BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MATTHEW SCHWADE,

Claimant,

vs.

AVEKA, INC.,

Employer,

and

SFM MUTUAL INS. CO.,

Insurance Carrier,
Defendants.

File No. 5057019

ALTERNATE MEDICAL CARE DECISION

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, Matthew Schwade. Claimant filed a petition on July 26, 2016. He alleged at paragraph 5 of his petition:

> Reason for dissatisfaction and relief sought: Defendant changed physicians and abruptly stopped treatment; claimant seeks to have additional treatment recommended by Dr. Flinchbaugh.

Defendants filed an answer on August 4, 2016. Defendants admitted the occurrence of a work injury on June 8, 2016 and do not dispute liability for the complaints sought to be treated by this proceeding.

The alternative medical care claim came on for hearing on August 5, 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 exhibits 1 through 3, defendants' exhibits A through E, and the testimony of the claimant and Melinda "Mindy" Markey. 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 designation of Dr. Flinchbaugh as an authorized treating physician.

FINDINGS OF FACT

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

Claimant suffered a stipulated injury on June 8, 2016. On this date, claimant was making and stacking empty cardboard boxes when he developed significant pain of his back. Claimant reported the injury to defendant-employer. Due to closure of the occupational medicine clinic typically utilized by defendant-employer for its employees, defendant-employer referred claimant for care with Jared Cardwell, M.D. (Claimant's testimony)

Claimant's course of care with Dr. Cardwell included a thoracic MRI and a follow-up visit on June 24, 2016, at which time Dr. Cardwell assessed a back strain and herniated thoracic disc without myelopathy. He recommended continued physical therapy and weekly follow-up visits. He released claimant to return to work under restrictions. (Exhibit 1, pages 1-2)

On or about June 27, 2016, claimant had a discussion regarding his care with claims adjuster, Melinda "Mindy" Markey. By claimant's testimony, on this date, Ms. Markey indicated she had arranged for evaluation of claimant by an occupational physician, a visit which claimant indicated he was willing to attend. Ms. Markey reportedly also informed claimant that if necessary, he could return to Dr. Cardwell for treatment. (Claimant's testimony)

On July 11, 2016, claimant presented for evaluation with Kenneth McMains, M.D. The evidentiary record in this matter does not contain examination notes from that date, but includes a narrative report dated July 12, 2016. Dr. McMains assessed acute right thoracic myofascial pain. He opined such sore muscles typically resolve in 10 to 14 days with frequent motion and only minimal treatment. Dr. McMains placed claimant at maximum medical improvement (MMI) and released claimant to full activity, with a recommendation to perform frequent stretching. He opined claimant sustained no permanent impairment and recommended no further treatment. (Ex. D, p. 2)

Claimant testified his evaluation with Dr. McMains was not a good experience, as Dr. McMains did not examine claimant, remained a distance from claimant, and then opined claimant simply suffered with a "Charley horse" of his back. (Claimant's testimony)

Claimant testified almost immediately following his visit with Dr. McMains, he contacted Ms. Markey and left a message requesting a second opinion. (Claimant's testimony) Ms. Markey returned claimant's call and advised claimant that a second opinion was not warranted. (Claimant's testimony; Ms. Markey's testimony) Ms. Markey confirmed she informed claimant he was not entitled to a second opinion, but added she indicated she would reconsider her position in the event claimant provided additional evidence for her to review. Ms. Markey testified in her opinion, claimant was thereafter not entitled to additional care because Dr. McMains had placed claimant at MMI. (Ms. Markey's testimony)

Defendants' records reveal a first report of injury form was completed with a reported injury date of July 19, 2016. (Ex. A) Claimant testified he did not suffer a distinct injury on this date, but rather suffered an aggravation of his existing pain while performing his work duties. (Claimant's testimony) Ms. Markey testified from this point forward, she believed claimant's complaints were related to this second injury. (Ms. Markey's testimony)

On July 21, 2016, claimant presented to his personal physician, Robert Flinchbaugh, D.O. Following examination of claimant's complaints, Dr. Flinchbaugh recommended MRIs of claimant's cervical spine and lumbar spine/sacroiliac joint. He also recommended conservative care of physical therapy, work restrictions, and use of Flexeril and Ultram. (Ex. 3, p. 1) Following claimant's appointment with Dr. Flinchbaugh, claimant's counsel authored a letter to Ms. Markey. Counsel referenced the June 8, 2016 injury and detailed claimant's medical treatment to date. He noted claimant continued to complain of ongoing pain and requested authorization of Dr. Flinchbaugh to provide care. (Ex. 2, pp. 1-2)

Ms. Markey authored a response on July 22, 2016, whereby she declined to authorize Dr. Flinchbaugh, but offered to arrange a return appointment with Dr. Cardwell. (Ex. 2, p. 4)

On July 25, 2016, claimant's attorney requested Ms. Markey arrange a return visit with Dr. Cardwell. (Ex. 2, p. 3) Later that same day, counsel provided Ms. Markey with Dr. Flinchbaugh's medical records and also indicated he had learned Dr. Cardwell had left his former practice. As Dr. Cardwell was no longer available, counsel renewed his request for authorization of Dr. Flinchbaugh. (Ex. 2, p. 3; Ex. C)

Ms. Markey responded to counsel's email that same date and indicated she was unfamiliar with Dr. Flinchbaugh and as a result, she was unwilling to authorize him to provide care. Ms. Markey represented that defendants would assign a new occupational medicine physician to claimant's claim, given Dr. Cardwell's departure. (Ex. 2, p. 3; Ex. C)

Claimant testified he desires further treatment of his complaints, as he does not feel he has experienced significant improvement of his symptoms. Claimant testified he did not object to evaluation by another occupational physician, provided the physician was not Dr. McMains. (Claimant's testimony)

Ms. Markey testified she and the case manager assigned to claimant's claim(s) have attempted to locate a local occupational medicine provider to treat claimant. Specifically, a request is pending for an evaluation with Kristen Heffern of Decorah, Iowa. According to Ms. Markey, Ms. Heffern has been on vacation and therefore, defendants had been unable to secure an appointment as of the time of evidentiary hearing. (Ms. Markey's testimony)

An internet provider search by the undersigned reveals Ms. Heffern is a nurse practitioner practicing with Winneshiek Medical Center in Decorah, Iowa.

CONCLUSIONS OF LAW

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).

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 1975).

"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 stipulated work injury on June 8, 2016 and a second injury or aggravation of the same body parts on July 19, 2016. Claimant has suffered with continued complaints dating to the June 8, 2016 injury. As of the date of evidentiary hearing, defendants had not arranged for medical evaluation of claimant since the evaluation of Dr. McMains on July 11, 2016. This lack of arranged care persisted despite multiple requests for care from claimant and claimant's counsel. It could be determined that defendants abandoned claimant's medical care.

However, in the intervening period, defendants offered to arrange a repeat visit to previously authorized physician, Dr. Cardwell. Through no fault of defendants, the parties subsequently learned Dr. Cardwell had left the practice. Under the circumstances of an authorized provider leaving a practice, defendants would be entitled to appoint an alternative care provider. Defendants demonstrated an effort to locate an alternative provider, but had been unable to schedule an appointment as of the date of evidentiary hearing.

It is therefore determined defendants have not abandoned claimant's medical treatment. There has, however, been an unnecessary delay to claimant in procuring medical treatment of his complaints. While defendants are entitled to select a medical provider, they must do so promptly and without undue delay or inconvenience to claimant.

It is determined defendants shall arrange for claimant to be evaluated within 7 days of the date of this decision. That evaluation may be with a provider of defendants' choosing, but must be with a physician in order to guarantee evaluation by a provider with similar qualifications to those who have evaluated claimant in the past. The designated physician must also be with a provider other than Dr. McMains, as it is clear he and claimant will be unable to establish a beneficial physician-patient relationship. If defendants are unable to arrange for the ordered evaluation to take place within 7 days of the date of this ruling, Dr. Flinchbaugh is hereby designated as an authorized treatment provider.

ORDER

THEREFORE, IT IS ORDERED:

Claimant's petition for alternate medical care is granted in part and denied in part. Defendants shall arrange for physician evaluation of claimant at a date within 7 days of the date of this ruling. If defendants fail to do so, Dr. Flinchbaugh is hereby designated as an authorized treatment provider.

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

ERICA J. FITCH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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