BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RICK ARGO, Claimant, vs. KINSETH HOSPITALITY d/b/a BENNIGAN'S GRILL & TAVERN, Employer, and C.N.A. CLAIM PLUS, Insurance Carrier, Defendants.	:	File No. 5030397 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 alternate medical care procedure of rule 876 IAC 4.48, is requested by claimant, Rick Argo.

The alternate medical care claim was scheduled for a telephone hearing on July 10, 2009. The hearing was recorded by means of a digital audio recorder, which constitutes the official record. The undersigned has been delegated the authority to issue a final agency action in this matter. Appeal of this decision, if any, would be made by judicial review pursuant to Iowa Code chapter 17A.19.

The record consists of claimant's testimony and claimant's exhibit 1 consisting of seven pages. Claimant's exhibits attached to the hearing report have been page numbered by the undersigned to facilitate references to the exhibits in this decision and will be referred to as exhibit 1 and the appropriate page number.

No answer was filed by Kinseth Hospitality d/b/a Bennigan's Grill and Tavern and C.N.A. Claims Plus, defendants. The hearing was held as authorized by Iowa Code section 17A.12(3) which allows a hearing to proceed and a decision to be made in the absence of a party.

ISSUE

The issue presented for resolution is whether claimant is entitled to alternate medical care he seeks, namely arthroscopic right knee surgery by Matthew Weresh, M.D.

FINDINGS OF FACT

The deputy workers' compensation commissioner having heard the testimony and considered the evidence in the record finds:

Rick Argo, claimant, is 46 years old and resides in Manly, Iowa. He sustained a work injury on April 29, 2008, when he slipped, fell and experienced right knee pain while working for Kinseth Hospitality d/b/a Bennigan's Grill and Tavern, (Claimant's Testimony and Exhibit 1, page 1) Claimant was initially treated by Jay Mixdorf, M.D., who ordered x-rays, an MRI and referred claimant to Eric Potthoff, D.O., an orthopedic surgeon in Mason City, Iowa. (Claimant's Testimony and Ex. 1, p. 1)

Dr. Potthoff saw claimant on June 24, 2008 and after reviewing the x-rays and MRI and examining him formed an impression of medial meniscal tear, right knee, with advanced degenerative joint disease greatest at the medial compartment. (Ex. 1, pp. 1-2) Dr. Potthoff noted claimant was 6 feet 4 inches tall and weighed 360 pounds. (Ex. 1, p. 1) Dr. Potthoff explained to claimant that he had significant underlying arthritis in the knee which limited his options. (Ex. 1, p. 2) Dr. Potthoff noted that at some point claimant was going to need total knee replacement arthroplasty but did not recommend it that time "secondary" to his young age and heavy weight. (Ex. 1, p. 2) Dr. Potthoff did not think physical therapy or a cortisone injection into the knee would likely result in "complete pain relief secondary to the arthritis in the knee." (Ex. 1, p 2) Claimant declined the cortisone injection. (Claimant's Testimony) Dr. Potthoff did not think that arthroscopy would be beneficial to claimant with the amount of arthritis he had in the knee. (Ex. 1, p 2) Dr. Potthoff also thought that given claimant's size he would not tolerate a knee brace even if one could be found to fit him. (Ex. 1, p. 3) Dr. Potthoff saw claimant again on August 25, 2008 and thought at that time it was premature to determine an impairment rating and recommend claimant follow-up in six months. (Ex. 1, p. 4)

Claimant's attorney referred him to Matthew Weresh, M.D., an orthopaedic surgeon, in Des Moines, Iowa. (Ex. 1, p. 6) Dr. Weresh reviewed the x-rays and MRI and examined claimant on May 4, 2009. (Ex. 1, p. 6) Dr. Weresh formed impressions of moderate to borderline-severe degenerative arthritis, predominantly in the medical compartment of the right knee; meniscal tearing and fragmentation, medial compartment right knee; and obesity. (Ex. 1, p. 6) Dr. Weresh offered claimant arthroscopy which the doctor thought might give claimant as little as zero to 10 percent relief or it could possibly give him up to 80 percent relief depending on the amount of symptoms coming from the meniscus tear versus his arthritis. (Ex. 1, p 7) Dr. Weresh discussed with claimant that the arthroscopy was not going to address all of his pathology and claimant should not expect complete relief of his symptoms. (Ex. 1, p 7)

Dr. Weresh also noted that if claimant's arthritis was treated with a knee replacement "that would be most appropriately done on his own insurance situation." (Ex. 1, p. 7)

Claimant returned to Dr. Potthoff on May 5, 2009 with continuing complaints of pain. (Ex. 1, p. 5) Claimant reported that he had seen Dr. Weresh and he was considering having arthroscopy of the knee. (Ex. 1, p 5) According to claimant's testimony Dr. Potthoff told him Dr. Potthoff could do the surgery but based on Dr. Potthoff's response he did not want Dr. Potthoff to do the surgery. (Claimant's Testimony) Dr. Potthoff explained to claimant that the knee arthroscopy can take care of the meniscal tear but it will not alleviate the degenerative joint disease and it is possible he could have increased pain after arthroscopy and that was why he was not pushing it as an option. (Ex. 1, p 5) Dr. Potthoff released claimant to return to work (Claimant's Testimony) and told claimant to follow-up on an as-needed basis. (Ex. 1, p 5)

Claimant continues to work without restrictions, has continuing knee pain and takes over-the-counter medication. (Claimant's Testimony).

CONCLUSIONS OF LAW

The issue to be resolved is whether claimant is entitled to the alternate medical care he seeks, namely arthroscopic right knee surgery by Dr. Weresh.

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 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. Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995).

Alternate care included alternate physicians when there is a breakdown in a physician/patient relationship. Seibert v. State of Iowa, File No. 938579 (September 14, 1994); Nueone v. John Morrell & Co., File No. 1022976 (January 27, 1994); Williams v. High Rise Const., File No. 1025415 (February 24, 1993); Wallech v. FDL, File No. 1020245 (September 3, 1992) (aff'd Dist Ct June 21, 1993).

"Determining what care is reasonable under the statute is a question of fact." Long v. Roberts Dairy Co., 528 N.W.2d 122, 123 (Iowa 1995).

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."

Offering no care is the same as offering no care reasonably suited to treat the injury. Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433, 436 (Iowa 1997)

Both Dr. Potthoff and Dr. Weresh think claimant sustained a medial meniscal tear. Both Dr. Potthoff and Dr. Weresh appear to agree that arthroscopy of the knee is an appropriate treatment for the medial meniscal tear but disagree on how successful the surgery might be. Both Dr. Potthoff and Dr. Weresh agree that the arthroscopy will not alleviate the degenerative joint disease nor all of claimant's symptoms. While the results of the arthroscopy are not guaranteed by Dr. Weresh, claimant continues to having ongoing pain and the defendants at this point are offering claimant no care. The testimony of claimant suggests that there has been a breakdown in a physician/patient relationship between him and Dr. Potthoff. Claimant has proved he is entitled to the care he seeks, the arthroscopy of the right knee for the medial meniscus tear.

ORDER

THEREFORE, it is ordered:

That claimant's petition for alternate medical care is granted and defendants shall provide care of right knee arthroscopy for the medial meniscus tear by Dr. Weresh.

Signed and filed this ___14th_____ day of July, 2009.

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CLAIR R. CRAMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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