BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
MAR 09 2017
WORKERS' COMPENSATION

TAMMY NEWCOMB, Claimant, vs. JOHN DEERE DAVENPORT WORKS, Employer, Self-Insured, Insurance Carrier,	:	File No. 5052805 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, Tammy Newcomb. Claimant appeared personally and through her attorney, Jerry Soper. Defendant appeared through its attorney, Troy Howell.

The alternate medical care claim came on for hearing on March 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 and claimant's exhibits 1 through 9; as well as defendants' exhibits A through G.

ISSUE

The issue presented for resolution is whether the defendant is required to authorize an implant of a temporary spinal cord stimulator in claimant's low back. The second issue is whether the defendant must authorize a topical cream to treat the claim in her low back.

FINDINGS OF FACT

Tammy Newcomb injured her low back working for John Deere Davenport Works on September 11, 2014. The disability has not been insignificant. Since that time, she has either been off work altogether or working under medical restrictions. Various physicians have been considering or recommending the possibility of implanting a temporary spinal cord stimulator for pain treatment for some time. Based upon the agency record, David Segal, M.D., began recommending such a trial in October 2015.

A routine psychological evaluation is required before the procedure can occur. On June 6, 2016, Luke Hansen, Ph.D., performed this examination and recommended Ms. Newcomb proceed with the procedure. (Claimant's Exhibit 4, pages 1-2) In the meantime, claimant's previous authorized physician from Cedar Rapids, ceased his practice.

Claimant filed for alternate medical care in October 2016, asking for approval of the spinal cord stimulator through Sanjay Sundar, M.D. The application was technically denied on October 31, 2016, however, the deputy ordered defendant to authorize an evaluation with Todd R. Ridenour, M.D., for purposes of obtaining another neurosurgical opinion pertaining to claimant's need for a spinal cord stimulator. Apparently, Dr. Ridenour would not cooperate, nor would another neurosurgeon the defendants attempted to retain.

Defendants finally retained an orthopedic surgeon, Frederick J. Dery, M.D. He prepared an examination report dated February 7, 2017, where he recommended the following.

> I believe that the best explanation for the patient's current pain issues are that they are related to the fall on or around 9/11/2014 and that she has at least 2 reasonable treatment options to be used in conjunction at this time to improve her pain control, functional capabilities, and allow her to return to gainful employment – the topical compounded [sic] cream and a spinal cord stimulator trial. The only caveat to these things is that I do not have her psych eval available to me and I would like to review that before stating unequivocally that she should have these treatments.

(Cl. Ex. 1, p. 4) Dr. Dery's evaluation and report were quite thorough. On February 26, 2017, Dr. Dery confirmed that he would like a new psychological examination before confirming the necessity of the trial. (Def. Ex. F) He opined, however, that the topical cream is appropriate immediately.

Ms. Newcomb testified her pain is worsening and she is developing a drop foot as a result of the pain in her legs.

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. Assmann 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 January 31, 1994).

The Iowa Workers' Compensation system is based upon a special compromise between employers and workers. A cornerstone of that compromise in Iowa is that the employer, not the employee, has the right to choose the claimant's medical provider. Iowa Code section 85.27 (2015). An injured worker can only overcome this right if the employer's chosen care provider offers treatment which is unreasonable. Unreasonable medical care is usually a medical issue, which will often, or almost always, require some type of medical evidence.

In this case, Ms. Newcomb is seeking treatment which has been recommended by the authorized treating physician, Dr. Dery. He specifically recommended this treatment "to improve her pain control, functional capabilities, and allow her to return to gainful employment". (Cl. Ex. 1, p. 4) The one caveat is that he wanted to see the psych evaluation. After seeing it, he wanted a new evaluation. Based upon the evidence in the record, this appears to be routine.

I find that this treatment should be authorized pending the psychological evaluation.

The employer does not deny that the claimant is entitled to this treatment. Rather the employer merely argues that the claimant should have the updated psychological evaluation before it is authorized. There have been numerous delays in the claimant receiving this treatment. In my opinion, it should not be delayed any further. In making this rather obvious statement, I place no blame specifically upon the employer. It appears there have been a variety of reasons for delays. Nevertheless, this process needs to be expedited. The temporary spinal cord implant procedure should be scheduled right away pending the psychological evaluation. Obviously, if the evaluation came back a cause for concern, the procedure could be de-authorized.

I also agree with the claimant regarding her request for the topical compound cream. The claimant clearly stated that this was a basis for her dissatisfaction with care. I find the defendant was on notice.

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."

It is treatment ordered by an employer-chosen physician which is substantially more extensive than the treatment which has been authorized by defendant. The claimant is in significant pain and is highly limited in her ability to function. Dr. Dery has indicated she needs the cream to decrease her pain and improve her functionality.

ORDER

THEREFORE IT IS ORDERED:

The claimant's petition for alternate medical care is GRANTED as set forth above.

Signed and filed this 9th day of March, 2017.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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