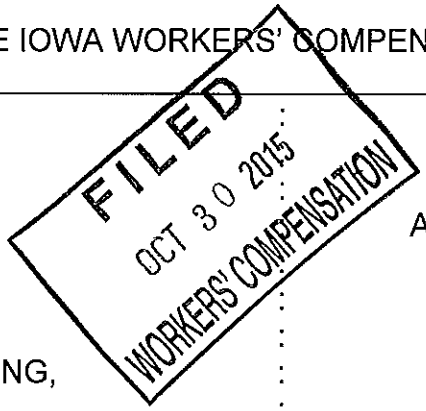
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



JEREMY CHESLEY,	:	File No. 5051887
Claimant,	:	ALTERNATE MEDICAL
vs.	:	CARE DECISION
L & C MEDICAL BILLING,	:	
Employer, Uninsured, Defendant.	:	HEAD NOTE NO: 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, Jeremy Chesley.

This alternate medical care claim came on for hearing on October 30, 2015. 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 a petition for judicial review under Iowa Code section 17A.19.

The record in this case consists of claimant's exhibits 1 through 2; defendant' exhibits A through L, and the testimony of claimant.

Defendant admitted that it did not have workers' compensation insurance at the time of claimant's injury.

ISSUE

The issue presented for resolution in this case is whether claimant is entitled to alternate medical care consisting of surgery by Robert Thompson, M.D.

FINDINGS OF FACT

Defendant accepts liability for an injury to claimant's left shoulder occurring on January 8, 2015. Claimant, Jeremy Chesley, was injured at work on January, 8, 2015. The defendant, L & C Medical Billing, did not accept responsibility for this claim for approximately nine months.

Claimant received medical care from Alan Koslow, M.D. Dr. Koslow performed thoracic outlet syndrome (TOS) surgery and scalanotomy on February 20, 2015. The

surgery was on his right side of his body. Claimant continued to have pain. According to claimant the surgery resulted in paralysis of the right side of his diaphragm. Claimant continued to treat with Dr. Koslow. Claimant used his wife's medical insurance to receive care.

While the record is not clear it appears that at least some time in August 2015 defendant accepted liability in this case and began to direct care. (Exhibit A). On August 27, 2015 defendant's counsel wrote to claimant's counsel

> Anyway, Koslow says that Chesley is released from his care and recommends an orthopedic surgeon to address some brand new complaints and the remaining TOS. Koslow says the 11-9 follow up is essentially bedside manner. As a result, no further treatment with Koslow is necessary or permitted. And, I'll let you know who we authorize as far as an orthopedic surgeon. Koslow says that the work release is wholly unrelated to the TOS and that it is based on Chesley's verbal complaint that he's incapacitated by the new symptoms in his neck, shoulders, and arms (bilateral). Koslow took him off work, but states that he cannot assess whether he can work or not and that an ortho needs to.

(Ex. A, p. 1)

On September 23, 2015 Dr. Koslow referred claimant to Dr. Thompson. This referral was after Dr. Koslow was no longer an authorized treating physician. According to claimant Dr. Thompson is a top specialist in TOS. Dr. Thompson's stationery stated that he is at the Washington University in St Louis and a "Professor of Surgery (Vascular), Radiology, and Cell Biology and Physiology, Director, Thoracic Outlet Syndrome Center."

Claimant met with Dr. Thompson in a clinic. Dr. Thompson has recommended bilateral TOS surgery and other procedures. Claimant is currently scheduled for surgery on November 2, 2015.

Defendant have referred claimant to Todd Harbach, M.D. at Iowa Ortho. Defendant made this referral after conferring with Dr. Koslow. Claimant has not been able to attend either of the two appointments made and stated that he will not be able to attend the third on November 3rd or 4th as he will be recovering from his surgery.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

Iowa Code section 85.27(4) provides, in relevant part:

> For purposes of this section, the 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.

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 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); 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.

In this case there is scant medical evidence about the urgency of the surgery. There is no evidence presented by the claimant as to why the referral to Iowa Ortho is not reasonable care. Claimant testified he did not believe that the referral would be

worthwhile, as he does not believe that there is anyone qualified to perform TOS surgery.

While that may or may not be true, it presupposes that TOS surgery is the only reasonable option. From the evidence presented to me today, I cannot reach such a conclusion. I have no medical evidence to support a claim that the defendant is not providing reasonable medical care. It is claimant's burden to prove unreasonable care. The claimant has not met his burden of proof.

I have no doubt that claimant has and is suffering pain and other symptoms that need to be corrected. He is entitled to reasonable medical care for his work injury. However, based upon the evidence presented today I am not able to order alternate medical care.

Claimant may obtain the procedure recommended by Dr. Thompson, but at claimant's expense. Claimant may seek reimbursement for such care using regular claim proceedings before this agency. Bell Bros. Heating v. Gwinn, 779 N.W.2d 193, 208 (Iowa 2010) (Detailing the burden of proof claimant must meet to receive reimbursement for unauthorized care); Haack v. Von Hoffman Graphics, File No. 1268172 (App. July 31, 2002); Kindhart v. Fort Des Moines Hotel, I Iowa Industrial Comm'r Decisions No. 3, 611 (App. March 27, 1985).

ORDER

THEREFORE, it is ordered:

That claimant's petition for alternate medical care is denied.

Signed and filed this 30th day of October, 2015.

JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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