BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MITCHELL A. SMITH, Claimant, vs. CERRO GORDO COUNTY, Employer, and UNITED WISCONSIN INSURANCE COMPANY, Insurance Carrier, Defendants.	FILED NOV 07 2018 WORKERS COMPENSATION	File No. 5059756 ALTERNATE MEDICAL CARE DECISION HEAD NOTE NO: 2701

This is a contested case proceeding under Iowa Code chapters 85 and 17A. The expedited procedures of rule 876 IAC 4.48, the "alternate medical care" rule, are invoked by claimant, Mitchell Smith.

This alternate medical care claim came on for hearing on November 7, 2018. The proceedings were recorded digitally and constitute the official record of the hearing. By an order filed by the workers' compensation commissioner, this decision is designated final agency action. Any appeal would be a petition for judicial review under Iowa Code section 17A.19.

The record in this case consists of Claimant's Exhibits 1-4 and 6-10.

ISSUES

The issues presented for resolution in this case are whether claimant is entitled to alternate medical care consisting of an authorized visit to James Nepola, M.D.'s office on November 12, 2018, and whether claimant is entitled to continue treatment with Dr. Nepola in the future.

FINDINGS OF FACT

Defendants accept liability for a work-related injury occurring on January 16, 2013.

On October 25, 2016 claimant was evaluated by Dr. Nepola at the University of Iowa Hospitals and Clinics (UIHC). The history section of notes from this exam indicates claimant fell on his right elbow forcing his arm into his shoulder. On June 11, 2013 claimant underwent a right cubital tunnel release and a right shoulder surgery consisting of a rotator cuff repair and a subpectoral biceps tenodesis. (Exhibit 9)

On March 18, 2014 claimant had a revision ulnar decompression. On July 14, 2014 he had arthroscopic surgery to deal with adhesions. On October 6, 2015 he had a right shoulder diagnostic arthroscopic surgery and biceps tenodesis with Dr. Nepola. Claimant was found to be at maximum medical improvement (MMI) on May 17, 2016. He was given permanent restrictions and returned to work full time. Claimant had continued pain in the right shoulder and was given periodic injections for pain by Dr. Nepola. (Ex. 9)

In a September 19, 2018 letter, defendants' counsel asked Dr. Nepola if he had a provider he could recommend closer to Mason City to provide ongoing care for claimant. If not, defendants would select a provider. (Ex. 2)

In an October 10, 2018 email, Dr. Nepola's office recommended Darron Jones, M.D. for claimant. (Ex. 3)

In an October 11, 2018 email, claimant's counsel indicated claimant was happy with the care provided by Dr. Nepola. Claimant usually received injections from Dr. Nepola in the fall and spring to deal with pain. Claimant's counsel asked claimant to be scheduled for a follow-up appointment with Dr. Nepola. (Ex. 4)

In an October 12, 2018 letter, defendants' counsel indicated claimant was authorized to treat with Dr. Jones and an appointment had been scheduled on January 14, 2019.

In an October 25, 2018 email claimant's counsel indicated claimant was dissatisfied with the transfer of care to Dr. Jones for several reasons. First, claimant was satisfied with the care provided by Dr. Nepola. Second, claimant had an appointment scheduled for an injection with Dr. Nepola in September. Claimant's counsel indicated claimant was in pain and it was unreasonable to make claimant wait until January to have an injection for pain.

An October 30, 2018 letter from the UIHC indicated claimant was scheduled with Rhonda Dunn, ACNP, under the direction of Dr. Nepola, for an exam and potential repeat injection in the right shoulder. (Ex. 10)

In a professional statement, claimant's counsel indicated claimant wanted to treat with Dr. Nepola's office on November 12, 2018, as claimant had ongoing shoulder pain. Claimant's counsel indicated claimant wanted to continue treatment with Dr. Nepola, that claimant did not mind making trips from Mason City to Iowa City, and that claimant had a good patient/physician relationship with Dr. Nepola. Claimant's counsel

expressed concerns with potentially waiting for months for an appointment if claimant's care was transferred to Dr. Jones in Mason City.

In a professional statement, defendants' counsel indicated defendants would authorize claimant to treat with Dr. Nepola's office on November 12, 2018.

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

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.

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 1975).

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. v. Reynolds, 562 N.W.2d 433 (Iowa 1997), 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.

Claimant has two concerns regarding this petition for alternate medical care. First, claimant wants defendants to authorize his November 12, 2018 appointment with Dr. Nepola's office, as shown in Exhibit 10. Defendants' counsel indicated defendants will authorize this visit. Given defendants' counsel's statements at hearing, the first issue appears to be resolved.

Claimant also seeks to have this agency order defendants to continue to authorize treatment with Dr. Nepola in the future.

The record indicates claimant saw Dr. Nepola's office twice a year for injections to deal with a painful shoulder. Defendants did initiate a communication with Dr. Nepola's office regarding a transfer of care. However, Dr. Nepola's office did not refuse that request and referred claimant to Dr. Jones in Mason City.

The facts detailed above are different from a situation where an insurer suddenly stops authorized care with a provider, and directs a claimant to a provider chosen by the insurer. As noted, I recognize defendants did initiate the communication with Dr. Nepola's office regarding a transfer of care. However, Dr. Nepola's office did refer Dr. Jones as a provider for claimant.

The claimant cites Santucci v. Air and Water Technologies, Corp, File No. 967995 (Arb. April 20, 1993), and other cases, in support of the position that once the care has been authorized the burden shifts to defendant to show that the new care is unreasonable.

More recent case law suggests that the defendants must only offer a rational justification, LaRue v. Blake Bykret Trucking, File No. 126513 (Alt Care, August 2000), and that the statutory right to authorize care is broad. In these situations claimant ultimately bears the burden of proof to show the new care is unreasonable.

I am empathetic to claimant's situation. The record indicates claimant had a good patient/physician relationship with Dr. Nepola and the care he received from Dr. Nepola was beneficial. Defendants contend it is not reasonable for claimant to continue maintenance care at a hospital approximately 160 miles away from Mason City. However, because the authorized future care with Dr. Jones does not appear unreasonable, I cannot find in claimant's favor regarding this issue.

ORDER

Therefore it is ordered, claimant's petition is granted, in part, and denied, in part. Defendants shall authorize care with Dr. Nepola for the appointment scheduled for November 12, 2018.

Signed and filed this 7th day of November, 2018.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
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