BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KATINA WESLEY,	:	
Claimant,	:	File Nos. 5050508, 5049297
vs.	:	REHEARING
TYSON FRESH MEATS, INC,	:	DECISION
Self-Insured Employer,	:	
Defendant.	:	Head Note Nos: 1801, 1803, 2500, 2700

FILED
MAY - 3 2017
WORKERS' COMPENSATION

Claimant filed an application for rehearing (application). Defendant has not responded. The application is considered.

Claimant raises two grounds for rehearing. First, claimant contends she should be reimbursed for an independent medical exam (IME) performed by Stanley Mathew, M.D. Claimant contends there were two separate injuries filed under two separate claims, and thus claimant should be allowed two IMEs.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

In Larson Mfg. Co., Inc. v. Thorson, 763 N.W.2d 842, 861 (Iowa 2009) the Iowa Supreme Court held that a claimant is entitled to reimbursement for only one IME.

Claimant did file two separate claims. File No. 5050508 concerns a date of injury of April 2, 2013, to claimant's lower back. File No. 5049297 concerns a date of injury of March 21, 2014, affecting claimant's shoulder and neck.

In a March 16, 2015, report, Farid Manshadi, M.D. gave his opinions of claimant's condition following an IME. Dr. Manshadi gave his opinion concerning claimant's permanent impairment, permanent restrictions and future care for the lower back injury of April 2, 2013. (Exhibit 3, page, 16) Dr. Manshadi also gave an opinion of claimant's permanent impairment, permanent restrictions and future care for the shoulder and neck injury of March 21, 2014. (Ex. 3, p. 17)

In a March 16, 2015, report, Dr. Mathew gave his opinion of claimant's condition following an IME. Dr. Matthews gave an opinion regarding claimant's permanent impairment, permanent restrictions and future care for the low back injury of April 2, 2013. (Ex. 2, pp 13-14) Dr. Mathew also gave an opinion regarding claimant's permanent impairment, permanent restrictions, and future care for the left shoulder and neck injury of March 21, 2014. (Ex. 2, p. 14)

Under Larson, claimant is entitled to one IME for an injury. In this matter, claimant seeks reimbursement for two IMEs for the April 2, 2013, date of injury, and the March 21, 2014, date of injury. Based on the facts in this case, claimant is entitled to reimbursement for only one IME. Claimant's application is denied as to this ground.

Second, claimant contends that because defendant denied liability for her injuries, after providing care, that claimant is entitled to direct her own care.

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

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 Decision October 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 Rule of Appellate Procedure 14(f)(5); 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. Id. 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). In Pirelli-

Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433 (Iowa 1997), the court approvingly quoted Bowles v. Los Lunas Schools, 109 N.M. 100, 781 P.2d 1178 (App. 1989):

> [T]he words "reasonable" and "adequate" appear to describe the same standard.
>
> [The New Mexico rule] requires the employer to provide a certain standard of care and excuses the employer from any obligation to provide other services only if that standard is met. We construe the terms "reasonable" and "adequate" as describing care that is both appropriate to the injury and sufficient to bring the worker to maximum recovery.

The commissioner is justified in ordering alternate care when employer-authorized care has not been effective and evidence shows that such care is "inferior or less extensive" care than other available care requested by the employee. Long; 528 N.W.2d at 124; Pirelli-Armstrong Tire Co.; 562 N.W.2d at 437.

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. 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).

Defendants provided care for an extended period of time to claimant for both dates of injury. Claimant received treatment and evaluation from Robert Gordon, M.D., Chad Abernathey, M.D., and Thomas Gorsche, M.D. Defendant authorized MRI's and other diagnostic studies for claimant's back, neck and shoulder. Defendant authorized injections. On both files, defendant denied further liability only after experts opined claimant reached maximum medical improvement (MMI), that claimant had no permanent impairment, or that claimant's symptoms were not work-related. (Ex. 4, p.5; Ex. 8, pp 2-3; Ex. 10, p. 11; Ex. 11, pp. 12 and 14; and Ex. A, pp. 29 and 32)

Defendant provided extended and reasonable care for both dates of injury. The record indicates that after providing the care detailed in the arbitration decision and above, defendant denied further liability based on the opinions of experts. Although defendant was ordered to provide further care for claimant's back, neck, and shoulder conditions, the care provided was reasonable. Based on this record, and that detailed in the arbitration decision, claimant has failed to carry her burden of proof she should be allowed to direct care. Claimant's application is denied as to this ground

ORDER

For the reasons detailed above, claimant's application for rehearing is denied.

Signed and filed this 3rd day of May, 2017.

Joseph S. Cortese II

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WORKERS' COMPENSATION
COMMISSIONER

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