BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

PEDRO MERO BUSTOS, Claimant, vs. TYSON FOODS, INC., Employer, Self-Insured, Defendant.	File No. 19700550.01 R E M A N D D E C I S I O N Head Note: 2701

This matter is before the Iowa Workers' Compensation Commissioner on remand from a decision of the Iowa District Court dated January 18, 2023.

The initial arbitration hearing was held on November 8, 2021, and the matter was considered fully submitted in front of the deputy workers' compensation commissioner on December 20, 2021. An arbitration decision was filed on February 14, 2022.

In the arbitration decision the deputy commissioner found claimant Pedro Mero Bustos failed to meet his burden of proof to establish he sustained a left shoulder sequela injury caused by the stipulated May 1, 2019, work injury to his low back. The deputy commissioner found claimant is entitled to healing period benefits from February 3, 2020, through September 2, 2020. The deputy commissioner found because defendant Tyson Foods, Inc., offered claimant work at the same or greater salary, wages, or earnings he earned on May 1, 2019, claimant's recovery is limited to his functional loss. The deputy commissioner found claimant sustained ten percent functional loss, which entitles claimant to receive 50 weeks of permanent partial disability benefits. The deputy commissioner found claimant is not entitled to reimbursement for medical bills related to his left shoulder condition because he did not prove he sustained a left shoulder sequela injury. The deputy commissioner found claimant is not entitled to reimbursement for medical bills related to his low back condition after the petition for alternate care was denied because claimant did not prove the unauthorized care provided a more favorable outcome than would have been achieved by the care offered by defendant. The deputy commissioner denied claimant's request for alternate care with Ric Jensen, M.D., finding claimant only proved a preference for care with Dr. Jensen and claimant did not prove the care offered by defendant was unreasonable. The deputy commissioner found defendant is entitled to a credit for 50 weeks of benefits it previously paid.

Claimant appealed the arbitration decision to the workers' compensation commissioner. On July 28, 2022, the commissioner filed an appeal decision affirming the arbitration decision in its entirety without providing additional analysis.

Claimant filed an application for judicial review. In the January 18, 2023, judicial review decision, the district court affirmed the agency's finding that claimant's healing period ended on September 2, 2020. The district court affirmed the agency's finding claimant sustained ten percent functional impairment as a result of the work injury. The district court affirmed the agency's finding claimant is not entitled to reimbursement for unauthorized medical costs. The district court reversed the agency's finding claimant is not entitled to alternate care and remanded the matter back to the agency for further explanation of the reasoning because the court could not tell what evidence the agency "considered or even whether anything was considered beyond that the Deputy had already ruled on a similar claim with different evidence," finding the agency's decision was "entirely conclusory." (Ruling on Petition for Judicial Review, p. 12).

An employer is required to furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, hospital services and supplies, and transportation expenses for all conditions compensable under the workers' compensation law. Iowa Code § 85.27(1). The employer has the right to choose the provider of care, except when the employer has denied liability for the injury. Id. § 85.27(4). "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 the necessity therefor, allow and order other care." Id. The statute requires the employer to furnish reasonable medical care. Id. § 85.27(4); Long v. Roberts Dairy Co., 528 N.W.2d 122, 124 (Iowa 1995) (noting "[t]he employer's obligation under the statute turns on the question of reasonable necessity, not desirability"). The Iowa Supreme Court has held the employer has the right to choose the provider of care, except when the employer has denied liability for the injury or has abandoned care. Iowa Code § 85.27(4); Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 204 (Iowa 2010).

On May 2, 2019, claimant attended an appointment with David Archer, M.D., an occupational medicine physician, complaining of right-sided low back pain following a work injury. (Joint Exhibit 1, page 2) Dr. Archer examined claimant, diagnosed him with a lumbar region strain, and prescribed medication. (JE 1, p. 3)

Dr. Archer referred claimant to Matthew Johnson, M.D., a neurosurgeon. On June 26, 2019, claimant attended an appointment with Dr. Johnson, complaining of numbness and tingling and right leg pain following a back injury at work. (JE 3, p. 107) Dr. Johnson examined claimant, reviewed claimant's imaging, listed an impression of a low back sprain and right lower extremity radiculopathy, and recommended a referral to a pain management clinic for a right S1 transforaminal epidural flood and injections

around the PSIS region of claimant's pelvic rim where he was quite tender. (JE 3, pp. 107-109)

Jeremy Poulsen, D.O., a pain management specialist, performed the injections. (JE 4, pp. 129-140) When claimant returned to Dr. Johnson on August 21, 2019, claimant informed Dr. Johnson he received three to four days of good relief from the sacroiliac injection, but not from the first injection and he continued to have pain in the right PSIS and sacroiliac region. (JE 3, p. 110) Dr. Johnson recommended claimant return to Dr. Poulsen to discuss whether claimant would benefit from a sacroiliac rhizotomy given his partial response to the sacroiliac joint injection. (JE 3, pp. 111-112) Claimant returned to Dr. Poulsen and he administered additional injections. (JE 4, pp. 144-151) Dr. Archer monitored claimant's care. (JE 1)

On January 15, 2020, claimant returned to Dr. Johnson complaining of numbness and tingling radiating down the posterior calf and into the bottom of his foot and reporting he underwent L4-L5 and L5-S1 transforaminal injections with Dr. Poulson on December 18, 2019, and that he felt quite a bit better for two or three days and then the pain returned. (JE 3, p. 113) Dr. Johnson reviewed new lumbar spine magnetic resonance imaging, which he noted:

> [D]oes show some lateral recess stenosis on the right at L4-5. The numbering of his lumbar vertebral and disk levels is somewhat complicated. I suspect that the disk that Dr. Franze has been calling L4-5 is functionally at L5-S1 level based pm the anatomy of the named L5 vertebral body, which is more consistent with an S1 vertebral body and the fact that it is contiguous with the sacroiliac joint, I suspect that the disk in question is actually the L5-S1. The S1 nerve root would, therefore, be in the lateral recess around the medial aspect of the S1 pedicle, which would be the nerve root that he is having the most trouble with.

(JE 3, p. 114)

Dr. Johnson listed an impression of S1 radiculopathy and recommended lumbar laminectomy surgery. (Id.)

On February 3, 2020, Dr. Johnson performed an L4-L5/L5-S1 microlaminotomy and foraminotomy on claimant. (JE 7, p. 193) Dr. Johnson listed a postoperative diagnosis of right L4-L5 and L5-S1 lateral recess stenosis with radiculopathy. (Id.)

Following surgery claimant reported his pain had improved, but he complained of tightness around his calf and some pain down the back of his calf and into his foot. (JE 3, p. 119) Dr. Johnson ordered an ultrasound to rule out deep vein thrombosis, which was negative, and prescribed a prednisone taper and physical therapy. (JE 3, p. 120)

Claimant continued to complain of recurrent pain in his right lower extremity. (JE 3, p. 123) Dr. Johnson spoke with claimant's primary care provider, Stephen Veit, M.D., who relayed claimant was having increasing problems with his right leg, including some

weakness. (Id.) Dr. Johnson recommended lumbar spine magnetic resonance imaging. (Id.)

When claimant returned to Dr. Johnson on March 27, 2020, Dr. Johnson examined claimant and reviewed his imaging. (JE 3, p. 125) Dr. Johnson noted the imaging showed no evidence of a compression lesion around the L5 nerve root and some enhancing granulation tissue in the area he did not believe was compressive in nature. (Id.) Dr. Johnson documented he suspected claimant's weakness was actually a pain response and he prescribed gabapentin and encouraged claimant to continue daily exercises. (Id.)

On May 6, 2020, claimant attended a follow up appointment with Dr. Johnson reporting his right lower extremity radiculopathy was worse than before surgery. (JE 3:126) Dr. Johnson found:

> Pedro has significant exaggerated pain responses. He has given way-type weakness in both lower extremities that is not explainable by his pain description and by his radiographic findings. A postoperative MRI, in my opinion, did not show any definitive compression of the S1 nerve root, but did show some postoperative granulation tissue/scar that is not usually felt to be compressive. I do not recommend further surgery and he is not really interested in that. I do not really feel that I have any other options for him at this time. He would like to talk to Dr. Veit, his family physician, about a second opinion. As I do not have anything further to offer from a surgical standpoint, I believe he is at maximum medical improvement and I will see him on a p.r.n. basis going forward. I would suggest he return to Dr. David Archer to start the return to work process as he is the occupational medicine physician who had referred to my office and is closer to his home for follow-ups.

(JE 3, p. 127)

During a follow-up appointment on June 2, 2020, Dr. Archer noted claimant's most recent magnetic resonance imaging did not have radicular findings and, on exam, claimant's pain response seemed exaggerated. (JE 1, p. 18)

Claimant sought a second opinion with Ric Jensen, M.D. On June 25, 2020, Dr. Jensen issued a letter to Dr. Archer, stating, in part:

> Unfortunately, and at this point in time, Pedro's only realistic options will be to continue conservative treatment measures at independent physical therapy efforts for back strengthening. Ultimately, surgical stabilization of the L4-5 lumbar intersegmental level will be required to eliminate the adverse biomechanical stresses associated with the pathology as listed above. However, the decision to move forward with operative therapy will be left up to Pedro. . . .

(JE 8, p. 197)

Dr. Jensen issued a one-time prescription for Dilaudid to claimant for breakthrough pain, and stated he would be happy to see claimant again. (JE 8, p. 197) Claimant began treating with Dr. Jensen on his own. Defendant did not authorize the treatment.

On July 22, 2020, claimant returned to Dr. Poulsen complaining of a recurrence of his low back pain extending along the entirety of his low back and into his bilateral regions and right-sided radicular pain extending down into his anterior calf. (JE 4, p. 152) Dr. Poulsen noted claimant had received reasonable relief from the injections he administered in December and Dr. Poulson administered additional injections and continued claimant's gabapentin. (JE 4, pp. 152-57)

On July 27, 2020, defendant sent Dr. Johnson a check-the-box letter asking for his opinion regarding Dr. Jensen's opinion. (Ex. G, p. 1) Dr. Johnson noted he had also reviewed the recent electromyography results. (Id.) Dr. Johnson stated his opinion had not changed and he opined claimant was not in need of any additional medical treatment for his work injury with the exception of a functional capacity evaluation ("FCE") to address claimant's return to work.

When he returned to Dr. Archer on July 29, 2020, claimant reported the injections he received provided relief for a couple of hours and the gabapentin made him groggy. (JE 1, p. 19) Dr. Archer opined that due to the absence of radiculopathy shown on electromyography, claimant was not a surgical candidate and he noted "he could be considered a failed back and rec: pain clinic care and a FCE to establish permanent restrictions. Assign PPI when he is at MMI." (JE 1, p. 20)

Claimant filed an application for alternate care. (Ex. N) The application for alternate care proceeded to a hearing on August 6, 2020. Claimant requested surgery recommended by Dr. Jensen. The deputy commissioner found claimant had not proven the care offered by defendant was unreasonable. (Ex. N, p. 4) In reaching that conclusion, the deputy commissioner found:

> The defendant has continued to authorize care with Dr. Archer and other pain management doctors. Additionally, Dr. Archer indicated that a referral to pain management may be appropriate. While a referral is pending as of the time of the hearing for this case, clearly the authorized treating providers are considering potential avenues to treat Mr. Mero Bustos' continued pain complaints based upon the records in evidence.

(Ex. N:4)

Claimant did not appeal the alternate care decision.

On September 2, 2020, claimant returned to Dr. Archer complaining of right low back pain. (JE 1, p. 21) Dr. Archer documented the results of the FCE were invalid with evidence of symptom magnification, and Dr. Archer documented that the physical therapist noted it was safe for claimant to return to work. (JE 1, pp. 21-22) The same date Dr. Archer also responded to a check-the-box letter from defendant agreeing

claimant had reached maximum medical improvement and that he was capable of returning to regular duty. (Ex. H, p. 1)

Dr. Jensen sent Dr. Archer a letter on September 11, 2020, stating claimant had failed conservative treatment, noting he did not recommend a trial of epidural cortisone injections, and stating claimant's best conservative measures include persistent back strengthening efforts, maintaining his current body weight, use of a TENS unit, use of heat and ice, and possibly an inversion table. (JE 8, pp. 198-199) Dr. Jensen further noted that due to the persistence of claimant's symptoms following extended conservative treatment measures he believed surgery could be considered "rational as a treatment course." (JE 8:199)

Dr. Jensen performed a posterior lumbar instrumented fusion and decompression procedure on claimant on October 27, 2020. (JE 8, p. 200) Dr. Jensen sent Dr. Archer a letter on October 27, 2020, reporting claimant was making excellent progress, and stating claimant had a significant reduction in his low back and bilateral proximal lower extremity pain/ache syndrome. (Id.)

Defendant again requested Dr. Johnson's opinion on November 4, 2020. (Ex. Q, p. 1) Dr. Johnson agreed with the statement, "[a]s the authorized treating surgeon, you still agree that the non-surgical care that was continuing to be provided primarily by Dr. Archer, including pain management, remained the most reasonable and correct care for Mr. Mero Bustos low back condition after your surgery" and Dr. Johnson wrote there was no change in his prior opinion. (Ex. Q, p. 2) Dr. Johnson further agreed with the statement "[a]fter reviewing Dr. Jensen's proposed restrictions and the increased 16% functional rating, you believe the second surgery by Dr. Jensen did not result in any substantial improvement of Mr. Mero Bustos's condition in comparison to Mr. Mero Busto's condition when you last saw him prior to the second surgery," and Dr. Johnson wrote there was no change in his prior opinion. (Ex. Q, p. 2)

On December 22, 2020, Dr. Jensen sent another letter to Dr. Archer stating claimant had reported his back pain had improved significantly and claimant indicated no focal weakness in either lower extremity, but noted claimant had a slight degree of sensory change over the distal aspect of the right L5 lumbosacral dermatome. (JE 8, p. 201)

Dr. Jensen sent another letter to Dr. Archer on March 22, 2021, reporting claimant's preoperative "radiculopathic right lower extremity symptomatology" had improved, and that he was recommending physical therapy for claimant. (JE 8, p. 202)

Dr. Johnson and Dr. Jensen provided competing opinions on extent of functional impairment. Dr. Johnson found claimant fell into DRE Category III and assigned claimant ten percent impairment using Table 15-3 of the of the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides") and Dr. Johnson assigned no permanent restrictions. (Ex. F, p. 1) Using the AMA Guides, Dr. Jensen assigned 16 percent permanent impairment and he assigned permanent restrictions. (JE 8, pp. 213-214) The deputy commissioner found Dr. Johnson's opinion most

persuasive, noting Dr. Jensen did not provide measurements of decreased range of motion or list any other considerations in arriving at his impairment rating. The commissioner affirmed the finding and the district court affirmed the agency's finding.

At hearing, claimant requested defendant be responsible for additional unpaid and unauthorized medical bills claimant incurred related to his low back condition. The deputy commissioner disagreed, finding claimant had not proven by a preponderance of the evidence that the unauthorized medical care resulted in a more favorable outcome than would have been achieved by care authorized by defendant, and noting claimant's healing period ended on September 2, 2020. The district court affirmed the agency's finding that claimant was not entitled to reimbursement for unauthorized medical expenses for his left shoulder and low back, including the surgery performed by Dr. Jensen on October 27, 2020. (JE 10, p. 219)

At hearing, claimant also requested alternate care with Dr. Jensen alleging the care defendant authorized with Dr. Johnson was ineffective and alleging defendant had abandoned care after September 2, 2020. Based on my review of the record I find there is no evidence defendant abandoned care in this case. Defendant did not deny liability for claimant's low back condition.

The deputy commissioner also found claimant failed to prove the care offered by defendant was unreasonable. Defendant authorized care with Dr. Archer and Dr. Johnson. None of the authorized treating physicians recommended the surgery performed by Dr. Jensen or other additional care. This is also consistent with the finding, affirmed on appeal by the district court, that claimant's healing period ended on September 2, 2020, the date of his last appointment with Dr. Archer before the surgery performed by Dr. Jensen. Dr. Jensen did not recommend additional injections or pain management that would warrant additional treatment with Dr. Poulsen or another pain management specialist. Considering all of the record evidence, I find claimant has not established defendant abandoned care or that the care offered by defendant was unreasonable. The request for alternate care is denied.

ORDER

IT IS THEREFORE ORDERED:

Claimant's application for alternate care is denied.

Pursuant to rule 876 Iowa Administrative Code 3.1(2), defendant shall file subsequent reports of injury as required by this agency.

Signed and filed on this 18th day of May, 2023.

Joseph S. Cortese II

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

The parties have been served as follows:

Mary Hamilton (via WCES)

Chris Scheldrup (via WCES)