BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

WALTER J. DUNHAM, Claimant, vs. UNITED PARCEL SERVICE, INC., Employer, and LIBERTY MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	:	File No. 5062713.01 ALTERNATE MEDICAL CARE DECISION HEAD NOTE: 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, Walter Dunham.

The alternate medical care claim came on for hearing on February 26, 2020. The proceedings were digitally recorded which constitutes the official record of this proceeding. This ruling is designated final agency action and any appeal of the decision would be to the Iowa District Court pursuant to Iowa Code 17A.

The record consists of Claimant's Exhibits pages1 – 10, Defendants' Exhibits pages 1 – 10 and the testimony of claimant and his wife Trina Dunham. Both parties submitted briefs.

ISSUE

The issue presented for resolution is whether the claimant is entitled to alternate medical care. Claimant has alleged:

> The employer/carrier has refused to authorize treatment recommended by the authorized treating physician, Dr. Saddler, consisting of physical therapy, chiropractic, acupuncture and massage therapy. In addition, the employer/carrier has delayed and refused to pay for treatment that was

> authorized, including treatment by Coldstream Health and Dr. Lindsey Lake, causing that clinic to refuse to treat Claimant.
>
> Due to the disruptions in recommended treatment, Claimant is experiencing severe symptoms that have become debilitating. Claimant seeks authorization for a comprehensive evaluation for spine pain management at UIHC to address the recent MRI results and his severe flare in symptoms. Claimant also seeks an order requiring employer/carrier to pay for authorized treatment to date.

(Alternate Care Petition)

FINDINGS OF FACT

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

Defendants admitted liability for an injury occurring on March 23, 2015.

Claimant has had two surgeries on his back, a surgery in 2012 and one in 2015. Claimant has not seen an orthopedic surgeon or orthopedic specialist since the surgery in 2015. Claimant testified that he would like to have an orthopedic physician or a neurologist evaluate his MRI. Claimant testified that his pain physician told him that she is not an expert in orthopedic matters.

Trina Dunham testified claimant's condition is getting worse and that claimant has socking pain in his right leg and his pain has significantly disrupted his sleep.

Defendants have authorized Julie Saddler, M.D., a pain specialist, to provide treatment for claimant's back pain. Coldstream Health and Lindsey Luke, D.C. has been providing treatment to the claimant since February 28, 2018. (Claimant's Exhibit 1, p. 4) On September 30, 2019 Dr. Saddler examined claimant. (Defendants' Exhibit 1, pp. 1- 2) Dr. Saddler noted claimant has had persistent pain in his right leg since his 2015 surgery. Dr. Saddler noted,

> He has been managing pain over the past 18 months with chiropractic care, acupuncture and massage therapy, but pain seems to be increasing. He describes a continuous sharp stab and electrical shocks. Pain is in his right buttock, shooting down his right posterior leg into the sole of his right foot with new pain developing into his right lateral leg. He rates his pain 6/10. Pain improves somewhat with water exercises in a hot tub. His best position for comfort varies. Pain increases with standing or sitting too long. His worst position for comfort is standing. Pain interrupts his sleep. He is unable to work a full 8 hours. Pain limits his physical activity and social activity.

(Def. Ex. 1, p. 1) Dr. Saddler discusses the 2015 MRI in this exhibit. On October 21, 2019 Dr. Saddler noted that the recent MRI did not show any significant changes. Dr. Saddler wrote,

> Recommend continued massage, chiro, PT. If right leg persists, patient is candidate for SCS consultation with one of my partners. Otherwise, no further pain interventional injections since no benefit from prior

(Def. Ex 1, p. 3)

On December 2, 2019[1] claimant's counsel contacted the insurance carrier concerning obtaining medical care. The email noted that Dr. Saddler had recommended continued massage, chiropractic and physical therapy. The email said claimant was receiving physical therapy, but on or about November 13, 2019 the defendants notified Coldstream Health that the defendants would not authorize anymore chiropractic, acupuncture or massage therapy until he finished his physical therapy. Claimant also requested a second opinion concerning the recent MRI. (Clm. Ex. 1, p. 7)

On December 3, 2019 Mr. Fults, with the insurance carrier Liberty Mutual, responded and told claimant's counsel he would check with Dr. Saddler's office to see if all three treatments can be taken at the same time. (Clm. Ex. 1, p. 6) On January 15, 2020 claimant contacted Mr. Fults concerning authorizing care. (Clm. Ex. 1, p. 2) On January 16, 2020 Mr. Fults said that he received a response for Dr. Saddler's office who told him that claimant could have all three treatments at the same time. Mr. Fults stated he would contact Coldstream to obtain treatment perimeters to review. (Clm. Ex. 1, pp. 1, 2)

On February 17, 2020 Dr. Luke wrote a letter concerning the care that Coldstream has been providing claimant.

> When Walter was under chiropractic care with cold laser, massages, and acupuncture treatments regularly, he had significant decreases in pain. The few times he has taken a break from care over the last two years has shown setbacks and increases in pain.
>
> Walter was approved for 9 massages, those massages lasted 60 minutes each visit. The chares for each massage was $75, this is the normal rate for therapeutic massage care. Liberty mutual only paid $16.28 for each massage. This service was overwhelmingly underpaid; therefore we discontinued Walter's massage care as our therapists refused such a low payment.
>
> I believe continued chiropractic, laser, and acupuncture care is warranted for Walter. He is currently on the following treatment plan: chiropractic,

[1] There is some indication that the email was sent on November 25, 2019, but the record is not entirely clear. See Claimant's Exhibit 1, page 6 email from Suzanne Welton to Kelly Fults.

> cold laser, and acupuncture: twice a week for two weeks, then once a week for two weeks, then twice a month for one month.
>
> Walter's treatment goals are to be able to decrease daily pain and sleep better. Massage therapy would be a wonderful added treatment for Walter but due to Liberty Mutual's inability to pay a fare [sic] amount for this service, Walter has been unable to receive this form of care.

(Clm. Ex. 1, pp. 4, 5)

The claimant testified that Coldstream has not been receiving timely payment for his care and was paying only $16.28 for his massage treatments. Claimant has been informed by Coldstream that they will not perform massages at the rate of $16.28 when it charges $75.00 per session. (Clm. Ex. 1, pp. 4, 5)

On September 18, 2019 claimant's counsel contacted Mr. Fults concerning problems Coldstream was having in getting payments for services. Claimant's counsel informed defendants that the payment issues were jeopardizing claimant's ability to get timely treatment. (Clm. Ex 1, p. 10) Claimant's counsel included part of an email from Coldstream that said;

> I have sent numerous bills to Liberty Mutual for the massages that they had previously approved. He was seen for those massages on 4-18-18, 4-25-18, 5-21-18, 5-23-18, 6-13-18, 6-28-18, 7-11-18, 7-25-18. They also have not paid for 2 exams on 3-28-18 and 6-4-18 both done by Dr. Luke. I had sent an appeal letter to them 5-20-19 and haven't heard anything. I have also called 3 times, I was on hold all three times for over an hour and [sic] half. The amount due for the massages and exams total $770. I recently (about 3 weeks ago) sent a bill for the remainder of his adjustments and acupuncture for a total of 2120.00 I do not expect to hear anything back on that bill for another week or so. If you need any additional information feel free to contact me. I will also forward you a couple email [sic] from Kelly at Liberty Mutual with whom I have been working with for the last year and a half.

(Clm. Ex. 1, p. 10)

Claimant's counsel contacted Mr. Fults concerning payment of medical treatment by Coldstream that was overdue. The email noted a number of visits and treatments from April 2018 through June 2018 that had not been paid. (Clm. Ex. 1, p. 9) On November 19, 2019 defendants provided a billing statement that five massage payments had been paid at $16.28 per session. (Clm. Ex. 1, p. 8) On February 17, 2020 defendants provided a patient statement concerning payments it had made since June 2018 to Coldstream. (Def. Ex. 1, pp. 4–10) These statements show payments and charges made from June 2018 until February 2020: The January and February

2020 charges had yet to be submitted to the insurance carrier and had not been paid. (Def. Ex. pp. 4, 10)

Claimant testified that due to the delay in proving services Dr. Luke would need to perform a comprehensive exam.

I find that defendants have not promptly provided chiropractic and massage care. I find the delay in authorizing care is not reasonable. I also find that failure to pay more than $16.28 per session for massage treatments is a failure to offer reasonable care, as there is no evidence that any provider will provide massages to claimant at this rate.

REASONING AND CONCLUSIONS OF LAW

In the expedited alternate medical care proceeding this agency does not determine or order payment for past medical care, but looks at whether the defendants are offering reasonable care at the present time. I make no ruling on defendants' obligation concerning past reimbursement for chiropractic and massage treatments. This ruling concerns current and future care.

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).

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he/she 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 question to answer is whether defendants have offered care to claimant, "… promptly and be reasonably suited to treat the injury without undue inconvenience to the employee." The answer to that is no, concerning the care provided by Coldstream. Defendants interfered with Dr. Saddler's recommendation that claimant receive physical therapy as well as massage and chiropractic treatment. There is nothing unclear in Dr. Saddler's October 21, 2019 recommendation. The defendants interposed a delay that was not warranted.

On January 16, 2020 defendants notified claimant that care would be authorized with Coldstream, but defendants wanted to obtain the perimeters to review. (Clm. Ex. 1, p. 2) The defendants stated that as of January 29, 2020 the insurance carrier authorized a treatment plan with Coldstream consisting of chiropractic, acupuncture, laser for two times a week for two weeks, one time a week for two weeks and two times

a month for one month. (Def. Answer p. 2) No authorization was made for massage treatment.

Coldstream is an authorized provider. The defendants are making judgments concerning the medical care and treatment plans provided by authorized medical professionals. Authorized medical providers do not need approval from an insurance carrier to provide care for an accepted work injury. The defendants need to pay for such care, not substitute their judgement on the number of treatments. The defendants are interfering in medical judgment, which is a denial of reasonable care. It is the medical providers who determine treatment, not the insurance carrier.

Additionally, by paying for massage at a rate that the authorized provider will not accept defendants are not providing reasonable care. Defendants need to provide massage therapy. They are not providing it now and it was not part of the authorized treatment indicated in Defendants' Answer. Additionally, the reimbursement rate is not one accepted by the authorized provider. [2]

Defendants argue that Coventry is a PPO and Coldstream is bound to accept the payment offered through the PPO agreement with Coventry. First, there was no evidence that Coldstream itself had agreed to be bound to the Coventry PPO agreement. Additionally, under Iowa Code section 85.18, "[n]o contract, rule, or device whatsoever shall operate to relieve the employer, in whole or in part, from any liability created by this chapter except as herein provided." A contract that provides a rate that no one will accept is not reasonable, and such a contract does not excuse defendants from providing the care recommended by authorized providers.

Defendants have argued that if there is a dispute concerning payment to Coldstream, Coldstream could appeal the decision to the carrier or utilize the process found in 876 IAC 10.3.

Coldstream did follow an appeal procedure according to the email in that claimant's counsel sent to Mr. Fults on September 18, 2019 and got no response. (Clm. Ex. 1, p. 10) Regardless of the reimbursement dispute between the insurance carrier and Coldstream, the issue is whether the defendants are providing prompt and reasonable care. Defendants are not providing reasonable care.

Defendants have argued that claimant has not expressed dissatisfaction with the care being provided by defendants and claimant is precluded from requesting alternate medical care relying on JBS Swift & Co. v. Contreras, 2013 840 N.W.2d 726 (Table) (Iowa Ct. App. 2013) and Grabill v. Apet, Inc., (File No. 5060318) (Dec. 6, 2017). I do not find the authorities completely on point. In JBS Swift the issue the court was deciding was whether the evidence supported the deputy's credibility finding. The court

[2] While there was no specific evidence offered on this point, I doubt that there are licensed providers of massage that would agree to such a rate offered by defendants.

did mention the requirements on Iowa Code 85.27, which does require an expression of dissatisfaction with care. In Grabill the deputy dismissed the case for lack of any evidence presented by the claimant, including not offering evidence of dissatisfaction of the care.

I find the claimant has met his burden to show he expressed dissatisfaction of care with the provision of chiropractic, massage, laser care and for a second opinion. Claimant on September 18 2019 told defendants the delay in payments was jeopardizing claimant's care. On December 2, 2019 claimant expressed dissatisfaction with delay in treatment and requested a second opinion. On January 15, 2020 claimant requested care that was still being denied. On January 29, 2020 defendants authorized some care to claimant, but not massage and was still controlling the treatment plan.

I find that claimant has proven that defendants are not providing reasonable care. Defendants shall immediately provide massage for the claimant and follow and pay for treatments that Dr. Luke recommends.

A second opinion as to a course of treatment is most certainly a part of treatment. The agency commonly orders evaluations for a second opinion in alternate care proceedings. Burr v. Bridgstone/Firestone Inc., File No. 1049010 (Alt Care Dec., September 1999); Tansel v. Umthun Trucking, 1179887 (Alt Care Dec., June 1998); Morris v. Lortex, Inc, File No. 1009285 (Alt Care Dec., April 1998); Dorothy v. Rockwell International, File No. 1045450 (Alt Care Dec., August 1993).

Claimant has requested and not received a second opinion concerning his MRI. The defendants shall provide a second opinion to the claimant concerning the MRI by an orthopedic specialist or neurologist.

Based upon the evidence submitted, claimant has failed to show that he has conveyed his dissatisfaction for a referral to the UIHC. The record does not show when claimant requested care at UIHC and what response the defendants have made.

ORDER

THEREFORE, IT IS ORDERED:

The claimant's petition for alternate medical care is granted in part and denied in part.

Defendants shall immediately provide massage therapy for claimant and follow treatment recommended by Dr. Luke.

Defendants shall provide a second opinion concerning the MRI by an orthopedic specialist or neurologist.

Claimant's request for a referral to UIHC is denied at this time.

Signed and filed this 28th day of February, 2020.

JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Donna Miller (via WCES)
Terri Davis (via WCES)