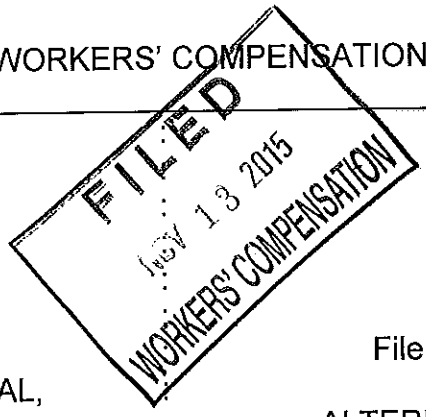
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



JAMES D. BRITTAIN,

Claimant,

vs.

TRADESMEN INTERNATIONAL,

Employer,

and

NEW HAMPSHIRE INSURANCE CO.,

Insurance Carrier,
Defendants.

File No. 5047566

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, James D. Brittain. Claimant appeared personally and through his attorney, Christopher Spaulding. Defendants appeared through their attorney, Thomas Wolle.

The alternate medical care claim came on for hearing on November 13, 2015. The proceedings were digitally recorded. That recording constitutes the official record of this proceeding. Pursuant to the Commissioner's 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 record consists of claimant's exhibits 1 and 2 in addition to the sworn testimony of James Brittain. All exhibits were offered without objection and received into evidence.

ISSUE

The issue presented for resolution is whether the claimant is entitled to alternate medical care. Claimant seeks an order compelling defendants to authorize and pay for a second opinion.

FINDINGS OF FACT

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

James Dean Brittain (hereafter "J.D.") suffered an injury which arose out of and in the course of employment on June 29, 2012. That injury claim was adjudicated on October 15, 2015, and an arbitration decision was entered on November 10, 2015 by Deputy Commissioner Larry Walshire.

The defendants have provided medical treatment and authorized medical care for that injury. The current, authorized treating physician is Jolene Smith, D.O. Dr. Smith is a pain management specialist. Dr. Smith has provided extensive treatment and treatment recommendations to manage his pain symptoms in his back. Based upon the evidence in the record, it appears that all of the treatment Dr. Smith has provided has been appropriate and reasonable.

J.D.'s current diagnosis is post-laminectomy syndrome and lumbar radiculopathy. (Claimant's Exhibit 1, page 2) On October 8, 2015, Dr. Smith provided the following medical opinion:

> Notes: The patient did not find any benefit with the Cymbalta. He did think the amitriptyline was working slightly better. I recommend he switch back to amitriptyline and stopped [sic] Cymbalta. We again discussed spinal cord stimulation, he continues to not want to pursue that as an option. I told him although spinal cord stimulation could be very helpful for his leg pain it is unlikely to help his other pain that he complains of. I again stressed the need for biofeedback and cognitive behavioral therapy but he does not wish to pursue those as options. I do not think narcotic therapy is in the best interest of this patient. I have run out of options for treating this patient's pain. I recommend he get a second opinion from an alternate pain physician for additional thoughts. ... He has reached maximal medical improvement under my care.

(Cl. Ex. 1, p. 2)

J.D., through counsel, sought approval for the second opinion recommended by Dr. Smith. This was denied. Defense counsel stated the following. "We authorized Dr. Smith who offered all kinds of things, some of which were accepted by JD (amitriptyline) and some which were not. We just see nothing else to do. He has had injections, surgery, meds, and been offered biofeedback, SCS, etc." (Cl. Ex. 2, p. 1)

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. Iowa Code section 85.27 (2013).

By challenging the employer's choice of treatment – and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See 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).

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).

An employer's statutory right is to select the providers of care and the employer may consider cost and other pertinent factors when exercising its choice. Long, at 124. An employer (typically) is not a licensed health care provider and does not possess medical expertise. Accordingly, an employer does not have the right to control the methods the providers choose to evaluate, diagnose and treat the injured employee. An employer is not entitled to control a licensed health care provider's exercise of professional judgment. Assman v. Blue Star Foods, File No. 866389 (Declaratory Ruling, May 19, 1988). An employer's failure to follow recommendations of an authorized physician in matters of treatment is commonly a failure to provide reasonable treatment. Boggs v. Cargill, Inc., File No. 1050396 (Alt. Care Dec. January 31, 1994).

An employer's right to select the provider of medical treatment to an injured worker does not include the right to determine how an injured worker should be diagnosed, evaluated, treated, or other matters of professional medical judgment. Assmann v. Blue Star Foods, File No. 866389 (Declaratory Ruling, May 19, 1988).

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).

When a designated physician refers a patient to another physician, that physician acts as the defendant employer's agent. Permission for the referral from defendant is not necessary. Kittrell v. Allen Memorial Hospital, Thirty-fourth Biennial Report of the Industrial Commissioner, 164 (Arb. November 1, 1979) (aff'd by industrial commissioner). See also Limoges v. Meier Auto Salvage, I Iowa Industrial Commissioner Reports 207 (1981).

"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 this case, the employer has undoubtedly provided reasonable medical treatment up until October 8, 2015. On that date, Dr. Smith recommended J.D. "get a second opinion from an alternate pain physician for additional thoughts." (Cl. Ex. 1, p. 2) Defense counsel characterizes this referral as an act of frustration by Dr. Smith based upon the fact that she had offered him numerous treatments that worked and other treatments that he refused. The employer has taken the position that the fact that J.D. has refused various reasonable treatment modalities should be taken into account when evaluating the defendants' denial of a second opinion. For his part, J.D. testified that he has good reasons for not attempting the spinal cord stimulator at this time, and he believes there may be other medication options, particularly medications he took previously, which could improve his condition.

Based upon the record before me, Dr. Smith clearly recommended a second opinion from a pain specialist. I find that this is a medical treatment recommendation and it is based upon the medical judgment of Dr. Smith. I am unwilling to second guess her medical judgment. I find that it is unreasonable for the defendants to refuse to authorize such a second opinion recommended by their authorized treating physician. In general, a second opinion is a valuable and useful type of medical treatment utilized by physicians for a variety of medical reasons. When the authorized treating doctor recommends a second opinion, it should be granted.

ORDER

THEREFORE IT IS ORDERED:

The claimant's petition for alternate medical care is GRANTED. Defendants shall authorize a local pain management specialist for a second opinion as recommended by Dr. Smith.

Signed and filed this 13th day of November, 2015.

JOSEPH L. WALSH
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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