

**SOAH DOCKET NO: 453-04-3714.M5**

<b>REZA NABAVI, P.T.,</b>	§	<b>BEFORE THE STATE OFFICE</b>
<b>Petitioner</b>	§	
	§	
<b>V.</b>	§	<b>OF</b>
	§	
<b>AMERICAN PROTECTION</b>	§	<b>ADMINISTRATIVE HEARINGS</b>
<b>INSURANCE COMPANY,</b>	§	
<b>Respondent</b>		

**DECISION AND ORDER**

Reza Nabavi, P.T., Petitioner, contests a decision of the Texas Workers' Compensation Commission (TWCC) that found that the aquatic physical therapy services provided to Claimant were not medically necessary. This decision finds that Provider proved by a preponderance of the evidence that the services rendered were reasonable and medically necessary, that the Carrier did not comply with TWCC rules regarding denials of payment, and orders Carrier to pay Provider the amount of \$3,629.00.

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

There are no contested issues of notice or jurisdiction in this proceeding, and these matters are addressed only in the findings of fact and conclusions of law. The hearing convened and closed on May 19, 2004, before Administrative Law Judge (ALJ) Nancy N. Lynch. Cherilyn Johnston represented the Provider. The Carrier was represented by Brandi Young, attorney.

**II. BASIS FOR DECISION**

**1. Background**

On \_\_\_\_, Claimant, a female who was approximately \_\_\_\_-years-old, sustained an injury at work when she attempted to catch a child falling out of a shopping cart. As a result, she had an L5-S1 fusion with hardware placement on March 25, 2002. Her surgeon, Craig C. Callewart, M.D., referred her to Provider for evaluation and treatment.

After evaluation, Provider's treatment plan consisted of aquatic therapy, three times per week for six weeks. Dr. Callewart re-examined Claimant and renewed prescriptions for additional aquatic therapy three times during the dates of service.<sup>1</sup>

The IRO decision acknowledged that aquatic therapy can be of some benefit in mechanical low back pain and retraining and strengthening antigravity muscles. However, it opined, it would

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<sup>1</sup> The disputed dates of service are August 19, 21, 23; September 16, 17, 23, 25, 27, 30; October 2, 4, 22, 25; November 5, 8, 19, and 21, 2002. In addition to the aquatic therapy charges, there is one charge for an evaluation and one for myofascial release. The amount in dispute is \$3,629.00, *see* P. Ex. 1, pp. 3 and 67.

not be justified after an initial regimen of twelve weeks was completed without benefit.

## **2. Legal Standards**

The Texas Labor Code (the 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 injury; (2) promotes recovery; or (3) enhances the ability to return to or retain employment.<sup>2</sup> "Health care" includes "all reasonable and necessary medical aid, medical examinations, medical treatment, medical diagnoses, medical evaluations, and medical services."<sup>3</sup>

Provider, as the party who requested the decision, has the burden of proving by a preponderance of the evidence that the services provided were reasonable and necessary.<sup>4</sup>

## **C. Discussion**

### **1. Evidence**

Both parties offered documentary evidence. In addition, Mr. Nabavi, Ms. Johnson, his office manager, and Donna Smith, LPT assistant, offered testimony.

During the June 24, 2002, evaluation, Claimant reported constant pain, numbness, and weakness in her low back, radiating to her right leg and foot.<sup>5</sup> She characterized the pain as moderate to unbearable. At the time of the evaluation, she rated it as 5/6 on a scale of 10, with 10 being severe. She was taking analgesics and Ambien at bedtime, but her sleep was frequently disturbed by her symptoms. Sitting and standing increased her symptoms. She could not sit for more than twenty minutes and could not stand for more than thirty minutes.<sup>6</sup>

Range of motion (ROM) testing indicated Claimant's lumbar range of motion was significantly less than normal. The straight leg test was positive for lumbar lesion when performed with the right leg. Her iliac crests were noted to not be level and her response to pelvic resisted isometric movements were Aweak and painful.<sup>7</sup>

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<sup>2</sup> TEX. LAB. CODE ANN. ' 408.021.

<sup>3</sup> TEX. LAB. CODE ANN. ' 401.011(19).

<sup>4</sup> 28 TEX. ADMIN. CODE ' 148.21(h) and (i).

<sup>5</sup> P. Ex. 1, pp. 1-8.

<sup>6</sup> P. Ex. 1, p. 6.

<sup>7</sup> P. Ex. 1, p. 7.

Provider noted that clinical signs and symptoms were consistent with Claimant's subjective complaints, that her effort appeared consistent throughout the testing, and that her condition was acute. Specific problems noted were pain and tenderness in the L-S region, decreased ROM in her lower back, decreased strength of low back and limitation of function. The long-term goal was restoration of function. Short-term goals were relief of pain and increased ROM/strength of low back. Provider noted that Claimant's potential to achieve the rehabilitation goals was good.<sup>8</sup>

Claimant had a significant setback when she received lumbar epidural steroid injections on or about October 11, 2002. Those injections apparently hit a nerve and she was hospitalized afterward for severe incapacitating pain, inability to void, and exacerbation of the right L5 root pain.<sup>9</sup> While hospitalized, she was placed on intravenous narcotic analgesics. While in the hospital, she underwent several diagnostic tests including an MRI, myelo CT, and a lumbar discogram. Those tests did not identify a source of her pain, and she was discharged on October 14, 2002, on narcotic painkillers and anti-nausea medications.<sup>10</sup> She returned to aquatic therapy on October 16, 2002. On October 22, 2002, she was again evaluated by Dr. Callewart's office and he wrote a new prescription for six-to-eight weeks of aquatic therapy.<sup>11</sup>

On October 23, 2002, Roger Thomas Canard, D.C. performed an independent medical evaluation of Claimant at the request of the TWCC. Dr. Canard noted that a nerve had apparently been struck during the epidural steroid injections, causing her to be hospitalized. He concluded that she had a chronic pain syndrome secondary to failed low back surgery and, therefore, was not deemed to be at maximum medical improvement (MMI). He stated that she would need chronic pain medications for an indefinite time period. Finally, he opined: AI feel that she is not at MMI at this time but may be at MMI within the 3 month time frame if the proper aquatic and kinetic rehabilitation exercises are performed.<sup>12</sup>

## **2. Parties' Positions and Arguments**

Provider argues that the two physicians who actually examined Claimant—the surgeon and the TWCC designated doctor—concluded that aquatic therapy was appropriate treatment for her. Progress was slow, but, Provider maintained, there was progress. This woman could not do exercises on dry land without tears, but with the additional buoyancy provided by the water, she could walk about and do some exercises in the water. This allowed her to maintain some strength and flexibility.

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<sup>8</sup> P. Ex. 1, p. 8.

<sup>9</sup> P. Ex. 1, pp. 21-22.

<sup>10</sup> P. Ex. 1, p. 22, 24.

<sup>11</sup> P. Ex. 1, pp. 24-25.

<sup>12</sup> P. Ex. pp. 27-31.

Provider also argues that Carrier's behavior was inconsistent and not in compliance with TWCC rules for denying payment for medical services. Carrier paid sometimes and did not pay other times. Furthermore, although treatment began in June 2002, the first denial of payment it received was dated October 16, 2002, and covered treatment for dates of service in August. In addition, the Carrier used the wrong explanation of benefits (EOB) code. It used AC@ or A negotiated contract price.@<sup>13</sup> This made no sense, according to Provider, because there was no A contract price.@ The denial also mentioned a lack of documentation. Provider, believing he had submitted adequate documentation, concluded that Carrier must not have received everything he submitted. He expected the Carrier to pay the claims when they were resubmitted.

Finally, Carrier's later denials had a denial code of AV,@ based upon a physician peer review. However no peer review was furnished initially, and when it was furnished, it was a peer review that had been done before these services were provided.

Carrier argues that there is no indication in the medical records that the aquatic therapy was curing or relieving the effects naturally resulting from Claimant's injury, or that it was promoting recovery. Carrier's attorney also asserted it had paid for the first twelve weeks of aquatic therapy, the same length of time the IRO physician cited as an appropriate initial regimen, after which therapy should be discontinued if there was no benefit.<sup>14</sup>

### **3. ALJ's Analysis**

The ALJ concludes that the treatment provided was reasonable and medically necessary and that the Carrier violated multiple requirements regarding the way carriers are to notify providers of denial of payment.

It is true that Provider's progress notes do not demonstrate a great deal of steady progress. Sometimes she seemed better, other times she complained of increased symptoms, many times the notes reflected that she was A the same.@ On the other hand, the notes do demonstrate that the aquatic therapy relieved her pain. The notes also indicate Claimant was able to maintain mobility through the aquatic therapy program that she would probably have lost without it. Maintaining her mobility and strength do promote her recovery and increase the likelihood she may return to work.

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<sup>13</sup> The refusal code of AC@ was used for dates of service: August 19, 21, and 23, 2002, for a total of \$624.00. On November 4, 2002, a similar EOB was sent to Provider for the dates of service, September 16 and 17, 2002. An amended EOB, dated January 16, 2003, was sent to Provider in response to Provider's request for reconsideration. It used the code AV- unnecessary treatment (with peer review).@

<sup>14</sup> The only evidence in this record, however, contradicts this assertion. According to Provider, Carrier denied payment for treatment on August 19 and 21, during week nine of the original twelve weeks. P. Ex. 1, pp. 68-71. It also paid for some treatments in October and November beyond the original twelve weeks of treatment.

Furthermore, not only were Carrier ' s responses to the claims inconsistent, they routinely violated TWCC requirements for the way they issue denials set out in 28 TEX. ADMIN CODE ' 133.304. No one at the hearing, including Carrier ' s attorney, could explain why the Carrier used AC@ as the initial EOB notation. It was accompanied by a very short, generic narrative rationale that raised issues of medical necessity and appropriateness and lack of explanation for failure to recover. Later EOBs used AV@ as the explanation code, but did not provide the peer review to Provider with the EOBs. When the peer review was finally provided, it was discovered it had been done *before* Provider began treating Claimant. Clearly, the peer did not review the services received by *this* Claimant from *this* Provider.

As to medical necessity of the treatment, the ALJ finds it persuasive that the opinions of the only doctors in this case who actually examined Claimant, Dr. Callewart and Dr. Canard, were the same B that aquatic therapy would be beneficial for her.<sup>15</sup> There would, of course, be a time beyond which it would not be reasonable to continue with aquatic therapy if Claimant continued to show no significant improvement. However, the ALJ concludes that such a time had not yet arrived when the treatment in question was provided.

The ALJ finds the aquatic therapy and related services at issue in this case were reasonable and medically necessary. Further, the ALJ finds that the Carrier did not comply with the requirements of 28 TEX. ADMIN. CODE ' 133.304.

### **III. FINDINGS OF FACT**

1. Claimant, a cashier supervisor, sustained a compensable injury to her lower back when she attempted to catch a child falling out of a shopping cart.
2. At the time of the accident, American Protection Insurance Company, or its predecessor company (Carrier), was the worker ' s compensation carrier for Claimant ' s employer.
3. Claimant had an L5-S1 fusion with hardware on March 25, 2002.
4. Her surgeon and a treating physician, Craig D. Callewart, M.D., referred her to Reza Nabavi, P.T. (Provider) for evaluation and treatment.
5. The initial treatment plan developed by Mr. Nabavi called for aerobic pool therapy three times per week for six weeks to relieve pain, increase ROM and strength of low back, and ultimately to restore function.
6. Dr. Callewart examined and re-evaluated Claimant and renewed the prescriptions for aquatic therapy on July 29, August 29, and October 22, 2002.

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<sup>15</sup> P. Ex. 1, p. 62. It would have been helpful to have had more of Dr. Callewart ' s notes which were, it appears, attached to one of the letters sent to the Carrier. However, they were not attached to the copy of that letter in the record.

7. Designated Doctor Roger Canard, D.C., examined Claimant and found her to not be at MMI on October 23, 2002, but found that with aquatic therapy, she could be at MMI in approximately three months.
8. The aquatic therapy relieved the Claimant's pain and enabled her to engage in exercises she could not accomplish out of water.
9. Those exercises helped Claimant maintain mobility and strength and increased the likelihood that she would recover and return to work.
10. Carrier sent EOB to Provider that cited the wrong payment exception code; did not include the peer review referred to in the EOB; and when it finally did provide the peer review, had relied on a peer review performed before the services had been provided.
11. The services in issue were reviewed by an IRO and, on September 4, 2003, the IRO issued an order finding they were not medically necessary to treat Claimant's condition.
12. On February 5, 2004, the MRD issued a decision adopting the IRO's decision and declining to recommend reimbursement for the Claimant's treatment.
13. Provider timely requested a hearing.
14. The Commission sent notice of the hearing to all parties by letter dated March 18, 2004.
15. The notice of hearing 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.
16. The hearing convened and closed on May 19, 2004.

#### **IV. CONCLUSIONS OF LAW**

1. The State Office of Administrative Hearings has jurisdiction over this proceeding, including the authority to issue a decision and order, pursuant to TEX. LAB. CODE ANN. ' 413.031(k) and TEX. GOV'T CODE ANN. ch. 2003.
2. The Provider timely requested a hearing, as specified in 28 TEX. ADMIN. CODE (TAC) ' 148.3.

3. Proper and timely notice of the hearing was provided in accordance with TEX. GOV ' T CODE ANN. ' ' 2001.051, 2001.052, and 28 TAC ' 148.4.
4. Carrier ' s EOBs violated 28 TEX. ADMIN. CODE ' 133.304.
5. Petitioner carried his burden of proof by proving his case by a preponderance of the evidence, pursuant to 28 TEX. ADMIN. CODE ' 148.21(h) and (i), and 1 TEX. ADMIN. CODE ' 155.41.
6. An employee who has sustained 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 cures or relieves the effects naturally resulting from the compensable injury, promotes recovery, or enhances the ability of the employee to return to or retain employment. TEX. LAB. CODE ANN. ' 408.021(a).
7. Based on the foregoing Findings of Fact and Conclusions of Law, Carrier should reimburse Provider in the amount of \$3,629.00.

### **ORDER**

It is ORDERED that Carrier pay to Provider the amount of \$3,629.00 plus interest as required by law. All other pending motions or requests for relief, if any, not specifically granted herein are denied for want of merit.

**Signed July 15, 2004.**

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**NANCY N. LYNCH  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS**