BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TOMMY MASON, JR., Claimant, vs. WEST SIDE TRANSPORT, Employer, and TRAVELERS INDEMNITY COMPANY OF CONNECTICUT, Insurance Carrier, Defendants.	File No. 23700331.02 ALTERNATE MEDICAL CARE DECISION Headnote: 2701

STATEMENT OF THE CASE

On May 3, 2023, the claimant filed a petition for alternate medical care pursuant to Iowa Code 85.27(4) and 876 Iowa Administrative Code 4.48. The defendants filed an answer admitting liability for injuries related to the claimant's left shoulder.

The undersigned presided over the hearing held via telephone and recorded digitally on May 15, 2023. That recording constitutes the official record of the proceeding pursuant to 876 Iowa Administrative Code 4.48(12). Claimant participated personally and through his attorney, Bryant Engbers. The defendants participated through their attorney, Julie Burger.

Prior to the hearing, the claimant submitted three pages of exhibits, marked as Exhibits 1-3. The defendants submitted five pages of exhibits labeled A-B. The evidentiary record consists of Claimant's Exhibits 1-3 and Defendants' Exhibits A-B.

On February 16, 2015, the Iowa Workers' Compensation Commissioner issued an order delegating authority to deputy workers' compensation commissioners, such as the undersigned, to issue final agency decisions on applications for alternate care. Consequently, this decision constitutes final agency action, and there is no appeal to the commissioner. Judicial review in a district court pursuant to Iowa Code Chapter 17A is the avenue for an appeal.

ISSUE

The issue under consideration is whether the defendants should be ordered to authorize and provide for a left shoulder rotator cuff surgery to include certain biologic patches.

FINDINGS OF FACT

Claimant, Tommy Mason, Jr., alleges that he sustained an injury to his left shoulder on, or about, March 16, 2023, while working for West Side Transport. The claimant testified that he sustained the injury in a single vehicle accident. Subsequent to that accident, the defendants provided medical care to the claimant. This included authorizing treatment with Joseph Newcomer, M.D.

On April 20, 2023, the claimant visited Dr. Newcomer. Dr. Newcomer noted that the claimant had left shoulder pain, which was aggravated by range of motion and laying in bed. (Defendants' Exhibit B:4-5). Dr. Newcomer reviewed the results of an MRI of the left shoulder and opined that the claimant had a full-thickness rotator cuff tear and a flattened biceps. (DE B:5). The doctor recommended that the claimant schedule surgery and "have all the biologic available including amnion patch PRP and maybe the tapestry patch from Zimmer." (DE B:5). Mr. Mason, Jr., testified that Dr. Newcomer informed him that this was the same surgery that he had for a similar injury, and that the "patches" provide for a more positive outcome. (Testimony). The claimant urged the undersigned to consider any denial of a portion of the surgery to be a denial of the surgery as a whole.

The defendants agreed to provide for the left rotator cuff surgery. They represented during the hearing that using certain patches, such as those described by Dr. Newcomer, are considered experimental treatments by the FDA. They also presented evidence that they have been reaching out to Dr. Newcomer in an effort to elicit further opinions as to the use of patches in the rotator cuff surgery. (DE A:1-3). Despite their best efforts, the defendants did not hear back from Dr. Newcomer with his opinions prior to the hearing.

CONCLUSIONS OF LAW

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

> For purposes of this section, the employer is obligated to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care…. The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

Iowa Code 85.27(4). See Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433 (Iowa 1997).

"Iowa Code section 85.27(4) affords an employer who does not contest the compensability of a workplace injury a qualified statutory right to control the medical care provided to an injured employee." Ramirez-Trujillo v. Quality Egg, L.L.C., 878

N.W.2d 759, 769 (Iowa 2016) (citing R.R. Donnelly & Sons v. Barnett, 670 N.W.2d 190, 195, 197 (Iowa 2003)). "In enacting the right-to-choose provision in section 85.27(4), our legislature sought to balance the interests of injured employees against the competing interests of their employers." Ramirez, 878 N.W.2d at 770-71 (citing. Bell Bros., 779 N.W.2d at 202, 207; IBP, Inc. v. Harker, 633 N.W.2d 322, 326-27 (Iowa 2001)).

The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Iowa Code section 85.27; Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening, October 16, 1975). An employer's right to select the provider of medical treatment to an injured worker does not include the right to determine how an injured worker should be diagnosed, evaluated, treated, or other matters of professional medical judgment. Assmann v. Blue Star Foods, File No. 866389 (Declaratory Ruling, May 19, 1988). Reasonable care includes care necessary to diagnose the condition, and defendants are not entitled to interfere with the medical judgment of its own treating physician. Pote v. Mickow Corp., File No. 694639 (Review-Reopening Decision, June 17, 1986).

The employer must furnish "reasonable medical services and supplies and reasonable and necessary appliances to treat an injured employee." *Stone Container Corp. v. Castle*, 657 N.W.2d 485, 490 (Iowa 2003)(emphasis in original). Such employer-provided care "must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee." Iowa Code section 85.27(4).

By challenging the employer's choice of treatment - and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See e.g. Iowa R. App. P. 14(f)(5); Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, 209 (Iowa 2010); Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). An injured employee dissatisfied with the employer-furnished care (or lack thereof) may share the employee's discontent with the employer and if the parties cannot reach an agreement on alternate care, "the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order the care." Id. "Determining what care is reasonable under the statute is a question of fact." Long, 528 N.W.2d at 123; Pirelli-Armstrong Tire Co., 562 N.W.2d at 436. As the party seeking relief in the form of alternate care, the employee bears the burden of proving that the authorized care is unreasonable. Id. at 124; Gwinn, 779 N.W.2d at 209; Pirelli-Armstrong Tire Co., 562 N.W.2d at 436. Because "the employer's obligation under the statute turns on the question of reasonable necessity, not desirability," an injured employee's dissatisfaction with employer-provided care, standing alone, is not enough to find such care unreasonable. Id.

The claimant must prove that the care being authorized is unreasonable. In this case, the defendants agree to authorize a left rotator cuff surgery. They argue that the FDA considers parts of the recommendation by Dr. Newcomer experimental. Accordingly, the defendants reached out to Dr. Newcomer on multiple occasions to clarify his recommendations. As of the time of the Dr. Newcomer did not respond to the defendants' questions.

Reaching out to Dr. Newcomer to clarify his opinions is reasonable considering Dr. Newcomer's note in the medical record is relatively noncommittal. Specifically, the note indicates that the surgery should be scheduled, but that the surgeon should "…have all the biologic available including amnion patch PTP and maybe the tapestry patch from Zimmer." These are three different patches. The record is unclear as to how these patches are used, and the undersigned has not seen this type of treatment in other cases pertaining to the rotator cuff. This is not to say that the undersigned is substituting their expertise for the treating physician, it is simply to observe that the undersigned has not observed recommendations for these type of procedures in other matters placed before him. Therefore, it is reasonable for the defendants to ask questions of the treating physician as to the necessity of experimental treatment.

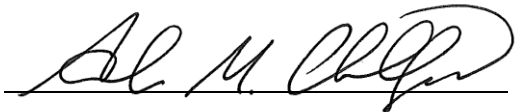
The defendants did not indicate what their position would be subsequent to receiving a response from Dr. Newcomer. There is also not evidence that the defendants are attempting to interfere with Dr. Newcomer's judgment by simply asking the doctor questions about certain experimental medical procedures.

It is not reasonable to require the defendants to provide the claimant with experimental treatment. The only portion of Dr. Newcomer's opinion that is clear is that the claimant requires a left shoulder rotator cuff repair. The record is not clear enough to show that the defendants approval of the left shoulder rotator cuff repair alone is unreasonable. Therefore, the defendants should provide the claimant with a left rotator cuff surgery. However, the defendants should not be ordered to provide the claimant with experimental treatment. The claimant did not sustain their burden as to this particular issue.

IT IS THEREFORE ORDERED:

1. The claimant's petition for alternate care is granted in part, and denied in part.
2. The defendants shall provide the claimant with the recommended left shoulder rotator cuff repair surgery.
3. As to provision of certain patches, based upon the current evidence in the record, the claimant's petition is denied.

Signed and filed this 17th day of May, 2023.



ANDREW M. PHILLIPS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Nicholas Shaull (via WCES)

Julie Burger (via WCES)