

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ANTHONY WURTH,

Claimant,

vs.

TOTAL SALES & SERVICE,

Employer,

and

FIRST COMP.,

Insurance Carrier,
Defendants.

FILED

JUN 02 2016

WORKERS COMPENSATION

File No. 5049357

ALTERNATE MEDICAL

CARE DECISION

HEAD NOTE NO: 2701

STATEMENT OF THE CASE

This is a contested case proceeding under Iowa Code chapters 17A and 85. Claimant Anthony Wurth sustained an injury to his right shoulder and arm while working for the defendant, Total Sales & Service. On May 19, 2016, Wurth filed a petition for alternate medical care under Iowa Code section 85.27 and rule 876 IAC 4.48. The independent medical examiner retained by Wurth requested EMG and physical therapist testing to complete his examination. Wurth requested the defendants, Total Sales & Service and First Comp, approve the testing, and the defendants refused.

On May 20, 2016, this division filed a notice of telephone hearing, scheduling a telephone hearing for June 1, 2016, at 10:30 a.m. A copy of the notice was mailed to the parties.

A telephone hearing was held on June 1, 2016 at 10:30 a.m. Attorney Dennis McElwain represented Wurth. Wurth appeared and testified. Attorney Garrett Lutovsky represented the defendants. Exhibits 1 through 6 and A through E were admitted into the record. The proceeding was recorded by digital recorder and the digital recording is the official record of the proceeding.

The undersigned has been delegated with the authority to issue final agency action in this matter. Appeal of this decision, if any, is to the district court pursuant to Iowa Code section 17A.19.

FINDINGS OF FACT

Wurth has worked for Total Sales & Service since 1995. (Exhibit 6) In 2008 he injured his right shoulder at work, and he received arthroscopic surgery in 2009, including debridement of a superior labral tear and subacromial decompression. (Ex. 6) Wurth was released to full duty and did not sustain a permanent impairment. (Ex. 6)

Wurth continued to work for Total Sales & Service. (Wurth Testimony) On September 4, 2013, he injured his right shoulder when removing a cylinder head with a pry bar on a vehicle. (Ex. 6) Wurth received medical treatment from the defendants. (Ex. 6) On November 20, 2014, Kristofer Kimber, M.D., performed a “[r]ight shoulder arthroscopic supra-pectoral biceps tenodesis” on Wurth. (Ex. 1) Dr. Kimber released Wurth without restrictions on February 23, 2015. (Ex. 6)

Wurth continues to work for Total Sales & Service. (Wurth Testimony) After his surgery Wurth continued to experience weakness and numbness in his right upper extremity. (Wurth Testimony; Ex. 2) Wurth sought out physical therapy. (Ex. 2)

In December 2015, the defendants sent Wurth for an independent medical examination with Douglas Martin, M.D. (Ex. 6) Dr. Martin determined Wurth sustained a permanent impairment of six percent of the right upper extremity, or three percent of the whole person. (Exs. 6; C, page 2)

After receiving Dr. Martin’s report, Wurth sought an independent medical examination with Michael O’Neil, M.D. (Ex. 6) Dr. O’Neil sent a letter to Wurth’s attorney on April 27, 2016, as follows:

Following our phone conversation this morning, I am writing this letter to request further diagnostic testing on Mr. Wurth’s right shoulder. As I indicated in my discussion, he has obvious atrophy of the anterior head of his right deltoid with weakness of internal rotation when compared to the left.

It would be very helpful for me to have an EMG of Mr. Wurth’s right upper extremity with special attention on the posterior, lateral and anterior heads of the deltoid. It would also be helpful to have him examined by a physical therapist with specific testing of the three heads of the deltoid on the right when compared to the left.

With the additional information requested above, I will be able to complete my IME report on Mr. Wurth.

(Ex. 3) The next day Wurth’s attorney sent the defendants’ attorney a letter requesting the defendants approve the further diagnostic testing recommended by Dr. O’Neil.

(Ex. 4)

On May 12, 2016, the defendants' attorney sent Wurth's attorney a letter stating, in part, "[w]hile I understand Dr. O'Neil requested [EMG and physical therapist] testing, his April 27, 2016 letter provides no reasoning for the same other than stating the testing is 'diagnostic' in nature. Please provide my client with a basis and reasoning for the additional 'diagnostic' testing recommended by the Iowa Code Section 85.39 examiner, Dr. Michael O'Neil, so that my client can make an informed decision on authorization for the same." (Ex. D) Wurth's attorney responded by sending a second copy of the April 27, 2016 letter from Dr. O'Neil. (Ex. E)

Wurth testified he has weakness and numbness in his right upper extremity following surgery. (Wurth Testimony) Wurth reported he does not have stamina and when he reaches with his arm he has to drop his arm and rest frequently at work. (Wurth Testimony)

REASONING AND CONCLUSIONS OF LAW

An employer is required to 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. Iowa Code § 85.27(1) (2015). The employer has the right to choose the provider of care, except when the employer has denied liability for the injury. Id. "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 necessity therefore, allow and order other care." Id.

The employee bears the burden of proving the care authorized by the employer is unreasonable. R.R. Donnelly & Sons v. Barnett, 670 N.W.2d 190, 196 (Iowa 2003). The determination of whether care is reasonable is a question of fact. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

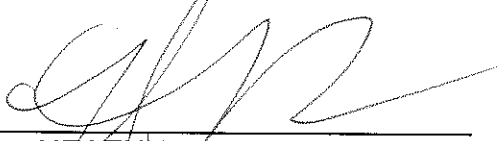
Wurth alleges the additional diagnostic testing requested by Dr. O'Neil is necessary to complete his independent medical examination. Defendants contend Wurth has failed to show that the additional diagnostic testing recommended by Dr. O'Neil is reasonable and necessary to conduct an independent medical examination pursuant to Iowa Code section 85.39 and not for the purpose of entering into a course of treatment. Wurth testified he has a loss of strength, stamina, and numbness in his right upper extremity that impairs his ability to work since he was released from care from Dr. Kimber. (Wurth Testimony) Dr. O'Neil has requested the additional testing to address the atrophy of the anterior head of Wurth's right deltoid with weakness of internal rotation. (Ex. 3) Wurth's condition persists. Defendants have refused to authorize additional diagnostic testing and have not provided a contrary opinion following the recent request. Wurth has established the defendants' refusal to authorize the care is unreasonable.

ORDER

THEREFORE IT IS ORDERED:

Wurth's petition for alternate care is GRANTED. Wurth is entitled to an EMG and one session of physical therapy testing of the right upper extremity.

Signed and filed this 2nd day of June, 2016.



HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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