

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

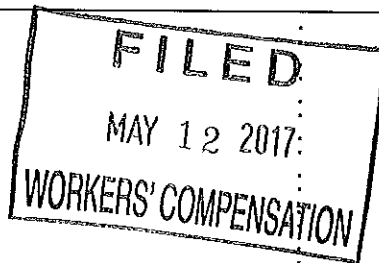
KRISTINA SMITH,

Claimant,

vs.

TARGET CORPORATION,

Employer,
Self-Insured,
Defendant.



File No. 5039640

ALTERNATE MEDICAL

CARE DECISION

Head Note No.: 2701

STATEMENT OF THE CASE

This is a contested case proceeding under Iowa Code chapters 85 and 17A. The expedited procedure of rule 876 IAC 4.48 is invoked by claimant, Kristina Smith. Claimant appeared through her attorney, Matthew Dake. Defendant appeared through their attorney, Jeffrey Lanz.

The Application for Alternate Medical Care was filed on May 1, 2017 and the matter came on for hearing on May 11, 2017. The proceedings were digitally recorded. That recording constitutes the official record of this proceeding. Pursuant to the Commissioner's February 16, 2015 Order, the undersigned has been delegated authority to issue a final agency decision in this alternate medical care proceeding. Therefore, this ruling is designated final agency action and any appeal of the decision would be to the Iowa District Court pursuant to Iowa Code section 17A.

The record consists of claimant's exhibits 1 through 4, which include a total of ten pages and defendants' exhibits A through H, which contain ten pages. All exhibits were admitted without objection. No witnesses were called to testify. Counsel offered helpful argument.

ISSUE

The issue presented for resolution is whether the claimant is entitled to the Platelet Rich Plasma (PRP) injection for the right shoulder and physical therapy for the left shoulder as recommended by Dr. Kim.

FINDINGS OF FACT

The undersigned having considered all the evidence in the record finds:

Kristina Smith, claimant, sustained injuries to her bilateral shoulders as a result of her work activities with the defendant on February 5, 2010. At the commencement of the hearing on this matter, defendant accepted liability for the injury date in question and the current condition for which claimant seeks treatment through this proceeding.

After the injury occurred on February 5, 2010, defendant authorized Stanley Mathew, M.D., who referred claimant to Lisa Coester, M.D., an orthopedic surgeon, for evaluation. (Ex. A, p. 1) On April 20, 2011, Dr. Coester noted that this was "approved for one visit with me and no treatments." (Id.) Claimant was diagnosed with "[r]otator cuff tendonitis –left impingement syndrome with high grade partial tear and SLAP tear." (Ex. A, p. 2) Dr. Coester recommended an injection, indicating that she was not optimistic that the injection would solve the issue, and stated her belief that claimant would ultimately need surgery to address the shoulder. (Ex. A, p. 2) Dr. Coester noted that:

We had a long discussion about surgery, post-op rehab plan, and risks. The patient understands that it might not be repairable, or that I might not be able to do this through a scope. The patient also understands that if I get it repaired, it may not heal. The patient also understands the risks of bleeding, infection, damage to surrounding structures, failure of procedure, need for future surgery, anesthesia risks, blood clot, pneumonia, heart attack, and stroke. The patient understands.

(Id.) The evidence taken as a whole, leads the undersigned to the conclusion that claimant declined to proceed with surgery and continues to decline surgery at the present time.

Dr. Mathew later referred claimant to Sunny Kim, M.D., of rehabilitation medicine, P.L.C. (Ex. B, p. 3) Dr. Kim stated at that time that "the probability of success with HTA or any injection procedure in [the] setting of fibromyalgia in my opinion is very low for some of these work related injuries," and recommended a "conservative stance on her condition," and discharged her from his care. (Ex. B, p. 3)

Claimant continued to receive treatment with Dr. Mathew.

In March, 2016, claimant returned to Dr. Coester, who recommended bilateral shoulder surgery (Ex. C, p. 4) This treatment recommendation was restated on April 4, 2016. (Ex. D, p. 5) Again, as stated above, Dr. Coester had a "long discussion about surgery, post-op rehab plan and risks."

I take administrative notice of the previous Alternate Medical Care Decision dated June 28, 2016. In that decision, Deputy Walsh found that following the 2016 recommendation for surgery from Dr. Coester, claimant sought approval of a second opinion with Mederic Hall, M.D., for an opinion about injections. However, claimant returned to see Dr. Kim in May, 2016, who recommended the PRP injection for the left shoulder. The fighting issue in the June 2016 Alternate Care hearing, was whether or not the offer of care for an opinion regarding injections with Dr. Hall in addition to the care being offered through Dr. Coester and Dr. Mathew was unreasonable, such that alternate care should be awarded to require defendants to also include care with Dr. Kim. That Alternate Medical Care request was denied.

Following the June, 2016 Alternate Care Decision, the defendants apparently attempted to schedule an appointment with Dr. Hall, without success and agreed to authorize the PRP injection recommended by Dr. Kim for the left shoulder. (Ex. 1, p. 1)

Claimant returned to see Dr. Kim thereafter and received the left shoulder PRP injections. The evidence presented does not indicate that Dr. Kim was subsequently de-authorized. However, defendant advised at hearing that Dr. Coester was the only authorized provider.

However, on December 22, 2016, David Tearse, M.D., responded to a letter prepared by defense counsel indicating that he would state, if deposed, that he believed that PRP injections are not supported by orthopedic literature and are "not likely to provide Ms. Smith with significant improvement." (Ex. E, p. 6)

On January 4, 2017, Dr. Coester, responded to a letter prepared by defense counsel indicating that she would state, if deposed, that she is familiar with PRP injections and she does not recommend PRP injections to her patients. (Ex. F, p. 8)

On February 7, 2017, Scott Neff, D.O., issued an independent medical evaluation (IME) and stated that he agreed with the surgery recommendations of Dr. Coester. He further states that following a "Medline literature search and a search of the American Academy of Orthopedic Surgeons web site regarding PRP injections," as far as he is aware, "there has been no scientific proof or publication, which states that PRP injections are beneficial or helpful." (Ex. G, p 9) He also notes that "the procedure is fairly expensive and not covered by private insurance carriers." (Id.)

In March, 2017, Dr. Kim noted that claimant presented "about 3 months post second PRP to the L shoulder. She reports increased pain occurring longer than initial PRP. Overall she reports improved pain levels, but admits continued pain in lateral aspect of upper arm. Pain is no longer considered sharp." (Ex. 2, p. 1) At that time Dr. Kim ordered physical therapy for the left shoulder, two times per week for six weeks and stated "given the benefits from PRP injection to the L shoulder it would be reasonable to offer the same treatment to the R shoulder." (Ex. 2, p. 2) I find that claimant had some improvement of symptoms that Dr. Kim attributed to the PRP injections.

At this point, defendant denied further medical care, other than the bilateral shoulder surgery recommended by Dr. Coester.

On April 24, 2017, claimant communicated to defendant her dissatisfaction with the care and requested authorization for the left shoulder physical therapy and right shoulder PRP injection.

On April 25, 2017, Dr. Neff responded to a letter prepared by defense counsel indicating that he would state, if deposed, that he had diagnosed stage III impingement syndrome in both shoulders and recommended surgical repair. He further agreed that ongoing conservative care, including "PRP injections as recommended by Dr. Mathew and Dr. Kim) after a period of 6 years is not reasonable and necessary treatment" and is not going to improve claimant's condition. (Ex. H, p. 10)

On May 10, 2017, Dr. Kim responded to a letter prepared by claimant's counsel asking that he respond in the affirmative or the negative to a prepared question and provide comment. (Ex. 4, p. 1) In response thereto, Dr. Kim affirms that he is familiar with the platelet rich plasma injection/protocol (PRP) that he is recommending and he attaches references to support its efficacy. Those included journal articles concluding that PRP injections have been found to provide some benefit. (Ex. 4, pp. 3-6) Dr. Kim also states in response to the letter: "Success of arthroscopic surgeries in this population is not very high." (Ex. 4, p. 2)

I find that Dr. Coester was an authorized physician when she made the recommendation to proceed with bilateral shoulder surgery.

I find that Dr. Kim was an authorized physician when he made the recommendation to proceed with right shoulder PRP injection and left shoulder physical therapy.

At the hearing, defendant advised through counsel that Dr. Coester is the only presently authorized physician and the only currently authorized treatment is the bilateral shoulder surgery.

The parties confirmed at hearing that claimant does not wish to proceed with bilateral shoulder surgery and agreed that claimant cannot be compelled to do so.

I find that when the only offer of medical care is surgery, which carries its own set of potential risks including the potential for continuing care post-surgery, and it is well known to defendant that claimant does not wish to proceed with surgery, the failure to authorize other care to address claimant's condition is unreasonable.

In this case, the care being offered is surgery or nothing. Claimant does not wish to proceed with surgery. It is not reasonable then for defendants to deny authorization for all other treatment, particularly the significantly less invasive PRP injection and physical therapy recommended by Dr. Kim, who was an authorized treating physician when the treatment recommendation was made. I further find, that even if claimant

were to proceed with bilateral shoulder surgery, there certainly remains no guarantee that claimant will not have ongoing symptoms that require conservative treatment. It is certainly not uncommon in many cases to see additional injections, physical therapy and pain medication occurring post-surgery. Just as it is unreasonable to compel a claimant to undergo surgery that they do not wish to have, it is likewise unreasonable to compel a claimant to choose between a surgery they do not wish to have and no treatment at all.

REASONING AND 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).

In the case at bar, defendant has accepted liability for the injury date and the current condition for which claimant seeks medical care.

The first issue is to determine the burden of proof. Claimant argues that defendant has the burden to prove that the care she seeks as recommended by Dr. Kim is unreasonable. Defendant argues that claimant has the burden to prove that the care defendant is offering of bilateral shoulder surgery through Dr. Coester is unreasonable.

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); Bell Bros. Heating v. Gwinn, 779 N.W.2d 193, 209 (Iowa 2010); 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 (Iowa 1995). 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).

I conclude that claimant carries the burden of proof to show that the care offered by defendant is unreasonable in order to succeed in her alternate medical care claim.

The care that is presently offered by defendant is bilateral shoulder surgery, as recommended by Dr. Coester, and endorsed by Dr. Neff.

Defendant admits that claimant cannot be compelled to undergo surgery, with all of its inherent risks, but argues that defendant should not be required to continue to provide conservative treatment measures for the indefinite future, particularly when conservative type treatment has been occurring since shortly after the injury occurred

on February 5, 2010, over seven years ago. Defendants argue that under these circumstances, the offer of surgery and denial of other treatment options is reasonable and also is reasonably anticipated to move the medical treatment toward a conclusion.

Claimant argues that she cannot be compelled to go through surgery, and that offering surgery as the only medical treatment option when it has been known for some time that claimant does not wish to have surgery, is unreasonable. Claimant states that this is particularly true when other forms of treatment are available, have been previously shown to provide some measure of relief from symptoms, and particularly when the treatment has been recommended by an authorized treating provider.

Defendant argues that the effectiveness of a PRP injection is questionable. In support of this argument, defendant provides the opinion of Dr. Tearse, who indicates that PRP injections are not supported by the orthopedic literature and that the procedure is "not likely to provide Ms. Smith with significant improvement." (Ex. E, p. 6) Dr. Neff also states that PRP injections are not supported by the literature that he references, and he states there is a lack scientific proof that they "are beneficial or helpful." (Ex. G, p. 9) Dr. Coester did not indicate whether they would or would not be helpful to claimant but did state that she does not recommend such injections to her patients. (Ex. F, p. 8)

However, in contrast to the opinions of Dr. Tearse and Dr. Neff that the PRP injections may not be helpful to claimant, I have found above that claimant has already had such injections in her left shoulder with noted improvement of her symptoms, such that the same is now recommended for the right shoulder.

Defendants do not argue in significant opposition to the left shoulder physical therapy recommended by Dr. Kim, and the focus of this matter is on the issue of surgery versus PRP injections.

"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).

I have found above that the offer of unwanted surgery or nothing is not reasonable.

I note that the outcome of this Alternate Care Petition is distinguishable from the earlier decision decided by Deputy Walsh described above. In the prior decision, it was clear that claimant had at her disposal the option of pursuing the surgery (which she did not want) or other reasonable care with Dr. Hall concerning injections. The only question was whether claimant could pursue the opinion regarding injections with a doctor of her choice (Dr. Kim) rather than the doctor selected by the employer (Dr. Hall) and the Deputy found that there was no compelling reason to find that Dr. Hall was an unreasonable choice. In the present case, that alternative has been removed and as stated above, the only offered care is one that defendant is aware that the claimant will not choose, and cannot be compelled to choose, leaving her with no care at all.

ORDER

IT IS THEREFORE ORDERED:

That claimant's petition for alternate medical care is granted.

Within seven (7) days of the entry of this decision, defendant shall authorize the PRP injection for the right shoulder and physical therapy for the left shoulder as recommended by Dr. Sunny Kim and communicate the same to Dr. Kim and claimant through counsel when the same has been accomplished.

Signed and filed this 12th day of May, 2017.



TOBY J. GORDON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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