COURT OF APPEALS
DECISION
DATED AND RELEASED

November 26, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-3440

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

GOLDEN RULE INSURANCE COMPANY,

PETITIONER-APPELLANT,

v.

COMMISSIONER OF INSURANCE,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: STUART A. SCHWARTZ, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

PER CURIAM. Golden Rule Insurance Company appeals from a circuit order affirming an administrative-level final decision by the Office of the Commissioner of Insurance (OCI). We affirm because we conclude that: (1) Golden Rule waived its challenge to WIS. ADM. CODE § INS 3.28(6)(d)(1)-(2);

(2) Golden Rule's rationale for denying benefits was incorrect; and (3) OCI's order is not in excess of its power.

BACKGROUND

On February 22, 1993, Linda and James Anderle[1] applied for a short-term health policy to cover the term March 1, 1993, through June 1, 1993.[2] On that same day, James consulted his internist, Dr. Golopol, complaining of sweat, chills, cough, nasal discharges, as well as confusion and disorientation, which he had suffered for about a week. Dr. Golopol diagnosed an upper respiratory infection. On February 24, James called Dr. Golopol complaining of a short episode of double vision and was told to call again if the condition persisted. On February 26, James traveled to Florida, and on February 27, played golf and drank heavily. On February 28, James again played golf and drank heavily, but did not feel well, experiencing disorientation, memory problems, and transient blurred vision.

On March 1, 1993, the Golden Rule short-term policy took effect. On that day, James again played golf, but had to stop because he felt tired and had phlegm. After taking a nap, he awoke with hives. His friends contacted Linda about James's condition, and Linda called Dr. Golopol that evening. Dr. Golopol suggested seeking care in Florida, or offered to see James upon James's return to Wisconsin. On the advice of his wife and friends, James returned to Wisconsin immediately. On March 2, James, who felt better, again consulted Dr. Golopol.

[1] Linda and James Anderle are wife and husband.

[2] The policy was to cover a waiting period before health insurance was provided by Linda's new employer.

Dr. Golopol noted dizziness, confusion and possible weakness. Dr. Golopol did not connect these symptoms to the late February diagnosis of upper respiratory infection, but instead suspected a lung tumor which had spread to the brain. Dr. Golopol recommended a CAT scan, which, however, was not performed. On March 10, James suffered a popping sensation, severe headaches, double vision and other symptoms requiring immediate medical assistance. Upon admission to a hospital, James was diagnosed with a stroke. Thereafter, James filed a claim with Golden Rule for expenses associated with the March 10, 1993 stroke.

On May 18, 1993, Golden Rule denied James's claim because his stroke was a pre-existing condition excluded by the policy. Specifically, Golden Rule concluded that James's February 22 and 24 visits to Dr. Golopol were symptoms of the same illness that resulted in the stroke. The Anderles responded by filing a complaint with OCI. On January 20, 1994, OCI's market regulation director ordered Golden Rule to pay James's claim and to comply with WIS. ADM. CODE § INS 3.28(6)(d) and (e) regarding claims administration. On February 9, 1994, Golden Rule requested a § 601.62(3), STATS., hearing, and on December 15, 1994,[3] OCI affirmed. On January 17, 1995, Golden Rule petitioned for a § 227.53, STATS., review, and on November 7, 1995, the circuit court affirmed OCI. Golden Rule appeals.

POLICY LANGUAGE

The relevant language in James Anderle's contract of insurance with Golden Rule reads as follows:

[3] As an intermediate step, an administrative law judge issued a proposed order on November 7, 1994, which Golden Rule challenged before OCI's December 15, 1994 final order.

> A "*preexisting condition*" means an *illness* or *injury*:
>
> (1) for which the *covered person* received medical advice or treatment within the 60 months immediately preceding the Effective Date [of the policy]; or
>
> (2) which, in the opinion of a qualified *doctor*:
>
> (a) probably began before the Effective Date ...; and
>
> (b) manifested symptoms which would cause an ordinarily prudent person to seek diagnosis or treatment within the 60 months immediately preceding the Effective Date ....

Illness is defined as:

> [A] sickness or disease of a covered person.... All *illnesses* that exist at the same time and which are due to the same or related causes are deemed to be one *illness*. Further, if an *illness* is due to causes which are the same as, or related to, the causes of a prior *illness*, the *illness* will be deemed a continuation of the prior *illness* and not a separate *illness*.

WISCONSIN ADM. CODE § INS 3.28(6)(d) provides:

> A claim shall not be reduced or denied on the grounds that the disease or physical condition resulting in the loss or disability had existed prior to the effective date of coverage, under coverage providing such a defense, unless the insurer has evidence that such disease or physical condition, as distinguished from the cause of such disease or physical condition, had manifested itself prior to such date. Such manifestation may be established by evidence of:
>
> 1. Medical diagnosis or treatment of such disease or physical condition prior to the effective date, or
>
> 2. The existence of symptoms of such disease or physical condition prior to the effective date which, would cause an ordinarily prudent person to seek diagnosis, care or treatment and for which such diagnosis, care or treatment was not sought prior to such date.

WISCONSIN ADM. CODE § 3.28(6)(e) provides:

> Coverage which contains wording which requires the cause of the disease or physical condition, as distinguished from the disease or physical condition itself, to originate after the effective date of coverage shall be administered in accordance with par. (d).

STANDARD OF REVIEW

There are three levels of deference granted to agency decisions: great weight deference, due weight deference and de novo review. ***UFE Inc. v. LIRC***, 201 Wis.2d 274, 284, 548 N.W.2d 57, 61 (1996). Which level is appropriate depends on the comparative institutional capabilities and qualifications of the court and the administrative agency. ***Id.***

We agree with the parties that the correct standard to apply here is "due weight." Under the due weight standard, a court need not defer to an agency's interpretation which, while reasonable, is not the interpretation that the court considers the best and most reasonable. ***Id.*** at 286, 548 N.W.2d at 62. This standard is appropriate when the agency has some experience in an area, but has not developed the expertise which necessarily places it in a better position to make judgments regarding the interpretation of a statute than a court. ***Id.*** However, since the standard is applicable only when the agency has had at least one opportunity to analyze the issue and formulate an opinion, a court will not overturn a reasonable agency decision that comports with the purpose of the statute unless the court determines that there is a more reasonable interpretation available. ***Id.*** at 286-287, 548 N.W.2d at 62.

As to agency findings of fact, we will sustain a finding of fact if the agency's finding is supported by substantial evidence in the record. Section 227.57(6), STATS. Where the evidence in the entire record, including the inferences therefrom, is found to be such that a reasonable man, acting reasonably,

might have reached the same decision, a court will sustain an agency's finding of fact. ***Omernick v. DNR***, 100 Wis.2d 234, 250, 301 N.W.2d 437, 445 (1981).

ANALYSIS

Mandatory or Permissive Nature of WIS. ADM. CODE § INS 3.28(6)(d)

Relying on the policy language, Golden Rule denied coverage because the double vision for which James consulted Dr. Golopol on February 24, 1993 "is the same illness as defined by the contract as the illness subsequently diagnosed" as a stroke. "Since Mr. Anderle received medical advice or treatment for this illness prior to the effective date of the policy," Golden Rule denied James's claim.

OCI held that WIS. ADM. CODE § INS 3.28(6)(d) "does not allow an insurer to say that just because someone has been treated for some symptoms which are sometimes indicative of a certain condition, then the person had that condition when the symptoms were treated." Stated otherwise, § INS 3.28(6)(d) prohibits an insurer from denying a claim on pre-existence grounds unless the insurer has evidence that the disease or physical condition itself, as distinguished from the *cause* of such disease or physical condition, had manifested itself before the effective date. OCI held that the insurer could meet its burden under § INS 3.28(6)(d)(1)-(2) by either showing under subsection (1) that diagnosis or treatment of the condition occurred before the effective date, or by showing under subsection (2) that if no care was sought, symptoms existed prior to the effective date which would cause an ordinarily prudent person to seek care.

Before this court, Golden Rule argues that the tests in subsections (1) and (2) are not mandatory and exclusive, but permissive.[4] Under Golden Rule's proposed reading, latitude exists for a third interpretation, consistent with Golden Rule's policy language, under which a person seeking medical "advice" may be barred by Golden Rule's pre-existing condition exclusion. We reject this argument. These issues were not raised before OCI. Therefore, under long-standing practice, we will not consider them here. *See* ***Zeller v. Northrup King Co.***, 125 Wis.2d 31, 35, 370 N.W.2d 809, 812 (Ct. App. 1985); ***Capon v. O'Day***, 165 Wis. 486, 490-91, 162 N.W. 655, 657 (1917). Put another way, the objecting party must have given OCI an opportunity to correct potential errors of interpretation. *Cf.* ***Herkert v. Stauber***, 106 Wis.2d 545, 560, 317 N.W.2d 834, 841 (1982).

Condition Versus Cause

As an alternative argument, Golden Rule maintains that it properly distinguished between the condition itself and the cause of the condition. According to Golden Rule, its neurological consultant established that James had an underlying disorder—vertebrobasilar insufficiency—which "manifested" itself in James's February symptoms, as well as in the stroke. Therefore, argues Golden Rule, it properly denied coverage because the stroke and the February symptoms are all symptoms of the pre-existing condition itself.

OCI rejected this argument and held that both James and his doctor "reasonably attributed" his February 22 and 24 symptoms to other causes, such as

[4] In a variation on this argument, Golden Rule argues that because OCI approved its policy language, the policy language is sufficient to support the action taken. We reject this argument. Where an insurance policy contravenes a statute, the statute controls. ***WEA Ins. Corp. v. Freiheit***, 190 Wis.2d 111, 119, 527 N.W.2d 363, 366 (Ct. App. 1994).

upper respiratory infection or hangover. OCI noted that even after the March 1 symptoms, "his physician, a reputable internist, did not suspect that [James] ... had or was about to have a stroke." Therefore, OCI concluded that Golden Rule's denial of benefits was not reasonable. Even under the terms of its own policy, benefits were to be excluded for illnesses for which a person received medical advice or treatment before the effective date. Mr. Anderle received neither in connection with the March 10 stroke.

There is substantial evidence in the record to support this holding, and we must therefore affirm. *See* § 227.57(6), STATS. Although Golden Rule's expert opined that James's illness was pre-existing, this finding relied upon subsequent events to determine that the February 22 and 24 and the March 2 symptoms were tied to the March 10 stroke. The doctor on the scene made no such diagnosis, and therefore did not "advise" or "treat" James for stroke before the effective date of Golden Rule's policy.

Stated otherwise, the fact that James had some symptoms which later proved consistent with stroke are insufficient to support a denial on pre-existence grounds. James's symptoms were also consistent with a variety of other ailments he did not ultimately suffer, such as the brain tumor his doctor suspected. Permitting backward-looking reinterpretation of symptoms to support claims denial would so greatly expand the definition of "pre-existing illness" as to make that term meaningless: Any prior symptom not inconsistent with an ultimate diagnosis would suffice for denial. In addition, such a procedure impermissibly confuses the illness itself with the cause of the illness, as prohibited by WIS. ADM. CODE § INS 3.28(6)(d).

Authority of the Commissioner

Golden Rule last argues[5] that the Commissioner of Insurance exceeded her power in ordering payments and in ordering Golden Rule to conform its interpretation of its policy to the requirements of WIS. ADM. CODE § INS 3.28(6)(d).[6] We reject this argument. The Insurance Commissioner has all power reasonably implied in order to enable the commissioner to perform the duties of the office. Section 601.41(2), STATS. This includes the power to issue orders necessary to secure compliance with the law. Section 601.41(4), STATS. The order here did not exceed that power.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

[5] Golden Rule also argues that the portion of the order requiring compliance with WIS. ADM. CODE § INS 3.28 is vague. However, this is an argument that the regulation itself is vague, an argument that is not properly before this court because, as discussed above, it was not raised before OCI.

[6] OCI relied on § 631.15(3m), STATS., which reads in relevant portion: "A policy that violates a statute or rule is enforceable against the insurer as if it conformed to the statute or rule."