BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
JUL 06 2017
WORKERS' COMPENSATION

LEISA ROBISON, Claimant, vs. TRI-CITY ENERGY, Employer, and ACE AMERICAN INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5033149 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, Leisa Robison. Claimant appeared telephonically and through her attorney, Paul McAndrew. Defendants appeared through their attorney, Peter Thill.

The alternate medical care claim came on for a telephone hearing on July 3, 2017 at 8:30 a.m. The proceedings were digitally recorded. The 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 1-4 and defendants' exhibits A-C. Claimant provided testimony. Claimant requested that the undersigned take official notice of the prior alternate care petitions filed in this case. The undersigned takes official notice thereof pursuant to Iowa Code section 17A.14(4)

ISSUE

The issue presented for resolution is whether the claimant is entitled to alternate medical care consisting of massage therapy and a Flexeril prescription recommended by authorized treating provider, Rueben Morris, M.D., and a return visit to James Nepola, M.D., for evaluation and treatment of her shoulder.

FINDINGS OF FACT

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

Defendants admitted liability for the work injury occurring on May 26, 2007 and the current condition for which claimant seeks alternate medical care.

Claimant sustained a work injury on May 26, 2007, to her bilateral shoulders and her neck. (Alternate Care Petition, p. 1; Arbitration Decision, p. 17)

Claimant has been seen by Rueben Morris, M.D., for her neck injury, as an authorized treating physician beginning in 2007 and continuing through 2017. (Ex. 1; Testimony) On March 27, 2017, Dr. Morris recommended "massage therapy for the cervical and trapezius regions once a week for 6 weeks . . ." (Ex. 1, p. 2) He also recommended a prescription for Flexeril. (Ex. 2, p. 1)

Defendants have not authorized these recommended treatments or medication.

Claimant has also requested that defendants authorize her to return to James Nepola, M.D., who has been an authorized provider in the past for treatment of claimant's shoulder injuries. (Ex. 4, p. 2)

Defendants in Exhibit A, offer claimant the opportunity to be seen at the University of Iowa Hospitals, by Dr. Nepola, the physician who has previously treated claimant's shoulder injuries or by Joseph Chen, M.D., a physician to whom claimant was previously directed by defendants on one occasion for the purpose of an independent medical exam (IME). However, no appointment has yet been scheduled with either physician. Defendants indicated that the individual schedules of the two physicians may make an appointment with Dr. Chen rather than Dr. Nepola more expeditious, and that Dr. Chen may also be able to evaluate and make recommendations concerning both the shoulders and neck going forward. (Ex. A)

Claimant has rejected the offer of treatment from defendants to the extent that it involves Dr. Chen. Claimant testified that she felt uncomfortable with Dr. Chen at the one-time IME and preferred to see Dr. Nepola, because he has been the previous treating physician for her shoulders, has seen claimant on more than one occasion, and she has confidence in him as a physician. Claimant also indicated her general dissatisfaction with Dr. Chen and a sense that he was not acting in her best interest, although, there were no specific examples of such.

Claimant testified that if the offer to return to the University of Iowa Hospital provided by defendants was to see Dr. Nepola without the possibility that her care would be taken over by Dr. Chen, she would accept.

Claimant testified that she is satisfied with the care that she has received from Dr. Nepola for her shoulders and from Dr. Morris for her neck and desires to continue to treat with both physicians.

The evidence indicated that at the time of the hearing, it remained unknown under defendants' offer of returning to the University of Iowa Hospital whether claimant would see Dr. Nepola or Dr. Chen as no appointment had yet been scheduled.

Defendants indicate that after an evaluation with either Dr. Nepola or Dr. Chen, defendants would seek opinions concerning current diagnosis, causation and treatment plan, including the therapy presently recommended by Dr. Morris. (Ex. A.)

At the time of the hearing, there was no medical opinion contradicting the recommendations for massage therapy and Flexeril made by Dr. Morris, an authorized treating physician.

Defendants suggested that the effectiveness of massage therapy is in question and argued that previous similar treatment did not improve claimant's condition. Claimant previously underwent massage therapy per Dr. Nepola, which was for her shoulder and was recommended for "4 treatments up to 1 time per week." (Ex. C) At each therapy visit, claimant reported pain level on a scale of 1-10. (Ex. B) On April 1, 2016, claimant noted her pain level to be 6/10. (Ex. B, p. 1) On April 20, 2016, her pain level was 4/10. (Id.) On August 11, 2016, her pain was 6/10 and on January 20, 2017, it was 10/10. (Ex. B, pp. 3-4) Defendant argued that this indicates the massage therapy was potentially ineffective.

Claimant testified that she waited for months for payment authorization for the massage therapy and was eventually compelled to pay for it herself and seek reimbursement, which also took several months. Claimant's testimony is supported by the fact that the recommendation for massage therapy from Dr. Nepola was issued on November 10, 2015, and the first massage therapy visit did not occur until April 1, 2016. (Ex. B, p. 1; Ex. C) Further, the administrative file contains multiple Applications for Alternate Care seeking authorization for the massage therapy recommended by Dr. Nepola.

However, claimant also testified that in addition, there were treatment delays because her therapist was pregnant and unavailable for a time. Although, it is unlikely that the therapist's pregnancy would account for three separate periods of delay of four to five months each: from November 2015 to April 2016; April 2016 to August 2016; and, August 2016 to January 2017.

Claimant testified that her experience in seeking authorization of treatment recommended by authorized providers has been poor and is often met with long delays.

I find that there is no specific medical evidence to support defendants' argument that the massage therapy may not be helpful. I find that it is just as likely that claimant's improving condition on April 20, 2016 followed by her complaints of higher pain on August 11, 2016 and January 20, 2017, may have been due to other reasons, including delays between appointments, perhaps related to defendants' failure to promptly authorize the treatment recommended by their own authorized physician.

Claimant testified that she felt the massage therapy improved her symptoms. I find that the only two appointments that occurred less than one month apart, indicated that claimant's symptoms were improving, from April 1 to April 20, 2016. (Ex. B, p. 1) During this period, claimant experienced a drop in pain from 6/10 to 4/10 or a one-third reduction.

I find that an authorized treating physician, Dr. Morris has recommended massage therapy and Flexeril medication and that there is no medical opinion in contradiction thereto. I find that the recommendations are reasonable in light of claimant's continued symptoms and that the failure to authorize this recommended care is unreasonable.

I find that the claimant has a high level of confidence with Dr. Nepola concerning treatment of her shoulders as well as great confidence in Dr. Morris for treatment of her neck condition. Claimant was uncomfortable with Dr. Chen and described him as "cold" and "stand-offish," during the one time visit for the IME. (Testimony)

I find that the failure to return claimant to Dr. Nepola, the treating physician for evaluation and the delay related thereto is unreasonable. Rather than return claimant to Dr. Nepola, they have offered the possibility of returning claimant to a trusted physician (Dr. Nepola), or to a physician in whom claimant has little confidence, (Dr. Chen), and apparently the determination of which doctor will care for claimant going forward is now based on the expediency of an available appointment, a factor which does not appear to have been heavily relied on in the past. This care is not being offered promptly or without undue inconvenience to claimant and the same is unreasonable.

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. 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.

Alternate care included alternate physicians when there is a breakdown in a physician/patient relationship. Seibert v. State of Iowa, File No. 938579 (September 14, 1994); Nueone v. John Morrell & Co., File No. 1022976 (January 27, 1994); Williams v. High Rise Const., File No. 1025415 (February 24, 1993); Wallech v. FDL, File No. 1020245 (September 3, 1992) (aff'd Dist Ct June 21, 1993).

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 June 17, 1986).

I found that the lack of authorization for the recommended treatment of the defendants' authorized provider, Dr. Morris, concerning the massage therapy and the Flexeril, is unreasonable. There is no medical evidence that is contrary to the recommendations of Dr. Morris.

I also found that the failure to authorize a return visit to the authorized provider, Dr. Nepola, is also unreasonable.

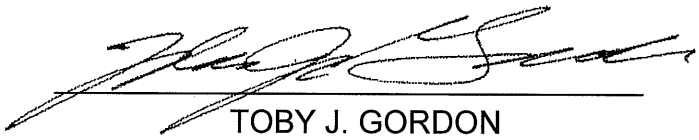
Therefore, I conclude that claimant has proven her claim for alternate medical care. I conclude that defendants should be ordered to immediately authorize and pay for massage therapy and Flexeril as recommended by Dr. Morris and authorize a prompt return for claimant to see Dr. Neploa.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall immediately authorize and timely pay for massage therapy and Flexeril as recommended by Dr. Morris and authorize a prompt return for claimant to see Dr. Neploa.

Signed and filed this 6th day of July, 2017.



TOBY J. GORDON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Paul J. McAndrew, Jr.
Attorney at Law
2771 Oakdale Blvd., Ste. 6
Coralville, IA 52241
paulm@paulmcandrew.com

Peter J. Thill
Attorney at Law
1900 54th St.
Davenport, IA 52807
pjt@bettylawfirm.com

TJG/kjw