

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BRIAN MUELLER,

FILED

Claimant,

JUL 03 2018

File No. 5064275

vs.

WORKERS COMPENSATION

ALTERNATE MEDICAL

CALEDONIA HAULERS,

CARE DECISION

Employer,
Defendant.

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, Brian Mueller. Claimant appeared telephonically and through his attorney, John W. Hofmeyer III. Defendant appeared through its attorney, Lindsey E. Mills.

The alternate medical care claim came on for hearing on July 2, 2018. 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 through 7 and Defendant's Exhibit A. Claimant provided testimony. No other witnesses were called. Counsel offered oral arguments to support their positions.

ISSUE

The issue presented for resolution is whether the claimant is entitled to alternate medical care for his back injury in the form of an evaluation with Marc Hines, M.D., or, in the alternative, a second opinion with another surgeon.

FINDINGS OF FACT

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

Claimant sustained an injury on December 22, 2016, when he was involved in a motor vehicle accident. Defendant admitted liability for this injury and the current back condition for which claimant seeks alternate medical care.

Claimant initially received treatment for his back complaints in the form of physical therapy beginning in early 2017. (Claimant Testimony) Shortly thereafter, in February of 2017, claimant obtained a lumbar MRI. (Cl. Testimony) The MRI results were not submitted as evidence to the undersigned, and it is not clear from the record which physician referred claimant for the MRI. Regardless, after completion of the MRI, claimant was seen by Chad Abernathey, M.D., in March of 2017. (Cl. Testimony) The note from this appointment was not submitted as an exhibit, but it appears Dr. Abernathey either recommended injections or opined that injections were a reasonable treatment option.

Two rounds of injections were performed by Ashar Afzal, M.D. (Cl. Testimony) The first provided only a few days of relief. (Cl. Testimony) The second, in April of 2017, provided a few months of relief. (Cl. Testimony) By May of 2017, claimant received a full-duty release with respect to his back. (Cl. Testimony) Since this release, claimant has continued to work without restrictions. (Cl. Testimony)

In July of 2017, claimant was seen by Richard Naylor, D.O., for purposes of an independent medical examination (IME) at defendant's request. (Cl. Testimony) Dr. Naylor apparently referred claimant back to Dr. Abernathey for a one-time follow-up appointment. (Cl. Testimony) At this September 1, 2017 appointment, Dr. Abernathey stated he did not recommend "an aggressive neurosurgical stance due to a paucity of clinical and radiographic findings." (Defendant's Exhibit A:1) He further indicated injections were a "reasonable approach" but that he would "be available for further consultation if so desired in the future." (Id.) Claimant did not return to Dr. Abernathey.

In the interim, claimant has been receiving treatment with Sarvenaz Jabbari, M.D., an occupational medicine physician, for his back complaints. (Cl. Testimony) Dr. Jabbari's recommendations included physical therapy and over-the-counter medication. Defendant is continuing to authorize claimant's treatment with Dr. Jabbari.

Claimant also sustained a brain injury as a result of his December 22, 2016 injury. Defendant authorized Dr. Hines to evaluate the brain injury. According to claimant, during the course of Dr. Hines' evaluation, Dr. Hines indicated he believed he could provide a diagnosis and treatment for claimant's back injury. (Cl. Testimony) Dr. Hines asked claimant to gather the medical records relating to his back before returning. (Cl. Testimony) Claimant did so, but defendant cancelled claimant's follow-up appointment with Dr. Hines because Dr. Hines was only authorized to treat claimant's brain injury and not his back. (Cl. Testimony)

Based on his conversation with Dr. Hines, claimant requests to be authorized to treat with Dr. Hines for his back because claimant believes Dr. Hines could offer more effective treatment than what defendant has offered. (Cl. Testimony) Notably, however, claimant did not specify what Dr. Hines had to offer; he testified only that Dr. Hines told him there was "something going on" in his back and that he believed he could help. (Cl. Testimony)

In the alternative, claimant requests authorization for a second opinion/surgical consultation. This request is based on the recommendations of by Robin Sassman, M.D., who evaluated claimant for purposes of his Iowa Code section 85.39 IME. Dr. Sassman diagnosed claimant with "[l]ow back pain with radiculopathy" and recommended claimant "be provided a second opinion from a different surgeon to determine if any surgical recommendations would be made." (Claimant's Ex. 6) She also recommended referral to pain management for possible injections or medication therapy if no surgical recommendations are made. (Id.)

In response to claimant's requests, defendant has offered to authorize a follow-up appointment with Dr. Abernathey. Claimant is also still authorized to treat with Dr. Jabbari.

It is claimant's position that the care offered by defendant has not been effective and is less extensive than what Dr. Hines or another surgeon could provide. He argues defendant's refusal to allow Dr. Hines to treat claimant's back is based on a technicality and defies the purpose of Iowa Code section 85.27, which is to help claimants get better.

I find claimant failed to show that the care offered by defendant has been ineffective. Claimant testified he had several months of relief after his second injection in April of 2017. While I am sympathetic to the fact that claimant's symptoms have returned, treatment can be effective without curing a claimant of all complaints. Further, claimant presented no evidence that he requested additional injections once the beneficial effects of the injection wore off.

I also find claimant failed to show that the treatment offered by defendant is less extensive than what Dr. Hines or another physician could provide. Claimant did not specify the ways in which Dr. Hines' or another physician's treatment would differ from what defendant has already offered or continues to offer. Claimant only offered the blanket statement that Dr. Hines suggested "potential treatment options." (Cl. Alternate Medical Care Petition, Ex. A) Defendant, on the other hand, is offering an appointment with a neurosurgeon who previously indicated he would be amenable to such a consultation if necessary. (Def. Ex. A:2)

Defendant is not ignoring claimant's requests, nor is it offering care that is not reasonably suited to treat his back complaints. Instead, defendant promptly offered a follow-up appointment with a specialist and continues to offer day-to-day management through an occupational medicine physician. For these reasons, I find the care offered by defendant, specifically a follow-up appointment with Dr. Abernathey and continued authorization of Dr. Jabbari, is reasonable.

REASONING AND 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.

Iowa Code § 85.27(4).

Defendant's "obligation under the statute is confined to *reasonable* care for the diagnosis and treatment of work-related injuries." Long v. Roberts Dairy Co., 528 N.W.2d 122, 124 (Iowa 1995) (emphasis in original). In other words, the "obligation under the statute turns on the question of reasonable necessity, not desirability." Id.

Similarly, 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. See Iowa Code § 85.27(4). Thus, 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 Rule of Appellate Procedure 14(f)(5); Long, 528 N.W.2d at 124.

Ultimately, determining whether care is reasonable under the statute is a question of fact. Long, 528 N.W.2d at 123.

Based on the above findings of fact, I conclude claimant failed to satisfy his burden to prove the care currently being offered by defendant is unreasonable. I further conclude defendant's authorization of a follow-up appointment with Dr. Abernathey, a neurosurgeon, and continued authorization of Dr. Jabbari, an occupational medicine physician, is reasonably suited to treat claimant's ongoing back complaints.

Claimant argues the care offered by defendant is ineffective and inferior to the care that Dr. Hines could provide. 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." However, as explained above, the care offered by defendant provided several months of relief to claimant, and claimant failed to carry his burden to prove that Dr. Hines or another physician would provide superior or more extensive care than that offered by defendant.

I appreciate how claimant might interpret defendant's refusal to authorize ongoing back treatment with Dr. Hines as a "technicality." However, the law entitles defendants to choose who will provide treatment to their injured employees. See Iowa Code § 85.27; IBP, Inc. v. Harker, 633 N.W.2d 322, 326 (Iowa 2001). "In promptly furnishing reasonable medical care to injured employees under chapter 85, employers are empowered to substitute their judgment for that of their injured employees on the important question of which medical professionals are best suited to diagnose and treat work-related injuries." Baker v. Bridgestone/Firestone, 872 N.W.2d 672, 678 (Iowa 2015). In this case, defendant chose Dr. Abernathey to provide treatment for claimant's back complaints and Dr. Hines to provide treatment for claimant's back injury. Thus, while defendant's decision to refuse to authorize Dr. Hines is understandably perceived by claimant as a frustrating technicality, the right to make that decision represents an important tradeoff in the grand bargain of the workers' compensation scheme. See id. at 676-78.

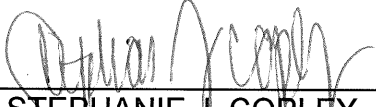
Ultimately, because claimant has not proven that the care offered by defendant is unreasonable, claimant's petition for alternate medical care must be denied.

ORDER

Therefore, it is ordered:

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

Signed and filed this 3rd day of July, 2018.



STEPHANIE J. COPLEY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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