

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ANDRE FISHER,

Claimant,

vs.

KINSETH HOTEL CORP.,

Employer,

and

GENERAL CASUALTY COMPANY
OF WISCONSIN,Insurance Carrier,
Defendants.

File No. 22008961.03

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 May 8, 2023. Defendants filed an answer on May 19, 2023. Defendants do not dispute liability for the condition on which the claim for alternate medical care is based.

The alternate medical care claim came on for hearing on May 19, 2023. 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 record consists of claimant's exhibit 1, pages 1-10 and defendants' exhibit A, pages 1-10. Both attorneys provided oral argument to support their positions.

ISSUE

The issue presented for resolution is whether the claimant is entitled to alternate medical care consisting of an order authorizing care with a spine surgeon of claimant's choice, along with an order that defendants provide a smoking cessation program.

FINDINGS OF FACT

Claimant sustained an injury to his lower back on July 14, 2022. Defendants provided authorized care with Brett Rosenthal, M.D. By October 24, 2022, Dr. Rosenthal recommended surgery. (Defendants' Exhibit A, p. 1) At that time, claimant reported he had cut back on smoking and was only smoking one to two cigarettes per day. Dr. Rosenthal recommended a facetectomy and interbody fusion surgery. (Def. Ex. A, p. 2) His record indicates claimant was confident he could achieve nicotine-free status by his next visit in one month.

At his next appointment on November 21, 2022, claimant reported he had stopped smoking about one month prior. (Def. Ex. A, p. 3) Surgery was scheduled. Claimant's attorney stated that after receiving surveillance footage in December of 2022 that showed claimant smoking a cigarette, Dr. Rosenthal cancelled the surgery. Claimant's attorney then sent several emails to defense counsel requesting claimant be provided with smoking cessation treatment. (Claimant's Exhibit 1, p. 4) No such treatment was provided.

Claimant returned to Dr. Rosenthal on January 3, 2023. (Def. Ex. A, p. 5) He reported he had only smoked "a few" cigarettes since his prior visit, and he was two weeks tobacco free on that date. Dr. Rosenthal noted that claimant was making strong efforts to maintain his tobacco free status, and understood the risks of nicotine consumption in the setting of a fusion procedure. (Def. Ex. A, p. 6) As such, Dr. Rosenthal agreed to get claimant back on the schedule for surgery after six weeks of claimant maintaining a nicotine free status, as that would be "critical for his success with this operation." (Def. Ex. A, p. 7)

On April 27, 2023, claimant returned to Dr. Rosenthal. (Def. Ex. A, p. 8) He reported he was 26 days free of nicotine. However, Dr. Rosenthal ran a nicotine test, which indicated otherwise. (Def. Ex. A, p. 10) 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.

On April 28, 2023, claimant's attorney wrote to defense counsel and again requested smoking cessation treatment, as well as a new authorized treating physician to provide care for claimant's low back condition. (CL. Ex. 1, pp. 6-7) The attorneys emailed back and forth a couple of times, and on May 8, 2023, defense counsel indicated that defendants were in the process of requesting claimant be seen by Trevor Schmitz, M.D., at Iowa Ortho. (Cl. Ex. 1, pp. 2-3) Counsel also advised that if Dr. Schmitz would not see claimant, they were working on finding an additional referral.

Claimant's petition for alternate medical care was filed on May 8, 2023. On May 17, 2023, defense counsel emailed claimant's attorney and indicated Dr. Schmitz was in

the process of reviewing claimant's records and would advise whether he will accept the referral as soon as possible. (Cl. Ex. 1, p. 1) At hearing, defense counsel advised they continue to wait on a response from Dr. Schmitz, and have also contacted Des Moines Orthopedic Surgeons (DMOS) in the event Dr. Schmitz will not agree to see claimant.

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. 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.

Ultimately, determining whether care is reasonable under the statute is a question of fact. Long, 528 N.W.2d at 123. Claimant's attorney referenced a 2016 alternate care decision, Stowe v. Oakleaf Property Management, File No. 5057591 (Alt. Care, Nov. 28, 2016). In that case, the deputy ordered defendants to provide smoking cessation treatment if the selected physician recommended it after evaluation. Likewise, in this case, should the authorized treating physician order specific smoking cessation treatment prior to surgery, defendants will then have an obligation to provide it. At this time, however, no such recommendation has been made. Claimant told Dr. Rosenthal on more

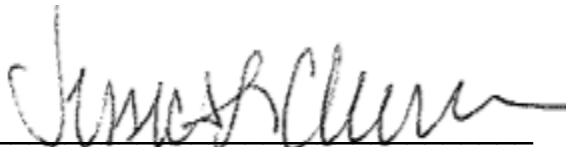
than one occasion that he was confident he would be able to stop smoking on his own. There is no indication in the medical records that a smoking cessation program or treatment has been recommended by an authorized treating physician.

Therefore, in this case, claimant has not made the requisite showing that the care defendants are providing was not offered promptly, was not reasonably suited to treat the injury, or was unduly inconvenient. Defendants are making attempts to have claimant's care transferred to a different spine specialist since Dr. Rosenthal will no longer treat claimant. They are waiting to hear from Dr. Schmitz, and have contacted DMOS to start the process in the event Dr. Schmitz will not see claimant. Claimant has not met his burden to prove the authorized care is unreasonable at this time. As such, claimant is not entitled to alternate care.

THEREFORE, IT IS ORDERED:

Claimant's petition for alternate medical care is denied.

Signed and filed this 19th day of May, 2023.



JESSICA L. CLEEREMAN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Nick Cooling (via WCES)

Jessica Voelker (via WCES)

Kathryn R. Johnson (via WCES)