BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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| JAY WITTE,<br><br>Claimant,<br><br>vs.<br><br>DEWEY FORD,<br><br>Employer,<br><br>and<br><br>ZURICH AMERICAN INSURANCE CO.,<br><br>Insurance Carrier,<br>Defendants. | File No. 1649581.03<br><br>ALTERNATE MEDICAL<br><br>CARE DECISION<br><br>HEAD NOTE NO: 2701 |

## STATEMENT OF THE CASE

On March 3, 2021, claimant filed an original notice and petition for alternate medical care under Iowa Code section 85.27, invoking the provisions of rule 876 IAC 4.48. This is claimant's second petition for alternate medical care. Defendants filed an answer accepting that claimant sustained a left injury on or about May 29, 2018, which arose out of and in the course of his employment.

This alternate medical care claim came on for hearing on March 16, 2021, at 10:30 a.m. The proceedings were recorded digitally. The recording constitutes the official record of the proceeding.

The record consists of Claimant's Exhibit 1, which includes a total of 4 pages. Defendants offered Exhibit A, which includes a total of 6 pages. Mr. Witte was the only witness to provide testimony. Counsel for both parties provided arguments. The record closed at the end of the alternate medical care telephonic hearing.

## ISSUE

The issue presented for resolution is whether claimant is entitled to alternate medical care. Claimant requests the opportunity to control care.

## FINDINGS OF FACT

The undersigned, having considered all of the testimony and evidence in the record, finds as follows:

Mr. Witte sustained a work-related injury to his left knee on May 29, 2018. Joseph Brunkhorst, D.O. served as claimant's authorized treating surgeon between the date of injury and the spring of 2019. (Claimant's Testimony) Dr. Brunkhorst performed two surgeries on claimant's left knee; one in 2018 and one in 2019. (Claimant's Testimony) He subsequently placed claimant at maximum medical improvement (MMI) and released claimant from care. (Claimant's Testimony)

Claimant moved to Florida in April, 2019. (Claimant's Testimony)

Claimant requested additional medical treatment in May of 2020. (Claimant's Testimony) Claimant's adjustor, Keith Brown, began working with the workers' compensation coordinator at Orthopedic Specialists of SW Florida to schedule claimant for an initial evaluation with Fletcher Reynolds, M.D., on or about June 11, 2020. (See Exhibit A, page 6) It appears as though Mr. Brown sent claimant's medical records, as well as signed fee agreement, to Dr. Reynolds' office on June 11, 2020. (See Ex. A, p. 6)

Dr. Reynolds' office did not act promptly when scheduling claimant for an initial evaluation. So much so, that in a July 9, 2020, electronic correspondence, Mr. Brown asked claimant if he would like Mr. Brown to try to find an alternative provider as Dr. Reynolds' office was, "moving extremely slow" in scheduling claimant's appointment. (Ex. 1, p. 4) Additional evidence reveals Mr. Brown was in the process of selecting an alternate medical facility in late August, 2018. (See Ex. 1, p. 3) Unfortunately, Mr. Brown passed away between August 28, 2020, and October 8, 2020, prior to securing an appointment for claimant. (See Defendants' Statement; see also Ex. 1, pp. 2, 3)

Claimant's file was subsequently transferred to Robert "Bob" McDade; effectively returning his requests for medical treatment back to square one. (See Ex. A, p. 5) Mr. McDade notified claimant on October 8, 2020, that claimant's request for additional medical treatment was being denied on account of the fact claimant's file was "closed" when Dr. Brunkhorst placed claimant at MMI. (Ex. 1, p. 2) The evidentiary record suggests a lull in communication occurred between October, 2020, and February, 2021. (See Ex. 1, pp. 1-2; Ex. A, p. 6)

The next communication with Dr. Reynolds' office occurred on February 12, 2021. The communication confirms claimant's medical records were initially sent over to Dr. Reynolds' office on June 11, 2020. (Ex. A, p. 6) The communication ends with a request to schedule claimant for an appointment. Id.

Between February 12, 2021, and March 3, 2021, defendants made a concerted effort to schedule claimant for an appointment; unfortunately, delays occurred. (Ex. A) Defendants had to sign off on a new fee agreement, and Dr. Reynolds' office was unable to locate claimant's medical records from June, 2020. (Ex. A, pp. 4-5) Dr. Reynolds' office relayed that they would not schedule claimant for an appointment until they had received and reviewed claimant's medical records. (Ex. A, p. 2) Defendants promptly sent claimant's medical records later that afternoon. (See Ex. A, p. 1)

As of the date of hearing, Dr. Reynolds' office had still not scheduled claimant for

an appointment. (Claimant's Testimony)

It is worth noting this is claimant's second petition for alternate medical care. The first petition was filed on January 22, 2021, and sought similar relief. Claimant's petition was subsequently dismissed on February 3, 2021, when defendants agreed to provide additional medical care for claimant's ongoing complaints. Based on defendants' Exhibit A, it appears as though defendants promptly contacted Dr. Reynolds' office in an attempt to secure an initial evaluation. (Ex. A, pp. 5-6)

## 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 Rule of Appellate Procedure 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 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 1975). While the defendant does have the right to choose care, they must do so in a timely and prompt fashion less they be deemed to have abandoned the care.

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).

Claimant contends that since moving to Florida in spring 2019, defendants have not provided prompt care reasonably suited to treat his injury. The record indicates claimant's care was satisfactory until moving to Florida. Defendants assert the disruption in claimant's care is largely due to claimant's decision to move out of state and the passing of the claims adjustor previously assigned to claimant's file.

Between May, 2020, and August 28, 2020, defendants were actively involved in scheduling claimant for medical treatment. However, between August 28, 2020, and February 12, 2021, there was little to no movement on claimant's file. In fact, claimant's request was expressly denied in an October 8, 2020, correspondence.

To defendants' credit, claimant's former claims adjustor, Mr. Brown, made several attempts to find claimant a physician in the state of Florida, and, since February 12, 2021, defendants have made numerous attempts to secure treatment for claimant. However, it cannot be said that defendants' actions between approximately September, 2020, and February, 2021, were reasonable.

The undersigned is cognizant of the fact that delays can, and often do, occur when an injured worker's file is transferred from one adjustor to the next. The undersigned is also cognizant of the unfortunate circumstances necessitating the transfer of claimant's file. That being said, the delay in care does not appear to be the result of said unfortunate circumstances. Mr. McDade was in possession of claimant's file and knew Mr. Brown had been attempting to schedule claimant for additional medical treatment on or before October 8, 2020. The delay in care stems from defendants' decision to deny claimant's request for ongoing medical treatment following the transfer of claimant's file from Mr. Brown to Mr. McDade. Defendants offer no explanation for their change in position, or why there was no movement on the file between October 8, 2020, and February 12, 2021.

As mentioned above, this is claimant's second petition for alternate medical care. The first petition was dismissed after defendants agreed to provide additional medical treatment for claimant's ongoing complaints in February, 2021. The evidentiary record reveals defendants made their first of many attempts to secure an appointment for claimant with Dr. Reynolds' just days after the first petition was dismissed.

There are arguably two periods of delay being addressed in this petition for alternate medical care. The first period of delay occurred between May, 2020, when claimant requested additional care, and October 8, 2020, when defendants ultimately denied claimant's request for additional care. The second period of delay arguably began on February 3, 2021, and remains in effect at this time.

Mr. Witte, through his actions and his testimony, has presented himself as a reasonable and patient individual. I empathize with his situation. He has not received any treatment since his initial request in May of 2020. Such a delay is clearly unreasonable. Fortunately, the record indicates claimant's wait may finally be coming to an end in the near future. For this reason, I am hesitant to grant claimant's petition at this time. Doing so at this juncture would likely only delay claimant's care further.

This is a close call. On one hand, it is clear there was an unreasonable delay in securing additional treatment for claimant's condition prior to the first petition for alternate medical care. On the other hand, defendants have put forth a good faith effort to provide claimant with additional medical treatment since agreeing to do the same on or about February 3, 2021. As a result of this agreement, claimant dismissed his first

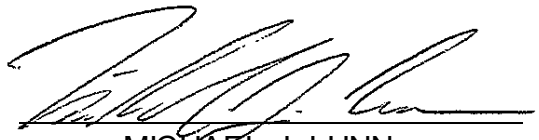
petition for alternate medical care. Ultimately, I have a difficult time stripping defendants of the ability to direct care when they have made every attempt to follow through on their February 3, 2021, agreement to provide additional medical care. For these reasons, I find claimant failed to carry his burden of proving defendants have abandoned care. That being said, I strongly encourage defendants to secure an appointment with Dr. Reynolds within 14 days from the date of this decision. I will not hesitate to strip defendants of their ability to control care should the delay in claimant's medical care continue.

ORDER

Claimant's petition for alternate medical care is denied at this time.

Claimant may re-file a petition for alternate medical care if defendants are unable to secure an appointment with Dr. Reynolds within 14 days from the date of this decision.

Signed and filed this 17th day of March, 2021.



MICHAEL J. LUNN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

MaKayla J. Augustine (via WCES)

Edward J. Rose (via WCES)