BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOHN ABITZ,

Claimant,

vs.

NEWT MARINE SERVICE DBA,

Employer,

and

LIBERTY MUTUAL INSURANCE,

Insurance Carrier,
Defendants.

File Nos.: 5051701
5051746
5051747
5051748
5051749

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, the "alternate medical care" rule, is invoked by the claimant.

Although the petition for alternate medical care was filed only under File No. 5051701, claimant's attorney stated during the hearing that four petitions in arbitration were recently filed in this case. File No. 5051746 relates to an alleged date of injury of November 8, 2013. File No. 5051747 relates to an alleged date of injury of January 27, 2014. File No. 5051748 relates to an alleged date of injury of August 28, 2014. File No. 5051749 relates to an alleged date of injury of November 14, 2014.

The file number utilized during the alternate medical care hearing on March 9, 2015, 5051701, was erroneously assigned by this agency. File No. 5051701 should be and is hereby dismissed and vacated. The alternate medical care petition filed by claimant is considered properly filed in File Nos. 5051746, 5051747, 5051748, and 5051749.

Defendants stated they admitted liability for the first two injuries, but denied liability for the latter two as being sequalae of the earlier injuries. Both parties agreed the hearing could go forward on this basis.

The alternate medical care claim came on for hearing on March 9, 2015. The proceedings were digitally recorded, which constitutes the official record of this proceeding. By order of the Iowa Workers' Compensation Commissioner, this ruling is designated final agency action.

The record consists of claimant's exhibits 1, 2 and 3; defendants' exhibits A, B and C; and the testimony of the claimant.

ISSUE

The issue presented for resolution is whether the claimant is entitled to alternate medical care consisting of authorization of James Nepola, M.D., to treat claimant's shoulder injury.

FINDINGS OF FACT

On or about November 8, 2013 the claimant suffered an injury, which arose out of and in the course of the claimant's employment. Claimant was working on a stump and as he turned a tree hit him on the right shoulder and back. Claimant continued to work over the next few weeks.

On January 27, 2014, claimant suffered another injury. While standing on a slope, wind blew him over, and again injured his right shoulder. He obtained medical treatment after that. He eventually underwent an arthroscopic surgery on June 6, 2014.

On August 28, 2014, after he returned to work he suffered another injury to his right shoulder when he tripped over a hose. He was working on light duty at the time. He continued with his physical therapy. He had increased pain, and trouble doing things like putting on a jacket.

Sue Gaul was his nurse case manager at first, and she was replaced by James Pagel. They were hired by the insurer. Exhibit 3, page 2, a physical therapy note, shows the effect of the injury, including trouble lifting overhead, dressing his upper body, etc. If claimant bumped his right shoulder, it would be painful. His job required him to be able to lift 150 pounds for full duty work. Claimant does not feel he could pass the strength tests today he was required to pass to get his job. Although further physical therapy was authorized, it was discontinued because it was felt it was no longer doing any good.

Claimant was injured again on November 14, 2014, in a motor vehicle accident when he was hit by another car while traveling to physical therapy. This aggravated the pain in his right shoulder. Dr. Field felt it was all part of the original injury. Dr. Field wanted to do an MRI, but it was not accomplished.

On January 15, 2015, at a visit with Dr. Field, claimant was given a work restriction of no lifting greater than 75 pounds, "permanent at this point". It also states no overhead restrictions were needed. (Exhibit 2, Exhibit B) Both claimant and James Pagel were confused by the restrictions. Dr. Field said not to worry, "he's stronger than both of us".

Claimant took the work restrictions to his employer. His supervisor was unhappy with the restriction. Exhibit C is a note from the insurer to Dr. Field, asking him to answer questions. On January 22, 2015, Dr. Field completed the form and under permanent restrictions, he wrote "no", in contradiction of what he said earlier.

Exhibit A is Dr. Field's office note of January 15, 2015. He states claimant's pain had gone away, which claimant states is untrue. He told the doctor his shoulder was still sore, to the point of feeling like his arm was being ripped off. The doctor did not have claimant do any motions or positions to test this. He did not ask claimant about strength or weakness in his arm. Exhibit C shows Dr. Field assigned claimant a three percent permanent partial impairment of his arm, even though Dr. Field did not see him again after January 15, 2015.

Dr. Field noted claimant was back at work and lifting up to 75 pounds. Claimant denies this and states he did not tell Dr. Field that. Dr. Field told him it would go away but it has gotten worse. Claimant states his wife can now lift more than he can. His sleep is disrupted. His pain is worse.

Claimant is asking for a referral to James Nepola, M.D., rather than return to Dr. Field. Claimant would like a second opinion because his arm is still hurting and he would like to get his strength back. Dr. Field told him he has nothing further to offer him.

On cross examination, claimant agreed no doctor has recommended a second opinion, and no doctor has recommended he see Dr. Nepola. Dr. Field's January 15, 2015, note stated claimant should return as needed, but claimant has not returned to him. The insurer has not told him he cannot return to Dr. Field. Dr. Field cancelled claimant's arthrogram, and no other doctor has rescheduled it.

Exhibit 3, page 2, shows the physical therapist found claimant's range of motion to be within normal limits. It also shows normal shoulder strength. Exhibit 3, page 4, shows claimant's four of five range of motion tests were within functional limits. Exhibit A shows Dr. Field felt the 75 pound restriction could be lifted in a month or so. He found claimant to be at maximum medical improvement. Exhibit C shows the restriction was lifted on January 22, 2015.

On redirect examination, claimant stated Dr. Field never explained why he changed his mind on the MRI. Exhibit 3, pages 1 and 2, describes claimant's physical abilities, but this was just before the motor vehicle accident that worsened his symptoms. In that accident claimant was hit on the left side of his vehicle by another

car. Claimant still has pain when dressing himself, putting on a shirt, etc. Claimant sees no sense in returning to Dr. Field for treatment, as he does not listen to claimant.

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); 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., 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.
>
> [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., (Review-Reopening June 17, 1986).

Claimant seeks alternate medical care in the form of authorization for treatment by Dr. Nepola. Claimant states Dr. Field's conclusion that claimant has reached maximum medical improvement, does not need work restrictions, and has only a three percent impairment of his arm is contradicted by the doctor's own notes, claimant's testimony, and the medical records.

Dr. Field did at one time feel claimant needed an MRI. It was later cancelled without explanation. Dr. Field also at one time assigned a "permanent for now" 75 pound lifting restriction. He did, however, also state it might be lifted in the future, and he did lift it later. Dr. Field assigned a rating of permanent impairment and told claimant he could do nothing further for him without conducting testing or seeing claimant again.

Claimant argues the record strongly implies the insurer pressured Dr. Field to withdraw his permanent restriction and terminate claimant's treatment. However, although the record does suggest that as a possibility, the undersigned cannot so find on the record as it exists. Dr. Field does seem to make a sharp turn in his thinking in regards to claimant's treatment. Initially, he seems to be properly concerned with claimant's welfare, but later in the course of treatment he appears to have concluded claimant is not severely impaired and further treatment is not needed, in spite of evidence to the contrary.

This contrasts with claimant's testimony that his pain has increased, not decreased, and that his strength is much diminished from what it was before the injuries. An MRI might shed light on the question of how much impairment claimant has in fact incurred, but it was cancelled and Dr. Field made his three percent pronouncement without the benefit of that test, or the benefit of strength and range of motion tests that could have been conducted in his office. Dr. Field cancelled the MRI and arthrogram because, as he stated, "Clearly, his shoulder has responded now." (Exhibit A) Claimant takes strong issue with this. Tellingly, Dr. Field also predicted claimant's pain would resolve, and when it did not and in fact got worse, he found claimant to be at maximum medical improvement (MMI) instead of exploring other treatment alternatives.

Claimant desires a second opinion from Dr. Nepola, a well-respected specialist at the University of Iowa. Defendants resist, in their closing remarks as well as their brief, correctly stating it is claimant's burden of proof to show a need to change the care that was provided. They point to physical therapy testing which shows a normal range of motion in several functional limit tests. They feel Dr. Field has been consistent, in that he said the restriction could be lifted in a month or so, and it was. They argue Dr. Field merely mentioned an MRI, rather than ordered one and then cancelled it. They assert a poor doctor-patient relationship between claimant and Dr. Field is insufficient to order alternative care.

The latter statement is true, if a breakdown in the doctor-patient relationship were all that was going on. But it is undeniable that Dr. Field has, without benefit of an MRI or other testing, concluded claimant cannot benefit from further treatment from him. He has assigned a low rating of impairment, no work restrictions, and told claimant he has nothing further to offer him. Yet claimant continues to experience chronic, and increasing, pain. He credibly testified to losing much of his arm strength. His sleep is disrupted. The picture painted by claimant differs significantly from the one painted by Dr. Field. It is noteworthy that Dr. Field made his final conclusions without again seeing claimant for an up to date assessment of his condition.

If the petition for alternate care is denied, it will mean claimant will have to accept the three percent rating of impairment, no restrictions, and no further treatment conclusion of Dr. Field. No MRI will be conducted. Worse, his pain will continue and perhaps increase more. The great discrepancy between claimant's description of his symptoms and impairment and the assessment of them by Dr. Field will never be clarified.

On the other hand, if the petition for alternate medical care is granted and Dr. Nepola is allowed to take a look at claimant and offer a second opinion, the questions of the extent of claimant's impairment; what further treatment, if any, is called for; and what work restrictions are needed, can be better decided. If there is further medical treatment that might alleviate some of the impairment claimant presently has, that will both benefit the claimant and reduce the liability of defendants.

In deciding such questions, more information is always better than less. It is better to err on the side of caution and be sure we know what is going on with claimant's shoulder before resolving this claim. It is concluded claimant has carried his burden of proof to show defendants have not provided medical treatment reasonably suited to fully treat his work injuries. Dr. Nepola will be authorized to evaluate and treat claimant's shoulder injury.

ORDER

THEREFORE IT IS ORDERED:

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

Signed and filed this 11th day of March, 2015.

JON E. HEITLAND
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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