BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

HUSEIN HABIBOVIC,

Claimant,

vs.

CTB, INC., d/b/a
LEMAR INDUSTRIES,

Employer,

and

LIBERTY MUTUAL,

Insurance Carrier,
Defendants.

File No. 5061006

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, Husein Habibovic. Claimant appeared personally and through his attorney, Ms. Jean Mauss. Defendants appeared through their attorney, Ms. Anita Dhar.

The alternate medical care claim came on for hearing on June 7, 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 hearing was conducted with an agreed upon interpreter, Ms. Pavlina Proevska. The record consists of claimant's exhibits 1-5 and defendants' exhibits A & B. All exhibits were received without objection. Claimant was the only witness. Counsel provided concise and helpful arguments.

ISSUE

The issue presented for resolution is whether the care being offered by defendants is reasonably suited to treat the injury under Iowa Code section 85.27, and is being offered promptly and without undue inconvenience to the employee.

FINDINGS OF FACT

The undersigned having considered all the evidence in the record finds:

Claimant Husein Habibovic testified that he is 61 years old and began his employment with CTB, d/b/a Lemar Industries, on or about July 17, 2005.

Claimant stated that he worked for the defendant employer as a welder and on or about December 3, 2014, he sustained an injury to his lower back. Claimant testified that his current pain level is 5-6, but he is not presently working and his pain increases considerably with activity.

After the work injury, claimant testified that he received medical treatment including physical therapy. He stated that physical therapy helped for a time, but that his pain got worse as time went on. Claimant testified that he was eventually referred to Dana L. Simon, M.D., of Pain Specialists of Iowa, whose primary specialty is anesthesiology and pain management. (Ex. 1; Ex. 5) Claimant stated that he first saw Dr. Simon on or about May 15, 2015. Claimant testified that he saw Dr. Simon about six times and last saw her on February 22, 2016. (Ex. 1) At that time, Dr. Simon made a referral to an orthopedic surgeon for an evaluation regarding spine pain and new findings on an MRI. (Ex. 1, p. 1) Dr. Simon's medical report included a reference to a follow-up appointment in two months. (Ex. 1, p. 1)

Claimant was sent to Todd Harbach, M.D. an orthopedic surgeon. (Ex. 3, p. 2) Claimant testified that he saw Dr. Harbach on April 7, 2016. Dr. Harbach did not recommend surgical intervention, but suggested a conservative treatment protocol consisting primarily of home exercises. (Ex. 3, p. 2) However, claimant testified that Dr. Harbach also prescribed him hydrocodone at the time of the evaluation. Claimant did not see Dr. Harbach again. Claimant testified that he went to the scheduled follow-up appointment with Dr. Simon on April 22, 2016, and was told that the appointment had been cancelled at the instruction of the insurance carrier.

On May 4, 2016, defendants advised claimant that "additional treatment with Dr. Simon is not authorized since Dr. Harbach placed him at MMI and did not recommend further treatment with Dr. Simon." (Ex. 2, p. 1-2) The medical record of Dr. Harbach concerning the April 7, 2016 evaluation is not in evidence. The only document in evidence prepared by Dr. Harbach is a letter to defense counsel dated May 9, 2016, in which he states: "you asked whether or not I would recommend referral to [a] pain management physician for further treatment. My answer to that is, no, I do not think that he will need that at this time, although in the future it may become a possibility."

(Ex. 3, p. 2) There is no follow up opinion from Dr. Simon or from any other medical provider addressing whether or not current pain management is appropriate or recommended.

On May 18, 2016, about six weeks after claimant was seen by Dr. Harbach, defense counsel wrote an email to claimant's counsel confirming claimant's complaints of pain and advising that an additional medical evaluation would be considered. (Ex. 2, p. 2) Defendants apparently offered multiple appointment dates to claimant with Daniel Miller, D.O., an occupational medicine physician. On June 1, 2016, defendant advised that because claimant had not selected one of the available appointment dates with Dr. Miller, the defendant scheduled claimant for the first available date of June 8, 2016. (Ex. A, p. 1; Ex. 4) Claimant testified that he has never seen Dr. Miller before. He also testified that he has a good relationship with Dr. Simon. Defense counsel confirmed that Dr. Miller is unable to provide certain treatments that Dr. Simon has provided in the past, such as "ESI, nerve block, ablations, etc." (Ex. A, p. 1) However, there is no evidence in the record that such treatments are currently recommended by any physician. Defendants "confirmed that his [Dr. Miller's] plan is to evaluate claimant and then determine what treatment is necessary and to refer claimant on if needed." (Ex. A, p. 1)

Claimant would like to be seen by Dr. Simon, and has requested the same.

I find that the most recent medical opinion is that of Dr. Harbach, in which he concludes that pain management is not needed at this time. There is no opinion in the record from Dr. Simon in response to Dr. Harbach's conclusion. Neither is there any particular or specific treatment that is currently recommended that defendants are refusing or failing to provide such as injection, pain medication, etc. I further find that defendants have currently offered treatment with Dr. Miller, for evaluation, treatment and referral, if needed.

I find that the care currently offered by defendants authorizing treatment with Dr. Miller is reasonable.

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 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).

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); Bell Bros. Heating v. Gwinn, 779 N.W.2d 193, 209 (Iowa 2010); 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. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). 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).

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).

"Determining what care is reasonable under the statute is a question of fact." Long v. Roberts Dairy Co., 528 N.W.2d 122, 123 (Iowa 1995).

Defendants have admitted liability for the injury and offered reasonable medical care in the form of evaluation and treatment with Dr. Miller, with the understanding that Dr. Miller will make appropriate referrals for treatment that he is not equipped to provide. I conclude that there is not a good reason at this time to remove defendants' ability to select the authorized treating physicians. Therefore, although claimant has requested authorization of Dr. Simon, I conclude that claimant has failed to carry his burden of proof and the application should be denied.

Claimant has directed the undersigned to the commissioner appeal decision of Tucker v. Sonoco Products Co., File No. 5005847 (Appeal September 13, 2004). Claimant argues that this case provides that when authorized care is established it should not be disestablished. However, the claimant's reliance on this case is misplaced in this circumstance. The Tucker appeal decision involves a case in which the claimant asserted a work injury and defendants denied medical care for nearly four years. Then, a month prior to hearing, authorized medical care, which was not particularly successful. In that case, the claimant was allowed to continue with the care he had established on his own after causation was determined, rather than be compelled to attend unsuccessful medical care with the employer selected provider. This is distinguishable from the present case on many fronts. Significantly, the claimant in the present case, Mr. Habibovic, has not yet attended the appointment with Dr. Miller and any treatment that may be provided by Dr. Miller, is not, at this stage, less successful or inferior to care desired by claimant, or that which may be provide by Dr. Simon. Further, it is unkown from the evidence presented what, if any, particular care Dr. Simon may recommend. Also, the appeal decision in Tucker states that, "[t]his ruling is not based on defendants having acted improperly or unreasonably. It is simply based on the fact that they were given an opportunity to provide care and declined to do so." (See Tucker) In the present case, the defendants have not declined to provide care.

Defendants advised that the appointment with Dr. Miller was scheduled for June 8, 2016. Because this appointment is the day after the alternate care hearing and may not be workable by the parties due to time constraints related to the receipt of this ruling, if the appointment does not occur on June 8, 2016, the defendants are strongly encouraged to reschedule the appointment for the next available date and time and provide prompt notice to claimant.

ORDER

THEREFORE IT IS ORDERED:

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

Signed and filed this 8th day of June, 2016.

TOBY J. GORDON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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