DOCKET NO. 453-03-4678.M5
MDR Tracking No. M5-03-0262-01

TEXAS MUTUAL INSURANCE COMPANY,	§	**BEFORE THE STATE OFFICE**
Petitioner	§	
	§	
VS.	§	**OF**
	§	
HEALTH AND MEDICAL PRACTICE ASSOCIATES,	§	
Respondent	§	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Texas Mutual Insurance Company (TMIC) appealed an independent review organization (IRO) determination that physical therapy sessions provided to an injured worker (Claimant) by Health and Medical Practice Associates (HMPA) from April 18, 2002, through July 5, 2002, were medically necessary and should be paid. Except for six therapeutic activities/procedures (four of which TMIC agreed to pay at the hearing), the ALJ concludes HMPA's claim should be denied. For the six therapeutic activities/procedures, TMIC should pay an additional $210 to HMPA.

I. PROCEDURAL HISTORY

A hearing convened on January 20, 2004, before the undersigned Administrative Law Judge (ALJ) at the State Office of Administrative Hearings (SOAH), Austin, Texas. TMIC appeared and was represented by its counsel, Katie Kidd. HMPA appeared and was represented by its counsel, H. Douglas Pruett. The parties filed post-hearing briefs and the record closed on January 26, 2004. The record was reopened on January 28, 2004, to consider Mr. Pruett's motion to withdraw and substitute counsel. The ALJ approved the request in an order dated January 29, 2004, and William Maxwell was substituted as counsel of record for HMPA. The hearing closed on January 29, 2004.

II. DISCUSSION

1. Background

The Claimant sustained a work-related injury to his lower back ___, while unloading a 70-inch television. He had to bend down and immediately felt a pop in his lumbar region and pain radiating into his buttock and right leg. He was treated at Occupational Medical Systems from April 4, 2002, through April 11, 2002, where he received hot packs, cold packs, ultrasound, soft tissue massage, therapeutic procedure, and therapeutic activities from Bryan Hasse, D.C. He began treatment with Maxie Sprott, M.D., and HMPA on April 11, 2002.

The services in dispute are physical therapy, consisting of therapeutic procedures, therapeutic activities, electrical stimulation, and ultrasound, provided from April 18, 2002, through April 23, 2002, and from June 7, 2002, through July 2, 2002. Also at issue is a July 5, 2002, physical performance evaluation.

Employees have a right to necessary health care under TEX. LABOR CODE ANN. §§ 408.021 and 401.011. Section 408.021(a) provides, "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 401.011(19) of the Labor Code provides that health care includes "all reasonable and necessary medical . . . services."

As Appellant, TMIC had the burden of proof.[1]

2. Discussion

A review of the record indicates that the most persuasive evidence is from the TMIC experts.[2] HMPA did not tender any expert testimony at the hearing. The IRO doctor's opinion was not as persuasive as the TMIC experts because he was not shown to be qualified to express an opinion on the care at issue. His speciality is family practice, the same as Dr. Sprott's.[3] In *Broders v. Heise*, 924 S.W. 2d 148, 152-153 (Tex. 1996), the Texas Supreme Court said,

> Moreover, given the increasingly specialized and technical nature of medicine, there is no validity, if there ever was, to the notion that every licensed medical doctor should be automatically qualified to testify as an expert on every medical question. Such a rule would ignore the modern realities of medical specialization.
>
> Dr. Condo's medical expertise is undoubtedly greater than that of the general population,[4] but the Heises did not establish that his expertise on the issue of cause in fact met the requisites of Rule 702. While he knew both that neurosurgeons should be called to treat head injuries and what treatments they could provide, he never testified that he knew, from either experience or study, the effectiveness of those treatments in general, let alone in this case.

The IRO doctor's training in family medicine was not shown to qualify him to give an opinion on the efficacy of physical therapy for lumbar spine injuries. But, even if he is considered qualified, his expertise should be contrasted with TMIC's experts, all of whom specialize in workers' compensation injuries such as the type suffered by the Claimant. TMIC's experts all criticized the IRO doctor's conclusions as being inconsistent with appropriate physical therapy care.

TMIC's witnesses were: Samuel M. Bierner, M.D., who is board certified in physical medicine and rehabilitation, and two physical therapists, Scott Herbowy and Mark Miller. All three

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[1] 1 TEX. ADMIN. CODE (TAC) §155.41; 28 TAC §148(h).

[2] The now-repealed Commission Rule 134.1001, which contained the 1999 Spine Treatment Guideline (STG), is also persuasive. Despite its repeal, both parties said the STG should be persuasive as a Commission policy indicating appropriate treatment.

[3] Ex. 2 at 104.

[4] Dr. Condo was an emergency room doctor.

have had many years experience in treating back injuries. Eighty percent of Dr. Bierner's practice is in treating workers' compensation injuries. He has had post-graduate training in his specialty. Mr. Herbowy and Mr. Miller have more than fifteen years of experience in physical therapy and both have lectured extensively on the subject.

None of the expert opinions (except the IRO doctor's and implicitly Dr. Sprott's) and none of the authority cited support the physical therapy performed in June and July 2002. Dr. Bierner, Mr. Herbowy, and Mr. Miller all said those services were medically unnecessary, given the Claimant's lack of progress from the beginning of treatment in April 2002.[5] All three said other options should have been explored when there was no improvement. The closest any authority came to supporting those services was STG subsection (j)(14)(B), which defined "lack of clinical progress" to mean "documented objective absence of change in the condition of the injured employee over a period of time of no less than one month. . . ." However, the June-July services were far longer than one month from the___, date of injury and April 4, 2002, beginning of service. HMPA's attorney argued correctly that no treatment is guaranteed at the start and there must be a reasonable trial period to determine the efficacy of treatment. However, the unanimous opinion of the most qualified experts was that the same type of treatment in June and July was no longer supportable for an injury and care that began two months before, in view of the Claimant's lack of progress.

Wholly aside from the expertise issue, the ALJ finds Dr. Bierner's, Mr. Herbowy's, and Mr. Miller's opinions on the June-July care convincing based on the fact that the therapy was simply not working. Overall, the June-July physical therapy was shown to be medically unnecessary.[6]

The evidence is also one-sided for the July 5, 2002, physical performance evaluation. Dr. Bierner testified that such evaluations can be reasonable in some situations, but in a case like this, where the patient's condition has actually worsened over time, one would not expect an evaluation to provide much useful information. He said the evaluation was medically unnecessary. There was no expert opinion evidence or other authority to the contrary.[7]

The remaining services in dispute are: two sessions per day of therapeutic procedure, CPT code 97110, on April 18, April 19, April 22, and April 23, 2002, and one session per day of therapeutic activity, CPT code 97530, on the same days.[8] TMIC paid for one session (out of three sessions charged) of therapeutic procedure on each day and agreed at the hearing to pay for one

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[5] All parties agreed the Claimant did not improve under the treatment at issue.

[6] The HMPA attorney was able to show that TMIC's experts differed on certain matters, including, for example, whether the appropriate length of service should be measured from the date of injury or the first date of service. He was also able to show that Dr. Bierner was not aware that the United States Agency for Health Care Policy and Research guideline for *Acute Low Back Pain Problems in Adults*, which Dr. Bierner relied on to form his opinion on the need for ultrasound, was withdrawn a few years ago. These matters may have carried weight if the medical necessity of treatment were a close call. That was not true in this case, however, where the strongest expert evidence was unanimously on one side of the issue, except where specifically noted below. Because of that, the ALJ does not believe it is necessary to discuss these matters in detail.

[7] The IRO doctor did not address the July 5, 2002, physical performance evaluation. Ex. 2 at 104-105.

[8] Dr. Bierner explained that a therapeutic procedure is a specific exercise directed toward specific muscles, whereas a therapeutic activity is more general.

session (out of two sessions charged) of therapeutic activity on each day based on Dr. Bierner's testimony that they were reasonable.

Dr. Bierner testified that more than one session of therapeutic procedure/activity was unnecessary on those dates because a single session of one-on-one training is sufficient to train a Claimant in the absence of a safety issue or physical or mental incapacity. There were no safety or incapacity issues noted in the record. Mr. Herbowy agreed with Dr. Bierner. Mr. Miller also agreed, except that he thought an hour's training on April 18, 2002, (two more sessions than TWIC paid or agreed to pay) was justifiable because a new exercise was introduced. The IRO doctor did not specifically address the question of one-on-one training more than one time per day.

Given the split in opinions from TMIC's experts on the two additional units of training on April 18, and considering the fact that TMIC has the burden of proof, the ALJ will order payment for two additional sessions on that day (one therapeutic procedure and one therapeutic activity). Overall, the decision will deny the claim except for the six sessions of therapeutic procedures/activities discussed above. At thirty-five dollars for each session, TMIC should pay an additional $210.

III. FINDINGS OF FACT

1. An injured worker (the Claimant) sustained a work-related injury to his lower back on ___, while unloading a 70-inch television. He had to bend down and immediately felt a pop in his lumbar region and pain radiating into his buttock and right leg.

2. The Claimant was treated at Occupational Medical Systems from April 4, 2002, through April 11, 2004, where he received hot packs, cold packs, ultrasound, soft tissue massage, therapeutic procedure, and therapeutic activities from Bryan Hasse, D.C.

3. The Claimant began treatment with Maxie Sprott, M.D., and Health and Medical Practice Associates (HMPA) on April 11, 2002.

4. The disputed services consist of: therapeutic procedures two times per day on April 18, 19, 22, and 23, and three times per day on June 7, 24, 25, and 28, and July 1, and 2, 2002; therapeutic activities one time per day on April 18, 19, 22, and 23, and two times per day on June 7, 24, 25, and 28, and July 1, and 2, 2002; electrical stimulation on June 24 and 28, and July 1 and 2, 2002; ultrasound on June 7 and 25, 2002; and a physical performance evaluation on July 5, 2002. Initially, two sessions per day of therapeutic activities were at issue on April 18, 19, 22, and 23, 2002, but TMIC agreed at the hearing to pay for one session per day on those days for a total of four additional sessions.

5. HMPA provided the disputed services to the Claimant and submitted a claim to Texas Mutual Insurance Company (TMIC) for payment.

6. TMIC denied the claim.

7. HMPA requested medical dispute resolution.

8. An Independent Review Organization concluded that the claim should be paid.

9. It is undisputed that TMIC requested a hearing not later than the twentieth day after receiving notice of the IRO decision.

10. During the course of treatment, the Claimant's condition and pain worsened.

11. Other options should have been explored when there was no improvement in the Claimant's condition.

12. With the Claimant's condition worsening since his injury, the July 5, 2002, physical performance evaluation would not provide much useful information.

13. None of the June or July services were reasonably required by the nature of the Claimant's injury.

14. Both therapeutic procedures and therapeutic activities involve one-on-one instruction.

15. Except in the case of a new exercise, safety issue, or patient incapacity, the Claimant should have been able to learn therapeutic procedures and therapeutic activities on his own with one session per day on April 18, 19, 22, and 23, 2002.

16. There were no safety or incapacity issues.

17. A new exercise was introduced on April 18, 2002.

18. One hour of one-on-one instruction, or two sessions more than TMIC paid or agreed to pay, was needed for the new exercise introduced on April 18, 2002.

19. One additional session of therapeutic activities and one additional session of therapeutic procedure on April 18, 2002, were reasonably required by the nature of the Claimant's injury.

20. Except for TMIC's agreement stated in Finding of Fact No. 4 to pay for four additional sessions of therapeutic activities and the additional sessions described in Finding of Fact No. 19, none of the disputed services provided in April 2002 were reasonably required by the nature of the Claimant's injury.

21. A reasonable charge for the six sessions described in Findings of Fact Nos. 4 and 19 is $35 per session for a total of $210 for six sessions.

22. All parties received not less than ten days' notice of the time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.

23. All parties had an opportunity to respond and present evidence and argument on each issue involved in the case.

V. CONCLUSIONS OF LAW

1. The State Office of Administrative Hearings has jurisdiction over this proceeding, including the authority to issue a decision and order. TEX. LAB. CODE ANN. §413.031(k) and TEX. GOV'T CODE ANN. ch. 2003.

2. All parties received adequate and timely notice. TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.

3. TMIC has the burden of proof. 1 TEX. ADMIN. CODE (TAC) §155.41(b); 28 TEX. ADMIN. CODE § 148.21(h).

4. TMIC should pay for two additional sessions of therapeutic activity on April 18, 2002, one additional session of therapeutic activity on April 19, 22, and 23, 2002, and one additional session of therapeutic procedure on April 18, 2002.

5. Except as stated in Conclusion of Law No. 4, TMIC should not be required to pay the disputed services.

6. TMIC should pay an additional $210 plus interest to HMPA.

ORDER

IT IS THEREFORE ORDERED that Texas Mutual Insurance Company pay Health and Medical Practice Associates $210 plus interest for the four sessions it agreed to pay as described in Finding of Fact No. 4 and for two additional sessions on April 18, 2002.

IT IS ORDERED FURTHER that, except as stated above, Health First Wellness Center's claim against Texas Mutual Insurance Company be, and the same is hereby, denied.

SIGNED February 18, 2004.

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JAMES W. NORMAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS