

## BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

SCOTT WAYBILL,

Claimant,

vs.

CITY OF CEDAR RAPIDS,

Employer,  
Self-Insured,  
Defendant.

File No. 22700553.03

ALTERNATE MEDICAL CARE  
DECISION

Head Note: 2701

## STATEMENT OF THE CASE

On October 6, 2022, the claimant filed a petition for alternate medical care pursuant to Iowa Code 85.27(4) and 876 Iowa Administrative Code 4.48. The defendant filed an answer admitting liability for injuries related to claimant's left hip.

The undersigned presided over the hearing held via telephone and recorded digitally on October 18, 2022. That recording constitutes the official record of the proceeding pursuant to 876 Iowa Administrative Code 4.48(12). Claimant participated personally and through his attorney, Nick Cooling. The defendant participated through their attorney, Aaron Oliver.

Prior to the hearing, the claimant submitted two pages of exhibits, marked as Exhibit 1. The defendant submitted nine pages of exhibits labeled A-E. The evidentiary record consists of Claimant's Exhibit 1 and Defendant's Exhibits A-E. The claimant objected to the admission of Defendant's Exhibit E. The claimant argued that the exhibit was only produced at about 6:20 a.m. on the morning of the hearing. Arguments were heard from both parties on the objection. The exhibit was admitted over the objections of the claimant because 876 Iowa Administrative Code 4.48(9) requires that written evidence be exchanged "prior to the hearing." The exhibit was served on the claimant prior to the hearing. The defendant only received the exhibit the night before the hearing, and it is a medical record that was promulgated during a visit on October 17, 2022. Therefore, there was no prejudice to the claimant in admitting the exhibit.

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 Chapter 17A is the avenue for an appeal.

## ISSUE

The issue under consideration is whether the defendant should be ordered to authorize and provide a surgery for the claimant's left hip as recommended by Dr. White.

## FINDINGS OF FACT

Claimant, Scott Waybill, alleges that he sustained an injury to his lower back and left hip on or about November 9, 2021, while working for the City of Cedar Rapids, in Linn County, Iowa. The defendant admitted liability for the left hip injury in their answer, and again at the hearing.

Since the time of his injury, the claimant has been treating with Dr. Pospisil. (Testimony). Dr. Pospisil has been directing the claimant's care since the time of the work injury. (Testimony). Dr. Pospisil eventually referred Mr. Waybill to Dr. White and Dr. Nassif. (Testimony). Mr. Waybill first saw Dr. Nassif, who ordered an MRI. (Testimony). Mr. Waybill then saw Dr. White. (Testimony). Dr. White is an authorized treating provider.

On August 10, 2022, the claimant had a confirmatory medial branch block trial. (Defendant's Exhibit B:3).

Erin Bass, a nurse case manager with Ohara, LLC, provided a post-appointment update report on August 16, 2022, for an appointment with Dr. White. (Claimant's Exhibit 1:1-2). Dr. White diagnosed the claimant with a strain of muscle fascia of the lower back and radiculopathy of the lumbar region. (CE 1:1). Mr. Waybill told the nurse case manager that he had a hip injection in July in order to provide pain relief. (CE 1:1). He indicated that the pain in his hip was "starting to creep back in," following the injection. (CE 1:1). Dr. White told the nurse case manager and Mr. Waybill that, based upon the results of the injection to the left hip, "he would be confident in offering him [Waybill] a surgical procedure to repair that labral tear." (CE 1:1). Dr. White indicated that he would like the claimant to have his radiofrequency ablation before any surgery was scheduled, as the claimant would be on crutches for six weeks following the surgery. (CE 1:1). Dr. White indicated that the claimant would not be able to get surgery until "mid-October" as it would be three months from the injection before surgery could be done. (CE 1:1). In a medical record dated August 16, 2022, Dr. White indicated that he recommended proceeding with a hip arthroscopy to be set up "in the fall." (DE A:2). Nurse Bass indicated as an action plan that she would "discuss and suggest authorization of surgical procedure [sic] and get it over to the work comp [sic] office coordinator. . ." (CE 1:2).

The claimant alleges that he was seen by Dr. White on August 16, 2022. (Testimony). Dr. White recommended a surgery for the claimant's left hip. (Testimony). Dr. White discussed the risks and benefits of the surgery with Mr. Waybill. (Testimony). After this discussion, Mr. Waybill concluded that he wanted to have the recommended surgery. (Testimony). The claimant testified that Dr. White told him that without surgery, he would not improve; however, his condition could worsen. (Testimony). Mr.

Waybill testified that he told the nurse case manager on several occasions that he wished to proceed with the surgery. (Testimony).

On August 29, 2022, the claimant had another confirmatory medial branch block trial at L4-5 and L5-S1. (DE B:4).

Mr. Waybill had a radiofrequency ablation, which occurred in mid-September. (Testimony). Dr. White indicated that he wished to see the results of the radiofrequency ablation before proceeding with surgery. (Testimony).

Dr. Pospisil examined Mr. Waybill on October 17, 2022. (Testimony). Mr. Waybill testified that she was unsure as to why the claimant would be seen by a doctor at the University of Iowa, as Dr. White was “one of the best.” (Testimony). This visit was also a follow-up to explore the results of the radiofrequency ablation performed in mid-September. (Testimony). Dr. Pospisil recommended that the claimant have physical therapy two to three times per week, use lidocaine patches as needed, use a TENS unit as needed, and use Flexeril as needed. (DE E:9). Dr. Pospisil confirmed a referral for the left hip, and placed the claimant on sitting duties. (DE E:9).

Counsel for Mr. Waybill discussed the possibility of a second opinion examination with Dr. Westermann, as arranged by the defendant. (Testimony). If the examination was an independent medical examination, then Mr. Waybill agreed that he would attend; however, if it was a redirection of care to Dr. Westermann, he would not want to attend the examination. (Testimony). He also would not want to proceed with any care recommended by an examination not performed by Dr. White. (Testimony).

#### CONCLUSIONS OF LAW

Iowa Code 85.27(4) provides, in relevant part:

For purposes of this section, the employer is obligated 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).

“Iowa Code section 85.27(4) affords an employer who does not contest the compensability of a workplace injury a qualified statutory right to control the medical care provided to an injured employee.” Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 769 (Iowa 2016) (citing R.R. Donnelly & Sons v. Barnett, 670 N.W.2d 190, 195, 197 (Iowa 2003)). “In enacting the right-to-choose provision in section 85.27(4),

our legislature sought to balance the interests of injured employees against the competing interests of their employers.” Ramirez, 878 N.W.2d at 770-71 (citing Bell Bros., 779 N.W.2d at 202, 207; IBP, Inc. v. Harker, 633 N.W.2d 322, 326-27 (Iowa 2001)).

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).

The employer must furnish “reasonable medical services and supplies *and* reasonable and necessary appliances to treat an injured employee.” Stone Container Corp. v. Castle, 657 N.W.2d 485, 490 (Iowa 2003)(emphasis in original). Such employer-provided care “must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee.” Iowa Code section 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 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). An injured employee dissatisfied with the employer-furnished care (or lack thereof) may share the employee’s discontent with the employer and if the parties cannot reach an agreement on alternate care, “the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order the care.” Id. “Determining what care is reasonable under the statute is a question of fact.” Long, 528 N.W.2d at 123; Pirelli-Armstrong Tire Co., 562 N.W.2d at 436. As the party seeking relief in the form of alternate care, the employee bears the burden of proving that the authorized care is unreasonable. Id. at 124; Gwinn, 779 N.W.2d at 209; Pirelli-Armstrong Tire Co., 562 N.W.2d at 436. 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.

As noted in Assman, the 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, or treated. In this case, the defendant wishes to send the claimant to a secondary evaluation. It is unclear whether this is an independent medical evaluation pursuant to Iowa Code section 85.39(1) and the Iowa Rules of Civil Procedure, or whether it is a redirection of care to a different physician. Dr. White, an authorized treating physician, has recommended that the claimant proceed with surgery to his left hip. According to the claimant’s credible testimony, Dr.

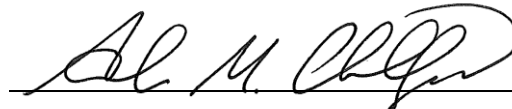
Pospisil expressed doubt as to why another examination is needed when Dr. White recommended a surgery.

Proceeding with another evaluation at this time is not reasonable considering an authorized treating physician, Dr. White, has recommended surgery. No one has questioned Dr. White's recommendations or qualifications. The defendant chose to send Mr. Waybill to Dr. White. The defendant seems to be engaged in an exercise in finding a reason to deny the recommended surgery. Based upon the information in the record, the claimant has proven that the offered care (or lack of offered care in this case) is unreasonable.

IT IS THEREFORE ORDERED:

1. The claimant's petition for alternate care is granted.
2. Within ten (10) days of the date of this order, the defendant shall authorize a left hip surgery as recommended by Dr. White.

Signed and filed this 18<sup>th</sup> day of October, 2022.

A handwritten signature in black ink, appearing to read "Al M. Phillips", written over a horizontal line.

ANDREW M. PHILLIPS  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Nick Cooling (via WCES)

Aaron Oliver (via WCES)