

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

NATHAN PENNA,

Claimant,

vs.

MMC MECHANICAL CONTRACTORS,
INC.,

Employer,

and

OLD REPUBLIC GENERAL INSURANCE :

Insurance Carrier,
Defendants.

File No. 20001196.03

ALTERNATE MEDICAL
CARE DECISION

Head Note No.: 2701

STATEMENT OF THE CASE

On January 5, 2020, Nathan Penna filed an application for alternate care under Iowa Code section 85.27 and agency rule 876 IAC 4.48. The defendants, employer MMC Mechanical Contractors, Inc., and insurance carrier Old Republic General Insurance, answered denying liability for alleged work injuries to Penna's arm and upper body, and accepting liability for his right shoulder injury.

The undersigned presided over an alternate care hearing that was held by telephone and recorded on January 13, 2022. That recording constitutes the official record of the proceeding under agency rule 876 IAC 4.48(12). Penna participated personally and through attorney John Lawyer. The defendants participated through attorney Tim Wegman. The record consists of:

- Claimant's Exhibits 1;
- Defendants' Exhibits A; and
- Hearing testimony by Penna.

ISSUE

Liability for an alleged injury is often a threshold issue when the agency considers an application for alternate care. Tyson Foods, Inc. v. Hedlund, 740 N.W.2d 192, 198–99 (Iowa 2007). Because the defendants denied liability for Penna's alleged injuries to the arm and upper body, Penna's petition with respect to care for the alleged

injuries to his arm and upper body is dismissed without prejudice under 876 IAC 4.48(7).

The parties agreed at hearing Penna is seeking alternate care for an injury to his right shoulder. The defendants have accepted liability for this injury. Consequently, the issue under consideration is whether Penna is entitled to alternate care in the form of care for his shoulder with a provider other than Dr. Buzzell.

FINDINGS OF FACT

Penna injured his right shoulder while working in the employ of MMC. The injury required care. The defendants chose Jonathan E. Buzzell, M.D., as his treating physician. (Testimony)

Dr. Buzzell performed surgery on Penna's right shoulder in 2020. After the surgery, Penna participated in physical therapy and work hardening. Even though Penna felt he made some progress in rehabilitation, his symptoms were worse after the surgery than before it. (Testimony)

Because the first surgery was ineffective, Dr. Buzzell performed a second surgery on February 19, 2021. Penna participated in physical therapy beginning on February 22, 2021, with a plan for him to have three appointments per week for twelve weeks. Penna attended physical therapy in accordance with this plan. The physical therapy ended on May 28, 2021. (Testimony)

Dr. Buzzell also prescribed work hardening for Penna. He attended three or four sessions of work hardening for about a month. On June 2, 2021, Penna took a functional capacity evaluation (FCE) that put him in the medium classification of work. The defendants believed this result was in line with the physical requirements of job duties. Penna never reviewed the FCE report. (Testimony)

Penna believes he knows his body. He was shaky when using his arms for day-to-day activities. In Penna's view, he had not reached a satisfactory level of physical function when the authorized work hardening ended. Despite the physical therapy and word hardening through June of 2021, he was still weak and needed to build his strength back up following the two procedures. Penna's nurse case manager told him the defendants would get more work hardening reauthorized by Dr. Buzzell and that it is just a formality. (Testimony)

Penna had a follow-up appointment with Dr. Buzzell, who did not offer him any additional care. Dr. Buzzell's refusal to authorize additional work hardening surprised Penna and the nurse case manager. Dr. Buzzell released Penna to return to full-duty work and offered no additional care. During the hearing, Penna credibly testified he feels Dr. Buzzell's refusal to authorize more word hardening seems "shady" to him and he no longer trusts Dr. Buzzell to provide care. (Testimony)

Penna has not seen any other doctor for his shoulder since mid-2021. (Testimony) He has ongoing symptoms in his shoulder. (Ex. 1; Testimony) On August

26, 2021, Penna communicated this to the defendants, but they refused to provide any additional care. (Ex. 1) On October 21, 2021, Penna applied for alternate care with the agency because the defendants had not provided additional care despite his request.

The undersigned presided over a telephone hearing on November 2, 2021. The undersigned takes judicial notice of the decision the agency issued on November 2, 2021, because its findings of fact and conclusion of law are binding here. See Winnebago Indus., Inc. v. Havery, 727 N.W.2d 567, 571–73 (Iowa 2006). This decision will not rehash the entirety of the first alternate care decision, but it concluded:

Penna has established ongoing symptoms stemming from the accepted work injury to his right shoulder and the defendants[] refused to provide any additional care after learning of his complaints. Their refusal is based on Penna’s past condition as opposed to his present-day complaints. Further, the defendants’ refusal to provide any additional care for Penna’s ongoing symptoms precludes him from receiving any care that might provide relief. For these reasons, the defendants’ refusal to authorize care for Penna’s ongoing symptoms is unreasonable. Penna has established a right to alternate care under Iowa Code section 85.27 in the form of additional care for his ongoing symptoms.

Penna v. MMC Mechanical Contractors, Inc., File No. 20001196.02 (Alt. Care, November 2, 2021). The decision ordered the defendants to authorize additional care, “with a physician of their choosing, for Penna’s ongoing right shoulder complaints.” Id.

The defendants did not comply with the order by arranging additional care. After waiting more than two months for the defendants to arrange care with a provider of their choosing in accordance with the first alternate care decision, on January 5, 2022, Penna filed the petition concerning application for alternate care now under consideration. The defendants answered on January 7, 2022. On January 12, 2022, defense counsel informed Penna, through a letter to his attorney, that the defendants had scheduled an appointment with Dr. Buzzell on January 27, 2022. (Ex. A)

CONCLUSIONS OF LAW

“Iowa Code section 85.27(4) affords an employer who does not contest the compensability of a workplace injury a qualified statutory right to control the medical care provided to an injured employee.” Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 769 (Iowa 2016) (citing R.R. Donnelly & Sons v. Barnett, 670 N.W.2d 190, 195, 197 (Iowa 2003)). Under the law, the employer must “furnish reasonable medical services and supplies *and* reasonable and necessary appliances to treat an injured employee.” Stone Container Corp. v. Castle, 657 N.W.2d 485, 490 (Iowa 2003) (emphasis in original). Such employer-provided care “must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee.” Iowa Code § 85.27(4).

An injured employee dissatisfied with the employer-furnished care (or lack thereof) may share the employee's discontent with the employer and if the parties cannot reach an agreement on alternate care, "the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care." Id. "Determining what care is reasonable under the statute is a question of fact." Long v. Roberts Dairy Co., 528 N.W.2d 122, 123 (Iowa 1995); Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433, 436 (Iowa 1997). As the party seeking relief in the form of alternate care, the employee bears the burden of proving that the authorized care is unreasonable. Id. at 124; Bell Bros Heating and Air Conditioning v. Gwinn, 779 N.W.2d at 209; Reynolds, 562 N.W.2d at 436; Long, 528 N.W.2d at 124. Because "the employer's obligation under the statute turns on the question of reasonable necessity, not desirability," an injured employee's dissatisfaction with employer-provided care, standing alone, is not enough to find such care unreasonable. Id.

Iowa Code section 85.27(4) expressly requires that employer-controlled care must be "offered promptly," which means the employee must be able to accept the care "without undue inconvenience." See also Reynolds, 562 N.W.2d 433, 435–37 (concluding substantial evidence supported the agency's conclusion with respect to alternate care that the authorized treating physician had no further care to offer and that was the same as offering no care). An unreasonable delay in offering care for a work injury violates an employer's responsibility under the statute. The question here is whether the defendants' delay in offering Penna care is unreasonable.

In this case, Penna requested care for ongoing symptoms in his right shoulder on August 26, 2021. In response, the defendants offered none. On November 2, 2021, the agency ordered the defendants to arrange the additional care Penna requested with a provider of their choice. In response, the defendants offered none until January 12, 2022, a week after Penna filed the petition currently under consideration.

The defendants' offer of care was too little too late. Penna was in pain and experiencing physical limitations that required care. The delay is unreasonable even when focusing on the time period from November 2, 2021, the date the agency found Penna's complaints credible and the defendants' refusal to offer additional care unreasonable, to January 12, 2022, the date of their first offer of care since Dr. Buzzell released him from care in June of 2021. This delay in offering care is unreasonable and is sufficient to entitle Penna to the alternate care requested.

In addition to the unreasonable delay in offering care that has caused Penna undue inconvenience, there is the breakdown of the doctor-patient relationship between Penna and Dr. Buzzell. The record establishes poor communication between Dr. Buzzell and Penna with respect to the reasoning behind Dr. Buzzell's refusal to offer additional care despite Penna's ongoing issues relating to the work injury. The care before Dr. Buzzell released Penna was ineffective at rehabilitating his shoulder after the surgery. See id. at 437 (noting "[t]he ineffectiveness of an employer-authorized medical provider has figured prominently in courts finding that such care is not reasonably suitable" and discussing cases). Penna has established a breakdown in the doctor-

patient relationship that makes continued care with Dr. Buzzell untenable and necessitates a change in provider.

The defendants failed to fulfill their statutory responsibility to promptly offer care for the ongoing symptoms caused by Penna's work injury. Their failure caused Penna undue inconvenience. Moreover, the doctor-patient relationship between Penna and Dr. Buzzell has broken down due in large part to ineffectiveness, necessitating care with a different provider. For these reasons, Penna is entitled to alternate care for his shoulder injury under the Iowa Workers' Compensation Act. Given the unreasonable delay in the defendants' offer of care, the defendants have lost the right to direct care.


ORDER

Under the above findings of facts and conclusions of law, it is ordered:

- 1) Penna's application for alternate care is GRANTED.
- 2) The defendants shall authorize additional reasonable care for Penna's right shoulder with a provider of his choosing. This includes but is not limited to follow-up appointments with that provider and referrals to other providers for reasonable care relating to the work injury.

On February 16, 2015, the Iowa workers' compensation commissioner issued an order delegating authority to deputy workers' compensation commissioners, such as the undersigned, to issue final agency decisions on applications for alternate care. Consequently, there is no appeal of this decision to the commissioner, only judicial review in a district court under the Iowa Administrative Procedure Act, Iowa Code chapter 17A.

Signed and filed this 14th day of January, 2022.


BENJAMIN G. HUMPHREY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

John Lawyer (via WCES)

Timothy Wegman (via WCES)