BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JEFFREY V. STUTTING, Claimant, vs. ARCONIC, INC., Employer, and INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Insurance Carrier, Defendants.	File No. 20000991.05, 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. On October 14, 2022, claimant, Jeffrey Stutting, filed an application for alternate care under Iowa Code section 85.27, invoking the expedited procedure rule 876 IAC 4.48. In the petition, claimant alleges he sustained a work-related injury to his left leg, left foot, and right hip on January 15, 2020. Claimant is requesting authorization for an exoskeletal ischial weight bearing KAFO as recommended by his independent medical examiner, Robert Rondinelli, M.D. On October 24, 2022, defendants, Arconic, Inc. and Indemnity Insurance Company of North America, filed an answer accepting liability for injuries claimant sustained to his left leg and left foot on January 15, 2020. They denied liability for claimant's alleged right hip injury.

The undersigned presided over an alternate care hearing held via telephone on October 26, 2022. Claimant appeared personally and through his attorney Rocco Motto. Defendants appeared through their attorney Jane Lorentzen. The proceedings were digitally recorded. That recording constitutes the official record of this proceeding.

The hearing record consists of:

- Claimant's exhibits 1 and 2;
- Defendants' exhibits A - C

Claimant was the only witness to provide testimony. Counsel for both parties provided argument. The record closed at the end of the telephonic hearing.

Pursuant to the Commissioner's order dated February 16, 2015, 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.

ISSUE

The issue presented for resolution is whether the claimant is entitled to alternate medical care in the form of:

- An exoskeletal ischial weightbearing KAFO for his left lower extremity.

FINDINGS OF FACT

On January 15, 2020, claimant sustained a work-related injury to his left lower extremity. (See Petition; Hearing Testimony). At the hearing, claimant testified a 5,000 pound headache bar rolled over his legs, fracturing his left tibia, fibula, and foot. (Hearing Testimony). Immediately after the incident, claimant was taken to Trinity Hospital for x-rays. (Id.). His care was then transferred to Ryan Dunlay, M.D., an orthopedic surgeon. (Id.). That same day, Dr. Dunlay performed surgery on claimant's left lower extremity. (Id.). He performed an open reduction, internal fixation of claimant's left tibial shaft fracture with intramedullary nailing and closed treatment of the left distal fibular shaft fracture. (Ex. A, p. 1). On February 19, 2020, Dr. Dunlay performed a second surgery on claimant to address his fractured foot. (Hearing Testimony). He performed an open reduction internal fixation of the left 5th metatarsal fracture. (Ex. A, p. 1).

Dr. Dunlay provided the claimant with follow-up care after the surgeries. (Hearing Testimony; Exhibit C). Claimant also attended physical therapy. (Hearing Testimony; Ex. A, p. 1). There is only one treatment note from Dr. Dunlay in the hearing record. (Ex. C). It is dated April 3, 2020. (Id. at 9). This treatment note states as follows:

> Jeff is a patient who is well known to me. He is approximately 3 months status post intramedullary nailing for his left tibia fracture and closed treatment of the left distal fibular fracture. He is approximately 1-1/2 to 2 months status post open reduction and internal fixation of his left 5th metatarsal fracture. He comes in today walking in flip-flops. He reports he has been participating in physical therapy 3 times a week and working with the athletic trainers at Arconic 2 times a week. He is frustrated by the extent of his therapy and feels like he only needs 3 days a week of therapy and is not seeing a lot of benefit from the athletic trainer at Arconic working with him. He does note persistent hypersensitivity of the left lower extremity and numbness all throughout the foot. He also notes swelling of the foot that is progressive throughout the day the more it is dependent. He is very irritated today and what I would describe as aggressive. He describes frustration with his lack of progress including his persistent pain and numbness as described. He has ceased wearing any sort of a brace or support.

> . . .
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> I discussed with Jeff and addressed specifically his frustration. It is my understanding that his frustration mostly stems from that which was mentioned including persistent numbness and tingling, his frustration with continued physical therapy and overall lack of progress. After a long discussion with Jeff, he has calmed down and understands my perspective with regard to his injury. I did discuss that a shoe support may offer him some significant support and may improve his gait. However, Jeff states that he does not wear shoes year-round, he only wears flip-flops because his feet tend to sweat and does not feel as though his foot swelling would allow him to wear a shoe comfortably. . . .

(Id. at 9-10).

On January 8, 2021, Dr. Dunlay placed claimant at maximum medical improvement (MMI) for his left lower extremity injury. (Hearing Testimony; Ex. A, p. 1). Dr. Dunlay's treatment note from January 8, 2021, is not in the hearing record. The record, however, contains two different impairment ratings from Dr. Dunlay. The first is dated February 12, 2021. (Ex. 2, p. 8). It indicates claimant sustained 20 percent body-as-a-whole impairment due to moderate gait derangement, citing to Table 17-5 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Id.). The second is dated April 30, 2021. (Ex. 2, p. 9). It indicates claimant sustained 23 percent body-as-a-whole impairment due to severe ankle motion impairment, loss of weight transfer over the 5th metatarsal, and sensory loss, citing to Tables 17-11, 17-33 and 17-37 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Id.).[1] Dr. Dunlay did not recommend claimant use any type of prosthetic or orthopedic devices at that time. (See Ex. A, p. 1).

At the behest of his attorney, claimant attended an independent medical examination (IME) with Robert Rondinelli, M.D. on September 14, 2021. (Ex. 1). Dr. Rondinelli released his IME report on September 27, 2021. (Ex. 1). It opined claimant was not at MMI because his "present gait dysfunction can be significantly mitigated by proper lower extremity orthotic management." (Ex. 1, p. 5). It recommended a rigid exoskeletal system to stabilize his left leg and foot, also known as a KAFO- knee ankle foot orthosis. (Id.). The report also recommended a custom orthotic shoe with extra depth, a rocker-bottom sole, and a 2-4 cm lift to his contralateral shoe. (Id. at 5-6). Dr. Rondinelli opined that the KAFO "can be expected to significantly reduce his antalgic gait problem and hopefully improve his work tolerance." (Id. at 6). Dr. Rondinelli provided claimant with a 20 percent body-as-a-whole impairment, "due to his need for routine use of" the KAFO. (Id. at 4).

[1] It should be noted that the record also contains proposed impairment ratings from Robert Rondinelli, M.D. and Rick Garrels, M.D. (Ex. 1; Ex. B). The extent of claimant's permanent impairment is not an issue in this proceeding; it will not be addressed.

In June 2022, Dr. Dunlay was asked to review Dr. Rondinelli's IME report and comment on his recommendation for a KAFO brace. (Ex. 2, p. 10). On June 6, 2022, Dr. Dunlay responded, stating as follows:

> Regarding brace recommendations for Mr. Stutting, I have no objection to the recommended brace. However, two years after this type of orthopedic injury, it is my expert medical opinion that Mr. Stutting is at MMI, as previously documented, and his work status is not likely to improve in any appreciable way.

(Id.).

In September 2022, defendants' counsel met with Dr. Dunlay to discuss Dr. Rondinelli's recommendation for a KAFO orthosis. (Ex. A). Following that meeting, Dr. Dunlay signed a report which states as follows:

> I understand that you examined Mr. Stutting on numerous occasions and are well familiar with the range of motion and physical strength of the affected leg. . . . A KAFO device can be used in quadriceps paralysis or weakness to maintain knee stability. I understand his knee is stable and unaffected by the work injury.
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> I understand you previously issued an opinion on 6/6/22 noting you had no objection to the brace. However, two years after this type of orthopedic injury, it was your expert medical opinion that he was at MMI, and his work status is not likely to improve in any appreciable way.
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> . . . .
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> To expand on that, I understand it is your opinion, within a reasonable degree of medical certainty, the KAFO device will not "reasonably" restore his function beyond what it is today and is not medically necessary. A KAFO device for Mr. Stutting's condition is not clinically indicated.

(Id. at 2). At the bottom of the report, Dr. Dunlay checked a box which states "I, Dr. Dunlay, agree with the above-mentioned points." He also signed and dated the report. (Id.).

At the hearing, claimant testified that he has returned to work at Arconic. (Hearing Testimony). He stated that for the duration of his employment, Arconic has agreed to pick him up and transport him to each job site, because he cannot walk the necessary distance. (Id.). He testified walking causes him pain; he does not walk very fast, and he needs to stop and take breaks. (Id.). Claimant testified he has consistently experienced gait issues and leg pain since the work accident on January 15, 2020. (Id.). Claimant described pain in his big toe and the top of his foot from nerve damage, as well as pain where the bone grew together and from two screws located "up by the

knee." (Id.). Claimant testified that his limp is permanent and "will never go away." (Id.).

On cross-examination, claimant testified that he likely had more than 10 post-operative visits with Dr. Dunlay. (Hearing Testimony). Claimant agreed that he has not worn a boot or brace on his left lower extremity since April 2020. (Id.). Claimant admitted Dr. Dunlay saw him walk numerous times after the boot was removed in April 2020, and he was aware of claimant's gait problems. (Id.). The last time claimant saw Dr. Dunlay was in February 2021. (Id.).

Defense counsel also questioned claimant on his use of flip-flops. (Hearing Testimony). His response was confusing. Claimant suggested that Dr. Dunlay's treatment notes mentioning flip-flops are incomplete or inaccurate. (Id.). Claimant testified that he stopped wearing flip flops after Dr. Dunlay suggested he wear a shoe instead. (Id.). However, he also admitted that he continued to wear flip flops to physical therapy because his foot swells. (Id.).

Claimant testified he disagrees with Dr. Dunlay that the KAFO brace is not medically necessary for his left foot and leg injury. (Id.). He stated that no one knows if the KAFO brace will improve his function, and no one will know until he gets one and tries it out. (Id.). Claimant testified he really wants something to relieve his pain. (Id.). Claimant admitted he has not attempted to return to Dr. Dunlay to have his ongoing pain complaints evaluated and treated.[2] (Id.).

In closing arguments, claimant's counsel alleged that the report provided by Dr. Dunlay in September 2022 is invalid and should not be relied upon by the agency. (Hearing Testimony). According to counsel, the report does not explicitly mention claimant's gait issues, thus it appears Dr. Dunlay was not notified about all the symptoms claimant is experiencing, and therefore Dr. Dunlay's opinion on whether the KAFO brace is reasonably medically necessary is inaccurate. (Id.).

Defendants' counsel argued Dr. Dunlay has provided the claimant with extensive treatment; he has a complete picture of claimant's injuries and symptoms, and he has determined that the KAFO brace recommended by Dr. Rondinelli will not restore claimant's function beyond where it is today. (Id.). It is not reasonably medically necessary. (Id.). Defendants argue the treatment provided by Dr Dunlay is reasonable. (Id.).

CONCLUSIONS OF LAW

Under Iowa law, an employer who has accepted compensability for a workplace injury has a right to control the care provided to the injured employee. Ramirez-Trujillo

[2] When defense counsel asked about claimant's failure to return to Dr. Dunlay for treatment of his pain complaints, claimant stated "You think I'm going to open up another can of worms by going back? No, I'm not going to . . . I'm gonna get the same answer as always." (Hearing Testimony).

v. Quality Egg, L.L.C., 878 N.W.2d 759, 769 (Iowa 2016). The relevant statute provides as follows:

> 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).

Defendants' "obligation under the statute is confined to *reasonable* care for the diagnosis and treatment of work-related injuries." Long v. Roberts Dairy Co., 528 N.W.2d 122, 124 (Iowa 1995) (emphasis in original). In other words, the "obligation under the statute turns on the question of reasonable necessity, not desirability." Id. 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. See Iowa Code § 85.27(4). 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); Long, 528 N.W.2d at 124.

An employee's desire for a different "reasonable" treatment plan does not make the employer-authorized care unreasonable. See Long, 528 at 124. A finding that the treatment requested by the claimant is reasonable does not result in an implicit finding that the authorized treatment is unreasonable. Id. The employee must prove the care being offered by the employer is unreasonable to treat the work injury, not that another treatment plan is reasonable. Id.; See also Lynch Livestock, Inc. v. Bursell, 870 N.W.2d 274 (Table) (Iowa Ct. App. 2015). Determining whether care is reasonable under the statute is a question of fact. Long, 528 N.W.2d at 123.

Iowa Code section 85.27 requires an employee to notify defendants of his dissatisfaction with care before applying to the agency for alternate care. According to the statute, this requirement is intended to give the parties an opportunity to reach an understanding on future care for the employee, before asking the agency to intervene. Here, claimant is seeking a KAFO brace. At hearing, claimant testified that he wants the KAFO brace because it might improve his function and decrease his pain complaints. The hearing record does not contain any evidence that claimant notified the defendants about his dissatisfaction with Dr. Dunlay's care, let alone that he notified defendants of

the symptoms he was experiencing which he felt were not being addressed by Dr. Dunlay. Put otherwise, it does not appear that claimant ever notified defendants that he was experiencing ongoing pain and wished for treatment to address that pain. In his report, Dr. Rondinelli recommended the KAFO brace to "reduce his antalgic gait problem" and "improve his work tolerance." (Ex. 1, p. 6). In his responsive report, Dr. Dunlay stated claimant's work status was not likely to improve with the KAFO brace and it was not medically necessary. (Ex. A, p. 2). Neither report mentions claimant's pain symptoms or what effect the KAFO brace may or may not have on those symptoms. There is no evidence claimant notified defendants of the reasons underlying his request for the KAFO brace.

Dr. Dunlay, the authorized treating physician, has indicated that the KAFO brace is not medically necessary because it will not improve claimant's function, but he has not been asked to opine on whether it or another device or treatment will improve claimant's pain complaints. Additionally, there is some question about whether claimant was compliant with Dr. Dunlay's footwear recommendations and treatment plan. At hearing, claimant did not provide any rationale for his frustration with the care provided by Dr. Dunlay and freely admitted that he made no attempt to return to Dr. Dunlay to have his pain complaints addressed. Given these facts, claimant's alternate medical care action is premature. Claimant needs to sufficiently notify defendants of the rationale for his dissatisfaction and determine whether Dr. Dunlay has any additional treatment that is reasonably suited to address his complaints.

Given the record as detailed above, claimant has not met his burden to prove the care offered by defendants is unreasonable. Claimant is not entitled to alternate medical care at this time. Claimant's petition for alternate care is denied.

ORDER

THEREFORE, IT IS ORDERED:

Under the above findings of facts and conclusions of law, the application for alternate care with respect to claimant's left lower extremity is DENIED at this time.

Signed and filed this 28th day of October, 2022.

Amanda Rutherford

AMANDA R. RUTHERFORD
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Rocco Motto (via WCES)

Jane Lorentzen (via WCES)