

**SOAH DOCKET NO. 453-04-4682.M5
TWCC MR NO. M5B04-1087-01**

KEVIN STRATHDEE, D.C.,	§	BEFORE THE STATE OFFICE
Petitioner	§	
	§	
VS.	§	OF
	§	
ZURICH AMERICAN INSURANCE	§	
COMPANY,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Petitioner Kevin Strathdee, D.C., (Dr. Strathdee) appealed a determination by an Independent Review Organization (IRO) that certain post-operative therapies and durable medical equipment (DME) Dr. Strathdee provided to Claimant ___ were not medically necessary. The amount in dispute is \$6,062.00. In this Decision and Order, the Administrative Law Judge (ALJ) finds that most, but not all, of the disputed services were reasonable and medically necessary and that Petitioner is entitled to recover the sum of \$5,789.00 for those services.

I. PROCEDURAL HISTORY

The hearing convened on January 20, 2005, with State Office of Administrative Hearings (SOAH) ALJ Renee M. Rusch presiding. Petitioner appeared *pro se*. Respondent Carrier was represented by attorney Scott Bouton. Neither party objected to notice or jurisdiction. The record closed on February 15, 2005, upon the ALJ's receipt of letter briefs from the parties identifying the dates of service at issue in this proceeding.

II. DISCUSSION

1. Background Facts

On ___, Claimant, a brick mason, suffered work-related injuries to his right shoulder and lower back while lifting a cornerstone weighing approximately 115 pounds. At a time not specified in the record, Dr. Strathdee became Claimant's treating doctor at the Texas Injury Clinic in Fort Worth.

Claimant's shoulder injury was repaired surgically, but he continued to experience low back pain. Therefore, on January 22, 2003, Phillip Cantu, M.D., performed a percutaneous nucleoplasty at L4-5 and L5-S1. Dr. Strathdee testified that nucleoplasty is a procedure in which a needle/neurotome is introduced into the disk and the inner nucleus of the disk vaporized so as to reduce the outward expansion of the disk and allow the disk to recede from the nerve root.¹ The procedure affected 40 percent of Claimant's lumbar spine.

¹ According to Dr. Strathdee, if nucleoplasty is successful, a patient may be able to avoid fusion surgery, a procedure in which the disk is removed and that area of the spine is immobilized.

This dispute arises from Dr. Strathdee's post-operative treatment of Claimant. Although Claimant recovered well from the nucleoplasty procedure, he experienced some complications.² On February 13, 2003, Dr. Strathdee prescribed certain DME and related items for Claimant, including a folding walker, a pad for a heat unit, a lumbosacral post-surgical brace, a recirculating ice bath, a humidifier, hydrocollloid dressing, a rigid lumbar seat cushion, and a triangular wedge to place beneath his knees when he performed therapy at home. (Pet. Ex. 2 at 19.)

On February 27, 2003, Dr. Cantu determined that Claimant's recovery had progressed to the point where it was appropriate for him to begin a combination of aquatic therapy and conditioning therapy three times a week for six to eight weeks. (Pet. Ex. 2 at 91.) Dr. Strathdee provided that therapy. During the initial phase of this therapy, Dr. Strathdee's goals were to improve Claimant's range of motion (ROM) and flexibility, and help him recover muscle function. A physical performance evaluation performed by Mark Williams, D.C., on April 21, 2003, indicated that Claimant's lumbar ROM had improved and his pain levels had decreased,³ but he was only capable of light-to-medium level work and did not yet meet the physical demand level for returning to work as a brick mason.⁴ (Pet. Ex. 2 at 95-96, 108-109.) On April 22, 2003, Dr. Cantu recommended that Claimant participate in another six weeks of aquatic therapy to strengthen his lower back. (Pet. Ex. 2 at 96.) During this second phase of Claimant's therapy (the portion primarily at issue here), Dr. Strathdee's focus was on strengthening Claimant's lower back muscles. As late as May 15, 2003, Claimant was experiencing severe muscle spasms and low back pain, and Dr. Cantu feared Claimant was experiencing collapse of the L4-5 and L5-S1 disks; therefore, Dr. Cantu reiterated the recommendation that Claimant continue with aquatic therapy and stretching exercises. (Pet. Ex. 2 at 97.)

Claimant reached Maximum Medical Improvement on August 19, 2003; he was released to work on September 2, 2003, without restrictions; and he has returned to his job as a brick mason.

2. This Fee Dispute

Initially, the Carrier denied reimbursement for dates of service January 16, 2003, though September 2, 2003, as well as for the DME and related items Dr. Strathdee provided on February 13, 2003. The denials were based on a peer review performed by Kevin Tomsic, D.C., who determined them to be medically unnecessary.

An IRO chiropractor found that 18 sessions of aquatic therapy, CPT Code 97113, between March 11 and April 18, 2003, were reasonable and medically necessary. The IRO chiropractor also found that office visits and examinations on March 7, April 8, and May 2, 2003, billed to CPT Code

² For example, approximately one week after the procedure, Dr. Cantu noted that Claimant had the initial symptoms of Reflex Sympathetic Dystrophy (RSD), a post-surgical kind of irritation, for which Dr. Cantu prescribed SI injections. (Pet. Ex. 2 at 89.)

³ As compared to a Functional Capacity Evaluation (FCE) performed on November 11, 2003. (Pet. Ex. 2 at 99-108.)

⁴ Dr. Williams, like Dr. Strathdee, is affiliated with Texas Injury Clinic.

99214, were reasonable and medically necessary. The IRO chiropractor concluded, however, that the remaining services were not medically necessary. The IRO chiropractor determined that Claimant's lumbar ROM and pain levels had reached a plateau in mid-April 2003. He or she considered it significant that Claimant's pain rating remained at level 3 during a two-week period, April 18 - May 2, 2003, when Claimant did not receive any treatment. The IRO chiropractor reasoned too that even if Claimant did require aquatic therapy after April 18, 2003, he did not require medically-supervised aquatic therapy; by that time, Claimant should have had sufficient knowledge and experience to perform aquatic therapy on his own in any pool. Additionally, the IRO chiropractor believed the folding walker, pad for heat unit, humidifier, corset, and related items were not medically necessary, prescribed as they were, three weeks after the surgical procedure.⁵

The Carrier did not appeal from the IRO chiropractor's determination; thus, the services the IRO found to be medically necessary and reasonable are not at issue here.⁶ The amount in dispute in this proceeding is \$6,062.00 for the following CPT Codes and dates of service:

CPT Code 99213-25 ("subsequent," MAR \$48): May 20 and 22, 2003 (total \$96)

CPT Code 97113 (aquatic therapy, MAR \$260): May 6, 8, 9, 13, 16, 20, 22, 27, and 29, June 3, 5, 6, 10, 12, and 13, 2003 (total \$3,900)

CPT Code 99212 ("subsequent," MAR \$32): May 30 and September 2, 2003 (total \$64)

CPT Code 97750-MT ("performance," MAR \$100): April 21, 2003

CPT Code 99212-25 ("subsequent," MAR \$32): June 6 and 13, 2003 (total \$64)

CPT Code 99213 ("subsequent," MAR \$48): January 6 and 20, February 13, and June 27, 2003 (total \$192)

CPT Code 99080-73 (special report, MAR \$15): January 20, June 27, and September 2, 2003 (total \$45)

CPT Code 99354 (not identified in the record, MAR \$150): September 2, 2003

CPT Code E1399 (recirculating ice bath rental, MAR \$690): February 13, 2003

CPT Code E0249 (pad for a heat unit, MAR \$118): February 13, 2003

CPT Code K0239 (dressing, MAR \$129): February 13, 2003

⁵ Indeed, the IRO chiropractor opined that the walker, TLSO-corset, and LSO-flexible would most likely have hindered and restricted Claimant's motion and movement so as to contradict the prescribed aquatic therapy.

⁶ The Carrier has compensated Petitioner \$5,872.47 for those services, plus \$680 for services performed under CPT Codes 97110 and 99082 between March 11 and April 18, 2003, and office visits on March 7 and May 2, 2003, plus interest.

CPT Code L0970 (corset, MAR \$126): February 13, 2003

CPT Code L0510 (lumbar support, MAR \$150): February 13, 2003

CPT Code E1399-H (unspecified DME, MAR \$150): February 13, 2003

CPT Code E10143 (folding walker, MAR \$75): February 13, 2003.

3. The Parties' Positions

1. The Carrier's Position

The Carrier's peer reviewer, Dr. Tomsic, testified at the hearing. In Dr. Tomsic's opinion, Claimant did not show significant enough improvement after April 18, 2003, to justify the treatment Petitioner provided. According to Dr. Tomsic, a patient should be immobilized for the first six weeks following the procedure Claimant underwent, perform aquatic therapy for the next six weeks, and then transition to land-based exercises. Once the patient transitions to land-based exercises, he no longer needs aquatic therapy.

Dr. Tomsic testified that if Claimant needed DME and the other items Dr. Strathdee provided on February 13, 2003, they should have been provided immediately after his surgery, not three weeks later. In his view, at the point when Claimant began aquatic therapy, he no longer needed DME.

2. Dr. Strathdee's Position

Dr. Strathdee testified that aquatic therapy allows a patient to "mobilize" muscles in a buoyant medium, water, where the effects of gravity are limited. According to Dr. Strathdee, water is "a wonderfully resistive medium" that gives patients immediate feedback about how much they can do. Exercises performed in water can be performed in all planes of motion.

Dr. Strathdee stressed that a patient who has undergone low back surgery has weakened muscles in the area of the surgery, and weakness in muscles that stabilize a joint may put that joint at risk of further injury. In May 2003, Dr. Cantu was concerned that Claimant's L4-5 and L5-S1 disks might be collapsing, and thus he recommended Claimant continue aquatic therapy in order to strengthen Claimant's lumbar muscles. Dr. Strathdee characterized the increase in Claimant's muscle strength between the May 21, 2003, and June 30, 2003, physical performance evaluations as 69 percent, and he attributed that increase to Claimant's aquatic therapy.⁷ He maintained Claimant could not have performed his aquatic exercises elsewhere, as Claimant did not have a swimming pool at home or membership in a health club. He acknowledged that Claimant's ROM and pain ratings reached a plateau in mid-April 2003, but he did not agree that Claimant's aquatic therapy should have stopped at that point. He considered the continued aquatic therapy to be medically necessary because Claimant was not a retired, 65-year old Medicare patient, but instead, a middle-aged brick mason who needed additional muscle strength in order to return to work.

⁷ Claimant's static NIOSH lift testing improvements ranged from 106.6% in Pull Down to 41.7% in Push Out, averaging 69.1%

Dr. Strathdee testified he provided Claimant with DME and related items on February 13, 2003, on Dr. Cantu's recommendation, so as to give Claimant an optimal chance of recovery. He contended the corset was provided to stabilize Claimant's lumbosacral region. Claimant was to use a folding walker so as to limit the rotation of Claimant's lower spine and enable Claimant to ambulate while his wife was at work. The recirculating ice bath was provided to minimize Claimant's swelling and pain. The bath contained temperature controls that enabled Claimant to keep the ice bath at a specified temperature. Claimant needed temperature controls, in Dr. Strathdee's opinion, because a patient who has had surgery is desensitized to sensations of heat and cold. Dr. Strathdee did not explain why items such the recirculating ice bath were not provided to Claimant immediately after the nucleoplasty procedure.

4. ALJ's Analysis

1. Aquatic Therapy and Related Office Visits and Examinations

The ALJ found Dr. Strathdee's testimony regarding his reasons for continuing Claimant's aquatic therapy beyond April 18, 2003, to be persuasive. The ALJ appreciates that Dr. Tomsic and the IRO chiropractor, applying accepted standards regarding the expected number of treatments the average patient might require, formed different opinions. However, neither Dr. Tomsic nor the IRO chiropractor ever examined Claimant; instead, they based their opinions on standard protocols and their reviews of Claimant's medical records. Dr. Strathdee, in contrast, was Claimant's treating doctor, and thus he was personally familiar with Claimant's condition and the complications Claimant encountered post-surgery. Accordingly, the ALJ believes his opinion should be accorded significant weight. Moreover, Dr. Cantu's office notes support Dr. Strathdee's rationale for continuing aquatic therapy. Even the Carrier's peer reviewer, Dr. Tomsic, agreed that weakness in muscles that stabilize a joint may put the joint at risk of further injury.

Additionally, the record reflects that, between the Physical Performance Evaluation conducted on April 21, 2003, and the one conducted on June 30, 2003, Claimant's lifting capabilities and physical demand level improved from light-medium to medium for occasional lifting, and from light to medium for frequent lifting. Indeed, Claimant regained enough strength to enable him to return to work as a brick mason without restrictions.

TEX. LABOR CODE ANN. §408.021(a) provides in relevant part:

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.

The aquatic therapy provided to Claimant appears to have met not just one, but all three, prongs of this disjunctive test. Indeed, because Claimant was able to return to gainful employment following treatment, this case presents an apparent success story in a workers compensation system in which

success stories do not often follow grievous injuries. The ALJ concludes, therefore, that Dr. Strathdee is entitled to reimbursement for aquatic therapy and related office visits and examinations through June 13, 2003.

2. DME and Related Items Totaling \$1,438

The question of whether Petitioner is entitled to reimbursement for the DME and related items provided to Claimant on February 13, 2003, is more difficult. Dr. Strathdee testified Dr. Cantu prescribed these items. The ALJ was unable, however, to find evidence in the documentary record that Dr. Cantu prescribed or recommended the DME and related items. Rather, Dr. Strathdee's office notes on February 13, 2003, state: "In my opinion, [Claimant's] recovery will be expedited by home-based, durable medical equipment to ease his postsurgical pain and aid activities of daily living." (Pet. Ex. 2 at 19.) Similarly, Dr. Strathdee's office notes on March 7, 2003, reflect Dr. Strathdee's opinion that Claimant was using the DME daily and the items had "significantly contributed to his improvement." (Pet. 2 at 20.) Regardless of whose idea these items were Dr. Cantu's or Dr. Strathdee's the ALJ was not persuaded by Dr. Tomsic's contention that they should have been provided immediately after Claimant's surgery, or not at all, and that they served no purpose after Claimant began aquatic therapy. Thus, she concludes Petitioner is entitled to reimbursement for the DME and related items.

3. Remaining CPT Codes and Dates of Service

Finally, Petitioner also billed Carrier for five CPT Codes on two separate dates of service subsequent to the last day of Claimant's aquatic therapy, June 13, 2003:

June 27, 2003--CPT Code 99213, MAR \$48, CPT Code 99080-73, MAR \$15, and

September 2, 2003BCPT Code 99212, \$32; CPT Code 99080-73, MAR \$15; and CPT Code 99354, MAR \$150.

The only evidence the ALJ has identified relating to services provided on either of these dates is a letter Dr. Strathdee wrote, dated September 2, 2003, entitled Dispute Impairment Rating, in which Dr. Strathdee stated that he "consulted with" Claimant on that date. (Pet. Ex. 2 at 9-10.) The evidence does not, however, reflect the nature of any services Dr. Strathdee provided to Claimant on that date, and neither party addressed these items at the hearing. Without knowing what the unspecified services were, the ALJ cannot find that they were reasonable and medically necessary. She concludes, therefore, that Petitioner is not entitled to reimbursement for such services.

5. Conclusion

For the reasons set forth above, the ALJ finds Petitioner is entitled to reimbursement in the sum of \$5,789.00 for the following services: 2 units of CPT Code 99213-25 at \$48 = \$96; 15 units of CPT Code 97113 at \$260 = \$3,900; 1 unit of CPT Code 99212 at \$32 = \$32; 1 unit of CPT code 97750-MT at \$100 = \$100; 2 units of CPT Code 99212-25 at \$32 = \$64; 3 units of CPT Code 99213 at \$48 = \$144; 1 unit of CPT Code 99080-73 at \$15 = \$15; 1 unit of CPT Code E1399 at \$690 = \$690; 1 unit of CPT Code E0249 at \$118 = \$118; 1 unit of CPT Code K0239 at \$129 = \$129; 1 unit of CPT Code L0970 at \$126 = \$126; 1 unit of CPT Code L0510 at \$150 = \$150; 1 unit of CPT Code E1399-H at \$150 = \$150; and 1 unit of E0143 at \$75 = \$75.

III. FINDINGS OF FACT

1. ____ (Claimant) suffered a work-related injury on ____.
2. At the time Claimant sustained the compensable injury, Zurich American Insurance Company (Carrier) was the workers' compensation insurance carrier for Claimant's employer.
3. Petitioner Kevin Strathdee, D.C. (Dr. Strathdee, Petitioner) became Claimant's treating doctor.
4. Claimant's shoulder was repaired surgically, but he continued to experience low back pain.
5. On January 22, 2003, Phillip Cantu, M.D., performed a percutaneous nucleoplasty at L4-5 and L5-S1.
6. Nucleoplasty is a procedure in which a needle/neurotome is introduced into the disk and the inner nucleus of the disk vaporized so as to reduce the outward expansion of the disk and allow the disk to recede from the nerve root.
7. Claimant recovered well after the nucleoplasty procedure, but he also experienced some complications, including the early symptoms of Reflex Sympathetic Dystrophy.
8. As of February 27, 2003, Claimant had recovered sufficiently from the nucleoplasty procedure to be ready to begin a combination of aquatic therapy and conditioning therapy three times a week.
9. During this initial phase of Claimant's therapy, Dr. Strathdee's goals were to increase Claimant's range of motion (ROM) and flexibility, and help him recover muscle function.
10. As of April 21, 2004, Claimant's lumbar ROM had improved and his pain levels had decreased, but he was only capable of light-to-medium level work and did not yet meet the physical demand level for returning to work as a brick mason.
11. On or about April 22, 2003, Dr. Cantu recommended that Claimant participate in another six weeks of aquatic therapy to strengthen his lower back. During this second phase of Claimant's therapy, Dr. Strathdee's goal was to strengthen Claimant's lower back muscles.
12. Aquatic therapy allows patients to mobilize muscles in a buoyant medium that give them immediate feedback about how much they can do.
13. A patient who has undergone low back surgery has weakened muscles in the area of the surgery.
14. Weakness in muscles that stabilize a joint may put that joint at risk of further injury.
15. In May 2003, Claimant exhibited symptoms that suggested his L4-5 and L5-S1 disks might be collapsing.

16. The aquatic therapy and exercises Petitioner provided to Claimant between April 21 and June 13, 2003, caused Claimant's muscle strength to increase by an average of approximately 69 percent.
17. Between April 21, 2003, and June 30, 2003, Claimant's lifting capabilities and physical demand level improved from light-medium to medium for occasional lifting, and from light to medium for frequent lifting.
18. Claimant reached Maximum Medical Improvement on August 19, 2003; he was released to work on September 2, 2003, without restrictions; and he has returned to his job as a brick mason.
19. Claimant did not have a swimming pool at home or membership in a health club.
20. The medically-supervised aquatic therapy and related office visits and examinations Petitioner provided Claimant up to and including June 13, 2003, were reasonable and medically necessary.
21. On February 13, 2003, Petitioner provided Claimant with certain durable medical equipment (DME) and related items, including a folding walker, a pad for a heat unit, a lumbosacral post-surgical brace, a recirculating ice bath, a humidifier, hydrocollolloid dressing, a rigid lumbar seat cushion, and a triangular wedge to place beneath his knees when he performed therapy at home.
22. The DME and related items Petitioner provided to Claimant on February 13, 2003, were medically necessary to relieve Claimant's pain and give him an optimal chance of recovery.
23. The Carrier denied reimbursement for the services provided between January 16, 2003, and September 2, 2003, on the basis that they were not medically necessary.
24. The Texas Workers' Compensation Commission (Commission), acting through an Independent Review Organization (IRO), found the services at issue in this proceeding were not reasonable and medically necessary.
25. Petitioner timely requested a hearing before the State Office of Administrative Hearings (SOAH) regarding the medical necessity of the services at issue.
26. The hearing convened on January 20, 2005, with SOAH Administrative Law Judge Renee M. Rusch presiding. Petitioner appeared *pro se*, and Respondent Carrier was represented by attorney Scott Bouton. The hearing closed the same day, but the record remained open until February 15, 2005, so as to give the parties an opportunity to submit letter briefs identifying the dates of service at issue in this proceeding.

IV. CONCLUSIONS OF LAW

1. SOAH has jurisdiction over this proceeding, including the authority to issue a decision and order, pursuant to the Texas Workers' Compensation Act, specifically 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 1 TEX. ADMIN. CODE ch. 155.
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 met his burden of establishing by a preponderance of the evidence that medically supervised aquatic therapy and related office visits and examinations up to and including June 13, 2003, constituted reasonable and necessary medical care that cured or relieved the effects naturally resulting from Claimant's injury, promoted his recovery, and enhanced his ability to return to work. TEX. LAB. CODE ANN. §§ 408.021(a), 401.011(19) and (31).
6. Petitioner met his burden of establishing by a preponderance of the evidence that DME and related items provided to Claimant on February 13, 2003, constituted reasonable and necessary medical care that cured or relieved the effects naturally resulting from Claimant's injury, promoted his recovery, and enhanced his ability to return to work. TEX. LAB. CODE ANN. §§ 408.021(a), 401.011(19) and (31).
7. Petitioner failed to carry his burden of proving by a preponderance of the evidence that the services provided on June 27 and September 2, 2003, were medically necessary. TEX. LAB. CODE ANN. §§ 408.021(a), 401.011(19) and (31).
8. Based on the foregoing Findings of Fact and Conclusions of Law, Petitioner is entitled to reimbursement totaling \$5,789.00 for the following services: 2 units of CPT Code 99213-25 at \$48 = \$96; 15 units of CPT Code 97113 at \$260 = \$3,900; 1 unit of CPT Code 99212 at \$32 = \$32; 1 unit of CPT code 97750-MT at \$100 = \$100; 2 units of CPT Code 99212-25 at \$32 = \$64; 3 units of CPT Code 99213 at \$48 = \$144; 1 unit of CPT Code 99080-73 at \$15 = \$15; 1 unit of CPT Code E1399 at \$690 = \$690; 1 unit of CPT Code E0249 at \$118 = \$118; 1 unit of CPT Code K0239 at \$129 = \$129; 1 unit of CPT Code L0970 at \$126 = \$126; 1 unit of CPT Code L0510 at \$150 = \$150; 1 unit of CPT Code E1399-H at \$150 = \$150; and 1 unit of E0143 at \$75 = \$75.
9. With the exception of the services identified in Conclusion of Law No. 8, Petitioner is not entitled to reimbursement for the dates of service in dispute in this proceeding.

ORDER

IT IS ORDERED that Zurich American Insurance Company pay Kevin Strathdee, D.C., the sum of \$5,789.00 for the services in dispute in this proceeding.

SIGNED April 13, 2005.

**RENEE M. RUSCH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**