BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

LOUISE HACKENBERG,

Claimant,

vs.

WALGREENS,

Employer,

and

AMERICAN ZURICH INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5052395

ALTERNATE MEDICAL

CARE DECISION

HEAD NOTE NO: 2701

This is a contested case proceeding under Iowa Code chapters 85 and 17A. The expedited procedures of rule 876 IAC 4.48, the "alternate medical care" rule, are invoked by claimant, Louise Hackenberg.

This alternate medical care claim came on for hearing on October 28, 2015. The proceedings were recorded digitally and constitute the official record of the hearing. By an order filed by the workers' compensation commissioner, this decision is designated final agency action. Any appeal would be a petition for judicial review under Iowa Code section 17A.19.

The record in this case consists of claimant's exhibits 1 through 7; defendants' exhibits A through E, and the testimony of claimant. Claimant's exhibits were numbered by the undersigned for clarity of the record.

ISSUE

The issue presented for resolution in this case is whether claimant is entitled to alternate medical care consisting of surgery recommended by Emile Li, M.D.

FINDINGS OF FACT

Defendants accept liability for an injury to claimant's left shoulder occurring on October 2, 2014.

On October 19, 2014 claimant underwent an MRI on the left shoulder. It showed no signs of a partial or full tear in the rotator cuff on the labrum. The MRI was found to be unremarkable. (Exhibits 2 and C)

On March 12, 2015, claimant was evaluated by Tricia Widlun, ARNP. Claimant complained of achy left shoulder pain. She was assessed as having bicipital tenosynovitis on the left, healed. Claimant was referred to a specialist. (Ex. A)

On March 20, 2015, claimant was evaluated by Benjamin Tuy, M.D., an orthopedic surgeon for left shoulder pain. Claimant was referred to a shoulder specialist. (Exs. 4 and B)

On May 20, 2015 claimant had another MRI on the left shoulder. The labrum and rotator cuff were found unremarkable with no evidence of a tear. The MRI was found to be an unremarkable study. (Ex. 3)

On May 22, 2015 claimant was evaluated by Steven Aviles, M.D., an orthopedic surgeon. Claimant's MR arthrogram showed no evidence of a rotator cuff, labral or biceps tear. There was no evidence of arthritis or impingement. Claimant was assessed as having some bicep tendinitis. She was returned to work with no restrictions. (Exs. 5, 6, and D)

In a July 15, 2015 note, Nicholas Honkamp, M.D. declined to see claimant, as he had nothing further to offer her. Dr. Honkamp is an orthopedic surgeon specializing in shoulder treatment. (Exs. 7 and E)

On August 31, 2015 claimant was seen by Dr. Li. Dr. Li opined claimant could benefit from biceps tenodesis. Claimant was recommended to use over-the-counter analgesics for pain. (Ex. 1)

Claimant testified she saw Dr. Aviles twice. She said Dr. Aviles did a minimal exam and did not spend much time explaining her condition.

Claimant testified her left shoulder is very painful. She said she has difficulty getting dressed and that she cannot raise her left hand above her shoulder. She said she has swelling in her fingertips past her left elbow.

Claimant testified she wants to have the procedure recommended by Dr. Li. She said Dr. Li was more caring and understanding that Dr. Aviles. She said Dr. Li did a better job examining her and explaining her condition.

In a professional statement, claimant's counsel indicated claimant had been examined twice by Dr. Tuy and Dr. Aviles.

In their answer to the petition, defendants indicted that at claimant's request, they agreed to have claimant evaluated by Dr. Honkamp. Defendants indicated they sent

claimant's records to Dr. Honkamp. Defendants indicated after review of claimant's records, Dr. Honkamp declined to treat claimant. (Exs. 7 and E)

CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.14(6).

Iowa Code section 85.27(4) provides, in relevant part:

> 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.

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 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" 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.

Claimant had two MRIs to the left shoulder in 2014 and 2015. Both MRIs were found to be unremarkable. Claimant has treated with a nurse practitioner and has seen two orthopedic surgeons. Based, in part, on the MRIs, the surgeons indicate they have nothing further to offer claimant. In their answer, defendants indicate they attempted to have claimant evaluated by Dr. Honkamp, but after review of claimant's records, Dr. Honkamp declined to treat claimant.

Claimant has had two unremarkable MRIs. She has seen two orthopedic surgeons. Defendants have attempted to have claimant treat with a third orthopedic surgeon, who has declined to treat claimant after review of her records.

I am empathic to claimant's situation. However, under the law, claimant has the burden of proof to show the care offered by the defendants has been unreasonable. Given the record detailed above, claimant has failed to carry her burden of proof the care offered by defendants is unreasonable.

Claimant may obtain the procedure recommended by Dr. Li, but at claimant's expense. Claimant may seek reimbursement for such care using regular claim proceedings before this agency. Bell Bros. Heating v. Gwinn, 779 N.W.2d 193, 208 (Iowa 2010); Haack v. Von Hoffman Graphics, File No. 1268172 (App. July 31, 2002); Kindhart v. Fort Des Moines Hotel, I Iowa Industrial Comm'r Decisions No. 3, 611 (App. March 27, 1985).

ORDER

THEREFORE, it is ordered:

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

Signed and filed this 28th day of October, 2015.

JAMES F. CHRISTENSON
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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