BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

LATOYIA TOWNS, Claimant, vs. SILVER OAKS NURSING AND REHABILITATION CENTER, Employer, and CCMSI, Insurance Carrier, Defendants.	File No. 23700726.01 ALTERNATE MEDICAL CARE DECISION Head Note: 2701

STATEMENT OF THE CASE

On September 7, 2023, the claimant filed a petition for alternate care pursuant to Iowa Code 85.27(4) and 876 Iowa Administrative Code 4.48. The defendants filed an answer admitting liability for injuries related to claimant's right upper extremity and right shoulder.

The undersigned presided over the hearing held via telephone and recorded digitally on September 19, 2023. That recording constitutes the official record of the proceeding pursuant to 876 Iowa Administrative Code 4.48(12). Claimant participated personally, and through her attorney, Dennis Currell. The defendants participated through their attorney, Tyler Block.

Prior to the hearing, the claimant submitted ten pages of exhibits, marked as Exhibits 1-5. The defendants submitted seven pages of exhibits labeled A. The evidentiary record consists of Claimant's Exhibit 1-5 and Defendants' Exhibit A.

On February 16, 2015, the Iowa Workers' Compensation Commissioner issued an order delegating authority to deputy workers' compensation commissioners, such as the undersigned, to issue final agency decisions on applications for alternate medical care. Consequently, this decision constitutes final agency action, and there is no appeal to the commissioner. Judicial review in a district court pursuant to Iowa Code Chapter 17A is the avenue for an appeal.

ISSUE

The issue under consideration is whether an order for certain alternate medical care is appropriate.

FINDINGS OF FACT

Claimant, Latoyia Towns, alleges that she sustained an injury to her right shoulder and right upper extremity that arose out of, and in the course of her employment with the defendant-employer on April 18, 2023. She alleges that she lifted a heavy patient and felt pain in her right upper extremity. She testified that she told her supervisor of her injury, along with her charge nurse, human resources representative, administrator, and corporate director of nursing. (Testimony). According to the claimant, the employer told her that they would move forward with filing a workers' compensation claim. (Testimony).

The claimant told her employer that she was going to seek care with the emergency room at the end of her shift, which she did. (Testimony). She initially went to a walk-in clinic, who recommended that she seek emergent care. (Testimony; Claimant's Exhibit 1). At the emergency room, Ms. Towns complained of right arm pain and right shoulder pain. (CE 1). She noted that she felt a pop in her right shoulder while she was lifting a very heavy patient. (CE 1). The examination in the emergency room showed mild pain to palpation of the AC joint. (CE 1:3). The emergency physician opined that the claimant may have torn her rotator cuff muscle or "just caused a sprain of her AC joint or caused tendinitis." (CE 1:3). The emergency room physician ordered physical therapy. (Testimony; CE 1:3).

Ms. Towns began physical therapy. (Testimony). She testified that there were problems with some of her physical therapy appointments, as there was an issue with authorization and identification of the proper workers' compensation insurance carrier. (Testimony). As of June of 2023, she completed seven visits for physical therapy. (CE 1:4). She was not improving at that time. (CE 1:4). The therapist recommenced further imaging to rule out a rotator cuff or pectoral tear. (CE 1:4).

Ms. Towns further testified that she received no accommodation to attend her physical therapy appointments, and that she had to make appointments on her off time. (Testimony). The physical therapist requested an MRI, as physical therapy appeared to not be working to solve Ms. Towns' issues. (Testimony).

Since Ms. Towns had not heard from the workers' compensation carrier as to this issue, she returned to her own primary care provider, on her own volition, and requested that the MRI be ordered. (Testimony). This visit occurred on June 28, 2023 with Anita Sharma, PA-C. (CE 2). Ms. Towns complained of an injury to her right arm with associated arm weakness, painful range of motion, and tingling or numbness. (CE 2). Ms. Sharma opined that the claimant had an injury to her shoulder and upper arm. (CE 2). She recommended an MRI. (CE 2). Her primary care physician ordered the MRI, and it was completed in July of 2023. (Testimony).

In August of 2023, the defendants arranged for care with Matthew Bollier, M.D., an orthopedic physician. (DE A). Dr. Bollier performed an examination on the claimant, though she testified that "he didn't say much." (Testimony; DE A; CE 4). Dr. Bollier recounted the claimant's treatment to date. (DE A). Ms. Towns had pain in her anterior shoulder, which traveled into her pectoralis and down her right arm. (DE A). The MRI obtained in July showed no labral or rotator cuff tear, but showed rotator cuff tendinopathy. (DE A). Ms. Towns expressed frustration about her continued right shoulder pain to the doctor. (DE A). She also told the doctor that she developed numbness and tingling in her 4th and 5th fingers following cessation of her physical therapy in May. (DE A). Dr. Bollier opined that the claimant's work injury was "a significant factor in our causation assessment regarding her shoulder pain." (DE A). Dr. Bollier recommended that the claimant have corticosteroid injections into her subacromial and glenohumeral spaces to reduce inflammation and improve her pain. (DE A). Dr. Bollier also recommended she continue strengthening exercises on her own. (DE A). Dr. Bollier recommended a 10-pound lifting restriction for the claimant. (DE A).

Ms. Towns testified that Dr. Bollier only offered a cuff for the claimant's right elbow in order to alleviate any numbness in her right 4th and 5th fingers. (Testimony). Dr. Bollier also recommended certain injections to the right arm. (Testimony). These injections have since been scheduled for October, with a subsequent follow-up visit scheduled with Dr. Bollier in early November. Ms. Towns testified to a dissatisfaction with Dr. Bollier's care. (Testimony).

Ms. Sharma saw the claimant again on an unidentified date. (CE 5). After examination, Ms. Sharma diagnosed the claimant with tendinitis of her right rotator cuff. (CE 5). She noted that: "[w]ork comp is fighting against cortisone injection." (CE 5). As a result, she provided a referral to an orthopedic surgeon. (CE 5). Ms. Sharma also diagnosed the claimant with numbness in her finger. (CE 5). She ordered an EMG and nerve conduction study due to numbness in the claimant's 4th and 5th fingers. (CE 5).

Ms. Towns confirmed that her primary care physician recommended a nerve conduction study and an orthopedic referral at PCI. (Testimony). The primary care physician scheduled a nerve conduction test for September 18, 2023; however, Ms. Towns could not attend this evaluation, as she was working. (Testimony). It has since been rescheduled. (Testimony).

Ms. Towns was never advised that care with her primary care physician or the emergency room, or physical therapist was not authorized. (Testimony).

CONCLUSIONS OF LAW

Iowa Code 85.27(4) provides, in relevant part:

> For purposes of this section, the employer is obligated 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.

Iowa Code 85.27(4). See Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433 (Iowa 1997).

"Iowa Code section 85.27(4) affords an employer who does not contest the compensability of a workplace injury a qualified statutory right to control the medical care provided to an injured employee." Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 769 (Iowa 2016) (citing R.R. Donnelly & Sons v. Barnett, 670 N.W.2d 190, 195, 197 (Iowa 2003)). "In enacting the right-to-choose provision in section 85.27(4), our legislature sought to balance the interests of injured employees against the competing interests of their employers." Ramirez, 878 N.W.2d at 770-71 (citing Bell Bros., 779 N.W.2d at 202, 207; IBP, Inc. v. Harker, 633 N.W.2d 322, 326-27 (Iowa 2001)).

The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Iowa Code section 85.27; Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening, October 16, 1975). An employer's right to select the provider of medical treatment to an injured worker does not include the right to determine how an injured worker should be diagnosed, evaluated, treated, or other matters of professional medical judgment. Assmann v. Blue Star Foods, File No. 866389 (Declaratory Ruling, May 19, 1988). Reasonable care includes care necessary to diagnose the condition, and defendants are not entitled to interfere with the medical judgment of its own treating physician. Pote v. Mickow Corp., File No. 694639 (Review-Reopening Decision, June 17, 1986).

The employer must furnish "reasonable medical services and supplies *and* reasonable and necessary appliances to treat an injured employee." Stone Container Corp. v. Castle, 657 N.W.2d 485, 490 (Iowa 2003)(emphasis in original). Such employer-provided care "must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee." Iowa Code section 85.27(4).

By challenging the employer's choice of treatment - and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See e.g. Iowa R. App. P. 14(f)(5); Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, 209 (Iowa 2010); Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). An injured employee dissatisfied with the employer-furnished care (or lack thereof) may share the employee's discontent with the employer and if the parties cannot reach an agreement

on alternate care, "the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order the care." Id. "Determining what care is reasonable under the statute is a question of fact." Long, 528 N.W.2d at 123; Pirelli-Armstrong Tire Co., 562 N.W.2d at 436. As the party seeking relief in the form of alternate care, the employee bears the burden of proving that the authorized care is unreasonable. Id. at 124; Gwinn, 779 N.W.2d at 209; Pirelli-Armstrong Tire Co., 562 N.W.2d at 436. Because "the employer's obligation under the statute turns on the question of reasonable necessity, not desirability," an injured employee's dissatisfaction with employer-provided care, standing alone, is not enough to find such care unreasonable. Id.

I would first note that there is no proof in the record that the claimant expressed a dissatisfaction with her care before filing the original notice and petition concerning application for alternate care. Iowa Code section 85.27(4) requires that a claimant express their dissatisfaction with care, in writing, prior to the filing of a petition seeking alternate medical care. The record contains copies of e-mails between claimant's counsel and the adjuster, but these e-mails are limited to a discussion about the claimant's statement and arrangement of an examination with Dr. Bollier, including whether this represented an examination pursuant to Iowa Code section 85.39. This alone could be fatal to the claimant's request for alternate medical care.

The claimant argues that the defendants abandoned medical care, and as such she sought care with her primary care provider. Based upon this, the claimant argues that the primary care provider (a physician's assistant) should be deemed the authorized treating provider, and thus be allowed to direct the claimant's medical care. The problem with this claim is that the defendants did not abandon care. While there was a short time at the outset that care was not promptly authorized by the defendants, they eventually provided authorization for some care. As admitted during the hearing, the defendants authorized physical therapy appointments for a time. While this care was initially ordered by an unauthorized provider, it represents the defendants assuming responsibility for directing care. While the defendants have not moved with great speed in directing the claimant's care, they arranged an appointment and approved treatment as recommended by Dr. Bollier. Dr. Bollier is far more qualified as an authorized treating physician than the claimant's requested authorizing treating provider, as Dr. Bollier is an orthopedic doctor. The claimant's requested authorized treating provider is a physician assistant with an unclear background.

The claimant is clearly displeased with the speed of which the defendants are authorizing certain treatments. The defendants would do well to move in a more timely manner in continuing their handling of this claim. However, the defendants authorized care with Dr. Bollier. Dr. Bollier recommended injections for the claimant. These injections have been authorized. A follow-up appointment after the injections has also been authorized. All indications are that the defendants intend to continue with Dr. Bollier as the treating physician for the claimant.

It is the claimant's burden to prove that the care authorized has been unreasonable. The claimant's own primary care provider, Physician Assistant Sharma,

ordered a visit with an orthopedic physician. The claimant has already been seen by an orthopedic physician, who has provided care recommendations, including injections. Ordering that Ms. Sharma be considered the claimant's treating provider seems absurd when Dr. Bollier, an orthopedic physician, has already undertaken care as an authorized treating physician for the claimant.

Finally, the claimant desires to have an EMG and/or a nerve conduction study performed. There is no indication in the record that Dr. Bollier has ruled these items out as possibilities. As an orthopedic physician, he is in a much stronger position to make these judgments than Ms. Sharma. The treatment provided by the defendants through Dr. Bollier is reasonable. The claimant has not proven that the care offered through Dr. Bollier is unreasonable. This seems more like a case where the claimant is merely dissatisfied with the care offered, and cannot prove that the current care being offered is unreasonable. Dr. Bollier has ordered injections "to decrease inflammation and improve her pain."

When taking into consideration the claimant's failure to provide the defendants with a notice of dissatisfaction, along with her failure to prove that the care authorized was unreasonable, I find that the claimant's petition for alternate care should be denied in its entirety.

IT IS THEREFORE ORDERED:

The claimant's petition for alternate care is denied.

Signed and filed this 20th day of September, 2023.

ANDREW M. PHILLIPS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Dennis Currell (via WCES)

Tyler C. Block (via WCES)