

**DOCKET NO. 453-03-4247.M2**  
**MRD Tracking No. M2-03-1233-01**

<b>LONE STAR ORTHOPEDICS,</b>	§	<b>BEFORE THE STATE OFFICE</b>
<b>Petitioner</b>	§	
<b>V.</b>	§	<b>OF</b>
	§	
<b>HOUSTON I. S. D.,</b>	§	<b>ADMINISTRATIVE HEARINGS</b>
<b>Respondent</b>	§	

**DECISION AND ORDER**

**I. Summary**

Kenneth G. Berliner, M.D., of Lone Star Orthopedics (Provider), sought review of a decision issued on July 1, 2003, by the Medical Review Division (MRD) of the Texas Workers' Compensation Commission (Commission) declining to preauthorize tarsal tunnel release to treat \_\_\_\_ (Claimant) right ankle injury on the grounds it was not medically necessary. The substantive review of Petitioner's claim was conducted by an Independent Review Organization (IRO).<sup>1</sup> Houston I.S.D (Carrier), a self-insured entity, had denied preauthorization for the treatment.

The hearing was held on September 15, 2003. The record closed on September 29, 2003, to permit parties to file and respond to an updated patient examination. Dr. Berliner appeared on his own behalf. Robert F. Josey, attorney, appeared on behalf of the Carrier.

Based on the evidence, the Administrative Law Judge (ALJ) concluded that Provider failed to meet his burden of proof to show that the medical procedure at issue is medically necessary. Preauthorization for right tarsal tunnel release is denied.

**II. Discussion**

It is undisputed that on \_\_\_\_, Claimant fell while pulling a small cart loaded with garbage cans up an incline. The cart fell backwards and she suffered a twisting injury to her right ankle.<sup>2</sup> No other facts concerning details of her injury are in evidence, nor is the *initial diagnosis*.<sup>3</sup> Since

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<sup>1</sup> The IRO company in this case was the Texas Medical Foundation (TMF). TMF identified its reviewer as being a board-certified orthopedic surgeon. IRO report, p. 1 (July 1, 2003).

<sup>2</sup> The most complete description of Claimant's injuries appeared in the IRO report on which the MRD's Decision was based. The Provider's request for hearing and attachments, in this case the MRD Decision and IRO report, are included in the record of this case by official notice.

<sup>3</sup> One surgeon consulted in October 2002 apparently concluded Claimant's injury had been only an ankle sprain. However, as neither the examination notes, or, possibly the records review notes, on which this opinion rested, nrt the identity of the surgeon who formed this conclusion is in the record, the passing mention of this by the IRO reviewer did little clarify the relevant medical facts.

Provider and Carrier's doctors disputed the severity of her injury, the absence of this information considerably undermined Provider's argument regarding the need for surgical intervention one and one-half years after his injury. In May 2003, Carrier's reviewing doctor, C. Reynolds, M.D., an orthopedic surgeon, concluded that right tarsal tunnel syndrome was an "uncertain but probable diagnosis." Carrier Exh. 1, p. 3. Dr. Reynolds did not elaborate on the medical reasons for his hesitancy, and the remarks considered as evidence of Claimant's medical conditions are at best conclusory. As Dr. Berliner, himself an orthopedic surgeon, noted at hearing, a number of orthopedic specialists have reviewed the data but recommended different treatments. Thus, the medical necessity of this particular treatment is not self-evident.

The patient was initially seen by a chiropractor and in May 2003, by Dr. Berliner. Before Dr. Berliner's surgery recommendation in May 2003, Claimant was treated with physical therapy, splinting, and medications. Carrier Exh. 1, p. 1. On September 26, 2002, an electromyograph (EMG) demonstrated, at least to Dr. Berliner's satisfaction, that Claimant had right tarsal tunnel syndrome. Dr. Berliner asserted this injury should be treated by surgery, a tarsal tunnel release.

The most recent clinical observation by Provider was September 15, 2003. Provider Exh. 1. Provider had last seen Claimant on April 22, 2003. In September 2003, Dr. Berliner stated that an additional four weeks of physical therapy had afforded Claimant only temporary relief and that she continued to have an antalgic, or self-protective, **gait**, forefoot tenderness, and that she had reported a high level of pain, seven on a 10-point scale. There is no description in the record of the treatment provided in either session of physical therapy. The chief gap in the record is evidence from Dr. Berliner that explains the basis of his conclusion that right tarsal tunnel release would afford Claimant relief from her symptoms.

In denying preauthorization on May 6, 2003, Peter Garcia, M.D., stated that Claimant's symptoms far exceeded the physical findings Dr. Berliner noted, and that he could not anticipate a "positive outcome" for Claimant with the proposed surgery. Carrier's Exh. 2. Again, the ALJ is unable to fully evaluate that statement as those physical findings are not in evidence, nor is there explanatory discussion by Dr. Garcia.<sup>4</sup> Upon denial of his request for surgery, Dr. Berliner had agreed to continue with physical therapy and to order another EMG if necessary. However, Dr. Berliner testified that he did not request a second EMG because he felt it would be a waste of money. It is not clear if this decision was based on a change in Claimant's condition, and if so, what change.

The evidence in this record is scanty at best, comprising conflicting medical opinions on the diagnosis and proposed treatment without benefit of supporting documentation that fleshed out details of Claimant's condition, symptoms, or the medical rationale for any of the opinions offered as evidence. However, because Provider as the petitioning party had the burden of proof in this proceeding, the ALJ concluded that Provider failed to meet his burden to show that this treatment is medically necessary. Thus, preauthorization for right tarsal tunnel release is denied.

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<sup>4</sup> In Carrier's response to Dr. Berliner's September 15, 2003, orthopedic report, Dr. Garcia stated that nothing about that newest examination changed his earlier opinion against surgery. However, he did not explain why he maintained that opinion in the face of the apparent failure of a trial of additional therapy. Carrier Exh. 2. Carrier had apparently requested or required a trial of additional conservative care earlier in 2003. IRO Report, p. 2.

### **III. Findings of Fact**

1. On \_\_\_\_ (Claimant) fell backwards while pulling a small cart with garbage cans up an incline and suffered a twisting injury to her right ankle. Claimant's initial diagnosis is unknown.
2. Houston I.S.D., a self-insured entity, was the responsible insurer on Claimant on the date of injury.
3. Between \_\_\_\_, and September 2002, Claimant was treated by a chiropractor. In May 2003, Claimant was referred to Kenneth Berliner, M. D. (Provider), an orthopedic surgeon with Lone Star Orthopedics.
4. At various times before May 2003, Claimant was treated with physical therapy, splinting, and medications. Claimant underwent two courses of physical therapy between April and September of 2003.
5. On September 24, 2002, Claimant had an electromyograph (EMG) showing evidence of right tarsal tunnel syndrome.
6. In May 2003, Dr. Berliner diagnosed Claimant as having right tarsal tunnel syndrome, and recommended a surgical procedure, right tarsal tunnel release.
7. In mid-September 2003, Claimant had pain when flexing her foot, tenderness on her upper foot, some loss of sensation on her sole, and exhibited a self-protective (antalgic) gait. The change in Claimant's symptoms, if any, between her date of injury and mid-September 2003 is unknown.
8. Dr. Garcia, M.D. an orthopedic surgeon, concluded that Claimant's condition, in both May and in mid-September of 2003, did not warrant surgical intervention, and that Claimant's symptoms exceeded the physical findings about her condition.
9. In May 2003, Carrier denied preauthorization for the right tarsal tunnel release on the grounds that Provider had not demonstrated the medical necessity for this treatment.
10. Provider appealed 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 July 1, 2003, the MRD concluded that right tarsal tunnel release was not medically necessary. The reviewer for the IRO was a board-certified orthopedic surgeon.
12. On July 14, 2003, Provider filed a timely request for a hearing at the State Office of Administrative Hearings (SOAH) on the MRD decision rendered on its behalf by the IRO.
13. On August 12, 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 September 15, 2003, and the record closed on September 29, 2003, to allow the parties to submit additional documentation.

#### **IV. Conclusions of Law**

1. The Texas Workers' Compensation Commission (Commission) has jurisdiction to decide the issues presented pursuant to TEX. LABOR CODE ANN. § 413.031.
2. 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 ANN. ch. 2003.
3. The notice of hearing issued by the Commission was sufficient under the terms of TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. As the petitioning party, Provider 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 and 28 TEX. ADMIN. CODE § 148.21 (h).
5. Right tarsal tunnel release, for which Provider sought preauthorization, is the type of treatment which must be preauthorized according to TEX. LABOR CODE ANN. § 413.015 and 28 TEX. ADMIN. CODE § 134.600.
6. Provider failed to prove by a preponderance of the evidence that the surgical procedure in Conclusion of Law No. 5 was reasonable and medically necessary, within the meaning of TEX. LABOR CODE ANN. §§ 408.021 and 401.011(19).

#### **ORDER**

**IT IS HEREBY ORDERED** that Lone Star Orthopedic's request for preauthorization to perform right tarsal tunnel release to treat Claimant \_\_\_\_ is denied.

**SIGNED October 27, 2003.**

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