BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ANSON RYAN,

Claimant,

vs.

SCOTTY'S BODY SHOP,

Employer,

and

SELECTIVE INSURANCE COMPANY,

Insurance Carrier,
Defendants.

FILED
MAR 31 2016
WORKERS' COMPENSATION

File No. 5055438

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, Anson Ryan. Claimant appeared personally and through his attorney, Mr. Gary Mattson. Defendants appeared through their attorney, Mr. Jeff Lanz.

The alternate medical care claim came on for hearing on March 30, 2016. 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 as 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 claimant's exhibits 1 through 7, which include a total of nine (9) pages. The record also contains defendants' exhibits A through G, which totals ten (10) pages. All exhibits were received without objection. The claimant, Anson Ryan testified and counsel for both claimant and defendant provided argument.

ISSUE

Under Iowa Code section 85.27(4) is the medical care offered by defendants reasonable, when defendants fail to authorize surgery recommended by an authorized treating provider, and instead offer other conservative treatment, and a second orthopedic opinion.

FINDINGS OF FACTS

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

Defendants accept liability for the left shoulder injury that occurred on July 22, 2015, and the current condition for which claimant seeks alternate medical care, but dispute the recommendation for surgery made by orthopedic surgeon, Mark Fish, D.O., an authorized treating physician in this case. Defendants indicate their willingness to provide a second orthopedic opinion concerning the surgery recommendation and other conservative treatment.

Mr. Ryan testified that following the injury to his left shoulder on or about July 22, 2015, he was sent by the employer to Kenneth Moon, Jr., D.O., who recommended an MRI. On August 13, 2015, Mr. Ryan saw Dr. Moon to discuss the MRI results, which were reported as "normal." (Ex. A, Ex. B) At that time, Dr. Moon recommended a referral to Capital Orthopedics. (Ex. B) Claimant testified that he had previously been a patient of Dr. Fish at Capital Orthopedics and asked to be seen by him. Dr. Moon specifically made the referral to Dr. Fish. (Ex. B)

Mr. Ryan testified that he saw Dr. Fish, who recommended physical therapy, which occurred from August to October three times per week at Accelerated Rehabilitation. Mr. Ryan also testified that Dr. Fish provided injections into the left shoulder. Mr. Ryan testified that despite this course of treatment, his shoulder symptoms did not improve.

On or about October 12, 2015, Mr. Ryan was seen by Joshua Kimelman, D.O., an orthopedic surgeon, for the purpose of an independent medical exam at the request of the defendants. (Ex. C) Dr. Kimelman appears to have diagnosed claimant with biceps tendinitis and impingement of the left shoulder. (Ex. C, p. 2) Dr. Kimelman stated at that time, that he recommended "continued physical therapy" along with the restrictions of no "lifting more than 5-10 pounds above shoulder height or working at shoulder height." (Id.) Dr. Kimelman also noted that he would expect Mr. Ryan to reach MMI in "4-6 months from onset of symptoms." (Id.) The undersigned finds that 4 to 6 months post injury would be in the range of November 2015 to January 2016, and that Mr. Ryan has not been placed at MMI and both Dr. Fish and Dr. Kimelman recognize that additional treatment is needed. Dr. Kimelman did not see or examine Mr. Ryan again after this one-time examination. (Ex. C, p. 2)

Claimant testified that after the appointment with Dr. Kimelman, he continued to have physical therapy. Mr. Ryan testified that he attended about five work hardening visits at Accelerated Rehabilitation, the same facility where he previously had physical therapy, but he stopped attending the appointments due to increasing pain. In a Capital Orthopedics document, both Mr. Ryan and Kevin from Accelerated Rehab (presumably the therapist, see Ex. D) called to advise that Mr. Ryan was reporting increasing pain with the work hardening. (Ex. 5) There is a handwritten note to: "hold off on therapy, recommend a MR Arthrogram of shoulder." (Ex. 5) Mr. Ryan ceased the work hardening program and the MR Arthrogram was authorized. (Ex. 6) Mr. Ryan was discharged from the work hardening program in December 2015 for non-compliance. (Ex. 7, Ex. D) The MR Arthrogram was performed on January 4, 2016. (Ex. F) The impression of the physician reviewing the MR Arthrogram was that there was "no labral tear." (Id.)

On January 7, 2016, Mr. Ryan followed up with Dr. Fish, who notes that, "He has done physical therapy. The shoulder has only been getting worse." (Ex. 1, p. 1) Dr. Fish then reviews the MR Arthrogram with Mr. Ryan and states that, "He does appear to have undercutting of the anteriorsuperior labrum, consistent with a labral tear even though this was read out as normal." (Ex. 1, p. 2) Dr. Fish further corroborates his suspicion of a labral tear stating, "On exam, he does have symptomology consistent with a labral tear as well. He has continued with conservative treatments which have not been effective for him." (Id.) Dr. Fish concludes that, "Due to the fact that he continues to be symptomatic, and the fact that there does appear to be a labral tear, a shoulder arthroscopy with labral repair would be a reasonable approach at this point." (Id.)

Mr. Ryan testified that Dr. Fish has recommended restrictions at this time of no lifting over five pounds and no work at or above shoulder height.

On March 10, 2016, defense counsel sent Dr. Kimelman a letter setting forth certain opinions to which Dr. Kimelman writes: "I agree with above and would recommend a second opinion from either Dr. Jeff Davick or Dr. Jason Sullivan of DMOS." (Ex. E, p. 2) The opinions agreed to by Dr. Kimelman include the statement that he does "not recommend the surgery as being recommended by Dr. Fish," rather Dr. Kimelman continues to "recommend PT and home exercise," and "getting another opinion from a physician at DMOS." (Id.) The opinions also include confirmation that Dr. Kimelman diagnosed impingement syndrome/biceps tendinitis from his exam of Mr. Ryan on October 12, 2015. (Ex. E, p. 1) However, there is no explanation or opinion from Dr. Kimelman as to why Mr. Ryan is not at MMI at this time, as his original opinion suggested should be the case. (Ex. C, p. 2) It is also noted that Dr. Kimelman does not adjust the restrictions that he previously assigned to Mr. Ryan, which are stated above. (Ex. C, p. 2 and Ex. E)

In the March 10, 2016, letter, Dr. Kimelman also agreed with the opinion that he showed the MR Arthrogram to Dr. Galles, his partner who specializes in shoulders, and it is his opinion and Dr. Galles' opinion that the "MR Arthrogram showed normal

shoulder anatomy and nothing surgical." (Ex. E, p. 1) Dr. Galles never evaluated Mr. Ryan, nor is there any indication that Dr. Galles reviewed any other records or that he was made aware of Dr. Fish's clinical findings corroborating a labral tear. The undersigned gives no weight to the opinion of Dr. Galles, which does not come from the mouth or pen of Dr. Galles, but is provided by Dr. Kimelman through language drafted by defense counsel, with no detail as to the extent of Dr. Galles' review.

On March 28, 2016, defense counsel sent an email to claimant's counsel offering a second opinion with either Dr. Davick or Dr. Jason Sullivan of Des Moines Orthopedic Surgeons. The email states that defense counsel has "sent the records to Dr. Davick and Dr. Jason Sullivan *requesting that one of them examine and treat the claimant.*" (Ex. G) (Emphasis added) There was no confirmation from defendant at hearing that either Dr. Davick or Dr. Sullivan has reviewed the records and responded indicating that one of them is available and willing to evaluate and treat the claimant. There is no evidence that an appointment has been scheduled. Although the defendant has offered the services of Dr. Davick and/or Dr. Sullivan, the record does not contain any evidence that either physician has actually agreed to provide said services.

The undersigned finds that the surgery recommended by the authorized treating physician has not been authorized by defendants, although it was recommended nearly twelve (12) weeks ago.

The undersigned finds that Mr. Ryan prefers to undergo surgery with Dr. Fish rather than attempt yet another form of physical therapy and the second opinion proposed by defendant.

The undersigned finds that the second opinion recommended by Dr. Kimelman with Dr. Davick or Dr. Sullivan has not been scheduled and defendants' exhibit G indicates that defendants have yet to confirm that either of these doctors has reviewed the relevant medical records or are willing and available to evaluate and treat Mr. Ryan.

Defendants are not currently offering reasonable medical care. Defendants have denied the recommended care from their own authorized medical specialist. In this sense, defendants are not offering prompt medical care to treat claimant's work injury. Defendants are essentially attempting to determine how the claimant should be diagnosed, evaluated, and treated. The undersigned finds that the care being provided by defendants at this time is therefore, unreasonable. The undersigned further finds that the current employer-authorized care has not been effective and is inferior or less extensive than the care requested by Mr. Ryan.

REASONING AND CONCLUSION OF LAW

Iowa Code section 85.27(4) provides, in relevant part:

> For purposes of this section, the employer is obligated 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. v. Reynolds, 562 N.W.2d 433 (Iowa 1997), 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.

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).

Further, 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

In this case, Mr. Ryan was seen by the authorized treating physician, Dr. Fish on January 7, 2016, following ineffective rounds of physical therapy and work hardening. At that time, Dr. Fish stated that, "The patient presents today for follow-up of his left shoulder MRI Arthrogram done at Iowa Ortho. He has done physical therapy. The shoulder has only been getting worse." (Ex. 1, p. 1) Dr. Fish, after considering the "normal" MRI Arthrogram combined with his examination of Mr. Ryan, recommends a

"left shoulder arthroscopy with labral repair." (Ex. 1, p. 2) After months pass, defendants' seek an opinion from the IME physician retained by defendants, Dr. Kimelman, on March 10, 2015. (Ex. E) Dr. Kimelman responds sometime thereafter (the date of his response is difficult to read, although it appears to be March 15, 2016). When defendants wait over two months (January 7, 2015 to March 10, 2016) to address the question of surgery, the provision of medical care, or more accurately the lack of provision of medical care, cannot be said to constitute care that is "prompt" or "without undue inconvenience" as required by Iowa Code section 85.27(4).

Further, 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" than other available care requested by the employee. Long, 528 N.W.2d at 124; Pirelli-Armstrong Tire Co.v. Reynolds, 562 N.W.2d at 437 (Iowa 1997).

In this case, defendants have offered physical therapy with shoulder stabilization and argue that this is substantially different from the physical therapy and work hardening therapy that Mr. Ryan has already attempted with no improvement to his shoulder. No particular details are given by defendant other than the bare assertions that this physical therapy is different from the two prior failed attempts. I conclude that the physical therapy modalities have proven to be ineffective and given the recommendation of Dr. Fish to proceed with surgery, the recommendation for surgery is determined to be superior and more extensive than the care offered by defendants.

The defendants argue that this case is controlled by the unpublished decision of Lynch Livestock, Inc. v. Bursell, No. 14-1133, filed May 20, 2015 (Iowa Ct. App.), unpublished, 870 N.W.2d 274 (Table), and suggest that the care offered by defendants is reasonable, regardless of what care the claimant may wish to have provided. The undersigned is not persuaded by this argument having specifically found above that the care provided by defendants has not been "prompt," nor has it been "without undue inconvenience" to the claimant as required by Iowa Code section 85.27(4). The undersigned further notes that the Court of Appeals in the Bursell case cites with approval, the Iowa Supreme Court holding in Pirelli-Armstrong Tire Co.v. Reynolds, 562 N.W.2d at 437 (Iowa 1997), finding that "if the employee proves the care authorized by the employer has not been effective and that the care is inferior or less extensive than the care requested by the employee, the agency is justified in ordering alternate care." (Id. at 437). The undersigned has reached such a conclusion as stated above, and finds that this is further support for the granting of claimant's application for alternate medical care.

ORDER

THEREFORE IT IS ORDERED:

The claimant's petition for alternate medical care is granted. Defendants should immediately authorize the surgery as recommended by Dr. Mark Fish of

Capital Orthopedics and schedule the first available date and time for claimant to proceed with this recommended medical care.

Failure to comply with this order may result in sanctions pursuant to 876 IAC 4.36.

Signed and filed this 31st day of March, 2016.

TOBY J. GORDON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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