BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

KATINA WESLEY, Claimant, vs. TYSON FRESH MEATS, INC., Employer, Self-Insured, Defendants.		File No. 5049297 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, Katina Wesley.

The alternate medical care claim came on for hearing on September 28, 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 the alternate care file, Defendant's Exhibits A through C[1]. Administrative notice was taken of the arbitration decision of November 23, 2015 and the commissioner's appeal decision of April 10, 2017 in File No 5049297 and File No. 5050508 and neither claimant nor the defendant called any witness.

Claimant on her petition for alternate medical care listed the date of injury as April 2, 2014. The date of injury for File No. 5049297 is March 21, 2014. As that is the date of injury in the final decision by the agency, I will use this date of injury for this decision.

ISSUE

The issue presented for resolution is whether the claimant is entitled to alternate medical care consisting of shoulder care that was ordered in an arbitration decision and affirmed by the commissioner and whether defendants have abandoned care.

[1] Defendant filed 39 pages of exhibits. This filing was rejected pursuant to 876 IAC 4.48(9). Defendant submitted 10 pages of exhibits, which was received into evidence.

FINDINGS OF FACT

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

Defendants admitted liability for an injury occurring on March 21, 2014.

An arbitration decision was issued on November 23, 2015. That decision found, "As claimant has prevailed in both files, defendants shall provide medical care to the claimant for her low back, left shoulder and cervical injuries." The Order portion of the decision held in part, "FOR FILE NO. 5049297 — DATE OF INJURY MARCH 21, 2014: . . . . Defendant shall provide medical care for claimant's left shoulder and cervical conditions." (November 23, 2015, Arbitration Decision, pages 10, 12) The arbitration decision as to medical care was affirmed on appeal.

On September 18, 2017, claimant filed the Original Notice and Petition for Alternate Medical Care.

Claimant did not contact the defendant before filing this petition and request any specific care. (Exhibit A, p. 4) Defendants requested information as to what care claimant was requesting for her shoulder. (Ex. a, pp. 1 – 4) Claimant responded that claimant was seeking the care ordered in the arbitration decision and was affirmed by the commissioner.

Claimant has been receiving treatment for her neck at the University of Iowa Hospitals and Clinics and was evaluated by a neurosurgeon on June 2, 2017. (Ex. B, p. 1)

Subsequent to the filing of the alternate care petition defendants have contacted Thomas Gorsche, M.D., to evaluate claimant's shoulder. Dr. Gorsche told defendants that before he would make an appointment for the claimant he wanted the records updated from 2014. (Ex. c, p. 1)

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).

Iowa Code section 85.27 (4) provides in 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. If the employer chooses the care, the employer shall hold the employee harmless for the cost of care until the employer notifies the employee that the employer is no longer authorizing all or any part of the care and the reason for the change in authorization. An employer is not liable for the cost of care that the employer arranges in response to a sudden emergency if the employee's condition, for which care was arranged, is not related to the employment. 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. In an emergency, the employee may choose the employee's care at the employer's expense, provided the employer or the employer's agent cannot be reached immediately. An application made under this subsection shall be considered an original proceeding for purposes of commencement and contested case proceedings under section 85.26.

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 their own treating physician. Pote v. Mickow Corp., File No. 694639, Review-Reopening, June 17, 1986).

Claimant asserts that the defendants have failed to provide the alternate care that was ordered in the arbitration decision. The arbitration decision did order medical care for the shoulder. The decision ordered care as defendant had denied the claimant's work injury and were not providing any medical care for the shoulder. There was no specific care ordered.

Before claimant may file a petition for alternate care using the expedited procedures under 876 IAC 4.48, claimant is required to inform defendants as to dissatisfaction of the care being offered. 876 IAC 4.48(4) Claimant did not do so in this case. As claimant did not follow 876 IAC 4.48(4) the case is dismissed.

Defendant was ordered to provide medical care pursuant to Iowa Code section 85.27. There is no specific care they have refused for claimant's shoulder. Defendant is now arranging with Dr. Gorsche as to whether he or another provider(s) may or may not provide care. Defendants have an obligation to promptly and reasonably provide medical care. Claimant has not proven defendants have not provided reasonable care at this time.

ORDER

THEREFORE IT IS ORDERED:

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

Signed and filed this 2nd day of October, 2017.

James F. Elliott

JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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