IN THE COURT OF APPEALS OF IOWA

No. 9-073 / 08-1677
Filed July 22, 2009

CITY OF AMES,
Employer/Petitioner-Appellant,

vs.

JERRY TILLMAN,
Claimant/Respondent-Appellee.

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

The City of Ames appeals a district court decision affirming the Iowa Workers' Compensation Commissioner's determination the City is liable for medical expenses incurred by Jerry Tillman at the University of Iowa Hospitals and Clinics for his work-related injury. **REVERSED.**

Stephen Spencer and Joseph M. Barron of Peddicord, Wharton, Hook, Barron & Wegman, LLP, Des Moines, for appellant.

David D. Drake of Lawyer, Lawyer, Dutton & Drake, L.L.P., West Des Moines, for appellee.

Heard by Sackett, C.J., and Vogel and Miller, JJ.

PER CURIAM

The City of Ames (the City) appeals a district court decision affirming the Iowa Workers' Compensation Commissioner's determination the City is liable for medical expenses incurred by Jerry Tillman for unauthorized medical treatment he received at the University of Iowa Hospitals and Clinics for his work-related injury. We reverse.

I. Background Facts and Prior Proceedings.

On December 17, 2005, Jerry Tillman sustained an injury to his left wrist when he fell on some ice while working for the City. He was immediately transported to the emergency room at Mary Greeley Medical Center in Ames where he was treated by Dr. Michael Miller. Dr. Miller ordered x-rays of Tillman's left wrist, which revealed, in part, distal radius and ulna fractures. Dr. Miller performed a "manual manipulation of the dorsal fragment," re-x-rayed the wrist to make sure of correct alignment, and placed it in a splint. Tillman was discharged with a sling and pain medication. Dr. Miller told Tillman to follow up the next day with Dr. Thomas Greenwald, an orthopedic surgeon.

Dr. Greenwald did not examine Tillman until December 19, 2005, at which time he noted Tillman "had excellent closed reduction performed by Dr. Mike Miller with splinting." Greenwald did not remove the splint during the appointment. He opined that the appropriate course of action would be to treat Tillman "in a splint for a couple of weeks, seeing him back on 01/03/06." Tillman testified that Greenwald told him there was nothing more to do for the wrist and that he was never going to be able to flex or rotate his wrist, and that his range of

motion would be permanently reduced. Tillman's wife testified Dr. Greenwald told them Tillman's wrist was "shattered" and described it as "powder." She asserts that when she inquired whether pins or wires would aid her husband's condition, Dr. Greenwald indicated the bone was too bad for pins to be an option. Mr. and Mrs. Tillman were unsatisfied with the care provided by Greenwald and did not return for the scheduled January 3, 2006 appointment.

Tillman testified that following the initial appointment he was stunned and skeptical about treating with Dr. Greenwald. Mrs. Tillman, also an employee of the City, questioned her co-workers about obtaining a second opinion and one suggested Dr. Todd McKinley at the University of Iowa Hospitals and Clinics in Iowa City. Mrs. Tillman scheduled an appointment for Tillman with Dr. McKinley for December 30, 2005. Neither she nor Tillman spoke to anyone with the City's Department of Human Resources before scheduling the appointment in Iowa City. Mrs. Tillman testified she had attempted to contact the personnel department before Christmas with regard to her husband's difficulties with his prescription medication but her attempt was unsuccessful.

Mrs. Tillman informed Leah Vander Zwaag, principal clerk for the City's Department of Human Resources, about the University of Iowa appointment after it had been scheduled but before the actual appointment. Mrs. Tillman told Vander Zwaag that she had made an appointment in Iowa City for a second opinion, that she had heard several negative things about Greenwald, and she did not trust him. Vander Zwaag advised Mrs. Tillman she could not do that

because approval was needed for them to get a second opinion in order for it to be paid by workers' compensation.

At the direction of Julie Hulsman, director of the City's human resources department, Vander Zwaag sent a December 28, 2005 memorandum to Mrs. Tillman. It stated in relevant part:

> As of today, Jerry's appointment in Iowa City on Friday, December 30, 2005, for a second opinion with Dr. McKinley regarding his work-related wrist injury will not be paid for by the City of Ames (worker's compensation). Approval is required by the employer (City of Ames/Jon-Scott Johnson) for the alternate care if the injured employee is dissatisfied with the medical provider that the employer (City of Ames) provides. (See the "Questions and Answers About Workers' Compensation Law for Injured Workers" brochure that I sent you.) Since Jon-Scott is out of the country and has not approved this appointment, I have sent him an e-mail asking him to advise on the this situation ASAP. I will let you know as soon as I hear from him.
>
> Jerry's appointment with Dr. McKinley will also not be paid for by Wellmark Blue Cross Blue Shield (private health insurance), as they do not pay for work-related injuries.

On December 29, 2005, Mrs. Tillman again contacted Vander Zwaag regarding permission for Tillman to see Dr. McKinley. The City refused to grant alternate medical care until Jon-Scott Johnson gave his approval. Johnson, the City's risk manager, was vacationing out of country until January 15, 2006. At the time of Mrs. Tillman's December 29 phone conversation with Vander Zwaag, Johnson had not made e-mail contact with the City regarding Tillman's care. However, later that afternoon Johnson sent an e-mail to Mr. and Mrs. Tillman stating

> [Vander Zwaag] sent me a message about your plans to see another doctor in Iowa City. I would caution you that this is not a good decision on your part.

> If you are dissatisfied with the treatment you have been given thus far, you need to send me a letter detailing WHY you are dissatisfied. I will then discuss this with Drs. Mooney and Greenwald to determine if they agree "medically" of your decision to change doctors. Without our approval neither the exam or the cost of any future treatment (surgery) will be paid for by the City.
>
> Please reconsider this decision. Dr. Greenwald is a very fine doctor. If he does not wish to cast the arm at this time, I'm sure there is a very good medical reason for it.

Johnson's e-mail was sent to Mrs. Tillman's work e-mail address. She was not working on December 29, 2005, and thus did not receive the message that day. However, on December 30, 2005, Vander Zwaag read the e-mail to Mrs. Tillman over the phone. Mrs. Tillman responded she did not know what they were going to do but they would probably have to hire an attorney. She also indicated to Vander Zwaag they were willing to pay for the cost of the second opinion themselves because it was important to them to determine if Tillman would be able to regain range of motion in his wrist.

Tillman attended his appointment with Dr. McKinley on December 30, 2005, at the University of Iowa. Dr. McKinley reviewed Tillman's x-rays and discussed his course of treatment. Dr. McKinley expressed concern about Tillman's progress, specifically the splint, the mending of the bones, and ligature issues. Tillman testified that Dr. McKinley was very concerned he had waited too long and the bones had started to mend the wrong way. He further stated McKinley indicated to him that if he had gone to the University right after the accident the surgery would have been performed "perhaps that weekend or as soon as possible, that waiting this long was – was a bad thing."

Dr. McKinley and Dr. Bryan Adams both opined that an "open reduction" and "internal fixation" surgery was needed and Tillman consented. Surgery was scheduled for and performed on January 3, 2006. Dr. Friscella actually performed the surgery on Tillman. Dr. McKinley did not scrub in for the surgery, but was "immediately available" if needed and was the final reviewer of the operative and discharge reports.

Dr. Greenwald's deposition testimony stated he did not want to rush into surgery because Tillman had a painful, swollen wrist. He instead was going to wait ten to fourteen days and then have Tillman return to his office to see if things had "settled down" and determine whether the fracture was "stable or unstable." He stated that at the January 3, 2006 visit he would have taken x-rays and determined at that time if Tillman needed surgery. If he needed surgery, Greenwald would have referred him to his partner, a hand surgeon, who would have done the surgery that day or one of the next two days, as soon as his schedule permitted. Greenwald testified he believed it was reasonable that Tillman had the surgery in question and did not disagree with Drs. McKinley's and Adams's opinions that surgery was necessary.

In a February 2, 2006 letter to Tillman denying payment for his surgery, Johnson referred to his earlier e-mail, prior to Tillman's visit to Dr. McKinley, in which he had stated that care by Dr. McKinley in Iowa City was not authorized. In the letter Johnson made specific reference to the formal alternate care procedure to challenge an employer's choice of care and provided Tillman with

the forms necessary to file such a challenge. This letter was sent nearly a month after Tillman's January 3, 2006 unauthorized surgery.

Tillman filed a petition with the Iowa Workers' Compensation Commissioner seeking payment for the unauthorized medical care he received at the University of Iowa for his work-related wrist injury in the amount of $18,844.06. A hearing was held before a deputy commissioner who issued an arbitration decision finding the City was liable for those medical expenses. The deputy gave two reasons for finding the City liable, first because "the care provided at the University of Iowa was successful and beneficial toward improving [Tillman's] condition," and second "due to the emergent nature of [Tillman's] injury." The deputy ordered the City to pay for the full amount of the medical expenses incurred at the University of Iowa and to reimburse Tillman for his out-of-pocket expenses. The City filed an intra-agency appeal.

An appeal decision[1] affirmed and adopted as the final agency action the reasons given in the arbitration decision, and added an additional ground for reaching the same result. The additional ground given in the appeal decision was that the City did not provide Tillman with adequate notice of his right to contest the choice of care, as required by Iowa Code section 85.27(4). The agency found that although the memo from Vander Zwaag to Mrs. Tillman denying the request for a second opinion referred to one of the agency's brochures that generally informs injured workers of their rights, including the right to commence an alternate care proceeding, the memo was very misleading.

[1] The appeal decision was issued by a deputy commissioner acting on behalf of the commissioner.

> The tenor of the memo is that there is nothing the claimant can do and cites the brochure as the authority for this misleading assertion. Injured workers are not lawyers or adjusters and many would not even bother looking at the brochure to verify the adjuster's assertion. The only specific reference to an available alternate care proceeding by insurance personnel was after claimant received the unauthorized care [referencing the February 2, 2006, letter from Johnson]. Consequently, I find that the required notice was not provided.

The City filed a petition for judicial review with the district court challenging the final agency action. In a written ruling the district court affirmed the agency's decision, concluding substantial evidence supported the agency's "conclusion that the treatment offered by Dr. Greenwald was neither timely nor reasonable given Mr. Tillman's injury," and that the agency "did not err in concluding that the City failed to provide proper notice of alternate care as required by Iowa Code section 85.27(4)." The court thus affirmed each of the three reasons given by the agency for holding the City liable for the expenses for medical treatment Tillman received at the University of Iowa for his work-related injury.

The City appeals.

II. Scope and Standards of Review.

The Iowa Administrative Procedure Act, Iowa Code chapter 17A (2005), governs the scope of our review in workers' compensation cases. Iowa Code § 86.26; *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 218 (Iowa 2006). "Under the Act, we may only interfere with the commissioner's decision if it is erroneous under one of the grounds enumerated in the statute, and a party's substantial rights have been prejudiced." *Meyer*, 710 N.W.2d at 218. The district court acts in an appellate capacity to correct errors of law on the part of the agency. *Grundmeyer*

v. Weyerhaeuser Co., 649 N.W.2d 744, 748 (Iowa 2002). In reviewing the district court's decision, we apply the standards of chapter 17A to determine whether our conclusions are the same as those reached by the district court. *Clark v. Vicorp Rests., Inc.*, 696 N.W.2d 596, 603 (Iowa 2005).

III. Merits.

Iowa Code section 85.27(1) provides that an employer "shall furnish reasonable surgical, medical . . . and hospital services and supplies and shall allow reasonably necessary transportation expenses incurred for such services." As a result of the employer's obligation to furnish such services to the injured employee, the employer generally has the right to choose the care. Iowa Code § 85.27(4). The statute further provides:

> 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. 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. . . . The employer shall notify an injured employee of the employee's ability to contest the employer's choice of care pursuant to this subsection.

Id.

We conclude the agency erred in each of the three reasons relied on by the agency, and affirmed by the district court, for holding the City liable for the expenses for the unauthorized medical treatment Tillman received.

The first reason given was that “the care provided at the University of Iowa was successful and beneficial toward improving [Tillman’s] condition.”

The statute should not be read in hindsight such that liability would attach if the unauthorized care proved to be successful and beneficial. Under such a reading, the employer’s ordinary right to choose the care would be eviscerated. Rather, the employer’s obligation under the statute is to offer reasonable care for the diagnosis and treatment of a work-related injury. *Long v. Roberts Dairy Co.,* 528 N.W.2d 122, 124 (Iowa 1995). We therefore conclude that finding by the agency finds no support in the law.

The second reason given by the agency was “due to the emergent nature of [Tillman’s] injury.” In support of this reason the agency noted Dr. McKinley’s opinion that correcting Tillman’s condition would have been much more difficult had the surgery been delayed or not performed, the City’s risk manager was out of the country until January 15 and difficult to communicate with, and had Tillman waited until the risk manager returned the result might not have been the same as Tillman secured by going to the University of Iowa.

The evidence shows without any dispute that Tillman had a follow-up appointment scheduled with Dr. Greenwald for January 3, the same day the surgery was performed, but did not keep the appointment; that upon reviewing Tillman’s care at the University of Iowa, Dr. Greenwald fully agreed that Tillman’s care and surgery was appropriate; and that if Tillman had kept his January 3 appointment the surgery could have and would have been arranged for and provided almost immediately by the employer-authorized providers. We

conclude that the agency's second reason for holding the City liable, that an emergency existed requiring the surgery to be performed by someone other than the authorized provider, is not supported by substantial evidence in the record before the court when the record is viewed as a whole.

The third reason given by the agency for finding the City liable for the expenses of unauthorized care was that the City failed to comply with section 85.27(4)'s requirement that when a dispute develops over medical care the employer "notify [the] injured employee of the employee's ability to contest the employer's choice of care." Sometime on or before December 28, 2005, Vander Zwagg had sent to Mrs. Tillman a brochure, which Mrs. Tillman acknowledged receiving, concerning workers' compensation law. The brochure is entitled, "Questions and Answers About Workers' Compensation Law For Injured Workers" and is published by Iowa Workforce Development, Division of Workers' Compensation. The brochure is referred to in Vander Zwagg's December 28 memorandum to Mrs. Tillman. We have earlier quoted Vander Zwagg's December 28 memorandum. In discussing the question of alternate care it states, in relevant part:

> Approval is required by the employer (City of Ames/John-Scott Johnson) for the alternate care if the injured employee is dissatisfied with the medical provider that the employer (City of Ames) provides. (See the "Questions And Answers About Workers' Compensation Law for Injured Workers" brochure that I sent you.)

On page 4 the brochure, in part, states:

> WHO CHOOSES THE MEDICAL CARE?
>
> The employer has the right to choose the medical care and must provide medical care reasonably suited to treat your injury. If you are dissatisfied with that care, you should discuss the problem

> with your employer (or its insurance carrier). You can request alternate care, and if your employer (or its carrier) does not allow that care, you may file a petition for alternate medical care before the Iowa Workers' Compensation Commissioner. (85.27)

The City asserts that by providing Tillman with the brochure it met section 85.27(4)'s requirement that the employer notify an injured employee of the employee's ability to contest the employer's choice of care. It argues, contrary to the agency's decision, that:

> [T]here was no misstatement to Claimant at all. Approval by the employer for alternate care is necessary in the absence of an order by the Commissioner pursuant to Iowa Code § 85.27. In other words, if the employee is dissatisfied with the medical provider that the employer provides, approval is required by the employer for alternate care. This is a correct statement and the City even provided the brochure published by the agency explaining Claimant's right to an Alternate Care proceeding.

The City points out that the agency, although it ultimately concluded, "the required notice was not provided," found that the agency brochure "generally informs injured workers of their rights under the statute, including the right to commence an alternate care proceeding"; notes that this is a factual finding subject to substantial evidence review; asserts that this finding by the agency is supported by substantial evidence; and claims the district court therefore erred by substituting a contrary finding regarding the brochure.

We agree with the City. The brochure correctly informed Tillman of his right to commence an alternate care proceeding. The district court erred in affirming the agency finding that the City failed to meet its obligation to inform Tillman of that right.

IV. Conclusion.

We reverse the judicial review decision of the district court and the underlying appeal decision of the agency.

REVERSED.

Sackett, C.J., and Vogel, J., concur. Miller, J., dissents.

MILLER, J. (dissents)

I respectfully dissent.

One ground upon which the district court affirmed the final agency decision is the court's conclusion that the agency did not err when it found the City had failed to provide proper notice of an alternate care proceeding as required by Iowa Code section 85.27(4). The district court on judicial review did not reverse or modify the agency's relevant findings or its resulting conclusion of liability on the part of the City. The court cited with approval the agency's finding in the agency's appeal decision that the tenor of the December 28, 2005 memo from Vander Zwaag to Mrs. Tillman denying the request to get a second opinion on Tillman's injury was "that there is nothing the claimant can do and cites the brochure as authority for this misleading assertion." The court also agreed with the agency that sufficient notice of an alternate care proceeding was not given to Tillman by the City until *after* Tillman received the unauthorized care, referring to the notice given in the February 2, 2006 letter from Johnson to Tillman.[2] For the following reasons, I would reach the same conclusion as the district court.

Vander Zwaag had provided Mrs. Tillman with a brochure that generally informs injured workers of their rights, including their right to initiate an alternate care proceeding. However, both the December 28, 2005 memo Vander Zwaag sent to Mrs. Tillman and the December 29 e-mail from Johnson that was read to Mrs. Tillman by Vander Zwaag over the phone on December 30 were very

[2] The district court did voice some concern regarding the fact the workers' compensation informational brochure in the record was not the same color as the brochure provided to Mrs. Tillman by Vander Zwaag. However, the court stated that the testimony indicated the color of the brochure changes every year and provided an assumption that both versions of the brochure's text were otherwise identical.

misleading regarding what options Tillman had if he was dissatisfied with the employer provided care. Vander Zwaag's memo stated that Tillman's appointment for a second opinion with Dr. McKinley

> will not be paid for by the City of Ames (worker's compensation). *Approval is required by the employer (City of Ames/Jon-Scott Johnson) for the alternate care if the injured employee is dissatisfied with the medical provider that the employer (City of Ames) provides.* (See the "Questions and Answers About Workers' Compensation Law for Injured Workers" brochure that I sent you.)

(Emphasis added). The memo does not mention the right of an employee to contest the employer's choice for care through the procedures set forth in section 85.27(4). The parenthetical phrase that immediately follows the sentence we have emphasized can most reasonably be read as directing the reader of the memo to a provision that affirms the emphasized sentence, that is, affirms the statement that the employer's approval is required for any alternate care.

Johnson's e-mail stated, in part,

> If you are dissatisfied with the treatment you have been given thus far, you need to send me a letter detailing WHY you are dissatisfied. I will then discuss this with Drs. Mooney and Greenwald to determine if they agree "medically" of your decision to change doctors. Without our approval neither the exam or the cost of any future treatment (surgery) will be paid for by the City.

While this e-mail at least alludes to the possibility of Tillman contesting the employer's choice of care, it also improperly seems to indicate that Johnson and the City's selected care providers would be the ones who would decide if such alternate care was appropriate, and does not notify Tillman of his ability to contest the employer's choice of care, as required by section 85.27(4). Further,

the e-mail from Johnson was not relayed to the Tillmans until the day of the appointment for the unauthorized second opinion.

Substantial evidence supports the finding of the agency, affirmed by the district court, that a proper notice of the existence of an alternate care proceeding was not provided to Tillman by the City until the February 2, 2006 letter sent to him by Johnson. In that letter the City expressly mentioned the formal proceeding an employee could use to challenge the care provided by the employer, including a reference to an Iowa Administrative Code ("IAC") provision, and provided Tillman with forms to begin such a process. However, the letter was not written or received until well after Tillman had already received his unauthorized care.

Applying the factors set forth in chapter 17A, I would reach the same conclusion as that reached by the district court with regard to the notice requirement. I would agree with the district court that the agency did not err in determining the City did not provide proper notice to Tillman of his ability to contest the City's choice of care, as required under section 85.27(4). Accordingly, I would conclude the district court did not err in affirming the Iowa Workers' Compensation Commissioner's determination that the City is liable for the unauthorized medical treatment Tillman received at the University of Iowa for his work-related injury, and would affirm the district court's affirmance of the agency decision. I would find it unnecessary to address the other grounds relied on by the agency and affirmed by the district court.