BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CHRISTOPHER SUNDQUIST, Claimant, vs. BH MANAGEMENT SERVICES, LLC, Employer, and ARGONAUT INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 161175.01 ALTERNATE MEDICAL CARE DECISION Head Note: 2701

STATEMENT OF THE CASE

On December 8, 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 right lower extremity, specifically a right trimalleolar ankle fracture.

The undersigned presided over the hearing held via telephone and recorded digitally on December 20, 2021. That recording constitutes the official record of the proceeding pursuant to 876 Iowa Administrative Code 4.48(12). Claimant participated personally, and through his attorney, Richard Schmidt. The defendants participated through their attorney, Kathryn Johnson. The evidentiary record consists of Claimant's Exhibits 1-2 and Defendants' Exhibit A. The defendants objected to Claimant's Exhibit 2 based upon a recent production of the report of an independent medical examiner. Arguments were heard on the record, and the objection was overruled. All of the exhibits were admitted and received into evidence.

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 transferring authorized care to Dr. Butler.

FINDINGS OF FACT

Claimant, Christopher Sundquist, alleges that he sustained an injury to his right lower extremity on January 29, 2019, while working for defendant BH Management Services, LLC, in Polk County, Iowa. The defendants accepted liability for the injury to the right lower extremity in their answer, and again, verbally, at the outset of the hearing. Specifically, the defendants accepted liability for a right trimalleolar ankle fracture.

The claimant testified that he fractured his right lower extremity on January 29, 2019. (Testimony). He experienced pain throughout his right leg and ankle. (Testimony). Dr. Temple, at the Iowa Clinic, saw him nine to ten times and performed a surgery in February of 2019. Dr. Temple provided surgical follow-up care. (Testimony). Unfortunately, the surgery did not improve Mr. Sundquist's pain symptoms. (Testimony). He told Dr. Temple that the pain did not improve, and Dr. Temple told Mr. Sundquist that he should not be feeling that much pain. (Testimony). Dr. Temple provided Mr. Sundquist with a cortisone injection. (Testimony). Subsequent to the surgery, Mr. Sundquist also developed blood clots in his right lower extremity. (Testimony). These were visualized on an ultrasound. (Testimony). Eventually, Dr. Temple discharged Mr. Sundquist from his care. (Testimony). This was partially due to Mr. Sundquist's status as a smoker. (Testimony).

Mr. Sundquist explained that he still has pain in his right ankle, right leg, bilateral hips, and left leg. (Testimony). He described the pain as constant. (Testimony). The level and location of pain depends on the day. (Testimony).

On March 23, 2020, Dr. Temple issued a letter to defendants' counsel. (Defendants' Exhibit A). Dr. Temple opined that Mr. Sundquist achieved maximum medical improvement, but that he had ankle arthritis and stiffness along with Achilles tendonitis with posterior tibial tendonitis. (DE A). Dr. Temple assigned no permanent restrictions and provided a permanent impairment rating pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (DE A). Dr. Temple noted that Mr. Sundquist may require further surgery for ankle arthritis, as well as injections. (DE A). Mr. Sundquist may also require surgery for his equinus due to stiff and tight posterior muscle groups. (DE A). Finally, Dr. Temple noted that Mr. Sundquist may require hardware removal due to his pain. (DE A).

Considering the positions of Dr. Temple, Mr. Sundquist sought a second opinion with Dr. Butler on April 7, 2021. (Testimony; Claimant's Exhibit 1). Dr. Butler performed a CT scan and told Mr. Sundquist that he suffered a nonunion of the fracture. (Testimony; CE 1). Dr. Butler recommended a second surgery on the right lower

extremity. (Testimony). Mr. Sundquist described the proposed surgery as cutting the tibia on each end, extracting bone marrow, and injecting it into open space to allow the fracture to heal completely. (Testimony). Dr. Butler noted the importance of smoking cessation. (CE 1).

John Kuhnlein, M.D. performed an independent medical evaluation on the claimant on December 6, 2021. (CE 2). He produced a report on December 13, 2021. (CE 2). In his report, Dr. Kuhnlein noted that he performed x-rays. (CE 2). The x-rays showed a screw loosening, along with a persistent fracture line. (CE 2). Dr. Kuhnlein diagnosed Mr. Sundquist with a nonunion of the fracture in his right lower extremity, and possible superficial peroneal nerve entrapment in the right lower extremity. (CE 2). Dr. Kuhnlein recommended an EMG/NCV of the right lower extremity. (CE 2). He also recommended further care with Dr. Butler for the ongoing right lower extremity issues. (CE 2).

Mr. Sundquist requested care with Dr. Butler because he felt that Dr. Temple did not provide complete care. (Testimony). He also opined that Dr. Temple did not address his complaints of pain or listen to his issues. (Testimony). Dr. Temple told Mr. Sundquist to give his right lower extremity time to heal. (Testimony). On the other hand, Mr. Sundquist felt that Dr. Butler listened to his complaints and was more informative. (Testimony). Mr. Sundquist also would like a follow-up with the Iowa Clinic for his ongoing DVT concerns. The defendants noted that they have an additional examination and evaluation with Dr. Temple and the Iowa Clinic.

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 claimant alleges that the defendants either abandoned care or that Dr. Temple was not responsive to the ongoing complaints of plaintiff in contravention of the objective reports of Drs. Butler and Kuhnlein. The defendants argued that they did not

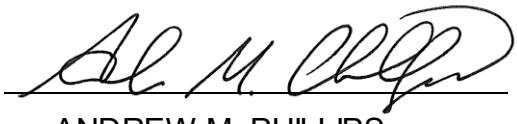
refuse to provide care and have timely authorized care with Dr. Temple. Further, the defendants noted that Dr. Temple provided care and discussed a possible revision to the hardware when the claimant quit smoking. Now that the claimant has quit smoking, the defendants agreed to authorize a return to Dr. Temple for additional examination.

The evidence does not show that the defendants abandoned care. Thus, the question in this alternate care proceeding is whether the claimant has proven that the authorized care is unreasonable. The defendants are authorizing a return visit to Dr. Temple for continued evaluation now that the claimant has completed smoking cessation. While the claimant may disagree with the previous opinions of Dr. Temple, the claimant has not proven that a return visit to Dr. Temple is unreasonable.

IT IS THEREFORE ORDERED:

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

Signed and filed this ___21st_____ day of December, 2021.



ANDREW M. PHILLIPS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Richard Schmidt (via WCES)

Kathryn Johnson (via WCES)