

**SOAH DOCKET NO. 453-04-4340.M5  
MDR TRACKING NO. M5-04-0089-01**

<b>TEXAS MUTUAL INSURANCE CO.,</b>	'	<b>BEFORE THE STATE OFFICE</b>
<b>Petitioner</b>	'	
	'	
<b>V.</b>	'	<b>OF</b>
	'	
<b>NORTH TEXAS PHYSICAL THERAPY,</b>	'	
<b>Respondent</b>	'	<b>ADMINISTRATIVE HEARINGS</b>

**DECISION AND ORDER**

This case is an appeal by Texas Mutual Insurance Co. (Petitioner) from a decision of an independent review organization (IRO) on behalf of the Texas Workers' Compensation Commission (Commission) in a dispute regarding the medical necessity of physical therapy services. The IRO found that Petitioner improperly denied reimbursement for physical therapy that North Texas Physical Therapy, (Respondent) administered between September 26 and November 15, 2002, to a claimant suffering from a shoulder injury.

Petitioner challenged the decision on the basis that the treatment at issue was not, in fact, medically necessary, within the meaning of ' ' 408.021 and 401.011(19) of the Texas Workers' Compensation Act (Athe Act@), TEX. LABOR CODE ANN. ch. 401 *et seq.* This decision finds that the treatment in issue was not medically necessary and that Petitioner is not ordered to reimbursement Respondent for the disputed services.

**I. JURISDICTION AND VENUE**

The Commission has jurisdiction over this matter pursuant to ' 413.031 of the Act. The State Office of Administrative Hearings (SOAH) has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a decision and order, pursuant to ' 413.031(k) of the Act and TEX. GOV'T CODE ANN. ch. 2003. No party challenged jurisdiction or venue.

**II. STATEMENT OF THE CASE**

The hearing in this docket was convened on September 21, 2004, at SOAH facilities in the William P. Clements Building, 300 W. 15<sup>th</sup> St., Austin, Texas. Administrative Law Judge (ALJ) Tommy L. Broyles presided. Petitioner was represented by Katie Kidd, Attorney. Respondent was represented by Cherilyn Johnston. The record closed on the date of the hearing.

The record revealed that on \_\_\_\_, the claimant suffered a compensable injury to her right shoulder. Consequently, she underwent shoulder surgery (arthroscopic acromioplasty and release) on May 10, 2002. Post-surgical rehabilitation included one-to-one physical therapy beginning on June 17, 2002, in an effort to increase her strength and range of motion. The claimant's rehabilitation was interrupted when, after five therapy sessions, she was diagnosed with breast cancer and underwent a mastectomy. Her shoulder therapy sessions later resumed on August 23, 2002, and continued until November 15, 2002.

Petitioner reimbursed Respondent for much of the physical therapy provided to the claimant. However, Petitioner denied reimbursement for services after September 26, 2002, on grounds that these services were not medically necessary. More specifically, Petitioner claimed the services provided were not cost-effective care in that one-to-one therapy was not necessary.

Respondent sought medical dispute resolution through the Commission. The IRO to which the Commission referred the dispute issued a decision on December 19, 2003, concluding that Petitioner should have reimbursed Respondent for the disputed services. The Commission's Medical Review Division (MRD) reviewed the IRO's decision and, on February 11, 2004, issued its own decision confirming that the disputed services were medically necessary and should be reimbursed. Petitioner then made a timely request for review of the IRO and MRD decisions before SOAH.

### **III. EVIDENCE AND ARGUMENTS**

Petitioner presented the testimony of Dr. Nicholas Tsourmas, a Board-certified practitioner in orthopedic surgery, who found the therapy provided by Respondent on the dates in question to be unreasonable. Dr. Tsourmas concluded that after September 26, 2002, the claimant did not need passive modalities and joint mobilization to enhance range of motion. In fact, he asserted, by that date the claimant could have relied on self-directed exercise to advance her rehabilitation which would have been much more cost effective than supervised, one-to-one therapy. Petitioner points out that the recommended protocol prescribed by claimant's surgeon suggested only five weeks of active range of motion followed by five weeks of Theraban internal and external rotation exercises, both of which could be performed at home. According to Petitioner, Respondent did not follow the surgeon's protocol but instead followed its own, much more costly protocol that was not medically necessary.

Petitioner also called Susan Dunlap, P.T., who reviewed the records and agreed that the physical therapy performed was not that recommended in the protocol suggested by claimant's surgeon. She noted that prior to the mastectomy, all treatments were well tolerated suggesting group or home therapy would have been appropriate. Even after the mastectomy, Ms. Dunlap opined that at a minimum, the surgeon should have been contacted and informed of any complications to see if his recommended treatment needed to be modified.

Respondent maintains that its highest priority was quality of care. The one-to-one therapy was necessary because of complications that arose from the mastectomy. Respondent points out that when the claimant's surgeon provided his protocol for rehabilitation, he could not and did not foresee this intervening event. Therefore, Respondent does not find his protocol to be controlling. Barbara Fraczek, P.T., testified that she provided the services to the claimant and that the services provided were in accordance with instructions from the claimant's treating doctor, a chiropractor. She further stated that the claimant needed one-to-one therapy due to lack of energy and safety issues. Respondent concludes that it followed doctor orders, did not provide excessive treatment, and discharged the claimant when she reached a plateau. Accordingly, Respondent seeks reimbursement for all therapy sessions provided.

#### **IV. ANALYSIS**

After a review of the evidence, the ALJ concludes that the medical services Respondent provided to the claimant were not reasonable and necessary medical care for the compensable injury. The disputed services were provided four and one-half months after the relatively minor shoulder surgery. Claimant's surgeon recommended only active range of motion physical therapy for the first five weeks of rehabilitation. The recommended therapy could have been performed at home and without one-to-one care. Disregarding the surgeons recommendations, Respondent provided passive range of motion and active assisted range of motion even before claimant's intervening medical condition. Thus, Respondent's reliance on the intervening condition as justification for providing one-to-one care later in treatment is suspect.

Respondent also suggested that safety issues required the higher degree of care. Again, this does not explain why such care was necessary before the mastectomy. Even when just reviewing the care provided after the mastectomy, Ms. Fraczek was unable to provide any evidence of safety issues in her treatment notes. Moreover, Ms. Dunlap testified that in her review of the treatment notes, she found no contraindications suggesting that claimant could not have received the same benefit from group therapy that she did with one-to-one therapy.

## **V. CONCLUSION**

The ALJ finds that, under the record provided in this case, the disputed medical services were shown to not be medically necessary. Petitioner reimbursed Respondent for several weeks of physical therapy performed with one-to-one care. Given the nature of the surgery performed to correct the compensable injury, the ALJ concludes that the disputed therapy was not necessary at the degree of care in which it was provided. Accordingly, reimbursement for these services is denied.

## **VI. FINDINGS OF FACT**

1. On \_\_\_\_, the claimant suffered an injury to her right shoulder that was a compensable injury under the Texas Worker ' s Compensation Act (Act), TEX. LABOR CODE ANN. ' 401.001 *et seq.*
2. The claimant's injury necessitated surgery, arthroscopic acromioplasty and release, on May 10, 2002.

3. Post-surgical rehabilitation began on June 17, 2002, with North Texas Physical Therapy (Respondent).
4. After five therapy sessions, the claimant's rehabilitation of her shoulder was interrupted by an unrelated health issue.
5. Rehabilitation of the claimant's shoulder resumed on August 23, 2002, and continued until November 15, 2002.
6. Respondent sought reimbursement for services noted above from Texas Mutual Insurance Co. (Petitioner), the insurer for claimant's employer.
7. Petitioner denied reimbursement for services beginning September 26, 2002, on grounds that these services were not medically necessary.
8. Respondent made a timely request to the Texas Workers' Compensation Commission (Commission) for medical dispute resolution with respect to the requested reimbursement.
9. The independent review organization (IRO) to which the Commission referred the dispute concluded that the disputed services were medically necessary to improve claimant's post-surgical range of motion and strength in the shoulder.
10. The Commission's Medical Review Division (MRD) reviewed and concurred with the IRO's determination in a decision dated February 11, 2004.
11. Petitioner requested in timely manner a hearing with the State Office of Administrative Hearings (SOAH), seeking review and reversal of the MRD decision regarding reimbursement.
12. The Commission mailed notice of the hearing's setting to the parties at their addresses on April 5, 2004. The hearing was subsequently continued to a later date, with proper notice to the parties.
13. A hearing in this matter was convened before SOAH on September 21, 2004, with the record closing on that same date. Petitioner and Respondent were represented at the hearing.
14. It was not medically necessary to have one-to-one medical care for claimant's physical therapy provided from September 26, 2002, through November 15, 2002.

## **VII. CONCLUSIONS OF LAW**

1. The Texas Workers' Compensation Commission has jurisdiction related to this matter pursuant to the Texas Workers' Compensation Act (Act), TEX. LABOR CODE ANN. § 413.031.
2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a decision and order, pursuant to § 413.031(k) of the Act and TEX. GOV'T CODE ANN. ch. 2003.
3. The hearing was conducted pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001 and the Commission's rules, 28 TEX. ADMIN. CODE (TAC) § 133.305(g) and §§ 148.001-148.028.
4. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
5. Petitioner, the party seeking relief, bore the burden of proof in this case, pursuant to 28 TAC ' 148.21(h).
6. Based upon the foregoing Findings of Fact, the claimant's physical therapy provided from September 26, 2002, through November 15, were not medically necessary care under § 408.021 of the Act.
7. Based upon the foregoing Findings of Fact and Conclusions of Law, reimbursement of Respondent for the disputed services should be denied.

#### **VIII. ORDER**

**IT IS THEREFORE, ORDERED** that the appeal is granted and Petitioner is not required to reimburse North Texas Physical Therapy for services provided from September 26, 2002, through November 15, 2002.

**SIGNED November 22, 2004.**

**TOMMY L. BROYLES  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS**