

DOCKET NO. 453-03-3355.M5
MRD NO. M5-03-0704-01

SUHAIL AL-SAHLI, DC,	§	BEFORE THE STATE OFFICE
Petitioner	§	
	§	
v.	§	OF
	§	
HARTFORD INSURANCE COMPANY	§	
OF THE MIDWEST	§	
Respondent	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Suhail Al-Sahli (Petitioner) appealed the Findings and Decision of the Texas Workers' Compensation Commission (Commission) acting through Maximus, an Independent Review Organization (IRO), denying Petitioner reimbursement for certain chiropractic services. This decision grants part of the relief sought by Petitioner.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

There were no contested issues regarding notice of the hearing. Therefore, those matters are addressed in the Findings of Fact and Conclusions of Law without further discussion here.

The hearing convened November 18, 2003, at the Hearings Facility of the State Office of Administrative Hearings (SOAH) before SOAH Administrative Law Judge (ALJ) Stephen J. Pacey. The Respondent was represented by Attorney John Fundis. Petitioner appeared *pro se*. The Commission did not appear. On November 20, 2003, Respondent sent the ALJ a rule purportedly supporting one of its assertions. After allowing Petitioner seven days to respond, the record was closed on November 27, 2003.

II. DISCUSSION

A. Background.

___ (Claimant) suffered a work-related injury on ___. Claimant worked as an electrician and injured his back while lifting a bundle of tubing. Claimant complained of sudden low back pain, and Petitioner evaluated Claimant and initiated physical therapy. When Claimant did not respond as anticipated, a November 14, 2001, magnetic resonance imaging (MRI) test was performed on Claimant. The MRI revealed an 8 mm herniated disk at L4 and L5. On January 2, 2002, an electromyogram (EMG) was performed on Claimant, which was normal. Petitioner performed both active and passive physical therapy from ___ to September 18, 2002.¹ Respondent denied payment for all Chiropractic services from March 19, 2002 through September 18, 2002.

¹ Claimant's treatment included electrical stimulation, kinetic activities, manipulation one-on-one exercise, and ultrasound.

B. Peer Review as Reason for Denial.

Petitioner noted that the peer review was not written until May 22, 2002. The evidence does reflect that the first peer review was May 22, 2002. On Respondent's Explanation of Reimbursement (EOB), it denied reimbursement for all services based on Code V. "After the AV", Respondent's forms stated "payment withheld as peer review indicates the treatment to be medically unreasonable and/or unnecessary." Commission Rule 28 TEX. ADMIN. CODE (TAC) § 133.304 (h) requires the Carrier to provide a copy of the peer reviewer's report to the sender of the bill.² As Respondent did not and could not until May 22, 2002 transmit a peer review to Petitioner justifying its denial, Respondent did not comply with this rule because there was no peer review. In addition, the May 22, 2002, did not evaluate the treatments, and it contradicts David Niekamp, D.C.'s October 17, 2002, peer review. Further Dr. Niekamp's peer review does not retrospectively review the period of March 19, 2002 through May 22, 2002. Consequently, there was no peer review covering this period.

Under the circumstances, the ALJ concludes that Respondent's denial of reimbursement is legally inadequate, as it has failed to deny reimbursement in compliance with the Commission's rules. This is consistent with past SOAH decisions.³ Because Respondent improperly denied reimbursement in compliance with the Commission's rules, it is now required to provide such reimbursement. Respondent must reimburse Petitioner for treatment provided from March 19, 2002 through May 22, 2002. Based on this threshold legal ruling, the ALJ does not address any medical necessity issues for the period noted above.

C. Treatments from May 22, 2002 through July 19, 2002.

Gary Martin, D.C., prepared the May 22, 2002, peer review in which he concluded that Claimant has undergone extensive chiropractic and rehabilitation treatments and, in Dr. Martin's opinion, reached maximum therapeutic benefit from these procedures. Respondent argued that Petitioner's SOAP notes indicated that Claimant was not improving from Petitioner's chiropractic care because for many months, Claimant's pain was noted as moderate. Petitioner countered by testifying that the pain has decreased from severe to moderate and his range of motion increased.

Apparently Dr. Martin, in his one-paragraph peer review, ignored Claimant's therapeutic injections. In his October 20, 2002, peer review, David Niekamp, D.C. noted that Claimant had epidural steroid injections on December 31, 2001, February 3, 2002, and April 3, 2002. Claimant also had sacroiliac joint injections on May 30, 2002. Dr. Niekamp's review indicated that chiropractic procedures for six weeks after each injection was reasonable. As all treatments between May 22, 2002 through July 19, 2002, were performed six or seven weeks

² 28 TAC § 133.304(h) states: When an insurance carrier reduces or denies payment for treatment(s) and/or service(s) on the recommendation of a peer review as described in subsection (g) of this section, the insurance carrier shall provide a copy of the peer reviewer's report to the sender of the bill, with the explanation of benefits...

⁶ See SOAH Docket Nos. 453-02-0991.M5, Decision and Order (April 12, 2002) (ALJ Ingraham); 453-03-2310.M5, Decision and Order (September 3, 2002) (ALJ Wood); 453-03-2355.M5, Decision and Order (July 31, 2003) (ALJ Beeler); 453-03-3682.M5, Decision and Order (October 17, 2003) (ALJ Bennett); and 453-03-3613.M5, Decision and Order (December 2, 2003) (ALJ Seitzman).

from an injection, the ALJ concludes the treatments were medically necessary and Respondent shall reimburse Petitioner for these dates of service.

D. Treatments Performed Subsequent to July 19, 2002.

On July 19, 2002, Richard Westmark, M.D., an orthopedic surgeon, recommended surgery on Claimant's herniated disc, which Claimant declined. Dr Niekamp indicated in his peer review that Claimant was at maximum medical improvement when he declined surgery, as no further improvement would be expected with any other procedure at this point. Petitioner said that Claimant returned to work without surgery. The ALJ agrees with the peer review. Petitioner's last treatment date subject to this hearing was September 18, 2002. According to Dr. Niekamp's review, on October 23, 2002, he talked to Petitioner, who told Dr. Niekamp that Petitioner had recently referred the Claimant out to address psychological issues regarding chronic pain. More than a month after the last treatment the Claimant had not returned to work. There was no evidence that Claimant benefitted from the treatments performed between July 19, 2002 and September 18, 2002. The ALJ concludes that the treatments during this period were not medically necessary, and Petitioner should not be reimbursed services performed from July 19, 2002 through September 18, 2002.

E. Evidentiary Weight Given the IRO Decision.

At the hearing, Respondent suggested that the IRO decision be given greater weight than other evidence. The ALJ responded that it will be afforded the same weight as any other credible evidence. Respondent was told that the hearing was a De Novo hearing and the IRO decision is used to determine who has the burden of proof. On November 20, 2003, Respondent sent the ALJ a copy 28 TEX. ADMIN. CODE (TAC) § 133.308(v).⁴ The rule states: "In all appeals from reviews of prospective or retrospective necessity disputes, the IRO decision has presumptive weight." This is a procedural rule. Both statute and rule⁵ provide that unless specifically adopted by SOAH, the procedural rules of an agency do not apply to a SOAH hearing. Consequently, the ALJ will give the IRO decision the same weight as any other credible evidence.

E. Summary.

The ALJ finds that Respondent shall reimburse Petitioner for dates of service March 19, 2002 through May 22, 2002. The basis of this decision is that Respondent did not deny Petitioner's request for payment according to Commission rule. The ALJ also finds that Respondent shall reimburse Petitioner for dates of service May 19, 2002 through June 19, 2002 because the dates of service are all six or seven weeks from a therapeutic injection and thus medically necessary. Respondent shall not be reimbursed for dates of service June 19, 2002 through September 18, 2002, because the treatments were not medically necessary.

⁴ Respondent referred to the rule as §133.308(w).

⁵ 1 TAC § 155.3(c) and Government Code § 2003.050(b).

III. FINDINGS OF FACT

1. On ____, Claimant ____, an electrician, sustained a compensable injury to his lower back when he was lifting tubing.
2. At the time of the Claimant's compensable injury, Hartford Insurance Company of the Midwest (Respondent) was the workers' compensation insurer for Claimant's employer.
3. Suhail Al-Sahli, D.C. (Petitioner) evaluated Claimant and initiated physical therapy.
4. The treatment was of minimal benefit and a November 14, 2001, MRI revealed an 8 mm herniated disk at L4 and L5.
5. Petitioner performed both active and passive physical therapy from ____, to September 18, 2002, and Respondent denied reimbursement for the treatments from March 19, 2002, through September 18, 2002.
6. The stated basis on the Explanation of Benefits (EOB) for the denials was Code "V," which means "payment withheld as peer review indicates the treatment to be medically unreasonable and/or unnecessary."
7. The peer review was not created until May 22, 2002.
8. If the denial is based on a peer review, the Carrier is required to provide a copy of the peer reviewer's report to the sender of the bill.
9. For the period March 19, 2002 to May 22, 2002, Respondent did not and could not transmit a peer review to Petitioner justifying the denial because such a peer review did not exist.
10. No peer review retrospectively reviewed the March through May 2002 period.
11. Respondent did not properly deny the Petitioner's request for payment for the period March 19, 2002 to May 22, 2002.
12. Claimant had epidural steroid injections on December 31, 2001, February 3, 2002, and April 3, 2002 and a sacroiliac joint injection on May 30, 2002.
13. Physical therapy is medically necessary for six to seven weeks after the therapeutic injections
14. The period from May 22, 2002, to July 19, 2002, was approximately six weeks from two of the injection dates.
15. On July 19, 2002, Richard Westmark, M.D., recommended surgery on Claimant's herniated disc, which Claimant denied.
16. Claimant was at maximum medical improvement when he declined surgery because no further improvement would be expected from physical therapy or any other procedure.

17. Between July 19, 2002, through September 18, 2002, physical therapy was not medically necessary
18. Unless specifically adopted by SOAH, the procedural rules of an agency do not apply to a SOAH hearing.
19. Based on Respondent's denial, Petitioner sought medical dispute resolution through the Texas Workers' Compensation Commission (Commission). The matter was referred to an Independent Review Organization (IRO) designated by the Commission for the review process. The IRO determined that the physical therapy sessions were not a medically necessary treatment for Claimant's compensable injury.
20. Petitioner then requested a hearing before SOAH. The hearing convened November 18, 2003, at the Hearings Facility of the State Office of Administrative Hearings (SOAH) before SOAH Administrative Law Judge (ALJ) Stephen J. Pacey. The Respondent was represented by Attorney John Fundis. Petitioner appeared *pro se*. The Commission did not appear. On November 20, 2003, Respondent sent the ALJ a rule purportedly supporting one of its assertions. After allowing Petitioner seven days to respond, the record was closed on November 27, 2003.
20. Notice of the hearing was sent August 21, 2003, and contained a statement of 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 sections of the statutes and rules involved; and a short, plain statement of the matters asserted.

IV. CONCLUSIONS OF LAW

1. The Texas Workers' Compensation Commission (Commission) has jurisdiction related to this matter pursuant to the Texas Workers' Compensation Act (the Act), 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 § 413.031(d) 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.
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 has the burden of proof in this matter. 28 TEX. ADMIN. CODE §§ 148.21(h) and 133.308(w).
6. Respondent failed to follow 28 TEX. ADMIN. CODE §133.304(h) by failing to send Petitioner a copy of the peer review with the explanation of benefits form denying payment for the treatments in issue.

7. Because Respondent has never properly denied reimbursement in compliance with the Commission's rules, it is now required to provide such reimbursement, for the treatments provided March 19, 2002, through May 22, 2002.
8. The physical therapy sessions between May 22, 2002, and July 19, 2002, were medically necessary treatment for Claimant's compensable injury.
9. The physical therapy sessions between July 19, 2002, and September 18, 2002, were not medically necessary treatment for Claimant's compensable injury.

ORDER

Hartford Insurance Company of the Midwest shall reimburse Suhail Al-Sahli for the physical therapy sessions from March 19, 2002 to July 19, 2002. Hartford Insurance Company of the Midwest shall not be required to reimburse Suhail Al-Sahli for the remainder of the services.

SIGNED this 23rd day of January, 2004.

STEPHEN J. PACEY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS