IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 16-1364
MUSCATINE COUNTY NO. CVCV023315

KELLY BREWER-STRONG

Petitioner-Appellant,

v.

HNI CORPORATION

Respondent-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR MUSCATINE COUNTY
THE HONORABLE JOHN TELLEEN

RESPONDENT - APPELLEE'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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PROOF OF SERVICE AND CERTIFICATE OF FILING

I certify that on January 4, 2017, the Respondent-Appellee's Final Brief and Request for Oral Argument was filed by electronic filing and electronic delivery via the EDMS system, pursuant to Iowa R. App. P. 6.902(2) and Iowa Ct. R. 16.1221(2), and was mailed to the parties as shown below:

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I further certify that on January 4, 2017, the Respondent-Appellee's Final Brief and Request for Oral Argument was filed by electronic filing and electronic delivery via the EDMS system, pursuant to Iowa R. App. P. 6.902(2) and Iowa Ct. R. 16.1221(2), with the Clerk of the Supreme Court, Judicial Branch Building, 1111 E. Court Ave., Des Moines, Iowa 50319.

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ROUTING STATEMENT

Respondent-Appellee, HNI Corporation, asserts that this case presents issues requiring application of existing legal principles and issues that are appropriate for summary disposition and should, therefore, be addressed by the Iowa Court of Appeals as provided in Iowa R. App. P. 6.1101(3)(a) and (b). Iowa R. App. P. 6.1101(3)(a) and (b). In addition, while the issues presented on appeal are of importance to the Petitioner-Appellant, the Petitioner-Appellant fails to demonstrate how her workers' compensation case presents any issues of such urgency or public importance that a decision by the Iowa Supreme Court is required. Iowa R. App. p. 6.1101(2)(d).

In her Routing Statement, the Petitioner-Appellant argues that this case should be retained by the Supreme Court on the basis of Iowa R. App. p. 6.1101(2)(c) and (f). However, the Petitioner-Appellant fails to state how the decision of the District Court (or the decisions of the Deputy or Workers'

Compensation Commissioner) conflicts with any published decision of the Iowa Court of Appeals or the Iowa Supreme Court arguing only that the Supreme Court should provide further explanation of Iowa Code §85.27 and the previous case of Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193 (Iowa 2010). The Petitioner-Appellant acknowledges that the principles set out by the Iowa Supreme Court in the Gwinn case were correctly applied by the District Court (as well as by the Deputy and the Workers' Compensation Commissioner). The Petitioner-Appellant also fails to identify any issue of first impression, instead attempting to create such an issue involving Iowa Code §85.27 by mischaracterizing the actions of Respondent-Appellee. Iowa R. App. p. 6.1101(2)(c). The Petitioner-Appellant argues that an issue exists regarding the Respondent-Appellee "forfeiting" or "regaining" the right to control medical care in a manner which fails to recognize the Respondent-Appellee's rights and obligations under Iowa Code §85.27 when an injury is accepted as compensable under the Iowa Workers' Compensation Law.

STATEMENT OF THE CASE

The Respondent-Appellee submits this statement due to dissatisfaction with the statement of the Petitioner-Appellee as it fails to

provide a correct and complete summary of the proceedings in this case which are relevant and of importance to the issues raised in this appeal.

This case involves a workers' compensation claim presented by the Petitioner-Appellant, Kelly Brewer[1] (hereinafter Brewer), against her employer, Respondent-Appellee, HNI Corporation (hereinafter HNI), for a cumulative injury to her bilateral upper extremities on a date of injury January 26, 2012. (App. p. 94.) A workers' compensation hearing was held on August 22, 2014 before Deputy Iowa Workers' Compensation Commissioner, William H. Grell.[2] The only issues at hearing were whether Brewer was entitled to healing period benefits including whether her period of healing period was the result of unauthorized medical care and whether she was entitled to penalty benefits on healing period benefits. (App. pp. 207-218 and Hearing Report.) Deputy Grell filed his Arbitration Decision on November 12, 2014, denying healing period benefits to Brewer on the basis that HNI proved a valid authorization defense and that Brewer failed to

[1] Kelly Brewer married during the pendency of these proceedings and became known as Kelly Brewer-Strong.

[2] The delay in scheduling of a hearing in this case was due to two continuances which were granted, the first for compelling an examination of Brewer and the second on the basis that Brewer had not yet reached MMI and all issues were not yet ripe for determination. (App. pp. 50-51 and 54-56.)

meet her burden to prove entitlement to payment for such unauthorized medical care and, therefore, any healing period benefits related to that care.[3] (App. pp. 12-13) Following an Application for Rehearing filed by Brewer, Deputy Grell issued a Ruling on Claimant's Application for Rehearing again denying healing period benefits and providing further explanation of his basis for this denial including rejecting Brewer's new argument that the Law of the Case Doctrine prohibiting HNI's authorization defense and rejecting her claim that she had met her burden of proof under the test set out in the case of Bell Brothers Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193 (2010). (App. pp. 57-61.)

Brewer then filed an appeal to the Iowa Workers' Compensation Commissioner. In his Appeal Decision, the Commissioner adopted Deputy Grell's findings, conclusions, and analysis in all regards and affirmed the Deputy's Arbitration Decision in its entirety. (App. pp. 17-18.) Brewer then filed a Petition for Judicial Review with the Muscatine County District Court. Judge John Telleen's Ruling on Petition for Judicial Review affirmed

[3] Brewer did not appeal the finding of the Deputy, the Commissioner, or the District Court that her care by Dr. Von Gillern was unauthorized. (App. pp. 6-8, 16-18, and 45.) This finding could have a determinative impact on later issues raised by Brewer concerning her claim for medical expenses and benefits for permanent disability, issues not addressed in the previous hearing.

the decision of the Iowa Worker's Compensation Commissioner finding that the Commissioner did not err in determining that Brewer's chosen treating physician was unauthorized and that due to her failure of proof Brewer was precluded from recovering healing period benefits based on this unauthorized care.[4] (App. pp. 19-46.)

STATEMENT OF THE FACTS

The chronology of events summarized in Brewer's brief fails to provide this Court with an accurate review of the evidence or how and when such evidence impacted on the previous proceedings in this case. The timing of the actions of the parties is crucial to the issues raised on appeal. HNI, therefore, submits this statement due to dissatisfaction with the factual statement presented by Brewer in order to provide this Court with the necessary information to consider this appeal.

On June 7, 2012 the Petitioner-Appellant, Kelly Brewer (hereinafter Brewer), commenced a contested case before the Iowa Workers' Compensation Commissioner by filing a Petition alleging an injury arising out of and in the course of her employment with the Respondent-Appellant, HNI Corporation (hereinafter HNI) on the date of injury January 26, 2012 involving a cumulative injury to her bilateral upper extremities. (App. p.

[4] Brewer did not raise an issue regarding denial of her claim for penalty benefits as a part of this Judicial Review. (App. pp. 19-46.)

94.) Prior to this filing and as a part of a previous workers' compensation claim involving an injury to her left shoulder, HNI had authorized an occupational physician, Dr. Tina Stec, to treat that injury. (App. pp. 62-66 and 219-220.) This treatment included EMG/NCV testing of both arms which was done on January 26, 2012, the date of injury used by Brewer in her Petition in this case. (App. pp. 62-66, 143, and 221.) Based on the results of that testing which showed bilateral carpal tunnel syndrome, Dr. Stec provided HNI with an opinion that Brewer's mild bilateral carpal tunnel was not related to the injury to her left shoulder and did not provide an opinion which related Brewer's bilateral upper extremity condition to any cumulative work injury. (App. pp. 67, 68-70, 222, and 225.) Dr. Stec provided Brewer with wrist splints but did not suggest any further evaluation or referrals for treatment. (App. p. 70.) HNI obtained further records and opinions from Dr. Stec regarding Brewer's cumulative bilateral upper extremity injury, but because Brewer's complaints were inconsistent and because Dr. Stec did not establish an opinion sufficiently establishing causation, HNI denied Brewer's request for medical care. (App. pp. 71-72 and 73-75.) On June 20, 2012 HNI filed an Answer to Brewer's Petition denying her cumulative bilateral upper extremity injury on January 26, 2012. (App. pp. 95-96.)

On September 4, 2012 Brewer filed an Application for Alternate Medical Care seeking a ruling from the Commissioner regarding medical care for her cumulative bilateral upper extremity injury. This Application failed to identify the alternative medical care she sought simply stating "abandonment of care." (App. pp. 101-102.) This Application for Alternate Medical Care was dismissed on the basis of HNI's denial of liability for Brewer's injury. (App. pp. 47-49 and 102.) In the Order of Dismissal, the Deputy stated that Brewer's Alternate Medical Care Petition was dismissed without prejudice and stated that "if the [petitioner] seeks to recover the charges incurred in obtaining the care for which [HNI denies] liability, [HNI is] barred from asserting lack of authorization as a defense for those charges." (App. pp. 47-49.) As of the time of Brewer's filing of this first Alternate Medical Care Petition, Brewer had lost no time from work or sought any medical care (other than visits with Dr. Stec authorized as a part of her left shoulder claim) as a result of her claimed cumulative bilateral upper extremity injury. (App. pp. 224-228 and 229-230.)

Despite its initial denial of Brewer's cumulative injury claim, on October 22, 2012, pursuant to arrangements made by HNI, Brewer was seen by Dr. Brian Adams at The University of Iowa Hospitals and Clinics for an evaluation of her bilateral upper extremity complaints. (App. pp. 202-206

and 265-267.) HNI requested Dr. Adams' opinions regarding whether these complaints were the result of a cumulative work injury and whether any medical care was needed. (App. pp. 139-142.) Dr. Adams diagnoses included bilateral carpal tunnel and cubital tunnel syndromes as well as a trigger finger, but as of his evaluation on October 22, 2012, he did not recommend any treatment, noting it was too early to proceed to surgery. (App. pp. 76-79 and 231-232.) Dr. Adams also expressed the opinion that Brewer's bilateral upper extremity problems were causally related to her work. (App. p. 78.) On the basis of Dr. Adams' opinion, on November 8, 2012 HNI amended its Answer to admit that Brewer had sustained a cumulative injury arising out of and in the course of her employment on January 26, 2012, involving her bilateral upper extremities. (App. pp. 112-114 and 233-234.) HNI received no responses to requests to Brewer regarding whether she was seeking medical care at that time for her bilateral upper extremities but medical records show Brewer had sought no medical care since last seeing Dr. Stec in June of 2012. (App. pp. 68-70, 199-201, and 264 and Tr. P. 49.)

Brewer had her first Independent Medical Examination (IME) with Dr. Kreiter on January 15, 2013, at which time Dr. Kreiter noted that Brewer had not sought any medical care for her bilateral upper extremity complaints

but by the time of his visit her complaints had worsened. (App. pp. 80-83 and 234.) Dr. Kreiter suggested repeat EMG/NCV testing and surgery. (App. p. 80.) Following receipt of Dr. Kreiter's report, HNI advised Brewer on March 12, 2013 that arrangements had been made for her to return to Dr. Adams for another evaluation of what additional medical care was needed and for him to provide Brewer with that care. (App. pp. 188-189, 190-192, 193, 195-198, and 235-239.) Brewer refused to attend any appointments with Dr. Adams. (App. pp. 188-189, 194, and 239.) In her testimony at hearing, Brewer acknowledged that her symptoms had significantly worsened between the time she saw Dr. Adams in October of 2012 and when she might have seen him in April of 2013 and she did not know if Dr. Adams would have suggested surgery or some other treatment had she attended that visit. (App. pp. 188-189 and 240-241.)

At Brewer's deposition on April 16, 2013, HNI learned that Brewer intended to obtain medical care for her bilateral upper extremities with Dr. Von Gillern, although Brewer acknowledged that she had not yet scheduled an appointment or received any treatment with him. (App. pp. 214 and 244-245.) Also at this deposition Brewer first advised HNI that she did not want to return to Dr. Adams for treatment because she saw him as a "high educated idiot" and did not like that he did not speak to her in

layman's terms. (App. p. 245.) Following her deposition, HNI advised Brewer that Dr. Adams and not Dr. Von Gillern was the authorized physician in this case and that medical expenses and weekly benefits would not be paid based on Dr. Von Gillern's treatment.[5] (App. pp. 185-186, 214, and 244-245.) HNI offered to reschedule an appointment with Dr. Adams if Brewer would reconsider her refusal to see him. (App. p. 187.) Brewer acknowledged in her testimony at hearing that before she ever sought treatment with Dr. Von Gillern, she was aware that his medical bills and any benefits for time off work during his treatment would not be paid by HNI. She was also aware before she ever sought treatment with Dr. Von Gillern that HNI had accepted her cumulative bilateral upper extremity claim as a work related injury. (App. pp. 245-246 and 251.)

A Ruling was entered on April 25, 2013 granting HNI's Motion to Compel Examination and ordering Brewer to be seen by Dr. Adams; however, on that same date Brewer filed her second Application for Alternate Medical Care seeking an order directing HNI "to authorize an

[5] Unknown to HNI until after Brewer's deposition, on March 25, 2013 before seeing Dr. Von Gillern Brewer sought treatment with Dr. Atwell who agreed with the diagnoses made by Dr. Adams and still did not think surgery was needed. (App. pp. 145 and 242-243.) Dr. Atwell also suggested to Brewer that she contact her employer concerning who would be authorized to provide her with further treatment. (App. p. 145.) Brewer chose not to return to Dr. Atwell for treatment. (App. p. 243.)

EMG/NCV which will be used by the doctors to determine appropriate medical treatment."[6] (App. pp. 50-51 and 171.) No doctor was requesting EMG/NCV testing at the time this second Application for Alternate Medical Care was filed. (App. pp. 248-249.) In its answer to Brewer's second Application for Alternate Medical Care HNI admitted liability for Brewer's cumulative bilateral upper extremity injury on January 26, 2012 consistent with its Amended Answer filed in November of 2012 in the contested case proceeding. (App. pp. 112-114 and 172.) Prior to any hearing on the merits, Brewer dismissed her Application for Alternate Medical Care, a Dismissal which was approved by a Ruling filed by Deputy Iowa Workers' Compensation Commissioner William H. Grell on May 6, 2013. (App. pp. 52-53 and 167-170.)

HNI learned of Brewer's planned surgeries with Dr. Von Gillern only through her request for a leave of absence from her employment with HNI on May 6, 2013. (App. pp. 151 and 250.) Prior to the first surgery scheduled for May 10, 2013, HNI advised Brewer that because of its

[6] Brewer placed "conditions" on her attendance at an appointment with Dr. Adams, including that Dr. Adams not attempt to offer her any medical treatment. (App. pp. 184 and 246-247.) As of the time of hearing in August of 2014, HNI had not yet sought an evaluation by Dr. Adams because Dr. Von Gillern had not yet determined that she had reached maximum medical improvement making a return appointment with Dr. Adams premature. (App. pp. 175-181.)

acceptance of her injury as work related, she might not receive short term disability benefits or payment of medical expenses through health insurance if she proceeded with unauthorized care by Dr. Von Gillern.[7] (App. pp. 182-183.) HNI again offered to authorize treatment with Dr. Adams for her cumulative bilateral upper extremity injury but received no response from Brewer. (App. pp. 182-183.)

In an attempt to bring this concern to the attention of the Workers' Compensation Commissioner, on May 7, 2013 HNI filed an Application for Alternate Medical Care (admittedly an unusual use of this procedure) but this Application was dismissed as not being allowed pursuant to Iowa Code §85.27(4). (App. pp. 162 and 165-166.) In the Order of Dismissal filed by Deputy Grell it was noted that when an employer accepts liability for an injury, a claimant can accept the care offered by the employer, file an Application for Alternate Medical Care, or obtain unauthorized medical care at her own expense. (App. pp. 161-164.) Also in this Order, Deputy Grell

[7] Brewer acknowledged at hearing that between her appointment with Dr. Adams in October of 2012 and May of 2013 she had not contacted Dr. Von Gillern regarding any treatment for her bilateral upper extremity complaints. (App. p. 253.) Brewer's only contact with physicians concerning her bilateral upper extremities during this period was her IME with Dr. Kreiter in January of 2013 and an examination by Dr. Atwell in March of 2013 with no treatment having been provided by either of these physicians. (App. pp. 80-83 and 145.)

noted the higher evidentiary burden Brewer would be required to meet if she later sought payment for unauthorized medical care cautioning her about choosing to "abandon the protections of Iowa Code section 85.27" and specifically stating that the "[d]efendants may elect to assert an authorization defense should claimant refuse the treatment offered without an order of this agency transferring care." (App. p. 163.) No further Applications for Alternate Medical Care were filed by Brewer, including any Application for Alternate Medical Care seeking an order requiring HNI to provide care with Dr. Von Gillern for her cumulative bilateral upper extremity injury. (App. p. 252.) Brewer also filed no request for reconsideration or appeal of Deputy Grell's Order.

Brewer still chose to proceed to surgery with Dr. Von Gillern on May 10, 2013, on the right upper extremity and June 12, 2013, on the left upper extremity resulting in a period of possible entitlement to healing period from May 10, 2013, through July 21, 2013, when she was released by Dr. Von Gillern and returned to work at her regular job. (App. pp. 84-86, 87-88, 89, and 254-255.) During this time period Brewer received short term disability benefits totaling $2,990.00.[8] (App. p. 156.) Brewer

[8] The amount of Brewer's claim for healing period benefits can be determined by reference to Claimant's Response to Defendants' Request for Admissions. (App. pp. 154-157.) The parties have stipulated to the correct

continued to demand that HNI make payment of healing period benefits for her time off work during Dr. Von Gillern's treatment, but HNI continued to advise that Dr. Von Gillern was not an authorized physician and neither his medical bills nor weekly benefits for healing period resulting from his treatment would be paid. (App. pp. 115 and 116.)

In his deposition taken before hearing, Dr. Von Gillern expressed his opinions concerning the care with Dr. Adams which HNI had offered to Brewer. (App. pp. 126-127, 129, and 130.) Dr. Von Gillern stated that when Brewer had seen Dr. Adams in October of 2012 Dr. Adams had not felt that surgery was warranted but Dr. Von Gillern believed that Dr. Adams likely would have agreed with and performed surgery had Brewer seen him in April of 2013. (App. pp. 129 and 130.) Dr. Von Gillern testified that he could not say his treatment of Brewer had provided a more favorable outcome than if Dr. Adams had provided treatment for her. (App. p. 127.) At hearing Brewer continued to express complaints in her bilateral upper

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rate of $457.05 per week and the dates of May 10, 2013 through July 21, 2013, a total of 10 and 3/7 weeks, as the period Brewer claims healing period benefits. (App. p. 155.) The parties have also stipulated to the amount Brewer received in short term disability benefits during this same time period, namely $2,990.00, the amount HNI is entitled to claim as a credit against any healing period benefits. These stipulations result in a calculation of healing period/temporary disability benefits claimed by Brewer of $457.05 x 10.429 - $2,990.00, or a total of $1,776.57.

extremities and admitted that she did not know if she was satisfied with Dr. Von Gillern's care or what additional treatment she might pursue. (App. pp. 259-260, 261-262, 263, and 267-268.) She testified at hearing that she had not pursued additional EMG/NCV testing Dr. Von Gillern had suggested and that she did not know what further treatment he might suggest for her.[9] (App. pp. 259-260.)

Although Dr. Von Gillern had indicated during his treatment of Brewer that he did not anticipate any permanent, at the time of his deposition Dr. Von Gillern provided an estimated impairment rating of 2% of each upper extremity even though he had not yet determined that Brewer had reached maximum medical improvement for her cumulative bilateral upper extremity injury.[10] (App. pp. 125, 148, and 149-150.) Consistent with its acceptance of the compensability of her cumulative bilateral upper

[9] On March 3, 2014, Brewer was seen for a second IME with Dr. Milas and complained to him of the same symptoms she had experienced before Dr. Von Gillern's surgeries. (App. pp. 90-91, 92, and 257.) Dr. Milas suggested additional testing and possibly additional surgery and even suggested that despite the fact that she continued to work her regular job, he did not believe Brewer could return to work or would be able to find work in the future. (App. pp. 92-93, 120, and 121-122.) Brewer produced no evidence indicating that she had pursued Dr. Milas' suggestions.

[10] Despite being her chosen physician, Brewer did not seek Dr. Von Gillern's opinions regarding maximum medical improvement, additional medical care needed, permanent impairment, or permanent restrictions. (App. p. 256.)

extremity injury (and to avoid possible penalties), HNI volunteered payment of permanent partial disability benefits to Brewer on the basis of this estimated impairment rating.[11] (App. p. 174.) HNI still made no payment of healing period benefits on the basis that such benefits were the result of Dr. Von Gillern's unauthorized medical care. The issues of Brewer's entitlement to medical expenses including for Dr. Von Gillern's unauthorized care and benefits for permanent disability were bifurcated for a later hearing. (App. p. 6.)

ARGUMENT

BRIEF POINT I

The District Court did not err in determining that Brewer was precluded from recovering healing period benefits under the test set forth in the Court's Gwinn decision.

Preservation of Error

HNI disagrees with Brewer's statement in her brief that error was preserved on this issue in Claimant's Post-Hearing Brief as this brief contains absolutely no mention or citation to the case of Bell Bros. Heating & Air Conditioning vs. Gwinn, 779 N.W.2d 193 (Iowa 2010). HNI's Post-Hearing Brief did raise the issue of the applicability of the Gwinn case in

[11] At hearing Brewer acknowledged that she had received voluntary payment of permanent partial disability benefits from HNI totaling approximately $5,000.00. (App. pp. 117, 118, and 258.)

denying Brewer's entitlement to healing period benefits. Claimant's Application for Rehearing did not take issue with the Gwinn case, only arguing that Gwinn should not apply to the facts of this case. HNI's Response to Claimant's Application for Rehearing notes that Deputy Grell properly relied upon the Gwinn case in denying healing period benefits to Brewer. In Brewer's Appeal Brief to the Iowa Workers' Compensation Commissioner Brewer again did not challenge the Gwinn case or its applicability to the facts of this case but denied that she had failed to meet her burden of proof as established in Gwinn. HNI's Appeal Brief to the Commissioner again noted that Deputy Grell correctly utilized the rule of the Gwinn case in finding that Brewer had failed to meet her burden to prove entitlement to healing period benefits. Finally, Respondents' Brief on Judicial Review filed by HNI set out the requirements of the Gwinn case and Brewer's failure to meet those requirements.

The issue of Brewer's failure to prove entitlement to healing period benefits under the rule of the Gwinn case was decided initially by Deputy Grell in his Arbitration Decision and again his Ruling on Claimant's Application for Rehearing of November 12, 2014, Arbitration Decision (App. pp. 12-13 and 57-61.) In his Appeal Decision the Iowa Workers' Compensation Commissioner affirmed Deputy Grell's decision in its

entirety again denying Brewer's request for healing period benefits. (App. pp. 16-18.) In his Ruling on Petition for Judicial Review Judge Telleen of the Muscatine County District Court relied on the Gwinn case and affirmed the Deputy's and the Commissioner's decision that Brewer had not proven entitlement to healing period benefits resulting from unauthorized medical care. (App. pp. 43-45.)

Standard of Review

On appeal, this Court follows much the same process as review by the District Court. The District Court reviews the Commissioner's actions in an appellate capacity and may grant relief only if the Commissioner's actions have prejudiced the Petitioner's substantial rights and the Commissioner's action meets one of the criteria set out in Iowa Code §17A.19(10)(a) through (n). Burton v. Hilltop Care Center, 813 N.W.2d 250, 256 (Iowa 2012). This Court applies those same criteria to determine whether the same result is reached and if so, affirms the decision of the District Court. Id. at 255-256 and Westling v. Hormel Foods Corp., 810 N.W.2d 247 251 (Iowa 2012).

Brewer's challenge to the determination of this issue is one involving correction of errors at law, if any, made by the District Court in interpreting the test set out by this Court in the case of Bell Bros. Heating & Air Conditioning vs. Gwinn, 779 N.W.2d 193 (Iowa 2010). See Iowa Ins. Inst.

V. Core Grp. of Iowa Ass'n for Justice, 867 N.W.2d 58, 65 (Iowa 2015). Interpretation of the workers' compensation statutes and related case law has not been clearly vested by a provision of law in the discretion of the Commissioner and the Court is free to substitute its own judgement. Lakeside Casino v. Blue, 743 N.W.2d 169, 173 (Iowa 2007). However, this Court can only substitute its judgement and reverse an agency decision "[b]ased on an erroneous interpretation of a provision of law." Mycogen Seeds v. Sands, 686 N.W.2d 457, 464 (Iowa 2004). Brewer's challenge to the Gwinn decision has varied from only questioning the applicability of the test set out in Gwinn to questioning the Gwinn test.

With regard to this issue Brewer also appears to challenge the District Court's determination that the test of the Gwinn case was properly applied to allow HNI the right to control Brewer's medical care. The issue for this Court when considering whether the Commissioner's and the District Court's application of law to fact is whether there was an abuse of discretion and this Court should only disturb the application of law to fact when the application was "irrational, illogical, or wholly unjustifiable." Mycogen Seeds v. Sands, 686 N.W.2d 457, 464 (Iowa 2004).

Argument

In this appeal, Brewer argues that the Deputy, the Commissioner, and the District Court erred in interpreting and applying the Gwinn case on the basis that the test of the Gwinn case conflicts with Iowa Code §85.34(1) and should not be applied to a determination of healing period benefits. Brewer also argues that the Gwinn case should not have been applied due to factual differences in this case and because the Gwinn case generally presents an impossible requirement of proof for an injured employee.

Iowa Code §85.34(1)

Brewer argues that Iowa Code §85.34(1) requires payment of healing period benefits regardless of any consideration other than the fact that an employee's injury was work related. Iowa Code §85.34(1) defines healing period benefits and the period such benefits are payable by an employer for an employee's work related injury. Iowa Code §85.34(1). See Waldinger Corp. v. Mettler, 817 N.W.2d 1 (Iowa 2012). While Brewer's simple approach in arguing that this single portion of the Iowa Workers' Compensation Law guarantees her healing period benefits might appear attractive for quick resolution of the issue in this case, it ignores other realities of an injured employee's elements of proof set out in the Law as a whole. Interpretation of a portion of a statute must be done with

consideration of each portion as consistent with the entire statute of which it is a part. Iowa Code §4.1. See Ramirez-Trujillo v. Quality Egg, 878 N.W.2d 759, 770 (Iowa 2016). It would be nonsensical to require an employer to pay benefits to an injured employee for time off of work if that time off was not proven by the employee to be directly related to the injury (rather than personal or vacation time) even though the statute provides no specific statement about this element of proof.

Likewise, even though not specifically stated in Iowa Code §85.34(1), another element of proof to be shown by the employee before an employer is required to pay healing period benefits is set out in Iowa Code §85.27(4). Iowa Code §85.27 sets out the rights and obligation of an employer regarding medical care for an accepted work related injury which, very generally stated, includes the employer's obligation to provide all reasonable and necessary medical care. See generally Iowa Code §85.27. Iowa Code §85.27(4) specifically provides for the employer's right to control the choice of medical care for an accepted injury. This Court has recognized that this right to choose provision was intended as a balance between the interest of injured employees and their employers. Ramirez-Trujillo v. Quality Egg, 878 N.W.2d 759, 770-771 (Iowa 2016). It requires an employer who agrees to the compensability of a work related injury to provide medical care to an

injured employee but also empowers the employer to use their own judgment rather than that of the employee in deciding which medical professionals are best suited to provide care. Id. at 771. By choosing or authorizing the injured employee's medical care, the employer must then make payment for that care. Id. The employer must also make payment for the results of that care whether healing period benefits or ultimately permanent disability benefits.[12] Because healing period has been defined as benefits during a period of recuperation from an injury, such benefits are dependent upon the treatment of the physician chosen by the employer. Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981). By reading together the provisions of Iowa Code §85.34(1) and Iowa Code §85.27(4), Brewer's argument regarding automatic payment of healing period benefits in this case must fail.

That an injured employee must prove a relationship between healing period and authorized care is supported by the case of Bell Bros. Heating &

[12] The employer's obligation to make payments of disability benefits resulting during and after an injured employee has been provided with medical care directed by the employer has been cited as a reason for allowing the employer the right to control care. Care selected by the employer has the value "of achieving the maximum standards of rehabilitation by permitting the compensation system to exercise continuous control of the nature and quality of medical services from the moment of injury. See Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 202 (Iowa 2010).

Air Conditioning v. Gwinn, 779 N.W.2d 193 (Iowa 2010). In Gwinn, the Iowa Supreme Court recognized the case of Thilges v. Snap-On Tools Corp., which stated that an injured employee was not entitled to payment for lost time from work to attend medical appointments not arranged for or approved by her employer. Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 617 (Iowa 1995). While Thilges may have dealt with whether benefits were to be paid for lost time to attend an employer authorized examination under Iowa Code §85.39, the employee's argument in that case that her lost time be paid as healing period was rejected as well. See Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 617 (Iowa 1995). After noting these statements from Thilges, the Court in Gwinn stated that there was nothing in the Iowa Workers' Compensation Law supporting an injured employee being paid benefits for unauthorized medical appointments. Gwinn at 209. The Court then acknowledged the relationship between authorized medical care and healing period stating that once an employer acknowledges compensability of an injury, Iowa Code §85.27(4) contemplates that the employer will provide reasonable medical care and will also pay benefits as described in other portions of the overall statute including Iowa Code §85.33 and §85.34. Gwinn at 202. See Iowa Code §85.34(1) (Describing temporary total and temporary partial disability benefits and healing period

benefits.) Brewer has not shown that the District Court erred in its interpretation of the Gwinn case, including the impact of that case on healing period benefits pursuant to Iowa Code §85.34(1).

The Test of Bell Bros. Heating & Air Conditioning v. Gwinn

Brewer also argues that the holding of the Gwinn case should not have been applied due to factual differences in her case and because Gwinn presents an impossible requirement for an injured employee to prove entitlement to unauthorized medical expenses and related healing period benefits.

Brewer argues that her situation is distinguishable from that of the Gwinn case as that case involved consideration of what Brewer describes as the merit and value of treatment offered by two different physicians, one a surgery and the other therapy. Brewer suggests that because in this case the issue was the same surgery by two different physicians the test of Gwinn should not apply. However, Brewer's attempt to distinguish Gwinn from the present case is based on an incorrect reading of the Gwinn case. Although in Gwinn the treatment suggested by two physicians differed greatly, the focus was not on the specific treatment recommended or received, but instead that one physician had been authorized by the employer and the other had not, just as in Brewer's case. Gwinn at 202-207. Brewer also misreads the

Gwinn case stating that in Gwinn an issue existed regarding whether the treatment, i.e. surgery, was causally related to the injury, but in Gwinn the reference to causal relationship was that it was the temporary disability claimed which was determined not to be causally related (and therefore not owed) due to the failure of the claimant's proof to show the unauthorized care was reasonable and beneficial, the test enunciated in Gwinn. Gwinn at 209. The District Court considered Brewer's argument that there was no issue regarding the merit and value of the recommended treatments by Dr. Adams who was authorized and Dr. Von Gillern who was not and determined this to be a factual difference of little impact with Gwinn test having been appropriately applied in this case. (App. pp. 42-43.)

Further examination of the facts and timing of the actions of the parties in this case shows the fallacies of Brewer's arguments regarding the Gwinn case. In Gwinn, the Iowa Supreme Court noted the importance of the employer's right to choose medical care for a compensable work related injury but also acknowledged circumstances where an employee might choose to select medical care at her own expense. Gwinn at 205. In the first circumstance, the employee may select her own medical care when an employer abandons care as a result of a denial of compensability of an injury. Under such circumstances, the employee is entitled to payment of

expenses for care upon proving her injury was compensable. Gwinn at 204. This is not the factual situation existing in the present case. By May of 2013 when Brewer sought medical care for her cumulative bilateral upper extremity injury, her injury had been accepted as compensable by HNI with the filing of its Amended Answer in November of 2012. (App. pp. 112-114.) As stated in Gwinn, "[to] require an employee seeking payment of authorized medical expenses to prove compensability after the employer has conceded compensability would upset the delicate balance of employer and employee protections the legislature sought to achieve in enacting section 85.27(4)." Ramirez-Trujillo v. Quality Egg, 878 N.W.2d 759, 774 (Iowa 2016).

In the second circumstance, an employee may select her own medical care by abandoning the protections of Iowa Code §85.27 and rejecting the care offered by the employer for an accepted work related injury. Gwinn at 204. In this situation, in order to protect the employer's right to choose medical care for an accepted work injury, the employee is required to meet a more significant burden of proof for entitlement to medical expenses related to care not chosen by her employer. Gwinn at 206. In order for the employee to recover the medical expenses related to her unauthorized care, the employee must prove by a preponderance of the evidence that under the

totality of the circumstances the care she sought was reasonable and beneficial. Gwinn at 206. The requirement of proof of reasonableness of the unauthorized care is the same as evaluation of the reasonableness of the employer's offered care involving analysis of differences of medical opinion regarding diagnosis and/or treatment as well as the qualifications of the physician and the quality of the care. Gwinn at 208. See also Mercy Hospital Iowa City v. Goodner, 828 N.W.2d 325 (Table) (Iowa App. 2013). Proof that the unauthorized care was beneficial requires a showing that the care produced a more favorable medical outcome than would likely have been achieved by the care authorized by the employer including possible reduction of the amount of weekly benefits for temporary and permanent disability which the employer might ultimately be required to pay. Gwinn at 208. Mercy Hospital Iowa City v. Goodner, 828 N.W.2d 325 *17 (Table) (Iowa App. 2013). Although Brewer argues to the contrary, in setting out this test in Gwinn, the Court noted that this interpretation of Iowa Code §85.27(4) is consistent with interpreting the workers' compensation statutes liberally in favor of the injured employee. Gwinn at 207-208.

It is exactly this second circumstance which occurred in the present case. Regardless of Brewer's arguments concerning HNI's initial denial of her cumulative bilateral upper extremity claim (whether in its initial Answer

to her Petition or in answer to her first Application for Alternate Medical care), as of the time Brewer sought unauthorized care with Dr. Von Gillern in May of 2013 she was well aware that his care was unauthorized and that she was abandoning the protections allowed to her by Iowa Code §85.27. (App. pp. 245-246 and 251.) HNI had filed an Amended Answer to Brewer's contested case Petition admitting her cumulative bilateral upper extremity injury and admitted liability in response to a second Application for Alternate Medical Care which was filed and then dismissed by Brewer. (App. pp. 50-51, 112-114, and 171-172.) With concern about Brewer's ability to obtain payment of her medical expenses or obtain payment during her healing period (as well as a concern about possible penalties), HNI filed an Application for Alternate Medical Care seeking to give the Commissioner the opportunity to determine the issue of reasonable care and again admitting compensability of Brewer's injury. (App. pp. 162 and 165-166.) In his Dismissal of HNI's Application for Alternate Medical Care, Deputy Grell made it quite clear that HNI had admitted Brewer's injury and though making no determination of issues of authorization or reasonableness of care noted that Brewer would have a higher evidentiary burden to meet if she later sought payment for unauthorized medical care. (App. p. 163.) Deputy Grell also specifically stated that HNI might elect to assert an authorization

defense if she sought such care without an order of Commissioner. (App. p. 163.) Brewer did not file any response, request for reconsideration, or appeal regarding Deputy Grell's Dismissal containing this language. Brewer also filed no further Alternate Medical Care Petitions including any Petition seeking an order from the Commissioner requiring HNI to provide care with Dr. Von Gillern and eliminating HNI's ability to present an authorization defense. Brewer chose to reject the medical care offered by HNI for her accepted cumulative bilateral upper extremity injury clearly evidencing an intent to ignore Iowa Code §85.27 both in terms of the rights allowed to HNI as well as the protections it might have allowed her.

As a result of her actions, Brewer faced a significant burden to prove entitlement to healing period benefits resulting from Dr. Von Gillern's unauthorized care. In an attempt to explain away her failure of this burden of proof, Brewer now claims on appeal that the test of Gwinn is unreasonable. Under the Gwinn test, Brewer was required to prove the reasonableness of the medical care she sought with Dr. Von Gillern. Because Brewer refused to be seen by Dr. Adams for his suggestions regarding surgery or other treatment for her bilateral upper extremities, it cannot be determined whether the treatment of Dr. Adams would have been identical to that of Dr. Von Gillern, but Dr. Von Gillern testified that Dr.

Adams most likely would also have performed surgery for Brewer's bilateral upper extremity conditions. (App. pp. 129 and 130.) On the basis that surgery was the treatment that Dr. Adams would have performed and was the treatment provided by Dr. Von Gillern, there is little question that such treatment would probably have been considered reasonable for treatment of Brewer's injury. However, that does not mean that Brewer met her burden to prove Dr. Von Gillern's treatment was beneficial or provided a more favorable outcome. Brewer argues that the surgery done by Dr. Von Gillern and the surgery which Dr. Adams might have provided were identical, but this cannot be known due to Brewer's refusal to even see Dr. Adams for his treatment suggestions. There also remains a question regarding the difference between the qualifications and abilities of each physician. Dr. Von Gillern himself testified that he could not say his surgery would have been better than any surgery done by Dr. Adams. (App. p. 127.) The evidence of the outcome of Brewer's surgery by Dr. Von Gillern certainly does not suggest a beneficial result as she continues to express complaints about her bilateral upper extremities and obtained a report from a second IME physician, Dr. Milas, which suggests permanent and total disability. (App. pp. 92-93.) Despite Brewer's arguments concerning a hypothetical outcome, it would not have taken much for Dr. Adams to have improved on

such a result. It is not the fault of the test from the Gwinn case which prevented Brewer from obtaining healing period benefits resulting from Dr. Von Gillern's care, but her own actions in refusing to allow HNI to authorize care, her failure to obtain any determination by the Commissioner regarding her intended unauthorized care, her failure to allow Dr. Adams to make suggestions regarding what his care might have entailed, and her ongoing bilateral upper extremity complaints and claim of significant disability following Dr. Von Gillern's care which resulted in the "harsh result" but the correct determination that Brewer was not entitled to such benefits. The District Court properly determined that under the appropriate test as set out in the Gwinn case Brewer failed to meet her burden to prove that the unauthorized care of Dr. Von Gillern was beneficial.

Brewer's argument regarding the Gwinn test as an impossible standard for an injured employee to meet is also without basis. 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 under this test. See Catholic Health Initiatives v. Hunter, 860 N.W.2d 342 (Table) 2014 WL 6681657 (Iowa App. 2014); Whirlpool Corp. v. Davis, 838 N.W.2d 681 (Table) 2013 WL 3864539 (Iowa App. 2013); Verizon Business Network Services, Inc. v. McKenzie, 823 N.W.2d

418 (Table) 2012 WL 4899244 (Iowa App. 2012) reversing the Commissioner's decision allowing the claimant to recover for unauthorized medical care in McKenzie v. Verizon Business Network Services, Inc., 2011 WL 2193982 (Iowa Workers' Comp. Com'n, Remand Dec. May 10, 2011); Chandler v. Ethon Smith, (Iowa Workers' Comp. Com'n, Arb. Dec. June 6, 2016); Bebensee v. City of Walker, 2016 WL 1712322 (Iowa Workers' Comp. Com'n, Arb Dec. April 22, 2016); Heim v. A.Y McDonald Mfg. Co., 2016 WL 555021 (Iowa Workers' Comp. Com'n, Arb Dec. February 8, 2016); Elwell v. Bomgaars Supply, Inc., 2015 WL 437418 (Iowa Workers' Comp. Com'n, Remand Dec. January 28, 2015); Beganovic v. Titan Tire, 2014 WL 4165322 (Iowa Workers' Comp. Com'n, Remand Dec. August 18, 2014); Johnson v. Family Resources, Inc., 2013 WL 5783128 (Iowa Workers' Comp. Com'n, Arb. Dec. October 23, 2013) and numerous others. Simply because Brewer did not meet her burden of proof as established by the test in Gwinn does not mean the District Court, the Commissioner, and the Deputy erred in relying on this case or that the test of the Gwinn case needs to be changed by the Court.

BRIEF POINT II

The District Court did not err in ruling that HNI had the right to control Brewer's medical care.

Preservation of Error

HNI agrees that this issue has been preserved for appellate review but not with all of the references to the record where this issue was raised as identified by Brewer in her Brief. The issue of HNI's right to control Brewer's medical care and arguments relating to the case of R.R. Donnelly & Sons v. Barnett, 670 N.W.2d 190 (Iowa 2003) and the Law of the Case Doctrine were not raised nor cited in Brewer's Post-Hearing Brief. The issue of HNI's rights under Iowa Code §85.27 relating to Brewer's accepted work related injury were raised in Defendant's Post-Hearing Brief (09/15/14); Defendants' Resistance to Claimant's Application for Rehearing; Defendant's Appeal Brief (02/23/15); and Respondents' Brief on Judicial Review (04/21/16).

The issue of HNI's right to control medical care for Brewer's accepted work related injury was decided initially by Deputy Grell in his Arbitration Decision although he did not address issues under the case of R. R. Donnelly & Sons v. Barnett and the Law of the Case Doctrine as those issues had not yet been raised by Brewer. (App. pp. 6-15.) In his Ruling on Claimant's Application for Rehearing Deputy Grell rejected these additional arguments again determining that HNI had the right to authorize medical care and that the care obtained by Brewer was unauthorized. (App. pp. 57-

61.) Deputy Grell rejected Brewer's Law of the Case argument on the basis of an exception to this Doctrine and rejected her argument concerning the R.R. Donnelly case by factually distinguishing that case. (App. pp. 57-60.) In his Appeal Decision the Iowa Workers' Compensation Commissioner affirmed Deputy Grell's decision in its entirety including the determination that Brewer had sought unauthorized care. (App. pp. 16-18.) Finally, Judge Telleen of the Muscatine County District Court entered his Ruling on Petition for Judicial Review affirming the Deputy's and the Commissioner's decision that Brewer had chosen to obtain unauthorized medical care despite HNI's right to control care for her accepted work related injury. (App. pp. 19-46.) Judge Telleen rejected Brewer's arguments under both the Law of the Case Doctrine and the case of R.R. Donnelly & Sons v. Barnett, 670 N.W.2d 190 (Iowa 2003). (App. pp. 28-39.)

Standard of Review

Brewer's challenge to the determination of this issue is one involving correction of errors at law, if any, made by the District Court in interpreting Iowa Code §85.27 and R.R. Donnelly v. Barnett & Sons v. Barnett, 670 N.W.2d 190 (Iowa 2003) as affecting and HNI's right to control medical care for Brewer's accepted work related injury. Iowa Ins. Inst. V. Core Grp. of Iowa Ass'n for Justice, 867 N.W.2d 58, 65 (Iowa 2015). Interpretation of

the workers' compensation statutes and related case law has not been clearly vested by a provision of law in the discretion of the Commissioner and the Court is free to substitute its own judgement. Lakeside Casino v. Blue, 743 N.W.2d 169, 173 (Iowa 2007). However, this Court can only substitute its judgement and reverse an agency decision "[b]ased on an erroneous interpretation of a provision of law." Mycogen Seeds v. Sands, 686 N.W.2d 457, 464 (Iowa 2004).

With regard to this issue Brewer also appears to challenge the District Court's determination that the Commissioner correctly applied the law allowing HNI the right to control Brewer's medical care to the facts of this case. The issue for this Court when considering whether the Commissioner's and the District Court's application of law to fact is whether there was an abuse of discretion and this Court should only disturb the application of law to fact when the application was "irrational, illogical, or wholly unjustifiable." Mycogen Seeds v. Sands, 686 N.W.2d 457, 464 (Iowa 2004).

Argument

In the District Court's Ruling on Judicial Review, the Court concluded that the Deputy and the Commissioner had properly interpreted the law in determining that HNI had the right to control medical care for

Brewer's cumulative bilateral upper extremity injury claim relying on Iowa Code §85.27, including provisions dealing with Alternate Medical Care proceedings, and the case of R.R. Donnelly & Sons v. Barnett, 670 N.W.2d 190 (Iowa 2003). (App. pp. 28-35.)

Iowa Code §85.27 and R.R.Donnelly case

Brewer has argued unsuccessfully that the case of R.R. Donnelly & Sons should apply in this case to cause HNI to lose its ability to assert an authorization defense after initially denying responsibility for Brewer's work injury in response to her first Application for Alternate Medical Care in September of 2012. The District Court rejected Brewer's argument determining that the Deputy and the Commissioner had correctly interpreted and applied the R.R. Donnelly case to the specific facts of this case. (App. pp. 28-34.) In summarizing the facts of R.R. Donnelly, the District Court stated that in that case the injured employee filed an Application for Alternate Medical Care which was procedurally dismissed due to a partial denial of liability on the part of the employer.[13] R.R. Donnelly & Sons v. Barnett, 670 N.W.2d 190, 194-95 (Iowa 2003). See Iowa Admin. Code r.

[13] Brewer has argued that this partial denial distinguishes the current case but in R.R. Donnelly the care at issue was for pain management and it did not matter to the dismissal of the Alternate Medical Care Petition whether such care related to the admitted physical injury or the denied mental injury as the deputy had determined that it was impossible to separate out the reason for the care. Id. pp. 194-195.

876-4.48(7) (which provides that where liability of the employer is an issue, an Application for Alternate Medical Care will be dismissed without prejudice.) The District Court recognized that in R.R. Donnelly it was determined that in the situation where an Application for Alternate Medical Care had been procedurally dismissed, the employer would not be allowed to assert an authorization defense when the employee later sought payment of expenses related to the alternate care obtained. Id. at 198. (App. p. 30.) However, it was also stated in R.R. Donnelly that an employer could assert an authorization defense for other alternate medical care sought by an injured employee which was not authorized by the employer or not submitted to the Commissioner in an Alternate Medical Care proceeding. Id. at 198. (App. p. 30.) Deputy Grell, the Commissioner, and ultimately the District Court all recognized that under R.R. Donnelly, HNI would not have been entitled to assert an authorization defense for medical care sought by Brewer following her first procedurally dismissed Application for Alternate Medical Care. However, the difference recognized in this case was that HNI amended its answer to the contested case proceeding to admit liability, a fact which did not exist in the R.R. Donnelly case. In properly applying the rule of the R.R. Donnelly case, it was determined that once HNI admitted liability, it obtained its rights and obligations under Iowa

Code §85.27. See Iowa Code §85.27(1) and §85.27(4). This portion of the statute provides for the employer's obligation to furnish reasonable and necessary medical care for all work related injuries and gives the employer the right to choose the medical care provided for accepted work related injuries. When HNI accepted Brewer's cumulative bilateral upper extremity injury as a work related injury, HNI acquired an authorization defense. This defense means that an employer who is providing reasonable medical care to an employee is not responsible to pay for unauthorized medical care. R.R. Donnelly & Sons v. Barnett, 670 N.W.2d 190, 196 (Iowa 2003). This authorization defense continued until HNI subsequently denied the injury, withdrew authorization of care, or an order of alternate care was entered by the Commissioner. Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 207 (Iowa 2010). None of these three things happened and HNI continued to be entitled to an authorization defense for medical care obtained by Brewer without their authorization.

Another problem recognized by the District Court with Brewer's argument on this issue was that her first Application for Alternate Medical Care in September of 2012 did not include a description of the care she sought. (App. pp. 33-34.) In that Application Brewer failed to identify what care she was seeking simply indicating that there had been an "abandonment

of care." (App. pp. 101-102.) The District Court recognized pursuant to R.R. Donnelly that an employer loses its authorization defense only for the medical care requested in the employee's Application for Alternate Medical Care for which liability was denied and an authorization defense could still exist for an employer for other care not included in the Alternate Medical Care Petition. Id. at 198. Not only did Brewer fail to specifically identify any medical care she wanted for her cumulative bilateral upper extremity injury at the time of the filing of her first Application for Alternate Medical Care, she did not actually seek any care for this injury until May of 2013, nearly 8 months after the filing of her first Application for Alternate Medical Care Petition and nearly a year after HNI had filed their Answer admitting liability for her injury. Her later care with Dr. Von Gillern was in no way the subject of Brewer's first Application for Alternate Medical care or any lack of authorization defense by HNI.

The District Court also considered the timing of HNI's authorization defense in relation to Brewer's first Application for Alternate Medical care as a part of its determination of this issue. (App. p. 37.) In the Order of Dismissal of Brewer's first Application for Alternate Medical Care, Deputy Grell explained that an employer is barred from asserting an authorization defense as to any treatment during the period of the denial. See Sizemore v.

Blackhawk Foundry, 2016 WL 756347 (Iowa Workers' Comp. Com'n, Alt. Med. Care Dec. February 19, 2016). Even though acknowledging that the Sizemore decision (which further explains Deputy Grell's reasoning regarding the period of the denial) was not binding on the District Court, the Court found it supportive of the previous determinations on this issue. Brewer had not obtained any medical care, including the unauthorized medical care with Dr. Von Gillern at issue during the period of HNI's denial of her cumulative bilateral upper extremity injury. It was only after HNI accepted compensability of her claim that Brewer obtained Dr. Von Gillern's unauthorized care.

The Law of the Case Doctrine

In its Ruling on Judicial Review, the District Court also concluded that the Deputy and the Commissioner had properly interpreted the law in determining that HNI had the right to control medical care for Brewer's cumulative bilateral upper extremity injury rejecting Brewer's arguments regarding the Law of the Case Doctrine. (App. pp. 35-39.) The District Court described the Law of the Case Doctrine as a practice by which courts refuse to reconsider what has already been decided in the process of a case. Winnebago Industries, Inc. v. Haverly, 727 N.W.2d 567 (Iowa 2006). Under the Haverly case, when an employer admits liability in response to an

Application for Alternate Medical Care and a decision is made on the merits of that Application, under the doctrine of judicial estoppel the employer is not allowed to later change its position on liability. Id. at 575. However, in Haverly, it was also recognized that if there is a significant change in the facts after an admission of liability that justifies an employer's change of position, an exception could exist allowing the employer to then deny liability. Id. Otherwise stated, the principle of the Law of the Case Doctrine is not applicable if the facts before the court in the second proceeding are materially different from those in the first proceeding. State v. Grosvenor, 402, N.W.2d 402, 405 (Iowa 1987). Even though HNI's change in its position was the opposite, namely a change from denial to acceptance of liability for Brewer's injury, such an exception occurred in this case as the facts were materially changed by HNI obtaining an opinion from Dr. Adams causally relating Brewer's cumulative bilateral upper extremity injury to her work.

The District Court noted that Brewer's argument regarding the Law of the Case Doctrine focuses on the time of the filing of her first Application for Alternate Medical Care. (App. pp. 36-37.) The Order of Dismissal for that Application stated that HNI would be barred from asserting a lack of authorization defense for those charges incurred in obtaining the care for

which HNI denied liability. (App. pp. 47-48.) As the District Court noted, this language did not relieve HNI of its obligation of ongoing investigation of Brewer's claim or prohibit HNI from later accepting liability. (App. pp. 36-38.) Even if as Brewer argues, this Order set the Law of the Case that HNI was not entitled to assert a lack of authorization defense, Deputy Grell, the Commissioner, and the District Court properly found that the facts existing at the time this order was entered in September of 2012 were significantly different when the issue of reasonable medical care was again raised in this case. (App. pp. 36-37.) As previously noted in this brief, as of the time of Brewer's filing of her first Application for Alternate Medical Care in September of 2012 there was no medical care at issue as Brewer failed to identify any medical care she sought. (App. pp. 101-102.) As of November 8, of 2012 when HNI accepted liability for Brewer's cumulative bilateral upper extremity injury, a significant and material change of the facts, there was no medical care at issue as no medical care was recommended by Dr. Adams. (App. pp. 76-79.) Medical care was only questionably at issue when Brewer filed her second Application for Alternate Medical Care was identified by Brewer as a request for EMG/NCV testing but Brewer dismissed that Application without a determination by the Deputy regarding what care was reasonable. (App. p.

171.) It was not until HNI attempted to file an Application for Alternate Medical Care that Brewer's plan to obtain care with Dr. Von Gillern known, however, this Application was also dismissed without a determination of reasonableness of the medical care offered by HNI or sought by Brewer. (App. pp. 162 and 165-166.) It was not until the hearing in this case that the issue of the reasonableness of her medical care was again raised and by that time clearly HNI had accepted compensability of Brewer's cumulative bilateral upper extremity injury. (App. p. 6 ("The employer stipulates that claimant sustained the claimed injuries.) Accordingly, the Deputy, the Commissioner, and the District Court all determined that this significant factual change justified application of the exception to the Law of the Case Doctrine. The District Court correctly concluded as the Deputy and the Commissioner had previously that the Law of the Case Doctrine did not bar HNI from choosing medical care for Brewer's claim once accepting liability or from asserting an authorization defense to the medical care Brewer obtained with Dr. Von Gillern or healing period benefits resulting from his care.

Brewer continues to argue that HNI forfeited its right to control medical care for her cumulative bilateral upper extremity injury as a result of its initial denial of liability. Brewer chooses to completely ignore events

that occurred later leading to HNI's acceptance of the compensability of Brewer's cumulative bilateral upper extremity injury. The District Court correctly noted Brewer failed to identify any statutory language or case law which suggested an employer forfeits its rights and obligations under Iowa Code §85.27 under circumstances where an employer admits liability for an injury. (App. pp. 34-35.) As had been recognized by Deputy Grell and the Commissioner previously, the District Court also found that the suggestion of an employer losing its rights under Iowa Code §85.27 would be "absurd," particularly in a situation where an employer accepts its duty to continue investigation of an injury and ultimately amends its denial to admit liability. See generally Squealer Feeds v. Pickering, 530 N.W.2d 678, 683 (Iowa 1995), abrogated on other grounds by Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc., 690 N.W.2d 38, 44 (Iowa 2004). (App. pp. 12, 16-18, and 34-35.) As suggested by previous rulings in this case, it would be "absurd" to require a forfeiture of rights allowed to HNI under Iowa Code §85.27 as well as its obligations to Brewer under that same provision by its admission of Brewer's claim. Such a determination would render Iowa Code §85.27 meaningless. This Court should refrain from the interpretation of Iowa Code §85.27 in a way that would most certainly lead to absurd

results. Schadendorf v. Snap-On Tools, Corp., 757 N.W.2d 330, 338 (Iowa 2008).

CONCLUSION

Respondent-Appellee HNI respectfully requests that this Court affirm the decision of the District Court determining that the decision of the Iowa Workers' Compensation Commissioner (and the decision of the Deputy) was a correct statement, interpretation, and application of the Iowa Workers' Compensation Law including the holdings in the cases of R.R. Donnelly & Sons v. Barnett and Bell Bros. Heating & Air Conditioning v. Gwinn. The Respondent-Appellee HNI also respectfully requests that the costs of this appeal be taxed to the Petitioner-Appellant Kelly Brewer-Strong.

REQUEST FOR ORAL ARGUMENT

Respondent-Appellee requests oral argument on all issues before the Court.

Respectfully Submitted,

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