BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BRAYAN CACERES, Claimant, vs. NORTHWEST STEEL ERECTION INC., Employer, TWIN CITY FIRE INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 20009310.02 ALTERNATE CARE DECISION Headnotes: 2701

I. STATEMENT OF THE CASE

On August 10, 2022, Brayan Caceres applied with the agency for alternate care under Iowa Code section 85.27 and agency rule 876 IAC 4.48 for alleged work injuries to the right knee, left knee, back, and body as a whole.[1] The agency scheduled the case for an alternate care hearing on August 23, 2022. The defendants, employer Northwest Steel Erection Inc. (Northwest) and insurance carrier Twin City Fire Insurance Company (Twin City), answered on August 22, 2022, accepting liability for the right knee injury and asserting they could neither admit nor deny liability for the alleged injuries to the left knee, back, or whole body before an independent medical examination with Robert Broghammer, M.D., scheduled for August 29, 2022.

The undersigned presided over an alternate care hearing held by telephone and recorded on August 23, 2022. The audio recording constitutes the official record of the proceeding under agency rule 876 IAC 4.48(12). Caceres participated personally and through attorney Nicholas W. Platt. The defendants participated through attorney Jane V. Lorentzen. The record consists of:

- Claimant's Exhibits 1 through 3; and
- Defendants' Exhibits A through D and F.[2]

[1] Caceres moved to amend the petition to allege injuries to the right knee, left knee, back, and body as a whole. The defendants' answer responded to the injuries identified in the motion to the amend. The undersigned issued an oral ruling granting the motion to amend during the hearing.

[2] The defendants withdrew proposed Exhibit E so their exhibits total ten or fewer pages in accordance with agency rule 876 IAC 4.48(9).

II. DISMISSAL WITHOUT PREJUDICE

Caceres seeks alternate care for alleged injuries to his right knee, left knee, back, and body as a whole. In the defendants' answer, they admit liability for the claim relating to Caceres's right knee. However, they also assert they "can neither admit nor deny" the alleged work injuries to his left knee, back, or body as a whole before an independent medical examination scheduled to occur after the hearing. This places the defendants' liability for the alleged injuries to Caceres's left knee, back, and whole body at issue and as explained below, requires dismissal without prejudice of Caceres's application for alternate care relating to the alleged injuries to his left knee, back, and whole body.

Liability for the alleged injury is a threshold issue when the agency considers an application for alternate care. See, e.g., Tyson Foods, Inc. v. Hedlund, 740 N.W.2d 192, 198–99 (Iowa 2007). Such an application cannot be filed "if the liability of the employer is an issue. If an application is filed where the liability of the employer is an issue, the application will be dismissed without prejudice." 876 IAC 4.48(7). The Iowa Supreme Court has "emphasize[d] 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." R.R. Donnelly & Sons v. Barnett, 670 N.W.2d 190, 197 (Iowa 2003).

The defendants' denial of liability means they lose the right to choose the care received by Caceres for the alleged injury. Winnebago Indus., Inc. v. Haverly, 727 N.W.2d 567, 575 (Iowa 2006) (citing Trade Prof'ls, Inc. v. Shriver, 661 N.W.2d 119, 124 (Iowa 2003)). Caceres may obtain reasonable care from any provider for the alleged injury, at the claimant's expense, and seek reimbursement for such care using regular claim proceedings before this agency. See Shriver, 661 N.W.2d at 121–25 (affirming on judicial review an agency decision ordering the payment of medical expenses for unauthorized care because the defendants denied liability for the alleged injury and therefore lost the right to control care).

The denial of liability and resultant dismissal without prejudice also limit the defendants' ability to assert a lack-of-authorization defense with respect to care relating to the injury alleged by the claimant.

> The authorization defense is applicable when the commissioner has denied a claimant's petition for alternate care on its merits. But it is inapplicable where the claimant's petition for alternate care was denied on procedural grounds such that the commissioner could not adjudicate the petition's merits, as is the case when the employer disputes the compensability of the injury.

Brewer-Strong v. HNI Corp., 913 N.W.2d 235, 243–44 (Iowa 2018) (citing Barnett, 670 N.W.2d at 97).

However, the defendants' initial denial of liability does not necessarily forever bar them from asserting an authorization defense in this case for care relating to the injuries or conditions alleged in the petition. See id. at 244. The defendants may change their position to accept liability if new information provides sufficient proof to justify doing so. Id. And if the defendants change their position, the defendants may regain the "authorization defense and the statutory rights and obligations to provide and choose appropriate medical care pursuant to Iowa Code section 85.27" moving forward, unless they subsequently change their position to once again deny liability or the commissioner grants a subsequent application for alternate care by the claimant. Id. at 245; see also Haverly, 727 N.W.2d at 575 ("There might, in some cases, be a significant change in the facts after the admission of liability that could justify a change of position by the employer . . . .").

III. ISSUE

The issue under consideration is whether Caceres is entitled to alternate care in the form of a second opinion regarding his right knee injury.

IV. FINDINGS OF FACT

Caceres sustained a work injury to his right knee on . The defendants accepted liability and directed care. The injury has required treatment.

First, Dr. Nicholson performed surgery including anterior cruciate ligament (ACL) reconstruction and microfracture of the medial femoral condyle. (Ex. A, p. 1) Because Caceres experienced ongoing pain, Dr. Nicholson referred him to Dr. Honkamp, who recommended an injection. (Ex. A, p. 1) After that proved ineffective, Dr. Honkamp performed a scope and cartilage biopsy. (Ex. A, p. 1)

Dr. Honkamp referred Caceres to Dr. Sullivan at Des Moines Orthopaedic Surgeons (DMOS), who recommended medial meniscus transplant and concomitant osteochondral allograft to the medial femoral condyle. (Ex. A, p. 2) The defendants obtained a second opinion at the University of Iowa Hospitals and Clinics (UIHC) with Dr. Bollier, who concurred with Dr. Sullivan's recommendation and performed surgery. (Exs. C, D, and F)

After the surgery, Caceres continued to experience symptoms. (Exs. 1, C, D, F) He obtained counsel to help get additional care. (Ex. 1) Claimant's counsel informed the defendants of Caceres's alleged injuries to his left leg, back, and whole body as well as ongoing symptoms and request for additional care for his right knee multiple times between May 27, 2022, and the filing of the petition concerning application for alternate care that initiated this case. (Exs. 1–3)

On July 25, 2022, Dr. Bollier saw Caceres and noted:

> He reports that his medial knee pain has been relatively same since last visit. However, his overall pain, function, and leg pain is improved. He has

> pain when he is ambulatory, reports some swelling if he is up and about for long periods of time. Also some difficulty with stairs.
>
> ****
>
> Overall improved but still having medial knee pain. This is not unexpected after 3 knee surgeries and a bad knee problem.

(Ex. C, pp. 1–2) Nonetheless, Dr. Bollier found Caceres was at maximum medical improvement (MMI), requested a functional capacity evaluation (FCE) to inform the assignment of work restrictions, assessed permanent disability, and released Caceres from care despite his congoing complaints. (Ex. C, p. 2)

Claimant's counsel sent a follow-up email, dated July 26, 2022, in which he asked about additional care because Caceres "was released today for his knee despite ongoing issues." (Ex. 3, p. 3) On August 2, 2022, claimant's counsel again emailed the defendants regarding authorization of care and informed them he would apply with the agency for alternate care if they did not act. (Ex. 3, p. 6) On August 10, 2022, Caceres applied with the agency for alternate care by filing the petition that initiated this case and prayed for direction to medical care for right knee.

After the July 26, 2022 email from claimant's counsel, the defendants have arranged for an IME with Dr. Broghammer regarding Caceres's alleged injuries to the left leg, back, and whole body. (Answer) However, they had not arranged for additional care for his right knee as of the time of hearing. At hearing, defense counsel stated the defendants were willing to arrange for additional care with Dr. Bollier. It is unclear why the defendants had not arranged for additional care with Dr. Bollier during the nearly four weeks between July 26, 2022, and the date of hearing. At hearing, claimant's counsel requested care with another doctor because Dr. Bollier had found Caceres at MMI and released him from care despite his ongoing complaints.

V. CONCLUSIONS OF LAW

"Iowa Code section 85.27(4) affords an employer who does not contest the compensability of a workplace injury a qualified statutory right to control the medical care provided to an injured employee." Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 769 (Iowa 2016) (citing R.R. Donnelly & Sons v. Barnett, 670 N.W.2d 190, 195, 197 (Iowa 2003)). Under the law, the employer must "furnish reasonable medical services and supplies *and* reasonable and necessary appliances to treat an injured employee." Stone Container Corp. v. Castle, 657 N.W.2d 485, 490 (Iowa 2003) (emphasis in original). Such employer-provided care "must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee." Iowa Code § 85.27(4).

An injured employee dissatisfied with the employer-furnished care (or lack thereof) may share the employee's discontent with the employer and if the parties cannot reach an agreement on alternate care, "the commissioner may, upon application

and reasonable proofs of the necessity therefor, allow and order other care." Id. "Determining what care is reasonable under the statute is a question of fact." Long v. Roberts Dairy Co., 528 N.W.2d 122, 123 (Iowa 1995); Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433, 436 (Iowa 1997). As the party seeking relief in the form of alternate care, the employee bears the burden of proving that the authorized care is unreasonable. Id. at 124; Gwinn, 779 N.W.2d at 209; Reynolds, 562 N.W.2d at 436; Long, 528 N.W.2d at 124. Because "the employer's obligation under the statute turns on the question of reasonable necessity, not desirability," an injured employee's dissatisfaction with employer-provided care, standing alone, is not enough to find such care unreasonable. Id.

The statute requires an employee to notify the defendants of his dissatisfaction with care before applying to the agency for alternate care to allow the parties an opportunity to reach an understanding regarding care. Here, Caceres sought care generally for his ongoing right-leg symptoms. There is an insufficient basis in the record from which to conclude Caceres notified the defendants he was dissatisfied with Dr. Bollier individually and wanted a second opinion until the time of hearing. Put otherwise, Caceres requested additional care without specifying his desire regarding the physician providing it.

Nonetheless, about a month has passed since Dr. Bollier released Caceres from care with no recommendation regarding future care despite his ongoing symptoms. It is unreasonable given the short amount of time and lack of intervening event to expect a different outcome after a follow-up appointment. It would be unreasonable to return Caceres to Dr. Bollier for additional care under the circumstances.

The defendants did not act on his request with respect to additional care for the right knee. While the defendants have arranged an IME with Dr. Broghammer regarding his alleged injuries to the left knee, back, and whole body, they have not arranged care with Dr. Bollier for Caceres's ongoing symptoms. Iowa Code section 85.27(4) requires that employer-controlled care must be "offered promptly." The defendants have known for a month that Caceres wants additional care for symptomatic right knee and have not acted on his complaint. This delay is unreasonable. The defendants have failed to promptly offer care as required by statute.

Logistically, there can be a delay between when a doctor has availability to see a patient and when care is arranged. Here, the defendants must finalize arrangements for care with a provider and Caceres within fourteen days of the date of the decision with the date of the appointment with the provider occurring as soon as possible, given the parties' respective schedules. The defendants may make arrangements for additional care with a provider of their choice.

VI. ORDER

Under the above findings of facts and conclusions of law, it is ordered:

1) The application for alternate care with respect to the alleged work injuries to Caceres's left knee, back, and whole body is DISMISSED WITHOUT PREJUDICE.

2) The application with respect to Caceres's right knee injury is GRANTED.

3) Within fourteen (14) days of the date of this decision, the defendants shall finalize arrangements for Caceres to receive care for his right knee with a provider of their choice, other than Dr. Bollier, with the appointment occurring as soon as possible.

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, there is no appeal of this decision to the commissioner, only judicial review in a district court under the Iowa Administrative Procedure Act, Iowa Code chapter 17A.

Signed and filed this 23rd day of August, 2022.

BEN HUMPHREY
Deputy Workers' Compensation Commissioner

The parties have been served, as follows:

Nicholas W. Platt (via WCES)

Jane V. Lortenzen (via WCES)