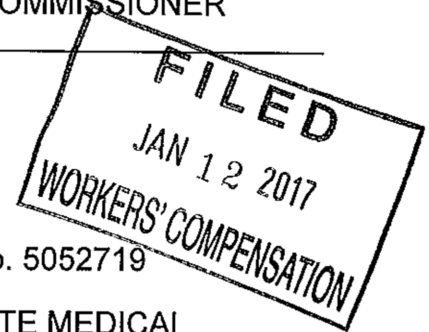
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



ROBERT OSTWINKLE,

Claimant,

vs.

MATHY CONSTRUCTION COMPANY,

Employer,

and

ZURICH AMERICAN INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5052719

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, Robert Ostwinkle. Claimant appeared personally and through his attorney, Dirk Hamel. Defendants appeared through their attorney, Thomas Wolle.

The application for alternate medical care came on for telephone hearing on January 11, 2017. The proceedings were digitally recorded. That recording constitutes the official record of this proceeding. Pursuant to the Commissioner's February 16, 2015 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 and 2, which include a total of eight pages. The record also contains defendants' exhibits A through C, which consist of 3 pages. The exhibits were admitted without objection and claimant provided testimony.

ISSUE

Whether claimant is entitled to return to a previously authorized physician, Michael Chapman, M.D., for additional evaluation and treatment recommendations.

FINDINGS OF FACT

The undersigned having considered all the evidence in the record finds:

This file was previously the subject of an application for alternate medical care that proceeded to hearing September 23, 2016. (Ex. 2) At that time, claimant had been seen by authorized provider, Dr. Chapman, who recommended multi-level fusion surgery. Defendant's then sent claimant to Chad Abernathey, M.D., who recommended and performed an L5-S1 decompression surgery, rather than the fusion recommended by Dr. Chapman. Thereafter, Dr. Abernathey recommended conservative care. Dr. Abernathey returned claimant to work without restrictions from a neurosurgical standpoint. However, claimant found that he was unable to resume full-duty work and received a restriction from his personal physician to work as tolerated. The employer accommodated this restriction. Claimant's symptoms continued and he sought an order for alternate medical care to obtain treatment at either the University of Iowa Hospital or Mayo Clinic. Defendants had offered a return visit to Dr. Abernathey. At the September, 2016 hearing, claimant argued that returning to Dr. Abernathey who evaluated, treated and released him was unlikely to produce a different result and was unreasonable. Deputy Fitch agreed that Dr. Abernathey was unlikely to change his position at that juncture and ordered that defendants designate an appropriate physician at either the University of Iowa or Mayo Clinic to evaluate claimant and offer treatment recommendations. (Ex. 2, p. 8)

The present application for alternate medical care has arisen because following Deputy Fitch's decision, both the University of Iowa Hospital and Mayo Clinic have declined to see claimant. (Ex. A & B) The evidence presented indicated only that the request for an appointment was denied, and does not include an affirmative statement that no additional treatment is warranted. (Id.)

Defendants have not authorized any other provider to evaluate claimant in place of the clinics designated in Deputy Fitch's decision. Claimant now requests a return visit to Dr. Chapman, of the Medical Associates Clinic in Dubuque, Iowa, for the purpose of an evaluation and treatment recommendations.

Claimant testified that his symptoms are continuing and involve his back, right leg and right foot. He further testified that his present symptoms are similar to the symptoms he was experiencing at the time of the prior alternate care hearing. At that time, under similar circumstances, Deputy Fitch found that claimant was entitled to receive additional evaluation.

Defendant's Exhibit C references claimant's rejection of defendants' offer to return to see Dr. Abernathey. There was no testimony or evidence presented whether this offer and rejection occurred before or after the prior application for alternate medical care. However, given the context, this offer to return to Dr. Abernathey was likely made prior to the September, 2016 application for alternate care. There was no affirmative

evidence of any current offer of medical care by defendants to address claimant's ongoing symptoms. However, it should be noted that there was also no evidence from claimant that the prior offer to return to Dr. Abernathey had been revoked.

I find that the only change in circumstances from the September, 2016 hearing to the present hearing is not the underlying facts, but merely, through no fault of either party, the University of Iowa and Mayo Clinic declined to schedule an appointment for claimant. In this application, claimant now seeks to designate an alternate provider to step into the shoes of the unavailable clinics identified in the previous order. It seems unreasonable to now undo the prior order simply because the particular provider initially designated was found to be unavailable.

Further, given the uncertainty of the extent of what, if any, care is presently offered to claimant, I find it unreasonable to fail to provide medical care when claimant has credibly testified concerning his ongoing back, leg and foot pain. Additionally, I find it unreasonable to limit authorized care to that which has failed in the past to be effective.

I find the requested evaluation with Dr. Chapman is reasonable under the present circumstances.

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).

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); Bell Bros. Heating v. Gwinn, 779 N.W.2d 193, 209 (Iowa 2010); 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. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). 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).

"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).

In Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433, 437 (Iowa 1997), the supreme court held that "when evidence is presented to the commissioner that the employer-authorized medical care has not been effective and that such care is 'inferior or less extensive' than other available care requested by the employee, . . . the commissioner is justified by section 85.27 to order the alternate care."

In this case, I have found that it is unclear whether defendants are presently offering medical care for claimant's ongoing symptoms. I also found that claimant continues to have symptoms in his back, right leg and right foot, and that if a return visit with Dr. Abernathey is authorized that such treatment to date has not been effective. Further, I have found that the previously authorized physician, Dr. Chapman had initially recommended a different course of treatment than claimant received with Dr. Abernathey. When I apply the legal standard set forth in Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433, 437 (Iowa 1997), I conclude that claimant has established entitlement to alternate medical care in the form of an evaluation with Dr. Chapman.

ORDER

IT IS THEREFORE ORDERED:

The claimant's petition for alternate medical care is granted.

Within ten (10) days of the entry of this decision, defendants shall communicate authorization for evaluation and treatment recommendations to Dr. Chapman, of the Medical Associates Clinic in Dubuque, Iowa, and notify claimant when the same has occurred.

Signed and filed this 12th day of January, 2017.

TOBY J. GORDON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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