IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

NORTHERN AG SERVICES, INC. and MICHIGAN MILLER'S MUTUAL INSURANCE COMPANY, **Petitioners,** **v.** **JARROD EVILSIZOR,** **Respondent.**	**05771 CVCV061837** **RULING ON JUDICIAL REVIEW**

This is a petition for judicial review from a final decision of the Iowa Workers' Compensation Commission. A hearing was held in this matter on 12/3/2021. The Parties appeared through counsel.

I. Background Facts and Procedural Posture.

Claimant/Respondent Jarrod Evilsizor sustained a work injury to his left hip and lower back on February 25, 2009. On March 29, 2021, Evilsizor filed an petition for alternate medical care. Petitioners Northern Ag Services, Inc. and Michigan Miller's Mutual Insurance Company (collectively Northern Ag Services) filed an answer to the petition for alternate medical care accepting liability for the left hip, low back, and psychiatric conditions pursuant to a July 29, 2016 Compromise Settlement.

As a result of Evilsizor's work injury, he previously had a hip replacement and low back surgery. Evilsizor testified that he spends roughly sixteen hours a day on average in a recliner, typically from 6:00 am until 10:00 pm. He testified that elevating his legs helps his condition and he alternates sitting squarely on his buttocks and on his right side. Evilsizor gets out of the chair one to three times per hour to avoid blood clots, he lets his dogs out. Evilsizor lives in the Upper

Peninsula of Michigan and he goes fishing about six times per year using a boat that he owns for two to four hours.

Northern Ag Services has been providing recliners to Evilsizor since 2015 and has paid for approximately six recliners. Evilsizor testified that the cushion of the recliners flattens overtime and becomes uncomfortable to sit on. Evilsizor testified that he has increased symptoms when the recliners begin to wear out. He also testified that the portion of the chair below the cushion also begins to sag, which causes him difficulty when he tries to get out of the chair.

Most recently, Northern Ag Services provided Evilsizor with a power recliner on February 20, 2019 (Ex. A) and again on March 19, 2020 (Ex. B). On February 23, 2021, Evilsizor purchased a new power recliner for $1,192.50 and requested reimbursement (Ex. C). Northern Ag Services asked for a picture of the March 2020 recliner and Evilsizor did not initially provide one. Northern Ag Services denied the request for a replacement recliner and stated that replacing recliners after less than one year was unreasonable. Instead, Northern Ag Services offered to provide $1200 every three years for a replacement recliner. (Aff. Kimberly Dodge; 3/9/2021 Letter from Kimberly Dodge).

Aistis J. Tumas, M.D. is the authorized treating physician. He provided a letter dated March 9, 2021 that states:

> Patient is under my medical care. He has chronic left leg lymphedema that is severe and requires wearing compression stockings on the left leg during all waking hours, he needs a power recliner chair, which is medically necessary given this history of lymphedema, and this is needed to elevate his legs to a neutral position as treatment for the lymphedema. His power recliner needs to be replaced every 9-12 months as it wears out from daily long-term use. He is compliant about using this chair on a daily basis for elevating his legs per the medical recommendations.

(3/9/2021 Letter from Dr. Tumis). On March 29, 2021, Evilsizor filed a Petition for Alternate Medical Care pursuant to Iowa Code section 85.27(4) seeking reimbursement of the February 2021 recliner.

The Deputy Commissioner granted the alternate medical care action and ordered Northern Ag Services to reimburse the claimant $1,192.50 for the cost of the power recliner purchased on February 23, 2021. The Deputy Commissioner also ordered Northern Ag Services to provide Evilsizor with a replacement power recliner ever 9 to 12 months based upon the recommendations of Dr. Tumas. (4/13/2021 Alt. Med Care. Decision). Northern Ag Services seeks judicial review.

II. Standard of Review.

Chapter 17A of the Iowa Code governs judicial review of final decisions by the workers' compensation commission. Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 768 (Iowa 2016), reh'g denied (May 27, 2016); see Iowa Code § 86.26. The district court acts in an appellate capacity to review decisions of the Workers' Compensation Commission. Meyer v. IBP, Inc., 710 N.W.2d 213, 219 (Iowa 2006). The standard of review varies based upon the type of error allegedly committed by the Commissioner. Jacobson Transp. Co. v. Harris, 778 N.W.2d 192, 196 (Iowa 2010).

If the alleged error is one of fact, the Court reviews the record to determine if the findings are supported by substantial evidence. Harris, 778 N.W.2d at 196; Schutjer v. Algona Manor Care Ctr., 780 N.W.2d 549, 557 (Iowa 2010) (quoting Iowa Code § 17A.19(10)(f)) (finding this Court will defer to the Commissioner's findings of fact if based on "substantial evidence in the record before the court when that record is viewed as a whole"). "Evidence is substantial if a reasonable person would find the evidence adequate to reach the same conclusion." Grundmeyer v. Weyerhaeuser Co., 649 N.W.2d 744, 748 (Iowa 2002) (citing Ehteshamfar v. UTA Engineered Sys. Div., 555 N.W.2d 450, 452 (Iowa 1996)). "[A] reviewing court can only disturb those factual findings if they are 'not supported by substantial evidence in the record before the court when that record is reviewed as a whole.'" Burton, 813 N.W.2d at 256 (quoting Iowa Code § 17A.19(10)(f)).

This Court's review "is limited to the findings that were actually made by the agency and not other findings the agency could have made." Id. "In reviewing an agency's findings of fact for substantial evidence, courts must engage in a 'fairly intensive review of the record to ensure the fact finding is itself reasonable.'" Neal v. Annett Holdings, Inc., 814 N.W.2d 512, 518 (Iowa 2012) (quoting Wal-Mart Stores, Inc. v. Caselman, 657 N.W.2d 493, 499 (Iowa 2003)).

If the agency's application of the law to the facts is challenged, "the question on review is whether the agency abused its discretion by, for example, employing wholly irrational reasoning or ignoring important and relevant evidence." Meyer, 710 N.W.2d at 219; Iowa Code § 17A.19(10)(i), (j).

If a challenge is to the interpretation of law, the standard of review depends upon whether interpretation of the provision of law at issue has been clearly vested in the discretion of the agency. Compare Iowa Code §17A.19(c) with §17A.19(l). The Iowa Supreme Court has repeatedly found the Iowa Workers' Compensation Commission is not vested with authority to interpret Iowa's workers' compensation statutes. See e.g. Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 769 (Iowa 2016) (finding legislature did not vest commission with authority to interpret provision at issue and noting the Court has declined to defer to the commissioner's interpretations of various provisions in recent years). Therefore, review is for correction of errors at law. Id. at 768; Iowa Code §17A.19(c) (court reviews whether agency action was "based upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency.")

III. Conclusions of Law.

A. Applicability of Iowa Code section 85.27(5).

Iowa Code section 85.27 provides that an employer shall furnish reasonable medical care for all compensable work injuries. Iowa Code § 85.27(1). In addition, the employer shall furnish reasonable and necessary "appliances." Id. "Reduced to its essentials, section 85.27 requires an [employer or insurer] to 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 (Iowa 2003) (emphasis in original).

The Deputy Commissioner held the recliner is an "appliance" included in the requirement to provide care under Iowa Code section 85.27(1). The Deputy Commissioner noted that as part of the duty to provide care, "an employer must furnish 'reasonable medical services and supplies *and* reasonable and necessary appliances to treat an injured employee.' " (4/13/2021 Alt. Med. Care. Decision at 4) (citing Stone Container Corp. v. Castle, 657 N.W.2d 485, 490 (Iowa 2003) (emphasis in original) (citing Iowa Code section 85.27(1)). The Deputy Commissioner held the February 23, 2021 replacement recliner was reasonable and necessary and, therefore, ordered Northern Ag Services to reimburse Evilsizor for the recliner.

Northern Ag Services does not disagree that the recliner is an appliance under Iowa Code section 85.27. As noted by Northern Ag Services: "The parties appear to agree Claimant's requested recliner subject to this dispute is an 'appliance' for classification and legal purposes, as it is alleged to serve a 'therapeutic purpose.' " (Northern Ag Services 10/11/2021 Brief at 11). The Iowa Supreme Court has previously held that an employer's duty to provide "care" under Iowa Code section 85.27 includes the duty to provide appliances. Manpower Temporary Services v. Sioson, 529 N.W.2d 259, 263 (Iowa 1995) (affirming commissioner's finding that modified van was an appliance for employee rendered a quadriplegic in workplace shooting).

Northern Ag Services argues, however, that Iowa Code section 85.27(5) should apply and that, pursuant to section 85.27(5), there is no obligation to provide a replacement recliner. The Deputy Commissioner held Iowa Code section 85.27(5) inapplicable. Iowa Code section 85.27(5) provides:

> When an artificial member or orthopedic appliance, whether or not previously furnished by the employer, is damaged or made unusable by circumstances arising out of and in the course of employment other than through ordinary wear and tear, the employer shall repair or replace it. When any crutch, artificial member or appliance, whether or not previously furnished by the employer, either is damaged or made unusable in conjunction with a personal injury entitling the employee to disability benefits or services as provided by this section, or is damaged in connection with employee actions taken which avoid such personal injury, the employer shall repair or replace it.

Iowa Code §85.27(5). The Deputy Commissioner focused on the first clause, which applies to an "artificial member or orthopedic appliance" and is not applicable here. Defendants argue, however, that the second clause is applicable. It is not.

Iowa Code section 85.27(1) sets out the employer's duty to provide care. Section 85.27(5) is an additional requirement that an employer replace an appliance if that appliance is damaged or made unusable in conjunction with a work injury (or an effort to avoid a work injury), regardless of whether the employer had originally been required to supply the appliance or not. The second clause of section 85.27(5) does not alter an employer's duty to provide care under section 85.27(1) (including the duty to furnish necessary appliances), it simply includes an additional obligation to replace crutches, artificial members, or appliances if those are damaged in the course of a separate work injury or effort to avoid a work injury.

Northern Ag Services relied on Meyers v. Holiday Express Corp., File Nos. 881251, 913214, 2000 WL 33992617 (Iowa Workers' Compensation Commission Appeal Decision July 31, 2000). As conceded by Northern Ag Services in reply, this reliance was misplaced. Meyers

reinforces the correctness of the statutory interpretation here. Meyers held that section 85.27(5) would not apply to a request to replace a damaged knee brace because the brace was not damaged by a later work injury. Id at *4. However, Meyers also held the employer was still required to replace the knee brace under Iowa Code section 85.27(1), even if made unusable by ordinary wear and tear, due to the obligation to furnish reasonable and necessary appliances. Id. at *4. As Meyers explained: "Previous holdings of this agency establish that an employer is obligated to replace an appliance that has become damaged or unusable as a result of wearing out." Id. at *4 (citing cases).

The Agency correctly applied Iowa Code section 85.27(1) to determine whether the employer was required to furnish the requested appliance and not Iowa Code section 85.27(5).

B. Application of Iowa Code sections 85.27(1) and (4).

Northern Ag Services next argues that substantial evidence does not support the agency's determination that the replacement recliner is a reasonable and necessary appliance and that the agency applied the incorrect standard.

Northern Ag Services argues the Deputy Commissioner applied the incorrect standard. Pursuant to Iowa Code section 85.27(4), an employer has the right to choose care, but the statute provides a mechanism for an injured worker to seek agency review if the worker is dissatisfied with the care. "[T]he employer is obligated to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care." Iowa Code § 85.27(4). If an employee is dissatisfied with the care offered, "the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care." Id. "By challenging the employer's choice of treatment—and seeking alternate care—[the employee] has assumed the burden of proving that the authorized care is unreasonable." Long v. Roberts Dairy Co., 528 N.W.2d 122,

123 (Iowa 1995). "Determining what care is reasonable under the statute is a question of fact." Id. Evilsizor invoked Iowa Code section 85.27(4) by filing an petition for alternate medical care.

Northern Ag Services argues that because the written opinion finds the replacement recliner is reasonable and necessary but does not expressly state that Northern Ag Services' offer of a recliner every three years was "unreasonable," that the Deputy Commissioner applied the incorrect standard. Reading the opinion in its entirety belies this argument. The Deputy Commissioner correctly identified and recited the standard and the burden in detail. In context, it is clear the Deputy Commissioner applied the correct burden. If a replacement recliner was necessary after 12 months, as determined by the Deputy Commissioner, it follows that forcing the employee to wait an additional two years—the care offered by Northern Ag Services—would not be reasonable. In Long v. Roberts Dairy Co, 528 N.W.2d 122, 123-23 (Iowa 1995), the Court held that as between two reasonable courses of treatment, the employer is permitted to choose care. Here, unlike in Long, there is no doctor recommendation identifying both treatment options as capable of providing reasonable care. There was no medical recommendation or any other evidence presented at the alternate care hearing to support Northern Ag Services' proposed care of providing a recliner every three years.

In addition, substantial evidence supports the decision and it is not an abuse of discretion or wholly irrational. Evilsizor testified that the chair begins to wear out after six to nine months of daily use and, when that happens, his pain starts to increase. The Deputy Commissioner found Evilsizor credible. The Deputy Commissioner also referred to photos of the recliner in question that showed a worn chair. Evilsizor's authorized provider wrote a letter stating that the chair is medically necessary and needs to be replaced every 9-12 months. Northern Ag Services had provided replacement chairs at almost exactly the same time the two prior years (February 20,

2019 (accepted); March 19, 2020 (accepted); February 23, 2021 (denied)). There is no contrary evidence in the record. There is no contrary medical opinion or lay witness testimony to support Northern Ag Services' position that it would be reasonable to provide a recliner only every three years.

Northern Ag Services argues Evilsizor inappropriately purchased the recliner without prior authorization. However, an alternate care petition is an appropriate mechanism to address whether an employer should be required to reimburse an employee's unauthorized care. Further, Northern Ag Services has not proposed some alternative replacement recliner. Instead, Northern Ag Services completely denied the request and informed Evilsizor it would not provide a recliner for two additional years.

Northern Ag Services also argues it was denied the opportunity to investigate the chair and whether it could be repaired. Although Evilsizor did not immediately provide photos, his attorney did provide photos to Northern Ag Services. (See Addendum to Defendant's Answer to Claimant's Petition Concerning Application for Alternate Medical Care; Exs. D-1, D-2, E). In addition, there is no evidence the claims adjuster asked to inspect the chair or suggested any type of repair or warranty services. Instead, Northern Ag Services simply denied the claim and offered to provide a recliner every three years. (See 4/8/2021 Aff. Kimberly Dodge; 3/9/2021 Letter from Kimberly Dodge to Evilsizor).

Northern Ag Services attempts to compare the replacement of the recliner to the collateral van expenses that were denied in Manpower Temporary Services v. Sision, 529 N.W.2d 259 (Iowa 1995). The comparison is not apt. In Sision, the Court held that the modified van itself was a reasonable and necessary appliance, but that the costs of insurance, title, and fuel for the modified van were not reasonable medical expenses. Sision, 529 N.W.2d at 261. Here, the Parties agree that

the recliner is an "appliance" and substantial evidence supports the determination that the February 23, 2021 recliner was reasonable and necessary.

Northern Ag Services also appears to challenge whether the recliner is related to Evilsizor's work injury. However, Northern Ag Services's Answer admitted liability relating to the left hip, low back, and psychiatric conditions in this alternate medical care petition. See NID, Inc. v. Monahan, 863 N.W.2d 301, 2015 WL 1332332, at *5 (Iowa Ct. App. 2015) (noting that if employer denies causation and liability, then alternate medical care is not available because the issue of compensability is totally removed from the alternate medical care process). Northern Ag Services did not contest liability, has been providing recliners for years, and offered care in the form of replacement recliners every three years.

Finally, Northern Ag Services challenges the Deputy Commissioner's order that Defendants provide a replacement power recliner every 9 to 12 months. Northern Ag Services does not provide any caselaw or citation to any legal authority to support its contention that the agency lacked authority to issue this order. (See 10/11/2021 Brief of Petitioners at 25; 11/29/2021 Reply Brief of Petitioners at 3). Therefore, the Court is unable to consider this argument in its appellate role on judicial review. See Jensen v. Baccam, 947 N.W.2d 771 (Iowa Ct. App. Apr. 29, 2020) ("When a party, in an appellate brief, fails to state, argue or cite to authority in support of an issue, the issue may be deemed waived."); Baker v. City of Iowa City, 750 N.W.2d 93, 103 (Iowa 2008) (noting that a party's failure to cite authority results in waiver because it would require the court to undertake a partisan role of research and advocacy).

IT IS HEREBY ORDERED that the Alternate Medical Care Decision is AFFIRMED. Costs are assessed to Petitioners.

IT IS SO ORDERED.

State of Iowa Courts

Case Number	**Case Title**
CVCV061837	NORTHERN AG SERVICES INC V JARROD EVILSIZOR
Type:	OTHER ORDER

So Ordered

Sarah Crane, District Court Judge
Fifth Judicial District of Iowa

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