BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

HENRY VALAGUEZ,

Claimant,

vs.

WAL-MART STORES, INC.,

Employer,

and

NEW HAMPSHIRE INS. CO.,

Insurance Carrier,
Defendants.

FILED

MAY 19 2015

WORKERS COMPENSATION

File No. 5049766

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, Henry Valaguez.

The alternate medical care claim came on for hearing on May 19, 2015. 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.

It should be noted that the petition seeks treatment for both the left knee and the low back. In their written answer and at the beginning of the alternate care hearing defendants disputed liability for the low back condition. Therefore, the alternate care petition was dismissed with regard to the low back. Defendants admitted claimant sustained an injury to his left knee on April 30, 2013; the portion of the alternate care petition dealing with the left knee proceeded to hearing.

The record consists of claimant's exhibits 1-4; defendants' exhibits A-E. Defendants also filed an alternate care brief.

ISSUE

The issue presented for resolution is whether the claimant is entitled to alternate medical care consisting of prompt and reasonable care for his left knee.

FINDINGS OF FACT

Mr. Valaguez is an employee of Wal-Mart. It is undisputed that he sustained a compensable injury to his left knee on April 30, 2013. Mr. Valaguez underwent left knee surgery performed by Atiba Jackson, M.D., on September 5, 2013. Subsequently he underwent physical therapy from September 12, 2013 to January 3, 2014; approximately 16 weeks of therapy. (Exhibits A & B)

Defendants requested Dr. Foad perform a records review; he has never seen or examined Mr. Valaguez. On December 18, 2013, Dr. Foad issued a written report. He noted claimant had undergone more physical therapy than most patients who undergo the same procedure. He went on to state that claimant's current condition was related to his pre-existing problems and not the work injury. (Ex. C) Dr. Jackson recommended additional physical therapy. However, this apparently was not authorized by the defendants.

On December 27, 2013, it was Dr. Jackson's opinion that claimant reached maximum medical improvement (MMI) on March 4, 2014, and did not require any additional treatment. (Ex. D) At his attorney's request claimant saw Richard Kreiter, M.D. for an independent medical evaluation (IME) on January 7, 2015. Dr. Kreiter recommended "proper exercises, anti-inflammatory medications, and mild analgesics." (Ex. 2, p. 3) However, it is not entirely clear from the report if this treatment is for the left knee, back, or both. The report also states: "[p]roper quad exercises for the left knee, and perhaps a Palumbo patellar brace might help improve the condition." (Ex. 2, p. 3) On April 20, 2015, Dr. Jackson indicated that it was still his opinion that claimant had reached MMI and did not require any additional medical treatment for his left knee related to the April 20, 2013, work injury. (Ex. E) However, I note that Dr. Jackson rendered this opinion without seeing claimant for over one year.

On February 2, 2015 and April 13, 2015, claimant's counsel sent letters to defense counsel seeking authorization for the specific recommendations for treatment as set forth by Dr. Kreiter.

Claimant has not been seen by the authorized treating surgeon for over one year. The last time he was seen for his left knee was for the IME by Dr. Kreiter. Dr. Jackson and Dr. Foad have opined that no additional treatment is necessary for the left knee as a result of the work injury. However, Dr. Kreiter has not seen or spoken with the claimant since he has returned to work and experienced an increase in knee symptoms. Dr. Foad has never seen or examined the claimant. Dr. Kreiter saw the

claimant for the purpose of an Iowa Code section 85.39 examination. The purpose of these examinations is for the evaluation of permanent disability, not for treatment recommendations. Furthermore, the recommendations of Dr. Kreiter are vague. I find claimant has failed to show the specific treatment recommended by Dr. Kreiter is reasonable and necessary. However, it has been more than one year since claimant has received any treatment. During that time he has returned to work for the defendant employer and has experienced an increase in symptoms. There is no evidence of an intervening injury. I find claimant has shown that it is reasonable and necessary for him to be seen by an occupational medicine physician or an orthopedic surgeon to see if any additional treatment for his left knee is necessary as a result of the work injury.

REASONING AND CONCLUSIONS OF LAW

First, we address the issue of the back condition. Before any benefits can be ordered, including medical benefits, compensability of the claim must be established, either by admission of liability or by adjudication. The summary provisions of Iowa Code section 85.27 as more particularly described in rule 876 IAC 4.48 are not designed to adjudicate disputed compensability of claim. Therefore, this action must be dismissed. However, defendants are barred from asserting a "lack of authorization" defense to any medical expenses accrued by claimant, if they are otherwise compensable. Defendants cannot deny liability and simultaneously direct the course of treatment. Barnhart v. MAQ Incorporated, I Iowa Industrial Comm'r Report 16 (App. March 9, 1981).

As a result of their denial of liability for the condition sought to be treated in this proceeding the alternate care petition was dismissed with regard to the back claim. Claimant may obtain reasonable medical care from any provider for this condition but at claimant's expense and, seek reimbursement for such care using regular claim proceedings before this agency. Haack v. Von Hoffman Graphics, File No. 1268172 (App. July 31, 2002); Kindhart v. Fort Des Moines Hotel, I Industrial Comm'r Decisions No. 3, 611 (App. March 27, 1985).

In the present case, defendants dispute liability for the back claim. Therefore, as a result of their denial of liability claimant may obtain reasonable medical care from any provider for this condition but at claimant's expense and, seek reimbursement for such care using regular claim proceedings before this agency.

We next turn to the issue of treatment for the left knee. 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).

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).

In the present case, I found that the recommendations of Dr. Kreiter were vague and therefore, claimant has not shown his recommendations to be reasonable and necessary. However, I found claimant did show that an evaluation and potentially additional treatment with an occupational medicine physician or another orthopedic surgeon is reasonable and necessary. During the hearing it became apparent that the parties do not feel Dr. Jackson will see the claimant again. Therefore, it is reasonable for claimant to be seen by someone other than Dr. Jackson.

ORDER

THEREFORE IT IS ORDERED:

IT IS THEREFORE ORDERED that with regard to claimant's back this cause should be and is hereby dismissed without prejudice.

IT IS FURTHER ORDERED that with regard to the back if claimant seeks to recover the charges incurred in obtaining care for a condition for which defendants denied liability, defendants are barred from asserting lack of authorization as a defense to those charges.

IT IS FURTHER ORDERED that claimant's petition for alternate care concerning the left knee is denied with regard to the specific recommendations made by Dr. Kreiter, but granted in that defendants shall promptly authorize an appointment for claimant to be seen by an occupational medicine physician or orthopedic surgeon other than Dr. Jackson.

Signed and filed this 19th day of May, 2015.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Andrew W. Bribriesco
Attorney at Law
2407 – 18th St., Ste. 200
Bettendorf, IA 52722
awbribriesco@netexpress.net

Kent M. Smith
Attorney at Law
1225 Jordan Creek Pkwy., Ste. 108
West Des Moines, IA 50266-0036
ksmith@scheldruplaw.com

EQP/srs