BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KIYLIE SMITH,

Claimant,

vs.

RIVERSIDE SOUTH,

Employer,

and

WEST BEND MUTUAL INSURANCE,

Insurance Carrier,
Defendants.

File No. 5055027

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, Kiylie Smith. Claimant appeared personally and through her attorney, Eric Loney. Defendants appeared through their attorney, Mark Bosscher.

The alternate medical care claim came on for hearing on January 15, 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 1-4, which include a total of seven pages. The record also contains defendants' exhibits A-G, which contain 10 pages. All exhibits were received without objection. No witnesses were called to testify. Counsel offered helpful argument, however.

ISSUE

The issue presented for resolution is whether the claimant is entitled to another orthopaedic evaluation and potential treatment of her left elbow.

FINDINGS OF FACT

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

Kiylie Smith, claimant, sustained a left elbow injury as a result of her work activities at Riverside South on December 15, 2014. Defendants accepted that work injury as compensable and concede that claimant's current condition is causally related to the work injury.

Having accepted the injury as compensable, defendants authorized reasonable and appropriate medical treatment for the left elbow. Defendants directed claimant to an occupational medicine physician, Charles Mooney, M.D. Dr. Mooney's clinic referred claimant for orthopaedic evaluation by David K. Sellner, M.D. on February 2, 2015.

Dr. Sellner evaluated claimant at his McFarland Clinic office on February 2, 2015, and diagnosed her with a left elbow strain and/or tendinitis. Dr. Sellner noted that claimant may have a partial ligament tear in her left elbow, "but nothing that requires any surgical treatment." (Exhibit B, page 1) However, Dr. Sellner indicated "she should consider getting a 2nd opinion." (Ex. B, p. 1)

Defendants authorized a second orthopaedic evaluation with Bryan Warme, M.D., another orthopaedic surgeon within the McFarland Clinics. Dr. Warme evaluated claimant on March 30, 2015 and opined, "I agree with Dr. Sneller's opinion, this does not need surgical intervention. I told Kiylie that even if she played football at Iowa State this is not an injury that I would operate on." (Ex. C, p. 1)

Claimant returned to Dr. Mooney for follow-up. Dr. Mooney recommended some physical therapy, which did not provide symptomatic relief for claimant's condition. In a report dated August 13, 2015, Dr. Mooney declared claimant to have achieved maximum medical improvement. He opined that claimant has no permanent impairment and that her left elbow "does not demonstrate any evidence of strength loss, range of motion loss, or nerve impairment which would indicated that impairment is present." (Ex. D, p. 1)

Following Dr. Mooney's release, defendants forwarded claimant's medical records to another orthopaedic surgeon, Dr. Teri Formanek. After reviewing the claimants' medical records, Dr. Formanek's staff sent an e-mail back to the insurance carrier stating, "Dr. Formanek reviewed the records and has declined seeing this patient." (Ex. F, p. 1) Defendants have not offered any additional treatment for claimant's left elbow since Dr. Mooney declared maximum medical improvement and Dr. Formanek declined to evaluate claimant.

However, claimant's left elbow symptoms did not resolve. Therefore, claimant sought evaluation by her personal physician, Arthur Check, D.O., on October 28, 2015. Dr. Check also noted reasonably good range of motion in the left elbow, but documented that claimant "still has pain sometimes just with sitting and resting the elbow certainly after she uses it to any great degree and this causes increased pain." (Ex. 3, p. 1) Dr. Check diagnosed claimant with "Persistent left elbow pain status post reported workman's comp injury to left elbow with partial ulnar collateral ligament tear per MRI." (Ex. 3, p. 1) Dr. Check opined:

> I think this warrants further investigation with another orthopedist for second opinion. I have told her I am not sure what their opinion will be clearly ligaments in the body are not necessarily surgically repaired because there is no necessary benefit seen from doing this; however, given her persistent pain and unstable feeling and the fact that this is a workman's comp injury I do think it warrants at least some more investigation and another opinion. I am going to refer her to Iowa Orthopedics.

(Ex. 3, p. 1)

Based upon Dr. Check's recommendation, claimant requested that defendants authorized another orthopaedic evaluation with a physician at Iowa Orthopaedics. (Ex. 1 & 2) Defendants declined and this alternate medical care petition was filed.

Sometime in early January 2016, defense counsel spoke with claimant's personal physician, Dr. Check, via telephone. Dr. Check documented the content of that conversation and his opinions following the call via correspondence dated January 13, 2016. In his correspondence, Dr. Check notes that both Dr. Sneller and Dr. Warme are competent orthopaedic surgeons. However, Dr. Check notes both surgeons are from the McFarland Clinic and opines, "I doubt that one would disagree with the other's evaluation as they work within the same group." (Ex. 4, p. 2)

Dr. Check also accurately noted:

> [T]hat while Dr. Formanek was asked to consult, he declined, however, this is not the same thing as actually giving an opinion the actual medical care. I am unable to determine from the information that I received whether this is a true medical opinion and that he did not have anything to offer her or whether he just did not want to be involved in a workman's comp case.

(Ex. 4, p. 2)

Dr. Check provided a further convincing statement, noting:

> Ultimately, my only concern is, what is in the best interest of my patient, Ms. Smith. As you well know, I am not the workman's comp consultation doctor involved in this case, but I am her primary care doctor. I also told you on the phone I am really only interested in what is best for her and not ultimately whether this was a workman's comp case or whether this was just an injury that occurred at home. If I have a patient who is still not improved to the point where she feels that she is back to the maximum recovery that she can achieve, then I only feel it appropriate to offer her another consultation.

(Ex. 4, p. 2)

On the other hand, Dr. Check also admits in his January 13, 2016 report that he is not an orthopaedic surgeon and cannot say whether claimant's condition can be corrected surgically.

Having considered the evidentiary records submitted as well as the arguments of counsel, I find that defendants have offered reasonable medical care to claimant through the date that Dr. Mooney released claimant from his care and declared maximum medical improvement. However, I also find that the care offered by defendants to date has not been effective in resolving claimant's condition and symptoms. Claimant has identified, through Dr. Check, potential alternate medical care that is more extensive and potentially superior to that which has been offered in the past. I also find that defendants are not currently offering treatment for claimant's left elbow and that claimant has offered a reasonable alternative treatment option via a third orthopaedic evaluation. Therefore, I find that the care claimant seeks is more extensive and superior to the defendants' current offer of no ongoing treatment.

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).

"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).

In Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433, 437 (Iowa 1997), the supreme court held that "when evidence is presented to the commissioner that the

employer-authorized medical care has not been effective and that such care is 'inferior or less extensive' than other available care requested by the employee, . . . the commissioner is justified by section 85.27 to order the alternate care."

In this case, I found that defendants are not currently offering ongoing medical care for claimant's left elbow. I found that claimant continues to have symptoms in her left elbow and that defendants' treatment options to date have not been effective in treating and resolving those symptoms. When I apply the legal standard set forth in Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433, 437 (Iowa 1997), I conclude that claimant has established entitlement to alternate medical care.

Defendants have admitted liability for the injury and offered reasonable medical care. I conclude that there is not a good reason to remove defendants' ability to select the authorized treating physicians. Therefore, although claimant has requested referral and authorization to Iowa Orthopaedics, I do not conclude that claimant has established that is the only reasonable option. I will allow defendants to select an appropriate and qualified orthopaedic surgeon at Iowa Orthopaedics or another clinic within reasonable travel distance to whom they wish to send claimant for another orthopaedic evaluation and potential treatment.

ORDER

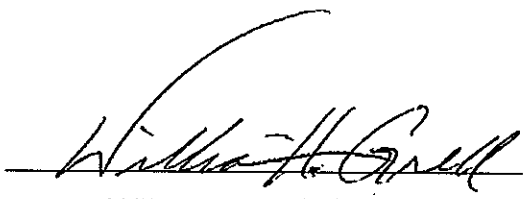
THEREFORE IT IS ORDERED:

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

Within 14 days of the entry of this decision, defendants shall identify an orthopaedic surgeon with whom claimant can obtain another evaluation to determine if there is an orthopaedic solution to her current left elbow condition.

Defendants shall schedule an appointment with their chosen orthopaedic surgeon at his or her earliest available appointment.

Signed and filed this 15th day of January, 2016.



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