BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JEFFERY KRIEGER,

Claimant,

vs.

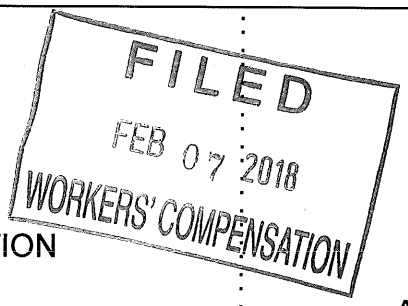
RUSSELL CONSTRUCTION COMPANY, INC.,

Employer,

and

AMERICAN ZURICH INSURANCE COMPANY,

Insurance Carrier,
Defendants.



File No. 5060940

ALTERNATE MEDICAL CARE DECISION

Head Note No.: 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, Jeffery Krieger.

This alternate medical care claim came on for hearing on February 6, 2018. 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 a petition for judicial review under Iowa Code section 17A.19.

The claimant properly served notice of this petition for alternate medical care on the defendant employer and defendant employer's insurance carrier. Claimant's counsel indicated she had not been contacted by anyone on behalf of the employer or any insurance carrier in regards to this petition.

No answer to the petition for alternate medical care was filed by the employer or any insurance carrier or attorney representing the employer. A copy of the return receipt of service of the petition and original notice indicate defendant employer received those documents. (See Return of Service)

The undersigned examined the file for this petition and there is no answer from the employer or its insurance carrier on file. There is no indication that anyone representing the employer or its insurance carrier called in to the agency to provide a phone number to be called during the hearing. The file does not show that this agency's notice of the hearing, sent to the employer and requesting a phone number to be called was returned as undelivered.

On the morning of the hearing, claimant's counsel called the adjuster on file to inquire whether the adjuster would be participating in the hearing. The adjuster gave claimant the name of a different employee who had been assigned to the case.

Claimant, claimant's attorney, and the adjuster were called by the undersigned. The adjuster admitted that she had received the file, but did not have any knowledge of it prior the hearing. She further indicated that no attorney had been assigned. The procedure for alternate care hearings was explained and the representative from the defendant insurer declined to participate.

Thus, a finding was made that the claimant had properly served notice of the petition for alternate medical care on the defendant employer; that the employer had not filed an answer or otherwise appeared; and that when contacted, the defendant insurer declined to participate. The employer was found to be in default for purposes of this alternate medical care proceeding, and the employer is found to have abandoned the care of the claimant by its refusal to respond to claimant regarding further treatment, or participate in this alternate medical care proceeding.

The record in this case consists of claimant's exhibits 1 through 3. Defendants did not participate in the hearing.

ISSUE

The issue presented for resolution in this case is whether claimant is entitled to alternate medical care consisting of treatment for the right shoulder and right upper extremity.

FINDINGS OF FACT

Claimant was injured on or about January 29, 2016, when he was assisting in the lift and carry of a 14-foot by 1-foot channel weighing over 300 pounds. While lifting the end of the channel to shoulder level, claimant felt a pop and developed acute pain. (Ex. 1:2) He reported the injury to his supervisor and returned to work in hopes that the pain would resolve. When the pain persisted, claimant sought out care on July 14, 2016, with Allison Crall, N.P., who referred claimant to an orthopaedic surgeon. He consulted with Mr. Matthew Bollier on August 29, 2016, who ordered an MRI. Id. The MRI revealed a partial-thickness tearing of the supraspinatus and subscapularis tendons. Id. Claimant was then referred to Dr. Eric Aschenbrenner's clinic and received an ultrasound-guided right shoulder subacromial injection and right glenohumeral joint injection. Id. The injections did not completely resolve the pain. Dr. Bollier recommended claimant undergo a surgical repair. This took place on January 18, 2017. Id. Postoperatively, he saw Elayne Gustoff, ARNP, and was sent to physical therapy. Id. at 3.

During therapy, claimant began to complain of numbness in the right upper extremity. Therapy concluded mid to late July 2017. Id. at 3. He was released from physical therapy with the ability to lift up to 25 pounds floor to knuckle level and the ability to perform two hours of work hardening that included box lifting and carrying as well as shoulder strengthening activities with weights as well as resistance bands. Id.

On July 25, 2017, Dr. Bollier authored a letter to defendant insurer, setting claimant's impairment rating at 9 percent of the whole person and recommended no permanent restrictions, informing the claimant to "do whatever you are comfortable with." Id. at 3.

Claimant has had no further care since that date. Currently, claimant has numbness in the forearm as well as diminished sensation in the ulnar aspect of his hand. Id. at 4. His shoulder still bothers him, waking him up from sleep on a periodic basis. Id. Dr. Mark Taylor's independent medical examination recorded decreased sensation in the forearm and down into the hand as well as tenderness over the superior shoulder and AC joint. He had normal strength in the shoulder with exception of possible mild weakness of supination on the right. Id. Dr. Taylor wrote that claimant would benefit from "consideration of neurodiagnostic studies, or an EMG" to address the numbness and tingling and that he should have his right upper extremity checked either through his primary care provider or Dr. Bollier's clinic.

Claimant requested he seek out care with his primary care provider and then follow through with referrals from that office.

A request was sent to defendant insurer on December 18, 2017, based on the examination and report of Dr. Taylor. (Ex. 2:9) On January 4, 2018, a second letter and request was sent, explicitly stating claimant's dissatisfaction with the lack of care and treatment being provided. (Ex. 3:10)

There is no contrary evidence.

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 Rule of Appellate Procedure 14(f)(5); 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" care 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.

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).

Claimant has contacted his employer via the insurer requesting further care for his work injury. Defendant did not offer any care. There has been no response to either letter. Defendant employer did not file an answer, did not respond to the petition, and declined to participate in the hearing.

Based on this, it is found defendant has abandoned the claimant's care. There is evidence indicating the treatment provided by defendant was not appropriate or adequate. Claimant seeks treatment that is appropriate for his injury. The petition for alternate medical care is granted.

ORDER

THEREFORE, IT IS ORDERED:

The claimant's petition for alternate medical care is granted. Defendant shall furnish claimant care consisting of authorization of a doctor to treat claimant's ongoing symptoms of numbness and tingling in the right upper extremity, either with his primary care physician or Dr. Bollier, whichever the claimant chooses.

Signed and filed this 7th day of February, 2018.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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