BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JAMES PICKETT, Claimant, vs. BARR-NUNN TRANSPORTATION, LLC, Employer, and ACE AMERICAN INSURANCE CO., Insurance Carrier, Defendants.	File No. 21013340.03 ALTERNATE MEDICAL CARE DECISION Head Note: 2701

STATEMENT OF THE CASE

On February 20, 2023, the claimant filed a petition for alternate medical care pursuant to Iowa Code 85.27(4) and 876 Iowa Administrative Code 4.48. The defendants filed an answer admitting liability for injuries related to claimant's low back.

The undersigned presided over the hearing held via telephone and recorded digitally on March 2, 2023. That recording constitutes the official record of the proceeding pursuant to 876 Iowa Administrative Code 4.48(12). Claimant participated through his attorney, Corey Walker. The defendants participated through their attorney, Sasha Finke.

Prior to the hearing, the claimant submitted ten pages of exhibits, marked as Exhibits 1-5. The defendants submitted six pages of exhibits labeled A-B. The evidentiary record consists of Claimant's Exhibit 1-5 and Defendants' Exhibits A-B.

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 Chapter 17A is the avenue for an appeal.

ISSUE

The issue under consideration is whether the defendants should be ordered to authorize and provide a pain pump trial as recommended by an authorized treating physician.

FINDINGS OF FACT

Claimant, James Pickett, alleges that he sustained an injury to his lower back on or about September 29, 2021, while working for Barr-Nunn Transportation, LLC, in Orange County, Florida. The defendants admitted liability for the low back injury in their answer, and again at the hearing.

Mr. Pickett is a patient of Chad Gorman, M.D., in Florida. (Claimant's Exhibit 1). Dr. Gorman is board certified and specializes in "treating musculoskeletal injury and chronic pain of the spine and extremities." (CE 5).

The defendants provide a letter addressed to Dr. Gorman on Barr-Nunn letterhead dated June 7, 2022. (Defendants' Exhibit B). There are certain questions and hand-written responses. (DE B). It appears that Dr. Gorman responded, but his signature is not appended to the letter, so it is unclear whether he, or a member of his staff, drafted the response. (DE B). Dr. Gorman noted that the claimant could have additional pain medication or lumbar epidural steroid injections to provide additional treatment. (DE B). If these injections were successful, the claimant would need to return for treatment on a monthly basis. (DE B).

On February 7, 2023, Mr. Pickett visited Physician Partners of America Pain Relief Group in New Port Richey, Florida. (CE 1:1-5). Theresa Gabriel, APRN, examined Mr. Pickett during this visit. (CE 1:1-5). Mr. Pickett is 47 years old. (CE 1:1). Mr. Pickett's chief complaints were lower back pain and lower extremity pain. (CE 1:1). He noted that he was injured while trying to switch axels on a semi-truck. (CE 1:1). While he was doing this, he developed severe pain in his lower back. (CE 1:1). Mr. Pickett had continued pain in his lower back that radiated down his right leg. (CE 1:1). Standing, walking, sitting, exercising, and bending worsened his pain. (CE 1:1). He wore a back brace due to his pain, and noted having a previous lumbar surgery on December 16, 2021. (CE 1:1). He also previously had a nerve block and epidural injection which provided minimal relief. (CE 1:2). Ms. Gabriel diagnosed Mr. Pickett with worsening lumbar postlaminectomy syndrome with pain radiating down his right leg. (CE 1:4). She ordered a trial of a pain pump. (CE 1:4; 2:6). She noted that this was medically necessary as the claimant had attempted and failed "over 12 weeks of conservative treatments, PT, medication, injections and surgery." (CE 1:4). Dr. Gorman electronically approved this on February 9, 2023. (CE 1:5).

On February 16, 2023, Mahdy Flores, D.O., conducted a utilization review and/or records review on behalf of Sedgwick. (DE A:1-5). Dr. Flores is board certified in family medicine and occupational medicine. (DE A:1-5). Dr. Flores reviewed a referral form from Sedgwick, which is not in the record, the February 7, 2023, medical record, and a May 10, 2022, psychiatric evaluation, which is also not in the record. (DE A:1). She never examined Mr. Pickett in arriving at her determination. (DE A:1-5). Dr. Flores

responded to the question, "[i]s [i]mplantable [i]nfusion [p]ump [t]rial for severe spasticity medically necessary?" (DE A:1). Dr. Flores opined that "[t]he request is not medically necessary." (DE A:1). She noted that "ODG" states implantable infusion systems are "recommended only as an end-stage treatment alternative for selected patients for specific conditions . . ." after failure of six months of less invasive methods and following a successful temporary trial. (DE A:1). She continued her opinion noting that even a temporary trial of infusion pumps are considered medically necessary to deliver drugs for treatment of certain cancers, severe refractory spasticity of cerebral or spinal cord origin in unresponsive spinal patients who could not use oral medications. (DE A:1). She went on to outline additional factors considered. (DE A:1). Dr. Mahdy noted, "[d]espite the claimants [*sic*] ongoing pain; there was no documentation regarding failure of oral medication and no indication that all contraindications haven't [*sic*] ruled out." (DE A:2). She concluded, "[i]n the setting of nonmalignant pain; there was no indication regarding failure [of] psychologic treatment and no indication that there was intractable pain related to objective documentation of pathology given that the claimant's objective examination was relatively benign." (DE A:2).

Sedgwick, who appears to be the third-party administrator for the defendant-insurer, sent Dr. Gorman a letter dated February 16, 2023. (CE 3:7-8). The letter is from their utilization review department, and denied authorization for the pain pump trial, noting that it was "[m]edically [n]ot [c]ertified by [p]hysician [a]dvisor." (CE 3:7).

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).

"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)). "In enacting the right-to-choose provision in section 85.27(4), our legislature sought to balance the interests of injured employees against the competing interests of their employers." Ramirez, 878 N.W.2d at 770-71 (citing Bell

Bros., 779 N.W.2d at 202, 207; IBP, Inc. v. Harker, 633 N.W.2d 322, 326-27 (Iowa 2001)).

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; 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).

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 section 85.27(4).

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). 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 the care." Id. "Determining what care is reasonable under the statute is a question of fact." Long, 528 N.W.2d at 123; Pirelli-Armstrong Tire Co., 562 N.W.2d at 436. 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; Pirelli-Armstrong Tire Co., 562 N.W.2d at 436. 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.

As noted in Assman, the 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, or treated. Dr. Gorman, who is a pain management physician, is board certified, is an authorized treating physician, and most importantly has actually treated the claimant, recommends a pain pump trial. The defendants rely solely on the opinions of a physician who has never examined or treated the claimant in an attempt to deny this care. In using the opinions of Dr. Mahdy in an attempt to deny care recommended by an authorized treating physician, the defendants are interfering with the medical judgment of the treating provider.

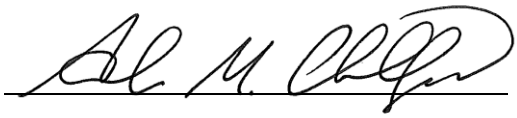
It is reasonable for a claimant to rely on the recommendations of their treating physician. In this case, Dr. Gorman, who appears to be well qualified in the field of pain management, is recommending a pain pump trial. The defendants are relying simply on a records review in an attempt to defray their responsibility for providing medical care. The claimant's request for care is entirely reasonable. By not abiding by the recommendations of treating physician Dr. Gorman, the defendants are acting unreasonably and are unnecessarily interfering in the judgment of an authorized treating physician.

IT IS THEREFORE ORDERED:

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

2. Within ten (10) days of the date of this order, the defendant shall authorize the treatment recommended by Dr. Gorman.

Signed and filed this ____2nd____ day of March, 2023.



ANDREW M. PHILLIPS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Corey Walker (via WCES)

Sasha Finke (via WCES)