



Claimant injured her right elbow when she was using a large cutting knife making pizzas for the defendant employer and struck her right elbow on the edge of the metal table. The area she struck was between the proximal ulna olecranon area and the lateral epicondyle. The claimant has received conservative care consisting of physical therapy and injections.

The claimant has been evaluated for surgery by three orthopedic surgeons, Thomas Berg, M.D., Theron Jameson, M.D. (on her own) and Anil Agarwal, M.D. (at defendants' request).

Dr. Jameson recommended radial tunnel release with lateral epicondylectomy on December 4, 2008. This surgery has not been performed.

Dr. Agarwal examined the claimant on January 16, 2009, and at that time his diagnosis was:

I. Diagnosis related to the work injury of 02/07/08:

Right chronic lateral epicondylitis, temporary aggravation, almost healed.

(Exhibit 1, page 15)

Dr. Agarwal however, later in his report indicates that claimant's injury has healed and that the claimant does not require further investigations or treatment. Based upon this opinion, the defendants have declined to provide claimant further care for the right elbow.

Claimant's present condition is described in the report of Ray Miller, M.D., an orthopedic surgeon the claimant saw for an independent medical examination:

Ms. Morrison describes pain that is deep in the elbow in the central portion of the elbow. The pain is intermittent. It is aggravated by heavy lifting, forceful use and grip and pull. It is improved with heat. She has no tingling in any of her fingers or thumb at the present time. She states the thumb does not feel quite right and it is difficult to use.

(Ex. A, p. 5)

He recommends the following care for the right elbow:

My evaluation today suggests that Ms. Morrison's right elbow symptoms are most likely related to the extensor muscle mass and injury or irritation to the radial nerve in the radial tunnel. Because she has not had an x-ray of the elbow since 05/2008, it would be worthwhile to repeat a 3-view x-ray of the elbow just to make sure it remains normal. However, I do not feel Ms. Morrison's symptoms are related to bony pathology. I think she would benefit from an MRI of the elbow and proximal third of the

forearm to evaluate the extensor muscle mass to eliminate any chronic injury to the muscle with a deep tear or with the development of a ganglion or other soft tissue structure. If that MRI is unremarkable, then the consideration is for a radial tunnel release.

(Ex. A, p. 7)

#### REASONING AND CONCLUSIONS OF LAW

Under Iowa law, the employer is required to provide care to an injured employee and is permitted to choose the care. Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433 (Iowa 1997).

[T]he employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

By challenging the employer's choice of treatment – and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See Iowa R. App. P. 14(f)(5); 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). In Pirelli-Armstrong Tire Co., 562 N.W.2d at 433, the court approvingly quoted Bowles v. Los Lunas Schools, 109 N.M. 100, 781 P.2d 1178 (App. 1989):

[T]he words "reasonable" and "adequate" appear to describe the same standard.

[The New Mexico rule] requires the employer to provide a certain standard of care and excuses the employer from any obligation to provide other services only if that standard is met. We construe the terms "reasonable" and "adequate" as describing care that is both appropriate to the injury and sufficient to bring the worker to maximum recovery.

The commissioner is justified in ordering alternate care when employer-authorized care has not been effective and evidence shows that such care is "inferior or less extensive" care than other available care

requested by the employee. Long; 528 N.W.2d at 124; Pirelli-Armstrong Tire Co.; 562 N.W.2d at 437.

The record shows that claimant is not at maximum medical improvement for the right elbow injury and that she requires additional treatment which is reasonable and necessary to treat this injury. This is supported by the opinions of Dr. Jameson and Dr. Miller. Dr. Agarwal's report is inconsistent. He states the claimant is almost healed on page 15 and completely healed on page 18. His opinion is not accepted. The claimant's request for alternate care for the right elbow as recommended by Dr. Miller is granted.

ORDER

THEREFORE, IT IS ORDERED:

The application for alternate medical care for the right elbow as recommended by Dr. Miller is granted. Defendants shall provide and pay for the care recommended by Dr. Miller for the right elbow immediately.

With respect to the right shoulder, the claimant's petition is dismissed and it is ordered that defendants have lost the right to choose the care for the right shoulder condition and defendants are barred from asserting a lack of authorization defense in response to a subsequent claim for the expenses of alternate care for the right shoulder condition.

Signed and filed this 31<sup>st</sup> day of July, 2009.



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