

**DOCKET NO. 453-03-2903.M5
[MDR TRACKING NO. M5-03-0872-01]**

**KEVIN R. WHITE, D.C.,
Petitioner**

v.

**TEXAS WORKERS' COMPENSATION
COMMISSION and LIBERTY MUTUAL
FIRE INSURANCE COMPANY,
Respondents**

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

I. Summary

Kevin R. White, D.C. (Petitioner), sought review of a decision by the Medical Review Division (MRD) of the Texas Workers' Compensation Commission (TWCC or Commission) declining to order payment for chiropractic services he performed on behalf of ____ (Claimant) on six dates between June 19 and July 10, 2002. The substantive review of Petitioner's claim was conducted by an Independent Review Organization (IRO). Liberty Mutual Fire Insurance Company (Carrier) had denied payment on the ground that the services were not medically necessary. In a decision issued on March 18, 2003, the MRD concluded that Petitioner had not demonstrated that there was a medical need for the services he provided to Claimant.

Based on the evidence, the Administrative Law Judge (ALJ) concluded that Petitioner failed to sustain his burden of proof that he is entitled to reimbursement for chiropractic services which he performed for Claimant on June 19, 24, 26, and July 2, 8, and 10, 2002. Petitioner failed to show that the physical therapy and other services were medically necessary to relieve the effects of Claimant's injury or promote his recovery.

II. Discussion

It is undisputed that on _____, Claimant suffered a compensable shoulder injury in the course of his employment. Claimant's injury was initially diagnosed as a sprain/strain of his neck, right elbow and shoulder, suffered when he attempted to move a treadmill. Petitioner, his treating physician, administered a course of conservative chiropractic care from the date of injury through July 10, 2002. Claimant's failure to improve under that treatment regimen led Petitioner to refer Claimant for further testing and evaluation by a surgeon. An MRI test, performed on an unknown date before May 30, 2002, revealed that Claimant had actually suffered a rotator cuff tear that would require surgery.

The Carrier denied payment for all chiropractic care that Petitioner rendered between the time it was determined that Claimant required surgery and July 15, 2002, the date on which arthroscopic surgery on Claimant's shoulder was performed (Carrier Exh. 2). The Carrier's denial was based on a peer review of Petitioner's course of treatment. Treatments administered by Petitioner included ultrasound therapy, electrical stimulation, application of hot or cold packs, physical therapy, and exercises to develop strength, endurance, and increased range of motion (ROM).

Petitioner stated that the continued therapy and exercises medically benefitted Claimant in two ways. First, they helped relieve Claimant's pain. Second, they helped Claimant retain his maximum strength and ROM so the shoulder would not "freeze up." Petitioner also stated that administration of active therapy immediately before the surgery assisted Claimant begin his post-operative rehabilitation in a better condition. Further, Petitioner stated that he had continued his course of therapy at the request of Dr. John C. McConnell, M.D., the surgeon who performed the shoulder surgery on Claimant. (Carrier Exh.1, P. 14). There was no evidence that Claimant was instructed to or did follow any home program of exercise or treatments to supplement the in-office care that Petitioner provided. In his office notes, Petitioner recorded Claimant's persistent presentation of pain and tenderness of the shoulder throughout the six-week period before the surgery. (Carrier Exh. 1, Pp. 6-22).

Testifying on behalf of the Carrier, Thomas B. Sato, D.C., stated that in his opinion there was no medical reason to continue a course of chiropractic therapy after the need for a surgery had been established, and that a program of home exercises, or possibly rest, would be sufficient to retain claimant's ROM and strength for the length of time involved in this case. He disagreed with Petitioner's assertion that active therapy up to the eve of surgery would put a person with Claimant's condition in a better position at the start of post-surgery rehabilitation. He also disputed that treatment to keep Claimant's shoulder from "freezing up" was indicated in this case since Petitioner's

notes failed to show that adhesions had formed in tissue of the injured shoulder. However, Dr. Sato did not dispute that pain relief would be appropriate treatment for a rotator cuff tear before a surgery.¹ In June 2002, Shawn Jones, D.C., the Carrier's peer reviewer, stated that *physical therapy* would not present any great therapeutic benefits to Claimant immediately before the scheduled surgery. (Carrier Exh. 1, Pp. 31-33).

Dr. McConnell's surgical report noted that persistent pain was one of the indications supporting surgery. Claimant had experienced more than three months of pain, unrelieved by conservative treatment, that was sufficiently intense to disrupt Claimant's sleep and to limit his activities of daily living, including preventing him from working. (Carrier Exh. 1, P. 25). Dr. McConnell's report also indicated that the extent of synovitis, bursitis and/or adhesions within Claimant's shoulder were greater than anticipated. Dr. McConnell debrided two areas within the shoulder to remove adhesions. (Carrier Exh. 1, Pp. 29-30).

Although the uncontroverted medical evidence in the record showed that throughout the period between the date of his injury and the shoulder surgery, Claimant was suffering persistent pain, there was insufficient evidence in the record to enable the ALJ to ascertain which, if any, of the treatment modalities Petitioner administered may have been solely or primarily administered to relieve pain, rather than to facilitate the physical therapy. Petitioner's rationale for administration of physical therapy and strengthening exercises was limited to a general assertion about their efficacy. The record was devoid of specifics about Claimant's particular condition that warranted such treatment during what was essentially a waiting period. In sum, Petitioner failed to demonstrate that he is entitled to compensation for treatments performed on the dates of service at issue.

¹ Carrier appeared to argue that there was some negative inference to be drawn from the existence of a six-week gap between the determination in late May or early June 2002 that surgery would be needed and the date of its performance on July 15, 2002. There is nothing in the record as to why this gap occurred, whether such a wait for this surgery would be expected in the metropolitan market in which Petitioner and Dr. McConnell practice, or what options Petitioner had for referral to surgeons qualified to perform surgery on behalf of workers' compensation claimants. Petitioner testified he referred his clients to Dr. McConnell and had been satisfied with the outcomes of surgeries that Dr. McConnell had performed. The only facts in evidence are that such a gap existed and that Petitioner continued to be responsible during that time for Claimant's medical care.

III. Findings of Fact

1. On _____, _____ (Claimant), a janitor, suffered a compensable injury to his neck, right shoulder, and right elbow when he attempted to move a treadmill.
2. Liberty Mutual Fire Insurance Company (Carrier) was the workers' compensation insurer for Claimant's employer on the date of injury.
3. Claimant suffered a torn rotator cuff, which required surgical treatment. On July 15, 2002, Dr. John C. McConnell, M.D., performed arthroscopic shoulder surgery on Claimant.
4. The initial diagnosis of Claimant's shoulder injury was sprain/strain. Dr. Kevin R. White, D.C., Claimant's treating physician (Petitioner), administered conservative chiropractic care from March 12, 2002, through July 10, 2002, five days before the operation.
5. Petitioner referred Claimant for surgical evaluation when Claimant continued to experience shoulder pain sufficient to disrupt his sleep and interfere with his activities of daily living, including work, three months after the injury. On an unknown date before June 19, 2002, Dr. McConnell determined surgery should be performed.
6. Claimant continued to experience pain up to the date of the surgery.
7. On June 19, 24, 26, and July 2, 8, and 10, 2002, dates after which Claimant had been determined to be a surgical candidate, Petitioner administered ultrasound therapy, electrical stimulation, hot or cold packs, physical therapy, and exercises to develop strength, endurance, and increased range of motion (ROM).
8. Treatments administered on June 19, 24, 26, and July 2, 8, and 10, 2002, did not improve Claimant's condition, or relieve or alleviate the effects of Claimant's injury.
9. Carrier denied payment to Petitioner for any treatments that he administered after it was determined surgery would be required to treat Claimant's compensable injury.
10. Petitioner appealed the Carrier's denial of benefits to the Medical Review Division (MRD) of the Texas Workers Compensation Commission (TWCC), which referred the dispute to an

Independent Review Organization (IRO).

11. On March 18, 2003, based on the recommendation of the IRO, the MRD determined that the treatments Petitioner administered on June 19, 24, 26, and July 2, 8, and 10, 2002, were not medically necessary and that no additional compensation was due Petitioner.
12. On March 25, 2003, Petitioner filed a timely request for a hearing at the State Office of Administrative Hearings (SOAH) on the MRD decision.
13. On April 29, 2003, the Commission issued a notice of hearing which included the date, time, and location of the hearing, the applicable statutes under which the hearing would be conducted, and a short, plain statement on the nature of the matters asserted.
14. SOAH Administrative Law Judge (ALJ) Cassandra Church convened a hearing on these issues on June 5, 2003; the record closed that day.

IV. Conclusions of Law

15. The Texas Workers' Compensation Commission (Commission) has jurisdiction to decide the issues presented pursuant to TEX. LABOR CODE ANN § 413.031.
16. 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 TEX. LABOR CODE ANN § 413.031 and TEX. GOV'T CODE ch. 2003.
17. The notice of hearing issued by the Commission was sufficient under the terms of TEX. GOV'T CODE § 2001.052.
18. Petitioner has the burden of proving by a preponderance of the evidence that it should prevail in this matter, pursuant to TEX. LABOR CODE ANN § 413.031.
19. Petitioner failed to prove by a preponderance of the evidence that the physical therapy and other chiropractic treatments he administered to Claimant on the dates of service of June 19, 24, 26, and July 2, 8, and 10, 2002, were services reasonably required to relieve the effects of or promote recovery from the compensable injury suffered by Claimant, within the meaning of TEX. LABOR CODE ANN. § 408.021 and 401.011(9).

ORDER

IT IS HEREBY ORDERED that Liberty Mutual Fire Insurance Company has no obligation to reimburse Petitioner for chiropractic service performed on behalf of Claimant on the dates of service June 19, 24, 26, and July 2, 8, and 10, 2002.

ISSUED June 12, 2003.

CASSANDRA J. CHURCH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS