

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CODY A. MILLS,

Claimant,

vs.

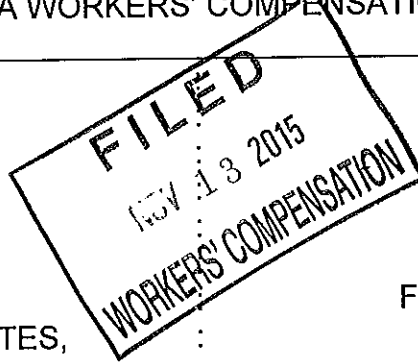
ALAN STEVENS ASSOCIATES,

Employer,

and

UNITED FIRE GROUP,

Insurance Carrier,
Defendants.



File No. 5048485

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. Claimant sustained physical injuries in the employ of defendant Alan Steven Associates. He now seeks an award of alternate medical care under Iowa Code section 85.27 and 876 Iowa Administrative Code 4.48.

The case was heard by telephone conference call and fully submitted on November 13, 2015. The entire hearing was recorded via digital recorder, which constitutes the official record of proceedings. By standing order of the workers' compensation commissioner dated February 16, 2015, the undersigned was delegated authority to issue final agency action in the proceeding.

The claimant, Cody Mills, was self-represented (pro se) with the assistance of Pamela Mills, his mother. Such assistance is authorized by 876 IAC 4.48(13).

ISSUE

Liability is admitted on this claim. The sole issue presented for resolution is whether or not the claimant is entitled to an award of alternate medical care. Claimant is requesting continued care with Advantage Nursing Services and providers that are trained in rehab home programming.

FINDINGS OF FACT

The claimant was employed by Alan Stevens Associates when he suffered catastrophic injuries. A medical fee dispute decision issued on December 10, 2010 found upon his discharge from the hospital:

Mills was discharged from Cedars Sinai on July 20, 2010. He was assessed at that time, as having ventriculitis (inflammation of the ventricles in the brain), intraventricular hemorrhage, hydrocephalus, pulmonary embolism, postoperative right frontal epidural hematoma, a massive left frontal epidural hemorrhage, a complex anterior skull fracture, a maxillary and orbital fracture, and a thalamic storm. According to the record, a thalamic storm is excessive and uncontrollable activities of the sympathetic nervous system leading to increased heart rate, restlessness, increased respiratory rate, and fever. Thalamic storms are usually associated with brain injuries. (Ex. K; Ex. L, p. 29-30) (Citations to exhibits are from the medical fee case)

An independent medical examination written by Alan Weintraub, M.D. on October 11, 2013 at the request of defendants' attorney stated in part:

Otherwise, from a nursing standpoint, he primarily needs 24/7 assistance to meet his needs. His [sic] has variable bowel results. This helps him with his toileting and his soiling. He is bladder incontinent. The nurses help with his PEG feeding tube management. They also assist with his skin care and his peri care. They assist managing his medications, and he certainly needs this assistance to meet his needs in the moment from an ADL standpoint.

....

From a functional standpoint, he has 24 hour services and this is provided through a home health company. This is because of his gastrostomy feeding tube needs and licensure issues as opposed to him having 24/7 CAN help.

He receives a rehabilitative therapy 5 days a week, approximately 3-4 hours a day, where they drive from Boonesville [sic], his home environment, to University of Missouri-Rusk Rehabilitation Institute. He is receiving PT/OT and Speech 5 days a week. In PT he works on gait training with a hemi-walker and a quad cane, body weight supported locomotor robotic rehabilitation and transfers. In OT, he is working on personal care and ADLs. In Speech, he is working on swallowing goals and cognitive compensation strategies. He has not had any specific

exposure as yet, according to his family with augmentative communication or adaptive technology.

Functionally in the home environment, his home is set up with wheelchair accessibility, ramps, and his room is downstairs. They would like better access to their porch deck. They do have an elevator and accessibility in their bathroom. He has a manual wheelchair which he does not use very often with maximal assist in transfers. He sits in a power chair, but there are some safety concerns and he definitely has supervision while using the power chair. They have an accessible van for community based transportation. They live on a large acreage with dogs and horses.

A day in Mr. Mill's life is described as needing assistance getting up in bed in the morning, helping him with his toileting, helping him with his transfers, weight shifts, and getting him in his power wheelchair where he can begin his day. He needs assistance with feeding such as verbal cues, and they use the G-tube for water flushes and meds. He needs bowel and bladder assistance. He travels to his rehabilitative therapies every morning, and the rest of the day is spent doing family activities and errands, etc.

(Ex. 5, pp. 3, 4)

In response to question from defendants' attorney Dr. Weintraub wrote.

In my opinion, Mr. Mills needs 24/7 full time care. The level of education and certification of those providing his hands on care is dictated by state licensure and the home health agency regulations-in particular because Mr. Mills has a gastrostomy feeding tube. His essential home care needs relate to managing his PEG feeding tube, his skin, bowel and bladder care and availability of someone to help him with his daily living skills and mobility. In addition, he needs this level of observation because of his seizure disorder, his cognitive impairments and for safety because of his impulsiveness. Ideally his attendant care, whether it be aid assistance or LPN, should be trained in much of the rehabilitation home programming which needs carryover and follow-through to help him be as independent as possible.

....

In addition to goal-oriented rehabilitative therapies that I recommend begin to be thought about in a more practical realistic home/community based rehabilitative paradigm, it is essential that he have adjunctive productivity rehabilitative therapies. Certainly hippotherapy/horseback therapy would be very appropriate given his level of disability as would

other alternative programming such as neurological music therapy, etc. Each and every one of these therapies should be looked at in a very practical holistic fashion by his treating physicians and hopefully you can obtain appropriate prescription for such.

(Ex. 4, pp. 1, 2)

Claimant receives nursing services from Advantage Nursing Services (Advantage). Claimant's treating physician is Dr. Wolf (no first name provided).

Defendants plan to terminate the services of Advantage Nursing Services on November 16, 2015. (Ex. 3, p. 1) Defendants have arranged with One Call to provide complex medical case management. One Call contacted Phoenix Home Care (Phoenix) to be the provider of nursing services. Another agency, Bright Star, is a back-up agency for Phoenix.

Dawn Hays, Workers' Compensation Claims Supervisor for United Fire testified on behalf of the defendants. She arranged for One Call to be the lead agency to develop a complex care plan. She testified that the defendants evaluated the claimant's case and had two primary concerns concerning the services provided by Advantage.

The first concern was that Advantage was allowing Ms. Pamela Mills to provide CNA care for her son, Mr. Cody Mills. Advantage had asked a number of years ago if they could have her provide care and be billed to the defendants¹. The answer then was no. Subsequently, Ms. Mills obtained a CNA license. (Ex. A-2) Advantage was not billing the defendants for Ms. Mills' services. Ms. Mills would be paid on those occasions when the regular staff was not available.²

Ms. Hays also testified that the defendants had some concern as to the care being provided including the night time irrigation of the PEG feeding tube, night time administration of some medications and the level of some documentation. It is not clear that those concerns were ever conveyed to Advantage, the claimant or Ms. Mills.

Ms. Hays testified that the comprehensive medical care plan was not developed as of the date of the hearing, that the assessment done on November 5, 2015 was the first step. Ms. Hays testified. Dr. Wolf is in favor of developing a comprehensive care plan.

On November 5, 2015 Phoenix performed a home visit and assessment. That assessment was not provided at the hearing and the results are unknown. In order to

¹ Defendants had Ms. Mills investigated by International Services Unlimited, presumably a detective agency. It is troubling that the defendants are investigating the mother of a claimant, obtaining confidential information such as her social security number and other information seemingly without her permission.

² It has been this deputy's experience that in cases like Mr. Mills with catastrophic injuries, it is not uncommon for a spouse or family member to be paid to provide some care.

have the assessment Phoenix had Ms. Mills sign a Nursing Care Consents and Agreements form.

Ms. Hays said she did not know the qualifications of the person that One Call had arranged to hire through Phoenix and Bright Star; that was the responsibility of One Call. Ms. Hays had no knowledge as to whether any of the staff at Phoenix or Bright Star were trained in neuro-rehabilitation.

Ms. Mills testified on behalf of her son Cody Mills. Ms. Mills testified that her current services with Advantage works very well and that the staff have specialized training that assist claimant.

Ms. Mills testified that a doctor hired by the defendants, the head of the traumatic brain injury of a Denver hospital (no name given) told her that the claimant should have nursing care from providers that can be specifically trained and work with claimant long term.

CONCLUSIONS OF LAW

Under Iowa law, the employer is required to provide care to an injured employee and is permitted to choose the care. Pirelli-Armstrong Tire Co. v. Reynolds, 526 2 N.W.2d 433 (Iowa 1997).

[T]he 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.

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.

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, Declaratory Ruling, File No. 866389 (May 18, 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).

The consequence of failing to promptly provide care is the loss of the right to choose the care. West Side Transport v. Cordell, 601 N.W.2d 691 (Iowa 1999). I see no authority for the proposition that somehow defendants regain the right to choose the care at some later date. Defendants should have considered the consequences of their actions when they chose to ignore their statutory responsibilities years after the Cordell decision, a decision that affirmed this agencies long standing alternate care precedents dating back to 1995. Unreasonableness can be established by showing 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. West Side Transport v. Cordell, 601 N.W.2d 691 (Iowa 1999); Long v. Roberts Dairy Company, 528 N.W. 2d 122 (Iowa 1995). Unreasonableness can be established by showing that the care authorized by the employer has not been effective and is "inferior or less extensive" than other available care requested by the employee. Pirelli-Armstrong, at 437. The consequence of failing to promptly provide care is the loss of the right to choose the care. West Side Transport v. Cordell, 601 N.W.2d 691 (Iowa 1999).

In this case the defendants have terminated the services of Advantage and are going to switch to using One Call, Phoenix and Bright Star. The claimant has a need for services 24/7. The defendants are offering services, but the offer is vague and undefined. The defendants will develop a comprehensive plan, which is no doubt a good idea, but is simply not clear that they have a reasonable plan in place with qualified providers that can address the claimant's specific needs right now..

I find that the plan to terminate Advantage is not reasonable care. The termination of Advantage without a comprehensive plan in place and the lack of knowledge of whether the new service providers can meet claimant's needs is not reasonable. There is precious little information provided as to how Phoenix and Bright

star will be delivering services. The defendants have not provided that information to the claimant or in the hearing.

While I am granting claimant's request for alternate care, I do want to say that the defendants can choose a different provider than Advantage in the future. It is just based upon the record before me there are too many unknowns, and the risks to the health of the claimant are too great. If the defendants develop a comprehensive plan and have qualified staff to provide the care, the defendants will be able to change providers. I would expect that in developing a comprehensive plan that all parties work together to the maximum extent possible and cooperate in developing a plan.

In this case the claimant's mother was required to sign a form for Phoenix Home care Nursing Care Consents and Agreements. (Ex.2) This form had a provision that read:

AGREEMENT TO PAY

In consideration for the medical services requested by me, or ordered by my physician, I agree that I am responsible for payment for services. If Phoenix Home Care accepts assignments for my insurance(s) or health plan, I am responsible for co-pay and deductibles. I am also responsible where payment is denied or only paid in part. I understand that I am responsible for payment and for any interest on unpaid amounts over (30) days, together with all collection and litigation costs.

(Ex. 2) Iowa Code 85.18 provides:

Contract to relieve not operative.

No contract, rule, or device whatsoever shall operate to relieve the employer, in whole or in part, from any liability created by this chapter except as herein provided.

The defendants are prohibited by Iowa Code 85.18 from requirement for any payment from the claimant for his medical care that is covered by workers' compensation. The provision of the Nursing Care Agreement is void and unenforceable.

Iowa Code section 86.42 provides the mechanism to enforce decisions issued by this agency.³

³ 86.42 Judgment by district court on award.

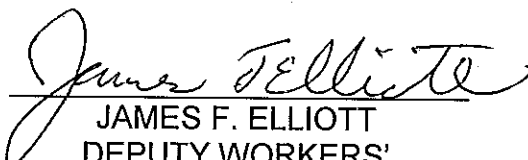
Any party in interest may present a file-stamped copy of an order or decision of the commissioner, from which a timely petition for judicial review has not been filed or if judicial review has been filed, which has not had execution or enforcement stayed as provided in section 17A.19, subsection 5, or an order or decision of a deputy commissioner from which a timely appeal has not been taken within the agency and which has become final by the passage of time as provided by rule and section 17A.15, or an agreement for settlement approved by the commissioner, and all papers in connection therewith, (footnote cont.)

ORDER

THEREFORE, IT IS ORDERED:

The application for alternate medical care is granted

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


JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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to the district court where judicial review of the agency action may be commenced. The court shall render a decree or judgment and cause the clerk to notify the parties. The decree or judgment, in the absence of a petition for judicial review or if judicial review has been commenced, in the absence of a stay of execution or enforcement of the decision or order of the workers' compensation commissioner, or in the absence of an act of any party which prevents a decision of a deputy workers' compensation commissioner from becoming final, has the same effect and in all proceedings in relation thereto is the same as though rendered in a suit duly heard and determined by the court.