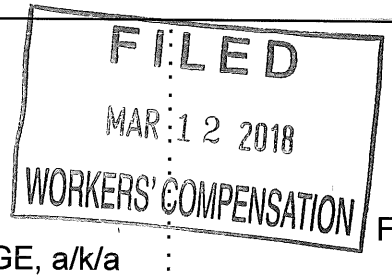
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



MICHELE McCLISH, Claimant, vs. THE PRESBYTERIAN VILLAGE, a/k/a GRAND JIVANTE, Employer, and WEST BEND MUTUAL INS. CO., Insurance Carrier, Defendants.	File No. 5060897 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, Michele McClish. Claimant appeared personally and through her attorney, Joanie Grife. Defendants appeared through their attorney, Charles Blades. In addition, an employer's representative, Karla Goings, was present.

The alternate medical care claim came on for hearing on March 9, 2018. 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 an on the record discussion with counsel regarding the current status of this claim, as well as claimant's exhibits 1 through 2 and defendants' exhibit A, which were received without objection. In addition, administrative notice was taken of the entire file, including a previous alternate medical care petition.

The defendants have generally accepted responsibility for claimant's low back condition. They have refused to accept liability for any surgical condition in claimant's low back.

ISSUES & STIPULATIONS

The issue presented for resolution is whether the claimant is entitled to an order for the treatment recommendations of Kurt Smith, D.O. These recommendations include: (1) a surgical consultation for claimant's low back, (2) and MRI myelogram, and (3) a pain management consultation. Alternatively, claimant seeks that surgery be authorized with Arnold Delbridge, M.D.

During the hearing, defendants agreed to provide the surgical consultation for claimant's low back which was scheduled for March 12, 2018. They also agreed to arrange a pain management consultation with Christian Ledet, M.D., assuming Dr. Ledet agrees to see claimant. This appointment had not been arranged.

FINDINGS OF FACT

The claimant sustained an injury to her low back on June 19, 2017, while working for the employer in this case. The defendants accepted the claim and directed her medical care to some degree. On January 22, 2018, claimant filed her first Petition for Alternate Medical Care, which alleged the following:

> Claimant sought the care of an orthpaedic surgeon, Dr. Arnold Delbridge. Dr. Delbridge ordered an MRI, which Claimant received. After review of the MRI, Dr. Delbridge recommended a mini-lateral multilevel fusion and a posterial laminectomy. (Ex. 1-Dr. Delbridge chart note & letter, 12-4-2017, 21-21-2017) Claimant requested Defendants provide approval for Dr. Delbridge to perform surgery. (Ex. 2-Letter to defendants, 12-7-2017) In response to said request, Claimant received notice of an appointment with a pain management physician. (Ex. 3-Letter from defendants, 12-11-2017) Claimant again requested defendants approve surgery. (Ex. 4-Letter to defendants, 12-14-17) No response has been received by Claimant as to her request for approval of the surgery recommended by Dr. Delbridge.

(Alt Care Petition, January 22, 2018, para. 5)

In response, defendants, through counsel, filed "Defendants' Response to Claimant's Application For Alternate Medical Care," wherein they stated the following:

> Defendants have accepted a claim for a low back injury occurring on June 19, 2017 and, since the date of injury and through the present time, have provided medical care for said alleged injury. However, defendants dispute liability on claimant's claim that the surgery apparently being recommended by Dr. Delbridge is causally related to the alleged 6/19/17 work injury. Therefore, paragraph 7 of claimant's petition is denied.

(Defendant's Response, January 31, 2018, para. 1)

On the same day, January 31, 2018, the agency entered an Order entitled "Alternate Medical Care Dismissal." Therein, the deputy commissioner stated, "the claimant's petition seeking medical treatment must be dismissed because the defendants are denying liability for the conditions she seeks to have treated." (Alt. Medical Care Dismissal, January 31, 2018, p. 2)

In the meantime, on January 26, 2018, defendants authorized an evaluation with Kurt Smith, D.O., a pain management specialist at Iowa Orthopedics. Dr. Smith performed a thorough second opinion evaluation, including the review of substantial medical records, history and examination of Ms. McClish. (Cl. Ex. 1) His report is thorough. After his full work-up, he described claimant's current status as follows.

> A 52-year-old female presents with a described work injury of 06/19/2017, when she was forced against a wall/hand rail by a food cart. This likely resulted in a contusion to the lumbar region. MRI of the lumbar region (08/2017 and 11/21/2017) demonstrated multilevel degenerative changes. It is my opinion that the degenerative changes were present prior to the injury date of 06/19/2017. With the extent of degenerative changes in the lumbar region, there is the possibility of exacerbation, but would not expect the diffuse and extensive symptoms described. Examination demonstrates findings consistent with symptoms magnification. Her treatment has included: Medications (cyclobenzaprine, naproxen and oxycodone), physical therapy, work modifications, left sacroiliac joint injection and left piriformis injection. I do not demonstrate evidence of left piriformis syndrome.
>
> Recommendations
> 1. Surgical consultation with MRI myelogram.
> 2. Interventional pain management consultation: I do question if she will benefit from injections secondary to the diffuse nature of her symptoms.
> 3. If nothing to offer from a surgical standpoint or interventional pain management, then would place her at maximum medical improvement.
> 4. Work restrictions: Sedentary activity, sit/stand/walk as needed. Lifting 20 pounds.

(Cl. Ex. A, p. 5)

A few days after this second opinion, defense counsel wrote to claimant's counsel. (Cl. Ex. 2) Therein, defendants assured claimant they were arranging a surgical consultation with Lynn Nelson, M.D., and a pain management consultation with Christian Ledet, M.D. (Cl. Ex. 2) They further assured claimant they were "in the process of scheduling the MRI myelogram recommended by Dr. Smith." (Cl. Ex. 2)

On February 26, 2018, claimant filed this Petition for Alternate Medical Care, alleging the following. "To date, the appointments have[1] been scheduled as recommended by Dr. Smith. Claimant requests the appointments as recommended by Dr. Smith be scheduled or that care be transferred to Dr. Delbridge for a surgical consult." (Alternate Care Petition, February 26, 2018, para. 5)

On the date of the scheduled hearing, March 9, 2018, defendants filed "Defendants' Response to Claimant's Application for Alternate Medical Care", stating that defendants had scheduled the surgical consultation with Dr. Harbach for March 12, 2018.[2]

The telephone hearing was commenced in this matter on March 9, 2018, at a little after one o'clock. After an opening statement outlining the background, the undersigned asked defense counsel whether the defendants had accepted liability for the condition for which the claimant is seeking treatment in this claim. Defense counsel ultimately stated that the defendants' previous denial of liability in the earlier alternate care matter, was still in effect. There was a great deal of discussion of this on the record regarding this point. Claimant's counsel disputed this characterization and suggested defendants were really attempting to deny the modes of treatment, rather than any specific condition. Ultimately, however, my interpretation of defendants' position is that they concede claimant did have some type of a low-back injury which requires ongoing medical treatment. They have, however, refused to either admit or deny that claimant's condition for which she is seeking treatment, is work-related. In particular, they have been entirely unwilling to admit that claimant has any condition which would require surgery.

Finally, defense counsel made a professional statement that he had spoken with Dr. Smith, who indicated that the MRI myelogram could be provided after the surgical consultation subject to the impressions of the evaluating surgeon. Claimant's counsel stated that claimant was injured nine months ago and her condition has not improved at all. She presented her condition as dire and in need of immediate relief and attention.

REASONING AND CONCLUSIONS OF LAW

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.

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[1] This appears to be a typographical error. Based upon my understanding of this file, I believe the word "not" was intended to be included in this sentence.

[2] It was cleared up at hearing that this was a typographical error. The filing actually states the appointment was scheduled for March 9, 2018, during the time of hearing. It should have read March 12, 2018.

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.
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> . . . .
>
> 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).

In this case, when the employer was asked whether the defendants were denying the condition for which claimant was seeking treatment, the defendants provided a lengthy explanation on the record, which concluded that their initial denial of liability remained in effect, however, the defendants did not deny "that Dr. Smith recommended a surgical consultation and a pain management consultation and that's what we're willing to provide." (Hearing) When further pressed, the defendants went on to state that "one of the things the claimant is asking for is to be sent back to Dr. Delbridge for surgery and that's what we denied in the first place . . ." (Hearing)

For her part, the claimant alleges that she has low back symptoms since her work injury. She contends different physicians have provided different diagnoses. Dr. Delbridge (whose records are not in the record) apparently diagnosed a surgical condition. She contended the defendants are not really denying liability at all, rather, they are attempting to have the best of both worlds – admitting the low back injury in order to control the medical care while denying specific modes of treatment.

The defendants seem to be under a misimpression that they can deny liability for specific modes of treatment. This is not accurate. When pressed further, however, the defendants denied that the condition or conditions that Dr. Delbridge seeks to treat the claimant for is causally connected to the work injury. The defendants seem to take the position that claimant has only suffered a strain of some sort, or some non-surgical condition. The defendants' position, however, is complicated by the fact that their own evaluating physician, Dr. Smith, recommended a surgical consultation, and defendants

are apparently willing to provide this consultation. It seems unlikely to me that there is any surgery for a back strain. It may be that the defendants are continuing to investigate medical causation in this matter, although they did not contend this on the record.

In an alternate care proceeding, however, this agency does not determine whether the defendants have a good reason for denying a claim or whether the denial is made in good faith. An alternate medical care proceeding is an expedited proceeding with limited evidence. It is not the proper forum to determine medical causation. The agency is simply charged with determining whether the defendants have denied the condition for which claimant is seeking treatment. Anything other than an admission that the condition is causally connected to the work injury is deemed a denial. As a result, during the hearing, I determined that the defendants have denied that the claimant has a surgical condition in her low back at this time.

The portion of claimant's petition seeking surgical treatment must be dismissed because the defendants refuse to accept liability for any surgical condition for which claimant seeks treatment. The defendants thereby lose their right to control the medical care claimant seeks in this proceeding and the claimant is free to choose that care on his own. Bell Bros., Heating v. Gwinn, 779 N.W.2d 193 (Iowa 2010). I find that the defendants' refusal to accept the possibility that claimant's low back disability includes any diagnosis which may be surgical causes them to lose the authority to direct the medical care. The defendants hereby lose their authorization defense on any treatment the claimant receives from this point forward.

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. 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 January 31, 1994).

The defendants' evaluating physician, Dr. Smith, recommended three forms of treatment. These recommendations include: (1) a surgical consultation for claimant's low back, (2) and MRI myelogram, and (3) a pain management consultation. The defendants have consented to provide a surgical consultation with a physician, which is arranged for March 12, 2018, as well as a pain management consultation, which has not yet been arranged. The only remaining issue is whether claimant is entitled to the MRI myelogram.

Defense counsel provided a professional statement that Dr. Smith agreed that the MRI myelogram could wait until the evaluating surgeon examined claimant and determined the necessity of it. This makes some logical sense if the purpose is to determine medical causation. In other words, if the evaluating surgeon indicates that claimant's diagnosis is not causally-connected to her work injury, it may be unnecessary for the defendants to provide such a test. In such a case, the claim will likely be denied and claimant will have to seek treatment at her own expense.

Dr. Smith, however, recommended that claimant needed this test for treatment purposes. The defendants did not deny that claimant's condition which causes the need for this test is related to her work injury. As such, based upon the evidence before me, I conclude she will need this test regardless of the outcome of any causation opinion from the evaluating surgeon. As such, I order defendants to provide the MRI myelogram.

The claimant's symptoms have been frustrating her for more than nine months now. While she did not testify at hearing, her attorney made statements suggesting that her symptoms are ongoing and severe. If the treatment providers selected by the defendants cannot provide a definitive diagnosis of the claimant's condition soon following this order, defendants should lose the right to direct her medical care in order to give her an opportunity to find a physician who can.

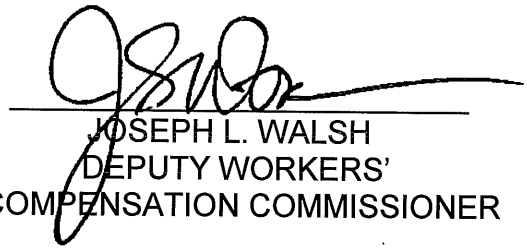
ORDER

THEREFORE IT IS ORDERED:

The claimant's petition for alternate medical care is GRANTED. The defendants shall expeditiously provide all of the treatment recommended by Dr. Smith.

Defendants hereby lose any authorization defense for any treatment claimant receives for her low back condition.

Signed and filed this 12th day of March, 2018.



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