

SOAH DOCKET NO. 453-05-3725.M5
MDR Tracking No. M5-05-0303-01

KENNETH BERLINER, M.D.,
PETITIONER

V.

TEXAS A&M SYSTEM,
RESPONDENT

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Kenneth Berliner, M.D., (Petitioner) appealed the decision of the Texas Workers' Compensation Commission's (Commission) Medical Review Division (MRD)¹ to adopt the decision of its designee, an Independent Review Organization (IRO), which upheld Texas A&M System's (Respondent) denial of reimbursement for services provided a workers' compensation claimant (Claimant). Respondent claimed that the services were not medically necessary healthcare. This decision finds that Petitioner should be reimbursed for the office visit and report provided to Claimant.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

There were no contested issues of jurisdiction or notice. Therefore, those issues are addressed in the findings of fact and conclusions of law without further discussion here.

The hearing in this matter convened November 7, 2005, at the State Office of Administrative Hearings, 300 W. 15th Street, Austin, Texas, with Administrative Law Judge (ALJ) Ann Landeros presiding. The record also closed that date. Assistant Attorney General Barbara Klein represented Respondent. Dr. Berliner appeared *pro se*. Commission Staff did not participate in the hearing.

¹ As of September 1, 2005, the Commission has become a division within the Texas Department of Insurance. Acts of May 30, 2005, 79th Leg., R.S., ch. 265, 2005 Tex. Sess. Law Serv. Ch 265 (HB 7). All citations in this Proposal for Decision are to the applicable statutes and rules as they existed at the time this case was referred to the State Office of Administrative Hearings in February 2005.

II. DISCUSSION

A. Background Facts

In ____, Claimant sustained an injury to back that was compensable under the Texas Workers' Compensation Act (Act), TEX. LAB. CODE ANN. ch. 401 *et seq.* At the time of the compensable injury, Claimant worked for Respondent, an entity that is self-insured for workers' compensation insurance coverage.

In August 2002, an MRI of Claimant's spine revealed an annular tear at L5-S1 and a bulge at L4-5. In February 2003, neurologist Randall Light, M.D., performed an EMG and an NVC of Respondent's lumbar spine. Both tests were normal with no evidence of neurological impairment. In April 2003, internal medicine specialist William Gaines, M.D., read the radiologist's report for Claimant's March 2003 MRI and concluded Claimant had degenerative changes at the L4-5 and L5-S1 spinal levels without stenosis or nerve root compression. He advised Claimant to resume his normal activities.

In April 2003, Claimant was released to unrestricted, full-time work. However, he continued to complain of pain, so his treating physician, John Wyatt, D.C., referred him to Petitioner, who is an orthopedic surgeon specializing in spine problems. On February 23, 2004, Petitioner performed an orthopedic evaluation of Claimant during an initial office visit. As part of that visit, Petitioner completed a required report for the Commission. Respondent denied payment for both the office visit and report as not being medically necessary.

The IRO reviewer, a chiropractor, upheld the denial of payment, stating:

. . . There is no hard clinical information to suggest that the medical necessity for another consultative referral examination existed on 02/23/2004. . . . No clinical data suggest that ongoing objective findings would support additional consultative referrals beyond what had already been ordered. Initial MRI findings had been opined as normal for the injured worker's age and a second exam found no additional neural compromise as per the report of Dr. Gaines. Electrodiagnostic testing was found to be normal and prior consultative referrals found the injured worker to be neurologically intact on 02/20/2003 by Dr. Light and from an orthopedic standpoint, was opined to exhibit no substantial physical findings on 4/02/2003 by Dr. Gaines.² Petitioner timely appealed the IRO decision.

B. Legal Standards

Petitioner has the burden of proof in this proceeding. 28 TEX. ADMIN. CODE (TAC) §§ 148.21(h) and (i); 1 TAC § 155.41.

Pursuant to the Act, an employee who has sustained 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 cures or relieves the effects naturally resulting from the compensable injury, promotes recovery, or enhances the ability of the employee to return to or retain employment. TEX. LAB. CODE ANN. § 408.021(a).

Health care includes all reasonable and necessary medical services, including a medical appliance or supply. TEX. LAB. CODE ANN. § 401.011(19)(A). A medical benefit is a payment for health care reasonably required by the nature of the compensable injury. TEX. LAB. CODE

² The IRO reviewer also referred to alleged non-compliance, possible psychological overlay, and completion of a chronic pain management program as other factors supporting the denial. However, there was nothing in this record that supported any of those findings.

ANN. § 401.011(31).

C. Evidence and Analysis

1. Petitioner

Petitioner introduced a copy of his February 23, 2004, orthopedic consultation report for Claimant and presented his own testimony.

Dr. Berliner testified that he was the first orthopedic surgeon to evaluate Claimant. According to him, Claimant's other doctors lacked the expertise to diagnose Claimant's pain source. Because an internal disc injury (damage to the nerves within the disc) will not produce abnormal results on an MRI, EMG, or NVC diagnostic test, Claimant could have pain despite normal results on these tests.

Dr. Berliner opined that Dr. Gaines, an internist, lacked the expertise to look for or diagnose an internal disc disruption. Furthermore, Dr. Berliner criticized Dr. Gaines for basing his opinion, not on a review of the actual MRI films, but rather just on the radiologist's report.

In his review of the MRI, Petitioner found a broad based disc bulge at L4-5 causing significant lateral foraminal stenosis. He diagnosed Claimant with a disc protrusion with stenosis at L4-5 and a bulge at L5-S1 and prescribed epidural steroid injections and physical therapy. According to Petitioner, the "degenerative" changes described by the radiologist could just as well have been caused by trauma as by the natural aging process so those findings were not incompatible with the etiology of Claimant's pain (an injury from lifting a couch).

Petitioner asserted that the IRO reviewer, a chiropractor, was unqualified to review the medical necessity of the work of an orthopedic surgeon such as himself.

2. Respondent

Respondent presented only the documentary evidence that had been provided to the IRO reviewer. Those records included Dr. Gaines' April 2003 MMI evaluation, Dr. Light's February 2003 evaluation and EMG report, and Dr. Wyatt's April 2003 evaluation.

In his evaluation, Dr. Wyatt noted Claimant reported low back pain during the heel walk, toe walk, deep knee bend, straight leg raise, on palpation, and during various tests. He wrote that Claimant had a 50-80% chance of continued residual pain that would interfere to some extent with his activities of daily living. (Res. Ex. 1 at 23-25). Despite finding Claimant at MMI with a 0% impairment rating, Dr. Gaines told Claimant to return in 2-3 weeks to discuss continued supportive care. (Res. Ex. 1 at 19-20).

3. Analysis

Petitioner met his burden to show that the services he rendered Claimant were medically necessary and thus should be reimbursed. On February 23, 2004, Claimant had. Claimant had not previously had an orthopedic evaluation and prior treatments and evaluations had not identified the source of his pain or provided pain relief. He was referred to Petitioner for an orthopedic consult due to ongoing back pain, pain which had been documented by Dr. Wyatt. The fact that prior diagnostic tests had not revealed the etiology of Claimant's pain did not make further treatment medically unnecessary. Even Dr. Gaines recommended Claimant receive continued supportive care despite finding him at MMI.

Dr. Berliner provided a plausible explanation why Claimant might have normal MRI and neurologic test results but still suffer from treatable low back pain. Compensability was not an issue in this case but even if degenerative changes in Claimant's spine contributed to this pain, there was no evidence that those changes were the primary cause of Claimant's pain. In fact, until his injury,

Claimant was able to work, some proof that it was his injury, not the degenerative changes, that caused his debilitating lumbar back pain reviewer was unqualified to review the medical necessity of services rendered by an orthopedic surgeon but cited no specific statute or rule to support his position. A review of the Texas Insurance Code and the applicable rules did not reveal a specific provision on this issue. In any event, it is not necessary to reach the merits of that argument to decide this case.³

Petitioner's orthopedic consultation office visit and the associated report were medically necessary healthcare for Claimant in February 2004.

III. FINDINGS OF FACT

1. In___, Claimant sustained a low back injury compensable under the Texas Workers' Compensation Act (Act), TEX. LAB. CODE ANN, ch. 401 *et seq.*
2. At the time of the compensable injury, Claimant's employer, Texas A&M System (Respondent), was self-insured for workers' compensation insurance coverage.
3. In August 2002, an MRI of Claimant's spine revealed an annular tear at L5-S1 and a bulge at L4-5.
4. In February 2003, neurologist Randall Light, M.D., performed an EMG and an NVC of Respondent's lumbar spine. Both tests were normal with no evidence of neurological impairment.
5. In April 2003, internal medicine specialist William Gaines, M.D., interpreted Claimant's March 2003 MRI as showing L4-5 and L5-S1 degenerative changes but without stenosis or

³ The statutes governing IROs require that the reviewers be properly trained and qualified and base the opinion on medically acceptable screening criteria and review procedures. See TEX. INS. CODE ANN. arts. 21.58A § 4 and 21.58C § 2. The statute is not specific as to what constitutes proper qualifications for an IRO reviewer.

An IRO review is simply an expert opinion rendered out of court and used as the basis of agency action. Under the Texas Rules of Evidence, not every medical doctor is qualified to testify as an expert on every medical question. *Broders v. Heise*, 924 S.W.2d 148, 152 (Tex. 1996). For that reason, it would be unusual to have a chiropractor's testimony admitted as expert testimony regarding treatment by an orthopedic surgeon.

Lack of equivalency of medical specialties between the reviewer and the provider creates a curious situation. For instance, had the IRO reviewer chiropractor in this case been called to testify at the hearing, the reviewer's testimony would have been subject to exclusion under Rule 702, Texas Rules of Evidence. It is odd that an expert could control an agency's action yet not be testify as an expert on the same matter.

nerve involvement. He advised Claimant to resume his normal activities.

6. It is possible to have low back pain from a spinal disc disruption and have normal MRI, EMG, and NVC test results.
7. In April 2003, Claimant was released to unrestricted, full-time work. However, he continued to complain of pain, so his treating physician, John Wyatt, D.C., referred him to orthopedic surgeon Kenneth Berliner, M.D. (Petitioner), who specializes in spine problems.
8. Based on the results of tests (heel walk, toe walk, deep knee bend, straight leg raise, and palpation) during his April 2003 examination by Dr. Wyatt, Claimant had low back pain and a 50-80% chance of continued residual pain that would interfere to some extent with his activities of daily living.
9. After Dr. Gaines rated Claimant at MMI with a 0% impairment rating, Claimant continued to need supportive care.
10. On February 23, 2004, Claimant suffered from low back pain derived from his compensable injury and had not been evaluated by an orthopedic specialist in spinal problems.
11. On February 23, 2004, Petitioner performed an evaluation of Claimant during an initial office visit. As part of that visit, Petitioner completed a required report for the Commission.
12. Claimant's orthopedic consultation with Petitioner on February 23, 2004, was medically necessary to treat Claimant's low back pain.
13. In conjunction with his evaluation of Claimant, Petitioner was required to submit a report to the Commission.
14. Respondent denied payment for both the office visit and report as not being medically necessary.
15. Petitioner's appeal of the denial was considered by the Texas Workers' Compensation Commission's (Commission) designee, an Independent Review Organization (IRO).
16. Petitioner appealed the IRO's decision to deny reimbursement.
17. The Commission Staff sent notice of hearing to the parties that stated the date, time, and location of the hearing and cited to the legal statutes and rules involved along with a short, plain statement of the factual matters involved.
18. Petitioner and Respondent were represented at the hearing held November 7, 2005, but the

Commission Staff chose not to participate.

IV. CONCLUSIONS OF LAW

1. The Texas Workers' Compensation Commission (Commission) has jurisdiction related to this matter pursuant to the Texas Workers' Compensation Act (Act), TEX. LAB. CODE ANN. § 413.031.
2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a decision and order, pursuant to § 413.031 of the Act and TEX. GOV'T CODE ANN. ch. 2003.
3. The hearing was conducted pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001 and the Commission's rules, 28 TEX. ADMIN. CODE (TAC) §§ 133.305 and 133.308.
4. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
5. Petitioner had the burden of proof in this proceeding. 28 TAC §§ 148.21(h) and (i); 1 TAC §155.41.
6. The IRO had authority to review the parties' positions and issue a decision pursuant to the Commission's rule at 28 TAC §§ 133.305 and 133.308.
7. Pursuant to the Act, an employee who has sustained 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 cures or relieves the effects naturally resulting from the compensable injury, promotes recovery, or enhances the ability of the employee to return to or retain employment. TEX. LAB. CODE ANN. § 408.021(a).
8. Health care includes all reasonable and necessary medical services, including a medical appliance or supply. TEX. LAB. CODE ANN. §401.011(19)(A). A medical benefit is a payment for health care reasonably required by the nature of the compensable injury. TEX. LAB. CODE ANN. § 401.011(31).
9. Petitioner is entitled to be reimbursed for the February 23, 2004, office visit and associated report provided Claimant because both were medically necessary.

ORDER

It is ORDERED that Texas A&M System reimburse Kenneth Berliner, M.D., for the office visit and associated report provided to Claimant in February 2004.

SIGNED November 28, 2005.

**ANN LANDEROS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**