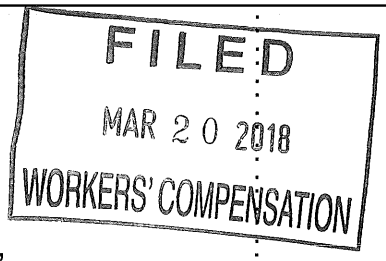
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ERIC AKKERMAN, Claimant, vs. CITY OF DES MOINES, Employer, Self-Insured, Defendants.		File No. 5051969 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, Eric Akkerman. Claimant appeared personally and through his attorney, Christopher Spaulding. Defendants appeared through their attorney, Luke DeSmet.

The alternate medical care claim came on for hearing on March 20, 2018. 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.

At the commencement of the hearing, it became apparent that the petition for alternate medical care alleged an inaccurate date of injury. This injury was initially alleged to have occurred on December 1, 2014. However, in a prior arbitration decision, another deputy workers' compensation commissioner found that the proper injury date for claimant's left knee condition was February 24, 2015. Claimant moved to amend the alternate medical care petition to allege the proper injury date of February 24, 2015 and the amendment of the petition was granted to permit the proceedings to move forward.

The evidentiary record consists of claimant's exhibits 1-2, which include a total of 4 pages. The record also contains defendant's exhibit A, which contains 10 pages. All exhibits were received without objection. Claimant testified on his own behalf. No other witnesses were called to testify. Counsel provided cogent and helpful legal arguments and responses to the undersigned's questions. The record closed at the end of the alternate medical care telephonic hearing.

ISSUE

The issue presented for resolution is whether the claimant is entitled to a second opinion evaluation with an orthopaedic surgeon other than the surgeon selected by defendants.

FINDINGS OF FACT

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

Eric Akkerman sustained a left knee injury that arose out of and in the course of his employment on February 24, 2015. Mr. Akkerman has submitted to medical treatment through an orthopaedic surgeon, Matthew DeWall, M.D., selected by defendant. Claimant has undergone three left knee surgeries, injections and draining of his left knee. However, claimant continues to experience symptoms in his left knee that include sharp pain on the inside of his left knee, weakness that has resulted in his left knee giving out, and swelling of the left knee.

Dr. DeWall last evaluated Mr. Akkerman on April 20, 2017. (Defendant's Exhibit A, p. 10) At that time, Dr. DeWall expressed an impression that claimant has osteoarthritis and bone edema. However, Dr. DeWall recommended against any further surgical intervention at that time. Dr. DeWall noted that claimant has lost most of his meniscus as a result of prior surgical procedures and he advised claimant that he is too young to undergo a total left knee replacement at this time. (Defendant's Ex. A, p. 10; Claimant's testimony) Dr. DeWall did not explain at what age he would consider performing the knee replacement for claimant. (Claimant's testimony)

Claimant testified that Dr. DeWall made him feel as though he should "just be a man" and deal with the symptoms in his left knee. Yet, Dr. DeWall's medical records and claimant's testimony demonstrate that Dr. DeWall has offered additional treatment options that do provide temporary symptomatic relief, including draining claimant's left knee and steroid injections into the joint. (Claimant's testimony; Defendant's Ex. A, p. 10) Claimant has not sought any of the additional treatment modalities since April 2017 and acknowledged that he has not submitted to any sustained treatment or series of injections to date. (Claimant's testimony)

When claimant did request alternate medical care, defendants scheduled a follow-up evaluation with Dr. DeWall to occur on February 28, 2018. (Claimant's Ex. 2, p. 2) Claimant testified that this appointment was not conveyed to him and he did not attend the scheduled evaluation with Dr. DeWall. (Claimant's testimony)

Claimant requests a second opinion from another orthopaedic surgeon to determine if there is anything else that can be done for his left knee at this time. Claimant expressed an opinion and belief that there should be something that can be done for his left knee. No physician has suggested or recommended a second opinion.

No physician has suggested or recommended an alternate course of medical care beyond or in the place of that offered by Dr. DeWall.

Mr. Akkerman alleges that it is not reasonable for defendant to offer care through Dr. DeWall because there has been a breakdown in the physician-patient relationship between he and Dr. DeWall. Realistically, however, claimant is just frustrated with the care offered, lack of results, and lack of any definitive surgical recommendations from Dr. DeWall. Claimant subjectively asserts that he distrusts Dr. DeWall because he was selected by the employer and claimant believes Dr. DeWall is just trying to keep costs down for the employer. He offers no evidence of the accuracy of his statement and conceded that he would have submitted to a total knee replacement with Dr. DeWall if it had been recommended previously. I find that claimant has not proven a breakdown in the physician-patient relationship.

I certainly understand claimant's desire for a second opinion. His request for a second opinion is reasonable and may, in fact, be an appropriate medical approach to this condition. Another surgeon may have additional recommendations for claimant, or may confirm Dr. DeWall's opinion and provide claimant some peace of mind that his medical care is appropriate and reasonable. However, there is no evidence in this evidentiary record to demonstrate that the care offered by defendant through Dr. DeWall is unreasonable.

Dr. DeWall has left open the possibility for claimant to return for further care. Dr. DeWall has additional treatment options he has recommended, including draining the knee and injections. Having not evaluated claimant for almost a year, it is reasonable for defendant to offer a return evaluation with Dr. DeWall to determine if there has been a change in claimant's left knee that warrants additional treatment at this time. It is certainly not clear that Dr. DeWall has nothing further to offer claimant or that there is an alternative and superior medical approach that could be pursued at this time.

While I understand claimant's desire for a second opinion and believe this desire is reasonable, I find that defendant is offering reasonable medical care at this time. Specifically, I find that claimant has failed to prove the care offered by defendant is unreasonable. Claimant has failed to prove a breakdown in the physician-patient relationship or that alternate, or superior, care is available for claimant's condition.

REASONING AND CONCLUSIONS OF LAW

Initially, I have some concerns in this case about claimant's notification of dissatisfaction. Claimant certainly gave written notice of his dissatisfaction. However, an exchange of written communications between counsel demonstrates that the defendant requested clarification of the basis of claimant's assertion that there was a breakdown in the physician-patient relationship between claimant and Dr. DeWall. Claimant, through counsel, declined to provide any specific information or clarification of

this alleged breakdown and, instead, simply indicated that the allegations would be put forth in the petition for alternate medical care.

Iowa Code section 85.27(4) provides, in pertinent part, "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." In this instance, the employer requested clarification of the basis of dissatisfaction and that request was declined.

The purpose of requiring the claimant to express his dissatisfaction is to encourage informal resolution of these alternate medical care claims without the need for intervention by this agency. Refusing to discuss the basis for dissatisfaction until a petition for alternate medical care is filed defeats the purpose of having the requirement in the statute and causes more petitions for alternate medical care to be filed. Many disputes could and are resolved informally if the parties communicate candidly and forthrightly before filing a petition for alternate medical care.

This agency has an increasing workload and is operating with fewer deputy workers' compensation commissioners than it has had over the past five years. The agency is not equipped, nor should it be equipped, to handle voluminous alternate medical care proceedings. Therefore, it is important that parties participate fully and attempt informal resolution of disputes without the need for agency intervention.

In this situation, claimant did assert that the basis for dissatisfaction was a breakdown in the physician-patient relationship. (Claimant's Ex. 1) Claimant's assertion is arguably minimally compliant with the requirement contained in Iowa Code section 85.27(4). Realistically, however, claimant's refusal to explain the basis for the breakdown in the physician-patient relationship could serve as a basis for dismissal of claimant's petition for alternate medical care but likely would only serve to increase the workload of this agency, as claimant would likely file another petition for alternate medical care after providing that explanation in writing to defense counsel. Therefore, I conclude that it is more appropriate to move forward on the merits of this claim for alternate medical care, but remind counsel that refusal to explain the basis of dissatisfaction could serve as a reason for dismissal in the future. Iowa Code section 85.27(4).

Claimant contends that defendants lost all right to select a medical provider in this case through their initial denial of Mr. Akkerman's left knee injury. Claimant cites R. R. Donnelly & Sons v. Barnett, 670 N.W.2d 190 (Iowa 2003) in support of this assertion. Indeed, Barnett indicates that the employer does not have the right to direct medical care or assert an authorization defense if it denies liability. Id. at 197-198. However, the Court also clarified that its analysis dealt with "[a]n alternate medical care claim brought by an injured worker prior to a final determination of liability of an employer." Id. at 196.

Barnett was further clarified by the Iowa Supreme Court Bell Bros. Heating and Air Conditioning v. Gwinn, 779 N.W.2d 193 (Iowa 2010). In Gwinn, the Court noted that "the statutory responsibility of the employer to furnish reasonable medical care to the employee or pay other employee benefits described in the workers' compensation statute is not imposed until the issue of compensability is resolved in favor of the employee." Id. at 204. However, the Court noted that this applies only before liability is proven for the injury. Id. at 204-205. Presumably, once liability is established, the employer's burden and acceptance of a claim also permits the employer to exercise its statutory right to select the necessary medical care and the employee again bears the burden to establish that the care offered by the employer is not reasonable. Iowa Code section 85.27(4); Gwinn, 779 N.W.2d at 206 ("The statute only requires the employer to furnish reasonable medical care.").

I conclude claimant's contention that defendants lost the right to select the medical provider was waived for the entirety of the claim is legally erroneous. Therefore, I conclude that claimant must prove that the medical care offered by defendant is unreasonable or not reasonably suited to treat his injury.

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 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).

Mr. Akkerman asserts one basis for his challenge to the reasonableness of the care offered by defendants. Specifically, claimant asserted that there has been a breakdown in the physician-patient relationship between Dr. DeWall and claimant.

This agency has held that a breakdown in the physician-patient relationship is sufficient reason and basis to find offered medical care is no longer reasonable.

Alternate care included alternate physicians when there is a breakdown in a physician/patient relationship. Seibert v. State of Iowa, File No. 938579 (September 14, 1994); Nueone v. John Morrell & Co., File No. 1022976 (January 27, 1994); Williams v. High Rise Const., File No. 1025415 (February 24, 1993); Wallech v. FDL, File No. 1020245 (September 3, 1992) (aff'd Dist Ct June 21, 1993).

However, in this instance, I found that there is not a significant breakdown in the physician-patient relationship. Claimant testified that he distrusts Dr. DeWall based on speculation that Dr. DeWall is attempting to help the employer keep costs down. However, claimant also conceded that he would have had a total left knee replacement performed by Dr. DeWall if it had been recommended previously. Dr. DeWall offered to evaluate and treat claimant again and provided specific medical procedures that can be performed to provide at least temporary relief for claimant's left knee symptoms.

Having found that claimant desires a second opinion to determine if there are alternate medical procedures or treatment that can be rendered for his left knee, I find that there is not a true breakdown in the physician-patient relationship. Rather, Mr. Akkerman is frustrated by his ongoing left knee symptoms. He desires additional, definitive treatment to provide symptom relief.

Dr. DeWall has not evaluated claimant since April 2017. It is unknown specifically what, if any, additional treatment options Dr. DeWall may have available at this time. However, Dr. DeWall made further recommendations for treatment in April 2017 and left open the possibility for claimant to return to him for additional care. Having found that it is reasonable to offer a return evaluation with Dr. DeWall, I conclude that claimant has not proven entitlement to alternate medical care.

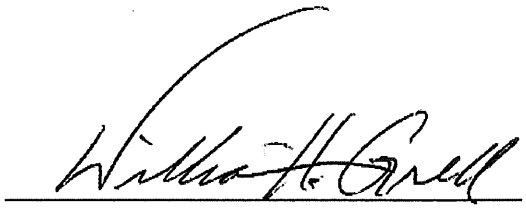
Again, I certainly understand claimant's desire for a second medical opinion. His request for a second opinion is reasonable. However, desirability of a certain course of action is not the legal standard utilized in an alternate medical care proceeding. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). I conclude that claimant has failed to carry his burden of proof that the medical care offered by defendants at this time is unreasonable.

ORDER

THEREFORE IT IS ORDERED:

Claimant's petition for alternate medical care is denied and dismissed without prejudice.

Signed and filed this 20th day of March, 2018.



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