IN THE SUPREME COURT OF IOWA

No. 16-1364

KELLY BREWER-STRONG,

Petitioner-Appellant,

vs.

HNI CORPORATION,

Respondent-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR MUSCATINE COUNTY
HONORABLE JOHN TELLEEN JUDGE
Muscatine No. CVCV023315

PETITIONER-APPELLANT'S FINAL REPLY BRIEF

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PROOF OF SERVICE AND CERTIFICATE OF FILING

The undersigned certifies that this Appellant's Final Reply Brief was served and filed on the 2nd day of February 2017, upon the following persons and upon the Clerk of the Supreme Court by electronic filing and electronic delivery to the parties via the EDMS system, pursuant to Iowa R. App. P. 6.902(2) and Iowa Ct. R. 16.1221(2) to the following:

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ROUTING STATEMENT

Claimant-Appellant submits that the Iowa Supreme Court should retain this case because this case presents a substantial issue of enunciating or changing legal principles regarding how the Iowa Workers' Compensation Agency ("Agency") is applying the law. Iowa R. App. P. 6.1101(2)(f). The Agency applied the "beneficial care" test of *Bell Bros. Heating & Air Conditioning v. Gwinn*, 779 N.W.2d 193 (Iowa 2010), and the *Gwinn* test led to an unfair and harsh result. (Arb. Dec., page 8) The Agency felt that the unfair and harsh result was mandated by *Gwinn*, and thus, Claimant requests that the Court revisit the holding in *Gwinn*.

Contrary to the Appellee's Routing Statement, this case presents fundamental and urgent issues of broad public importance requiring prompt and ultimate determination by the Iowa Supreme Court. Iowa R. App. P. 6.1101(2)(d). There have been two amicus curie briefs filed in this case: one on behalf of the Appellant and one on behalf of Appellee. Claimant submits that there have been two amicus curie briefs filed because this case presents fundamental and urgent issues relating the Iowa Workers' Compensation Act. Specifically, this case involves the rights that workers have to reasonable medical care under the Iowa Workers' Compensation Act and these rights are of broad public importance requiring prompt and ultimate determination by the Iowa Supreme Court.

In addition, Claimant submits that the Iowa Supreme Court should retain this case because this case presents an issue of first impression. Iowa R. App. P. 6.1101(2)(c). Contrary to the Appellee's Routing Statement, the Iowa Supreme Court has not specifically addressed whether an employer can regain control of an employee's medical care after initially denying liability for a work injury. In fact, Appellee has failed to identify any Iowa Supreme Court case holding that specifically addresses the issue whether: Employers should be allowed to regain the power to control an employee's treatment after having intentionally forfeiting that right.

STATEMENT OF THE CASE

This case is a review of the appeal decision of the Workers' Compensation Commissioner ("Commissioner") denying healing period benefits to the Claimant, Kelly Brewer-Strong ("Claimant"), for an injury she sustained while working for Defendant, HNI Corporation ("the Employer"). The Commissioner determined the physician who had performed surgery on Claimant, Thomas VonGillern, M.D., was not authorized by the employer. Consequently, the Commissioner held that under the test set out in *Bell Brothers Heating & Air Conditioning v. Gwinn*, 779 N.W.2d 193 (Iowa 2010), Claimant could not recover healing period benefits during the time she recuperated from that surgery.

Claimant relies on Appellant's Brief for the rest of her Statement of the Case.

REBUTTAL STATEMENT OF THE FACTS

Claimant relies on her Statement of the Facts in Appellant's Brief except to emphasize the following facts:

I. Claimant's treating doctor, Dr. VonGillern, testified that the Employer's doctor, Dr. Adams, would have recommended and performed surgery just like he had done.

Claimant sought medical treatment with Dr. Thomas VonGillern who performed surgery on both of her arms. App. 84-89. Dr. VonGillern performed surgical procedures on Claimant's right arm and on Claimant's left arm. App. 84-89. It is undisputed that Dr. VonGillern's surgery was causally connected to the work injury and that the fees charged for the surgery were fair and reasonable. App. 132-138.

In a deposition, Dr. VonGillern testified about the medical treatment that Dr. Brian Adams, the Employer's choice for the doctor, would have hypothetically provided to Claimant. App. 127. Dr. VonGillern testified that he believed Dr. Adams would have recommended and performed surgery just as Dr. VonGillern had done – if Claimant had allowed Dr. Adams to treat her in May and June of 2013. App. 129-130.

Dr. VonGillern testified that Dr. Adams performed similar types of surgical procedures as Dr. VonGillern. App. 126-127. Dr. VonGillern was asked to compare the outcome from the surgery he performed with the hypothetical outcome from a

surgery performed by Dr. Adams. App. 127. Dr. VonGillern testified that: "…I don't know that his would—his procedures would have been any different." App. 127.

Dr. VonGillern testified that the surgeries that he performed were reasonable and beneficial. *Id.*

II. The Agency found that the Employer's doctor, Dr. Adams, would have performed the same exact surgeries that Claimant's doctor, Dr. VonGillern, had performed

The Deputy Workers' Compensation Commissioner ("Deputy") that presided over the Arbitration Hearing found that Dr. VonGillern's testimony was "convincing" and accepted it as accurate. App. 9. The Deputy found that Dr. Adams would have performed the exact same surgeries that Dr. VonGillern had performed:

> [C]laimant was likely to have the bilateral arm surgeries performed by either Dr. Adams or Dr. VonGillern. *If the surgeries were performed by Dr. Adams*, claimant would be entitled to be compensated for healing period benefits for the disputed period of time. *Having had the exact same surgeries performed by Dr. VonGillern*…

App. 13. In the final agency decision, the Commissioner affirmed the Deputy's decision and "reached the same analysis, findings and conclusions as those reached by the deputy commissioner in all regards." App. 17.

REBUTTAL ARGUMENT

The Claimant, Kelly Brewer-Strong ("Claimant"), is entitled to Healing Period Benefits based on the plain language of the Iowa Workers' Compensation Act.

Nevertheless, the Agency felt that it was obligated to deny Claimant healing period benefits because of its interpretation of *Bell Brothers Heating & Air Conditioning v. Gwinn*, 779 N.W.2d 193 (Iowa 2010). The Agency denied healing period benefits even though its interpretation of the law led to an unfair and harsh result. App. 13. While the Agency felt it was bound by the Court's precedent in *Gwinn*, Claimant submits that the Agency erred in interpreting the law and this Court has the power to clarify any misunderstanding.

The Commissioner erred in interpreting the law in two regards. First, the Commissioner erroneously interpreted the law when he applied the test set forth in *Gwinn* to an issue involving entitlement to healing period benefits. Second, the Commissioner erroneously interpreted the law when he ruled that the Employer regained control of medical care after it chose to intentionally forfeit this right.

I. The Commissioner erred in determining that Claimant was precluded from recovering healing period benefits under the test set forth in the Court's *Gwinn* decision.

The Commissioner erred in denying healing period benefits because the Commissioner should not have applied the test set forth in *Gwinn.* In that case, the Court decided "whether an employer can be liable for medical benefits under section 85.27 based on unauthorized medical care to treat a work injury." *Gwinn*, 779 N.W.2d at 202. The Court explained that "[i]n this context, unauthorized medical care is beneficial if it provides a *more* favorable outcome than would likely have been achieved by the care authorized by the employer." *Id.* at 206 (emphasis added).

The *Gwinn* Court went further and then addressed entitlement to healing period benefits. *Id.* at 209. Specifically, the *Gwinn* Court held that the employer could not be held liable for healing period benefits based on recovery time from an unauthorized surgery where the unauthorized medical care was not "reasonable and beneficial." *Id.*

Claimant requests that the Court announce that the test in *Gwinn* should never be applied when deciding entitlement to healing period benefits. Claimant submits that the holding in *Gwinn* is inconsistent with a plain reading of the code section that actually controls healing period benefits, Iowa Code subsection 85.34(1).

In the alternative, Claimant submits that this case is distinguishable from *Gwinn* on its facts, and therefore, *Gwinn* is not controlling. Here, the same surgery

would have been performed regardless of which physician had been authorized to treat Claimant. Therefore, unlike the situation in *Gwinn*, there is really no dispute with respect to the merit and value of the surgery, and consequently, there was no dispute, as there was in *Gwinn*, that the treatment "was causally related to the injury."

Claimant submits that the plain language of Subsection 85.34(1) allows for a fair and just result of Claimant receiving healing period benefits; however, if there is any ambiguity, the Court should interpret the Iowa Workers' Compensation Act in favor of the Claimant. *See Des Moines Area Reg'l Transit Auth. v. Young*, 867 N.W.2d 839, 842 (Iowa 2015) (citations omitted) ("It is well established that '[w]e liberally construe workers' compensation statutes in favor of the worker,' because '[t]he primary purpose of the workers' compensation statute is to benefit the worker and his or her dependents, insofar as statutory requirements permit.'")

Under these circumstances, the Agency's denial of healing period benefits becomes a penalty, which is not supported by *Gwinn* and is certainly not supported by the intent underlying the Iowa Workers' Compensation Act. Accordingly, the Court should rule that the Commissioner's denial of healing period benefits was based on an erroneous interpretation of the law.

A. The Employer fails to find any specific language in the Iowa Workers' Compensation Act that actually supports the denial of healing period benefits in this case.

The Employer argues that the Iowa Workers' Compensation Act requires an additional element of proof but cannot actually point to specific language in the Act to support this argument. On the other hand, the Claimant can show her entitlement to Healing Period Benefits is based on the plain language of the Iowa Workers' Compensation Act. The Iowa Workers' Compensation Act states:

> **Healing period.** If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the first day of disability after the injury, and until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

Iowa Code § 85.34(1) (2016) (emphasis original). According to the plain language of Subsection 85.34(1), the employer shall pay to the employee compensation for a healing period if an employee has suffered a personal injury causing permanent partial disability ("PPD"). *Id.* Consequently, the statutory requirement for healing period benefits is met when an employee has suffered PPD.

Here, Claimant has suffered PPD. App. 127-128. In fact, the Employer has voluntarily paid PPD benefits. App. 117 & App. 118. Thus, Claimant has met the statutory requirement under Subsection 85.34(1) because she has suffered PPD.

Moreover, Claimant is requesting healing period benefits for the time period when she was recovering from a medically necessary surgery. While recovering from surgery, Claimant was off work for the time period of May 10, 2013 through July 21, 2013. App. This time period is undisputed *Id.*, and it is undisputed that the surgical procedures were causally related to the work injury, *Id.* & App. 132-138.

It is important to remember that this case involves entitlement to healing period benefits. The Legislature dedicated Iowa Code subsection 85.34(1) to entitlement to healing period benefits. Iowa Code § 85.34(1) ("Compensation…during a healing period for permanent partial disabilities shall be payable to an employee as provided in this section.") The Employer admits that it cannot support its argument for denial of healing period benefits with the actual language contained in the Iowa Code subsection 85.34(1) (Appellee's Brief, page 32, "…even though not specifically stated in Iowa Code § 85.34(1)…")

The Employer has attempted to find statutory support for its argument in Iowa Code section 85.27, but this case does not involve entitlement to medical benefits. The Legislature dedicated Iowa Code section 85.27 to entitlement to medical benefits, not healing period benefits, however, the Employer relies on this section for its argument. The Employer argues that the Court must impose an additional element of proof on workers before they are allowed to receive healing period

benefits. (Appellee's Brief, page 32) Interestingly, the Employer fails to support its argument with specific language from Iowa Code section 85.27.

In addition, the Employer argues that the Court is allowed to impose additional requirements of proof even though there is not specific language in Subsection 85.34(1) to support these additional requirements. The Employer argues otherwise, an employee could claim healing period benefits from a health condition or disease which is not work-related; however, the Employer's argument once again ignores the plain language of Subsection 85.34(1). The language of Subsection 85.34(1) does not allow for the Employer's hypothetical because this Subsection requires that the "employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section[.]"

First, the plain language of Subsection 85.34(1) quickly disposes of the Employer's argument because it contains the phrase "personal injury," which has a specific definition under the Iowa Workers' Compensation Act. *See* Iowa Code § 85.61(4) (listing what is and is not a "personal injury"); *See also Musselman v. Central Telephone Co.*, 154 N.W.2d 128, 132 (Iowa 1967) (discussing what is a "personal injury" under the Workers' Compensation Act).

Second, the plain language of Subsection 85.34(1) supports the reading that judges should distinguish between entitlement to healing period benefits and

entitlement medical benefits. *See* Iowa Code § 85.34(1) ("…The compensation shall be in addition to the benefits provided by sections 85.27 and 85.28[.]") And that entitlement to healing period benefits should be determined by looking Iowa Code Subsection 85.34(1). Iowa Code § 85.34(1) ("Compensation…during a healing period for permanent partial disabilities shall be payable to an employee as provided in this section.")

Thus, the Court should allow for Claimant to receive healing period benefits because there is statutory support in the plain language of Iowa Code subsection 85.31(4) and there is no language that requires the denial of healing period benefits.

B. The Employer concedes that the *Thilges* Court never interpreted Iowa Code § 85.34(1), the subsection that controls entitlement to healing period benefits.

In 1995, the Court decided the case of *Thilges v. Snap-On Tools Corp.*, 528 N.W.2d 614. The *Thilges* Court never interpreted Iowa Code subsection 85.34(1), the subsection that controls entitlement to healing period benefits. Consequently, *Thilges* should not be used as precedent to determine entitlement to healing period benefits because it would be precedent that is founded on the interpretation of the wrong sections of the Iowa Workers' Compensation Act. *Id.*, 528 N.W.2d at 617.

The *Thilges* Court interpreted different sections of the Iowa Workers' Compensation Act: Iowa Code section 85.39, which controls entitlement to reimbursement for medical evaluation; Iowa Code subsections 85.33(2), which

controls entitlement to temporary partial disability benefits; and Iowa Code subsection 85.33(3), which controls entitlement to temporary total disability benefits. *Id.* at 617. Generally, the *Thilges* Court reasoned that these subsections do not contemplate that employer pay employees for lost time to attend a medical appointment.

The Employer concedes that the *Thilges* Court interpreted different code sections than the one that controls entitlement to healing period benefits, yet, the Employer insists that *Thilges* is proper precedent because the "[e]mployee's argument in that case that her lost time to attend a medical appointment be paid as healing period was rejected as well." (Appellee's Brief, page 34). Claimant submits that the employee's claim in *Thilges* was rejected because it did not meet the statutory requirements of a healing period. Specifically, the employee in *Thilges* missed work to attend medical appointments but this period of time was different than the period of time starting with the "first day of disability after the injury" and ending with the date of maximum medical improvement. *See* Iowa Code § 85.34(1). Thus, under the proper analysis, the *Thilges* holding would actually be consistent with the allowing healing period benefits in this case.

C. The Court should announce that the test in *Gwinn* does not apply to the issue of entitlement to healing period benefits.

The Court should announce to the Agency that the test in *Gwinn* has a limited application. Specifically, the Agency should limit the application of the *Gwinn* test

to the issue of entitlement to medical benefits. In other words, the Agency should never apply the *Gwinn* test when deciding the issue of entitlement to healing period benefits.

Claimant submits that the Court's holding in *Gwinn* is based on shaky precedent that interpreted different code sections.

Claimant submits that there is no statutory requirement that a healing period must come from "authorized care," yet, the *Gwinn* Court wrote the following:

> …In a related context, we have held a claimant who misses work to attend unauthorized medical care appointments is not entitled to healing-period benefits. *Thilges v. Snap-On Tools Corp.*, 528 N.W.2d 614, 617 (Iowa 1995). We observed that the applicable statutes provide no indication that the legislature intended workers to receive awards for unauthorized medical appointments in the normal course of events. *Id.*

Gwinn, 779 N.W.2d at 209. The *Gwinn* Court discussed the legislation's intent towards healing period benefits. *See Id.* ("We observed that the applicable statutes provide no indication that the legislature intended workers to receive awards…")

As discussed in the previous section, the *Thilges* Court never interpreted Iowa Code subsection 85.34(1) – the subsection involving entitlement to healing period benefits. Consequently, *Thilges* should not be used as precedent to deny healing period benefits.

D. Even if the Court applies the holding of *Gwinn* to certain cases involving entitlement to healing period benefits, the Court should not apply the test in *Gwinn* to the facts of this case because the facts in this case are distinguishable.

Even if the Court continues to apply the test in *Gwinn* to certain cases involving healing period benefits, the Court should not apply the *Gwinn* test to the present case because of important, factual differences. In this Case, it was undisputed that Claimant would have received the exact same medical care that was recommended by the Employer-Chosen doctor and as a result, the Claimant would have been off work recuperating from the surgery regardless of what doctor performed the surgery.

In *Gwinn*, the employee, Gwinn, was examined by a physician, Dr. Pichler, who recommended surgery to treat Gwinn's foot and ankle problems. *Id.* at 197. When Gwinn requested that the employer pay for the treatment recommended by Dr. Pichler, the employer refused, and authorized Gwinn to see Dr. Galles, an orthopedic physician. *Id.* Dr. Galles recommended physical therapy for Gwinn's continuing problems. *Id.* Thereafter, Gwinn had Dr. Pichler perform the surgery, and then sought payment for the surgery, as well as healing period benefits, from the employer. *Id.* at 198.

In deciding that Gwinn could not recover healing period benefits, the Court stated:

> *The healing-period benefits awarded by the commissioner in this case were based solely on Gwinn's recovery time from the unauthorized casting and surgery performed by Dr. Pichler*. Without substantial evidence to support a finding that the unauthorized medical care was reasonable and beneficial under the totality of the circumstances, there was no evidence to support a finding that the temporary disability on account of the unauthorized casting and surgery was causally related to the injury.

Id. at 209 (emphasis added). The merit and value of the unauthorized treatment itself was at issue in *Gwinn* and as a result, the need for "recovery time" was at issue. It is important distinction that: if the employee had continued to receive authorized care, the employee would not have needed "recovery time" away from work to recuperate. No unauthorized care, no recovery time away from work.

In contrast to the situation in *Gwinn*, the evidence in this Case showed that – *hypothetically* – had Claimant obtained treatment for her injury with Dr. Adams, the Employer-Chosen physician, Dr. Adams, would have recommended and performed surgery just as Dr. VonGillern did. App. 13.

Thus, the facts of this Case differ in an important respect from *Gwinn* as the merit and value of the unauthorized treatment was not in dispute. This difference is highly relevant to whether an employee should be able to recover healing period benefits resulting from treatment by an unauthorized physician.

The Court should acknowledge this important, factual difference and allow Claimant to receive healing period benefits for her compensable injury. The Iowa Supreme Court has consistently stated: "It is well established that '[w]e liberally

construe workers' compensation statutes in favor of the worker,' because '[t]he primary purpose of the workers' compensation statute is to benefit the worker and his or her dependents, insofar as statutory requirements permit.'" *Des Moines Area Reg'l Transit Auth. v. Young*, 867 N.W.2d 839, 842 (Iowa 2015) (citations omitted). It would be contrary to this underlying rule of interpretation with respect to the workers' compensation statute to deny healing period benefits for recovery time that would have been required regardless of whether an authorized or unauthorized physician provided the treatment. When benefits are denied under these circumstances, the denial is not based on a failure to prove beneficial care, as it was in *Gwinn*, but rather becomes a penalty exacted from the employee for having the procedure performed by an unauthorized physician. This imposition of a penalty is not supported by *Gwinn* and certainly not supported by the intent underlying the workers' compensation statute.

Accordingly, this Court should rule that the Commissioner's denial of healing period benefits was based on an erroneous interpretation of the law and should reverse the Commissioner's decision.

E. The Employer cites to cases that prove that the *Gwinn* standard is an impossible standard to apply in nearly almost every case.

To the extent the *Gwinn* Court created an additional requirement to the entitlement to healing period benefits, Claimant requests that that Court overrule *Gwinn* because it imposed a nearly impossible standard on Claimant. The *Gwinn*

Court charged the Agency with applying an impossible standard in this Case: did Claimant achieve a better result from Dr. VonGillern's surgery than from the hypothetical result of the same surgery if Dr. Adams had performed the procedures instead? *See* App. 13. ("…Having had the exact same surgeries performed by Dr. VonGillern, it becomes a harsh result to deny claimant benefits simply because she cannot prove she achieved a better result from the same treatment…")

The Agency was tasked with determining the hypothetical outcome that Claimant would have experienced if she had the same surgery with a different doctor. Then, the Agency had to compare that hypothetical outcome to her actual outcome. Not surprisingly, the Agency held that Claimant did not meet her burden of showing a "more" favorable outcome because the nearly impossible standard calls for the fact finder to speculate about a hypothetical outcome.

In its Brief, the Employer has a two-page string cite that is supposed to show overwhelming support for the proposition that the *Gwinn* standard is not a nearly impossible standard. (Appellee's Brief, pp. 42-43) Upon closer examination, almost every case cited by the Employer actually shows that the Agency is not truly applying the *Gwinn* standard. Claimant submits that this is situation because of the near impossibly of correctly applying the *Gwinn* standard.

In nearly almost every case cited by the Employer, the Agency did not truly analyze whether the unauthorized care was "beneficial" as defined by *Gwinn*. Under

Gwinn, a worker must show that unauthorized care is both: (1) reasonable; and (2) beneficial. *Id.* at 208. The Iowa Supreme Court has said that this is a "significant burden." *Id.* at 206. The significant burden does not come showing the unauthorized care is reasonable, rather, the high burden is from showing that the unauthorized care is "beneficial" because the term "beneficial" does not have an intuitive meaning under the *Gwinn* standard. *See e.g.*, *Verizon Business Network Services, Inc. v. McKenzie*, 823 N.W.2d 418 (Table), 2012 WL 4899244 (employer appealed on issue of whether unauthorized care was "beneficial" and did not raise appeal on issue of whether unauthorized care was "reasonable")[1].

Under *Gwinn*, the term "beneficial" means analyzing whether unauthorized care produced a "more favorable outcome than would likely have been achieved by the care authorized by the employer." *Id.* at 206. Procedurally, the *Gwinn* standard tasks the Agency with a five-step process in analyzing whether unauthorized care is beneficial:

1. Determine the actual outcome from the unauthorized care, and quantify this outcome.

2. Determine the hypothetical outcome from the authorized care, and quantify this outcome.

3. Compare the actual outcome from the unauthorized care to the hypothetical outcome from the unauthorized care.

[1] The Employer cited to this case to support the following argument: "Even a quick review of recent cases presenting the issue of whether unauthorized care was reasonable and beneficial shows that injured employees often meet their burden of proof." (Appellee's Brief, pp. 42-43) This case shows the exact opposite situation where an injured employee did not meet the burden of proof.

4. If the actual outcome from the unauthorized care is more favorable than the hypothetical outcome from the authorized care, than unauthorized care is "beneficial."

5. If the actual outcome from the authorized care is less favorable than or as favorable as the hypothetical outcome from the authorized care, then the unauthorized care is not "beneficial."

In nearly almost every case cited by the Employer, the Agency does not get past step one of the process of applying the *Gwinn* standard, and in fact, the Agency applies a different analysis for this step. The Agency will cite to the *Gwinn* standard and may use the word "beneficial," but the Agency does not proceed to the next step of determining the hypothetical outcome from the authorized care. *See E.g.*, *Catholic Health Initiatives v. Hunter*, 860 N.W2d 342 (Iowa App. 2014) (Table), 2014 WL 6681657[2]; *Whirlpool Corp. v. Davis*, 838 N.W.2d 681 (Iowa App. 2013) (Table), 2014 WL 6681657; *John Chandler v. Ethon Smith & Nationwide Mutual Ins. Co.*, File No. 5051637 (Arb. Dec. 06/06/16); *Rick Bebensee v. City of Walker & Fireman's Ins. Co. of WA, D.C.*, File No. 5047290 (Arb. Dec. 04/22/16); *Heim v. A.Y. McDonald Mfg. Co.*, File Nos. 50444264 & 5052066 (Arb. Dec. 02/08/16)[3]; *Jennifer Johnson v. Fam. Resources, Inc. & Argent – A division of West Bend Mut. Ins. Co.*, File No. 5042067 (Arb. Dec. 10/23/13).

[2] In this case, the Court of Appeals used the phrase "more medically beneficial"; however, the Agency did not actually analyze the hypothetical outcome of the authorized treatment.

[3] Unlike the other cases cited by the Employer, the Agency actually used the phrase "more favorable outcome than the authorized treatment provided by the employer" in the application section; however, the Agency did not actually analyze the hypothetical outcome of the authorized treatment.

Instead, the Agency uses the word "beneficial" and substitutes the analysis with the following: whether the unauthorized care improves the worker's qualify of life. *See E.g., John Chandler v. Ethon Smith & Nationwide Mutual Ins. Co.*, File No. 5051637 (Arb. Dec. 06/06/16) (finding unauthorized treatment was "beneficial" under *Gwinn* because it was beneficial to claimant in that it reduced pain); *Rick Bebensee v. City of Walker & Fireman's Ins. Co. of WA, D.C.*, File No. 5047290 (Arb. Dec. 04/22/16) (finding unauthorized treatment was "beneficial" under *Gwinn* because it was beneficial to claimant in that it reduced pain); *Heim v. A.Y. McDonald Mfg. Co.*, File Nos. 50444264 & 5052066 (02/08/16) (finding unauthorized treatment was "beneficial" under *Gwinn* because it was beneficial to claimant in that it reduced pain)[4]; *Jennifer Johnson v. Fam. Resources, Inc. & Argent – A division of West Bend Mut. Ins. Co.*, File No. 5042067 (Arb. Dec. 10/23/13) (finding unauthorized treatment was "beneficial" under *Gwinn* because it was beneficial to claimant's condition in that it reduced symptoms such as vertigo, dizziness, and headaches).

Or, the Agency undergoes one analysis for both "reasonable and beneficial" and completely ignores five-step process. *E.g., Catholic Health Initiatives v. Hunter*, 860 N.W2d 342 (Iowa App. 2014) (Table), 2014 WL 6681657 (holding that

[4] Unlike the other cases cited by the Employer, the Agency actually used the phrase "more favorable outcome than the authorized treatment provided by the employer" in the application section; however, the Agency did not actually analyze the hypothetical outcome of the authorized treatment.

unauthorized medical care was more medically beneficial because choice to treat with unauthorized doctor was "entirely reasonable" and the care was reasonable); *Whirlpool Corp. v. Davis*, 838 N.W.2d 681 (Iowa App. 2013) (Table), 2014 WL 6681657 (holding it was reasonable for worker to seek unauthorized care).

It is important to note that Claimant is not saying that the *Gwinn* standard is impossible to apply in every case, rather, Claimant is saying that it is an impossible standard to apply in *nearly* every case. Given the right assumptions, there is one category of cases where the Agency could work the standard. This category of cases can be described as: an unauthorized doctor is recommending some type of medical treatment and the authorized doctor is not recommending any type of treatment. *See. E.g.*, *Amy Elwell v. Bomagarrs Supply, Inc. & Iowa Ins. Guaranty Association*, File No. 5040442 (Remand Dec. 01/28/15); *Redzo Beganovic v. Titan Tire & Zurich Am. Ins. Carrier*, File Nos. 5036517, 5036363, 5036364 (Remand Dec. 08/18/14).

For example, the unauthorized doctor performs surgery and worker reports that her pain has been reduced. *See Amy Elwell v. Bomagarrs Supply, Inc. & Iowa Ins. Guaranty Association*, File No. 5040442 (Remand Dec. 01/28/15). Whereas the authorized doctor does not recommend surgery, medication, or refer the worker to another provider. *Id.*

In analyzing this type of case, the Agency could make the assumption that the hypothetical outcome from authorized care would not be any different from the

workers' current state before the unauthorized care. *See Redzo Beganovic v. Titan Tire & Zurich Am. Ins. Carrier*, File Nos. 5036517, 5036363, 5036364 (Remand Dec. 08/18/14) (finding that "a better outcome would not have been accomplished by offering no care at all")

Consequently, the five-step process is simplified to eliminate the steps of the *Gwinn* standard that make it impossible and it becomes one step:

1. Determine whether unauthorized care improved the worker's quality of life

If the authorized doctor is not offering any more medical treatment, than this is the equivalent to denying responsibility for the claim. Employers cannot have it both ways. Employers cannot deny responsibility for a medical condition and at the same time assert a right to control the medical care. *Redzo Beganovic v. Titan Tire & Zurich Am. Ins.*, File Nos. 5036517, 5036363, 5036364 (Remand Dec. 08/18/14), 2014 WL 4165322, *2.

Given the right assumptions, the *Gwinn* standard is workable for a small category of cases; however, this same category of cases are more easily treated as simple denial cases because no treatment is offered by the employer-authorized doctor. Consequently, the *Gwinn* standard is impossible in nearly every case and certainly should not be applied to this Case.

II. The Commissioner erred in ruling that the Employer had regained the right to control Claimant's medical care after it intentionally forfeited this right.

Employers should not be allowed to regain the power to control an employee's treatment after having once forfeited that right. The "whipsaw" of changing control will most often and most likely cause a change in treating physicians for the employee. This change could have a deleterious impact on an employee's recovery because it would disrupt an employee's ongoing relationship with her treating physician, potentially result in major modifications in the treatment regimen, and most likely result in delays and interruptions of care.

The Agency had long standing precedent that "[i]f the employer denies liability for a work injury, fails to promptly authorize medical care or withdraws authorization for medical care, the employer loses the right to choose the care and injured workers can obtain care on their own and later obtain reimbursement for such care after establishing the employer's liability for the medical condition treated. *Beganovic,* at *2 (citing *R.R. Donnelly & Sons v. Barnett*, 670 N.W.2d 190 (Iowa 2003); *Trade Professionals, Inc. v. Shriver*, 661 N.W.2d 119 (Iowa 2003); *West Side Transport v. Cordell*, 601 N.W.2d 691 (Iowa 1999); *Haack v. Von Hoffman Graphics*, File No. 1268172 (App. July 31, 2002); (other citation omitted)).

Here, the Employer chose to do all three actions to lose its right to control medical care: the Employer denied liability for the work injury; the Employer failed

to promptly authorize medical care; and the Employer forfeited its right to the authorization defense. First, the Employer denied liability in its Answer to the Petition. App. 95-96. Second, the Employer ignored Claimant's request for to promptly authorize medical care. App. 97-98; App. 99-100. Third, the Employer forfeited its right to the authorization defense.

Given that the worker's compensation statute is to be construed liberally in favor of the employee, an interpretation of the statute that would be disruptive to an employee's treatment and recovery would be contrary to the purpose of Iowa's workers' compensation law.

CONCLUSION

For the reasons stated above, the Court should reverse the Commissioner's determination by ruling that Claimant is entitled to healing period benefits, and then, order the Employer to pay benefits for the healing period starting with May 10, 2013 and going through July 21, 2013 along with interest accrued.

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We hereby certify that the costs paid for printing Claimant-Appellant's Reply Brief was the sum of $_____.

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