IN THE COURT OF APPEALS OF IOWA

FILED
NOV 26 1985
CLERK SUPREME COURT

LOVEJOY CONSTRUCTION COMPANY and BITUMINOUS CASUALTY COMPANY,

Petitioners-Appellants,

vs

DONALD WEBB, JR.,

Respondent-Appellee.

Filed November 26, 1985

5-495
84-1420

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Appeal from the Iowa District Court for Polk County - Ray A. Fenton, Judge

Petitioners appeal from an order for medical care and an award of healing period benefits **AFFIRMED.**

William D. Scherle, of Hansen, McClintock & Riley, Des Moines, for petitioners-appellants.

Arvid D Oliver, Des Moines, for respondent-appellee.

Considered by Donielson, P.J., and Hayden and Sackett, JJ.

SACKETT, J.

This is a workers' compensation case in which the appellants Lovejoy Construction Co. and Bituminous Casualty Co. have appealed contending that: (1) the industrial commissioner exceeded his statutory authority by unilaterally authorizing specific medical care, and (2) substantial evidence does not exist to support the award of healing period benefits. The district court affirmed the industrial commissioner's decision in this case, and we affirm the district court.

I.

Appellants argue that the industrial commissioner exceeded his statutory authority in deciding an issue that was neither pleaded nor raised by the parties. The issue is that of authorizing specific medical treatment for the claimant and naming the treating physician. The facts that led up to this issue are as follows.

In 1977 the claimant sustained a work-related injury[1] while employed with the appellant Lovejoy Construction Co. and was awarded a 25 percent permanent partial disability rating and healing period benefits. Claimant was treated by Dr. Bashara.[2] The healing period benefits ended in September of

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[1] Claimant fell from a ladder striking his spine on some scaffolding before hitting the ground. He stated to Drs. Burton and Zittergruen he fell twenty-five feet onto his head and developed a large knot on his right forehead. After 15-20 minutes, he stated he was able to stand although he experienced total body numbness. Claimant was taken to the hospital emergency room where he was examined, X-rayed, and released with no indication of any fractures at that time. After 3-4 days, he returned to work but experienced severe back pain after only a couple of days.

[2] Claimant stated to Dr. Zitterguen that he had been hospitalized several times for back problems while under the care of Dr. Bashara. Claimant stated he was hospitalized in 1978 by Dr. Bashara for physical therapy and traction. Appellants do not dispute the fact that they paid for these prior services offered by Dr. Bashara.

1979. In the fall of 1981 claimant began employment with another construction company which is not a party to this litigation. Claimant returned to Dr. Bashara in November of 1981 complaining of back pain. Dr. Bashara recommended hospitalization and treatment of traction therapy. Claimant contacted the appellants requesting they authorize and assume responsibility for conservative treatment procedures suggested by Dr. Bashara. Appellants refused to provide this treatment claiming that there was no showing the requested treatment was necessitated as a result of the 1977 injury.

Claimant filed for a review-reopening. Appellants filed a motion for examination and treatment requesting the claimant:

> . . . present himself in the office of Dr. Sinesio Misol for purposes of care and treatment for the reason that following specific direction by the Employer-Insurance Carrier, to do so, Claimant has refused to comply with the request or the provisions of Section 85.39. [emphasis added].

Claimant filed a resistance to the motion stating:

> That claimant has remained under the care of Dr. Jerome Bashara from November 11, 1977, through the present date, and the insurance company has paid for and acquiesced in the care provided by Dr. Bashara up to November 1981.

Claimant argued he was satisfied with the care of Dr. Bashara and did not wish to change his care and treatment to Dr. Misol. The deputy industrial commissioner ordered that claimant present himself to Dr. Misol for physical examination only.

After a hearing, the deputy commissioner found the claimant's 1977 injury was the proximate cause of his present condition, Dr. Bashara should be and is ordered to be claimant's attending physician, and claimant should receive healing period benefits.

Appellants claim that the industrial commissioner exceeded his authority by ordering treatment by Dr. Bashara. When exercising the power of judicial

review, the district court is functioning in an appellant capacity to correct errors at law. Iowa Code § 17A.19(8); Korhorst v. Iowa State Commerce Comm'n, 348 N.W.2d 619, 621 (Iowa 1984). Our duty is to correct errors of law made by the district court. Thomas v. William Knudson & Son, Inc., 349 N.W.2d 124 126 (Iowa App. 1984). In doing so, we apply the standards set forth in section 17A.19(8) to the agency action and determine whether our conclusions are the same as the district court's. Gipson v. Iowa Dep't of Job Service, 315 N.W.2d 834, 836 (Iowa App. 1981). Findings of fact by the industrial commissioner are considered binding; however, questions of law are not conclusive and are subject to review. Thomas, 349 N.W.2d at 125. With these principles in mind, we turn to the issue of choice of care.

Iowa Code section 85.27 outlines the industrial commissioner's authority with regard to the issue of choice of care:

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. 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. [emphasis added].

Appellants claim that at no time prior to the hearing did either party raise before the commissioner the question of whether a specific attending physician should be appointed. In examining the record, we find otherwise. In appellant's motion for examination and treatment, appellants offered "treatment" for the claimant to be given by Dr. Misol, their choice of physician. In claimant's resistance to this motion, he states:

6. In letters dated February 8, 1982 and February 26, 1982, demand was made that Claimant present himself to Dr. Sinesio Misol for "care and treatment". In letters dated February 16, 1982 and March 3, 1982, Claimant advised Insurance Carrier that he declined to change his care from Dr. Bashara, assuring the Insurance Carrier that he is not dissatisfied with the care with which he has been provided.

7. On March 5, 1982, the Insurance Carrier filed a Motion for Examination and Treatment alleging that Section 85.39 requires Claimant to do as requested.

8. Claimant is willing to present himself for "examination" pursuant to the provisions of Section 85.39 at any time he is requested to do so.

9. Claimant does not believe that the Insurance Carrier has the right to change the care and treatment from the physician who has treated him for the past several years and which the Insurance Carrier has provided pursuant to Section 85.27. See Larson Worker's Compensation 61:12, (d), (g).

10. Since Claimant agrees to present himself for examination as required in Section 85.39 and since the Insurance Carrier now appears to take the position that they will provide care and treatment, it would seem that the only issue left to be decided is whether or not the Insurance Carrier can require the Claimant to change his care and treatment to another physician. [emphasis added].

We believe the issue of choice of care was before the commissioner due to the disagreement between the parties as to who should be the treating physician. The statutory authority of a deputy industrial commissioner is enumerated in Iowa Code section 86.3 and states: ". . . the deputies shall have any necessary specified powers to perform any necessary or specified duties of the industrial commissioner pertaining to the commissioner's office." The necessary and specified duties of the commissioner's office are set out in section 86.8 which permits the commissioner to "[i]n general do all things not inconsistent with law in carrying out said provisions according to their true intent and purpose." Iowa Code § 86.8(5). In a hearing "[t]he deputy commissioner or the commissioner may make such inquiries and investigation in contested case proceedings as shall be deemed necessary, consistent with the provisions of section 17A.17." Iowa Code § 86.17. In addition to the specific powers set out in the

statutes, the commissioner also has such implied powers as are incident to the exercise of the commissioner's jurisdiction. Barauer v. J.C. White Concrete Co., 253 Iowa 1304, 1308, 115 N.W.2d 202, 204 (Iowa 1962). Since the issue had been raised by the parties and was, therefore, before the commissioner, there was a "necessity" for the commissioner to order who the treating physician should be.

While it is true that the employer has the right to choose care, section 85.27 empowers the industrial commissioner to choose other care if the employer and employee cannot agree on alternate care. The primary purpose of the workers' compensation statute is to benefit the worker insofar as the statute permits, and therefore the statute is to be interpreted liberally with a view toward that objective. Caterpillar Tractor Co. v. Shook, 313 N.W.2d 503, 506 (Iowa 1981). In this case, it is clear that appellants were refusing to provide any care and then offered to provide treatment under Dr. Misol. An employee has a right to continue with his doctor and a belated attempt by the insurance carrier to offer other care will not cut off the right of the employee to continue. A. Larson, The Law of Workmen's Compensation § 61.12(d) (1983).

We find that the industrial commissioner did not exceed his statutory authority.

II.

Appellants claim that there is no substantial evidence in the record to support the award to claimant of healing period benefits.

The commissioner's findings have the effect of a jury verdict, and this court will broadly and liberally apply those findings in order to uphold rather than defeat the commissioner's decision. Briar Cliff College v. Campolo, 360 N.W.2d 91, 93 (Iowa 1984). We are bound by the finding of the commissioner

where it has substantial support in evidence when record is reviewed as a whole. Blacksmith v. All-American, Inc., 290 N.W.2d 348, 352 (Iowa 1980); see Iowa Code § 17A.19(8)(f).

Claimant is entitled to healing period or recuperation benefits until healing is completed and the extent of the disability can be determined. Armstrong Tire and Rubber Co. v. Kubli, 312 N.W.2d 60, 65 (Iowa App. 1981).

Appellants contend that claimant has reached the maximum point of medical improvement as a result of his work-related injury in 1977 and that claimant's condition may continue to deteriorate but only as a result of other elements. Appellants claim that the award of healing period benefits was in error.

Whether an injury or disease has a direct causal connection with employment or arose independently is essentially within the domain of expert testimony, and the weight to be given such testimony is for the finder of fact. Armstrong, 312 N.W.2d at 65. Drs. Bashara, Burten, O'Neil, and Zittergruen all indicated that some type of further treatment for claimant was necessary. All of the doctors agreed that claimant's condition could possibly improve with treatment.

We find there is substantial evidence in the record to support the commissioner's findings on this issue.

We affirm the district court which upheld the commissioner's decision.

AFFIRMED.