BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

YUNIOR TAMAYO-PEREZ, Claimant, vs. HORMEL FOODS CORP., Employer, Self-Insured, Defendants.	:	File No. 20003849.02 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 September 28, 2021, claimant filed an alternate medical care petition against Hormel Foods, a self-insured employer. Claimant did not appear personally at hearing but rather through attorney, Jennifer Zupp. Defendant appeared through counsel, Abigail Wenninghoff. Defendants answered the Petition on October 8, 2021. The defendant does not dispute liability for the claimant's December 19, 2019, low back injury and condition.[1]

The alternate medical care claim came on for telephone hearing on October 11, 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 claimant's exhibits 1 through 2 and defense exhibits 3 through 8, which were received without objection. In addition, administrative notice was taken of claimant's previous alternate medical care claim file, File No. 20003849.01. This file was reviewed by the undersigned accordingly.

[1] There was a typographical error on claimant's petition listing the injury date as December 19, 2021. At hearing, claimant moved to amend without objection to the correct date, December 19, 2019.

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 an injury which arose out of and in the course of his employment on December 19, 2019. The defendant accepted the claim and has directed medical treatment for his low back condition. Based upon the evidence submitted, it appears this condition is highly symptomatic and disabling. The claimant's primary language is Spanish and an interpreter is utilized for his doctor appointments.

Mr. Tamayo has received authorized treatment from both Allen Eckhoff, M.D., and Anthony Kopp, D.O. Both of these physicians recommended a spinal cord stimulator (SCS) trial. Dr. Eckhoff first raised the possibility of an SCS in February 2021. He then formally recommended an SCS on May 7, 2021. The employer apparently continued to investigate whether this procedure was necessary. Mr. Tamayo filed an alternate medical care petition on July 12, 2021, seeking authorization for this procedure. On July 19, 2021, Hormel filed an answer indicating that it had authorized the treatment requested and claimant dismissed his petition without prejudice.

As a precursor to the SCS trial, Mr. Tamayo is required to undergo an additional MRI, as well as a psychological evaluation. (Claimant's Exhibit 1, page 4) After dismissing the alternate care petition, claimant's counsel began doggedly pursuing the appointment dates she was promised in Hormel's answer to the first alternate care petition. In closing arguments, as well as her Memorandum of Support, claimant's counsel stated that she soon learned that neither the MRI, nor the psychiatric evaluation had actually been scheduled. On July 26, 2021, LeeAnne Sindt, a claims adjustor acting on behalf of the defendant, sent an email to Dr. Eckhoff's office authorizing all of the treatment requested. (Def. Ex. 3) Dr. Eckhoff's office responded that Dr. Eckhoff wanted Mr. Tamayo "to come in for an office visit first." (Def. Ex. 4) This appointment was not scheduled until September 8, 2021. After the September 8, 2021, appointment, claimant's counsel aggressively continued her pursuit of obtaining firm appointment dates for claimant's MRI and psychological evaluation. There were further delays in obtaining a firm date for these appointments. At the time of hearing, claimant's MRI was scheduled for October 22, 2021, and his psychological evaluation was not formally scheduled, however, was in the process of being scheduled for some time around Thanksgiving holiday.

In closing arguments, as well as in written attachments to the pleadings, both attorneys essentially provided "professional statements" regarding various aspects of the defendant's handling of this claim. Claimant's counsel contended that the nurse case manager and an adjustor essentially conspired to delay authorization in various

respects. Defense counsel offered various explanations for the delays in scheduling the appointments.

I find that there have been numerous delays in scheduling the claimant's treatments recommended by the authorized treating physicians. Some of these delays, when reviewed individually, are reasonable. For example, Dr. Eckhoff's office did not want to schedule the MRI until claimant was seen by Dr. Eckhoff again, which resulted in a delay from early August 2021, through September 8, 2021. The fact that the doctor's office recommended this course of action is significant and justifies the delay as "reasonable." Some of the delays, however, are unreasonable. More importantly, the overall delay caused in Mr. Tamayo's treatment is unreasonable. There is no good reason in this record why the MRI and psychological evaluation were not scheduled shortly after Dr. Eckhoff first recommended them in May 2021. It has now been over five months since these treatments were first formally recommended and the firm appointment dates were not even scheduled until after the claimant filed his second alternate medical care petition. I find that the overall delay of claimant's treatment recommended by his authorized treating physicians is unreasonable.

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).

Based upon the record before me, I find that the overall delays in claimant's treatment are unreasonable. Claimant has requested fairly novel relief in this case. At the time of hearing, his MRI was scheduled with a firm date, and the psychological evaluation was close to being scheduled with a firm date.[2] Claimant cites Podgorniak v. Asplundh Tree Expert Company, File No. 5005469 (Review-Reopening, May 8, 2015), as authority that the defendant should completely lose authority to direct the care and receive other novel relief in the order. Podgorniak was a review-reopening claim which had a full and extensive record of evidence as well as years of delays. This case is not a Podgorniak case at this time. It appears claimant's counsel is attempting to proactively prevent it from becoming such a case. The record reflects that the claimant is highly symptomatic and has visited the emergency room on more than one occasion during this extensive, mostly unnecessary delay. It is imperative at this time, that there are no further delays in the claimant's treatment.

ORDER

THEREFORE IT IS ORDERED:

The claimant's petition for alternate medical care is GRANTED. The defendant shall promptly authorize any and all treatment recommended by the authorized treating physicians, Dr. Eckhoff and Dr. Kopp, for his work-related condition, including but not limited to his scheduled MRIs and his psychological evaluation. Failure to comply with this order may result in sanctions.

Signed and filed this 12th day of October, 2021.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Jennifer Zupp (via WCES)

Abigail Wenninghoff (via WCES)

[2] It is noted that scheduling a Spanish-language psychological evaluation for an injured worker is probably challenging.