BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

QUENTIN MCGACHEY,

Claimant,

vs.

MIDWEST IOWA SLEEP,

Employer,

and

ACUITY,

Insurance Carrier,
Defendants.

File No. 5057058

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. The expedited procedures of rule 876 IAC 4.48, the "alternate medical care" rule, are invoked by claimant, Quentin McGachey.

This alternate medical care claim came on for hearing on November 22, 2016. The proceedings were recorded digitally and constitute the official record of the hearing. By an order filed by the workers' compensation commissioner, this decision is designated final agency action. Any appeal would be a petition for judicial review under Iowa Code section 17A.19.

The record in this case consists of claimant's Exhibit 1 through 4, defendants' Exhibits A through B.

ISSUE

The issue presented for resolution in this case is whether claimant is entitled to alternate medical care consisting of authorization for shoulder surgery recommended by Daniel Fabiano, M.D.

FINDINGS OF FACT

Defendants accept liability for a work-related injury to claimant's right shoulder occurring on October 20, 2015.

Claimant filed his first petition for alternate medical care regarding this injury on August 1, 2016. In that petition claimant requested this agency order defendants to authorize surgery recommended by Dr. Fabiano.

An alternate medical care decision was issued on that petition on August 11, 2016. That decision granted claimant's petition, in part. Defendants were ordered to authorize shoulder surgery, if recommended by Kary Schulte, M.D., following an exam by Dr. Schulte. That decision was based, in part, on a finding of fact there was no evidence Dr. Fabiano consented to performing the surgery claimant wanted. It was also based on a finding that defendants authorized treatment with Dr. Schulte. Some of the findings of fact from that decision are incorporated in this decision for clarity of the record.

In a ruling on an application for rehearing, claimant was allowed to have surgery with Dr. Fabiano, if that surgery was recommended by Dr. Schulte

In February of 2016 claimant was evaluated by Dr. Fabiano. A January 7, 2016 MRI of the right shoulder showed a surface tear of the distal supraspinatus tendon involving less than 50 percent of the tendon thickness. (Exhibit 1) Claimant was given an injection in the right shoulder and told to follow-up in two weeks. (Alternate Medical Care Decision, August 11, 2016, page 2)

In February and April claimant missed four appointments with Dr. Fabiano. Claimant testified, at the August 2016 alternate medical care hearing, he missed these appointments due to lack of income and transportation. The record indicated Dr. Fabiano refused to treat claimant due to missed appointments. (Alternate Medical Care Decision, August 11, 2016, page 2)

On April 29, 2016 claimant was evaluated by Dr. Fabiano. Claimant was assessed as having a right rotator cuff tendonitis, a right impingement syndrome and a partial tear. Arthroscopic surgery was discussed and chosen as a treatment option. (Ex. 1)

In April, May, June and July claimant was put under surveillance. Surveillance showed claimant moving a motorcycle off a trailer with the help of two others, shopping, driving, and riding a motorcycle. (Alternate Medical Care Decision, August 11, 2016, page 2)

Defendant insurer requested Dr. Fabiano review surveillance footage and give an opinion for treatment. Dr. Fabiano declined to review surveillance. (Alternate Medical Care Decision, August 11, 2016, page 2)

On September 1, 2016 claimant was evaluated by Dr. Schulte. Dr. Schulte reviewed medical records, the January 2016 MRI and surveillance footage. Dr. Schulte saw nothing in claimant's exam that warranted further intervention. He did not give claimant restrictions. He recommended against arthroscopic surgery. He found

claimant was at maximum medical improvement and had no permanent impairment. (Ex. A)

In a September 20, 2016 letter, claimant's counsel asked Dr. Fabiano to review past medical records and Dr. Schulte's exam notes. Dr. Fabiano was asked if surgery was still recommended. (Ex. 4)

In a handwritten note, dated September 27, 2016, Dr. Fabiano wrote "no change in my recommendations". The note also appears to indicate the January 2016 MRI showed pathology. (Ex. 4)

In an October 3, 2016 letter to claimant's counsel, defendants' counsel declined claimant's request for surgery with Dr. Fabiano. (Ex. B)

In a professional statement at the November hearing, claimant's counsel indicated claimant still wanted to have shoulder surgery with Dr. Fabiano.

CONCLUSION OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

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.

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 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); 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. v. Reynolds, 562 N.W.2d 433 (Iowa 1997), the court approvingly quoted Bowles v. Los Lunas Schools, 109 N.M. 100, 781 P.2d 1178 (App. 1989):

The doctrine of res judicata includes both claim preclusion and issue preclusion. Winnebago Industries, Inc. v. Haverly, 727 N.W.2d 567, 571 (Iowa 2006). Principles of res judicata are applicable to administrative decisions. Bd. of Sup'rs. Carroll Cty. v. Chi. & N.W. Transp. Co., 260 N.W.2d 813, (Iowa 1977). Under issue preclusion, once a court has decided an issue of fact or law necessary to its judgment, the same issue cannot be re-litigated in later proceedings. The doctorate of issue preclusion applies if:

1. The issue determined in the prior action is identical to the present issue;

2. The issue was raised and litigated in prior action;

3. The issue was material and relevant to the disposition and the prior actions;

4. The determination made of the issue in the prior action was necessary and essential to the resulting judgment.

Winnebago Industries, Inc. v. Haverly, 727 N.W.2d at 571-572 (Iowa 2006).

The doctrine of res judicata provides that:

> A final judgment rendered by a court of competent jurisdiction on merits is conclusive as to the rights of the parties . . ., and as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand, or cause of action.

(Blacks Law Dictionary, 1305 (6th Edition) 1990).

To establish the bar under the doctrine of res judicata, the party asserting the bar must establish that the former case involves:

1. The same parties or parties in privity;

2. The same cause of action;

3. The same issues.

Bloom v. Steeve, 165 N.W.2d 825, 827-828 (Iowa 1969).

Claimant sought an order from this agency, in his August 2016 petition, requiring defendants to authorize surgery by Dr. Fabiano. That decision ordered defendants to

authorize surgery if recommended as a treatment option after evaluation with Dr. Schulte. Dr. Schulte evaluated claimant, and found nothing on exam that warranted further intervention. Dr. Schulte recommended against surgery. In November of 2016 claimant filed a second petition requesting authorization for the surgery recommended by Dr. Fabiano. This is the same relief claimant sought in his August 2016 petition.

The issue in the November 2016 petition, authorization of surgery recommended by Dr. Fabiano, is the same issue determined in the August 2016 alternate medical care decision. That issue has already been raised and litigated. That issue was the sole issue in the August 2016 alternate medical care decision. The issue of claimant's request for surgery with Dr. Fabiano has already been litigated. The issue of surgery recommended by Dr. Fabiano has already been determined by the August 2016 alternate medical care decision. As such, the request for surgery recommended by Dr. Fabiano is barred by the doctrines of issue and claim preclusion.

Assuming for arguments sake the doctrines of issue and claim preclusion do not bar claimant from re-litigating this matter, claimant's petition for alternate medical care would still be denied.

As detailed in the August 2016 alternate medical care decision, Dr. Fabiano declined to review or comment on surveillance. There is still no evidence in the record Dr. Fabiano consents to performing the surgery claimant seeks. Claimant was evaluated by Dr. Schulte. Dr. Schulte is an orthopedic surgeon who specializes in shoulder surgeries. Dr. Schulte reviewed medical records, the January 2016 MRI, and surveillance. He opined surgery was not recommended. Given this record, claimant's petition is also denied for a failure to carry the burden of proof the authorized care is unreasonable.

ORDER

Therefore it is ordered that claimant's petition is denied for the reasons detailed above.

Signed and filed this 22nd day of November, 2016.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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