

**SOAH DOCKET N. 453-04-7661.M5
TWCC MDR NO. M5-03-2741-01**

ERIC VANDERWERFF, D.C.,	§	BEFORE THE STATE OFFICE
Petitioner	§	
	§	
V.	§	OF
	§	
AMERICAN HOME ASSURANCE CO.,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Eric Vanderwerff, D.C., (Petitioner) challenged the Findings and Decision of the Texas Workers' Compensation Commission (Commission) acting through Independent Review Incorporated, an Independent Review Organization (IRO), finding physical therapy treatments were not medically necessary for the treatment of injured worker ___ (Claimant).

After considering the evidence and arguments of the parties, the Administrative Law Judge (ALJ) concludes that American Home Assurance Co. (Respondent) is not liable for reimbursing Petitioner for the physical therapy treatments.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY.

The hearing convened on February 3, 2005, with State Office of Administrative Hearings (SOAH) ALJ Stephen J. Pacey presiding. Petitioner appeared through its attorney, William Maxwell. Respondent appeared through its attorney, Dan C. Kelley. Eric Vanderwerff, D.C., testified for Petitioner, and Michael Hemby, D.C., testified for Respondent. The hearing concluded and the record closed February 3, 2005.

Petitioner raised a jurisdictional question. Petitioner asserted that the Commission Order also included a fee dispute decided by the Medical Review Division (MRD). The MRD decided that the Petitioner was entitled to a reimbursement of \$2,592.70. Petitioner asserted that the fee dispute was not properly appealed by Respondent, consequently, the ALJ does not have jurisdiction to hear a challenge to the fee dispute decision. The ALJ concurs. Respondent apparently inadvertently appealed the IRO decision contained in the Commission Order, and not the fee dispute contained in that Order. In pertinent part, Respondent request for appeal stated: "American Home Assurance Company disagrees with the Decision and Order of the Independent Review Organization and hereby requests a hearing to appeal this matter and overturn the decision and Order." The Order of the MRD stands because it was not properly challenged. The 20 day mandatory period for challenging the MRD's fee dispute decision has expired; therefore, SOAH does not have jurisdiction to hear a challenge to the fee dispute decision. After the ALJ made an oral ruling granting Petitioner's plea to the jurisdiction, Respondent requested that its documents supporting Respondent's challenge to the fee dispute be retained by the ALJ as Respondent's offer of proof.

II. DISCUSSION

Claimant was working as a ___ “demonstrator”¹ when a supervisor asked her to help in the bakery. Claimant, then 68 years old, suffered a work related injury on ___, while lifting a bakery tray weighing 25-to-30 pounds. As a result of this injury, Claimant complained of pain in her arm, shoulder, and elbow. Three months later, she complained of upper back and left arm pain. Claimant described her symptoms as a stabbing pain in the lateral upper arm to the elbow, and numbness at the border of the left scapula. She was diagnosed with a shoulder sprain/strain and upper arm and elbow pain.

On June 12, 2001, Charles Tuen, M.D., conducted an electrodiagnostic study of the upper extremities on Claimant. Dr. Tuen determined that all the tests on the median nerve and the ulnar nerve were within normal limits, except the motor nerve conduction test which reflected that the ulnar nerve had a conduction block over both elbows. On November 11, 2000, Victor E. McCall, M.D., conducted a cervical spine MRI on Claimant. The MRI showed that the intervertebral discs had no desiccation or herniation, and that there was no suggestion of spinal stenosis and the spinal cord showed no significant abnormality. Dr. McCall also found that the interspaces were well maintained and the bony anatomy showed no fracture or contusion.

In the summer of 2001, Petitioner began treating Claimant with physical therapy, which continued until March 5, 2003. Respondent denied payment for the services from July 29, 2002, to March 5, 2003. Upon Respondent’s denial, Petitioner filed for a dispute resolution, and on June 24, 2004, the MRD reviewed the IRO decision, and determined that Petitioner did not prevail on the issues of medical necessity. On July 19, 2004, Petitioner challenged the IRO decision.

III. EVIDENCE AND DECISION

A. Petitioner

Petitioner testified that Claimant needed treatment almost 2 years post injury because she was 70 years-old and a heavy smoker. He said that the usual time periods for recovery are different for an elderly person who smokes. Petitioner diagnosed Claimant with a cervical disc injury having radicular symptoms in her left upper extremity and shoulder. According to Petitioner, disc lesions are the most important source of pain in the spine. Petitioner said that TEX LAB. CODE (Code) Section 408.021 provides for reimbursement if the treatments relieve pain.²

He said that his passive modalities treated the pain created from the secondary effects of the principal cervical disk injury. Petitioner treated for muscle spasms, trigger points, and subluxations.

¹ In this capacity, Claimant lifted no more than five pounds.

² Section 408.021(a) of the Texas Workers’ Compensation Act (Act) provides that 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 goal was to increase function in Claimant's neck, which will reduce pain. Petitioner said that Claimant's objective improvement was demonstrated in his daily notes, which indicated significant gradual reductions in the severity of her cervical subluxations, as well as a reduction in the severity and number of her mid-back and left shoulder muscle spasms. Petitioner also pointed out that Claimant's subjective Neck Disability Index Outcome Assessment showed significant improvement. In Petitioner's opinion, Claimant made consistent, steady, uninterrupted improvement throughout Claimant's course of treatment.

B. Respondent

Michael Hemby, D.C., testified that the passive modalities administered two years post injury were excessive and not medically necessary. Dr. Hemby indicated that when Petitioner initiated the disputed services, Claimant had already undergone 70 physical therapy sessions. Respondent disagreed with Petitioner's diagnosis of a severe cervical spine lesion. In Respondent's opinion, Claimant suffered from a shoulder sprain/strain and upper arm and elbow pain. Respondent said the November 22, 2000, cervical spine MRI was unremarkable. The radiologist indicated that there was no desiccation or herniation.³

Dr. Hemby noted that on July 18, 2002, Claimant reported her pain level at 0 on a 10-point scale. On almost every date of service from July 29, 2002, through December 3, 2002, Claimant reported her pain level from 0 to 1 and one-half.⁴ Dr. Hemby noted that on December 3, 2002, an FCE was performed on Claimant, which revealed Claimant's pain level at 0. Dr. Hemby also pointed out that Adrian Olivares, D.C., who performed the FCE, reported that Claimant should return to work as a demonstrator. Despite the fact that Claimant had no pain and had returned to work, Petitioner continued to perform physical therapy on Claimant for three more months. Respondent concluded that the disputed services were not medically necessary because Petitioner's main thrust was to relieve pain where there was no pain.

C. Analysis.

It is understandable that Petitioner believes that his treatments were medically necessary. After all, Claimant probably did improve under his care. The problem is that he is looking at a picture that involves almost two years when the issue was whether the services rendered from July 29, 2002, through March 5, 2003, were medically necessary. It is the ALJ's opinion that the services were not medically necessary. When Petitioner started the disputed services, Claimant had a pain rating of 0, and when Petitioner completed the disputed services, Claimant had a pain rating of 0. It is hard to envision any reason to continue physical therapy during the disputed time. This is especially true from December 3, 2002, through March 5, 2003, when Claimant had returned to work and had no pain. During this period, Petitioner performed 27 passive physical therapy treatments. The treatments were the same passive modalities Petitioner applied before and during the first part of the disputed dates of service. Petitioner stressed the point that the treatments were medically necessary to relieve pain. His point is problematic because there was very little or no pain; therefore, the treatments were not medically necessary. Petitioner is not entitled to reimbursement for the treatments from July 29, 2002, through March 5, 2003.

³ Petitioner discounted the MRI stating that it contained a false negative. Petitioner cited a study indicating that 27% of the lumbar spine MRIs contain false negatives.

⁴ Petitioner's SOAP notes found in Provider's Ex. 1 at pages 40-105.

IV. FINDINGS OF FACT

1. ____ (Claimant) suffered a work-related injury on ____, while lifting a bakery tray weighing 25-to-30 pounds.
2. Claimant described her symptoms as a stabbing pain in the lateral upper arm to the elbow, and numbness at the border of the left scapula.
3. Claimant was diagnosed with a shoulder sprain/strain and upper arm and elbow pain.
4. In the summer of 2001, Eric Vanderwerff, D.C. (Petitioner) began treating Claimant with physical therapy.
5. Claimant underwent 70 physical therapy sessions prior to the date of the disputed services.
6. The services between July 29, 2002, and March 5, 2003, are in dispute.
7. When Petitioner initiated the disputed services, Claimant had pain rating of 0, and when Petitioner completed the disputed services, Claimant had a pain rating of 0.
8. On December 3, 2002, an FCE was performed on Claimant, which revealed Claimant's pain level at 0 and contained a recommendation that Claimant should return to work.
9. After Claimant returned to work and had no pain, Petitioner performed 27 passive physical therapy treatments on Claimant.
10. American Home Assurance Co. (Respondent) denied reimbursement for physical therapy treatments from July 29, 2002, through March 5, 2003, as not medically necessary.
11. The Texas Workers' Compensation Commission (Commission) acting through Independent Review Incorporated, an Independent Review Organization (IRO), found that the physical therapy treatments provided by Petitioner were not medically necessary for the treatment of Claimant.
12. Petitioner timely requested a hearing before the State Office of Administrative Hearings (SOAH).
13. The hearing convened on February 3, 2004, with State Office of Administrative Hearings ALJ Stephen J. Pacey presiding. Petitioner appeared through its attorney, William Maxwell. Respondent appeared through its attorney, Dan C. Kelly. The hearing concluded and the record closed that same day.

V. 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 28 TEX. ADMIN. CODE ch. 148.
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 has the burden of proof in this matter. 28 TEX. ADMIN. CODE §§ 148.21(h) and 133.308(w).
6. The physical therapy treatments provided by Petitioner to Claimant from July 29, 2002, through March 5, 2003, were not medically necessary.

ORDER

THEREFORE IT IS ORDERED that American Home Assurance Co. is not required to reimburse Eric Vanderwerff, D.C., for charges associated with physical therapy treatments provided to injured worker ___ from July 29, 2002, through March 5, 2003.

SIGNED April 4, 2005

STEPHEN J. PACEY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS