

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

<p>POLK COUNTY, IOWA, Petitioner, vs. BRENT LOZANO, Respondent.</p>	<p>Case No. CVCV060037</p> <p>ORDERING GRANTING PETITION FOR JUDICIAL REVIEW AND REVERSING FINAL AGENCY ACTION</p>
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Petitioner Polk County, Iowa (the County) filed a Petition for Judicial Review of Agency Action (the Petition) on April 16, 2020. Telephonic oral argument was held on November 20, 2020. The County was represented by Assistant County Attorney Meghan Gavin. Respondent Brent Lozano (Mr. Lozano) was represented by attorney Matthew Sahag. Oral argument was not reported.

Upon review of the Petition, the record presented, the court file, and the parties' briefing in light of the relevant law, and after considering the respective statements of counsel, the court finds and concludes that the Petition should be granted and the alternate medical care decision of the Iowa deputy workers' compensation commissioner (the Deputy) should be reversed.

BACKGROUND FACTS AND PROCEEDINGS

The material facts are undisputed. On March 16, 2016, Mr. Lozano injured his left ankle while working as a civilian detention officer at the Polk County Jail. (03/17/20 Alt. Med. Care Dec. at 1). The County accepted the injury and provided protracted treatment. (*Id.*). Prior to his return to work almost two years later, Mr. Lozano claimed a mental health injury from the occupational event. (*Id.*). Following an evaluation, the County denied the mental health injury. (*Id.*).

The case proceeded to hearing on May 13, 2019. (03/17/20 Alt. Med. Care Dec. at 2). The Deputy determined Mr. Lozano “has shown that he sustained an aggravation of a pre-existing mental condition as a result of the March 16, 2016 work injury.” (*Id.*). The Deputy ordered the County to “promptly identify and authorize an appropriate medical provider to treat claimant’s mental health condition related to the March 16, 2016 work injury.” (*Id.*). The County initially appealed the August 18, 2019 ruling, but voluntarily dismissed the appeal one month later.

In October 2019, the parties began discussions about the County identifying and authorizing an appropriate medical provider to treat Mr. Lozano’s mental health condition. (Ex. 1). The County initially set up an appointment for Mr. Lozano with Callie Brass at Ames Therapy and Consulting Services, PC in late October 2019. (Ex. A-4). Mr. Lozano through counsel objected two months later—after Mr. Lozano unilaterally cancelled the scheduled appointment—because Ms. Brass was a mental health counselor and “not a doctor.” (*Id.*). Mr. Lozano did not notify the County of the cancelled appointment. (Ex. A-9).

The County then scheduled an evaluation with Dr. Amy Mooney at Ames Therapy and Consulting Services, PC. (Ex. A-3). Again, Mr. Lozano objected because Dr. Mooney “is not a medical doctor.” (Exs. A-3, A-4). Mr. Lozano wanted to be treated by a psychiatrist alone. (*Id.*). The County informed Mr. Lozano that the purpose of the appointment was to “evaluate you[] and determine what treatment [you] need[], whether that be treatment be from a psychiatrist, psychologist, counselor, or some combination thereof.” (Ex. A-2).

Mr. Lozano did not attend the evaluation with Dr. Mooney. (Ex. A-9). He did not let the provider or the County know he was not going to appear. (Ex. A-9). The County

was charged a \$500.00 no-show fee. (Exs. A-8, A-9). On January 27, 2020, the County wrote Mr. Lozano a letter stating it had once again arranged an appointment for him for a comprehensive mental health evaluation with Dr. Mooney at Ames Therapy and Consulting Services. (Ex. A-9). Mr. Lozano did not respond to the letter and did not attend this third appointment scheduled for March 4, 2020.

On or about February 6, 2020, Mr. Lozano unilaterally sought treatment with psychiatrist Dr. James Gallagher. (Ex. 2). Dr. Gallagher prepared a “check box” report opining that neither a psychologist nor a licensed mental health counselor was an appropriate medical provider to treat Mr. Lozano. (*Id.*). Dr. Gallagher further opined that Mr. Lozano should only be evaluated and treated by a psychiatrist, in part because he needed medication management¹. (*Id.*).

On March 5, 2020, Mr. Lozano filed a Petition for Alternate Care seeking authorization of treatment by Dr. Gallagher. (03/05/20 Pet. for Alt. Care; 03/17/20 Alt. Med. Care Dec. at 1). Dr. Gallagher’s opinion was attached as an exhibit to the Petition. Receipt of the Petition and attachment was the County’s first notice of Dr. Gallagher’s report.

A telephone hearing on this Petition was held on March 17, 2020. (03/17/20 Alt. Med Care Dec. at 1). Although noting the instant matter was a “close case,” the Deputy determined the County’s refusal to send Mr. Lozano to a psychiatrist was unreasonable given the unrebutted opinion of Dr. Gallagher. (03/17/20 Alt. Med. Care Dec. at 4).

¹ In 2016, the Iowa General Assembly authorized psychologists to prescribe psychotropic medication to expand the provision of mental health treatment in Iowa. 2016 Iowa Acts, ch. 1112, § 10.

The Deputy's decision is final agency action for purposes of Iowa Code chapter 17A. (03/17/20 Alt. Med. Care Dec. at 1).

The County timely filed the instant Petition. (04/06/20 Pet.).

STANDARD OF REVIEW AND ANALYSIS

The Iowa Administrative Procedure Act provides “the court shall reverse, modify, or grant other appropriate relief from agency action . . . if it determines that substantial rights of the person seeking judicial relief have been prejudiced” by any of the agency actions set forth in Iowa Code section 17A.19(10)(a)-(n). Iowa Code § 17A.19(10) (2019). On judicial review, Mr. Lozano seeks to limit the court's review to evaluating whether there is substantial evidence in the record to support the Deputy's decision. Iowa Code § 17A.19(10)(f). Alternative medical care requests are typically evaluated on judicial review under the deferential substantial evidence standard. *See, e.g., Long v. Roberts Dairy Co.*, 528 N.W.2d 122, 122 (Iowa 1995)

The County has not alleged that the Deputy's decision was not supported by substantial evidence. This is what the Deputy said in relevant part in making his reasonableness determination:

An employer's statutory right is to select the providers of care and the employer may consider cost and other pertinent factors when exercising its choice. *Long*, at 124. An employer (typically) is not a licensed health care provider and does not possess medical expertise. Accordingly, an employer does not have the right to control the methods the providers choose to evaluate, diagnose and treat the injured employee. An employer is not entitled to control a licensed health care provider's exercise of professional judgment. *Assman v. Blue Star Foods*, File No. 866389 (Declaratory Ruling, May 19, 1988). An employer's failure to follow recommendations of an authorized physician in matters of treatment is commonly a failure to provide reasonable treatment. *Boggs v. Cargill, Inc.*, File No. 1050396 (Alt. Care January 31, 1994).

The only question presented at hearing is whether the mental health care offered by the County is reasonable under the circumstances. In this case,

the County initially denied that claimant's mental health condition was causally related to his work injury. In August 2019, a Deputy Commissioner found that the condition is causally related and ordered the County to provide mental health treatment. Prior to that decision, the only treatment claimant has received has been medication management through his family physician.

In response to the Arbitration Decision, the County authorized an evaluation by a licensed counselor and/or a psychologist, which would determine the treatment claimant needed. In the County's mind, if claimant needed medication treatment, this could be managed by a psychiatrist at the designated provider's office. Claimant has insisted upon seeing a psychiatrist in the first instance. Therefore, he refused to attend the appointments arranged by the County.

(03/17/20 Alt. Med. Care Dec. at pp. 3-4). After recognizing that "both parties have demonstrated some stubbornness which has impeded claimant's ability to receive his medical care," the Deputy found the County's refusal to send claimant to a psychiatrist was unreasonable under the record presented. (03/17/20 Alt. Med. Care Dec. at p. 4).

The County asserts the Deputy erred by relying on the unrebutted evidence of Dr. Gallagher or, alternatively, by drawing a negative inference from the County's failure to present evidence rebutting Dr. Gallagher's opinion. The County alleges that due to Mr. Lozano's refusal to submit to any of the three examinations it arranged, it was impossible for the County to obtain a contrary medical opinion. The County further asserts that by allowing Mr. Lozano to refuse to cooperate with his employer by unilaterally select his own medical provider and granting his petition for alternate care, the Deputy usurped the County's statutory authority under Iowa Code section 85.27(1) to select medical providers.

As a result, the County asks the court to reverse the Deputy's decision because (1) it is the product of a decision-making process in which the agency did not consider a relevant and important matter relating to the propriety or desirability of the action in

question that a rational decision maker in similar circumstances would have considered prior to taking that action, or (2) it is otherwise unreasonable, arbitrary, capricious, or an abuse of discretion. Iowa Code § 17A.19(10)(j), (n).

After reviewing the record as a whole, the court finds the Deputy failed to consider a relevant and important matter relating to the propriety of granting Mr. Lozano's petition for alternate care that a rational decision maker in similar circumstances would have considered prior to taking that action, and it was unreasonable, arbitrary, capricious, and an abuse of discretion for the Deputy to grant Mr. Lozano's petition for alternate care for the following reasons.

First, the County could not prove that the care it was offering Mr. Lozano was reasonable because Mr. Lozano refused to be evaluated by either of the medical providers the County scheduled three separate appointments for him with over a period of approximately four months. Mr. Lozano's independent action in seeking care by Dr. Gallagher in February 2020 does not change the fact that the County has the statutory obligation under section 85.27(1) to select and make reasonable care available to Mr. Lozano in the first instance. Mr. Lozano must avail himself of this care before Mr. Lozano can decide whether this care is adequate to meet his needs. Put another way, the County must go first under section 85.27(1) and Mr. Lozano must accept the treatment offered before he can assert that the treatment is unreasonable. Mr. Lozano got the cart before the horse.

By ignoring the County's choices of evaluators three times—and instead seeking alternate care on his own—Mr. Lozano attempted to assume the burden of proving the care authorized by the County was unreasonable. This he could not do because he did not submit to the care the County offered and instead sought out the provider he wanted.

Long, 528 N.W.2d at 124-25 (claimant's desire for treatment by one provider over another is not determinative of the question of which provider will provide more appropriate care to claimant).

Desirability of a certain kind of medical care by a claimant does not overcome the reasonableness of medical care that was offered, scheduled, and has yet to be provided because the claimant refuses to go forward. *Harned v. Farmland Foods, Inc.*, 331 N.W.2d 98, 99 (1983) (services provided under section 85.27 are expected to be reasonable but the employer may choose the type of reasonable care to be provided). The County's two choices of medical providers went untested by Mr. Lozano because he refused to attend any of the three evaluations the County arranged and failed to give the County any notice of his intentions, thereby unreasonably thwarting any possibility for the County to meet its burden of proof regarding reasonableness under section 85.27(1).

At the time Mr. Lozano refused to cooperate with the County, he clearly desired to be treated by a psychiatrist. Dr. Gallagher—a psychiatrist—opined that Mr. Lozano should be treated by a psychiatrist. The self-serving nature of this observation does not prove that only a psychiatrist can provide Mr. Lozano with reasonable care. Rebuttal evidence by the County is lacking only because Mr. Lozano refused to cooperate with the County's treatment plan. The court finds the County's selection of a comprehensive medical evaluation for Mr. Lozano was per se reasonable to determine an appropriate course of treatment for Mr. Lozano.

The comprehensive medical evaluation the County had in mind could have determined that treatment by a psychiatrist, psychologist, counselor, or a combination thereof was the appropriate course of treatment for Mr. Lozano. Mr. Lozano refused to submit to an evaluation from October 2019 to February 2020 when he struck out on his

own. Mr. Lozano's refusal to attend any of the three appointments the County set up for him merely caused more delay in Mr. Lozano receiving appropriate evaluation by the County for the treatment he needs.

Iowa Code chapter 85 penalizes employees who refuse to cooperate in other contexts. *See* Iowa Code §§ 85.39 (providing sanction for failure to attend independent medical examination); 85.33(3) (providing sanction for failure to accept "suitable" work consistent with worker's disability). Here, Mr. Lozano seeks not to avoid a sanction but to benefit from his failure to cooperate with the County by selecting his own medical provider.

It was unreasonable for Mr. Lozano to (1) cause a long delay in treatment offered by the County, (2) refuse to cooperate with the County by failing to attend any of three separate evaluation appointments arranged for him by the County, and (3) attempt to benefit from the delay he created by seeking treatment from a psychiatrist of his choosing. Affirming the Deputy's decision would be contrary to the requirements of section 85.27(1), which clearly provides that "the employer shall furnish reasonable . . . medical . . . services and supplies for all conditions compensable under the workers' compensation law." Iowa Code § 85.27(1).

Had Mr. Lozano cooperated with the County and attended any of the three evaluations the County scheduled for him, he may well have received his preferred treatment with a psychiatrist months sooner, as well as any additional care that a comprehensive evaluation may have revealed would be beneficial for him. He also could have avoided the need to seek alternate medical care.

When this record is considered as a whole, the Deputy erred in granting Mr. Lozano alternate medical care because in doing so, he ran afoul of section 17A.19(10)(j)

and (m), thereby prejudicing the substantial rights of the County under its statutory mandate imposed by section 85.27(1) to provide reasonable medical care for Mr. Lozano.

The Petition should be granted and Deputy's decision should be reversed.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Petition is granted and the March 17, 2020, alternate medical care decision of the Deputy is reversed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that costs are assessed to Mr. Lozano.



State of Iowa Courts

Type: ORDER FOR JUDGMENT

Case Number **Case Title**
CVCV060037 POLK COUNTY V BRENT LOZANO

So Ordered

A handwritten signature in cursive script that reads 'Jeanie Vaudt'.

Jeanie Vaudt, District Court Judge,
Fifth Judicial District of Iowa