BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
MAR 08 2017
WORKERS COMPENSATION

PATRICIA HINTZ, Claimant, vs. WILLOW GARDENS CARE CENTER, Employer, and AMERICAN COMPENSATION INS. CO., Insurance Carrier, Defendants.	File No. 5063287 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, Patricia Hintz. Claimant appeared personally and through her attorney, Christoph Rupprecht. Defendants appeared through their attorney, Thomas Wolle.

The alternate medical care claim came on for hearing on March 7, 2017. The proceedings were digitally recorded. That recording constitutes the official record of this proceeding. Pursuant to the Commissioner's 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 the sworn testimony of claimant and claimant's exhibits 1 through 4; and defendants' exhibits A through C.

It is also noted that while the defendants conceded liability for the claimant's bilateral shoulder conditions, they did not accept responsibility for the claimant's left knee condition. While the defendants did not specifically deny liability, they refused to accept liability.

ISSUE

The issue presented for resolution is whether the claimant is entitled to a referral to a neurologist or pain specialist for evaluation of complex regional pain syndrome

(CRPS). The second issue is whether claimant is entitled to a referral to a knee specialist.

FINDINGS OF FACT

The claimant is a 68-year-old licensed practical nurse (LPN). She has worked in nursing for 50 years and has worked with older patients for much of that time. She is skilled in evaluating patient's complaints of pain and range of motion.

Claimant testified live at hearing. She was credible. Her demeanor was straightforward, tearful and indignant. She provided specific details in her testimony. Based upon her demeanor and the corroborating records in the file, I believed every word she said.

She was injured on October 13, 2016. She fell forward at work, hitting her face. She fell hard. During the fall, she injured her bilateral shoulders. She also claims she injured her left knee, however, since the employer has not accepted liability for this condition, I make no finding regarding the knee. The injury was severe, resulting in bilateral humeral fractures and ultimately, significant surgeries on both shoulders (right reverse total shoulder replacement, left hemi-shoulder replacement). The first surgery was October 25, 2016, and the second was November 2, 2016. The surgeries were performed by a highly-qualified orthopedic surgeon named Daniel Fabiano, M.D.

Since the surgeries, Ms. Hintz has been recuperating slowly and in great pain. She testified she has awful pain in both shoulders. She testified that it is constant. She testified that she also has the following symptoms: swelling, redness or discoloration, sweating and that her skin is frequently hot or warm to the touch. It is noted that these are classic complex regional pain syndrome (CRPS) symptoms. Depression and crying from pain are also symptoms of CRPS.

Claimant began receiving physical therapy at Unity Point Health in Cedar Rapids with Megan Thompson, P.T. On January 5, 2017, Ms. Thompson noted that claimant was "in tears at start of session and throughout session today, . . ." (Claimant's Exhibit 2, page 2) She noted that claimant "cannot even move the L [left] arm without excruciating pain, rates it over 10/10." (Cl. Ex. 2, p. 2) She also noted that Ms. Hintz became "nauseous when attempting to move L shoulder," on that date (Cl. Ex. 2, p. 2) She concluded that the left shoulder "appeared to be 'frozen' in all areas of ROM and pt became sick when this PT attempted to touch or move it, demonstrating severe allodynia and pain responses." (Cl. Ex. 2, p. 3) Ms. Thompson suggested that "further intervention for L shoulder may be indicated at this time, . . ." (Cl. Ex. 2, p. 3)

Ms. Hintz testified that Ms. Thompson gave her the document in evidence as Claimant's Exhibit 3 and told her that while she is a physical therapist and cannot diagnose injuries, she suspected CRPS. (Cl. Ex. 3) While this is hearsay, I do believe this happened. I also believe claimant that her family physician told her she "may have" CRPS. Claimants testified that he did not make a referral because he did not want to interfere with the workers' compensation system.

Ms. Hintz last saw Dr. Fabiano on February 23, 2017. (Cl. Ex. 4) Ms. Hintz testified that she does not feel like Dr. Fabiano listens to her. She provided a specific example. Specifically, she testified that the employer has retained a nurse case manager, Jan Collins. She felt Dr. Fabiano spoke to Ms. Collins instead of her. She testified that he did not ask her about her symptoms.

On February 23, 2017, Dr. Fabiano documented the following in his medical notes:

> ASSESSMENT
> Intact shoulder prosthesis, post-op reverse right hemi left for fracture.
>
> PLAN
> • Pain in unspecified shoulder
> ORTHO RAD COMBOS/SHOULDER: Shoulder: Grashey/Reverse Axial
> Instructions: Bilateral shoulders

(Cl. Ex. 4, p. 2) He provided her medications, ordered additional physical therapy and indicated he would follow up.

The claimant was returned to light duty work at some point. She works four days a week, anywhere from 3 to 4 hours per day. She does not lift more than 1-2 pounds with either arm. She testified that the pain at work is unbearable. She cannot perform many activities of daily living, including dressing and cleaning herself or sleeping soundly.

The employer introduced a statement and affidavit from the nurse case manager, Ms. Collins, which states that Dr. Fabiano did not feel claimant had symptoms consistent with CRPS, and he did not recommend a pain clinic referral. He did apparently recommend a second opinion with an orthopedist. The parties further stipulated that the defendants have arranged an appointment with a second shoulder specialist in Iowa City. Claimant is scheduled to see Carolyn Hettrich, M.D., on April 4, 2017. Claimant's counsel argued that she cannot wait for this appointment and she needs an evaluation for CRPS immediately. Defendants also introduced a medical report from Dr. Fabiano on defense counsel's letterhead, confirming that he did not believe claimant has CRPS or that a pain clinic is recommended.

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. Iowa Code Section 85.27 (2013).

By challenging the employer's choice of treatment – and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See 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).

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 statutory right is to select the providers of care and the employer may consider cost and other pertinent factors when exercising its choice. Long, at 124. An employer (typically) is not a licensed health care provider and does not possess medical expertise. Accordingly, an employer does not have the right to control the methods the providers choose to evaluate, diagnose and treat the injured employee. An employer is not entitled to control a licensed health care provider's exercise of professional judgment. Assman v. Blue Star Foods, File No. 866389 (Declaratory Ruling, May 19, 1988). An employer's failure to follow recommendations of an authorized physician in matters of treatment is commonly a failure to provide reasonable treatment. Boggs v. Cargill, Inc., File No. 1050396 (Alt. Care Dec. January 31, 1994).

The Iowa Workers' Compensation system is based upon a special, and sometimes delicate, compromise between employers and workers. A cornerstone of that compromise in Iowa is that the employer, not the employee, has the right to choose the claimant's medical provider. Iowa Code Section 85.27 (2015). An injured worker can only overcome this right if the employer's chosen care provider offers treatment which is unreasonable. Unreasonable medical care is usually a medical issue, which will often, or almost always, require some type of medical evidence.

In this case, claimant argues that the care offered by Dr. Fabiano is not reasonably suited to treat her injury. I understand her argument. It makes logical sense.

The claimant is in extreme pain which is constant. Even with severe restrictions, she has tremendous difficulty performing her job. She cannot perform activities of daily living without assistance. All of her activities aggravate her pain and she continues to try to work. She is in so much pain that she frequently breaks down into tears and becomes nauseous when her left shoulder is moved. With this background she dutifully attends her medical appointments with a physician she does not really trust, chosen by her employer. She feels he does not really listen to her and pays more attention to the nurse hired by the insurance company. This would likely not seem like "reasonable care" to any lay person outside of the Iowa Workers' Compensation system. And yet, under the current law, it is.

It is the claimant's burden to prove the care is unreasonable and in most cases that will require some medical evidence. 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, the claimant is a nurse. She relies upon her own medical judgment, as well as the hearsay statements of her physical therapist, and, to some extent, her family physician. It is noted, however, that claimant testified that her family physician told her that she "may" have CRPS. This evidence is not sufficient to overcome the medical evidence provided by the treating surgeon. He has recommended a second opinion from another orthopedic shoulder specialist. (Def. Ex. C) He is a qualified shoulder surgeon who has treated the claimant, and, based upon the record before me, I have no reason to believe he has done anything other than attempt to heal her. He may not be the best communicator in the world. He may not be as aggressive as the claimant, or most patients, would like. I do not, however, have enough medical evidence in this record to overrule his medical judgment.

Stated another way, I am not a physician. If Dr. Fabiano recommended that the claimant see a neurologist, and the defendants refused to authorize it, I would likely order them to authorize it for the simple reason that an employer may not substitute its medical judgment for the medical judgment of its chosen physician. Conversely, in most cases, a claimant may not substitute her medical judgment for the medical judgment of the physician without some medical evidence supporting her position. There may be extreme cases where this is not true, such as a true breakdown of the doctor-patient relationship, but that does not exist here.

Having stated all of this, I note that I am concerned that the claimant has described a number of classic symptoms of CRPS, including severe pain, swelling, discoloration, warmth to touch, sweating, in addition to some symptoms of depression (e.g., crying). She also testified that she does not feel as though Dr. Fabiano is listening to her complaints and I note that the symptoms she testified about are not documented in his medical records. It is my understanding that treatment for CRPS is usually more effective when it occurs promptly. Nevertheless, the greater weight of competent medical evidence in the record supports the defendants' position.

I also note that the defendants have not refused to do anything. They have proactively arranged a second opinion with another qualified orthopedist. I presume the defendants will authorize this physician's recommendations if she recommends another course. The claimant argues that she cannot wait until April 4, 2017, to see another physician, however, it seems unlikely that she would get into a qualified neurologist any faster.

Having considered the entire record of evidence, I find that claimant has failed to prove that the care offered by the defendants is unreasonable at this time.

Regarding the claimant's alleged left knee injury, I find the following.

Before any benefits can be ordered, including medical benefits, compensability of the claim must be established, either by admission of liability or by adjudication. The summary provisions of Iowa Code section 85.27 as more particularly described in rule 876 IAC 4.48 are not designed to adjudicate disputed compensability of claim.

The Iowa Supreme Court has held:

> We emphasize that the commissioner's ability to decide the merits of a section 85.27(4) alternate medical care claim is limited to situations where the compensability of an injury is conceded, but the reasonableness of a particular course of treatment for the compensable injury is disputed.
>
> . . . .
>
> Thus, the commissioner cannot decide the reasonableness of the alternate care claim without also necessarily deciding the ultimate disputed issue in the case: whether or not the medical condition Barnett was suffering at the time of the request was a work-related injury.
>
> . . . .
>
> Once an employer takes the position in response to a claim for alternate medical care that the care sought is for a noncompensatory injury, the employer cannot assert an authorization defense in response to a subsequent claim by the employee for the expenses of the alternate medical care.

R. R. Donnelly & Sons v. Barnett, 670 N.W.2d 190, 197-198 (Iowa 2003).

If the defendants refuse to accept liability for the condition for which the claimant seeks treatment, they lose their right to control the medical care claimant seeks in this proceeding and the claimant is free to choose that care on his or her own. Bell Bros., Heating v. Gwinn, 779 N.W.2d 193 (Iowa 2010). Cases where the employer has refused to accept liability, are essentially treated as a denial.

In this case, the defendants have not admitted or denied that the knee condition is related to the admitted work injury. As such, the defendants have not accepted liability for this condition and I have no authority to order them to provide alternate medical care. Therefore the portion of claimant's claim related to the alleged knee condition is dismissed without prejudice at this time. Claimant may obtain reasonable medical care from any provider for this treatment at her own expense and seek reimbursement for such care using regular claim proceedings before this agency. Defendants are prohibited from asserting an authorization defense.

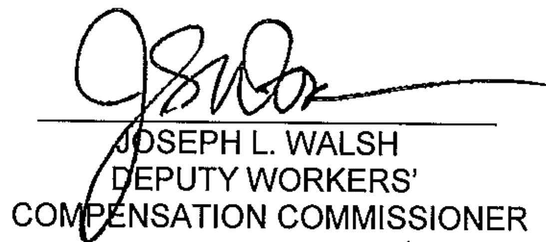
ORDER

THEREFORE IT IS ORDERED:

The claimant's petition for alternate medical care is DENIED in part.

IT IS FURTHER ORDERED that if claimant seeks to recover the charges incurred in obtaining the care for which defendants have refused to accept liability, defendants are barred from asserting lack of authorization as a defense for those charges.

Signed and filed this 8th day of March, 2017.



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