BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

LONNIE FENTRESS, Claimant, vs. ALL IN A DAY, LLC/AVENTURE STAFFING, Employer, and RIVERPORT INSURANCE COMPANY, Insurance Carrier, Defendants.		File No. 5068034 RULING ON APPLICATION FOR ALTERNATE CARE HEAD NOTE NO: 2701

STATEMENT OF THE CASE

On June 13, 2019, Lonnie Fentress, the claimant, filed an application for alternate care under Iowa Code section 85.27(4) and 876 Iowa Administrative Code section 4.48. The defendants, employer All In A Day, LLC (which is also referred to as Aventure Staffing in pleadings) and insurance carrier Riverport Insurance Company filed their most-recent amended answer on June 24, 2019, disputing the application.

The undersigned presided over an alternate care hearing that was held by telephone and recorded on June 25, 2019. That recording constitutes the official record of the proceeding. *See* 876 IAC § 4.48(12). Fentress participated personally and through attorney Sara Lamme. The defendants participated through attorney Danielle Augustine. The record consists of:

- Testimony at hearing by Lonnie Fentress;
- Claimant's Exhibits 1 through 3; and
- Defendants' Exhibit A.

ISSUE

The issue under consideration is whether Fentress is entitled to alternate care under Iowa Code section 85.39(4) in the form of post-surgery follow-up care on his left shoulder with A. Althaus, M.D. (first name not given), the employer-chosen doctor who operated on Fentress.

FINDINGS OF FACT

Fentress sustained an injury to his left shoulder arising out of and in the course of his employment with All In A Day on April 14, 2018. Fentress reported the injury to All In A Day. Ultimately, the defendants chose Dr. Althaus to provide care to Fentress. The defendants authorized surgery by Dr. Althaus on Fentress's left shoulder and physical therapy after the surgery.

Fentress saw Dr. Althaus for an appointment on March 22, 2019. (Exhibit 1, page 1) Dr. Althaus found that Fentress was "making gains to his left shoulder, although it is a slow improvement." (*Id.*) At that time, Fentress was being held off work due to his left shoulder injury, surgery, and rehabilitation. (*Id.*) Fentress was participating in physical therapy (PT) at the time. (*Id.*) Dr. Althaus documented the following in the "Plan" section of the medical record for the appointment:

> I think he is doing fair. I think it has been six months, we have given him sufficient time to heal and be in rehabilitation. I believe we can begin some duty. I would like him for the left shoulder to work on work hardening. The right shoulder at this point I think an MRI is reasonable and warranted. We will get this set up in the near future and see him back in four weeks.

(*Id.* at p. 3)

The defendants scheduled an appointment for Fentress with Dean K. Wampler, M.D., for an independent medical examination (IME) in early April. Question No. 3 of the report asks if Dr. Wampler can use current objective findings and diagnostics to confidently establish a diagnosis and treatment plan and if not, to identify what additional diagnostics are indicated. (Ex. A, p. 4) Dr. Wampler responds that he believes "Fentress' non-physiologic arm complaints are likely not present and do not warrant additional investigation." (*Id.*)

> Because of the marked discrepancy between passive and active shoulder mobility, I also believe Mr. Fentress attained maximum medical improvement from his left shoulder surgery at his last visit with Dr. Althaus on March 26, 2019.

(*Id.* (underline in original))

When asked to identify a reasonable and necessary treatment for Fentress's injuries, Dr. Wampler states:

> Mr. Fentress has attained maximum medical improvement on 03/26/2019 for any injury he might have sustained on 08/14/18. No additional medical investigation or treatment is medically warranted. Extending an offer of more treatment only serves to support Mr. Fentress' medically unsubstantiated claim of debility.

(*Id.* at p. 5)

Dr. Wampler concludes that Fentress is engaging in symptom magnification, based in part on notes from Dr. Althaus's initial consultation with the claimant. *Id.* at 5–6. According to Dr. Wampler, Fentress "does not have any medical condition that would prevent him from returning to work without restrictions immediately." (*Id.* at p. 6) Dr. Wampler opines that Fentress does not need any work restrictions. (*Id.*) Dr. Wampler assigns "a minimum of 10% upper extremity impairment because Dr. Althaus removed his AC joint." (*Id.*)

In a letter dated April 15, 2019, Jena Stapleton, RN, informed Fentress that she was closing her file for medical case management at the request of the insurance carrier. (Ex. 2) Stapleton directed Fentress to contact his claims representative if he had any questions. (*Id.*) At or around this time, the defendants terminated authorization for all care relating to Fentress's injuries, including his left shoulder.

In a letter dated May 29, 2019, Fentress's attorney wrote to defense counsel to express the claimant's dissatisfaction with the defendants' decision to cancel all previously scheduled appointments with Dr. Althaus. (Ex. 3, p. 1) Defendant counsel responded by email, stating that the defendants "have denied further treatment based on the attached IME from Dr. Wampler." (*Id.* at p. 2) At hearing, defense counsel elaborated that the symptom magnification found by Dr. Wampler, Fentress's new part-time job as an armed security guard, and Dr. Wampler's conclusion that Fentress is at maximum medical improvement (MMI) form the foundation for the defendants' decision not to authorize further care with Dr. Althaus.

CONCLUSIONS OF LAW

Fentress filed an application for alternate care on June 13, 2019, alleging injuries to both shoulders and arms. There was some confusion between the parties regarding what alternate care Fentress is seeking in his application. After multiple filings and a pre-hearing conference, Fentress has made clear that the application for alternate care currently under consideration relates only to follow-up care for his left shoulder by Dr. Althaus.

The defendants do not dispute that Fentress sustained an injury to his left shoulder arising out of and in the course of his employment with All In A Day. Rather,

the defendants are refusing to authorize any additional care for the injury. The defendants contend that their refusal to authorize additional care with Dr. Althaus is reasonable due to the IME report from Dr. Wampler, which found Fentress to be at MMI.

"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)). Under the law, 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).

An injured employee dissatisfied with the employer-furnished care (or lack thereof) may share the employee's discontent with the employer and if the parties cannot reach an agreement on alternate care, "the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care." *Id.* "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 right to choose care does not authorize the employer to interfere with the medical judgment of its own treating physician. *Assman v. Blue Star Foods*, File No. 866389 (Declaratory Ruling May 19, 1988); *Pote v. Mickow Corp.*, File No. 694639 (Review-Reopening June 17, 1986); *Martin v. Armour Dial, Inc.*, File No. 754732 (Arb. July 31, 1985); *Dietz v. Iowa Meat Processing*, File No. 757109 (Arb. July 20, 1985); *Cahill v. S & H Fabricating & Engineering*, File No. 1138063 (Alt. Care Decision, May 30, 1997); *Hawxby v. Hallett Materials*, File No. 1112821 (Alt. Care Decision, February 20, 1996); *Leitzen v. Collis, Inc.*, File No. 1084677 (Alt. Care Decision, September 9, 1996); *Boggs v. Cargill, Inc.*, File No. 1050396 (Alt. Care Decision, January 31, 1994). This may include relying on an IME report by a non-treating doctor that recommends treatment that is contrary to that chosen by the employer's chosen treating physician. *See Byers v. William Bros. Constr.*, File No. 5023178 (Alt Care Decision March 11, 2010).

Dr. Althaus last saw Fentress for an appointment on or about March 22, 2019. Dr. Althaus decided to schedule a follow-up appointment with Fentress to take place four weeks later, in late April. (Ex. A, p. 3). The appointment never took place because

the defendants refused to authorize it due to the conclusions in Dr. Wampler's report. The defendants have effectively used Dr. Wampler's IME report to overrule their authorized treating physician on the question of care.

Dr. Wampler cites his fresh perspective as one factor allowing him to identify Fentress's alleged symptom magnification. One of the two cited bases for finding symptom magnification is Fentress's initial consultation with Dr. Althaus last year. After that initial consultation at which symptoms magnification allegedly occurred, Dr. Althaus continued to treat Fentresss. Dr. Althaus recommended surgery on Fentress's left shoulder and performed the surgery, which the defendants authorized. Now the defendants cite to Dr. Wampler's report, which is based in part on alleged pre-surgery symptoms magnification, to deny authorization for Fentress to have a post-surgery follow-up appointment with Dr. Althaus — an appointment that is likely to address potential work hardening.

Under the facts of this case, *Byers* is persuasive. It is unreasonable for the defendants to rely on Dr. Wampler's report, which is based in part on alleged pre-surgery symptoms magnification to Dr. Althaus, to veto post-surgery treatment by Dr. Althaus, the authorized treating surgeon.

ORDER

It is therefore ordered:

1) Fentress's application for alternate care is granted.

2) Fentress may receive follow-up care with Dr. Althaus.

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 26th day of June, 2019.

BENJAMIN G. HUMPHREY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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