

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FRANCIS J. STEPHEN III,

Claimant,

vs.

A TOUCH OF CLASS BANQUET
& CONVENTION CENTRE, INC.

Employer,

and

ACCIDENT FUND GENERAL INS. CO.,

Insurance Carrier,
Defendants.

File No. 1588289.02

ALTERNATE MEDICAL
CARE DECISIONHEAD NOTE NO: 2701

STATEMENT OF THE CASE

This is a contested case proceeding under Iowa Code chapters 85 and 17A. Claimant, Francis Stephen III, invokes the expedited procedure of rule 876 IAC 4.48. Claimant appeared personally and through his attorney, Thomas Wertz. Defendants appeared through their attorney, Laura Ostrander.

The alternate medical care claim came on for a telephonic hearing on September 24, 2021. The proceedings were digitally recorded. That recording constitutes the official record of this proceeding. Pursuant to the Commissioner's February 16, 2015 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.

Claimant offered exhibits 1-3, which include a total of 7 pages. Defendants offered Exhibit A, which includes 3 pages. All exhibits were received without objection. Claimant testified on his own behalf. No other witnesses were called to testify and the evidentiary record closed at the conclusion of the alternate medical care hearing.

ISSUE

The issue presented for resolution is whether the claimant is entitled to authorization of care through Sunny Kim, M.D.

FINDINGS OF FACT

The undersigned having considered all the evidence in the record finds:

Claimant, Francis Stephen, sustained injuries as a result of a fall on March 24, 2014. Among the injuries sustained was a low back injury. Defendants admitted liability for the low back injuries as well as current causal connection of the low back injury to the current treatment being requested by claimant.

Claimant obtained an evaluation on his own. Claimant's evaluating physician recommended additional treatment, including a referral to Dr. Kim. Defendants declined that authorization and instead directed claimant to seek care through a neurosurgeon, Chad Abernathey, M.D.

Dr. Abernathey evaluated claimant on August 13, 2021. He opined that claimant's low back injury was not surgical. (Claimant's Ex. 1) However, he advised claimant that there are several conservative treatment options. Claimant discussed the possibility of a referral to Dr. Kim with Dr. Abernathey. According to claimant, Dr. Abernathey indicated that Dr. Kim was a good physician and that referral would be appropriate. (Claimant's testimony)

On his August 13, 2021 office note, Dr. Abernathey indicated that claimant "would like to be referred to Sunny Kim, MD for a chronic pain evaluation. I made those arrangements for him." (Claimant's Ex. 1, p. 2) Dr. Abernathey issued a formal referral and request for authorization on the same date. (Claimants' Ex. 1, p. 1)

Claimant testified that he spoke with Dr. Abernathey's office before leaving the clinic on August 13, 2021. Dr. Abernathey's office indicated that they would submit the referral for authorization and that it would schedule the appointment with Dr. Kim once authorization was received. Dr. Abernathey's office subsequently scheduled the appointment with Dr. Kim and called claimant to notify him that it was authorized and scheduled. (Claimant's testimony)

Dr. Kim evaluated claimant on September 2, 2021. Dr. Kim concluded that claimant is a "candidate for spinal rejuvenation protocol using regenerative biologics." (Claimant's Ex. 2, p. 6) He recommended a fluoroscopically guided caudal epidural injection "followed by autologous PRP to the lumbar multifidi and B/L SI ligaments." (Claimant's Ex. 2, p. 6) Dr. Kim also recommended additional treatments, including physical therapy and core strengthening and some shockwave therapy to break up adhesions from surgery. (Claimant's Ex. 2, p. 6)

After claimant received these recommendations, he requested that defendants authorize them. (Claimant's Ex. 3) Defendants declined to authorize treatment through Dr. Kim and returned to Dr. Abernathey. At defendants' request, Dr. Abernathey signed off on a September 8, 2021 letter in which he indicated he "would be in agreement with

a referral to Dr. Justin Wikle at the University of Iowa Hospitals & Clinics rather than Dr. Kim.” (Defendants’ Ex. A)

Claimant is not currently scheduled for evaluation with Dr. Wikle, though Dr. Abernathey arguably made the referral on September 8, 2021. Claimant wishes to proceed with treatment already scheduled and recommended through Dr. Kim. Claimant also expressed concerns because he has treated at the University of Iowa Hospitals and Clinics for these injuries in the past and defendants did not reimburse his mileage for those appointments and treatment. Claimant also pointed out in his testimony that it is about a 5-6 minute drive for him to get to Dr. Kim’s office and about 40-45 minutes for him to drive to the University of Iowa Hospitals and Clinics.

Considering the evidence introduced into this record, I find that Dr. Abernathey was an authorized treating physician. I find that Dr. Abernathey made a referral to Dr. Kim. I further find that Dr. Abernathey’s office issued a referral and request for authorization and received authorization from the insurance carrier for the evaluation with Dr. Kim before scheduling claimant for an appointment with Dr. Kim. Defense counsel offered an opening statement suggesting defendants did not authorize Dr. Kim. However, claimant’s testimony contradicted that statement and defendants offered no evidence on the issue. I find claimant’s testimony on this issue to be credible and that authorization was given for treatment with Dr. Kim.

Only after Dr. Kim evaluated claimant and recommendations were made did defendants elect to send claimant to a different provider at the University of Iowa. I find that the defendants are seeking to interfere with the treatment recommendation and referral made by Dr. Abernathey. Specifically, defendants authorized treatment with Dr. Kim and then rescinded that authorization only after receiving his treatment recommendations.

Defendants offered no valid reason for desiring to transfer care away from Dr. Kim. They have no alternative treatment recommendations being offered at this time and have not yet scheduled an evaluation with Dr. Wikle in spite of the passage of 17 days since claimant’s demand for care and 16 days since Dr. Abernathey agreed treatment with Dr. Wikle would also be acceptable. The current lack of care offered by defendants is not reasonable and prompt.

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); Bell Bros. Heating v. Gwinn, 779 N.W.2d 193, 209 (Iowa 2010); 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 (Iowa 1995). 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 right to select the provider of medical treatment to an injured worker does not include the right to determine how an injured worker should be diagnosed, evaluated, treated, or other matters of professional medical judgment. Assmann v. Blue Star Foods, File No. 866389 (Declaratory Ruling, May 19, 1988).

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).

When a designated physician refers a patient to another physician, that physician acts as the defendant employer's agent. Permission for the referral from defendant is not necessary. Kittrell v. Allen Memorial Hospital, Thirty-fourth Biennial Report of the Industrial Commissioner, 164 (Arb. November 1, 1979) (aff'd by industrial commissioner). See also Limoges v. Meier Auto Salvage, Iowa Industrial Commissioner Reports 207 (1981).

Claimant expressed a preference for treatment with Dr. Kim. Claimant's preference is not a legal basis for transfer of medical care. Claimant also expressed dissatisfaction with traveling to the University of Iowa Hospitals and Clinics when Dr. Kim was much closer. However, the distance of travel to the University of Iowa Hospitals and Clinics is not unreasonable and is not a basis for transfer of care in this case.

However, I found that defendants authorized treatment with Dr. Abernathey. Dr. Abernathey made a referral to Dr. Kim. At that point, Dr. Kim legally became an authorized physician. Regardless, I found that defendants ultimately authorized the referral to Dr. Kim and that Dr. Abernathey's office only scheduled the evaluation with Dr. Kim after receiving authorization from the defendants.

Only after Dr. Kim offered treatment recommendations did defendants attempt to transfer care to another physician. Defendants are not in a legal position to determine what care should be offered. Defendants are permitted to select the authorized treating physician. They selected Dr. Abernathey. By operation of law and also by their direct authorization, defendants authorized Dr. Kim.

Defendants are not legally permitted to question or refuse to authorize treatment recommended by an authorized physician. In this instance, defendants only attempted to transfer care after receiving Dr. Kim's recommendations for additional care. Defendants have not yet scheduled an evaluation with their newly selected physician. Therefore, I conclude that claimant has proven by a preponderance of the evidence that defendants are attempting to interfere with the medical judgment and recommendations of an authorized treating physician, Dr. Kim. Having found that defendants were attempting to interfere in the treatment recommendations of Dr. Kim, an authorized medical provider, I conclude that claimant established entitlement to an order for alternate medical care specifically for the treatment recommended by Dr. Kim.

ORDER


THEREFORE, IT IS ORDERED:

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

Defendants shall immediately authorize and pay for all causally connected medical care through and recommended by Dr. Kim for claimant's low back injury.

Defendants shall reimburse claimant for all medical mileage or otherwise provide transportation for treatment with Dr. Kim.

Signed and filed this 24th day of September, 2021.


WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Thomas Wertz (via WCES)

Laura Ostrander (via WCES)