

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

NATHAN PENNA,

Claimant,

vs.

MMC MECHANICAL CONTRACTORS,
INC.,

Employer,

and

OLD REPUBLIC INSURANCE,

Insurance Carrier,
Defendants.

File No. 20001196.02

ALTERNATE MEDICAL
CARE DECISION

STATEMENT OF THE CASE

On October 21, 2021, Nathan Penna filed a petition concerning application for alternate care under Iowa Code section 85.27 and agency rule 876 IAC 4.48. The agency scheduled the case for a telephone hearing. The defendants, employer MMC Mechanical Contractors, Inc. (MMC), and insurance carrier Old Republic General Insurance (Old Republic), filed an answer accepting liability for the right shoulder injury and denying liability for alleged injuries to the arm and upper body.

The undersigned presided over an alternate care hearing held by telephone and recorded on November 2, 2021. The audio recording constitutes the official record of the proceeding under agency rule 876 IAC 4.48(12). Penna participated through attorney John Lawyer and the defendants participated through attorney Timothy Wegman. The record consists of:

- Claimant's Exhibits 1 and 2; and
- Defendants' Exhibits A and B.

ISSUE

Liability for an alleged injury is often a threshold issue when the agency considers an application for alternate care. Tyson Foods, Inc. v. Hedlund, 740 N.W.2d 192, 198–99 (Iowa 2007). Because the defendants denied liability for Penna's alleged injuries to the arm and upper body, Penna's petition with respect to care for the alleged injuries to arm and upper body is dismissed without prejudice under 876 IAC 4.48(7).

The issue under consideration is whether Penna is entitled to alternate care for his right shoulder injury in the form of additional care for his ongoing symptoms.

FINDINGS OF FACT

Penna sustained a right shoulder injury while working for MMC on or about October 2, 2019, tearing his rotator cuff. The defendants chose Jonathan E. Buzzell, M.D., as Penna's treating physician. (Ex. B) Dr. Buzzell performed right shoulder arthroscopy with debridement of partial rotator cuff tear, biceps tenodesis, distal clavicle excision, and subacromial decompression in January 2020. (Ex. B) Due to post-surgery issues, Dr. Buzzell performed a subsequent debridement and lysis of adhesions in February 2021. (Exs. B, 2)

Penna completed physical therapy as part of his rehabilitation from surgery. (Ex. A) Dr. Buzzell found Penna had reached maximum medical improvement (MMI) on May 24, 2021, because he "had the vast majority of his motion back without concerns about continued improvement and return of all of his motion," "excellent strength of the rotatory cuff," and "[h]is symptoms had resolved." (Ex. B) Penna has since experienced ongoing symptoms in his right shoulder such as pain, weakness, and loss of range of motion. (Ex. 1)

Through counsel, Penna requested additional care from the defendants because of his ongoing symptoms. (Ex. 1) The defendants refused to authorize additional care. Because the defendants refused to authorize additional care for Penna's ongoing right shoulder symptoms, he applied with the agency for alternate care. Sunil Bansil, M.D., recommended in an opinion dated November 2, 2021, steroid injections and pain management medication for his right shoulder symptoms. (Ex. 2)

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 [Iowa Workers' Compensation C]ommissioner 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.

Here, Dr. Buzzell found Penna at MMI on May 24, 2021, and released him from care. Regardless of Penna’s symptoms when he last saw Dr. Buzzell, the evidence establishes it is more likely than not that in late summer and at the time of hearing, Penna suffered ongoing symptoms including pain, weakness, and loss of range of motion. Because of Penna’s symptoms, he requested additional care from the defendants. The defendants refused to authorize it. Thus, at the time of hearing, the defendants were not offering Penna any care for his ongoing symptoms because Dr. Buzzell found him at MMI.

On the morning of the alternate care hearing, Penna filed amended exhibits, adding Exhibit 2, an opinion by Dr. Bansal. The defendants had not seen Dr. Bansal’s recommendation until that morning. There is no indication in the record Penna requested Dr. Bansal’s recommended care from the defendants before filing Exhibit 2 with the agency and serving it on the defendants.

Penna has established ongoing symptoms stemming from the accepted work injury to his right shoulder and the defendants’ refused to provide any additional care after learning of his complaints. Their refusal is based on Penna’s past condition as opposed to his present-day complaints. Further, the defendants’ refusal to provide any additional care for Penna’s ongoing symptoms precludes him from receiving any care that might provide relief. For these reasons, the defendants’ refusal to authorize care for Penna’s ongoing symptoms is unreasonable. Penna has established a right to alternate care under Iowa Code section 85.27 in the form of additional care for his ongoing symptoms.

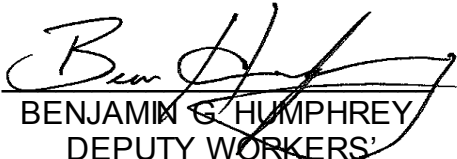
ORDER

THEREFORE, IT IS ORDERED:

- 1) Penna’s petition regarding alternate care for the alleged injuries to his arm and upper body is DISMISSED WITHOUT PREJUDICE because the defendants denied liability for any alleged injury to those body parts.
- 2) Penna’s application for alternate care regarding the accepted work injury to his right shoulder is GRANTED. The defendants must authorize additional care, with a physician of their choosing, for Penna’s ongoing right shoulder symptoms.

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 2nd day of November, 2021.


BENJAMIN G. HUMPHREY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

John Lawyer (via WCES)

Timothy Wegman (via WCES)