

Notice and jurisdiction, which were not disputed, are addressed in the Findings of Fact and Conclusions of Law.

II. DISCUSSION

Background.

Claimant suffered a compensable injury to his lower back while lifting a package from the floor on _____. The day after Claimant's injury, he exhibited pain and a decreased range-of-motion in his lumbar spine. A lumbar x-ray produced negative results, and Claimant was diagnosed with a lumbar strain/sprain.

Beginning in December 2001, and continuing until October 2002, Dr. VanderWerff administered chiropractic care to Claimant on a regular basis. Such services included myofascial release, joint mobilization, electrical stimulation, manipulations, and therapeutic exercises. Liberty refused reimbursement for services provided from July 1, 2002, to October 10, 2002. In response to Liberty's denial of reimbursement, Dr. VanderWerff requested medical dispute resolution, which resulted in decisions by an Independent Review Organization decision and the Texas Workers' Compensations Commission's Medical Review Division. The decisions were challenged, which culminated in a hearing before the State Office of Administrative Hearings and this Decision and Order.

Summary of Evidence and Argument

Consistent with Liberty's position that the disputed services were not medically necessary to treat Claimant's injury, its expert witness, Kevin Tomsic, D.C., presented testimony reflecting the following positions:

- ! A February 2002 MRI revealed normal disc interspace; normal paravertebral tissues; no evidence of disc herniation; and no acute problems.
- ! Thirty days is sufficient time to determine whether a person is responding favorably to treatment. After 30 days of no improvement, the appropriate course of action would have been to try another treatment approach, such as referring Claimant for trigger point injections.

- ! Dr. VanderWerff's treatment protocol did not change over the disputed treatment period.
- ! Despite Dr. VanderWerff's ongoing care, Claimant's reported pain levels increased during the chiropractic treatment.
- ! No objective improvement in Claimant's condition was documented.
- ! A sprain/strain does not require up to 12 months to heal. The most generous guidelines allow for only six months.

Dr. VanderWerff wholly disagreed with Dr. Tomsic's characterization of the evidence and his conclusions. His testimony included the following assertions in support of the position that his services were medically necessary:

- ! Based on objective findings, Claimant's injury was more than a sprain/strain. There are three grades of sprain/strain, and he considered Claimant's to be a mild Grade 2 based on an exacerbation incident.
- ! Claimant carried his weight 18 millimeters anteriorly, which created a significant shearing force on his lumbar spine.
- ! Claimant suffered from idiopathic scoliosis, which contributed to an extended healing period.
- ! Claimant smoked, which contributed to a longer healing period.
- ! Claimant's latest Functional Capacity Evaluation (FCE), on August 1, 2002, reflected substantial improvement in his condition.

C. Analysis and Conclusion

The evidence preponderates in favor of Liberty's position that the disputed chiropractic services were not were not medically necessary. It is undisputed that Claimant suffered a back injury

requiring treatment. However, both early diagnostic testing and later evaluations by different medical professionals consistently pointed to the conclusion that despite Dr. VanderWerff's

description of the injury as "very serious," it was more minor in degree and did not require continued chiropractic care more than six months after its occurrence:

- ! A ____, x-ray of Claimant's lumbar spine was negative, resulting in a diagnosis by Kenneth Baldwin, D.O. of lumbar strain.
- ! Electro-diagnostic testing conducted on Claimant's lower extremities by Charles Tuen, M.D., on January 29, 2002, which included motor nerve conduction velocities, distal sensory latencies, H and F reflexes, and somatosensory evoked responses, all produced results within normal limits. Claimant did, however, exhibit prolonged bilateral dermatosensory latency at the S1 level of his spine, which Dr. Tuen concluded was suggestive of nerve root dysfunction or sensory pathway.
- ! Mark Meiches, M.D., interpreted Claimant's February 20, 2002, MRI as revealing very minimal annular bulges at four lower spine levels without evidence of disc herniation or spinal canal stenosis, and mild hypertrophic facet disease at spine level L4-L5 that, along with Claimant's mild annular bulge at that level, caused foraminal narrowing but without definite nerve root impingement.
- ! A June 14, 2002, Digital-Video Functional Capacity Evaluation conducted by Exercise Physiologist Jason Ford and Edward Velasquez, M.P.T., revealed that Claimant was able to frequently squat, crouch, bend forward, and work overhead.
- ! Based on a June 27, 2002, Required Medical Evaluation, Radie Berry, M.D., concluded it would be difficult to objectify Claimant's injury such that he would not be able to return to regular-duty work and that because there were no MRI findings and six months had elapsed since Claimant's injury, he did not think additional medical care was reasonable or appropriate beyond a home exercise program. Dr. Berry also was unable to objectify any neurological or musculo-skeletal reasons why Claimant would be unable to return to work as long as he avoided repetitive bending, stooping, or squatting. He believed Claimant's pain complaints were sincere

Notwithstanding the conclusion that objective testing and evaluations revealed a somewhat minor injury, the evidence also reveals that Claimant did not improve over the months of disputed treatment or the by Dr. VanderWerff. In fact, his subjective report of pain in January 2002 was 4-to-5 on a scale of 1-to-10, increasing to 5-to-6 in February, to seven in March, to 8 in April, and leveling off at 7-to-8 through the disputed dates of service from extending from early July to mid-October 2002. Also, during the entire course of treatment Claimant almost unfailingly reported his

condition as being about the same as compared to his previous visit to Dr. VanderWerff, and that he felt about the same overall since his treatments began.

The ALJ was not persuaded by Dr. VanderWerff's suggestion that because Claimant smoked and healing rates in smokers are double that of non-smokers, his healing time would have been extended. Dr. VanderWerff failed to tie this general observation to the personal circumstances of Claimant, who smoked two cigars per day, according to an August 20, 2002, impairment evaluation.

Likewise, Dr. VanderWerff testified to the presence of idiopathic scoliosis in Claimant's spine as another potential problem that could have extended the required healing time. He speculated that the scoliosis might explain why Claimant was experiencing pain in the lumbo-sacral area of his spine. Despite this observation, the ALJ is unaware of the mention of scoliosis by any other medical professionals or in any test results. Certainly, as Dr. VanderWerff testified, the literature may indicate that scoliosis can play a significant role in treatment outcomes. Nevertheless, he failed to sufficiently tie the existence and severity of any scoliosis in Claimant's spine to Claimant's back problems or inhibited recovery.

Certainly, not all medical professionals who evaluated or treated Claimant believed chiropractic treatment was no longer helpful to him during the months of disputed services. DeAnna Gray, P.T., who conducted April 4, 2002, and August 1, 2002, Functional Capacity Evaluations (FCEs) on Claimant, recommended that he "continue with passive care combined with conservative manipulative treatments in order to decrease pain, increase range of motion, promote joint integrity, and improve [Claimant's] current condition." [A 0100; A0180] Dr. VanderWerff relied on the two FCEs in support of his assertion that Claimant exhibited objective improvement over the four months between the FCEs.

However, a close comparison of the FCEs reveals very little difference in Ms. Gray's observations on the two dates. While she did conclude that Claimant's strength improved from a light-duty to a medium-duty capability over the four months, many of her observations in August echoed those in April:

- ! While she observed some improvement in Claimant's lumbar motion, he continued to exhibit restrictions in August, after over seven months of chiropractic treatment.

- ! At each of the two FCEs Claimant had complaints of increased lumbar pain at end ranges.
- ! In August, Claimant's hand-grip strength was weaker than in April.
- ! In both April and August, Ms. Gray reported the results of a static lifting evaluation identically: "Static lifting was represented by wavy, non-linear curves torque curves, which is evidence of lifting instability and muscular fatigue." On each date she also reported that Claimant had significant increased pain with static lifting tasks.
- ! In both April and August, Ms. Gray identically reported that Claimant was able to perform stooping, crouching, and kneeling activities. Although Ms. Gray reported complaints of increased pain with all of the activities in her April FCE, her August FCE did report such pain only in the crouching and stooping activities.
- ! In both FCEs, Ms. Gray reported that Claimant exhibited difficulties with sitting or standing for prolonged periods, as evidenced by frequent weight shifting and other expressions of discomfort.

In addition, despite the passing of four months between the two FCEs and dozens of intervening treatments by Dr. VanderWerff, Ms. Gray's recommendations regarding future treatments on the two dates were almost identical, with the exception of an August recommendation for a psychological evaluation. Despite hints of subtle differences in Ms. Gray's findings in the two FCEs, the ALJ agrees with Liberty witness Kevin Tomsic, D.C., that neither the FCE results nor any of the other evidence reveals any concrete improvement supportive of chiropractic care continuing into October 2002, ten months after Claimant's injury and ten months after the treatment began.

Although Dr. VanderWerff argues that his Daily Notes clearly reveal objective improvement in Claimant's condition over time, the ALJ disagrees. Routine observations throughout Dr. VanderWerff's notes, without any elaboration by the doctor, were that Claimant exhibited either mild or moderate pelvic rotation and mild or moderate spasms, and either that he was doing better or was

improved. While such observations reflect Dr. VanderWerff's conclusions about Claimant's progress, they fall short of establishing objective improvement that would support reimbursement.

The ALJ was more persuaded by a combination of Claimant's objective test results and by his own words. According to an August 26, 2002, evaluation of Claimant by B.J. Hahn, D.C., Claimant reported he had experienced no improvement since his treatment began. This statement is consistent not only with Claimant's reported pain levels over several months but also with the observations of nearly all of the medical professionals who evaluated him. The evidence likewise reflects no improvement during the six weeks of chiropractic treatment following Claimant's August statement to Dr. Hahn.

Based on the diagnostic evidence reflecting the nature and extent of Claimant's injury; the six months of consistent, unchanging chiropractic care leading up to the more than three months of additional chiropractic that is the subject of this dispute; Claimant's reports reflecting gradually increasing pain levels over several months; his statement after seven months of treatment by Dr. VanderWerff that he had not experienced any improvement; and evaluations reflecting little if any objective change in Claimant's condition over a period of several months; the ALJ concludes the disputed services were not medically necessary. Dr. VanderWerff is not entitled to reimbursement for them.

III. FINDINGS OF FACT

1. An injured worker (Claimant) suffered a compensable back injury on ____, while lifting a box.
2. At the time of Claimant's injury, his employer held workers' compensation insurance coverage with Liberty Mutual Fire Insurance Company (Liberty).
3. The day after Claimant's injury, he exhibited pain and a decreased range-of-motion in his lumbar spine.
4. A lumbar x-ray soon after Claimant's injury produced negative results.
5. Claimant was diagnosed with a lumbar strain/sprain.
6. Beginning December 17, 2001, and continuing until October 2002, Dr. VanderWerff administered chiropractic services to Claimant during approximately 80 office visits. Such services included myofascial release, joint mobilization, electrical stimulation, manipulations, and therapeutic exercises.

7. Liberty refused reimbursement for services provided on 21 occasions from July 1, 2002, to October 10, 2002.
8. In response to Liberty's denial of reimbursement, Dr. VanderWerff requested medical dispute resolution, which resulted in decisions by an Independent Review Organization and the Texas Workers' Compensations Commission's Medical Review Division. Both decisions were challenged by the parties, which culminated in a hearing before the State Office of Administrative Hearings.
9. Notice of the hearing was sent to the parties on May 17, 2004. The notice informed the parties of the date, time, and location of the hearing; a statement of the matters to be considered; the legal authority under which the hearing would be held; and the statutory provisions applicable to the matters to be considered.
10. The hearing convened on February 1, 2005, and closed upon the submission of post-hearing filings on February 23, 2005.
11. A February 2002 MRI revealed no evidence of disc herniation; normal disc interspace; normal paravertebral tissues; and no acute problems.
12. From December 2001 to through February 2002, Claimant's reported pain levels were between 4 and 6 on a scale of 1-to-10, with 0 being no pain and 10 being the most severe pain.
13. From March 2002 through October 2002, Claimant's reported pain level varied between seven and eight on a scale of one-to-ten.
14. There was neither subjective nor objective improvement in Claimant's condition during the more than three months Dr. VanderWerff administered the disputed chiropractic services.
15. A sprain/strain does not require more than six months to heal.
16. Electro-diagnostic testing conducted on Claimant's lower extremities on January 29, 2002, which included motor nerve conduction velocities, distal sensory latencies, H and F reflexes, and somatosensory evoked responses, produced results within normal limits.
17. On February 20, 2002, Claimant's lumbar spine had very minimal annular bulges at four lower spine levels without evidence of disc herniation or spinal canal stenosis.
18. On February 20, 2002, Claimant's lumbar spine did not reveal nerve root impingement.
19. Based on the diagnostic evidence reflecting the nature and extent of Claimant's injury; the six months of consistent, unchanging chiropractic care leading up to the more than three months of additional chiropractic care that is the subject of the dispute in this case;

Claimant's reports reflecting gradually increasing pain levels over several months; Claimant's statement after seven months of treatment that he had not experienced any improvement; and evaluations reflecting little if any objective change in Claimant's condition over a period of several months; the disputed services were not medically necessary.

IV. CONCLUSIONS OF LAW

1. SOAH has jurisdiction over this proceeding pursuant to TEX. LAB. CODE ANN. §413.031(k) and TEX. GOV'T CODE ANN. ch. 2003.
2. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. §§2001.051 and 2001.052.
3. The disputed services were not reasonably required by the nature of Claimant's injury. TEX. LAB. CODE ANN. §408.021.
4. Based on the Findings of Fact, the disputed services were not medically necessary.
5. Dr. VanderWerff is not entitled to reimbursement for any of the disputed services.

ORDER

IT IS ORDERED that the reimbursement claim of Eric A. VanderWerff, D.C. for chiropractic services provided from July 1, 2002, to October 10, 2002, is denied.

SIGNED April 22, 2005.

**GARY W. ELKINS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**