

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

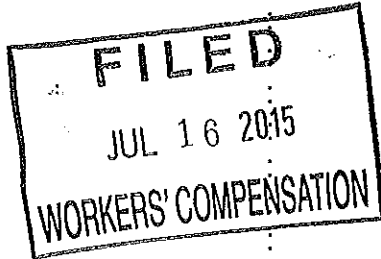
ALFONSO PENNY,

Claimant,

vs.

WHIRLPOOL,

Employer,
Self-Insured,
Defendant.



File No. 5053195

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, Alfonso Penny. Claimant appeared personally and through his attorney, Dennis Currell. Defendants appeared through their attorney, Steve Durick.

The alternate medical care claim came on for hearing on July 14, 2015. 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 claimant's exhibits 1 through 4 and defendant's exhibits A through C in addition to the sworn testimony of Alfonso Penny. All exhibits were offered and received into evidence. Claimant's counsel offered a few objections to defense exhibits which the undersigned ruled went to the weight to be given to the evidence, not the admissibility. The claimant filed a previous alternate medical care decision on June 2, 2015, which resulted in a hearing on June 12, 2015, and subsequent alternate medical care decision filed on June 15, 2015. Deputy Commissioner James Christiansen considered the claimant's petition and denied it. There is significant overlap between the two claims. Administrative notice has been taken of the prior decision and record with the consent of both parties.

ISSUE

The issue presented for resolution is whether the claimant is entitled to alternate medical care. In his petition, claimant alleges that care was not offered reasonably and promptly. He essentially argues the care was abandoned. The claimant further argues

that the defendant has interfered with the care because a company official has "veto" authority over any care offered by the physicians.

FINDINGS OF FACT

The undersigned having considered all the evidence in the record finds:

The self-insured defendant accepts liability for claimant's work-related low back injury dated April 1, 2015.

Prior to the first hearing on June 12, 2015, claimant was provided conservative treatment through the employer's company physician who has an office in the plant, Peter Matos, M.D. He was evaluated by neurosurgeon Chad Abernathy, M.D., who opined that the conservative care was appropriate, at least as of May 4, 2015. The claimant did not attend a scheduled appointment with Mercy Pain Clinic for an injection on May 20, 2015. Claimant filed an alternate medical care petition on June 2, 2015. In that petition, he alleged "Dr. Abernathy indicated there was nothing further he could offer the claimant for treatment." (Alt Care Petition, June 2, 2015) Hearing was held on June 12, 2015. On June 15, 2015, Deputy Commissioner James Christiansen ruled in favor of the defendant, finding that the claimant failed to meet his burden. "Given this record, I cannot find the care offered by defendant is unreasonable." (Alternate Care Decision, June 15, 2015, p. 5)

On June 8, 2015, Darin Smith, M.D., evaluated the claimant. Dr. Smith is a neurosurgeon. Claimant has been evaluated by Dr. Smith on his own due to his dissatisfaction with the treatment received through the employer. Dr. Smith stated the following: "Patient has a central to left paracentral L5-S1 disk protrusion with annular tear. PT has worsened the pain. I have recommended lumbar ESI. RTC 1 week after. Light duty for now." (Claimant's Exhibit 1, p. 5)

On June 17, 2015, claimant's counsel wrote to defense counsel to request authorization of treatment. (Cl. Ex. 1, p. 1) He attached Dr. Smith's June 8, 2015, report as well as a letter from Linn County Anesthesiologists which indicated an appointment had been arranged to see Julie Saddler, M.D. (Cl. Ex. 2)

The appointment was authorized. The claimant attended the appointment and received an injection on June 30, 2015. Since then, the claimant has followed up twice with Dr. Matos. (Def. Exs. B and C)

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 (Alternate Care January 31, 1994).

The claimant has failed to prove that the care offered since the last hearing has been unreasonable. The claimant alleges that the care has not been reasonably suited to treat his injury. Specifically, he alleges that no treatment was offered at all and care was abandoned between May 20, 2015, and June 30, 2015. He further argues that the adjustor's "veto authority" over any treatment offered by Dr. Matos demonstrates that the care offered is unreasonable.

The claimant has been offered care. An appointment was scheduled for the claimant to receive an injection on May 20, 2015. The claimant missed that appointment. The claimant provided reasons he missed the appointment, essentially alleging the employer returned him to an inappropriate job at the plant on May 19, 2015, which further injured him and caused him to be unable to make the appointment. I find it unnecessary to determine whether the reason was a good reason. Even if I assume it is a good reason, the record before me clearly indicates that the appointment was re-set with the same clinic and physician for June 30, 2015. I find no evidence that the defendant abandoned the care between May 20, 2015, and June 30, 2015. (See also, Def. Ex. 1)

In his petition, claimant alleged the basis for dissatisfaction as follows. "Emplor [sic] refuses to reauthorize epidural injection one month after their Dr. made referral to same anesthesiologist: Emplor [sic] offered no reasonable care in interim". (Alt Care Petition, June 29, 2015) The care referred to, however, was authorized and the claimant had the injection on June 30, 2015. He has been allowed to follow up with the company doctor on two occasions thereafter and has been offered further injections.

In this case, the claimant testified in a compelling and credible manner that he has substantial pain in his low back which is interfering with his life in numerous ways. He is sincerely worried and concerned that the treatment he is receiving from the employer's chosen physician is substandard and biased. In fact, he is so concerned that he is seeking out treatment on his own and using his private insurance to cover the treatment. The pain he has described is not trivial. As set forth in the statement of law above, insurance adjustors do not have veto authority over medical care decisions based upon sound medical judgment. The law is clear that an employer may not substitute its judgment for the judgment of the medical professionals.

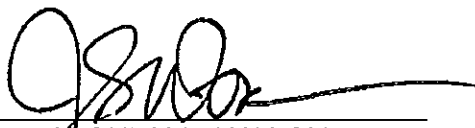
It would behoove the parties to work cooperatively on the medical care issues to avoid future alternate care litigation and otherwise ensure excellent medical care for the claimant. It is also highly recommended that the claimant make a substantial good faith effort to resolve his concerns about his care through legal counsel prior to filing any additional alternate medical care claims. Claimant's counsel should attempt to resolve the care issues with defense counsel through personal discussions and negotiation, such as a phone call.

ORDER

SO IT SHALL BE:

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

Signed and filed this 16th day of July, 2015.



JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Dennis Currell
Attorney at Law
PO Box 1427
Cedar Rapids, IA 52406-1427
dcurrell@qwest.net

Steven T. Durick
Attorney at Law
6800 Lake Dr., Ste. 125
West Des Moines, IA 50266
Steven.durick@peddicord-law.com

JLW/kjw