COURT OF APPEALS
DECISION
DATED AND FILED

August 26, 2003

Cornelia G. Clark
CLERK OF COURT OF APPEALS

NOTICE

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

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

Appeal No. 02-3204 Cir. Ct. No. 01-CV-1893

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

BROWN COUNTY,

PETITIONER-APPELLANT,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION AND LOCAL 1901, AFSCME, AFL-CIO,

RESPONDENTS-RESPONDENTS.

Decision No. 30016-D
[NOTE: This document was re-keyed by WERC. Original pagination has been retained.]

APPEAL from an order of the circuit court for Brown County: SUE E. BISCHEL, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Brown County appeals an order affirming the Wisconsin Employment Relations Commission's determination that the County violated its collective bargaining agreement with Brown County Mental Health Center Employees, Local 1901, when it refused to arbitrate

Catherine Christensen's medical claim grievance. The County argues that Christensen's grievance is not subject to arbitration under the terms of the collective bargaining agreement. We reject this argument and affirm the order.

BACKGROUND

¶2 Christensen, a Brown County Mental Health Center employee, filed a claim for certain chiropractic services she received under the County's basic health insurance plan. Although Christensen had received payment for chiropractic services in the past, the County's third-party administrator denied Christensen's claim, concluding that the treatments were no longer "medically necessary." After exhausting all her remedies with the insurance plan supervisor, Christensen filed a grievance under the collective bargaining agreement, alleging that the denial of her claims for chiropractic services violated that agreement. The County ultimately denied the grievance and refused to arbitrate. In turn, the union filed a complaint with the commission, alleging that the County's refusal to arbitrate the grievance constituted a violation of the collective bargaining agreement, contrary to WIS. STAT. § 111.70(3)(a)1 and 5.[1]

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[1] The statute provides that it is a prohibited practice for a municipal employer to "interfere with, restrain or coerce municipal employees in the exercise of their rights." WIS. STAT. § 111.70(3)(a)1. The statute further provides that it is a prohibited practice for a municipal employer:

> [t]o violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employees, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement or to accept the terms of such arbitration award, where previously the parties have agreed to accept such award as final and binding upon them.

(continued)

¶3 Following a hearing on the complaint, the hearing examiner issued a decision concluding that because the grievance was arbitrable under the collective bargaining agreement, the County had committed a prohibited practice by refusing to arbitrate. The County petitioned the commission for review of the examiner's decision and the commission ultimately affirmed the examiner's decision with minor modifications. The County then filed suit in circuit court seeking certiorari review of the commission's decision. The circuit court affirmed the commission's decision and this appeal follows.

ANALYSIS

¶4 Whether Christensen's grievance is subject to arbitration under the terms of the collective bargaining agreement is a question of law that this court reviews independently. ***City of Madison v. WERC***, 2003 WI 52, ¶12, 261 Wis. 2d 423, 662 N.W.2d 318. There is a "broad presumption of arbitrability" and courts are limited to determining "whether the arbitration clause can be construed to cover the grievance on its face and whether any other provision of the contract specifically excludes it." ***Id.***, ¶20. An order to arbitrate a specific grievance will not be denied unless it "may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute." ***United Steelworkers of America v. Warrior & Gulf***, 363 U.S. 574, 582-83 (1960). Without an express provision excluding a particular grievance from arbitration, only the most forceful evidence of a reason to exclude the grievance will prevail. ***Id.*** at 585.

WIS. STAT. § 111.70(3)(a)5. All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶5 Here, the County argues that the grievance, on its face, does not present an arbitrable dispute under the terms of the collective bargaining agreement. Article 21 of the agreement governs insurance and states, in relevant part, that "[t]he Employer shall provide a Hospital and Surgical Insurance Group Plan, with major medical, during the term of this Agreement." Article 21 also requires that "any changes in policy must be negotiated by the parties." In turn, Article 26 of the agreement sets out a four-step grievance procedure and provides, in relevant part:

> Any grievance or misunderstanding which may arise between the Employer and an employee (or employees) or the Employer and the Union, shall be handled as follows:
>
> ….
>
> Step 4. If a satisfactory settlement is not reached as outlined in Step 3, either party desiring arbitration must submit a request to the Wisconsin Employment Relations Commission requesting a staff arbitrator be appointed.
>
> ….
>
> The parties agree that the decision of the arbitrator shall be final and binding on both parties to the Agreement. The arbitrator shall not have the authority to add to, subtract from, change, alter, modify or delete any of the specific terms or provisions of this Agreement, and *his/her ruling will be restricted to an interpretation of the contractual part of this Agreement only*. (Emphasis added.)

Only grievances relating to the termination of probationary employees are expressly excluded from the grievance/arbitration process.

¶6 The County contends that Christensen's grievance on its face concerns a "medical necessity" claim that arises out of a collateral agreement— namely, the health insurance policy—that is not subject to the grievance and arbitration provisions of the collective bargaining agreement. The County further

argues that because the merits of Christensen's grievance will require interpretation of the insurance policy rather than "the contractual part of this Agreement only," the arbitrator has no authority to consider the grievance. The County urges this court to "adopt the reasoning" of ***International Ass'n of Machinists & Aerospace Workers v. Waukesha Engine Div., Dresser Indus. Inc.***, 17 F.3d 196, 199 (7th Cir. 1994), in which the court concluded that the language of both the collective bargaining agreement and the insurance plan did not intend to subject determinations of medical necessity to arbitration. ***Id.*** at 198.

¶7 There, the only language in the collective bargaining agreement relating to medical claims provided: "The Company will continue to provide the present employee insurance coverage as amended, for the term of this Agreement, *as specified in the Summary Plan Booklet*." (Emphasis added.) In turn, the plan booklet indicated that no medical expense benefits were provided under the plan for "[c]harges for services and supplies that are not medically necessary, as determined by Aetna, for the diagnosis, care or treatment of the physical or mental condition involved, even if they are prescribed, recommended or approved by the attending physician or dentist." The ***Waukesha Engine*** court ultimately determined that whether a group health plan participant's hospitalization was medically necessary and, therefore, covered under the employer's health plan, was not arbitrable under the collective bargaining agreement. ***Id.***

¶8 The language of the collective bargaining agreement in ***Waukesha Engine***, however, is distinguishable from the present case. Here, the collective bargaining agreement requires the County to provide "a Hospital and Surgical Insurance Group Plan," but does not incorporate a specific insurance plan nor refer the reader to a collateral document such as the "Summary Plan Booklet" in ***Waukesha Engine***. The agreement here also expressly provides that "any changes

in policy must be negotiated by the parties." Thus, arbitrability of the grievance in this case is less controlled by the provisions of the separate insurance plan than by the collective bargaining agreement's specific language.

¶9 Ultimately, doubts about arbitrability in a labor agreement should be resolved in favor of arbitration. ***AT&T Technologies, Inc. v. Communications Workers***, 475 U.S. 643, 650 (1986). Applying the presumption favoring arbitration, it cannot be said "with positive assurance that the grievance/arbitration provision is not susceptible of an interpretation that covers the asserted dispute." ***United Steelworkers***, 363 U.S. at 582-83. The commission and the union argue that Christensen's grievance relates to alleged "changes in policy" within the meaning of Article 21 of the collective bargaining agreement—i.e. changes to benefit levels for chiropractic services and to the determination of what is "medically necessary." Given the broad language of the arbitration clause, Christensen's grievance on its face can reasonably be read to implicitly allege that there had been a "change" in the health insurance policy in violation of the collective bargaining agreement. Because the arbitration clause can be construed to cover the grievance on its face and no other provision of the contract specifically excludes it, we conclude that the grievance was subject to arbitration under the terms of the collective bargaining agreement.[2]

[2] Although the County argues there is forceful evidence that "the parties did not intend to have arbitrators determine medical necessity claims," the proper inquiry here is whether there is forceful evidence to exclude a grievance alleging a change in the health insurance policy.

By the Court.—Order affirmed.

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