

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
JUN 14 2019
WORKERS COMPENSATION

ERIC AKKERMAN,

Claimant,

vs.

CITY OF DES MOINES,

Employer,
Self-Insured,
Defendant.

File No. 5047534

ALTERNATE MEDICAL

CARE REMAND DECISION

(September 6, 2018, Petition)

HEAD NOTE NO: 2701

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Claimant,

vs.

CITY OF DES MOINES,

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Self-Insured,
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ALTERNATE MEDICAL

CARE DECISION

(May 31, 2019 Petition)

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STATEMENT OF THE CASE

This is a combined remand proceeding and contested case proceeding under Iowa Code chapters 85 and 17A.

On September 20, 2018, the agency entered an order granting alternate medical care to the claimant. Specifically, the undersigned found that the City had failed to offer any medical care to the claimant for his low back condition and that Andrej Szczepanek, M.D., was authorized to treat him. Thereafter Defendant City filed a Petition for Judicial Review and requested a stay pending judicial review. The motion was denied on November 21, 2018. On or about April 22, 2019, the Iowa District Court for Polk County entered a Ruling on Petition for Judicial Review remanding the matter back to the agency for further proceedings.¹ The District Court did not forward this Decision to the

¹ The District Court decision held the following: "In the present case, the deputy commissioner found that Petitioner [City] did not offer any care at all to Respondent [claimant] prior to the hearing. As a result, the deputy commissioner then found that Respondent [claimant] was entitled to direct his own medical care under Iowa Code section 85.27. These findings do not address whether or not the deputy commissioner perceived the care sought by the Respondent [claimant] to be reasonable and necessary. Further, although it could be inferred, these findings do not specifically address whether or not the deputy

agency until requested by the agency on June 5, 2019. The decision initially came to the attention of the agency on May 31, 2019, when claimant filed a new Petition for Alternate Medical Care, alleging that Defendant City has continued to refuse to authorize an appointment with Dr. Szczepanek. The District Court decision was attached as Claimant's Exhibit 1.

On June 10, 2019, an informal telephone conference was held with counsel for both parties to discuss the matter. Since there is substantial overlap between the two cases, both parties agreed to combine the proceedings. It is noted that ordinarily, remand proceedings are limited to the evidence in the record at the time of remand. Shortly thereafter, the remand proceedings were formally assigned to the undersigned.

The expedited procedure of rule 876 IAC 4.48 is invoked by claimant, Eric Akkerman. Claimant appeared personally and through attorney, Christopher Spaulding. Defendant City appeared through their attorney, Luke Desmet.

The combined remand proceedings and alternate care hearing came on for hearing by telephone conference on June 14, 2019. 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 these alternate medical care proceedings. 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 combined record consists of claimant's exhibits 1 through 3 and defense exhibits A through F, as well as the sworn testimony of Mr. Akkerman. The record from the September 18, 2018, alternate care hearing was reviewed as well. In addition, official notice was taken of the agency file. At the commencement of hearing, claimant clarified that he is seeking pain management treatment from Andrew Spellman, D.O., at Metro Anesthesia & Pain Management. The City has agreed to authorize an appointment for treatment with Dr. Spellman, however, does not wish to be under an agency order compelling this treatment.

ISSUE

The issue presented for resolution in the remand proceedings is whether the treatment offered by the City is reasonable as compared to the treatment sought by the claimant.

The issue presented for resolution in the original alternate care proceeding filed on May 31, 2019, is whether pain management treatment should be authorized with Dr. Spellman.

Accordingly Petitioner's substantial rights have been prejudiced and this matter should be remanded for further proceedings to allow the deputy commissioner to address the reasonableness and necessity of medical care sought by Respondent [claimant] as an alternative to the care offered by Petitioner [City]." (Claimant's Exhibit 1, pages 4-5)

FINDINGS OF FACT

The findings of fact set forth in the September 20, 2018 alternate medical care decision (pages 2 and 3) are incorporated by reference. Based upon those findings of fact, I ordered that Defendant City authorize treatment with Dr. Szczepanek. The order stated "Defendants shall immediately authorize Dr. Szczepanek for pain management treatment for claimant's low back condition." While I did not specifically write in the decision that the City's failure to authorize any care at all was unreasonable, the District Court did correctly infer my intent. I found that the City's failure to authorize any medical treatment for the claimant's low back amounted to an abandonment of medical care. I also did not specifically address whether the treatment I was authorizing – a referral to Dr. Szczepanek, was reasonable and necessary. Having reviewed all of the evidence in the original proceeding, as well as the proceeding today, I conclude that the care offered by the City was unreasonable, and the care sought by the claimant – a referral to a well-qualified pain specialist, was reasonable and necessary.

Following that alternate care decision, the City filed for judicial review and then requested a stay pending judicial review. In the Motion for Stay, the City raised a number of issues not raised in the alternate medical care proceedings. Specifically, the City raised the claimant's past history with opioid misuse in combination with an accusation that Dr. Szczepanek has a history with the Iowa Board of Medicine, which includes failing to provide appropriate pain management treatment to numerous patients including overprescribing opioids.² The City attached a number of documents to this end, to the Motion for Stay Pending Judicial Review. This evidence was presented at hearing. (Def. Exs. C, D, E and F) The City also argued that, after the hearing, it had taken steps to authorize appropriate pain management treatment other than Dr. Szczepanek. The City reiterated this argument at the June 14, 2019, hearing, providing an affidavit from the claims manager and a professional statement from defense counsel detailing all of the efforts undertaken to secure appropriate medical treatment. (Def. Exs. A and B) It is evident that the City went to significant lengths to secure a pain management physician for the claimant other than authorizing the care which was ordered.

At the time of hearing, the City agreed to authorize the appointment with Dr. Spellman. The claimant clarified at hearing, that he is agreeable to this and effectively amended his request for treatment to be limited to the appointment, and recommended care, if any, by Dr. Spellman. The City, however, was unwilling to agree this appointment should be required as an order from the agency. The City's position is that it should be able to have flexibility to deny treatment in the future should their IME physician opine that the treatment claimant is receiving is not related to his work injury. This appears to be a hypothetical issue since the City has not denied liability for

² In a 24 page detailed decision, Dr. Szczepanek was cited and placed on probation for violating the standards of practice under various Iowa Medical Board regulations. He served a three-year probationary period and was discharged from probation on February 17, 2017. All of this has very little relevancy to the case at the present time, particularly given the fact that the claimant is no longer seeking treatment with Dr. Szczepanek.

claimant's low back condition and there does not appear to be any medical evidence at this time that there is a basis for such a denial.

The claimant testified that his back is not fully healed and that he has pain at times, particularly related to certain activities. At times, the pain necessitates treatment. There was some testimony at hearing as to whether there has been any intervening or superseding causes of his back pain. Claimant denies that there have been any such incidents. There are presently review-reopening proceedings pending to determine these issues.

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).

“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.”

Remand Decision of Alternate Medical Care (September 6, 2018, Petition):

I conclude that the City unreasonably abandoned its responsibility to provide medical care and treatment for the claimant. This abandonment of care was

unreasonable. It interfered with the claimant's ability to receive timely and appropriate medical treatment for his low back. The referral to Dr. Szczepanek sought by the claimant was perfectly reasonable. The appropriate remedy is that the Defendant City is no longer authorized to direct medical care. The claimant may direct his own care and treatment at this time.

Alternate Care Decision (May 31, 2019, Petition):

I find that the treatment offered by the City at the time of hearing and accepted by the claimant – evaluation and treatment by Dr. Spellman – is reasonable and necessary. While the City does not wish to be under an order to provide this treatment, since the City has previously lost its authority to direct medical care based upon an earlier unreasonable denial of treatment. This conclusion should not be interpreted to be a ruling upon any future, hypothetical circumstances, such as new medical opinions by an IME physician.

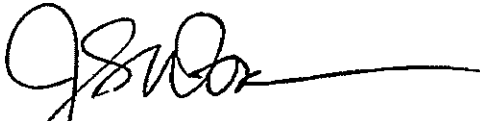
ORDER

THEREFORE IT IS ORDERED:

The claimant is authorized to direct his own medical care. The Defendant City has agreed to authorize Dr. Spellman. At this time, Dr. Spellman is authorized as a gatekeeper physician to direct and authorize all treatment for claimant's January 15, 2014, work injury.

Violation of this order may result in sanctions under 876 Iowa Administrative Code section 4.36.

Signed and filed this 14th day of June, 2019.



JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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