BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JAMES D. BRITTAIN,

Claimant,

vs.

TRADESMAN INTERNATIONAL,

Employer,

and

GALLAGHER BASSETT SRVC. INC.,

Insurance Carrier,
Defendants.

File No. 5047566

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, James D. Brittain. Claimant appeared personally and through his attorney, Christopher Spaulding. Defendants appeared through their attorney, Thomas Wolle.

The alternate medical care claim came on for hearing on September 15, 2017. The proceedings were digitally recorded. That recording constitutes the official record of this proceeding. Pursuant to the Commissioner's 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.

The record consists of the sworn testimony of James Brittain. Administrative notice is taken of the agency file. Ms. Anita Green from Gallagher Bassett Services was also present at hearing. She did not end up testifying.

ISSUE

The issue presented for resolution is whether the claimant is entitled to alternate medical care. Claimant contends prescription authorization has been delayed repeatedly and seeks an order from this agency protecting the claimant.

FINDINGS OF FACT

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

James Brittain suffered an injury which arose out of and in the course of employment on June 29, 2012. That injury claim was adjudicated on October 15, 2015, and an arbitration decision was entered on November 10, 2015 by Deputy Commissioner Larry Walshire.

Mr. Brittain testified under oath at hearing. I find his testimony believable and credible.

The defendants have provided medical treatment and authorized medical care for that injury. Mr. Brittain has significant, ongoing low back pain from his work injury. (See Arbitration Decision, November 10, 2015, pages 5 and 6). The current, authorized treating physician is Christian Ledet, M.D. Mr. Brittain testified that he receives pain medication from Dr. Ledet. Specifically, he is prescribed two different doses of Nucynta: a 75 mg instant release prescription and a 150 mg extended release prescription.

Mr. Brittain testified that he has had difficulty having his prescriptions authorized in a timely fashion by the defendants. He testified this is a long-standing problem. The agency file demonstrates that claimant has filed numerous alternate medical care petitions. Most recently, Deputy Michelle McGovern entered an alternate medical care decision on January 26, 2017, where the issue was whether the claimant's prescriptions were unreasonably delayed. Deputy McGovern concluded the following.

> However, one of the claims adjusters at the adjusting company changed the procedures. The adjuster added another step to the process. She decided to complicate the procedures by requiring her approval before the approved prescriptions could be filled. As a result, there were delays in filling the medications. Some of the delays resulted in weeks where claimant had no access to this authorized prescribed medication. The actions of the claims adjuster were unreasonable. She should not be "second-guessing" the prescription medications ordered by the authorized treating physician. The actions of the claims adjuster have resulted in medical care that is unreasonable. Claimant should not have to wait for his prescription medication.

Brittain v. Tradesmen International, File No. 5047566 (Alt Care, January 26, 2017). Deputy McGovern concluded that the defendants acted unreasonably and interfered with the medical judgment of the authorized physician. Deputy Stan McElderry entered a similar Consent Order in September 2016 following an alternate care petition. Brittain v. Tradesmen International, File No. 5047566 (Alt Care, September 15, 2016).

Mr. Brittain testified that after the January 2017, alternate medical care decision by Deputy McGovern, the defendants did a better job in timely authorizing his prescriptions. He did not have additional difficulties until August 2017.

In this instance, claimant turned a prescription into his pharmacy on or before August 30, 2017. On August 30, 2017, he saw and received a copy of a written notice that the prescription had been denied. He immediately turned this in to his attorney, who filed the petition in this case on September 1, 2017. Mr. Brittain testified that when he is on his pain medications his pain is rated at approximately a "2" on the traditional 1-10 scale. When he has no medications, his pain elevates to a "10." This is consistent with the findings of fact in the 2015 arbitration decision. Mr. Brittain testified that each prescription is expensive and he is ordinarily unable to pay for the prescription out of pocket pending authorization.

Mr. Brittain testified that, prior to hearing, he learned on Wednesday, September 13, 2017, that his prescription had been authorized. In this record, there is no explanation for why the prescription was denied for two weeks between August 30, 2017, and September 13, 2017. Defense counsel represented in closing statement that as soon as the matter came to the attention of the defendants, they acted to obtain authorization. While it is clear the defendants understand the need to authorize these medications without further delay, it happened anyway.

I find, as a matter of fact, that a 15-day delay in authorizing the claimant's prescription, is unreasonable.

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. Iowa Code section 85.27 (2013).

By challenging the employer's choice of treatment – and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See 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).

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 statutory right is to select the providers of care and the employer may consider cost and other pertinent factors when exercising its choice. Long, at 124. An employer (typically) is not a licensed health care provider and does not possess medical expertise. Accordingly, an employer does not have the right to control the methods the providers choose to evaluate, diagnose and treat the injured employee. An employer is not entitled to control a licensed health care provider's exercise of professional judgment. Assmann v. Blue Star Foods, File No. 866389 (Declaratory Ruling, May 19, 1988). An employer's failure to follow recommendations of an authorized physician in matters of treatment is commonly a failure to provide reasonable treatment. Boggs v. Cargill, Inc., File No. 1050396 (Alt. Care January 31, 1994).

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 June 17, 1986).

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).

"Determining what care is reasonable under the statute is a question of fact." Long v. Roberts Dairy Co., 528 N.W.2d 122, 123 (Iowa 1995).

The defendants did not present any evidence that the care they have offered is reasonable. Rather, the defendants argued that, since the claimant's prescription was authorized prior to the hearing, the claimant's claim must be dismissed. In essence, defendants argue the agency cannot order a modality of treatment which has already been authorized.

I reject this argument. Section 85.27 grants this agency powers to order alternate medical care in situations where medical care provided is unreasonable, which includes instances where the care is not offered promptly. This agency has a long history of providing various remedies, up to and including complete loss of control of the medical care, when an employer fails to offer prompt medical treatment. If the position of the defendants were adopted, an employer would be able to unreasonably delay medical treatment up to the day before an alternate medical care hearing, then

authorize the care and avoid any consequence under Section 85.27. This is clearly wrong. Having found that this employer has unreasonably delayed authorization of the claimant's prescription of pain medications, I am left to fashion a remedy. The difficulty of doing this is demonstrated by claimant's own inability to request a specific remedy for the ongoing delays.

ORDER

THEREFORE IT IS ORDERED:

The claimant's petition for alternate medical care is GRANTED. Within 10 days from this decision defendants shall provide a letter to claimant's pharmacy pre-authorizing any and all causally-connected prescriptions from claimant's authorized treating physician, Dr. Christian Ledet. Defendants shall attach a copy of this decision to the pre-authorization letter.

IT IS FURTHER ORDERED that if the defendants fail to comply with this Order, they may be subject to sanctions as set forth in 876 Iowa Administrative Code section 4.36, including the assessment of costs and expenses, including attorney fees necessary to enforce this Order.

Signed and filed this 18th day of September, 2017.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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