

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

NATHAN RICHARDS,

Claimant,

vs.

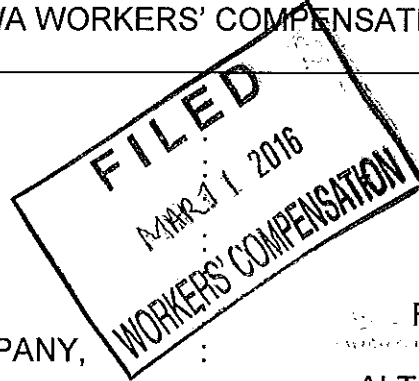
PEPSI BEVERAGES COMPANY,

Employer,

and

OLD REPUBLIC INSURANCE,

Insurance Carrier,
Defendants.



File No. 5045018

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, Nathan Richards.

The alternate medical care claim came on for hearing on March 9, 2016. The proceedings were digitally recorded, which constitutes the official record of this proceeding. By order filed February 16, 2015, this ruling is designated final agency action.

The record consists of claimant's exhibits 1-3; defendants' exhibits A-C.

ISSUE

The issue presented for resolution is whether the claimant is entitled to alternate medical care.

FINDINGS OF FACT

The claimant, Nathan Richards, sustained a repetitive work injury on April 28, 2008. As a result of the work injury he underwent several operations involving his wrists, elbows, and right shoulder. This agency issued an arbitration decision on April 7, 2014, which was affirmed on appeal on March 11, 2015. This agency found that Richards' depression is related to the work injury. Despite years of treatment Richards has substantial ongoing symptoms, including depression. All of the mental health

treatment which Richards has received since the time of the arbitration decision has been authorized and selected by the defendants.

Richards initially treated with licensed psychologist, Philip L. Ascheman, Ph.D. Richards and Dr. Ascheman discussed ways to adapt to the pain as opposed to allowing pain to control his life. Dr. Ascheman indicated that one way to do that was to adapt his behavior. For example, try to figure out a way for him to continue air brush painting. Dr. Ascheman recommended claimant try to do activities that Richards did prior to the work injury to help him not focus on the pain and get back to the way his life was. He treated with Dr. Ascheman four times prior to being discharged. (Testimony; Exhibit A)

Richards is currently receiving authorized mental health treatment at Plains Area Mental Health Center with Christel J. Rinehart, ARNP. Richards sees her every three or four months and has now seen her approximately four times. On December 23, 2015, and again on January 8, 2016, she wrote that claimant had been under her care for treatment of depression. She further stated,

He had a work related injury several years ago and has had to adjust to a life with limitations he did not previously have. He is in constant pain as well. In treating anxiety and depression, it is beneficial to engage in activities that bring pleasure and a sense of accomplishment on a daily basis. Creative endeavors are particularly helpful in the healing process. Mr. Richards has a talent in art and he finds that when he is air brushing he is distracted him from his pain, anxiety and depression. It is my recommendation that he be provided with air brush supplies so he can pursue this avenue towards recovery further.

(Ex. 1)

In this alternate care proceeding Richards is requesting air brush painting supplies as set forth in Exhibit three. Prior to the work injury, Richards engaged in some air brush painting. Richards testified that since the accident air brush painting helps him to "get out of his head" and not focus on the pain. He further testified that this is a form of art therapy that helps him manage his depression and helps him to deal with his suicidal thoughts.

Defendants do not dispute that this recommendation was made by an authorized provider. Defendants also do not dispute that engagement and participation in such an activity might provide Richards with enjoyment and might help him stop thinking about his work injury. However, defendants argue that this alternate care request goes beyond the intended scope of Iowa Code section 85.27. Defendants further argue that allowing such a request could lead to an extremely broad and overreaching potential category of unlimited life activities. Defendants contend that the notion of broadly awarding reimbursement for any life activity which provides enjoyment and a sense of accomplishment is a slippery slope.

To support their denial of claimant's request for alternate medical care defendants criticize Nurse Practitioner Rinehart's experience, indicating that she "graduated just 5 years ago." (Def. Brief p. 5) Defendants' argument is not persuasive. In a compensable workers' compensation case the defendants are in the unique position of being able to select the medical provider that treats the injured worker. Richards has been treating with Nurse Practitioner Rinehart for several months. For defendants to now criticize her experience in an attempt to relieve themselves of liability for her recommendations is disingenuous at best.

Defendants point out that they have an appointment for the injured worker to return to see Dr. Ascherman on March 14, 2016. Defendants intend to seek his opinion as to whether air brush paint supplies represent a reasonable medical expense for the claimant's alleged work injury. This alternate medical care petition was originally filed on December 28, 2015 and set for hearing on January 11, 2016. However, because defense counsel was scheduled to be out of the country until the day before the hearing claimant's counsel extended a professional courtesy and dismissed the alternate care petition. The petition for alternate medical care was not re-filed until February 26, 2016. Thus, defendants have been aware of claimant's request since at least December 28, 2015. Yet, the record is void of any expert opinion indicating that the treatment recommendation from Nurse Practitioner Rinehart is not reasonable or necessary as a result of the work injury. Additionally, her opinion regarding the air brush painting treatment is unrebutted.

In the present case, claimant has sustained a compensable mental injury. Defendants have authorized treatment for that mental injury. The authorized mental treatment provider has recommended that Richards be provided with air brush supplies for further recovery. While the requested supplies for claimant's art therapy might not be within the original intent of Iowa Code section 85.27, there is no expert opinion to indicate that this mental treatment recommendation is not reasonable or necessary. If there was a mental health provider recommending treatment in the form of prescription drugs this agency would not hesitate to order that treatment. In the present case, the mental health provider is recommending a different form of treatment. The defendants cannot interfere with the recommendation of the mental health care provider. I find that the defendants shall provide claimant the requested air brush supplies for the reasonable and necessary treatment recommended by the authorized mental health provider.

REASONING AND CONCLUSIONS OF LAW

Iowa Code section 85.27 states in pertinent part:

The employer, for all injuries compensable under this chapter or chapter 85A, shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing,

ambulance and hospital services and supplies therefor and shall allow reasonably necessary transportation expenses incurred for such services. The employer shall also furnish reasonable and necessary crutches, artificial members and appliances but shall not be required to furnish more than one set of permanent prosthetic devices.

Iowa Code section 85.27(2015).

An appliance is defined as "hearing aids, corrective lenses, orthodontic devices, dentures, orthopedic braces, or any other artificial device used to provide function or for therapeutic purposes." 876 IAC 8.5.

Under Iowa law, the employer is required to provide care to an injured employee and is permitted to choose the care. Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433 (Iowa 1997).

[T]he employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

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.

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).

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 Decision June 17, 1986). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

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 January 31, 1994).

Based on the above findings of fact I conclude that the authorized treating mental health provider has recommended air brush painting as treatment for further recovery. Defendants are responsible to provide supplies for all conditions compensable under the workers' compensation law. See Manpower Temporary Services v. Sioson, 529 N.W.2d 259 (Iowa 1995) (defendants ordered to pay for a specially modified van); Quaker Oats, Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996) (defendants ordered to pay for van and home modifications); Stone Container Corp. v. Castel, 657 N.W.2d 485 (Iowa 2003) (defendants ordered to pay for laptop computer); Krieg v. American Eagle Airlines, File No. 5048407 (Alt. Med., June 27, 2014) (defendants ordered to pay for aqua therapy and biofeedback treatment and to pay for acupuncture); Nevels v. State of Iowa, File No. 1037781 (Alt. Med., February 19, 2014) (defendants ordered to pay for handicap bathtub and hydrotherapy massage); Walterblodgett v. Mercy Hospital, File No. 5042533 (Alt. Med., December 28, 2012) (defendants ordered to pay for therapeutic massage on weekly or biweekly basis). Whether recommended treatment is reasonable and necessary is largely dictated by expert testimony. The undersigned is neither a doctor nor a medical expert, merely an adjudicator of facts and can only work within the facts presented. If there are other expert opinions that the recommended

treatment is not reasonable or necessary those opinions are not part of this record. Thus, based on the opinion of Nurse Practitioner Rinehart I concluded that her treatment recommendation was reasonable and necessary as a result of the work injury. Therefore, defendants shall provide the requested supplies contained in claimant's Exhibit 3.

ORDER

THEREFORE IT IS ORDERED:

Claimant's petition for alternate medical care is granted. Defendants shall be responsible for the cost of the supplies contained in claimant's Exhibit 3.

Signed and filed this 11th day of March, 2016.



ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Harry W. Dahl
Attorney at Law
974 - 73rd St., Ste. 16
Des Moines, IA 50312-1090
harrywdahl@msn.com

Terrence M. Donohue
Attorney at Law
33 N. Dearborn, Ste. 1825
Chicago, IL 60602
tdonohue@inmanfitzgibbons.com

EQP/sam