BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

AARON SHINN, Claimant, vs. MCWANE, INC., d/b/a CLOW VALVE COMPANY, Employer, and ACE AMERICAN INSURANCE, Insurance Carrier, Defendants.	File No. 21700759.01 ALTERNATE MEDICAL CARE DECISION Head Note: 2701

STATEMENT OF THE CASE

On July 29, 2021, Aaron Shinn (claimant) filed an application for alternate care under Iowa Code section 85.27(4) and 876 IAC 4.48 for a work injury to his shoulder sustained on February 23, 2021. Defendants McWane, Inc., doing business as Clow Valve Company (employer), and Ace American Insurance Company (insurance carrier) filed their answer on August 11, 2021, accepting liability and asserting their right to direct Shinn's care for the injury. For clarity this decision will refer to the defendants collectively as McWane.

The undersigned presided over an alternate care hearing held by telephone and recorded on August 12, 2021. That audio recording constitutes the official record of the proceeding. See 876 IAC 4.48(12); see also Dotts v. City of Des Moines, No. 20-0954, 2021 WL 3076305 (IA App. July 21, 2021) (Slip Copy). Shinn participated personally and through attorney Joseph S. Powell. McWane participated through attorney Robert C. Gainer. The record consists of:

- Hearing testimony by Shinn;
- Claimant's Exhibits 1 through 4; and
- Defendants' Exhibit A.

ISSUE

The issue under consideration is whether Shinn is entitled to alternate care in the form of care from Neil Schwimley, D.O.

FINDINGS OF FACT

Shinn sustained an injury to his right shoulder on February 23, 2021. McWane accepted liability and directed care. (Testimony) Shinn treated with Steven Aviles, M.D. (Testimony; Exs, 1, A) On June 8, 2021, Dr. Aviles released Shinn from care and noted:

> [Shinn] had a small anterior labral tear that is typically not a source of pain. I would have expected him to get better, but he has failed physical therapy and now has failed an intra-articular corticosteroid injection. He states that he feels a pop and he has pain over his biceps. I do not see any clear evidence of superior labral tearing and I do not see any biceps pathology. I do not feel comfortable recommending surgical intervention under the circumstances. I would like to get a second opinion on this matter. I am keeping the same work restrictions of 30 pounds. I will see him back as needed. If he continues to have trouble, I will be happy to see him again and we can consider a diagnostic arthroscopy.

(Exs. 1, A) Thus, care with Dr. Aviles did not help alleviate Shinn's symptoms, so Dr. Aviles thought a second opinion was appropriate. A note on the records to cc providers indicates Iowa Ortho shared the records by facsimile with employer representative Mitzi Fisch and claims adjuster Harvey Tulabot. (Exs. 1, A)

After the appointment with Dr. Aviles, Shinn attended a meeting at work along with a union representative, Shinn's foreperson and supervisor, a nurse employed by the company, and an employee who works in human resources for the company. (Testimony) The representatives of McWane informed Shinn it would not authorize further care and he had a choice: return to work full duty or go on leave under the federal Family and Medical Leave Act of 1993 (FMLA). (Testimony) After the meeting, Shinn set up an appointment with his personal physician to complete FMLA certification paperwork, because he could not return to work full duty given his ongoing symptoms, and to obtain a referral for a second opinion since McWane had refused to authorize such care. (Testimony; Ex. 3)

Apparently in response to a request for an opinion on Shinn's permanent impairment caused by his work injury, Dr. Aviles sent a letter to ESIS, dated June 30, 2021, stating:

> I do feel [Shinn] is at maximum medical improvement, as of the last time I saw him on June 8, 2021. At that time, I had recommended a second opinion. I do think it is reasonable to get a second opinion if necessary.

> According to the AMA Guides to Evaluation of Permanent Impairment, 5th Edition, he deserves a 0% impairment rating. He does not require any restrictions at work. He does not require any other health care, unless otherwise indicated by the second opinion.

(Exs. 1, A)

On July 12, 2021, Shinn saw Jana C. Galbreath, A.R.N.P., at Mahaska Health to get FMLA certification paperwork completed and a referral for a second opinion on his shoulder. (Ex. 3) She completed the FMLA certification paperwork. (Ex. 3) Galbreath also referred Shinn for an appointment with Dr. Schwimley. (Ex. 3)

Shinn saw Dr. Schwimley on July 19, 2021, 2021. (Ex. 3) Dr. Schwimley examined Shinn and obtained imaging of his injured shoulder. (Ex. 3) Based on the examination and imaging, Dr. Schwimley recommended surgery in the form of right shoulder diagnostic arthroscopy with subacromial decompression, biceps tenodesis, and possible labral repair. (Ex. 3)

On July 28, 2021, a nurse case manager contacted Shinn's attorney to inform him McWane had scheduled an independent medical examination (IME) for Shinn. (Ex. 2) In response, Shinn's attorney wrote a letter to Joe Feldkamp at ESIS. (Ex. 2) He summarized the course Shinn's care had taken and that Dr. Schwimley had recommended surgery. (Ex. 2) Shinn's attorney also informed Feldkamp that Shinn had informed him of the phone conversation the day before between Shinn and Feldkamp and that Feldkamp had directed Shinn to cancel the surgery with Dr. Schwimley. (Ex. 2) Shinn's attorney concluded:

> It appears clear that you are aware that my client had the second opinion as request by Dr. Aviles, that my client saw Dr. Schwimley, and th[at] Dr. Schwimley has recommended surgery. My client would like to have that surgery. Rather than authorize the surgery, you are instead requesting an IME. My client would not like an IME; he would like to have the surgery recommended by Dr. Schwimley. Please consider this notice of my client's dissatisfaction with the medical treatment being provided, as you are not willing to authorize further care under Iowa Code [section] 85.27.

(Ex. 2) The following day, case manager Tammy Machin, R.N., sent Shinn's attorney a "Claimant Appointment Letter to Attorney," to inform Shinn's attorney, "Per the request of ESIS, I have scheduled an IME appointment for your client, Aaron Shinn, with Dr. Henson on 8/9/2021 at 9:30 a.m." (Ex. 4)

Shinn's attorney wrote Dr. Schwimley a check-box letter dated July 28, 2021. (Ex. 3) In it, he asked Dr. Schwimley if Shinn's right shoulder injury at work caused the need for the surgery. (Ex. 3) Dr. Schwimley indicated it had and signed the letter on August 2, 2021. (Ex. 3) Dr. Schwimley performed surgery on Shinn's right shoulder on August 3, 2021. (Ex. 3) Shinn wishes to continue care with Dr. Schwimley.

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)). 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).

"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; 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.

The evidence establishes the care Shinn received from Dr. Aviles, which McWane authorized, was ineffective. Dr. Aviles noted Shinn "failed" conservative care in the form of physical therapy and an injection. Nonetheless, Dr. Aviles was hesitant to recommend surgery, though he did float the possibility of a diagnostic arthroscopy, and recommended a second opinion when he released Shinn from care on June 8, 2021.

The evidence shows it is more likely than not a nurse case manager acting as an agent of McWane knew of Dr. Aviles's June 8, 2021 recommendation that Shinn get a second opinion on his right shoulder. Moreover, the medical records from that appointment indicate Iowa Ortho shared the records from that appointment with other representatives of McWane. Reinforcing this conclusion is the meeting McWane held after Dr. Aviles released Shinn from care (and recommended a second opinion) that culminated in the employer giving Shinn the ultimatum of returning to work full duty or going on FMLA leave. There is no indication in the record McWane or its agents took action to arrange for a second opinion as recommended by Dr. Aviles after learning of the recommendation. Taken together, the evidence shows McWane knew of Dr. Aviles's recommended care and refused to promptly offer Shinn a second opinion without undue inconvenience, forcing him to continue to miss work while enduring ongoing symptoms and seek the recommended second opinion on his own out of a desire to get better.

After McWane's rejection, Shinn reasonably arranged for an appointment with his personal physician to get FMLA certification and a referral for a second opinion. He then pursued the referral and participated in an appointment with Dr. Schwimley, who recommended surgery. Even after McWane learned of Dr. Schwimley's recommendation, it did not act to reclaim control of care after its earlier refusal to

arrange for a second opinion. Instead, McWane scheduled an IME, which Shinn rejected. Shinn's rejection was reasonable because of his ongoing symptoms, need for surgery in the judgment of Dr. Schwimley, and McWane's refusal to arrange for additional care despite Dr. Aviles's recommendation almost seven weeks earlier.

The evidence shows the authorized care with Dr. Aviles was ineffective. It also establishes McWane refused to arrange for a second opinion as recommended by Dr. Aviles. McWane acted unreasonably by refusing to arrange for a second opinion as recommended by Dr. Aviles despite Shinn's ongoing symptoms. In contrast, Shinn acted reasonably in seeking a referral from his personal physician for a second opinion, as Dr. Aviles recommended, and seeing that care through. He has met his burden under the Iowa Workers' Compensation Act for alternate care.

ORDER

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

1) Shinn's application for alternate care is GRANTED.

2) Shinn may receive alternate care in the form of past and future care from Dr. Schwimley, including referrals to other providers relating to such care as deemed necessary by Dr. Schwimley.

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 12th day of August, 2021.

BENJAMIN G. HUMPHREY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Joseph Powell (via WCES)

Robert C. Gainer (via WCES)