BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

NIKOLAS MORROW, Claimant, vs. WINGER CONTRACTING COMPANY, Employer, and OLD REPUBLIC INSURANCE, Insurance Carrier, Defendants.	File No. 19000418.03 ALTERNATE MEDICAL CARE DECISION

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, Nikolas Morrow. Claimant appeared through his attorney, Robert Gainer. Defendants appeared through their attorney, Timothy Wegman.

The alternate medical care claim came on for hearing on October 4, 2022. The proceedings were digitally recorded. That recording constitutes the official record of this proceeding. Pursuant to the Commissioner's order dated February 16, 2015, 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 4 and defendants' exhibits A and B. Claimant called Laurie Dieken as a witness, and also provided his own sworn testimony. Counsel also offered oral arguments to support their positions.

ISSUE

The issue presented for resolution is whether claimant is entitled to alternate care, specifically an order requiring defendants to re-authorize Thomas Kowalkowski, D.O., FIPP.

FINDINGS OF FACT

Claimant has alleged injuries to his back, ribs, spleen, liver, kidney, left shoulder, hips, lungs, pulmonary function, and mental health as a result of a work injury on July 12, 2019. (See Application for Alternate Care). Defendants have accepted liability for the claim related to the back and lungs/pulmonary conditions, but deny the remaining body parts/conditions. The care sought in this proceeding is related to claimant's back injury, for which defendants have accepted liability.

Laurie Dieken, MA, RN, PHN, CDMS, provided sworn testimony. (See Claimant's Exhibit 1, p. 3 regarding credentials) Ms. Dieken is a nurse case manager who was hired by Gallagher Bassett to attend claimant's appointments with Dr. Kowalkowski in Minnesota. She testified that she has attended two appointments with claimant at Dr. Kowalkowski's office, the first when he had a HydroCision procedure, and the second on September 12, 2022, for his post-procedure follow-up. Ms. Dieken testified that claimant was then scheduled for another follow-up with Dr. Kowalkowski on September 29, 2022, but when she arrived at his office for that visit, the receptionist told her it had been cancelled by the insurance company, and no additional treatment had been authorized.

Ms. Dieken testified that her understanding is that Dr. Kowalkowski wanted to continue his treatment with claimant. She also testified that Dr. Kowalkowski had suggested possible injection therapy at claimant's next appointment. Based on her experience, physical therapy and the other recommendations Dr. Kowalkowski has made are typical after the type of procedure claimant had, and his treatment recommendations have all been related to claimant's low back pain. She was unsure whether Dr. Kowalkowski had reviewed any surveillance materials involving the claimant prior to making any of his recommendations, and agreed that it is important for a doctor to have all available objective and subjective information in making diagnoses and treatment recommendations for patients. Finally, she testified that in her interactions with claimant, she has found him to be honest and credible.

Claimant also provided sworn testimony, and I found him to be a credible witness. He testified that the insurance company originally sent him to Dr. Kowalkowski, and has paid for all of his treatment to date. He was most recently scheduled for an appointment on September 29, 2022, which he later found out was cancelled from his attorney's office. He is happy with the care Dr. Kowalkowski has provided, and wants to continue treatment with him.

Claimant testified that Dr. Kowalkowski has told him to maintain the things he can in his life, as that helps the doctor with his treatment recommendations and diagnoses. Claimant has seen the surveillance report introduced as Defendants' Exhibit B, but has not seen the video. Claimant testified that he enjoys playing golf, and estimated he has golfed about ten times over the past four months. He said that when he plays golf, he is usually "laid up" and sore the next day. He usually plays golf on Saturdays, and occasionally on a Sunday. He has not had to miss work due to playing golf, as he is

able to work through any increased pain. Claimant also continues to do household chores as much as he is able, as he does not have the money to hire help to fix things around the house. He wants to continue his treatment with Dr. Kowalkowski, including his recommendations to continue physical therapy, see a pain psychologist, and receive injection therapy if needed.

On cross-examination, claimant confirmed that he is the person in the photographs included with the written surveillance report. The photographs and report/video involve a golf outing that took place on July 16, 2022. Claimant testified it was a 4-person best shot tournament that was a fundraiser for a youth football program. He testified that he has informed Dr. Kowalkowski that he continues golfing and tells him about other activities as well. Claimant testified that at the time of the golf tournament in July, he was not on the same restrictions he has currently. After the HydroCision procedure, his restrictions were increased. As a result, claimant is not currently golfing. Claimant testified that his recent treatment is working well and his pain levels have been steadily decreasing. The cancelled appointment on September 29 was supposed to be a follow up, as claimant had some increased nerve irritation immediately after the procedure. Claimant is able to work within his current restrictions, and has been working. His current work is not aggravating his low back symptoms, as he is able to move around as needed. His symptoms are aggravated by doing a lot of physical activity. Claimant agreed that any activities that involves twisting, bending, and turning will aggravate his back pain more than just sitting and working.

The records submitted as evidence include nurse case manager Dieken's summary of claimant's September 12, 2022 appointment with Dr. Kowalkowski. (Cl. Ex. 1) Her note indicates the appointment was claimant's first follow-up after the HydroCision procedure on August 29, 2022. (Cl. Ex. 1, p. 1) Claimant indicated the pain in the center of his low back was better, but he continued to have a sharp pain going down his right buttock and the back of his leg. (Cl. Ex. 1, p. 2) Dr. Kowalkowski thought the HydroCision procedure likely irritated the nerves at L4-5 and L5-S1. He thought it should improve with time and additional healing. He saw the physical therapist, who did myofascial release and instructed him on some exercises to continue at home.

Dr. Kowalkowski provided claimant with the following restrictions:

- Sitting - stretching and positional changes every 30 minutes;
- Standing and walking – stretching or resting every one hour;
- Carrying and hip level lifting – 20 pounds, frequently;
- Bending and lifting – 5 pounds with back straight and no twisting, occasionally, but only up to 50 times per hour;
- Pushing and pulling – 20 pounds without bending or 50 pounds on wheels;

(Cl. Ex. 1, p. 3)

Dr. Kowalkowski stated that if there was no improvement in claimant's radicular pain, he would like to do a transforaminal injection at L4-5 and L5-S1 to help calm the

symptoms. (Cl. Ex. 1, p. 2) He recommended claimant perform his physical therapy exercises and stretches daily, and return for evaluation in two weeks. If his radicular pain persisted, they would proceed with the injections. He was also anticipating a return to regular physical therapy after the next visit, and returning to pain psychology. That follow up was the September 29, 2022 appointment that defendants cancelled. (Cl. Ex. 1, p. 3; Defendants' Exhibit A, p. 2)

The surveillance report contains a summary of claimant's activities on July 16, 2022. (Def. Ex. B) As noted above, he attended a golf tournament that day, which took about six hours. (Def. Ex. B, p. 8) Claimant was observed first wiping down the exterior of a golf cart in his driveway. (Def. Ex. B, p. 4) Claimant then traveled to the golf tournament via golf cart, as it took place at a nearby country club. He was observed throughout the day entering and exiting the golf cart, swinging his golf club, bending, twisting, and pivoting. According to the written report, his movements were unrestricted and exhibited no symptoms of injury, pain, or discomfort.

The undersigned has reviewed the surveillance video submitted as part of defendants' exhibit B. Over the course of the footage, claimant is seen primarily driving a golf cart, standing, walking, bending from the waist to place and pick up golf balls, swinging a golf club, putting, and sitting on benches. From my observation of the video, it appears that claimant walks, bends, and swings somewhat stiffly, and he also seems to sit in the cart and on benches more frequently than any of the other golfers. He also seems to lean on his golf club for support, unlike other golfers. However, having no knowledge of how claimant played golf, walked, stood, or bent prior to the work injury, I did not find the video to be particularly useful.

Defendants sent a copy of the surveillance report and video to Dr. Kowalkowski on August 24, 2022; just prior to claimant's HydroCision procedure. (Def. Ex. A, p. 1) Claimant's attorney requested that Dr. Kowalkowski review the materials and then participate in a telephone conference to discuss. A follow-up letter was sent to Dr. Kowalkowski on September 21, 2022, noting that at least seven phone messages had been left regarding scheduling a phone conference, to no avail. (Def. Ex. A, p. 2) The letter advised that defendants "are not going to authorize any additional medical treatment until Tim Wegman (defense counsel) is able to discuss the claimant's present medical status and necessity for further medical treatment as it relates to the work injury." The letter further noted that this included the upcoming appointment set for September 29, 2022.

Defense counsel also notified claimant's attorney that no additional treatment would be authorized until the phone conference with Dr. Kowalkowski, including the September 29 appointment. (See attachment to claimant's application for alternate medical care) Claimant's attorney responded and expressed claimant's dissatisfaction with care, and subsequently filed his petition on September 21, 2022.

Defense counsel noted in his opening statement that a phone conference has been scheduled to take place with Dr. Kowalkowski on October 5, 2022, the day after

the hearing. Defendants intend to authorize ongoing treatment with Dr. Kowalkowski if that is what he recommends after reviewing the surveillance. Defendants essentially argue that they have the right to obtain Dr. Kowalkowski's thoughts on the surveillance prior to authorizing additional treatment.

I disagree with defendants' position. I find the de-authorization of treatment is an unreasonable interference with the medical judgment of claimant's authorized treating physician. Claimant testified that Dr. Kowalkowski's treatment has been effective. The surveillance footage was taken prior to claimant's most recent procedure, when his restrictions were different. Claimant credibly testified that Dr. Kowalkowski is and has been aware of claimant's golfing activities. While defendants have every right to send the surveillance materials to Dr. Kowalkowski and seek his opinions regarding same, defendants have no legal basis on which to terminate or delay the authorized physician's recommended treatments while waiting for that to occur. While his response has not been as timely as they desire, there is no medical evidence to suggest their refusal to authorize care was reasonable.

Defendants' cancellation of the September 29, 2022 appointment and refusal to authorize treatment until after the phone conference with Dr. Kowalkowski is an interference with care and unreasonable. Defendants are essentially offering no care at this time. I find defendants are attempting to determine how claimant should be diagnosed and treated and acting contrary to the current recommendations of the authorized treating physician. While the issue may be essentially moot given the conference has now been scheduled for the day after hearing, I find claimant has proven he is entitled to alternate care.

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. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 16, 1975).

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

> 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.

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. See Iowa Code § 85.27(4). Thus, 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.

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). Defendants are not entitled to interfere with the medical judgment of their own treating physician. Pote v. Mickow Corp., File No. 694639 (Review-Reopening, June 17, 1986).

The right to choose the care means the right to choose the provider, not the treatment modalities recommended by the provider. The employer must provide the treatment, testing, imaging or other treatment modalities recommended by its own authorized treating physician, even if another consulting physician disagrees with those recommendations. Haack v. Von Hoffman Graphics, File No. 1268172, p. 9 (App. July 31, 2002) [MRI and x-rays]; Cahill v. S & H Fabricating & Engineering, (Alt Care, File No. 1138063, May 30, 1997) (work hardening program); Hawxby v. Hallett Materials, File No. 1112821, (Alt Care, February 20, 1996); Leitzen v. Collis, Inc. File No. 1084677, (Alt Care, September 9, 1996). The right to choose the care does not authorize the employer to interfere with the medical judgment of its own treating physician. Boggs v Cargill, Inc. File No. 1050396, (Alt Care, January 31, 1994).

Ultimately, determining whether care is reasonable under the statute is a question of fact. Long, 528 N.W.2d at 123. In this case, I found that defendants are offering no care for the accepted low back condition, as they have de-authorized Dr. Kowalkowski pending a telephone conference. In doing so, defendants have attempted to substitute their judgement regarding the implications of the surveillance materials for the medical judgment of their chosen authorized treating physician. The treatment recommendations made by Dr. Kowalkowski are superior to and more extensive than the care currently being authorized by defendants, which is nothing.

Defendants' actions in this case are especially egregious given that the cancelled appointment was scheduled as a follow-up to a procedure that defendants previously authorized, which took place after the surveillance footage was obtained. Defendants

presented no contrary medical evidence to suggest Dr. Kowalkowski's recommendations are inappropriate, or even that claimant was restricted from golfing in July. Defendants currently admit liability for claimant's low back condition. They selected the authorized treating physician, Dr. Kowalkowski. Defendants are required to follow his recommendations.

ORDER

THEREFORE IT IS ORDERED:

The claimant's petition for alternate medical care is granted.

Defendants shall immediately authorize and pay for claimant's ongoing treatment with Dr. Kowalkowski.

Signed and filed this 5th day of October, 2022.

JESSICA L. CLEEREMAN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Robert Gainer (via WCES)

Timothy Wegman (via WCES)