BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JUNIOR TAMAYO-PEREZ, Claimant, vs. HORMEL FOODS CORP., Employer, Self-Insured, Defendant.	:	File No. 20003849.05 ALTERNATE MEDICAL CARE DECISION 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, Junior Tamayo Perez. Claimant appeared through attorney, Jennifer Zupp. Defendant appeared through its attorney, Abigail Wenninghoff.

The alternate medical care claim came on for hearing on May 24, 2022, at 10:30 a.m. The proceedings were digitally recorded. The recording constitutes the official record of this proceeding. Pursuant to the Commissioner's Standing 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 4 and defendant's exhibits A through E. All exhibits were offered and received into evidence. Defendant did object to Claimant's Exhibit 4, however, the objection was overruled. Administrative notice was taken of the entire agency claims files, including the compliance files, as well as the previous alternate care hearings.

Since the exhibits were not marked prior to the hearing, I designate the exhibits as follows:

Exhibit	**Date**	**Type**
Cl. 1	4/18/22	Dr. Eckhoff Office Note
Cl. 2	4/18/22	Physical Therapy Referral
Cl. 3	4/18/22-4/20/22	Email exchange counsel
Cl. 4	5/18/22	Dr. Eckhoff Report

Exhibit	Date	Type
Def. A	1/28/21	Dr. Harbach Report
Def. B	6/24/21	Dr. Harbach Report
Def. C	7/15/21	Dr. Munson Report
Def. D	2/17/21	Dr. Harbach Report
Def. E	4/18/22	Attorney Denial Letter

The procedural history is significant. Claimant has filed four previous alternate medical care claims as set forth below:

File No.	Date filed	Answer	Disposition
20003949.01	7/12/21	Admit	Voluntary Dismissal
20003849.02	9/28/21	Admit	AC Decision
20003849.03	10/15/21	Admit	AC Decision
20003849.04	4/27/22	Denial	Dismissal w/o Prejudice

Claimant filed this action on May 12, 2022. On May 13, 2022, defendant answered, denying liability for the claim. The claimant filed an objection to defendant's answer, asserting that the principles of judicial estoppel should prevent the defendant from denying liability on the claim at this time. The hearing was held on May 24, 2022. No witnesses testified. All of the aforementioned exhibits were accepted into the record and counsel, after responding to questions from the undersigned, made closing statements.

ISSUE

There are two issues presented. The first issue is whether the defendant is barred from denying liability based upon the principle of judicial estoppel. The second issue is whether the claimant is entitled to alternate medical care. Specifically, claimant seeks an order compelling defendant to authorize and pay for the treatment recommended by Allen Eckhoff, M.D., an authorized treating physician.

FINDINGS OF FACT

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

The claimant sustained an injury which arose out of and the in course of his employment on December 19, 2019. This injury has resulted in ongoing significant low back symptoms including some radicular symptoms. Defendant has authorized and directed medical care for this condition since the injury occurred up through April 18, 2022. At some point, Allen Eckhoff, M.D., a pain management specialist, became an authorized treating physician.

Todd Harbach, M.D., an orthopedic surgeon, had also treated Mr. Tamayo-Perez. In January 2021, Dr. Harbach provided the following diagnosis: "The patient has low back pain and mild lumbar spondylosis with decreased signal and height at L3-L4 and L4-L5 with L5 having a disc bulge with a posterior high-intensity zone indicative of an annular tear. (Def. Ex. A, p. 1) He further opined that surgery was not a good option and no "further supervised treatment" was necessary. (Def. Ex. A, p. 1) In response to a question about restrictions, Dr. Harbach stated that Mr. Tamayo-Perez "does have a degenerative back, which may flare up and give him trouble from time to time." (Def. Ex. A, p. 1)

Mr. Tamayo-Perez, however, did continue to receive supervised treatment after January 2021, mostly through Dr. Eckhoff. Dr. Eckhoff attempted a number of pain management treatments, with varying degrees of success. In the summer of 2021, he sought to provide Mr. Tamayo-Perez with a spinal cord stimulator (SCS). In June 2021, defendant asked Dr. Harbach to provide an expert opinion regarding the medical necessity of the SCS. On June 24, 2021, Dr. Harbach provided the following answers to specific questions:

> **Question #1: What is your diagnosis as it relates directly to Mr. Tamayo's work injury?**
>
> **Answer:** The patient aggravated a pre-existing degenerative condition at L4-L5 and L3-L4. Work will not cause degeneration of the discs, but can aggravate it and this aggravation is temporary in nature. . . .
>
> . . . .
>
> **Question #4:** Has Mr. Tamayo reached maximal medical improvement? If so, please state A) his date of MMI, B) what permanent impairment, if any, you would assign, C) what permanent restrictions, if any, would you recommend, and D) what future medical treatment, if any, Mr. Tamayo will require?
>
> **Answer:**
> **A.** I would put him at MMI the date I saw him January 28, 2021.
> **B.** I do not believe that aggravation of a pre-existing degenerative condition warrants an impairment. The work was not responsible for his degeneration, but work activities could certainly aggravate it. If I was forced administratively to put him into a category I would put him in to DRE lumbar category II, which is found in Table 15-3 on page 384 of the book. In that category, he should receive 5% permanent partial impairment of the whole person. By way of apportionment, I believe that at some point in his life outside of work he would have aggravated this, so the degenerative condition is at least 60% of the problem and his work-related injury at most is 40% of the apportionment, which

would give him a 2% permanent partial impairment of the whole person.

C. Please see functional capacity evaluation.

D. The patient should require no further treatment related to his aggravation of his degenerative problem on December 21, 2019.

(Def. Ex. B, pp. 1-2) Interestingly, Dr. Harbach opined that the SCS trial was reasonable if nothing else seems to help.

On July 15, 2021, Troy Munson, M.D., a neurosurgeon, also provided an expert opinion regarding claimant's condition.

> Regarding the question of whether the patient's diagnosis relates directly to the patient's work injury; it is my opinion that the patient's diagnosis is not related to an acute injury. The patient has age-appropriate degenerative disc changes at the lumbar 4 – lumbar 5 level. Through evaluation of the patient's subjective symptoms and review of the patient's imaging and EMG testing, we have determined Mr. Tamayo is not a surgical candidate.

(Def. Ex. C)

On July 12, 2021, claimant filed his first alternate medical care petition, File No. 20003849.01. Defendant admitted liability and then admitted the care being requested, prompting claimant to dismiss the claim without prejudice. The agency never formally accepted this admission of liability since the claimant dismissed without prejudice prior to hearing.

On September 28, 2021, claimant filed a second alternate care petition, File No. 20003849.02. In this petition, claimant sought various prerequisite treatment in order to obtain an SCS trial. On October 8, 2021, defendant answered the petition accepting liability for the claim. Defendant actually contended that it authorized all of the care claimant had requested in his petition. Claimant, however, sought to proceed to receive an order because he felt as though the defendant had already authorized the care in July, but he had still not received it. In any event, the matter proceeded to hearing and based upon the defendant's admission of liability, alternate medical care was awarded.

On October 15, 2021, claimant filed a third alternate care petition, File No. 20003849.03. In this petition, claimant contended that certain prerequisite care had still not been authorized. On the same date, defendant answered, again admitting liability for the claim. Defendant again contended that it had already authorized all of the care requested by claimant and, in fact, sought sanctions against claimant's counsel. The matter proceeded to hearing on the basis of defendant's acceptance of liability. After reviewing all of the evidence, I entered an order awarding alternate care.

I find that defendant has twice admitted liability in circumstances wherein the agency administratively accepted the admission. This has allowed the employer to direct the claimant's medical care.

In February 2022, Dr. Harbach wrote an additional report to Leanne Sindt and Melissa Yanqui. He apparently reviewed updated medical records. The records he reviewed did not change any of his opinions. "The records I have reviewed today did not change my opinions I have previously written." (Def. Ex. D, p. 1) "I believe that the patient's current symptoms are just a normal progression of the degenerative lumbar spine." (Def. Ex. D, p. 1) He again commented on the SCS and reiterated his opinion about medical causation. "Again, I believe these treatments are related to a pre-existing degenerative problem that was aggravated by work." (Def. Ex. D, p. 1)

Mr. Tamayo-Perez never had the SCS implanted. Instead his pain management care continued up through April 18, 2018. At that appointment, Dr. Eckhoff rendered the following opinion which included a summary of his prior treatment:

> Notes: This is a work comp case. He was working at Hormel on 12-21-19 and was bending and twisting and felt pain in his back. He has had ESI's gave 40% relief for about 8-9 days. He has seen 2 surgeons who both did not recommend surgery. SCS was discussed by Dr. Munson as a possible option. He feels that he is overall 30% improved with PT, injections Nabumatone and Baclofen. Gabapentin caused sedation. I discussed medical cannabis and a SCS as possible options. We were doing a spinal cord stim work-up but with new imaging show that there was not much pathology in the lumbar spine and the disc protrusion he had had reduced. I discussed that we could do the spinal cord stim but I did give a low likelihood of success due to his back pathology. We decided not to do the spinal cord stim. At this point I would place him at MMI. He states that he is no longer working for the company with the work comp case and is moved to Miami. I discussed that he can follow-up with a pain physician there. I believe that most of his pain now is his chronic low back pain/myalgia. I will have him start physical therapy twice week for 4 weeks since that seemed to help in the past and he is requesting this at this time. Consider a PMR physician for OMT as well. He did have an FCE and I would leave any restrictions up to the FCE recommendations. MRI from October 2021 describes T12-L1 through L3-4 no disc herniation, spinal canal stenosis, neuroforaminal narrowing, L4-5 mild central disc protrusion with annular fissure but no bony spinal canal stenosis or significant neuroforaminal narrowing, L5-S1 no disc herniation, spinal canal stenosis, neuroforaminal narrowing.

(Cl. Ex. 1, pp. 1-2) Dr. Eckhoff also provided a physical therapy referral form which specified the type of therapy he should receive. (Cl. Ex. 2)

On the same day, April 18, 2022, defense counsel sent a denial letter to claimant's counsel.[1] It began with a statement that all benefits to claimant would cease in 30 days and then listed out ten numbered paragraphs supporting this position.

> 9. After several canceled appointments, he [Mr. Tamayo-Perez] was finally seen today by Dr. Eckhoff who makes no medical opinions and mentions nothing of MMI and only recommends PT because Claimant specifically requested it.

(Def. Ex. E) Defense counsel went on and referenced Dr. Harbach's February 2022, report, noting that "his opinions were not changed" by any of the recent treatment or testing and that no further treatment is necessitated by the work injury.

Opposing counsel then exchanged emails over the next couple days with claimant's counsel requesting the care recommended by Dr. Eckhoff and defense counsel justifying the denial. "We are denying future care based on Dr. Harbach as well as the recent report of Dr. Eckhoff which says that the pain is now coming from his myalgia." (Cl. Ex. 3) Defense counsel specifically cited the June 24, 2021, report from Dr. Harbach, as well as the February 17, 2022, report.

On April 27, 2022, claimant filed for alternate medical care requesting the treatment recommended by Dr. Eckhoff, File No. 20003849.04. The defendant filed an answer on April 28, 2022, which, for the first time, denied liability on the claim. Another deputy dismissed the claim without prejudice. It was unclear from any of the filings that claimant was challenging the defendant's authority to deny liability based upon the principles of judicial estoppel. Claimant immediately requested rehearing. Rehearing was denied due to agency procedural requirements which set strict time deadlines for ruling on petitions, as well as agency rules which prohibit motions.

Claimant then refiled his petition. Defendant again denied the claim. Claimant filed an objection to defendant's answer and the matter proceeded to hearing.

At hearing, defendant challenged the agency's authority to even conduct a hearing, suggesting that it was a violation of the defendant's right to deny the claim. NO witnesses were called. Exhibits were received and counsel answered a few questions then offered closing statements.

REASONING AND CONCLUSIONS OF LAW

I. Does "judicial estoppel" prevent the defendant from denying liability on the December 19, 2019 injury?

[1] While this letter was sent, a review of the agency compliance file does not show that a Subsequent Report of Injury (SROI) was filed formally denying liability on this claim.

The Iowa Supreme Court has applied the principles of judicial estoppel to alternate medical care proceedings in the workers' compensation context. See Winnebago Industries v. Haverly, 727 N.W.2d 567 (Iowa 2006); Tyson Foods v. Hedlund, 740 N.W.2d 192 (Iowa 2007); Judicial estoppel is "a commonsense doctrine that prohibits a party who has successfully and unequivocally asserted a position in one proceeding from asserting an inconsistent position in a subsequent proceeding." Hedlund, 740 N.W.2d at 196. Its purpose is "to protect the integrity of the judicial process." Id. For judicial estoppel to apply, the party's inconsistent position must be "judicially accepted by the commissioner at the first alternate medical care hearing." Judicial acceptance means that the "previous, inconsistent assertion was material to the holding in the first proceeding." Id. at 197.

One court has summarized the principle of judicial estoppel in the context of alternate medical care proceedings as follows:

> Indeed, to allow an employer to control the medical care of an employee while simultaneously allowing that same employer to free itself of any obligation to later pay for medical care or benefits is a contravention of justice and fairness. Such a result, as the Iowa Supreme Court related, "simply does not advance the policy goal of avoiding inconsistent and misleading results." Hedlund, 740 N.W.2d at 198. It does not respect judicial integrity. Generally, once an employer admits liability for a claim in an alternate medical care proceeding, it is bound by that assertion. See Winnebago, 727 N.W.2d at 575 (explaining it would take a "significant change in the facts after the admission of liability" in order to later deny liability); Hedlund, 740 N.W.2d at 198-99 (describing the critical role that admitting liability plays in an alternate medical care proceeding). This is because "[l]iability is normally an important component of the course of an alternate medical care proceeding." Hedlund 740 N.W.2d at 198. Without first admitting liability, the workers' compensation commissioner cannot hear the case. Iowa Admin. Code r. 876—48.7.

Spencer v. Annett Holdings, Inc., 905 F.Supp.2d 953, 985 (S.D. Iowa 2012).

I find that the principles of judicial estoppel are present in this case. The defendant admitted liability for this work injury on two separate occasions which were administratively judicially accepted and relied upon by this agency.

Once the claim became judicially accepted, the defendant is prevented from changing their position on liability. The only exception is if there is a "significant change in the facts after the admission of liability." Winnebago, 727 N.W.2d at 575. The burden is on the defendant to demonstrate by a preponderance of evidence that there is a significant "change in the facts." The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6904(3)(e).

The defendant has failed to present evidence that there has been a significant change in the facts after the admission of liability. As such, claimant's objection to defendant's answer is SUSTAINED.

The defendant has asked the agency to read Dr. Harbach's opinion as a denial of medical causation as it relates to any of the ongoing treatment provided to the claimant, including the SCS. I am not entirely certain what Dr. Harbach's opinion means, however, it is true that ordinarily the agency does not evaluate or determine the legitimacy of a defendant's denial of liability. In other words, even if a denial is made in bad faith, the agency will ordinarily dismiss a petition for alternate medical care when liability is denied.

The problem here is that the defendant has known Dr. Harbach's opinion since at least June 2021, long before it admitted liability on the second and third alternate medical care petitions. Based upon the defendant's reading of Dr. Harbach's opinions, it had a basis to deny liability as early as January 2021, but chose not to do so. In February 2022, Dr. Harbach specifically clarified that after reviewing updated records, there was no change in his opinion. (Def. Ex. D) Moreover, the defendant acknowledged his opinion was not new in the April 18, 2022, denial letter. (Def. Ex. D)

The agency relied on the formal answers provided by the defendant in those cases and proceeded to alternate care hearing on two previous occasions. Again, once this happens, there must be a change in the underlying facts since the original admission for the defendant to properly deny liability. From this record, there has been no change in the underlying facts. The defendant has simply been carrying around a basis for denial in its back pocket which it chose not to use until this latest medical care dispute.

At hearing, as well as in correspondence to claimant's counsel, defendant also asserted that Dr. Eckhoff had opined that claimant's ongoing symptoms were from his "myalgia", which defendant contends is not work-related. In reviewing the entire record, however, I cannot find that this constitutes a significant change in the facts. It is evident that Mr. Tamayo-Perez has been diagnosed with myalgia for some time and there is no evidence that Dr. Eckhoff considers myalgia to be non-work related. (Cl. Ex. 4)

Simply stated, the evidence strongly demonstrates that there has been no change in the facts since the previous admissions in September and October 2021.

To allow the defendant to now switch positions, would be to allow the precise wrong to occur which the Supreme Court warned of in Winnebago – namely allowing the employer to control an injured worker's medical care until it suits them to deny it for tactical advantage or some other reason.

II. Should alternate care be granted?

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. 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 (2013).

By challenging the employer's choice of treatment – and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See 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).

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).

An employer's statutory right is to select the providers of care and the employer may consider cost and other pertinent factors when exercising its choice. Long, at 124. An employer (typically) is not a licensed health care provider and does not possess medical expertise. Accordingly, an employer does not have the right to control the methods the providers choose to evaluate, diagnose and treat the injured employee. An employer is not entitled to control a licensed health care provider's exercise of professional judgment. Assmann v. Blue Star Foods, File No. 866389 (Declaratory Ruling, May 19, 1988). An employer's failure to follow recommendations of an authorized physician in matters of treatment is commonly a failure to provide reasonable treatment. Boggs v. Cargill, Inc., File No. 1050396 (Alt. Care January 31, 1994).

In this case, the evidence supports the claimant's request for alternate medical care. He has moved out of state and his treating doctor has recommended referral to a new pain specialist in addition to some additional physical therapy which has helped with his symptoms in the past. The authorized physician has recommended this care. The denial of this care is unreasonable.

ORDER

THEREFORE IT IS ORDERED:

The claimant's objection to defendant's denial of liability on this claim is SUSTAINED on the basis of the principles of judicial estoppel.

The claimant's petition for alternate medical care is GRANTED. Defendant shall authorize the care recommended by Dr. Eckhoff.

Signed and filed this __25th___ day of May, 2022.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Jennifer Zupp (via WCES)

Abigail Wenninghoff (via WCES)