DOCKET NO. 453-03-1540.M5
MDR Tracking No. M5-03-0109-01

KENT RICE, D.C.,	§	**BEFORE THE STATE OFFICE**
Petitioner	§	
	§	
VS.	§	**OF**
	§	
RSKCO INSURANCE (previously styled SENTRY INSURANCE CO.),	§	
Respondents	§	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Kent Rice, D.C., appealed an Independent Review Organization (IRO) determination upholding a RSKCO Insurance (RSKCO) decision denying him reimbursement, on the basis of medical necessity, for certain services he provided to an injured worker (Claimant) from March 19, 2002, until June 21, 2002. This proposal concludes that the claim should be denied because the services at issue were not medically necessary to treat the Claimant's compensable injury.

I. Procedural History and Jurisdiction

A hearing convened in this case on May 6, 2003, before the undersigned Administrative Law Judge (ALJ) at the State Office of Administrative Hearings (SOAH), 300 West 15th Street, Austin, Texas. Dr. Rice appeared and represented himself. RSKCO appeared and was represented by James. M. Loughlin, Attorney. The hearing began on the morning of May 6, 2003; it recessed in the early afternoon of that day so that Dr. Rice could see previously-scheduled patients. The hearing resumed on July 1, 2003, and concluded that day.

As there were no issues concerning notice or jurisdiction, those matters are stated in the fact findings and legal conclusions without further discussion here.

II. Discussion

A. Background

1. Factual

- A November 14, 1996, Lumbar spine magnetic resonance imaging (MRI) report showed the Claimant suffered from diffuse degenerative disc disease at the L3-4, L4-5, and L5-S1 levels of his spine consistent with intervetebral osteochondrosis; broad based small posterior central disc herniations at L3-4, L4-5, measuring between two and three millimeters indenting the anterior thecal sac, but with no direct neural compression; posterior central to left posteriolateral disc extrusion at L5-S1 compromising and posteriorly displacing the traversing left S1 nerve root; and mild facet asymmetry at L5-S1.

- The Claimant had back pain throughout 1997.
- In March and April 1997, two physicians recommended surgery, but the Claimant refused in July 1997.
- The Claimant sustained a compensable work-related injury on ___.
- Dr. Rice treated the Claimant for his work-related injury into ___.
- Dr. Rice reported in July 1998 that the Claimant reached maximum medical improvement (MMI).
- The Claimant experienced pain again in 2001 and Dr. Rice treated him again.
- The Claimant exacerbated his pre-existing back problems in March 2002 when "he bent over a couple of days ago and felt his back go."

2. Legal

An employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury, as and when needed. The employee is specifically entitled to health care that: (1) cures or relieves the effects naturally resulting from the injury; (2) promotes recovery; or (3) enhances the ability to return to or retain employment. TEX. LABOR CODE ANN. § 408.021. "Health care" includes "all reasonable and necessary medical . . . services." TEX. LABOR CODE § 401.011(19).

B. Standard of Proof

Because he lost at the IRO level, Dr. Rice has the burden of proof.

RSKCO argued that Dr. Rice's burden in this case is to show by the great weight and preponderance of the evidence that the IRO decision is wrong. It argued that SOAH Rule 1 TEX. ADMIN. CODE (TAC) §155.41(b) states the burden of proof is to be determined by the referring agency;[1] the Texas Workers' Compensation Commission (Commission) rules at 28 TAC § 133.308(v) say in all appeals from IRO decisions concerning necessity disputes, the IRO decision carries presumptive weight; and "presumptive weight" is a term of art defined in the Labor Code as meaning the decision stands unless the great weight of medical evidence is to the contrary.[2]

RSKCO's argument was unpersuasive because RSKCO has erroneously equated burden of proof with standard of proof. Standard of proof means the degree of proof required, whereas burden of proof means the burden on one party to persuade the trier of fact (by whatever degree of proof is

[1]Section 155.41(b) provides, "Normally, the party with the burden of proof will present evidence first. If the burden is not ascertainable after reference to statute or consideration of referring agency policy adequately documented in the record . . .," then the judge will place the burden of proof (based on a number of factors stated in the rule). (TEX. REV. CIV. STAT. ANN. § 2003.050 provides that a referring agency's procedural rules apply to SOAH hearings to the extent SOAH rules adopt those rules by reference.)

[2]TEX. LABOR CODE ANN. §§ 408.0041, 408.122, 408.125, and 408.151.

necessary-usually by a preponderance of evidence in civil cases).[3]

As indicated above, SOAH has adopted the Commission's burden of proof rule, but it has not adopted its procedural rules regarding the standard of proof.

C. Services Unnecessary to Treat Compensable Injury [4]

Virtually the only evidence on the issue of whether the services at issue were necessary to treat the Claimant's ___, compensable injury was that they were not.

RSKCO's expert witness, Brian Glenn, D.C., stated his opinion that the Claimant's pain from bending over in ___ was not related to an injury five years earlier. He emphasized the fact that the 1996 MRI had shown long-standing multiple degenerative problems at three levels of the Claimant's spine, including a large herniation at L5-S1. He stressed the long lapse in time since the 1997 sprain/strain. As a separate issue, he maintained the records do not document how the 2002 services relate to the ___ compensable injury.

A peer review performed by Derek A. Martin, D.C., on February 22, 2002, shortly before the March 2002 exacerbation of his back problem, said several times that the ___, injury had already resolved and that future problems with the Claimant's back would not be related to that injury. He stressed the fact that the Claimant had significant spinal disc damage before the ___ injury.[5] Dr. Rice criticized the peer review as being written before the ___ re-injury.
The criticism carried some weight, but Dr. Martin's opinion is nonetheless probative because of its conclusion that the ___ injury had already resolved and future treatment would likely be related to problems pre-dating the injury.[6]

Dr. Rice did not counter Dr. Glenn's testimony with testimony or other evidence of his own. He criticized Dr. Glenn as a part-time chiropractor who does not perform x-rays, does not possess certain technical equipment, does not treat patients with insurance, has not written articles or taught courses, does not belong to professional organizations, and is a consultant who earns half his income by discrediting other doctors. However, there was no affirmative evidence to rebut what Dr. Glenn said. Dr. Glenn's opinions carried some weight.

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[3]The distinction is shown in Texas case law and other authority. See *Leal v. Texas Department of Protective and Regulatory Services*, 25 S.W.3d 315, 319-320 (Tex. App.- Austin 2000, no writ); *Huckaby v. Huckaby*, 436 S.W. 2d 601, 605 (Tex. Civ. App.- Houston /1st/ 1968, writ ref'd. n.r.e); and 35 TEX. JUR. 3d *Evidence* " 98, 106 (2002).

[4]Commission Appeals Panel Decision in Appeal No. 981133, of which administrative notice is hereby taken, concluded that the issue of whether a compensable injury was the producing cause of pain experienced a few years later was a medical care issue for the Commission medical review division to decide rather than an extent-of-injury case for determination by the Commission Hearing Division. A copy of the decision is attached to this order.

[5]Ex. 2 at 46-47.

[6]Dr. Martin's peer review (which was sent to Dr. Rice when RSKCO denied the claim) was also important as clear notice of RSKCO's initial reason for denying the claim, that the services were not necessary to treat the ___ injury.

Overall, based on Dr. Glenn's and Dr. Martin's opinions, the preponderant evidence is that Dr. Rice's services to the Claimant from March until June 2002 were not related to the ___, compensable injury.

In view of the above-stated conclusion, it is unnecessary to determine whether Dr. Rice's treatments to the Claimant were otherwise medically necessary.

III. Findings of Fact

1. Kent Rice, D.C., appealed an Independent Review Organization (IRO) determination upholding a RSKCO Insurance (previously styled Sentry Insurance Company) decision denying reimbursement, on the basis of medical necessity, for services he provided to an injured worker from March 19, 2002, until June 21, 2002.

2. It is undisputed that Dr. Rice appealed not later than the 20th day after he received notice of the decision.

3. All parties received not less than 10 days' notice of the time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.

4. All parties had an opportunity to respond and present evidence and argument on each issue involved in the case.

5. Dr. Rice provided office visit, x-ray, nerve conduction studies, physical therapy, office visit with manipulation, and other physician services after the Claimant exacerbated his pre-existing back problems in March 2002 while bending over.

6. The Claimant suffered a compensable injury, a sprain/strain, on ___.

7. Prior to his ___ injury, the Claimant had long-standing multiple degenerative problems at three levels of his spine, including a large herniation at the L5-S1 level which compromised and posteriorly displaced the traversing S1 nerve root.

8. Two different physicians recommended back surgery to the Claimant in 1997, prior to his ___ injury; however, the Claimant refused.

9. The injury the Claimant suffered in ___ resolved before March 2002.

10. Dr. Rice's treatment of the Claimant from March until June 2002 was not related to his ___ injury.

11. Dr. Rice's treatment of the Claimant from March until June 2002, was not reasonably required by the nature of his compensable injury.

IV. Conclusions of Law

1. The State Office of Administrative Hearings has jurisdiction over this proceeding, including the authority to issue a decision and order. TEX. LAB. CODE ANN. §413.031(d) and TEX. GOV'T CODE ANN. ch. 2003.

2. All parties received adequate and timely notice of the hearing. TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.

3. Dr. Rice had the burden of proof in this matter. 28 TEX. ADMIN. CODE §148.21(h).

4. Dr. Rice's treatment of the Claimant from March until June 2002 does not qualify for reimbursement. TEX. LAB. CODE ANN. §413.021.

5. Dr. Rice's claim for treatment to the Claimant from March 19, 2002, until June 21, 2002, should be denied.

ORDER

IT IS, THEREFORE, ORDERED that the Claim of Kent Rice, D.C., against RSKCO Insurance (previously styled Sentry Insurance Company) for treatments to the Claimant from March 19, 2002, until June 21, 2002, be, and the same is hereby, **denied**.

Signed August 11th, 2003.

STATE OFFICE OF ADMINISTRATIVE HEARINGS

_____

JAMES W. NORMAN
Administrative Law Judge