

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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DAVID VALENTINE,

**FILED**

Claimant,

AUG 11 2016

vs.

WORKERS COMPENSATION

WEST DES MOINES COMMUNITY  
SCHOOLS,

File No. 5057060

ALTERNATE MEDICAL

Employer,

CARE DECISION

and

CCMSI,

Insurance Carrier,  
Defendants.

HEAD NOTE NO: 2701

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STATEMENT OF THE CASE

This is a contested case proceeding under Iowa Code chapters 17A and 85. The expedited procedure of rule 876 IAC 4.48, the "alternate medical care" rule, is requested by claimant, David Valentine. Claimant filed a petition on August 2, 2016. He alleged at paragraph 5 of his petition:

Reason for dissatisfaction and relief sought: Dr. Nepola has recommended an injection that Defendants refuse to authorize.

Defendants filed an answer on August 8, 2016. Defendants admitted the occurrence of a work injury on October 6, 2014 and liability for the medical condition sought to be treated by this proceeding.

The alternative medical care claim came on for hearing on August 11, 2016. The proceedings were recorded digitally and constitute the official record of the hearing. By an order filed February 16, 2015 by the workers' compensation commissioner, this decision is designated final agency action. Any appeal would be by petition for judicial review under Iowa Code section 17A.19.

The evidentiary record offered at the time of hearing consists of claimant's exhibits 1 through 4, defendants' exhibits A through C and E through F, and the testimony of the claimant. Both parties submitted hearing briefs for consideration.

Shortly following telephonic hearing, claimant's submitted proposed Exhibit 5 for consideration. The proposed exhibit is a letter authored by claimant's authorized treating physician and was authored in response to inquiry from defendants' counsel regarding the treatment recommendations of Dr. Nepola. Defendants requested the letter authored by Dr. Galles and intended to offer the letter as an exhibit, assuming the letter was received prior to evidentiary hearing. As the letter was not in the possession of defendants' counsel at the time of hearing, defendants were unable to offer the exhibit. When defendants' counsel received the letter, he promptly provided it to claimant's counsel. Claimant promptly supplied the proposed exhibit to the undersigned and requested it be incorporated into the evidentiary record.

Proposed Exhibit 5 is a letter solicited by defendants from claimant's authorized treating physician specifically addressing the treatment recommendations at issue in this hearing. Furthermore, defendants intended to offer the letter, as evidenced on the proposed exhibit list, and only did not do so because the report had not been received prior to hearing. Defendants did not raise an objection to introduction of the proposed exhibit. Claimant's Exhibit 5 is admitted into evidence and considered in this decision.

#### ISSUE

The issue presented for resolution is whether claimant is entitled to alternate medical care in the form of authorization of the diagnostic right glenohumeral joint injection recommended by Dr. Nepola, to be performed at the University of Iowa Hospitals and Clinics in conjunction with a follow-up appointment with Dr. Nepola.

#### FINDINGS OF FACT

The undersigned, having considered all of the testimony and evidence in the record, finds:

Claimant suffered an admitted injury to his right shoulder on October 6, 2014. Defendants authorized treatment of claimant's right shoulder complaints, including with orthopedic surgeon, Kyle Galles, M.D. of Iowa Ortho. (Claimant's testimony) During the extended course of treatment, Dr. Galles diagnosed right shoulder girdle pain and opined claimant's radiographic studies were normal. (Exhibit 2)

On April 12, 2016, at the referral of his attorney, claimant presented for an independent medical evaluation with James Nepola, M.D. of the University of Iowa Hospitals & Clinics (UIHC). Claimant reported suffering with right shoulder pain at a level 9 on a 10-point scale, described as aching, stabbing, and numbness, with radiation. Claimant reported he was unable to move his arm well due to pain. Additionally, claimant expressed concern over what he described as conflicting opinions received from physicians over the course of his treatment. (Ex. 1, page 1)

Dr. Nepola summarized claimant's medical care to date and reviewed claimant's MRI studies. (Ex. 1, pp. 1, 4) Claimant submitted to a physical examination. (Ex. 1, pp. 3-4) Dr. Nepola opined claimant suffered with right shoulder pain of an unclear

etiology, but did not state claimant lacked pathology of the shoulder or did not experience pain. Dr. Nepola explained there could be a "disconnect between what is seen on MRI and what is seen through an arthroscope" and imaging did not always identify the source of a patient's pain. Dr. Nepola indicated it was possible claimant suffered from bursitis or internal derangement of the right shoulder. Accordingly, he recommended a diagnostic injection of the right glenohumeral joint in order to determine if the joint was a pain generator. In the event the injection yielded a positive result, Dr. Nepola opined claimant warranted surgical evaluation. (Ex. 1, p. 4)

Claimant testified Dr. Nepola performed a thorough examination and during the examination, was able to provide relief of his complaints through a test which involved palpation of the right armpit. (Claimant's testimony)

On June 9, 2016, Dr. Galles authored a letter to defendants' counsel. By the letter, Dr. Galles opined an intraarticular injection was unlikely to change his treatment plan with respect to claimant's shoulder girdle pain. He explained that in the past, he had not found such injections to "be particularly helpful in this particular situation" as he believed claimant's normal radiographic studies made it relatively unlikely that there was an intraarticular pain generator. (Ex. 2) Dr. Galles went on to state:

At this point in time, I would have little more to offer him from a surgical or otherwise workup standpoint. The recently patient has undergone a functional capacity evaluation, which I reviewed with him recently, and would recommend for future employability continuing those restrictions and guidelines on a permanent basis.

(Ex. 2)

Dr. Nepola was provided with Dr. Galles's note and the results of claimant's functional capacity evaluation for review. After having the opportunity to review these records, Dr. Nepola authored a supplemental letter dated July 6, 2016. By the letter, Dr. Nepola explained that although claimant's MRI did not reveal obvious surgical pathology, claimant's clinical presentation led Dr. Nepola to suspect intraarticular derangement, possibly related to instability. As a result, he recommended a diagnostic ultrasound-guided local anesthetic injection into the glenohumeral joint. If the injection resulted in immediate, temporary resolution of pain, Dr. Nepola indicated this would confirm the presence of intraarticular pathology and support arthroscopic evaluation. He opined his recommendations remained unchanged following review of additional records. (Ex. 3, p. 1) Dr. Nepola stated:

I continue to recommend the diagnostic injection as it is relatively non-invasive and may indicate a treatable diagnosis and surgical target. It is critical that the injection be done immediately prior to [claimant] returning to my clinic so he can be evaluated while the local anesthetic is in his glenohumeral joint and we can get an accurate assessment of the efficacy.

(Ex. 3, p. 1)

If his injection test is negative (i.e. the local anesthetic does NOT resolve or dramatically improve his pain complaints) then it is likely I would assign MMI at that time and would be happy to provide an impairment rating.

(Ex. 3, p. 2)

On July 7, 2016, claimant's counsel served Dr. Nepola's report upon defendants' counsel. Counsel requested defendants authorize the recommended injection, to be performed at UIHC in order to allow Dr. Nepola to evaluate claimant immediately thereafter. (Ex. 4, pp. 1-2)

The following day, August 8, 2016, defendants' counsel authored a responsive letter indicating defendants were willing to authorize the requested injection; however, defendants were unwilling to authorize it to be performed at UIHC with Dr. Nepola. Instead, defendants' counsel indicated:

We will check to see if Dr. Galles will perform the injection and follow up exam here in Des Moines. If not, we will see if we can find another local physician that will do so. If one cannot be found, then we will authorize the injection with Dr. Nepola.

(Ex. A, p. 1)

On that same date, August 8, 2016, defendants' counsel authored a letter to Dr. Galles. Counsel indicated claimant continued to request the injection recommended by Dr. Nepola and counsel expressed defendants' preference for the procedure to be done with Dr. Galles, as the authorized physician. Counsel inquired as to whether Dr. Galles would be willing to perform the diagnostic injection and the required follow-up appointment. (Ex. B, p. 2)

On August 10, 2016, defendants' counsel authored a letter to claimant's counsel representing Dr. Galles' response gleaned from a telephone conversation. Counsel represented Dr. Galles indicated he did not believe an injection would be helpful, did not recommend proceeding with the injection, and did not have a member of his practice who performed such injections. (Ex. C, p. 3) Counsel wrote:

As I told you earlier, my clients have agreed to pay for an injection if someone other than your 85.39 IME doctor recommends it, and if they will do so here in Des Moines. Currently, we are working to contact Dr. William Jacobson and Dr. Jeffrey Davick to see if they are willing to perform an exam and do the injection if they think it is a good idea.

Please give us some additional time to see if those local physicians are willing to see him and perform an injection if they agree with Dr. Nepola. I think there are two advantages to this. First, it saves on

travel. Secondly, it gives us another opinion as to whether the injection would be a good idea.

(Ex. C, p. 3)

William Jacobson, M.D. is an orthopedic surgeon with Capital Orthopaedics, who specializes in arthroscopic surgery of the knee and shoulder. (Ex. F, p. 7) Jeffrey Davick, M.D. is an orthopedic surgeon with Des Moines Orthopaedic Surgeons, who specializes in treatment of knees and shoulders. (Ex. E, p. 6)

Dr. Galles subsequently authored a letter in response to the inquiries posed by defendants' counsel. Dr. Galles's letter is dated August 10, 2016, but was not received until August 11, 2016. Dr. Galles indicated he reviewed Dr. Nepola's records and acknowledged Dr. Nepola recommended a diagnostic injection. Dr. Galles indicated he personally did not perform such injections and in the past, had referred patients to a colleague when necessary. However, he represented this colleague had left the practice and Iowa Ortho does not currently employ a physician who performs the recommended type of diagnostic injection. (Ex. 5) Dr. Galles went on to state:

There is no one at present that is doing this type of diagnostic injection in our group. Again, this is something that I do not perform, and until we otherwise have someone doing these diagnostic injections here, it would be most appropriately handled perhaps in Iowa City with Dr. Nepola and his colleagues.

(Ex. 5)

#### CONCLUSIONS OF LAW

The employer shall 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. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 16, 1975).

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.

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he has been receiving. Mere dissatisfaction with the medical care is not ample grounds for granting an application for alternate medical care. Rather, the claimant must show that the care was not offered promptly, was not reasonably suited to treat the injury, or that the care was unduly inconvenient for the claimant. 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." Long v. Roberts Dairy Co., 528 N.W.2d 122, 123 (Iowa 1995).

In Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433, 437 (Iowa 1997), the supreme court held that "when evidence is presented to the commissioner that the employer-authorized medical care has not been effective and that such care is 'inferior or less extensive' than other available care requested by the employee, . . . the commissioner is justified by section 85.27 to order the alternate care."

Claimant requests an order authorizing the right shoulder diagnostic injection, with the injection to take place at UIHC in order to allow immediate follow up with Dr. Nepola. Defendants' counsel represented defendants are actively seeking a third opinion from a qualified orthopedic surgeon in the Des Moines metropolitan area. In the event that surgeon recommends a diagnostic injection, counsel represented defendants would authorize the procedure. Defendants contend that the offered evaluation with a third orthopedic surgeon constitutes reasonable care, given the legitimate dispute between the treatment recommendations of two qualified surgeons.

Both Drs. Galles and Nepola are highly qualified physicians who, in this case, have a difference of opinion as to the necessity of a diagnostic injection. While Dr. Galles does not believe it is likely to demonstrate any pathology of the shoulder, Dr. Nepola believes the procedure is a minimally invasive method of further evaluating the possibility of intraarticular pathology. Claimant continues to suffer with right shoulder pain and desires further evaluation with Dr. Nepola, a physician who he opined was able to elicit some relief in symptoms with manual testing. Claimant's preference for a physician is not, however, dispositive of the issue.

Defendants provided claimant's authorized medical treatment and upon receipt of Dr. Nepola's opinions, performed continued investigation of the recommendations by consulting with Dr. Galles. Dr. Galles maintained his opinion the injection was unlikely to reveal right shoulder pathology and further indicated he would not recommend such a procedure. When asked if he would perform the injection, Dr. Galles opined he did not personally perform such procedures and his practice currently lacked a physician who did perform such injections. For these reasons, he indicated that if an injection was to be completed, it was appropriately left to Dr. Nepola and his colleagues at UIHC.

As of the time of evidentiary hearing, defendants had offered to arrange a third opinion with a qualified orthopedic surgeon in the Des Moines area. However, no such appointment had been secured and there is no guarantee the proposed physicians would be willing to accept claimant as a patient. While obtaining a third opinion would generally represent a reasonable treatment option under the medical facts of this case, such an opinion should be secured promptly and without undue inconvenience to claimant. Claimant is not currently receiving any active treatment and defendants have, to date, not scheduled evaluation with a provider who will assume claimant's care. On these facts, the care currently offered by defendants will result in delay and is certainly less extensive than the care requested by claimant.

The diagnostic injection and follow up appointment requested by claimant represent a limited request for care. Claimant did not request authorization of Dr. Nepola as an authorized treatment provider. The procedure requested is minimally invasive and will allow Dr. Nepola to better opine as to the pathology of claimant's shoulder. As acknowledged by Dr. Nepola, if the injection fails to provide relief, Dr. Nepola will likely express agreement with Dr. Galles insofar as claimant has reached maximum medical improvement and is not a surgical candidate.

Claimant's request for care is reasonable and is limited in nature and duration. Defendants currently are not offering any treatment and do not have an evaluation scheduled with a potential treatment provider. As defendants are not currently offering any treatment and securing an third evaluation will result in further delay without guarantee of a treatment plan, claimant's request for alternate care is hereby granted. If defendants wish to do so, they are free to arrange a third opinion for claimant; however, they may not require that evaluation to take place prior to the diagnostic injection and evaluation with Dr. Nepola.

ORDER

THEREFORE, IT IS ORDERED:

Claimant's application for alternate medical care is granted. Claimant is authorized to undergo the recommended diagnostic injection, to take place at UIHC and in conjunction with an immediate follow-up evaluation with Dr. Nepola.

Signed and filed this 11th day of August, 2016.

  
ERICA J. FITCH  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

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