



## ISSUES

1. Whether claimant's claim for benefits is barred by application of Iowa Code section 85.16(2).
2. Whether claimant is entitled to alternate medical care under Iowa Code section 85.27.
3. Costs.

## FINDINGS OF FACT

Claimant was 55 years old at the time of hearing. Claimant works as a cook at Hardees. As a cook, claimant cleaned dishes, made biscuits and prepared sausage and eggs. Claimant alleged a date of injury of February 26, 2018. Claimant testified prior to the date of injury she had worked at the Hardees for approximately three weeks.

Claimant's prior history is relevant. In 2002 claimant worked at a Waffle House restaurant in Florida. In that year claimant was shot in the head while two of her coworkers were murdered execution-style by a man robbing the restaurant. (Exhibit B2) Claimant testified she received Social Security Disability benefits related to the injury. (Transcript page 47) Claimant testified she has throbbing in her head due to bullet fragments still in her head. She said to ease pain, to help her relax, and to help her sleep, she smokes marijuana, at night, before she goes to bed. (Tr. pp. 49-50) Claimant testified she does not smoke marijuana in the mornings before she goes to work. (Tr. p. 35)

Claimant worked in the morning at Hardees. Claimant said she usually began her work day at approximately 4:30 a.m. On February 26, 2018 claimant was putting dishes away shortly after she came to work. She said a circular blade, used on a machine to cut lettuce and tomatoes, was sitting on a shelf above her. Claimant said she pushed the blade back to keep it from falling and continued to put away dishes. Claimant said the blade fell off the shelf and cut her right hand near the base of her index finger. (Tr. pp. 21, 44)

Claimant drove herself to the emergency department at Genesis Medical Center. Claimant had a "knife" cut her right index finger at work after it fell off a shelf. (Joint Exhibit 1, page 1) Claimant had a 2.5 centimeter laceration on the dorsal portion of the right hand near the index finger approaching the first web space. (Jt. Ex. 1, p. 3) Claimant was assessed as having a laceration of the right hand. Claimant indicated she used marijuana several times a day. (Jt. Ex. 1, p. 3) Claimant's finger was sutured and she was released home. (Jt. Ex. 1)

On March 14, 2018 claimant was evaluated at Genesis Occupational Health. Claimant indicated movement of her right hand caused pain shooting into the wrist. The cause of claimant's problem was found related to the February 26, 2018 injury. Claimant's sutures were removed. Claimant was returned to regular duty, but limited to working 40 hours a week. (Jt. Ex. 2, p. 6-7)

Claimant was seen by Rick Garrels, M.D., on August 15, 2018. Claimant cut her right index finger when a blade fell on it at work. Claimant had right hand pain. Claimant was assessed as having a laceration on the right hand and pain in the joints of the right hand. Occupational therapy three times a week was recommended. Claimant was returned to work with restrictive duty of no sustained gripping, pinching or grasping of the right hand. Claimant's symptoms were related to the February 26, 2018 injury. (Jt. Ex. 2, pp. 10-12)

Claimant underwent occupational therapy for her right hand from August 28, 2018 through October 1, 2018. Notes from the October 1, 2018 session indicate claimant had a 58-60 percent improvement in her symptoms in her right hand. Claimant did not believe she required further occupational therapy. Therapy was discontinued on October 1, 2018. (Jt. Ex. 4) Claimant testified the occupational therapy helped the pain and range of motion in her right hand. (Tr. pp. 37-38)

In an October 29, 2019 report, Richard Kreiter, M.D., gave his opinions of claimant's condition following an independent medical evaluation (IME). Claimant was not at maximum medical improvement (MMI). Dr. Kreiter recommended claimant have EMG/nerve conduction testing performed on the right hand to get information regarding the median nerve compression. He recommended claimant wear a night splint. Dr. Kreiter indicated claimant's history indicated nerve entrapment and he suspected claimant had carpal tunnel syndrome. (Ex. 2)

Claimant testified she had returned to work at the Hardees doing her regular duties. She said her employer did not test her for marijuana or drugs. (Tr. pp. 29, 35) She said she has never been sent home from work at Hardees due to intoxication. (Tr. pp. 29, 35)

Claimant said she has lost strength and has pain in her hands. She said she gets an aching feeling in her hands and occasionally shooting pains up to her wrist. (Tr. pp. 38-39, 44) Claimant said her index finger will "lock up" at work. (Tr. pp. 38-39) Claimant said she had a traumatic injury from the blade cutting her hand. She said her work has aggravated her injury. (Tr. p. 56) Claimant said she often uses her left hand to compensate for symptoms in her right hand. (Tr. pp. 39-40)

Claimant said she has asked for additional care from her employer. Claimant says she wants to have the EMG/nerve conduction studies recommended by Dr. Kreiter. She said she also wants to get treatment to improve the condition of her right hand. (Tr. pp. 42-43, 53-54, 59)

#### CONCLUSIONS OF LAW

The first issue to be determined is if claimant's claim for treatment and benefits is barred by application of Iowa Code section 85.16(2).

Defendants contend claimant's claim for any benefits, is barred by application of Iowa Code section 85.16(2). During the 2017 legislative session, the Iowa legislature made a significant change to Iowa Code section 85.16(2). The statute now provides in relevant part:

No compensation under this chapter shall be allowed for an injury caused:

...

(2) (a) By the employee's intoxication, which did not arise out of and in the course of employment but which was due to the effects of alcohol or another narcotic, depressant, stimulant, hallucinogenic, or hypnotic drug not prescribed by an authorized medical practitioner, if the intoxication was a substantial factor in causing the injury.

(b) For the purpose of disallowing compensation under this subsection, both of the following apply:

(1) If the employer shows that, at the time of the injury, or immediately following the injury, the employee had positive test results reflecting the presence of alcohol, or another narcotic, depressant, stimulant, hallucinogenic, or hypnotic drug which drug either was or was not prescribed by an authorized medical practitioner or was not used in accordance with the prescribed use of the drug, it shall be presumed that the employee was intoxicated at the time of the injury and that intoxication was a substantial factor in causing the injury.

(2) Once the employer has made a showing as provided in subparagraph (1), the burden of proof shall be on the employee to overcome the presumption by establishing that the employee was not intoxicated at the time of the injury, or that intoxication was not a substantial factor in causing the injury.

The 2017 changes to Iowa Code section 85.16(2) did place a greater burden on an employee to show they were not intoxicated at the time of injury or that intoxication was not a substantial factor in causing the injury. However, the employer, under the law, still has the burden of proof of producing evidence that the employee had a positive test result reflecting the presence of alcohol or other drugs. Iowa Code section 85.16(2)(b)(1).

There is no evidence in the record claimant was tested, at the time of her injury, or immediately following the injury for drugs. Claimant's un rebutted testimony is she

had no drug test. (Tr. pp. 29, 35) Claimant's un rebutted testimony is that she has never been sent home from Hardees from work due to intoxication. At the time of hearing, claimant was still employed with the same Hardees restaurant.

Defendants appear to argue that because claimant's emergency room records indicate claimant used marijuana, and that claimant testified she smoked marijuana in the evenings to deal with pain in her head due to a gunshot wound, Iowa Code section 85.16(2) applies.

There is no evidence claimant had a positive drug test. There is no evidence claimant had any drug test. For these reasons, and the others detailed above, defendants have failed to prove Iowa Code section 85.16(2) bars claimant's claim for benefits.

The next issue to be determined is whether claimant is entitled to alternate medical care.

Iowa Code section 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.

Under Iowa law, the employer is required to provide care to an injured employee and is permitted to choose the care. Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433 (Iowa 1997).

[T]he 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.

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 v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). Determining what care is reasonable under the statute is a question of fact. Id. 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). In Pirelli-Armstrong Tire Co., 562 N.W.2d at 433, the court approvingly quoted Bowles v. Los Lunas Schools, 109 N.M. 100, 781 P.2d 1178 (App. 1989):

[T]he words "reasonable" and "adequate" appear to describe the same standard.

[The New Mexico rule] requires the employer to provide a certain standard of care and excuses the employer from any obligation to provide other services only if that standard is met. We construe the terms "reasonable" and "adequate" as describing care that is both appropriate to the injury and sufficient to bring the worker to maximum recovery.

The commissioner is justified in ordering alternate care when employer-authorized care has not been effective and evidence shows that such care is "inferior or less extensive" care than other available care requested by the employee. Long, 528 N.W.2d at 124; Pirelli-Armstrong Tire Co., 562 N.W.2d at 437.

Claimant has not had any medical care for her hand injury since October of 2018. Claimant credibly testified she has pain and loss of strength in her right hand. Claimant credibly testified she has an index finger that locks. Claimant credibly testified because of pain and loss of strength in her right hand, she often uses her left hand to compensate.

Claimant's credible and un rebutted testimony is she asked her employer for additional care for her hand injury. Claimant has not received any care since October of 2018.

Dr. Kreiter opined claimant requires EMG/nerve conduction study testing, and other care for her right hand. (Ex. 2) There is no expert testimony contrary to Dr. Kreiter's expert opinion.

Given this record, claimant has carried her burden of proof she is entitled to the requested alternate medical care. Defendants shall furnish claimant with EMG/nerve conduction testing for her right upper extremity, and other care reasonable to treat her right hand injury.

The final issue is costs. Costs are assessed at the discretion of the agency. Claimant has prevailed on all the issues in this case. For that reason, claimant is awarded costs. Claimant is awarded her filing fees. Claimant is also awarded her

medical mileage, shown at Exhibit 6, excluding mileage associated with Dr. Kreiter's IME.

ORDER

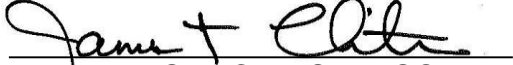
Therefore, it is ordered:

That defendants shall provide claimant with alternate medical care, including but not limited to, EMG/nerve conduction testing recommended by Dr. Kreiter, and care reasonable to treat her right hand injury.

That defendants shall pay claimant's costs as detailed above.

That defendants shall file subsequent reports of injury as required by this agency under rule 876 IAC 3.1(2).

Signed and filed this 4th day of March, 2020.

  
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JAMES F. CHRISTENSON  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Laura Ostrander (via WCES)

Mary Tyler (via WCES)

**Right to Appeal:** This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.