BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
MAR 08 2019
WORKERS' COMPENSATION

GERALD LEACH,	
Claimant,	
vs.	File No. 5066102
REYES HOLDINGS L.L.C. d/b/a REINHART FOODSERVICE,	ALTERNATE MEDICAL CARE DECISION
Employer,	
and	
INDEMNITY INSURANCE COMPANY OF N.A.,	
Insurance Carrier, Defendants.	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, Gerald Leach. Claimant appeared personally and through attorney, Dennis Currell. Defendants appeared through their attorney, Courtney Ruwe.

The alternate medical care claim came on for hearing on March 6, 2019. 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 7 and defendants' exhibits A through E, which were offered and received without objection, in addition to the claimant's testimony. The defendants do not dispute liability for claimant's work injury nor that the care requested for his back is related to that injury. Both parties submitted briefs.

ISSUE

The issue presented for resolution is whether the defendants have provided reasonable medical care.

FINDINGS OF FACT

The claimant, Gerald Leach, sustained an injury to his low back In August, 2018, which arose out of and in the course of his employment. Mr. Leach is a 49-year-old man who worked for Reinhart Foodservice delivering groceries.

Claimant filed a petition for alternate medical care on December 12, 2018 asserting defendants had abandoned care. A decision was issued by this agency on December 21, 2018 denying claimant's petition for alternate care. That case is currently on appeal to the Iowa District Court. (Exhibit E)

Claimant's counsel sent a letter to defendants' attorney on Sunday, February 17, 2019 expressing dissatisfaction with the care the defendants were providing. (Ex. 7) On February 18, 2019 claimant and claimant's attorney signed the petition for alternate care. (Ex. D, p. 1) The answer filed by the claimant had a fax date and time stamp indicating claimant faxed the petition for alternate medical care to defendants on February 18, 2019 at 1:10 p.m. (Administrative record) On February 19, 2019 claimant's attorney completed a proof of service regarding service on the defendants for the petition for alternate medical care.

The defendants filed an answer to the alternate care petition on February 19, 2019. (Administrative record) The petition for alternate medical care was received and file stamped by this agency on February 21, 2019. (Administrative record)

Claimant testified that he was receiving treatment from Shirley J. Pospisil, M.D. for his knee injury. Dr. Pospisil referred clamant to see Darin Smith, M.D. for his low back symptoms. Claimant had an appointment and was seen by Dr. Smith on January 8, 2019. Dr. Smith was not authorized by defendants to provide treatment.

Claimant testified that Dr. Smith provided a thorough examination. Claimant said Dr. Smith recommended an epidural steroid injection (ESI). Claimant said Dr. Smith told him that if he did not improve after a week after the injection he would perform surgery.

Defendants arranged an appointment with Chad Abernathey, M.D. before claimant's appointment with Dr. Smith.

Claimant was seen by Dr. Abernathey on January 23, 2019. Dr. Abernathey wrote,

> Gerald Leach presents with chronic subjective lumbosacral strain following a work-related incident. I do not recommend an aggressive neurosurgical stance due to a paucity of clinical or radiographic findings. His neural elements are well decompressed on his images and his neurologic function remains intact. I discussed the risks, goals, and alternatives of various diagnostic and treatment options. We mutually felt that he may benefit from an epidural steroid injection and we will attempt

> [sic] make those arrangements for him. I will be available for further consultation if so desired in the future.

(Ex. A, p. 2) Dr. Abernathey's diagnosis was subjective low back pain. The patient's medical management was accepted; however, he did not believe that claimant requires additional medical management other than the ESI. (Ex. 6, pp. 1, 2) The claimant testified that Dr. Abernathey said he was willing to perform the ESI but Dr. Abernathey did not think it would help.

On January 30, 2019 claimant was informed the ESI was authorized and to contact Dr. Abernathey's office for an appointment. On February 1, 2019 claimant contacted Dr. Abernathey's office and said that he would get back with available dates. (Ex. A, p. 3) Claimant did not contact Dr. Abernathey's office regarding available dates.

On February 11, 2019 claimant's counsel wrote defendants' counsel. In this letter claimant's attorney stated, "I've been asked to request that you please furnish us with the identity of Dr. Abernathey's malpractice carrier." (Ex. B, p. 2) On February 12, 2019 Dr. Abernathey wrote to defendants' attorney,

> 1. Dennis Currell, JD has requested from you, a copy of my malpractice carrier insurance coverage. Since I am not a retained expert in your case and I am not Mr. Leach's treating physician, this information does not fall within the scope of your firm's relationship to me. Therefore, I will not be providing that information to you.
>
> 2. Additionally, I would consider this request to be a thinly veiled threat of a malpractice lawsuit. I have never seen this type of request regarding an independent medical evaluation. I am concerned that this activity may constitute witness tampering or witness intimidation. Therefore, I decline any further involvement in this case, and I will defer to the patient's primary physicians regarding any additional medical opinions or management.

(Ex. C, p. 1; Ex. 5, p. 1)

Defendants' counsel stated during the hearing that the defendants have authorized Dr. Smith to perform the ESI and have informed claimant's counsel.

REASONING AND CONCLUSIONS OF LAW

Iowa Code section 85.27(4) provides.

> 4. 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. If the employer chooses the care, the employer shall hold the employee harmless for the cost of care until the employer notifies the employee

> that the employer is no longer authorizing all or any part of the care and the reason for the change in authorization. An employer is not liable for the cost of care that the employer arranges in response to a sudden emergency if the employee's condition, for which care was arranged, is not related to the employment. The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. <u>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</u>. In an emergency, the employee may choose the employee's care at the employer's expense, provided the employer or the employer's agent cannot be reached immediately. An application made under this subsection shall be considered an original proceeding for purposes of commencement and contested case proceedings under section 85.26. The hearing shall be conducted pursuant to chapter 17A. Before a hearing is scheduled, the parties may choose a telephone hearing or an in-person hearing. A request for an in-person hearing shall be approved unless the in-person hearing would be impractical because of the distance between the parties to the hearing. The workers' compensation commissioner shall issue a decision within ten working days of receipt of an application for alternate care made pursuant to a telephone hearing or within fourteen working days of receipt of an application for alternate care made pursuant to an in-person hearing. The employer shall notify an injured employee of the employee's ability to contest the employer's choice of care pursuant to this subsection. 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).

(Emphasis supplied)

By challenging the employer's choice of treatment – and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. <u>See</u> <u>Long v. Roberts Dairy Co.</u>, 528 N.W.2d 122 (Iowa 1995). Determining what care is reasonable under the statute is a question of fact. <u>Id</u>. The employer's obligation turns on the question of reasonable necessity, not desirability. <u>Id</u>.; <u>Harned v. Farmland Foods, Inc.</u>, 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 Dec. January 31, 1994). 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 Decision June 17, 1986).

The question is whether the claimant has proven he is entitled to alternate medical care and whether the defendants have failed to offer reasonable care.

In this case claimant sent a letter of dissatisfaction on Sunday February 17, 2019 and sent the defendants a petition for alternate care at 1:10 p.m. the next day, Monday February 18, 2019.

There is no explicit waiting time requirement for a claimant expressing dissatisfaction before filing a petition for alternate care. However, Iowa Code 85.27(4) implies that there is at least some opportunity to allow the defendants to respond. ["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." 85.27(4)]. Claimant did not allow defendants to respond and the claimant's petition for alternate care is denied for this ground.

Additionally, claimant's petition is denied as defendants have authorized Dr. Smith to provide an ESI. The defendants stated at the hearing that they will authorize Dr. Smith to provide ESI. The defendants are bound by that promise. Defendants are providing reasonable medical care.

The current delay in receiving the ESI is the result of claimant's attorney requesting malpractice insurance information from Dr. Abernathey. This request is highly suspect in light of the fact that any claim for "malpractice" is subsumed by the workers' compensation case. Such actions will make it more difficult for defendants to find medical providers in the future and could lead to delays that are a result of claimant's actions.

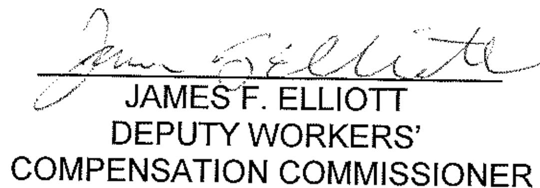
By way of dicta, I do note that defendants appear to only authorize treatment of short duration or one-time visits. Assuming arguendo claimant may not need aggressive medical intervention, claimant should be provided to reasonable medical palliative care for his work-related back symptoms.

ORDER

THEREFORE, IT IS ORDERED:

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

Signed and filed this 8th day of March, 2019.



JAMES F. ELLIOTT
DEPUTY WORKERS' COMPENSATION COMMISSIONER

Copies to:

Dennis Currell
Attorney at Law
PO Box 1427
Cedar Rapids, IA 52406-1427
Currell.law@gmail.com

Patrick J. Sodoro
Attorney at Law
7000 Spring St., Ste. 200
Omaha, NE 68106
patrick@patricksodorolaw.com

Courtney R. Ruwe
Attorney at Law
702 North 129th St.
Omaha, NE 68154
cruwe@patricksodorolaw.com

JFE/sam