BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ANTONIO CARRASCO, Claimant, vs. BILLIARD & SPA GALLERY, LLC, Employer, and ACUITY, Insurance Carrier, Defendants.	File No. 5062546 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, Antonio Carrasco.

The alternate medical care claim came on for hearing on October 24, 2016. 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 1 and 2 and Defendants' Exhibits A through D. Defendants called Sandy Schneider, Case Manager for Acuity to testify. Claimant was not present and did not testify.

ISSUE

The issue presented for resolution is whether the claimant is entitled to alternate medical care consisting of a referral to Frederick Dery, M.D., a pain physician.

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 15, 2015 and admit that the treatment claimant is seeking is related to the March 15, 2015 work injury. Claimant is dissatisfied with the defendants' refusal to follow the recommendation of authorized physician, Mark Mysnyk, M.D. to have the claimant receive treatment by Dr. Dery.

The testimony and records admitted into evidence show that claimant was referred to Mercy Occupational Health by his employer in March 2015. This was an authorized health care provider. Mercy Occupational Health referred claimant to Dr. Mysnyk for treatment. Dr. Mysnyk performed distal biceps repair on May 7, 2015. (Exhibit A, page 2) Dr. Mysnyk continued to provide care for claimant. On September 1, 2015 Dr. Mysnyk found the claimant at maximum medical improvement and returned him to work. Ms. Schneider testified that Dr. Mysnyk was an authorized physician at this time.

Claimant requested to return to Dr. Mysnyk for right arm pain. Dr. Mysnyk was authorized by Ms. Schneider to treat claimant. Claimant was seen in March of 2016 (No record provided). He was seen on April 8, 2016 by Dr. Mysnyk for right arm pain. The diagnosis at that time was pain in his right elbow. Dr. Mysnyk wrote,

> Impression:
>
> I think his pain and sensitivity is likely related to a neuroma. I think there is a small chance he could have a low grade chronic infection although that would typically not cause the extreme sensitivity and there was no evidence of that on his x-rays. I would suggest having him start on gabapentin for the nerve pain and we will prescribe that for him today. We will set up a return appointment in 6 weeks.

(Ex. 1, p. 2)

On May 17, 2016 claimant returned to Dr. Mysnyk for right arm pain. He noted that part of claimant's pain is related to a medial epicondylitis. He further stated,

> I think the neuroma pain has improved, but he has been off of work and I think that will likely be aggravated again when he gets back to work. I think the next step would be to have him evaluated by a physiatrist. We will refer him to Dr. Dery for further evaluation.

(Ex. 2, p. 2)

Defendants did not refer claimant to Dr. Dery.

Defendants decided to obtain an independent medical examination (IME) by Abdul Foad, M.D. On June 23, 2016 he issued a report and found that claimant has a clinically intact right biceps tendon and recommended an MRI. Claimant did not present with problems of medial epicondylitis. (Ex. A, p. 6) At the request of defendants

Dr. Mysnyk ordered the MRI. An MRI was performed on July 11, 2015, which showed an intact postoperative right elbow. (Ex. B, p. 7) Defendants requested an addendum to the IME which Dr. Foad issued on October 11, 2016. Dr. Foad stated,

> 1.) Mr. Carrasco has an intact, repaired right biceps tendon. The implant is sitting in the correct position at the level of the radial tuberosity. The distal biceps does not show a re-tear, but rather intact. I do not see any significant effusion or bone increased bone marrow signal.

(Ex. C, p. 8) He made no treatment recommendation.

Defendants offered claimant the opportunity of another opinion by Dr. Nepola of the University of Iowa Hospitals and Clinics. Claimant declined.

On October 20, 2016 defendants offered to refer claimant to Timothy Miller, M.D. Dr. Miller is a pain specialist in Davenport, Iowa and is available to see claimant on October 31, 2016. (Ex. D, p. 10) The distance between Davenport and the claimant's home in Iowa City is around 55 miles. Ms. Schneider testified that she has had good results with Dr. Miller for workers she has referred to him.

There was no evidence that Ms. Schneider or anyone connected with the defendants spoke to Dr. Mysnyk to ask him if a referral to any pain specialist was appropriate or if his specific referral to Dr. Dery did not need to be followed.

REASONING AND CONCLUSIONS OF LAW

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.

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).

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). 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 Dec. January 31, 1994).

"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).

An employer/insurance carrier is not entitled to control a licensed health care provider's exercise of professional judgment. Assmann v. Blue Star Foods, Declaratory Ruling, File No. 866389 (May 18, 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). Defendants have the right to choose the medical care but only if that care is offered promptly, reasonably suited to treat the injury and offered without undue inconvenience to the injured worker. West Side Transport v. Cordell, 601 N.W.2d 691 (Iowa 1999).

The defendants did not offer a referral to a pain specialist until after claimant filed the petition for alternate care.

Dr. Mysnyk made a specific referral to Dr. Dery. He did not refer claimant to any pain specialist. He was an authorized physician. Ms. Schneider made the judgment call to refer claimant to Dr. Miller. Ms. Schneider is not a physician. Had defendants asked Dr. Mysnyk concerning a referral to a different pain specialist and he agreed, then the care could be reasonable, assuming it was timely. Dr. Mysnyk made a medical judgement to refer claimant to Dr. Dery. Absent evidence that any pain specialist would suffice, and there was no convincing evidence, the defendants are not allowed to second guess a qualified authorized treating physician. The failure to follow the medical recommendations for care, is a failure of the defendants to provide reasonable care.

It should be noted that Dr. Mysnyk recommended a referral to Dr. Dery on May 17, 2016. Defendants' offer of a referral as of October 31, 2016 is over 5 months

after the fact. Such a delay is not reasonable and the defendants are not providing reasonable care for this reason as well.

Care should be provided within a reasonable distance from claimant's residence. Trade Professionals, Inc. v. Shriver, 661 N.W.2d 119, 124 (Iowa 2003) (more than 100 miles and 3 hours driving time is an undue inconvenience to the injured worker); Schrock v. Corkery Waste Disposal, Inc. File No. 1133725 (Alt Care Decision 6/26/96) (120 mile round trip excessive); Cordero v. Florilli Corp., File No. 1084577 (Alt Care Decision 9/5/96) (care ordered within 50 mile radius of claimant's home); Schulte v. Vocational Services of Area Residential Care, File No. 1134342 (Alt Care Decision 9/6/96) (care more than 70 miles away unreasonable). There was no evidence that the reason claimant was dissatisfied with the care being offer by defendants was that it was about 55 miles away. As such, based upon the record, the offer of Dr. Miller is not unreasonable based upon distance.

ORDER

Therefore It Is Ordered:

The claimant's petition for alternate medical care is granted. Defendants shall immediately arrange for claimant to be seen by Dr. Dery.

Signed and filed this 25th day of October, 2016.

JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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