BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SUSIE SMITH, Claimant, vs. CYGNUS HOME SERVICE, LLC, Employer, and AIU INSURANCE CO., Insurance Carrier, Defendants.	File No. 22701219.01 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, Susie Smith.

This alternate medical care claim came on for hearing on December 27, 2022. Claimant appeared through her attorney Marlon Mormann. Defendants appeared through their attorney Joni Ploeger. 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 hearing record consists of:

- Claimant's exhibits 1-4;
- Defendants' exhibits A-C

Claimant was the only witness to provide testimony. Counsel for both parties provided argument. At the start of the hearing, Ms. Ploeger clarified that defendants have accepted liability for the August 11, 2022 date of injury and for claimant's left elbow and neck injuries—one of which the claimant seeks treatment for in this

proceeding. Defendants indicated they are still investigating claimant's low back condition and are not able to formally accept or deny compensability for that condition at this time. The record closed at the end of the alternate medical care telephonic hearing.

DISMISSAL WITHOUT PREJUDICE

Claimant seeks alternate care for injuries to her neck and spine/low back. In defendants' answer, they admit liability for the claim relating to her neck.[1] However, they assert that they are still investigating causation for claimant's low back condition, thus at this time they can neither admit nor deny liability. This places defendants' liability for the alleged injury to claimant's low back at issue.

Liability for the alleged injury is a threshold issue when the agency considers an application for alternate care. See, e.g., Tyson Foods, Inc. v. Hedlund, 740 N.W.2d 192, 198–99 (Iowa 2007). Such an application cannot be filed "if the liability of the employer is an issue. If an application is filed where the liability of the employer is an issue, the application will be dismissed without prejudice." 876 IAC 4.48(7). The Iowa Supreme Court has "emphasize[d] that the commissioner's ability to decide the merits of a section 85.27(4) alternate medical care claim is limited to situations where the compensability of an injury is conceded, but the reasonableness of a particular course of treatment for the compensable injury is disputed." R.R. Donnelly & Sons v. Barnett, 670 N.W.2d 190, 197 (Iowa 2003).

The defendants' default denial of liability means they lose the right to choose the care received by claimant for her low back injury. Winnebago Indus., Inc. v. Haverly, 727 N.W.2d 567, 575 (Iowa 2006) (citing Trade Prof'ls, Inc. v. Shriver, 661 N.W.2d 119, 124 (Iowa 2003)). During the period of defendants' denial, she may obtain reasonable care from any provider for the alleged injury, at the claimant's expense, and seek reimbursement for such care using regular claim proceedings before this agency. See Shriver, 661 N.W.2d at 121–25 (affirming on judicial review an agency decision ordering the payment of medical expenses for unauthorized care because the defendants denied liability for the alleged injury and therefore lost the right to control care).

The denial of liability and resultant dismissal without prejudice can also limit the defendants' ability to assert a lack-of-authorization defense with respect to care relating to the injury alleged by the claimant.

> The authorization defense is applicable when the commissioner has denied a claimant's petition for alternate care on its merits. But it is inapplicable where the claimant's petition for alternate care was denied on procedural grounds such that the commissioner could not adjudicate the

[1]Defendants also accepted liability for claimant's left elbow. During the hearing, however, claimant indicated that her elbow issues had resolved. (Testimony). She is not seeking additional treatment for her left elbow in this proceeding.

> petition's merits, as is the case when the employer disputes the compensability of the injury.

Brewer-Strong v. HNI Corp., 913 N.W.2d 235, 243–44 (Iowa 2018) (citing Barnett, 670 N.W.2d at 97).

Defendants default denial of liability at this stage in the proceedings does not necessarily forever bar them from asserting an authorization defense in this case for care relating to the injuries alleged in the petition. See id. at 244. Defendants' answer indicated they are attempting to schedule an appointment with Trevor Schmitz, M.D., at Iowa Ortho to address causation for the low back condition. (See Defendants' Answer). Defendants may change their position to accept liability if new opinions and/or information provide evidence to justify doing so. Id. And if the defendants change their position, the defendants may regain the "authorization defense and the statutory rights and obligations to provide and choose appropriate medical care pursuant to Iowa Code section 85.27" moving forward, unless they subsequently change their position to deny liability once again, or the commissioner grants a subsequent application for alternate care by the claimant. Id. at 245; see also Haverly, 727 N.W.2d at 575 ("There might, in some cases, be a significant change in the facts after the admission of liability that could justify a change of position by the employer . . . .").

ISSUES

The issues presented for resolution are whether the claimant is entitled to alternate medical care in the form of:

- Neck injections as ordered by Carlos Moe, D.O., at Concentra;
- Claimant seeks the right to treat with Lisa Klock, D.O., at Broadlawns rather than with defendant's authorized physicians, Carlos Moe, D.O., at Concentra, and Thomas Klein, D.O., and Trevor Schmitz, M.D., at Iowa Ortho.

FINDINGS OF FACT

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

On August 11, 2022, claimant sustained a work-related injury to her neck and left elbow while working for the defendants. At the hearing, claimant testified she was reaching up to grab something off a shelf, when a tray came out and hit her in the neck, causing her to fall. (Hearing Testimony). Claimant sought medical treatment at Broadlawns Medical Center (hereinafter "Broadlawns"). (Id.; Ex. 1). Claimant chose Broadlawns because her primary care physician, Lisa Klock, D.O., practices there. (Hearing Testimony). It is not clear whether defendants consented, approved, and/or planned to pay for claimant's treatment at Broadlawns. (Id.).

Claimant notified defendants' third-party administrator (hereinafter "TPA") about the work incident shortly after it occurred. (Ex. 1). On August 12, 2022, Geraldine Dunn, a claims adjuster working for defendants, emailed claimant. (Id.). That email states,

> I have received your claim.
>
> Please confirm if you went for any medical treatment.
>
> Where did you seek treatment at? Name, address, city, state, zip code, and phone number.
>
> Do you have any restrictions?
>
> When is your next follow-up visit?

(Ex. 1). Claimant replied that same day, stating she went to Broadlawns Urgent Care, where she received a cortisone injection and restrictions taking her off work until Monday. (Id.). Claimant also noted that Broadlawns wanted her to seek follow-up treatment from her own doctor. (Id.). She made a follow-up appointment with her doctor, Dr. Klock, for August 23, 2022. (Id.). On August 17, 2022, claimant emailed Ms. Dunn again indicating that she had returned to Broadlawns Urgent Care on August 15, 2022. (Id.). Five days later, claimant emailed Ms. Dunn asking for a fax number so she could send in a signed patient's waiver. (Id.). In this email, claimant also asked Ms. Dunn "Do I go to my own doctor or do you have a work comp doctor that you use?" (Id.). At the hearing, claimant testified Ms. Dunn never responded to her email. (Hearing Testimony).

From August through November 2022, claimant received treatment at Broadlawns for symptoms she alleges relate to the work incident on August 11, 2022. (Hearing Testimony). None of claimant's treatment records from Broadlawns were placed in evidence at the alternate care hearing, however, claimant testified that she saw Dr. Klock several times during this time period, as well as went to physical therapy. She also had an MRI performed on her neck. (Id.). Claimant testified the MRI revealed a disk herniation on her spine. (Id.). The MRI is also not in evidence. At the hearing, defendants submitted copies of several emails sent to claimant's counsel. (Ex. A). In those emails, defendants label claimant's treatment at Broadlawns as unauthorized care. (Id.).

On November 1, 2022, Mr. Mormann sent a letter of representation to defendants' TPA.[2] (Ex. A, pp. 5-6). In this letter, he asked defendants to designate an authorized treating physician for claimant's alleged work injury and provide care. (Id.).

[2] At the hearing, claimant testified she asked her legal counsel to send defendants a letter on November 1, 2022, because they denied Dr. Klock's request to authorize neck injections. (Hearing Testimony). As stated above, there are no treatment records from Broadlawns in the hearing record. Given this, the undersigned is not able to make any factual findings concerning Broadlawns' recommendations for future care.

On November 3, 2022, the adjuster sent claimant's counsel an email indicating that an appointment had been made for claimant with Carlos Moe, D.O., at Concentra on November 8, 2022. (Id. at 5). Dr. Moe recommended an MRI of her lumbar spine, a referral to pain management physician Thomas Klein D.O., for further treatment of her neck issues, and a follow-up visit with Dr. Moe in two weeks. (Ex. B). However, when claimant attempted to schedule the care recommended by Dr. Moe, she received a text message from Concentra which stated "Referral not accepted at this time. Please contact your adjuster Debbie Brown, . . . for further info." (Ex. 3).

On December 14, 2022, defendants' counsel sent an email to claimant's counsel, explaining that claimant's low back condition was a new complaint, and defendants were still investigating its compensability. (Ex. A). They however, agreed to authorize the lumbar MRI recommended by Dr. Moe. (Id.). Once that was completed, defendants planned to send claimant for an evaluation with Trevor Schmitz, M.D., for a causation opinion on claimant's low back complaints. (Id.). Defendants also planned to ask Dr. Schmitz to evaluate claimant's neck and make recommendations for further treatment for that condition as well. (Id.). Claimant's counsel sent a response email expressing dissatisfaction with defendants' treatment plan. (Id.). Defendants' counsel sent another email the following Monday, clarifying that defendants had already authorized the MRI and injections recommended by Dr. Moe. (Id.) The evaluation with Dr. Schmitz was in addition to the previously recommended care. (Id.). Defense counsel indicated Iowa Ortho would be contacting claimant shortly to get the MRI and injections scheduled. (Id). Claimant's counsel sent defendants two separate response emails. (Id.). The first accuses defendants of "bad faith claims adjusting." (Id.). The second proposes that claimant go to Brett Rosenthal, M.D., for an evaluation instead of Dr. Schmitz. (Id.). The email states, "At least this way my client will know she is going for treatment and not just for the ulterior motive of a causation opinion." (Id.). Defendants' counsel responded declining to make Dr. Rosenthal claimant's authorized treating physician. (Id.).

On December 21, 2022, Dr. Moe issued a referral for claimant to see an orthopedic specialist. (Ex. C). The referral note indicates that claimant missed her follow-up appointment with Dr. Moe scheduled two weeks after her initial evaluation. (Id.). On the note, Dr. Schmitz is specifically listed as the referral doctor. (Id.). Claimant testified that Dr. Moe did not mention an evaluation with Dr. Schmitz when she saw him on November 8, 2022, and she did not previously know anything about the referral. (Hearing Testimony).

At the hearing, claimant stated that she wants to return to Broadlawns for treatment of her neck condition. (Hearing Testimony). Claimant testified that doctors have told her there is a risk of paralysis if her neck remains untreated, but she did not specify which doctors and there are very few treatment notes in evidence. Claimant indicated she has ongoing pain radiating down her arm and fingers, and she drops things. (Id.). According to claimant, Broadlawns provides faster treatment; she can get an appointment right away there. (Id.). There is no evidence in the hearing record to corroborate these claims. There are no medical records documenting a risk of paralysis

nor is there any documentation indicating Broadlawns has immediate openings to treat claimant.

At the time of the hearing, defendants had already authorized the neck injections recommended by Dr. Moe. (See Addendum to Defendant's Answer). Defendants' nurse case manager has been working on getting the injections scheduled with Dr. Klein since approximately December 13, 2022, but the process has been delayed by the holidays. (Hearing Testimony). Defendants have not yet received a date from Dr. Klein's office for the injections. Defendants would also like to schedule an evaluation with Dr. Schmitz, but his office requires copies of claimant's prior medical records before he will schedule the appointment. (Hearing Testimony). Despite numerous requests, defendants have not been able to obtain copies of claimant's medical treatment notes from Broadlawns. (Id.). Defendants have asked claimant for help in obtaining the Broadlawns records, they also asked claimant for a list of past medical providers, so they knew where to request records. (Id.). Based upon the correspondence between the parties, it appears claimant was not very cooperative with defendants' investigation. (See Ex. A). She did not provide a list of past medical providers to the defendants, and her counsel refused to allow her to make a recorded statement so that they could gather the information themselves. (Id.). Additionally, during the hearing claimant was asked to verbally provide a list of her past medical treatment and she declined. (Hearing Testimony).

CONCLUSIONS OF LAW

Under Iowa law, an employer who has accepted compensability for a workplace injury has a right to control the care provided to the injured employee. Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 769 (Iowa 2016). The relevant statute provides as follows:

> 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).

Defendants' "obligation under the statute is confined to *reasonable* care for the diagnosis and treatment of work-related injuries." Long v. Roberts Dairy Co., 528 N.W.2d 122, 124 (Iowa 1995) (emphasis in original). In other words, the "obligation

under the statute turns on the question of reasonable necessity, not desirability." Id. An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care she 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. See Iowa Code § 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, 528 N.W.2d at 124. Ultimately, determining whether care is reasonable under the statute is a question of fact. Long, 528 N.W.2d at 123.

An employer's right to select the provider of medical treatment for the 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 18, 1988). An employer is not entitled to interfere with the medical judgment of its own treating physician. Pote v. Mickow Corp., File No. 694639 (Review-Reopening June 17, 1986). When a designated physician refers a patient to another physician, that physician acts as the defendant employer's agent. Permission for the referral from defendant is not necessary. Kittrell v. Allen Memorial Hospital, Thirty-fourth Biennial Report of the Industrial Commissioner, 164 (Arb. November 1, 1979) (aff'd by industrial commissioner). See also Limoges v. Meier Auto Salvage, I Iowa Industrial Commissioner Reports 207 (1981).

On November 8, 2022, Dr. Moe recommended claimant receive neck injections with Dr. Klein, a pain management physician. (Ex. B). Defendants have accepted claimant's neck condition as compensable and designated Dr. Moe as the authorized treating physician for that injury. Defendants are not allowed to encroach upon Dr. Moe's treatment recommendations. Claimant is entitled to the recommended care. Defendants shall promptly schedule an appointment with Dr. Klein for the recommended neck injections.

Under Iowa Code section 85.27, claimant bears the burden of providing "reasonable proofs of the necessity" to order alternate care. In addition to the neck injections, claimant seeks an order from this agency changing her authorized treating physicians from Dr. Moe, Dr. Klein, and Dr. Schmitz to Dr. Klock, her family provider at Broadlawns Medical Center. Claimant alleges this change is reasonable and necessary because Broadlawns has faster treatment times, and it is essential she get treatment right away as doctors have told her that a delay in care could cause paralysis. (Hearing Testimony). The undersigned can find no objective evidence in the record to support claimant's assertion. There are no medical records documenting a risk of paralysis, nor is there any documentation indicating Broadlawns has immediate openings to treat claimant. Additionally, Dr. Klock is a family provider, while Dr. Moe specializes in occupational/emergency medicine, Dr. Klein is a pain management physician, and Dr. Schmitz an orthopedic surgeon. The specialized treatment being offered by

defendants appears thorough and reasonable. An employee's desire for a different treatment plan does not make the employer-authorized care unreasonable. See Long, 528 at 124. A finding that the treatment requested by the claimant is reasonable does not result in an implicit finding that the authorized treatment is unreasonable. Id. The employee must prove the care being offered by the employer is unreasonable to treat the work injury, not that another treatment plan is reasonable. Id.; See also Lynch Livestock, Inc. v. Bursell, 870 N.W.2d 274 (Table) (Iowa Ct. App. 2015). There is no evidence in the record showing that the treatment being authorized by defendants with Dr. Moe, Dr. Klein, and Dr. Schmitz is unreasonable. Given this, claimant's request to change her authorized treater to Dr. Klock is denied.

ORDER

THEREFORE, IT IS ORDERED:

Within ten (10) days of the filing of this decision, defendants shall schedule an appointment with Dr. Klein for claimant's neck injections.

Claimant's request to change her authorized provider to Broadlawns/Dr. Klock is denied. Defendants retain the right to direct claimant's medical treatment under the law, and claimant is reminded that Iowa Code section 85.27(2) instructs her to cooperate and disclose all information concerning the claimant's physical or mental condition relative to the claim.

Each party shall bear their own costs

Signed and filed this 29th day of December, 2022.

Amanda Rutherford

AMANDA R. RUTHERFORD
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Marlon Mormann (via WCES)

Joni Ploeger (via WCES)