

## BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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JORGE A. PENA,

Claimant,

vs.

LOWE'S HOME IMPROVEMENT,

Self-Insured Employer,  
Defendant.

File No. 23700337.03

ALTERNATE MEDICAL

CARE DECISION

HEAD NOTE NO: 2701

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## 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, Jorge Pena, invoked the expedited procedure of rule 876 IAC 4.48.

The alternate medical care claim came on for telephonic hearing on May 19, 2023. The proceedings were digitally recorded. That recording constitutes the official record of this proceeding. Claimant appeared personally and through his attorney, Nathan Willems. Defendant appeared through its attorney, Lori Scardina Utsinger.

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.

The evidentiary record consists of Claimant's Exhibits 1-5, consisting of eight pages and Defendant's Exhibits A-D, consisting of six pages. Mr. Pena testified on his own behalf. No other witnesses testified at the hearing. Counsel for both parties offered cogent arguments at the conclusion of the hearing. The evidentiary record closed at the conclusion of the telephonic hearing.

## ISSUE

The issue presented for resolution is whether it is medically reasonable and necessary for claimant to have a recliner for sleep purposes following a May 8, 2023 left shoulder surgery.

## FINDINGS OF FACT

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

Jorge Pena sustained a work-related injury to his left shoulder and/or arm on February 15, 2023. Ultimately, defendants authorized treatment with an orthopaedic surgeon, Daniel Fabiano, M.D. Dr. Fabiano recommended surgical intervention. (Def. Ex. A, p. 2) The undersigned ordered that surgery be authorized by defendant in a prior alternate medical care proceeding. (File No. 23700337.01) and that defendant authorize any related post-surgical care recommended by Dr. Fabiano.

Defendant asserts that it did authorize that surgery with Dr. Fabiano. Dr. Fabiano is a fellowship trained and board-certified orthopaedic surgeon with a specialty in sports medicine, including treatment of the knees, shoulders, and reconstructive surgery. He has practiced orthopaedic surgery in Iowa since 1995. (Def. Ex. D)

After recommending surgery, Dr. Fabiano referred claimant to Casey J. Boyles, M.D., for a pre-surgical consultation and surgical clearance. (Claimant's testimony) Dr. Boyles is a board-certified family medicine physician, who has practiced in Iowa since 2000. (Cl. Ex. 5, p. 6) Dr. Boyle evaluated claimant only once and cleared claimant for surgery after obtaining a cardiac consultation. (Cl. Test.)

Prior to surgery, Dr. Boyles authored a hand-written note dated May 1, 2023, which opines that claimant "requires a reclining chair for post-operation recovery for his work-related injury. It is medically necessary as it will be required for sleep. He may be unable to sleep in a bed for up to a month post-op." (Cl. Ex. 1, p. 1) Claimant expressed his desire for a recliner and asked that defendant provide him one, presumably as a medical appliance pursuant to Iowa Code section 85.27.

On May 8, 2023, claimant submitted to a left shoulder scope performed by Dr. Fabiano. He testified that Dr. Fabiano debrided a SLAP tear as well as repairing and repositioning his left biceps tendon. Mr. Pena testified that he has had difficulties sleeping since the surgery, getting only about four hours of sleep per night. He testified that he unconsciously rolls onto the left shoulder when he sleeps, even though he sleeps with a sling. He is currently sleeping on couch propped up on pillows and thinks that he would benefit from sleeping in a recliner. However, he does not own a recliner. (Cl. Test.)

Defendant investigated the claim for a recliner by seeking the input and opinion of the treating orthopaedic surgeon. Dr. Fabiano authored a report dated May 9, 2023, the day after claimant's shoulder surgery, opining, "Jorge does not need a recliner for post operative recovery from a left shoulder scope." (Def. Ex. B)

## 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 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).

Generally, an employer is bound by the treatment recommendations of an authorized medical provider and cannot interfere with the medical judgment of the authorized provider. Assman v. Blue Star Foods, File No. 866389 (Declaratory Ruling, May 1988). However, when a designated physician refers a patient to another physician, that physician acts as the defendant employer's agent. Permission for the referral from defendant is not necessary. Kittrel v. Allen Memorial Hospital, Thirty-fourth Biennial Report of the Industrial Commissioner, 164 (Arb. November 1, 2079) (aff'd by industrial commissioner). See also Limoges v. Meier Auto Salvage, Iowa Industrial Commissioner Reports 207 (1981).

In this instance, Dr. Fabiano was the authorized orthopaedic surgeon. He referred claimant to Dr. Boyles for a pre-operative evaluation. After that referral, Dr. Boyles became an authorized physician as well. Therefore, this case results in competing medical opinions from two authorized physicians. Both parties make cogent arguments why either physician's opinion should be accepted over the other.

Claimant contends that Dr. Boyles was specifically selected by Dr. Fabiano and that his specialty in family medicine qualifies him to deal with pain related issues. Claimant asserts that the recommendation made by Dr. Boyles is reasonable and is

corroborated by claimant's testimony about his actual sleep experience and ongoing pain since surgery on May 8, 2023. Therefore, claimant contends that he has established that it is both medically reasonable and necessary for him to have a recliner to sleep in as a result of his work-related injury.

When asked during the argument portion of the hearing why the opinion of Dr. Fabiano should be disregarded, claimant asserted that orthopaedic surgeons do not have the best expertise for dealing with post-surgical sleep issues. Claimant notes that often patients are referred by orthopaedic surgeons to pain specialists post-surgery for ongoing treatment of pain complaints. I do not find this argument to be persuasive. Orthopaedic surgeons perform surgery on patients and will nearly always have to consider and treat patients' pain symptoms, including sleep difficulties, after surgery.

While orthopaedic surgeons may sometimes refer patients to other specialists for ongoing pain complaints, this does not disqualify orthopaedic surgeons as experts in the treatment of post-surgical pain and sleep difficulties. Regardless, this is not evidence that is in the record and is not specifically relied upon as a basis for this decision. I offer this comment simply to demonstrate that I considered the argument and do not find it convincing.

Defendant argues that Dr. Fabiano evaluated claimant prior to the surgery, performed the surgery, and is scheduled to re-evaluate claimant post-surgically. Defendant further notes that Dr. Fabiano's specialty as an orthopaedic surgeon qualifies him to treat post-surgical pain and sleep difficulties. Defendant further points out that Dr. Boyles was authorized to perform a pre-surgical evaluation to clear claimant for surgery but is not scheduled to re-evaluate claimant or conduct post-surgical care for claimant. Defendant contends that Dr. Fabiano is in a better position to evaluate and provide treatment recommendations for claimant. Defendant also points out that claimant can return to Dr. Fabiano post-surgically if he has complications or ongoing pain or sleep issues.

In essence, defendant asserts that this is a desirability issue and not a medical necessity. Defendant urges the undersigned to accept the opinions of Dr. Fabiano as the most credible and convincing and to find that claimant did not prove that a recliner is medically reasonable and necessary for his post-surgical condition.

Ultimately, I find the opinions of both Dr. Fabiano and Dr. Boyles to be reasonable. I also found the testimony of Mr. Pena to be generally reasonable and accurate. That being said, Dr. Fabiano issued his report on May 9, 2023, after claimant's surgery occurred. At that point in time, Dr. Fabiano knew the extent of the surgery, the technical success of the surgery, and likely had a good idea of the post-surgical needs of claimant. Dr. Boyles offered his opinion prior to surgery and did not know the extent of the surgery performed or the outcome of the surgical intervention.

While I believe claimant is experiencing difficulties with sleep since his May 8, 2023 surgery, and I accept the sincerity of his testimony, there is no evidence in this

record that suggests claimant will have a worse outcome from his surgical intervention if he does not receive and use a recliner. Certainly, a recliner may be a desirable appliance for claimant. See Long v. Roberts Dairy Co., 528 N.W.2d 122, 124 (Iowa 1995) (noting the applicable legal standard is legal necessity not desirability). While it is hypothetically possible that claimant's sleep difficulties could delay his healing and recovery, resulting in more distress for claimant and additional cost for defendant in the long run, there is no evidence in this record that defendant's refusal to provide a recliner will cause claimant to have a worse outcome or that the treatment will be inferior because a recliner is not provided.

The Iowa Supreme Court has indicated that an employer is permitted to make decisions that appear reasonable at the moment they are made, even if hindsight ultimately demonstrates those decisions to be "penny-wise but pound foolish." Id. Therefore, I decline claimant's implicit invitation to speculate as to potential future developments without evidence to establish that the failure to provide a recliner will necessarily have an adverse impact on claimant's ultimate recovery or outcome.

Instead, I ultimately accept the opinion of Dr. Fabiano as most convincing. As the treating orthopaedic surgeon, he knew the status of claimant's shoulder post-surgically. He offered his opinion about the medical necessity of a recliner after performing surgery on claimant's shoulder. Therefore, I conclude that claimant failed to prove the treatment provided by defendant is unreasonable or that a recliner is medically reasonable and necessary under these circumstances.

ORDER

THEREFORE, IT IS ORDERED:

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

Signed and filed this 23rd day of May, 2023.



WILLIAM H. GRELL  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Nate Willems(via WCES)

Lori Nichole Scardina Utsinger (via WCES)

Jean Zetta Dickson (via WCES)