BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DEBRA SLADEK,	FILED	
Claimant,	APR 21 2017	File No. 5000113
vs.	WORKERS COMPENSATION	ALTERNATE MEDICAL
K-MART CORPORATION,		CARE DECISION
Employer, Self-Insured, Defendant.		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, Debra Sladek.

The alternate medical care claim came on for hearing on April 20, 2017. The proceedings were digitally recorded, which constitutes the official record of this proceeding. This ruling is designated final agency action and any appeal of the decision would be to the Iowa district court pursuant to Iowa Code 17A.

The record consists of Claimant's Exhibits 1 and 2 and Defendant's Exhibits 1 – 4 (relabeled A – D). The claimant testified. Terri Brizzolara from Sedgwick Claims Management was part of the conference call but did not testify.

ISSUE

The issue presented for resolution is whether the claimant is entitled to alternate medical care consisting of payment and installation of a home whirlpool.

FINDINGS OF FACT

The undersigned having, considered all of the testimony and evidence in the record, finds:

Defendant admitted liability for an injury occurring on August 20, 1982 and that claimant's request for the whirlpool is related to her work injury and it has denied the request.

Claimant was injured at work in August of 1982. Claimant testified that the last time she was able to drive a car was the day of her work injury in August 1982. Claimant said that the last chiropractic treatment she had, her mother drove her.

Richard Neiman, M.D., is the authorized physician for claimant. He has been treating claimant for 34 years. Claimant sees Dr. Neiman every three months for treatment. Dr. Neiman prescribes claimant's medications including narcotics. On March 16, 2017, Dr. Neiman re-issued a prescription that ordered a new whirlpool for claimant's back condition. He noted the claimant's current whirlpool was over 15 years old. (Exhibit 1, page 1) On March 17, 2017, Dr. Neiman wrote a letter to claimant's attorney. Dr. Neiman stated "I have re-prescribed the whirlpool, which is a reasonable and necessary treatment for Debra Sladek related to the injury occurred on August 20, 1982." (Ex. 2, p. 1) Additionally, Dr. Neiman expressed his own personal experience with back surgery supported his opinion that a whirlpool makes a major difference for back discomfort. (Ex. 2, p. 2) Dr. Neiman opined that the whirlpool was a reasonable and necessary treatment for claimant as it reduced claimant's discomfort.

The defendant has decided not to authorize the whirlpool and sent a letter to Dr. Neiman on March 16, 2017. (Ex. A, pp. 1, 2) Defendant relied, in part, upon the opinion of a reviewing physician , Jeffery Schiffman, M.D. Dr. Schiffman did not examine claimant. He reviewed an office visit note by Dr. Neiman of December 1, 2016 and a prescription written by Dr. Neiman written on March 7, 2017. (Presumably this was for the whirlpool) (Ex. A, p. 3) Dr. Schiffman concluded the whirlpool was not medically necessary. Dr. Schiffman wrote,

> **REVIEW QUESTIONS (S):**
>
> **1. Is Whirlpool Tub medically necessary?**
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> No, a Whirlpool Tub is not medically necessary.
>
> A whirlpool tub is not medically necessary. The guideline criteria have not been met. There is no documentation of a need for special equipment such as a whirlpool for this claimant to successfully undergo a home exercise program. There is no documented evidence of why the patient cannot participate in a home exercise program without the whirlpool or what specific objective findings support the need for a whirlpool in this individual with chronic pain not explained by objective findings. There is no documentation that this individual is homebound or any diagnosis given that would make this person homebound. Guideline criteria have not been met. Therefore, a whirlpool is not medically necessary.

(Ex. A. p. 3) Dr. Schiffman relied upon an ODG guideline. Iowa has not adopted the ODG guidelines.

In 2013, Joseph Chen, M.D., at the University of Iowa Hospital and Clinics (UIHC) examined claimant. He noted that surgical intervention would not likely be very successful in improving her back pain or function. He recommended claimant start working on her own pool-based exercise program she can tolerate. He also recommended claimant stop taking opiate medications for her condition and that she talk to Dr. Neiman about this issue. (Ex. C, p. 4)

Defendant obtained one estimate for the purchase of a whirlpool for the claimant. The cost, including installation and removal of the old whirlpool was $11,785.28. (Ex. D, p. 1)

Claimant first started using a whirlpool for her back condition in 1984. Her father purchased this whirlpool for her. In 1986 it broke down and K-Mart purchased a whirlpool for her. This worked for about 16 years and then broke. Claimant testified that K-Mart paid for most of the cost of another whirlpool, with her father helping to pay a little of the cost. For the past 2 ½ years claimant's whirlpool has not been operating correctly. Claimant has attempted to have it repaired, but she said the repairs only last for a couple of days.

Claimant said that she used the whirlpool at least twice a day. It helps her back spasms and makes her more flexible. She also does exercises in the whirlpool. Claimant testified that she is able to take one less narcotic pill a day when she can use her whirlpool.

In response to whether claimant could use a bath tub, claimant said she could not lie down and do her exercises. A tub would not have the water jets which help her as well.

I find that the whirlpool has been prescribed by an authorized treating physician. I find that the whirlpool provides pain relief. The whirlpool allows claimant to take less medication. The whirlpool also provides palliative care. I also find that the defendant has not offered alternative care in place of the whirlpool.

REASONING AND CONCLUSIONS OF LAW

Iowa Code section 85.27(1) provided;

> The employer, for all injuries compensable under this chapter or chapter 85A, shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies therefor and shall allow reasonably necessary transportation expenses incurred for such services. The employer shall also furnish reasonable and necessary crutches, artificial members and appliances but shall not be required to furnish more than one set of permanent prosthetic devices.

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); 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.

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).

The last whirlpool wore out after approximately 15 years. Dr. Chen's 2013 report describes claimant as being extremely limited in her activities. She does not drive. The whirlpool provides pain relief and exercise.

Defendant suggested that a bath tub might be sufficient for the claimant. No physician has opined that a bath tub would work. Claimant credibly testified that such a device would not provide appropriate relief.

Dr. Chen's report states claimant was working on a pool-based exercise program. Claimant is doing water based exercises in her whirlpool. Additionally the heated water and jets of water provided by a whirlpool are somewhat different treatment than exercising in a pool. There is no indication in the record that defendant would provide transportation to aqua therapy that would be as effective as the whirlpool.

In one case Stephenson v. Furnas Electric Co., 522 N.W. 2d 828 (Iowa 1994) the Iowa Supreme Court upheld the decision of the commissioner not to award a hot tub.

I find the Stephenson case to be distinguishable. The Supreme Court upheld the decision of the commissioner based upon the evidence in that case under the standards of Iowa Code 17A. The Court held that there was substantial evidence to support the commissioner's decision. Id. p. 830. The court did not hold that a hot tub was not

allowed as a medical expense. In Stephenson the claimant's physician issued a prescription after claimant purchased a hot tub. The claimant was found to have bilateral carpel tunnel as her work injury. The court noted that claimant had purchased a hot tub and did not allow the insurance carrier to contest the claim beforehand. Stephenson, at 832.

In this case claimant, since 1982, has had three whirlpools. The first one she purchased. Two whirlpools were purchased by K-Mart. An arbitration decision was issued by this agency concerning these same two parties and payment of a hot tub. This arbitration decision found that the defendant was to pay the expense claimant incurred for a Crown Hot Tub in 2002. Sladek v. K-Mart, File No. 5000133 (Arb., October 7, 2002). The fact the employer has purchased two whirlpools is different than the facts in Stephenson.

Dr. Neiman has provided treatment to the claimant for 34 years and is in the best position to make a determination as to the whirlpool being reasonable medical care. Dr. Schiffman had extremely limited information about the claimant's condition. While defendant argued Dr. Neiman's opinion was his personal preference as to a whirlpool and should not be given any weight, I find that he gave both a medical opinion as the authorized physician and additionally his own personal experience. I find his medical opinion convincing.

I find that defendant is not providing reasonable care. Claimant's request for alternate medical care is granted. Defendant shall, within 60 days of this order, have a new whirlpool installed for the claimant.

ORDER

THEREFORE IT IS ORDERED:

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

Signed and filed this 21st day of April, 2017.

James F. Elliott

JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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