BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TAMMY COOK, Claimant, vs. WALMART ASSOCIATES, INC., Employer, and NEW HAMPSHIRE INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 1662227.01 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, Tammy Cook. Claimant appeared personally and through attorney, Mindi Vervaecke. Defendants appeared through their attorney, Alison Stewart.

The alternate medical care claim came on for hearing on May 29, 2020. The proceedings were digitally recorded. That recording constitutes the official record of this proceeding. Pursuant to the Commissioner's 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 5 and defense exhibits A through D, which were received without objection. The defendants do not dispute liability for claimant's February 12, 2019, work injury.

ISSUE

The issue presented for resolution is whether the claimant is entitled to medical treatment for her left ankle condition.

FINDINGS OF FACT

Tammy Cook sustained an injury to her left lower extremity in February 2019 while working for the employer. She suffered a fracture in her left ankle. She received authorized medical treatment through Michael Scherb, M.D. The treatment provided was reasonable. Dr. Scherb diagnosed closed avulsion fracture of left ankle with

routine healing. In November 2019, he noted "aching and swelling", placed her in a boot and released her with no follow ups and no restrictions. (Claimant's Exhibit 1) He formally released her from his care on January 17, 2020. He provided an impairment rating for her continued symptoms at the time she was released.

Unfortunately, she did not heal well and continued to have significant symptoms. Ms. Cook sought out treatment on her own with Justin Raatz, DPM. In March 2020, he recommended further medical treatment, including possibly surgery and provided a handicap parking permit "while patient is in the recovery process following a left ankle trauma in February of 2019." (Cl. Ex. 2, p. 5)

In April 2020, claimant's counsel contacted defendants and requested care with Dr. Raatz. Defendants refused. "Thank you for your email, however a surgery has not been recommended by Dr. Scherb who is the authorized treating physician on this claim." (Cl. Ex. 3, p. 1) Soon after this response, defense counsel became involved in the claim and sought out an additional report from Dr. Scherb. He prepared an opinion on May 28, 2020, wherein he continued to not recommend surgery for a variety of reasons. (Def. Ex. B) He recommended treatment by Joseph Galles, M.D., in Des Moines.

At hearing, defense counsel indicated that Dr. Scherb was better positioned as the authorized treating physician to know all of the facts and circumstances surrounding claimant's condition and that care should remain with him. The defendants stated they are willing to authorize an orthopedist in Mason City.

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. 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 Dec. January 31, 1994).

In Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433, 437 (Iowa 1997), the supreme court held that "when evidence is presented to the commissioner that the employer-authorized medical care has not been effective and that such care is 'inferior or less extensive' than other available care requested by the employee, . . . the commissioner is justified by section 85.27 to order the alternate care."

Based upon the record before me, I find the care offered by the employer is inferior and less extensive than the care recommended by Dr. Raatz. Dr. Scherb released the claimant in November 2019 in spite of her ongoing symptoms. Since November 2019, the defendants have offered no medical care to the claimant. After she underwent the second opinion from Dr. Raatz, she asked for more care and defendants responded as follows. "Thank you for your email, however a surgery has not been recommended by Dr. Scherb who is the authorized treating physician on this claim." (Cl. Ex. 3, p. 1) Defense counsel attempted to clean up the record on behalf of defendants to suggest they were offering some type of care to the claimant, however, the May 28, 2020, report from Dr. Scherb really offered nothing new other than a unscheduled referral to an orthopedist more than 100 miles away.

ORDER

THEREFORE IT IS ORDERED:

The claimant's petition for alternate medical care is GRANTED. Medical care is transferred to Dr. Raatz.

Signed and filed this 29th day of May, 2020.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Mindi Vervaecke (via WCES)

Alison Stewart (via WCES)