

TEXAS MUTUAL INSURANCE COMPANY, Petitioner	§ § § § § § § § § §	BEFORE THE STATE OFFICE
VS.		OF
INJURY 1 TREATMENT CENTER Respondent		ADMINISTRATIVE HEARINGS

**DECISION AND ORDER**

Texas Mutual Insurance Company (“TMIC” or “the carrier”) denied payment for office visits and physical therapy for a worker with cervical, thoracic, and lumbar area injuries. TMIC asserted that these services were not reasonable or necessary. The provider, Injury 1 Treatment Center (Injury 1), a chiropractic clinic, requested medical dispute resolution. An independent review organization (IRO) concluded that the services for the dates at issue in this case were reasonable and necessary medical care, and TMIC requested a hearing. The amount in dispute is approximately \$7,500.00. The Administrative Law Judge (ALJ) determines that eight of the 11 weeks of disputed therapy should be reimbursed.

**I.  
DISCUSSION**

**A. General Facts**

The claimant, \_\_\_\_, was injured on or about \_\_\_\_, in a fall. He was a worker at a youth facility and fell while chasing some children who were trying to escape. He was in his late fifties at the time of the accident. He experienced back and neck pain, and also had pain, paresthesia, and numbness in his left arm. It appears that he first went to a doctor on May 1, 2002, when he was seen by Matthew Furman, M.D. The doctor’s assessment was, “Chronic neck pain associated with recent injury with no significant neurologic deficits.”<sup>1</sup> Dr. Furman recommended moist heat and exercises, prescribed a muscle relaxant, and refilled a prescription for an anti-depressant.<sup>2</sup> \_\_\_\_ was seen again at Dr. Furman’s clinic on May 8, 2002, with continuing neck pain. \_\_\_\_ first visited Injury 1 on \_\_\_\_, when he commenced chiropractic treatment.<sup>3</sup> Darcy Pope, D.C., of Injury 1 administered adjustments to the neck, electrical stimulation, and heat. Over the following three months, \_\_\_\_ was treated at Injury 1 with various chiropractic modalities, including: hot/cold packs, electrical stimulation, myofascial release, joint mobilization, and therapeutic activities and exercises.

The claimant was unable to resume work at the end of the disputed treatments. He began a work hardening program, for which the carrier paid, after the disputed dates of service here.

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<sup>1</sup> Carrier Ex. 15.

<sup>2</sup> *Id.*

<sup>3</sup> Carrier Ex. 8.

## 2. Procedural History

Injury 1 requested medical dispute resolution with respect to dates of service that mostly occurred between May 16 and August 22, 2002.<sup>4</sup> The IRO issued its decision July 3, 2003.<sup>5</sup> TMIC requested a hearing July 29, 2003. The hearing was convened on December 11, 2003, before State Office of Administrative Hearings (SOAH) Judge Shannon Kilgore. TMIC was represented by Orlesia A. Hawkins. P. James Rainey appeared for Injury 1. The hearing adjourned, and the record closed, the same day.

### C. Applicable Law

The Texas Labor Code contains the Texas Workers' Compensation Act (Act) and provides the relevant statutory requirements regarding compensable treatment for workers' compensation claims.<sup>6</sup> In particular, the Act provides in pertinent part that:

(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.

\* \* \*

Health care includes all reasonable and necessary medical aid, medical examinations, medical treatment, medical diagnoses, medical evaluations, and medical services.<sup>7</sup>

### D. Burden of Proof

Under the Commission's rules, an IRO decision is deemed a Commission decision and order.<sup>8</sup> The burden of proof in this case is on TMIC to prove that the disputed services were not reasonable and necessary medical treatments.<sup>9</sup>

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<sup>4</sup> See Carrier Ex. 2 (Table of Disputed Services).

<sup>5</sup> Carrier Ex. 1. The Commission issued its decision, based on the IRO's decision, on July 9, 2003.

<sup>6</sup> TEX. LAB. CODE § 408.021.

<sup>7</sup> TEX. LAB. CODE § 401.011(19).

<sup>8</sup> 28 TEX. ADMIN. CODE § 133.308(p)(5).

<sup>9</sup> 1 TEX. ADMIN. CODE § 155.41; 28 TEX. ADMIN. CODE §§ 133.308(p)(5), 148.21(h).

**E. IRO Decision**

At issue before the IRO were services from May 16 through October 10, 2002. The IRO reviewer determined that the services rendered from May 16 through August 2 were medically necessary. The reviewer believed that \_\_\_ had a soft tissue injury warranting an eight to 10 week trial of rehabilitative therapies, and the treatment from the middle of May through July was therefore appropriate. The reviewer determined that as of August 2, it became apparent that the patient was not responsive to primary-level therapeutics, and any passive therapeutics after that point were unnecessary. According to the IRO reviewer, work hardening should have commenced at that time.

Since only TMIC requested a hearing, the dates of service disallowed by the IRO are not at issue here. Therefore, only the May 16 through August 2 dates are disputed here.

**F. General Description of the Evidence**

The evidence in this case consists of medical records, the deposition testimony of Scott Herbowy (a physical therapist whose testimony was offered by the carrier), the testimony of David Alvarado, D.C. (offered by the carrier), and the testimony of Michael Todd Smith, D.C. (offered by Injury 1).

**G. Analysis and Recommendation**

*TMIC's position.* Dr. Alvarado testified, based on his review of the records, that for the first four weeks of care, the frequency of the visits -- four times a week -- was excessive. He testified that three times a week would have been appropriate. He also testified that the number of units billed for each visit was inappropriately high. He cited to May 16, 2002, on which 13 total units of therapy were performed, as an example. According to Dr. Alvarado, one unit of each therapy per day of treatment would have been more suitable. Dr. Alvarado went on to state that a four-week trial of primary chiropractic care was sufficient for a soft tissue injury of the cervical area; therefore, all the disputed care after June 16, 2002, was inappropriate. He stressed that \_\_\_ had obvious psychological issues (indicated by his long-term use of anxiety medication and his multiple signs of depression) of such a magnitude that they constituted a "huge barrier" to his recovery, such that his prognosis with physical therapy alone beyond the first four weeks of therapy was very poor. Dr. Alvarado stated that as of June 18, the therapy should have been discontinued, and the patient provided psychological care. Finally, Dr. Alvarado testified that the documentation of the myofascial release therapy lacked the necessary detail to explain what was done and why.

Mr. Herbowy, a physical therapist, testified that any treatment beyond the first two weeks was excessive, and \_\_\_ should have been on a home exercise program instead.<sup>10</sup> Mr. Herbowy noted documentation in the record that a physical therapist had recommended home exercises, but such a program was never implemented.<sup>11</sup> Like Dr. Alvarado, Mr. Herbowy emphasized the apparent importance of \_\_\_'s psychological barriers to physical recovery,<sup>12</sup> and noted that \_\_\_ made little objective progress overall.

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<sup>10</sup> Carrier Ex. 15 at 13.

<sup>11</sup> Dr. Alvarado had mentioned this as well.

<sup>12</sup> Carrier Ex. 15 at 14-15. ("At a certain point, those psychological problems . . . can dominate the picture. And no amount of physical intervention and physical therapy and work hardening is going to help that patient.")

*Injury 1's position.* Dr. Smith agreed that the patient had a soft tissue injury. He testified that the patient's diagnostic tests show congenital fusion in the cervical spine, and the healing process for the soft tissue injury may have taken longer because of this pre-existing condition. Dr. Smith also agreed that \_\_\_ had psychological issues that could also have exacerbated the difficulties of his recovery. Dr. Smith testified that under these circumstances, a trial of eight weeks for primary chiropractic care was reasonable and in accordance with the Spine Treatment Guideline.<sup>13</sup> Injury 1 points out that the record indicates the carrier denied a referral to a psychological consultant.<sup>14</sup> Injury 1 also notes that the Spine Treatment Guideline did not specify the number of units of chiropractic modalities that should be administered in a single session. Dr. Smith stated that there were indications in the record that \_\_\_ was not a good candidate for a home exercise program due to possible compliance issues.

*Analysis and recommendation.* The ALJ determines that the carrier has offered insufficient evidence to support a conclusion that the IRO decision was wrong as to the first eight weeks of therapy. However, the evidence does not show that the subsequent three weeks of therapy were necessary.

The disputed services were rendered from May 16 through August 2, 2002. This was an 11-week period. It is significant that all expert witnesses agree that some portion of the services denied by the carrier were, in fact, reasonable and necessary. Mr. Herbowy seemed to say that the first two weeks of therapy were indicated. Dr. Alvarado testified that a four-week course of therapy, although with one fewer session per week and with fewer units of therapy per day, was reasonable and necessary. As to these early weeks of therapy, the ALJ finds that Dr. Alvarado's testimony about the number of sessions per week and modalities per day seemed to represent his personal opinion about what was best, but was not persuasive enough to overcome the IRO's determination to the contrary.

With respect to weeks five through eight, TMIC relies heavily on the argument that \_\_\_'s psychological condition needed to be addressed before any further physical progress could be expected; however, the carrier's denial of preauthorization for psychological services as medically unnecessary considerably undercuts TMIC's position.<sup>15</sup> Dr. Smith testified that an eight-week trial was reasonable, and the ALJ sees insufficient reason to overturn the IRO's decision as to the therapy up to eight weeks.

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<sup>13</sup> The Spine Treatment Guideline referred to by the parties, *see* 28 TEX. ADMIN. CODE § 134.1001 (West 2002), was not in effect at the time the treatments in this case were rendered; it had been abolished by statute effective January 1, 2002. However, it could still provide some guidance about the reasonableness of treatments for spinal conditions.

<sup>14</sup> Respondent Ex. 1.

<sup>15</sup> TMIC notes that the record indicates the appeal was denied on or about August 12, but there is nothing in the record showing that the referral was made during the period of the disputed services. Respondent Ex. 1. However, Dr. Pope charted on July 2: "The patient is also seeing Dr. Hankins for psychological services." Carrier Ex. 7. Dr. Hankins is the psychologist who evaluated \_\_\_ and sought pre-authorization for counseling, biofeedback, and medication management. Respondent Ex. 1.

Dr. Alvarado, when asked to comment on the carrier's denial of coverage for psychological services, said that the carrier had probably determined that the depression was not secondary to the work-related injury. This statement, however, is contrary to the record. The carrier's denial apparently stated: "[P]eer to peer was done and physician advisor denied request. Injury is only 4 months old. Mot [sic] medically necessary." Respondent Ex. 1.

There is little evidence, however, that the final disputed three weeks of therapy were warranted. Injury 1's own expert, Dr. Smith, talked about eight weeks as being the generally accepted maximum duration for primary therapy for spinal injuries. Since \_\_\_ was not showing significant objective signs of progress, there was no apparent reason for continuation of these services beyond the eight-week point.

The ALJ therefore finds that TMIC must reimburse Injury 1 for the disputed services from May 16 through July 12, 2002, but does not have to pay for such services rendered after July 12 and through August 2, 2002.

## **II. FINDINGS OF FACT**

1. The claimant, \_\_\_, was injured on or about \_\_\_, in a fall. He was a worker at a youth facility and fell while chasing some children who were trying to escape.
2. Texas Mutual Insurance Company (TMIC) is the workers' compensation insurer with respect to the claims at issue in this case.
3. Injury 1 Treatment Center (Injury 1), a chiropractic clinic, administered therapy to the claimant from May 16 through October 10, 2002.
4. TMIC declined to pay for these services. TMIC asserts that they were medically unnecessary.
5. The amount in dispute is approximately \$7,500.00.
6. Injury 1 requested medical dispute resolution.
7. On July 3, 2003, an independent review organization (IRO) issued a decision finding that the services rendered from May 16 through August 2, 2002, were medically necessary.
8. TMIC requested a hearing July 29, 2003.
9. Notice of the hearing was issued August 26, 2003.
10. The notice 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.
11. The hearing was convened on December 11, 2003, before State Office of Administrative Hearings (SOAH) Judge Shannon Kilgore. TMIC was represented by Orlesia A. Hawkins. P. James Rainey appeared for Injury 1. The hearing adjourned, and the record closed, the same day.
12. From May 16 through August 2, 2002, \_\_\_ was treated at Injury 1 with hot/cold packs, electrical stimulation, myofascial release, joint mobilization, and therapeutic activities and exercises.
13. \_\_\_ had a soft tissue injury in the area of his cervical spine.

14. \_\_\_ had psychological issues that impeded his recovery.
15. Injury 1 referred \_\_\_ to a psychologist, who evaluated and sought preauthorization for counseling, biofeedback, and medication management for \_\_\_
16. The carrier denied preauthorization for these psychological services, stating they were not medically necessary.
17. \_\_\_ had congenital fusion of the cervical spine that might have complicated and slowed his recovery.
18. An eight-week trial of primary therapy for \_\_\_'s injury was reasonable and necessary.
19. At the end of eight weeks of therapy, \_\_\_ was not showing significant objective signs of improvement.
20. There was no sound medical reason to continue \_\_\_'s therapy beyond eight weeks.
21. TMIC should reimburse Injury 1 for \_\_\_'s therapy from May 16 through July 12, 2002, but does not have to pay for such services rendered after July 12 and through August 2, 2002.

### **III. CONCLUSIONS OF LAW**

1. The Texas Workers' Compensation Commission (Commission) has jurisdiction over this matter pursuant to Section 413.031 of the Texas Workers' Compensation Act (the Act), TEX. LAB. CODE ch. 401 *et seq.*
2. SOAH has jurisdiction over this proceeding, including the authority to issue a decision and order. TEX. LAB. CODE § 413.031; TEX. GOV'T CODE ch. 2003.
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. TEX. LAB. CODE § 408.021.
4. TMIC timely filed a notice of appeal as specified in 28 Texas Administrative Code § 148.3.
5. Adequate and timely notice of the hearing was provided in accordance with the Administrative Procedure Act. TEX. GOV'T CODE § 2001.051, 2001.052.
6. TMIC has the burden of proof in this matter. 1 TEX. ADMIN. CODE § 155.41; 28 TEX. ADMIN. CODE §§ 133.308(p)(5), 148.21(h).
7. Based on the Findings of Fact, and pursuant to § 408.021 of the Texas Labor Code, TMIC must reimburse Injury 1 for \_\_\_'s therapy from May 16 through July 12, 2002, but does not have to pay for such services rendered after July 12 and through August 2, 2002.

**ORDER**

**IT IS THEREFORE ORDERED** that Texas Mutual Insurance Company pay for the therapy administered to the claimant \_\_\_ by Injury 1 Treatment Center from May 16 through July 12, 2002, but need not pay for such services rendered after July 12 and through August 2, 2002.

**ISSUED this January 16, 2004.**

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**SHANNON KILGORE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**  
**ADMINISTRATIVE LAW JUDGE**