BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BRYAN TRIPP,	:	
Claimant,	:	File No. 22700113.04
vs.	:	ALTERNATE MEDICAL CARE DECISION
HORMEL FOODS,	:	
Employer, Self-Insured, Defendant.	:	Head Note: 2701

This is a contested case proceeding under Iowa Code chapters 85 and 17A. The expedited procedures of rule 876 IAC 4.48, the "alternate medical care" rule, are invoked by claimant, Bryan Tripp.

This alternate medical care claim came on for hearing on November 2, 2022. The proceedings were recorded digitally and constitute the official record of the hearing. By an order filed 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 record in this case consists of Claimant's Exhibits 1-2, and Defendant's Exhibits A-F.

ISSUE

The issue presented for resolution in this case is whether claimant is entitled to alternate medical care consisting of cervical surgery with Chad Abernathey, M.D. or shoulder surgery as recommended by Ryan Cloos, D.O.

FINDINGS OF FACT

Defendant accepts liability for a work-related accident on December 7, 2021.

On July 29, 2019, claimant was evaluated by Kyle Tevebaugh, PA-C with Grand River Medical Group. Claimant had pain radiating down the right upper extremity. Claimant said he had five bulging discs in his neck and requested to be sent to an orthopedic specialist. Claimant indicated he was scheduled for shoulder surgery and surgery was not completed as claimant moved to Iowa. (Defendant's Exhibit B)

An alternate medical care case came for hearing on this matter originally on August 5, 2022. Evidence in that hearing indicated Dr. Abernathey, in a July 28, 2022, letter, indicated that if claimant had a 2018 MRI of the cervical spine, review of that MRI would be relevant for an opinion of claimant's current cervical condition. Dr. Abernathey recommended claimant proceed with shoulder surgery until he had the 2018-2019 medical information on claimant's cervical spine. Tripp v. Hormel, File No. 22700113.03 (Alternate Medical Care Dec. August 5, 2022), page 2

Based on Dr. Abernathey's opinion, the undersigned denied claimant's alternate medical care petition on August 5, 2022. Defendant was given thirty days from the date of the decision to get the records at issue for Dr. Abernathey regarding claimant's cervical spine.

In supplemental responses to discovery dated March 22, 2022, August 17, 2022, September 7, 2022, and September 23, 2022, claimant listed approximately 15 medical care providers he had treated with over the past ten years. (Ex. A)

In a May 15, 2022, letter, defendant asked claimant to supplement discovery regarding health care providers. The record indicates that discovery was supplemented. (Exs. A and C)

In an August 9, 2022, letter, defendant again requested claimant to supplement responses to discovery regarding claimant's July 29, 2019, medical care. That discovery was supplemented. (Exs. A, B, and D)

In a September 16, 2022, letter, defendant requested medical records from Nikan Khatibi, D.O. regarding claimant. Defendant's brief indicates Dr. Khatibi did not comply with this request. (Ex. E)

In an October 6, 2022, letter, defendant's counsel indicated Dr. Khatibi was not responsive to the request for claimant's records and asked claimant to sign an authorization for those records. Based on defendant's brief, claimant did sign that authorization, that authorization was sent, and Dr. Khatibi has still not responded to a request for claimant's medical records. (Ex. F)

In an October 10, 2022, letter, written by claimant's counsel, Dr. Cloos assessed claimant as having a left shoulder full thickness rotator cuff tear. He opined the rotator cuff tear was caused or materially aggravated by claimant's December 7, 2021, work injury. Dr. Cloos wanted claimant to return to his office to discuss shoulder surgery. He indicated he requested authorization for shoulder surgery several month ago. He opined claimant should proceed with a left shoulder surgery as soon as possible. (Ex. 2)

In an October 14, 2022, letter, to defendant's counsel, claimant's counsel requested defendant authorize cervical surgery with Dr. Abernathey or shoulder surgery with Dr. Cloos. (Ex. 1)

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.

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. 6.904(3)(e); 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. v. Reynolds, 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.
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> [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.

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).

Claimant requests, in part, that defendant authorize and pay for shoulder surgery as recommended by Dr. Cloos. Dr. Cloos is an authorized provider. Dr. Cloos has opined claimant's need for surgery to the left shoulder is caused by his work injury of December 7, 2021. Dr. Cloos opines the July 29, 2019, medical record from Grand River Medical Group is irrelevant to his causation opinion as that note related to

claimant's right shoulder and Dr. Cloos is treating claimant for his left shoulder. Dr. Cloos also opined that given the nature of claimant's shoulder injury, claimant should proceed with surgery ". . .as soon as possible." Dr. Cloos indicated he originally requested authorization to treat claimant's left shoulder, from defendant, several months ago.

In a prior alternate medical care proceeding, Dr. Abernathey also indicated claimant should proceed with shoulder surgery.

There is no opinion contradicting the opinions of Dr. Cloos and Dr. Abernathey.

Defendant contends the delay in care for claimant is due to claimant's failure to adequately respond to discovery. Defendant also contends the delay in claimant's surgery is caused, in part, by Dr. Khatibi who refuses to comply with requests for medical records. I appreciate defendant's situation. However, records indicate that as of September 23, 2022, claimant has provided the names of approximately 15 medical care providers he has treated with over the past ten years. Claimant has done everything requested by defendant to secure the records from Dr. Khatibi.

Dr. Cloos is an authorized provider. He recommends claimant have left shoulder surgery as soon as possible. There is no opinion contradicting Dr. Cloos. Given this record, and that as detailed above, it is found the delay of defendant to provide shoulder surgery for claimant is unreasonable. Claimant has carried his burden of proof he is entitled to alternate medical care consisting of shoulder surgery with Dr. Cloos.

ORDER

Therefore, it is ordered:

That claimant's request for alternate medical is granted. Defendant shall immediately authorize and pay for the shoulder surgery recommended by Dr. Cloos.

Signed and filed this 2nd day of November, 2022.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Eric Loney (via WCES)

Abigail Wenninghoff (via WCES)