BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RONALD BURBACH,

Claimant,

vs.

AREA RESIDENTIAL CARE, INC.,

Employer,

and

ARGENT/WEST BEND INSURANCE,

Insurance Carrier,
Defendants.

File No. 5054222

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, Ronald Burbach. Claimant appeared through her attorney, Barbara Diment. Defendants appeared through their attorney Jordan Kaplan, with testimony provided by Mr. Rob McGaver on behalf of the defendant.

The alternate medical care claim came on for hearing on February 8, 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 exhibit 1, which included a total of 12 pages. Defendant objected to pages 11 and 12, citing the ten page limit set forth in 876 IAC 4.48(9), claimant agreed to the exclusion of pages 11 and 12. Defendant further objected to page 10, claimant's affidavit, citing due process. The objection was overruled and exhibit 1, page 10 was admitted. The remainder of exhibit 1, consisting of pages 1-9, were admitted without objection. The record also contains defendants' exhibits A through F, which contains 10 pages. Defendants' exhibits were admitted without objection. Claimant did not participate personally. Mr. Rob McGaver, an adjuster for the defendant insurance carrier, was called by defendant and provided sworn testimony. Counsel also provided argument.

ISSUES

The issues presented for resolution are as follows:

1) Whether defendants should be ordered to provide follow-up care following a lumbar CT scan, which was performed on February 4, 2016.

2) Whether defendants should be ordered to identify a primary care physician or other doctor for medication prescriptions and management.

3) Whether defendants should be ordered to provide physical therapy for claimants back and right leg condition.

4) Whether defendants should be ordered to pre-pay mileage for authorized medical appointments.

FINDINGS OF FACT

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

Ronald Burback, claimant, sustained a left shoulder injury on or about November 12, 2012 as a result of his work activities. Mayo Clinic is an authorized provider for claimant's left shoulder claim. (Exhibit A, page 1)

On or about December 3, 2015, claimant underwent surgery at Mayo Clinic for the left shoulder with Mark Morrey, M.D. Following surgery, claimant developed symptoms in his right lower extremity. On January 4, 2016, claimant reported to G.D. Potter, M.D., at the Mayo department of Orthopedic Surgery, that he was having lower extremity, radicular-type pain. Dr. Potter notes that claimant "does not have any established care regarding his lumbar radicular pain. . . ." (Ex. 1, p. 2)

Claimant was then seen on January 13, 2016, by Dr. Morrey who referred claimant for his spine condition to Shawn Oxentenko, M.D. (Ex. 1, p. 6) Claimant was seen by Dr. Oxentenko on the same day, January 13th. (Ex. 1, p. 3-4) At that time, Dr. Oxentenko requested a lumbar CT scan. (Ex. 1, pp. 1-2, 4) The date of the medical record in which the recommendation for the lumbar CT scan appears is January 13, 2016. (Ex. 1, p. 3) The same record shows an electronic signature date by the physician of January 19, 2016. (Ex. 1, p. 4)

Mr. Rob McGaver, testifying on behalf of the defendant stated that the insurance carrier received the request for authorization from Mayo for the CT scan on February 1, 2016 (Ex. E, p. 1) and that the same was approved within a few hours of receipt. The CT scan was originally scheduled for February 2, 2016, in Galena, Illinois, and subsequently rescheduled for February 4, 2016, at Unity Point in Dubuque, a location closer to claimant's home. Mr. McGaver further testified that he was not aware of any outstanding request for follow-up care concerning the CT scan.

The same medical record from Dr. Oxentenko that recommended the lumbar CT scan, also stated that the claimant was to "obtain his pain medications through his primary care physician." (Ex. 1, p. 4) Therefore, the undersigned finds that claimant has a need for prescriptions and management concerning pain medication. However, claimant apparently does not have a current primary care physician and defendant has not authorized any particular physician for this purpose. As a result, claimant has felt it necessary to present himself at a local emergency room to address the ongoing pain. (Ex. 1, p. 8) Mr. McGaver testified that he has not followed up with Dr. Oxentenko's office concerning the identification of a physician for purposes of prescribing and managing pain medication. However, neither has Mr. McGaver received from Mayo clinic a referral to a particular primary care physician to take on this role.

It appears as part of claimant's recovery concerning the shoulder surgery that claimant was to undergo physical therapy. Dr. Morrey, on January 13, 2016, states "we reviewed the stages of recovery, potential problems that can arise, and the physical therapy and activities that can be done after a total shoulder arthroplasty." (Ex. 1, p. 5) The physical therapy note in the record at Exhibit 1, page 7 indicates an "electronically signed" date of January 18, 2016. This record relates to treatment of the right lower extremity and is understood by the undersigned to be the same treatment discussed by Dr. Potter at Defendant's Exhibit E, page 2. In that document, Dr. Potter states:

> Mr. Burbach is status post left shoulder open rotator cuff repair with augmentation on December 3, 2015. He was scheduled to start physical therapy on January 18 for his left shoulder. At that time, he was seen by PM&R PT and per patient report and documentation in the computer, had no rehab on his left shoulder. All of his rehab was focused on his right leg for his lumbar radiculopathy. We will discuss with the physical therapy team that the patient is actually scheduled and ordered for physical therapy, Morrey protocol for rotator cuff repair to improve range of motion and slowly increase strength.

(Ex. E, p. 2)

The claimant has not provided evidence of a physician's recommendation for physical therapy concerning the back or right leg. It appears from the evidence available to the undersigned, that the physical therapy described in Exhibit 1, page 7, is more likely the result of claimant's complaint of pain and miscommunication, rather than a particular physician order for therapy for the right lower extremity.

In regards to pre-payment of mileage for authorized medical care, claimant asserts that his current financial condition makes it difficult, if not impossible for him to attend appointments without prepayment of transportation. Deputy Fitch just recently issued a ruling on January 26, 2016, on a motion for payment of 85.27 mileage and reasonable transportation and accommodations in advance. The undersigned takes administrative notice of the agency file, including claimant's motion for advance payment of mileage and reasonable accommodations, filed January 14, 2016,

Defendants resistance thereto and Deputy Fitch's ruling denying the motion. Deputy Fitch denied the motion citing her conclusion that it appeared that the mileage and travel expenses claimed to be due by claimant, were in fact, paid by defendant. Upon further inspection by the undersigned, it appears that the payments were made by the defendant even before claimant's motion was filed. Defendants argue that Deputy Fitch's ruling denying prepayment is now controlling and has become the law of this case, citing res judicata.

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).

In Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433, 437 (Iowa 1997), the supreme court held that "when evidence is presented to the commissioner that the employer-authorized medical care has not been effective and that such care is 'inferior or less extensive' than other available care requested by the employee, . . . the commissioner is justified by section 85.27 to order the alternate care."

1) Whether defendant should be ordered to provide follow-up care following a lumbar CT scan that was performed on February 4, 2016.

I have found above that Mr. McGaver, testified that the insurance carrier received the request for authorization from Mayo for the CT on February 1, 2016 and that the request was then approved within a few hours. The CT scan was scheduled for the following day on February 2, 2016 and was then rescheduled to February 4, 2016, at a different location, for claimant's convenience. There is no evidence of any specific follow-up treatment having been recommended as a result of the CT Scan.

Dr. Oxentenko from the Mayo Clinic, concerning the lumbar CT scan, under "Plan" states: "Lumbar CT scan. Will contact him [claimant] once that is completed." (Ex. 1, p. 4) The undersigned is unable to find that any particular or specific care has been recommended that defendants have failed to authorize.

It stands to reason that some follow-up appointment, consultative discussion, or communication of some kind would logically follow a CT scan for the purpose of informing the patient of the results and discussing treatment recommendations, if any. However, in this case, the CT scan just occurred on Thursday, February 4, 2016, and the hearing on this matter took place on the morning of Monday, February 8, 2016, just two business days after the scan had been completed. It appears from Dr. Oxentenko's office note described above that the Mayo clinic intends to "contact him [claimant]" when the scan is completed. (Id.) A delay of two business days by the medical provider, does not constitute defendants' failing to provide reasonable care. The undersigned finds that the care provided concerning the CT scan is reasonable and the Application for Alternate Medical Care, as it relates to this issue is denied.

2) Whether defendant should be ordered to identify a primary care physician or other doctor for medication prescriptions and management.

I have found above that claimant has a need for prescriptions and management concerning pain medications according to Dr. Oxentenko of the Mayo Clinic. (Ex.1, p. 4) Defendants did not oppose this fact at hearing. Rather they argued that defendants' have not stood in the way of claimant obtaining care from his primary care physician for this purpose. However, claimant does not have a primary care physician. When asked by claimant's counsel "to whom should the claimant go for pain medication", Mr. McGaver responded, that Dr. Morrey and Dr. Oxentenko of Mayo Clinic are authorized providers. However, neither of those doctors appear to be willing to prescribe and manage pain medication. A referral has been made to a primary care physician for this purpose.

When applying the law as stated in Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433, 437 (Iowa 1997), the undersigned finds that the lack of care concerning the provision of pain medication as recommended by the authorized provider is unreasonable. The defendant is ordered to provide care consistent with the referral and recommendation of Dr. Oxentenko for pain medication prescription and management through another physician (Ex. 1, p. 4), by authorizing an appropriate physician within a reasonable travel distance of claimant's home.

3) Whether defendant should be ordered to provide physical therapy for claimants back and right leg condition.

The undersigned found above that the claimant has not provided evidence of a physician's recommendation for physical therapy concerning the back or right leg. Claimant carries the burden to show that the care being provided by the defendant is unreasonable. Bell Bros. Heating v. Gwinn, 779 N.W.2d 193, 209 (Iowa 2010). Claimant has failed to carry his burden on this issue that the care being provided concerning physical therapy for the back and leg is not reasonable as there does not appear to be any physician order or recommendation for such treatment at this time. Claimant's application concerning this issue is denied.

4) Whether defendants should be ordered to pre-pay mileage for authorized medical appointments.

Deputy Fitch recently decided the issue of prepayment of mileage and reasonable transportation expenses based upon the argument from claimant that "prepayment is necessary due to his financial condition and defendants' past failure to pay incurred transportation expenses." (Ruling on Motion for Payment, p. 1, (January 26, 2016).

Claimant in this matter expressed concerns about failure to pay past mileage expenses and there was testimony and argument that claimant had previously signed an authorization for electronic fund transfers directly to his account to receive payments, but had then closed the account. Mr. McGaver testified that he had only recently become aware of the account closure recently and it had appeared that the fund transfers were being honored. He also testified that the file now includes instructions to issue only hard checks, and no longer attempt electronic fund transfers. Claimant argued that he is in a financially difficult position and has substantial difficulty getting to appointments without the benefit of prepayment of travel expenses.

The doctrine of res judicata includes both claim and issue preclusion. Selchert v. State, 420 N.W.2d 816, 818 (Iowa 1988). Under the doctrine of issue preclusion parties may not continue to relitigate issues previously decided in litigation. Colvin v. Story County Bd. Of Review, 653 N.W.2d 345, 348 (Iowa 2002). Under a four-part test, issue preclusion will apply if:

> (1) the issue determined in the prior action is identical to the present issue; (2) the issue was raised and litigated in the prior action; (3) The issue was material and relevant to the disposition in the prior action; and (4) the determination made of the issue in the prior action was necessary and essential to that resulting judgment.

United Fire & Cas. Co. v. Shelly Funeral Home, Inc., 642 N.W.2d 648, 655 (Iowa 2002).

The undersigned finds that Deputy Fitch's prior order, addressed a similar issue of prepayment of mileage with similar arguments from claimant. However, the prior motion and ruling related to different factual underpinnings. Under issue preclusion, once a court has decided an issue of fact or law necessary to its judgment, the same issue cannot be relitigated in later proceedings. Hunter v. City of Des Moines, 300 N.W.2d 121, 123 (Iowa 1981). Deputy Fitch's ruling dealt with similar arguments, but different facts and therefore, the factual findings and the prior ruling are not binding on a ruling in this matter based, which although contains similar arguments, is based upon different specific facts. The undersigned rejects the argument that res judicata applies. To conclude otherwise would foreclose claimant's opportunity to seek prepayment of 85.27 mileage and travel expenses regardless of future events that may require such an order to preserve the integrity of claimant's treatment.

At this time, the claimant has not shown that any particular appointment or treatment has been delayed or rescheduled due to a lack of funds, although he indicates in an affidavit that it is difficult. (Ex. 1, p. 10) The undersigned is concerned that the parties' lack of effective communication promotes a problem that may not otherwise exist. For example, claimant had signed a consent for electronic deposits, then some time later closed the account and apparently did not notify defendants of its closure. The record contains accusations of prior unpaid mileage without specific data. The undersigned strongly recommends that the parties utilize an agreed upon form for the regular submission of mileage reimbursement to assist with communication, the log can then be reasonably relied upon by the parties and fact finders alike to determine such information as when mileage was incurred, when the reimbursement was requested and when the mileage payment was issued and received, along with the outstanding balance, if any. Based on the facts presented to the agency at this time, the issue of prepayment of mileage is denied.

ORDER

THEREFORE IT IS ORDERED:

The claimant's petition for alternate medical care is granted in part and denied in part.

Within fourteen (14) days of the entry of this decision, defendants shall identify an appropriate physician to provide care consistent with the referral and recommendation of Dr. Oxentenko for pain medication prescription and management. Said physician shall be within a reasonable travel distance of claimant's home and defendants shall schedule an appointment for the claimant at the first available date and time and immediately alert claimant's counsel of the name of the physician and the date, time and location of the appointment.

The remainder of claimant's application for alternate medical care is denied.

Signed and filed this 10th day of February, 2016.

TOBY J. GORDON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Barbara J. Diment
Attorney at Law
475 S 50TH St., Ste. 600
West Des Moines, IA 50265
dimentbj@aol.com

Jordan A. Kaplan
Attorney at Law
111 E. Third St., Ste. 600
Davenport, IA 52801
jak@bettylawfirm.com

TJG/kjw