BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DENNIS M. MARSHALL,

Claimant,

vs.

CITY OF MAXWELL,

Employer,

and

EMC INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5255382

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, Dennis Marshall. Claimant appeared personally and through his attorneys, Mark Soldat and Amanda Green. Defendants appeared through their attorney, Brian Scieszinski.

The alternate medical care claim came on for hearing on February 10, 2017. 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 1-10 and defendants' exhibits A through E. All exhibits were received without objection. Mr. Marshall testified on his own behalf and Amanda Green offered testimony on behalf of the claimant as well. Logan Gerleman, a claims representative from EMC insurance Company, testified on behalf of the defendants. Attorneys Soldat and Scieszinski both offered professional statements during the hearing. Finally, defendants asked that administrative notice be taken and administrative notice was taken of all prior alternate medical care hearing documentation in the agency's file.

ISSUE

The issue presented for resolution is whether the claimant is entitled to an order granting him alternate medical care and, specifically, whether claimant should be allowed to treat moving forward with David Strothman, M.D.

FINDINGS OF FACT

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

Claimant, Dennis Marshall, sustained a low back injury that arose out of and in the course of his employment on December 11, 2013. Defendants accepted that injury and have provided claimant medical care, including three back surgeries. (Original Notice and Petition for Alternate Medical Care; Answer; Testimony of Claimant; Testimony of Logan Gerleman) Nevertheless, claimant testified that he continues to experience ongoing symptoms, including numbness in his leg and now constant low back pain. (Claimant's testimony)

The treating surgeon, Dr. Nelson, released claimant from his care in January 2015. He offered no additional treatment recommendations. Claimant has not had any treatment since January 2015. (Claimant's testimony)

In July 2015, Mr. Marshall retained Amanda Green to represent his interests. Ms. Green scheduled claimant to be evaluated by Robin Sassman, M.D., for an independent medical evaluation. Dr. Sassman recommended additional treatment be provided to claimant, including physical therapy as well as evaluation by a neurosurgeon and evaluation by a pain medicine specialist. (Claimant's testimony)

Attorney Green requested additional treatment on behalf of claimant. No significant additional treatment was forthcoming voluntarily from defendants despite Dr. Sassman's recommendations. Therefore, Attorney Green proceeded to file a petition for alternate medical care in January 2016. After the filing of the petition for alternate medical care, defendants agreed to schedule claimant for evaluation by a neurosurgeon, David Boarini, M.D.

Dr. Boarini evaluated claimant on March 30, 2016. (Ex. B) He recommended a repeat MRI, but would not order the MRI himself because he was an evaluating and not a treating physician. (Claimant's testimony; Ex. B) Claimant obtained the MRI order through his personal physician, Dr. Lowry, and defendants authorized the MRI. (Claimant's testimony; Ex. A) Dr. Lowry also recommended an additional neurosurgical evaluation after Dr. Boarini's evaluation. (Attorney Green's testimony)

After the MRI was completed, in a report dated June 17, 2016, Dr. Boarini recommended against further surgical intervention. (Ex. B) Defendants offered some work hardening at this point in time. Claimant appeared for the work hardening, but the

physical therapist scheduled to perform that work hardening recommended against claimant proceeding until he was re-evaluated by a physician. (Claimant's testimony)

On July 1, 2016, Attorney Green requested additional treatment for claimant after receipt of Dr. Boarini's report. She gave defendants notice that claimant desired the additional treatment recommended by Dr. Lowry and Dr. Sassman. No additional treatment authorization was forthcoming. (Attorney Green's testimony; Ex. 1-3)

Ms. Green followed up with defense counsel seeking care on July 6, 2016, July 28, 2016, July 29, 2016, August 3, 2016, September 9, 2016, September 13, 2016, and September 23, 2016. (Ex. 1-3) On October 5, 2016, co-counsel at Attorney Green's office similarly made a request for treatment. (Ex. 3) No voluntary offers of additional treatment were made by defendants throughout this time period. (Claimant's testimony; Attorney Green's testimony)

Attorney Green and claimant engaged Attorney Soldat to assist with this case in the fall of 2016. On November 23, 2016, December 1, 2016, and January 13, 2017, Attorney Soldat requested additional treatment for the claimant. (Ex. 3-5, 8) No voluntary treatment was authorized or offered by defendants during this period of time. (Attorney Soldat's professional statement; Claimant's testimony)

Having received no responsive treatment offers from defendants since July 2016, claimant sought an evaluation with David H. Strothman, M.D. on January 6, 2017. Dr. Strothman is a spine fellowship trained orthopaedic surgeon in private practice in Plymouth, Minnesota. (Ex. 6-7, 9-10) Dr. Strothman's office is approximately 249 miles from claimant's residence in Maxwell, Iowa. (Claimant's testimony) Dr. Strothman recommends a CT scan of the lumbar spine, x-rays of the lumbar spine, as well as an injection into claimant's lumbar spine. He also discussed the possibility of revision surgeries for treatment of claimant's lumbar spine and residual symptoms. (Ex. 6)

Defendants have not authorized treatment through Dr. Strothman. (Testimony of Logan Gerleman) Defendants challenge the distance to be traveled for the treatment and note claimant's concession on cross-examination that driving great distances is difficult for him and that he would prefer treatment closer to his residence.

Nevertheless, despite having recommendations from Dr. Sassman for a pain medicine evaluation, defendants have not identified or authorized any treatment with a pain specialist. Despite the recommendations for another injection by Dr. Strothman, defendants have not made arrangements or authorized claimant to be evaluated by a local pain specialist, orthopaedic surgeon, or neurosurgeon to perform an injection and consider the treatment recommendations made by Dr. Strothman.

Not until the date of the alternate medical care hearing did defendants offer any additional care responsive to the recommendation of Dr. Sassman for a pain specialist or from Dr. Strothman for an injection and potential surgical revision. On the date of the hearing, and actually via submission of exhibits and at the hearing, defendants offered

to authorize further treatment through an orthopaedic surgeon, William R. Boulden, M.D., and a family practitioner, Jamey J. Hawk, M.D. (Testimony of Logan Gerleman; Attorney Scieszinski's professional statement)

Defendants offered no evidence that they have scheduled appointments for claimant to be evaluated by either Dr. Boulden or Dr. Hawk. Ms. Gerleman was unable to provide any explanation why defendants had not authorized Dr. Hawk at any time prior to the date of the alternate medical care hearing. Ms. Gerleman is not aware of Dr. Boulden's specialties, other than being an orthopaedic surgeon. She is not aware of whether he performs back surgeries. Similarly, Ms. Gerleman is not aware of Dr. Hawk's credentials. She concedes that defendants have never offered an evaluation or treatment with a pain specialist, as recommended by Dr. Sassman. (Testimony of Logan Gerleman)

Ultimately, I find that defendants provided reasonable and appropriate medical care for claimant through January 2015. However, after Dr. Nelson released claimant, defendants have not offered ongoing medical care, despite ongoing symptoms, requests, and recommendations from other physicians. Only after claimant made numerous requests and filed petitions for alternate medical care were actions taken by defendants to secure alternate evaluations. Defendants have never provided a pain specialist evaluation.

At the last minute, indeed at the time of the alternate medical care hearing, defendants offered alternate medical care. However, they offer no evidence that they have scheduled evaluations for claimant to be treated by either Dr. Boulden or Dr. Hawk. Certainly, neither of these physicians has reviewed prior medical recommendations or made independent medical treatment recommendations to date.

Claimant offers evidence of specific medical interventions that can be performed that are superior to the lack of care that has been authorized by defendants since January 2015. Dr. Sassman recommended a pain specialist evaluate claimant. Dr. Strothman recommends an injection, which is a procedure commonly also recommended and performed by pain specialists. It appears that there are additional treatment modalities available to treat claimant's low back injury. Defendants have delayed in providing additional care or even investigating the additional treatment options. Their offer of care at the time of the alternate medical care hearing is more of a last ditch litigation strategy than an actual attempt to investigate the prior medical recommendations.

Therefore, I find that claimant has proven the care (or lack of care) offered by defendants since January 2015 is unreasonable. I find that claimant has proven there are additional treatment modalities, and particularly an additional injection into the lumbar spine and potential revision surgery, that can be performed to treat claimant's low back injury. I find that the treatment recommended by Dr. Strothman is superior to and more extensive than the lack of care offered by defendants until the date of the hearing. The treatment offered by defendants at the time of hearing is speculative and

unknown because neither Dr. Boulden nor Dr. Hawk have evaluated claimant and made any recommendations.

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).

"[T]he terms 'reasonable' and 'adequate' [describe] care that is both appropriate to the injury and sufficient to bring the worker to maximum recovery." Pirelli-Armstrong tire Co. v. Reynolds, 562 N.W.2d 433, 437 (Iowa 1997).

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."

Having found that the defendants have not provided reasonable medical care for claimant's condition since January 2015, have not appropriately authorized or investigated the additional recommendations for evaluation by a pain specialist or the injection recommended by Dr. Strothman, I conclude that claimant has proven entitlement to an order for alternate medical care.

Similarly, having found that claimant proved that the employer-authorized medical treatment has not been effective and that there is other available care that is superior to and more extensive than the care offered by defendants, I similarly conclude that claimant has proven entitlement to an order for alternate medical care.

Defendants' challenge to the distance of travel from claimant's residence to Dr. Strothman's office is heard, but is not convincing. Defendants had ample requests and opportunities to offer claimant reasonable and local medical care. Their failure to do so is not a basis to deny claimant the care he has identified through Dr. Strothman under the facts of this case.

ORDER

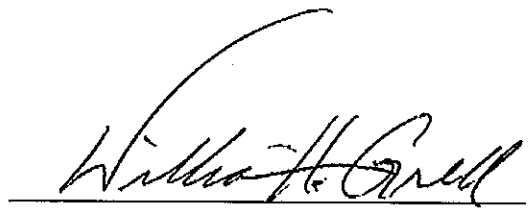
THEREFORE IT IS ORDERED:

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

Care is transferred to David H. Strothman, M.D.

Defendants shall authorize and pay for all medical care recommended and provided by or at the recommendation of Dr. Strothman.

Signed and filed this 10th day of February, 2017.



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