BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TAMMY L. NEWCOMB, Claimant, vs. JOHN DEERE DAVENPORT WORKS, Employer, Self-Insured, Defendant.	File No. 5052805.01 ALTERNATE MEDICAL CARE DECISION HEAD NOTE NO: 2701

STATEMENT OF THE CASE

On July 8, 2020, claimant filed a petition for alternate medical care pursuant to Iowa Code 85.27(4) and 876 Iowa Administrative Code 4.48. The defendant filed an answer on July 9, 2020.

The undersigned presided over the hearing held via telephone and recorded digitally on July 20, 2020. That recording constitutes the official record of the proceeding under 876 Iowa Administrative Code 4.48(12). Claimant participated personally, and through her attorney, Jerry Soper. The defendant participated via its attorney, Troy Howell. The record consists of:

- Claimant's Exhibits, labeled A through C, comprised of three pages of documents attached to the petition for alternate medical care.
- Defendant's Exhibits, numbered 1 through 6, comprised of ten pages of documents, attached to the employer's hearing brief.
- Testimony at hearing by the claimant, Tammy L. Newcomb.

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 17A is the avenue for an appeal.

ISSUE

The issue under consideration is whether claimant is entitled to alternate care under Iowa Code 85.27(4) in the form of:

1) Referral for evaluation and treatment at the Mayo Clinic.

FINDINGS OF FACT

Claimant, Tammy Newcomb, sustained numerous injuries as the result of a work incident on September 11, 2014, which arose out of and in the course of her employment with John Deere Davenport Works. Defendant has accepted liability for the claim via its answer. The main injury noted during this proceeding was to the claimant's low back.

Ms. Newcomb testified that she has ongoing back pain. (Testimony). Since the time of her arbitration hearing, her back pain has changed in intensity and character. (Testimony). Ms. Newcomb now has pain in the upper part of her back and around to her ribs. (Testimony). She also claims a blood pressure issue stemming from the pain. (Testimony). Due to this blood pressure issue, she has sought emergent care on a number of occasions. (Testimony). Ms. Newcomb claims that she called John Deere medical seeking additional care, but was told that she was no longer supposed to contact John Deere. (Testimony).

Ms. Newcomb treated with her personal provider, a physician assistant. (Testimony). The personal provider offered to refer Ms. Newcomb to either the Mayo Spine Clinic or the Mayo Pain Clinic, but then decided in consultation with the claimant to refer her back to Sanjay Sundar, M.D., a pain management physician. (Testimony). Dr. Sundar was an authorized treating physician, and the claimant was never informed that he was no longer an authorized treating physician. (Testimony). The claimant called Dr. Sundar's office, and spoke to one of his assistants, who agreed to discuss a referral to the Mayo Clinic Spine Center with Dr. Sundar. (Testimony). On June 11, 2020, Dr. Sundar issued a referral note to the Mayo Clinic Spine Center for a pain management evaluation and treatment. (Claimant's Exhibit A). The claimant testified that she received a call from the Mayo Clinic indicating that if she was to be treated at the spine center, she would need to have her spinal cord stimulator removed prior to an examination. (Testimony). Ms. Newcomb was not willing to do this. (Testimony). Thus, she was informed that she needed to instead be referred to the Mayo Clinic Pain Clinic. (Testimony). Dr. Sundar made this referral after conferral with Ms. Newcomb. (Testimony; Cl. Ex. B).

The defendant argued three points: 1. Dr. Sundar did not issue the referral as an authorized physician; 2. Dr. Sundar's referral was made merely to placate and appease Ms. Newcomb; and, 3. Dr. Sundar is not recommending additional care or treatment and there is no evidence that additional care would be helpful. (Defendant's Hearing Brief). The defendant presented a letter signed by Dr. Sundar, dated May 2, 2018, indicating that Dr. Sundar recommends no further treatment or care related to Ms. Newcomb's lower back or lumbar spinal issues. (Def. Ex. 1). The defendant also provided notes from Dr. Sundar's office indicating the claimant was calling to request a referral. (Def. Ex. 3 and 4). There is no indication that the defendants ever expressed to Ms. Newcomb that Dr. Sundar was no longer an authorized treating physician.

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 section 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)).

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 [the] 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., 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. Long, 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.

Whether an authorized physician remains an authorized physician is a question examined by the Iowa Supreme Court in Ramirez-Trujillo. Ramirez-Trujillo, 878 N.W.2d at 777. The employer can avoid liability for the cost of care provided by an authorized medical provider if the employer can prove that the employer no longer authorized the care received by the employee at the time care is provided. Id. The determinative question is whether the totality of the circumstances indicates the employee knew or should have known that care was no longer authorized by the employer. Id. The employer may also show that actual notice of a change in authorization was provided to the employee, or that the employee had knowledge of facts and circumstances that would have led a reasonable employee to conclude the employer was no longer authorizing care for the injury. Id. The court stated

> . . . when an employer seeks to avoid liability for care an employee received from an authorized provider and cannot prove it notified an employee it was not authorizing further care from that provider, the employer bears the burden of proving by a preponderance of the evidence the employee knew or reasonably should have known either that the care the employee received was unrelated to the medical condition or conditions upon which the employee's claim for workers' compensation benefits is based or that the employer no longer authorized the care the employee received at the time the employee received it.

Id. at 778. The court further defined seven facts or circumstances that the commissioner considers:

> (1) the method in which the employer communicated to the employee that care was authorized throughout the period during which the employer concedes care was authorized; (2) the actual communications between the employer and employee throughout that period and thereafter concerning the injury, the care, and the costs of the care; (3) any communications between the employee and medical providers; (4) how much time passed between the date the employer authorized care and the date the employee sought the disputed care; (5) the nature of the injury for which the employer authorized care; (6) the nature of the care the employee received, including the overall course of the care and the frequency with which the employee sought or received care throughout the period during which the employer concedes care was authorized and thereafter; and (7) any other matters shown by the evidence to bear on what the employee knew or did not know with respect to the question of whether the employer authorized the care sought when the employee received it.

Id. at 778-779. Based on the foregoing, if the employer proves knowledge or that the employee reasonably should have known that further care was not authorized when care was received, the employer is not liable for the cost of the unauthorized care. Id.

In this case, there is no evidence that the employee knew or should have known that care was unauthorized. She testified that she was never informed that Dr. Sundar

was no longer an authorized treating physician. The defendant provided no evidence that Dr. Sundar was no longer a treating physician. Additionally, the defendant acknowledged in their brief that a previous arbitration decision denied alternate care; however, the quote from the arbitration decision stated, "[w]hile that could change in the future, defendant was providing reasonable care at the time of the hearing." Based on the testimony of the claimant and her discussions with her doctors, there appears to have been a change in the nature of her pain since the time of the hearing.

I share the defendant's concerns that Dr. Sundar was placating his patient by making the referral to the Mayo Clinic Spine Center and/or Pain Clinic. However, Dr. Sundar was more than capable of declining to make the referral, and yet he did not. Dr. Sundar could have abided by his previously agreed upon note that there was no further treatment to offer to Ms. Newcomb. He did not do this, either. We are left with an authorized treating physician making a referral for additional treatment.

The employer has the right to choose the provider, in this case, Dr. Sundar. There was no revocation of Dr. Sundar's status as an authorized treating provider. Based on a potential change in condition to the claimant's back pain, it is reasonable to consider additional treatment. Therefore, Dr. Sundar's referral to the Mayo Clinic is reasonable care that is being denied by the employer. Based on the testimony of the claimant during the hearing, and referral by Dr. Sundar, the undersigned orders alternate care via the Mayo Clinic Pain Management Program.

ORDER

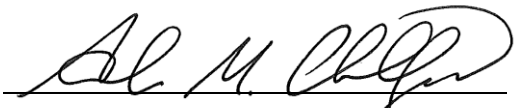
IT IS THEREFORE ORDERED:

1. Claimant's petition for alternate medical care is granted.

2. The defendant shall authorize and arrange for treatment with the Mayo Clinic Pain Management Program.

3. The defendant retains the right to direct and control medical care going forward.

Signed and filed this 21st day of July, 2020.



ANDREW M. PHILLIPS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Jerry A. Soper (via WCES)

Troy Howell (via WCES)