BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JARROD EVILSIZOR, Claimant, vs. NORTHERN AG SERVICES, INC., Employer, and MICHIGAN MILLERS MUTUAL INS., Insurance Carrier, Defendants.	File No. 5030278.02 ALTERNATE MEDICAL CARE DECISION

STATEMENT OF THE CASE

On October 28, 2021, the claimant filed a petition for alternate medical care pursuant to Iowa Code 85.27(4) and 876 Iowa Administrative Code 4.48. The defendants filed an answer accepting liability for injuries related to the left hip and back. They denied liability for a neck injury or mental health injuries. Accordingly, the claims related to the neck and mental health were verbally dismissed at the outset of the hearing.

Prior to the hearing, the defendants filed a motion to dismiss the claimant's petition for alternate medical care on November 5, 2021. The defendants argue that the claimant's request for a replacement recliner is "essentially identical" to a previous petition filed on March 29, 2021. That petition was previously heard and granted by the undersigned. I ordered the defendants to provide the claimant with a replacement recliner every 9 to 12 months pursuant to the recommendation of the claimant's physician.

The defendants subsequently filed an application for re-hearing and motion to reconsider, amend, or vacate the alternate medical care decision, which was denied by the undersigned. On May 12, 2021, the defendants filed a petition for judicial review of my decision in the previous alternate medical care matter alleging a number of errors in my previous decision. That petition for judicial review is still pending before the Iowa District Court for Polk County, with a date for oral argument set for December 3, 2021.

The defendants argue that this agency lacks subject matter jurisdiction over this matter pursuant to Iowa Rule of Civil Procedure 1.421(1), as "the identical matter is

currently on judicial review to the District Court of Polk County." The defendants also argue that proceeding to an alternate medical care hearing in the instant case is "a waste of judicial resources," and that the "original action" should be allowed to proceed to its finality to "promote efficiency, fairness, and avoiding inconsistent adjudication."

The claimant filed a resistance to the defendants' motion to dismiss. The claimant argues that the recliner purchased by the claimant in February of 2021 has since worn out and needs to be replaced. The claimant notes that the previous petition for alternate care regarded "an entirely different recliner," and that the claimant is "requesting relief to replace the recliner that was the subject matter of the most recent alternate medical care decision."

All motions, except timely motions to change the type of hearing, are considered during the hearing for alternate medical care. 876 Iowa Administrative Code 4.48(10). As such, this motion was considered at the outset of the hearing.

876 Iowa Administrative Code 4.35 applies the Iowa Rules of Civil Procedure to the contested case proceedings before this agency, unless the rules conflict with Iowa Code chapters 85, 85A, 85B, 86, 87, 17A, or the administrative code, or are obviously inapplicable to the workers' compensation commissioner.

Iowa Rule of Civil Procedure 1.421(1) states,

> Every defense to a claim for relief in any pleading must be asserted in the pleading responsive thereto, or in an amendment to the answer made within 20 days after service of the answer, or if no responsive pleading is required, then at trial. The following defenses or matters may be raised by pre-answer motion:
>
> a. Lack of jurisdiction of the subject matter.

Additionally, 876 Iowa Administrative Code 4.9(2) requires motions attacking a pleading be served before responding to a pleading. Motions made pursuant to Iowa Rule of Civil Procedure 1.421 must specify how the pleading they attack is claimed to be insufficient. Iowa Rule of Civil Procedure 1.421(6).

Workers' compensation statutes are liberally construed in favor of the worker. Ewing v. Allied Const. Services, 592 N.W.2d 689, 691 (Iowa 1999)(citing Stumpff v. Second Injury Fund of Iowa, 543 N.W.2d 904, 905 (Iowa 1996)). Iowa Code section 85.27 provides a framework for actions surrounding alternate medical care. It states:

> 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.

Iowa Code 85.27(4). 876 Iowa Administrative Code 4.48 provides additional guidance and procedures for alternate medical care proceedings.

In the context of a motion to dismiss a petition for arbitration, the Iowa Supreme Court has said:

> Generally, a motion to dismiss should not be granted. We have stated that "nearly every case will survive a motion to dismiss under notice pleading. U.S. Bank v. Barbour, 770 N.W.2d 350, 353 (Iowa 2009); see also Rees v. City of Shenandoah, 682 N.W.2d 77, 79 (Iowa 2004). If a claim is "at all debatable," we have advised against the filing or sustaining of a motion to dismiss. Renander v. Inc., Ltd., 500 N.W.2d 39, 40-41 (Iowa 1993).

Weizberg v. City of Des Moines, 923, N.W.2d 200, 217 (Iowa 2018). A decision to grant a motion to dismiss is "proper only when the petition, 'on its face shows no right of recovery under any state of facts.'" Rieff v. Evans, 630 N.W.2d 278, 284 (Iowa 2001)(citing Tate v. Derifield, 510 N.W.2d 885, 887 (Iowa 1994)). "A motion to dismiss should not be liberally granted." Rieff, 630 N.W.2d at 284. The supreme court noted that a dismissal would only be affirmed if a petition "failed to state a claim upon which any relief could be granted under any state of supporting facts that could be established." Id. (citations omitted). Facts to be considered are based upon matters alleged in the pleading assailed. Winneshiek Mut. Ins. Ass'n. v. Roach, 257 Iowa 354, 132 N.W.2d 436 (1965). While these pertain to notice pleading, they are illustrative of the standard to be considered in dismissing a matter.

In this matter, it appears that the relief sought by the claimant is a request for an additional recliner. The petition in this matter is worded differently than that in the previous alternate medical care petition. While the issues from the previous alternate medical care decision remain outstanding before the Iowa District Court for Polk County, they may be different from those presented in this alternate medical care petition. Without further developing the evidence in this matter, it is unclear. Dismissing the petition for a lack of subject matter petition is inappropriate. The motion to dismiss is denied.

Having dispensed with the motion to dismiss, the undersigned presided over the hearing held via telephone and recorded digitally on November 9, 2021. That recording constitutes the official record of the proceeding pursuant to 876 Iowa Administrative Code 4.48(12). Claimant participated personally, and through his attorney, Gary Nelson. The defendants participated through their attorney, Jane Lorentzen. The evidentiary record consists of testimony from the claimant, Claimant's Exhibits 1-3, and Defendants' Exhibits A-B. The defendants objected to Claimant's Exhibits 1 and 2 based upon their potential relevance to the matter at hand; however, the objection was overruled. All of the exhibits were admitted and received into evidence.

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 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 claimant is entitled to a replacement recliner.

FINDINGS OF FACT

Claimant, Jarrod Evilsizor, alleges that he sustained an injury to his left hip, back, neck, mental health, and body as a whole on February 25, 2009, while working for defendant Northern Ag Service. The defendants accepted liability for the left hip and back injury in their answer. They denied liability for claims related to the neck and mental health issues. The petition as it relates to the neck and mental health issues was dismissed without prejudice.

As a result of his work injuries, Mr. Evilsizor requires a recliner in which to sit. Aistis Tumas, M.D., the claimant's treating physician, wrote a letter dated March 9, 2021. (Claimant's Exhibit 3). Dr. Tumas noted that Mr. Evilsizor has chronic left leg lymphedema that necessitates his wearing compression stockings during waking hours. (CE 3). He also requires a power recliner so that he can elevate his legs "to a neutral position as treatment for the lymphedema." (CE 3). Dr. Tumas recommended that the power recliner be replaced every 9 to 12 months "as it wears out from daily long-term use." (CE 3).

Mr. Evilsizor testified that he bought the chair in question on, or around, February 23, 2021. (Testimony). The chair was delivered shortly after that. (Testimony).

Mr. Evilsizor testified that he sits in the chair from 6:00 a.m. to 10:00 p.m. every day. (Testimony). He takes short breaks to walk, get food, let his dogs out, use the restroom, and generally attempts to be active. (Testimony). He did not submit photos of the chair; however, the claimant submitted two videos of the chair. (CE 1-2). The videos show a can rolling into the chair and a significant depression in one side of the chair. (CE 1-2). Sitting in the chair caused the depression to develop. (Testimony). Despite what appears to be a significant depression, the chair still functions properly. (Testimony).

No one from the insurer has ever inspected the chair. (Testimony). Mr. Evilsizor also has not checked to see if it is still covered under a manufacturer's or store warranty considering its relative age. (Testimony). He has not provided additional photos to the defendants. (Testimony). The defendants argued that some testimony made by the claimant regarding possessing a loaded gun gave them pause as to the possibility of a representative from the insurer inspecting the chair at the claimant's home. (Defendants' Exhibit B).

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 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, Inc., 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 reasonable 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. 6.904(3)(e); 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.

In a previous decision, the undersigned granted claimant's request for a new recliner ever 9 to 12 months based upon the recommendation of Dr. Tumas. Evilsizor v. Northern Ag. Services, File No. 5030278.01 (Alt. Care April 13, 2021). That decision is currently pending judicial review as the defendants contend that the order of the undersigned was not reasonable and necessary. The defendants also contend that the chair is not an appliance as defined by Iowa law.

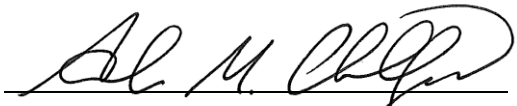
The undersigned maintains that a recliner, as ordered by Dr. Tumas, can be an appliance as defined by Iowa law. 876 Iowa Administrative Code 8.5 defines an appliance as "hearing aids, corrective lenses, orthodontic devices, dentures, orthopedic braces, or *any other artificial device used to provide function or for therapeutic purposes*." Appliances for the correction of a condition that results from an injury or appliances that are damaged or made unusable as a result of an injury or avoidance of an injury are compensable pursuant to Iowa Code section 85.27. 876 Iowa Administrative Code 8.5. A recliner is an artificial device that, according to an authorized treating physician, Dr. Tumas, provides a therapeutic benefit to Mr. Evilsizor.

Dr. Tumas recommends replacement of a chair every 9 to 12 months. Mr. Evilsizor bought the chair in question on, or about, February 23, 2021. The chair was delivered shortly after its purchase. The claimant filed a petition for alternate care in this matter on October 28, 2021. A hearing was held on November 9, 2021. Nine months from February 23, 2021, would be late November 2021. As noted above, the employer's obligation turns on the question of reasonable necessity, not desirability. While the claimant desires a replacement chair, we have not reached a 9 to 12 month window as recommended by Dr. Tumas. The claimant did not meet his burden of proof in this matter that the actions of the defendants are unreasonable at this time.

IT IS THEREFORE ORDERED:

1. The claimant's petition for alternate care is denied.

Signed and filed this ___9th___ day of November, 2021.



ANDREW M. PHILLIPS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Gary Nelson (via WCES)

Jane Lorentzen (via WCES)