BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KENNETH BURROUGHS,

Claimant,

vs.

CROWN LIFT TRUCKS,

Employer,

and

ACE AMERICAN INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5054437

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, Kenneth Burroughs.

The alternate medical care claim came on for hearing on September 18, 2017. The proceedings were digitally recorded which constitutes the official record of this proceeding. This ruling is designated final agency action and any appeal of the decision would be to the Iowa district court pursuant to Iowa Code 17A.

The record consists of Claimant's Exhibits 1 through 5, Defendants' Exhibits A through E. Administrative notice was take of the arbitration decision of November 28, 2016 in File No 5054436 and File No. 5054437.

The Petition for Alternate Medical Care filed by claimant listed March 10, 2014 as the date of injury and was made part of File No. 5054436. Upon review of the arbitration decision of November 28, 2016 it was revealed that the claimant was not awarded any additional indemnity or medical benefits for the March 10, 2014 injury in File No 5054436. Claimant was awarded indemnity benefits and medical care for the injury date of April 21, 2017, File No 5054437. Claimant moved to amend his petition to list April 21, 2017 as the date of injury. Defendants had no objection and were willing and able to proceed with the alternate medical care proceeding. The motion to amend was granted.

ISSUE

The issue presented for resolution is whether the claimant is entitled to alternate medical care consisting of an EMG, referral of claimant to a pain clinic and whether claimant's medical care should be transferred to Anthony Kwan, M.D.

FINDINGS OF FACT

The undersigned having considered all of the testimony and evidence in the record finds:

Defendants admitted liability for an injury occurring on April 21, 2015.

The claimant was found entitled to indemnity benefit and medical care in an arbitration decision of November 28, 2016. The arbitration decision in the Statement of Facts portion of the arbitration decision:

> Dr. Garrels also recommended an EMG, which was not conducted. (Ex. A, p. 26) When asked about the lack of the EMG, Benson felt that there was no purpose to it. (Benson Depo., p. 29, p. 51)

(November 28, 2016, Arb., page 5)

The arbitration decision held in the Conclusions of Law section:

> Because of the finding that claimant's April 21, 2015, injury arose out of and in the course of his employment, claimant is entitled to ongoing care recommended by his treating providers such as the EMG test, pain clinic referral, and any other testing his treating providers recommend.
>
> Defendants still have the right to direct care.

(November 28, 2016, Arb., p. 11)

The arbitration decision held in the Order section:

> That claimant is entitled to ongoing medical care recommended by Dr. Garrels and Ms. Benson, as well as any other medical care reasonable and necessary to treat claimant's work related injury.

(November 28, 2016, Arb., p. 15)

The arbitration decision became a final agency decision when both parties dismissed their appeals on January 11, 2017.

On February 11, 2017 claimant wrote to defendants and requested medical care mentioned in the arbitration decision, including an EMG, pain clinic referral and any other testing claimant's physicians recommend. (Exhibit 2, p. 1) On February 15, 2017, claimant's counsel emailed defendants' counsel and asked about claimant having treatment that was awarded in the arbitration decision. (Ex. 3, p. 1) On February 21, 2017, claimant's counsel emailed defendants' counsel about the status of the "ALT Care ordered in the Arbitration Decision." (Ex. 3, p. 1) On August 14, 2017, claimant's counsel stated, "...and as to medical we have withheld filing our Alt Care Petition." (Ex. 4, p. 1) On September 1, 2017, claimant notified defendants that he was filing an alternate medical care petition. (Ex. A, p. 1) On September 5, 2017, claimant's Original Notice and Petition for alternate Medical Care was filed with this agency.

Defendants informed claimant on September 5, 2017 that they had authorized claimant to return to Rick Garrels, M.D., and were working on scheduling an appointment. (Ex. B, p. 2) On September 5, 2017, defendants informed claimant that an appointment had been scheduled with Dr. Garrels on September 13, 2017. (Ex. D, p. 2) Claimant did not attend this appointment. (Ex. E, p. 1)

On September 18, 2017, claimant filed Exhibit 5 which requested that Dr. Kwan provide the EMG and treat or refer claimant. The claimant also asserted that the appointment did not comply with the arbitration decision which ordered "alternate care." (Ex. 5, p. 2)

Claimant has not had treatment by Dr. Garrels since December 2015. There was no evidence presented that additional recommendations for treatment have been made since December 2015.

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); 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):

> [T]he words "reasonable" and "adequate" appear to describe the same standard.
>
> [The New Mexico rule] requires the employer to provide a certain standard of care and excuses the employer from any obligation to provide other services only if that standard is met. We construe the terms "reasonable" and "adequate" as describing care that is both appropriate to the injury and sufficient to bring the worker to maximum recovery.

The commissioner is justified in ordering alternate care when employer-authorized care has not been effective and evidence shows that such care is "inferior or less extensive" than other available care requested by the employee. Long, 528 N.W.2d at 124; Pirelli-Armstrong Tire Co., 562 N.W.2d at 437.

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

Claimant asserts that the defendants have failed to provide the alternate care that was ordered in the arbitration decision. Defendants are correct that no specific alternative medical care was ordered in the decision. Defendants were ordered to provide medical care pursuant to Iowa Code section 85.27.

A careful reading of the arbitration decision does not support the claimant that defendants were required to provide alternative medical care in the form of an EMG and referral to a pain clinic.

The arbitration decision stated that PA-C Benson felt that an EMG was not needed. (November 28, 2016, Arb. p. 5) Given the length of time since the claimant has received treatment (over 1 ½ years) it is not unreasonable for defendants to have the claimant examined again. The exact language in the Conclusions of Law section required defendants to provide "ongoing care recommended by his treating providers such as the EMG test, pain clinic referral, and any other testing his treating providers recommend." (November 28, 2016, Arb. p. 11) I do not have any current record for ongoing care and ongoing treatment. If such treatment is recommended by Dr. Garrels defendants will be required to provide such treatment. I have no evidence that the defendants are not providing reasonable care. As such, the claimant's request for alternate medical care is denied.

ORDER

THEREFORE IT IS ORDERED:

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

Signed and filed this 19th day of September, 2017.

JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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