BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BRANDON VALENTI,

Claimant,

vs.

CITY OF DES MOINES,

Employer,

and

EMC RISK SERVICES,

Insurance Carrier,
Defendants.

File No. 5049719

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, Brandon Valenti.

The alternate medical care claim came on for hearing on June 12, 2015. The proceedings were digitally recorded, which constitutes the official record of this proceeding. By order filed February 16, 2015, this ruling is designated final agency action.

The record consists of claimant's exhibits 1-4; defendants' exhibits A and E and claimant's testimony.

ISSUE

Whether claimant is entitled to seek a neurosurgical consult from Mercy Neurosurgery.

FINDINGS OF FACT

Brandon Valenti sustained a work injury on August 27, 2014. He was referred to Richard S. McCaughey, D.O., at the behest of the employer. In November 2014, Dr. McCaughey referred claimant to Dana L. Simon, M.D. He has continued to treat with Dr. Simon today. Dr. McCaughey also recommended claimant be seen by a physiatrist to assess claimant's ongoing pain.

After being seen by Dr. Simon, Dr. McCaughey referred claimant to Lynn Nelson, M.D., a neurosurgeon, who wrote, "I am unenthused about recommending surgical treatment, particularly given his lack of short term relief with previous lumbar epidural steroid injection." (Ex. A) Dr. Nelson recommended "symptomatic treatment for the time being in regards to [claimant's] low back and left lower extremity pain complaints." (Ex. A)

On May 11, 2015, Dr. Simon recommended claimant receive a second opinion. His medical records state, "I would suggest alternative opinion either with Neurosurgery here or with University of Iowa Dept. of Orthopedic Spine for example..." In the same document, he also states "Whichever the patient prefers. If Dr. Nelson does not wish to see the patient or do surgery, then referral to Mercy Neurosurgery to Drs. Munson, Gachiani, or Henderson should be considered." (Ex. 1) This recommendation was made known to the defendants.

The referral was initially turned down on May 20, 2015, because claimant had already one evaluation with a neurosurgeon and "work comp does not allow for a second opinion." (Ex. 2)

When pressed by the claimant for a specific recommendation, Dr. Simon responded only with a general recommendation. "I do recommend neurosurgical evaluation." (Ex. 3)

Claimant was then instructed to see Todd C. Troll M.D., a physiatrist. Dr. Troll ordered an EMG which had abnormal results suggestive of mild motor unit loss in the left L5 distribution. On June 4, 2015, Dr. Troll noted that claimant had failed conservative treatment and should be referred to neurosurgery.

At the hearing, defendants asserted that they have made contact with a local neurosurgery group. It was unclear from the record whether defendants would send claimant back to Dr. Nelson or whether claimant would be sent to a different neurosurgery group.

CONCLUSIONS OF LAW

Under Iowa law, the employer is required to provide care to an injured employee and is permitted to choose the care. Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433 (Iowa 1997).

> [T]he 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.

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 R. App. P. 14(f)(5); 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). In Pirelli-Armstrong Tire Co., 562 N.W.2d at 433, the court approvingly quoted Bowles v. Los Lunas Schools, 109 N.M. 100, 781 P.2d 1178 (App. 1989):

> [T]he words "reasonable" and "adequate" appear to describe the same standard.
>
> [The New Mexico rule] requires the employer to provide a certain standard of care and excuses the employer from any obligation to provide other services only if that standard is met. We construe the terms "reasonable" and "adequate" as describing care that is both appropriate to the injury and sufficient to bring the worker to maximum recovery.

The commissioner is justified in ordering alternate care when employer-authorized care has not been effective and evidence shows that such care is "inferior or less extensive" care than other available care requested by the employee. Long, 528 N.W.2d at 124; Pirelli-Armstrong Tire Co., 562 N.W.2d at 437 (Iowa 1997).

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. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 16, 1975).

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 June 17, 1986).

In this case, claimant argues that Dr. Simon made a specific recommendation for claimant to be seen at Mercy Neurosurgery and that to send claimant to a different neurosurgeon would be interfering with the medical judgment of a treating physician. However, the factual evidence is not as clear cut as the claimant's assert. Dr. Simon has made general referrals, including returning claimant back to Dr. Nelson. In fact, the

referral to Mercy Neurosurgery occurs only if Dr. Nelson does not wish to treat the claimant.

There is no response in the record from Dr. Nelson either after Dr. Simon's medical record or after the referral from Dr. Troll. This is not a case where claimant has been offered no care. Initially, the second opinion was turned down, but according to the assertions at hearing, the defendants are willing to return claimant back to Dr. Nelson.

Claimant does not assert an abandonment claim but does argue that the care provided is untimely. The untimeliness component would go to whether the care that the defendants are offering is unreasonable. Dr. Simon recommends a neurosurgical consult on May 11, 2015. Defendants refuse on May 20, 2015, and instead send claimant to a physiatrist, Dr. Troll. On June 4, 2015, Dr. Troll recommends a neurosurgical consult.

The alternate care petition is filed on June 1, 2015. Defendants are offering return to Dr. Nelson which is in line with Dr. Simon's recommendations.

It is found that the care that defendants are currently offering is reasonably suited to treat the injury without undue inconvenience to the claimant. There is not sufficient evidence upon which to make a finding of abandonment of care allowing the claimant the right to choose providers.

ORDER

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

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

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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