BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BARBARA KELLEY,	
Claimant,	File No. 20700927.06
vs.	
HOME INSTEAD SENIOR CARE,	ALTERNATE MEDICAL CARE
Employer,	DECISION
and	
PINNACLEPOINT INSURANCE CO.,	
Insurance Carrier, Defendants.	Headnote: 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, Barbara Kelley. Claimant appeared personally and through her attorney, MaKayla Augustine. Defendants appeared through their attorney, Kathryn Johnson.

The alternate medical care claim came on for hearing on February 16, 2022. The proceedings were digitally recorded. That recording constitutes the official record of this proceeding. Pursuant to the Commissioner's February 16, 2015, 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, which includes a total of 10 pages, and Defendants' Exhibit A, which includes a total of 9 pages. Claimant testified on her own behalf. No other witnesses were called to testify. Counsel were permitted an opportunity to argue their cases and the record closed on February 16, 2022.

During the oral proceedings, defendants confirmed that they admit liability and current causal connection for claimant's COVID-19 condition. Defendants deny liability for any alleged mental health injury at this time. The undersigned gave notice to the parties that no alternate medical care decision would be rendered on the issue of claimant's alleged mental health condition.

ISSUE

The issue presented for resolution is whether the claimant is entitled to continued treatment of her lungs as recommended by Alpana Garg, M.D.

FINDINGS OF FACT

The undersigned having considered all the evidence in the record finds:

Barbara Kelley sustained a work-related injury on March 31, 2020. More specifically, claimant contracted COVID-19 while caring for a patient in Bettendorf, Iowa. Defendants accepted the injury and provided medical care.

Initially, there was some confusion as to the identity of claimant's authorized treating physician. According to the evidentiary record, an authorized treating physician referred claimant to the University of Iowa Hospitals and Clinics (UIHC) Post-COVID-19 Clinic in February 2021. (Ex. 1, p. 9) On April 14, 2021, claimant's counsel contacted defendants via electronic correspondence and relayed that, "Ms. Kelley has had months on end issues with authorization and scheduling her appointment at Iowa City Hospitals & Clinics as recommended by her authorized treating physician at CVA." (Ex. 1, p. 10)

Defendants eventually scheduled claimant for an initial evaluation with Patrick Hartley, M.D. of the Pulmonary and Occupational Disease Clinic at UIHC. (Ex. A, p. 1) Claimant believed that she was presenting to Dr. Hartley to establish care. According to defense counsel, defendants intended for Dr. Hartley to serve as claimant's authorized treating physician. Unfortunately, Dr. Hartley operated under the assumption that he was to conduct an independent medical examination. I question how such a misunderstanding could happen.

The evaluation with Dr. Hartley occurred on May 19, 2021. (Ex. A, p. 1) Dr. Hartley opined that claimant's COVID-19 infection was a substantial cause of her ongoing shortness of breath, cough, and fatigue. (Ex. A, p. 8) He felt the treatment claimant received prior to his examination had been appropriate, and opined claimant had not yet reached maximum medical improvement (MMI). (Id.) Lastly, he recommended claimant present for additional treatment consisting of methacholine challenge, repeat spirometry, and negative inspiratory force to evaluate for persistent post-viral bronchial hyperreactivity and possible respiratory muscle weakness. (Ex. A, p. 9)

On May 20, 2021, claimant's counsel documented her confusion as to the purpose of Dr. Hartley's evaluation in an electronic correspondence to defendants. (Ex. 1, p. 9) Claimant's counsel further requested that defendants authorize the February 2021 referral to UIHC's Post-COVID-19 Clinic. (Id.)

On July 16, 2021, claimant presented to Alpana Garg, M.D. of UIHC's Post-COVID-19 Clinic. (Ex. 1, p. 7) At hearing, claimant was unaware of how she ended up

treating with Dr. Garg. Nevertheless, defendants acknowledge Alpana Garg, M.D. as claimant's authorized treating physician. While it was not confirmed at hearing, it appears that the July 16, 2021, appointment was claimant's first appointment with Dr. Garg.

On July 22, 2021, claimant's counsel contacted defendants and requested authorization for Dr. Garg's referrals and recommendations. (Ex. 1, p. 6) According to the electronic correspondence, Dr. Garg referred claimant for evaluations with a psychiatrist and an Ear, Nose, and Throat specialist. (Id.) As previously mentioned, defendants have denied liability for the alleged mental health condition and this alternate medical care decision will not address issues pertaining to the same.

Claimant returned to Dr. Garg on January 14, 2022. (Ex. 1, p. 4) Claimant reported intermittent shortness of breath, occasional coughing, and a persistent feeling that something is wrong with her throat. (Id.) She further reported her frustrations with her workers' compensation provider, as it was not covering the costs of her medications. (Id.) Dr. Garg assessed claimant as a COVID-19 long-hauler manifesting chronic cough. (Ex. 1, p. 5) Dr. Garg prescribed fluticasone-salmeterol and albuterol inhalers, and recommended diagnostic testing of the thyroid and liver. (Id.) While it is not documented in Dr. Garg's medical notes, the After Visit Summary for the January 14, 2022, appointment also provides a referral for a Pulmonary Function Test (PFT). (Ex. 1, p. 3) Claimant seeks to have these recommendations approved through this alternate medical care proceeding.

Later that day, claimant received a notification that her insurer denied authorization for the referral to the Pulmonary Clinic at UIHC. (See Ex. 1, p. 2) It is unclear whether the notification is from the defendant insurer or claimant's own private healthcare. At hearing, claimant testified that both defendants and her private health insurance denied authorization for the referral.

On January 28, 2022, claimant's counsel requested authorization of Dr. Garg's referral to the Pulmonary Clinic at UIHC for additional pulmonary function testing. (Ex. 1, p. 1) The electronic correspondence also notes claimant's dissatisfaction with defendants' "ongoing, unreasonable denial and delay in authorizing Ms. Kelley's treatment nearly every time her authorized treating physicians recommend medical treatment." (Id.) Claimant's counsel also relayed her intent to file a petition for alternate medical care if the recommendations and referrals were not authorized in a timely fashion.

There appears to be some confusion with respect to Dr. Garg's January 14, 2022, referral. After analyzing the January 14, 2022, record, and listening to the parties' arguments at hearing, there appears to be a misunderstanding with respect to what Dr. Garg is actually recommending. Claimant is requesting authorization of a referral "to the Pulmonary Clinic at UIHC for additional pulmonary testing[.]" (Ex. 1, p. 1) Defendants assert claimant is already receiving authorized treatment with the Pulmonary Clinic through Dr. Garg. They further assert appointments with Dr. Garg

have been, and will continue to be, authorized.

At the time of hearing, there was no indication that a follow-up appointment with Dr. Garg for additional pulmonary testing had been authorized or scheduled.

Defendants assert that some of the delay in authorizing claimant's treatment can be attributed to the fact COVID-19 is a new virus and there are several questions that remain unanswered by the scientific community. While it is true COVID-19 is a relatively new virus, this alone does not excuse defendants' conduct. Claimant is not seeking enforcement of recommendations from a family physician. The recommendations at the center of this case come from a medical physician working in the Pulmonary and Post-COVID-19 Clinics at the University of Iowa Hospitals and Clinics, a comprehensive academic medical center.

I find that defendants authorized care through Dr. Garg. Dr. Garg has made recommendations that are consistent with her expertise and reasonable. More specifically, Dr. Garg has recommended two different types of inhalers, diagnostic testing of the thyroid and liver, and additional pulmonary function tests. Defendants offer no basis to challenge the reasonableness of Dr. Garg's recommendations at this time. It is concerning Dr. Garg's recommendations were made over a month prior to the alternate medical care hearing and there is still some confusion as to what has been recommended. Defendants currently control claimant's medical care. As such, defendants are in the best position to request clarification from Dr. Garg as to what she is specifically recommending in the January 14, 2022, medical record.

I find that the care recommended by Dr. Garg is reasonable and necessary. In failing to authorize the care recommended by Dr. Garg, defendants have not offered prompt medical care, nor have they offered reasonable medical care that is suited to treat claimant's work injury. While it cannot be known with any certainty at this time when claimant can be scheduled for the recommended additional testing, the undersigned notes that there has already been a delay of more than a month since authorization was requested. Further delay is not appropriate or reasonable.

If defendants intend to retain any right to direct or authorize medical care, they should act with haste. If defendants fail to timely authorize necessary medical care recommended by the authorized physician, they risk losing any rights they may still possess to direct future medical care.

REASONING AND CONCLUSIONS OF LAW

Claimant's original notice and petition for alternate medical care asserts a request for authorization of treatments for her respiratory system, lungs, and mental health. During hearing, defendants admitted liability and current causal connection for injuries and conditions relating to claimant's respiratory system and lungs. Defendants denied liability for the alleged mental health condition.

Before any benefits can be ordered in an alternate medical care proceeding 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 a 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).

Given the denial of liability, claimant's original notice and petition for alternate medical care must be dismissed with respect to the claim for treatment of her mental health condition. Given their denial of liability for the mental health condition sought to be treated in the petition for alternate medical care, defendants lose their right to control the medical care claimant seeks for these conditions during their period of denial and the claimant is free to choose that care. Brewer-Strong v. HNI Corp., 913 N.W.2d 235 (Iowa 2018); 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 conditions 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. Haack v. Von Hoffman Graphics, File No. 1268172 (App. July 31,2002); Kindhart v. Fort Des Moines Hotel, I Iowa Industrial Comm'r Decisions No. 3, 611 (App. March 27, 1985). "[T]he employer has no right to choose the medical care when compensability is contested." Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, 204 (Iowa 2010). Therefore, defendants are precluded from asserting an authorization defense as to any future treatment during

their period of denial for the alleged mental health conditions.

Defendants admit liability for the issues within claimant's respiratory system and lungs. Therefore, it is appropriate to proceed with the alternate medical care proceeding with respect to the request for treatment of the same. R. R. Donnelly & Sons v. Barnett, 670 N.W.2d 190 (Iowa 2003); Iowa Code section 85.27(4); 876 IAC 4.48(7).

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).

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. 6.904(3)(e); 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). 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 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 18, 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, June 17, 1986).

When a designated physician refers a patient to another physician, that physician acts as the defendant employer's agent. Permission for the referral from defendant is not necessary. Kittrell v. Allen Memorial Hospital, Thirty-fourth Biennial Report of the Industrial Commissioner, 164 (Arb. November 1, 1979) (aff'd by industrial commissioner). See also Limoges v. Meier Auto Salvage, I Iowa Industrial

Commissioner Reports 207 (1981).

In this case, defendants have authorized some medical care; however, they have not authorized the reasonable medical recommendations of Dr. Garg, claimant's authorized treating physician. Defendants have not authorized prompt medical care or care that is reasonably suited to treat claimant's injury. Defendants' actions are an interference with the treating physician's recommendations. Therefore, I conclude that claimant has established entitlement to alternate medical care.

Defendants were permitted to select the authorized medical provider, Dr. Garg. Iowa Code section 85.27(4). Having exercised that right to select the authorized provider, defendants may not ignore Dr. Garg's recommendations. Defendants may not interfere with Dr. Garg's professional medical judgment, whether by design or delay. Given that claimant has already been waiting a month for authorization of the recommended additional testing, and given that the evidentiary record notes additional delays in authorizing medical treatment have occurred, I conclude that claimant has proven that there has been an unreasonable delay in providing care.

It is evident from the evidentiary record that defendants have, to some extent, authorized reasonable and appropriate treatment in the past. At hearing, defendants acknowledged that Dr. Garg is claimant's authorized treating physician, and they intend to authorize additional appointments with Dr. Garg and at the Pulmonary Clinic. Given this information, I cannot find that defendants have abandoned care.

I conclude that defendants continue to maintain the right to direct medical care, provided they act promptly to schedule and authorize the care ordered in this decision. If defendants fail to timely authorize necessary medical care recommended by the authorized physician, they risk losing any rights they may still possess to direct future medical care. I will not hesitate to strip defendants of their ability to control care should the delay in claimant's medical care continue.

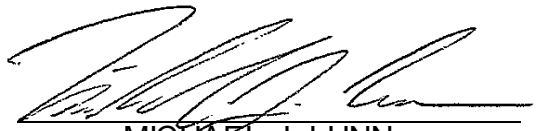
ORDER

THEREFORE, IT IS ORDERED:

Claimant's petition for alternate medical care is granted with respect to treatment of the respiratory system and lungs.

With respect to the request for treatment of the alleged mental health condition, claimant's petition for alternate medical care is dismissed without prejudice.

Signed and filed this ____17th____ day of February, 2022.



MICHAEL J. LUNN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served as follows:

MaKayla Augustine (via WCES)

Kathryn Johnson (via WCES)