BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KEVIN SIMPSON, Claimant, vs. PETERSON CONTRACTORS, INC., Employer, and XL SPECIALTY INS. CO., Insurance Carrier, Defendants.	File No. 20013123.03 ALTERNATE MEDICAL CARE DECISION Head Note: 2701

STATEMENT OF THE CASE

On November 23, 2021, 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 accepting liability for injuries related to the low back.

The undersigned presided over the hearing held via telephone and recorded digitally on December 8, 2021. That recording constitutes the official record of the proceeding pursuant to 876 Iowa Administrative Code 4.48(12). Claimant participated through his attorney, Mindi Vervaecke. The defendants participated through their attorney, Anita Dhar Miller. The evidentiary record consists of Claimant's Exhibits 1-7 and Defendants' Exhibits A-E. All of the exhibits were admitted and received into evidence without objection.

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 claimant is entitled to alternate medical care in the form of additional pain management, including injections with Dr. Mark Kline, and evaluation and treatment with either Dr. Matthew Howard or Dr. Kevin Eck.

FINDINGS OF FACT

Claimant, Kevin Simpson, alleges that he sustained an injury to his low back with radiation to his lower extremities on September 22, 2020, while working for defendant Peterson Contractors, Inc., in Austin, Texas. The defendants accepted liability for the low back injury in their answer, and again verbally at the hearing.

There is a dispute in this case as to whether or not the claimant named the correct insurer in their petition. The claimant named XL Specialty Insurance Co., based upon information available to them. The defendants contend that Liberty Mutual is the correct insurer. As discussed on the record at hearing, an alternate care proceeding is not the correct venue to discuss whether or not the proper insurer is named. The defendants could either file a motion to drop a named party, or a petition under Iowa Code section 85.21 if there is a liability dispute amongst insurers.

The claimant received a set of injections with Dr. Mark Kline in February of 2021. (Claimant's Exhibits). Subsequent recommendations for injections were denied by the insurer. (CE). Mr. Simpson also treated with Dr. Fields; however, Dr. Fields retired, and no additional treatment was provided. (CE). Claimant's counsel represented that the claimant has received no authorized care since February of 2021.

Defendants' counsel indicated that Mr. Simpson was to choose a new provider, and that the insurer had not heard from Mr. Simpson as to who he wanted to treat him. (Defendants' Exhibits).

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 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.

The defendants and their insurers are pointing fingers at one another as to who is the proper insurer to authorize care. An alternate care proceeding is not the proper venue to determine which insurer is liable for the claimant's treatment; however, the employer is the one who is responsible for providing care. In this case, the defendant-employer has not authorized care since February of 2021. This is almost one year with no authorized care for the claimant. In the interim, one of the possible insurers has denied certain care based upon utilization management. There is also no current authorized treating physician.

The defendants have effectively abandoned care and are shirking their responsibilities under the statute. It is not reasonable to go almost one year with no authorized treating physician. Simply trying to pass the responsibility onto the claimant to choose their own provider is not providing reasonable medical services.

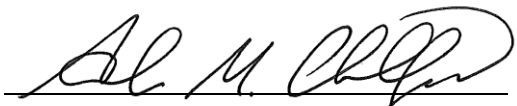
IT IS THEREFORE ORDERED:

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

2. Within five (5) days of the date of this order, the defendants shall authorize additional care with Dr. Mark Kline.

3. Within five (5) days of the date of this order, the defendants shall authorize care with either Dr. Matthew Howard at the University of Iowa, or Dr. Kevin Eck at PCI.

Signed and filed this 8th day of December, 2021.



ANDREW M. PHILLIPS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Thomas Wertz (via WCES)

Mindi Vervaecke (via WCES)

Anita Dhar Miller (via WCES)