BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JORGE TABORA AYALA, Claimant, vs. CONCRETE TECHNOLOGIES, INC., Employer, and TWIN CITY FIRE INS. CO., Insurance Carrier, Defendants.	File Nos. 21012765.02, 22011094.02 ALTERNATE MEDICAL CARE DECISION HEAD NOTE NO: 2701

STATEMENT OF THE CASE

This is a combined contested case proceeding under Iowa Code chapters 85 and 17A. The expedited procedure of rule 876 IAC 4.48 is invoked by claimant, Jorge Tabora Ayala. Claimant appeared through attorney, Nick Platt, and did not participate personally. Defendants appeared through their attorney, Jane Lorentzen.

The alternate medical care claim came on for hearing on July 3, 2023. 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 Exhibit 1 and Defense Exhibits A through D, which were received without objection. The claimant is seeking further medical treatment for his right leg, right hip, back and whole body (for both claims). In their answers, defendants have specifically admitted that claimant has sustained a right leg condition for which they have provided medical treatment. For both claims, defendants have indicated that the alleged right hip, low back and whole body conditions are being investigated. The defendants indicated at the outset of hearing that they have arranged medical evaluations for those alleged conditions; however, at the time of this hearing, they are not accepting liability for these conditions.

ISSUE

The issue presented for resolution is whether the claimant is entitled to alternate medical care.

FINDINGS OF FACT

The claimant sustained an injury to his right knee on or about October 12, 2021, and on August 12, 2022. The defendants accepted this claim and authorized reasonable treatment. (See Defendants' Exhibits A through D) In fact, at hearing, claimant's counsel specifically commented that the claimant did not challenge that the treatment which has been offered thus far has been reasonable at least up through May 15, 2023.

The claimant is 29 years old at the time of hearing. He did not testify at hearing. In addition to the medical notes in evidence, defense counsel summarized all of the treatment that Mr. Tabora Ayala has received since his initial injury. After his initial injury, defendants authorized physical therapy, medications, diagnostic testing (MRI) and evaluation. After a course of physical therapy, he was evaluated by Steven Aviles, M.D., who performed surgery including a medial meniscus repair and ACL reconstruction. The initial result was good, and he was eventually returned to work without restrictions. On June 8, 2022, Athletico Physical Therapy released him from care, noting that all of his goals had been achieved. (Def. Ex. D)

Claimant then sustained his second injury in August 2022, and again was provided with evaluation, restrictions, diagnostic testing and eventually a second surgery in October 2022. (Def. Ex. C) He again underwent substantial physical therapy. On October 24, 2022, Dr. Aviles again released him. The following is documented: "Jorge returns back for re-evaluation of his right knee arthroscopy with partial medial meniscectomy. He states that he feels great. He has restored all of his motion. He states that he has a little bit of weakness but otherwise is doing okay." (Def. Ex. C)

In April 2023, defendants directed further care to Timothy Vinyard, M.D., also with Iowa Ortho. (Def. Ex. B) Dr. Vinyard documented the following:

> Jorge is a very pleasant 29-year-old male works for Creative Risk solutions here for evaluation of his RIGHT knee pain. He is here today to review the results of his RIGHT knee MR arthrogram. He denies any problems with his knee until he injured it on 10/12/21. This is a Worker's Compensation transfer of care case. His initial injury was when he had a slip and fall at work. He has had a previous right knee ACL reconstruction with hamstring autograft, medial meniscal repair on 02/03/22 and a right knee revision arthroscopy, partial medial meniscectomy on 10/06/22 by Dr. Aviles. Patient complains of sharp pain along the anterior aspect of

> his knee. Pain and swelling is worse with being on standing walking, and going up and down stairs and better with ice, massage, and stretching. Pain persists in spite of rest, ice, anti-inflammatory medical and physical therapy type exercises. He denies any other local or systemic complaints. His history form was reviewed by me. Patient has an interpreter present with him today.

(Def. Ex. B, p. 4) Dr. Vinyard opined that the MRI did not "demonstrate any structural damage" and recommended a cortisone shot which was performed the same day. (Def. Ex. B, p. 6)

Claimant returned to Dr. Vinyard on May 15, 2022. At that time, Dr. Vinyard documented his continued pain described as aching and sharp. "Severity level is moderate-severe." (Def. Ex. A, p. 1) Dr. Vinyard provided the following opinions:

> I had a thorough discussion with the patient. Unfortunately, his symptoms have not completely resolved. I really think the majority of his symptoms are coming from his arthritis and his previous injuries. I do not have anything else to offer him at this time. I would not recommend any further injections, medications or physical therapy. We discussed that he could take some anti-inflammatory medication on his own. I will allow him to return to work without any formal restrictions. He understands that he is starting [to] get arthritis. I told him that my best guess is that there will be times where his knee feels really good and other times where he has significant symptoms. I would be happy to see him back on an as-needed basis. I do not think he requires any further care as it relates to his recent work related injury/symptoms.

(Def. Ex. A, p. 3)

Claimant's counsel began requesting further care for new symptoms in his right hip, low back and whole body on May 5, 2023. (Cl. Ex. 1) "Jorge is having pain in his hips that he believes is from his knee injury and how he has had to walk over the time since his injury. He said that he talked to Dr. Vinyard about this and understood Dr. Vinyard to say he could not treat his hip pain." (Cl. Ex. 1, p. 3) On May 17, 2023, claimant's counsel requested a second opinion regarding the knee. (Cl. Ex. 1, p. 1) There was some further communications between the parties, but ultimately claimant filed both petitions on June 20, 2023.

There is no medical evidence in the record that there is any effective treatment for claimant's knee condition at this time.

Defendants represented at the outset of hearing that they are investigating the allegations of hip and back involvement. To that end, defendants asserted they have arranged medical appointments with two separate specialists in the upcoming weeks.

While the defendants contend that they have not denied the hip/back conditions, they are not, at the time of hearing, authorizing any treatment for these conditions.

REASONING AND CONCLUSIONS OF LAW

Before any benefits can be ordered, including medical benefits, compensability of the claim must be established, either by admission of liability or by adjudication. The summary provisions of Iowa Code section 85.27 as more particularly described in rule 876 IAC 4.48 are not designed to adjudicate disputed compensability of claim.

The Iowa Supreme Court has held:

> We emphasize 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. . . . Thus, the commissioner cannot decide the reasonableness of the alternate care claim without also necessarily deciding the ultimate disputed issue in the case: whether or not the medical condition Barnett was suffering at the time of the request was a work-related injury.
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> Once an employer takes the position in response to a claim for alternate medical care that the care sought is for a noncompensatory injury, the employer cannot assert an authorization defense in response to a subsequent claim by the employee for the expenses of the alternate medical care.

R. R. Donnelly & Sons v. Barnett, 670 N.W.2d 190, 197-198 (Iowa 2003) (fn 2).

Therefore, the portion of claimant's claim for treatment for the alleged right hip and low back conditions must be dismissed because the defendants refuse to accept liability for the condition for which claimant seeks treatment. The defendants thereby lose their right to control the medical care claimant seeks in this proceeding and the claimant is free to choose that care on his own. Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193 (Iowa 2010).

As a result of the denial of liability for the condition sought to be treated in this proceeding, claimant may obtain reasonable medical care from any provider for this treatment but at claimant's expense and seek reimbursement for such care using regular claim proceedings before this agency.

The defendants, however, have accepted responsibility for the right knee/leg claim.

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 (2021).

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).

The claimant alleges that the defendants are no longer offering any treatment for the claimant's right leg/knee condition. In response, the defendants point out that they have timely authorized two surgeries, three MRIs, evaluations with two different knee specialists, medications, restrictions and approximately 100 or more physical therapy appointments with three providers. Claimant's counsel acknowledged at hearing that the treatment up to May 15, 2023, was, in fact, reasonable. The claimant argued that, as of the May 15, 2023, appointment, Dr. Vinyard had no further treatment to help Mr. Tabora Ayala, and that this is essentially unreasonable as a matter of law.

I have some sympathy for the claimant's position. Mr. Tabora Ayala is only 29 years old and has well-documented chronic, moderate to severe right knee symptoms following two work-related surgeries. Dr. Vinyard opined "I do not think he requires any

further care as it relates to his recent work-related injury/symptoms." (Def. Ex. A, p. 3) Very few patients would accept this prognosis without protest.

The problem for the claimant is that he has no medical evidence that there is any treatment which is reasonably suited to treat his injury.[1] The unfortunate reality is that there are times when there is no treatment available to help an injured person's condition. I am not finding that this is the case here; however, I simply have no evidence either way. The burden of proof is on the claimant to prove the care offered by defendants is unreasonable.

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."

In this case, the claimant has failed to prove that there is any treatment which could benefit his condition.

Having stated this, I do admit that I have some significant concerns with Dr. Vinyard's opinions which are confusing or at least unexplained at this time. Dr. Vinyard specifically opined the following: "I would not recommend any further injections, medications or physical therapy. We discussed that he could take some anti-inflammatory medication on his own." (Def. Ex. A, p. 3) Dr. Vinyard apparently offered this opinion in the context of claimant's symptoms coming from his "arthritis and his previous injuries." (Def. Ex. A, p. 3) This possibly suggests that Dr. Vinyard would provide some medication treatment to Mr. Tabora Ayala, however, he deems it unrelated to the work injury. The problem is, in this limited, expedited record, I am not entirely certain what all this means. The claimant has sustained two separate work injuries, both admitted. There is no mention in this limited record of any preexisting right leg condition. The defendants specifically chose not to deny liability for the claimant's right knee condition in spite of Dr. Vinyard's opinion. In other words, given this record, I am not entirely clear whether it is Dr. Vinyard's opinion that there is no effective treatment for claimant's condition, or whether he believes that any treatment he could provide is not related to his work injury.

Nevertheless, since it is the claimant's burden of proof and he has not offered evidence at this time that there is a superior or more extensive modality of treatment available for his condition, the alternate medical care claim must be denied at this time.

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[1] It should be noted that this opinion does not hold that an injured worker must always have medical evidence in order to prove that the care offered by the employer is unreasonable. This is a question which depends upon the facts of the case. In this case, the employer is only offering to allow the claimant to return to the treating physician, who is explicitly offering no care. This is only true, however, after the employer has timely authorized substantial reasonable medical care including two surgeries, multiple diagnostic tests, including three MRIs, pain medications, an injection, multiple specialist evaluations and upwards of a hundred physical therapy appointments. It appears that all of this treatment was timely. In this record, it is at least possible that there truly is no further treatment which can help Mr. Tabora Ayala.

ORDER

THEREFORE IT IS ORDERED:

IT IS THEREFORE ORDERED that the portion of this case involving claimant's alleged right hip, back and whole body conditions should be and is hereby dismissed without prejudice.

IT IS FURTHER ORDERED that if claimant seeks to recover the charges incurred in obtaining the care for which defendants have refused to accept liability, defendants are barred from asserting lack of authorization as a defense for those charges.

IT IS FURTHER ORDERED that claimant has failed to meet his burden of proof that the care offered by the defendants is unreasonable.

Signed and filed this 3RD day of July, 2023.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Nick Platt (via WCES)

Jane Lorentzen (via WCES)