BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JEFFREY SELCK,

Claimant,

vs.

NATIONWIDE OFFICE CLEANERS, LLC,

Employer,

and

ACCIDENT FUND NATIONAL INS. CO.,

Insurance Carrier,
Defendants.

File No. 5049938

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, Jeffrey Selck, sustained a stipulated work injury in the employ of defendant Nationwide Office Cleaners, LLC on or about August 19, 2013. 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 12, 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.

Claimant's exhibits 1 – 5 and defendants' exhibits A and B were admitted. Defendants submitted a brief.

Defendants denied liability for any psychological injury, and therefore no ruling can be made as to alternate care for the alleged psychological injury.

ISSUES

Liability is admitted on this claim for the right shoulder injury. The sole issue presented for resolution is whether or not Jeffrey Selck is entitled to an award of

alternate medical care. Claimant has requested an examination at the Mayo Clinic for his shoulder.

FINDINGS OF FACT

The claimant was employed by Nationwide Office Cleaners, LLC on August 19, 2013 when he suffered an injury arising out of and in the course of employment.

The claimant suffered an injury to his right upper extremity at Nationwide Office Cleaners, LLC on August 19, 2013. (Exhibit 2, page 1) After conservative treatments claimant eventually had shoulder surgery performed by James Nepola, M.D. on April 10, 2014.

An MRI of the claimant on October 5, 2013 found:

> IMPRESSION:
>
> 1. HAGL lesion of the anterior band of the inferior glenohumeral ligament.
>
> 2. Supraspinatus tendinopathy.
>
> 3. Tendinopathy of the long head of biceps just superior to the bicipital groove.

(Ex.5. p. 1)

Claimant was seen for follow-up with Dr. Nepola. Clinic notes of July 14, 2015 stated:

> ASSESSMENT
>
> Jeff A Seick is a 37 y.o. male with right shoulder pain more than a year after right anterior stabilization procedure (capsulorraphy) [sic] on 04/10/2014. He has anterior capsular pain. His repair has not come loose. No further surgery is recommended. People who have repeated surgeries to try to treat this pain develop arthritis early.
>
> We will not prescribe narcotics for his shoulder pain. He could use a nonsteroidal anti-inflammatory medication or an injection of corticosteroid into his right shoulder joint.
>
> His complaints of left shoulder pain are not related to his right shoulder work injury. He has a mild degree of hyperlaxity.
>
> Encounter Diagnoses
>
> 1. Encounter related to worker's compensation claim 08/19/2013 right shoulder

2. 04/10/2014 right anterior stabilization procedure (capsulorrhaphy)

3. Right shoulder pain

(Ex. B, p. 1) On August 19 Dr. Nepola stated, "Future treatment for this injury could include nonsteroidal anti-inflammatory medications, periodic corticosteroid injections, physical therapy, and possibly revision surgery. (Ex. 3. p. 2)

Richard Kreiter, M.D. wrote to claimant's attorney on September 9, 2015 concerning his diagnosis, which was:

> A) Chronic right shoulder pain with instability, post right diagnostic arthroscopy with open anterior stabilization procedure, capsulorrhaphy. B) Posttraumatic stress with anxiety/depression.

(Ex. 1, p. 1)

Regarding further treatment Dr. Kreiter recommended the following:

> It is my opinion, a second evaluation in regard to the shoulder, with repeat MRI arthrogram perhaps at the Mayo Clinic, would be beneficial. I respect Dr. Nepola as an outstanding shoulder surgeon, but Jeffrey may need to hear another view of the situation so he can accept the present condition. Repeat surgery certainly could make the situation more complicated. Conservative measures also are needed at this time, with the use of monitored anti-inflammatory medications and mild analgesics like Tylenol or Tramadol. Jeff's post injury stress should be addressed with antianxiety or antidepressant medications since it has been over a year of trying to overcome the situation.

(Ex. 1, p. 1)

Claimant testified that Dr. Nepola was unable to find the HAGL lesion when he performed the surgery.

Claimant's surgery did not lessen his pain. He testified he is no better now than at the time of his injury. Claimant testified that he is very limited by pain in his right shoulder. He has limited use of his right arm. Tasks like pulling or pushing a door, any throwing motion or sleeping on his right side are impaired. When claimant lifts with his right arm his arm feels like it is partially out of his socket. Claimant's ability to function at this time is significantly reduced due to his shoulder pain.

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).

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 critical issue that needs to be determined is whether the defendants are providing reasonable care. The claimant has the burden to show the care is unreasonable.

Dr. Kreiter recommended "...a second evaluation in regard to the shoulder, with repeat MRI arthrogram perhaps at the Mayo Clinic, would be beneficial." (Ex. 1) Dr. Nepola has stated that "...and possibly revision surgery" could be considered. (Ex. 3, p. 2)

Given the diminished level of function of the claimant's shoulder and pain and in the two opinions cited above I find that the defendants are not providing reasonable medical care to the claimant.

Dr. Kreiter's statement that the Mayo Clinic be used appears to be a possible suggestion, but not a requirement.

The defendants shall have the claimant evaluated by a qualified shoulder specialist, other than Dr. Nepola, and if recommended by that specialist shall provide a repeat MRI arthrogram.

ORDER

THEREFORE, IT IS ORDERED:

The application for alternate medical care is granted in part.

Signed and filed this 12th day of November, 2015.

JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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