BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ODIS LUNDY, Claimant, vs. TATE & LYLE AMERICAS, Employer, and ZURICH AMERICAN INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5029402.01 ALTERNATE MEDICAL CARE DECISION HEAD NOTE NO: 2701

STATEMENT OF THE CASE

On January 20, 2021, claimant filed a petition for alternate medical care pursuant to Iowa Code 85.27(4) and 876 Iowa Administrative Code 4.48. The defendants filed an answer accepting liability for the left arm injury that occurred on December 3, 2007.

The undersigned presided over the hearing held via telephone and recorded digitally on February 1, 2021. That recording constitutes the official record of the proceeding under 876 Iowa Administrative Code 4.48(12). Claimant participated personally, and through his attorney, Tom Drew. The defendants participated through their attorney, Garrett Lutovsky. The evidentiary record consists of ten pages of exhibits from the claimant, and seven pages of exhibits from the defendants, labeled Exhibit A through C.

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, this decision constitutes final agency action, and there is no appeal to the commissioner. Judicial review in a district court pursuant to Iowa Code 17A is the avenue for an appeal.

ISSUE

The issue under consideration is whether claimant is entitled to alternate care under Iowa Code 85.27(4) in the form of authorization of a surgery recommended by Chad Moorman, D.P.M.

FINDINGS OF FACT

Claimant, Odis Lundy, sustained a work injury to his left lower extremity on December 3, 2007. The work incident arose out of, and in the course of his employment with the defendant employer. Defendants accepted liability for the December 3, 2007, left lower extremity injury in their answer, and verbally at hearing.

Mr. Lundy testified that he injured his left ankle in 2007. (Testimony). Since then, he has had 13 years of care, including six or seven surgeries. (Testimony). He indicated that his left leg no longer sits on his left ankle or foot due to arthritis. (Testimony). The claimant can barely walk and must use a brace or cane for assistance in ambulating. (Testimony). Mr. Lundy can function, but not very well. (Testimony). He expressed a desire to have a left ankle fusion, as recommended by authorized treating physician, Dr. Moorman. (Testimony). Mr. Lundy testified that he felt that he had no other option to achieve increased mobility. (Testimony). In addition to Dr. Moorman, Mr. Lundy sees a neurologist and pain management doctor. (Testimony).

On July 31, 2020, Mr. Lundy visited Dr. Moorman's office for a follow up at the request of Dr. Visvalingam. (Claimant Exhibits). Mr. Lundy presented with left ankle pain and a left ankle injury. (CE). He continued to have pain after his December of 2007 injury. (CE). Mr. Lundy had complex regional pain syndrome ("CRPS") of the left lower extremity. (CE). Mr. Lundy arrived fully weightbearing with a double upright brace and the use of a cane. (CE). Left ankle x-rays showed displacement of the tibia, a decrease in joint space, and end stage osteoarthritis of the left ankle joint. (CE). Dr. Moorman assessed Mr. Lundy with CRPS with left ankle post-traumatic arthritis. (CE). Dr. Moorman told Mr. Lundy that he could not improve his CRPS. (CE). The only other treatment noted by Dr. Moorman, beyond bracing, was an ankle fusion. (CE). Dr. Moorman noted that the risk from another surgery would be infection, non-union, and aggravation of CRPS. (CE). In order to proceed with surgery, Dr. Moorman indicated another CT scan of the ankle would need to be completed. (CE).

Mr. Lundy returned to Dr. Moorman's office on August 28, 2020. (CE). Dr. Moorman examined Mr. Lundy again, and diagnosed Mr. Lundy with CRPS and post-traumatic arthritis of the left ankle. (CE). Mr. Lundy informed Dr. Moorman that he thought through his treatment options, and would like to proceed with a left ankle fusion. (CE). Dr. Moorman noted that the specific procedure depended on the results of a necessary preoperative CT scan. (CE). Dr. Moorman noted the need for assistance from Mr. Lundy's pain management doctor and neurologist to control pain medications postoperatively. (CE).

Mr. Lundy reported to University of Virginia Health System on November 12, 2020, where Joseph Park, M.D. examined him for his history of left ankle pain. (Defendants' Exhibit A:1-3). Dr. Park visited with Mr. Lundy concerning his history. (DE A:1). Mr. Lundy reported a pilon fracture in 2007 with surgical repair. (DE A:1). Subsequently, Mr. Lundy had two surgeries to revise the original surgery. (DE A:1). Mr. Lundy reported significant pain in his left ankle "for years," and that he experienced "significant hypersensitivity throughout his ankle and foot." (DE A:1). Upon physical examination, Dr. Park found hypersensitivity to light touch throughout Mr. Lundy's left ankle. (DE A:1). Dr. Park opined that surgery was not a good option at the time due to Mr. Lundy's nerve pain and hypersensitivity. (DE A:1).

Dr. Visvalingam saw Mr. Lundy on December 22, 2020, and noted that Mr. Lundy had a fibrous dysplasia of his bone. (DE B:5).

On January 18, 2021, Dr. Moorman's office prepared a note indicating that Mr. Lundy required a CT scan to complete surgical planning. (CE). The planned surgical procedure would be either an endoscopic gastrocnemius resection with arthroscopy or an open ankle fusion with bone marrow and bone grafting. (CE). Dr. Moorman noted that Mr. Lundy required preoperative clearance from his primary care physician. (CE). After surgery, Mr. Lundy would require casting, a walking boot, and physical therapy. (CE).

Based upon Dr. Park's opinions, counsel for the defendants' sent a letter to Dr. Moorman requesting answers to several questions. (DE C:6-7). At the hearing, defendants' counsel indicated that surgery may still be authorized depending upon the response of Dr. Moorman to Dr. Park's opinions contained in their letter to Dr. Moorman. The defendants indicated that they sought additional information from Dr. Moorman as to why the proposed surgery is reasonable and necessary in light of prior surgeries. Dr. Moorman indicated a slight delay in surgery due to COVID-19 issues, but Mr. Lundy testified that no delay would be required. (Testimony).

CONCLUSIONS OF LAW

Iowa Code 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.

Iowa Code 85.27(4). See Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433 (Iowa 1997).

"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)). "In enacting the right-to-choose provision in section 85.27(4), our legislature sought to balance the interests of injured employees against the competing interests of their employers." Ramirez, 878 N.W.2d at 770-71 (citing Bell Bros., 779 N.W.2d at 202, 207; IBP, Inc. v. Harker, 633 N.W.2d 322, 326-27 (Iowa 2001)).

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., 562 N.W.2d at 436. 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; Pirelli-Armstrong Tire Co., 562 N.W.2d at 436. 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.

The claimant argues that failing to authorize the surgical recommendation of the authorized treating physician, Dr. Moorman, is unreasonable.

The defendants argue that seeking a clarification of Dr. Moorman's opinions based upon the opinions of Dr. Park is reasonable considering the claimant has a lengthy surgical history, and diagnosis of CRPS. The defendants indicated at hearing, and in a brief that the claimant is not prejudiced by a slight delay in surgical approval.

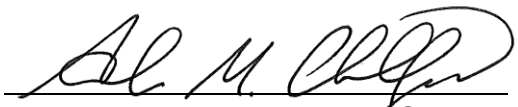
The claimant has the burden of proving that authorized care is unreasonable. The employer's obligation is to provide reasonable care. In this matter, the authorized treating physician recommends surgery. He laid out a course of action ahead of the surgery, including a CT scan in order to determine the appropriate surgical procedure. Not approving the surgery based upon the recommendation of the authorized treating physician is unreasonable in this matter.

IT IS THEREFORE ORDERED:

The claimant's petition for alternate care is granted.

Defendants shall authorize the surgery recommended by Dr. Moorman, along with the required pre-surgical CT scan and any other required pre-surgical appointments.

Signed and filed this 1st day of February, 2021.



ANDREW M. PHILLIPS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Tom L. Drew (via WCES)

Garrett A. Lutovsky (via WCES)