BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

TONYA FINDLAY,

Claimant,

vs.

EXPRESS SERVICES, INC.,

Employer,

and

NEW HAMPSHIRE INS. CO.,

Insurance Carrier,
Defendants.

FILED

MAR 11 2015

WORKERS COMPENSATION

File No. 5051246

ALTERNATE MEDICAL

CARE DECISION

HEAD NOTE NO: 2701

This is a contested case proceeding under Iowa Code chapter 17A. Claimant sustained a work-related injury on September 9, 2013. Claimant filed a petition for alternate medical care. The petition was filed on February 27, 2015. Claimant stated she was dissatisfied with the quality of treatments she had received and claimant sought an order requiring defendants to authorize surgery with Chad Abernathey, M.D. (Original Notice and Petition)

Defendants filed an answer on March 11, 2015. Defendants accepted liability for further evaluation of the potential surgical condition.

The hearing administrator set the case for a telephone hearing on March 11, 2015, at 10:30 a.m. The hearing was recorded by digital means. The digital recording is the official transcript of the hearing.

Claimant offered exhibit 1. Claimant testified on her own behalf. Defendants offered exhibit A. All exhibits were admitted as evidence.

According to the Iowa Workers' Compensation Commissioner, the deputy workers' compensation commissioner presiding at the contested case in an application for alternate medical care, pursuant to rule 876 IAC 4.48, is hereby delegated the authority to issue the final agency decision on the application, Iowa Code section 86.3. There is no right of intra-agency appeal on this decision. Continental Telephone Co. v.

Colton, 348 N.W.2d 623 (Iowa 1984) and Leaseamerica Corp. v. Iowa Dept. of Revenue, 333 N.W.2d 847 (Iowa 1983).

If claimant is dissatisfied with the medical care she has been receiving, she must communicate her dissatisfaction to the employer. Such dissatisfaction must be communicated to the employer prior to the filing of the original notice and petition. Iowa Code section 85.27.

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.

Reasonable care includes care necessary to diagnose the condition and defendants are not entitled to interfere with the medical judgment of its own treating physician. Pote v. Mickow Corp., File No. 694639 (Review-Reopening Decision June 17, 1986).

An employer's right to select the provider of medical treatment to an injured worker does not include the right to determine how an injured worker should be diagnosed, evaluated, treated or other matters of professional medical 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 Dec. January 31, 1994).

A referral by an authorized physician to another practitioner is generally found to be authorized care. Coleman v. Coleman Indus. Cleaning, 4 Iowa Indus. Comm'r Rep. 67 (1984).

There is no dispute; Chad D. Abernathey, M.D., is the authorized treating neurosurgeon in this case. Claimant has been receiving care from Dr. Abernathey. Claimant treated with the neurosurgeon on February 4, 2015. Dr. Abernathey ordered a current MRI. (Exhibit 1, pages 1-2)

On February 13, 2015, claimant returned to see Dr. Abernathey. (Ex. 1, p. 2) He interpreted the MRI studies as showing:

> That study, once again, demonstrates significant left C5-6 and C6-7 disc protrusions with osteophyte formation and stenosis.

(Ex. 1, p. 2)

Dr. Abernathey explained the risks of surgery to claimant. She indicated she wished to proceed with "a 2 level ACDF with instrumented allograft in the coming days." (Ex. 1, p. 2)

The surgery did not occur subsequent to the examination on February 13, 2015. Claimant still desired the surgery. However, Dr. Abernathey had apparently changed his opinion whether surgery would be a viable treatment modality for claimant. The neurosurgeon issued an opinion letter on March 2, 2015. The doctor opined:

> 1. The patient's diagnosis is chronic subjective neck and left arm pain consistent with C5-6 and C6-7 disc degeneration with osteophyte formation and stenosis.
>
> 2. If the patient had good relief from her symptoms prior to her altercation with the police, then I would consider her symptoms to be related to this event. If her symptoms did not resolve prior to that date, then I would attribute her symptoms to her original injury.
>
> 3. I would consider the patient to be a modest surgical candidate due to the chronic history and worker's [*sic*] compensation issues involved and moderate MRI degenerative findings.
>
> 4. I do not believe that the patient requires any additional restrictions.

(Ex. A)

A claimant's dissatisfaction with the chosen care – without more – is not sufficient grounds for granting an application for alternate medical care. Long v. Robert's Dairy Co., 528 N.W.2d 122, 123 (Iowa 1995). To succeed on an application for alternate medical care, the claimant must show the chosen care was not reasonable, was not offered promptly, or was unduly inconvenient. Id. "[T]he employer's obligation under the statute turns on the question of reasonable necessity, not desirability." Long, 528 N.W.2d at 124.

In the present case, defendants are providing reasonable and necessary care with Dr. Abernathey, the authorized treating neurosurgeon. Defendants have not in the past and are not currently denying claimant the ability to treat with Dr. Abernathey. However, it is Dr. Abernathey who seems to modify his treatment plans for claimant.

There is nothing this division is able to do to control the decisions of any medical providers. Claimant's petition seeking an order requiring defendants to authorize surgery with Chad Abernathey, M.D., is denied.

ORDER

THEREFORE, IT IS ORDERED:

Claimant's petition seeking an order requiring defendants to authorize surgery with Chad Abernathey, M.D., is denied.

Defendants are not denying reasonable and necessary treatment with Dr. Abernathey.

Signed and filed this 11th day of March, 2015.

Michelle A. McGovern

MICHELLE A. MCGOVERN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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