SOAH DOCKET NO. 453-03-2744.M5
MDR TRACKING NUMBER: M5-02-3135-01

OXYMED, INC.	§	**BEFORE THE STATE OFFICE**
PETITIONER	§	
	§	
V.	§	**OF**
	§	
ROYAL INDEMNITY COMPANY,	§	
RESPONDENT	§	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

I. SUMMARY

OxyMed, Inc. (Petitioner) sought reimbursement for certain durable medical equipment (DME) it provided to Claimant who suffered a work-related injury. Royal Indemnity Company (the Carrier) denied payment stating the equipment was not medically necessary and had not been preauthorized. Petitioner sought review of the Carrier's denial. Pursuant to Petitioner's request for dispute resolution, an independent review organization (IRO) considered the claim and recommended it not be paid as the equipment was not medically necessary. The Texas Workers' Compensation Commission (Commission) adopted the IRO's recommendation and issued its decision denying reimbursement. Petitioner appealed, arguing the claim should be reimbursed because the DME was medically necessary and was allowed under the Commission's Medical Fee Guideline (MFG) and under Commission rule 134.600(h).[1] After considering the evidence and arguments, the Administrative Law Judge (ALJ) concludes that Petitioner's claim should be granted.

The hearing in this case was convened on November 17, 2003, by State Office of Administrative Hearings (SOAH) ALJ Ruth Casarez. The Commission opted not to participate in the hearing. Petitioner was represented by attorney Peter Rogers, and the Carrier was represented by attorney Mark Sickles. Neither party contested notice or jurisdiction. Therefore, those matters will be detailed in the findings and conclusions below without further discussion here. The record of the hearing closed on November 24, 2003, with the filing of closing arguments.

II. EVIDENCE AND ARGUMENTS

1. Petitioner's Evidence

Petitioner relied on its Submission to the IRO and on a Supplemental Submission, filed with SOAH prior to the hearing. It also presented ___, an employee of Petitioner, who testified concerning the DME that was provided in this case.

Claimant sustained a right knee injury on ___. After undergoing conservative treatment for several months, he was referred to orthopedic surgeon, James C. McConnell, M.D., who examined him and made the following preliminary diagnosis of the cause of Claimant's pain in the right knee: effusion, synovitis, medical [sic] meniscal derangement, and medial collateral ligament strain. Dr. McConnell subsequently decided that arthroscopic surgery was needed. However, on January 3,

[1] 28 TEX. ADMIN. CODE § 134.600(h)

2002, prior to the surgery, he wrote a prescription for "cryo therapy," "pain infusion pump," and "CPM," which were to be provided by Petitioner.[2] On the prescription form section captioned "certifying medical necessity" for such equipment, Dr. McConnell indicated the equipment was necessary for the following reasons: painful joint, post-surgical status, increase and maintain range of motion (ROM), stiffness, and to reduce inflammation, pain, medication. On January 15, 2002, Dr. McConnell performed the surgery described as "arthroscopic synovectomy, extensive, involving two or more compartments including lysis of adhesions."[3] Petitioner supplied the pain infusion pump (CPT Code 0781, billed at $485) to Dr. McConnell, who applied the pump to Claimant. ____ testified the pump infuses pain medication to the patient, so the patient does not have to take pain medications orally.[4] Petitioner also supplied Claimant with the following: a water circulating unit (CPT Code 0236, billed at $494), a water circulating pad (CPT Code E1399, billed at $155), and a cooler wrap (CPT Code E1399), billed at $75) to facilitate the cryo therapy. Petitioner then submitted its claim for $1,209, but the Carrier denied the claim. ___ stated this denial was contrary to Petitioner's experience, as normally charges for DME prescribed in this case are routinely paid. ___ noted that Dr. McConnell had provided a letter dated December 5, 2002, indicating the pain pump and equipment for the cryo therapy were medically necessary for Claimant. As to the cryo therapy, Dr. McConnell explained that:

> Applied during and post surgery, these devices (water circulating unit, wrap & pad) reduce post-operative pain, swelling/edema, hemorrhage & inflammation. . . . Reducing swelling and hemorrhage reduces risks of compartment syndrome. Use of circulating cryo therapy is much more efficacious in cooling rather than a stagnant cold source such as an ice bag/cold pack which can leak and contaminate wounds.[5]

Dr. McConnell also indicated that cry therapy after surgery is generally recognized within the medical/orthopedic community as a standard treatment for post-operative patients such as Claimant. As to the pain pump, Dr. McConnell wrote:

> Applied during surgery, these devices reduce post-op pain in most patients. . . . pump reduces the need for narcotics, which reduces problems with narcotic tolerance & addiction. Reduced pain reduces hospital stay and/or allows procedures to be done as an outpatient surgery rather than admitting a patient for pain control.[6]

___ testified that Petitioner simply delivered the DME per the physician's instructions. He also stated Dr. McConnell had a good reputation as an orthopedic surgeon. He believed Dr. McConnell prescribed the pain infusion pump about 45% of the time for his patients.

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[2] *See* Petitioner Ex. 1, pp.16-18. Page 16 is the prescription and certification of medical necessity for durable medical equipment which was written and signed by Dr. McConnell on January 3, 2002. He checked off "cryo therapy, pain infusion pump, and CPM" as "surgical equipment needed." There was no explanation as to what "CPM" meant and it did not appear to be another item of DME in the claim; therefore, the ALJ did not address it.

[3] *See* Pet. Ex. 1, p. 47.

[4] *Id*., pp. 24-26.

[5] *Id.*, p. 18.

[6] *Id*., p. 17.

Petitioner also presented a utilization review dated April 14, 2002, prepared by Utilization Nurse Diana Helms of Corvel Corp. Nurse Helms summarized Claimant's various treatments through that date. She indicated that Donald M. Mauldin, M.D., had conducted an independent medical evaluation in December 2001. Dr. Mauldin's diagnosis was summarized as follows: A status post twisting injury to the right knee with subsequent MRI finding of torn posterior medial horn of the medical [sic] meniscus. "rthroscopic partial medial menisectomy was recommended." (*Id.* p. 46). Nurse Helms had also asked Benjamin Agana, M.D., to review Claimant's medical records. In his response of April 22, 2002, as to whether physical modalities were reasonable and necessary, Dr. Agana described Claimant's treatment after the arthroscopy surgery, as follows:

> The patient received continuous passive modalities and physical therapy postoperatively, continuous passive motion machine and cryo therapy. addition to [sic] patient had active physical therapy in the form of ambulation, exercises, strengthening followed by ultrasound & electrical stimulation until March 15, 2002. *Given the recent surgery, passive modality would be reasonable including cryo therapy* and electrical stimulation for a period for three months following surgery.[7]

(Emphasis added). Dr. Agana further wrote that "it is reasonable to consider the complaints and diagnoses the result of the compensable injury"' and that "[t]he current treatment is also reasonable and necessary and related."[8]

Lastly, Mr. Payne stated that in this case, the IRO decision deals only with the issue of medical necessity, and not with whether preauthorization was required.

2. Carrier's Evidence

The Carrier introduced three exhibits it had previously filed.[9] Carrier's Ex. 3 was a peer review report prepared on May 19, 2003, by Thomas Diliberti, M.D.[10] Dr. Dilberti described the surgery performed by Dr. McConnell as "[t]his surgery included a diagnostic arthroscopy with debridement of a medial meniscus tear, lateral meniscus tear, medial collateral ligament sprain, as well as a chondroplasty." Toward the end of his review, Dr. Diliberti indicated:

> It is generally accepted that a cryotherapy unit and pain infusion system is reasonable and indicated after major reconstructive surgery to the shoulder or knee. There is no indication that either a cryotherapy unit or a pain infusion system is necessary or indicated after minor arthroscopic surgery to the knee such a simple debridement of a meniscus tear or a chondroplasty.[11]

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[7] *See* Pet. Ex. 1, p. 44.

[8] *Id.*, p. 45.

[9] Carrier's pre hearing submissions were (1) 11 pages of documents submitted for medical dispute resolution and the IRO/MRD decision filed on May 14, 2003; (2) 29 pages filed on May 15, 2003, including a report from a designated doctor, John C. Milani, M.D., a copy of a peer review by Dr. Agana dated April 22, 2002, advertisements related to cryo therapy products, and proposals for decisions that had previously been issued, and (3) a two-page report by Dr. Diliberti filed on June 23, 2003. Carrier's Exs. 1, 2, and 3 were admitted without objection.

[10] It appears that Dr. Diliberti is an orthopedic surgeon, as the E-signature on his letter indicated " TX. Lic #J1972 American Board of Orthopedic Surgery."

[11] Carrier's Ex. 3, p. 2.

The Carrier pointed out that the IRO had agreed with Dr. Diliberti's opinion and found such equipment was not necessary for treating this Claimant. The Carrier argued the IRO decision was correct and the ALJ should affirm the decision. The Carrier also included in Exhibit 2 a report from a designated doctor, John C. Milani, M.D., who examined Claimant and found him at maximum medical improvement (MMI) as of September 24, 2002, with 4% impairment of the whole person. In explaining how he arrived at the impairment rating, Dr. Milani wrote that since Claimant had a medial meniscal repair and a partial excision of the lateral meniscus, he was probably best calculated as having partial tears of both the medial and the lateral meniscus requiring meniscectomy and this merits a 4% impairment of the whole person.[12]

In addition, the Carrier argued that even if the DME were medically necessary, Petitioner should not be reimbursed because it had not obtained preauthorization to supply the DME, which cost more than $500. The Carrier argued that since Commission rule ' 134.600(h) requires preauthorization to be obtained prior to supplying DME that costs more than $500, Petitioner should not be reimbursed because it did not seek such preauthorization.

III. APPLICABLE LAW, ISSUES AND DISCUSSION

A. Entitlement to Medical Benefits.

Section 408.021 of the Texas Workers' Compensation Act (Act) provides that 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 compensable injury; (2) promotes recovery; or (3) enhances the ability of the employee to return to or retain employment. Section 401.011(19) of the Act defines "health care" to include "all reasonable and necessary medical . . . services." In addition, Commission rule 134.600(h)(11) provides that preauthorization is required for "all durable medical equipment (DME) in excess of $500 per item (either purchase or expected cumulative rental) and all transcutaneous electrical nerve stimulators (TENS) units."

B. Issues Presented

The first issue presented is whether the DME that was supplied by Petitioner for Claimant's treatment was medically necessary. Petitioner argues that it was because the treating doctor prescribed the equipment. The Carrier argues that it was not because the Claimant's injury was not very serious and other less expensive means were available to treat Claimant after the knee arthroscopic surgery, *e.g.*, cold packs instead of circulating unit and oral pain medication instead of the pain infusion pump.

The second issue is whether the ALJ is limited in this hearing to the scope of the matters underlying the IRO's decision, *i.e.*, whether the DME that was provided to Claimant was medically necessary. Petitioner contends because that was the sole issue submitted to the lRO, that is the extent f the ALJ's authority. The ALJ has no authority to consider whether the DME that was provided should have been preauthorized according to rule 134.600(h) because that issue was not submitted to the IRO. Petitioner argues that if the ALJ decides the DME *was* medically necessary, and the Carrier wishes to dispute reimbursement based on no preauthorization, that issue must be submitted to the Commission for review before the ALJ may consider the issue. The Carrier responds that such a

[12] *See* Carrier Ex. 2, p. 5.

process would waste everyone's time and resources. The Carrier urges the ALJ to consider the medical necessity and preauthorization issues, pointing out the Carrier gave both reasons as bases for denial of the claim.

C. Discussion

The issue relating to the scope of the hearing in this case will be addressed preliminarily and quickly. The ALJ agrees with Carrier's argument that in the interest of judicial economy, both issues should be considered in this proceeding.

The facts associated with the claim in this case are fairly straightforward. Claimant injured his right knee, which then required arthroscopic surgery. Preceding the surgery, Dr. McConnell prescribed certain DME, pain infusion pump and equipment for cryo therapy, that would be required after the surgery. It appears Dr. McConnell applied the pump to Claimant immediately after the surgery, and Petitioner then delivered the cryo therapy DME to Claimant some time later.

Both parties agree that such DME is appropriate for treating patients who require knee surgery. However, Carrier maintains that Claimant's injury was not serious enough to warrant the DME prescribed by Dr. McConnell. The problem with Carrier' argument is that statements by other doctors familiar with the case seem to contradict that position. For example, Dr. Milani, who examined Claimant to determine if he was at MMI, wrote that Claimant had a medial meniscal repair and a partial excision of the lateral meniscus, and it would be appropriate to calculate his injury as having partial tears of both the medial and the lateral meniscus. Dr. Mauldin's diagnosis also makes it appear that the tear in the knee was not a simple one. Thus, from the various characterizations of Claimant's injury by a number of doctors, it appears that Claimant's injury was more serious than a simple knee tear. Similarly, Dr. Agana, who performed a peer review for Carrier, found the treatment that had been provided, including cryo therapy and the pain pump, was medically necessary and reasonable. (*supra*. p. 3). In reviewing the diagnoses and opinions of several surgeons involved in this case, it appears the meniscal tear in this case was not a simple one. Furthermore, Dr. McConnell was in the best position to assess the extent or seriousness of Claimant's injury and he prescribed the DME at issue. Thus, considering that other orthopedic surgeons, who either examined Claimant or reviewed his records, also indicated his injury could be treated with cryo therapy and a pain infusion pump, the ALJ concludes that the DME supplied in this case was medically necessary.

With regard to the issue of the cost of the DME, it should be noted that both parties introduced copies of decisions issued by other SOAH ALJs that dealt with whether DME that costs more than $500 requires preauthorization under 28 TEX. ADMIN. CODE (TAC) §134.600(h)(11). The ALJ is aware of the divergence of opinion relating to the interpretation of the rule.

First, a determination must be made if these two items work as a unit. According to one interpretation of the DME rule, if they do and they cost more than $500, preauthorization would be required. The evidence showed that a pain infusion pump can be used separately from equipment that is required in cryo therapy. Therefore, it is a separate item and can be billed separately.

Second, a question arises as to the cost of the DME that makes up the unit that provides the cryo therapy prescribed by Dr. McConnell. Petitioner supplied three individual components that would facilitate the cryo therapy. Individually, these components cost less than $500, but together, they cost $724. The Carrier argues that preauthorization should have been obtained because the cost of the cryo therapy unit was more than $500. Petitioner counters that rule 134.600(h)(11) provides the $500 amount is applied "per item," and since none of the items cost more than $500,

preauthorization was not required. Petitioner urges that many SOAH ALJs have followed that interpretation of the rule. While the ALJ may not agree, she is aware the interpretation urged by Petitioner is the majority view. The ALJ adopts the majority interpretation in this case and concludes that because the individual components of the cryo therapy unit did not cost more than $500, Petitioner was not required to seek preauthorization.

IV. FINDINGS OF FACT

1. Claimants sustained a compensable injury to his right knee on___.

2. Claimants' injury was covered by workers' compensation insurance written for Claimant's employer by Royal Indemnity Company (Carrier).

3. The cause of Claimant's right knee pain was diagnosed as "a torn posterior medial horn of the medial meniscus" and as "effusion, synovitis, medical [sic] meniscal derangement; medial collateral ligament strain."

4. Claimant received conservative treatment for several months, but continued to report pain. John McConnell, M. D., an orthopedic surgeon performed arthroscopic surgery on Claimant's right knee on January 15, 2002.

5. Prior to the surgery on January 3, 2002, Dr. McConnell ordered certain durable medical equipment (DME) for use on and by Claimant immediately after the surgery. His prescription indicated as follows: "cryo therapy, pain infusion pump, and CPM."

6. The cryo therapy DME prescribed by Dr. McConnell was necessary to reduce pain, weakness, instability, and stiffness in the knee. The pain infusion pump was to reduce the need for narcotics, reduce post-operative pain and reduce healing time for Claimant.

7. Oxymed, Inc. (Petitioner) supplied the pain infusion pump to Dr. McConnell, who applied it to Claimant immediately after the surgery.

8. Petitioner supplied the water circulating unit, water circulating pad, and cold therapy cooler wrap to Claimant for use as directed by Dr. McConnell.

9. The cost of the individual components was as follows: water circulating unit-E0236--$494; water circulating pad-E1399--$155; a cooler wrap--E1399--$75; and a pain infusion pumpBE0781B$485, for a total of $1,209.

10. The first the components indicated in finding number 9 facilitated the cryo therapy that was prescribed by Dr. McConnell. All the items listed in finding number 9 are durable medical equipment (DME) under the Commission's 1996 Medical Fee Guideline.

11. None of the individual components indicated in finding number 9 cost more than $500.

12. Petitioner billed the Carrier $1,209, which represented payment for the individual or separate components, as indicated in finding number 9 and submitted the bill for reconsideration in May 2002.

13. The Carrier denied payment indicating the DME was not medically necessary with peer review for Claimant's treatment, and that the cost of the DME was more than $500 and required preauthorization, which had not been obtained.

14. Neither Dr. McConnell nor Petitioner sought preauthorization for the purchase of the DME.

15. Cryo therapy and the pain infusion pump can function independently of each other.

16. The water circulating unit, cooler wrap and water circulating pad supplied to Claimant by Petitioner served to facilitate the cryo therapy.

17. Dr. McConnell believed the DME indicated in finding number 9 was medically necessary to promote healing and rehabilitation of Claimant's right knee.

18. On April 22, 2002, Dr. Agana, a peer review doctor for the Carrier indicated that passive modalities, including cryo therapy were reasonable for Claimant for a period of three months following surgery.

19. Thomas Diliberti, M.D., performed a peer review for Carrier on May 19, 2003, but did not examine Claimant and did not have first-hand knowledge of Claimant's specific injury.

20. Dr. McConnell, the surgeon who performed the arthroscopic surgery on Claimant, was in a better position than Dr. Diliberti to know what DME, if any, was required to promote Claimant's rehabilitation.

21. Petitioner timely requested medical dispute resolution by the Medical Review Division (MRD) of the Texas Workers' Compensation Commission (Commission).

22. On February 21, 2003, the MRD adopted as its own and issued the decision of the Independent Review Organization finding the DME provided was not medically necessary and that Carrier should not have to pay for it. Petitioner timely appealed the MRD's decision.

23. The Commission sent notice of the hearing to the parties on April 10, 2003. The hearing notice informed the parties of the matter to be determined, the right to appear and be represented by counsel, the time and place of the hearing, and the statutes and rules involved.

24. The hearing was held on November 17, 2003, and all parties appeared and participated. The record of the hearing closed on November 24, 2003.

V. CONCLUSIONS OF LAW

1. The Texas Workers' Compensation Commission (Commission) has jurisdiction to decide the issues presented pursuant to TEX. LAB. 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 TEX. LAB. CODE ANN.§ 413.031 and TEX. GOV'T CODE ch. 2003.

3. The notice of hearing complied with requirements of TEX. GOV'T CODE §2001.052, as it included the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular section of the statutes and rules involved; and a short plain statement of the matters asserted.

4. Petitioner has the burden of proving by a preponderance of the evidence that it should prevail in this matter. TEX. LAB. CODE ANN. § 413.031 and 28 TEX. ADMIN. CODE (TAC) § 148.21(h) and (i).

5. Based on Findings Nos. 5 - 7, 10, and 16 - 20, Petitioner proved that the pain infusion pump and the DME necessary for cryo therapy were medically necessary for treatment of Claimant's right knee.

6. Based on Findings Nos. 5 - 7, 10, and 15, Petitioner proved that the pain infusion pump and the DME necessary to provide cryo therapy for Claimant did not require preauthorization pursuant to 28 TAC § 134.600 (h)(11) because they could be used independently of each other.

7. Based on Findings Nos. 9 - 11, Petitioner proved that the DME necessary to provide cryo therapy for Claimant did not require preauthorization pursuant to 28 TAC § 134.600 (h)(11) because each item cost less than $500.

8. Based on the foregoing Findings and Conclusions, Respondent should reimburse Petitioner for the DME supplied in this case.

ORDER

IT IS, THEREFORE, ORDERED that Royal Indemnity Company shall be required to reimburse Oxymed, Inc., for the amount claimed.

SIGNED on January 29, 2004.

RUTH CASAREZ
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARING