BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KENNETH BURSELL,

Claimant,

vs.

LYNCH LIVESTOCK, INC.,

Employer,

and

NATIONWIDE AGRIBUSINESS INSURANCE,

Insurance Carrier,
Defendants.

File No. 5032265

REMAND

DECISION

Head Note No.: 2701

STATEMENT OF THE CASE

This matter is before the Iowa Workers' Compensation Commissioner on remand from the Iowa Court of Appeals following a decision dated May 20, 2015.

This matter was initially heard on April 19, 2010. The alternate medical care decision in this case found claimant proved entitlement to alternate medical care consisting of a laparoscopic lumbar sympathectomy.

A petition for judicial review was filed. A decision was issued on June 16, 2014. The district court decision determined the Iowa Workers' Compensation Commission failed to apply the correct legal test in granting claimant's petition for alternate medical care.

The matter was appealed to the Iowa Supreme Court. In a May 20, 2015 decision, the Iowa Court of Appeals affirmed the district court's remand decision. It remanded the case back to the district court, to remand the case back to the agency, to apply the correct legal standard to determine if claimant had carried his burden of proof he was entitled to alternate medical care.

As noted in the Iowa Court of Appeals and the district court decision, the administrative file indicates there was a problem in the recording of the agency hearing. As a result, the parties filed a joint bill of exceptions with the district court in September

of 2012. Along with the joint bill of exceptions, the record in this matter consists of claimant's Exhibits 1, pages 1 through 10, and defendants' Exhibits A through D. Prior to hearing, claimant filed 16 pages of exhibits. Before hearing claimant was instructed by the deputy workers' compensation commissioner to identify which ten pages claimant wished to use as exhibits for the hearing, under rule 876 IAC 4.48(9). Claimant complied, and the exhibits were numbered and marked by the deputy workers' compensation commissioner. (Joint bill of exceptions (JBE), paragraph 2)

Upon written delegation of authority by the workers' compensation commissioner under Iowa Code section 86.3, I render this decision as a final agency decision on behalf of the Iowa Workers' Compensation Commissioner.

ISSUE

Did claimant carry his burden of proof that he was entitled to alternate medical care consisting of authorization of a lumbar sympathectomy?

FINDINGS OF FACT

Claimant sustained a work-related injury on December 31, 2008. Claimant slipped when getting out of a skid loader and injured his left foot. (JBE, paragraph 7)

Claimant initially treated for the injury at the Floyd Valley Hospital. (JBE, paragraph 8)

Claimant began treating with Valerie Rash, D.P.M. Claimant testified he selected Dr. Rash, and defendants paid for Dr. Rash's care. (JBE, paragraph 9)

Claimant underwent two tarsal tunnel decompressions to the left foot. (Exhibit 1, page 1; Ex. B)

Dr. Rash assessed claimant as having complex regional pain syndrome (CRPS) in the left lower extremity. (Ex. 1, p. 1)

Claimant was referred by Dr. Rash to John Cook, M.D. The employer accepted the referral to Dr. Cook and paid for the treatment. (JBE, paragraph 11)

On January 6, 2010 claimant was evaluated by Dr. Cook. A diagnostic lumbar facet block was performed approximately one month prior, and claimant had good pain relief from the block. Dr. Cook recommended claimant be provided with a lumbar sympathectomy. He referred claimant to Patrick Kelly, M.D. for surgery. (Ex. 1, p. 3; JBE, paragraph 12)

In a January 19, 2010 letter, Dr. Cook indicated a lumbar sympathectomy was not only a reasonable but a necessary treatment for claimant to have so he could resolve his CRPS long term. Dr. Cook based this opinion on claimant's responses to a

December of 2009 sympathetic nerve block. Dr. Cook recommended against further physical therapy. (Ex. 1, p. 4)

Claimant was sent for an independent medical evaluation (IME) with Jerry Blow, M.D. Due to inclement weather, claimant did not attend the exam. Dr. Blow did a records review and recommended against claimant having a lumbar sympathectomy. (JBE, paragraph 25)

In a January 24, 2010 letter Dr. Cook indicated he reviewed Dr. Blow's report. Dr. Cook indicated delaying surgery was unnecessary. He opined that Dr. Kelly was an excellent surgeon and recommended against further delay of surgery. (Ex. 1, p. 7)

On January 28, 2010 claimant was evaluated by Leonel Herrera, M.D. Dr. Herrera found no evidence of CRPS. He assessed claimant as having chronic pain syndrome in the left lower extremity, etiology unknown. He opined a lumbar sympathectomy was not going to resolve claimant's pain syndrome, as he did not believe claimant had CRPS. Dr. Herrera recommended claimant return back to active exercise and gradually return to putting weight on his left leg to the point where he could return to work. (Ex. A, pp. 1-2)

In a February 11, 2010 letter Dr. Kelly recommended maximum conservative treatment prior to performing surgery. He noted when all else failed a lumbar sympathectomy was an appropriate course of treatment. Dr. Kelly recommended doing a full course of treatment through Dr. Blow's office prior to undergoing any surgical intervention. (Ex. 1, p. 8; JBE, paragraph 28)

Claimant was sent for further evaluation with Timothy Fitzgibbons, M.D. Dr. Fitzgibbons is an orthopedic surgeon specializing in foot and ankle care. In a February 11, 2010 report Dr. Fitzgibbons recommended against a sympathectomy. He opined claimant probably had somewhat of a disuse dystrophy. He opined claimant's symptoms were out of proportion. Dr. Fitzgibbons recommended claimant undergo a combination of psychotherapy and physical therapy. (Ex. C, pp. 7-8; JBE, paragraph 30)

On February 17, 2010 claimant was evaluated by Dr. Cook. Dr. Cook again recommended a lumbar sympathectomy. Dr. Cook indicated he was afraid if there was further delay, claimant would be at risk of losing his left lower extremity. (Ex. 1, p. 5)

On February 17, 2010 claimant was evaluated by Angie Rakes, M.D. Dr. Rakes opined claimant had CRPS. She recommended claimant either have a surgical sympathectomy or a spinal cord stimulator. (Ex. 4, pp. 9-10)

In a February 27, 2010 note, Dr. Herrera again recommended against the lumbar sympathectomy. He opines claimant's condition was due to prior surgeries and claimant's non-use of the foot. He indicated claimant should participate in an active exercise program and continue to be seen at the UNMC Pain Clinic. (Ex. B)

On April 14, 2010 Dr. Rakes responded to a letter from defense counsel after reviewing Dr. Fitzgibbons' notes. She recommended claimant have a second opinion from a neurosurgeon prior to having a sympathectomy. She also indicated a sympathectomy was a significant procedure with a low likelihood of success. She noted the procedure is not commonly done. (Ex. D, pp. 9-10)

Claimant indicated at the time of hearing he had not gone through any of the medical care recommended by Dr. Blow. (JBE, paragraph 29)

CONCLUSIONS 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.

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).

When a designated physician refers a patient to another physician, that physician acts as the defendant employer's agent. Permission for the referral from defendant is not necessary. Kittrell v. Allen Memorial Hospital, Thirty-fourth Biennial Report of the Industrial Commissioner, 164 (Arb. November 1, 1979) (aff'd by industrial commissioner). See also Limoges v. Meier Auto Salvage, I Iowa Industrial Commissioner Reports 207 (1981).

Generally speaking, this agency will grant a petition for alternate medical care when it appears that the defendant insurer is interfering with the judgment of an authorized medical provider. See Assman v. Blue Star Foods, Declaratory Ruling, File No. 866389 (May 18, 1988).

In this case, Dr. Cook, an authorized provider, recommended claimant undergo an L2 lumbar sympathectomy. (Ex. 1, p. 3) He recommended claimant have surgery performed with Dr. Kelly. (Ex. 1, p. 3; JBE, paragraph 12)

Dr. Kelly recommended claimant not have lumbar sympathectomy until after claimant underwent a full course of treatment through Dr. Blow's office. He also encouraged claimant to undergo maximum conservative treatment and only would perform the sympathectomy "When all else fails . . .." (Ex. 1, p. 8)

As noted above, this agency will ordinarily grant a petition for alternate medical care when it appears that defendant insurer is interfering with the recommendations of an authorized medical provider. This case is an anomaly. Dr. Cook, the authorized treater, recommended claimant have a lumbar sympathectomy. Dr. Cook recommended Dr. Kelly perform the surgery. Under agency case law, by the referral from Dr. Cook, Dr. Kelly also becomes an agent of the defendants. Dr. Kelly indicated the surgery only be performed after conservative care, recommended by Dr. Blow, and other providers, was exhausted. Dr. Kelly recommended the surgical procedure be performed only when the conservative treatment failed.

Dr. Kelly recommended surgery only after conservative care had been exhausted and failed. The record indicates claimant did not undergo the conservative care recommended by Dr. Blow, and other physicians. As a result, claimant has failed to carry his burden of proof the care authorized by the employer has not been effective, that the care is inferior or less extensive, or that the care recommended by defendants is unreasonable.

ORDER

THEREFORE IT IS ORDERED:

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

Signed and filed this 2nd day of August, 2016.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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