

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JORGE PENA,

Claimant,

vs.

LOWE'S HOME IMPROVEMENT,

Employer,
Self-Insured,
Defendant.

File No. 23700337.01

ALTERNATE MEDICAL CARE
DECISION

Headnote: 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, Jorge Pena, invoked the expedited procedure of rule 876 IAC 4.48. Claimant properly served the original notice and petition for alternate medical care upon the self-insured employer, Lowe's Home Improvement. Claimant similarly served copies of his hearing exhibits upon the employer in advance of hearing. Defendant employer did not contact claimant's attorney, did not file an answer or appearance with this agency, or otherwise request the opportunity to participate in the evidentiary hearing.

Pursuant to typical scheduling procedures and properly served notice of hearing, the alternate medical care claim came on for telephonic hearing before the undersigned on April 24, 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 failed to appear for the hearing and was declared to be in default at the commencement of the hearing.

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 exhibit 1, consisting of six pages. Mr. Pena testified on his own behalf. No other witnesses testified at the hearing. The evidentiary record closed at the conclusion of the hearing.

ISSUE

The issue presented for resolution is whether the claimant is entitled to an alternate medical care order requiring defendant to authorize a left shoulder and left biceps surgery recommended by an authorized physician, Daniel C. Fabiano, M.D., as well as any follow-up treatment recommended by Dr. Fabiano after completion of the recommended surgery.

FINDINGS OF FACT

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

Claimant, Jorge Pena, sustained a left shoulder and left biceps injury as a result of work activities performed for the employer, Lowe's Home Improvement, on February 15, 2023. The employer apparently accepted this claim because it directed claimant for medical care. (Claimant's testimony) Claimant was referred to an orthopaedic surgeon, Dr. Fabiano, for evaluation. An MRI of claimant's left shoulder demonstrated "a large SLAP tear, and a split tear of the biceps." (Claimant's Exhibit 1, pages 3, 5-6) Dr. Fabiano recommended surgical intervention for claimant's left shoulder and left biceps to include repair of a SLAP tear and a biceps tenodesis. (Claimant's testimony; Claimant's Ex. 1, p. 3)

The employer's third-party administrator questioned the medical reasonableness and necessity of the recommended surgical procedure. It sought a peer medical review, which was performed by James W. Depuy, M.D. Dr. Depuy issued a report dated April 5, 2023. Dr. Depuy opined that the surgical recommendation made by Dr. Fabiano "is medically necessary." He explained, "the claimant has failure of physical therapy treatment. MRI shows surgical pathology of a large SLAP tear, and a split tear of the biceps that further non-operative care cannot cure. As such, the request is medically necessary. Therefore, [l]eft shoulder arthroscopy repair vs. debridement biceps tenodesis is medically necessary." (Claimant's Ex. 1, p. 3)

After Dr. Fabiano's surgical recommendation, claimant spoke with the workers' compensation adjuster for the employer's third-party administrator. Claimant testified that the adjuster questioned the wisdom, reasonableness, or necessity of proceeding with surgical intervention so soon after claimant's injury. Instead, the adjuster required claimant to return to Dr. Fabiano to discuss alternative courses of treatment, including potential therapy and injections. The adjuster provided no explanation of her credentials to challenge Dr. Fabiano's recommendations.

Nevertheless, claimant complied with the adjuster's request and discussed the situation with Dr. Fabiano last Tuesday. Once again, Dr. Fabiano explained to claimant that physical therapy and/or injections will not heal or improve his condition. Similar to the analysis provided by Dr. Depuy, Dr. Fabiano recommends that surgery be performed on claimant's left shoulder and left biceps. No contrary medical evidence

exists in this record. In fact, two physicians, both selected or authorized by the employer, concur that claimant needs surgery on his left shoulder and left biceps.

I find that the undisputed medical evidence clearly and specifically recommends surgical intervention on claimant's left shoulder and left biceps. Surgical intervention is reasonable, medically necessary, and really the only solution presented for claimant's left shoulder and left biceps injury. The employer's current offer of care was to have claimant return to Dr. Fabiano to consider alternate courses of care. Claimant complied with that request or directive and no alternative course of care was deemed reasonable by Dr. Fabiano.

Claimant desires to proceed with the recommended surgery through Dr. Fabiano, the authorized medical provider. The employer has not offered reasonable care at this time. In fact, the employer's offered care has been specifically shown to be unreasonable and inferior to the care sought by claimant and recommended by two physicians selected by the employer. Claimant has clearly demonstrated that the recommended surgery is reasonable and necessary to treat his injury. Claimant has clearly proven that the employer has not offered reasonable, prompt care that is reasonably suited to treat his injury. Claimant has also proven that the employer has interfered with and rejected the recommendations and medical judgment of the authorized medical provider, Dr. Fabiano. Finally, claimant has proven that the surgical intervention recommended and offered by Dr. Fabiano is superior to the recommended care of the adjuster, which was definitively proven to be inferior and ineffective for claimant's injury.

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).

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. Assman 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).

In Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433, 437 (Iowa 1997), the supreme court held that "when evidence is presented to the commissioner that the employer-authorized medical care has not been effective and that such care is 'inferior or less extensive' than other available care requested by the employee, . . . the commissioner is justified by section 85.27 to order the alternate care."

Having determined that claimant proved the alternative care recommended by the adjuster, or the lack of care offered by defendant is inferior and not reasonably suited to treat claimant's injury, I conclude that claimant may state a claim for alternate medical care. Having also proven that the care sought is recommended by the authorized physician and that defendant has interfered with and ignored the medical judgment of the authorized physician, I conclude claimant is entitled to an order for alternate medical care.

Claimant also prevails on alternative theories. He has established that the care he seeks is superior to and more extensive than the lack of care (or care alternatives crafted by a workers' compensation adjuster and rejected by both physicians considering those options) currently offered by the employer. Finally, claimant prevails because the care he seeks is reasonable and necessary to treat his injury. I conclude claimant is entitled to an order authorizing and requiring defendant to pay for the surgical repair of claimant's SLAP tear in his left shoulder and the split tear of the left biceps.

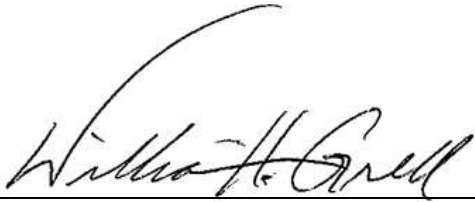
ORDER

THEREFORE, IT IS ORDERED:

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

Defendant shall immediately authorize and pay for the surgical procedure recommended by Dr. Fabiano as well as any follow-up care recommended by Dr. Fabiano upon completion of the left shoulder and left biceps surgery.

Signed and filed this 25th day of April, 2023.

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:

Nate Willems (via WCES)

Lowe's Home Improvement (via regular and certified mail)
5300 Blairs Forest Blvd NE
Cedar Rapids, IA 52402