

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ROBERT GIERS,

Claimant,

vs.

LJ & J, CORP.,

Employer,

and

HASTINGS MUTUAL INSURANCE,

Insurance Carrier,
Defendants.

File No. 21000184.02

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. On October 3, 2022, claimant, Robert Giers, filed an application for alternate care under Iowa Code section 85.27, invoking the expedited procedure rule 876 IAC 4.48. In the petition, claimant alleges he sustained a work-related injury to his left ankle and leg on January 2, 2021. Claimant states he is still having extreme pain and the authorized provider has indicated he has no further treatment to offer him. Claimant requests a second opinion for his left lower extremity with an orthopedic surgeon. On October 13, 2022, defendants LJ & J Corp., and Hastings Mutual Insurance, filed an answer accepting liability for the January 2, 2021 date of injury.

The undersigned presided over an alternate care hearing held via telephone on October 14, 2022. Claimant appeared through her attorney Zeke McCartney. Defendants appeared through their attorney Caitlin Kilburg. The proceedings were digitally recorded. That recording constitutes the official record of this proceeding.

The hearing record consists of:

- Claimant's exhibits 1 and 2;
- Defendants' exhibit A

Claimant was the only witness to provide testimony. Counsel for both parties provided argument. The record closed at the end of the alternate medical care telephonic hearing.

Pursuant to the Commissioner's order dated February 16, 2015, 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.

ISSUE

The issue presented for resolution is whether the claimant is entitled to alternate medical care in the form of:

- A second medical opinion with an orthopedic surgeon for his left lower extremity injury.

FINDINGS OF FACT

On January 2, 2021, claimant sustained a work-related injury to his left lower extremity. (See Petition; Hearing Testimony). Defendants admitted liability for the left lower extremity injury and authorized treatment with Scott Ekroth, M.D., at Physicians Clinic of Iowa. (Hearing Testimony; Ex. 2).

On November 4, 2021, Dr. Ekroth performed surgery on claimant's left ankle. (See Ex. 2). He performed a debridement and grafting of avascular necrosis of the distal tibia along with an ankle scope and GSR. (Id. at 1).

Dr. Ekroth provided the claimant with follow-up care after the surgery. (Ex. 2; Hearing Testimony). Only one of Dr. Ekroth's treatment notes is in the hearing record. (See Ex. 2). On February 23, 2022, claimant saw Dr. Ekroth for a follow-up visit.¹ (Id.). The treatment note from this visit states as follows:

Things are progressing along. He still is dealing with pain and limitations in terms of balance and strength and endurance but overall things are headed in the right direction. He has graduated from formal physical therapy, and was doing some labor-intensive work with them prior to his discharge.

On exam the surgical incisions are well-healed. There are no signs of any infection. He has limitations in his ankle range of motion in terms of dorsiflexion and eversion. His sensation is intact over the dorsal and plantar aspects of this foot.

¹ Dr. Eckroth's diagnosis was Equinus contracture of the left ankle, pain in left ankle and joints of left foot, avascular necrosis of bone of ankle. (Ex. 2, p. 2).

His x-rays look encouraging as well, in that the AVN appears to be consolidating. I believe he is ready to get back to work without any restrictions starting on Monday. I do believe he is at MMI. I would be happy to see him back if he runs into problems.

(Ex. 2, p. 2). The note indicates claimant should follow-up with Dr. Ekroth as needed. (Id.).

At the hearing, claimant testified he last saw Dr. Ekroth on February 23, 2022. (Hearing Testimony). Claimant stated that at that appointment, Dr. Ekroth said he was free to return to see him if needed. (Id.). However, Dr. Ekroth did not provide him with any further treatment recommendations for his continued pain complaints at that appointment, such as further surgery or pain medication. (Id.). Claimant testified the November 4, 2021 surgery was not successful; he continues to experience left ankle pain and it is getting worse. (Id.). Claimant testified he wants a second medical opinion for his continued ankle pain. (Id.).

On August 29, 2022, claimant's counsel sent Hastings Mutual Insurance Company a letter. (Ex. 1). It stated claimant was having extreme pain in his ankle and would like a second opinion from an orthopedic specialist, preferably from the University of Iowa or Orthopedic Specialists in Davenport. (Id.). The letter also asserted that Dr. Ekroth did not have any further treatment recommendations. (Id.).

Defendants contend that Dr. Ekroth has never stated he has no further treatment to offer claimant. (Hearing Testimony). Defendants have approved further treatment with Dr. Ekroth, the authorized treating physician. (Ex. A). Claimant has never attempted to return to see Dr. Ekroth since his last visit in February 2022. (Hearing Testimony). It is defendants' understanding that claimant does not wish to receive any further treatment from Dr. Ekroth. (Id.).

Defendants also stated that Dr. Ekroth has already provided claimant with a permanent impairment rating. (Hearing Testimony). Defendants argue that if claimant wishes to have a second opinion, he is free to exercise his right to an independent medical exam under Iowa Code section 85.39. (Id.). Defendants, however, assert that the care being provided by Dr. Ekroth is reasonable. (Id.).

CONCLUSIONS OF LAW

Under Iowa law, an employer who has accepted compensability for a workplace injury has a right to control the care provided to the injured employee. Ramirez-Trujillo v. Quality Egg, L.L.C., 878 N.W.2d 759, 769 (Iowa 2016). The relevant statute provides as follows:

For purposes of this section, the 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.

Iowa Code § 85.27(4).

Defendants' "obligation under the statute is confined to *reasonable* care for the diagnosis and treatment of work-related injuries." Long v. Roberts Dairy Co., 528 N.W.2d 122, 124 (Iowa 1995) (emphasis in original). In other words, the "obligation under the statute turns on the question of reasonable necessity, not desirability." Id. An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care she 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. See Iowa Code § 85.27(4). 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, 528 N.W.2d at 124. Ultimately, determining whether care is reasonable under the statute is a question of fact. Long, 528 N.W.2d at 123.

Under Iowa Code section 85.27, claimant bears the burden of providing "reasonable proofs of the necessity" to order alternate care. In his correspondence, claimant's counsel states "At his last visit with Dr. Ekroth, Dr. Ekroth did not have any further treatment recommendations." (Ex. 1). There is, however, no evidence in the record that claimant asked Dr. Ekroth for future treatment recommendations. (Ex. 2). Dr. Ekroth's treatment note states "I would be happy to see him back if he runs into problems." (Id. at 1). Despite this, at the alternate care hearing, claimant admitted he has not attempted to return to Dr. Ekroth for further care. (Hearing Testimony). The hearing record does not support claimant's assertion that Dr. Ekroth has no further treatment to offer him.

I appreciate claimant's desire for a second opinion on his ongoing left ankle pain. However, there is no evidence in the record that the care provided by Dr. Ekroth is unreasonable. In his medical records, Dr. Ekroth left open the possibility for the claimant to return for further treatment on his left lower extremity. Defendants are willing to schedule a follow-up appointment with Dr. Ekroth. Dr. Ekroth's treatment note does not state he has nothing further to offer the claimant for his ankle pain. It is unknown specifically what, if any, additional treatment options Dr. Ekroth may have available to offer claimant at this time to mitigate his pain complaints. It is reasonable for defendants to offer a return appointment with Dr. Ekroth to determine what additional treatment, if any, he has available for the claimant at this time.

Given the record as detailed above, defendants' offered care is not unreasonable. Claimant has not met his burden of proof to show he is entitled to alternate medical care at this time. Claimant's petition for alternate care is denied.

ORDER

THEREFORE, IT IS ORDERED:

Under the above findings of facts and conclusions of law, the application for alternate care with respect to claimant's left lower extremity is DENIED at this time.

Signed and filed this 17th day of October, 2022.

A handwritten signature in black ink, reading "Amanda Rutherford", written over a horizontal line.

AMANDA R. RUTHERFORD
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Zeke McCartney (via WCES)

Caitlin Kilburg (via WCES)