BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

LANCE BUSHBAUM,

Claimant,

vs.

CUSTOM WOOD PRODUCTS,

Employer,

and

CINCINNATI INSURANCE CO.,

Insurance Carrier,
Defendants.

File No. 5061186

ALTERNATE MEDICAL

CARE DECISION

Head Note No.: 2701

STATEMENT OF THE CASE

On March 21, 2018, claimant filed a petition for alternate medical care. The defendants answered on April 2, 2018. The matter was set for hearing on April 3, 2018, at 8:30 a.m.

A telephonic hearing was held on April 3, 2018, commencing on or about 8:34 a.m. Present at the hearing was claimant, Lance Bushbaum; his attorney, Richard Schmidt; and counsel for the defendants, Randall Nielson.

Presiding at the hearing was the undersigned accompanied by Deputy Workers Compensation Commissioner Stephanie Copley.

The record consists of the testimony of the claimant, claimant's exhibits 1-6, and defendants exhibits A-C.

I take judicial notice of the previous alternate medical care decisions rendered August 3, 2017 and December 20, 2016.

FINDINGS OF FACT

On December 12, 2014, claimant sustained injury to his back. The defendants have accepted this work injury. Claimant testified during the hearing that he has ongoing back pain, no recent care, and his desire is to seek out a specialist to alleviate his discomfort.

On March 10, 2015, claimant was evaluated by Sandeep Bhangoo, M.D., a neurosurgeon in Mason City, Iowa. (Ex. A) At that time, claimant reported pain across his low back, into his left leg, and down into the top of the left foot. Id. He rated the pain between 4 to 6 on a 10 scale. Id. During the examination, he showed normal strength in

both lower extremities, had good reflexes, no gross sensory deficits that the doctor could note, but some paraspinal muscular tenderness to palpation. (Ex. A:2) A review of the MRI revealed foraminal narrowing, especially in the lateral recess at L4 – L5 and L5 – S1. Id. Dr. Bhangoo surmised that it was possible that the foraminal narrowing at both levels could be causing the sciatic symptoms. Id.

Dr. Bhangoo advised the claimant that his back pain was likely due to degenerative arthritis and that his condition was not severe enough where surgery would be a good option. (Ex. A:2) Dr. Bhangoo further recommended claimant consider conservative treatments such as steroid injection or continued physical therapy and that time may be the best chance to resolve the pain. Id. Claimant was continued on light duty because Dr. Bhangoo was "not sure that any heavy duty here would benefit [claimant's] back." Id.

Claimant was sent to a pain management physician who performed two right-sided sacroiliac joint injection which claimant reported as helpful. (Ex. B:1) He returned to work on May 2015 but was subsequently laid off. He had not returned to work.

Claimant's back pain returned and he was treated with a third right-sided sacroiliac joint injection. (Ex. B:1) Claimant did not find this treatment helpful. Following that third injection, claimant had no further care until he was seen by Joseph J. Chen, M.D. This visit was facilitated via the alternate care ruling on December 20, 2016. (See Alternate Care Decision, December 20, 2016)

Dr. Chen reviewed the 2015 MRI and examined the claimant. (Ex. B:1) Claimant described back pain in the right paraspinals muscle area and right buttock along with lateral thigh pain and numbness and tingling radiating to the top of the foot. Id. at 3. Pain was rated at a 5 to 6 on a 10 scale. Id. Dr. Chen's examination revealed tenderness at the lumbosacral junction and gluteal areas, reduced lumbar flexion as well as reduced gluteal muscle. Id. Claimant had tenderness to palpation in his gluteal region. Id. The pain in his back and buttocks was reproducible. Id. Reflexes, straight leg test, and strength were normal. Id.

Dr. Chen diagnosed claimant with chronic right-sided low back pain without sciatica and physical deconditioning. (Ex. B:4) His interpretation of the February 23, 2015, MRI was of age appropriate degenerative changes in the discs without focal nerve root compression. Id. As a result, Dr. Chen explained with "these incidental imaging abnormalities when coupled with [claimant's] physical examination today which shows normal in strength, reflexes and negative nerve provocative maneuvers, he does not have a specific, treatable nerve root abnormality or radiculopathy that would explain the extent and intensity of his pain." (Ex. B:4)

According to Dr. Chen, claimant's condition could not be fixed with prescription medications or other interventions but rather exercise on a consistent basis. Id. Claimant was invited to participate in the Spine Rehabilitation program run by Dr. Chen. Id. There are no records that claimant agreed to this. Defendants' counsel, during argument, asserted claimant refused this care. There was no disagreement from claimant's counsel.

Claimant went through another period of time without care. He filed another alternate care proceeding, this time requesting that he be referred to a spine specialist and obtain another MRI. (See Alt Care Decision, August 3, 2017)

Defendants were ordered to "promptly arrange for an MRI and for the claimant to be evaluated by a spine specialist." (See Alt Care Decision, August 3, 2017, p. 4) Per the professional statement of the defendants' counsel, an MRI was conducted in September 2017. However, no evaluation by a spine specialist occurred. Instead, the medical records were sent to Russell Buchanan, M.D., a neurosurgeon with Heartland Neurosurgery. Dr. Buchanan declined to see claimant, writing in a letter, "based on the notes and films, [Dr. Buchanan] does not have anything surgically to offer." (Ex. C)

When asked during the hearing whether the defendants believed that this action complied with the agency order, defendants' counsel replied yes. Defendants were further asked whether any care was being offered to the claimant at this time. Defendants responded no. Defendants did not appeal the August 3, 2017, alternate medical care decision.

Claimant's current request is to designate his family practice physician, Mark Haganman, D.O., as the authorized treating physician. Claimant testified that he believes Dr. Haganman can provide claimant the care or referrals to treat his ongoing back pain.

Dr. Haganman has recommended claimant be sent for an evaluation by an expert of the spine. (Ex. 1) Claimant requested this care repeatedly but received no response. (Ex. 2-6)

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.

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). 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.

"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).

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."

Defendants have displayed a long history of reluctance to provide care for the claimant's condition. Claimant has filed four alternate care petitions, including the one presently under consideration. One petition was dismissed and two were granted. Dr. Chen's medical records show a lapse in care from October 2015 until March 2017. Claimant appears to have had no meaningful care provided by the defendants since March 2017. Instead, claimant has been forced to seek help via his family practice doctor.

Defendants were ordered to have claimant evaluated by a spine specialist. Rather than making an appointment for the claimant to be examined, claimant's records were sent Dr. Buchanan, a spine specialist, who refused to see claimant on the basis that, in Dr. Buchanan's opinion, claimant did not need surgical care.

Surgery is not the sole care that defendants are under an obligation to provide. The statute requires the defendants to "furnish reasonable services and supplies to treat an injured employee." Iowa Code section 85.27(4). Further, the treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. Id.

In the present case, defendants have opted to offer no care, arguing that sending claimant to Dr. Bhangoo, Dr. Chen, and a pain specialist who administered three right-sided injections satisfies the reasonable standard thereby fulfilling the employer's duty to claimant.

Two examinations by medical providers over the course of three years is not reasonable care. Further, defendants have not complied with the agency's previous, unchallenged order. Finally, defendants are declining to provide any care at this time such as a referral to a pain management specialist, physical therapy, or occupational therapy.

An employer ordinarily has the right to control the care provided to the employee. Iowa Code section 85.27(4). In Trade Professionals, Inc. v. Shriver, 661 N.W.2d 119, 124 (Iowa 2003), the Supreme Court allowed that the employer can lose this right in two circumstances:

> The industrial commissioner has interpreted this section to mean that,
>
> > in Iowa, an employer and its insurer have the right to control the medical care claimant receives, with two exceptions. The first is where the employer has denied liability for the injury. The second is where claimant has sought and received authorization from this agency for alternative medical care.

Trade Professionals, Inc. v. Shriver, 661 N.W.2d at 124 (quoting Freels v. Archer Daniels Midland Co., #1151214 (7/30/2000)). Once an abandonment of care has occurred, the claimant is free to seek care on his own at defendant's cost. See West Side Transport v. Cordell, 601 N.W.2d 691 (Iowa 1999) (the court upheld the holding that the defendant employer had "lost the right to choose the care" and that "allow and order other care" language is broad enough to include treatment by a doctor of the employee's choosing).

Based on the failure to provide adequate care in the past, the failure to comply with the agency's orders regarding an actual spine specialist evaluation, and the failure to furnish any care at the present, it is found that defendants have abandoned care. As such, claimant has the right to choose his own medical providers for this accepted work injury and it is the obligation of the defendants to promptly pay for the medical care chosen by the claimant.

ORDER

THEREFORE, IT IS ORDERED, claimant's petition for alternate medical care is granted. Claimant may seek out his own medical providers for the accepted work injury. Defendants are ordered to promptly pay for the medical care chosen by the claimant.

Signed and filed this 4th day of April, 2018.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Richard R. Schmidt
Attorney at law
2423 Ingersoll Ave.
Des Moines, IA 50312-5233
Rick.schmidt@sbsattorneys.com

Randall E. Nielsen
Attorney at Law
PO Box 1588
Mason City, IA 50402-1588
Nielsen@pappajohnlaw.com

JGL/kjw