IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ONTARIO DAVIS,

Plaintiff,

v.

BARBARA DeLAP, SGT. NOVINSKA, PETER HUIBREGTSE and VICKI DORN a.k.a. "JANE DOE",

Defendants.

OPINION AND ORDER

10-cv-674-slc

This is a prisoner civil rights case in which plaintiff Ontario Davis claims that defendants provided constitutionally inadequate treatment for his impacted wisdom tooth. Plaintiff was granted leave to proceed on his claims that: 1) defendants Peter Huibregtse and Barbara DeLap violated his rights under the Eighth Amendment by failing to provide an adequate number of dentists and dental equipment, resulting in delay and unnecessary pain to plaintiff; and 2) defendants Lesa Novinska and Nurse Jane Doe (who has now been identified as Vicki Dorn) violated his rights under the Eighth Amendment by failing to provide adequate care for his headache and face pain on July 27, 2010.

All of the defendants except Dorn[1] have moved for summary judgment. Because I agree with the defendants that plaintiff has failed to come forth with admissible evidence from which a jury could conclude that these defendants were deliberately indifferent to his dental needs, I am granting defendants' motion.

From the parties' proposed findings of fact and granting all inferences in favor of plaintiff, I find the following to be undisputed for the purpose of deciding the motion for summary judgment:

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[1] Dorn is not represented by the attorney general's office and has failed to appear or otherwise defend this lawsuit. This court will address plaintiffs' motion for default judgment against Dorn (dkt. 94) in a separate order.

UNDISPUTED FACTS

I. The Parties

At all times material to this action, plaintiff Ontario Davis was imprisoned at the Wisconsin Secure Program Facility ("WSPF") in Boscobel, Wisconsin. (Plaintiff has been transferred to Columbia Correctional Institution.) Defendant Peter Huibregtse was the warden at the prison; defendant Lesa Novinska was a correctional officer there. Neither Huibregtse nor Novinska is responsible for providing dental care to inmates.

Defendant Barbara DeLap is the Dental Director for the Wisconsin Department of Corrections (DOC). DeLap oversees all the dental practitioners who provide dental services to inmates, authorizes requests for non-emergency diagnostics, consultations and oral surgery procedures, and ensures that dentists practicing at the various institutions have the equipment they need to perform their duties.

Defendant Vicki Dorn was a registered nurse employed by Premier Medical, an agency with which the DOC contracted to provide nursing care to WSPF inmates. Dorn worked as a nurse at WSPF through Premier Medical from May 21, 2010 to August 22, 2010.

II. WSPF's Dental Services Unit

WSPF has a fully-equipped dental unit with three dental chairs and one intraoral x-ray machine. The dental services unit is staffed by a part-time LTE dental hygienist and a 0.3 FTE dental assistant. WSPF is allocated a 0.3 FTE dentist position, but DeLap only has been able to fill 0.2 FTE of the 0.3 FTE time, which works out to one work day each week. The dentist is Dr. Mathias Weber, who visits WSPF on Fridays. Weber is an independent contractor hired

by WSPF for this purpose. DeLap occasionally has deployed dentists from other institutions to WSPF on an as-needed basis.

WSPF dental staff provide preventative, routine and urgent dental care on site. The dentist examines teeth, fills cavities, performs routine extractions and certain root canals. Under the direction of the dentist, the hygienist cleans teach and educates patients in oral health. The hygienist maintains a recall list and contacts inmates when they are due for their next cleaning.

DOC employs three general dentists on a regional basis who are skilled in certain oral surgery procedures that are beyond the skill level of many general dentists, including difficult extractions and other surgical procedures. DOC deploys these specially-skilled dentists to correctional institutions in order provide specialized dental care to inmates internally, thus eliminating–or at least minimizing–the need to transport inmates into the community. At the times material to this lawsuit, none of these specially-skilled dentists visited WSPF on a regular basis.

WSPF does not have a panoramic x-ray machine. The only panoramic x-ray machines in the DOC system are located at intake facilities such as Dodge Correctional Institution (DCI). If the WSPF dental staff additional x-rays for an inmate, then they can take certain types with WSPF's intraoral machine or they can send the inmate to DCI or into the community for additional panoramic x-rays.

To request dental care, an inmate must fill out a Dental Service Request (DSR) in his housing unit. These requests are picked up daily and delivered to the dental unit at the start of the morning shift.

III. Plaintiff's Dental History Regarding Tooth #32

On May 11, 2005, plaintiff was advised by Dr. Boston, a contract dentist at WSPF, that his wisdom tooth on the lower right side–Tooth #32–was undergoing "chronic inflammation" and needed to be extracted. Dr. Boston noted, however, that he would be unable to extract the tooth until an x-ray was taken. After plaintiff's examination by Dr. Boston, plaintiff was under the impression that he was on the dental list to have his tooth extracted, but no appointments to extract the tooth were made.

Almost four years went by. On March 31, 2009, plaintiff was examined by another dentist at WSPF and was told that he should have been on the list to have his tooth extracted. As the dentist recommended, plaintiff submitted a DSR asking to have his tooth extracted, noting that the dentist had told him that problems could arise in the future if the tooth was not removed. Plaintiff did not report any problems with his tooth at that time. Dental health services responded that plaintiff had been placed on the list to have his tooth extracted, noting that there was "a dentist who comes in as needed to do these difficult extractions" but it was unknown when he would next visit WSPF.

On November 2, 2009, plaintiff submitted another DSR, again asking to have his tooth extracted. Plaintiff stated that he was feeling "slight agitation" when he bit down on his left side and he wanted the tooth removed before the problem worsened. Dental services staff again responded that plaintiff was on the waiting list to see the dentist who performed surgical extractions, but it was unknown when the dentist would be at WSPF.

On March 10, 2010, plaintiff was placed on the "essential wait list" after filing yet another DSR asking about the extraction, and was told that he would be called in to have the

situation reevaluated. Shortly thereafter, he was told by the WSPF dentist, Dr. Weber, that the tooth could not be extracted until plaintiff had a panoramic x-ray that showed the area surrounding the tooth. Dr. Weber told plaintiff that the panoramic x-ray machine would arrive at WSPF in about a month. (Although defendants have not disputed plaintiff's assertion that this conversation occurred, there is no corresponding dental record showing that Dr. Weber saw plaintiff in March 2010, that Dr. Weber ordered a panoramic x-ray or that any of the defendants knew that plaintiff needed a panoramic x-ray.)

In April and June 2010, plaintiff inquired about the x-ray machine and was told by dental services staff that they were still waiting for it.

On February 11, 2011, Dr. Weber again saw plaintiff. Weber described plaintiff as having chronic pericornitis (a dental disorder in which the gum tissue around the molar teeth becomes swollen and infected, usually caused by wisdom teeth) that had flared up one to three times in the past several years. Dr. Weber told plaintiff that if his pericornitis flared up, he could take 800 milligrams of ibuprofen every four hours. He also prescribed 500 milligrams penicillin to be taken four times daily for seven days if appropriate.

On or before February 15, 2011, DeLap authorized plaintiff to be taken off site for a panoramic x-ray, particularly of Tooth #32. The x-ray was taken on February 15, 2011. After reviewing the x-ray, Weber requested that plaintiff be permitted to see an oral surgeon for extraction of the tooth, noting that plaintiff's tooth was situated horizontally within the bone with the crown of the tooth lower than the root. DeLap approved this request on February 22, 2011.

On March 25, 2011, plaintiff was seen by Dr. Kelly, an oral surgeon working at DCI. Dr. Kelly spent at least 45 minutes discussing with plaintiff the pros and cons of surgery, what the extraction procedure would entail, potential alternative treatments and potential risks of the surgery. In particular, Kelly informed plaintiff that there was a high risk of permanent nerve damage affecting the tongue, lips, chin, teeth and gums on the operated side. Dr. Kelly noted that after this discussion, plaintiff was indecisive about whether he wanted to proceed with the surgery. Accordingly, Dr. Kelly indicated that he would treat the appointment as a "consult only" and that plaintiff could call to reschedule if he decided to go ahead with the extraction.

(Plaintiff admits that he began to sign a form indicating that he was refusing treatment, but says he then changed his mind and told Dr. Kelly to proceed with the extraction; according to plaintiff, at that point Dr. Kelly refused to perform the surgery, stating that he and plaintiff were "not on the same wavelength." Plaintiff, however, has not sued Dr. Kelly or alleged that any of the other defendants were responsible for Dr. Kelly's alleged refusal to extract the tooth on March 25, 2011.)

Plaintiff submitted DSR forms on June 18 and June 30, 2011, in which he complained about sores and pain in his mouth around the area of his wisdom tooth. Dr. Weber saw plaintiff on July 8, 2011. In his notes, Dr. Weber wrote that plaintiff was not having problems with his tooth at that time but that he had had inflammation recently. Dr. Weber discussed with plaintiff the risks of extracting versus not extracting the tooth. According to Dr. Weber's notes, plaintiff was reluctant to have Tooth #32 extracted because of the surgical risks, but he wanted to have medication available if an infection arose. (Plaintiff denies ever indicating reluctance to

have the tooth pulled.) Weber issued a standing prescription that allowed plaintiff to receive ibuprofen and penicillin for seven days as needed when his pericornitis of Tooth #32 flares up.[2]

In October 2011, plaintiff submitted a DSR form asking to be seen again by the oral surgeon, Dr. Kelly, for the purpose of having his tooth extracted. Dental services staff responded that the appointment would be scheduled. Plaintiff was seen by a different oral surgeon, Dr. Bacsik, on November 10, 2011. According to Dr. Bacsik's office reports, he has recommended that plaintiff return to the clinic to have Tooth #32 extracted.

Plaintiff still has not had his wisdom tooth extracted.

IV. The July 27, 2010 Incident

At 6:44 p.m. on July 27, 2010, plaintiff pressed the emergency call button in his cell. Defendant Novinska, the correctional officer on duty, responded to the call on the intercom. Plaintiff told Novinska that he had a severe headache and pain on the right side of his face emanating from his wisdom tooth, and asked if he could see a nurse. Novinska responded that he would have to pay a $7.50 co-pay if the nurse came to see him and asked if he wanted Tylenol instead; plaintiff responded that he wanted to see a nurse. Novinska then cut off the intercom. Plaintiff used his emergency call button again to call Novinska at around 6:56 p.m.; Novinska again responded that plaintiff would have to pay the co-pay if he saw the nurse and reiterated her offer of Tylenol. Plaintiff repeated that he wanted to see the nurse regardless of the co-pay. Novinska informed the nurse on duty in the Health Services Unit–defendant Vicki Dorn–about plaintiff's complaint.

[2] Plaintiff asserts that this prescription was cancelled when he transferred to Waupun Correctional Institution, but he does not suggest that it was any of the defendants in this lawsuit who cancelled it.

At around 7:47 p.m., Novinska informed plaintiff that the nurse would be down in two minutes. However, Dorn did not come to plaintiff's unit because Novinska told her that plaintiff was refusing to pay the medical co-pay for the visit. (When plaintiff later filed an inmate complaint about the incident, the Institution Complaint Examiner found that Dorn should have gone to the unit and evaluated plaintiff even if he was refusing to pay the co-pay.) Although Novinska does not recall whether plaintiff was provided with any medication, plaintiff avers that Novinska provided him with two Tylenol tablets, which were delivered by correctional officer Fritz at 7:51 p.m. According to plaintiff, the Tylenol was ineffective.

At around 8:30 p.m., Novinska arrived at plaintiff's cell door. Plaintiff told her that he did not care about paying the co-pay, to which Novinska responded: "I know, I logged it down," adding "They didn't want to see you."

On July 29, 2010, plaintiff submitted a DSR stating that on July 27, he had experienced a severe headache and extreme pain on the right side of his face emanating from his wisdom tooth area. Plaintiff asked for a "controlled med" to be prescribed in the event he experienced similar pain in the future. Dental staff responded that although they could not prescribe "controlled medication," plaintiff could take 800 milligrams of ibuprofen with food up to four times a day.

On August 10, 2010, plaintiff submitted an Offender Complaint, WSPF-2010-16559, in which he complained that Novinska had lied to the institution complaint examiner who investigated his complaint related to the July 27, 2010 incident when she told the examiner that plaintiff had refused to pay the co-pay. The WSPF institution complaint examiner investigated the complaint and recommended that it be rejected, on the ground that the issues raised had been addressed in plaintiff's previous complaint. Plaintiff appealed the rejection to Huibregtse,

who was the reviewing authority. Huibregtse rejected plaintiff's complaint, finding that it had been appropriately rejected by the institution complaint examiner. Huibregtse did not receive any other correspondence or offender complaints from plaintiff indicating that he was not being provided with dental treatment at WSPF.

OPINION

I. Summary Judgment Standard

Summary judgment is proper where there is no showing of a genuine issue of material fact in the pleadings, depositions, answers to interrogatories, admissions and affidavits, and where the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "'A genuine issue of material fact arises only if sufficient evidence favoring the nonmoving party exists to permit a jury to return a verdict for that party.'" *Sides v. City of Champaign*, 496 F.3d 820, 826 (7th Cir. 2007) (quoting *Brummett v. Sinclair Broadcast Group, Inc.*, 414 F.3d 686, 692 (7th Cir. 2005)). In determining whether a genuine issue of material facts exists, the court must construe all facts in favor of the nonmoving party. *Squibb v. Memorial Medical Center*, 497 F.3d 775, 780 (7th Cir. 2007). Even so, the nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, he must come forward with enough evidence on each of the elements of his claim to show that a reasonable jury could find in his favor. *Borello v. Allison*, 446 F.3d 742, 748 (7th Cir. 2006); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986).

II. Eighth Amendment Framework

To survive summary judgment on his Eighth Amendment claims, plaintiff must propose facts from which a reasonable jury could find that defendants' alleged failure to provide adequate treatment for his wisdom tooth constituted "deliberate indifference" to his "serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). A medical need may be serious if it is life-threatening, if it carries a risk of permanent serious impairment if it is left untreated or if it results in needless pain and suffering when it is not treated, *Gutierrez v. Peters*, 111 F.3d 1364, 1371-73 (7th Cir. 1997), or otherwise subjects the prisoner to a substantial risk of serious harm, *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). A serious medical need may be a condition that a doctor has recognized as needing treatment or one for which the necessity of treatment would be obvious to a lay person. *Johnson v. Snyder*, 444 F.3d 579, 584-85 (7th Cir. 2006).

If plaintiff shows that he has a serious medical need, he would still need to show that defendants' treatment with respect to his wisdom tooth and associated pain was "so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate the prisoner's condition." *Snipes v. DeTella*, 95 F.3d 586, 592 (7th Cir. 1996) (internal quotations omitted). In other words, defendants' treatment must be so far afield of accepted professional standards as to imply that it was not actually based on a medical judgment. *Estate of Cole by Pardue v. Fromm*, 94 F.3d 254, 262 (7th Cir. 1996). "Deliberate indifference" means that the officials were aware that the prisoner needed medical treatment, but disregarded the risk by failing to take reasonable measures. *Forbes v. Edgar*, 112 F.3d 262, 266 (7th Cir. 1997). A delay in treatment may constitute deliberate indifference if the delay exacerbated the injury or unnecessarily prolonged an inmate's pain. *Estelle*, 429 U.S. at 104-05; *Gayton v. McCoy*, 593 F.3d 610, 619 (7th Cir. 2010); *Edwards v. Snyder*, 478 F.3d 827, 832 (7th Cir. 2007).

III. Delay in Treatment for Impacted Wisdom Tooth from March 2009 to March 2011

Although defendants dispute whether plaintiff's impacted wisdom tooth is a serious medical need, it is unnecessary to reach this question because plaintiff has failed to adduce evidence to show that defendants were deliberately indifferent to that need. In this regard, it is important to understand the nature of plaintiff's claims. Plaintiff does not contend that the dental services staff at WSPF ignored his condition or provided him with inadequate care. It is undisputed that plaintiff was eventually seen in March 2011 by an oral surgeon, Dr. Kelly, who was prepared to extract the tooth. Further, with the exception of the July 27, 2010 incident (which I address below), plaintiff has not submitted evidence showing that he suffered any flare-ups of his pericornitis that went unaddressed by dental staff or that rose to the level of a serious medical need. What plaintiff complains of is the delay that occurred from March 2009, when he submitted a DSR asking for the tooth to be extracted, to March 2011, when he saw Dr. Kelly. (Although plaintiff points out that the recommendation that the tooth be extracted was first made in 2005, he does not offer any evidence suggesting that either Huibregtse or DeLap was personally responsible for any delay from 2005 to 2009.) According to plaintiff, because of the delay, he now faces a high risk of permanent nerve injury if he has the wisdom tooth extracted.

There are several problems with plaintiff's claim. First, when an inmate contends that prison officials delayed rather than denied him medical assistance, he must offer "verifying medical evidence" that the delay (rather than his underlying condition) caused some degree of harm. *Williams v. Liefer*, 491 F.3d 710, 714 -715 (7th Cir. 2007); *Langston v. Peters*, 100 F.3d 1235, 1240 (7th Cir. 1996); *see also Petty v. County of Franklin, Ohio*, 478 F.3d 341, 344 (6th Cir. 2007); *Laughlin v. Schriro*, 430 F.3d 927, 929 (8th Cir. 2005); *Hill v. Dekalb Reg'l Youth Det. Ctr.*,

40 F.3d 1176, 1188 (11th Cir. 1994), *abrogated on other grounds by Hope v. Pelzer*, 536 U.S. 730 (2002). Expert testimony would constitute such evidence, and in most cases, will be necessary to assist a jury in determining the effect of the delay in treatment. *Williams*, 491 F.3d at 715. However, in some instances, the inmate's medical records may be sufficiently clear to permit an inference that a delay in treatment caused the plaintiff to undergo necessary harm. *Id*.

Plaintiff has not offered any expert testimony in support of his claim that the potential for nerve damage presented by the position of his wisdom tooth should he choose to have it extracted is any greater now than it was in 2009 or even in 2005, when a dentist first recommended that he have the procedure. Instead, plaintiff offers mostly his own testimony about what various dentists allegedly told him. *See* Plt.'s PPFOF, dkt. 93, Nos. 27-31. Such evidence, however, constitutes hearsay and is not admissible. Plaintiff also avers that he compared an x-ray of his wisdom tooth taken in 1998 to one taken in 2011 and noticed that "the tooth shifted significantly" during that time period. Plaintiff, however, offers no evidence that he has any expertise in interpreting dental x-rays, which is a subject beyond the capacity of lay persons and therefore one in which expert testimony is required. Without expert testimony, plaintiff simply cannot prove that the risk of nerve damage he faces can be attributed to any delay from 2009-2011.

Second, even if plaintiff could prove that the two-year delay in extracting his wisdom tooth has created an enhanced risk of nerve damage or otherwise caused him unnecessary pain, plaintiff's Eighth Amendment rights were violated only if DeLap or Huibregtse was aware of this risk and disregarded it. *Farmer,* 511 U.S. at 837. Plaintiff has failed to propose any facts from which a jury could draw this conclusion. Notably, there is no evidence in the record showing

that plaintiff or anyone else informed DeLap or Huibregtse that plaintiff was in need of a panoramic x-ray or consultation with an oral surgeon. DeLap's first involvement in plaintiff's dental care appears to have been in February 2011, when she approved plaintiff being sent off-site for a panoramic x-ray. (Presumably, Dr. Weber made this request, but that is not clear from the record.) On February 18, 2011, Dr. Weber requested that plaintiff be sent off site to consult with an oral surgeon; DeLap approved this request four days later. There is simply no evidence that DeLap was personally involved in the delay with respect to plaintiff's dental treatment. *Backes v. Village of Peoria Heights, Ill.*, 662 F.3d 866, 869 (7th Cir. 2011) (it is a "well-established principle of law that a defendant must have been 'personally responsible' for the deprivation of the right at the root of a § 1983 claim for that claim to succeed").

The same goes for Warden Huibregtse. Plaintiff's theory of liability against Huibregtse rests solely on his contention that as the highest-ranking official at the institution, Huibregtse is generally responsible for the well-being of all inmates housed there and for the conduct of all of his subordinates. This theory will not fly: §1983 does not allow plaintiffs to hold supervisors strictly liable for the acts of their underlings. *Harris v. Greer*, 750 F.2d 617, 618 (7th Cir. 1984). Further, the mere fact that Huibregtse reviewed plaintiff's inmate complaint in which he alleged that Novinska lied to the ICE when she reported that plaintiff had refused to pay the co-pay on July 27, 2010 is not enough to suggest that Huibregtse was aware that plaintiff was awaiting treatment for an impacted wisdom tooth or that he turned a blind eye to plaintiff's dental needs.

Finally, plaintiff says DeLap and Huibregtse are personally responsible for the delay in treating his wisdom tooth because they failed to hire an adequate number of dentists to meet the institution's dental needs and to have a panoramic x-ray machine at WSPF. However,

plaintiff has offered no evidence as to what would constitute "adequate" dentist staffing levels, nor has he provided evidence that a panoramic x-ray machine was necessary at the institution. Plaintiff might well have obtained treatment more quickly if there had been more dentists on staff or if a panoramic x-ray machine had been available, but this does not establish that defendants were deliberately indifferent to plaintiff's dental needs. "Under the Eighth Amendment, [a prisoner] is not entitled to demand specific care" or "the best care possible," only "reasonable measures to meet a substantial risk of serious harm[.]" *Forbes v. Edgar*, 112 F.3d 262, 267 (7th Cir. 1997). Plaintiff has not shown that the dental care available to him at WSPF was not reasonably capable of meeting his dental needs, much less that defendants were aware of that fact.

For all these reasons, defendants DeLap and Huibregtse are entitled to summary judgment.

IV. Failure to Treat Flare-Up on July 27, 2010

Plaintiff's second claim relates to his pain flare-up on July 27, 2010. According to plaintiff, defendant Novinska exhibited deliberate indifference to his pain when she: 1) tried to "deter" him from receiving medical attention from the Health Services Unit by telling him he would be charged a co-pay for any visit; and 2) told the nurse (Dorn) in the Health Services Unit that plaintiff was refusing to pay the co-pay. According to plaintiff, Novinska's actions prevented him from being examined by medical staff that day.

As an initial matter, plaintiff has failed to propose sufficient facts from which a jury could find that his headache and right-sided face pain were sufficiently serious to constitute a serious

medical need. Although the Court of Appeals for the Seventh Circuit understandably has been reluctant to define the outer boundaries of what constitutes a serious medical need, it goes without saying that not "every ache and pain or medically recognized condition involving some discomfort can support an Eighth Amendment claim." *Gutierrez*, 111 F.3d at 1372.

Plaintiff says in his affidavit that his headache was "severe" and his pain was "extreme," but he does not say how long this pain lasted. Aff. of Ontario Davis, dkt. 82, ¶55. Even so, I can infer from the DSR that plaintiff submitted on July 29, 2010 that his pain had resolved by the end of the day on July 27. Aff. of Matthew Weber ,dkt. 77, exh. 1001, at 62 ("On 7-27-10 (Tuesday), I experienced a severe headache as well as extreme pain on the right side of my face . . . ").[3] Plaintiff has averred to intense discomfort and the court accepts his averments, but his four-to-six hour headache and facial pain are the "sort of ailments for which many people who are not in prison do not seek medical attention," *Cooper v. Casey*, 97 F.3d 914, 916 (7th Cir. 1996). Therefore, they are not serious enough to implicate the Eighth Amendment. *Compare Henderson v. Sheahan*, 196 F.3d 839, 846 (7th Cir. 1999) (breathing problems, chest pains, dizziness, sinus problems, headaches are "not sufficiently serious to be constitutionally actionable"), *Snipes v. DeTella*, 95 F.3d 586, 591 n. 1 (7th Cir. 1996)(toe whose toenail had been removed did not constitute serious medical need), and *Gibson v. McEvers*, 631 F.2d 95 (7th Cir. 1980) (failure to treat common cold does not violate Eighth Amendment) with *Gutierrez*, 111 F.3d at 1374 (purulent draining infection accompanied by excruciating pain and

[3] Further, even though plaintiff has averred that the Tylenol provided to him at 7:51 p.m. on July 27 was not effective in reducing his pain, he does not allege that he reported this fact or complained of pain to Novinska when she came to his cell about 40 minutes later. This suggests that his pain might have abated even earlier.

periodic fever exceeding 100 degrees was serious medical need), *Boyd v. Knox*, 47 F.3d 966 (8th Cir. 1995) (failure to send referral for dental care for three weeks after observing inmate's swollen and infected mouth, coupled with knowledge of inmate's suffering, could support a finding of an Eighth Amendment violation); *Fields v. Gander*, 734 F.2d 1313 (8th Cir. 1984) (claim may proceed where plaintiff alleged that defendants knew of pain resulting from infected tooth but delayed in providing dental care for three weeks); *Boretti v. Wiscomb*, 930 F.2d 1150 (6th Cir. 1991) (refusal to treat wound for five days or provide fresh dressings or pain medication as prescribed stated Eighth Amendment claim); *Brown v. Hughes*, 894 F.2d 1533, 1538 (11th Cir. 1990) ("a deliberate delay on the order of hours in providing care for a serious and painful broken foot is sufficient to state a constitutional claim"); *Hunt v. Dental Dep't*, 865 F.2d 198, 201 (9th Cir. 1989) (claim may proceed where plaintiff alleged that loss of dentures caused severe pain, bleeding gums, and breaking teeth, yet defendants took no action to provide pain relief or prescribe soft-food diet and delayed three months in obtaining replacement dentures); *Loe v. Armistead*, 582 F.2d 1291 (4th Cir. 1978) (11-hour delay in examining prisoner's painfully swollen and obviously broken arm may state claim).

Even assuming, however, that plaintiff's pain on July 27, 2010 rose to the level of a serious medical need, plaintiff's own proposed facts show as a matter of law that defendant Novinska was not deliberately indifferent to that medical need. "To demonstrate deliberate indifference, a plaintiff must show that the defendant 'acted with a sufficiently culpable state of mind,' something akin to recklessness." *Arnett v. Webster*, 658 F.3d 742, 751 (7th Cir. 2011) (quoting *Johnson v. Snyder*, 444 F.3d 579, 585 (7th Cir. 2006)). As plaintiff acknowledges, Novinska did not ignore his complaints of pain, but reported them to the nursing staff. *Greeno*

v. Daley, 414 F.3d 645, 656 (7th Cir. 2005) ("Perhaps it would be a different matter if [the non-medical prison official] had ignored [the plaintiff's] complaints entirely, but we can see no deliberate indifference given that he investigated the complaints and referred them to the medical providers who could be expected to address [the plaintiff's] concerns.").

Plaintiff does not suggest that Novinska minimized or failed to accurately describe his symptoms to the nurse. His claim of deliberate indifference rests on his contention that Novinska lied to the nurse about his willingness to pay the medical co-pay, which he argues must have been for the purpose of denying him relief for his pain. However, plaintiff has alleged that Novinska knew that a medical co-pay would not apply to plaintiff because it was an emergency situation, and that even if it did, the nurse's decision to provide him with medical treatment would not be based on whether he agreed to pay the co-pay or not. PPFOF, dkt. 93, at ¶48. This knowledge defeats any implication that Novinska knew or ought to have known that, by informing the nurse that plaintiff was refusing to pay the co-pay, plaintiff would not receive treatment. Thus, although plaintiff makes much of Novinska's alleged lie about the co-pay, by his own admission, it would have been immaterial.

Further, Novinska's own actions belie any suggestion that she acted in disregard of plaintiff's pain. According to plaintiff, after it became clear that nursing staff was refusing to see him, Novinska provided him with two Tylenol tablets without receiving permission from medical personnel to do so. Thus, Novinska did not simply report plaintiff's complaints to nursing staff, but took it upon herself to address plaintiff's pain. This suggests concern, not indifference. Novinska did not violate his constitutional rights.

CONCLUSION

As a result of this order, there is no need for a trial in this case because all of the parties who have appeared have obtained summary judgment. The remaining defendant never appeared and will have the outcome of plaintiff's claims against her decided in the court's order ruling on plaintiff's motion for default judgment (dkt. 94). Therefore, the April 30, 2012 trial date is stricken as unnecessary.

ORDER

IT IS ORDERED that the motion of defendants Peter Huibregtse, Barbara DeLap and Sgt. Lesa Novinska for summary judgment is GRANTED. The clerk of court is directed to enter judgment for these defendants.

Entered this 2nd day of April, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge