Even though Michael's initial requests for further treatment at this stage were denied, Liberty did agree to have Michael seen again by Dr. McGuire. Dr. McGuire then refused to see Michael again, but we cannot translate Dr. McGuire's action into bad faith conduct on the part of Liberty. There is simply no evidence in the record to support this inference. In our review of summary judgment we consider legitimate inferences on behalf of the nonmoving party, but an inference is not legitimate if it is based on speculation or conjecture. *McIlravy*, 653 N.W.2d at 328. Reports from the various physicians, though somewhat ambiguous, were consistent. The reports stated that further treatment could be sought, but was not necessary. This recommendation gave Liberty a logical basis to deny further treatment to Michael.

We agree with the district court that Michael's claim was "fairly debatable" and therefore Liberty had an objectively reasonable basis to deny further treatment to Michael. Liberty was correctly granted summary judgment since it cannot be held liable for bad faith as a matter of law.

AFFIRMED.