

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

VALERIE JUST,

Claimant,

vs.

WELLS FARGO BANK, NA,

Employer,

and

OLD REPUBLIC INSURANCE CO.,

Insurance Carrier,  
Defendants.

File No. 5067290.02

ALTERNATE MEDICAL

CARE DECISION

HEAD NOTE NO: 2701

Claimant Valerie Just filed an Original Notice and Petition Concerning Application for Alternate Care (“Application for Alternate Care”) on January 5, 2021, alleging the defendants, Wells Fargo Bank, NA (“Wells Fargo”) and Sedgwick had unreasonably delayed and denied treatment for her right shoulder, right upper extremity and whole body, and requested approval of treatment with Dr. Jacobson. Defendant Wells Fargo, and its insurer, the defendant, Old Republic Insurance Company (“Old Republic”), filed an answer with attached Exhibits A and B on January 18, 2021, admitting and denying liability, and averring “[d]efendants have not denied care; rather have paid for all care from the authorized treating physicians. The claimant has refused to return, not because of quality of care, but because of her personal preference.” Just filed Exhibits 1 through 3 on January 18, 2021.

On January 19, 2021, a hearing was held on the Application for Alternate Care by telephone conference call. The proceeding was recorded digitally by iPhone and the digital recording is the official record of the proceeding. Attorney Nick Platt represented Just. Just appeared and testified. Attorney Tiernan Siems represented Wells Fargo and Old Republic. At the start of the hearing the attorney for Wells Fargo and Old Republic objected to pages two and three of Exhibit 3, alleging the pages contained settlement discussions. I sustained the objection and Just’s attorney refiled the Exhibits, with one page for Exhibit 3. Exhibits 1 through 3 and A and B were admitted into the record.

Workers’ Compensation Commissioner Joseph Cortese, II, delegated the authority to me to issue final agency action in this matter. Appeal of this decision, if any, is to the district court pursuant to Iowa Code section 17A.19.

## FINDINGS OF FACT

Just filed a petition in arbitration on January 25, 2019, in File Number 5067290, alleging she sustained injuries to her right shoulder, right upper extremity, left lower extremity, and body as a whole while for working for Wells Fargo on February 8, 2017. An arbitration hearing was held on February 6, 2020. Just requested alternate medical care for her right shoulder with Dr. Jacobson, in addition to other relief. Following the receipt of post-hearing briefs, the record was closed and I issued an arbitration decision on April 7, 2020. No treatment records were submitted from Dr. Jacobson at hearing. In the decision I found Wells Fargo and Old Republic had not wholly abandoned care and should retain the right to control the care, but also found Just was entitled to a second opinion concerning the ongoing problems she was experiencing with her right upper extremity. I ordered Wells Fargo and Old Republic within twenty days of my order to schedule an appointment with an orthopedic surgeon specializing in the shoulder, other than Dr. Kyle Galles, and to follow any and all treatment recommendations made by the orthopedic surgeon.

Wells Fargo and Old Republic appealed my decision. On October 27, 2020, Commissioner Cortese affirmed my decision. The decision is final agency action.

In late October 2020, after Commissioner Cortese issued the appeal decision, Just requested treatment for her shoulder or right upper extremity condition. In an e-mail sent on November 3, 2020, Just's attorney requested Dr. Jacobson be authorized and that his treatment recommendations and any referrals be authorized. (Exhibit 3, page 1) On November 30, 2020, the attorney for Wells Fargo and Old Republic sent an e-mail to Just's attorney stating they had authorized Dr. Vinyard to provide a second opinion on her shoulder condition, and noting appointments were available on December 7, 2020, December 9, 2020, and December 10, 2020. (Ex. B, pp. 1-2) Just's attorney responded on December 3, 2020, stating his client testified during her deposition and during the hearing she believed Dr. Vinyard had "insinuated that she was lying and questioned her integrity while treating her knee. She is not going to return to him now for shoulder care," noting she had established care with Dr. Jacobson who was only prescribing conservative care. (Ex. B, p. 1) Just's attorney also averred given no care had been offered for such a long period of time, she had an argument that care had been abandoned.

As noted above, on January 5, 2021, Just filed an Application for Alternate Care alleging Wells Fargo and Old Republic had unreasonably delayed and denied treatment for her right shoulder, right upper extremity and whole body, and requested approval of treatment with Dr. Jacobson. At hearing the attorney for Wells Fargo and Old Republic admitted liability for the condition.

During the original arbitration hearing Just was treating with Dr. Jacobson. She continued to treat with him after the arbitration hearing. During the hearing on the Application for Alternate Care, Just testified she had treated with Dr. Jacobson three times and her last visit was in October 2020. Just reported Dr. Jacobson recommended conservative treatment, without surgery, to include physical therapy and cortisone

injections. No treatment records were presented from Dr. Jacobson during the arbitration hearing or for treatment she received after the arbitration hearing during the hearing on the Application for Alternate Care. Just submitted a treatment record from February 4, 2020 only. (Ex. 2)

Just testified she does not feel comfortable returning to Dr. Vinyard because she believes he questioned her integrity when he treated her knee. Just admitted Dr. Vinyard is skilled and she does not allege his treatment was inferior or ineffective.

Much of testimony focused on Dr. Galles. In the arbitration decision I ordered Wells Fargo and Old Republic within twenty days to schedule an appointment with an orthopedic surgeon specializing in the shoulder, other than Dr. Galles, and to follow the surgeon's treatment recommendations. Wells Fargo and Old Republic did not schedule the appointment and appealed the arbitration decision. Within days of the appeal decision in late October 2020, the parties discussed scheduling an appointment.

During the pendency of the appeal Just did not request Wells Fargo and Old Republic schedule an appointment with an orthopedic surgeon. Just admitted during the hearing on the Application for Alternate Care that she is at high risk if she contracted Covid-19 and she had been delaying medical treatment due to Covid-19.

### **CONCLUSIONS OF LAW**

Under Iowa Code section 85.27 (2017), an employer is required to furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under Iowa Code chapters 85 and 85A. The employer has the right to choose the provider of care, except when the employer has denied liability for the injury. Id.

“The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee.” Id. § 85.27(4). If the employee is dissatisfied with the care, the employee should communicate the basis for the dissatisfaction to the employer. Id. If the employer and employee cannot agree on alternate care, the commissioner “may, upon application and reasonable proofs of the necessity therefor, allow and order other care.” Id.

The employee bears the burden of proving the care authorized by the employer is unreasonable. R.R. Donnelly & Sons v. Barnett, 670 N.W.2d 190, 196 (Iowa 2003). “[T]he employer’s obligation under the statute turns on the question of reasonable necessity, not desirability.” Long v. Roberts Dairy Co., 528 N.W.2d 122, 124 (Iowa 1995). The care authorized by the employer is unreasonable if it is ineffective, inferior, or less extensive than the care requested by the employee. Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433, 437 (Iowa 1997). The determination of whether care is reasonable is a question of fact. Long, 528 N.W.2d at 123.

Just has been experiencing ongoing problems with her right upper extremity for more than a year. In the arbitration decision I ordered Wells Fargo and Old Republic within twenty days to schedule an appointment with an orthopedic surgeon specializing in the shoulder other than Dr. Galles, and to follow the surgeon's treatment recommendations. I also found Wells Fargo and Old Republic retained the right to direct the care. Wells Fargo and Old Republic appealed the arbitration decision and did not schedule the appointment. Just did not request an appointment until late October 2020, after Commissioner Cortese issued the appeal decision. Wells Fargo and Old Republic selected Dr. Vinyard to provide a second opinion with treatment recommendations and provided appointment dates in December 2020. Just responded she did not wish to return to Dr. Vinyard. Both parties provided portions of the arbitration hearing transcript regarding Dr. Vinyard.

During the Alternate Care hearing, Just argued she is entitled to ongoing care with Dr. Jacobson under Oxley v. Lennox Indus., File No. 5067306 (App. Dec. Nov. 16, 2020). In Oxley, the deputy commissioner found the defendants lost their right to control the claimant's medical care and ordered the authorization of ongoing care with Dr. McCune. The deputy commissioner held "[t]he Supreme Court has confirmed that when an employer denies care, it loses its authorization defense for the care that the employee has requested." On appeal, Commissioner Cortese found the deputy commissioner had "slightly misconstrued" the court's holding in Brewer-Strong v. HNI Corp., 913 N.W.2d 235, 245 (Iowa 2018), noting a defendant loses the right to control care during the period of denial, but may re-acquire the right the right to direct care if the defendant admits liability. Commissioner Cortese found the defendants in Oxley continued to contest liability throughout the case and at hearing, and during the period of denial, the claimant established care and underwent surgery with Dr. McCune, and the defendants had not authorized care or identified a provider they planned to authorize at hearing. Based on the facts of the case, Commissioner Cortese found Dr. McCune's treatment reasonable and the type of care the defendants should have furnished, and ordered ongoing care with Dr. McCune.

This case differs from Oxley, in that Wells Fargo and Old Republic have not denied liability. In the arbitration decision I found Wells Fargo and Old Republic had not wholly abandoned care and should retain the right to control the care, but also found Just was entitled to a second opinion concerning the ongoing problems she was experiencing with her right upper extremity. I did not grant her request that the defendants be ordered to provide care with Dr. Jacobson. I ordered Wells Fargo and Old Republic within twenty days of my order to schedule an appointment with an orthopedic surgeon specializing in the shoulder, other than Dr. Kyle Galles, and to follow any and all treatment recommendations made by the orthopedic surgeon.

I do not find Wells Fargo and Old Republic have abandoned care, or that the care offered with Dr. Vinyard is ineffective, inferior, or less extensive than the care requested by Just. Just did not request care until late October 2020. The situation would be different if she had requested care during the pendency of the appeal and Wells Fargo and Old Republic refused to authorize any care.

Just did not provide any treatment records from Dr. Jacobson during the original arbitration hearing, or any records from treatment she received after the original arbitration hearing in this proceeding. Just provided a record from February 4, 2020, Exhibit 2, which was not provided during the arbitration hearing. I have no means of evaluating Dr. Jacobson's treatment recommendations at this time without the records. Also, Just testified Dr. Jacobson recommended cortisone shots, which was also treatment recommended by Dr. Galles in 2019. While Just may prefer to go to Dr. Jacobson, she has not established Wells Fargo and Old Republic have abandoned care of that the care offered with Dr. Vinyard is ineffective, inferior, or less extensive than the care she has requested.

**ORDER**

Claimant's Application for Alternate Care is DENIED.

Signed and filed this 19<sup>th</sup> day of January, 2021.

  
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HEATHER L. PALMER  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Nick Platt (via WCES)

Tiernan T. Siems (via WCES)