

SOAH DOCKET NO. 453-03-1538.M5
[MDR TRACKING NO. M5-03-0447-01]

SCD BACK & JOINT CLINIC,
Petitioner

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BEFORE THE STATE OFFICE

OF

FIDELITY AND GUARANTY
INSURANCE COMPANY,
Respondent

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

SCD Back & Joint Clinic (Petitioner) seeks review of a decision by the Texas Workers' Compensation Commission (Commission), acting through an independent review organization ("IRO"), in a dispute regarding the medical necessity of chiropractic treatment. The Commission found that the insurer, Fidelity and Guaranty Insurance Co. (Respondent) properly denied reimbursement for physical therapy that Petitioner administered between October 29, 2001, and April 5, 2002, to a claimant suffering from a neck and shoulder injury.

Petitioner challenged the decision on the basis that the treatment at issue was, in fact, medically necessary, within the meaning of Sections 408.021 and 401.011(19) of the Texas Workers' Compensation Act ("the Act"), TEX. LABOR CODE ANN. ch. 401 *et seq.*

This decision finds that reimbursement of Petitioner should be denied, as the Commission previously determined.

I. JURISDICTION AND VENUE

The Commission has jurisdiction over this matter pursuant to § 413.031 of the Act. 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. GOVT. CODE ANN. ch. 2003. No party challenged jurisdiction or venue.

II. STATEMENT OF THE CASE

The hearing in this docket was convened on October 7, 2003, at SOAH facilities in the William P. Clements Building, 300 W. 15th St., Austin, Texas. Administrative Law Judge (ALJ) Mike Rogan presided. Petitioner was represented by Scott Hilliard, attorney. Respondent was represented by Laurie Gallagher, attorney. After presentation of evidence and argument, the hearing was adjourned and the record closed on that same date.¹

The record revealed that on _____, the claimant suffered a compensable injury to the neck and left shoulder while lifting a heavy object. After a course of medical treatment that left him still experiencing persistent pain, the claimant presented on August 7, 2001, to Dr. Sam Liscum, a chiropractor then practicing through Petitioner. Dr. Liscum made a diagnosis of neck sprain/strain, left rotator cuff sprain.

Dr. Liscum made a diagnosis of neck sprain/strain, left rotator cuff/sprain/strain and myofascial pain syndrome. He then adopted a treatment plan consisting of 12 sessions of active and passive physical therapy (three sessions per week for four weeks). The plan also stated:

Goals and expected outcomes of the treatment plan include normalized joint motion, reduction in muscle spasm and tightness, reduced pain, increased mobility and physical capacity, and return to normal work and activities of daily living after completion of this proposed plan. Treatment to be reduced in frequency and duration as signs and symptoms allow.

However, on August 31, 2001, Dr. Liscum ordered the claimant taken off the job, because

¹ The staff of the Commission formally elected not to participate in this proceeding, although it filed a general "Statement of Matters Asserted" with the notice of the hearing.

work was interfering with the planned treatment. On September 13, 2001, Dr. Liscum re-evaluated the patient, who reported little overall relief from his pain. The doctor noted, though, that the claimant had achieved marked improvements in many measures of bodily strength since his evaluation a month earlier. A new treatment plan was formulated for an additional six weeks, incorporating much of the earlier plan and declaring, “The patient will work out in the clinic a maximum time of three hours in therapeutic exercises, with the goal of returning to full normal activities of daily living and return to work” after completion of the plan. The evaluation concluded by projecting the claimant’s date of maximum medical improvement (MMI) and return to work as November 13, 2001.

Similar re-evaluations occurred on November 5, 2001, January 29, 2002, and March 8, 2002. After each, Dr. Liscum re-instituted, in effect, the previous treatment plan, while pushing back further the patient’s projected date of MMI. In accordance with the plans, claimant continued to receive treatment through Petitioner’s office until April 5, 2002, when he was released without restrictions to return to full-time work.

Reimbursement for services provided through October 28, 2001, is not in dispute. However, when Petitioner submitted to Respondent (the insurer for the claimant’s employer) subsequent incremental bills of \$9,989 for services from October 29, 2001, through April 5, 2002, Respondent denied reimbursement on the grounds that the treatment had been medically unnecessary, “based upon the results of a peer review.” Petitioner then sought medical dispute resolution through the Commission.

The IRO to which the Commission referred the dispute issued a decision on November 19, 2002, concluding that the chiropractic care and physical therapy administered through the Petitioner during the disputed dates of service, had not been medically necessary, given the “absence of objective documentation of improvement.” The decision agreed that similar treatment provided during the eight weeks prior to the disputed period had been reasonable and necessary,

although it had produced “minimal progress” for the patient.

The Commission’s Medical Review Division (MRD) reviewed the IRO’s decision and, on November 22, 2002, issued its own decision confirming that the disputed services were not medically necessary and should not be reimbursed. Petitioner then made a timely request for review of MRD decision.

III. PARTIES EVIDENCE AND ARGUMENTS

A. Petitioner

Petitioner argued that the disputed treatment was not only necessary for the claimant’s achieving optimal rehabilitation but was also cost-effective, in that it helped avoid more expensive alternatives, including surgery or a work-hardening program. Petitioner pointed out that the Commission’s designated doctor in this case (Dr. Richard Channing, a chiropractor), in a report dated October 23, 2001, predicted that the claimant would not reach MMI until either three to four months after surgery or after six weeks of a work-hardening program. In fact, the patient was declared at MMI on April 5, 2002, the final day of the disputed treatment.

Dr. David Bailey (a chiropractor and principal owner of SCD Back & Joint Clinic) testified for Petitioner at the hearing. He noted that the patient’s strength and flexibility, as measured by a battery of some dozen-and-a-half physical tests, generally continued to increase throughout the period of treatment by Petitioner. Only during the assessment of January 29, 2002, did the claimant exhibit virtually across-the-board decreases in capacity and this, Dr. Bailey suggested, actually confirmed the efficacy of physical therapy in this case, since it resulted from a three-month hiatus in the program (ending February 4, 2002), which was caused by Respondent’s denial at the time of any further medical care for the patient.

Dr. Bailey also observed that the IRO's decision in this case incorrectly states that the claimant "went through a work hardening program" after treatment with passive and active therapeutic modalities.

B. Respondent

Respondent urged that Petitioner's treatment of the claimant demonstrated insufficient efficacy to justify continuing it into the disputed period. At the hearing, Respondent presented Dr. Kevin Tomsic, a chiropractor, who testified that the potential efficacy of chiropractic modalities should become evident within the first two to four weeks of applying such treatment. If significant results are not obtained during that period, the injury in question is not reasonably amenable to such chiropractic care, according to the *Texas Guideline for Chiropractic Quality Assurance and Practice Parameters*, which has been adopted by the Texas Chiropractic Association (TCA). In this case, Dr. Tomsic noted, the claimant had already received more than eight weeks of such treatment more than twice the amount of evaluative treatment contemplated by this guideline before the start of the disputed treatment period.

And in Dr. Tomsic's view, neither the initial treatment period nor the disputed period produced significant, timely progress in relieving pain or increasing functionality for the claimant. For example, the record indicates that the patient described the level of his subjectively perceived pain as "7" (on an ascending 1 to 10 scale) on August 10, 2001, rising to 8 on September 7, 2001, and returning to 7 on October 29, 2001. On January 30, 2002-despite a three-month interruption in therapy-he reported a slight decline, to 6. The pain then subsided to 4 on March 8, 2002, and 2 on April 5, 2002.

IV. ANALYSIS

Petitioner bears the burden of proving that the disputed services are medically necessary. In the ALJ's view, it has not discharged that burden. And while the IRO did state incorrectly that the claimant in this case underwent work hardening, that appears to be an incidental error in describing the background of the case, not an element of the core rationale for decision.

The record indicates that the disputed services failed to satisfy standards for medical necessity on two levels. In a broader context, Dr. Tomsic's essentially unrebutted testimony portrayed the treatment as inconsistent with TCA-adopted standards for determining the potential efficacy of extended chiropractic treatment. Moreover, on an internal, case-specific level, the medical documentation shows that the treatment program repeatedly failed to satisfy Dr. Liscum's projected time-frames for achieving the goals of pain reduction and a "return to normal work and activities of daily living." While these goals eventually were met, the fact that they took so much longer than predicted casts doubt on the degree to which the disputed services actually complemented or superseded natural healing processes.

Petitioner's records of physical testing do demonstrate overall progress by the claimant in performing certain types of "exertions" as might be expected of most persons in a continuing work-out program. However, because these records do not show commensurate steady gains in real functionality or relief of pain, the ALJ is unable to conclude with certainty that the disputed services effectively addressed those aspects of the compensable injury for which claimant actually sought assistance.

In summary, the preponderance of the evidence does not demonstrate that the IRO erred in finding the disputed services to be medically unnecessary. Under the circumstances, then, the ALJ must conclude that Petitioner failed to provide efficient management of the claimant's health care, as required by 30 TEX. ADMIN. CODE §180.22.

V. CONCLUSION

The ALJ finds that, under the record provided in this case, the medical services at issue have not been shown to be medically necessary. Accordingly, reimbursement for these services should be denied.

VI. FINDINGS OF FACTS

1. On _____, the claimant suffered an injury to the neck and left shoulder that was a compensable injury under the Texas Worker's Compensation Act (the Act"), TEX. GOVT. CODE ANN. § 401.001 *et seq.* Subsequent to the injury, claimant experienced chronic pain in the left shoulder and neck.
2. Dr. Sam Liscum, a licensed chiropractor who practiced through SCD Back & Joint Clinic (Petitioner) began treatment of the claimant on August 7, 2001, upon diagnosing the claimant as suffering from "neck sprain/strain, left rotator cuff sprain/strain, and myofascial pain syndrome."
3. Dr. Liscum treated the claimant under a plan of active and passive therapies, administered three times per week for four weeks, with goals of normalized joint motion, reduction in muscle spasm and tightness, reduced pain, increased mobility and physical capacity, and return to normal work and activities of daily living after completion of the proposed plan .
4. On September 13, 2001, Dr. Liscum again examined the claimant and noted complaints of pain similar to those noted in the examination of August 7, 2001. Dr. Liscum formulated (and continued to treat the claimant under) a plan of treatment essentially the same as that described in the report for August 7, 2001, but extending for six weeks and stating, "The patient will work out in the clinic a maximum time of three hours in therapeutic exercises, with the goal of returning to full normal activities of daily living and return to work" after completion of the plan .
5. Dr. Liscum again evaluated the claimant on November 5, 2001, January 29, 2002, and March 8, 2002, and in each instance noted significant persisting pain and re-adopted most elements of the previous treatment plan; in accordance with the plans, the claimant continued to receive treatment through Petitioner's office until April 5, 2002.
6. Petitioner sought reimbursement of \$9,989 for services from October 29, 2001, through April 5, 2002, as noted in Findings of Fact Nos. 4 and 5, from Fidelity and Guaranty Insurance Company (Respondent), the insurer for the claimant's employer.
7. Respondent denied the requested reimbursement on grounds that the disputed treatment had been medically unnecessary, based upon a peer review.

8. Petitioner made a timely request to the Texas Workers' Compensation Commission (Commission) for medical dispute resolution with respect to the requested reimbursement.
9. The independent review organization (IRO) to which the Commission referred the dispute issued a decision on November 19, 2002, concluding that the disputed treatment was not medically necessary.
10. The Commission's Medical Review Division reviewed and concurred with the IRO's decision in a decision dated November 22, 2002, in dispute resolution docket No. M5-03-0447-01.
11. Petitioner requested in timely manner a hearing with the State Office of Administrative Hearings (SOAH), seeking review of the MRD decision.
12. The Commission mailed notice of the hearing's setting to the parties at their addresses on December 31, 2002. The hearing was subsequently continued upon motion of the parties, with proper notice of rescheduling.
13. A hearing in this matter was convened on October 7, 2003, at the William P. Clements Building, 300 W. 15th St., Austin, Texas, before Mike Rogan, an Administrative Law Judge with SOAH. Petitioner and Respondent were represented.
14. The medical services provided by Petitioner for the claimant between August 7, 2001, and October 28, 2001, as noted in Findings of Fact Nos. 3 and 4, provided only relief of the claimant's symptoms or restoration of function, while failing to achieve the goals set out in the treatment plans outlining such treatment.
15. The claimant's relative lack of progress through the treatment noted in Finding of Fact No. 14 indicated that a further regimen of such treatment, which was provided by Petitioner for the claimant between October 29, 2001, and April 5, 2002, as noted in Findings of Fact Nos. 4 and 5, would not be efficacious in resolving the patient's condition.

VII. 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. GOVT. 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. GOVT. CODE ANN. ch. 2003.
3. The hearing was conducted pursuant to the Administrative Procedure Act, TEX. GOVT. CODE ANN. ch. 2001 and the Commission's rules, 28 TEX. GOVT. CODE (TAC) §133.305(g) and §§ 148.001-148.028.
4. Adequate and timely notice of the hearing was provided in accordance with TEX. GOVT. 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, the treatments for the claimant provided by Petitioner from October 29, 2001, through April 5, 2002, as noted in Findings of Fact Nos. 4 and 5, do not represent elements of health care medically necessary under § 408.021 of the Act.
7. Based upon the foregoing Findings of Fact and Conclusions of Law, Petitioner's request for reimbursement of \$9,989 for the services noted in Findings of Fact Nos. 4 and 5 should be denied.

ORDER

IT IS THEREFORE, ORDERED that the appeal of SCD Back & Joint Clinic, seeking reimbursement of \$9,989 for medical services from October 29, 2001, through April 5, 2002, be **DENIED**.

SIGNED October 15th, 2003.

**MIKE ROGAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**