BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

WILLIAM GUERIN, JR.,

Claimant,

vs.

REBAR SETTERS, INC.,

Employer,

and

CNA INSURANCE,

Insurance Carrier,
Defendants.

FILED

MAY 19 2017

WORKERS COMPENSATION

File No. 5062615

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, William Guerin.

The alternate medical care claim came on for hearing on May 18, 2017. The proceedings were digitally recorded, which constitutes the official record of this proceeding. This ruling is designated final agency action and any appeal of the decision would be to the Iowa District Court pursuant to Iowa Code 17A.

The record consists of Claimant's Exhibits 1 – 7 and Defendants' Exhibits A – C. Claimant testified at the hearing. Both parties submitted briefs.

Defendants objected to Exhibit 7 as exceeding the page limit allowed and due to relevancy. I do not find the exhibit material to any issue in this claim and do not rely upon this exhibit in this decision.

Liability is admitted on this claim.

ISSUE

The issue presented for resolution is whether the claimant is entitled to alternate medical care requiring defendants to authorize and pay for additional diagnostic, treatment and medical care.

FINDINGS OF FACT

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

On August 27, 2016, claimant sustained an injury while an employee of Rebar Setters. (Exhibit B, page 1) Claimant was working as a rod buster. His job requires him to move steel that weighs up to 150 pounds and tie rebar. While working in Ida Grove, Iowa, the claimant was pinned between a pick-up truck and a dumpster, resulting in his injury. (Ex. B, p. 1) The claimant was driven to an emergency room in Kansas City, Missouri to evaluate the extent of his injuries. (Ex. B, p. 1) During the evaluation, X-Rays, as well as advanced image studies, were conducted by Research Medical Center. (Ex. B, p. 1) A cervical MRI showed no acute traumatic injury, and X-rays were negative for acute injury. (Ex. B, p. 4) The evaluation, however, did lead to a diagnosis of (1) a crush injury between from being between a pick-up truck and a dumpster; (2) bilateral shoulder pain; (3) back pain; (4) mild numbness of the right hand; and (5) an elevated CK level. (Ex. B, p. 4) The claimant was released after two days on August 29, 2016, and given Flexeril as a muscle relaxant and Percocet for pain management. (Ex. B, p. 4) The claimant testified that he was told by the emergency department he should see an orthopedic specialist and have an MRI. Claimant has not had an MRI of his shoulders as of the date of the alternate care hearing.

It took until December 2015 before the defendants provided claimant medical care. The claimant was referred to James Doll, D.O. (Ex. B, p. 1) Dr. Doll recommended physical therapy.

The claimant's physical therapy included: (1) therapeutic activities, (2) manual therapy, (3) neuromuscular re-education, (4) ADL simulation activities, (5) strengthening, (6) stretching, (7) stabilization activities, (8) body mechanics training, (9) patient education, and (10) a home exercise program. (Ex. 2, p. 3) As a result of physical therapy, pain largely subsided in both his neck and shoulders. (Ex. A, p. 1) Despite the healing that occurred, a popping sensation persisted in the claimant's right shoulder. (Ex. 2, p. 3) By February 2, 2017, the claimant was able to push/pull 54 pounds and carry/lift 30 pounds. (Ex. 2, p. 3) The claimant noted that he needed to be able to carry 100 to 150 pounds of weight for his job. (Ex. 2 p. 3) A long-term goal of being able to lift to his shoulder and carry steel weighing 150 pounds was set by his physical therapist and was deemed in progress. (Ex. 2, p. 3) Claimant's last scheduled physical therapy appointment was set for February 3, 2017, and he never hit his long term goal. (Ex. 2, p. 3) Claimant was able to carry 40 – 50 pounds.

While the claimant was seeing the physical therapist, he was also seeing Dr. Doll. (Ex. B, p. 1) On February 9, 2017, Dr. Doll noted that range of motion of the cervical spine was full in all directions. (Ex. A, p. 1) Dr. Doll additionally noted that full 5/5 strength was demonstrated throughout all planes of shoulder motion. (Ex. A, p. 1) In light of the testing conducted by Dr. Doll coupled with the considerable improvement

performance during physical therapy (Ex. 2, p. 3), Dr. Doll prescribed ongoing home exercises to be conducted by the claimant and concluded that the claimant was fit to return to full work activities. (Ex. A, p. 2)

The claimant informed Rebar Setters of his status; however, did not return to work. (Ex. A, p. 3) On March 9, 2017, the claimant saw Dr. Doll again noting popping present in his right shoulder and was examined. (Ex. A, p. 3) The recommendations issued by Dr. Doll did not substantially differ from previous opinions and deemed claimant to be at maximum medical improvement (MMI). (Ex. A, p. 3) Dr. Doll noted that the claimant continued to require no restrictions on his activity attributed to his August 27, 2016, work related injury. (Ex. A, p. 3) Dr. Doll deemed further medical treatment was also unnecessary. (Ex. A, p. 3)

On April 5, 2017, claimant was examined by Patricia A. Hurford M.D., M.S. (Ex. B, p. 5) Dr. Hurford reviewed the medical record of the claimant finding a post-crush injury, with bilateral shoulder symptoms and paresthesias in the upper right extremity stemming from the August 27, 2016, injury. (Ex. B, p. 5) It was however noted that claimant still had a clicking sensation in his right shoulder but no pain or weakness was detected. (Ex. B, p. 5) All X-rays that were taken were deemed unremarkable, and no traumatic injuries were identified. (Ex. B, p. 5)

Dr. Hurford, after having reviewed the medical reports, agreed with Dr. Doll that the claimant had reached maximum medical improvement and that the regular duty was reasonable and appropriate. (Ex. B, p. 5) Dr. Hurford wrote,

> If for some reason he would demonstrate any significant limitations to the requirements of his job, a consideration for very limited work hardening to reach necessary lifting requirements may be reasonable. In the absence of any deficiencies in lifting, further therapy in not indicated, as the patient can continue his exercises and progression on his own until he reaches the necessary requirements for work activities.

(Ex. B, p. 5)

Claimant testified that he had difficulty lifting 50 pounds due to pain and did not attempt to lift 100 pounds. Claimant's work requires him to lift 100 to 150 pounds on a frequent basis.

I find that claimant has deficiency in lifting. The claimant's testimony was credible that he is limited to lifting less than 50 pounds. The physical therapy notes also show objective evidence of claimant's lifting deficiency.

Claimant has requested additional medical care and has expressed his dissatisfaction with the care being provided by the defendants. (Ex. 6, pp. 1, 2)

Liability is admitted on this claim.

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. Iowa Code section 85.27 (2013).

By challenging the employer's choice of treatment – and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See 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).

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 statutory right is to select the providers of care and the employer may consider cost and other pertinent factors when exercising its choice. Long, at 124. An employer (typically) is not a licensed health care provider and does not possess medical expertise. Accordingly, an employer does not have the right to control the methods the providers choose to evaluate, diagnose and treat the injured employee. An employer is not entitled to control a licensed health care provider's exercise of professional judgment. Assman v. Blue Star Foods, File No. 866389 (Declaratory Ruling, May 19, 1988). An employer's failure to follow recommendations of an authorized physician in matters of treatment is commonly a failure to provide reasonable treatment. Boggs v. Cargill, Inc., File No. 1050396 (Alt. Care Dec. January 31, 1994).

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., 562 N.W.2d at 433, 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.

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).

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."

Claimant expressed a desire to return to his full lifting functionality so that he can return to work as a rod buster and lift up to 150 pounds. Certainly it is a reasonable desire for claimant to want a complete recovery. However it is unknown whether that can or will happen.

The defendants are required under Iowa law to provide reasonable care; nothing more and nothing less.

The record is clear that claimant has developed a popping/clicking in his shoulders, with the right shoulder causing most of his difficulties.

Claimant, during physical therapy, was only able to carry 30 pounds and push or pull 54 pounds. This is the objective evidence in the record concerning claimant's lifting ability. It is a deficiency in lifting. Based upon Dr. Hurford's recommendation, claimant should receive additional care. The defendants have declined to provide such care. I find that the defendants are not offering reasonable care at this time.

I grant claimant's request for alternate medical care.

Defendants shall promptly refer claimant to an orthopedic shoulder specialist and authorize and pay for diagnostic and any treatment including physical therapy the physician may recommend.

Claimant has requested an MRI. There was no documentation in the claim requesting such testing and considering the length of time and lack of current medical opinion about the need for an MRI, I decline to order care at this time. If the orthopedic shoulder specialist orders an MRI defendants shall provide an MRI.

ORDER

THEREFORE IT IS ORDERED:

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

Claimant shall be referred to an orthopedic physician and shall provide testing recommended, treatments and physical therapy if requested by that physician.

Signed and filed this 19th day of May, 2017.

JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

R. Saffin Parrish-Sams
Attorney at Law
3408 Woodland Ave., Ste. 302
West Des Moines, IA 50266-1937
saffinspslaw@aol.com

L. Tyler Laflin
Garrett Lutovsky
Attorneys at Law
1350 Woodmen Twr.
1700 Farnam St.
Omaha, NE 68102
tlaflin@ekoklaw.com
glutovsky@ekoklaw.com

JFE/srs