

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

VALERIE WYO BADIA JOE,

Claimant,

vs.

O'REILLY AUTO ENTERPRISES d/b/a  
OZARK AUTOMOTIVE DIST.,

Employer,

and

SAFETY NATIONAL CASUALTY CO.,

Insurance Carrier,  
Defendants.

**FILED**

**FEB 13 2019**

WORKERS' COMPENSATION

File No. 5059272

ALTERNATE MEDICAL

CARE DECISION

HEAD NOTE NO: 2701

Claimant Valarie Wyo Badia Joe filed a petition in arbitration on July 28, 2017, against the defendants, O'Reilly Auto Enterprises, d/b/a Ozark Automotive Distributing ("Ozark"), and Safety National Casualty Company ("Safety National"), alleging she sustained an injury to her right shoulder and chest while working for Ozark on May 10, 2017. Ozark and Safety National filed an answer on August 1, 2017, denying Wyo Badia Joe had sustained a work injury. An arbitration hearing was held on July 10, 2018. The arbitration decision was filed on December 10, 2018.

On February 4, 2019, Wyo Badia Joe filed an application for alternate medical care, alleging Ozark and Safety National had unreasonably delayed or denied medical treatment for her right shoulder as recommended by Shane Cook, M.D., an orthopedic surgeon. Ozark and Safety National filed an answer on February 12, 2019, reporting they had authorized care with Steven Aviles, M.D., an orthopedic surgeon, and that an appointment had been scheduled for January 28, 2019, at 9:15 a.m., but the appointment had been placed on hold since the filing of the application for alternate medical care.

A hearing on the application for alternate medical care was held on February 13, 2019, by telephone conference call. Attorney Nicholas Platt represented Wyo Badia Joe. Wyo Badia Joe appeared and testified. Attorney Kelsey Paumer represented

Ozark and Safety National. Exhibits 1, 2 and A through C were admitted into the record. The proceeding was recorded by digital recorder and the digital recording is the office record of the proceeding.

The undersigned has been delegated with the authority to issue final agency action in this matter. Appeal of this decision, if any, is to the district court pursuant to Iowa Code section 17A.19.

### FINDINGS OF FACT

Wyo Badia Joe filed a petition in arbitration on July 28, 2017, against Ozark and Safety National alleging she sustained an injury to her right shoulder and chest while working for Ozark on May 10, 2017. Ozark and Safety National filed an answer on August 1, 2017, denying Wyo Badia had sustained a work injury. After Ozark and Safety National denied liability, Wyo Badia Joe sought medical care from Dr. Cook. Wyo Badia Joe v. O'Reilly Auto Enterprises, d/b/a Ozark Automotive Distributing, File No. 5059272 (Arb. Dec. Dec. 10, 2018). An arbitration hearing was held on July 10, 2018.

On December 10, 2018, a deputy workers' compensation commissioner issued an arbitration decision finding Wyo Badia Joe had met her burden of proof that she sustained an injury arising out of and in the course of her employment with Ozark on May 10, 2017. Id. The deputy workers' compensation commissioner awarded Wyo Badia Joe healing period benefits for May 1, 2018, and seventy-five weeks of permanent partial disability benefits commencing on May 11, 2017, at the stipulated rate of \$284.59 per week. Id. at 13.

During the arbitration hearing, Wyo Badia Joe requested Ozark and Safety National be responsible for medical expenses and medical mileage set forth in Exhibits 5 and 6. Id. at 9. The deputy workers' compensation commissioner found the medical expenses and medical mileage to be causally related and ordered Ozark and Safety National to pay the medical expenses and medical mileage, with the exception of the dates identified in Joint Exhibit 5 and the claimant's e-mail pertaining to the July 3, 2017 service date with Holley Bermel, D.O. Id. at 9-10, 13. Wyo Badia Joe did not request the deputy workers' compensation commissioner direct Ozark and Safety National to authorize any future care with Dr. Cook or request alternate medical care during the arbitration hearing. Id. at 1-14.

Following the arbitration hearing, Wyo Badia Joe sent Ozark and Safety National additional medical records from Dr. Cook involving treatment she received after the arbitration hearing. (Exhibit 1) On July 24, 2018, Wyo Badia Joe attended an appointment with Dr. Cook, complaining of continued right shoulder pain. (Ex. 1, page 3) Dr. Cook assessed Wyo Badia Joe with right shoulder pain with an underlying superior labrum anterior posterior tear and bicipital tendonitis with a new onset of upper extremity numbness and tingling. (Ex. 1, p. 3) Dr. Cook recommended a nerve

conduction study to rule out carpal tunnel syndrome, and noted Wyo Badia Joe may be a likely candidate for surgery, as she had failed multiple modalities of conservative treatment and continued to have pain. (Ex. 1, p. 3)

Wyo Badia Joe returned to Dr. Cook on September 4, 2018, complaining of right shoulder pain, and right hand numbness and tingling. (Ex. 1, p. 5) Dr. Cook noted her right shoulder pain had continued, but the numbness and tingling in her right hand had improved. (Ex. 1, p. 5) Dr. Cook arranged a follow-up appointment for November, planned to move forward with surgery, and continued her work restrictions. (Ex. 1, p. 5)

On November 20, 2018, Wyo Badia Joe attended an appointment with Dr. Cook complaining of continued right shoulder pain. (Ex. 1, p. 7) Dr. Cook noted magnetic resonance imaging from 2017 showed a superior labrum anterior posterior tear and noted a biceps injection helped. (Ex. 1, p. 7) Dr. Cook recommended a diagnostic arthroscopy with possible rotator cuff repair and biceps tenodesis with subacromial decompression. (Ex. 1, p. 7)

During the hearing on the application for alternate medical care the parties stipulated Wyo Badia Joe first requested additional treatment and surgery with Dr. Cook from Ozark and Safety National on January 10, 2019. Ozark and Safety National accepted Wyo Badia Joe's claim as compensable, and scheduled an appointment with Dr. Aviles for January 28, 2019, at 9:15 a.m. Wyo Badia Joe informed Ozark and Safety National she would not attend the appointment and she filed an application for alternate medical care.

Wyo Badia Joe testified she has treated with Dr. Cook for the last eighteen months. (Wyo Badia Joe Testimony) Wyo Badia Joe reported Dr. Cook has administered medication, ordered physical therapy, and performed injections to try to relieve her pain. (Wyo Badia Joe Testimony) Wyo Badia Joe reported Dr. Cook recommended surgery to her before the original arbitration hearing, but she elected to pursue conservative treatment first. (Wyo Badia Joe Testimony) During the arbitration hearing Wyo Badia Joe did not request the deputy workers' compensation commissioner order Ozark and Safety National to authorize additional treatment or surgery with Dr. Cook. Wyo Badia Joe wants to continue treating with Dr. Cook. (Wyo Badia Joe Testimony)

### CONCLUSIONS OF LAW

Under Iowa Code section 85.27 (2017), an employer is required to furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under Iowa Code chapters 85 and 85A. The employer has the right to choose the provider of care, except when the employer has denied liability for the injury. Id.

“The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee.” Id. § 85.27(4). If the employee is dissatisfied with the care, the employee should communicate the basis for the dissatisfaction to the employer. Id. If the employer and employee cannot agree on alternate care, the commissioner “may, upon application and reasonable proofs of necessity therefore, allow and order other care.” Id.

The employee bears the burden of proving the care authorized by the employer is unreasonable. R.R. Donnelly & Sons v. Barnett, 670 N.W.2d 190, 196 (Iowa 2003). “The employer’s obligation under the statute turns on the question of reasonable necessity, not desirability.” Long v. Roberts Dairy Co., 528 N.W.2d 122, 124 (Iowa 1995). The care authorized by the employer is unreasonable if it is ineffective, inferior, or less extensive than the care requested by the employee. Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433, 437 (Iowa 1997). The determination of whether care is reasonable is a question of fact. Long, 528 N.W.2d at 123.

Ozark and Safety National denied liability and refused to provide care to Wyo Badia Joe from the date of the injury, May 10, 2017, until January 2019. The deputy workers’ compensation commissioner issued an arbitration decision on December 10, 2018, finding Wyo Badia Joe had sustained an injury arising out of and in the course of her employment with Ozark. Wyo Badia Joe, File No. 5059272.

Wyo Badia Joe provided Ozark and Safety National with additional medical records, Exhibit 1, after the deputy workers’ compensation commissioner issued the arbitration decision. On January 10, 2019, Wyo Badia Joe requested Ozark and Safety National authorize the surgery recommended by Dr. Cook. Ozark and Safety National did not authorize treatment or surgery with Dr. Cook, and authorized treatment with Dr. Aviles.

During the hearing on the application for alternate medical care, Wyo Badia Joe argued Ozark and Safety National have acted unreasonably by refusing to authorize medical care for many months after denying liability. Ozark and Safety National dispute her contention, and allege under Brewer-Strong v. HNI Corp., 913 N.W.2d 235, 244 (2018), an employer may regain control of an employee’s medical care following an initial denial of liability, which is what they had done in this case, and the care they have offered is reasonable.

The claimant in Brewer-Strong argued the workers’ compensation commissioner and the district court erred in finding an employer can regain control of an employee’s medical care after the employer initially denied liability for the work injury. 913 N.W.2d at 243. The Iowa Supreme Court rejected the claimant’s contention and found that even after initially denying liability,

it is incumbent on employer to continue to monitor and investigate any claim for benefits. When, as here, sufficient proof justifies a reexamination

of an initial determination of nonliability, the employer should be encouraged to change its position to accept liability for an employee's work-related injury. Holding otherwise would run contrary to the very purpose of Iowa Code chapter 85 to resolve "workplace-injury claims with minimal litigation" by forcing employers to reach a conclusion about their liability for an employee's injury without thoroughly performing their duty to investigate the claims, potentially creating more litigation and expenses in the process. . . .

Thus, the workers' compensation commissioner and the district court correctly found [the employer] acquired its authorization defense and the statutory rights and obligations to provide and choose appropriate medical care pursuant to Iowa Code section 85.27 once it amended its answer to acknowledge compensability for [the claimant's] injury. [The employer] then retained its right to control medical care throughout the course of treatment for [the claimant's] compensable injury since it did not subsequently contest whether the injury was work-related or withdraw its authorization of care for [the claimant].

Id. at 244-45.

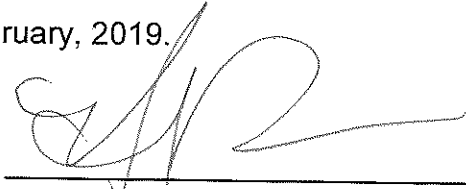
As with the employer in Brewer-Strong, Ozark and Safety National denied Wyo Badia Joe had sustained a compensable injury and refused to authorize care for her. Wyo Badia Joe sought care on her own with Dr. Cook. Following the arbitration hearing, Ozark and Safety National were ordered to pay Wyo Badia Joe's medical expenses as discussed above. Wyo Badia Joe did not request the deputy workers' compensation commissioner direct Ozark and Safety National to authorize any future care with Dr. Cook or request alternate medical care, during the arbitration hearing. Wyo Badia Joe, File No. 5059272, at 1-14.

After receiving the December 10, 2018 arbitration decision, and after Wyo Badia Joe requested Ozark and Safety National authorize treatment and surgery with Dr. Cook on January 10, 2019, Ozark and Safety National authorized treatment with Dr. Aviles, and scheduled an appointment for January 28, 2019. The Iowa Supreme Court held in Brewer-Strong, that an employer may regain control of an employee's medical care following an initial denial of liability. Id. That is what occurred in this case after Ozark and Safety National received the arbitration decision and the request from Wyo Badia Joe for additional treatment. I find Ozark and Safety National acted reasonably by authorizing care with Dr. Aviles and arranging an appointment with him for January 28, 2019. Wyo Badia Joe has presented no evidence to the contrary that the treatment offered by Dr. Aviles is ineffective, inferior, or less extensive than the care requested by Wyo Badia Joe. While Wyo Badia Joe may prefer to treat with Dr. Cook, the decision to authorize treatment with Dr. Aviles is not unreasonable. Wyo Badia Joe has not established Ozark and Safety National have acted unreasonably in this case.

**ORDER**

Claimant's application for alternate care is DENIED.

Signed and filed this 13<sup>th</sup> day of February, 2019.



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HEATHER L. PALMER  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

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