BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

VIRGINIA HERNANDEZ,

Claimant,

vs.

DMF GARDENS, INC.,

Employer,

and

DONEGAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 19700050.01

ALTERNATE MEDICAL

CARE DECISION

HEAD NOTE NO: 2701

This case 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. The undersigned has been delegated final agency action in this decision. Iowa Code section 17A.15(1); Order of Delegation, February 15, 2015. Any appeal of the decision will be to the Iowa District Court.

Claimant appeared with her attorney, Marlon Mormann. Defendants appeared through their attorney, Jason Kidd. A Spanish interpreter was used for claimant. The interpreter was duly sworn.

The alternate medical care claim came on for hearing on July 31, 2019 at 10:30 a.m. The proceedings were digitally recorded. The recording constitutes the official record of this proceeding.

At the commencement of the proceedings, claimant offered Exhibits 1, 2 and 3. Defendants offered Exhibits A through D. All proffered exhibits were admitted as evidence in the hearing.

Claimant testified on her own behalf. Mr. Mormann made an opening statement. Defendants filed a pre-hearing brief. Both attorneys provided closing statements.

Claimant sustained an injury to her back on November 26, 2018. The injury is admitted. During cross-examination, it was learned, claimant underwent the following treatment modalities:

CONCENTRA

6 doctor visits

9 physical therapy visits

IOWA ORTHO

12 examinations with a pain management specialist

5 injections

ATHLETICO

15 physical therapy visits

13 work hardening sessions

x-rays of her back

MRI of her back

MERCY ONE – EAST DES MOINES OCCUPATIONAL HEALTH

Robert Kruse, M.D.

6 medical visits

On July 10, 2019, John W. Rayburn, M.D., a physician at Iowa Ortho, opined, claimant had reached maximum medical improvement (MMI) from the standpoint of pain management. The only other option was a referral to a spine surgeon. (Ex. B, p. 2)

Dr. Kruse opined claimant had reached MMI and had a zero percent permanent partial impairment effective July 12, 2019. (Defendants' Exhibit A, p. 5)

Claimant requested additional medical care but she was told she had to seek a second opinion on her own. (Claimant's Ex. 1) Twice she was denied additional medical care. (Cl. Ex. 2) The claims adjuster, Nicole Jarvis, explained to claimant's counsel on July 19, 2019 why the company was denying additional medical treatment. (Cl. Ex. 3)))

However, on July 30, 2019, defense counsel notified claimant's counsel, defendants had scheduled an appointment for claimant with Trevor R. Schmitz, M.D. at Iowa Ortho on August 21, 2019 at 1:00 p.m. Dr. Schmitz is a board certified orthopedic surgeon specializing in the treatment of neck and spine disorders. This referral to Dr. Schmitz is in keeping with the recommendation of Dr. Rayburn.

Claimant testified she does not trust Dr. Schmitz because the insurance company selected him. She would prefer to treat at her personal clinic, Primary Health Care, Inc. There, she treats with Tonya Diehn, PA-C. Claimant testified she can get into the clinic on very short notice. There is also an interpreter on staff. Claimant seeks the right to self-direct her own care.

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 1975).

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).

The employee bears the burden to establish what care is reasonable and it is a question of fact. Long v. Roberts Dairy Co., 528 N.W.2d 122, 123 (Iowa 1995). The determination will be based on what is reasonably necessary. Long, at 124.

An employer's right to select the provider of medical treatment to an injured worker does not include the right to determine how an injured worker should be diagnosed, evaluated, treated, or other matters of professional medical 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).

Defendants have provided reasonable medical treatment for claimant since the onset of her work injury on November 26, 2018. Now defendants have agreed to follow the recommendation of Dr. Rayburn. A referral to a board certified orthopedic surgeon, Dr. Schmitz has been made. The appointment has been scheduled. While claimant wants to be treated by her own personal physician's assistant, a board certified orthopedic surgeon who specializes in the spine is more eminently qualified to treat claimant's condition.

ORDER

THEREFORE, IT IS ORDERED:

Claimant's application for alternate medical care is denied.

IT IS FURTHER ORDERED:

If the attorneys have not already done so, counsel are ordered to register within seven (7) days of this order in the Workers' Compensation e-Filing System (WCES) and as a participant in this case to receive future filings from this agency.

Signed and filed this 31st day of July, 2019.

MICHELLE A. MCGOVERN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Marlon Dale Mormann
Attorney at Law
3320 Kinsey Ave.
Des Moines, IA 50317
aljmormann@gmail.com

Jason A. Kidd
Attorney at Law
1700 Farnam St., Ste. 1350
Omaha, NE 68102
jkidd@ekoklaw.com

MAM/sam