STATE OFFICE OF ADMINISTRATIVE HEARINGS
300 West 15th Street, Suite 502
Austin, Texas 78701

SOAH DOCKET NO. 453-03-1530.M4
MDR TRACKING NO. M4-03-1304

MARCOS V. MASSON, M.D.,	§	**BEFORE THE STATE OFFICE**
Petitioner	§	
V.	§	
	§	**OF**
TRANSCONTINENTAL	§	
INSURANCE COMPANY,	§	
Respondent	§	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Marcos V. Masson, M.D. ("Petitioner"), has challenged a decision by the Texas Workers' Compensation Commission's Medical Review Division ("MRD") in a medical fee dispute. The MRD denied Petitioner's requested reimbursement of $3,136.00 for surgery upon a claimant suffering from a compensable work-related injury, on the basis that Petitioner failed to submit a written preauthorization for the services.

Petitioner contends that his administrative staff obtained adequate verbal preauthorization for the disputed procedure from personnel associated with Transcontinental Insurance Company ("Respondent").

This decision generally supports that of the MRD, concluding that Petitioner has failed to show that any preauthorization was obtained in this case.

JURISDICTION AND VENUE

The Texas Workers' Compensation Commission ("Commission") has jurisdiction over this matter pursuant to § 413.031 of the Texas Workers' Compensation Act ("the Act"), TEX. LABOR CODE ANN. ch. 401 *et seq.* The State Office of Administrative Hearings ("SOAH") has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a decision and order, pursuant to § 413.031(k) of the Act and TEX. GOV'T CODE ANN. ch. 2003. No party challenged jurisdiction or venue.

STATEMENT OF THE CASE

The hearing in this docket was convened on March 24, 2003, at SOAH facilities in the William P. Clements Building, 300 W. 15th St., Austin, Texas. Administrative Law Judge ("ALJ") Mike Rogan presided. Petitioner appeared by telephone and was represented by Judy Parker, Office Manager. Respondent Corp. was represented by James Loughlin, Attorney.[1] The hearing adjourned after presentation of evidence and argument, but the record remained open until March 31, 2003, to allow the parties opportunity to submit comments or pleadings upon the validity of documentary evidence received at hearing.

The evidence presented revealed that the claimant suffered a compensable injury on ____. As part of the claimant's subsequent treatment, Petitioner scheduled surgery for April 2, 2002.[2] The surgery was not performed in response to an emergency, and obtaining preauthorization was therefore a prerequisite to the insurer's reimbursing Petitioner for such services. Although Petitioner had not received written preauthorization, he performed the surgery on schedule, apparently assuming that the insurer had given verbal.

However, an employee of the insurer (RSKCo, which is associated with Respondent) verbally denied preauthorization on April 3, 2002, in a telephone call to Petitioner's staff. Written denial was sent to Petitioner the next day, stating that a peer physician advisor had reviewed the request for preauthorization and had determined that no evidence demonstrated medical necessity for the surgery in question. Petitioner unsuccessfully requested reconsideration of the insurer's denial, then sought a dispute resolution review before the MRD.

The MRD issued a decision on November 14, 2002, concluding that Petitioner was entitled to no reimbursement for the disputed services. The MRD stated its rationale for decision as follows:

> Based on Commission Rule 134.600(a)(1)(4) preauthorization must be requested and approved; the requestor did not submit a written preauthorization for the procedures in dispute; therefore, reimbursement is not recommended.

Petitioner effected a timely appeal from the MRD's decision.

[1] The staff of the Commission was initially designated as a Respondent in the proceeding but formally elected not to participate, although it filed a "Statement of Matters Asserted" (incorporated within the Notice of Hearing).

[2] The surgery at issue was a right shoulder inferior capsular shift and a right cubital tunnel in situ release.

THE PARTIES' EVIDENCE AND ARGUMENTS

A. PETITIONER

Tracy Knauss, surgical coordinator for Houston Hand and Upper Extremity Clinic (with which Petitioner is associated), testified that she faxed a request for preauthorization of the April 2 surgery to ___ at RSKCo on February 21, 2002. On March 29, 2002, having received no response to the first request, Ms. Knauss faxed a second request to RSKCo's pre-certification department. The same day, she made a follow-up telephone call to the department, speaking to a male employee named "Deno" (who did not divulge his last name). According to Ms. Knauss, Deno told her that the requested preauthorization had been approved.

Ms. Knauss stated that she did not contact RSKCo again after March 29, 2002, to confirm that the insurer would issue a formal written approval of preauthorization, since, in her experience, such issuance could take a week or even a month. She also noted that her clinic had relied upon unconfirmed verbal authorizations on various occasions prior to this one.

Both Ms. Knauss and Obie Holland (the clinic's billing and insurance department supervisor) testified that the hospital at which the April 2 surgery was performed apparently obtained from RSKCo an "authorization number" for the procedure. Based upon her review of the case, Ms. Holland stated that the hospital must have contacted the insurer independently to confirm preauthorization, which is a normal working procedure. (On cross examination, however, Ms. Holland conceded that the number she perceived as an authorization number was the same number that RSKCo had used as a general case "Reference Number" at the top of the letter, dated April 4, 2002, that initially denied preauthorization.)

Petitioner argued, in closing, that relying upon verbal preauthorization is standard industry practice in those instances when time is too short to obtain written preauthorization.

B. RESPONDENT

Kathy Davidson, senior claims adjustor for RSKCo, testified for Respondent. She stated that any significant telephone communications relating to a case are required to be memorialized in the company's "file activity notes," which employees are instructed to update shortly after each such contact. Any transmission of verbal preauthorization should have been recorded in such notes, but nothing of the sort appears in the file for this case, either for March 29, 2002, or any other date. Nor do the notes reflect the receipt of any faxed request for preauthorization in this case on February 21, 2002.

In addition, Ms. Davidson noted, a review of company records indicated that no person named Deno has ever worked for RSKCo.

According to the record, after RSKCo received the request for preauthorization on March 29, 2002, it promptly referred the matter for peer review, in order to meet the three-day deadline for responding to such requests. Ms. Davidson noted that RSKCo policy does not contemplate giving approval for surgical procedures prior to peer review. But, she concluded, if such approval *had* been given, as Ms. Knauss asserted it was, RSKCo logically would not have then referred the case for a peer review, which at that point would have been wholly superfluous.

The certified record compiled by the Commission in this case, including the MRD's decision and accompanying documents totaling 58 pagesBwas admitted into evidence as Exhibit 1.

ANALYSIS

Clearly, the communications in this case between Petitioner and Respondent produced unfortunate confusion. Based upon the demeanor of the witnesses and the internal consistency of their testimony, the ALJ believes that both parties are convinced that their respective positions in the dispute are correct. However, because Petitioner bears the burden of proof in this proceeding, he must present evidence that is at least marginally more persuasive than that presented by Respondent, with respect to the fundamental issues in the case. In fact, though, the evidence produced by Petitioner upon the pivotal issue of whether or not Respondent actually approved preauthorization was, in the ALJ's view, at least marginally *less* persuasive than the corresponding evidence from Respondent.

The fact that Petitioner's staff merely faxed the initial request for preauthorization and then neglected to confirm its receipt or approval for more than a month undermines any contentions that the staff acted in a duly careful and orderly manner to arrange administrative aspects of the disputed surgery. Ms. Knauss conceded that she understood Commission rules requiring an insurer to respond to requests for preauthorization within three days, but she did not investigate the reason for lack of response to her first faxed request until less than three days before the scheduled date of the surgery.[3] The need for haste in addressing preauthorization at that point would naturally increase the likelihood of miscommunication and misunderstanding.

In order to establish that an agent for Respondent gave effective verbal preauthorization for the requested surgery, Petitioner would need to demonstrate that the agent in question had reasonably apparent authority to convey that preauthorization. However, Petitioner did not do this, either by citing official representations from RSKCo or by describing a clearly established course of dealings between RSKCo and Petitioner. Indeed, the preponderance of the evidence in this case raises doubts that any person who fits the limited description given for the authorizing agent even exists.

[3] According to Commission Advisory 96-11, issued on June 28, 1996, failure by an insurer to respond to a preauthorization request within three days, as required by Commission rules, represents a *denial* of the requested preauthorization–although an improper form of denial that is subject to administrative penalty.

The documentary evidence in the certified record, as corroborated by Ms. Davidson's testimony, indicates quite clearly that RSKCo initiated a routine process of evaluating the request for preauthorization, including the usual peer physician review, immediately after receiving the request on March 29, 2002. RSKCo completed the process within the three working days prescribed by Commission rule and transmitted a telephone response to Petitioner on April 3, 2002, with written confirmation on April 4, 2002. Certainly this would have been an idle and wasted effort if RSKCo had already authorized the surgery in question.

RSKCo's assignment of a general reference number to this case which the hospital hosting the surgery purportedly interpreted as an "authorization number"does not logically strengthen Petitioner's argument that RSKCo actually approved preauthorization. Since the number appears on the letter dated April 4, 2002, by which RSKCo initially denied preauthorization, it clearly seems to serve as a means of administratively tracking this particular case, not an indicator of the insurer's disposition of the request for preauthorization.

SOAH cases have held generally (although not uniformly) that an effective response to a request for preauthorization must include written notification. The version of Commission Rule 134.600(f)(4) in effect at the time this dispute arose (*i.e.*, amended as of January 1, 2002) requires that when an insurer responds to such a request by telephone, it must reiterate its decision to the requestor in writing within one working day. If RSKCo had given verbal approval for preauthorization on March 29, 2002-which was a Friday-it would have been required to provide written confirmation on Monday, April 1, 2002, the next working day. April 1 was still one day before the scheduled surgery at issue. Ordinary care seemingly would have prompted Petitioner to make sure that written preauthorization was forthcoming on April 1, particularly given the earlier confusion and ineffective communication relating to this case. However, Petitioner's staff made no inquiries to assure that RSKCo would provide written preauthorization. And consistent with Respondent's view that no verbal preauthorization had been given on March 29, 2002, RSKCo did not provide written confirmation on the next working day.

Instead, on the regulatory deadline for responding to the March 29 request for preauthorization, which was April 3, 2002, a RSKCo employee (case manager James Cox) undisputedly did telephone Petitioner's office with the information that RSKCo was denying the request, based upon peer review. The next day, RSKCo sent Petitioner written confirmation of that denial. Thus–unless some extraordinarily instant verbal preauthorization actually had been given on March 29, 2002–RSKCo's response to that date's request clearly conformed with the tight deadlines and rather precise procedures set out in Commission rules.

In the ALJ's judgment, this decision does not need to reach the question of whether Petitioner failed to obtain *written* preauthorization, since he has failed to demonstrate that he obtained any type of preauthorization at all. However, to the extent that specific written approval is a prerequisite for proper preauthorization, Petitioner clearly failed to obtain it in this case. And perhaps more significantly for purposes of this particular dispute, evidence of actions taken by the parties within

the specific context of the rule on written responses further supports the conclusion that verbal preauthorization was not given on March 29, 2002.

CONCLUSION

The ALJ finds that, under the record provided in this case, Petitioner did not establish that he had obtained preauthorization for the requested surgical services and thus is not entitled to reimbursement for those services.

FINDINGS OF FACT

1. On___, claimant suffered a compensable injury under the Texas Worker's Compensation Act ("the Act"), TEX. LABOR CODE ANN. § 401.001 *et seq*.

2. As part of the claimant's subsequent treatment, Petitioner performed non-emergency surgery on April 2, 2002.

3. Petitioner sought preauthorization for the surgery noted in Finding of Fact No. 2 from the claimant's insurer (RSKCo, an associate of Respondent Transcontinental Insurance Company) in a facsimile transmission sent to the insurer on March 29, 2002.

4. Petitioner did not obtain either verbal or written preauthorization from the claimant's insurer before performing the surgery noted in Finding of Fact No. 2.

5. On April 3, 2002, three working days after March 29, 2002, the insurer informed Petitioner's office by telephone that the pending request for preauthorization of the surgery noted in Finding of Fact No. 2 was being denied. Written confirmation of the denial was sent to Petitioner the next day. A timely request by the Petitioner for reconsideration of the denial was also denied.

6. Petitioner made a timely request to the Medical Review Division ("MRD") of the Texas Workers' Compensation Commission ("Commission"), seeking medical dispute resolution with respect to reimbursement sought for the surgery noted in Finding of Fact No. 2.

7. The MRD concluded that Petitioner was entitled to no reimbursement in a decision dated November 14, 2002, in dispute resolution docket No. M4-03-1304-01. The MRD concluded that Petitioner failed to satisfy Commission Rule 134.600(a)(1)(4), which provides that preauthorization must be requested and approved before the delivery of certain medical services. The MRD specifically found that Petitioner did not submit a *written* preauthorization for the procedures in dispute

8. Petitioner requested in timely manner a hearing with the State Office of Administrative Hearings, seeking review and reversal of the MRD decision.

9. The Commission mailed notice of the hearing's setting to the parties at their addresses on December 30, 2002. The hearing was subsequently continued, at the request of Respondent, with proper notice.

10. A hearing in this matter was convened on March 24, 2003, at the William P. Clements Building, 300 W. 15th St., Austin, Texas, before Mike Rogan, an Administrative Law Judge with the State Office of Administrative Hearings. Petitioner and Respondent were represented.

CONCLUSIONS OF LAW

1. The Texas Workers' Compensation Commission has jurisdiction related to this matter pursuant to the Texas Workers' Compensation Act ("the Act"), TEX. LABOR CODE ANN. ' 413.031.

2. 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 ' 413.031(k) of the Act and TEX. GOV'T CODE ANN. ch. 2003.

3. The hearing was conducted pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001 and the Commission's rules, 28 TEX. ADMINISTRATIVE CODE ("TAC") § 133.305(g) and §§148.001-148.028.

4. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.

5. Petitioner, the party seeking relief, bore the burden of proof in this case, pursuant to 28 TAC ' 148.21(h).

6. Based upon the foregoing Findings of Fact, preauthorization was required for the type of services in dispute, pursuant to 28 TAC § 134.600(h), as in effect at the time the disputed services were provided.

7. Based upon the foregoing Findings of Fact and Conclusions of Law, Petitioner is entitled to no reimbursement for the surgery noted in Finding of Fact No. 2.

ORDER

IT IS THEREFORE, ORDERED that the order of the Medical Review Division of the Texas Workers' Compensation Commission, issued in this matter on November 14, 2002, in dispute resolution docket No. M4-03-1304-01, be confirmed and that Petitioner receive from the insurer no reimbursement for the surgery in dispute.

SIGNED this 3rd day of April 2003.

MIKE ROGAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS