BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DENISE MALCOM, Claimant, vs. EVENTIDE LUTHERAN HOME FOR THE AGED, Employer, and SFM MUTUAL INS. CO., Insurance Carrier, Defendants.	File No. 21013233.01 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 September 14, 2022, claimant, Denise Malcom, 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 requests authorization for an MRI of her right shoulder and an MRI of her brachial plexus. Claimant alleges these diagnostic tests are necessary treatment for a work-related injury she sustained on April 29, 2020. On September 23, 2022, defendants, Eventide Lutheran Home for the Aged and SFM Mutual Ins. Co., filed an answer which neither accepted nor denied liability for the April 29, 2020 date of injury.

The undersigned presided over an alternate care hearing held via telephone on September 26, 2022. Claimant appeared through her attorney Jennifer Zupp. Defendants appeared through their attorney Alison Stewart. 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 A1 and A2

No witnesses were called. Counsel offered oral arguments to support their positions. At the start of the hearing, Ms. Stewart clarified that defendants have accepted liability for the April 29, 2020 date of injury and for claimant's right shoulder injury—one of the conditions for which claimant seeks treatment in this proceeding. Following the hearing, defendants filed an amended answer. In this answer, defendants accepted liability for the April 29, 2020 right shoulder injury. Defendants stated causation for claimant's alleged brachial plexus condition had not yet been addressed

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.

DISMISSAL WITHOUT PREJUDICE

Malcom seeks alternate care for injuries to her right shoulder and brachial plexus. In defendants' answer, they admit liability for the claim relating to her right shoulder. However, they assert that causation has not yet been addressed for Malcom's alleged brachial plexus condition, thus at this time they can neither admit nor deny liability. This places the defendants' liability for the alleged injury to Malcom's brachial plexus at issue.

Liability for the alleged injury is a threshold issue when the agency considers an application for alternate care. See, e.g., Tyson Foods, Inc. v. Hedlund, 740 N.W.2d 192, 198–99 (Iowa 2007). Such an application cannot be filed "if the liability of the employer is an issue. If an application is filed where the liability of the employer is an issue, the application will be dismissed without prejudice." 876 IAC 4.48(7). The Iowa Supreme Court has "emphasize[d] that the commissioner's ability to decide the merits of a section 85.27(4) alternate medical care claim is limited to situations where the compensability of an injury is conceded, but the reasonableness of a particular course of treatment for the compensable injury is disputed." R.R. Donnelly & Sons v. Barnett, 670 N.W.2d 190, 197 (Iowa 2003).

The defendants' default denial of liability means they lose the right to choose the care received by Malcom for the alleged brachial plexus injury. Winnebago Indus., Inc. v. Haverly, 727 N.W.2d 567, 575 (Iowa 2006) (citing Trade Prof'ls, Inc. v. Shriver, 661 N.W.2d 119, 124 (Iowa 2003)). Malcom may obtain reasonable care from any provider for the alleged injury, at the claimant's expense, and seek reimbursement for such care using regular claim proceedings before this agency. See Shriver, 661 N.W.2d at 121–25 (affirming on judicial review an agency decision ordering the payment of medical expenses for unauthorized care because the defendants denied liability for the alleged injury and therefore lost the right to control care).

The denial of liability and resultant dismissal without prejudice can also limit the defendants' ability to assert a lack-of-authorization defense with respect to care relating to the injury alleged by the claimant.

> The authorization defense is applicable when the commissioner has denied a claimant's petition for alternate care on its merits. But it is inapplicable where the claimant's petition for alternate care was denied on procedural grounds such that the commissioner could not adjudicate the petition's merits, as is the case when the employer disputes the compensability of the injury.

Brewer-Strong v. HNI Corp., 913 N.W.2d 235, 243–44 (Iowa 2018) (citing Barnett, 670 N.W.2d at 197).

However, defendants default denial of liability at this stage in the proceedings does not necessarily forever bar them from asserting an authorization defense in this case for care relating to the injuries or conditions alleged in the petition. See id. at 244. Defendants' answer indicates Malcom has an appointment with authorized provider Brian Johnson, M.D. on October 5, 2022 to address the newly alleged brachial plexus condition. (See Amended Answer; Ex. A-1). Defendants may change their position to accept liability if new opinions and/or information provide evidence to justify doing so. Id. And if the defendants change their position, the defendants may regain the "authorization defense and the statutory rights and obligations to provide and choose appropriate medical care pursuant to Iowa Code section 85.27" moving forward, unless they subsequently change their position to deny liability once again, or the commissioner grants a subsequent application for alternate care by the claimant. Id. at 245; see also Haverly, 727 N.W.2d at 575 ("There might, in some cases, be a significant change in the facts after the admission of liability that could justify a change of position by the employer . . . .").

ISSUE

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

- An MRI of claimant's right shoulder at Crawford County Memorial Hospital.

FINDINGS OF FACT

On April 29, 2020, claimant sustained a work-related injury to her right shoulder. Defendants admitted liability for the right shoulder injury and authorized treatment with Brian Johnson, M.D., at CNOS. (See Hearing Testimony; Defendant's Brief). On May 12, 2020, an MRI was taken of Malcom's right shoulder.[1] (See Defendants' Brief, p. 1). According to defendants' brief, this MRI suggested infraspinatus tendinosis and possible biceps tendinosis. (Id.). Following receipt of the MRI, Dr. Johnson recommended surgery. (Id.).

On January 12, 2021, Dr. Johnson performed a right shoulder arthroscopy, biceps tenotomy, anterior-superior labral debridement glenoid chondroplasty, chondroplasty of the humerus, subacromial decompression and distal clavicle excision. (Id.; See also Claimant's Ex. 1, p. 1).

Malcom continued to experience symptoms in her right shoulder after the surgery. (Defendants' Brief, p. 1). Dr. Johnson gave Malcom a right shoulder injection and ordered an EMG of her right upper extremity. (Id.). According to defendants' brief, the EMG revealed chronic cervical radiculopathy. (Id.). A cervical MRI was completed on October 14, 2021. (Id.). The results of that MRI are not in the record.[2] Dr. Johnson

[1] The actual record of this MRI is not in evidence. None of Claimant's treatment records are in evidence for this proceeding.

[2] However, in her IME report, Dr. Sassman states "the cervical spine MRI did not reveal nerve root impingement." (Ex. 1, p. 4).

placed Malcom at maximum medical improvement (MMI) on May 16, 2022. (Defendants' Brief, p. 1). This treatment record is also not in evidence.

On September 9, 2022, Malcom underwent an independent medical exam (IME) with Robin Sassman, M.D. (See Ex. 1, p. 1-5). During this exam, Malcom informed Dr. Sassman of a new alleged injury or aggravation that she sustained in April 2022. (Ex. 1, p. 4; See also Hearing Testimony). Following this exam, Dr. Sassman issued a report. (Ex. 1). In this report, Dr. Sassman stated "I question whether a brachial plexus injury could be causing some of her ongoing symptoms." (Id. at 1). Dr. Sassman recommended an MRI of Malcom's brachial plexus, as well as a repeat MRI of her right shoulder to "determine the status of her right shoulder after the injury that occurred in April 2022 . . ." (Id. at 5).

On September 9, 2022, claimant's counsel emailed Michele Metz, a claim representative with SFM Mutual Insurance Company. (Ex. 2, p. 6-8). In this email, she notified Ms. Metz that Dr. Sassman's report recommended an MRI of Malcom's brachial plexus, as well as a repeat right shoulder MRI. (Id.). On September 13, 2022, claimant's counsel sent Ms. Metz a second email formally requesting that defendants authorize the additional MRIs recommended by Dr. Sassman. (Id. at 6). On September 14, 2022, Ms. Metz responded indicating that the additional MRIs were not authorized. (Id.). Claimant filed her petition for alternate care that same day. (See Petition).

On September 20, 2022, counsel for defendants' emailed claimant's counsel, announcing her representation of defendants in this alternate care action. (Ex. A-2). In the email, counsel stated defendants had authorized a return visit to Dr. Johnson, the authorized provider, to address Dr. Sassman's treatment recommendations and Malcom's alleged brachial plexus injury. (Id.). Claimant's counsel replied on September 21, 2022. (Ex. 2, p. 9). In this email counsel stated, "I personally tend to see an in-person visit as a waste of my client's time when the doctor can simply be asked, like he should've been when I first made the request for MRIs." (Id.). On September 22, 2022, claimant's counsel sent another email indicating a return visit with Dr. Johnson was not sufficient, as Malcom "would like the MRIs now." (A-1). Later that day, defendants' counsel sent an email confirming the return appointment with Dr. Johnson was scheduled to take place on October 5, 2022 at 10:45 a.m. (Id.).

At the hearing, defendants' counsel stated that claimant's request for an immediate MRI without a return visit to Dr. Johnson was not reasonable or feasible. (Hearing Testimony). Counsel argued Dr. Johnson was the authorized treater; he should be the one to determine whether a repeat MRI was needed. (Id.). Counsel additionally argued that as a practical consideration, a return visit to Dr. Johnson was necessary so that he could order the MRI, review it, and make recommendations on future treatment. (Id.).

There is no dispute in this case that Dr. Johnson is the authorized treating physician. Dr. Sassman is not a treating physician. The authorized treating medical provider is the individual who directs the medical care, not the claimant's IME physician. Defendants have authorized and scheduled a return visit to Dr. Johnson to evaluate claimant's ongoing shoulder symptoms, address Dr. Sassman's recommendation for a repeat MRI, and if necessary, order additional treatment. Based upon these facts, claimant has not proven that the care currently offered by defendants is unreasonable.

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 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 she 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. Ultimately, determining whether care is reasonable under the statute is a question of fact. Long, 528 N.W.2d at 123.

Under Iowa Code section 85.27, claimant bears the burden of providing "reasonable proofs of the necessity" to order alternate care. In her correspondence, claimant's counsel alleges that a return visit with Dr. Johnson is unreasonable and a waste of her client's time because he already had the opportunity to order additional testing and refused. (Ex. 2, p. 9). There is no evidence in the record to support this assertion. None of Dr. Johnson's treatment records were put into evidence, and defendants' brief asserts that Dr. Johnson has provided extensive treatment including multiple MRIs, an EMG, injections, and surgery. (See Defendants' Brief, p. 1). While claimant's brief cites to several cases where the agency has ordered diagnostic testing recommended by an IME physician, those decisions were fact specific. Given the record, the undersigned cannot state the holdings of those cases apply to this claim.[3]

[3] For example, in Garza v. Tyson Foods, Inc., File 5042559, 2014 WL 6480291, (Nov. 12, 2014), the agency ordered a new MRI because the authorized reviewing radiologist had already indicated that the original imaging

At this point defendants have not denied claimant's request for a repeat MRI of the right shoulder. Instead, they have given the decision to Dr. Johnson—the authorized provider. To that end, they have authorized and scheduled a return visit with Dr. Johnson. This is not unreasonable. Claimant's petition for alternate care is denied.

ORDER

THEREFORE, IT IS ORDERED:

The application for alternate care with respect to claimant's alleged brachial plexus condition is DISMISSED WITHOUT PREJUDICE.

Under the above findings of facts and conclusions of law, the application for alternate care with respect to claimant's right shoulder is DENIED.

Signed and filed this __28th___ day of September, 2022.

Amanda Rutherford

AMANDA R. RUTHERFORD
DEPUTY WORKERS'
COMPENSATIONCOMMISSIONER

The parties have been served, as follows:

Jennifer Zupp (via WCES)

Alison Stewart (via WCES)

was unclear and additional imaging was needed to diagnose claimant's condition. In Ayodele v. Wells Blue Bunny, File No. 5036671, 2011 WL 6119341 (Dec. 2, 2011), MRIs were ordered by the Agency because the authorized provider refused to get any imaging before determining the claimant was not a surgical candidate. That is not the situation in this case. Dr. Johnson has already ordered MRIs and performed surgery.