

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

BRENNEMAN PORK, INC. AND FARM)	Case. Nos:	CVCV061543
BUREAU PROPERTY AND CASUALTY)		CVCV061545
INSURANCE COMPANY)		
)		
Petitioners,)		
)		
vs.)		
)		
GRISELDA PEREZ-AVINA,)	ORDER ON JUDICIAL REVIEW	
)		
Respondent.)		

Petitioners Brenneman Pork, Inc. and Farm Bureau Property and Casualty Insurance Company (Petitioners) seek Judicial Review of an Alternate Medical Care Decision filed on February 15, 2021 (the AMC Decision; Ex. A-1) by a Deputy Workers' Compensation Commissioner (the Deputy). The AMC Decision involved two file numbers and are final agency action pursuant to Iowa Code chapter 17A.

Telephonic oral argument was held on July 23, 2021. Attorney James Russell appeared for Petitioners. Attorney Andrew Bribresco appeared for Respondent Griselda Perez-Avina (Griselda). Oral argument was reported. The parties agreed on the record that this matter should be consolidated with CVCV062543 as both appeals are identical.¹

The AMC Decision ordered that Defendants continue authorizing Dr. Curtis Frier under Iowa Code section 85.27 for treatment related to Griselda's work-related conditions. As described in more detail below, the court concludes the Deputy did not commit legal error when rendering the AMC Decision and substantial evidence in the record supports that decision.

¹ The AMC Decision involved two file numbers before the Iowa Workers' Compensation Commissioner and the Petitioners, out of procedural precaution, filed two petitions for judicial review with the court. Petitioners filed an unopposed Motion to Consolidate, which the district court granted under a separate Order filed September 21, 2021.

BACKGROUND FACTS AND PROCEEDINGS

In prior proceedings it was established that Griselda sustained injuries on February 26, 2014, and April 16, 2014, that arose out of and in the course of her employment. (AMC Dec. p. 2; Ex. A-1 p. 2; Admin. Rec.). It was also established that Griselda developed permanent chronic pain to her bilateral upper extremities, depression, and anxiety as a result of her work injuries. (AMC Dec. p. 2; Ex. A-1 p. 2; Admin. Rec.). These were final adjudications by the Iowa Workers' Compensation Commissioner (the Commissioner) in December 2019. (AMC Dec. p. 2; Ex. A-1 p. 2; Admin. Rec.). The Deputy who entered the AMC Decision is familiar with the instant case because she was the Deputy who entered the underlying Arbitration Decision. (AMC Dec. p. 2; Ex. A-1 p. 2).

Petitioners authorized Dr. Curtis Frier (Dr. Frier) beginning in August 2014 to treat Griselda's work-related injuries. (Ex. 1; AMC Dec. p. 2; Ex. A-1 p. 2). Dr. Frier has seen Griselda approximately 48 times since 2014. (Ex. 2.) Dr. Frier treats Griselda for her work-related conditions: bilateral upper extremity conditions, anxiety, and depression. (AMC Dec. p. 2; Ex. A-1 p. 2). Dr. Frier prescribes Griselda medications related to these conditions, including her mental health conditions. (Ex. A; Ex. B; Ex. 2; Ex. 3; Ex. 4).

Dr. Frier practices in Washington, Iowa, where Griselda lives. (AMC Dec. p. 2; Ex. A-1 p. 2). His office is minutes away by car for Griselda. (Tr. 8). Griselda's husband takes her to these appointments. (Tr. 9; AMC Dec. p. 4; Ex. A-1 p. 4; Arbitration Decision).

In October 2020, Defendants through counsel sent a letter to Griselda through counsel wanting to de-authorize Dr. Frier as Griselda's treating physician. (Ex. D). Defendants scheduled an appointment for Griselda with Dr. Rick Garrels. (Ex. E). Dr. Garrels has over twenty years of experience as an occupational physician. (Ex. E). Defendants' basis for wanting to de-authorize

Dr. Frier was his delayed response to myMatrixx, a third-party pharmaceutical review company. (AMC Dec. pp. 2-3; Ex. A-1 pp. 2-3). Defendants were also unhappy that Dr. Frier, as Griselda's primary care physician, would see Griselda for conditions unrelated to work injuries. (AMC Dec. pp. 2-3; Ex. A-1 pp. 2-3).

On January 13, 2021, Dr. Frier wrote a letter stating that he wished to continue treating Griselda. (Ex. 2). He also stated that she "has stabilized and is showing a glimmer of improvement in self cares." (Ex. 2; Ex. 4).

That same day Dr. Frier also wrote a letter to Petitioners urging that he should "continue to be involved in [Griselda's] care and treatment." (Ex. 3). Dr. Frier was willing to work with Petitioners' prescription medication consultant (myMatrixx), as he eventually filled out the inquiry myMatrixx sent to him in August 2020. (Ex. 3).

Against this backdrop Griselda filed two Alternate Medical Care Petitions on February 2, 2021. (AMC Dec. p. 1; Ex. A-1 p. 1). Griselda filed these petitions because Defendants refused to continue authorizing her care with Dr. Frier. (AMC Dec. p. 1; Ex. A-1, p. 1; AMC Petitions). A hearing before the Deputy took place by teleconference on February 12, 2021. (AMC Dec. p. 1; Ex. A-1 p. 1). The record consisted of Griselda's Exhibits 1-4, Petitioners' Exhibits A-G, and the testimony of Griselda and Heather Lutterman (Lutterman). (AMC Dec. p. 1; Ex. A-1 p. 1).

At the hearing, Griselda testified she is willing to see Dr. Frier for appointments dedicated to her adjudicated work injuries, with separate visits for non-work-related injuries. (AMC Dec. p. 4; Ex. A-1 p. 4). Griselda said she has trust and confidence in Dr. Frier because "he knows a lot about [her] conditions." (Tr. 12; AMC Dec. p. 4; Ex. A-1 p. 4). Griselda said Dr. Rick Garrels is located about one and a half hours away from her home. (Tr. 19).

Defendants called Lutterman, a Farm Bureau adjuster, to testify. (Tr. 22-23). Lutterman has twenty years of experience as a workers' compensation adjuster. (Tr. 23). Lutterman testified that Dr. Frier had been authorized to treat Griselda as of spring 2020, along with Dr. Kari "who manages her pain pump" and Luminous Minds for mental health. (Tr. 24). Lutterman had never contacted Dr. Frier's office about billing and billing procedures. (AMC Dec. p. 4; Ex. A-1 p. 4). On cross-examination, Lutterman said she was not aware whether Dr. Garrels had ever treated "a single workers' compensation claimant with mental illness." (Tr. 54; AMC Dec. p. 5; Ex. A-1 p. 5).

STANDARD OF REVIEW

The Iowa Administrative Procedure Act, Iowa Code chapter 17A (the IAPA) governs judicial review of administrative agency actions. The district court is bound by the findings of fact by the agency unless a different result is required by law. *Ward v. Iowa Dep't of Transp.*, 304 N.W.2d 236, 238 (Iowa 1981). The district court will not review the evidence of a workers' compensation case de novo. *Locate.Plus.Com, Inc. v. Iowa Dep't of Transp.*, 650 N.W.2d 609, 612 (Iowa 2002). Furthermore, judicial review based entirely upon an alleged lack of substantial evidence is unlikely to be reversed. *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 632 (Iowa 2000).

Substantial evidence is "the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of the fact are understood to be serious and of great importance." Iowa Code § 17A.19(10)(f)(1).

When an agency exercises its discretion based upon an erroneous interpretation of the law, the court is not bound by those legal conclusions and "may correct misapplications of the law." *Stroup v. Reno*, 530 N.W.2d 441, 443 (Iowa 1995). If the claim of error "lies with the ultimate

conclusion reached, then the challenge is to the agency's application of the law to the facts, and the question on review is whether the agency abused its discretion by, for example, employing wholly irrational reasoning or ignoring important and relevant evidence." *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 219 (Iowa 2006). Put another way, the court will only reverse the agency's application of law to the facts if "it is 'irrational, illogical, or wholly unjustifiable.'" *Neal v. Annett Holdings, Inc.*, 814 N.W.2d 512, 518 (Iowa 2012) (internal quotations omitted). In such instances, the court may substitute its interpretation of the law for that of the agency. Iowa Code §§ 17A.19(10)(c), 17A.19(11)(b); *Meyer*, 710 N.W.2d at 218-19.

ANALYSIS

A. Alternate Medical Care – Governing Principles. Iowa Code section 85.27 gives an employer the right to choose care for an injured worker. However, that section qualifies the right by requiring the treatment to be "offered promptly, reasonably, and without undue inconvenience." *Id.*; *West Side Transp. v. Cordell*, 601 N.W.2d 691, 693 (Iowa 1999). If the worker is dissatisfied with the employer's choice of care, he or she can file an Alternate Medical Care petition:

The statute outlines a procedure for the commissioner to hear and decide disputes upon the filing of an application for alternate medical care. The procedure permits disputes over the medical care for compensable injuries to be quickly resolved in advance of a contested case hearing on a claim for workers' compensation benefits. If the treatment provided by the employer is not prompt, not "reasonably suited to treat the injury," or is unduly inconvenient to the employee, the commissioner has authority to order the alternate care. The burden to prove that the care authorized by the employer is unreasonable is on the employee.

R.R. Donnelly & Sons v. Barnett, 670 N.W.2d 190, 195–96 (Iowa 2003) (citations omitted).

The Iowa Supreme Court (the Court) has held that an agency is justified in ordering alternate care under section 85.27 when the employee has shown that "employer-authorized medical care has not been effective and that such care is 'inferior or less extensive' than other

available care requested by the employee.” *Pirelli-Armstrong Tire Co. v. Reynolds*, 562 N.W.2d 433, 437 (Iowa 1997).

As noted above, when an employee seeks alternate medical care, the burden of proof is on the employee to show that the care is not reasonably suited to treat the injury. *Pirelli*, 562 N.W.2d at 436. Reasonableness is a fact question. *Id.* Thus, the appropriate standard of review for alternate medical care decisions will generally be for substantial evidence. *See id.*; *Newt Marine Serv. DBA v. Abitz*, No. 15-1957, 2016 WL 4036185, at *3 (Iowa Ct. App. July 27, 2016); *Paulino v. Chartis Claims, Inc.*, 985 F. Supp. 2d 1051, 1059 (S.D. Iowa 2013), *aff’d*, 774 F.3d 1161 (8th Cir. 2014) (“The precedent from the Iowa Supreme Court indicates that the question of whether an employer is obligated to provide an employee with alternate care is intensely fact driven . . .”).

In *Newt Marine Service DBA Abitz*, No. 15-1957, 2016 WL 4036185 (Iowa Ct. App. July 27, 2016), the Iowa court of appeals concluded that substantial evidence supported the alternate medical care decision since a reasonable person—despite evidence to the contrary—could find that the medical care provided by the employer was not effective. *Newt Marine*, 2016 WL 4036185, at *4. The court of appeals also rejected the employer’s argument that the agency failed to hold the worker “to his burden of proving the medical treatment it offered was unreasonable and instead applied an improper desirability standard.” *Id.*

B. Appropriate Standard of Review. The initial dispute between the parties is the appropriate standard of review. Petitioners argue the Deputy erred as a matter of law in two regards: (1) by shifting the burden of proof to them; and (2) by considering evidence not in the record, specifically an alternate medical care decision by the agency in *Wilson v. Hillcrest Family Servs.*, File No. 5037882, 2015 WL 13306976 (02/05/15 AMC Dec.). Respondent urges the appropriate standard of review is for substantial evidence.

As discussed in section D below, the court concludes the Deputy did not commit legal error. The appropriate standard of review for the AMC Decision is substantial evidence.

C. **Substantial Evidence**. After reviewing the testimony, evidence, and reciting the correct law² the Deputy concluded:

[Griselda] avers the care the defendants are proposing with Dr. Garrels is ineffective, inferior, or less extensive than the ongoing care she requests with Dr. Frier because she has treated with Dr. Frier since 2014, Dr. Frier has experience treating her mental health conditions, and Dr. Garrels does not have experience treating patients with mental health conditions. Defendants reject her assertion and allege Dr. Garrels is qualified to provide the care Perez-Avina needs.

There was no evidence presented at hearing Dr. Garrels has ever provided treatment to a patient with anxiety, depression, or any other mental health condition. Dr. Garrels did not testify at hearing; he did not submit an affidavit documenting he has ever treated a patient with anxiety, depression, or any other mental health condition.

In the case of Wilson v. Hillcrest Family Servs., File No. 5037882, 2015 WL 13306976 (Iowa Workers' Comp. Comm'r Feb. 5, 2015), pursuant to an order from the Workers' Compensation Commissioner, the presiding deputy was delegated authority to issue final agency action. In the case the defendants scheduled an appointment for the claimant's mental health conditions with Dr. Garrels. The deputy noted during the hearing "[t]he Association conceded . . . that Dr. Garrels is an occupational medicine physician with no mental health expertise." The deputy commissioner granted the claimant's request for alternate care, finding the care offered was not reasonably suited to treat the claimant's medical conditions, and allowing the claimant to seek medical treatment of the claimant's own choosing. In reviewing the Iowa Workers' Compensation published opinions on Westlaw, I was unable to find any opinion where Dr. Garrels was providing treatment for a person with anxiety, depression, or any other mental health condition.

Dr. Frier has been providing care to [Griselda] for her chronic pain, anxiety, and depression since 2014. He has experience treating [Griselda's] anxiety and depression. His most recent medical record notes [Griselda's] ability to perform activities of daily living recently improved. To the contrary, there was no evidence presented at hearing Dr. Garrels has any experience treating persons with anxiety, depression, or any other mental health condition. While the defendants take issue with Dr. Frier's treatment of [Griselda's] personal health conditions, the evidence reveals the treatment offered by the defendants with Dr. Garrels is ineffective,

² Petitioners concede the Deputy recited the correct legal standard and precedent in the AMC Decision. (Pet. Br. p. 9).

inferior, and less extensive than the care requested by [Griselda] with Dr. Frier. The Applications for Alternate Care are granted.

(AMC Dec, pp. 5-6; Ex. A-1 pp. 5-6).

The AMC Decision contains no indication that the Deputy shifted the burden of proof to Petitioners. The Deputy concluded Griselda had shown by the preponderance of the evidence that Petitioners' offer of care with Dr. Garrels was "inferior or less extensive" than the care being requested by Griselda, which was continued care with Dr. Frier.

The Deputy determined that Griselda met her burden by producing evidence that (1) she has treated with Dr. Frier for over six years, (2) she has trust and confidence in Dr. Frier, (3) Dr. Frier is located in the same town as Griselda, and (4) Dr. Frier has working knowledge about Griselda's work-related conditions, including mental health conditions.

Aside from presenting evidence supporting care with Dr. Frier, Griselda also presented argument at the agency hearing challenging the validity of Dr. Garrels' ability to treat mental health conditions such as Griselda's. (Tr. 54, 59-63; AMC Dec. p. 5; Ex. A-1 p. 5). Though Dr. Garrels is an occupational physician, Griselda urged that Dr. Garrels' care would be inferior because, unlike Dr. Frier, Dr. Garrels is not qualified to treat Griselda's mental health conditions or prescribe medications related to her mental health diagnoses. (*See id.*).

Under this record Griselda's evidence stands undisputed by Petitioners. Petitioners had the opportunity to present evidence that the medical care they were offering to Griselda through Dr. Garrels was not inferior. As noted by the Deputy, Petitioners did not do so.³ They presented no evidence to counter Griselda's challenge to Dr. Garrels' qualifications. A reasonable person could

³ Defendants indicate in their judicial review brief that they did not have time to arrange for Dr. Garrels to testify at the agency hearing.

find that Lutterman's testimony supported Griselda's challenge. Lutterman was unaware whether Dr. Garrels had ever treated any workers' compensation claimant who had mental illness. (Tr. 54; AMC Dec. p. 5; Ex. A-1 P. 5). Although Dr. Garrels has been in the Iowa workers' compensation system for more than twenty years, Petitioners did not substantiate that he had treated any injured worker for anxiety, depression or any other mental health condition. (AMC Dec. p. 6; Ex. A-1 p. 6).

As the Deputy reasonably found, Griselda met her burden while simultaneously demonstrating that the care being offered by Petitioners with Dr. Garrels was ineffective, inferior, and less extensive than the continued care with Dr. Frier requested by Griselda. Petitioners' argument that the Deputy applied an incorrect standard and/or shifted the burden to Petitioners is unsupported by a plain reading of the AMC Decision and a review of the record.

D. Legal Error. Petitioners also argue it was legal error for the Deputy to "take factual conclusions from one case and use them as evidence in another case." (Pet. Brief., p. 12). In support Petitioners cite a criminal law case (a sentencing hearing) and civil law case (a probate court's filing), neither of which apply to the instant matter.⁴

An agency by statute may use its unique expertise when making findings of fact and conclusions of law. Section 17A.14(5) of the IAPA states: "The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence." Section 17A.14(1) provides that a "finding shall be based upon the kind of evidence on which

⁴ In their reply brief and at oral argument, Petitioners attempted to make new arguments about the Deputy improperly taking judicial notice pursuant to Iowa Code § 17A.14(4). This argument was not preserved in their original brief on judicial review. They have waived argument on this issue. Order Establishing Schedule for Conduct of Proceedings Pursuant to I.R.C.P. 1.1603(2) ("Under each issue separately stated shall be a list of cases, statutes and other authorities referred to in the argument covering that issue. Failure in the brief to state, to argue or to cite authority in support of an issue may be deemed waiver of that issue.").

reasonably prudent persons are accustomed to rely for the conduct of their serious affairs, and may be based upon such evidence even if it would be inadmissible in a jury trial.”

Agencies are not bound by technical rules of evidence. *McConnell v. Iowa Dep't of Job Serv.*, 327 N.W.2d 234, 237 (Iowa 1982) (concluding hearsay evidence is admissible and supplemented other evidence in the record); *Stone Container Corp. v. Castle*, 657 N.W.2d 485, 489–90 (Iowa 2003) (holding that it was not error for the agency to cite to a medical dictionary).

Griselda challenged Dr. Garrels’ qualifications for providing her alternate medical care. The Deputy consulted the agency’s published opinions to confirm the validity of Griselda’s challenge after Petitioners offered nothing refute it. The Deputy’s action was akin to confirming agency precedent. Even if the Deputy’s one paragraph analysis in this regard was excised from her six page ruling—which the court has not found is necessary—the record before the Deputy still contains substantial evidence supporting Griselda’s argument. The Deputy acted within the purview of the IAPA in reaching the decision at issue. Plaintiffs simply disagree with the final agency decision.

Because there is substantial evidence in the record to uphold the final agency decision and the Deputy did not err as a matter of law, the AMC Decision should be affirmed in its entirety.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the final agency decision regarding alternate medical care for agency file numbers 5050212.02 and 5050213.02 are affirmed in their entirety and the Petition is dismissed.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that costs are assessed to Petitioners Brenneman Pork, Inc. and Farm Bureau Property and Casualty Insurance Company.



State of Iowa Courts

Case Number
CVCV061543

Case Title
BRENNEMAN PORK INC ET AL VS GRISELDA PEREZ-
AVINA
Type: OTHER ORDER

So Ordered

A handwritten signature in cursive script, reading "Jeanie Vaudt".

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

Electronically signed on 2021-09-21 18:19:50