

**SOAH DOCKET NO. 453-04-2256.M5  
TWCC MDR NO. M5-03-2136-01**

<b>JOHN D. CARLSON, D.C.</b>	:	<b>BEFORE THE STATE OFFICE</b>
<b>Petitioner</b>	:	
	:	
<b>V.</b>	:	<b>OF</b>
	:	
<b>SECURITY NATIONAL INSURANCE COMPANY,</b>	:	
<b>Respondent</b>	:	<b>ADMINISTRATIVE HEARINGS</b>

**DECISION AND ORDER**

John D. Carlson, D.C. (Petitioner) requesting a hearing challenging the Findings and Decision of the Texas Workers' Compensation Commission (Commission) acting through the Texas Medical Foundation, an Independent Review Organization (IRO), finding physical therapy treatments were not medically necessary for the treatment of injured worker \_\_\_\_ (Claimant).

After considering the evidence and arguments of the parties, the Administrative Law Judge (ALJ) concludes that Security National Insurance Company (Respondent) is not liable for reimbursing Petitioner for the physical therapy treatments.<sup>1</sup>

**I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY**

The hearing convened on March 16, 2004, with State Office of Administrative Hearings ALJ Stephen J. Pacey presiding. Petitioner appeared *pro se*. Respondent appeared through its attorney, Tommy Lueders. The hearing concluded March 16, 2004, and after allowing the parties additional time to file more documentation, the record closed March 24, 2004. Neither party objected to notice or jurisdiction.

**II. DISCUSSION**

Claimant suffered a work-related injury, which she reported on \_\_\_\_\_. Claimant worked for a law firm, and for four-and-one-half years she cradled the telephone between her neck and left shoulder while typing. After developing pain in her head, neck and left arm, Claimant contacted Petitioner for treatment and physical therapy.

Petitioner diagnosed Claimant with a cervical strain/sprain, muscle spasm, radiculalgia and

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<sup>1</sup> Dates of service in dispute are May 2, 2002, through July 12, 2002. The modalities denied were manipulations, hot or cold pack, electrical stimulation, ultrasound therapy, radiology exam, special reports, and therapeutic procedures.

displacement of cervical disc. On April 22, 2002, Petitioner began treating Claimant's condition with conservative passive physical therapy treatments. Respondent paid for these services until May 2, 2002, when, on the basis of a peer review by Mike O'Kelley, D.C it discontinued payment. On June 18, 2002, it denied payment based on a lack of medical necessity. At Petitioner's request, Randall F. Dryer, M.D., examined Claimant on July 16, 2002. Dr. Dryer ' s report said that because Claimant said the treatments were beneficial, he would recommend four to six weeks of continued physical therapy.

On July 31, 2002, Petitioner sent Dr. O'Kelley a demand letter and a “request for re-review and re-consideration”. The basis for the request was, among other things, that Dr. O'Kelley's peer review did not include a description or the source of the screening criteria or information regarding Respondent's internal complaint and appeal procedures, which are required by section 21.58A of the Texas Insurance Code. On October 11, 2002, Dr. O'Kelley answered Petitioner with a peer review that referred to some of the questions raised in Petitioner's demand letter. Respondent continued to deny payment for the physical therapy treatments on the basis that the treatments were not medically necessary. Petitioner filed a medical dispute, and the IRO decided the treatments were not medically necessary.

### **III. EVIDENCE AND DECISION**

#### **A. Petitioner**

Petitioner attacked the process of both the IRO system and the peer review system. He asserted that the peer reviews of Dr. O'Kelley should be considered null and void and given no weight for the following reasons:

1. Dr. O'Kelley either did not have Petitioners documentation or he did not read the documentation.
2. Dr. Kelley's peer review report did not cite or rely upon the standard of medical necessity as defined by TEX. LAB. CODE Ann. § 408.21.<sup>2</sup>
3. Dr. O'Kelley did not comply with the provisions of TEX. INS. CODE § 21.58.

Petitioner asserted that the IRO should be considered null and void and given no weight for the following reasons:

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<sup>2</sup> Section 408.021(a) of the Texas Workers= Compensation Act (Act) 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. 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.

1. The IRO decision did not contain any findings or specific statements.
2. The IRO did not address relief of pain as being medically necessary.

Although Petitioner insisted that Claimant showed improvement resulting from his treatments, his primary substantive argument was that his treatments relieved Claimant's pain. He argued that the case or *Travelers v. Martin* (Travelers), 28 S.W. 3d 42 (Tx. App.-Texarkana, 2000)<sup>3</sup> stands for the proposition that the “cures or relieves” language in the Act means that pain relief is medically necessary. Petitioner also cited a SOAH decision<sup>4</sup> that said section 408.021(a) of the Act includes pain relief.

Petitioner insisted that Claimant's pain levels decreased as a result of Petitioner's treatments. Petitioner argued that the Dr. O'Kelley's diagnoses was incorrect. Petitioner asserted that that Claimant's injury was a ligament sprain, not a muscle sprain as diagnosed by Dr. O'Kelley. He explained that because the injury was more serious, additional physical therapy was needed to relieve Claimant's pain. Petitioner concluded that his treatments both cured and relieved the pain of Claimant.

## **B. Respondent**

Respondent said the nature of the injury is important because it is not the usual violent lifting injury. Claimant was injured by repeatedly holding the phone between her head and neck while typing. Respondent noted that Petitioner's reviewing doctor, Raymond Dryer, M.D., indicated that the injury was muscular. Dr. O'Kelley's peer review indicated that the clinical facts and findings supported a diagnosis of a muscular cervical sprain/strain, which has a natural history of resolution in eight weeks. Dr. O'Kelley also reported that the maximum chiropractic benefit for a sprain/strain is eight weeks with passive care for only the first four weeks. According to Dr. O'Kelley, Claimant had forty-nine chiropractic sessions with Petitioner over seventeen weeks.

Respondent argued that after the initial eight weeks, the healing process would have progressed the same without any chiropractic therapy. Petitioner indicated that once Claimant uses earphones, thus removing the cause of the trauma, Claimant could expect significant resolution of the symptoms without chiropractic treatment. Using earphones, Claimant returned to work on June 12, 2002, without restrictions. Further, Petitioner argued that the symptoms reflected a non-complicated soft tissue injury that is generally expected to resolve within six to eight weeks.

Respondent argued that Dr. O'Kelley reported that passive modalities are not efficacious over four weeks. Respondent noted that most of the therapy performed in the ten weeks in dispute, May 2, 2002, to July 12, 2002, were passive in nature.<sup>5</sup> According to Respondent, passive physical

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<sup>3</sup> The court in *Travelers* said: “When given its plain meaning, the statute clearly states that one type of service that is reasonably required are those treatments that are necessary to give reasonable relief only to those employees whose injuries are curable.”

<sup>4</sup> SOAH Docket No. 453-02-3523, August 29, 2002, ALJ Shannon Kilgore

<sup>5</sup> The following are passive modalities performed on Claimant during the disputed ten weeks: manipulations, hot or cold packs, electrical stimulation, and ultrasound therapy.

therapy is only efficacious for four to eight weeks.

Respondent pointed out that once the telephone induced trauma stopped, the physical therapy was no more effective than no therapy at all. Respondent noted that Petitioner 's treatment goals were not met in regard to pain, and Claimant's range of motion was less after therapy than it was when she started therapy. Respondent noted that when it asked Petitioner why Claimant's pain was greater after two weeks of therapy, Petitioner replied that Claimant had been taking Ibuprofen, which had masked her symptoms. Petitioner said that Claimant's pain level increased when he took her off Ibuprofen.

### **C. Analysis.**

While Petitioner presented an organized case, the facts do not preponderate in Petitioner's favor. Petitioner presented a two-pronged case. He first assailed the process by attacking the validity of the IRO decision and the peer reviews. His second prong asserted that the physical therapy was medically necessary to reduce pain.

Petitioner's first prong that neither Dr. O'Kelley peer reviews nor the IRO decision<sup>6</sup> should be considered, is untenable. Petitioner believes that the *Travelers* case and SOAH Docket No. 453-02-3523.M2 mandate that pain relief must be fully discussed in a peer review or IRO decision or they will not be admissible. Obviously each aspect of the statute does not have to be addressed, but even if addressed, the statute provides for services that cure or relieve the effects of the injury. Pain is certainly a part of relief, but the absence of a detailed discussion does not render the IRO decision or the peer reviews inadmissible. Petitioner also argued that because the peer reviews and IRO decision are vague and do not specifically refer to his arguments, they should not be considered and should be rendered null and void. This argument goes to the sufficiency of the evidence in the particular document and not to its admissibility.

Petitioner also argued that Dr. O'Kelley's peer reviews and the IRO decision violated TEX. INS. CODE ANN. (Code) Section 21.58A entitled "Health Care Utilization Review Agents;" therefore, these documents should not be considered. This provision has absolutely nothing to do with Texas Workers' Compensation benefits. The person who writes a peer review is not a review agent under this statute. This statutory provision does not apply to Workers' Compensation; instead it applies to health care insurance and health plans, and the only similarity to this hearing is that it uses the term "medical necessity." The ALJ therefor disregards Petitioner's attacks concerning the IRO decision and the peer reviews are viable.

Petitioner's second argument was that his services were medically necessary to relieve Claimant's pain. Many times during the hearing Petitioner compared this case with provider's success in SOAH Docket No. 453-02-3523.M2. In that SOAH case, the ALJ concluded that a chronic pain management program should be preauthorized. This particular program included physical rehabilitation, individual psychotherapy, group therapy, EMG biofeedback training, and

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<sup>6</sup> The ALJ explained at the hearing that he was not bound by the IRO decision, and it would be given such weight it deserves.

medication management. In the instant, the issue is whether primarily passive modalities performed on Claimant were medically necessary to cure or relieve her symptoms. Consequently, the SOAH case cited by Petitioner bears no relationship to the instant case.

The *Travelers* case is also distinguishable from the instant case. The holding in *Travelers* was that treatments are necessary that give reasonable relief from pain.<sup>7</sup> The key word is reasonable. Petitioner's treatments may have had Claimant temporarily feeling better, but over the disputed time, Claimant's pain level would have subsided without Petitioner's treatment. ALJ believes pain would subside naturally over a reasonable period of time. Consequently Petitioner's treatments between May 2, 2002, and July 12, 2002 were not medically necessary.

#### IV. FINDINGS OF FACT

1. \_\_\_\_ (Claimant) suffered a work-related injury on or about \_\_\_\_, when she held the telephone between her neck and shoulder while typing.
2. Petitioner diagnosed Claimant with a cervical strain/sprain, muscle spasm, radiculargia and displacement of a cervical disc.
3. On March 22, 2002, Petitioner began treating Claimant's condition with conservative passive chiropractic treatments.
4. Claimant had forty-nine chiropractic sessions over seventeen weeks.
5. Respondent paid for these services until May 2, 2002, when, based upon Mike O'Kelley, D.C.'s June 18, 2002 peer review, it denied payment.
6. The disputed dates of service were May 2, 2002, through July 12, 2002, and the modalities denied were manipulations, hot or cold pack, electrical stimulation, ultrasound therapy, radiology exam, special reports, and therapeutic procedures.
7. Except for therapeutic procedures, all of the modalities referred to in Finding of Fact No. 6 are passive.
8. Claimant suffered cervical sprain/strain, which has a natural history of resolution in eight weeks.
9. The maximum chiropractic benefit for a sprain/strain is eight weeks, including passive care for only the first four weeks.
10. During the disputed dates of service, Claimant's pain level would have subsided without Petitioner's treatment.

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<sup>7</sup> It is unclear why Claimant was instructed to discontinue her Ibuprofen. Petitioner testified that this masked her symptoms. It, therefore, seems logical to conclude that Ibuprofen was helping relieve her pain.

11. The Texas Workers' Compensation Commission (Commission), acting through Texas Medical Foundation, an Independent Review Organization (IRO), found that the physical therapy treatments provided by Petitioner were not medically necessary for the treatment of Claimant.
12. Petitioner timely requested a hearing before the State Office of Administrative Hearings (SOAH).
13. The hearing convened on March 16, 2004, with State Office of Administrative Hearings ALJ Stephen J. Pacey presiding. Petitioner appeared *pro se*. Respondent appeared through its attorney, Tommy Lueder. The hearing concluded March 16, 2004, and the record closed March 24, 2004.

## **V. CONCLUSIONS OF LAW**

1. SOAH has jurisdiction over this proceeding, including the authority to issue a decision and order pursuant to TEX. LABOR CODE ANN. § 413.031(k), and TEX. GOV'T CODE ANN. ch. 2003.
2. The hearing was conducted pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001 and 28 TEX. ADMIN. CODE ch. 148.
3. The request for a hearing was timely made pursuant to 28 TEX. ADMIN. CODE § 148.3.
4. Adequate and timely notice of the hearing was provided according to TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
5. Petitioner has the burden of proof in this matter. 28 TEX. ADMIN. CODE §§ 148.21(h) and 133.308(w).
6. The physical therapy treatments provided by Petitioner to Claimant from May 2, 2002, through July 12, 2002, were not medically necessary.

**ORDER**

**THEREFORE IT IS ORDERED** that Security National Insurance Company is not required to reimburse John D. Carlson, D.C. for charges associated with physical therapy treatments provided to injured worker \_\_\_\_\_ from June 19, 2002, through September 24, 2002.

**SIGNED May 24, 2004.**

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**STEPHEN J. PACEY  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

the Texas Workers' Compensation Commission (Commission) acting through Texas Medical Foundation, an Independent Review Organization (IRO), finding physical therapy treatments were not medically necessary for the treatment of injured worker \_\_\_\_ (Claimant).