

SUPREME COURT OF NEBRASKA

Fentress v. Westin, Inc.

304 Neb. 619 (2019) · No. No. S-19-128 · Decided December 6, 2019

SUMMARY

The Nebraska Supreme Court affirmed a Workers' Compensation Court order awarding Suzy Fentress temporary total disability benefits, medical treatment, and attorney fees. The court held that Westin could not withdraw its motion to determine maximum medical improvement after the evidentiary hearing, that an audio recording of Fentress' physician consultation was properly admitted, and that the medical treatment at issue was compensable. The court declined to consider Fentress' purported cross-appeal because it did not comply with appellate briefing requirements.

CASE DETAILS

COURT	Supreme Court of Nebraska
WRITING FOR THE COURT	Miller-Lerman, J.; Heavican, C.J.; Cassel, J.; Stacy, J.; Funke, J.; Papik, J.; Freudenberg, J.
JURISDICTION	Nebraska
DECIDED	December 6, 2019
DOCKET	No. S-19-128
DISPOSITION	affirmed
PROCEDURAL POSTURE	Westin, Inc., and its workers' compensation insurer appealed a Nebraska Workers' Compensation Court order awarding Fentress medical treatment, temporary total disability benefits, and attorney fees. Fentress filed a purported cross-appeal challenging benefit calculations, but the Supreme Court declined to consider it because she did not properly assign cross-errors.
STANDARD OF REVIEW	Under Neb. Rev. Stat. § 48-185, an award may be modified, reversed, or set aside only if the compensation court acted without or in excess of its powers, the award was procured by fraud, the record lacks sufficient competent evidence, or the factual findings do not support the award. Factual determinations are reviewed for clear error and are treated like a jury verdict; statutory interpretation is reviewed independently as a question of law; and evidentiary rulings are reviewed for abuse of discretion.

PRECEDENTIAL VALUE	published precedential opinion
PARTIES	Westin, Inc., LM Insurance Corporation v. Suzy Fentress, formerly known as Suzy Schlick

TOPICS

workers compensation appellate procedure evidence remedies

PRACTICE AREAS

workers' compensation appellate procedure evidence remedies

QUESTIONS PRESENTED

1. Whether the Workers' Compensation Court properly denied Westin's motion to withdraw its motion to determine maximum medical improvement after the evidentiary hearing.
2. Whether the Workers' Compensation Court abused its discretion by admitting a recording of Fentress's consultation with Dr. Aviles.
3. Whether Fentress's treatment with Dr. Nelson was compensable despite her not following the ordinary physician-referral chain.
4. Whether the evidence supported an award of temporary total disability benefits.
5. Whether Westin proved an independent intervening event that broke the causal connection between the work injury and Fentress's ongoing condition.
6. Whether the Workers' Compensation Court erred in awarding Fentress \$2,500 in attorney fees.
7. Whether Fentress's purported cross-appeal should be considered despite her failure to separately assign errors.

HOLDINGS

1. The court declined to consider the merits of Fentress's purported cross-appeal because her brief did not present a proper cross-appeal with separately assigned errors and the required appellate-brief components.
2. The Workers' Compensation Court did not err in denying Westin's motion to withdraw its motion to determine maximum medical improvement.
3. The Workers' Compensation Court did not abuse its discretion by admitting the recording of Fentress's consultation with Dr. Aviles.
4. Because Westin denied compensability and failed to authorize additional care through the existing referral chain, Fentress could select her own physician and seek compensation for treatment that was otherwise compensable.
5. The compensation court's finding that Fentress was temporarily totally disabled was supported by the record and was not clearly wrong.

6. Westin did not establish an independent intervening cause that relieved it of liability for Fentress's ongoing compensable condition.
7. The compensation court did not err in awarding Fentress \$2,500 in attorney fees.

KEY QUOTATIONS

“We have viewed § 48-177 as a voluntary dismissal of a case which “removes the case from the [compensation] court’s docket.”” (630)

“Given the beneficent purposes of workers’ compensation law, a compensation court can admit evidence in order to investigate cases in the manner it judges is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of the Nebraska Workers’ Compensation Act.” (633)

“The mere possibility of an independent intervening cause does not relieve an employer from liability for an employee’s otherwise compensable claim for workers’ compensation and benefits.” (635-636)

FACTUAL BACKGROUND

Fentress suffered compensable work-related hip and mental-health injuries while employed by Westin in October 2014. After hip surgery and continuing pain-management treatment, Westin disputed ongoing disability and medical treatment, including treatment by Dr. Christopher Nelson after Westin denied authorization for a visit with a previously authorized physician. The compensation court credited evidence including a functional capacity evaluation and Dr. Nelson's opinions, rejected a later opinion by Dr. Steven Aviles that Fentress was malingering, and found that a June 2018 stumble in a park was not proven to be an independent intervening cause of her ongoing condition.

PROCEDURAL HISTORY

Fentress sustained compensable work-related hip and mental-health injuries in October 2014 and received an award of temporary partial benefits in 2017. Westin later moved to terminate indemnity benefits and determine maximum medical improvement. After an evidentiary hearing, the Workers' Compensation Court denied Westin's attempted withdrawal of the motion, admitted a recording of Fentress's physician consultation, found maximum medical improvement as to mental-health issues but not the hip injury, awarded medical treatment, temporary total disability benefits, and \$2,500 in attorney fees. The Nebraska Supreme Court affirmed and declined to reach Fentress's purported cross-appeal.

DISPOSITION

affirmed

CASES CITED

- In re Estate of Graham, 301 Neb. 594, 919 N.W.2d 714 (2018)
- In re Interest of Samantha L. & Jasmine L., 286 Neb. 778, 839 N.W.2d 265 (2013)
- Interiano-Lopez v. Tyson Fresh Meats, 294 Neb. 586, 883 N.W.2d 676 (2016)
- Tchikobava v. Albatross Express, 293 Neb. 223, 876 N.W.2d 610 (2016)

- Knapp v. Village of Beaver City, 273 Neb. 156, 728 N.W.2d 96 (2007)
- Cruz-Morales v. Swift Beef Co., 275 Neb. 407, 746 N.W.2d 698 (2008)
- Bower v. Eaton Corp., 301 Neb. 311, 918 N.W.2d 249 (2018)
- Brock v. Dunning, 288 Neb. 909, 854 N.W.2d 275 (2014)
- Harpham v. General Cas. Co., 232 Neb. 568, 441 N.W.2d 600 (1989)
- Clark v. Alegent Health Neb., 285 Neb. 60, 825 N.W.2d 195 (2013)
- Krause v. Five Star Quality Care, 301 Neb. 612, 919 N.W.2d 514 (2018)
- Hintz v. Farmers Co-op Assn., 297 Neb. 903, 902 N.W.2d 131 (2017)
- Kerkman v. Weidner Williams Roofing Co., 250 Neb. 70, 547 N.W.2d 152 (1996)
- Mendoza v. Omaha Meat Processors, 225 Neb. 771, 408 N.W.2d 280 (1987)
- Simmons v. Precast Haulers, 288 Neb. 480, 849 N.W.2d 117 (2014)