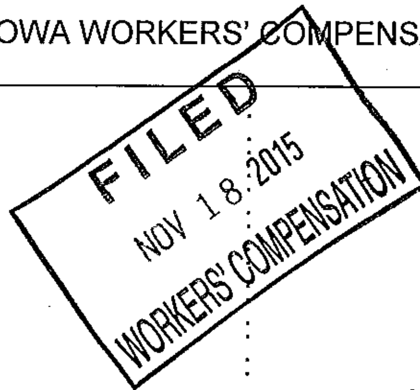
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



AMBER CAVANAUGH,	:	
Claimant,	:	
vs.	:	File No. 5045315
BBU INC.,	:	
Employer,	:	ALTERNATE MEDICAL
and	:	CARE DECISION
ACE AMERICAN INSURANCE CO.,	:	
Insurance Carrier, Defendants.	:	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, Amber Cavanaugh.

The alternate medical care claim came on for hearing on November 18, 2015. The proceedings were digitally recorded, which constitutes the official record of this proceeding. Claimant, Amber Cavanaugh, and the nurse case manager, Karrie Kolsto, testified live at the telephone hearing. The record consists of claimant's exhibits 1-5; defendants' exhibit A.

By order filed February 16, 2015, this ruling is designated final agency action.

ISSUE

The issue presented for resolution is whether the claimant is entitled to alternate medical care consisting of a second opinion with David Segal, M.D.

FINDINGS OF FACT

Claimant, Amber Cavanaugh, sustained a work injury to her neck on December 12, 2012. As a result of that injury defendants authorized Ms. Cavanaugh to treat with Chad Abernathey, M.D. Claimant is contending that there has been a breakdown of the doctor/patient relationship and therefore, she should be allowed to see Dr. Segal for a second opinion. She has an appointment scheduled to see

Dr. Segal tomorrow, November 19, 2015. Defendants contend that there has been no such breakdown in the doctor/patient relationship and that Dr. Abernathey is still the authorized physician. Defendants have an appointment for Ms. Cavanaugh to follow up with Dr. Abernathey on November 23, 2015.

To date, Dr. Abernathey has performed two neck surgeries on Ms. Cavanaugh. The first procedure was performed on December 17, 2013. Following the surgery some of Ms. Cavanaugh's symptoms improved but the numbness, tingling, and pain was still present. She testified that her follow-up appointments with Dr. Abernathey were "not very good" because he would not provide her with work restrictions; rather, he simply told her if it hurts, don't do it. In March of 2014, at her physical therapist's suggestion she called Dr. Abernathey's office to explain she was still having a lot of problems getting through her therapy sessions and again requested work restrictions. However, Dr. Abernathey did not assign specific restrictions.

Ms. Cavanaugh did return to full-duty work with the defendant employer. While at work she was pushing a cart, that she estimates weighs 2000 pounds, when she felt a pop in her neck. She was sent back to Dr. Abernathey who performed a second neck surgery on February 19, 2015. Ms. Cavanaugh testified that she was not happy to be sent back to Dr. Abernathey because he had previously released her to return to work without restrictions. Following surgery she again attended physical therapy and continued to follow up with Dr. Abernathey. When she saw him on May 18, 2015, she complained of right upper extremity paresthesia. The notes indicate she was concerned she might have right cubital tunnel syndrome. Dr. Abernathey ordered a new EMG study. (Exhibit A, page 5) Following the EMG she returned to see Dr. Abernathey on June 15, 2015. The doctor noted that the EMG was unrevealing. He noted he did not recommend an aggressive neurosurgical management; rather, he favored conservative treatment. (Ex. A, p. 6) Ms. Cavanaugh testified that she informed the doctor she did not think she was capable of returning to work. However, he did not want to give her any permanent restrictions; rather he suggested that she obtain a non-physical job. (Testimony)

Ms. Cavanaugh has not returned to work since the second surgery in February of 2015, because she knows she will sustain another injury. She does not want to return to Dr. Abernathey because he does not even examine her; he just stands on the other side of the room, looks at her scars, and tells her she is good. At the June appointment he stated he could not provide an impairment rating until six months post-operation and that he would not need to see her to rate her. (Testimony)

Claimant testified that she wanted a second opinion so she asked her attorney, Mr. Powell, if he knew of a doctor that would be willing to see her; he recommended Dr. Segal. Ms. Cavanaugh saw her personal physician last month, who then faxed a referral to Dr. Segal's office. Ms. Cavanaugh testified that Dr. Segal's name originally came from her attorney, not from the personal doctor. (Testimony)

Ms. Cavanaugh contends that Dr. Abernathey has largely ignored her complaints and that he is unwilling to consider her ongoing complaints. However, she does admit that since the February surgery he has prescribed her medication, recommended physical therapy, ordered cervical x-rays, and most recently ordered the EMG. Additionally, he has recommended ice and using a pillow at home for her swelling. (Testimony)

Karrie Kolsto, the nurse case manager in this case also testified. She has been an R.N. since her graduation in 1993. She has worked for Coventry Health as an R.N. Field Case Manager for the past three years. She was assigned to Ms. Cavanaugh's case in August of 2014. Her role in this case is to help facilitate medical care as ordered by the doctors and authorized by the insurance carrier. She also attends claimant's appointments with Dr. Abernathey. Ms. Kolsto was not granted permission to go into the exam room during many of the appointments with Dr. Abernathey. However, Ms. Cavanaugh did grant her permission to be in the room during the last couple of appointments. Under cross-examination Ms. Kolsto did agree that, based on claimant's testimony at today's hearing, it was fair to say there was a breakdown in the doctor/patient relationship. However, Ms. Kolsto testified that this was the first she had heard of any such a breakdown. During her time attending appointments with Ms. Cavanaugh at Dr. Abernathey's office she never observed any type of breakdown in doctor/patient relationship. At the June appointment neither Dr. Abernathey nor Ms. Cavanaugh expressed any concern about continuing the doctor/patient relationship. Ms. Kolsto also testified that Ms. Cavanaugh has never contacted her to request a second opinion. In fact, when Ms. Kolsto scheduled the November 23, 2015, appointment for Ms. Cavanaugh with Dr. Abernathey's office there was no problem obtaining the appointment. At this point, Dr. Abernathey is certainly willing to continue to treat Ms. Cavanaugh. Ms. Kolsto testified that if nine to twelve months following the last operation Ms. Cavanaugh was not better then she would recommend a second opinion with another physician who specializes in cervical spine surgery. Specifically, she would recommend Myles Luszczyk, D.O. However, she felt it was appropriate for Ms. Cavanaugh to finish the healing process with Dr. Abernathey. (Testimony)

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. 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.

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).

I understand Ms. Cavanaugh's concerns regarding her ongoing symptoms and the potential for another injury. It is reasonable and rational for her to desire to pursue additional treatment options and recommendations. However, under the Iowa workers' compensation system, the legal standard for determining whether additional care should be ordered is whether the case offered by the defendants has been reasonably suited to

treat the injury. In this case, the defendants have and are continuing to authorize care with a reputable neurosurgeon, Dr. Abernathey. I find the care offered by defendants is reasonable and reasonably suited to treat her work injury. There is no indication that Dr. Abernathey has nothing further to offer her or that he is not willing to see her. Furthermore, the only indication that there has been a breakdown in the doctor/patient relationship is claimant's testimony. Claimant has never expressed these concerns to Dr. Abernathey, nor to Ms. Kolsto. Therefore, I find that Ms. Cavanaugh has failed to carry her burden of proof to show that the authorized care is unreasonable.

Having found that the care offered by defendants is reasonable and reasonably suited to treat claimant's work injury, I conclude that the petition for alternate medical care should be denied.

ORDER

THEREFORE IT IS ORDERED:

The claimant's petition for alternate medical care is denied.

Signed and filed this 18th day of November, 2015.

ERIN Q. PALS
DEPUTY WORKERS' COMPENSATION COMMISSIONER

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