

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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MARIA MURRAY,

Claimant,

vs.

KRAFT HEINZ COMPANY,

Employer,

and

INDEMNITY INSURANCE COMPANY  
OF N.A.,

Insurance Carrier,  
Defendants.

**FILED**  
JAN 25 2019  
WORKERS' COMPENSATION

File No. 5067080

ALTERNATE MEDICAL

CARE DECISION

HEAD NOTE NO: 2701

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This is a contested case proceeding under Iowa Code chapters 85 and 17A. The expedited procedures of rule 876 IAC 4.48, the "alternate medical care" rule, are invoked by claimant, Maria Murray.

This alternate medical care claim came on for hearing on January 25, 2019. The proceedings were recorded digitally and constitute the official record of the hearing. By an order filed by the workers' compensation commissioner, this decision is designated final agency action. Any appeal would be a petition for judicial review under Iowa Code section 17A.19.

The record in this case consists of Claimant's Exhibit 1, Defendants' Exhibits A-C, and the testimony of claimant

#### ISSUE

The issue presented for resolution in this case is whether claimant is entitled to alternate medical care consisting of a second diagnostic surgery to be performed by Jonathan Winston, M.D.

#### FINDINGS OF FACT

Defendants accept liability for an injury occurring to claimant on July 16, 2017.

On December 11, 2017 claimant had left shoulder surgery consisting of, in part, an infraspinatus tendon repair and a subpectoral bicep tenodesis. Surgery was performed by Dr. Winston. (Exhibits 1, page 3 and A, page 1)

On August 29, 2018 claimant underwent an MRI of the left shoulder. (Ex 1, pp. 1-2)

On September 6, 2018 claimant was evaluated by Dr. Winston. Claimant had left shoulder pain. Dr. Winston believed the MRI showed normal post-surgery changes. He told claimant she had several options. The first was to return to work with no restrictions and monitor the outcome. The second was to perform diagnostic surgery to see if further repair was required. Dr. Winston did not believe surgery would be "fruitful", but indicated he would do the surgery. A third option would be for claimant to undergo a functional capacity evaluation (FCE). Claimant chose the FCE. (Ex. 1, pp. 3-4)

On or about September 11, 2018, claimant called Dr. Winston's office indicating she had changed her mind and wanted surgery. (Ex. 1, p. 5) Following claimant's request, Dr. Winston requested defendant insurer authorize the surgery. (Ex. 1, p. 7)

On November 16, 2018 claimant was evaluated by Camilla Frederick, M.D. Claimant had ongoing left shoulder pain. Dr. Frederick assessed claimant as having a left rotator cuff tear. She recommended claimant see a second orthopedic specialist to see if surgery was warranted. (Ex. A)

In a November 27, 2018 letter, defendants' counsel forwarded Dr. Frederick's report to Dr. Winston and asked for his response to the report. He asked if he agreed with Dr. Fredrick's recommendation claimant have a second opinion. (Ex. 1, pp. 8-9)

In a December 14, 2018 response, Dr. Winston indicated his review of the MRI showed no re-tear of the rotator cuff. He noted the need for further surgery would be to explore the prior repair and to see if further surgery of a tear was necessary. He noted he did not think surgery had a good chance of success, but it was an option he offered claimant. He agreed a second orthopedic opinion regarding further surgery would be reasonable. (Ex. 1, p. 10)

In a January 16, 2019 email, defendants' counsel informed claimant's counsel a second opinion had been arranged for claimant with Tuvi Mendel, M.D. (Ex. B) Dr. Mendel is an orthopedic surgeon inn Davenport. (Ex. C)

Claimant testified she has ongoing pain and clicking in her left shoulder. She says she has difficulty sleeping and lifting with her left shoulder. Claimant has temporary restrictions limiting her to lifting only 10 pounds with the left arm, and no overhead work.

Claimant said that given her ongoing symptoms, there is still something wrong with her left shoulder. Claimant said she wants the surgery offered by Dr. Winston.

Claimant said she would attend the second opinion evaluation with Dr. Mendel if required.

#### CONCLUSION OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

Iowa Code section 85.27(4) provides, in relevant part:

For purposes of this section, the 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. v. Reynolds, 562 N.W.2d 433 (Iowa 1997).

The employee requesting the care has the burden to prove the care being offered by the employer is unreasonable. R.R. Donnelly & Sons v. Barnett, 670 N.W.2d 190, 196–96 (Iowa 2003); Lynch Livestock v. Bursell, No. 14-1133, Filed May 20, 2015 (Iowa Ct. App).

Dr. Winston performed claimant's first surgery. Following surgery claimant still had pain in the left shoulder. On September 6, 2018 claimant was evaluated by Dr. Winston. At that time Dr. Winston offered several alternatives to claimant. One of the options offered was a second diagnostic surgery. Dr. Winston noted "I don't think this will be fruitful..." but that he would not refuse claimant diagnostic surgery if that was the option she wanted. (Ex. 1, p. 4)

Claimant was evaluated by Dr. Frederick. She assessed claimant as having a rotator cuff tear and recommended a second orthopedic opinion. (Ex. A)

In a December 14, 2018 note, Dr. Winston agreed it was reasonable to have a second orthopedic opinion. He also again noted he thought the chance of significant success was low with a second surgery and noted "Again I do not think that this is going to be a high yield successful operation..." (Ex. 1, p 10)

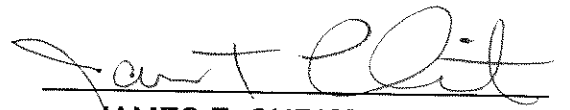
I empathize with claimant. Dr. Winston sought authorization for a second surgery over 4 months ago. A second opinion for claimant has not been scheduled until February 4, 2019. Defendants clearly should not have delayed further evaluation of claimant for this long.

However, Dr. Winston has indicated, on two different occasions, he did not think a second surgery would be "fruitful". Both Dr. Winston and Dr. Frederick indicate a second opinion from an orthopedic surgeon, given the circumstances in this case, is reasonable. Given these facts, I cannot find it is unreasonable for claimant to have a second orthopedic opinion prior to surgery. Because of this, it is found claimant has failed to carry her burden of proof she is entitled to alternate medical care.

ORDER

THEREFORE it is ordered, that claimant's petition for alternate medical care is denied.

Signed and filed this 25<sup>th</sup> day of January, 2019.

  
JAMES F. CHRISTENSON  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

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