

## BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

YUNIOR TAMAYO-PEREZ,

Claimant,

vs.

HORMEL FOODS CORP.,

Employer,  
Self-Insured,  
Defendants.

File No. 20003849.03

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, Yunior Tamayo-Perez. On October 15, 2021, claimant filed an alternate medical care petition against Hormel Foods, a self-insured employer. Claimant appeared for hearing through attorney, Jennifer Zupp. Defendant appeared through counsel, Abigail Wenninghoff. Defendant answered the Petition on October 15, 2021. The defendant does not dispute liability for the claimant's December 19, 2019, low back injury and condition.

The alternate medical care claim came on for telephone hearing on October 27, 2021. 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 the pleadings. I have taken administrative notice of the prior case files. Defendant has requested sanctions for frivolous pleadings under the Iowa Rules of Civil Procedure.

## ISSUE

The issue presented for resolution is whether the defendant has provided reasonable treatment to the claimant without undue delay and, if not, the appropriate remedy.

## FINDINGS OF FACT

The claimant sustained a work-related injury to his low back and a spinal cord stimulator (SCS) trial has been recommended by the authorized physicians since May 2021. As a precursor to the SCS, the claimant needed to have a new MRI and a psychological evaluation. Claimant has filed two prior alternate care petitions attempting to have the precursors to this care authorized.

At the time of the last alternate care hearing (October 11, 2021), the defendant had agreed to authorize a psychological evaluation for the claimant, which was to be scheduled to take place “around Thanksgiving,” however, no firm date had been set. At that alternate care hearing, on the record, defense counsel invited claimant’s counsel to attempt to have the psychological evaluation scheduled earlier. Claimant’s counsel did. According to the Memorandum in Support of Petition for Alternate Care, she arranged an appointment with Tracy Thomas, Ph.D., and quickly provided all of the details to defense counsel on or about October 14, 2021, at 1:00 p.m. Defense counsel responded at 9:26 a.m., the following day, in essence, that she would need to address this with her client, who was out of the office on October 15, 2021. (See Def. Addendum to Answer, par. 3) Claimant’s counsel responded at 9:35 a.m., indicating that waiting was not acceptable and an immediate response was needed.

Claimant filed the third alternate care petition on Friday, October 15, 2021, at 3:18 p.m. On Monday, October 18, 2021, at 10:52 a.m., defense counsel emailed claimant’s counsel and stated the following: “Since we do not have a date from a doctor through Eckhoff’s office, you may proceed scheduling Dr. Thomas for Hormel billing.” (Def. Add. 2, attached email) She went on to state that if claimant’s counsel had just been more patient, the matter was resolved without need for an alternate care petition.

Prior to hearing, claimant’s counsel indicated that she would accept a “consent order” for the care requested, while defense counsel indicated the petition should be dismissed and claimant’s counsel should be sanctioned under the Iowa Rules of Civil Procedure for frivolous filings. In closing arguments, defense counsel argued strongly that granting claimant’s petition would only encourage more frivolous, unnecessary filings.

At the time of hearing, defendant had no objection to authorizing the psychological evaluation with Dr. Tracy Thomas. In essence the only disputes are: (1) whether procedurally the petition should be dismissed or an order should be entered memorializing (and ordering) this agreement, and (2) whether sanctions should be assessed against claimant for filing a frivolous claim.

## 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 January 31, 1994).

As an initial matter, I conclude as a matter of law, that this agency not have any authority to order sanctions for a frivolous filing against an injured worker under the Iowa Rules of Civil Procedure in an alternate care proceeding. Sanctions under 876 Iowa Administrative Code Section 4.36 may be applicable to alternate care proceedings, however, can only be invoked when a party fails to comply with the rules or an order of the deputy. Moreover, I find, as a matter of fact, that such sanctions would likely not be warranted in any event. This is because, when the matter was filed, the treatment claimant was seeking was not authorized. It only became authorized after the claim was filed.

I do tend to agree with defense counsel that claimant's counsel may have jumped the gun to some degree by not waiting until defense counsel had an opportunity to review the request with her client. Claimant's counsel indicated that this is because the matter has already been substantially and unnecessarily delayed. It is also apparent that there is a significant breakdown in trust between the parties and counsel in particular.

The Alternate Care statute does require the injured worker to communicate the basis for dissatisfaction to the employer and make reasonable efforts to resolve the dispute without filing a claim. Iowa Code section 85.27(4) (2019). I find that the claimant's insistence upon an immediate response is on the borderline of compliance with this provision. On the other hand, the hearing would have been unnecessary had defendant simply agreed to a consent order.

Having reviewed this entire file, in conjunction with the two prior alternate care records, and weighing the interests of all parties, I find that the most appropriate way to deal with this dispute is to grant the claimant's request for alternate medical care. Both parties, however, are ordered heretofore to engage in reasonable communication in all disputes regarding authorized care, including allowing reasonable time for opposing counsel to confer with a client regarding such disputes.


ORDER

THEREFORE IT IS ORDERED:

The claimant's petition for alternate medical care is GRANTED. Defendants shall immediately authorize the psychological evaluation, including any reasonable associated costs with Dr. Tracy Thomas.

FURTHER both parties are ordered to engage in reasonable communications regarding any future medical care disputes as set forth above.

Signed and filed this 27<sup>th</sup> day of October, 2021.

  
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JOSEPH L. WALSH  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Jennifer Zupp (via WCES)

Abigail Wenninghoff (via WCES)