

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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CATHY L. DAMM,

Claimant,

vs.

DIERCKS SENIOR CARE, LLC,

Employer,

and

WESTERN NATIONAL INSURANCE,

Insurance Carrier,  
Defendants.

**FILED**

JUN 26 2019

WORKERS' COMPENSATION

File No. 5068600

ALTERNATE MEDICAL

CARE DECISION

HEAD NOTE NO: 2701

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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, Cathy Damm.

The alternate medical care claim came on for hearing on June 24, 2019. 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 – 3 and Defendants' Exhibits A – E. The claimant and Shelly Kalkman testified.

ISSUE

The issue presented for resolution is whether the claimant is entitled to alternate medical care consisting of back surgery recommended by authorized treating physician Russell Buchanan, M.D.

FINDINGS OF FACT

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

Defendants admitted liability for an injury occurring on October 3, 2018. Defendants agree that the recommended laminectomy is related to claimant's work injury. Defendants deny that the recommended fusion is related to claimant's work injury. Claimant has requested the defendants authorize Dr. Buchanan to perform a lumbar fusion and a laminectomy. The defendants have denied the request and claimant has expressed dissatisfaction to the defendants.

On October 3, 2018 claimant was assisting a patient when she was grabbed by the patient and felt pain in her back. Claimant was referred to Dr. Buchanan for treatment on October 29, 2018. Dr. Buchanan was authorized by the defendants to treat claimant.

Dr. Buchanan's diagnosis was,

Visit Diagnoses

Spondylolisthesis, grade 1 – Primary

Disc degeneration, lumbar

Relevant Medications

HYDROcodone-acetaminophen (NORCO) 5-325 MG per tablet

Disc degeneration, lumbosacral

Relevant Medications

HYDROcodone-acetaminophen (NORCO) 5-325 MG per tablet

Herniation of lumbar intervertebral disc

Foraminal stenosis of cervical region

Tobacco use

Osteoporosis

Weakness of foot

(Ex. 1, p. 1) Dr. Buchanan further wrote,

- Exam findings: Right dorsiflexion 3/5, left dorsiflexion 4+/5. Using a walker for stability. Osteoporosis
- The evidence from the previous mentioned findings leads to I believe Cathleen is a good candidate for a surgical intervention. Offered patient Lumbar laminectomy L4-5, L5-S1, screws L4-5.

Posterior/lateral fusion L4-5, L5-S1. Allograft. Allograft. Risks, alternative, benefits were discussed with patient to their satisfaction and they would like to proceed with surgery. We discussed the risks of tobacco use and Cathleen understands, and she stated that is using less then [sic] she was. We will keep her off work until after her surgery. She will return 3 weeks post op and we will discuss her return to work at that time. We anticipate MMI at 6 months-1 year.

(Ex. 1, p. 1) At the time of claimant's exam with Dr. Buchanan claimant was using a walker.

On October 30, 2018 the defendants wrote Dr. Buchanan two questions and Dr. Buchanan responded.

1. Is the need for the lumbar fusion directly related to the work injury or to a pre-existing condition?
2. Is the need for the laminectomy directly related to the work injury or to a pre-existing condition?

Pre-existing work injury but both conditions are linked in a way I cannot separate in a procedure.

(Ex. A, p. 1)

Claimant was sent for a second opinion concerning her condition to Cassim Igram, M.D. on November 28, 2018. Dr. Igram wrote,

Dr. Buchanan recommended a lumbar laminectomy [sic] at L4-5, L5-S1 and a PLIF at L4-5 and L5-S1. Per Dr. Buchanan, laminectomy was to treat the work injury, and the fusion was related to a pre-existing condition.

(Ex. B, p 1) Dr. Igram's assessment was, "Assessment is superior endplate fracture of L5. Herniated disc L4-L5 on the right." (Ex. B, p. 5) Dr. Igram noted claimant had pre-existing L5-S1 spondylolisthesis. He recommended waiting for the fracture to heal and that surgery should be the last resort. (Ex. B, p. 5)

Claimant received an evaluation from Kenneth McMains, M.D. On January 17, 2019 Dr. McMains found claimant at MMI for her endplate fracture and discharged her from care. He noted claimant does have a guarded prognosis due to her other multiple conditions which were pre-existing to her work injury. (Ex. D, p.2)

On March 29, 2019 Robin Sassman, M.D. issued an independent medical examination report. Dr. Sassman recommended that claimant be referred back to Dr. Buchanan to be reexamined for possible back surgery. (Ex. 2, p. 3)

On June 19, 2019 Dr. Igram wrote defendants. He noted that he saw claimant one time on November 28, 2018. Dr. Igram wrote that the MRI findings of the endplate fracture of the L5 and herniated disc at L4-L5 on the right side was related to the work injury of October 3, 2018. Dr. Igram did not recommend surgical intervention. (Ex. E, pp. 1, 2)

Shelly Kalkman has been a workers' compensation claimant's adjuster for nine years and worked in insurance for thirty-three years. She was assigned to the claimant's October 3, 2018 injury to adjust the claim. Ms. Kalkman authorized the referral to Dr. Buchanan.

When Dr. Buchanan recommended both a laminectomy and a fusion the defendants requested Dr. Buchanan provide information on the surgeries. Dr. Buchanan wrote that the need for the fusion was based on a condition that pre-existed claimant's October 3, 2018 injury. Dr. Buchanan wrote that the need for the laminectomy was related to the work injury. (Ex. A, p.1) Ms. Kalkman said that the defendants would authorize the laminectomy and denied the fusion.

Ms. Kaulkman testified that she was told by Dr. Buchanan both procedures needed to be done at the same time by Dr. Buchanan. Claimant was then sent to Dr. Igram for a second opinion.

Claimant is still in pain and is on medication. Claimant testified she is using a walker. Claimant has undergone physical therapy and conservative treatment and still has radiating pain into her right lower extremity.

#### REASONING AND CONCLUSIONS OF LAW

The issue that needs to be determined is whether or not the defendants are offering or providing reasonable 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 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. v.

Reynolds, 562 N.W.2d 433 (Iowa 1997), 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" 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 their own treating physician. Pote v. Mickow Corp., File No. 694639 Review-Reopening Decision June 17, 1986).

The conservative care recommended by Dr. Igram has not worked. Conservative care has not provided claimant relief from her radiating pain. She needs to use a walker to ambulate and is on pain medications.

In this case the authorized treating physician has recommended two surgical procedures. The record is undisputed that if surgery is to be performed both must be performed at the same time. Dr. Buchanan will not perform the laminectomy without also including the fusion surgery. Defendants have refused to authorize the fusion surgery and the result is the claimant has been de facto denied the laminectomy. Based upon the unique facts of this case the defendants are not providing reasonable medical care.

An employer is liable for treatment and for the associated healing period to treat a pre-existing non-work related condition necessary to treat a work related condition. Woods v. Siemens-Furnas Controls, File No. 1303082 (App. July 22, 2002). As Commissioner Trier held in Woods,

This agency has a long history of precedents which require an employer to treat a preexisting nonwork-related condition to the extent that doing so is necessary in order to effectively treat a work-related condition. Shilling v. Eby Constr. Co., II Iowa Industrial Commissioner Report, 350 (App. 1981). One of the basic rules of workers' compensation law is that the employer takes the employee as he finds him/her. Few individuals are a picture of perfect physical and mental health.

Woods v. Siemens-Furnas Controls Id. p. 12. See also Edgington v. Iowa Spring Mfg. No. 1281672 (Arb. November 24, 2014).


ORDER

THEREFORE, IT IS ORDERED:

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

Defendants shall authorize Dr. Buchanan to treat claimant and shall pay for care as recommend by Dr. Buchanan including laminectomy and a fusion surgery if they are performed at the same time.

Signed and filed this 26<sup>th</sup> day of June, 2019.

  
JAMES F. ELLIOTT  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

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