BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ANDRE FISHER, Claimant, vs. KINSETH HOTEL CORPORATION, Employer, and GENERAL CASUALTY COMPANY OF WISCONSIN, Insurance Carrier, Defendants.	File No. 22008961.04 ALTERNATE MEDICAL CARE DECISION Headnote: 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, Andre Fisher. Claimant appeared through his attorney, Nick Cooling. Defendants appeared through their attorney, Kathryn Johnson. Claimant's petition was filed on September 22, 2023. Defendants filed an answer on October 4, 2023. Defendants do not dispute liability for the condition on which the claim for alternate care is based.

The alternate medical care claim came on for hearing on October 4, 2023. The proceedings were digitally recorded. That recording constitutes the official record of this proceeding. Pursuant to the Commissioner's July 21, 2023 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 1-3, and Defendants' Exhibit A. Both attorneys provided oral arguments to support their positions.

ISSUE

The issue presented for resolution is whether the claimant is entitled to alternate medical care consisting of an order that defendants provide claimant with a smoking

cessation program, and authorized treatment with a spine specialist or neurosurgeon other than Brett Rosenthal, M.D., or Trevor Schmitz, M.D.

FINDINGS OF FACT

This case was the subject of a prior alternate care hearing, which took place on May 19, 2023 before the undersigned. The decision was filed the same day, and denied claimant's request for alternate medical care. By way of background, claimant sustained an injury to his lower back on July 14, 2022. Defendants provided authorized care with Dr. Rosenthal, who recommended a facetectomy and interbody fusion surgery. The recommendation for surgery was made in October of 2022. Dr. Rosenthal advised claimant he would not perform the surgery until claimant was nicotine-free.

On April 27, 2023, claimant reported to Dr. Rosenthal that he was 26-days free of nicotine. However, Dr. Rosenthal ran a nicotine test, which indicated otherwise. Dr. Rosenthal stated that since it was the second time claimant had been dishonest about his smoking cessation progress, the doctor-patient relationship had been compromised. Dr. Rosenthal stated that he did not have any reliable surgical interventions other than the fusion surgery, so he discharged claimant from his care as he did not have anything else to offer safely. He also placed claimant at maximum medical improvement (MMI) since he had nothing more to offer.

At the time of the prior alternate care hearing, defendants had contacted Trevor Schmitz, M.D., at Iowa Ortho, who was in the process of reviewing claimant's medical records to determine whether he would see claimant. As such, claimant's petition for alternate medical care was denied because defendants continued to provide reasonable care. Since that time, claimant has seen Dr. Schmitz. On June 23, 2023, Dr. Schmitz noted that Dr. Rosenthal had previously recommended surgery, but claimant had trouble with stopping nicotine use. (Claimant's Exhibit 3, page 1) His note indicates that claimant had stopped nicotine use on that date. Claimant reported pain at a level 8 out of 10.

Dr. Schmitz reviewed claimant's prior MRI, and noted a large disc bulge with bilateral foraminal stenosis causing questionable L5 neural impingement. (Cl. Ex. 3, pp. 3-4) He noted that claimant had subjective reports of radiculopathy, but had not had an EMG. (Cl. Ex. 3, p. 4) He ordered an EMG to confirm lumbar radiculopathy prior to surgery, as well as a urine nicotine test to be performed the same day. He noted that if the EMG came back negative or the nicotine test came back positive, claimant would be at MMI. If not, he would discuss a stand-alone L5-S1 anterior lumbar interbody fusion (ALIF). He placed claimant on a 15-pound lifting restriction, as well as restrictions against repetitive lifting, bending, and twisting. (Cl. Ex. 3, p. 5)

On August 4, 2023, claimant's attorney emailed defense counsel after he received a copy of Dr. Schmitz's note. (Cl. Ex. 1, p. 1) He expressed his client's dissatisfaction with care, and his own confusion and disappointment at the fact that Dr. Schmitz said he would place claimant at MMI if there was a negative EMG test or a positive nicotine test. He noted that he had requested defendants authorize a nicotine

cessation program on several occasions in the past, as it is clear claimant will not get the surgery he needs through the authorized treating physicians at Iowa Ortho if he continues to smoke, and he had not been able to "kick the habit on his own."

Claimant returned to Dr. Schmitz on September 20, 2023. (Defendants' Exhibit A, page 1) He reported worsening pain at a level 9 of 10. The record notes that claimant had an EMG on September 8, 2023, which demonstrated bilateral S1 radiculopathy. (Def. Ex. A, p. 3) Dr. Schmitz noted that claimant had another positive urine nicotine test that day, but that claimant stated he had not smoked or used nicotine for 26 days. Dr. Schmitz stated it was claimant's second or third failed test, and he thought it was likely claimant continued to use nicotine products. He stated that claimant was at MMI, and from a structural standpoint, does not require restrictions. The patient status report indicates claimant can return to work with no restrictions, and Dr. Schmitz provided a handwritten note next to that status that states "[because] of smoking." (Def. Ex. A, p. 4)

The nurse case manager assigned to the case, Gene Coon, RN, emailed claimant's attorney on September 20, 2023, with a brief update regarding claimant's visit that day. (Cl. Ex. 2, p. 1) He noted that Dr. Schmitz advised claimant that he could contact his office if he gets to a point where he can test nicotine-free for six weeks. Otherwise, no further surgical intervention can be evaluated.

Claimant's attorney represented at hearing that claimant has discussed utilizing a formal smoking cessation program with the doctors at Iowa Ortho, but those conversations have not made it into the medical records. Claimant argues that he is not at MMI, as two authorized treating physicians have recommended spinal fusion surgery that has not been performed, and Dr. Schmitz has indicated he is still willing to do the surgery if claimant can stay nicotine free for 6 weeks. Claimant argues that defendants should be required to treat the condition that is preventing him from receiving the surgery he needs, which is his nicotine dependence.

Defendants argue that they have met their duty to provide reasonable care under Iowa Code section 85.27. No doctor has ordered a formal nicotine cessation program for claimant. As such, defendants argue they are not obligated to provide claimant with that treatment. Defense counsel represented that defendants do not have any additional care scheduled for claimant at this time, as he has been placed at MMI and released with no restrictions by both Dr. Rosenthal and Dr. Schmitz.

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. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 16, 1975).

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.

An application for alternate medical care is not automatically sustained because claimant is dissatisfied with the care he or she 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. See Iowa Code § 85.27(4). Thus, 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, 528 N.W.2d at 124.

In Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433, 437 (Iowa 1997), the supreme court held that "when evidence is presented to the commissioner that the employer-authorized medical care has not been effective and that such care is 'inferior or less extensive' than other available care requested by the employee, . . . the commissioner is justified by section 85.27 to order the alternate care." Ultimately, determining whether care is reasonable under the statute is a question of fact. Long, 528 N.W.2d at 123.

At the time of the prior alternate care hearing, defendants were actively working to schedule claimant with another doctor, as Dr. Rosenthal had dismissed him from care due to a breakdown of the doctor-patient relationship. As such, I found that claimant had not met his burden to prove the authorized care was unreasonable at that time. Currently, however, defendants are not authorizing any additional treatment, as claimant has been placed at MMI and released to return to work with no restrictions. The problem with defendants' position is that claimant's MMI status and full duty release are based solely on his inability to proceed with the recommended surgery due to positive nicotine tests. Yet, the physicians at Iowa Ortho have done nothing to help claimant achieve nicotine-free status. Despite discussions with claimant regarding smoking cessation and multiple requests from claimant's attorney, no authorized treating physician has formally ordered a nicotine cessation program. This is not reasonable medical care given the situation.

This is an accepted injury claim, for which two authorized treating providers have recommended spinal fusion surgery. Claimant recently reported a pain level of 9 out of 10, with worsening symptoms. Nothing about his physical condition has changed that would suggest the prior 15-pound lifting restriction is no longer necessary. Despite all this, Dr. Schmitz declared him at MMI and released him to return to work full duty, "because of smoking." Defendants have not provided claimant with meaningful or effective treatment, as his condition has remained essentially untreated since the original recommendation for surgery in October 2022. He is no longer being offered care, despite his ongoing symptoms, and is not being offered help to overcome his nicotine dependence, which is preventing him from receiving the recommended surgery. Defendants' failure to offer additional medical care in this case is unreasonable, and constitutes an abandonment of defendants' obligation to provide claimant with reasonable medical care under Iowa Code section 85.27.

I find defendants are not offering medical care reasonably suited to treat the claimant's work injury. Therefore, claimant has established he is entitled to alternate medical care. Once an abandonment of care has occurred, the claimant is free to seek care on his own at defendant's cost. See West Side Transport v. Cordell, 601 N.W.2d 691 (Iowa 1999) (the court upheld the holding that the defendant employer had "lost the right to choose the care" and that "allow and order other care" language is broad enough to include treatment by a doctor of the employee's choosing). As such, claimant is entitled to seek treatment for his spine condition with a physician of his choosing. Should the selected physician recommend a smoking cessation program after evaluation, defendants shall provide the recommended smoking cessation treatment.

THEREFORE, IT IS ORDERED:

Claimant's petition for alternate medical care is granted.

Claimant may seek out his own medical providers for the accepted work injury. Defendants are ordered to promptly pay for all reasonable and causally related charges, including smoking cessation treatment, should the selected physician recommend it.

Signed and filed this ____5th____ day of October, 2023.

JESSICA L. CLEEREMAN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Nick Cooling (via WCES)

Kathryn Johnson (via WCES)