

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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AMY JOHNSON,	:	
	:	
Claimant,	:	File No. 19700195.03
	:	
vs.	:	ALTERNATE MEDICAL
	:	
CARE INITIATIVES,	:	CARE DECISION
	:	
Employer,	:	
Self-Insured,	:	
Defendant.	:	Head Note No.: 2701

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STATEMENT OF THE CASE

On April 21, 2020, claimant filed a petition for alternate medical care pursuant to Iowa Code 85.27 and 876 Iowa Admin. Code 4.48. The defendant filed an answer. The defendant does not dispute liability for the injury of November 7, 2018 for the lower extremities and low back conditions for which claimant is seeking treatment.

The matter was scheduled for hearing on May 1, 2020, at 10:30 a.m. The undersigned presided over the hearing held via telephone and recorded digitally on May 1, 2020. That recording constitutes the official record of the proceeding under 876 Iowa Admin. Code 4.48(12). Claimant participated personally through attorney Mark Chipokas. The defendant participated through attorney Joseph Thornton. The record consists of:

- Claimant's Exhibits, which are unnumbered, but are comprised of two pages of documents attached to the petition for alternate medical care.
- Defendant's Exhibits A through C.
- Claimant's testimony during the telephonic hearing.

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 17A is the avenue for an appeal.

### ISSUE

The issue under consideration is whether claimant is entitled to alternate care in the form of authorizing treatment with Sunny Kim, M.D., and giving claimant control of her medical care.

### FINDINGS OF FACT

Claimant, Amy Johnson, sustained an injury to her low back and lower extremities as the result of an injury on November 7, 2018, which arose out of and in the course of her employment with Care Initiatives. Defendant has accepted liability for the injury and current causal connection of the treatment claimant is seeking via this alternate care proceeding. The dispute in this case is whether or not the defendant has acted reasonably in their efforts to schedule care for the claimant pursuant to a February 26, 2020, ruling in case number 19700195.02, as issued by Deputy Commissioner Erin Pals, and thus whether claimant is entitled to control her own medical care.

Ms. Johnson testified that she continues to have constant pain due to her work related injury. She rated her pain between 4 or 5 out of 10 on a regular basis. When she walks, her pain increases, which makes walking difficult. She noted that when her left heel hits the ground, she feels pain. Due to ongoing health issues noted in the February 26, 2020, ruling by Deputy Pals, the claimant continues to avoid lengthy car trips, other than several 26-mile trips to Cedar Rapids. (Testimony)

Ms. Johnson contacted Dr. Sunny Kim and arranged a meeting and examination for April 28, 2020. Due to the ongoing COVID-19 pandemic, the claimant and Dr. Kim wore masks, and there was only one other patient in the office at the time. According to Ms. Johnson, Dr. Kim reviewed the claimant's medical reports, but was unable to review imaging. Ms. Johnson indicated that she wishes to continue care with Dr. Kim. (Testimony)

The defendant provided a timeline of attempts made to arrange care for Ms. Johnson pursuant to the February 26, 2020, ruling of Deputy Pals. This timeline is located in Exhibit C. On five occasions between March 4, 2020, and March 24, 2020, counsel for defendant and/or a member of his staff attempted to contact Work Well Clinic in Cedar Rapids, but was forced to leave a message. On March 24, 2020, Work Well returned a call from defense counsel's paralegal indicating that Dr. Pospisil was "tied up with Covid 19 management" and short-staffed. Work Well also indicated to defendant's counsel that Work Well doctors required a record review prior to accepting any evaluations. On March 25, 2020, Work Well contacted defendant counsel's staff and requested that the claimant's records be forwarded. The records were forwarded to the provider on the same day. Subsequent to the records being forwarded to Work

Well, there were additional follow-up calls and e-mails indicating their doctors were stretched thin due to the global pandemic caused by COVID-19. On April 15, 2020, Work Well contacted counsel for defendant and noted that Dr. Brady could not take on the case at this time, but that the office may be able to see Ms. Johnson when “this is all over.” This prompted defendant counsel’s office to contact Work Well and request an appointment for Ms. Johnson in May or June. On April 16, 2020, counsel for defendant found other potential providers to see Ms. Johnson. These providers were contacted on April 20, 2020, to which it was noted that their offices were not taking on new referrals and/or were only taking referrals for patients suffering from the respiratory effects of COVID-19.

Claimant is dissatisfied with the fact that no appointment has been scheduled with a treating physician subsequent to Deputy Pals’ February 26, 2020, ruling. Claimant wishes to have her care transferred to Dr. Sunny Kim, and to be awarded control of her care. Defendant requests that the current petition not be granted and that reconsideration be made to Deputy Pals’ decision and find that claimant’s care should be with Dr. Fields. I find that the attempts made by defendant to obtain care for Ms. Johnson in accordance with Deputy Pals’ February 26, 2020, ruling are reasonable. We are operating in a time of unprecedented challenges for the medical field due to the current COVID-19 pandemic. Linn County, and specifically Cedar Rapids, have experienced higher rates of infection and confirmed cases than other parts of the state of Iowa. This has caused a strain on the medical community, and made it more difficult for providers to see patients. Pursuant to an emergency declaration by the Governor of Iowa, some elective medical procedures were even banned for some time. I am concerned by the fact that the claimant could schedule an appointment with little difficulty, and would note to the defendant that they should continue to attempt to schedule Ms. Johnson for treatment with a treating physician pursuant to Deputy Pals’ February 26, 2020, ruling. Decisions made on alternate care hearings are considered final agency action, and thus, I cannot modify or overrule the decision made by Deputy Pals, as defendant requests. Defendant’s remedy would be to appeal final agency action, such as Deputy Pals’, ruling to the Iowa District Court.

#### 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).

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).

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). Determining what care is reasonable under the statute is a question of fact. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

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 care was unduly inconvenient for the claimant. Id. Because "the employer's obligation under the statute turns on the question of reasonable necessity, not desirability," and injured employee's dissatisfaction with employer-provided care, standing alone, is not enough to find such care unreasonable. Id. Reasonable care includes care necessary to diagnose the condition, and defendants are not entitled to interfere with the medical judgement of its own treating physician. Pote v. Mickow Corp., File No. 694639 (Review-Reopening Decision, June 17, 1986).

Past decisions have held that "[d]efendants cannot compel a physician to provide care, when that physician is unwilling to do so." See Ostwinkle v. Mathey Construction, File No. 5052719 (Alt. Care Decision, Oct. 13, 2017).

Finally, pursuant to a February 16, 2015, order by the workers' compensation commissioner, authority has been delegated to the deputy workers' compensation commissioners to act as the workers' compensation commissioner in presiding at contested case hearings relating to applications for alternate medical care. Pursuant to

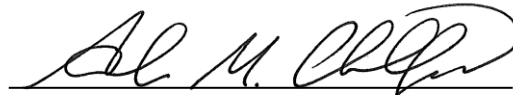
876 IAC 4.48, the deputy presiding at a contested case hearing for an application for alternate medical care is delegated the authority to issue the final agency decision on the application pursuant to Iowa Code 17A.15(1). Iowa Code 17A.15(1) states, “[w]hen an agency presides at the reception of the evidence in a contested case, the decision of the agency is a final decision.” There is no right of intra-agency appeal on these decisions, and the proper avenue for appeal would be to the Iowa District Court.

We are currently in an unprecedented time for individuals seeking medical care. This includes claimants in workers’ compensation cases. I find that the efforts undertaken by the defendant were reasonable, and the claimant has failed to uphold her burden of proof. While it could be argued that not offering care at all was unreasonable, I would note that the defendant’s efforts to arrange care were reasonable in light of Deputy Pals’ February 26, 2020, ruling, and the current pandemic emergency. I also would note that, despite defendant’s suggestion, the February 26, 2020, ruling of Deputy Pals is final agency action. Thus, the undersigned cannot take any action to overrule or modify that ruling. Had the defendant wished to have Deputy Pals’ order overturned, modified, or reconsidered, the proper avenue would have been to appeal to Iowa District Court.

IT IS THEREFORE ORDERED:

1. Claimant’s petition for alternate medical care is denied.
2. Defendant shall authorize treatment with a qualified physician in Cedar Rapids, Iowa, pursuant to the February 26, 2020, ruling of Deputy Erin Pals.

Signed and filed this 4<sup>th</sup> day of May, 2020.



ANDREW M. PHILLIPS  
DEPUTY WORKERS’  
COMPENSATION COMMISSIONER

The parties have been served as follows:

Joseph Thornton (via WCES)

Mark Chipokas (via WCES)