DOCKET NO. 453-03-4223.M2
MDR Tracking Number: M2-03-1169-01

ERIC VANDERWERFF, D.C., Petitioner	§	**BEFORE THE STATE OFFICE**
VS.	§	**OF**
CHARTER OAK FIRE INSURANCE CO., Respondent	§	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

This dispute arose as a result of a request for work hardening services provided by Eric Vanderwerff, D.C. (Provider), to ____ (Claimant), a maintenance laborer who sustained injuries to his wrist from a work-related injury on ____. Provider seeks preauthorization for the services.

The ALJ finds that the Provider's services cannot be preauthorized because he has already rendered the services and finds that the Carrier is not liable for costs relating to treatments that require preauthorization, but can no longer be preauthorized.

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 on October 7, 2003, at the Hearing Facility of the State Office of Administrative Hearings (SOAH) before SOAH Administrative Law Judge (ALJ) Bill Zukauckas. The Provider represented himself and participated by phone. Charter Oak Fire Insurance Co. (Carrier) was represented by Dan Flanagan.

II. PROCEDURAL HISTORY

This matter was referred to the State Office of Administrative Hearings (SOAH) when the Provider requested a hearing on August 6, 2003, subsequent to the issuance of an Independent Review Organization (IRO) decision on June 23, 2003, determining the work hardening should not be preauthorized.

III. APPLICABLE STATUTES AND RULES

The question to be decided is whether the Carrier is liable for work hardening costs for treatment and services provided prior to receiving preauthorization.

According to section 408.021 of the Act,

(a) 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 413.014 of the Act addresses the issue of preauthorization:

(a) The commission by rule shall specify which health care treatments and services require express preauthorization by the insurance carrier. Treatments and services for a medical emergency do not require express preauthorization.

(b) The insurance carrier is not liable for those specified treatments and services unless preauthorization is sought by the claimant or health care provider and either obtained from the insurance carrier or ordered by the commission.

Pursuant to the provisions of the Act, the Commission promulgated rules to ensure the orderly progression of preauthorization disputes through the dispute resolution system at 28 TEX. ADMIN. CODE ch. 134.

Subchapter G. Treatments and Services Requiring Preauthorization

§ 134.600. Procedure for Requesting Preauthorization of Specific Treatments and Services

(a) The insurance carrier is liable for the reasonable and necessary medical costs relating to the health care treatments and services listed in subsection (h) of this section, required to treat a compensable injury, when any of the following situations occur:

(1) there is a documented life-threatening degree of a medical emergency necessitating one of the treatments or services listed in subsection (h) of this section;
(2) the treating doctor, his/her designated representative, or injured employee has received preauthorization from the carrier prior to the health care treatments or services; or
(3) when ordered by the commission.

* * * * *

(h) The healthcare treatments and services requiring preauthorization are:

* * * * *

(9) work hardening and/or work conditioning programs that have not been approved for exemption by the commission. For approval, facilities must

> submit documentation of current accreditation by the Commission on Accreditation of Rehabilitation Facilities (CARF), to the commission. A comprehehensive occupational rehabilitation program or a general occupational rehabilitation program constitutes work hardening and/or work conditioning programs, regardless of accreditation, will be subject to preauthorization and concurrent review after December 31, 2003. . . .

The parties agreed that Provider was not CARF-accredited.

IV. DISCUSSION

As stated previously, the issue in this case is whether the Carrier is liable for the services provided prior to receiving preauthorization. The Commission in previous cases has interpreted the statute and its preauthorization rule to mean that the effective date of preauthorization is the date an order is issued by the Commission granting preauthorization.[1] In this case, however, there has been no order from the Commission or IRO granting preauthorization. The ALJ concludes Provider's failure to obtain preauthorization for the work hardening is dispositive of the entire case.

A. Provider's Position

Provider focused most of his energy attempting to show that four weeks of work hardening should be preauthorized. The fact that the service was provided in June and July of 2003, only became apparent as Provider attempted to support the medical necessity of the work hardening by discussing the results of the service for which he was requesting preauthorization.

Provider generally relied on section 408.021 of the Act in support of his medical necessity position. Section 408.021 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." Provider argued that the Carrier's position does not serve an injured employee. Specifically, the injured employee must wait seven or eight months for necessary services and treatment until the provider has exhausted the administrative process to obtain an MRD, IRO, or SOAH order. Such an interpretation would not result in the provision of reasonably required health care services as and when needed as contemplated by the Act.

Provider admits he was not CARF-accredited at the time he provided the work hardening services for which he now seeks preauthorization. He argues, however, that the preauthorization he requested was not required because the services were rendered for an emergency and thus not required to be preauthorized pursuant to Commission rule 134.600(a)(1).

B. The Carrier's Position

In order for the carrier to be liable for the treatments and services enumerated within Commission rule 134.600(h), the Carrier argues that Provider must have express preauthorization from either the Carrier or an order from the Commission (or the IRO in this case), prior to the performance of the services in question. A Commission's order under Rule 134.600(a)(3) cannot

[1]Commission rules provide that the IRO decision is the decision of the Commission in these cases.

order liability for services already performed without preauthorization; it can only order liability for services expressly preauthorized.

The Provider also notes that the great majority of SOAH decisions have repeatedly held that preauthorization must issue prior to the performance of the service.[2] The plain meaning of preauthorization is "authorized prior to performance." The Act does not provide authority for the Commission to retroactively approve the Petitioner's provision of treatments. [3] The only thing that can be ordered by the Commission for services requiring preauthorization is preauthorization. Thus, it is impossible for the Commission to preauthorize treatments that have already been performed.[4]

The Carrier asserts that Provider's actions make no sense in light of the expedited process. Why speed up the process if the service can be performed at any time after the provider requests preauthorization, regardless of the carrier's response? If the legislature intended a retrospective review, like all other medical disputes, why the need to draft entirely different medical dispute resolution rules for preauthorization cases? The preauthorization rule would be eviscerated, and every medical treatment , regardless of the preauthorization requirement, would be subject to review.

C. ALJ's Analysis

Section 413.014(a) of the Act requires the Commission to specify by rule those health care treatments and services that require express preauthorization by the insurance carrier. Commission Rule 134.600(h) lists 16 categories of services that require preauthorization for a health care provider to qualify for payment from a carrier. Those services include non-emergency hospitalizations, physical therapy or occupational therapy beyond eight weeks of treatment, durable medical equipment in excess of $500 per item, nursing home, convalescent, residential, home health care services and treatments, and most recently, work hardening (when the Provider is not CARF-accredited). According to the statute, insurance carriers will not be liable for those treatments delineated by the Commission unless preauthorization is sought by the health care provider and either obtained from the carrier or ordered by the Commission. § 413.014(b). It is clear from the statute that preauthorization must be (i) sought and obtained or (ii) sought and ordered.[5] Preauthorization is the subject of the verbs "sought," "obtained," and "ordered," not treatment or services.[6]

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[2] *See e.g.* SOAH Docket No. 453-99-1354.M4 at 3 (ALJ Zukauckas, April 2000); SOAH Docket No. 453-99-0160.M2 at 4-5 (ALJ Pacey, July 1999); SOAH Docket No. 453-96-0456.M4 at 4 (ALJ Cunningham, October 1996).

[3] SOAH Docket No. 453-97-1527.M2 at 4 (ALJ Landeros, December 1, 1997).

[4] SOAH Docket No. 453-96-2107.M4 at 3 (ALJ Zukauckas, November 1, 1999).

[5] 453-97-1599.M2 at 2; Consolidated 453-96-0091.M1, 453-96-0124.M1, 453-96-0248.M2, 453-96-0275.M4 at 8; *see also* 453-96-0680.M2 at 4.

[6] 453-99-0160.M2 at 5; 453-96-0680.M2 at 5; Consolidated 453-96-0091.M1, 453-96-0124.M1, 453-96-0248.M2, 453-96-0275.M4 at 8.

Because Commission rule 134.600 was promulgated under the authority of section 413.014, it must be interpreted consistently with the section. The provision of the rule that makes the carrier liable for services and treatments "when ordered by the commission" concerns preauthorization. Preauthorization means "advance approval."[7]

Although the phrase "when ordered by the Commission," has presented some confusion, there is little doubt that the Commission's order can only order liability for services that receive preauthorization. As this ALJ noted in an earlier case,

> [T]he only arguably vague language of the rule is "when ordered by the commission." That language, however, must be read in the context of the statute from which the rule gets its authority, Section 413.014(b) of the Act. Although the ALJ recognizes that other SOAH ALJs have held to the contrary, this ALJ finds the plain language of the section 413.014 makes clear that what can be "ordered by the commission," for services requiring preauthorization, is preauthorization. Thus, it is impossible for the commission to preauthorize treatments that have already been performed.[8]

The ALJ notes that two SOAH ALJ decisions have held to the contrary. In one decision the ALJ determined that a liberal construction of the Act would harmonize the benefit entitlement provision of section 408.021 with the preauthorization provision of section 413.014 to best achieve the basic purpose of providing health care as and when needed.[9] The ALJ also interpreted rule 134.600(a) to only require preauthorization by the carrier prior to the rendering of services, not preauthorization by the Commission. That decision was followed by one other ALJ, who determined that the issue is whether the service was reasonable and necessary when the request for preauthorization was made.[10] In those two decisions, however, the ALJs actually upheld the MRD decisions denying preauthorization because the providers did not prove that the treatments were medically necessary, and whether preauthorization could be issued retroactively was not squarely considered.

The majority of opinions at SOAH is that "when ordered by the Commission" does not create liability for all treatment rendered, but preauthorization for the certain services that require preauthorization. Because the plain meaning of section 413.014 is specific in its requirement of preauthorization, its meaning must control over the more general provision of section 408.021.[11]

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[7] Docket No. 453-96-0680.M2 at 4 quoting the comments pertaining to the adoption of 28 TAC§134.600 published in 16 Tex. Reg. 7099 (1991).

[8] 453-96-2107.M4 at 3.

[9] SOAH Docket No. 453-96-1633.M2 at 5 (ALJ Marquardt, December 13, 1996).

[10] SOAH Docket No. 453-98-2348.M4 at 6-7 (ALJ Burns, April 26, 1999); SOAH Docket No. 453-99-0351.M2 at 7-8 (ALJ Burns, June 1, 1999).

[11] 453-95-0435.M2 at 8.

Even though 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 Act and the rules require that preauthorization or advance approval be given before certain services and treatments are provided. In the absence of express preauthorization obtained from the carrier or ordered by the Commission (or in this case the IRO now acting in the Commission's stead), the carrier is not liable for those certain treatments or services, regardless of the reasonableness of the treatment.

Preauthorization cannot be issued retroactively. Because this Provider delivered work hardening services requiring preauthorization, before obtaining preauthorization, he is not entitled to a retrospective review of the services and is not entitled to reimbursement for those services.

V. FINDINGS OF FACT

1. ____ (the Claimant) sustained a compensable, work-related injury on_____, while employed by___, which at the time of this incident had worker's compensation insurance through Charter Oak Fire Insurance Company (Carrier).

2. Eric A. Vanderwerff, D.C. (Provider) sought preauthorization from Carrier to treat the Claimant for his compensable injury prior to the date of the proposed treatment or service.

3. The Carrier denied preauthorization.

4. Provider properly appealed the denial to an Independent Review Organization (IRO) which, on June 23, 2003, also denied the request for work hardening preauthorization.

5. From June 23, 2003, through July 18, 2003, Provider rendered the work hardening services for which it was seeking preauthorization.

6. Provider did not receive preauthorization from the Carrier, or approval by order of the Texas Workers' Compensation Commission (Commission) or IRO ruling, prior to the performance of the treatments or services. At the time Provider rendered the work hardening services, he was not CARF-accredited and the services he provided were not emergent in nature.

7. The parties sought dispute resolution review with the Medical Review Division (MRD) of the Commission.

8. Pursuant to notice of hearing provided by the Commission, Provider and Carrier appeared at the hearing on October 7, 2003.

9. The record in this matter closed on October 31, 2003, after parties responded to the ALJ's request for information about Provider's CARF accreditation.

10. Provider did not present persuasive evidence that the work-hardening services he provided to Claimant were emergent in nature.

VIII. CONCLUSIONS OF LAW

1. The Texas Workers' Compensation Commission has jurisdiction to consider the issue presented pursuant to the Texas Workers' Compensation Act, TEX. LABOR 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. LABOR CODE ANN. §§402.073 and 413.031(d) and TEX. GOV'T CODE ANN. Ch. 2003.

3. Provider timely filed notice of appeal, as contemplated in 28 TEX. ADMIN. CODE (TAC) §148.3.

4. Proper and timely notice of the hearing was effected upon the parties according to TEX. GOV'T CODE ANN. § 2001.051 and 28 TAC §148.4(b).

5. Provider notified the Carrier of the recommended treatment of or service for the compensable injury and requested preauthorization prior to the date of the proposed treatment or service, in a manner consistent with 28 TAC § 134.600(d).

6. Pursuant to TEX. LABOR CODE ANN. § 413.014(b), an insurance carrier is not liable for those specified treatments and services unless preauthorization is sought by a claimant or health care provider and either obtained from the insurance carrier or ordered by the commission.

7. TEX. LABOR CODE ANN. § 413.014 directs the Commission to specify which health care treatments and services require express preauthorization by the insurance carrier.

8. Commission rule 28 TAC §134.600(h)(2) requires, except in the case of a medical emergency, that certain treatments must be preauthorized.

9. "Preauthorized" means that the service or treatment must be authorized before it is provided to the recipient.

10. Preauthorization may be obtained from the carrier, or if denied, may be ordered by the Commission, pursuant to 28 TAC §134.600.

11 Provider was required to obtain preauthorization for the services rendered to Claimant before providing those treatments.

12. Because Provider rendered the work hardening services to Claimant without having obtained either preauthorization from the Carrier or a Commission order of preauthorization (or in this case a ruling from the IRO), the Carrier is not liable to pay for the disputed services, and the appeal must be denied.

ORDER

IT IS, THEREFORE, ORDERED that Charter Oak Fire Insurance Company is not liable for the costs relating to work hardening treatments and services provided without preauthorization.

SIGNED this 5th day of November 2003.

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BILL ZUKAUCKAS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARING