BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JACKIE ALLEN, Claimant, vs. CARISCH, INC. d/b/a ARBY'S, Employer, and PENNSYLVANIA MANUFACTURERS ASSOCIATION, INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5064108 ALTERNATE MEDICAL CARE DECISION HEAD NOTE NO: 2701

STATEMENT OF THE CASE

This is a contested case proceeding under Iowa Code chapters 85 and 17A. The expedited procedure of rule 876 IAC 4.48 is invoked by claimant, Jackie Allen. Claimant appeared personally and through attorney, Corey Walker. Defendants appeared through their attorney, Eric Lanham.

The alternate medical care claim came on for hearing on June 18, 2018. The proceedings were digitally recorded. That recording constitutes the official record of this proceeding. Pursuant to the Commissioner's 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 and any appeal of the decision would be to the Iowa District Court pursuant to Iowa Code section 17A.

The record consists of claimant's exhibits 1 through 6 and defense exhibits A through C, which were received without objection. The defendants do not dispute liability for claimant's February 1, 2017, work injury.

ISSUE

The issue presented for resolution is whether the claimant is entitled to return to surgery, and if so, by whom.

FINDINGS OF FACT

The claimant sustained an injury to her right shoulder on or about February 1, 2017. Defendants accepted the claim and directed medical care. Michael Doarn, M.D., became the authorized physician. In March 2018, Dr. Doarn documented in his treatment notes that claimant "does not want surgery and I am not sure surgery would really help anyway." (Defendants' Exhibit A, page 2) At that time, the diagnosis was right shoulder pain from partial RTC tears. On March 22, 2018, Dr. Doarn released Ms. Allen without further care, placed her at maximum medical improvement and recommended a functional capacity evaluation. (Def. Ex. A, p. 3)

Ms. Allen was dissatisfied and sought a second opinion. On April 24, 2018, Andrew Pick, D.O., evaluated Ms. Allen. He diagnosed "proximal biceps tendinopathy along with impingement symptoms." (Cl. Ex. 2, p. 3) He recommended biceps tenotomy and subacromial decompression surgery. (Cl. Ex. 2, p. 3) On May 24, 2018, through counsel, claimant articulated her dissatisfaction with the care offered and asked to have care switched to Dr. Pick. (Cl. Ex. 3) On June 5, 2018, she filed this alternate medical care action. On the same day she also received a medical report from Dr. Doarn wherein he opined, "I am in agreement with Dr. Pick regarding the surgery on her Right shoulder." (Cl. Ex. 5) Dr. Doarn, however, was unwilling to perform the surgery. (Cl. Ex. 6)

Defendants immediately began making efforts to arrange a different physician for claimant to see. (Def. Exs. B and C) No surgeon recommended by the defendants at this point has agreed to perform the surgery recommended by Dr. Pick and Dr. Doarn. The defendants have, however, taken all reasonable and appropriate steps to authorize such a surgery.

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. Iowa Code section 85.27 (2013).

By challenging the employer's choice of treatment – and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See 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).

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 statutory right is to select the providers of care and the employer may consider cost and other pertinent factors when exercising its choice. Long, at 124. An employer (typically) is not a licensed health care provider and does not possess medical expertise. Accordingly, an employer does not have the right to control the methods the providers choose to evaluate, diagnose and treat the injured employee. An employer is not entitled to control a licensed health care provider's exercise of professional judgment. Assmann v. Blue Star Foods, File No. 866389 (Declaratory Ruling, May 19, 1988). An employer's failure to follow recommendations of an authorized physician in matters of treatment is commonly a failure to provide reasonable treatment. Boggs v. Cargill, Inc., File No. 1050396 (Alt. Care January 31, 1994).

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."

It is evident at this point that the claimant is entitled to have surgery on her right shoulder. Two physicians, including the authorized treater, have recommended the surgery. Dr. Doarn, the authorized physician, however, does not wish to perform the surgery himself.

The question is whether the claimant has met her burden that the care offered by the defendants is unreasonable. The defendants, upon learning that Dr. Pick had recommended surgery, immediately attempted to arrange an evaluation for Ms. Allen with a physician other than Dr. Doarn. They had initially arranged an appointment with a physician who was too far away and then sought a physician at CNOS. The claimant has not been seen by this physician yet. Claimant's counsel argues, with some merit, this physician has not even agreed that surgery is the appropriate course of action.

While this is a close case, I find that the claimant has failed to meet her burden of proof. The defendants have taken reasonable actions regarding claimant's treatment at each step of the process. Once the defendants learned that Dr. Pick recommended surgery, they attempted to arrange an appointment with another surgeon. Once they learned Dr. Doarn concurred, they contacted Dr. Doarn, who declined to provide the surgery. The defendants have arranged an appointment at this time for claimant to be

evaluated. While this process is cumbersome and results in some delays, it is the legal framework provided by statute.

I mention this is a close case because, outside of the workers' compensation system, a normal health care consumer might find the process itself to be unreasonable. It does appear unusual, or possibly even unreasonable, when two physicians have already evaluated the injured person, to have to wait for a third physician to see her again before authorizing the recommended treatment. It is a further and possibly unnecessary delay. This is the current posture of the case. While it would be perfectly reasonable for the defendants to simply authorize surgery with Dr. Pick at this point, this is not the legal standard. The issue is not whether it would be reasonable to allow the surgery with Dr. Pick. The legal standard is that claimant must prove that the defendants have failed to authorize appropriate medical care in some fashion. By a narrow margin, I find that has not occurred in this case.

ORDER

THEREFORE IT IS ORDERED:

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

Signed and filed this 18th day of June, 2018.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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