

## BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DENNIS DORR,

Claimant,

vs.

ANTHONY P &amp; L, INC.,

Employer,

and

AMERICAN INTERSTATE INSURANCE,

Insurance Carrier,  
Defendants.

File No. 1664167.02

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 procedure of rule 876 IAC 4.48 is invoked by claimant, Dennis Dorr. Claimant appeared personally and through his attorney, Leif Erickson. Defendants appeared through their attorney, Kathryn Hartnett.

The alternate medical care claim came on for a telephonic hearing on September 10, 2021. The proceedings were digitally recorded. That recording constitutes the official record of this proceeding. 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 and any appeal of the decision would be to the Iowa District Court pursuant to Iowa Code section 17A.

Claimant offered exhibits 1-5, which include 12 pages. Defendants offered exhibits A and B, which include 3 pages. Dennis Dorr testified on his own behalf. No other witnesses were called to testify and the evidentiary record closed at the conclusion of the alternate medical care hearing.

## ISSUE

The issue presented for resolution is whether the claimant is entitled to authorization of care through and at the direction of Jitendrakumar S. Gupta, M.D.,

including but not limited to authorization of additional medications prescribed including Breo Ellipta, montelukast, and Fasenra.

### FINDINGS OF FACT

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

Claimant, Dennis Dorr, is a 69-year-old man, who sustained a pulmonary injury when exposure to hydrogen sulfide acid in the course of his employment on May 2, 2019. (Claimant's Testimony) As a result of that exposure, claimant was rendered unresponsive, went into cardiopulmonary arrest, and required CPR to be resuscitated. (Claimant's Ex. 2, p. 1) Defendants admit the injury and current causal connection of the asserted pulmonary injury. (Answer; Hearing Record)

Defendants selected the authorized treating physician, Dr. Gupta. Dr. Gupta has provided claimant care on an ongoing basis for his pulmonary condition. Beginning in March 2020, Dr. Gupta prescribed Fasenra for claimant. This is an injectable drug that claimant takes every other month. (Claimant's Testimony) It is quite expensive. (Claimant's Exhibit 4)

Defendants authorized and paid for Fasenra from March 2020 through April 2021. However, in April 2021, defendants quit authorizing Fasenra and other medications for claimant. Claimant now obtains those medications through Medicare and pays some portion of those expenses out-of-pocket. (Claimant's Testimony)

The evidence in this case demonstrates that Dr. Gupta last evaluated claimant on July 30, 2021. Claimant testified this appointment was actually moved up due to his deteriorating pulmonary function. At the July 30, 2021 evaluation, Dr. Gupta noted, "He was doing quite well on FESENRA[,] Breo Singulair[,] and albuterol. His insurance company started denying the payments for Fasenra and he missed 2 doses of Fasenra. He started having significant dyspnea with cough and wheezing.... Lungs wise he has significantly gotten worse since his Fasenra was discontinued." (Claimant's Ex. 1, p. 1)

That same date, Dr. Gupta opined that claimant "has very severe persistent asthma which started after getting exposed to hydrogen sulfide, suggestive of very severe persistent asthma in my opinion.... He does need Fasenra along with Breo and Singulair along with albuterol. Not using his medication does make his lung function significantly worse." (Claimant's Ex. 1, p. 2) Claimant testified that Fasenra significantly improved his lung function and condition.

Defendants obtained an independent medical evaluation performed by Dr. Jeffrey Jarrett on September 10, 2020. (Claimant's testimony) Following his evaluation, Dr. Jarrett noted, "From his clinic visit and evaluation, it is not clear that he is obtaining significant benefit from the injections, I am not certain that he would require ongoing therapy." (Claimant's Ex. 2, p. 2) However, Dr. Jarrett's full opinion is not included in this evidentiary record. Claimant testified that Dr. Jarrett told him Dr. Gupta

was treating him very aggressively, but recommended claimant continue taking the medications recommended by Dr. Gupta because those medications were working.

Defendants assert that Dr. Gupta has not been responsive to their inquiries. (Claimant's Ex. 2, p. 2) Specifically, defense counsel asserts that Dr. Gupta has not been willing to review additional medical records, view claimant's surveillance video, and that defendants have scheduled a deposition of Dr. Gupta to occur on September 16, 2021. (Defendants' Ex. B) Defendants assert they will require Dr. Gupta to review the additional evidence during the deposition to ensure that his opinions about ongoing and future care are reasonable and necessary. Defendants also conceded that they would authorize the prescribed medications if Dr. Gupta felt them necessary and reasonable after his deposition. Therefore, defendants contend that the request for alternate medical care is premature and should be "tabled" until after Dr. Gupta's deposition in six days.

In reality, the evidentiary record in this case discloses that defendants selected the authorized medical provider, Dr. Gupta. The record establishes that Dr. Gupta currently recommends ongoing use of the medications sought by claimant, including Breo Ellipta, montelukast, and Fasenra. (Claimant's Ex. 2, p. 3; Claimant's Ex. 3) As of July 14, 2021, Dr. Gupta continues to recommend the use of these medications. As noted previously, defendants admit liability for the ongoing condition.

This evidentiary record does not contain any alternative treatment recommendations made by Dr. Gupta or Dr. Jarrett. Rather, Dr. Gupta has recommended ongoing use of certain medications. Defendants challenge the reasonableness and necessity of those medications but offer no alternative treatment plan. Offering no treatment to claimant is not reasonable.

Claimant testified that the insurance carrier denied and discontinued authorization and payment of Fasenra in April 2021. Claimant missed two doses of the medication and his condition deteriorated. While defendants assert that the medications may not be reasonable and necessary and that they need additional opinions from Dr. Gupta, realistically they only offer the opinion of Dr. Jarrett, who opines it is "not clear" there is significant benefit from Fasenra and that he is "not certain" that claimant would require ongoing use of the medication.

However, Dr. Garrett's opinion is from a year ago. Dr. Gupta re-evaluated claimant in July 2021. At that time, claimant's pulmonary function had declined significantly after missing doses of Fasenra. Dr. Gupta reiterated the need for the Fasenra in July 2021.

While Dr. Gupta may not have been as responsive to defendants as they desire, defendants really produce no medical evidence to suggest that their refusal to authorize medications was reasonable. No physician in this record opines that claimant may discontinue all medications for his condition. Yet, defendants have declined to authorize medications. Defendants assert that they continue to authorize pulmonary

care for claimant's condition, but they are not authorizing medications recommended by the physician they chose. In reality, defendants have a very weak opinion questioning the usefulness and necessity of ongoing medication usage by claimant that was disproved when claimant actually missed doses of Fasenra. Instead, defendants contend that this decision should be delayed until additional opinions are obtained by Dr. Gupta.

Claimant presents convincing evidence that he needs Fasenra and other medications to manage his pulmonary symptoms. I find that defendants are attempting to determine how claimant should be diagnosed and treated and acting contrary to the current recommendations of the authorized treating physician. I also find that claimant has proven the care currently being offered by defendants, essentially no medications until they conduct additional investigation, is unreasonable. I also find that the claimant has proven that the care offered by defendants (no use of Fasenra) is unreasonable and results in a significant worsening of his pulmonary functioning. Therefore, I find that the treatment recommendations of Dr. Gupta is more extensive and superior to the care being authorized by defendants.

#### REASONING AND CONCLUSIONS OF LAW

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).

An employer's right to select the provider of medical treatment to an injured worker does not include the right to determine how an injured worker should be diagnosed, evaluated, treated, or other matters of professional medical judgment. Assmann v. Blue Star Foods, File No. 866389 (Declaratory Ruling, May 19, 1988).

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 Decision 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, I found that defendants are essentially offering no medications as part of their authorized medical care for claimant. I found that claimant proved that care to be unreasonable. I also found that the treatment recommendations made by the authorized treating physician, Dr. Gupta, are superior to and more extensive than the care currently being authorized or offered by defendants.

In reality, defendants rely on a year-old medical opinion that is less than certain as to claimant's need for Fasenra to challenge ongoing care recommendations. However, Dr. Gupta evaluated claimant as recently as July 2021 and recommends additional medication usage, which has improved claimant's pulmonary function. Claimant has proven that the care offered by defendants is unreasonable and that Dr. Gupta's recommendations are reasonable and necessary.

Defendants contend that the alternate medical care determination is premature and should be "tabled" until after Dr. Gupta's deposition. Yet, Dr. Gupta's treatment and recommendations are clear in this record. I conclude the issue is ripe for determination and that providing no medications for claimant's condition in spite of Dr. Gupta's recommendations is not reasonable.

At this time, defendants admit liability for the underlying injury and the current causal connection of claimant's ongoing condition. They have selected the treating physician, Dr. Gupta. They should follow Dr. Gupta's recommendations.

At this time, Dr. Gupta's recommendations include use of certain medications for management of claimant's pulmonary condition. Those recommendations are reasonable and superior to the defendants' offer of no medications. If, as defendants hope and project, Dr. Gupta changes his treatment recommendations after his deposition, defendants would be well within their rights to authorize the treatment recommendations offered at that time. However, at this time, the much superior evidence is the treatment recommendations of Dr. Gupta. Defendants should follow the

recommendations of Dr. Gupta, including his recommendations pertaining to medication usage.

ORDER


THEREFORE, IT IS ORDERED:

The claimant's petition for alternate medical care is granted.

Dr. Gupta remains and is the authorized treating physician.

Defendants should authorize and follow the treatment recommendations of Dr. Gupta, including his current recommendation for use of Breo Ellipta, montelukast, and Fasenra.

Signed and filed this 13<sup>th</sup> day of September, 2021.

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

WILLIAM H. GRELL  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Leif Erickson (via WCES)

Kathryn Hartnett (via WCES)