

SOAH DOCKET NO. 453-03-3877.M5
MRD NO. M5-03-0948-01

**LIBERTY MUTUAL FIRE
INSURANCE COMPANY,
Petitioner,**

v.

**KELLY ALANA, D.C.,
Respondent.**

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Liberty Mutual Fire Insurance Company (Carrier) appealed a decision of the Medical Review Division (MRD) of the Texas Worker's Compensation Commission (Commission), adopting the determination of an Independent Review Organization (IRO). The IRO authorized reimbursement to Kelly Alana, D.C. (Provider) for physical therapy services and office visits from January 17, 2002, through July 8, 2002. Carrier contended that the services and office visits were not medically reasonable or necessary. The ALJ finds that some of the services provided were medically reasonable and necessary.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The Texas Worker's Compensation Commission has jurisdiction over this matter pursuant to Section 413.031 of the Texas Workers' Compensation Act (Act), TEX. LAB. CODE ANN. ch. 401 *et seq.* The State Office of Administrative Hearings (SOAH) has jurisdiction over this proceeding, including the authority to issue a decision and order, pursuant to TEX. LAB. CODE ANN. § 413.031(d) and TEX. GOV'T CODE ANN. ch. 2003.

A hearing in this matter was convened on November 17, 2003, before Administrative Law Judge (ALJ) Suzanne Formby Marshall. Charlotte Salter, attorney, represented Carrier and Larry Laurent, attorney, represented the Provider. There are no contested issues of notice or jurisdiction; therefore, those matters are addressed in the findings of fact and conclusions of law without further discussion. The record was held open until January 7, 2004, to allow the parties time to file additional evidence.

II. BACKGROUND

Claimant is a ____ year old male who has suffered at least two compensable worker's compensation injuries. On ____, Claimant fell to a concrete floor from a scaffold approximately six feet off the ground. He injured his back, right hip, right knee, and right ankle. In ____, Claimant felt a pop in his right wrist while he was using wire pliers to pull apart a steel collar. He sought treatment from Dr. Alana for the injury to his wrist. During Dr. Alana's initial evaluation, Claimant reported that he continued to have pain from his ____ injury.

Dr. Alana began providing physical therapy services to Claimant in _____. On March 11, 2002, Claimant had arthroscopic surgery to his right ankle.¹ Claimant began post-operative physical therapy on March 18, 2002, and received thirteen sessions from March 18 through April 19, 2002. The therapy treatment was extended for another thirteen visits, beginning April 22, 2002. In May 2002, the therapy was extended by Provider and continued until July 8, 2002. It appears that Claimant received approximately forty-four sessions of therapy. On August 27, 2002, Claimant had arthroscopic knee surgery.

The disputed services in this case relate to treatment given by Dr. Alana to Claimant for injuries from the _____ incident. The services provided to Claimant included office visits, mechanical traction, electrical stimulation, therapeutic exercise, neuromuscular re-education, manual traction therapy, myofascial release/soft joint mobilization and review of medical reports.

II. LEGAL STANDARDS

The applicable legal standards are found in sections 408.021 and 401.011 of the Texas Labor Code. Section 408.021 states:

- (3) 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;
 - 1. promotes recovery; or
 - 2. enhances the ability of the employee to return to or retain employment.

Section 401.11(19) defines “health care” to include “all reasonable and necessary medical aid, medical examinations, medical treatments, medical diagnoses, medical evaluations, and medical services.”

III. EVIDENCE

The issue presented in this case is whether the Carrier should reimburse Provider approximately \$ 8,000 for physical therapy, office visits, and medical information reviews rendered by Provider to Claimant from January 18 through July 8, 2002. The time period at issue is before and after the ankle surgery performed on Claimant on March 11, 2002.

¹ The surgery was performed by Dr. John McConnell, M.D. The surgery was necessary to repair the right ankle’s lateral ligament (ATF).

A. Carrier's Evidence

Carrier introduced into evidence the medical records of Claimant which were marked as Carrier's Exhibits Nos. 1 (A1 - A309) and 2 (C1 - C155). After the hearing, Carrier submitted supplemental exhibits which were admitted into evidence as Petitioner's Exhibits 1 and 2. Additionally, the testimony of Dr. McCaskill, an expert witness, was presented.

Carrier contends that: (1) Provider did not appeal a number of the Carrier's denials of payment in accordance with 28 TEX. ADMIN. CODE (TAC) §133.304(m) and, consequently, several of the dates of service should not have been considered by the IRO; (2) the physical therapy and other services were not medically necessary because they did not improve Claimant's condition; and (3) the physical therapy and other services were not necessary because the ankle and knee surgeries were not necessary.

According to Carrier, Provider failed to ask for reconsideration of a number of the disputed dates of service. Carrier asserts that, before it can appeal Carrier's reason for denying reimbursement, Provider must seek reconsideration by the Carrier.²

With regard to Carrier's assertion that the services were not medically necessary, Carrier relied on the testimony of Dr. McCaskill, and the reports of peer reviewers and other doctors contained within the medical records.

After the ____ injury, x-rays were taken of Claimant which showed no acute ankle abnormality, a normal knee, and no evidence of a fracture or change in the wrist. Carrier's Exhibit 2, p. C-1. In February 2001, an MRI of the right knee showed a tiny anterior and lateral joint effusion and abnormal increased signal in the medial meniscus. *Id.* at C-6, C-7.

Dr. McCaskill, a Board-certified orthopedic surgeon, examined Claimant on March 18, 2003, as part of a required medical evaluation.³ According to Dr. McCaskill, Claimant appeared unimproved as a result of the treatment he received from Provider. Dr. McCaskill testified that there were very few abnormal physical findings and no objective basis for the difficulties that Claimant reported. Indeed, Dr. McCaskill noted that Claimant's symptoms were very similar to those he displayed in June of 2001, almost two years earlier. Carrier's Exhibit 2, p. C-12.

Dr. McCaskill testified that after reviewing the treatment notes in the Carrier's exhibits, it was difficult to tell whether the therapy had relieved the effects of Claimant's injury. He observed that Claimant had not returned to work and continued to suffer from severe pain, negating a conclusion that the therapy promoted recovery in a substantial way. Dr. McCaskill agreed that a course of physical therapy for six to twelve weeks would be reasonable and necessary after the surgery to Claimant's ankle. However, he did not believe that the therapy resulted in significant progress or improvement of Claimant's condition, nor was there any objective measurement of

² Specifically, Carrier argues that Provider failed to file a request for reconsideration for treatment and services rendered on the following dates: March 25, 28, 29; April 1, 3, 5, 10, 12, 15, 17, 19, 22, 24, 25, 26, 29; May 1, 3, 6, 8, 10, 13, 15, 17, 20, 29; June 3, 5, 7, 10, 11, 12, 13, 14, 17, 19, 21, 24, 27; and July 1, 8. Petitioner's Exhibit 1.

³ No other identifying information about Dr. McCaskill was offered into evidence. Dr. McCaskill prepared a report which was to be submitted into evidence after the hearing. The report was not received by the ALJ.

progress. Dr. McCaskill also testified that he disagreed with the recommendation to place Claimant in work conditioning or work hardening in June of 2002 because Claimant continued to complain of problems with his knee. Dr. McCaskill said that the knee problem should be resolved prior to beginning such a program.

Dr. McCaskill did not agree with the IRO reviewer's conclusions regarding the active trend in the therapies applied or the statements relating to the mechanism or severity of the injury. He said that he would have continued to treat Claimant with physical therapy or medications until he either got better or not, and he did not see any indicators for the ankle or knee surgeries.

B. Provider's Evidence.

Provider introduced into evidence Claimant's medical records and medical bills in Provider's Exhibit 1. Provider also testified in this matter. Provider argues that the services and office visits were medically necessary and were recommended by Claimant's surgeon, Dr. John McConnell. The therapeutic services were provided prior to the ankle and knee surgeries, as well as after the ankle surgery. According to Provider, Claimant's multiple injuries and difficulty in healing caused the physical therapy process to take longer than usual. However, Provider testified that the treatment improved Claimant's condition. Provider urges that the MRD decision be upheld.

Dr. Kelly Alana has been licensed as a chiropractor since 1996. He works at the Southwest Injury and Rehab center. Dr. Alana testified that the disputed dates of service were from January 18 through July 8, 2002. He noted that Carrier had paid the charges for some of the dates of service.⁴

Dr. Alana testified that the treatment given to Claimant varied, depending on which body part was being treated. He said that the SOAP notes indicated the body part that received services on a

given day. According to Dr. Alana, Claimant had multiple body part injuries, i.e., a right knee internal derangement, small tears on in the meniscus of his right ankle, a disk herniation at L4-L5, and loose bodies in his knee. Dr. Alana stated that the injuries were confirmed through numerous MRIs.

Dr. Alana noted that Claimant was under the care of Dr. John McConnell during his treatment of Claimant and that the physician recommended physical therapy for Claimant. He testified that the therapy consisted of active treatment targeted to the ankle through the use of a wobble board and theraband. The physical therapy was designed to assist in improving Claimant's low back and knee with passive exercise. Claimant received physical therapy, myofascial release, joint mobilization, range of motion exercises and strength and endurance exercises for his ankle and knee on January 18, 29, and 31, 2002. Dr. Alana testified that these therapies were considered as pre-operative physical therapy because Claimant was scheduled to have ankle surgery in January. However, the surgery was moved to March 11, 2002, and physical therapy was continued until the time of the surgery.

With regard to whether Claimant's condition improved, Dr. Alana noted that the progress varied at times due to the multiple injuries and multiple body parts being treated. He testified that

⁴ Those dates are February 13, 15, 22, 25, 27, and March 1, 2002.

Claimant showed improvement overall. After Claimant's surgery on March 11, he continued with physical therapy. Due to Claimant's increased pain, he was given passive modalities of treatment. After Claimant saw Dr. McConnell on March 26, it was recommended that Claimant receive passive modalities of treatment.

Dr. Alana testified that as Claimant was able to engage in active physical therapy, his range of motion increased and his pain level decreased. On June 26, 2002, a Functional Capacity Evaluation was conducted and it was determined that Claimant could not perform at the heavy work level of his job. Dr. Alana believed that he was a good candidate for work hardening.

Robert Henderson, M.D., examined Claimant in September 12, 2001, with regard to his back injury. Dr. Henderson noted that Claimant had responded to the physical therapy he had received from Dr. Alana, including manipulation, therabends, cycling and treadmill. Dr. Henderson stated that Claimant said his symptoms increased when he did not participate in therapy. Carrier's Exhibit 2, p. C-17. Dr. Clifford Ferrell, M.S., D.O., examined Claimant in January 17, 2002, for Claimant's complaints of pain in his right ankle and right knee. According to Dr. Ferrell, Claimant exhibited weakness and pain and limited range of motion. He noted that Claimant was scheduled for ankle surgery on January 29, 2002, and recommended continuation of physical therapy until that time. *Id.* at C-21-22.

John McConnell, M.D., evaluated Claimant on January 28, 2002. He noted that Claimant was scheduled for ankle arthroscopy with ATF repair the next day, but the surgery was postponed because there was no CT scan of the ankle. Dr. McConnell noted that Claimant needed to continue to wear a brace as stabilization for his knee. *Id.* at C-24. Dr. McConnell recommended that Claimant continue with physical therapy throughout the dates of service in issue. On April 9, 2002, Dr. McConnell evaluated Claimant one month post-surgery. He noted improvement in Claimant's condition since surgery, with some stinging pain. He recommended that Claimant engage in home exercises and begin physical therapy three times a week, with passive range of motion continuing to strengthening and active range of motion.

Dr. McConnell evaluated Claimant on May 20, 2002, and noted that Claimant continued to have some pain and swelling, but that Claimant reported feeling well as a result of the physical therapy. Dr. McConnell recommended continuing physical therapy 3 times a week for 4 weeks. Carrier's Exhibit 1, p. A-11.

IV. DISCUSSION

In reviewing the evidence in this case, the ALJ believes that Carrier met its burden of proof that some of the disputed physical therapy services and office visits were medically unnecessary, but failed to meet its burden of proof on all dates of disputed services. The ALJ first notes that Carrier's claim that Provider failed to request reconsideration of numerous dates of service does not comport with the evidence. Petitioner's Exhibit 1. The evidence shows that Provider did request

reconsideration of all denied claims.⁵ Further, there is no evidence that Carrier disputed these claims during the medical review process. Consequently, the ALJ finds that all the claims in Petitioner's Exhibit 1 are properly before the ALJ for consideration.

With regard to the issue of medical necessity, the ALJ has reviewed the numerous pages of medical records in this case. In summary, Claimant's progress throughout the physical therapy and treatments is varied. On some days, Claimant seems to be making progress, while on other days, Claimant's condition does not seem to improve. Provider's Exhibit 1, pp. 74-95. While there are a couple of instances in which a reviewing doctor concludes that the treatment provided is not medically necessary, the majority of reviewers do not dispute the need for the surgeries or related physical therapy. The ALJ finds the peer review of Shawn Jones, D.C. to be most instructive on the issue of medical necessity. Carrier's Exhibit 2, pp. C-142-144.

According to Dr. Jones, pre-operative therapy of three times a week for two to three weeks prior to the ankle surgery is reasonable and necessary. Additionally, a post-operative rehabilitation program of 12-18 sessions for strengthening, conditioning, and stability purposes is also medically necessary. Further, Dr. Jones concluded that a pre-op therapy program of three times a week for two to three weeks is appropriate prior to Claimant's knee surgery, followed by 12 to 24 treatments after the surgery.

Claimant was originally scheduled for ankle surgery on January 29, 2002, but that surgery was postponed. Consequently, the ALJ finds that the services provided on January 18 and 29 are medically reasonable and necessary as pre-operative physical therapy. The ALJ believes that the charges on January 31, February 11 and 14, 2002, for reviewing medical records and reports are also reasonable and necessary, especially after considering that Claimant's surgery had been postponed and the doctor reports discussed the future plan of action.

⁵ All references are to Provider's Exhibit 1. January 29, 2002, pp. A-141, 243; January 31, 2002, pp. A-142, 244; February 11, 2002, pp. A 144, 245; February 14, 2002, p. A-146, 247; March 18, 2002, pp. A-155, 254; March 21, 2002, pp. A - 157, 255; March 22, 2002, pp. A-159, 256; March 25, 2002, pp. A 161, 257; March 28, 2002, pp. A-163, 258; March 29, 2002, pp. 165, 259; April 1, 2002, pp. A, 72, 167, 260; April 3, 2002, pp. A - 73, 169, 261; April 5, 2002, pp. A - 76, 171, 262; April 10, 2002, pp. A - 75, 173, 263; April 12, 2002, pp. A - 76, 175, 264; April 15, 2002, pp. A - 77, 177, 265; April 17, 2002, pp. A - 78, 266; April 19, 2002, pp. A - 79, 181, 267; April 22, 2002, pp. A - 80, 183, 268; April 24, 2002, pp. A - 81, 185, 269; April 25, 2002, pp. A - 82, 187, 270; April 26, 2002, pp. A - 83, 189, 271; April 29, 2002, pp. A - 84, 191, 272; May 1, 2002, pp. A - 85, 193, 273; May 3, 2002, pp. A - 86, 195, 274; May 6, 2002, pp. A - 87, 197, 275; May 8, 2002, pp. A - 88, 198, 276; May 10, 2002, pp. A-89, 200, 277; May 13, 2002, pp. A - 90, 202, 204, 278; May 15, 2002, pp. A - 91, 204, 279; May 17, 2002, pp. A - 92, 206, 280; May 20, 2002, pp. A - 93, 206, 281; May 29, 2002, pp. A - 96, 208, 282; June 3, 2002, pp. A-95, 210, 283; June 5, 2002, pp. A-96, 212, 284; June 7, 2002, pp. A-97, 214, 285; June 10, 2002, pp. A - 98, 216, 286; June 11, 2002, pp. A-99, 218, 287; June 12, 2002, pp. A-100, 220, 288; June 13, 2002, pp. A-101,222,289; June 14, 2002, pp. A-102, 224, 290; June 17, 2002, pp. A-103, 226, 291; June 19, 2001, pp.; A-104, 228, 292; June 21, 2002, pp. A-105, 230, 293; June 24, 2002, pp. A-106, 232, 294; June 27, 2002, pp. A-107, 234, 295; July 1, 2002, pp. A-108, 236, 296; July 3, 2002, pp. A-109, 238, 297; and July 8, 2002, pp. A-110, 240, 291.

Carrier paid for services rendered until March 18, 2002.⁶ Although Claimant received services on March 18, 21, 22, and 25, 2002, there is no evidence in the record that provides a rationale for this treatment. The notes for these sessions indicate that Claimant's participation in therapy was minimal due to the cast on his leg and his significant pain. Carrier's Exhibit 2, pp. C-50-51. Indeed, Dr. McConnell indicates on March 26, 2002, that he wants Claimant to stop physical therapy "until probably the next week" because he wanted Claimant to heal more before starting range of motion exercises. *Id.* at C-53. Given this, the ALJ does not find the services on March 18, 21, 22, 25, and 28, 2002, to be medically reasonable and necessary.

In accordance with Dr. Jones' recommendation, the ALJ believes that post-operative therapy of 12-18 visits is medically reasonable and necessary. Given the slower progress Claimant had made in previous therapy and the testimony of Dr. Alana regarding the difficulties related to treating multiple body parts, the ALJ believes that increasing the number of treatments and visits recommended by Dr. Jones is supportable by the evidence in the case. Consequently, the ALJ finds that the visits from April 1 through June 3, 2002 were medically necessary. All services provided from June 5 through July 8, 2002, were not medically necessary.⁷

Based upon the evidence in this case, the ALJ concludes that reimbursement is owed to the Provider by Carrier.⁸

V. FINDINGS OF FACT

1. Claimant is a forty-six man who suffered a compensable worker's compensation injury on ____, when he fell from a scaffold and injured his back, right hip, right knee, and right ankle.
2. Claimant's injury is covered by worker's compensation insurance provided by his employer, and carried through Liberty Mutual Insurance Company.
3. Claimant was evaluated by Kelly Alana, D.C. (Provider) of Southwest Injury and Rehab in September 2000, over two-years' post-injury.
4. Provider provided physical therapy services to Claimant from January 18, 2002, through July 8, 2002.
5. The services referred to in Finding of Fact No. 3 included office visits, mechanical traction, electrical stimulation, therapeutic exercise, neuromuscular re-education, manual traction therapy, myofascial release, soft joint mobilization and review of medical records.

⁶ Provider agreed that Carrier had already reimbursed him for the following dates of service: February 13, 15, 20, 22, 25, 27, and March 1, 2002.

⁷ Dr. Alana testified that he had withdrawn his claim for reimbursement for services provided on June 11 and 13, 2002.

⁸ The ALJ notes that Carrier has already made reimbursement for some of the disputed dates of service.

6. Claimant had arthroscopic ankle surgery on March 11, 2002.
7. Claimant was originally scheduled for ankle surgery on January 29, 2002, but the surgery was postponed.
8. Dr. John McConnell prescribed physical therapy for Claimant prior to his ankle surgery in January, 2002.
9. The physical therapy services on January 18 and 29, 2002, helped to prepare Claimant for his ankle surgery scheduled for January 29, 2002.
10. Claimant received post-ankle surgery physical therapy on March 18, 21, 22, and 25, 2002; however, Claimant's condition was such that he could not effectively participate in or benefit from the treatment.
11. After Claimant's ankle surgery, Dr. McConnell recommended that Claimant receive physical therapy beginning the week of March 31, 2002.
12. There is medical necessity for post-operative physical therapy treatment after arthroscopic ankle surgery to improve range of motion, decrease pain, and strengthen the ankle.
13. A usual course of post-surgery physical treatment after arthroscopic ankle surgery is from 12-18 visits.
14. Claimant's condition was unusual in that he suffered injuries to multiple body parts and continued to suffer from a great deal of pain, slowing his progress throughout the physical therapy.
15. Claimant needed to participate in a greater number of physical therapy treatments in order to obtain the same results that would be expected in a usual case.
16. Claimant's overall condition improved as a result of the services provided by Dr. Alana.
17. The physical therapy helped relieve Claimant's pain and improved his range of motion, strengthening, and conditioning.
18. Carrier denied payment of the charges for the physical therapy and office visits from January 18, 2002, through July 8, 2002, on the grounds that they were not medically necessary.
19. Provider requested reconsideration of Carrier's decisions.
20. Provider requested dispute resolution by the Texas Worker's Compensation Commission Medical Review Division (MRD) on seeking reimbursement for the medication. The matter was referred to an IRO for review.
21. On June 9, 2003, the MRD issued a decision granting reimbursement for the physical therapy and office visits from January 17, 2002 through July 8, 2002.

22. On June 18, 2003, Carrier appealed the MRD's decision.
23. On July 22, 2003, the Commission sent a notice of hearing to the parties. The notice contained a statement of the time and place 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.

VI. CONCLUSIONS OF LAW

1. The Texas Worker's Compensation Commission (Commission) has jurisdiction to decide the issues presented pursuant the Texas Worker's Compensation Act (Act), TEX. LABOR CODE ANN. § 413.031.
2. The State Office of Administrative Hearings has jurisdiction over matters related to this proceeding, including the authority to issue a decision and order, pursuant to § 413.031(d) of the Act and TEX. GOVT. CODE ANN. ch. 2003.
3. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. §§ 2001.052 and 2001.057.
4. As the party appealing the MRD decision, the Carrier has the burden of proof in this matter, pursuant to 28 TEX. ADMIN. CODE § 148.21(h).
5. Based on the above Findings of Fact and Conclusions of Law, the office visits, medical records review, and physical therapy provided from January 18, 2002, through March 18, 2002, and from April 1 through June 3, 2002, were medically necessary.
6. Based on the above Findings of Fact and Conclusions of Law, the office visits, medical records review, and physical therapy provided from March 18 through 28, 2002, and from June 5 through July 8, 2002, were not medically necessary.
7. Based on the above Findings of Fact and Conclusions of Law, Petitioner is entitled to reimbursement under TEX. LABOR CODE §§ 413.015 and 408.021(a) for the services reflected in Conclusion of Law No. 5.

ORDER

IT IS ORDERED that Carrier reimburse Kelly Alana, D.C. for the office visits, medical records reviews, and services provided to Claimant from January 18 through March 18, 2002, and from April 1 through June 3, 2002.

SIGNED March 8, 2004.

**SUZANNE FORMBY MARSHALL
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**