

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

EDGARDO MENDEZ,

Claimant,

vs.

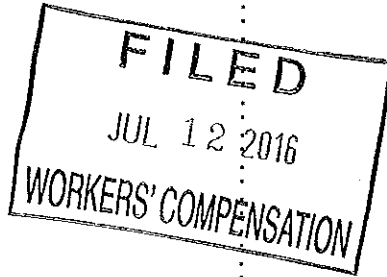
QSI,

Employer,

and

THE HARTFORD,

Insurance Carrier,
Defendants.



File No. 5055676

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, Edgardo Mendez. Claimant appeared personally and through his attorney, Phillip Miller. Defendants appeared through their attorney, Jessica Voelker.

The alternate medical care claim came on for an in-person hearing on July 11, 2016. 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.

The record consists of claimant's exhibits 1-10. The record also contains defendants' exhibits A through C. Claimant testified on his own behalf. Claimant testified utilizing the services of a Spanish to English interpreter, Patricia Vargas-Ver Ploeg. No other witnesses were called to testify.

At the commencement of hearing, the undersigned asked defendants to clarify their answer. Defendants confirmed that they deny liability for claimant's alleged mental, psychological, and/or post-traumatic stress disorder (PTSD) conditions. Defendants admitted claimant sustained a left hand injury at work on February 10, 2016 and that claimant's left hand condition is causally related to the work injury.

The undersigned gave the parties notice that no issues pertaining to mental injury, psychological injury, or PTSD could be tried. However, the evidentiary hearing continued with respect to the issue of alternate medical care for claimant's physical injuries to the left hand.

ISSUE

At the commencement of hearing, claimant presented two issues for resolution. The first is whether claimant was entitled to an order authorizing and compelling payment for a prescription medication, Lyrica. At the time of hearing, defendants conceded that the Lyrica medication should be authorized and provided pursuant to the recommendations of the treating orthopaedic surgeon. Defendants will be ordered to provide the recommended Lyrica and this issue is considered moot for purposes of all findings of fact and conclusions of law in this decision.

The second issue presented for resolution by claimant is whether defendants abandoned claimant's medical care such that an order should be entered terminating defendants' statutory right to select the authorized medical provider. At hearing, defendants consented to and agreed to authorize treatment through the hand specialist claimant desires to utilize, Timothy M. Schurman, M.D. Therefore, the disputed issue remaining for determination is whether defendants should be ordered to provide care through the surgeon requested by claimant or whether defendants right to select the authorized medical provider should be ordered terminated such that claimant may seek treatment at his own direction through Dr. Schurman, or presumably through a different surgeon.

FINDINGS OF FACT

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

Claimant sustained a traumatic and significant left hand injury as a result of a workplace accident on February 10, 2016. Claimant was working the night shift cleaning machinery when the machine he was cleaning turned on and caught his left hand. This accident caused a very significant laceration of claimant's left hand over most of the palm and down to the left wrist.

The employer took claimant to the emergency room. Defendants later authorized orthopaedic surgeon, Bradley Scott, D.P. Dr. Scott evaluated claimant on several occasions. Dr. Scott has recommended claimant be evaluated by a hand specialist at either the University of Iowa Hospitals and Clinics or Iowa Orthopaedics.

Defense counsel offered a professional statement that she attempted to secure treatment for claimant's left hand through both the University of Iowa Hospitals and Clinics and Iowa Orthopaedics without success. Defense counsel indicated she has attempted to locate alternate hand specialists to treat claimant's condition since Dr.

Scott's recommendation and has not been successful in identifying a hand surgeon to assume care. Therefore, defendants consented to and agreed to authorize claimant's chosen orthopaedic surgeon, Dr. Schurman.

Claimant's counsel refuses to accept the professional statement of defense counsel as to her attempts to obtain medical care or identify alternate hand surgeons. Claimant's counsel asserts that there are credibility issues with defendants and asserted that documentary proof is necessary to establish the veracity of counsel's statements at the alternate medical care proceeding.

Defense counsel is under a duty of candor toward this tribunal. She is an officer of the court. Iowa R. Prof. Conduct 32:3.3(a)(1), (3). Although claimant's counsel called for documentary proof to establish the statements put forth by defense counsel, this agency limits the amount of documentary evidence that is permitted in an alternate medical care proceeding. 876 IAC 4.48(9). The undersigned assumes that counsel of record take their professional obligations seriously and that defense counsel would not intentionally mislead or provide a false statement to this agency. Ms. Voelker's professional statement as to her efforts to secure alternate hand specialists is accepted as truthful and correct.

Claimant detailed attempts by counsel on June 14, 2016 and June 24, 2016 to express claimant's dissatisfaction with the care provided by defendants and to obtain a referral to a hand specialist. Claimant also documents that Dr. Scott's recommendations for a second opinion with a hand surgeon were conveyed to defendants on May 9, 2016.

Defendants' inaction or failure to identify a hand surgeon and obtain an evaluation for claimant between May 9, 2016 and the June 28, 2016 filing of claimant's petition for alternate medical care is not something this agency wishes to promote, encourage or reward. On the other hand, claimant's demand for termination of defendants' statutory right to select the authorized hand surgeon seems excessive, particularly since defendants are agreeable to authorize the hand surgeon, Dr. Schurman, claimant initially requested.

I find that defendants' offer to authorize Dr. Schurman is reasonable. Given defense counsel's explanation of the efforts to secure alternate care via a hand surgeon, I also find that defendants had not abandoned claimant's medical care. Defendants have not acted in such an egregious manner that I find their efforts to be totally unreasonable and worthy of terminating their right to select the medical provider.

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).

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).

"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).

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).

Claimant asserts that the undersigned should follow agency precedent in Ahl-Jones v. Dr. Pepper Snapple Group, File Nos. 5055353, 5061253 (Alternate Medical Care July 2016). As claimant asserts, another deputy commissioner found in the above file that defendants abandoned claimant's mental health condition in the above cited

case. The deputy; therefore, permitted claimant to select his own mental health provider.

However, review of the Ahl-Jones decision also demonstrates that the same deputy commissioner found that the defendants had not abandoned care when they made attempts to secure alternate medical treatment for claimant's physical conditions. Similar to this case, it was necessary to send medical records to providers to identify a willing medical provider. In this instance, the defendants were unable to identify a willing hand specialist to treat claimant's condition and, therefore, defendants consented to claimant's request for Dr. Schurman at the time of the alternate medical care proceeding.

Having found that defendants made reasonable attempts to try to identify alternate hand specialists initially recommended by Dr. Scott, I conclude that defendants did not abandon claimant's care for the physical injuries resulting to his left hand. Having found that defendants' offer of care through the surgeon initially requested by claimant, Dr. Schurman, is reasonable, I conclude that claimant failed to prove he is entitled to an order terminating defendants' right to select the authorized medical provider pursuant to Iowa Code section 85.27. However, I also conclude that it is appropriate to enter an order for alternate medical care that requires defendants to authorize Dr. Schurman as the treating hand specialist if he will accept claimant as a patient.

Finally, defendants denied liability for claimant's alleged mental health, psychological, and/or PTSD. 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).

Given the denial of liability for the mental injury, psychological injury and/or PTSD, claimant's original notice and petition for alternate medical care must be dismissed on these issues. Given their denial of liability for the mental health, psychological, PTSD conditions, defendants lose their right to control the medical care claimant seeks during their period of denial and the claimant is free to choose that care. Bell Bros. Heating v. Gwinn, 779 N.W.2d 193 (Iowa 2010).

As a result of the denial of liability for the mental health, psychological, and/or PTSD conditions, claimant may obtain reasonable medical care from any provider for this treatment but at claimant's expense and seek reimbursement for such care using regular claim proceedings before this agency. Haack v. Von Hoffman Graphics, File No. 1268172 (App. July 31, 2002); Kindhart v. Fort Des Moines Hotel, Iowa Industrial Comm'r Decisions No. 3, 611 (App. March 27, 1985). "[T]he employer has no right to choose the medical care when compensability is contested." Bell Bros. Heating v. Gwinn, 779 N.W.2d 193, 204 (Iowa 2010). Therefore, defendants are precluded from asserting an authorization defense as to any future treatment during their period of denial.

ORDER

THEREFORE IT IS ORDERED:

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

Defendants shall authorize and provide claimant with the Lyrica prescribed by Dr. Scott.

Defendants may elect to use their mail order service to provide the Lyrica but shall ensure that the prescription is provided to claimant either via local pharmacy or delivered to his home by the mail order service within ten (10) days of the entry of this order.

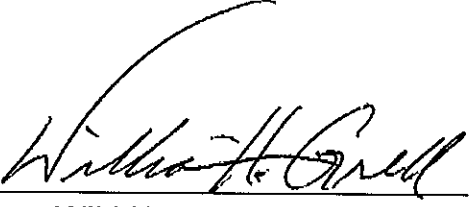
Defendants shall authorize and provide future medical care for claimant's left hand injury through and at the recommendation of Timothy M. Schurman, M.D.

If Dr. Schurman declines to accept claimant as a patient, defendants shall identify and authorize another hand surgeon for evaluation of claimant's left hand within fourteen (14) days of Dr. Schurman's decision to refuse treatment.

With respect to claimant's request for mental health, psychological, or treatment of PTSD, claimant's original notice and petition for alternate medical care is hereby dismissed without prejudice.

If claimant seeks to recover the charges incurred in obtaining care for the mental health, psychological, and/or PTSD conditions for which defendants denied liability, defendants are barred from asserting lack of authorization as a defense to those charges during the period of their denial.

Signed and filed this 12th day of July, 2016.


WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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