BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TRACY DRAAYER, Claimant, vs. PELLA CORPORATION, Employer, Self-Insured, Defendant.	FILED MAR 08 2016 WORKERS COMPENSATION	File No. 5018137 ARBITRATION DECISION Head Note No.: 2500

STATEMENT OF THE CASE

This case was heard in Sioux City, Iowa and fully submitted on September 12, 2015. The evidence in this case consists of the testimony of claimant, claimant's exhibits 1 – 42 and defendant's exhibits A – H.

A summary of the procedural history of this case is in order. Tracy Draayer, claimant, filed a petition in arbitration seeking workers' compensation benefits from Pella Corporation as a result of an injury she sustained on August 10, 2008 that arose out of and in the course of her employment. An amended and substituted decision (hereinafter arbitration decision) was issued on November 26, 2007. This decision found that claimant was permanently and totally disabled as a result of her work injury with Pella Corporation. An appeal decision was issued on October 14, 2008. The final agency decision affirmed the amended and substituted decision, which held that claimant had proven she was permanently and totally disabled and also was an "odd-lot worker." The decision was appealed to the Iowa District Court, which affirmed the agency decision and remanded the case back to the agency to calculate claimant's gross income without considering some bonus income. A remand decision was issued on November 30, 2011. The application for partial commutation and review-reopening cases were heard and an arbitration decision was issued on June 5, 2015 denying both petitions. The issue of payment for certain medical expenses was bifurcated from these cases and is the subject of this decision. The decision concerns whether the defendant is responsible for $2,877.31 in medical expenses and whether claimant is entitled to alternate medical care.

ISSUES

1. Whether the defendant is responsible for medical costs.

2. Whether claimant is entitled to alternate medical care.

FINDINGS OF FACT

The deputy workers' compensation commissioner, having heard the testimony and considered the evidence in the record, finds:

Tracy Draayer, claimant, testified that she has received mental health treatment from Rodney Dean, M.D. and Martha Hibma, LISW, as a result of her work injury. (Transcript, page 26) Claimant testified she has not received treatment from any other mental health provider and that the medical care and prescriptions she received from Plains Area Mental Health and Dr. Dean were related to her work injury. (Tr. p. 29)

Quentin Durward, M.D., performed claimant's neck surgery. On August 21, 2006 Dr. Durward wrote, "She [claimant] can have chiropractic treatment with gentle manipulation. I have given her a prescription for message therapy for her neck muscles prn." (Exhibit 42, p. 1) This is the last time Dr. Durward saw the claimant. (Tr. p. 31) On May 4, 2011, Dr. Durward's records stated,

> Dr. Durward reviewed MR[I], et nothing surgical, it looks good. Pts c/o popping and cracking most likely coming from facet joints. Tx is conservative, et may try some PT. Pt notified et she was relieved nothing wrong on scan. She will get back to her family dr. for PT order.

(Ex. E, p. 51) On May 5, 2011, claimant requested a prescription for physical therapy be faxed to Hawarden PT. Dr. Durward responded,

> Pt informed that this is Dr[.] Durward's recommendation, based on his viewing of the MRI. He is not currently treating and the rx should come from the PCP.

(Ex. E, p. 52) On July 16, 2015, Dr. Durward reviewed a MRI of the claimant and the records state, "MRI reviewed by Dr. Durward. States office visit is not necessary at this time. Recommends pt continue conservative tmt for as long as possible, if symptomatic." (Ex. 42, p. 1)

Claimant had an MRI in 2011 that was ordered by the Hawarden Family Clinic. (Tr. p. 32) This MRI was paid for by Medicaid. (Tr. p. 34) Claimant had 12 visits for physical therapy which were paid for by Medicaid. (Tr. p. 35) Claimant received notice from the Iowa Department of Human Services that it was claiming a Medicaid lien of $2,899.31. (Tr. p. 39: Ex. 24, p. 1)

Claimant went to the Hawarden Clinic on January 24, 2011 complaining of left shoulder pain. On March 8, 2001, she was complaining of left shoulder and neck pain at the Hawarden Clinic. (Ex. C, p. 25) The Hawarden Clinic referred claimant to Dr. Durward, but he would not see her until she had an MRI. (Ex. C, p. 27)

Sunil Bansal, M.D., provided an opinion that the medial expenses claimant incurred from the Isakson Chiropractic Health Center and the Hawarden Family Medical, among other expenses, were necessitated as a result of a natural progression of the neck surgery. (Ex. 29, p. 4)

I find claimant's testimony credible about her treatments she is requesting payment for to be related to her work injury. While she briefly complained of left shoulder pain to the Hawarden Clinic, it soon involved her neck. The Hawarden Clinic wanted Dr. Durward to evaluate the problems as he performed her surgery for the work related injury. I also find the opinion of Dr. Bansal to be convincing as to the fact that the medical care that is in dispute in this case was related to her work injury.

REASONING AND CONCLUSIONS OF LAW

MEDICAL EXPENSES

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).

As I stated above, I found the testimony of claimant and the medical evidence to be convincing that the medical bills claimant is requesting reimbursement for to be related to her work injury. The conservative treatment was consistent with the recommendation of Dr. Durward. Dr. Bansal provide a checkbox yes opinion. Defendant correctly cites cases when this agency has discounted the weight of checkbox opinions. Certainly brief checkbox statements are not as persuasive as detailed reports or testimony, but it is more persuasive than the evidence provided by defendant. And in fact, Dr. Bansal performed an independent medical examination in this case so he was familiar with claimant's medical history.

The defendant argued in its brief, "On the other hand, if Draayer can be free of symptoms by not engaging in activity her body tells her to avoid, then symptoms caused by such activity do not result from the 2005 injury or subsequent surgery. Tr., p. 56." (Defendant's brief, p. 3) Ms. Draayer was asked when she could be pain free. Her response was, "If I lay down, sit in my chair and --- way back in my recliner, most of the time, or if I hold my head up." (Tr. p. 56) Part of the defendant's argument in this case is that since it is possible for Ms. Draayer to sit in a recliner and be pain free it should not be responsible for medical care if she engages in activities such as vacuuming, housecleaning, shoveling her steps or other daily activities and experiences pain that can lead to medical treatment. (See also, Ex. F, p. 71, "If she is undertaking physical

activities which exacerbates or aggravates her cervical spine condition, or causes myofascial pain complaints, I do not believe Pella Corporation is responsible to pay for evaluation or treatment of those new, acute complaints.")

In considering the defendant's argument, I found that the commissioner provided extensive analysis concerning second-non work related injuries and the responsibilities of the employer in the Sloan v. Carl Nelson & Co., File No. 5039835 (App. July 14, 2014). The commissioner held,

> Because of the close proximity of the accidents in addition to the fact that the second non-work injury so clearly aggravated claimant's condition, this case does necessitate consideration of intervening or superseding causes. More specifically, what happens when a claimant has proven medical causation linking an injury to the disability and a subsequent incident away from work substantially aggravates that condition, increasing the severity of the physical disability?
>
> Professor Larson has written extensively in the area of subsequent injuries which always begins with the "natural result" analysis, writing:
>
> > The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.
> >
> > The simplest application of this principle is the rule that all the medical consequences and sequelae that flow from the primary injury are compensable. . . .
> >
> > . . . .
> >
> > In a Utah case, claimant had suffered a compensable accident in 1966, injuring claimant's back. Several years later, this condition was triggered by a sneeze into a disc herniation, for which claimant required surgery. The medical testimony was that because of the back condition it was probable that had not had the sneezing episode, some other major or minor event would have eventually necessitated the surgery. The finding that the sneezing episode was the independent cause of claimant's disability, and the resultant denial of compensation, were held to be error, and benefits were awarded on appeal. This result is clearly correct. The presence of the sneezing incident should not obscure the true nature of the case, which is nothing more than that of a further medical complication

> flowing from a compensable injury. If the herniation had occurred while claimant was asleep in bed, its characterization as a mere sequel to the compensable injury would have seemed obvious. The case should be no different if the triggering episode is some nonemployment exertion like raising a window or hanging up a suit so long as it is clear that the real operative factor is the progression of the compensable injury, associated with an exertion that in itself would not be unreasonable in the circumstances. A different question is presented, of course, when the triggering activity is itself rash in the light of the claimant's knowledge of his or her condition.

Larson's Workers' Compensation Law, section 10.01, 10-3 (internal citations omitted). Larson points out that such issues are usually intensely fact driven. Efforts to develop a simple, all-encompassing formula often lead to absurd or indefensible results.

"It is only when we come to cases involving the conduct of the claimant himself or herself that the possibility of a break in the chain of compensable consequences is encountered." Larson's, section 10.09[4] 10-25. In other words, once the claimant has proven medical causation, that chain of causation can only be broken when the claimant's conduct amounts to an intentional violation of an express or implied prohibition and it medically supersedes the claimant's original condition. A clear and fairly extreme example of this is the worker who had a hand laceration which was healing nicely. The worker rashly decided to enter a boxing match. The laceration was reopened and infected. Larson's, section 10.10[2], 10-28 citing Kill v. Industrial Commission, 160 Wis.549, 152 N.W. 148 (1915).

The key is the employee must violate an express or implied duty to the employer not to intentionally disregard his condition and choose to risk injury. The worker described in the boxing scenario knew he had a serious laceration on his hand that was healing nicely, but was obviously at risk from use in a boxing match. Instead of allowing the hand to heal properly he chose to engage in an activity he knew or should have known was likely to further damage and injure his hand.

The phrase "express or implied duty to an employer" is explicitly narrowly construed by this decision. Such a "duty" is limited to an extremely narrow range of unusual cases similar to the aforementioned boxing case. It would never include workers who are further injured while working in the course of employment (unless it rose to horseplay or a similar affirmative defense). It does not apply to workers engaging in activities of daily living even where they may be performing heavy tasks.

> Workers, however, do have some duty to attempt to heal and not engage in extraordinarily dumb and risky behavior which would clearly impede the ability to heal. The scenarios of what would be dumb and risky behavior are quite likely limitless. A worker on medical restrictions for a bad back should not enter a crash up derby at the county Fair. A worker healing nicely from a work-related head trauma should know better than to enter a tough-man contest. A worker who broke his hand at work should not punch a wall in a fit of anger. Workers who engage in such extraordinarily bad judgment while attempting to heal from a work injury must face accountability as the law is written. However, workers attempting to heal from a work injury must also be allowed to participate in activities of daily living and remain active and mobile.
>
> It is also important to remember that it is always claimant's burden to prove medical causation. Once a claimant has proven medical causation, however, it is the burden of defendants to prove an intervening cause. The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of evidence. Iowa R. App. P. 6.14(6)(e).

Sloan, id. pp.11 – 13. The Sloan case was affirmed by the Iowa Court of Appeals. See, Carl A. Nelson & Co. v. Sloan, (Iowa Ct App., 2015) 2015 WL 7574232 (Further reviewed denied February 1, 2016.)

In this case claimant has been engaged in normal activities of daily living. There is no proof that the flare ups of her neck and back conditions are the result of intervening or superseding causes. Claimant has not engaged in dumb and risky behavior as set forth in the Sloan case. Claimant had a three-level fusion surgery and still has residual pain and restriction in functioning that are related to her work injury. The medical care claimant obtained and for which she is seeking reimbursement is the responsibility of the defendant.

Evidence in administrative proceedings is governed by section 17A.14. The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence. The rules of evidence followed in the courts are not controlling. Findings are to be based upon the kind of evidence on which reasonably prudent persons customarily rely in the conduct of serious affairs. Health care is a serious affair.

Prudent persons customarily rely upon their physician's recommendation for medical care without expressly asking the physician if that care is reasonable. Proof of reasonableness and necessity of the treatment can be based on the injured person's testimony. Sister M. Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963).

It is said that "actions speak louder than words." When a licensed physician prescribes and actually provides a course of treatment, doing so manifests the physician's opinion that the treatment being provided is reasonable. A physician practices medicine under standards of professional competence and ethics. Knowingly providing unreasonable care would likely violate those standards. Actually providing care is a nonverbal manifestation that the physician considers the care actually provided to be reasonable. A verbal expression of that professional opinion is not legally mandated in a workers' compensation proceeding to support a finding that the care provided was reasonable. The success, or lack thereof, of the care provided is evidence that can be considered when deciding the issue of reasonableness of the care. A treating physician's conduct in actually providing care is a manifestation of the physician's opinion that the care provided is reasonable and creates an inference that can support a finding of reasonableness. Jones v. United Gypsum, File No. 1254118 (App. May 2002); Kleinman v. BMS Contract Services, Ltd., File No. 1019099 (App. September 1995); McClellon v. Iowa Southern Utilities, File No. 894090 (App. January 1992). This inference also applies to the reasonableness of the fees actually charged for that treatment.

Claimant has shown that the medical costs in Exhibit 24 arose out of her work injury, and the costs are recoverable under section 85.27(1). The costs are reasonable. Claimant has met her burden of proof to show the treatments, including prescriptions, are a result of her work injury.

ALTERNATE MEDICAL CARE

Claimant has requested that the defendant designate a physician. The claimant asserted that the employer has not provided her with a physician or care provider that she can see about her complaints for the neck and shoulder issues. The employer stated at the hearing,

> So at this point, we're on the outlook to try to find somebody who she [claimant] could go to, who would understand the circumstances in which she might be showing up. And could do the sort of triage necessary to define whether the complaints which she might have, for which she may be seeking treatment, are at least arguably causally related to the work injury, that we should move forward, or whether it was because she fell down the stairs the night before, or was in a motor vehicle accident or some other sort of precipitating cause that we could all be made aware of and have some communication about before we just started down a course of treatment.

(Tr. p. 17) On December 1, 2014, the defendant stated it was considering who to appoint as an authorized treating physician. (Ex. 38, p. 1) As of the date of the hearing, no physician had been designated by the employer.

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. 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., 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.

It is remarkable that the evidence shows the defendant has not designated a treating physician for many years. The defendant has an obligation to provide care for her work-related medical conditions. Informing the claimant as to what physician or clinic she can use is an elementary step in providing her care. The consequence of failing to promptly provide care is the loss of the right to choose the care. West Side Transport v. Cordell, 601 N.W.2d 691 (Iowa 1999). As of the date of the hearing no

physician was authorized to provide ongoing care to the claimant for her neck and shoulders. (The defendant acknowledged that Dr. Dean was authorized to provide her mental health treatment.) Claimant's attorney asserted in his brief that as of the time of filing of his brief no physician had been designated for the neck and shoulder. The defendant may have designated a physician after the hearing. If not, the defendant is to notify the claimant of who the claimant's authorized treating physician is within 30 days of the decision. The defendant shall lose the right to control care and shall pay the physician claimant has designated as her physician for neck and shoulder problems and pay for any care provided or care that is the result of any referral for claimant's selected physician if the defendant has failed to authorize a physician within 30 days of this decision. This decision does not prevent the defendant from utilizing a nurse case manager or other professional to assist in the provision of medical care.

The alternative medical care is granted.

ORDER

THEREFORE IT IS ORDERED:

Defendant shall pay the medical costs listed in Exhibit 24.

Defendant, if it has not done so already, shall authorize a treating physician for claimant. Failure to do so will result in defendant's loss of the right to control care for the neck and shoulder conditions.

Defendant shall file subsequent reports that are required by this agency.

Signed and filed this 8th day of March, 2016.

JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Dennis J. Mahr
Attorney at Law
520 Nebraska St., Ste. 334
Sioux City, IA 51101-1316
mahrlaw@cableone.net

David L. Jenkins
Attorney at Law
801 Grand Ave., Ste. 3700
Des Moines, IA 50309-2727
jenkins.david@bradshawlaw.com

JFE/srs

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876 4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.