BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ASHLEY L. MEYER, Claimant, vs. GENERAL MILLS, Employer, and OLD REPUBLIC INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 1661007.01 ALTERNATE MEDICAL CARE DECISION HEAD NOTE NO: 2701

STATEMENT OF THE CASE

On April 30, 2020, claimant filed a petition for alternate medical care pursuant to Iowa Code 85.27 and 876 Iowa Admin. Code 4.48. The defendants filed an answer. The defendants do not dispute liability for the injury of February 12, 2019, for the left ankle for which claimant is seeking treatment.

The matter was scheduled for hearing on May 12, 2020, at 10:30 a.m. The undersigned presided over the hearing held via telephone and recorded digitally on May 12, 2020. That recording constitutes the official record of the proceeding under 876 Iowa Administrative Code 4.48(12). Claimant participated through her attorney, Andrew Giller. The undersigned attempted to contact defense counsel, Peter Thill, via three different phone numbers--a total of eight times between 10:30 a.m. and commencement of the hearing at 10:45 a.m. Being unable to reach the attorney for the defendants, the hearing was commenced without presence of defense counsel. The record consists of:

- Claimant's Exhibit, numbered 1, comprised of three pages of documents attached to the petition for alternate medical care.
- Defendants presented no 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 17A is the avenue for an appeal.

ISSUE

The issue under consideration is whether claimant is entitled to alternate medical care.

FINDINGS OF FACT

Claimant, Ashley Meyer, sustained an injury to her left ankle as the result of an injury on February 12, 2019, which arose out of and in the course of her employment with General Mills. Defendant has accepted liability for the injury and resulting treatment claimant is seeking via answer to the claimant's petition. The dispute in this case is whether or not the defendants have acted reasonably in not scheduling a surgery recommended by an authorized physician.

Claimant was seen by Scott Ekroth, M.D., on February 19, 2020. (Claimant's Exhibit 1, page 1). Dr. Ekroth is an authorized treating physician. In his notes, Dr. Ekroth assesses the claimant with: 1. Left ankle instability; 2. Sprain of other ligament of left ankle, subsequent encounter; and, 3. Peroneal tendinitis, left leg. (Cl. Ex. 1, p. 3). Dr. Ekroth noted:

> Ashley is back in today, and we are now a year out from her work-related injury to her left ankle. She has been through physical therapy, bracing, medications, time, and a steroid injection but continues to have pain. The pain that she gets is on the lateral aspect of the ankle. It is worse with activities. It is a sharp pain that does radiate somewhat. She notes continued feelings of instability.

(Cl. Ex. 1, p. 1). The claimant has a positive surgical history for an appendectomy and endo excision in 2018, and an ankle surgery in 2017. (Cl. Ex. 1, p. 2). Dr. Ekroth noted that the claimant had a previous lateral ligament reconstruction in 2016, "for which she made a full recovery and did not have any symptoms. Her symptoms recurred after this work-related injury last February, and I do not believe that her previous surgery is playing a role in her current situation." (Cl. Ex. 1, p. 1).

Dr. Ekroth examined Ms. Meyer's ankle during the February 19, 2020, visit and noted:

> It has been a year without any significant improvement in her situation. She is ready to talk about surgical intervention, which I think is reasonable given her lack of improvement. The surgical option here is a left ankle arthroscopy and debridement, Brostrom with an internal brace, and a peroneal tenolysis. This is something that can be done as an outpatient

> underneath a popliteal block, and I would ask Ashley to be nonweightbearing for a month after surgery with two weeks in a splint and two weeks in a cast.

(Cl. Ex. 1, p. 1). Dr. Ekroth outlined additional care that he would recommend after completion of the recommended surgery. (Cl. Ex. 1, p. 1).

Claimant is dissatisfied with the fact that no surgery has been authorized, despite the recommendation of Dr. Ekroth. Based upon the opinion and recommendation of Dr. Ekroth, I find that the recommended surgery should be authorized. It is important to note that we are in the midst of a pandemic, and global health emergency. This has caused the governor of Iowa to issue several public health emergency declarations. Some elective medical procedures are delayed based on these declarations. Therefore, the timing of scheduling the procedure should be flexible as conditions continue to evolve.

CONCLUSIONS OF LAW

Iowa Code 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.

Iowa Code 85.27(4). See Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433 (Iowa 1997).

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, 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).

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. 14(f)(5); 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). Determining what care is reasonable under the statute is a question of fact. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

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 care was unduly inconvenient for the claimant. Id. 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. Reasonable care includes care necessary to diagnose the condition, and defendants are not entitled to interfere with the medical judgement of its own treating physician. Pote v. Mickow Corp., File No. 694639 (Review-Reopening Decision, June 17, 1986).

Since recommendation was made by an authorized treating physician, Dr. Ekroth, for the claimant to undergo surgery, defendants are ordered to authorize surgery as indicated by Dr. Ekroth in his February 19, 2020, medical report.

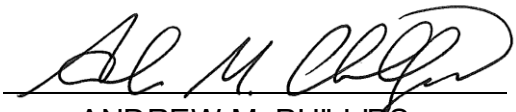
Finally, I would note that defendants' counsel reached out to the undersigned several hours after the hearing indicating that he believed he never received notification of the hearing date or time. In reviewing the WCES record, the undersigned found a hearing notice addressed to the defendants via U.S. Mail. This notice would also have been in the electronic file when counsel for defendants filed his appearance and answer.

IT IS THEREFORE ORDERED:

1. Claimant's petition for alternate medical care is granted.

2. Surgery as recommended by Dr. Ekroth is to be authorized.

Signed and filed this 13th day of May, 2020.



ANDREW M. PHILLIPS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Andrew M. Giller (via WCES)

Peter John Thill (via WCES)