IN THE IOWA DISTRICT COURT FOR POLK COUNTY

BRIAN DENEMARK, **Petitioner,** **vs.** **ARCHER DANIELS MIDLAND COMPANY,** **Respondent.**	**Case Nos. CVCV061078, CVCV061434** **RULING ON JUDICIAL REVIEW**

I. INTRODUCTION

Before the Court are consolidated petitions for judicial review filed on December 9, 2020 and March 3, 2021. Petitioner Brian Denemark ("Denemark"), filed his consolidated brief on April 5, 2021. Respondent Archer Daniels Midland Company ("ADM") filed its brief on April 30, 2021. Denemark filed a reply on May 14, 2021. The parties' counsel presented arguments at a hearing on June 4, 2021. Dennis Currell represented Denemark. Peter J. Thill and Jacob V. Kline represented ADM. After hearing arguments of counsel and reviewing the court file, including the briefs filed by both parties and the certified administrative records, the Court now enters the following ruling.

II. FINDINGS OF FACT

On December 16, 2019, Denemark suffered a left wrist injury while working for ADM. (Alt. Care Pet. 1, Denemark Ex. 1, at 1). He received treatment from Dr. Meiying Kuo ("Dr. Kuo") at Physician's Clinic of Iowa ("PCI"), which ADM authorized. (*Id.*). ADM sent its agent, Karl Schewe ("Schewe") to attend some of Denemark's appointments at PCI through January 2020. (Alt. Care Pet. 1, Denemark Ex. 4). Denemark received authorized injections for his left wrist on February 7, 2020 and June 9, 2020. (Alt. Care Pet. 1, Denemark Ex. 1, at 1).

On August 18, 2020, Dr. Kuo proposed a surgical option to treat Denemark's left wrist condition: a left wrist arthroscopy and debridement of the TFCC. (*Id.* at 2). On August 20, 2020, a PCI nurse advised Denemark that he could not schedule his surgery until thirty days after his cardiac ablation due to his use of a blood thinner. (Alt. Care Pet. 1, Denemark Ex. 2). On September 11, 2020, Denemark informed PCI he had been off blood thinners for twenty-one days and wanted to schedule the surgery. (*Id.*). On September 18, 2020, ADM, through its third-party administrator for workers' compensation, ESIS, informed PCI that it had concerns about Denemark and was going to investigate causation. (*Id.*). PCI scheduled surgery for October 5, 2020. (Alt. Care Pet. 1, Ex. 6). ADM did not complete its causation investigation in time and PCI cancelled the scheduled surgery. (*Id.*). On October 16, 2020, Denemark requested pain medication from Dr. Kuo who declined and directed him to contact his primary care physician. (*Id.*). On October 21, 2020, ADM notified PCI that ADM authorized the proposed surgery. (Alt. Care Pet. 1, ADM Ex. A1).

On October 22, 2020, PCI sent an authorization form to ADM seeking approval of PCI's referral of Denemark to the University of Iowa Hospitals & Clinics ("UIHC") hand surgery department for transfer of care. (Alt. Care Pet. 1, ADM Ex. B2). On November 1, 2020, ADM authorized PCI's requested transfer of Denemark's care to the UIHC hand surgery department. (Alt. Care Pet. 1, ADM Ex. C3). On November 15, 2020, ADM informed Denemark he had an appointment with the hand surgeon Dr. Ericka Lawler ("Dr. Lawler") at UIHC on November 24, 2020, which UIHC later rescheduled for December 3, 2020. (Alt. Care Pet. 1, ADM Ex. D4). Denemark attended the December 3, 2020 appointment at UIHC with transportation provided by ADM. (Alt. Care Dec. 01/26/21, at 2). Denemark scheduled his authorized left wrist surgery for December 29, 2020. (*Id.*). On December 16, 2020, Denemark cancelled his surgery due to a conflicting dental appointment he had scheduled for the same date. (*Id.*). Denemark rescheduled

his surgery for January 12, 2021 with a mandatory pre-surgical COVID screening on January 11, 2021. (*Id.*). ADM agreed to provide transportation for both appointments, but failed to arrange transport for the COVID screening. (Alt. Care Pet. 2, Denemark Exs. 2, 3, 4, 5, 6). Denemark attempted to get to the COVID screening on his own by driving from Cedar Rapids to leave his dog with his grandmother in Monticello and then driving to Iowa City. (Alt. Care Dec. 01/26/21, at 2). While he was driving, UIHC called to inform him it was too late to get the test results back in time for the surgery. (*Id.*). Without ADM's transportation, Denemark was unable to obtain the necessary COVID screening on January 11, 2020, so UIHC cancelled his surgery on January 12, 2020. (*Id.*). UIHC rescheduled his surgery for January 29, 2021 with a mandatory COVID screening on January 28, 2021. (Alt. Care Pet. 2, Denemark Ex. 8). ADM provided transportation to those appointments and Denemark underwent the authorized surgery on January 29, 2021. Following surgery, Denemark is receiving follow-up care.

Denemark filed his first application for alternate medical care on November 3, 2020. He alleged ADM intentionally interfered with the medical care recommended by ADM's selected authorized treating provider by having Schewe attend appointments, delaying surgery by seeking an improper causation opinion, and transferring him to UIHC. He sought the ability to direct his own care. On November 17, 2020, Deputy Commissioner Heather L. Palmer (the "Deputy Commissioner") entered an order denying relief. The Deputy Commissioner did not find Schewe's testimony persuasive to support ongoing interference. She held that Denemark did not establish ADM had abandoned care or that the care offered was ineffective, inferior, or less extensive than the care requested by Denemark, so he was not entitled to direct his own care. On November 27, 2020, Denemark filed a motion to exceed page limits, to reopen the record for consideration of newly discovered evidence, and to reconsider, enlarge, and amend the alternate medical care

decision. On December 4, 2020, the Deputy Commissioner denied Denemark's motion. Denemark filed an appeal of the Deputy Commissioner's decisions in the district court on December 9, 2020.

On January 13, 2021, Denemark filed his second application for alternate medical care. He alleged ADM intentionally failed to provide transportation to interfere with his medical care and sought an order for surgery with Dr. Lawler, uninterrupted follow-up care, and the ability to self-direct his care. On January 26, 2021, the Deputy Commissioner denied the application for alternate medical care, because she held Denemark had not proven ADM engaged in ongoing interference, abandoned care, or offered care that was ineffective, inferior, or less extensive than the care Denemark requested. With ADM's consent, she ordered that ADM shall provide transportation for the COVID screening and surgery and shall follow all treatment recommendations from Dr. Lawler following surgery. On February 1, 2021, Denemark filed a motion to reconsider, enlarge, and amend the alternate medical care decision. The Deputy Commissioner denied the motion on February 5, 2021. On March 3, 2021, Denemark filed an appeal of the Deputy Commissioner's decisions on his second application in the district court. The Court consolidated the appeals on March 18, 2021.

On appeal, Denemark argues the agency made factual and legal errors by failing to find that ADM intentionally interfered with the prompt receipt of medical care. He believes ADM intentionally interfered with his medical care by (1) causing Schewe to improperly influence medical decisions at Denemark's appointments, (2) causing the adjuster to cancel the October 5, 2020 surgery, (3) causing the transfer of Denemark's care to UIHC, and (4) promising to provide transportation to the January 11, 2021 COVID screening but failing to do so, causing the cancellation of the January 12, 2021 surgery. He argues the agency made legal errors by refusing to acknowledge undue inconvenience as an element, failing to recognize that ADM's causation

investigation was improper, and wrongly requesting that Denemark's counsel clarify what remedy he sought. Denemark argues the agency decisions departed from agency precedents without adequate explanation, because prior precedents prohibit employers from denying recommended medical care or unilaterally transferring care to another provider. Denemark asks the Court to reverse the agency rulings and order that ADM allow Denemark to self-direct his care. In the alternative, Denemark asks the Court to remand to the agency with instructions to order ADM to allow Denemark to self-direct his care.

III. STANDARD OF REVIEW

The Iowa Administrative Procedure Act, Chapter 17A of the Iowa Code, governs judicial review of administrative agency decisions. The court shall reverse, modify, or grant other appropriate relief from final agency action if it determines the substantial rights of a petitioner have been prejudiced by any of the means set forth in Iowa Code section 17A.19(10)(a)-(n). Review of agency action is at law, not de novo, and is limited to the record made before the agency. *Taylor v. Iowa Dep't of Job Serv.*, 362 N.W.2d 534, 537 (Iowa 1985). Additional evidence or issues not considered by the agency cannot be considered by the court. Iowa Code § 17A.19(7); *Meads v. Iowa Dep't of Social Servs.*, 366 N.W.2d 555, 559 (Iowa 1985). The court may not substitute its judgment for that of the agency. *Mercy Health Center v. State Health Facilities Council*, 360 N.W.2d 808, 809 (Iowa 1985). The court may not usurp the agency's function of making factual findings. *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181, 186 (Iowa 1980).

The court shall reverse, modify, or grant other appropriate relief from agency action if the agency action was based upon a determination of fact clearly vested by a provision of law in the discretion of the agency that is not supported by substantial evidence in the record before the court when that record is viewed as a whole. Iowa Code § 17A.19(10)(f). "Record viewed as a whole"

means that the adequacy of the evidence in the record before the court to support a particular finding of fact, must be judged in light of all the relevant evidence in the record cited by any party that detracts from the findings, as well as all of the relevant evidence in the record cited by any party that supports it. § 17A.19(10)(f)(3). This includes any determinations of veracity by the presiding officer who personally observed the demeanor of the witnesses and the agency's explanation of why the relevant evidence in the record supports its material findings of fact. *Id.*

The evidence need not amount to a preponderance in order to be substantial evidence, but a mere scintilla will not suffice. *Elliot v. Iowa Dep't of Transp.*, 377 N.W.2d 250, 256 (Iowa Ct. App. 1985). Substantial evidence means the quantity and quality of evidence that would be deemed sufficient by a neutral, detached and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance. Iowa Code § 17A.19(10)(f)(1). The fact that two inconsistent conclusions can be drawn from the evidence does not mean that one of those conclusions is unsupported by substantial evidence. *Moore v. Iowa Dep't of Transp.*, 473 N.W.2d 230, 232 (Iowa Ct. App. 1991). The relevant inquiry is not whether the evidence might support a different finding, but whether the evidence supports the findings actually made. *Id.*

The commissioner has a duty to state the evidence relied upon and detail the reasons for any conclusions. *Pitzer v. Rowley Interstate*, 507 N.W.2d 389, 392 (Iowa 1993) (citing *Catalfo v. Firestone Tire & Rubber Co.*, 213 N.W.2d 506, 510 (Iowa 1973)). This requirement is satisfied if the reviewing court is able to determine with reasonable certainty the factual basis on which the administrative officer acted. *Id.* at 393. Courts understand that an administrative agency "cannot in its decision set out verbatim all testimony in a case." *Id.* at 392 (citing *McDowell v. Town of Clarksville*, 241 N.W.2d 904, 908 (Iowa 1976)) "Nor, when the agency specifically refers to some

of the evidence, should the losing party be able, ipso facto, to urge successfully that the agency did not weigh all the other evidence." *Id.* An agency decision is final if supported by substantial evidence. *Robbennolt v. Snap-On Tools Corp.*, 555 N.W.2d 229, 234 (Iowa 1996).

The court shall also reverse, modify, or grant other appropriate relief from agency action if such action was based upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency. Iowa Code § 17A.19(10)(c). The court shall not give deference to the view of the agency with respect to particular matters that have not been vested by a provision of law in the discretion of the agency. § 17A.19(11)(b). However, appropriate deference is given when the contrary is true. § 17A.19(11)(c). The agency's findings are binding on appeal unless a contrary result is compelled as a matter of law. *Ward v. Iowa Dep't of Transp.*, 304 N.W.2d 236, 238 (Iowa 1981).

Additionally, a reviewing court must also reverse, modify, or grant other appropriate relief when the agency's decision is "[b]ased upon an irrational, illogical, or wholly unjustifiable application of law to fact that has clearly been vested by a provision of law in the discretion of the agency." Iowa Code § 17A.19(10)(m). "In order to determine an employee's right to benefits, which is the agency's responsibility, the agency, out of necessity, must apply the law to the facts." *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 465 (Iowa 2004). Because the agency has been entrusted with the responsibility of applying the law to the facts, the "agency's application of the law to the facts can only be reversed if we determine such an application was 'irrational, illogical, or wholly unjustifiable.'" *Id.* (citing Iowa Code § 17A.19(10)(m)).

"The findings of the commissioner are akin to a jury verdict, and we broadly apply them to uphold the commissioner's decision." *Quaker Oats Co. v. Ciha*, 552 N.W.2d 143, 150 (Iowa 1996) (quoting *Second Inj. Fund v. Shank*, 516 N.W.2d 808, 812 (Iowa 1994) (citation omitted)).

"We may reverse, modify, affirm or remand the case to the commissioner for further proceedings if we conclude the agency's action is affected by an error at law or if it is not supported by substantial evidence." *Id.* at 150.

IV. CONCLUSIONS OF LAW

A. Overview of Alternate Medical Care

Iowa Code section 85.27(4) provides in relevant part:

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. If the employer chooses the care, the employer shall hold the employee harmless for the cost of care until the employer notifies the employee that the employer is no longer authorizing all or any part of the care and the reason for the change in authorization.
> . . .
> 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).

An employer gains the right to choose an employee's care after the employer concedes the compensability of the injury and authorizes care. *Ramirez-Trujillo v. Quality Egg, L.L.C.*, 878 N.W.2d 759, 772 (Iowa 2016). In exchange for the right to choose the care, the employer must pay for the cost of care up to the time when the employer notifies the employee it is no longer authorizing care. *Id.*

If an employee is dissatisfied with the offered care, the statute provides a process for seeking alternate care. The employee must notify the employer of his dissatisfaction. § 85.27(4). The employer and employee may agree to alternate care. *Id.* Where they cannot reach an

agreement, the commissioner has discretionary authority to order alternate care, including self-directed care, if the treatment the employer offers fails to meet any one of three qualifications: the treatment must be (1) prompt, (2) reasonably suited to treat the injury, and (3) without undue inconvenience to the claimant. *West Side Transport v. Cordell*, 601 N.W.2d 691, 693–94 (Iowa 1999).

B. Review of Factual Findings and Application of Facts to Law

Denemark argues the Deputy Commissioner made factual and legal errors by failing to find ADM intentionally interfered with the prompt receipt of medical care when ADM (1) caused Schewe to improperly influence medical decisions at Denemark's appointments, (2) caused the adjuster to cancel the October 5, 2020 surgery, (3) caused the transfer of Denemark's care to UIHC, and (4) caused the cancellation of the January 12, 2021 surgery by promising to provide transportation to the January 11, 2021 COVID screening but failing to do so. There is substantial evidence under Iowa Code section 17A.19(10)(f) to support the conclusion that none of the alleged interferences prevented Denemark from receiving prompt care or receiving care reasonably suited to treat his injury, or caused him to suffer undue inconvenience. Further, the Deputy Commissioner's application of the facts to the law in holding Denemark received prompt care, received reasonable care, and did not suffer undue inconvenience was not irrational, illogical, or wholly unjustifiable under section 17A.19(10)(m).

Schewe stopped attending Denemark's medical appointments after January 2020. (Alt. Care Dec. 11/17/20, at 1). Dr. Kuo did not recommend surgery until August 18, 2020. (Alt. Care Pet. 1, Denemark Ex. 1, at 2). The time gap indicates it is unlikely Schewe's presence caused any delay in Denemark undergoing surgery. There was also testimony at the arbitration hearing about the effect of Schewe's presence at the appointments that supports the Deputy Commissioner's

findings. The Deputy Commissioner "d[id] not find the testimony regarding Schewe persuasive to support ongoing interference." (Alt. Care Dec. 11/17/20, at 4). This credibility determination by the presiding officer is influential in assigning weight to the testimony. *Iowa State Fairgrounds Sec. V. Iowa C.R. Comm'n*, 322 N.W.2d 293, 295 (Iowa 1982). The lack of persuasive testimony about Schewe and the time gap between Schewe's attendance and the surgery proposal are substantial evidence that Schewe's presence did not interfere with Denemark's treatment. It was reasonable for the Deputy Commissioner to hold Schewe's presence did not overly interfere with his care.

There was substantial evidence that ADM's role in the cancellation of the October 5, 2020 surgery did not result in the failure to provide prompt medical care or undue inconvenience. Aside from ADM's actions, there was already going to be a necessary thirty-day delay between the surgery proposal and the surgery, because Denemark needed to be off blood thinners for thirty days prior to surgery. (Alt. Care Pet. 1, Denemark Ex. 2). Through ESIS, ADM notified PCI that it wanted to investigate causation before authorizing surgery. (*Id.*). PCI planned to wait to schedule surgery until after ADM provided authorization. (Alt. Care Pet. 1, Ex. 6). Instead, PCI scheduled surgery for October 5 before receiving authorization. (*Id.*). PCI had to cancel the scheduled procedure because ADM did not provide authorization until October 21, 2020. (*Id.*; Alt. Care Pet. 1, ADM Ex. A1). The Deputy Commissioner could have interpreted these events as PCI prematurely scheduling surgery when it knew ADM had not provided authorization, meaning PCI was responsible for the cancellation. There was only a two-month delay between Dr. Kuo proposing surgery and ADM authorizing the surgery, thirty days of which would have happened anyway due to the blood thinners. The two-month delay, the necessary thirty-day delay for Denemark to get off blood thinners, and PCI scheduling the surgery prematurely are substantial

evidence that ADM's role in the cancellation of the October 5, 2020 surgery did not prevent Denemark from receiving prompt and reasonable care or cause him to suffer undue inconvenience. It was reasonable for the Deputy Commissioner to conclude the limited delay and PCI's responsibility for scheduling the surgery prematurely meant ADM did not improperly interfere with Denemark's care.

There was substantial evidence that ADM's role in the transfer of Denemark's care to UIHC did not prevent prompt and reasonable medical care or cause undue inconvenience. The employer authorization form dated October 22, 2020 shows that Dr. Kuo referred Denemark to the UIHC hand department and requested authorization for the transfer from ADM. (Alt. Care Pet. 1, ADM Ex. B2). ADM completed the form and authorized the transfer on November 1, 2020. (Alt. Care Pet. 1, ADM Ex. C3). ADM informed Denemark he had an appointment with Dr. Lawler. (Alt. Care Pet. 1, ADM Ex. D4). Denemark voluntarily attended the appointment and scheduled surgery with Dr. Lawler. (Alt. Care Dec. 01/26/21, at 2). The evidence supports the conclusion that ADM did not transfer Denemark's care improperly and unilaterally, but simply authorized the transfer that Dr. Kuo initiated. Denemark seems to have gone along with the transfer. Under these circumstances, there would be little delay or inconvenience for Denemark. The Deputy Commissioner's conclusions were reasonable.

There was substantial evidence that ADM's failure to provide transportation and the resulting cancellation of the January 12, 2021 surgery did not prevent prompt and reasonable medical care or cause Denemark to suffer undue inconvenience. While ADM failed to follow through with its promise to provide transportation on January 11 and indirectly caused the cancellation of the January 12 surgery, UIHC quickly rescheduled Denemark's COVID screening

for January 28 and his surgery for January 29. The Deputy Commissioner could have reasonably found that a delay of two weeks did not rise to the level of interference required in section 85.27(4).

There was substantial evidence that ADM's interference with Denemark's treatment was not intentional, even if its actions caused some delay and inconvenience. There is little or no evidence to suggest that ADM had ulterior motives to prevent Denemark from receiving proper care when it sent Schewe to Denemark's appointments, conducted a causation investigation, authorized transfer of care to UIHC, and failed to provide transportation to the COVID screening. The main indication that ADM's interference was intentional was that there were four alleged interferences. As explained above, it was reasonable for the Deputy Commissioner to conclude the interferences had minimal effect, so the existence of the four instances alone does not compel the conclusion that ADM intentionally interfered. The emails between the parties' counsel regarding transportation to the COVID screening could go either way, but nonetheless provide substantial evidence that the failure to provide transportation was a mistake. At first, ADM's counsel believed Denemark failed to go to his appointment and was unaware ADM had not arranged transport. (Alt. Care Pet. 2, Denemark Ex.4). ADM's counsel readily agreed to provide transportation to the rescheduled appointments for January 28 and 29. (Alt. Care Pet. 2, Denemark Ex. 8). These communications could suggest ADM simply made an administrative error. It was reasonable for the Deputy Commissioner to conclude any interference with Denemark's care was unintentional.

There was substantial evidence to support the Deputy Commissioner's factual findings under section 17A.19(10)(f) and her application of the facts to the law was not irrational, illogical, or wholly unjustifiable under section 17A.19(10)(m).

C. Review of Legal Interpretations

Denemark contends the Deputy Commissioner improperly interpreted Iowa Code section 85.27(4). The legislature did not clearly vest the interpretation of section 85.27(4) in the discretion of the workers' compensation commissioner, so courts do not defer to the commissioner's interpretation of the provision. *Ramirez-Trujillo*, 878 N.W.2d at 770. The Court will review the Deputy Commissioner's interpretation of section 85.27(4) for errors of law under section 17A.19(10)(c). *Id.*

Denemark argues the Deputy Commissioner made a legal error by failing to consider undue inconvenience as a factor justifying alternate medical care under section 85.27(4). In both alternate medical care decisions, the Deputy Commissioner cited section 85.27(4) for the rule that the employer must offer treatment without undue inconvenience to the employee. (Alt. Care Dec. 11/17/20, at 3; Alt. Care Dec. 01/26/21, at 3). Referencing the rule indicates the Deputy Commissioner considered undue inconvenience as a factor. The only indication she did not consider undue inconvenience is that she did not explicitly state Denemark did not suffer undue inconvenience. However, her consideration of the factual circumstances and her reference to the rule is enough to conclude she properly considered undue inconvenience in her analysis of whether Denemark was entitled to alternate medical care. She did not make a legal error by failing to consider undue inconvenience.

Denemark argues the Deputy Commissioner made a legal error by not holding it was improper for ADM to initiate a causation investigation on September 18, 2020, after ADM had already conceded to the compensability of his injury. Denemark believes that once an employer concedes to compensability, the employer must promptly furnish care and cannot later question causation. He argues an employer must pay for whatever care an authorized provider recommends without question, because the employer cannot exercise medical judgment.

Denemark is correct that an employer cannot practice medicine and must follow the recommendations of authorized medical providers, because interfering with recommended treatment constitutes a failure to provide care reasonably suited to treat the injury under section 85.27(4). *Lamphier v. Schlee Masonry*, File No. 5039649, 2012 WL 1373790, at *4 (Alt. Care Dec. Apr. 16, 2012). However, ADM did not practice medicine or interfere with Dr. Kuo's surgery recommendation. ADM examined whether Denemark's injury that needed surgery in August 2020 was the same workplace injury from December 2019, or whether there was some intervening cause, unrelated to the workplace injury, that necessitated surgery. "Once an employer's right to control medical care attaches under section 85.27(4), 'it remains with the employer under the statute until the employer denies the injury is work-related, withdraws authorization of the care, or until the commissioner orders alternative care.'" *Ramirez-Trujillo*, 878 N.W.2d at 772 (quoting *Bell Bros. Heating and Air Conditioning v. Gwinn*, 779 N.W.2d 193, 207 (Iowa 2010)).

> A dispute between the parties as to the nature or extent of a physical or mental disability arising from an injury for which the employer has acknowledged liability during the time medical care is controlled by the employer, is not a ground, standing alone, for a determination that the employer has forfeited its right to select medical care.

Gwinn, 779 N.W.2d at 207.

ADM did not withdraw its concession that Denemark's workplace injury was compensable. It did not deny the injury was work-related or withdraw authorization of care. It did not seek a second opinion about whether surgery was appropriate or try to switch providers to one that would not recommend surgery. ADM simply disputed the nature and extent of Denemark's workplace injury, including whether the workplace injury had a causal connection to the injury that needed surgery. ADM's investigation was permissible under the statute without forfeiting its

right to select medical care. The Deputy Commissioner did not make a legal error by not recognizing ADM's causation investigation as improper.

Denemark argues the Deputy Commissioner made a legal mistake by asking his counsel what remedies Denemark sought, rather than exercising discretion to choose an appropriate remedy. This is not a legal error. Courts and agencies commonly limit relief to the relief a claimant requests. The Deputy Commissioner only considering the relief Denemark requested did not prevent her from considering Denemark's legal claims fairly and thoroughly.

The Deputy Commissioner did not make an error of law under section 17A.19(10)(c).

D. Consistency with Agency Precedents

Denemark contends the Deputy Commissioner failed to follow agency precedents without explanation. Section 17A.19(10)(h) requires the Court to grant relief where the claimant's substantial rights have been prejudiced because the agency action "is inconsistent with the agency's prior practice or precedents, unless the agency has justified that inconsistency by stating credible reasons sufficient to indicate a fair and rational basis for the inconsistency." Iowa Code § 17A.19(10)(h). The Court reviews allegations pursuant to section 17A.19(10)(h) under the unreasonable, arbitrary, capricious, or abuse of discretion standard. *Off. of Consumer Advoc. v. Iowa Utils. Bd.*, 770 N.W.2d 334, 341 (Iowa 2009).

Denemark contends the Deputy Commissioner failed, without explanation, to follow agency precedent that holds employers cannot exercise medical judgment and interfere with authorized providers' treatment recommendations.[1] As explained above, ADM did not exercise

[1] *Lamphier*, 2012 WL 1373790, at *4; *Crawford v. Bridgestone/Firestone*, File No. 5024746, 2008 WL 376151, at *3 (Alt. Care Dec. Feb. 5, 2008); *Smith v. Broadlawns Med. Ctr.*, File No. 5015626, 2005 WL 1252286, at *2–*3 (Alt. Care Dec. May 23, 2005); *McFarland v. Amana Soc'y Builders*, File No. 5008275, 2003 WL 215054477, at *2–*3 (Alt. Care Dec. May 20, 2003); *Dal Ponte v. Care Initiatives*, File No. 5007191, 2003 WL 21503350, at *2 (Alt. Care Dec. May 6, 2003); *Burkett v. Com-Force*, File No. 1199960, 2001 WL 34111196, at *2–*4

medical judgment or interfere with Dr. Kuo's surgery recommendation. A dispute over the nature and extent of injury does not undo an employer's concession that an injury is compensable or take away the employer's right to choose care. *Gwinn*, 779 N.W.2d at 207. The statute allowed ADM to investigate the cause of Denemark's injury after Dr. Kuo recommended surgery to ensure it was still a result of the workplace injury. Therefore, the Deputy Commissioner did not fail to follow agency precedent that employers cannot practice medicine or second-guess authorized providers' recommendations.

Denemark argues the Deputy Commissioner failed, without explanation, to follow agency precedent that holds employers cannot unilaterally transfer an employee's care to another provider.[2] As explained above, substantial evidence supports the factual finding that ADM did not unilaterally transfer Denemark's care to UIHC. Dr. Kuo referred Denemark to UIHC and ADM authorized the transfer. The Deputy Commissioner's decisions were consistent with prior precedent because ADM did not initiate an improper transfer of care.

The Deputy Commissioner did not fail to follow agency precedent under section 17A.19(10)(h).

E. Requested Relief

Denemark seeks relief in the form of an order that ADM allow Denemark to self-direct his care. In the alternative, Denemark asks the Court to remand to the agency with instructions to order

(Arb. Dec. Aug. 16, 2001); *Cahill v. S. & H. Fabricating & Eng'g*, File No. 1138063 (Alt. Care Dec. May 30, 1997); *Boggs v. Cargill, Inc.*, File No. 1050396 (Alt. Care Dec. Jan. 31, 1994); *Pote v. Mickow, Corp.*, File No. 694639 (Review-Reopening Dec. June 17, 1986).

[2] *Crawford*, 2008 WL 376151, at *3; *Smith*, 2005 WL 1252286, at *3–*4; *McFarland*, 2003 WL 215054477, at *2–*3; *Dal Ponte*, 2003 WL 21503350, at *2; *Burkett*, 2001 WL 34111196, at *2–*4; *LaRue v. Blake Byrket Trucking*, File No. 1265132, 2000 WL 33992836 (Alt. Care Dec. Aug. 7, 2000); *Cahill*, File No. 1138063; *Fowler v. Iowa Culvert Builders*, File No. 987055, 1994 WL 16034930, at *1–*2 (Alt. Care Dec. Mar. 7, 1994); *Santucci v. Air and Water Techs.*, File No. 967995, 1993 WL 13021475, at *5 (Apr. 20, 1993); *Pote*, File No. 694639.

ADM to allow Denemark to self-direct his care. Even if Denemark were successful in showing reversible error, the Court could not grant the requested relief. The commissioner's authority under section 85.27(4) to order alternate medical care is discretionary, not mandatory. Under the mandatory-permissive canon, unless context indicates otherwise, mandatory words, such as "shall" or "must," impose a duty or state a requirement, while permissive words, such as "may," grant discretion. Iowa Code § 4.1(30); *Kopecky v. Iowa Racing and Gaming Comm'n*, 891 N.W.2d 439, 443–44 (Iowa 2017). The provision states, "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) (emphasis added). If the claimant shows that treatment is not prompt, not reasonably suited to treat the injury, or not without undue inconvenience, then the commissioner can choose whether to order alternate medical care. Denemark would not have an absolute entitlement to alternate medical care, even if he showed ADM's failure to meet one of the factors. Therefore, the Court cannot order alternate medical care or instruct the Deputy Commissioner to order alternate medical care.

V. RULING

IT IS THEREFORE ORDERED that the Iowa Workers' Compensation Deputy Commissioner's decisions of November 17, 2020, December 4, 2020, January 26, 2021, and February 5, 2021 are **AFFIRMED**.

Costs are taxed to Denemark.

State of Iowa Courts

Case Number	**Case Title**
CVCV061078	BRIAN DENEMARK VS ADM
Type:	OTHER ORDER

So Ordered

Scott D. Rosenberg

Scott D. Rosenberg, District Court Judge, Fifth Judicial District of Iowa

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