

<b>MEDICAL ASSOCIATES,</b>	§	<b>BEFORE THE STATE OFFICE</b>
<b>Petitioner</b>	§	
	§	
<b>V.</b>	§	<b>OF</b>
<b>TEXAS MUTUAL INSURANCE</b>	§	
<b>COMPANY,</b>	§	
<b>Respondent</b>	§	<b>ADMINISTRATIVE HEARINGS</b>

## DECISION AND ORDER

Medical Associates (Petitioner) appealed the findings and decision of the Texas Workers' Compensation Commission's designee, an independent review organization (IRO), which found that physical therapy Petitioner provided a workers' compensation claimant (Claimant) was not medically necessary healthcare. The IRO's decision upheld a denial of reimbursement by Texas Mutual Insurance Company (Carrier/Respondent). This Decision and Order finds only the active physical therapy modalities administered from June 13 through July 29, 2002, were reasonable and medically necessary healthcare for Claimant.

### I. NOTICE, JURISDICTION, AND PROCEDURAL HISTORY

There were no contested issues of jurisdiction or notice. Those issues are set out only in the Findings of Fact and Conclusions of Law below.

The hearing in this matter convened and the record closed December 8, 2003, before State Office of Administrative Hearings (SOAH) Administrative Law Judge (ALJ) Ann Landeros. Petitioner's designated employee representative Dr. A.J. Morris represented Petitioner, and attorney Orlesia Hawkins represented Respondent. The Commission Staff did not participate in the hearing.

### II. DISCUSSION

#### A. Factual Background

In \_\_\_\_, Claimant sustained a compensable work place injury to his neck, right shoulder, and back. Texas Mutual Insurance Company (Carrier/Respondent) was the workers compensation carrier for Claimant's employer. On February 26, 2002, orthopedic surgeon Dr. Linden Dillin operated on Claimant's shoulder to treat the compensable injury.

Dr. Dillin referred Claimant to Petitioner for post-operative rehabilitation physical therapy on his shoulder. Claimant began the physical therapy on March 11, 2002, and continued through July 29, 2002. Petitioner billed Carrier under the following CPT codes: 97010 (hot packs); 99070 (special supplies); 97110 (therapeutic exercises); 97124 (massage); and 97014 (electrical stimulation). Carrier paid for physical therapy up to April 14, 2002, then denied payment for additional physical therapy through July 2002 on the basis that the services after April 14, 2002, were not medically necessary healthcare.

The IRO upheld the denial of the physical therapy, stating:

There is no clearly documented clinical rationale to explain why a well structured home exercise program would be any less effective than active physical therapy in this clinical setting, particularly in light of a functional range of motion documented shortly after arthroscopy. There is no documentation of any significant complication to indicate the need for the therapy prescribed.

**B. Legal Standards**

Petitioner has the burden of proof in this proceeding. 28 TAC §§ 148.21(h) and (i); 1 TAC § 155.41. Pursuant to the Act, an employee who has sustained 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 cures or relieves the effects naturally resulting from the compensable injury, promotes recovery, or enhances the ability of the employee to return to or retain employment. TEX. LAB. CODE ANN. § 408.021(a). Health care includes all reasonable and necessary medical services. TEX. LAB. CODE ANN. § 401.011(19)(A). The IRO was authorized to hear the medical dispute pursuant to 28 TAC § 133.308. Medical care under the Act must be cost effective. See TEX. LAB. CODE ANN. § 413.011.

**C. Petitioner’s Evidence**

Post-surgically, Dr. Dillin prescribed both physical therapy and home exercises for Claimant. On March 1, April 4, May 2, and June 24, 2002, he prescribed four weeks of five physical therapy sessions per week. He testified that Claimant made satisfactory progress with the physical therapy until injured during a functional capacity evaluation (FCE) performed by Carrier’s representative in mid-June 2002. He also testified that four weeks of post-surgical physical therapy was not enough to rehabilitate Claimant.

Dr. Morris testified that the duration and intensity of the physical therapy was determined and administered as prescribed by Dr. Dillin. The goals of therapy were to improve motion, strength, and function. (Pet. Exh. 1, p. 60). Claimant’s range of motion in his right shoulder improved during physical therapy from March through July 2002 as follows:

<u>Measurement</u>	<u>March 2000</u>	<u>April 12, 2000</u>	<u>July 26, 2002</u>
flexion	115 degrees	145 degrees	160 degrees
extension	55 degrees	60 degrees	56 degrees
abduction	110 degrees	140 degrees	160 degrees
internal rotation	50 degrees	60 degrees	67 degrees
external rotation	55 degrees	75 degrees	80 degrees
pain level	9 out of 10	7 out of 10	6-7 out of 10

(Pet. Exh. 1, p. 1, 27, 60). From April 5 through August 2, 2002, Claimant consistently rated his pain at 7 out of 10.

Dr. Dillin’s office notes for Claimant were as follows:

<u>Date</u>	<u>Comment</u>
May 5, 2002	[Claimant's] pain is down to about half of what it had been before. However, he is still ginger about getting his arm to full abduction. (Pet. 1, p. 7).
June 10, 2002	[Claimant] is doing well as far as his shoulder is concerned. He is significantly better, excellent range of motion. An FCE performed on 5/15/02 documented values that were close to his contralateral shoulder. (Pet. Exh. 1, p. 6)
June 24, 2002	[Claimant] was doing great as far as his shoulder is concerned until he had a[n] FCE performed on the 13 <sup>th</sup> of this month. The FCE lasted about 2 hours and following it he had marked discomfort in his right shoulder that has persisted to date. (Pet. Exh. 1, p. 5).

Petitioner did not submit Dr. Dillin's office notes for April 2002.

Dr. Dillin stated that while home exercises are certainly part of rehabilitation, they are not a medically acceptable alternative to physical therapy. Lack of expertise, proper equipment, compliance, motivation, and the possibility of reinjury are all factors which diminish the effectiveness of home exercises.

On June 18, 2002, Dr. Richard Guyer, M.D., examined Claimant, who believed the burning pain down both arms and sharp shooting pains aggravating his neck and back pain were caused by the recent FCE. Dr. Guyer prescribed pain medication and thought Claimant might benefit from a course of physical therapy. (Pet. Exh. 1, p. 17-18).

#### **D. Carrier's Evidence**

Carrier presented various medical records and the testimony of two experts, an orthopedic surgeon and a physical therapist.

##### 1. Scott Herbowy

Carrier's expert witness, physical therapist Scott Herbowy, testified that the goals of Claimant's physical therapy should have been to improve his minimally restricted range of motion and his strength, goals which could have been achieved through a home exercise program monitored by a therapist. In his opinion, the type of intensive, one-to-one physical therapy Claimant received is required only for safety, program progression, or to monitor symptomatic responses. (Res. Exh. 1, tab 10, p. 7).

Based on Claimant's consistent self-rating on the pain scale over the course of the therapy, Mr. Herbowy did not believe Claimant progressed during the course of the therapy. He also saw no reason documented to justify the passive modalities of hot packs, electrical stimulation, or massage. (Res. Exh. 1, tab 10, p. 11). He felt the most efficacious treatment for Claimant's recovery would have been stretching the muscles four-five times a day, which Claimant could have done at home. (Res. Exh. 1, tab 10, p. 12). Apparently, he was not aware that Claimant had been instructed to perform home exercises.

##### 2. Dr. Nicolas Tsourmas

Carrier's expert orthopedist, Dr. Nick Tsourmas, testified that Claimant's physical therapy after April 14, 2002, was neither reasonable nor medically necessary. Dr. Tsourmas agreed with Dr. Dillin that post-surgical physical therapy is appropriate but disagreed as to the appropriate duration and intensity for Claimant.

According to Dr. Tsourmas, a couple of weeks of one-on-one physical therapy to prepare Claimant for home exercises should have been sufficient, especially because he had extensive previous physical therapy. Dr. Tsourmas considered the five weeks of physical therapy up to April 14, 2002, (which Carrier paid for) more than sufficient for the typical post-surgical shoulder rehabilitation. In his opinion, the physical therapy was not the most cost efficient way to rehabilitate Claimant's shoulder because home exercises could have achieved the same result.

Dr. Tsourmas questioned the efficacy of the passive modalities (e.g. hot packs) given to Claimant during the physical therapy because he believed the true benefit of rehabilitative therapy came from active modalities.

Dr. Tsourmas agreed that if Claimant had been injured during an FCE his case would not be considered a typical case, but he did not believe the documentation actually established Claimant was injured during the FCE as claimed.

## **E. Analysis**

The evidence established that Claimant's recovery from surgical trauma to his arm suffered a set back after the FCE administered by Carrier's chosen provider in mid-June 2002. Therefore, there are two sub-issues to be addressed: was physical therapy medically necessary from April 15 through June 13, 2002, and was it medically necessary from June 14 through July 29, 2002?

Petitioner's records showed that, although his pain complaints remained steady, Claimant's range of motion improved after his physical therapy. In fact, on June 10, 2002, Dr. Dillin described Claimant's range of motion as "excellent," evidence that, by that date, the major goal of Claimant's physical therapy had been achieved. It appears that, but for the injury sustained during the \_\_\_ FCE, Claimant would not have needed physical therapy after that date.

Petitioner's evidence supported Carrier's experts' opinions that Claimant benefitted from active physical therapy modalities. But both Dr. Tsourmas and Mr. Herbowy criticized the passive modalities as unnecessary and not cost-effective when administered in the clinical setting. Petitioner failed to explain why those passive modalities were necessary or cost effective in the clinical setting.

The record lacked sufficient documentation to support Petitioner's contention that the type and intensity of physical therapy from April 15 through June 13, 2002, was reasonable and necessary. By April 15<sup>th</sup>, Claimant had received over a month of post-surgical physical therapy and had achieved significant gains in his range of motion, which had been minimally restricted to begin with.

The record did establish that Claimant suffered a significant setback after the mid-June FCE as shown by his increased pain levels noted by Drs. Guyer and Dillin, both of whom examined Claimant and recommended further physical therapy to deal with this pain. Therefore, the physical

therapy from June 14 through July 29, 2002, was shown to be medically necessary for Claimant with one caveat. Petitioner failed to present evidence sufficient to establish that any of the passive modalities (hot packs, electrical stimulation, or massage) were either necessary or cost effective as

delivered.

Because Dr. Dillin did prescribe the home exercise regimen (although the record is silent as to Claimant's compliance level), Mr. Herbowy's criticism that Claimant's treatment lacked a home exercise component was ill-founded. Although used to justify clinical therapy, non-compliance with

the home exercise protocol was not shown to be a factor in Claimant's recovery or to necessitate providing passive physical therapy modalities in the clinical setting. The record contained no more than a scant reference to Claimant's alcohol consumption, but this factor was not shown to be a reason to have him receive physical therapy in the clinical setting.

Petitioner only met its burden to show that the active physical therapy modalities (billed under CPT code 97110) provided Claimant from June 14 through July 29, 2002, were reasonable and medically necessary healthcare. Petitioner did not meet its burden of proof on any of the other disputed dates of service or for any of

### **III. FINDINGS OF FACT**

1. In \_\_\_\_, Claimant sustained an injury compensable under the Texas Workers' Compensation Act (Act).
2. At the time of the compensable injury, Claimant's employer had Workers' Compensation Insurance coverage with Texas Mutual Insurance Company (Carrier/Respondent).
3. On February 26, 2002, orthopedic surgeon Dr. Linden Dillin operated on Claimant's shoulder to treat the compensable injury.
4. Dr. Dillin referred Claimant to Medical Associates (Petitioner) for post-surgical physical therapy.
5. Carrier paid for Claimant's physical therapy from March through April 14, 2002, then denied reimbursement for physical therapy from April 15 through July 29, 2002, as being not medically necessary.
6. After Carrier denied reimbursement, Petitioner appealed to the Texas Workers' Compensation Commission (Commission), which referred the dispute to its designee, an independent review organization (IRO).
7. The IRO's decision upheld Carrier's denial of reimbursement on the basis that the physical therapy sessions were not medically necessary. Petitioner timely appealed that decision.
8. The Commission's notice of hearing stated the date, time, and location of the hearing and cited to the statutes and rules involved along with a short, plain statement of the factual matters involved.
9. Petitioner and Respondent were represented at the hearing, but the Commission Staff chose not to participate.
10. Claimant's physical therapy consisted of both passive and active modalities.
11. In addition to physical therapy, Dr. Dillin prescribed home exercises for Claimant but his level of compliance was not shown.

12. The goals of Claimant's physical therapy were to increase range of motion, strength and endurance in his arm.
13. The active physical therapy modalities (billed under CPT code 97110) were the essential part of Claimant's post-surgical physical therapy.
14. The passive physical therapy modalities did not benefit Claimant and administering such passive modalities (hot packs, electric stimulation, or massage) in a clinical setting was neither necessary nor cost-effective.
15. By mid-April 2002, Claimant had undergone a month of physical therapy and had shown significant gains in his range of motion.
16. By June 10, 2002, Claimant's range of motion was excellent and the major goal of his physical therapy had been achieved.
17. The record lacked documentation establishing that, between April 15 and June 13, 2002, Claimant needed the physical therapy provided by Petitioner.
18. After a functional capacity evaluation on June 13, 2002, Claimant again needed physical therapy because the pain in his arm and neck increased significantly.
19. The active physical therapy modalities administered Claimant between June 13 and July 29, 2002, (billed under CPT code 97110), were reasonable and medically necessary healthcare.

#### **IV. CONCLUSIONS OF LAW**

1. The Texas Workers' Compensation Commission (Commission) has jurisdiction over this matter pursuant to the Texas Workers' Compensation Act (Act), TEX. LAB. CODE ANN. § 413.031.
2. The State Office of Administrative Hearings has jurisdiction over 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 IRO was authorized to hear the medical dispute pursuant to 28 TEX. ADMIN. CODE (TAC) § 133.308.
4. The hearing was conducted pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001 and the Commission's rules, 28 TAC § 133.308(u).
5. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
6. Petitioner had the burden of proof in this proceeding. 28 TAC §§ 148.21(h) and (i); 1 TAC § 155.41.
7. Pursuant to the Act, an employee who has sustained 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 cures or relieves the effects naturally resulting from the compensable injury, promotes recovery, or enhances the ability of the employee to return to or retain employment. TEX. LAB. CODE ANN. § 408.021(a).

8. Health care includes all reasonable and necessary medical services. TEX. LAB. CODE ANN. § 401.011(19)(A). A medical benefit is a payment for health care reasonably required by the nature of the compensable injury. TEX. LAB. CODE ANN. § 401.011(31).
9. Medical care under the Act must be cost effective. See TEX. LAB. CODE ANN. § 413.011.
10. Only the active physical therapy modalities administered from June 13 through July 29, 2002, (billed under CPT code 97110) were reasonable and medically necessary healthcare under TEX. LAB. CODE ANN. §§ 401.011(19) and 408.021(a).
11. Petitioner is entitled to reimbursement only for the active physical therapy modalities provided Claimant between June 13 and July 15, 2002.

### **ORDER**

It is ORDERED that Medical Associates is entitled to reimbursement by Texas Mutual Insurance Company only for the active physical therapy modalities, billed under CPT code 97110, provided to Claimant from June 13 through July 29, 2002.

**SIGNED January 5, 2004.**

---

**ANN LANDEROS  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS**