

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KEITH MYERS, Claimant, vs. IOWA DEPARTMENT OF TRANSPORTATION, Employer, STATE OF IOWA, Insurance Carrier, Defendants.	File No. 21003707.02 ALTERNATE CARE DECISION
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I. STATEMENT OF THE CASE.

On September 29, 2022, claimant Keith Myers applied with the agency for alternate care under Iowa Code section 85.27 and rule 876 IAC 4.48 for a work injury to his back on March 8, 2021.¹ The defendants, employer Iowa Department of Transportation (IDOT) and insurance carrier State of Iowa (State), filed an answer accepting liability for the back injury and disputing whether Myers is entitled to the alternate care for which he prayed in the petition.

The undersigned presided over a hearing held by telephone and recorded on October 11, 2022. That recording constitutes the official record of the proceeding under agency rule 876 IAC 4.48(12). Lloyd participated personally and through attorney Greg A. Egbers. The defendants participated through attorney Laura J. Ostrander. The record consists of:

- Claimant's Exhibits 1 through 5; and
- Defendants' Exhibits A through E; and
- Hearing testimony by Myers and Sarah Spindler, a claims examiner with Sedgwick, a third-party company that administers workers' compensation insurance benefits who was assigned to Myers's claim at all times material hereto.

¹ In the alternate care petition, Myers alleges injuries to right shoulder, back, and whole body; however, the focus in this matter is alternate care for only his back injury.

II. ISSUE.

The issue under consideration is whether Lloyd is entitled to alternate care in the form of a second opinion from a doctor employed somewhere other than MD West One.

III. FINDINGS OF FACT.

Myers was working for IDOT on March 8, 2021, in a vehicle parked on the side of a road. Another vehicle struck the vehicle in which Myers was sitting. The collision killed the driver of the other vehicle and caused Myers to sustain a back injury among other injuries. (Testimony)

The defendants initially provided care with Dr. West for the work injury Myers sustained to his back. Dr. West oversaw conservative care of the injury, but it did not help reduce the pain Myers was experiencing. After conservative care failed, Dr. West referred Myers to neurosurgery in or around July of 2021. (Testimony)

Dr. Dorn took over care and prescribed more conservative care in the form of physical therapy and pain medication. When that did not work, Dr. Dorn administered an epidural steroid injection. The injection also failed to provide Myers with relief from his back pain. Consequently, Dr. Dorn performed back surgery that included laminectomy at L5 and L5-S1 fusion. The procedure was successful in treating the sciatic nerve pain Myers had been experiencing but did not resolve his stabbing back pain, which Dr. Dorn treated with muscle relaxers and pain killers. (Testimony)

Myers was dissatisfied with Dr. Dorn's care because of his ongoing back pain, so he applied for alternate care with the agency on June 22, 2022. The agency assigned the case File No. 21003707.01 and scheduled a telephone alternate care hearing. However, before the hearing, the defendants agreed to transfer care for Myers's back injury to Dr. Bowdino, so he moved to dismiss the case without prejudice and the undersigned issued a ruling granting the motion before the scheduled hearing. (Testimony; Exs. A, B)

Dr. Bowdino took over care for Myers's back from Dr. Dorn. He prescribed different pain medication and muscle relaxers to address Myers's symptoms. After a CT scan of Myers's lumbar spine showed an incomplete fusion of the endplate, Dr. Bowdino installed a bone growth stimulator in an effort to help complete the fusion. (Testimony; Ex. 2, p. 4) Myers was scheduled to follow up with Dr. Bowdino in December of 2022. (Testimony)

The bone growth stimulator did not help reduce Myers's pain level. In fact, his pain increased after the implant. Myers notified the defendants. The defendants then moved up his follow-up exam with Dr. Bowdino to November. (Testimony)

Myers was dissatisfied with the care for his work injury because his pain was getting worse and the doctors did not give him any answers as to why. Rather than apply for alternate care with the agency a second time, he sought care with Dr.

Ehtesham, who works at a different provider than MD West One. Dr. Ehtesham reviewed imaging previously performed of Myers's back, discussed the history of his injury and care, and requested magnetic resonance imaging (MRI). (Testimony; Ex. 3)

Myers underwent the MRI on July 5, 2022, which showed:

Postoperative changes L5-S1 posterior stabilization, interbody fusion, and posterior decompression. Within the right paracentral subarticular recess at L5-S1 there is a small amount of signal abnormality which could potentially represent disc or bone graft material which abuts and potentially impinges the descending right S1 nerve root.

(Ex. 4)

After learning of Myers's MRI, the defendants obtained it and sent it to Dr. Bowdino for review. They also scheduled a follow-up appointment with Dr. Bowdino for September 27, 2022, which Kim Vice, BSN, RN, the nurse case manager (NCM) assigned to his workers' compensation claim, followed up on. NCM Vice noted that Dr. Bowdino opined Myers would not reach maximum medical improvement (MMI) from the spinal fusion until at least one year post-surgery, which would mean March 2023 at the earliest. She also noted:

Dr. Bowdino, Neurosurgeon, did not have any change in assessment stating that the consumer was healing and 'that it just takes time and the patient is in a hurry and thought he would be all well right after surgery'. Asked if he had concerns about the MRI this summer showing that POSSIBLY there was bone graft or disc fragment encroaching on the nerve. This may be causing the pain and he said he was not concern[ed] and did not think this was an issue. Asked him why he provided a bone stimulator so soon after surgery and he said that the consumer was so escalated at that appt this last spring that he just ordered the stimulator to get the one to start healing faster since the consumer was anxious about it. Dr. Bowdino said that he was not concerned about the hardware being too mobile and not solid and said that the doctor in the summer should not have speculated without a CT scan.

(Ex. 5)

Dr. Bowdino opined a CT scan in December was appropriate in order to determine whether the bone is properly healing or if there is an issue with a bone fragment. If the CT scan shows such issues at that time, Dr. Bowdino will consider other interventions. He also left open the possibility of performing a CT scan sooner in time if Myers's symptoms continue unchanged. (Ex. 5)

Myers's complaints remained unchanged at the time of hearing. He experiences stabbing pain that radiates when he bends over (for example, to put on shoes) or moves

from side to side. He wants a surgical consultation to determine if he needs a revision surgery to alleviate his pain. (Testimony)

IV. 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 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. 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. “[W]hen 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.” Reynolds, 562 N.W.2d at 437 (quoting Long, 528 N.W.2d at 124).

Myers is understandably frustrated with his ongoing pain. He wants to know what is causing it and how doctors can make it go away. Myers is dissatisfied with the care he has received to date because it has not eliminated his pain. However, his desire for alternate care is not the test for alternate care under the Iowa Workers’ Compensation Act. He must show that the care offered by the defendants is unreasonable. Under the record before the agency, he has failed to meet his burden on this question.

Myers argues the care provided by the defendants has been ineffective because of his ongoing pain. However, there is an insufficient basis in the evidence from which to conclude a second surgery would alleviate his pain. That is because he is not far enough removed from surgery for doctors to make such a determination.

Myers sustained a serious back injury in a violent crash. Doctors attempted to treat the injury conservatively but ultimately had to perform a major surgery. The recovery period for such a surgery is typically drawn out. Dr. Bowdino's opinion that such recovery takes at least a year is adopted.

The course of care to date has reduced Myers's symptoms. Myers testified the procedure alleviated his sciatic nerve pain. It is the stabbing pain in his back that has continued and the reason for both of his alternate care petitions.

Dr. Bowdino took over care after Myers's first petition. He recommended a bone growth stimulator to speed Myers achieving MMI after his spinal fusion. The bone growth stimulator has now been implanted for about four months.

There is an insufficient basis in the record from which to conclude the bone growth stimulator has been implanted long enough to have been given a reasonable change to succeed at generating the growth it was implanted to achieve. Dr. Bowdino initially set December of 2022 as the time when such a determination can reasonably be made. His opinion is unrebutted in the evidence and is adopted.

Lastly, Meyers contends the July 5, 2022 MRI supports a surgical consultation with another neurosurgeon. The MRI report states there was "a small amount of signal abnormality which could potentially represent disc or bone graft material which abuts and potentially impinges the descending right S1 nerve root." This evidence establishes the possibility of such an impingement but it is insufficient to show by a preponderance of the evidence that such an impingement is present and is the source of Myers's ongoing pain.

Dr. Bowdino opined speculating about an impingement based on MRI is inappropriate and that a CT scan in December is appropriate to gauge the effectiveness of the bone growth stimulator and to determine if disc or bone graft material is impinging the nerve root. He also left open the possibility of conducting a CT scan sooner if Myers's symptoms continue. Depending on what the CT scan shows, Dr. Bowdino will consider other treatment options. Based on the evidence before the agency, Dr. Bowdino's opinion with respect to the course of treatment is reasonable.

V. ORDER.

Under the above findings of facts and conclusions of law, it is ordered that the application for alternate care is DENIED.

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 12th day of October, 2022.

A handwritten signature in black ink, appearing to read "Ben Humphrey", is written over a horizontal line.

BEN HUMPHREY
Deputy Workers' Compensation Commissioner

The parties have been served, as follows:

Joni L. Ploeger (via WCES)

Sarah C. Timko (via WCES)