

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MARTIN PERRY,

Claimant,

vs.

SOUTHERN GLAZER'S WINE
& SPIRITS,

Employer,

and

SENTINEL INSURANCE CO.,

Insurance Carrier,
Defendants.

File No. 21005320.02

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, Martin Perry. Mr. Perry appeared through his attorney, Saffin Parrish-Sams. Defendants appeared through their attorney, Patrick Mack.

The alternate medical care claim came on for hearing on January 27, 2023. The proceedings were digitally recorded. That recording constitutes the official record of this proceeding. Pursuant to the Commissioner's Order, the undersigned has been delegated authority to issue a final agency decision in this alternate medical care proceeding. Therefore, this ruling is designated 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 3 which were received without objection. Both parties made arguments on the record, however, no other evidence was offered. The record is a condensed record in compliance with agency rules. The defendants did not file an answer prior to hearing, however, stated on the record that they do not dispute liability for claimant's March 10, 2021, work injury.

ISSUE

The issue presented for resolution is whether the claimant is entitled to alternate medical care.

FINDINGS OF FACT

The claimant sustained an injury to his low back on or about March 10, 2021, which arose out of and in the course of his employment. This injury has caused medical treatment which defendants have authorized. Claimant underwent two low back surgeries and was released from the care of his authorized treating physician in July 2022.

Since being released from his treating surgeon, Mr. Perry has not been evaluated by any authorized physician. He was evaluated by his primary clinic on December 1, 2022. The following is documented from that visit:

Martin Perry presents with complaints of foot problem (Patient states he has had persistent right foot pain and toe pain in the second through fifth digits ever since his back surgery about a year ago. States it is a sharp stabbing/burning type of pain intermittently. He has tried physical therapy in the past with no significant improvement. Surgeon does not think there is anything they can do more from a surgical standpoint) Associated symptoms include foot numbness but no swelling.

(Claimant's Exhibit 1) The clinic recommended medications to treat the foot pain. (Cl. Ex. 1)

Claimant's counsel immediately requested further pain management care from defendants on December 7, 2022. (Cl. Ex. 2) Defendants quickly responded and agreed in principle, although indicated they would need to review the records from his appointment. (Cl. Ex. 2)

He also had a functional capacity evaluation (FCE) arranged by his attorney, dated December 28, 2023. The physical therapist who performed the FCE thoroughly documented Mr. Perry's continued symptoms, in particular pain and loss of function in his low back, and right foot. He described the condition of his right foot as a "right drop foot." (Cl. Ex. 3) The therapist thoroughly documented the functional challenges this condition creates for Mr. Perry. He recommended that Mr. Perry be fitted for a hinged/flexible ankle/foot orthosis (AFO). (Cl. Ex. 3)

Claimant's counsel immediately requested this treatment as well. (Cl. Ex. 2) On December 29, 2022, she wrote:

Please ask your client to authorize and schedule an appointment for Mr. Perry to be evaluated and fitted for the hinged flexible orthosis, and authorize and schedule an appointment with a board certified pain management physician. If these appointments have not been authorized [sic] by the end of business on January 12, 2023, I will have no choice but to file an Alternate Care Petition.

(Cl. Ex. 2)

At the time of hearing, defendants had not authorized either of the requested treatments recommended by the medical providers. Defense counsel did indicate in argument that the defendants do not dispute at this time that the treatment is needed, however, the defendants need some type of referral for these treatments. Defense counsel indicated that within the “past week” the defendants have been attempting to contact the treating surgeon’s office to make such a referral.

Claimant’s counsel alleged in argument that the treating surgeon has indicated he does not have any further treatment for the claimant. Defense counsel did not specifically agree with this assessment, however, acknowledged that Mr. Perry has not been seen by the treating surgeon or any authorized physician since July 2022. It is documented that Mr. Perry told his primary clinic treatment provider that the treating surgeon had no further treatment to offer him. (Cl. Ex. 1)

REASONING AND 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. Iowa Code section 85.27 (2013).

By challenging the employer’s choice of treatment – and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See 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).

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 statutory right is to select the providers of care and the employer may consider cost and other pertinent factors when exercising its choice. Long, at 124. An employer (typically) is not a licensed health care provider and does not possess medical expertise. Accordingly, an employer does not have the right to control the methods the providers choose to evaluate, diagnose and treat the injured employee. An employer is not entitled to control a licensed health care provider’s exercise of professional judgment. Assmann v. Blue Star Foods, File No. 866389 (Declaratory Ruling, May 19, 1988). An employer’s failure to follow recommendations of an

authorized physician in matters of treatment is commonly a failure to provide reasonable treatment. Boggs v. Cargill, Inc., File No. 1050396 (Alt. Care January 31, 1994).

At the time of hearing, the defendants were not offering any specific care for the claimant, other than the statement of defense counsel that the carrier was attempting to contact the original treating surgeon's office for a referral for the requested treatment. In essence, they presented the "we are working on it" defense. To be clear, I believe defense counsel is, in fact, working on it in good faith and he is trying to get the delay resolved. It is also understood that the insurance carrier is a bureaucracy with its own internal requirements and procedures. This can cause delays. Those problems, however, are not problems that the injured worker should bear.

Claimant's counsel argued convincingly that claimant is entitled to prompt treatment for his work-connected condition. Furthermore, I am convinced the claimant's need for treatment for his drop foot is urgent at this point due to his pain and functional deficits as convincingly documented by the physical therapist. (Cl. Ex. 3)


In fairness to the defendants, all of this has really only been delayed since the end of December 2022, for approximately four weeks. In that time, however, the defendants have accomplished nothing prior to hearing in order to avert the ongoing delay. Had the defendants secured any type of appointment either with the treating surgeon or even another physician prior to this hearing, the outcome of this case would likely be different. I find it is unreasonable for the defendants to provide no treatment to the claimant, which is what was being offered at the time of hearing.

ORDER

THEREFORE IT IS ORDERED:

The claimant's petition for alternate medical care is GRANTED. Defendants shall immediately authorize pain management treatment for the claimant's condition, as well as a referral for a hinged/flexible ankle/foot orthosis.

Signed and filed this 27th day of January, 2023.



JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Saffin Parrish-Sams (via WCES)

Patrick Mack (via WCES)