

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JOSHUA RAISTY,

Claimant,

vs.

BRIAN NETTLETON EXCAVATING,
INC.,

Employer,

and

SELECTIVE INSURANCE COMPANY
OF THE SOUTHEAST,Insurance Carrier,
Defendants.

File No. 19007178.01

ALTERNATE MEDICAL CARE
DECISION

Head Note: 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, Josh Raisty.

This alternate medical care claim came on for hearing on September 16, 2021. 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 by certified mail. The record shows claimant's attorney received a return receipt of service of the petition and original notice indicating defendant employer received those documents on September 7, 2021. (Exhibit 4) Claimant's counsel indicated she had not been contacted by anyone on behalf of the employer or the insurance carrier in regard to this petition.

No answer to the petition for alternate medical care was filed by the employer or the insurance carrier or attorney representing the employer. A copy of the return receipt of service of the petition and original notice indicates defendant employer received those documents on September 7, 2021. (Ex. 4)

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 into 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. No phone calls were received by the agency during the hearing inquiring why the employer was not called at the time designated for the hearing.

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 the employer had not provided this agency with a phone number or person to be contacted for its participation in the hearing. 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 4, and the testimony of claimant. 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 continued care with BlueTail Biologics.

FINDINGS OF FACT

Claimant sustained a work-related injury to his knee with defendant employer. Claimant testified he had authorized care with Robert Bartelt, M.D. Dr. Bartelt performed a left knee arthroscopy with a partial medial meniscectomy. (Ex. 1) Claimant testified that after surgery he began to have left knee symptoms again. He said Dr. Bartelt recommended a knee replacement, but that defendant insurer would not authorize the treatment.

On August 12, 2020, claimant was evaluated by Dr. Bartelt. Claimant had a mild antalgic gait. Claimant was given permanent restrictions of only occasional kneeling, crawling and use of ladders. Claimant was also limited to occasionally lifting up to 50 pounds. Claimant was told a knee replacement might be beneficial. (Ex. 1)

Claimant said that after defendant insurer denied authorization of surgery recommended by Dr. Bartelt, Dr. Bartelt told Mr. Raisty he had no other care to offer. Claimant testified that because of continued pain and symptoms he eventually sought treatment on his own with BlueTail Biologics (BlueTail) in St. Louis, Missouri.

On April 7, 2021 claimant was evaluated by David Crane, M.D. with BlueTail. At that time claimant underwent a bone marrow aspirate and PRP (platelet rich plasma)

autografts with autologous fat matrix. (Ex. 2, p. 3) Claimant testified he understood the procedure to be a stem cell injection in the left knee to help with repair of the meniscus. Claimant said the injection was very beneficial for his knee pain and other symptoms. In a July 29, 2021 letter, claimant's counsel requested defendant insurer authorize further care with BlueTail. The letter indicates claimant's injection with BlueTail was very beneficial for claimant's symptoms. (Ex. 3)

There is no record in evidence that either defendant insurer or employer responded to that request for authorized care.

Claimant testified BlueTail has recommended a second injection for his knee. Claimant testified that because the first injection was so beneficial for his knee, he would like to have the second injection as recommended.

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 6.904(3)(e); 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.

Claimant has contacted his employer requesting further care for his work injury. Defendants did not offer any care. Claimant's counsel sent defendant employer a letter requesting care for claimant's ongoing symptoms. There has been no response to that letter. Defendant employer received the alternate medical care petition in this matter. Defendant employer did not file an answer, did not respond to the petition, and failed to appear at hearing.


Defendants have not communicated with the claimant or his attorney regarding claimant's requests for continued care. Defendants did not participate in the hearing on this alternate medical care petition. Based on this, it is found defendants have abandoned the claimant's care. There is evidence indicating the treatment provided by defendants 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:

That claimant's petition for alternate medical care is granted. Defendants shall authorize claimant's continued care with BlueTail Biologics, including, but not limited to, a second injection for claimant's left knee.

Signed and filed this 16th day of September, 2021.


JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Nicole Merrill (via WCES)

Brian Nettleton Excavating, Inc. (via regular and certified mail)
269 370th St
Joice, IA 50446

Selective Insurance Co. of the Southeast (via regular and certified mail)
PO Box 7252
London, KY 40742-7252