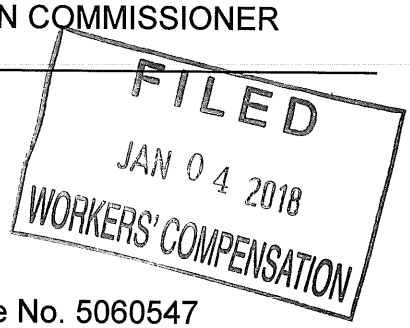
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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| MATTHEW J. SORENSEN,<br><br>Claimant,<br><br>vs.<br><br>NYSTROM ELECTRIC COMPANY, INC.,<br><br>Employer,<br><br>and<br><br>UNITED FIRE & CASUALTY CO.,<br><br>Insurance Carrier,<br>Defendants. | File No. 5060547<br><br>ALTERNATE MEDICAL<br><br>CARE DECISION<br><br><br><br>Head Note No.: 2701 |

## STATEMENT OF THE CASE

This is a contested case proceeding under Iowa Code chapters 85 and 17A. The expedited procedure of rule 876 IAC 4.48 is invoked by claimant, Matthew Sorenson.

The claim for alternate medical care came on for telephone hearing on January 3, 2018. The proceedings were digitally recorded. That recording constitutes the official record of this proceeding. Pursuant to the Commissioner's February 16, 2015 Order, the undersigned has been delegated authority to issue a final agency decision in this alternate medical care proceeding. Therefore, this ruling is designated final agency action and any appeal of the decision would be to the Iowa District Court pursuant to Iowa Code section 17A.

The record consists of claimant's exhibits 1 through 3, which total 4 pages and defendants' exhibits A through C, which total 7 pages. All exhibits were admitted without objection. Claimant testified and counsel provided helpful argument at hearing.

## ISSUE

Whether the care offered by defendants is unreasonable and claimant is entitled to an order compelling defendants to provide evaluation and treatment with Dr. Matthew Hahn, a physiatrist.

## FINDINGS OF FACT

The undersigned having considered all the evidence in the record finds:

Matthew Sorenson, claimant, sustained an injury that arose out of and in the course of his employment on or about October 5, 2016.

As a result of the work injury, claimant had authorized treatment at CNOS with three separate specialist physicians, two orthopedists and one neurologist.

Claimant testified at hearing that he continues to have pain in his upper back to his shoulder blade, which can involve his shoulder and neck. Defendants agree that the work injury is compensable and that claimant's current condition is causally related to the work injury.

On May 1, 2017, claimant was seen at CNOS. It was noted that he had been seen by Dr. Matthew Johnson and Dr. Wade Jensen a neurologist and orthopedist, respectively for his spine and possible cervical radiculopathy. He had also been seen by Dr. Jensen for his shoulder and "nothing to this point has been effective in his treatment." (Ex. B, pp. 2-3) A recommendation was made for claimant to be seen by Dr. Meis for further evaluation of his right shoulder and subscapularis pain, which occurred thereafter. (Ex. B, p. 3)

Claimant was last seen at CNOS on July 7, 2017, by Nichole Friessen, PA-C/Orthopedics. Claimant testified that he understood Ms. Freissen to be an assistant to Dr. Meis. (Ex. B, p. 1; Testimony) At that time, it was noted that claimant continued to have "diffuse pain throughout his right shoulder, which has been present since his injury in October." (Id.) The recommendation at that time was:

> [T]o move forward with a FCE and at some point may need to consider a referral to an Occupational Medicine specialist as we do not feel as though he would benefit from surgery. We will obtain the FCE and see him back in the office, at which time we will discuss options. They are in agreement with this plan.

(Id.)

Claimant testified that he left this appointment on July 7, 2017, with the understanding that after the FCE, he would have a follow-up appointment at CNOS. However, claimant testified that he was later told by the nurse case manager, who went with him to the doctor visits, that the follow-up appointment would not occur and was not authorized. Claimant testified that at that time, he understood that Dr. Meis did not have any further care to offer him. (Testimony)

On August 28, 2017, claimant received a letter from the workers' compensation insurance adjuster advising that Dr. Meis placed claimant at maximum medical improvement (MMI) on July 24, 2017, and assigned a permanent partial disability rating. (Ex. 3)

Claimant testified that after the FCE, no appointment was ever scheduled for him to return to CNOS.

After being told that a return visit to CNOS would not be authorized and no appointment was scheduled for him, and after he received the letter from the workers' compensation insurance adjuster stating that Dr. Meis placed him at MMI and assigned an impairment rating, claimant went to his family doctor to address his ongoing pain.

On October 3, 2017, claimant was seen by his family physician, Dr. Paul Dudley, who recommended that claimant be referred to a physiatrist, Dr. Matthew Hahn. He stated that the referral was "routine" and that claimant "can be referred elsewhere." (Ex. 1, p. 2) Claimant had not yet been treated for this work injury by a physiatrist. (Ex. 2)

On December 18, 2017, claimant's counsel sent a letter to the workers' compensation insurance carrier regarding Dr. Dudley's referral to a physiatrist. The letter also acknowledged the understanding that the request was being denied and then advised of claimant's intent to file an application for alternate medical care. (Ex. 2)

In a letter from defense counsel to claimant's counsel dated December 21, 2017, it is stated that "[i]f Dr. Meis indicated that Dr. Hahn was necessary, my client would authorize the same." (Ex. A. p. 2)

There is no evidence that Dr. Meis was ever asked whether a referral to Dr. Hahn was necessary or appropriate.

Claimant testified at hearing that after the application for alternate care was filed, he was then told that he could return to see Dr. Meis. (Testimony)

I find from the evidence that claimant completed the FCE prior to the August 28, 2017 letter from the insurance adjuster. I note that the application for alternate medical care was filed on December 20, 2017. Therefore, I find that claimant was denied a return visit to see Dr. Meis from approximately the end of August, 2017 until nearly the end of December 2017, or about four months.

There was no medical evidence or opinion presented to support defendants' delay in authorizing the return visit to Dr. Meis following the FCE.

Claimant testified at hearing that he did not see any point in returning to see Dr. Meis who he understood was of the opinion that there was nothing more he could do. The fact that Dr. Meis ordered the FCE, declared claimant to be at MMI and assigned an impairment rating supports claimant's understanding.

Claimant testified that he desires to see Dr. Matthew Hahn for evaluation and treatment.

## REASONING AND CONCLUSIONS OF LAW

Workers' compensation is a statutory creation. This agency only has the powers designated to it by the legislature. Iowa Code section 85.27(4) sets up a mechanism for contesting and litigating disputes as to future medical care.

Under Iowa law, the employer is required to provide care to an injured employee and is permitted to choose the care. Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433 (Iowa 1997).

> [T]he 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 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 Iowa R. App. P. 14(f)(5); Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). Determining what care is reasonable under the statute is a question of fact. Id. The employer's obligation turns on the question of reasonable necessity, not desirability. Id.; Harned v. Farmland Foods, Inc., 331 N.W.2d 98 (Iowa 1983). In Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433 (Iowa 1997), the court approvingly quoted Bowles v. Los Lunas Schools, 109 N.M. 100, 781 P.2d 1178 (App. 1989):

> [T]he words "reasonable" and "adequate" appear to describe the same standard.
>
> [The New Mexico rule] requires the employer to provide a certain standard of care and excuses the employer from any obligation to provide other services only if that standard is met. We construe the terms "reasonable" and "adequate" as describing care that is both appropriate to the injury and sufficient to bring the worker to maximum recovery.

The commissioner is justified in ordering alternate care when employer-authorized care has not been effective and evidence shows that such care is "inferior or less extensive" care than other available care requested by the employee. Long, 528 N.W.2d at 124; Pirelli-Armstrong Tire Co., 562 N.W.2d at 437.

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 right to select the medical provider is not unlimited. Iowa Code section 85.27 states that the right to select the medical provider is qualified by requiring that the care be "offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee." Iowa Code section 85.27(4) If such care is not provided promptly and reasonably suited to treat the injury, the commissioner has authority to order alternate care, including care from a physician chosen by claimant. West Side Transp. v. Cordell, 601 N.W.2d 691, 693 (Iowa 1999).

In this case the employer's authorized treating medical provider indicated on July 7, 2017 that claimant was to return for a visit after completing the FCE. That did not occur. Claimant was told that the appointment would not happen and no appointment was scheduled for him. Claimant then did what one might expect a reasonable person to do with ongoing pain. He went to his family doctor seeking help and was referred to Dr. Matthew Hahn, a physiatrist. I note that claimant has not yet been evaluated or treated by a physiatrist for his work injury.

After the application for alternate medical care was filed, the defendants reversed course and offered a return visit to Dr. Meis and have rejected claimant's request to see Dr. Hahn.

I consider whether defendant's actions have been "prompt" and have been offered "without undue inconvenience to the employee" as required under Iowa Code section 85.27(4) and I conclude that the delay in offering treatment of about four months is neither "prompt" nor offered "without undue inconvenience " to claimant. It is not clear whether treatment would have ever been authorized, but for claimant filing the application for alternate medical care. This is not how the system is supposed to work. Defendants cannot be said to provide prompt care without undue inconvenience to the employee, when the method for delivering medical authorization involves an unnecessarily long delay and requires that claimant file an application for alternate medical care before authorization is granted. I could understand if the delay involves a period of a few weeks or even perhaps a month or more in some situations, considering

that defendants need time to obtain the medical records from the provider and perhaps seek clarification and then authorize an evaluation or treatment. But in this case, there is no evidence to explain why defendants waited four months after the FCE and until after claimant filed an application for alternate medical care before authorizing the return visit to CNOS. Further adding to the unexplained nature of the delay, is that defendants were aware from the July 7, 2017 medical record that CNOS recommended a return visit after the FCE was completed. There is no reason that authorization for the return visit had to be delayed until after the FCE. Again there was no explanation why the return visit was not authorized until late December, 2017.

I also find support for claimant's application in the lack of effectiveness of the treatment he has received thus far, as stated by the authorized provider. On May 1, 2017, the CNOS record states that "nothing to this point has been effective in his treatment." (Ex. B, pp. 2-3) An evaluation by a physiatrist, a specialist that claimant has not yet seen, and who has been recommended by another physician familiar with claimant's medical history, is more extensive treatment than the care offered by defendants.

Therefore, based on the above facts and law, I conclude that defendants have failed to offer reasonable medical care and that claimant has established entitlement to alternate medical care. Defendants should be ordered to authorize evaluation and treatment with Dr. Matthew Hahn, or if Dr. Hahn is unavailable for any reason, another appropriate physiatrist.

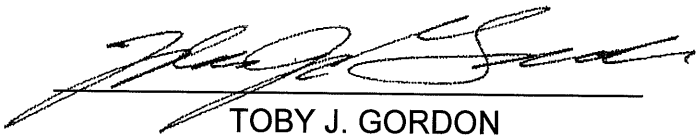
**ORDER**

THEREFORE IT IS ORDERED:

The claimant's petition for alternate medical care is granted.

Defendants shall promptly provide authorization and payment to Dr. Matthew Hahn for the evaluation and treatment of claimant's work injury. In the event that Dr. Hahn is not available to evaluate and treat claimant, defendant shall promptly and without undue inconvenience to claimant, authorize another appropriate physiatrist.

Signed and filed this 4th day of January, 2018.



TOBY J. GORDON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Mark S. Pennington
Attorney at Law
5000 Westown Pkwy, Ste. 310
West Des Moines, IA 50266
mark@kphlawfirm.com

Paul Thomas Barta
Attorney at Law
1248 "O" St, Ste 600
Lincoln, NE 68508
pbarta@baylorevnen.com

TJG/kjw