BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ZACH A. WRIGHT,

Claimant,

vs.

ISU VETERINARY SPECIALTIES,

Employer,

and

SELECTIVE INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5059898

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, Zach A. Wright.

The alternate medical care claim came on for hearing on March 16, 2018. 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-E. Claimant alleges a date of injury of December 18, 2015. During the course of hearing, defendants admitted the occurrence of a work injury on December 18, 2015, and liability for the conditions sought to be treated by this proceeding. Counsel offered oral arguments to support their positions; no witnesses testified. Defendants also filed a pre-hearing brief.

ISSUE

The issue presented for resolution is whether the claimant is entitled to alternate medical care.

FINDINGS OF FACT

Claimant, Zach Wright, sustained an injury arising out of and in the course of his employment with ISU Veterinary Specialties on December 18, 2015. On February 9, 2018, the authorized treating physician, Matthew C. Biggerstaff, D.O. recommended a surgical evaluation. Dr. Biggerstaff's assessment on that date included lumbosacral spondylosis without myelopathy, herniated lumbar disc without myelopathy, and degeneration of lumbar or lumbosacral intervertebral disc. (Exhibit 1, page 5)

Defendants received Dr. Biggerstaff's notes on Friday, February 16, 2018. (Ex. 1) By Wednesday, February 21, 2018, defendants had scheduled a surgical consult for Mr. Wright with David J. Boarini, M.D., a neurosurgeon. The first available appointment is April 11, 2018. (Ex. 2, pp. 1-2; Ex. A, p. 1) As part of the appointment Dr. Boarini has been asked to provide his opinion regarding further treatment or testing as a result of the work injury. (Ex. B, p. 5) On February 21, 2018, claimant was advised of the appointment. (Ex. D, p. 8)

On March 5, 2018, defense counsel had a phone conversation with a staff member at claimant's counsel's office. Defense counsel was advised that Dr. Boarini no longer performed surgeries. Thus, claimant was dissatisfied with the care being offered. On March 6, 2018, at 9:39 a.m. claimant sent written notice of dissatisfaction of care to defendants. The notice states that claimant is dissatisfied with "the unreasonable delay in scheduling a surgical consultation that has been ordered by the ATP Dr. Biggerstaff." (Cl. Ex. 3, p. 3) Claimant contends that, assuming Dr. Boarini no longer performs surgeries, that this appointment does not amount to a surgical consult. I do not find this argument to be persuasive. Even if Dr. Boarini no longer performs surgeries, he is still a neurosurgeon qualified to offer an opinion regarding surgical treatment.

The petition for alternate care was filed approximately four hours after the emailed dissatisfaction of care was sent. Claimant's counsel represented to the undersigned that the petition was inadvertently filed that quickly. However, the undersigned notes that the alternate care petition could have been dismissed. I find that the short timeframe between even the verbal notice of dissatisfaction of care and the filing of the alternate care petition is insufficient. The notice of dissatisfaction was not a good faith notice. The spirit of the law is that claimant should provide notice of dissatisfaction of care so that the parties may then try to resolve the matter without the necessity of utilizing agency resources or judicial resources on appeal. Therefore, I conclude that claimant failed to communicate the basis of such dissatisfaction to the employer prior to filing the petition for alternate medical care, as required by Iowa Code section 85.27(4).

I further find that even if claimant had provided sufficient notice of dissatisfaction of care, claimant still would not prevail on his petition for alternate medical care. After a

staff member at claimant's counsel's office advised defense counsel that Dr. Boarini no longer performed surgeries, defendants confirmed with Dr. Boarini's office that he does still perform surgeries. Both parties claim their source of their information is Dr. Boarini's office. Based on the evidence, it frankly is not clear if Dr. Boarini still performs surgery or not. However, this information is not critical to the question at hand today. The authorized provider recommended a surgical consult. Dr. Boarini is a neurosurgeon. Defendants have scheduled an appointment for the claimant to see Dr. Boarini. Defendants have asked Dr. Boarini to provide his opinion with regard to further treatment or testing as a result of the work injury. Defendants have also offered to allow claimant to see Dr. Nelson or Dr. Hatfield, both surgeons at DMOS. Dr. Boarini has the first available appointment. Claimant has contacted Iowa Ortho and has been told that Dr. Harbach would have an appointment available within one to two weeks. Claimant would prefer the earlier appointment with Dr. Harbach. There is no evidence in the record to show that there is an urgent need for the surgical consult. Defendants have contacted three surgeons and have authorized and scheduled the first available appointment. I find that the care offered by defendants is reasonable.

REASONING AND 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.

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).

Based on the above findings of fact, I conclude that claimant failed to give good faith notice of his dissatisfaction of care.

Based on the above findings of fact, I conclude that even if claimant had provided the required notice of dissatisfaction, claimant's petition for alternate medical care would still be denied. Defendants have scheduled a surgical consult with a qualified neurosurgeon, as recommended by the authorized treating physician. Defendants checked with three different surgeons and authorized the first available appointment with Dr. Boarini. I conclude the care offered by defendants is reasonable. Therefore, I conclude that claimant has failed to carry his burden of proof to show that the care offered by defendants is not reasonable. Thus, claimant's petition for medical care is denied.

ORDER

THEREFORE IT IS ORDERED:

Claimant's petition for alternate medical care is denied.

Signed and filed this 19th day of March, 2018.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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