

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DANIEL NEHRING,

Claimant,

vs.

MARTIN MARIETTA MATERIALS, INC.,

Employer,

and

CHUBB d/b/a INDEMNITY INSURANCE
COMPANY OF NORTH AMERICA,Insurance Carrier,
Defendants.

File No. 19006754.04

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. By filing an original notice and petition for alternate medical care, claimant, Daniel Nehring, invoked the expedited procedure of rule 876 IAC 4.48.

The alternate medical care claim came on for telephonic hearing on January 12, 2022. The proceedings were digitally recorded. That recording constitutes the official record of this proceeding. Claimant appeared personally and through her attorney, Saffin Parrish-Sams. Defendants appeared through their attorney, Rene Charles Lapierre.

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. Any appeal of the decision would be to the Iowa District Court pursuant to Iowa Code section 17A.

The evidentiary record consists of claimant's exhibits 1 through 4, consisting of ten pages and defendants' exhibits 1 through 3, consisting of ten pages. Mr. Nehring testified on his own behalf. No other witnesses testified at the hearing.

Claimant's petition alleges injuries to the right shoulder, right upper back, right scapula, right arm, and cervical spine. Defendants admitted the injury to the right

shoulder and/or right rotator cuff tendons, but deny liability for all other alleged injuries. Defendants acknowledge liability for torn rotator cuff tendons resulting in prior surgical intervention. However, defense counsel was unsure of whether the right biceps tendon was operatively treated and defendants were not able or willing to admit liability for an alleged right biceps tendon injury. Defense counsel clarified that defendants would not deny liability for the right biceps tendon, if that was previously treated by the authorized physicians. Defendants are encouraged to review prior medical records and clarify their position with claimant's counsel regarding admission and treatment for the right biceps tendon.

Given the defendants denial of liability and refusal to admit liability for certain conditions, the undersigned verbally dismissed all claims for treatment related to any alleged injury other than the right shoulder and right rotator cuff tendons. The alternate medical care hearing proceeded solely on the claim for treatment of the right shoulder and/or right rotator cuff tendons.

ISSUE

The issue presented for resolution is whether the claimant is entitled to an alternate medical care order requiring defendants to authorize and pay for a right shoulder MRI, evaluation and treatment with an orthopaedic surgeon, Dr. Li in Fort Dodge, treatment with Shelley Wells, D.O., to provide pain management for claimant's right shoulder, and Kathleen Haverkamp, M.D., to provide care for claimant until the above specialist evaluations are scheduled and occur.

FINDINGS OF FACT

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

Daniel Nehring, claimant, sustained a right shoulder injury, including torn rotator cuff tendons, as a result of a work injury on July 8, 2019. On that date, claimant was working for the employer when a door on his heavy equipment swung and hit him in the right scapula area causing injury to his right shoulder and/or right rotator cuff tendons. Defendants admitted liability for the injury and directed claimant's medical care through an orthopaedic surgeon, Dr. Sneller.

Dr. Sneller performed surgery on claimant's right shoulder. Unfortunately, the surgery was not entirely beneficial and claimant sought and obtained a referral from Dr. Sneller to James V. Nepola, M.D., at the University of Iowa Hospitals and Clinics. Dr. Nepola subsequently performed surgery on claimant's right shoulder and/or right rotator cuff.

Dr. Nepola last evaluated claimant on April 20, 2021. He released claimant at maximum medical improvement (MMI) at that time. Dr. Nepola recommended a functional capacity evaluation (FCE), which was completed on April 29, 2021. After he received the results of the FCE, Dr. Nepola authored a subsequent report dated August

23, 2021. He imposed permanent restrictions on claimant. Dr. Nepola also opined that future treatment options for claimant's right shoulder included the use of non-steroidal anti-inflammatory medications, periodic corticosteroid injections, physical therapy, and potentially revision surgery on the right shoulder. (Defendants' Exhibit 1)

After the FCE, the employer removed claimant from light duty work and returned him to his full-duty work as a heavy equipment operator. Claimant returned to that work in late April or early May 2021 and continued working full-duty as a heavy equipment operator until laid off for winter approximately two weeks ago. However, Mr. Nehring testified that his right shoulder symptoms, along with various other denied injuries, gradually worsened after he returned to work as a heavy equipment operator.

Mr. Nehring sought a return evaluation with Dr. Nepola when his right shoulder symptoms began to worsen in May or June 2021. Dr. Nepola's nurse advised claimant that he was at MMI and that he should seek care through his personal care provider. In spite of efforts by the assigned nurse case manager and the insurance carrier, claimant could not obtain a return evaluation or appointment with Dr. Nepola.

Instead, claimant began treatment with his personal physician, Kathleen Haverkamp, M.D. Dr. Haverkamp recommends claimant obtain a repeat MRI of the right shoulder and recommends referral to Dr. Li, an orthopaedic surgeon, and Shelley Wells, D.O., a pain management physician, both at least partially as a result of claimant's right shoulder injury. (Claimant's Ex. 2, pp. 3-4) Claimant expressed an opinion and desire to seek care through Drs. Li and Wells, who both work in the same clinic. Claimant speculates that he will receive better care because these two physicians work for the same clinic and can communicate more effectively. Claimant expresses a desire to not return for treatment with Dr. Nepola, as he feels ignored or abandoned by Dr. Nepola since April 2021.

In addition, claimant obtained an independent medical evaluation (IME) with David H. Segal, M.D. Dr. Segal recommends additional treatment for claimant's right shoulder, including an MR arthrogram of the right shoulder, as well as evaluation and treatment with Dr. Nepola, Dr. Bollier at the University of Iowa Hospitals and Clinics or Dr. Li in Fort Dodge. Dr. Segal opines that claimant has likely re-torn his right rotator cuff. (Claimant's Ex. 3, p. 1) Mr. Nehring testified that he believes the right rotator cuff has re-torn because he now experiences pain and loss of range of motion similar to that experienced previously when diagnosed with a torn rotator cuff.

Claimant expressed his dissatisfaction with the lack of care and made specific request for additional treatment of the defendants. (Claimant's Ex. 4) As noted, defendants apparently attempted to return claimant to Dr. Nepola without success. Defendants have not authorized or offered any alternate medical care since Dr. Nepola declined to re-evaluate claimant. At the time of the alternate medical care hearing, defendants were not offering or authorizing any specific medical care for claimant's right shoulder and/or right rotator cuff injury.

I find that claimant has established additional treatment options exist for his injury. Dr. Nepola opined that additional treatment may be required for the right shoulder. Dr. Nepola suggested that physical therapy, medications, injections, and potential revision surgery may be indicated. However, defendants have not authorized any of the treatment recommendations made by Dr. Nepola or authorized a medical provider to oversee or administer such treatment options.

Claimant has also produced evidence from Dr. Haverkamp and Dr. Segal that additional treatment options exist for claimant's condition. The opinions of Drs. Nepola, Haverkamp, and Segal are accepted and it is found that additional reasonable treatment options exist for claimant's right shoulder and/or right rotator cuff injuries. The treatment requested by claimant is reasonable, necessary, reasonably suited to treat the work injuries, and more extensive than the treatment offered (or lack thereof) by defendants.

Accordingly, I find that defendants are not currently offering medical care that is reasonably suited to treat claimant's right shoulder and/or right rotator cuff injuries. Claimant has established that he expressed his dissatisfaction to the defendants. Claimant has also established that alternate treatment options exist that are more extensive and/or superior to the lack of authorized medical treatment currently offered by defendants.

REASONING AND CONCLUSIONS OF LAW

Before any benefits can be ordered, including medical benefits, compensability of the claim must be established, either by admission of liability or by adjudication. The summary provisions of Iowa Code section 85.27, as more particularly described in rule 876 IAC 4.48, are not designed to adjudicate disputed compensability of a claim.

The Iowa Supreme Court has held:

We emphasize 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. . . . Thus, the commissioner cannot decide the reasonableness of the alternate care claim without also necessarily deciding the ultimate disputed issue in the case: whether or not the medical condition Barnett was suffering at the time of the request was a work-related injury.

. . . .

Once an employer takes the position in response to a claim for alternate medical care that the care sought is for a noncompensatory injury, the employer cannot assert an authorization defense in response to a subsequent claim by the employee for the expenses of the alternate medical care.

R. R. Donnelly & Sons v. Barnett, 670 N.W.2d 190, 197-198 (Iowa 2003) (fn 2).

In this case, defendants denied liability for the alleged injuries to claimant's upper back, right scapula, right arm, and cervical spine. Defendants could not or would not admit liability for an injury to the right biceps tendon at the time of hearing. Given the denial of liability or refusal to admit liability for the various listed conditions, claimant's original notice and petition for alternate medical care must be dismissed with respect to the disputed injury claims. Given their denial of liability for the various conditions sought to be treated in the petition for alternate medical care, defendants lose their right to control the medical care claimant seeks during their period of denial and the claimant is free to choose that care. Brewer-Strong v. HNI Corp., 913 N.W.2d 235 (Iowa 2018); Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193 (Iowa 2010).

As a result of the defendants' denial of liability or refusal to admit liability for the alleged injuries to claimant's upper back, right scapula, right arm, cervical spine, and right biceps tendon, Mr. Nehring may obtain reasonable medical care from any provider for treatment of these alleged injuries but at claimant's expense and seek reimbursement for such care using regular claim proceedings before this agency. Haack v. Von Hoffman Graphics, File No. 1268172 (App. July 31, 2002); Kindhart v. Fort Des Moines Hotel, Iowa Industrial Comm'r Decisions No. 3, 611 (App. March 27, 1985). "[T]he employer has no right to choose the medical care when compensability is contested." Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193, 204 (Iowa 2010). Therefore, defendants are precluded from asserting an authorization defense as to any future treatment during their period of denial. Brewer-Strong v. HNI Corp., 913 N.W.2d 235 (Iowa 2018).

Turning to the alleged right shoulder and/or right rotator cuff injuries, defendants admit liability for those injuries. Accordingly, it is proper to conduct the alternate medical care hearing and determine what care should be authorized for the right shoulder and/or right rotator cuff. 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).

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 and Air Conditioning 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).

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. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

Reasonable care includes care necessary to diagnose the condition and defendants are not entitled to interfere with the medical judgment of its own treating physician. Pote v. Mickow Corp., File No. 694639 (Review-Reopening June 17, 1986).

In Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433, 437 (Iowa 1997), the supreme court held that "when 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."

In this case, claimant expressed preferences for future care. As noted above, claimant's preferences are not sufficient to justify a transfer of care. Instead, the question is whether the care offered by defendants is reasonably suited to treat claimant's injury without undue inconvenience or delay.

I found that the defendants are not currently offering care for claimant's right shoulder and/or right rotator cuff. I also found that claimant established that reasonable alternative treatment options exist that are more extensive than the care offered by defendants. Given that the defendants are not currently authorizing additional care for claimant's right shoulder and/or right rotator cuff injuries and that additional reasonable treatment options exist, I conclude claimant has established entitlement to alternate medical care.

Specifically, I conclude that claimant has established entitlement to authorization of a right shoulder MRI, an evaluation with Dr. Li, and evaluation with Dr. Wells, and authorization of Dr. Haverkamp and any treatment she recommends (including the right shoulder MRI) until the evaluations with Dr. Li and Dr. Wells occur. Once the evaluations with Dr. Li and Dr. Wells occur, they shall become the authorized treating physicians and their treatment recommendations shall become the authorized treatment for Mr. Nehring's right shoulder and/or right rotator cuff injuries.

ORDER

THEREFORE, IT IS ORDERED:

The claimant's petition for alternate medical care is granted in part and dismissed in part.

All claims involving the alleged injuries to claimant's upper back, right scapula, right arm, neck, headaches, and/or right biceps tendon are dismissed without prejudice.

Claimant's petition for alternate medical care pertaining to the right shoulder and/or right rotator cuff is granted.


Defendants shall authorize Kathleen Haverkamp, M.D., to provide care for claimant, including but not limited to medication management and ordering of a right shoulder MRI, until both an orthopaedic surgeon and a pain management specialist evaluate claimant.

If still recommended and ordered by Dr. Haverkamp, defendants shall authorize and pay for a right shoulder MRI.

Defendants shall authorize orthopaedic surgeon, Dr. Li in Fort Dodge, and pay for an evaluation and any recommended treatment for claimant's right shoulder and/or right rotator cuff injuries.

Defendants shall authorize pain management specialist, Shelley Wells, D.O., and pay for an evaluation and any recommended treatment for claimant's right shoulder and/or right rotator cuff injuries.

Signed and filed this 12th day of January, 2022.

A handwritten signature in black ink, appearing to read "William H. Grell", is written over a horizontal line.

WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Saffin Parrish-Sams (via WCES)

Rene Lapierre (via WCES)