BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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| SONJA HANSEN-SMITH,<br><br>Claimant,<br><br>vs.<br><br>WEST DES MOINES COMMUNITY SCHOOL DISTRICT,<br><br>Employer,<br><br>and<br><br>SFM MUTUAL INSURANCE COMPANY,<br><br>Insurance Carrier,<br>Defendants. | File No. 19700676.02<br><br>ALTERNATE MEDICAL<br><br>CARE DECISION<br><br>Head Note No.: 2701 |

Sonja Hansen-Smith filed a petition seeking alternate care under Iowa Code section 85.27 for the injuries to her neck, back, and body as a whole, arising out of an alleged work injury of May 16, 2019. A hearing was scheduled for February 27, 2020. The defendants, employer West Des Moines Community School District and insurance carrier SFM Mutual Insurance Company did not file an answer prior to the hearing, but on the record denied liability for all injuries and conditions alleged in the petition.

The matter was subject to a previous alternate medical care hearing held on January 3, 2020. For the purposes of the alternate medical care proceeding, defendants accepted liability. Deputy Lunn, among other things, ordered the defendants to authorize a neurological consult.

At the present hearing, defendants denied all liability based on medical records obtained following the January 9, 2020, decision of Deputy Lunn. Claimant argues that defendants cannot change their position and that the present alternate medical care proceeding is bound by the defendants' position in the previous alternate medical care proceeding.

In Winnebago Industries, Inc. v. Haverly, the Supreme Court held that unless the agency actually decides the issue of liability, the "law of the case doctrine" is not applicable. 727 N.W.2d 567, 573 (Iowa 2006). In Winnebago, the claimant argued that the deputy commissioner's order requiring the defendant to provide care was binding in future proceedings on the same claim. Id. "The answer to Haverly's law-of-the-case argument is that the agency did not decide anything as to Winnebago's liability for compensation benefits, but only his right to alternate care. In fact, for reasons we discuss later, the agency *could not* decide liability at that stage." Id. The agency is not

empowered with determining liability in an alternate care proceeding and therefore, the "law of the case" doctrine does not bar a different argument later in the same case. The court in Winnebago also addressed the issue of judicial estoppel but did not apply it.

In Brewer-Strong v. HNI Corporation, 913 N.W.2d 235, the defendant employer initially admitted liability and then, when presented with an alternate care petition, the defendants denied liability. Later, they accepted liability. At hearing, claimant requested reimbursement for medical bills but defendants asserted an authorization defense. In ruling in favor of the defendants, the Supreme Court re-iterated that the law "the law-of-the-case doctrine did not bar an employer's denial of liability based on a deputy commissioner's order requiring the employer to furnish alternate medical care because the deputy commissioner could not decide the employer's liability in an alternate care proceeding." Brewer-Strong, 913 N.W.2d 235, 246 (Iowa 2018).

The Supreme Court went on to say:

> We have never held that an employer forever forfeits its rights and obligations under Iowa Code section 85.27 by initially denying liability for an injury, and it does not make sense that we would. Even after an initial determination, it is incumbent on an employer to continue to monitor and investigate any claim for benefits. When, as here, sufficient proof justifies a reexamination of an initial determination of nonliability, the employer should be encouraged to change its position to accept liability for an employee's work-related injury. Holding otherwise would run contrary to the very purpose of Iowa Code chapter 85 to resolve "workplace-injury claims with minimal litigation" by forcing employers to reach a conclusion about their liability for an employee's injury without thoroughly performing their duty to investigate the claims, potentially creating more litigation and expenses in the process. Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 770 (Iowa 2016) ("[C]hapter 85 encourages employers to compensate employees who receive workplace injuries promptly and provides a forum for efficient resolution of workplace-injury claims with minimal litigation.").

Id. at 244. The converse must also be true—that a defendant employer can accept and then later deny liability as the investigation proceeds.

In the present case, defendants assert that new evidence has caused them to shift positions and deny liability. Claimant argues that the "new" evidence is not sufficient, however, the agency is not equipped to analyze this claim as an alternate care proceeding is designed only to address the reasonableness of defendants actions as it relates to providing medical care. The agency is not permitted to decide issues of causation during an alternate medical care proceeding.

To the extent that claimant is seeking alternate medical relief outside of the specific grant of care ordered by Deputy Lunn in his decision of January 9, 2020, those requests for relief are dismissed.

Defendants cannot deny liability and simultaneously direct the course of treatment. Barnhart v. MAQ Incorporated, Iowa Industrial Comm'r Report 16 (App. March 9, 1981). If claimant seeks to recover the charges incurred in obtaining care for a condition for which defendants denied liability, defendants are barred from asserting lack of authorization as a defense to those charges.

The undersigned agreed to hear the issue of whether the defendants acted reasonably in obtaining a neurologist consult for the claimant. Claimant notes that the order was issued on January 9, 2020, and that claimant's counsel has been in regular contact with the defendants in order to obtain an appointment for the claimant. On February 14, 2020, defendants replied that they were actively working to obtain an appointment with a specialist. (Ex 1:7) An appointment is set up with Dr. Kitchell on March 23, 2020. (Ex A)

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

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

> 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.

Claimant's argument appears to be that this appointment was not made promptly and without undue inconvenience to the employee. Claimant's counsel has been in regular email contact with the defendant since the January 9, 2020, decision from Deputy Lunn. The appointment for the neurologic consult is not set until March 23, 2020, over two months after the order of the deputy. However, in the emails, there is not an alternative neurologist appointment proffered by the claimant to show that it was feasible to obtain an earlier appointment.

Thus, the evidence in the record does not support a finding that the defendants' actions at this time were not reasonable. Claimant has a neurological consult appointment set up per the order. While it might have been preferred to have the appointment set for earlier, it is unknown whether that was possible. Thus, the defendants' actions are deemed reasonable based on the current set of facts.

THEREFORE IT IS ORDERED, claimant's alternate medical care petition is denied in part and dismissed in part.

Signed and filed this __28th___ day of February, 2020.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Thomas Berg (via WCES)

Nick Cooling (via WCES)