BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ALEC BABCOCK,

Claimant,

vs.

M.H. CONSTRUCTION EQUIPMENT CO.,

Employer,

and

ZURICH AMERICAN INSURANCE CO.,

Insurance Carrier,
Defendants.

FILED
FEB 08 2018
WORKERS COMPENSATION

File No. 5065685

ALTERNATE MEDICAL CARE DECISION

HEAD NOTE NO: 2701

STATEMENT OF THE CASE

This is a contested case proceeding under Iowa Code chapters 17A and 85. The expedited procedure of rule 876 IAC 4.48, the "alternate medical care" rule, is requested by claimant, Alec Babcock. Claimant filed a petition on January 29, 2018. He alleged at paragraph 5 of his petition:

> Reason for dissatisfaction and relief sought: Following a positive EMG in August 2017, no further care was directed. Defendants have not responded to requests regarding whether further care will be authorized.

Defendants filed an answer on January 31, 2018. Defendants admitted the occurrence of a work injury on October 20, 2016 and liability for the medical condition sought to be treated by this proceeding.

The alternative medical care claim came on for hearing on February 8, 2018. The proceedings were recorded digitally and constitute the official record of the hearing. By an order filed February 16, 2015 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 evidentiary record consists of Claimant's Exhibits 1 through 4 and Defendants' Exhibit A. The parties did not submit hearing briefs.

ISSUE

The sole issue presented for resolution is whether claimant is entitled to alternate medical care in the form of the ability to direct his own medical treatment.

FINDINGS OF FACT

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

Claimant sustained an admitted injury to his low back on October 20, 2016. Defendants authorized medical treatment, including a lumbar MRI, physical therapy, and two epidural injections. At defendants' referral, on July 10, 2017, claimant presented to Patrick Hitchon, M.D. of the neurosurgery department at the University of Iowa Hospitals & Clinics (UIHC). Claimant complained of back pain with radiation into the right lower extremity and reported aggravation of symptoms with physical therapy and no significant relief with epidural injections. Dr. Hitchon opined claimant's lumbar spine MRI of December 8, 2016 demonstrated a small disc herniation at L5-S1. Following examination, Dr. Hitchon assessed low back pain with sciatica. He opined neurosurgical care was unwarranted, but recommended additional nonsurgical care. He recommended a right lower extremity EMG/NCV, return to the pain clinic, and consultation with Joseph Chen, M.D. of the UIHC Spine Rehabilitation Clinic. (Exhibit 3, pages 1-2)

Pursuant to Dr. Hitchon's recommendation, claimant underwent EMG/NCV testing on August 21, 2017 with Sunny Kim, M.D. Dr. Kim opined claimant's results demonstrated moderate L5 radiculopathy on the right, which he opined correlated with claimant's MRI findings and mechanism of injury. He recommended follow up with Dr. Bingham. (Ex. 4, p. 1)

On December 5, 2017, claimant's counsel contacted one of defendants' attorneys via email, inquiring about defendants' authorization of further care. Counsel represented claimant was willing to return to the pain clinic, as advised by Dr. Hitchon. Counsel expressed some hesitation regarding evaluation by Dr. Chen, due to a perceived lack of objectivity, but inquired if another physician would be available to oversee claimant's evaluation for the UIHC Spine Rehabilitation Program. (Ex. 2, p. 3)

Claimant's counsel followed up with defendants' counsel via email on January 4, 2018 and inquired whether defendants had authorized further care and/or had sought an impairment rating. (Ex. 2, p. 3)

The evidentiary record contains a copy of a fax transmittal sheet dated January 4, 2018. The document is directed from defendants' third party administrator to UIHC and identifies authorization was provided for EMG/NCV studies and a pain clinic evaluation with Dr. Chen. (Ex. A) Defendants' counsel represented to the undersigned that he did not receive a copy of this document until February 7, 2018; the document was provided to claimant's counsel that same date.

Defendants' counsel authored a reply email to claimant's counsel on January 5, 2018 and represented he was "working on it." (Ex. 2, p. 2)

On January 15, 2018, claimant's counsel emailed defendants' counsel and again inquired of the status of authorization of further care and/or an impairment rating. (Ex. 2, p. 2) Defendants' counsel responded the following day and indicated he had received no word from his clients on claimant's request for further care. (Ex. 2, p. 1)

On January 26, 2018, claimant's counsel emailed defendants' counsel and provided a courtesy copy of the instant alternate care petition. (Ex. 2, p. 1) Claimant's counsel filed the petition with this agency on January 29, 2018. The matter was scheduled for hearing on February 8, 2018. At the time of hearing, defendants' counsel represented defendants have attempted to arrange a repeat evaluation with Dr. Chen, but as of the date of hearing, had been unable to schedule said appointment.

The underlying arbitration petition with respect to claimant's October 20, 2016 injury is set for hearing on March 5, 2018 in Cedar Rapids, Iowa.

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. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 16, 1975).

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.

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).

When a designated physician refers a patient to another physician, that physician acts as the defendant employer's agent. Permission for the referral from defendant is not necessary. Kittrell v. Allen Memorial Hospital, Thirty-fourth Biennial Report of the Industrial Commissioner, 164 (Arb. November 1, 1979) (aff'd by industrial commissioner). See also Limoges v. Meier Auto Salvage, I Iowa Industrial Commissioner Reports 207 (1981).

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).
"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).

Claimant suffered an admitted work related injury to his low back on October 20, 2016. Medical care was provided, yet stalled following claimant's neurosurgical evaluation by Dr. Hitchon in July 2017. Although claimant subsequently underwent EMG/NCV studies ordered by Dr. Hitchon and the studies confirmed L5 radiculopathy, no care was provided. Claimant's counsel requested authorization of further care in December 2017, to no avail.

On January 4, 2018, claimant's counsel again requested further care. Although defendants' third party administrator appeared to authorize further care that same date, there is no evidence that authorization was conveyed to claimant, claimant's counsel, or defendants' counsel. Defendants at no point scheduled further evaluation for claimant. Defendants' counsel represented defendants continue in attempts to arrange evaluation by Dr. Chen, but was unable to provide the undersigned with details regarding the duration or frequency of such attempts.

Claimant argues defendants' failure to authorize additional care, despite the positive EMG/NCV findings is tantamount to a refusal of care. Claimant's arguments are convincing: an authorized provider outlined treatment recommendations in July 2017 and those recommendations were not fulfilled by defendants until, at minimum, January 2018. This extended delay is unacceptable, as defendants are obligated to furnish claimant with reasonable and necessary medical treatment incidental to a work injury, without undue delay. Claimant remains entitled to medical care and defendants have, as of yet, failed to provide any treatment despite multiple requests. Therefore, an award of alternate medical care is appropriate.

However, I believe claimant's request to eliminate defendants' right to direct care is too severe a result given the facts of this case. Although Dr. Hitchon issued treatment recommendations in July 2017 and Dr. Kim performed confirming EMG/NCV studies in August 2017, claimant did not request further care until December 2017. While it is undoubtedly defendants' responsibility to provide medical care, it is noteworthy that claimant did not actively pursue the prior treatment recommendations

nor seek treatment on his own through his primary medical provider. As of the date of hearing, claimant possessed no alternative treatment plan to that recommended by Dr. Hitchon in July 2017.

Under these facts, I find a lesser award of alternate care is appropriate. Dr. Hitchon specifically recommended a treatment plan including EMG/NCV studies, pain clinic evaluation, and evaluation by Dr. Chen. The EMG/NCV studies have been completed. Defendants have now authorized pain clinic evaluation by Dr. Chen, the referral specifically designated by Dr. Hitchon. Although claimant objects to Dr. Chen, it is without specific identifiable basis. Defendants maintain the right to direct care and are doing so by authorizing the specific physician designated by Dr. Hitchon. On this basis and with consideration that claimant has not advocated for any alternative treatment plan, I find defendants' current offer of care is reasonable.

However, given the unacceptable delay in authorizing follow up care and lack of current appointment scheduled, I believe a time limitation on defendants' efforts is warranted. Specifically, defendants must promptly schedule claimant for the authorized evaluation with Dr. Chen. Within seven (7) days of this order, defendants must have arranged for claimant to be evaluated by Dr. Chen at his earliest available appointment date and time. If defendants fail to secure an appointment with Dr. Chen within these terms, it is determined that defendants have abandoned care and claimant will be allowed to select his own treatment providers.

ORDER

THEREFORE, IT IS ORDERED:

Claimant's application for alternate care is granted, in part, and denied, in part. Defendants shall, within seven (7) days, schedule an appointment for claimant with Dr. Chen at the earliest available date. If defendants fail to secure the appointment within these terms, defendants' right to direct care is terminated and claimant may select his own treatment providers.

Signed and filed this 8th day of February, 2018.

ERICA J. FITCH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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