

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

PAMELA RICHARDSON,

Claimant,

vs.

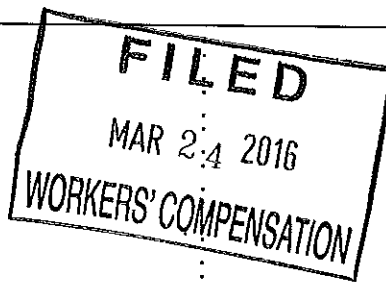
HCR MANORCARE,

Employer,

and

INS. CO STATE OF PENNSYLVANIA,

Insurance Carrier,
Defendants.



File No. 5046023

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, Pamela Richardson. Claimant appeared through her attorney, Mr. Anthony Olson. Defendants appeared through their attorney Ms. Jean Dickson.

The alternate medical care claim came on for hearing on March 24, 2016. The proceedings were digitally recorded. That recording constitutes the official record of this proceeding. Pursuant to the Commissioner's February 16, 2015 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 claimant offered exhibits 1 and 2, which were admitted without objection. Defendant offered exhibit A, which was also admitted without objection. No witnesses testified at the hearing. Both counsel provided argument.

ISSUE

The issue presented for resolution is whether regenerative injection therapies in the form of adult mesenchymal stem cell therapy concerning claimant's accepted left hip injury should be ordered under Iowa Code section 85.27.

FINDINGS OF FACT

On December 17, 2015, Sunny Kim, M.D. drafted a letter/report to Claimant's attorney concerning an independent medical exam performed by him. (Exhibit 1, page 1). Therein, Dr. Kim describes the history of treatment that claimant has undergone concerning the hip injury, which included conservative modalities, which did not resolve the symptoms. Claimant underwent surgery with Dr. Peterson at Core Orthopedics and although she "initially did well," the "symptoms returned and she underwent a second surgery by Dr. Peterson." (*Id.*) Following the second surgery, claimant's symptoms returned and her condition is "now complicated by, symptoms of hip instability, weakness and pain . . ." (*Id.*) Dr. Kim then goes on to recommend the "adult mesenchymal stem cell therapy to help facilitate healing of her injured hip joint as a result of work injury and surgeries for work injury." (Ex. 1, p. 2)

This recommendation of Dr. Kim was made known to Karyn M. Shanks, M.D., an authorized treating physician. Dr. Shanks stated in an email dated February 8, 2016, that:

After 2 failed surgeries this seems like the prudent next course of action. Would like to avoid hip replacement at this time. The regenerative nature of stem cell therapy may allow that hip to heal, along with ongoing rehab. There's quite a bit of experience with stem cell therapy for hip degeneration and structural problems and it's being used with success at many major academic centers and private rehab/orthopedic centers around this country.

(Ex. 2)

In response to the above two opinions, defendants offered the opinion of the authorized orthopedic surgeon, Erik D. Peterson, M.D., who performed the two surgeries described by Dr. Kim and Dr. Shanks above. Dr. Peterson authored a letter dated March 4, 2016, in which he stated: "I decline to comment on mesenchymal stem cell therapy to the hip, as I have no experience with this. Although it may show promise, as it is not currently FDA approved for this indication I would deem it more experimental. Although it may help, I think it is indeterminate in my mind." (Ex. A)

The undersigned finds that Dr. Shanks, is an authorized treating physician and has recommended the stem cell therapy along with the IME physician, Dr. Kim. The undersigned finds that Dr. Peterson does not take a position on recommending or not recommending the treatment and states that while it is not currently FDA approved, it may be helpful to the claimant.

The undersigned finds that defendants' failure to authorize the adult mesenchymal stem cell therapy is unreasonable.

REASONING AND CONCLUSIONS OF LAW

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 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).

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.

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" 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.

Claimant argued that physical therapy and other conservative modalities along with two separate failed surgeries have not adequately addressed claimant's symptoms and that the proposed stem cell therapy would be appropriate based on the opinions of Dr. Kim and Dr. Shanks. Defendants argue that claimant remains under the care of Dr. Shanks for day to day matters and Dr. Peterson the orthopedic surgeon and that this alone is reasonable. The undersigned found above that Dr. Shanks is an authorized physician and recommends the stem cell treatment. The undersigned also found above that Dr. Peterson, who notes the lack of FDA approval, recognizes the potential benefit to claimant, but does not take a final position on whether the treatment should be recommended, stating "I have no experience with this." (Ex. A) Therefore, Dr. Peterson does not take a contrary position to Dr. Kim and Dr. Shanks, but rather merely declines to comment.

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).

Neither case law, nor statute demands that all care attainable through alternate medical care under Iowa Code 85.27 be FDA approved. The question is whether the care, or lack of care being provided by the defendants, is reasonable. In this case, there is a history of failed conservative treatment, and two failed surgeries, which leads both Dr. Kim and Dr. Shanks to recommend the stem cell treatment. Dr. Shanks stated that this treatment "seems like the prudent next course of action." (Ex. 2) Dr. Peterson declines to comment concerning a recommendation. Further, the undersigned concludes that the evidence shows that the care provided by defendants has not been effective and that the current care being offered is less extensive than the care being requested by the claimant. The undersigned also concludes that the recommendation of the authorized treating physician, Dr. Shanks, concerning the stem cell therapy has not been approved by defendants without a contrary medical opinion.

The undersigned concludes that defendants' failure to authorize the adult mesenchymal stem cell therapy to help facilitate healing of claimant's injured hip joint is unreasonable.

The defendant is ordered to provide the adult mesenchymal stem cell therapy to the claimant. Defendant shall arrange for an appointment for claimant with an appropriate provider for the ordered treatment within ten (10) business days of this order, or as soon thereafter as the doctor's schedule may allow, and shall promptly notify claimant of the date, time and location of the appointment.

Defendant still has the right to choose the provider.

ORDER

IT IS THEREFORE ORDERED that claimant's petition for alternate medical care is granted.

Signed and filed this 24th day of March, 2016.



TOBY J. GORDON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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