

**SOAH DOCKET NO. 453-04-0679.M5<sup>1</sup>**

<b>TEXAS MUTUAL INSURANCE CO.,</b>	§	<b>BEFORE THE STATE OFFICE</b>
<b>Petitioner</b>	§	
	§	
<b>VS.</b>	§	<b>OF</b>
	§	
<b>CRAIG A. THIRY, D.C.,</b>	§	
<b>Respondent</b>	§	<b>ADMINISTRATIVE HEARINGS</b>

**DECISION AND ORDER**

Texas Mutual Insurance Company (Carrier) contested the decision of the Medical Review Division (MRD) of the Texas Workers' Compensation Commission (the Commission) ordering reimbursement for physical therapy and office visits that were provided to Claimant on 39 dates of service between September 11, 2002, and January 9, 2003. Carrier denied reimbursement on the basis that the treatment was not reasonable or medically necessary. The Administrative Law Judge (ALJ) finds Carrier reimbursed Provider for a reasonable amount of Claimant's post-operative rehabilitation, and that Carrier was correct to deny reimbursement for the disputed services, because they were neither reasonable nor medically necessary.

**I. PROCEDURAL HISTORY**

The parties did not contest notice or jurisdiction, which are addressed in the Findings of Fact and Conclusions of Law below. ALJ Sharon Cloninger convened the hearing on March 10, 2005 in the William P. Clements Building, 300 West 15<sup>th</sup> Street, Austin, Texas. Carrier was represented by Ryan T. Willett, attorney. Provider was represented by William Maxwell, attorney. The hearing concluded that same day.

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<sup>1</sup> For hearing purposes only, this case was joined with SOAH Docket No. 453-04-4212.M5. A separate decision and order is being issued for each case.

## II. BACKGROUND

Claimant injured his neck and both knees on \_\_\_\_, when he was pulling a gas line hose off a reel on the back of a cargo tanker. The following day, he was diagnosed with neck sprain and bilateral knee sprain/strain, although only the left knee injury is compensable. He underwent conservative care with Provider for a number of months before undergoing arthroscopic surgery on his left knee on August 23, 2002. Following the surgery, he returned to Provider for post-operative rehabilitation from September 11, 2002, through January 9, 2003.

The disputed post-operative rehabilitation treatment consists of therapeutic exercises (CPT Code 97110), group therapeutic procedure (CPT Code 97150), myofascial release (CPT Code 97250), joint mobilization (CPT Code 97265), therapeutic activities (CPT Code 97530), office visits (CPT Code 99213), and extended office visits (CPT Code 99214).

A December 20, 2002 MRI of Claimant's left knee was "essentially normal" according to J.S. Lee, M.D., although Dr. Lee suggested that Claimant needed vigorous, active physical therapy to rebuild the mineralization of bony structures in his left knee.<sup>2</sup>

Claimant was examined by Stephen De Young, M.D., a designated doctor, on February 27, 2003, who determined that Claimant had reached maximum medical improvement (MMI) with a four percent whole person impairment rating, in part because of left thigh atrophy. At that time, Claimant had not returned to work, was still undergoing physical therapy, and described constant sharp, aching, throbbing and itching pain in his left knee with pain radiation to the left ankle and

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<sup>2</sup> Provider's Exh. 4, at 164-165.

heel. Dr. Lee reported Claimant's active movement in his left knee to be restricted between full extension and 120 degrees of flexion.<sup>3</sup> Dr. Lee released Claimant to return to work with restrictions on February 27, 2003, allowing him to do medium level work with limitations on kneeling, squatting, and climbing stairs and ladders.<sup>4</sup>

Carrier paid Provider in part for Claimant's post-surgical rehabilitation, denying reimbursement for some of the treatment. Provider requested medical dispute resolution on Carrier's denial. The MRD granted Provider's request for reimbursement, following its review of a decision issued by an independent review organization (IRO).<sup>5</sup> Carrier then requested a hearing on the disputed services.

### **III. APPLICABLE LAW**

#### **A. Texas Labor Code**

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

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3 Provider's Exh. 4, at 168, 170-172.

4 Provider's Exh. 4, at 169.

5 The independent review organization (IRO) decision issued August 21, 2003, found that the disputed services were reasonable, customary, and medically necessary for Claimant's treatment. The IRO stated that national treatment guidelines allow two to three months of post-surgical rehabilitation, although four months of rehabilitation is allowed if there are additional complicating factors and continued objective examination findings such as in Claimant's case. *See* Carrier's Exh. 3, at 161-162. The ALJ notes that the IRO does not list any complicating factors or objective examination findings in support of its conclusion.

injury;

- (2) promotes recovery; or
- (3) enhances the ability to return to or retain employment. TEX. LAB. CODE § 408.021(a).

**B. Medical Fee Guideline: Medicine Ground Rule**

For the purposes of the Medical Fee Guideline, treatment provided under CPT Code 97110 (therapeutic exercises) is considered physical medicine care or therapy, and a one-on-one setting is required. Medicine Ground Rule (I)(A)(9).

**IV. EVIDENCE AND DISCUSSION**

Carrier called one witness and offered one exhibit, which was admitted. Provider called one witness and offered two exhibits, which were admitted.

**A. Testimony of David Alvarado, D.C.**

David Alvarado, D.C., testified on behalf of Carrier that the disputed services were not medically necessary. He disagreed with the IRO decision, which states two to three months of post-operative rehabilitation is not unreasonable.<sup>6</sup> He said two or three months of post-operative rehabilitation was excessive in Claimant's case for two reasons: (1) Claimant had about 81 hours of pre-operative physical therapy from Provider and others, and should have had a good grasp of the exercises to be performed post-operatively, and (2) Claimant's knee surgery was very minor. Dr. Alvarado noted that the IRO decided four months of post-operative rehabilitation was warranted for Claimant due to complications, but Dr. Alvarado said he saw no complications listed in the medical records.

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<sup>6</sup> Carrier's Exh. 3, at 162.

Dr. Alvarado testified that Claimant did the same exercises on each disputed date of service. He said it would take the average patient about 30 minutes to learn how to properly perform all of the exercises, which he described as "not difficult to learn." He said that at most, two or three units of one-on-one instruction would be medically necessary, and that Claimant could have learned the exercise routine in two or three visits at most, beginning with the September 11, 2002 date of service. He said the exercises could have been performed by Claimant in a group setting or at home, particularly because there is nothing in the medical records to indicate Claimant was having any trouble performing the exercises.

Dr. Alvarado noted that Carrier paid for three out of four units of therapeutic activities provided on September 12-13, 2002, and paid for one unit on dates of service from September 17 through October 29, 2002. He said Carrier paid for office visits until November 5, 2002, which was sufficient for Claimant's care.

## **B. Provider's Deposition Testimony<sup>7</sup>**

Provider testified in his deposition that the standard post-surgical rehabilitation protocol is treatment three times per week for six weeks.<sup>8</sup> He described Claimant's complications following surgery as swelling and decreased range of motion.<sup>9</sup> He said the disputed treatment was medically necessary because Claimant had atrophy in his quadriceps.<sup>10</sup>

Provider testified that one-on-one therapy was medically necessary initially because Claimant needed to be careful about the biomechanics of the exercises, and through at least October

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7 Provider's Exh. 3.

8 Provider's Exh. 3, at 21. The ALJ notes September 11 through October 23, 2002, comprises six weeks.

9 Provider's Exh. 3, at 34.

10 Provider's Exh. 3, at 74.

11, 2002, because Claimant needed motivation to perform the exercises.<sup>11</sup> He said that by November 11, 2002, Claimant could execute the exercises in a group setting.<sup>12</sup> Provider explained that on January 8, 2003, one-on-one therapy was needed because Claimant had reached the end of his treatment, and Provider wanted to affirm that he was doing the exercises properly, with maximum effort, and that he had continued to progress while in the group setting.<sup>13</sup> Provider said that in the group setting, about three patients are monitored simultaneously.<sup>14</sup> He said Claimant also performed quadriceps stretches at home.<sup>15</sup>

Provider said passive modalities were needed to reduce Claimant's pain and encourage him to perform the exercises.<sup>16</sup> He explained that myofascial release was used to alleviate pain in Claimant's quadriceps during rehabilitation.<sup>17</sup> He said joint mobilization was performed to get more range of motion in Claimant's knee than was obtained during exercises.<sup>18</sup>

## **C. Documentary Evidence**

### **1. SOAP notes**

On September 12, 2002, Claimant's range of motion was decreased, and his pain level was at

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11 Provider's Exh. 3, at 35-36; Provider's Exh. 3B, at 15.

12 Provider's Exh. 3B, at 18.

13 Provider's Exh. 3B, at 20-21.

14 Provider's Exh. 3, at 51.

15 Provider's Exh. 3, at 26.

16 Provider's Exh. 3, at 38.

17 Provider's Exh. 3, at 30.

18 Provider's Exh. 3, at 41.

8 out of 10 for 70 to 100 percent of the time.<sup>19</sup> On October 23, 2002, after six weeks of treatment, Claimant's pain level was at 7 out of 10, and his flexion was at 96 degrees,<sup>20</sup> up from 20 degrees on the first day of rehabilitation.<sup>21</sup> Claimant's flexion reached 100 degrees the following day, October 24, 2002.<sup>22</sup> By January 9, 2003, Claimant's pain level was at 6 out of 10, and his flexion was at 102 degrees.<sup>23</sup>

## **2. Review by Nicholas Tsourmas, M.D.**

At Carrier's request, Nicholas Tsourmas, M.D., reviewed Claimant's medical information and rendered an opinion on August 26, 2004. Dr. Tsourmas stated that Claimant was more than adequately coached and educated in knee rehabilitation before the disputed dates of service, because he underwent active and passive physical modalities to treat his compensable injury for two months in 2001 and for eight months in 2002 prior to his surgery. Dr. Tsourmas also opined that following Claimant's August 23, 2002 knee surgery, some minor amount of re-coaching, re-education, and re-training was needed, as well as possibly a week or so of passive modalities to help control post-operative pain and swelling, but no more. He expressed surprise that the vaporized free edge meniscectomy undergone by Claimant produced any post-operative swelling and edema, because it is the most minimal arthroscopic intervention that can be performed. He described the meniscectomy as simple outpatient surgery that allows most patients to return to work after recuperating for one or two weeks. Dr. Tsourmas said he found little in the way of documentation to affirm the medical necessity of the amount, duration, and intensity of the physical therapy modalities performed on

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19 Provider's Exh. 4, at 128.

20 Provider's Exh. 4, at 133.

21 Provider's Exh. 3, at 36-37.

22 *Id.*

23 Provider's Exh. 4, at 147-148.

Claimant by Provider from September 11, 2002, through January 9, 2003.<sup>24</sup>

### **3. Dr. Ghadially's examinations**

On September 3, 2002, James A. Ghadially, M.D., examined Claimant, who reported ongoing discomfort and swelling in his knee. Dr. Ghadially recommended that Claimant begin a course of physical therapy with an emphasis on quadriceps rehabilitation, and improved range of motion.<sup>25</sup>

In a follow-up visit on September 24, 2002, Dr. Ghadially noted that no substantial medical problems had developed since Claimant's September 3, 2002, visit. He said Claimant lacked 15 degrees of having full extension, and that he could flex his knee to 85 degrees. Dr. Ghadially said mild edema was present, and the portal sites were well healed, with no signs of infection. He reported Claimant continued to have an antalgic gait and recommended an aggressive rehabilitation program for the left knee with an emphasis on range of motion and strengthening.<sup>26</sup>

On October 15, 2002, Dr. Ghadially found Claimant to have done extremely well since the arthroscopy, with some weakness. He said Claimant had not done any exercises, but had done "stretching-type" treatments. He noted that Claimant's pain was at 5 on a scale of 1-10, which was significantly better than his post-operative pain level. He reported no substantial medical problems developed since September 24, 2002 visit and said that Claimant's active range of motion was from 0 to 90 degrees. He also found that Claimant had quadriceps atrophy, about 25 percent on left side as compared to right side.<sup>27</sup>

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24 Carrier's Exh. 3, at 309-311.

25 Provider's Exh. 4, at 151-152.

26 Provider's Exh. 4, at 153-156.

27 Provider's Exh. 4, at 157-160.

When Claimant continued to complain of discomfort on December 5, 2002, Dr. Ghadially decided that an MRI was needed to ensure Claimant had an adequate meniscectomy and had not sustained a recurrent tear.<sup>28</sup> On December 19, 2002, a post-surgical MRI of Claimant's left knee was taken, and the knee was determined to be normal, although the radiologist recommended that Claimant undergo vigorous active physical therapy and rehabilitation to rebuild the mineralization of the bony structures of the left knee.

## V. ANALYSIS AND CONCLUSION

### A. Analysis

The ALJ finds that Carrier met its burden of proving the disputed services were not reasonable or medically necessary for Claimant's post-surgical rehabilitation, based on the minor nature of Claimant's surgery and the fact that he had performed the exercises in 2001 for about eight months in 2002 prior to his surgery. Carrier proved that it paid for an adequate number of units of one-on-one therapy to allow Claimant to be re-trained in the exercises. Provider maintained that Claimant's complications warranted additional one-on-one therapy, but the complications identified by ProviderBswelling and lack of motivationBcould have been addressed in a group setting, especially given that a group consists of only three patients. In addition, Claimant apparently needed no motivation to complete his home exercises, bringing into question why he would need motivation to complete physical therapy exercises. The ALJ therefore finds the uncompensated one-on-one therapy to have been medically unnecessary.

Provider testified that six weeks of rehabilitation is standard for the type of post-surgery rehabilitation Claimant needed. For Claimant, the six weeks would have run from September 11, 2002, through October 23, 2002. Notwithstanding Provider's position that additional rehabilitation provided after October 23, 2002, was medically necessary to treat Claimant's quadriceps atrophy,

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<sup>28</sup> Provider's Exh. 4, at 161-163.

the ALJ finds that rehabilitation provided after October 23, 2002, did little to cure or relieve the effects naturally resulting from Claimant's compensable injury, promote his recovery, or enhance his ability to return to or retain employment, pursuant to TEX. LAB. CODE ANN. § 408.021(a). From September 11, 2002, through October 23, 2002, Claimant's flexion improved from 20 degrees to 96 degrees, and his pain level dropped from 8 out of 10 to 7 out of 10. On October 24, 2002, Claimant's flexion was at 100 degrees. From October 24, 2002, through January 9, 2003, Claimant's flexion only improved another two degrees, and his pain level only dropped from 7 out of 10 to 6 out of 10. The ALJ finds such slight improvement over two-and-a-half months to demonstrate that the treatment was not reasonable or medically necessary.

Also in dispute is the joint mobilization provided to Claimant from October 2, 2002, onward. The evidence shows that passive modalities such as joint mobilization were warranted for up to one or two weeks after Claimant's knee surgery to reduce swelling and to help control post-operative pain. Therefore, the ALJ concludes that joint mobilization provided after September 25, 2002, was not reasonable or medically necessary.

## **B. Conclusion**

Carrier met its burden of proof, and reimbursement to Provider for the disputed services is not warranted.

## **VI. FINDINGS OF FACT**

1. Claimant suffered a compensable sprain/strain to his left knee on \_\_\_\_, when he was pulling a gas line hose off a reel on the back of a cargo tanker.
2. Texas Mutual Insurance Company (Carrier) was the workers' compensation insurance carrier for Claimant's employer when his compensable injury occurred.
3. Craig A. Thiry, D.C. (Provider) began treating Claimant with conservative care following his injury.

4. Claimant underwent arthroscopic surgery on his left knee on August 23, 2002.
5. Claimant's vaporized free edge meniscectomy was the most minimal type of arthroscopic intervention that can be performed, and most patients return to work within one or two weeks after such surgery.
6. Claimant began post-surgery rehabilitation with Provider on September 11, 2002.
7. From September 11, 2002, through January 9, 2003, Provider treated Claimant with therapeutic exercises, group therapeutic procedures, myofascial release, joint mobilization, therapeutic activities, office visits, and extended office visits (the disputed services).
8. From September 11 through October 23, 2002, Claimant's pain level dropped from 7 out of 10 to 6 out of 10, and his flexion improved from 20 degrees to 96 degrees.
9. On October 24, 2002, Claimant's flexion was at 100 degrees.
10. From October 24, 2002, through January 9, 2003, Claimant's flexion only improved two degrees, and his pain level only dropped from 7 out of 10 to 6 out of 10.
11. After October 23, 2002, Claimant's rehabilitation treatment did not promote his recovery, relieve the effects naturally occurring from his compensable injury, or enhance his ability to return to or retain employment.
12. Passive modalities such as joint mobilization were warranted for up to one or two weeks after Claimant's knee surgery to reduce swelling and to help control post-operative pain.
13. Joint mobilization provided after September 25, 2002, was not reasonable or medically necessary.
14. Claimant's suffered no complications following his surgery that would have warranted treatment beyond October 23, 2002.
15. Provider sought reimbursement from Carrier for the treatments rendered to Claimant.
16. Carrier paid for three out of four units of therapeutic activities provided September 12-13, 2002, and for one unit on each date of service from September 17-October 29, 2002. Carrier also paid for office visits through November 5, 2002.
17. Carrier paid for a reasonable amount of therapeutic activities and office visits for Claimant's post-surgical rehabilitation.

18. Carrier refused to reimburse Provider for any of the additional services listed in the preceding findings.
19. Provider filed a request for medical dispute resolution with the Texas Workers' Compensation Commission's Medical Review Division (MRD), asking for reimbursement of the above-described services.
20. The MRD issued a decision on August 26, 2003, after reviewing August 21, 2003 IRO decision, finding medical necessity to be the only issue in the case, and ordering reimbursement for the disputed physical therapy and office visits.
21. On September 12, 2003, Carrier contested the MRD decision and requested a hearing before the State Office of Administrative Hearings (SOAH).
23. On October 20, 2003, notice of the hearing was mailed to Carrier and Provider.
24. 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.
25. On March 10, 2005, SOAH Administrative Law Judge Sharon Cloninger convened the hearing in the William P. Clements Building, Fourth Floor, 300 West 15<sup>th</sup> Street, Austin, Texas. Carrier was represented by Ryan T. Willett, attorney. Provider was represented by William Maxwell, attorney. The hearing concluded and the record closed that same day.

## **VII. CONCLUSIONS OF LAW**

1. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this case, 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. Carrier timely requested a hearing contesting the decision of the Medical Review Division (MRD) of the Texas Workers' Compensation Commission (the Commission), 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. § 2001.052 and 28 TAC § 148.4(b).
4. Carrier has the burden of proving the case by a preponderance of the evidence, pursuant to

28 TAC § 148.21(h) and (i).

5. Based on the above Findings of Fact and Conclusions of Law, and pursuant to TEX. LABOR CODE § 408.021(a), Provider's disputed treatments of Claimant's compensable injury were neither reasonable nor medically necessary.
6. Based on the above Findings of Fact and Conclusions of Law, Carrier's request should be granted, and Provider should not be reimbursed.

**ORDER**

IT IS ORDERED THAT Texas Mutual Insurance Company is not required to reimburse Craig A. Thiry, D.C., for the disputed treatment provided to Claimant from September 11, 2002, through January 9, 2003.

**SIGNED May 3, 2005.**

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**SHARON CLONINGER  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS**