BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DOMENICA GUTIERREZ,

Claimant,

vs.

WESLEY LIFE,

Employer,

and

WEST BEND MUTUAL INSURANCE CO.,

Insurance Carrier,
Defendants.

File No. 5064430

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, Domenica Gutierrez. Claimant appeared personally and through her attorney, Phillip Miller. Defendants appeared through their attorneys, Rachel Irlbeck and Charles Blades. Kimberly Westphal was also present for defendants.

The alternate medical care claim came on for hearing on April 1, 2019. The proceedings were digitally recorded. That recording constitutes the official record of this proceeding. Pursuant to the Commissioner's February 16, 2015 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 evidentiary record consists of Claimant's Exhibits 1-8 and Defendants' Exhibits A-F, and claimant's testimony during the telephonic hearing. During the course of the hearing defendants accepted liability for the April 18, 2017 work injury and for the right shoulder condition that for which Ms. Gutierrez is seeking treatment.

ISSUE

The issue for resolution is whether the claimant is entitled to alternate medical care.

FINDINGS OF FACT

Claimant, Domenica Gutierrez, sustained an injury to her right shoulder which arose out of and in the course of her employment with Wesley Life on April 18, 2017. Following the injury, defendants authorized treatment for Ms. Gutierrez. After conservative treatment failed, Kary R. Schulte, M.D., at DMOS became the authorized treating physician. On July 27, 2017, Dr. Schulte performed a right shoulder arthroscopic subacromial decompression for impingement syndrome. Subsequently, Ms. Gutierrez underwent physical therapy which was ordered by Dr. Schulte. Ms. Gutierrez testified that the therapy did not help at all. She also testified that she did not like the way Dr. Schulte treated her during the office visits. For example, when she reported pain and other ongoing symptoms, he advised her that the more she used her shoulder, the better it would get and he suggested that she stop babying her shoulder. In response to claimant's expressed dissatisfaction about the manner in which Dr. Schulte treated her, defendants arranged to have another DMOS staff member, such as an x-ray technician or physical therapist in the room during the clinical visits. (Claimant's Exhibit 8; Testimony)

At the request of her attorney, Ms. Gutierrez underwent an Independent Medical Examination (IME) with Mark B. Kirkland, D.O. As a result of that IME, Dr. Kirkland issued a report in November of 2017. Dr. Kirkland recommended a selected injection of lidocaine into the right acromioclavicular joint. Dr. Kirkland also noted that if she experienced pain relief following the injection, Ms. Gutierrez might be a candidate for excision of the distal clavicle. (Cl. Ex. 2)

Ms. Gutierrez returned to see Dr. Schulte on March 5, 2018; this was the last time she saw Dr. Schulte. Ms. Gutierrez testified that Dr. Schulte did not discuss Dr. Kirkland's treatment recommendations with her during this visit. The clinical notes indicate that Ms. Gutierrez had not been doing a home exercise program. Dr. Schulte recommended that she be seen by physical therapy for instruction in an at home exercise program. Dr. Schulte noted that his examination did not reveal anything for which further intervention from him would predictably change her symptoms. Ms. Gutierrez was advised that she could return to see him on an as needed basis. (Ex. C, Testimony)

The evidentiary record is void of any evidence to suggest that Ms. Gutierrez requested to return to see Dr. Schulte or that she ever reported her pain or ongoing symptoms to the defendants during the timeframe of March 5, 2018 until January of 2019.

In January of 2019, claimant reported dissatisfaction with Dr. Schulte's medical care and treatment to the defendants. At that time, claimant specifically requested a referral for alternate care with Kyle S. Galles, M.D., to provide the care recommended by Dr. Kirkland. Defendants scheduled a return visit for Ms. Gutierrez to see Dr. Schulte. Additionally, defendants agreed to send Ms. Gutierrez to Dr. Galles for further evaluation. Unfortunately, Dr. Galles declined to see Ms. Gutierrez. Defendants then scheduled an appointment for Ms. Gutierrez to be evaluated by Steven Aviles, M.D. Defendants scheduled the appointment for Dr. Aviles to evaluate Ms. Gutierrez and to provide his opinions regarding Ms. Gutierrez, including his opinion regarding Dr. Kirkland's treatment recommendations. Although claimant had agreed to see Dr. Galles for an evaluation, she would not agree to see Dr. Aviles. (Ex. D, Cl. Ex. 4)

Ms. Gutierrez testified that she continues to have pain and other symptoms in her right shoulder. She would like to receive the treatment recommended by Dr. Kirkland.

I find that defendants continue to authorize Dr. Schulte as a treating physician and that there is no evidence in the record to suggest that Dr. Schulte is not willing to see Ms. Gutierrez. Claimant sought an opinion with a doctor of her choosing, Dr. Kirkland. Dr. Kirkland made recommendations for additional treatment. Dr. Schulte did not make recommendations for the treatment recommended by Dr. Kirkland. Defendants have scheduled an appointment for Ms. Gutierrez to be evaluated by Dr. Aviles. Defendants have asked Dr. Aviles to provide his opinions on the treatment recommendations made by Dr. Kirkland. I find that defendants are offering prompt and reasonable medical care.

Through her petition for alternate medical care claimant is also seeking an order instructing defendants to provide claimant with a copy of particular letters sent to doctors in this file. I find that claimant's request is a discovery dispute. I further find that a petition for alternate medical care is not the proper vehicle for discovery disputes.

REASONING AND 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, 562 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., 562 N.W.2d at 433, 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.

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 16, 1975).

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).

Claimant contends that the care being offered is inferior than the care she is seeking. I do not find this argument to be persuasive. Claimant is seeking treatment as recommended by her own IME doctor, Dr. Kirkland. In this instance, defendants are not obligated to provide treatment recommended by claimant's IME doctor. However, defendants have offered to allow the claimant to continue to see the authorized treating physician, Dr. Schulte, for treatment. Additionally, defendants have asked another

orthopaedic surgeon, Dr. Aviles, to evaluate Ms. Gutierrez and provide his opinions on the treatment recommendations of Dr. Kirkland. I conclude claimant has failed to carry her burden of proof to show that the care being offered by defendants is unreasonable. Therefore, I conclude that claimant's petition for alternate medical care is denied.

Through her petition for alternate medical care claimant is also seeking an order instructing defendants to provide claimant with a copy of particular letters sent to doctors in this file. In support of this position claimant cites to a prior consent order issued by this deputy. *Dan Laurie v. Agriland FS*, File No. 5061458 (Consent Order, January 23, 2019). Claimant's cited legal authority is a consent order, not a decision, that was issued by this agency. The consent order claimant relies on, is merely an order that reflects the details of the agreement the parties voluntarily reached in order to resolve their alternate medical care dispute. A petition for alternate medical care is not the proper vehicle for settling a discovery dispute. Therefore, the portion of claimant's petition for alternate medical care seeking discovery matters is denied.

ORDER

THEREFORE, IT IS ORDERED:

Claimant's petition for alternate medical care is denied.

Signed and filed this 2nd day of April, 2019.

ERIN Q. PALS
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COMPENSATION COMMISSIONER

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