

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CHRISTOPHER ZWECK,

FILED

Claimant,

AUG 04 2016

vs.

WORKERS COMPENSATION

File No. 5057005

SUKUP MANUFACTURING,

ALTERNATE MEDICAL

Employer,

CARE DECISION

and

ZURICH AMERICAN INSURANCE
COMPANY,

Insurance Carrier,
Defendants.

HEAD NOTE NO: 2701

STATEMENT OF THE CASE

This is a contested case proceeding under Iowa Code chapters 17A and 85. The expedited procedure of rule 876 IAC 4.48, the "alternate medical care" rule, is requested by claimant, Christopher Zweck. Claimant filed a petition on July 25, 2016. He alleged at paragraph 5 of his petition:

Reason for dissatisfaction and relief sought: Recommended surgery from the approved treating physician has not been approved by Defendants.

Defendants filed an answer on August 2, 2016. Defendants admitted the occurrence of a work injury on August 24, 2015 and liability for the medical condition sought to be treated by this proceeding.

The alternative medical care claim came on for hearing on August 3, 2016. The proceedings were recorded digitally and constitute the official record of the hearing. By an order filed February 16, 2015 by the workers' compensation commissioner, this decision is designated final agency action. Any appeal would be by petition for judicial review under Iowa Code section 17A.19.

The evidentiary record consists of claimant's exhibit 1, defendants' exhibits A and B, and the testimony of the claimant. The parties did not submit hearing briefs.

ISSUE

The issue presented for resolution is whether claimant is entitled to alternate medical care in the form of authorization of left below-the-knee amputation as contemplated by Dr. William Cross at the Mayo Clinic.

FINDINGS OF FACT

The undersigned, having considered all of the testimony and evidence in the record, finds:

Claimant suffered a crushing fracture injury to his left ankle on August 24, 2015. Defendants admitted liability for the work injury and initially directed claimant for care at Mercy Hospital in Mason City, Iowa. While at Mercy, there was discussion of potentially amputating a portion of claimant's left leg. In an effort to salvage the leg, claimant's care was transferred to the Mayo Clinic. Claimant thereafter underwent multiple surgeries, including a significant lower extremity surgery with orthopedic trauma surgeon, Dr. William Cross. During this surgery, Dr. Cross attempted to repair the bones of claimant's foot and ankle, as well as repair a partial tear of the Achilles' tendon. The attempted surgical fixation involved placement of three plates in claimant's ankle. Claimant continued to follow up with Dr. Cross and also attempted to return to work. Claimant testified he continued to suffer with significant pain and loss of function of the ankle. (Claimant's testimony)

Dr. Cross ordered a CT scan of claimant's left ankle, which took place on June 21, 2016. (Ex. 1, p. 2) That same day, claimant presented to Dr. Cross, who reviewed the CT scan and opined it revealed a very clear medial malleolar nonunion and a partial fibular nonunion. Claimant and Dr. Cross engaged in a discussion of surgical options; primarily, the two discussed a potential nonunion takedown with bone grafting, re-plating, and compression, versus an amputation. In his medical note, Dr. Cross noted it was possible secondary surgeries would be necessary following a nonunion surgery, including ankle fusion or hardware removal. Claimant indicated he desired time to consider his options. Dr. Cross noted claimant was strongly considering proceeding with an amputation; Dr. Cross indicated he would "support [claimant] in whatever decision that he chooses to make." (Ex. 1, p. 1)

Claimant testified his discussion with Dr. Cross on his treatment options was thorough and meaningful. He testified they discussed lesser surgeries, including essentially redoing the original surgery performed. Claimant indicated he was doubtful as to the success of such a procedure given it failed to result in healing the first time it was performed. Claimant and Dr. Cross also discussed an ankle fusion option, but claimant noted this procedure would result in complete loss of motion of his foot and

would require follow-up care, including potentially the need for an amputation. Claimant did not seek a second surgical opinion on belief the Mayo Clinic employs some of the best physicians "in the world." (Claimant's testimony)

Following consideration of his options, claimant elected to proceed with below-the-knee amputation. (Claimant's testimony) On June 30, 2016, the nurse case manager assigned to claimant's claim by defendants notified the third party administrator that claimant had been scheduled for a preoperative physical on July 6, 2016, with surgery tentatively scheduled for July 7, 2016. (Ex. 1, p. 4)

On July 6, 2016, claimant returned to the Mayo Clinic. He was evaluated in the Mayo Amputee Clinic to discuss the process and potential outcomes of a below-the-knee amputation. (Ex. 1, p. 5) He also presented for evaluation with Dr. Cross; however, Dr. Cross indicated defendants had not authorized the amputation and would not do so pending a second opinion. Accordingly, claimant's procedure was cancelled. (Ex. 1, p. 5)

By a letter dated July 15, 2016, defendants directed a letter which sought to arrange an independent medical evaluation (IME) "with possible takeover care" with Dr. Joseph Galles of Iowa Ortho. The letter posed 11 questions for Dr. Galles' consideration, including on issues of causation, permanency, and treatment recommendations. (Ex. A)

On August 1, 2015, defendants made contact with Iowa Ortho, seeking an update of the status of the request for IME. A representative indicated the case had not been presented to Dr. Galles, but agreed to set a tentative appointment pending Dr. Galles' review of records and approval of the appointment. In the event Dr. Galles elected not to evaluate claimant, the representative indicated the case could be presented to either Dr. Trout or Dr. Kessler. (Ex. B)

Claimant testified he desires to proceed with the below-the-knee amputation as contemplated by Dr. Cross. He explained that the original attempt to salvage his limb was not successful and he is doubtful the second attempt would be successful in resolving his complaints. Meanwhile, claimant continues to suffer with a great deal of pain and impaired function. Claimant testified he wants to proceed with the amputation and move on with his life. Claimant is 30 years of age. (Claimant's testimony)

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).

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).

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. Assman v. Blue Star Foods, File No. 866389 (Declaratory Ruling, May 19, 1988). "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).

Claimant sustained a significant traumatic injury to his left foot and ankle as a result of a stipulated work injury on August 24, 2015. Defendants have authorized care at the Mayo Clinic, where claimant has treated for nearly one year. Care at the Mayo Clinic has included multiple surgeries, including an attempt to allow union of the bones of claimant's foot and implantation of hardware. This attempt to salvage claimant's lower leg has failed to result in union of the bones and as a result, claimant continues to suffer with pain and loss of function of the foot and ankle.

Claimant's surgeon believes further surgery is warranted and recommended either a below-the-knee amputation or lesser surgeries. After thoughtful discussion and consideration, claimant elected to proceed with the below-the-knee amputation, a

choice his physician supported, and scheduled the procedure. Claimant rationally explained his decision to proceed with a significant and irreversible procedure; he also expressed a legitimate desire to attempt to return to a more normal level of functioning as expeditiously as possible.

While I agree with defendants that a second opinion would generally be a prudent choice prior to pursuing such an extreme procedure, I am untroubled by claimant's decision to proceed based upon the facts of this case. There is no evidence to support an inference that claimant is uninformed or has been pressured into a procedure. There is similarly no evidence that Dr. Cross is unqualified or that any party involved doubts Dr. Cross's expertise or skill. Claimant has established a nearly one-year course of treatment at a prestigious medical facility and a physician-patient relationship with an undoubtedly qualified physician. Dr. Cross explained claimant's surgical options and indicated he would support claimant's decision to proceed with any of the procedures, thus indicating he believed any option was a reasonable choice.

This agency will ordinarily grant a petition for alternate medical care when it appears that defendants are interfering with the recommendations of an authorized medical provider. Bursell v. Lynch Livestock, File No. 5032265 (Remand August 2, 2016). By refusing to authorize the surgery recommended and scheduled by authorized physician, Dr. Cross, defendants are impermissibly interfering with the professional judgment of a physician they selected. While a second opinion might be a logical choice in some circumstances, I see nothing unreasonable about the surgical option which claimant has selected in conjunction with his authorized physician.

Furthermore, defendants have known since, at least, June 30, 2016 of the decision to proceed with amputation. While some delays are to be expected when seeking a second opinion, it is noteworthy that the physician selected for an IME has not agreed to evaluate claimant. Similarly, the other physicians cited by defendants have also not agreed to evaluate claimant and to the undersigned's knowledge are podiatrists, not orthopedic surgeons. I am additionally troubled by the breadth of the letter seeking Dr. Galles' opinions, as its inquiries refer to more than a second opinion on treatment options and even refer to potentially transferring claimant's care.


Claimant's authorized physician has recommended surgery, including the option of a below-the-knee amputation. Claimant's surgical election is reasonable and based upon an informed decision. Dr. Cross has explicitly expressed support for claimant's surgical choice and went so far as to schedule the procedure, which indicates that in Dr. Cross's opinion, the procedure is both reasonable and necessary. This agency does not favor allowing defendants to interfere, second-guess, or delay treatment recommended by an authorized physician, absent a compelling reason. I find such a compelling reason absent under the facts of this case.

ORDER

THEREFORE, IT IS ORDERED:

Claimant's petition for alternate medical care is granted. Defendants shall, within ten (10) days of receipt of this decision, authorize the below-the-knee amputation recommended and to be performed by Dr. Cross.

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


ERICA J. FITCH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Tom L. Drew
Attorney at Law
PO Box 12129
Des Moines, IA 50312-9403
tdrew@drewlawfirm.com

Ryan M. Clark
Attorney at Law
505 – 5th Ave., Ste. 729
Des Moines, IA 50309
rmc@pattersonfirm.com

EJF/srs