

SOAH DOCKET NO. 453-04-4212.M5¹

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

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 provided to Claimant on 15 dates of service from July 25 through October 25, 2002, following a three-level lumbar fusion on February 22, 2002. Carrier denied reimbursement on the basis that the treatment was not reasonable or medically necessary. The Administrative Law Judge (ALJ) finds Provider's treatment of Claimant was reasonable and medically necessary, and that Carrier should reimburse Provider for the disputed services.

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 15th Street, Austin, Texas. Carrier was represented by Ryan T. Willett, attorney. Provider was represented by William Maxwell, attorney. The hearing concluded that same day.

¹ For hearing purposes only, this case was joined with SOAH Docket No. 453-04-0679.M5 pursuant to an order issued March 18, 2004. A separate decision and order is being issued for each case.

II. BACKGROUND

Claimant injured his lower back, left knee, and right elbow on ____, when he was loading a 20-foot long strut weighing up to 75 pounds on some rollers. Claimant slipped in a puddle of water, his left leg buckled, and he fell backwards, hitting his head and lower back on a concrete surface, with the strut falling on his right elbow.² He was diagnosed with internal derangement of the right elbow; a torn medial meniscus in the left knee, with medial collateral ligament injury; and acute lumbar strain with superimposed Grade I spondylolisthesis.³ Beginning April 4, 2000, Provider treated Claimant with conservative care consisting of physical therapy and exercises.⁴ Claimant underwent a left knee arthroscopy on June 13, 2000,⁵ and a lumbar fusion from L-4 through S-1 on February 22, 2002.⁶ Following the lumbar fusion, Claimant returned to Provider for post-operative rehabilitation beginning on June 10, 2002, with disputed dates of service from July 25 through October 25, 2002.

The disputed post-operative rehabilitation treatment consists of five units of application of hot packs (CPT Code 97010) from August 12 through September 4, 2002; 70 units of therapeutic activities (CPT Code 97530), of up to eight 15-minute units per visit, on 13 dates of service from July 31 through October 25, 2002; and nine office visits (CPT Code 99213) from July 25 through October 25, 2002.⁷

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

2 Carrier's Exh. 2, at 349.

3 *Id.*

4 *Id.*

5 Carrier's Exh. 2, at 354 and 356.

6 Carrier's Exh. 2, at 578.

7 Carrier's Exh. 2, at 304-312.

independent review organization (IRO).⁸ Carrier then requested a hearing on the disputed services.

III. APPLICABLE LAW

Pursuant to Tex. Lab. Code Ann. § 408.021(a), 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.

IV. EVIDENCE AND DISCUSSION

Carrier called one witness and offered two exhibits, which were admitted. Provider 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 treatment was not reasonable or medically necessary. He said post-operative rehabilitation through August 5, 2002, was reasonable and medically necessary, but after that point, Claimant should not have required one-on-one therapeutic exercises, office visits more than once every three or four weeks, or hot packs. He pointed out that by August 5, 2002, Claimant should have had a good grasp of the exercises to be performed, because by that time he had undergone 86 hours of pre-operative and post-operative physical therapy with Provider.

⁸ The IRO concluded that four units of therapeutic activities per visit, the hot packs, and the office visits were medically necessary. Electrical stimulation treatment was also in dispute before the IRO. Although the IRO decided the disputed electrical stimulation treatment was not medically necessary, and the hot packs were medically necessary, the MRD ordered payment for the four units of electrical stimulation and not for the hot packs. Therefore, electrical stimulation treatment was not in dispute in this hearing.

Dr. Alvarado said he did not believe that the complicating factors listed by Provider, including Claimant's obesity and the possibility of Claimant falling and being pierced by hardware in his spine, warranted one-on-one supervision. He said one-on-one supervision is medically indicated for instructional purposes, safety of the patient (*i.e.* if patient has improper balance), to augment the exercise regimen with more instruction, and when assessing a patient. Dr. Alvarado agreed that Claimant had undergone an extensive surgical procedure, but opined that Claimant could have been educated, monitored, and allowed to work on his own to gain functional independence and return to work, either at home or in a group setting. He said a therapist could have provided encouragement to Claimant in a group setting.

Dr. Alvarado stated that hot packs are a passive modality medically indicated for a few weeks early on in rehabilitation to reduce tissue inflammation and muscle spasm. He said heat packs offer minimal benefits, if any, after the first few weeks.

Dr. Alvarado observed that Claimant's pain was at 9 out of 10 on July 25, August 23, and October 25, 2002, denoting a lack of progress. He said that despite the lack of progress, Provider did not change Claimant's treatment program, and that augmentation or a different approach would have been expected when there was no progress with the prescribed program.

Dr. Alvarado testified that he agrees in general with the opinion of Nicholas Tsourmas, M.D.⁹

B. Provider's Deposition Testimony¹⁰

Provider testified that one-on-one supervision was medically necessary to treat Claimant's compensable injury to ensure Claimant's safety, to ensure he performed the exercises correctly so that he would not cause additional injury to his spine, and to motivate him.¹¹ Provider explained

⁹ Carrier's Exh. 1, at 288.

¹⁰ Provider's Exh. 1A, dated October 1, 2004, is the beginning of Provider's deposition. Provider's Exh. 1B, dated October 25, 2004, is the conclusion of Provider's deposition.

¹¹ Provider's Exh. 1A, at 68-70.

that Claimant had a tight hamstring, which caused his leg to give out on him from time to time, leaving him susceptible to falling and injuring himself during physical therapy.¹² He also said that Claimant suffered pain in his left knee and feet, and radiculopathy into his legs, which contributed to a longer rehabilitation period.¹³ Provider described Claimant's Vicodin addiction, anxiety, depression, mood swings, sleep disturbances, and lack of motivation as all contributing to the need for a longer rehabilitation period.¹⁴ He said Claimant's recent divorce and loss of his parents, as well as his obesity and Vicodin addiction, delayed his recovery from the surgery.¹⁵ Provider pointed out that spinal fusions can take up to a year to heal properly,¹⁶ and he did not know if Claimant did the prescribed home exercises.¹⁷

Provider testified that the hot packs were medically necessary to treat Claimant's compensable condition because their application reduced Claimant's pain level, allowing him to perform his prescribed exercises. Provider explained that although Claimant was using heating pads at home, he needed the hot packs to loosen up his tissues prior to exercising, after driving about 25 minutes in an uncomfortable position to get to Provider's office.¹⁸ Provider said the hot packs were discontinued after September 4, 2002, either because Claimant had an electrical muscle stimulator to use at home, or because Claimant felt the hot packs were not greatly improving his condition.¹⁹

C. Documentary Evidence

12 Provider's Exh. 1A, at 78, and 83-84.

13 Provider's Exh. 1A, at 90-92.

14 Provider's Exh. 1A, at 103-104.

15 Provider's Exh. 1A, at 110-112.

16 Provider's Exh. 1A, at 47.

17 Provider's Exh. 1A, at 72-73.

18 Provider's Exh. 1A, at 56-57.

19 Provider's Exh. 1A, at 52.

1. SOAP notes

The SOAP notes indicate that from July 25 through October 25, 2002, Claimant's pain level remained at 9 out of 10, except on one disputed date of service, and he experienced moderate to severe tenderness of the spine and mild low back spasms.²⁰

2. Review by Nicholas Tsourmas, M.D.²¹

At the request of Carrier's counsel, Nicholas Tsourmas, M.D., reviewed Claimant's medical information and rendered an opinion on August 26, 2004, that Claimant was more than adequately coached and educated in therapeutic exercises through the rehabilitation training previously provided to him in 2000, 2001, and 2002. Therefore, only a minimal amount of re-coaching, re-education, and re-training was needed for Claimant to begin rehabilitation following his February 22, 2002 lumbar fusion. Dr. Tsourmas concluded that none of the physical therapy, therapeutic exercise, or hot and cold packs were medically necessary to treat Claimant's condition from July 8 through October 15[sic], 2002. He said intermittent medical visits of once every three or four weeks with augmentation and checking on Claimant's home program were all that would be reasonable and necessary.

3. Texas Pain Institute: Son K. Nguyen, M.D.

Son K. Nguyen, M.D., of the Texas Pain Institute, examined Claimant on July 30, August 13, September 10, September 30, and October 22, 2002, and found each time that Claimant should continue pain medication and stretching exercises. Claimant reported to Dr. Nguyen that his pain increased from 7 out of 10 on July 30 and August 13, 2002, to 9 out of 10 on September 10, September 30, and October 22, 2002. On each visit, Claimant said his pain was exacerbated by

²⁰ Carrier's Exh. 2, at 648-662.

²¹ Carrier's Exh. 1, at 286-288.

sitting, standing, or walking for more than 10 minutes. He also told Dr. Nguyen on each visit that he suffered from leg numbness, tingling, and weak knees that buckled at times.²²

4. Mark F. McDonnell, M.D., P.A.

Mark F. McDonnell, M.D., P.A., performed Claimant's lumbar fusion on February 22, 2002. On June 10, 2002, he prescribed post-operative rehabilitation for Claimant.²³ Dr. McDonnell examined Claimant again on October 22, 2002, and found the hardware to be symptomatic, with the possible need to be removed.²⁴

Dr. McDonnell's prescribed rehabilitation protocol included a trunk isometric program with abdominal crunches and prone extension isometrics, as well as supervised low impact cardiovascular work attempted to tolerance, possibly including the treadmill, exercise bike, and stair climber. He said Claimant could do isometric upper body exercises with a 10-pound maximum weight limit. The protocol was to begin at three months post surgery, or May 22, 2002, assuming the x-rays were satisfactory, but it did not actually begin until June 10, 2002. Dr. McDonnell said that after three months, or by September 10, 2002, in Claimant's case, if there was minimal tenderness, the isometric weight could be increased to 25 pounds, and the cardiovascular limit could be increased to tolerance. Dr. McDonnell noted that sometimes the increase is not possible for another six months, depending on the extent of surgery and healing.²⁵ Dr. McDonnell said in the final phase, between a year to 18 months after surgery, if a patient's arthrodesis is fully healed, he can be tested at maximum functional capacity and released.²⁶

22 Carrier's Exh. 2, at 645-646; 649-650; 654; 661; and 680-681.

23 Carrier's Exh. 2, at 635.

24 Carrier's Exh. 2, at 678-679. Claimant's hardware was, in fact, removed in September 2003.

25 Claimant's tenderness level dropped from severe on July 25, 2002, to moderate on August 2, 2002, but did not drop to minimal by October 25, 2002. *See* Carrier's Exh. 2, 648-662.

26 Carrier's Exh. 2, at 637-638.

5. Designated doctor examination

On December 17, 2002, Donald R. Stafford, M.D., performed a designated doctor examination on Claimant. He found Claimant to have symptomatic lumbar spondylolisthesis with loss of motion segment integrity, requiring surgical stabilization. He gave Claimant a 21 percent whole person impairment, including a 20 percent whole person impairment for the lumbar spine, and a one percent whole person impairment for the left knee. He found no impairment to Claimant's left elbow.²⁷

Dr. Stafford found Claimant to have a cautious and reserved gait, with a forward flexed posture. He observed Claimant to have difficulty moving from sitting to standing. Dr. Stafford also found him to have poor tolerance for lumbar range of motion, particularly flexion, and to have difficulty kneeling and squatting. He noted that straight leg raises elicited increased complaints of low back pain.²⁸

V. ANALYSIS AND CONCLUSION

A. Analysis

The ALJ finds that Carrier failed to meet its burden of proving the disputed services were not reasonable or medically necessary for Claimant's post-surgical rehabilitation. Although Claimant should have been familiar with the rehabilitation regimen, having gone through it with Provider in 2000, 2001, and 2002 before and just after his three-level spinal fusion, Claimant's complications warranted additional one-on-one therapy that could not have been adequately addressed in a group setting or in a home exercise program. Further, the application of hot packs prior to exercising helped loosen Claimant's tissues so he could execute the prescribed exercises more effectively, and the disputed office visits were necessary to monitor Claimant's condition, because a three-level spinal fusion can take up to a year to heal. The ALJ finds the disputed services were reasonable and necessary to promote Claimant's recovery, pursuant to TEX. LAB. CODE ANN. § 408.021(a).

²⁷ Carrier's Exh. 2, at 686-689.

²⁸ *Id.*

B. Conclusion

Carrier failed to meet its burden of proof, and should reimburse Provider for the disputed services.

VI. FINDINGS OF FACT

1. Claimant suffered compensable injuries to his back, left knee, and elbow on ____, when he was carrying a 20-foot strut and stepped in a water puddle and slipped, falling on to a concrete surface.
2. Texas Mutual Insurance Company (Carrier) was the workers' compensation insurance carrier for Claimant's employer when he was injured.
3. On April 4, 2000, Craig A. Thiry, D.C. (Provider) began treating Claimant with conservative care for his compensable injuries.
4. Claimant underwent a lumbar fusion on February 22, 2002.
5. A lumbar fusion can take up to a year to heal.
6. Claimant underwent post-surgery rehabilitation with Provider beginning June 10, 2002, with disputed dates of service from July 25 through October 25, 2002.
7. From July 25 through October 25, 2002, Provider's disputed treatment of Claimant included office visits, hot packs, and one-on-one therapeutic activities.
8. Claimant needed one-on-one therapeutic therapy to ensure his safety, in that his knees sometimes buckled and he could have fallen; to ensure that he executed the exercises in a way that would not further injure his spine; and for motivation, since walking, sitting, or standing for more than 10 minutes exacerbated his back pain, which remained at 9 out of 10 on all but one of the disputed dates of service.
9. Claimant needed heat packs on the disputed dates of service to loosen his tissues prior to exercising, since he drove about 25 minutes from home to Provider's office, sitting in an uncomfortable position.
10. Claimant needed the disputed office visits so that his condition, which included addiction to Vicodin, emotional issues over a divorce and the deaths of his parents, and ongoing severe pain, could be adequately monitored.

11. Supervised therapeutic activities, hot packs, and office visits provided to Claimant from July 25 through October 25, 2002, were medically necessary to treat Claimant's compensable injury and promote his recovery.
12. Provider sought reimbursement from Carrier for the treatments rendered to Claimant.
13. Carrier refused to reimburse Provider for the disputed services.
14. 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.
15. The MRD issued a decision on February 3, 2004, after reviewing a January 30, 2004 IRO decision, ordering reimbursement for the disputed services.
16. On February 23, 2004, Carrier contested the MRD decision and requested a hearing before the State Office of Administrative Hearings (SOAH).
17. On March 23, 2004, notice of the hearing was mailed to Carrier and Provider.
18. 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.
19. On March 10, 2005, SOAH Administrative Law Judge Sharon Cloninger convened the hearing in the William P. Clements Building, Fourth Floor, 300 West 15th 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 its 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 reasonable and medically necessary.
6. Based on the above Findings of Fact and Conclusions of Law, Carrier's request should be denied, and Provider should be reimbursed.

ORDER

IT IS ORDERED THAT Texas Mutual Insurance Company shall reimburse Craig A. Thiry, D.C., for the disputed treatment he provided to Claimant from July 25, 2002, through October 25, 2002.

SIGNED May 9, 2005.

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