

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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LARRY SIMON,

Claimant,

vs.

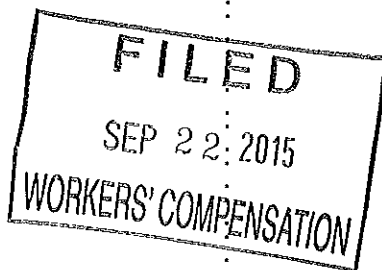
S.E. ELECTRIC,

Employer,

and

CINCINNATI INSURANCE,

Insurance Carrier,  
Defendants.



File No. 5043801

ALTERNATE MEDICAL CARE DECISION

(Filed September 8, 2015)

Head Note No.: 2701

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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, the "alternate medical care" rule, is invoked by the claimant.

The alternate medical care claim came on for hearing on September 18, 2015. The alternate medical care petition filed August 27, 2015, seeks authorization of a cervical x-ray and cervical MRI recommended by Richard Neiman, M.D.

Hearing on that petition was originally scheduled to be heard September 10, 2015. The hearing was convened but claimant moved to continue the hearing. Claimant waived the time limitations in the statute. The parties agreed to have this case heard on September 18, 2015, along with a second petition for alternate medical care filed by claimant September 8, 2015, and seeking authorization of appointments with Dr. Albright of ongoing knee complaints, with Dr. Fattal for an ENT evaluation, and an audiogram recommended by Dr. Fattal. This decision will address both petitions.

The proceedings were digitally recorded, which constitutes the official record of this proceeding. By order of the Iowa Workers' Compensation Commissioner, this ruling is designated final agency action.

The record consists of claimant's exhibits 1 through 16, and affidavits of Pamela Thompson designated exhibits 100 and 101; Defendants' exhibits are A through N, and the testimony of the claimant, Pamela Thompson, and Mary Burke.

### ISSUES

For the first alternate medical care petition, filed August 27, 2015, the issue presented for resolution is whether the claimant is entitled to alternate medical care consisting of authorization of a neck x-ray and MRI as recommended by Richard Neiman, M.D.

For the second alternate medical care petition, filed September 8, 2015, the issue presented for resolution is whether knee treatment by Dr. Albright and an ENT evaluation and an audiogram, as recommended by Dr. Fattal, should be authorized.

### FINDINGS OF FACT

Claimant, Larry Simon, testified he was injured August 29, 2012 when he was injured by a fall from a ladder and subsequent electrocution. Claimant was seen by Laurence Krain, M.D., at the direction of the insurer. Dr. Krain did not know why he was there. He did not tell claimant he would be his treating doctor. The doctor checked claimant's balance and reflexes in his knee and foot. No diagnosis or plan for treatment was given to claimant. The doctor's report only noted dizziness and balance issues. There was no plan for a second appointment. That appointment lasted 15 minutes.

Claimant wishes to return to John Albright, M.D. as he is still having trouble with his knees. Claimant wrote to him August 20, 2015, because of continuing problems, and he was told to contact workers' compensation for authorization, otherwise Dr. Albright would not see claimant. Claimant stated walking, bending, etc. bothers his knees.

Claimant was referred to Deema Fattal, M.D., at the University of Iowa. Dr. Fattal has been very slow in providing care, and it has been hard to get appointments with her.

Frederick Dery, M.D., twice recommended claimant be seen by an electrocution specialist at the University of Iowa if they had one. Mary Burke, the nurse case manager, was present at both appointments. Claimant believes this was on May 14 and on September 2, 2015. On September 2, 2015, claimant asked Dr. Dery to talk to Ms. Burke about the referral. Ms. Burke never explained why the referral was not made.

Dr. Fattal has recommended care and Dr. Neiman has recommended care. Claimant wants treatment with both so he can get better.

Claimant stated he did not intentionally check a box incorrectly on his unemployment benefits application.

Claimant believes Ms. Burke on one occasion, claimant believes September 2, 2015, told the doctor to limit the examination to claimant's back, and not his knees.

Claimant has made arrangements with Steindler Clinic to get his appointments with Dr. Dery on time, but he was told the appointments had to be arranged with Ms. Burke's schedule, and this delayed the appointment for two weeks.

On cross examination, claimant was asked about his receipt of unemployment benefits. He received just under \$15,000.00 in benefits. He has been told he has to pay it back. He thought he was able to draw both workers' compensation and unemployment benefits at the same time.

He wants the referral to Dr. Albright for his knees. He also seeks the ENT evaluation and the audiogram, and the neck x-ray recommended by Dr. Neiman. Claimant's attorney did not tell claimant about an appointment with Dr. Krain, and therefore did not tell claimant Dr. Krain could have addressed those things.

He agreed he already had an ENT examination last year, with Marlan Hansen, M.D., which was authorized. He has had three or four audiograms, the most recent being last year. He agreed he is not being denied treatment with Dr. Albright or being denied an audiogram. He has seen Dr. Albright three times, most recently in June 2015. Dr. Albright released him and found him at maximum medical improvement once claimant had received his brace. An issue developed in July with the fitting of the brace, but it works fine now.

When he went to see Dr. Fattal, on August 28, 2015, that was an appointment that was set for September but it was moved up at claimant's request. Claimant is not aware what Dr. Fattal has ordered. He has not looked at many of the doctor's notes and reports. He stated he does not read his doctor's reports on him because it upsets him. He suffers from post-traumatic stress disorder. He saw a psychologist early in the case for this.

He has not seen Exhibit I, dated September 11, 2015, which is a response to Mary Burke, indicating the doctor needed more time.

The audiogram and ENT appointments are now set by Dr. Fattal, according to Pamela Thompson's affidavit. (Exhibit 101)

Dr. Dery is also looking at claimant's hands. He is treating claimant for his pain as well. He agreed he just underwent an injection in his back on September 14, 2015 four days before the hearing. He is scheduled for another on September 21, 2015.

On re-direct examination, claimant indicated Dr. Krain did not examine claimant's back, or have him bend at the waist other than a little. He did not take measurements of how far claimant could bend forward and back. Claimant has difficulty bending forward and back, and cannot bend as far as before the injury.

He was sent to two neuropsychologists by the insurer. Both indicated he did not need any care and both indicated any psychological condition was not related to the work injury.

Claimant feels there have been many delays in his care.

No doctor has recommended an MRI or x-ray of the neck other than Dr. Neiman and Dr. Fattal. Dr. Neiman is not a treating physician. Claimant's attorney sent him to see Dr. Neiman. Claimant agreed defendants have a right to evaluate that recommendation. His attorney did not tell him about the appointments with Dr. Krain and Michael Cullen, M.D. His attorney did not tell him the defendants wanted Dr. Krain to evaluate claimant's need for a neck x-ray or MRI at the appointment set for September 1, 2015.

On re-re direct examination, claimant stated his attorney told him Dr. Krain had no further care to offer because he had found claimant to be at maximum medical improvement (MMI), and he told claimant not to attend the appointment. Claimant's attorney stated to the undersigned that he did tell claimant not to attend the Dr. Krain appointment because he had found claimant at MMI, and that Ms. Burke had told Dr. Krain claimant did not need more care. He also felt Dr. Krain would be asked to criticize the other doctors in the case.

Claimant called Pamela Thompson, a member of claimant's attorney's office staff, as a witness. She has worked in workers' compensation as a paralegal for eleven years. She stated claimant did not ask Mr. McAndrew's office to file anything out of anger at the defendants. Defendants at one point required a formal order from a doctor for treatment, rather than just a recommendation in a doctor's note, which has never been required before or in other cases.

She stated much of her time is spent seeking authorization for their clients' medical care. In this case, there have been significant delays in getting authorization. The office practice is to request authorization from the employer, and if none is received within a certain number of days, a petition for alternate medical care is filed.

She has compiled a table of alternate care petitions in this case. Typically when a request for authorization of care is sent to defense attorney's office, there is no response authorizing the care until just before the hearing. Compared to other workers' compensation cases she has been involved in, the care has been delayed more in this case, and more alternate care petitions have had to be filed in this case, than any other she has worked on. Exhibit 100 is her affidavit of the office's experience concerning delays in obtaining responses from Dr. Dery's office.

Exhibit 101 is her affidavit as to the promptness with which Dr. Fattal responds to requests for care. Dr. Fattal's office did call her the day of the hearing.

She stated since Dr. Fattal is an authorized treating physician, any recommendations she makes should be carried out by defendants. She agreed defendants have the right to look at the records, and to review whether the recommendation is for the work-related injury. She stated there is no set time for them to do so, but three days would be a reasonable amount of time. But she agreed the alternate care petition was filed less than three days after receipt by defendants, and this was because the hearing was imminent at that time, before it was continued.

In addition to questions answered by the witness, the undersigned interposed questions to Mr. McAndrew, claimant's attorney, to clarify their office procedures. The attorney for claimant stated if an authorized treating doctor recommends a procedure, and their office asks the employer to authorize the procedure, and the employer has not responded by the time requested in the letter, usually within a week, they file a petition for alternate medical care. If, in response to their office's request for authorization, the employer indicates they have asked a second doctor to review the recommendation and offer an opinion whether the procedure is related or whether it is appropriate, and if that doctor agrees with the recommendation, they will authorize the procedure without need of an alternate care petition, their office would hold off filing the petition if the delay was not unreasonable.

However, in this case, the normal procedure was not followed. Mr. McAndrew went ahead and filed the petition for alternate medical care without waiting for the second opinion appointment with Dr. Krain. He did so because he told claimant not to attend that appointment, because Dr. Krain had already said he would only allow changes in claimant's medication but no other care, and he had found claimant to be at MMI. Mr. McAndrew felt Dr. Krain would not be fair, and claimant needed a fair assessment of the procedure. Mr. McAndrew stated doctors normally do not change their minds, and it would be a waste of time and inappropriate to have claimant seen by Dr. Krain again.

Continuing with Ms. Thompson's testimony, she agreed defendants are entitled to a reasonable time to respond, and they usually allow about a week before filing the petition for alternate medical care. She agreed Dr. Fattal's communication the day of the hearing indicates an authorization of the audiogram. She did not think there was authorization of the ENT yet. This was about two weeks after the request. Dr. Fattal is in her University of Iowa office only one day per week.

For Dr. Cullen's independent medical examination (IME), scheduled for August 28, 2015, claimant was told about the appointment. Ms. Thompson did not tell claimant he had to attend the IME appointment, nor was she told to tell claimant about the appointment but it was her job to do so. For the Dr. Krain IME, she had nothing to do with claimant not attending that IME follow-up appointment.

On re-direct examination, Ms. Thompson stated defendants did not, in response to the request for authorization, request further time to respond to the request beyond the deadline set in the request for a response. Exhibit I, pages 13 and 14, dated

September, 2015, is an email from Mary Burke. It only refers to a recommendation for audiometry but it does not mention the ENT. Ms. Thompson was able to verify the audiometry was going forward, but the status of the ENT is unknown.

Mary Burke was called as a witness by defendants. She is a nurse case manager. She has a bachelor of science degree in nursing. She has been a nurse case manager for about five years. For this case, she was instructed by claimant's attorney to have all contact with claimant through his attorney, including contact at doctor's appointments. She disputes any implication she has been trying to deny or frustrate care for claimant.

Dr. Krain was supposed to address the recommendation by Dr. Neiman for the x-ray and MRI of the neck at the missed appointment.

She stated a clinical note is often insufficient to order medical procedures, and a doctor's order is required. The "My Chart" clinical notes of Dr. Fattal did not constitute medical orders, as a physician may mention possible procedures or tests that may be considered in the future in their clinical notes, but a procedure is not initiated until the physician actually orders it. For her to act, she needs a doctor's order. Dr. Dery's current recommendations are for injections, which have been initiated. His plan of treatment is clear. Dr. Fattal's recommendations will be clarified and followed up on next week.

On cross examination, Ms. Burke testified she was instructed not to communicate directly with claimant's attorney, but to go through defense counsel. Exhibit 10, Dr. Fattal's note, shows under "plans", in August 2015, a mention of procedures but Ms. Burke again indicated she can only act on orders, not notes. Ms. Burke agreed she did not respond to a June 8, 2015, email where claimant's attorney expressed disagreement with sending claimant back to Dr. Krain.

On re-direct, she indicated pursuant to a prior alternate medical care order, Dr. Krain was chosen to treat claimant's back and hands. Dr. Fattal and Dr. Dery were both authorized physicians. It is not uncommon for an authorized physician to find a health condition that is not related to the work injury.

Claimant was recalled as a rebuttal witness. He stated he did not think he would have received a fair assessment from Dr. Krain the second time because the doctor had already made up his mind.

#### REASONING AND CONCLUSIONS OF LAW

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. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening decision, October 16, 1975).

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 Rule of Appellate Procedure 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" 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.

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., (Review-Reopening June 17, 1986).

For the August 27, 2015, petition for alternate medical care, Dr. Neiman has recommended an MRI and x-ray of claimant's neck, and claimant seeks authorization of those procedures. Defendants resisted, and continue to resist, the petition because when they set up an appointment with Dr. Krain to review the recommendation, claimant refused to attend the appointment, and instead filed this petition for alternate medical care.

The testimony and comments of counsel clearly indicate Mr. McAndrew, as claimant's attorney, determined on his own that the appointment with Dr. Krain would not be useful, as Dr. Krain had already found claimant to be at MMI and was offering no further care. For that reason, defendants did not get the opportunity to have Dr. Krain offer a second opinion on the appropriateness of the MRI and x-ray of the neck.

It was inappropriate for claimant's counsel to instruct claimant not to attend the appointment with Dr. Krain, especially since the only reason for doing so was counsel's low opinion of Dr. Krain's views. Under Iowa Code section 85.27, it is defendants who choose the claimant's medical care, not claimant. For that reason, claimant can be seen as failing to cooperate with his own course of medical treatment. His petition for the x-ray and MRI recommended by Dr. Neiman cannot be granted under these facts, as it would be a denial of due process and the opportunity to fully exercise their right to choose the care under Iowa Code section 85.27 to grant the petition. Defendants are entitled to the input of their own physician before deciding whether to resist this petition for alternate medical care, and claimant's attorney thwarted that right. Claimant has thus precluded the granting of his petition by that conduct.

However, defendants state Dr. Dery will be examining claimant again soon. Although he is authorized to treat claimant's back only, defendants state he would be capable of addressing whether claimant should have an MRI or x-ray of the neck as well. In other words, defendants would accept Dr. Dery's opinion on whether the x-ray and MRI are needed as they would have Dr. Krain's if that appointment had taken place. Claimant previously objected to this, but at hearing stated he would consent to Dr. Dery offering an opinion on Dr. Neiman's recommendation. Thus, although the petition filed August 27, 2015, must be denied, claimant may obtain the same result, and defendants may have their second opinion, without further ruling by this agency.

For the September 8, 2015, petition for alternate medical care, defendants, in their answer and again at the conclusion of the hearing, reiterated they do indeed authorize the three things requested in claimant's September 8, 2015, petition, but they cannot be acted upon until actual orders are received from Dr. Fattal. Presumably the same is true for Dr. Albright. Thus, claimant's petition filed September 8, 2015, is granted in its entirety, and defendants will arrange for the procedures, consisting of care for the knees by Dr. Albright, an ENT evaluation and an audiogram, promptly once the appropriate orders are received.

#### ORDER

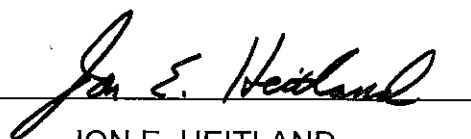
THEREFORE IT IS ORDERED:

The August 27, 2015, alternate medical care petition is denied.

The September 8, 2015 alternate medical care petition is granted.

Claimant can renew his request for the neck MRI and x-ray after defendants' physician has had a chance to offer an opinion on their necessity.

Signed and filed this 22<sup>nd</sup> day of September, 2015.



JON E. HEITLAND  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER



Copies To:

Paul J. McAndrew, Jr.  
Attorney at Law  
2771 Oakdale Blvd., Ste. 6  
Coralville, IA 52241  
[paulm@paulmcandrew.com](mailto:paulm@paulmcandrew.com)

J. Richard Johnson  
Attorney at Law  
1636 42<sup>nd</sup> St. NE  
Cedar Rapids, IA 52402  
[rjohnson@jllawplc.com](mailto:rjohnson@jllawplc.com)

JEH/kjw

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**Right to Appeal:** This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.