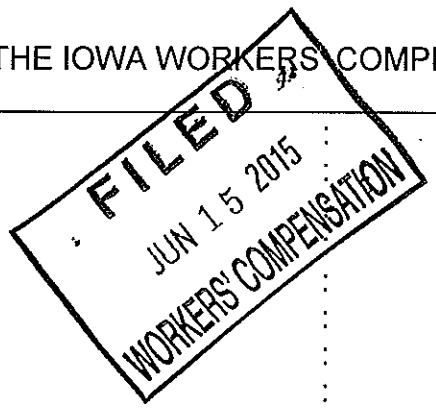
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



AL PENNY,

Claimant,

vs.

WHIRLPOOL,

Employer,
Self-Insured,
Defendant.

File No. 5053195

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 procedures of rule 876 IAC 4.48, the "alternate medical care" rule, are invoked by claimant, Al Penny.

This alternate medical care claim came on for hearing on June 12, 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 8, defendant's exhibits A through B, and the testimony of claimant, Christi Takes, and Cathy Sams.

ISSUE

The issue presented for resolution in this case is whether claimant is entitled to alternate medical care consisting of transfer of claimant's care to Darin Smith, M.D., a neurosurgeon.

FINDINGS OF FACTS

Defendant accepts liability for an injury occurring to claimant's back on or about April 1, 2015.

On April 2, 2015 claimant was evaluated by Peter Matos, M.D. Claimant had low back pain. Claimant was using Tylenol and ice for his back. Claimant was told to continue treating his back with ice and taking Tylenol. (Exhibit A, page 7)

Claimant returned in follow-up with Dr. Matos on April 9, 2015. Claimant indicated his back pain had not improved. He was told to continue to ice regularly. (Ex. A, p. 6)

On April 23, 2015 claimant was evaluated by Dr. Matos. Claimant indicated his condition had worsened. He said lifting at work aggravated his back. Claimant had seen his personal doctor who prescribed Flexeril and Tramadol. Dr. Matos contacted claimant's personal physician and was told an x-ray had been taken that was normal. Claimant was recommended to begin physical therapy and acupuncture. (Ex. A, pp. 6-7)

Claimant returned to Dr. Matos on April 28, 2015 with complaints of worsening back pain. Claimant had attended physical therapy and acupuncture. He was recommended to continue with this treatment. (Ex. A, p. 4)

On April 30, 2015 claimant underwent a lumbar MRI. It showed an L5-S1 annular tear that contacted portions of the bilateral S1 nerve root. (Ex. 2)

In a May 4, 2015 letter, Chad Abernathey, M.D., indicated he reviewed claimant's MRI and other records. He indicated claimant's neural function was intact. He recommended against aggressive treatment due to a paucity of radiographic findings. He recommended conservative treatment. (Ex. 3)

Claimant testified that when he saw Dr. Abernathey, the doctor did not think surgery was a good option. Claimant said the doctor told him to let his injury heal with time.

On May 6, 2015, claimant was seen at Mercy Emergency with acute back pain. Claimant was given hydrocodone. (Ex. 4, A, pp. 3-4) Claimant testified he went to the Mercy Emergency Room because he was in a great deal of pain.

Claimant was seen by Dr. Matos on May 12, 2015. Claimant had pain with forward flexion and radicular symptoms. (Ex. A, p. 3)

On May 14, 2015 claimant returned to Mercy Emergency. He was assessed as having back pain and prescribed oxycodone. (Ex. 6)

On May 14, 2015 claimant returned to Dr. Matos. Claimant requested three weeks off to get better. He also requested a second opinion. Both requests were denied. Human resources visited with claimant and explained to him that if he sought care without Whirlpool's authorization, he would be personally responsible for payment of those bills. Claimant left the clinic agitated. (Ex. A, p. 2)

Claimant testified that when he spoke with Dr. Matos on May 14, 2015, Dr. Matos told him he was trying to get claimant seen by a neurosurgeon at the University of Iowa. Claimant testified that, to the best of his knowledge, this appointment was never made.

He testified that after he left the clinic, he was taken to human resources by someone named "Zach" (no last name given). Claimant testified he was told by "Zach" his work injury was no longer covered by Whirlpool.

Based on records from Whirlpool, it appears that shortly after the May 14, 2015 meeting, Sarah Frauenkron, R.N. E-mailed Cathy Sams with Gallagher Bassett. Gallagher Bassett is the third-party administrator for Whirlpool's self-insured plan. Cathy Sams testified at hearing she is the claims adjuster who is handling claimant's claim for Gallagher Bassett. The E-mail indicates Dr. Matos wanted to send claimant to a neurologist at the University of Iowa and asked if Gallagher Bassett would authorize the treatment.

Christi Takes is claimant's fiancée. She testified that on May 15, 2015 she spoke with Dr. Matos about claimant's treatment. She asked Dr. Matos why Whirlpool no longer considered claimant's back injury work-related. She said Dr. Matos told her he was trying to get claimant evaluated by a neurosurgeon at the University of Iowa. Ms. Takes testified she was lead to believe, in the conversation with Dr. Matos, the injury was still considered work-related by Whirlpool.

Cathy Sams testified she is the claims adjuster for claimant's claim. She said after she received the E-mail from Nurse Frauenkron, she spoke with Dr. Matos regarding the E-mail. She indicated that after the conversation, Dr. Matos spoke with Dr. Abernathey's office regarding further care for claimant. She said after speaking with Dr. Abernathey's office, it was determined claimant should undergo EMG/NCS to determine claimant's radicular symptoms. She said a referral was also made to a pain clinic to give claimant some pain relief while Dr. Abernathey made determinations following review of EMG/NCS testing.

On May 15, 2015, at approximately 4:00 p.m., Whirlpool staff made attempts to have claimant undergo EMG/NCS testing and referral to a pain clinic. (Ex. A, pp. 1-2)

Ms. Sams testified arrangements were made for appointments and transportation for claimant for EMG/NCS, and for treatment at a pain clinic, but that claimant did not show at the appointments. (Ex. A, p. 1)

Claimant said he did not attend the appointments, as he believed Whirlpool considered his back injury not work-related.

In a May 20, 2015 E-mail, defendant's counsel indicated claimant's back injury was considered accepted by Whirlpool. (Ex. B)

In an undated letter claimant's counsel gave notice of claimant's dissatisfaction with care received from Whirlpool. (Ex. 8)

Claimant returned to Dr. Matos on May 19, 2015. Claimant indicated nothing made his back pain better. Claimant had a normal gait and radicular symptoms with flexion. Claimant was warned regarding using opiate pain medicine while at work. Claimant was to be seen at Mercy Pain Clinic on May 20, 2015. (Ex. A, p.1)

On May 20, 2015 Whirlpool staff contacted Mercy Pain Clinic. Claimant was a no-show for his appointment with the Pain Clinic. (Ex. A, p.1)

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.

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" 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.

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).

The record indicates claimant reported a work injury occurring on or about April 1, 2015. Claimant received treatment for the injury the next day. Claimant was authorized to treat with Dr. Matos and Dr. Abernathey. Dr. Abernathey specializes in neurosurgery. Claimant was also authorized to attend physical therapy and acupuncture treatments.

I found the testimony of all three witnesses credible. Claimant testified that after a conversation with human resources, he believed he was told his injury was no longer considered compensable. I believe this testimony, as it is supported by the E-mail from defendant's attorney.

It also appears that after the May 14, 2015 meeting, Dr. Matos did discuss claimant with Cathy Sams. This resulted in a consultation with Dr. Abernathey's office. It appears, based on that conversation, claimant was authorized to have EMG/NCS to further assess claimant's complaints of neuropathy. Authorization was also given for claimant to visit a pain clinic. Claimant failed to attend those visits. I believe claimant's testimony as to why he failed to go to those appointments.

Defendant Whirlpool has authorized treatment with two physicians, one a neurosurgeon. They have authorized an MRI, physical therapy, and acupuncture. They also authorized EMG/NCS and for claimant to treat at a pain clinic. Given this record, I cannot find the care offered by defendant is unreasonable.

That said, I have empathy for claimant's situation. He has back pain and is frustrated that for the past two months the authorized care has done little for his symptoms. It is hoped that a future referral to a pain clinic and future diagnostic testing will help with his situation.

ORDER

THEREFORE, it is ordered:

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

Signed and filed this 15th day of June, 2015.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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