BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOHN C. LEVASSEUR,

Claimant,

vs.

UDELL TRUCKING, INC.,

Employer,

and

CINCINNATI INSURANCE,

Insurance Carrier,
Defendants.

File No. 5056536

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, John Levasseur. Claimant appeared personally and through his attorney, Dennis Mahr. Defendants appeared through their attorney, Kathleen Roe.

The alternate medical care claim came on for hearing on May 3, 2016. 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 John Levasseur and claimant's exhibits A through C; and defendants' exhibits G, H and J. Official notice was taken of the Interagency Guideline on Prescribing Opioids for Pain, previously marked as defendants' Exhibit G1, pages 9 through 16.

Prior to hearing, defendants filed a Motion to Allow More than 10 Pages of Evidence and a Four Page Hearing Brief, contending that this is an extremely complex case and 10 pages is not enough for defendants to adequately defend the claim. Claimant resisted. The undersigned allowed the parties to make a record on this point. The motion was denied. The language in 876 IAC rule 4.48(9) is mandatory. It states

that written "evidence shall be limited to ten pages per party." The argument made by defendants on the record was that the defendants have provided a substantial amount of care to the claimant, including several evaluations, and, in order to make a full record, more than 10 pages are necessary. I found that the defendants' position is not compelling. The claimant has conceded he has received substantial treatment and the only evidence which is necessary concerns the specific treatments in question. The defendants were given a couple of hours to reduce their exhibits to the ten pages allowable. The other records remain in the file as an offer of proof.

It is also noted that while the defendants conceded liability for the low back and neck/cervical conditions, they denied any responsibility for the following specific conditions or diagnoses: headaches, depression, anxiety, bariatric, tinnitus, and hearing loss. These were denied on the basis of medical causation. (*See* Answer to Alternate Care Petition)

ISSUE

The issue presented for resolution is whether the claimant is entitled to the treatment recommended by the authorized treating physicians, specifically: (1) Spinal Cord Implant, (2) Pool Therapy, and (3) Narcotic Prescriptions.

FINDINGS OF FACT

The claimant is a 47 year old truck driver for Udell Trucking. He suffered a serious injury on July 21, 2014, which arose out of and in the course of his employment. The injury itself is stipulated. Claimant testified his truck was hit by a train on that date. Claimant testified he was knocked unconscious for 10 or 15 minutes and had a deep head laceration in addition to four broken ribs. Claimant had a previous neck fusion which was damaged in the accident. His medical care was eventually taken over by Quentin Durward, M.D., a local surgeon at CNOS. Dr. Durward performed a multilevel surgical fusion which the claimant testified was highly successful.

The claimant has a history of prior injury, as well as a history of opioid abuse or addiction. Following this injury, physicians did place him on opioid medications in spite of his difficulties. He has now been taking Oxycodone and Oxycontin for a significant period of time in high dosages. Dr. Durward referred the claimant to John E. Cook, M.D., for pain management. Dr. Cook and his physician's assistant, Dave Welch, P.A., have managed the routine pain treatment and medication management. Dr. Cook is an authorized treating physician.

In July 2015, claimant was evaluated by occupational medicine physician, Douglas Martin, M.D., at the request of the employer. Dr. Martin did not agree with the treatment approach of Dr. Cook. (Def. Ex. G) He did not agree with injections, nor with the prescription of opioids.

> I feel that what this gentleman needs is a multidisciplinary type of program for the control of his spinal problems. This is going to require weaning away from his chronic opioid medications and a significant behavioral health component. His behavior health components here, in the Sioux City area, although well intentioned, I think do not hit the tip of the iceberg with respect to everything that is going on. I think a lot of the issue here, again, can be laid at the feet of the utilization of these chronic opioid medications.
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> Regarding the dosage of his opioids, this is concerned in and of itself. There are evidence based recommendations, such as the Agency Guidelines out of the State of Washington would suggest that his oxycodone levels are not appropriate for his issue and his problem.
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> We now know that opioid use of a chronic variety creates lots of other issues in individuals. It is very much the possibility here that his opioids could be the cause of his mental health problems and certainly the cause of his obesity (It appears that may have actually gained 100 pounds since his accident, as opposed to just 30 pounds.) and a variety of other issues with respect to failure for recovery.

(Def. Ex. G, pp. 2-3)

The defendants also sought an independent medical evaluation with Bruce D. Gutnik, M.D., a psychiatrist, in January 2016. He diagnosed claimant with somatic symptom disorder with predominate pain, malingering, opioid use disorder, opioid induced depressive disorder and opioid induced anxiety disorder. (Def. Ex. H, p. 1) He recommended discontinuation of opioids and a "behavioral pain program that could teach him to deal with his remaining physical pain without the use of narcotic pain medications." (Def. Ex. H, p. 3)

On February 17, 2016, Dr. Durward noted that Dr. Cook was providing pain management for the claimant. "He has been having injections from Dr. John Cook which have actually been converted into radiofrequency blocks, and he gets about 8 months of reasonably good pain relief, he says about 70% with the RF blockade but it has to be repeated." (Cl. Ex. A, p. 2) Later he considered the ongoing treatment plan.

> So what else can be done for the man? I do not think there is anything surgical. Therefore, I think we are at a point where he should restart his physical therapy with pool therapy, I would recommend twice a week maybe for a couple of months as that does give him additional relief. He must lose weight. . . . .
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> I think he is close to reaching maximum medical improvement, [sic] In fact for his cervical spine I think he has reached maximum medical improvement.

(Cl. Ex. A, pp. 2-3) He went on to note his continued treatment with Dr. Cook. "I will see him back at the completion of treatment from Dr. Cook, . . . I would estimate it is going to be a few months but I do not know exactly when." (Cl. Ex. A, p. 3) He wrote out prescriptions for pool therapy on February 17, 2016. (Cl. Ex. A, p. 5)

On March 1, 2016, Dr. Cook documented the following:

> He is to continue his chronic pain medications per Dave Welch in our office and we will reschedule him in two weeks for a diagnostic transforaminal nerve root block at L5-S1 on the right side to see if this is the etiology of his right leg pain. Also, in the near future we may consider a spinal cord stimulator trial for failed back pain."

(Cl. Ex. C, p. 4)

On April 1, 2016, Dr. Durward opined at claimant's request that Mr. Levasseur "would benefit from a spinal cord stimulator for his chronic back pain." (Cl. Ex. C, p. 3)

At hearing, the claimant conceded that he violated his narcotic agreement on three occasions. The claimant explained these errors at hearing. He was prescribed various types of medications from other physicians. For example, a family doctor provided him with Lorazepam. He did not realize he was violating the narcotic agreement. On two separate occasions, defendants have offered a multi-disciplinary pain clinic treatment option to the claimant through counsel. On both occasions, claimant did not respond.

On April 4, 2016, claimant's counsel wrote to defense counsel requesting various treatments for the low back and neck/cervical conditions, including the pool therapy and spinal cord stimulator. (Cl. Ex. C, p. 1) He also requested treatment for several diagnoses or conditions which have been denied by the defendants.

REASONING AND CONCLUSIONS OF LAW

The defendants have explicitly denied liability for the following conditions: (1) headaches, (2) depression, (3) anxiety, (4) bariatric, (5) tinnitus and (6) hearing loss. I interpret "bariatric" to refer to the claimant's weight issues. Bariatric is technically a type of treatment, not a diagnosis. It is not the agency's place in an alternate care proceeding to determine the legitimacy of the denial of liability.

Before any benefits can be ordered, including medical benefits, compensability of the claim must be established, either by admission of liability or by adjudication. The summary provisions of Iowa Code section 85.27 as more particularly described in rule 876 IAC 4.48 are not designed to adjudicate disputed compensability of claim.

The Iowa Supreme Court has held:

> We emphasize that the commissioner's ability to decide the merits of a section 85.27(4) alternate medical care claim is limited to situations where the compensability of an injury is conceded, but the reasonableness of a particular course of treatment for the compensable injury is disputed.
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> . . . .
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> Thus, the commissioner cannot decide the reasonableness of the alternate care claim without also necessarily deciding the ultimate disputed issue in the case: whether or not the medical condition Barnett was suffering at the time of the request was a work-related injury.
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> . . . .
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> Once an employer takes the position in response to a claim for alternate medical care that the care sought is for a noncompensatory injury, the employer cannot assert an authorization defense in response to a subsequent claim by the employee for the expenses of the alternate medical care.

R. R. Donnelly & Sons v. Barnett, 670 N.W.2d 190, 197-198 (Iowa 2003).

Thus, the portion of claimant's petition seeking medical treatment for the six above-named conditions must be dismissed because the defendants refuse to accept liability for those conditions for which claimant seeks treatment. The defendants thereby lose their right to control the medical care claimant seeks in this proceeding and the claimant is free to choose that care on his own. Bell Bros., Heating v. Gwinn, 779 N.W.2d 193 (Iowa 2010).

As a result of the denial of liability for various conditions sought to be treated in this proceeding, claimant may obtain reasonable medical care from any provider for this treatment but at claimant's expense and seek reimbursement for such care using regular claim proceedings before this agency.

Furthermore, I find that the claimant has the right to be notified as to the reason(s) for the denials. "When liability on a claim is denied, a letter shall be sent to claimant stating reasons for the denial." 876 IAC section 3.1(2). There is no evidence in the file, at this time that the defendants have complied with this compliance provision.

The defendants have accepted liability for the low back and neck/cervical conditions. With regard to those conditions, I make the following legal conclusions.

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).

The defendants have authorized Dr. Durward and Dr. Cook to provide treatment to the claimant. These physicians are highly qualified to manage the claimant's treatment for low back and neck pain. It would be an unreasonable interference with the claimant's medical care to allow less qualified, non-treating physicians (Dr. Martin and Dr. Gutnik) to interfere with their care by denying certain forms of treatment. The remedy which is available to the employer in these circumstances is to communicate their concerns to the authorized treating physicians. There is no evidence in this file that this has been done.

It is evident this medical care situation is not ideal. The claimant is an individual who has a difficult history with prescription drugs to begin with. He now needs drugs to function and is likely addicted.

It is noted, however, that claimant was hit by a train. His previous neck fusion was damaged. He was knocked unconscious for several minutes. He broke several ribs and apparently damaged the transverse processes, where the spine connects to the ribs in his back. His injury was serious. His pain and disability are serious.

At some point, claimant will likely require treatment to help him off of the narcotic medications. This, however, is a decision which should be made by the authorized treating physicians in consultation with the claimant.

The real issue in this case is about timing. The defendants would prefer claimant get off of opioids through a multidisciplinary pain program while the claimant would prefer to get his pain under control first and then address his addiction or dependency issues. I am unwilling to override the opinions of the authorized treating physicians. It is not unreasonable for the defendants to provide additional evaluating opinions of physicians to the authorized treating physicians and ask them to carefully consider the same. It would behoove the physicians to carefully consider the opinions of the other physicians involved. It would, however, be unreasonable for the defendants to deny treatment recommended by their physicians.

ORDER

THEREFORE IT IS ORDERED:

The claimant's petition for alternate medical care is GRANTED. Dr. Durward and Dr. Cook (and his P.A.) are the authorized treating physicians in this claim. Any treatment they recommend, including spinal cord stimulator (or trial), water therapy and medications are authorized by operation of law.

IT IS FURTHER ORDERED that if claimant seeks to recover the charges incurred in obtaining the care for which defendants deny liability, defendants are barred from asserting lack of authorization as a defense for those charges.

FURTHER, if defendants have not already done so, defendants are ordered to file a Subsequent Report of Injury "denial of liability" through the EDI system, and send a letter to the claimant which states the reason(s) for the denial of each condition denied, pursuant to 876 IAC 3.1(2). The defendants shall do this within ten (10) days from the date of this order.

Signed and filed this 4th day of May, 2016.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Dennis J. Mahr
Attorney at Law
520 Nebraska St., Ste. 334 – Box B8
Sioux City, IA 51101-1307
mahrlaw@cableone.net

Kathleen Roe
Attorney at Law
505 5th St., Ste. 700
PO Box 1828
Sioux City, IA 51102
kathleenr@helligelaw.com

JLW/kjw