BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JEANINE FOX,

Claimant,

vs.

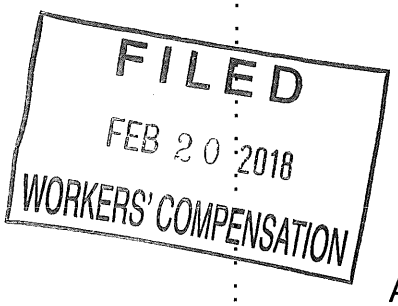
NURSEFINDERS, LLC,

Employer,

and

SENTINEL INSURANCE CO. LT.,

Insurance Carrier,
Defendants.



File No. 5061404

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, Jeanine Fox. Claimant appeared through her attorney, James Fitzsimmons. Defendants appeared through their attorney, David Castello.

The alternate medical care claim came on for telephone hearing on February 20, 2018. 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 through 3 and defendants' exhibits A and B. There was no testimony provided. Counsel provided helpful argument.

ISSUE

The issue presented for resolution is whether the claimant is entitled to alternate medical care consisting of surgery as recommended by Richard Rattay, M.D., an authorized treating physician.

FINDINGS OF FACT

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

Defendants admitted liability for an injury occurring on April 26, 2017 and the current condition for which claimant seeks alternate medical care.

Claimant seeks an order for alternate medical care compelling defendant to provide the left shoulder surgery and left cubital tunnel release as recommended by Dr. Rattay.

Claimant sustained a work injury on April 26, 2017, while helping a resident into a wheelchair. She felt her shoulder "pop out and twist." (Ex. 2, p. 1) She was seen at the Mercy Medical Center of North Iowa emergency room on the day of the injury. (Ex. 2, p. 1)

Claimant was referred to Dr. Rattay, an orthopedic upper extremity specialist for additional medical care.

On August 23, 2017, Dr. Rattay diagnosed ulnar nerve compression and shoulder impingement syndrome. He recommended left shoulder arthroscopic subacromial decompression and distal clavicle resection; labral, biceps and glenohumeral debridement and rotator cuff repair as well as left cubital tunnel release. (Ex. 3, p. 2)

Claimant indicated that she would like to proceed with the surgery as recommended by Dr. Rattay. (Ex. 3, p. 3)

Defendants, rather than authorize the surgery, sent claimant for an independent medical examination (IME) with Joshua Kimelman, D.O., an orthopedic surgeon at Iowa Ortho. (Ex. B) Dr. Kimelman recommended that claimant receive a series of shoulder injections and that she undergo EMG/NCV testing before undergoing surgeries recommended by Dr. Rattay. (Ex. B, p. 4)

The injections recommended by Dr. Kimelman and the EMG/NCV were completed and Dr. Rattay again recommended surgery. (Ex. 1, pp. 1-2; Ex. 3, pp. 4, 5) On January 16, 2018, Dr. Rattay stated that the results of these injections and studies "has not changed my opinion," concerning surgery and "[s]he remains symptomatic and is progressively worsening." (Ex. 3, p. 5)

At hearing, defendants' attorney advised that another appointment has been scheduled for claimant with another physician, Dr. Aviles at Iowa Ortho, on February 28, 2018. It was understood that this was not for the purpose of conducting surgery, but that the additional opinion might result in surgery at some point in the future.

There were no medical records introduced suggesting that the surgeries recommended by Dr. Rattay were unnecessary or inappropriate to treat the condition.

Claimant continues to want to pursue the surgery originally recommended by the authorized treating physician nearly six months ago.

I find that defendants' authorized treating physician, Dr. Rattay, recommended surgery nearly six months ago and defendants have yet to authorize the treatment.

I find that the defendants' refusal to authorize the recommended surgery is unreasonable.

I find that the medical treatment offered by defendants of a third opinion with Dr. Aviles is not reasonably suited to treat claimant's work injury.

REASONING AND 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. 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 433 (Iowa 1997), 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" 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.

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).

An employer's right to select the provider of medical treatment to an injured worker does not include the right to determine how an injured worker should be diagnosed, evaluated, treated, or other matters of professional medical judgment. Assmann v. Blue Star Foods, File No. 866389 (Declaratory Ruling, May 19, 1988).

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 June 17, 1986).

I found that defendants' authorized treating physician, Dr. Rattay, recommended surgery nearly six months ago and defendants have yet to authorize the treatment. I found that the defendants' refusal to authorize the recommended surgery is unreasonable. I further found that the medical treatment being offered by defendants of a third opinion with Dr. Aviles and is not reasonably suited to treat claimant's work injury.

Defendants are not allowed to substitute their own judgment for that of the treating medical specialists. Defendant's authorized treating orthopedic surgeon has recommended surgery. Defendant's initial position was a second opinion, which claimant complied with. Dr. Kimelman recommended injections and EMG/NCV studies, which were completed and did not change Dr. Rattay's recommendation for surgery. When that recommendation was stated again by Dr. Rattay, defendants sought a third opinion from Dr. Aviles. Although Dr. Aviles may be a very competent and well qualified physician, defendants are not allowed to continue to shop for a different opinion in lieu of authorizing the recommended treatment of their own authorized physician, Dr. Rattay. A near six month delay in authorizing the recommended surgeries is not reasonable under these circumstances.

Therefore, I conclude that claimant has proven her claim for alternate medical care. I conclude that defendants should be ordered to authorize and pay for the recommended surgeries with Dr. Rattay as identified above.

ORDER

IT IS THEREFORE ORDERED:

That defendants shall promptly authorize and timely pay for the recommended surgeries with Dr. Rattay as identified above and as stated in the medical records.

Signed and filed this 20th day of February, 2018.

TOBY J. GORDON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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