BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DERWIN WALLACE, Claimant, vs. W.W. TRANSPORT COMPANY, Employer, Defendant.	FILED MAR 20 2019 WORKERS COMPENSATION	File No. 5067801 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, Derwin Wallace. Claimant appeared telephonically and through his attorney, Niko Pothitakis. Defendant appeared through its attorney, Terri Davis.

The alternate medical care claim came on for hearing on March 20, 2019. 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 through 2 (5 total pages) and Defendant's Exhibits 1 through 3 (13 total pages). Claimant testified on his own behalf, and Jennifer Medina, a representative from Cottingham & Butler, also testified. Counsel offered oral arguments to support their positions.

ISSUE

The issue presented for resolution is whether the claimant is entitled to alternate medical care consisting of a spinal cord stimulator trial.

FINDINGS OF FACT

Claimant sustained an injury to his low back on October 23, 2017 when he was involved in a motor vehicle accident. Defendant admits liability for this injury and the current low back condition for which claimant seeks alternate medical care.

After being treated and released in the emergency room after the accident, claimant followed up with Kevin Johnson, PA-C, at Physicians East P.A. – Urgent Care. (Defendant's Exhibit 1, page 1) PA Johnson prescribed some pain relievers and referred claimant for a course of physical therapy. (Def. Ex. 1, p. 5) PA Johnson subsequently ordered an MRI of claimant's lumbar spine, but the MRI apparently did not reveal any surgical pathology. (See Def. Ex. 2, p. 7)

When claimant returned to PA Johnson on December 28, 2017, claimant was continuing to complain of low back symptoms. (Def. Ex. 2, p. 7) While PA Johnson indicated his urgent care clinic had nothing left to offer claimant, he referred claimant to a pain clinic for possible injections. (Def. Ex. 2, p. 9; Claimant's Ex. 2, p. 5)

Claimant testified he underwent multiple epidural steroid injections and a rhizotomy from Lynn Johnson, M.D., at Vidant Pain Management in the spring and early summer of 2018. (Cl. Testimony) Because claimant continued to be symptomatic, Dr. Johnson referred claimant to neurosurgery. (Cl. Testimony) Claimant's neurosurgeons reviewed claimant's MRI and recommended continued pain management instead of surgery. (Cl. Testimony) More specifically, claimant testified his neurosurgeons recommended discussing a spinal cord stimulator with Dr. Johnson. (Cl. Testimony) Claimant did so, and in August of 2018 Dr. Johnson recommended a spinal cord stimulator trial. (Cl. Testimony)

Before claimant could start the spinal cord stimulator trial, he was required to participate in psychological testing. (Cl. Testimony) That testing began in October of 2018 and was completed in March of 2019, at which time claimant was cleared to proceed with the spinal cord stimulator trial. (Cl. Testimony)

All of claimant's treatment through March of 2019, including the psychological testing for the spinal cord stimulator, was authorized by defendant. (Medina Testimony)

Defendant, however, has not yet agreed to authorize the spinal cord stimulator trial. Instead, defendant recently informed claimant that it is delaying authorization until it gets a second opinion to address the reasonableness and necessity of the spinal cord stimulator trial. (Medina Testimony)

Defendant has asked Lynn Nelson, M.D., at Des Moines Orthopedic Surgeons to evaluate claimant to determine if the spinal cord stimulator trial is reasonable and necessary. It argues the second opinion by Dr. Nelson is reasonable at this juncture in light of the fact that a spinal cord stimulator is an invasive procedure.

Claimant objects to defendant's decision to wait nearly eight months to acquire its second opinion. (Cl. Testimony) Claimant wants to proceed with the spinal cord stimulator now that he has passed his psychological testing. (Cl. Testimony)

When asked why defendant waited until now, roughly eight months after the spinal cord stimulator was recommended, to seek a second opinion, defendant's counsel indicated it was uncertain until recently that claimant would be psychologically

cleared for the procedure. While it is true that claimant's psychological testing was just recently completed, this does not explain why defendant could not have sought and acquired a second opinion last summer when it initially received the recommendation. Until earlier this month, defendant had authorized and paid for all of claimant's psychological testing and given claimant all indications that the spinal cord stimulator trial would be authorized.

For these reasons, I find that waiting until now acquire a second opinion, when there is no reason the second opinion could not have been acquired in the summer of 2018, is unreasonable. It is the several-month delay in seeking the second opinion that makes it unreasonable.

There is also no credible evidence in the record that any physicians are currently questioning the reasonableness or necessity of the recommendation for the spinal cord stimulator. To the contrary, claimant testified his neurosurgeons and Dr. Johnson believe he is a "good candidate." (Cl. Testimony) While PA Johnson recently indicated in a letter he does not believe any medical treatment after March 1, 2018 is related to claimant's October 23, 2017 work injury, I give this letter very little weight. (Def. Ex. 3, p. 12) Per claimant's testimony, PA Johnson has not evaluated claimant since January of 2019, and it is unclear which, if any, of claimant's subsequent medical records he reviewed. Further, PA Johnson is a physician's assistant at an urgent care clinic. In this situation, I give more deference to the pain management physician who has been treating claimant since the summer of 2018.

I therefore find defendant's decision to seek a second opinion at this point in the course of claimant's treatment is an attempt to interfere with the medical judgment of its own treating physician.

REASONING AND CONCLUSIONS OF LAW

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.

Iowa Code § 85.27(4).

Defendant's "obligation under the statute is confined to *reasonable* care for the diagnosis and treatment of work-related injuries." Long v. Roberts Dairy Co., 528 N.W.2d 122, 124 (Iowa 1995) (emphasis in original). In other words, the "obligation under the statute turns on the question of reasonable necessity, not desirability." Id.

Similarly, 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. See Iowa Code § 85.27(4). Thus, 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 Rule of Appellate Procedure 14(f)(5); Long, 528 N.W.2d at 124.

However, 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). Defendants are not entitled to interfere with the medical judgment of their own treating physician. Pote v. Mickow Corp., File No. 694639 (Review-Reopening Decision, June 17, 1986).

Ultimately, determining whether care is reasonable under the statute is a question of fact. Long, 528 N.W.2d at 123.

In this case, I found that defendant's decision to wait until now—roughly eight months after the initial recommendation for a spinal cord stimulator was made—to seek a second opinion is both unreasonable and an attempt to interfere with the medical judgment of its own treating physician.

Defendant argues that waiting briefly for a second opinion will not harm claimant. While it is true that no physician has opined that claimant needs the spinal cord stimulator immediately for it to be successful, the absence of such an opinion does not negate defendant's statutory obligation to provide prompt and reasonable care.

In its resistance, defendant cites two agency decisions in support of its position. In the first case, Schwartz v. Crystal Distributing Services, Inc., File No. 5025555 (Alt. Med. Care Dec., Nov. 10, 2010), the deputy commissioner found that defendants' decision to seek a second opinion before authorizing amputation surgery was reasonable even though the second opinion came months after the initial recommendation for surgery. Schwartz is distinguishable from the instant case, however, because in Schwartz the authorized treating physician who recommended the amputation surgery also believed claimant would benefit from getting the second opinion. See id. at p. 8 ("It also must be noted that Dr. Naylor has stated claimant would benefit from visiting Dr. Huntoon and the amputation clinic . . . .") In the instant case, defendant offered no such evidence. Thus, I do not find Schwartz persuasive.

In the second case, Richardson v. HCR Manorcare, File No. 5046023 (Alt. Med. Care Dec., April 9, 2015), the deputy commissioner found that defendant's decision to seek a second opinion was reasonable despite claimant's objection that the second opinion would delay his surgery. The difference between this case and Richardson, however, is that defendants in Richardson obtained an appointment for a second opinion roughly a month after the surgery was recommended. (See id. at 2) As discussed above, defendant in the instant case waited nearly eight months. I therefore do not find Richardson persuasive.

Because I found the treatment being offered by defendant—an appointment for a second opinion in lieu of authorizing the spinal cord stimulator that was initially recommended eight months ago—to be unreasonable, I conclude claimant has proven his claim for alternate medical care. Defendant is ordered to authorize and pay for the spinal cord stimulator trial as recommended by Dr. Lynn Johnson.

ORDER

THEREFORE IT IS ORDERED:

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

Defendant shall immediately authorize and timely pay for the spinal cord stimulator trial as recommended by Dr. Lynn Johnson.

Signed and filed this 20th day of March, 2019.

STEPHANIE J. COPLEY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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