

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

LATONYA PEGUES,

Claimant,

vs.

KRAFT HEINZ COMPANY,

Employer,

and

INDEMNITY INSURANCE COMPANY
OF NORTH AMERICA,

Insurance Carrier,
Defendants.

FILED

APR 01 2019

WORKERS COMPENSATION

File No. 5067809

ALTERNATE MEDICAL

CARE DECISION

HEAD NOTE NO: 2701

STATEMENT OF THE CASE

On March 18, 2019, LaTonya Pegues (claimant) filed an application for alternate care under Iowa Code section 85.27(4) and 876 Iowa Administrative Code section 4.48. Defendants Kraft Heinz Company (employer) and Indemnity Insurance Company of North America (insurance carrier) filed an answer, disputing the application. For clarity this decision will refer to the defendants collectively as Kraft.

The undersigned presided over a hearing held by telephone and digitally recorded on March 29, 2019. That recording constitutes the official record of the proceeding. See 876 IAC § 4.48(12). Pegues participated personally and through attorney Edward Cervantes. Kraft participated through attorney Peter Thill. The record consists of:

- Testimony at hearing by Pegues and Rachel Henderson, RN; and
- Claimant's Exhibit 1.

ISSUE

The issue under consideration is whether Pegues is entitled to alternate care under Iowa Code section 85.39(4) in the form of surgery as discussed with Ryan Dunlay, M.D.

FINDINGS OF FACT

Pegues suffered a work-related injury to her left ankle on or about September 14, 2018. She reported the injury to Kraft that same day. Kraft accepted liability for the injury.

Henderson is employed by Premise Health, a non-party to this case, that provides occupational health services to Kraft. She works in the position of health center manager at the Kraft facility on Granite Street in Davenport, Iowa. In that role, Henderson manages Pegues's claim.

Initially, Kraft treated the injury with ice as needed at their facility. Kraft ultimately authorized Pegues for medical treatment. On November 30, 2018, Pegues underwent a magnetic resonance image (MRI) that revealed a "[s]mall osteochondral defect in the medial talar dome with disruption of the articular cartilage" with "no occult fractures." (Exhibit 1, page 1)

Pegues underwent conservative treatment that included "attending physical therapy 3 times a week, without much relief." (Ex. 1, p. 2) She was prescribed a crutch to help her walk. (Testimony) Dr. Dunlay gave Pegues shots to help ease her pain. (Testimony) She also wore a brace. (Ex. 1, p. 2) According to Pegues's testimony, none of these measures provided relief.

Pegues saw Dr. Dunlay on February 18, 2019. Dr. Dunlay assessed her progress as follows:

Operative vs non-operative treatment was discussed. I discussed with Latonya that she has failed conservative treatment. I am not recommending any more physical therapy or injections. I discussed a trial of return to work without restrictions vs operative treatment. She wants to think about surgery at this time. She will call back either today or tomorrow. She was given a return to work note with restrictions of 50% seated/standing duty. I will see her back in 1 month. The patient voiced understanding and agreement with this.

(Ex. 1, p. 2)

Pegues "was told risk/complications but doesn't know what chances of having a positive outcome are." (Ex. 1, p. 5) Pegues testified credibly that she contacted Dr. Dunlay's office and communicated her desire to move forward with surgery on February 19, 2019, a desire she reiterated at hearing.

On February 19, 2019, at the direction of Kraft, Pegues saw Camilla J. Frederick, M.D., at Quad City Occupational Health at the direction of Kraft. In response to questions posed by Kraft, Dr. Frederick states:

I recommend a course of work hardening, not to exceed 1 month with a gradual increase in time on her specific job as directed by her onsite

physical therapist. If she continues to have symptoms or can't be progressed back to her regular work successful, I recommend a FCE with XRTS at the end of that period. Then I would recommend a visit to Dr. Dunlay with the results of her work hardening and FCE to determine again if surgery is warranted.

(Ex. 1, p. 6)

According to testimony at hearing by Pegues and Henderson, the claimant has participated in the work hardening and physical therapy recommended by Dr. Frederick since March 11, 2019. (Testimony) Pegues has undergone the prescribed physical therapy from that date to present. She participates in work hardening during her scheduled shifts at Kraft. (Testimony) The work hardening consists of working on her feet as a slicer for about 30 minutes and then 30 minutes of light-duty work performing tasks such as opening rejected packages. (Testimony) Pegues missed work from March 21 through March 25 due to an unrelated health issue, which meant that she did not participate in work hardening on those days. (Testimony) Because of this time off of work, Pegues will complete the work hardening prescribed by Dr. Frederick in approximately mid-April. (Testimony)

Pegues has had the work restrictions prescribed by Dr. Dunlay on February 18 lifted. (Testimony) Pegues had her crutch taken away from her at physical therapy, so she no longer uses it. (Testimony) She must now stand 100 percent of the time that she is at work. (Testimony) Pegues testified that this is painful and causes her ankle to swell. (Testimony)

Henderson testified that the Midwest Therapy records reflect improvement in Pegues's condition as a result of Dr. Frederick's prescribed treatment. (Testimony) Pegues had a follow-up appointment scheduled with Dr. Frederick that she rescheduled due to a potential conflict with the alternate care hearing. (Testimony) It is possible that surgery could be authorized after completion of the conservative course of treatment recommended by Dr. Frederick. (Ex. 1, p. 6)

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)). 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; *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.*

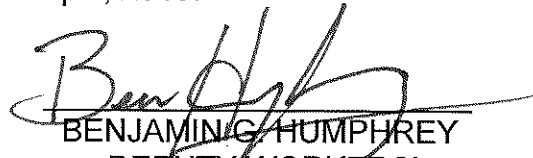
Pegues has not met her burden of proof to show that Kraft's chosen care in the form of Dr. Frederick's conservative course of treatment is unreasonable. Pegues has been participating in the course of treatment recommended by Dr. Frederick since on or about March 11, 2019. Dr. Frederick's treatment is reasonably suited to treat Pegues's work-related injury. If effective, it is possible that surgery will not be necessary. If ineffective, it is possible that Pegues may ultimately undergo surgery without an undue delay under the totality of the circumstances. Moreover, the evidence establishes that Pegues does not know what the chances of a positive surgical outcome are. For the foregoing reasons, it is reasonable for Pegues to complete Dr. Frederick's recommended course of conservative treatment before potentially undergoing the surgery, with its unknown likelihood of success, that Dr. Dunlay presented as an option.

ORDER

Therefore, it is ordered that the application for alternate care is **denied**.

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 1st day of April, 2019.


BENJAMIN C. HUMPHREY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Edward J. Cervantes
Attorney at Law
3475 Jersey Ridge Rd., Ste. 3
Davenport, IA 52807-2293
edonlaw1@msn.com

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Peter J. Thill
Attorney at Law
1900 E. 54th St.
Davenport, IA 52807
pjt@bettylawfirm.com

BGH/srs