

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DALLAS THURMAN,

Claimant,

vs.

CITY OF DES MOINES,

Employer,

and

EMC INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 21005822.01

ALTERNATE MEDICAL

CARE DECISION

Head Note No.: 2701

STATEMENT OF THE CASE

This is a contested case proceeding under Iowa Code chapters 85 and 17A. By filing an original notice and petition for alternate medical care, claimant, Dallas Thurman, invoked the expedited procedure of rule 876 IAC 4.48.

The alternate medical care claim came on for telephonic hearing on October 19, 2021. The proceedings were digitally recorded. That recording constitutes the official record of this proceeding. Claimant appeared personally and through his attorney, Nicholas Shaull. Defendants appeared through their attorney, Molly Tracy.

Pursuant to the Commissioner's February 16, 2015 Order, the undersigned has been delegated authority to issue a final agency decision in this alternate medical care proceeding. Therefore, this ruling is designated final agency action. Any appeal of the decision would be to the Iowa District Court pursuant to Iowa Code section 17A.

Claimant's original notice and petition asserts injuries to his left shoulder, a torn labrum, a scapular injury, as well as injuries to the body as a whole. Defendants admit claimant sustained a left shoulder injury, including a torn labrum. However, defendants deny any injury or causal connection of a scapular injury or injuries to the body as a whole. Any claims for treatment of injuries to claimant's scapula or body as a whole were dismissed at the commencement of the hearing. See Brewer-Strong v. HNI Corp., 913 N.W.2d 235 (Iowa 2018). However, the claims for injuries and treatment of the left

shoulder injury, including the torn labrum, proceeded to formal alternate medical care hearing.

The evidentiary record consists of claimant's exhibits 1-8. Defendants did not offer a separate set of exhibits. Mr. Thurman testified on his own behalf. No other witnesses testified at the hearing. Both counsel were permitted an opportunity to present argument and answer questions of the undersigned.

ISSUE

The issue presented for resolution is whether the claimant is entitled to an alternate medical care order requiring defendants to authorize a different orthopaedic surgeon for treatment of claimant's left shoulder and labrum tear.

FINDINGS OF FACT

The undersigned having considered all the evidence in the record finds:

Dallas Thurman sustained a left shoulder injury, including a torn labrum, as a result of his work activities for the City of Des Moines on October 13, 2020. The employer admitted that injury and directed claimant to an occupational medicine physician for treatment. He was subsequently referred to Kyle Galles, M.D., an orthopaedic surgeon.

Dr. Galles evaluated claimant and saw an MRI of his shoulder. However, claimant testified that Dr. Galles saw the MRI of the front of his shoulder but did not see the MRI taken for the back of his shoulder. Dr. Galles did not recommend surgery. Instead, he referred claimant to a pain specialist.

The pain specialist evaluated claimant, reviewed the MRI and identified significant pathology in the left shoulder. He recommended another orthopaedic evaluation. Defendants authorized claimant to be evaluated and treated by Jason Sullivan, M.D., an orthopaedic surgeon.

Dr. Sullivan diagnosed claimant with surgical pathology in his left shoulder. Dr. Sullivan performed surgical intervention on claimant's left shoulder on April 28, 2021. After a period of healing, Dr. Sullivan prescribed physical therapy for claimant's left shoulder. Mr. Thurman has been attending physical therapy two to three times per week for approximately five months.

Unfortunately, claimant testified that his left shoulder symptoms have worsened since he underwent physical therapy. He testified that he had significant pain in his left shoulder and difficulty sleeping prior to Dr. Sullivan's surgery. Since surgery, claimant continues to experience significant pain in his shoulder, difficulty sleeping, and describes a sensation that the shoulder pops out of place. He testified that he cannot live normally with these symptoms.

Mr. Thurman last returned for evaluation by Dr. Sullivan on August 17, 2021. At that time, he testified that he relayed his ongoing symptoms to Dr. Sullivan. Claimant testified that Dr. Sullivan refused at that time to order a new MRI and told claimant that he performed a “perfect surgery” on his shoulder. Dr. Sullivan recommended return to work and discontinuance of physical therapy.

Claimant went to human resources at the City of Des Moines. He requested repeat imaging (an MRI) of his left shoulder. The City of Des Moines consented to pay for the repeat imaging. However, claimant testified that Dr. Sullivan refused to order the MRI.

Therefore, claimant went to his personal physician, who did order the repeat left shoulder MRI. Claimant has now obtained that MRI. It shows a repeat tear in claimant’s left shoulder posterior inferior labrum, as well as a small displaced tear flap. (Claimant’s Exhibit 3) After receiving the MRI results, claimant’s personal physician referred him to Brian Crites, M.D., another orthopaedic surgeon, for evaluation. Claimant understands that he likely requires another surgery on his left shoulder.

Defendants refuse to authorize Dr. Crites for treatment. Instead, defendants directed claimant back to Dr. Sullivan and scheduled an evaluation for the date of this hearing. Claimant declined the appointment with Dr. Sullivan and now asserts there has been a breakdown in the physician-patient relationship. He does not want Dr. Sullivan to evaluate him and does not wish for Dr. Sullivan to perform additional surgery on him.

Claimant’s perception is that Dr. Sullivan does not care about his condition or him personally. Following his last appointment, claimant understood Dr. Sullivan’s instructions to be that he would not order further diagnostic imaging or provide further care unless claimant’s left shoulder pops out and stays out and claimant seeks care at the emergency room. Claimant perceived Dr. Sullivan as being “cocky” and believing that he was 100 percent correct and claimant was 100 percent wrong. Yet, claimant now has a repeat MRI that demonstrates objective changes within his left shoulder joint. Claimant has lost any confidence in treatment with Dr. Sullivan.

Defendants contend that they offer reasonable care with Dr. Sullivan. They point out that claimant’s surgery was less than six months ago. They point out that the repeat MRI has not been reviewed by Dr. Sullivan to make further recommendations. Defendants contend that it is reasonable and appropriate to have the treating surgeon, Dr. Sullivan, review the repeat MRI, evaluate claimant, and offer further treatment recommendations. Claimant does not want Dr. Sullivan’s recommendations because he does not trust those recommendations.

All things being equal, I would find the care offered by defendants through Dr. Sullivan to be reasonable and appropriate care. Dr. Sullivan is a well-known

orthopaedic surgeon. Allowing a treating surgeon to review a repeat MRI taken post-surgery and offering additional treatment recommendations is generally reasonable and appropriate care.

However, in this instance, claimant credibly testifies that there has been a breakdown in the physician-patient relationship. Mr. Thurman perceives Dr. Sullivan as cocky and unconcerned about his personal well-being. In spite of ongoing symptoms and a request for repeat imaging, Dr. Sullivan refused to order repeat imaging.

Now that the imaging has been obtained, it documents a repeat tear. Dr. Sullivan's refusal to order the testing, coupled with objective changes being identified in the repeat MRI, have eroded claimant's confidence in Dr. Sullivan's skill and concern for his well-being. While personal preference of a physician is not the applicable legal standard for alternate medical care, claimant credibly testified that there has been a breakdown of the physician-patient relationship in this instance. I find that an irreparable breakdown has occurred and that returning claimant to Dr. Sullivan is not a reasonable or appropriate option at this time.

Mr. Thurman's original notice and petition seeks authorization of care through Dr. Crites. This is the surgeon to whom his personal physician referred him for further care. (Claimant's Ex. 5) However, on questioning, claimant indicated that he is willing to accept care from another qualified surgeon for his shoulder. He simply does not want Dr. Sullivan to treat him at this time. I find claimant's request for a transfer of care is appropriate and that it is no longer reasonable for care to be directed through Dr. Sullivan given the breakdown in the physician-patient relationship.

REASONING AND CONCLUSIONS OF LAW

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 16, 1975).

By challenging the employer's choice of treatment – and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See 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). Determining what care is reasonable under the statute is a question of fact. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). The employer's obligation turns on the question of

reasonable necessity, not desirability. Id.; Harned v. Farmland Foods, Inc., 331 N.W.2d 98 (Iowa 1983).

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

The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27; Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner, 78 (Review-Reopening 1975).

Alternate care included alternate physicians when there is a breakdown in a physician/patient relationship. Seibert v. State of Iowa, File No. 938579 (September 14, 1994); Nueone v. John Morrell & Co., File No. 1022976 (January 27, 1994); Williams v. High Rise Const., File No. 1025415 (February 24, 1993); Wallech v. FDL, File No. 1020245 (September 3, 1992) (aff'd Dist Ct June 21, 1993).

In this instance, defendants offered reasonable care through Dr. Sullivan. However, having found that there is an irreparable breakdown of the physician-patient relationship between claimant and Dr. Sullivan, I conclude that it is no longer reasonable and appropriate to offer care through Dr. Sullivan. I conclude that claimant's petition for alternate medical care should be sustained.

While I acknowledge claimant's request for treatment through Dr. Crites, I also acknowledge the employer's right to select the authorized medical provider. In this instance, there is not a specific treatment that requires care through Dr. Crites. Defendants offered reasonable care through Dr. Sullivan and had no part in the breakdown of the physician-patient relationship. Therefore, I conclude it is appropriate that defendants should retain the right to select an authorized treating surgeon for claimant's left shoulder and torn labrum. Specifically, I conclude defendants should retain the right to select a different orthopaedic shoulder surgeon at a clinic other than where Dr. Sullivan practices to treat claimant's left shoulder and torn labrum.

ORDER

THEREFORE, IT IS ORDERED:

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

Within 14 days of this decision, defendants shall schedule an appointment for claimant to be evaluated by an orthopaedic shoulder surgeon at a clinic other than where Dr. Sullivan practices (it is not anticipated or expected that the appointment will

occur within 14 days, only that defendants will have acted on this order and obtained an appointment for claimant).

Defendants retain the right to select the authorized provider, other than Dr. Sullivan or his clinic, provided they comply with the above timeframe.

Defendants shall select and secure the first available appointment date and time for claimant to be evaluated with the surgeon they select.

If defendants fail to identify an alternate shoulder surgeon and obtain an appointment within the above time frame, Dr. Crites shall become the authorized surgeon for treatment of claimant's left shoulder and torn labrum, and claimant may proceed to schedule and obtain such care without further order.

All alternate medical care claims related to claimant's scapulae or body as a whole (other than the left shoulder or torn labrum) are hereby dismissed without prejudice.

If claimant seeks and obtains treatment for the scapulae and/or body as a whole (other than the left shoulder and torn labrum), he may pursue reimbursement and defendants shall not be permitted to assert an authorization defense for such treatment during the period of their denial of those conditions.

Signed and filed this 19th day of October, 2021.

A handwritten signature in black ink, reading "William H. Grell", written over a horizontal line.

WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Nicholas Shaul (via WCES)

Molly Tracy (via WCES)