

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DOREEN FERRIS,

Claimant,

vs.

SIGOURNEY TRACTOR &
IMPLEMENT, LLC,

Employer,

and

CHARTER OAK FIRE INS. CO.,

Insurance Carrier,
Defendants.

File No. 21012974.02

ALTERNATE MEDICAL CARE
DECISION

Head Note: 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, Doreen Ferris. Claimant appeared personally and through her attorney, Daniel Bernstein. Defendants appeared through their attorney, Terrence Donohue.

The alternate medical care claim came on for hearing on September 13, 2022. 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.

The evidentiary record consists of Claimant's Exhibits 1-4 and Defendants' Exhibits A and B, and claimant's testimony during the telephonic hearing. During the course of the hearing defendants accepted liability for the October 21, 2021 work injury and for the right lower extremity condition for which claimant is seeking treatment.

ISSUE

The issue for resolution is whether the claimant is entitled to alternate medical care.

FINDINGS OF FACT

Claimant, Doreen Ferris, sustained a work-related injury on October 21, 2021 to her right ankle and foot. Defendants accepted liability for the injury and authorized treatment. Ms. Ferris treated with Peter Maurus, M.D. at Steindler Clinic. Defendants authorized right lower extremity surgery performed by Dr. Maurus on December 28, 2021. Unfortunately, after surgery Ms. Ferris continued to have pain and loss of function from her injury. Dr. Maurus eventually referred Ms. Ferris to a physical rehab and pain specialist at Steindler, Fred J. Dery, M.D. (Claimant's Exhibit 1, p. 1; Testimony)

Ms. Ferris saw Dr. Dery on several occasions. Treatment with Dr. Dery was also authorized by defendants. On May 18, 2022, Ms. Ferris saw Dr. Dery for follow-up of her right foot and ankle pain. Ms. Ferris was frustrated with her ongoing symptoms. Dr. Dery felt she would always have some discomfort. He noted she would see Dr. Goldish to discuss dorsal root ganglion (DRG) stimulation. (Cl. Ex. 2, pp. 5-6; Testimony)

On May 26, 2022, Dr. Maurus noted Ms. Ferris had a complicated recovery with static pain and significant stiffness. He noted Dr. Dery thought discussion with Dr. Goldish about a dorsal root ganglion injection/stimulator would be helpful. Dr. Maurus noted Ms. Ferris had some loss of subtalar motion and dysesthetic pain in her lateral foot in the superficial peroneal nerve distribution. He stated he did not have any other good options for her. He felt it would be reasonable to have her discuss her options with Dr. Goldish. Dr. Maurus placed her at MMI as of May 26, 2022. He noted she would have some restrictions but those could change based on what Dr. Goldish recommends as a treatment plan. Dr. Maurus recommended that Ms. Ferris see Dr. Goldish. (Cl. Ex. 2, pp. 2-4; Cl. Ex. 3)

On June 15, 2022, Albert Bisson, M.D. of Genex in Westlake Village, California authored a missive. Dr. Bisson never personally examined Ms. Ferris. Dr. Bisson stated he was request by PMA Management Corporation to perform a "utilization review to determine if requested health care services are medically necessary and appropriate for this claim." He states that the Official Disability Guidelines regarding DRG Stimulation do not recommend it for pain. His letter states that the requested DRG stimulator is not warranted and the requested 1 DRG stimulator for purchase was non-certified. The letter also stated that the requested referral to pain management was warranted and certified. (Defendants' Exhibit B, pp. 7-8; Testimony)

On July 5, 2022, Dr. Dery signed a missive stating that he was Ms. Ferris's authorized treating physician for her work injury to her right foot and ankle. He stated he referred her to Dr. Goldish to discuss DRG stimulation. He opined this was the best

option for relief of her pain. He noted the DRG stimulator was by far the most efficacious treatment in the majority of cases similar to Ms. Ferris'. He stated, "[t]he referral to Dr. Goldish to determine whether to proceed with a test of a dorsal root ganglion stimulator which, if effective upon testing, would be followed by implantation, is the most reasonable treatment for Ms. Ferris." (Cl. Ex. 4, p. 10)

On July 21, 2022, Howard S. Konowitz, M.D. from the Comprehensive Pain Management Group in Des Plaines, Illinois, authored a report addressed to the defendants regarding Ms. Ferris. He never personally examined Ms. Ferris but he did review the records of Ms. Ferris provided to him by the defendants. Based on his review of records, he opined that the referral for DRG stimulation is not reasonable or necessary. Instead of the referral made by Dr. Dery and Dr. Maurus, authorized treating physicians, Dr. Konowitz recommended possible alternative treatment courses, including but not limited to, changing her medications and obtaining a neurology evaluation. Some of his proposed treatment recommendations had already been tried by treating physicians. (Def. Ex. A; Testimony)

Ms. Ferris returned to Dr. Dery on August 29, 2022. His impression was that Ms. Ferris had neuropathic right foot pain after a traumatic crush injury to her right ankle at work. He felt she essentially exhausted reasonable treatment options other than DRG stimulation. He reiterated that he still believed she should see Dr. Goldish for a discussion of DRG stimulation which would likely be significantly beneficial for her pain control and functional capabilities. (Cl. Ex. 2, pp. 7-8)

In this case, claimant seeks a consultation with Dr. Goldish to discuss the use, testing, and potential implantation of a DRG stimulator as recommended by Dr. Dery and Dr. Maurus. Defendants argue that the referral to Dr. Goldish is not medically reasonable or necessary because Ms. Ferris does not meet any of the established criteria for such a procedure.

Ms. Ferris testified she is interested in additional treatment to decrease her pain and improve her function. During cross-examination defense counsel asked Ms. Ferris if she was willing to undergo different types of treatment if they were recommended by her treating physicians. When she was asked by defense counsel whether she would prefer to undergo additional physical therapy or have the DRG stimulator, she credibly testified she did not know the answer to that question because she has not yet been given the opportunity to consult with Dr. Goldish to learn about the DRG stimulator. Through this proceeding Ms. Ferris is seeking authorization for a consultation with Dr. Goldish as recommend by Dr. Dery and Dr. Maurus. (Testimony)

I find Dr. Bisson is not a treating physician. I find Dr. Konowitz is not a treating physician. I find that both Dr. Dery and Dr. Maurus are authorized treating physicians. I find that both Dr. Dery and Dr. Maurus have recommended Ms. Ferris consult with Dr. Goldish. I further find that by refusing to authorize the recommended referral to Dr. Goldish defendants are interfering with the medical judgment of its own treating physicians. With regard to medical treatment, I find defendants are unreasonable.

REASONING AND CONCLUSIONS OF LAW

Under Iowa law, the employer is required to provide care to an injured employee and is permitted to choose the care. Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433 (Iowa 1997).

[T]he 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.

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. 6.904(3)(e) ; 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., 562 N.W.2d at 433, 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” care 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.

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).

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 Decision 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, Iowa Industrial Commissioner Reports 207 (1981).

In the present case, both authorized treating physicians, Dr. Dery and Dr. Maurus, referred claimant to Dr. Goldish for a discussion of DRG stimulation. At this point, only a consultation with Dr. Goldish about DRG stimulation has been recommended. Claimant is merely seeking authorization of the referral for a discussion of the DRG stimulation. Claimant testified she is interested in learning more about DRG stimulation. She also testified she does not know if she would prefer to have additional physical therapy¹ or have a DRG stimulator because she has not been given the opportunity to even talk to Dr. Goldish about the stimulator. Claimant is merely seeking authorization for a consultation to see if a DRG stimulator is even an option for her. Claimant being able to find out her possible treatment options is reasonable. It is unreasonable for defendants to interfere with the medical judgment of its own treating physicians. Thus, I conclude defendants' actions are unreasonable because they are interfering with the medical judgment of its own treating physicians.

ORDER

THEREFORE IT IS ORDERED:

Claimant's petition for alternate medical care is granted.

Defendants shall authorize the referral to Daniel B. Goldish, M.D. for a consultation as recommend by the authorized treating physicians, Dr. Dery and Dr. Maurus.

¹ Claimant testified that her prior physical therapy was stopped because defendants denied any additional therapy visits.

Signed and filed this 14th day of September, 2022.

A handwritten signature in black ink, appearing to read 'E. Pals', is written over a horizontal line.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Daniel Bernstein (via WCES)

Terrence Donohue (via WCES)