BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DIYONDA AVANT,

Claimant,

vs.

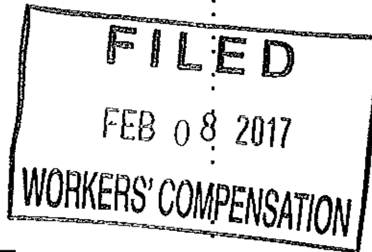
NATIONWIDE INSURANCE,

Employer,

and

AMCO INSURANCE CO.,

Insurance Carrier,
Defendants.



File No. 5054462

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, Diyonda Avant. Claimant appeared personally and through her attorney, Marty Ozga. Defendants appeared through their attorney, L. Tyler Laflin.

The alternate medical care claim came on for hearing on February 8, 2017. The proceedings were digitally recorded. That recording constitutes the official record of this proceeding. Pursuant to the Commissioner's 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 the sworn testimony of claimant, claimant's exhibits 1 through 5; and defendants' exhibits A through C.

The defendants conceded liability for an April 23, 2015, low back injury. An arbitration hearing was held on October 17, 2016 before Deputy Workers' Compensation Commissioner Erica Fitch. The issue of alternate care was raised at the arbitration hearing. Nevertheless, both parties argued and submitted this case on the merits to the undersigned. Claimant seeks an order at this time for future chiropractic care with Jeff Stickel, D.C.

ISSUE

The issue presented for resolution is whether the claimant is entitled to the treatment recommended by Jeff Stickel, D.C.

FINDINGS OF FACT

The claimant sustained an injury to her low back which arose out of and in the course of her employment on April 23, 2015. The defendants have provided medical care for this injury, including, at one time, authorized chiropractic care with Jeff Stickel, D.O.

At some point, the care with Dr. Stickel was de-authorized. Claimant has been receiving treatment with physicians at Iowa Ortho, including Todd Harbach, M.D. Dr. Harbach last evaluated Ms. Avant on December 23, 2016. He noted the following at that time:

> Diyonda returns back for re-evaluation of her low back pain under workman's compensation. She has been seeing Dr. Rayburn in the pain clinic for injections which have not given her any relief. She was not been working since November of last year which was when we last saw her. She is doing chiropractic care which seems to be helping her. She has not been walking. She has been doing her core strengthening. She is taking an anti-inflammatory. She has a question about her medications she is currently taking and moving forward who she will be getting her medicines from.
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> . . . .
>
> The patient returns 13 months after my last visit with her. She has not been working that entire time. She has been to the pain clinic with multiple injections with the last one occurring 3 months ago. She has not had any relief with injections but does get relief from the chiropractic care. She also takes a pain medicine, a muscle relaxer and anti-inflammatory, and I told her she can either continue with Dr. Rayburn in chronic pain management or with her primary care physician to get those medications. She has reached a chronic but steady state of pain and all possible avenues of treatment have been exhausted. I would not recommend a fusion for her back pain. She is at MMI and is released at this time. . . ."

(Claimant's Exhibit 2, page 2)

Diyonda testified that she has been receiving the chiropractic care on her own even after it was de-authorized by defendants. She testified that the care enables her to sit longer. This is confirmed by Dr. Stickel who provided a detailed opinion that she would benefit medically from seeing her approximately 3 times per week. "Chiropractic care is very beneficial for Ms. Avant and I foresee three times weekly until around

3/1/17 where I will do a full re-evaluation and should be able to determine future Chiropractic care . . ." (Cl. Ex. 3, p. 4)

Claimant's counsel made a couple of attempts to have care authorized. Defendants responded that since no treating physician had written an order for care, it would not be authorized.

No treating physician, however, has ever provided a specific opinion as to whether chiropractic treatment should be authorized. This could be interpreted as an opinion that chiropractic care is of no benefit to the claimant. Dr. Harbach did note that "all possible avenues of treatment have been exhausted." (Cl. Ex. 2, p. 2) I find that Dr. Harbach was not talking about maintenance care with this opinion. It appears he was referring to treatment which would actually improve her underlying condition. Moreover, in the same record, Dr. Harbach stated that the chiropractic care "seems to be helping her." (Cl. Ex. 2, p. 2) While the defendants argue this is merely documentation of a self-serving statement by the claimant, I believe Diyonda. In fact, I have no doubt that she feels better when she receives her chiropractic treatment. It makes her more functional. Nothing else has helped. Therefore, I find that the care being offered by the defendants is significantly inferior and less extensive than the chiropractic care.

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).

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."

I find that the care offered by the employer is substantially inferior and less extensive than the chiropractic care recommended by claimant's chiropractor.

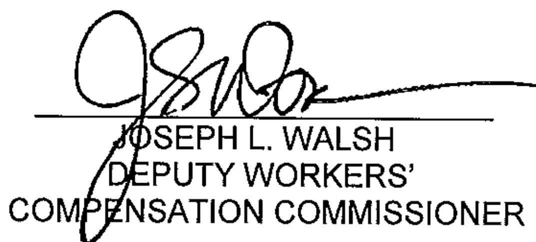
It troubles me to some extent that this issue is pending before another Deputy in an arbitration case. This was an expedited proceeding, whereas the arbitration hearing had a full hearing with discovery and full due process. Deputy Fitch would have a much broader picture of the entire situation. This Order, therefore is non-binding upon Deputy Fitch and should be narrowly interpreted to grant claimant chiropractic care up to three times per week for the month of February 2017, with a re-evaluation of her need for chiropractic treatment on March 1, 2017, as recommended by Dr. Stickel. This will also enable the defendants to obtain medical opinions from the authorized treaters.

ORDER

THEREFORE IT IS ORDERED:

The claimant's petition for alternate medical care is GRANTED. Chiropractic treatment is authorized until it is re-evaluated on March 1, 2017.

Signed and filed this 8th day of February, 2017.



JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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