DOCKET NO. 453-03-1242.M2
[MDR TRACKING NO. M2-02-1185-01]

TML INTERGOVERNMENTAL RISK_____, **Petitioner**	§	**BEFORE THE STATE OFFICE**
v.	§	**OF**
_____, **Respondent**	§	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

I. Summary

Texas Intergovernmental Risk Pool (Carrier) sought review of the preauthorization by an independent review organization (IRO) of six months of in-home nursing and health aide care for _____ (Claimant). Carrier had denied Claimant's request for the service on the basis that more appropriate care would be rendered in a skilled nursing facility during the six-month period at issue. Based on the evidence, the Carrier failed to carry his burden of proof to show that in-home care was not the most appropriate care, and was not a reasonable and necessary treatment for Claimant's compensable injury. Home health care in the form of skilled nursing for 10 hours a day for seven days a week and a health aide for four hours per day for a duration of six months is preauthorized.

Administrative Law Judge (ALJ) Cassandra Church convened a hearing on this issue on January 22, 2003, and the record closed on that date. ___, Claimant's guardian, appeared on his behalf, aided by Luz Loza with Ombudsman Services of the Texas Workers' Compensation Commission (Commission). Steve Tipton appeared for the Carrier. The Commission did not participate. Notice and other jurisdictional facts were not contested, and are set forth below in the Findings of Fact and Conclusions of Law without further discussion.

II. Discussion

On_____, while serving as a volunteer for a civic event sponsored by_____, Claimant fell off a tractor, suffering a severe closed-head injury. Claimant is bedridden, has severe quadriparesis,[1] and currently uses tracheostomy[2] and feeding tubes. He has limited movement,

[1] Paresis is an incomplete paralysis. Dorland's *Illustrated Medical Encyclopedia.* (1994), P. 1234. Although Claimant's quadriparesis arose from the compensable injury, the precise physical cause is not known.

severe communication disabilities and is legally blind. He suffers from dysphagia, which is inability to swallow. After the acute care phase of treatment and initial rehabilitation, Claimant was moved to his home. His daily care is at present handled by his mother, _____, and members of Claimant's extended family. On June 20, 2002, Jose Burbano, M.D., Claimant's treating physician, requested preauthorization for six months of in-home medical care, specifically, a skilled nurse to attend Claimant at night for 10 hours per day, and a health aide to assist for four hours per day, seven days a week. After being denied preauthorization because he failed to provide a rationale for these services, Dr. Burbano resubmitted an expanded request on July 31, 2002. (Claimant Exhs. 3, 7). Carrier denied preauthorization of the more-detailed request on the basis that it was not the *most appropriate* care to achieve functional gains by Claimant in activities of daily living, so was not reasonable and necessary care in the immediate future.

Claimant requested review of the Carrier's decision, and on October 21, 2002, a reviewer with the Texas Medical Foundation (TMF), an independent review organization, determined that the home health care as described above was medically necessary to treat Claimant's condition. (Claimant Exh. 1). The Carrier then requested a hearing on the issue.

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[2] A tracheostomy tube is a device inserted in the front of the trachea, or windpipe, to relieve upper airway obstructions and assist the patient to breathe. Dorland's at P. 1727.

The dispute in this case concerns the best means of caring for Claimant, rather than a dispute as to whether Claimant needs round-the-clock health care of some type. Claimant continues to undergo therapy to improve his movement and speech skills. However, illnesses arising from his physical condition have prevented his continuous participation on those therapies, limiting his progress. Since July 2002, Claimant has been hospitalized at least three times, primarily for infections and pneumonia. Claimant spent approximately two and one-half months in the hospital in the latter half of 2002. (Claimant Exh. 10-13). During an episode of illness, Claimant discontinued his outpatient physical and speech/communications therapy. There is no disagreement that a major medical treatment goal is to "wean" Claimant from the tracheostomy tube and improve his ability to swallow. These two conditions require the most intensive daily care and also contribute materially to his recurrent illnesses. The Carrier's medical reviewer concluded gains in therapy and tracheostomy "weaning" could best be achieved in a skilled nursing facility, so the Carrier denied the July 31, 2002 reimbursement request for *in-home* health care.[3]

Testifying on Claimant's behalf was Mary Carlisle, M.D. Dr. Carlisle is Director of Traumatic Brain Injury Services at Baylor Institute for Rehabilitation. She was head of the team that oversaw Claimant's rehabilitation immediately after the acute care phase of his injury; she continues to follow his care and medical progress as needed, although she does not see him at regular intervals. She testified that Claimant is more motivated and performs better when his family is actively involved in his care, and recommended strongly against his institutionalization for the purposes of intensified therapy. She stated Claimant "shuts down" in an institutional environment and doubted he would show hoped-for gains in that environment. She also stated her belief that Claimant was not medically ready for "weaning" from the tracheostomy tube.

Dr. Carlisle was unstinting in her praise of the quality of care and training in health care procedures that Claimant's family members have undertaken to handle what she termed a "medically-complex" patient. They assist with both speech and physical therapy to preserve gains made in professional sessions, and actively engage Claimant in family life. However, Dr. Carlisle acknowledged that she did not have knowledge of Claimant's medical history in the six to eight months immediately before the hearing, including the hospitalizations for infections. However, Dr. Carlisle stated colonized bacteria common to persons with Claimant's conditions were liable to flare in either a home or institutional setting.

[3] The only pending request was for the preauthorization for the home health care, so this decision rules only on that request. There was no request for care in a skilled nursing facility, so this decision renders no opinion on whether that type of institutional care would be appropriate in the future.

___ herself described a day of care, including a checklist she devised to make sure Claimant's multiple care givers do all procedures timely. She also described the training family members have undergone. The family can readily transport Claimant to medical or therapy appointments and there is medical care nearby; Dr. Burbano will treat Claimant in his home.

In a letter prepared on December 10, 2002, Joseph V. Sudarki, M.D., of Pulmonary Associates, stated that treating Claimant at home "significantly reduces his exposure to resistant bacteria which is very important in a patient with a tracheostomy." He concluded that Claimant's treatment at home may reduce future hospitalizations. (Claimant Exh. 4). Dr. Sudarki has been treating Claimant for ongoing respiratory difficulties associated with the tracheostomy.

It is of some concern that neither party addressed the issue of whether the home health care in the frequency prescribed would be the most appropriate level of care necessary to support the therapy goals. Further, Dr. Sudarki's letter was the only medical evidence that affirmatively stated the home environment would be more likely to improve Claimant's pattern of illness. However, his opinion is undercut to some degree by the fact that Claimant's illness arose while he was living at home. Taken as a whole, the medical evidence in the record suggests that his medical condition is, to some degree, independent of setting.

The Carrier's medical evidence consisted primarily of a report prepared on November 8, 2002, by Eduardo R. Elizondo, M.D.[4] Based on his review of medical records though September 2002, Dr. Elizondo concluded that Claimant would make the most gains toward maximizing his independence in activities of daily living in a multi-disciplinary, in-patient stay at a rehabilitation facility. He concluded that concentration now on improving Claimant's ability to manage some activities of daily living activities might alter his long-term care needs. (Carrier Exh. 2). Essentially, he considered the home-health request to be premature. However, Dr. Elizondo's report failed to discuss the motivational or psychological elements of a home versus an institutional setting in accomplishing the stated therapy goals. Dr. Carlisle testified that in Claimant's case, the mental factors, particularly motivation, would be important to Claimant's success in a more-intensive therapy program, and that these were markedly better in the home setting.

Notwithstanding the fact that Dr. Elizondo's comments are based on more-recent medical information, the ALJ was, in the end, persuaded that care in Claimant's home would provide both

[4] Dr. Elizondo is a diplomate of both the American Boards of Physical Medicine and Rehabilitation and Electrodiagnostic Medicine.

increased medical scrutiny and leave intact the positive psychological and motivational elements provided by close family involvement. There was no evidence that home care would expose Claimant to a greater risk of illness than institutional care, or that home care could not be integrated with intensified therapy. Dr. Carlisle's testimony that illnesses caused by colonized bacteria will flare up in either a home or an institutional setting was persuasive.

The ALJ saw in this case two good-faith efforts to provide the best care for Claimant, and what appears to be an honest disagreement on how to best help Claimant manage at least some of his activities of daily living. The evidence from both parties suggested strongly that this six-month period could provide an ideal opportunity for joint assessment by his various doctors and therapists, along with his family, on how to most effectively employ both the abundant support of the family and the professional skills available in order to improve Claimant's capabilities and to moderate the long-term care tasks. However, the issue before the judge is not that broad, it is whether the specific course of home health care prescribed in August 2002 is medically necessary.

Based on the evidence in the record, the ALJ concludes that six months of night nursing care and day time home health aide care is medically necessary and reasonable for Claimant's care. It is hereby preauthorized.

III. Findings of Fact

1. On_____, _____ (Claimant) suffered a compensable injury, specifically a severe closed-head injury resulting from a fall from a tractor.

2. Texas Intergovernmental Risk Pool (Carrier) was the responsible insurer on Claimant's date of injury.

3. On July 31, 2002, Jose Burbano, M.D. (Provider), Claimant's treating physician, prescribed six months of home-health care to treat Claimant's ongoing medical conditions. He requested skilled nursing for 10 hours per day for seven days a week at night, and a home health aide for four hours per day, seven days a week.

4. Claimant is unable to swallow (dysphagia) and currently requires a tracheostomy tube to assist his breathing. He has some paralysis of all four limbs (quadriparesis) and cannot move his body without assistance. Claimant is legally blind and has severe communication disabilities. Claimant requires round-the-clock health care.

5. Claimant's movement and communication has improved some since the time of his injury. Continued progress toward mastering some activities of daily living is anticipated,

particularly through speech and physical therapy. Claimant cannot participate in physical or speech therapy when ill.

6. In the last six months of 2002, Claimant was hospitalized at least three times, spending approximately two and one-half months in hospitals. Claimant was hospitalized for illnesses arising from his medical condition, including urinary tract infections and pneumonia.

7. Improvement of Claimant's ability to swallow and "weaning" from the tracheostomy tube are important medical goals, both of which will improve his long-term condition, including the degree of long-term care needed.

8. Home health care would provide increased medical scrutiny and supplement care being given to Claimant by his mother and other extended-family members.

9. Claimant's emotional and psychological states, and his motivation, are more positive in his home. Positive mental factors would contribute materially to Claimant's success with physical and speech therapy.

10. Flare-ups in illnesses arising from Claimant's complex medical condition, particularly infections resulting from colonized bacteria, are possible in either a home or institutional setting.

11. Claimant's family members are trained to help Claimant preserve gains in movement and in communication which he reaches in professional therapy sessions conducted on an outpatient basis.

12. Claimant's family can transport him to outpatient speech and occupational therapy sessions, and has access to medical care close to Claimant's home. Claimant's treating physician will treat Claimant at Claimant's home.

13. Home health care will help Claimant achieve functional gains in activities of daily living as Claimant is more motivated and performs better when his family is actively involved in his care.

14. Carrier declined to preauthorize the in-home health care requested on the basis that immediate therapy goals could be met more effectively in an inter-disciplinary, intensive program in a skilled nursing facility.

15. Claimant timely sought review of the Carrier's decision. On October 21, 2002, a reviewer with the Texas Medical Foundation (TMF), an independent review organization, preauthorized the home health care described in Finding of Fact No. 3 as being medically necessary.

16. On November 27, 2002, Carrier requested a hearing on the decision by TMF.

17. On December 4, 2002, the Commission issued a notice of hearing which included the date, time, and location of the hearing and the applicable statutes under which the hearing would be conducted and a statement of matters asserted.

18. Administrative Law Judge Cassandra Church conducted a hearing on the merits of the case on January 22, 2003; the record closed that day.

IV. Conclusions of Law

19. The Texas Workers' Compensation Commission (Commission) has jurisdiction to decide the issues presented pursuant to TEX. LABOR CODE § 413.031.

20. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a Decision and Order, pursuant to TEX. LABOR CODE § 413.031 and TEX. GOV'T CODE ch. 2003.

21. Carrier timely requested a hearing, as specified in 28 TEX. ADMIN CODE (TAC) § 148.3.

22. Proper and timely notice of the hearing was effected on the parties in accordance with TEX. GOV'T CODE ch. 2001 and 28 TAC § 148.4(b).

23. Carrier has the burden of proving by a preponderance of the evidence that it should prevail in this matter, pursuant to 28 TAC § 148.21(h) and (i).

24. Carrier failed to prove by a preponderance of the evidence that six months of home health care, including skilled nursing and health aide care, was not reasonably required to relieve the effect of or promote recovery from a compensable injury suffered by Claimant, within the meaning of TEX. LABOR CODE §§ 408.021 and 401.0111(19).

25. Under TX. LABOR CODE § 413.015 and 28 TAC § 134.600, home health care should be preauthorized.

ORDER

IT IS HEREBY ORDERED that Dr. Jose Burbano's request for six months of home health care, including skilled nursing for 10 hours per day, seven days a week, and home health aide care for four hours, seven days a week during the day, is preauthorized.

SIGNED February 11, 2003.

STATE OFFICE OF ADMINISTRATIVE HEARINGS

CASSANDRA J. CHURCH
ADMINISTRATIVE LAW JUDGE