BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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| ROBERT HEROLD,<br><br>Claimant,<br><br>vs.<br><br>FEDEX FREIGHT, INC.,<br><br>Employer,<br><br>and<br><br>INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,<br><br>Insurance Carrier,<br>Defendants. | File No. 22700865.05<br><br>ALTERNATE MEDICAL<br><br>CARE DECISION<br><br>HEAD NOTE NO: 2701 |

## STATEMENT OF THE CASE

This is a contested case proceeding under Iowa Code chapters 85 and 17A. The expedited procedure of rule 876 IAC 4.48 is invoked by claimant, Robert Herold. Claimant appeared personally and through attorney, Joseph Lyons. Defendants appeared through their attorney, John Cutler.

The alternate medical care claim came on for hearing on November 14, 2023. The proceedings were digitally recorded on agency software. This recording constitutes the official record of this proceeding. Pursuant to the Commissioner's Order, the undersigned has been delegated authority to issue a final agency decision in this alternate medical care proceeding. Therefore, this ruling is designated final agency action and any appeal of the decision would be to the Iowa District Court pursuant to Iowa Code section 17A.

The record consists of Claimant's Exhibits 1 through 3 and Defense Exhibits A through C, which were received without objection, in addition to live, sworn testimony from Mr. Herold. The defendants do not dispute liability for claimant's May 3, 2023, work injury.

## ISSUE

The issue presented for resolution is whether the claimant is entitled to alternate medical care (pain management treatment).

## FINDINGS OF FACT

The claimant sustained an injury to his right foot on or about May 3, 2022. The employer directed his medical treatment and accepted the injury. He ended up treating with Thomas Gorsche, M.D., an orthopedic surgeon.

In December 2022, Dr. Gorsche evaluated Mr. Herold after reviewing his MRI. (Claimant's Exhibit 2, page 3) Dr. Gorsche documented his symptoms at that time and recommended a cortisone injection, medications and "surgical excision of the ganglion" in his right foot. (Id.) The MRI is in evidence as well. (Cl. Ex. 3)

Mr. Herold testified that he has seen Dr. Gorsche approximately 8 times since his injury and Dr. Gorsche has repeatedly recommended excision of the ganglion. Mr. Herold testified that he has repeatedly declined this because Dr. Gorsche told him the ganglion could return even if removed. Dr. Gorsche last evaluated Mr. Herold on October 18, 2023. At that time, he again recommended excision of the ganglion. (Defendants' Exhibit C, p. 1) "He will let me know if he wants to proceed with the excision. If he does not, then I would place him at maximum medical improvement." (Id.) Mr. Herold acknowledged on cross-examination that he did not request pain management treatment from Dr. Gorsche. I understand his testimony to say that Dr. Gorsche no longer wanted to provide treatment if he did not wish to proceed with the excision.

At hearing, Mr. Herold testified that he still has significant pain in his foot and ankle which now goes to his toes. He testified that his work aggravates his symptoms and he also has swelling. He testified is now asking for a referral to a pain management specialist. He testified Dr. Gorsche is offering him no treatment other than the surgical option, which he has repeatedly declined; however, he is certain that something is wrong with his right foot which requires further treatment.

## REASONING AND CONCLUSIONS OF LAW

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. 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 (2013).

By challenging the employer's choice of treatment – and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). Determining what care is reasonable under the statute is a question of fact. Id. The employer's obligation turns on the question of reasonable necessity, not desirability. Id.; Harned v. Farmland Foods, Inc., 331 N.W.2d 98 (Iowa 1983).

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

An employer's statutory right is to select the providers of care and the employer may consider cost and other pertinent factors when exercising its choice. Long, at 124. An employer (typically) is not a licensed health care provider and does not possess medical expertise. Accordingly, an employer does not have the right to control the methods the providers choose to evaluate, diagnose and treat the injured employee. An employer is not entitled to control a licensed health care provider's exercise of professional judgment. Assmann v. Blue Star Foods, File No. 866389 (Declaratory Ruling, May 18, 1988). An employer's failure to follow recommendations of an authorized physician in matters of treatment is commonly a failure to provide reasonable treatment. Boggs v. Cargill, Inc., File No. 1050396 (Alt. Care Dec. January 31, 1994).

Claimant argues that the employer-authorized medical care has not been effective and is therefore "inferior or less extensive than other available care requested by the employee, …" (Cl. Brief, p. 1) Mr. Herold does not wish to have the surgery which has been recommended by Dr. Gorsche. Dr. Gorsche has not offered any other type of treatment. Based upon Mr. Herold's testimony and the medical notes in evidence, it does appear that Dr. Gorsche does not have any treatment to offer him other than the surgery. Mr. Herold, however, has not presented any evidence that there is any other treatment which could effectively treat his condition. Based upon the record before me, I cannot assume that pain management treatment will be effective in treating his condition. Stated another way, the burden is on the claimant to prove that the care offered by the employer is inferior or less extensive than other treatment options. In this record, I cannot make such a finding. While it is quite possible that he should have further treatment, this is a recommendation which should be made by a physician or medical practitioner.

Ordinarily, a finding that an employer is offering no treatment to an injured worker is unreasonable. In this case, the employer is offering treatment. It is treatment Mr. Herold has refused. Thus, in this case, Mr. Herold will have to develop evidence that there is a treatment modality which can help him before alternate care can be granted. As the record stands now, his petition must be denied.

ORDER

THEREFORE IT IS ORDERED:

The claimant's petition for alternate medical care is DENIED.

Signed and filed this ___15TH___ day of November, 2023.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Joseph Lyons (via WCES)

John Cutler (via WCES)