

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MONICA BARBER,

Claimant,

vs.

PLANNED PARENTHOOD,  
OF THE HEARTLAND

Employer,

and

ACCIDENT FUND GENERAL INS. CO.,

Insurance Carrier,  
Defendants.

**FILED**

MAY 11 2017

WORKERS' COMPENSATION

File Nos. 5062246, 5062245

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, Monica Barber. Claimant appeared personally and through her attorney, Channing Dutton. Defendants appeared through their attorney, Andrew Portis.

The alternate medical care claim came on for hearing on May 10, 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 Monica Barber; claimant's exhibits 1 through 7; and defendants' exhibits A through F. It is also noted that while the defendants conceded liability for the claimant's low back conditions, they did not accept responsibility for the claimant's mental condition. The defendants had the claimant evaluated and denied liability for that condition.

## ISSUE

The issue presented for resolution is whether the claimant is entitled to the treatment recommended by Jolene Smith, M.D.

## FINDINGS OF FACT

The claimant was injured while working as a nurse for Planned Parenthood in February 2015. She fell on the ice while in the course of her employment and suffered a compression fracture. She was treated conservatively by Todd Harbach, M.D., and released in June 2015, with no restrictions. She was provided a 5 percent permanent impairment at that time. Unfortunately, her low back condition was aggravated in August 2015, in a second work accident.

After the second injury, the defendants authorized treatment with Jolene Smith, M.D. (Claimant's Exhibit 006) Between October 2015 and January 2016, Dr. Smith made a number of recommendations, including mental health treatment, injection therapy and aqua therapy. (Cl. Exs. 001-004) This treatment was never authorized. The one injection which was performed did not help at all. In December 2015, the insurance carrier adjustor, Brenda Morris, informed the claimant that "we will be re-directing your care to a physician of our choosing . . ." (Cl. Ex. 007)

The claimant returned to Dr. Todd Harbach on two occasions. Thereafter, the defendants arranged care with Joseph Chen, M.D., at the University of Iowa Hospitals and Clinics. Claimant saw Dr. Chen and the Spine Rehab Team on a couple of occasions between June 2016 and March 2017. Dr. Chen documented the following from their March 28, 2016, visit.

Monica Barber is a 41 y.o. woman who has predominantly chronic mechanical and myofascial low back pain. She does have an L1 compression fracture from February 2015 and a lumbar strain event that worsened her back pain.

I explained that her muscle inflexibility is the main reason for her ongoing low back and buttock pain and the muscle weakness and fatigue is the reason for her pain with prolonged standing. I told her that these are properties that we cannot fix with prescription medications or other interventions and that she has to work on by doing these exercises on a consistent basis. I also encouraged getting back into some type of preferred endurance exercise such as walking, bicycling, or swimming if possible.

(Def. Ex. A, p. 1)

He went on to document, in fairly significant detail, the causes of her pain and the best way to gain control of it. (Def. Ex. A, p. 2) As a course of action, he recommended that she return to meet the Spine Rehab Team (an inter-disciplinary pain management team) for a possible referral to the Spine Rehabilitation Program at the University of Iowa. "If the team thinks she has sufficient motivation to make some difficult behavioral changes she may be a candidate to return for the Spine Rehabilitation Program but she may need extensive local physical therapy before she would be a candidate for the Spine Rehab Program. (Def. Ex. A., p. 2)

The claimant met with the Spine Rehab Team on July 20, 2016. Ten recommendations were made at that time.

1. We recommend you begin immediately with the physical therapy exercises taught to you the day of the evaluation. These programs are designed to increase strength, flexibility and endurance and to assist you in better managing your pain.
2. We recommend you complete the simple breathing exercise for stress and pain management every hour, and either the focused breathing relaxation exercise or audio-recorded relaxation exercise twice daily and when attempting to sleep.
3. Based on the results of the exercise study, it is essential that you initiate a consistent aerobic program which could involve walking, stationary biking or swimming/aquatic exercise. You should work towards achieving at least a total of 30 to 45 minutes at least 5 days a week, beginning with 5 to 10 minute time periods of exercise.
4. You are also advised to integrate more "physical steps" within your daily activities by incorporating the following suggestions; parking the car further way, walking when visiting friends or doing errands, and taking the steps when available. You may benefit from using a wheeled walker to improve your ability and confidence when walking longer distances.
5. You would improve overall health by:
  - a. Discontinuing smoking. Behavioral strategies were discussed and information concerning smoking cessation was issued.
  - b. Reducing BMI below 27.0 by losing at least 35 pounds through dietary modifications and increased physical activity, as outlined.
6. You should follow through with the counseling referrals and recommendations you were given.
7. You should also implement the suggestions you were given for improving sleep.
8. We encourage you to explore the handouts you were given for free web based applications for meditation, relaxation, and sleep management.
9. We have included a referral for aquatic therapy to be performed locally to assist you in improving strength, flexibility and endurance.
10. You are scheduled to follow-up with Dr. Joseph Chen at the West Des Moines Work Injury Recovery Center on August 17, 2016, at 9:30, report time of 9:15.

You should receive a reminder letter approximately two weeks prior to this appointment.

(Def. Ex. C)

Claimant returned to Dr. Chen in August 2016. (Def. Ex. D) "I don't think she has made significant progress over the past month. She says she has improved a little but I don't think that she would be ready to participate in the September Spine Rehab Program." (Def. Ex. D) Dr. Chen further stated that he recommended an "alternative plan" of "allowing her to recover at her own pace" and concluded that he did not "have any additional recommendations for supervised medical treatment that are likely to benefit her." (Def. Ex. D)

The claimant testified that, throughout her treatment with Dr. Chen, she complained that she was not allowed to return to Dr. Smith since January 2016. She further testified that she would have preferred to continue receiving medical treatment but that she chose Dr. Chen's suggestion of recovering at her own pace because she was convinced she would not receive any substantial treatment from him. Claimant currently ambulates with a walker and finds it very difficult to exercise to lose weight.

The defendants have arranged for the claimant to return to Dr. Chen on May 19, 2017.

#### 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. Assman 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 Dec. January 31, 1994).

The claimant argues that the defendants have refused to authorize the treatment recommendations of an authorized treating physician. The claimant argues it is unreasonable to fail to authorize such treatment. The defendants argue that they appropriately switched the claimant to a new physician in early 2016 and she acquiesced to the new provider. They argue that the new provider, Dr. Chen, has provided reasonable treatment and claimant has failed to avail herself of the treatment offered.

While this is a close case, I agree with the claimant.

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."

Dr. Chen and the Spine Rehab Team appear to be quite selective about who is offered treatment in their program. It is apparent that for an individual to qualify for their program, they must be committed to broad lifestyle changes. I have no doubt that the program is excellent. Such an option may be the claimant's best chance to dramatically improve her condition. The Spine Rehab Team provided these recommendations to the claimant in July 2016. Just a month later, in August 2016, Dr. Chen opined that the claimant was not ready for this. Dr. Chen was probably right. Nevertheless, the claimant is still entitled to treatment, even if the best possible option is not right for her. The only alternative provided by Dr. Chen was for the claimant to be released from all care to "heal at her own pace." I find that this is really not a treatment option at all. It is an option for non-treatment. I cannot find this to be reasonable care under the circumstances presented.

Having found that the care offered by defendants is not reasonable, I find that the best solution is for the claimant to return to Dr. Smith for further care.

Regarding the claimant's alleged mental injury or need for counseling, I find the following.

Before any benefits can be ordered, including medical benefits, compensability of the claim must be established, either by admission of liability or by adjudication. The summary provisions of Iowa Code section 85.27 as more particularly described in rule 876 IAC 4.48 are not designed to adjudicate disputed compensability of claim.

The Iowa Supreme Court has held:

We emphasize that the commissioner's ability to decide the merits of a section 85.27(4) alternate medical care claim is limited to situations where the compensability of an injury is conceded, but the reasonableness of a particular course of treatment for the compensable injury is disputed.

....

Thus, the commissioner cannot decide the reasonableness of the alternate care claim without also necessarily deciding the ultimate disputed issue in the case: whether or not the medical condition Barnett was suffering at the time of the request was a work-related injury.

....

Once an employer takes the position in response to a claim for alternate medical care that the care sought is for a noncompensatory injury, the employer cannot assert an authorization defense in response to a subsequent claim by the employee for the expenses of the alternate medical care.

R. R. Donnelly & Sons v. Barnett, 670 N.W.2d 190, 197-198 (Iowa 2003).

If the defendants refuse to accept liability for the condition for which the claimant seeks treatment, they lose their right to control the medical care claimant seeks in this proceeding and the claimant is free to choose that care on his or her own. Bell Bros., Heating v. Gwinn, 779 N.W.2d 193 (Iowa 2010). Cases where the employer has refused to accept liability are essentially treated as a denial.

In this case, the defendants have denied that the mental condition is related to the admitted work injury. As such, the defendants have not accepted liability for this condition and I have no authority to order them to provide alternate medical care. Therefore the portion of claimant's claim related to the alleged mental health treatment is dismissed without prejudice at this time. Claimant may obtain reasonable medical care from any provider for this treatment at her own expense and seek reimbursement for such care using regular claim proceedings before this agency. Defendants are prohibited from asserting an authorization defense.

ORDER

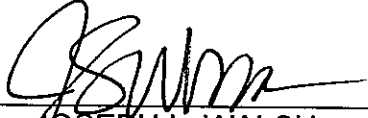
THEREFORE IT IS ORDERED:

The claimant's petition for alternate medical care is GRANTED IN PART. Defendants shall authorize claimant to return to Dr. Smith for treatment recommendations.

The claimant's petition as it relates to mental health treatment is DENIED until such time liability is established.

Defendants are barred from asserting authorization as a defense for the mental health treatment.

Signed and filed this 11th day of May 2017.

  
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JOSEPH L. WALSH  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

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