

**DOCKET NO. 453-05-4508.M5**  
**MDR Tracking No. M5-04-3256-01**

<b>AMERICAN CASUALTY COMPANY</b>	§	<b>BEFORE THE STATE OFFICE</b>
<b>OF READING, PENNSYLVANIA</b>	§	
	§	
<b>VS.</b>	§	<b>OF</b>
	§	
<b>WACO</b>	§	
<b>ORTHO REHAB</b>	§	<b>ADMINISTRATIVE HEARINGS</b>

**DECISION AND ORDER**

American Casualty Insurance Company of Reading, Pennsylvania, Carrier, and Waco Ortho Rehab, Provider, both requested hearings to contest Independent Review Organization (IRO) and Texas Workers' Compensation Commission (Commission) medical review division (MRD) decisions concerning Carrier's denial of payment for some of the services provided to an injured worker, Claimant, from \_\_\_\_, through November 7, 2003.<sup>1</sup> The parties agreed at the beginning of the hearing to waive their contest of all MRD fee-dispute determinations. As a result, the Administrative Law Judge (ALJ) will order that the fee-dispute portions of the claim be paid or denied in accordance with the MRD decision.

The parties did not waive any of their dispute regarding the medical-necessity determinations. On those issues, the ALJ concludes that Carrier should pay for all CPT code 97110 therapeutic-exercise-disputed services up to, but not including, September 24, 2003, with the exception of June 30, 2003, July 2, 2003, and July 7, 2003. The ALJ concludes that Carrier should not be required to pay for any other services disputed on the basis of medical-necessity because they were not medically necessary.<sup>2</sup>

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<sup>1</sup> As of September 1, 2005, the functions of the Commission have been transferred to the Texas Department of Insurance, Division of Workers' Compensation.

<sup>2</sup> The ALJ has used Provider's Table of Disputed Services found at Ex. 1 at 50-54 to determine which services were paid or unpaid and determined by the IRO to be medically necessary or unnecessary.

## **I. PROCEDURAL HISTORY**

A hearing convened on November 7, 2005, before the undersigned ALJ at the State Office of Administrative Hearings, Austin, Texas. Provider appeared and was represented by its counsel, William Maxwell. Carrier appeared and was represented by its counsel, David Swanson. Carrier filed a closing argument on December 19, 2005. Provider filed a closing argument on December 27, 2005. On January 9, 2006, Carrier filed a reply to Provider's closing argument. On January 16, 2006, Provider responded to an objection by Carrier to the late filing of Provider's brief. The hearing record closed on January 16, 2006. Because there were no notice or jurisdictional issues, those matters are addressed in the findings of fact and conclusions of law without discussion here.

Carrier objected to considering Provider's brief because it was filed more than a week late. Provider said its brief was filed late because its counsel was ill. Provider also waived its right to file a reply to Carrier's brief. The ALJ concludes that Carrier was not prejudiced by the late filing because it was able to file a reply on January 9, 2006, and because of Provider's waiver of its right to reply. Carrier's objection is denied.

## **II. DISCUSSION**

### **1. Background**

Claimant injured his left wrist on \_\_\_\_, at a food restaurant where he worked. He began treatment at Concerta, with two weeks of physical therapy, before presenting to Provider on \_\_\_\_\_. Provider treated Claimant from \_\_\_\_, through July 7, 2003. Claimant had DeQuervain's release surgery on July 19, 2003. Claimant had postoperative treatment with Provider from August 4, 2003, through November 7, 2003.

After Carrier denied payment for portions of the services, Provider requested medical dispute resolution. MRD issued its decision on February 4, 2005. Carrier and Provider both requested hearings.

Employees have a right to necessary health treatment under TEX. LAB. CODE ANN. §§408.021 and 401.011. Section 408.021(a) provides, "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.” Section 401.011(19) of the Labor Code provides that health care includes “all reasonable and necessary medical . . . services.”

Carrier had the burden of proof on the services it contested and Provider had the burden of proof on the services it contested.<sup>3</sup>

## **B. Decision**

The disputed services can be divided into three parts. The first is pre-surgery care from \_\_\_\_, through July 7, 2003, excluding CPT code 97110, therapeutic exercise, which is considered below as a separate category. Carrier paid for most of these services up to, but not including, June 30, 2003, and July 2 and 7, 2003.<sup>4</sup> Carrier denied Provider’s claim for all services on June 30, 2003, July 2, 2003, and July 7, 2003.

The second category of disputed services is CPT code 97110, therapeutic exercise. Carrier paid for some of the units charged for this service from \_\_\_\_, through June 25, 2003, as pre-surgery therapy; none of the units charged on June 30, 2003, July 2, 2003, and July 7, 2003; some of the units charged as post-surgery therapy from August 4, 2003, up to, but not including September 24, 2003; and none of the units charged on and after September 24, 2003.

A third category of disputed services is post-surgery therapy on and after August 4, 2003, excluding the separately-considered CPT code 97110 therapeutic exercises. The great majority of these unpaid claims were for services provided on and after September 24, 2003. Carrier denied payment for almost all of these services.<sup>5, 6</sup>

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<sup>3</sup> 1 TEX. ADMIN. CODE (TAC) §155.41; 28 TAC §148.14(a).

<sup>4</sup> Ex. 1 at 44. Carrier did not pay for CPT code 99080-73, work status reports, on June 10, 2003, and CPT code 97750-MT, physical performance muscle testing or measurements, on June 10, 2003. However, in accordance with the parties’ agreement to waive MRD-determined fee-dispute issues, those issues are not considered in dispute.

<sup>5</sup> Ex. 1 at 44-46. Carrier did pay for one CPT code 99080 special report on October 20, 2003.

<sup>6</sup> Carrier did not pay for a portion of the following pre-September 24, 2003, charges: CPT code 97750-MT,

## **1. Pre-Surgery Treatments**

The ALJ concludes that Carrier should not be ordered to pay for disputed pre-surgery treatments (other than CPT code 97110, therapeutic exercises discussed in Part 2 below). Although the IRO found that most of the services provided on June 30, 2003, July 2, 2003, and July 7, 2003, were medically necessary, the preponderant evidence is they were not. Carrier witness William D. Defoyd, D.C.<sup>7</sup> testified that by June 25, 2003, it was predictable that further pre-operative treatment was not likely to be effective. This was corroborated by Provider's June 30, 2003, notes,<sup>8</sup> which showed Claimant was going to schedule surgery to cure his condition; Provider's June 10, 2003 notes,<sup>9</sup> which said Claimant's left-wrist strength measures did not show improvement; and Provider's June 10, 2003, notes on Claimant's "wrist progress," which showed worsening in ten out of twelve areas tested.<sup>10</sup>

## **2. Therapeutic Exercises**

The ALJ concludes that the CPT code 97110 therapeutic exercises provided during the periods that all parties agreed some services were needed were medically necessary and should be paid. This includes the periods from \_\_\_\_, up to, but not including June 30, 2003, July 2, 2003, and July 7, 2003, and from August 4, 2003, up to, but not including, September 24, 2003, and after. Carrier paid for some, but not all, of the disputed therapeutic exercises during these times. Because the IRO concluded that all of therapeutic exercises provided during those times were medically necessary, Carrier had the burden of proving they were not necessary.

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physical performance muscle testing or measurements on August 4 and 29, 2003; CPT code 98943, chiropractic manipulation, extraspinal alone, on August 27 and 29, 2003; and CPT code 99070, supplies and materials on August 27, 2003; and all of the charges for CPT code 95851, range of motion (ROM) measurements on August 4, 2004; CPT code 99070, supplies and materials on August 4, 18, and 27, 2003; and CPT code 99211-25, office/outpatient visit, on August 14 and 20, 2003. However, in accordance with the parties' agreement concerning the MRD fee-dispute determination, any issues on those services are considered waived.

<sup>7</sup> Dr. Defoyd was licensed in 1987. He is a board certified chiropractic orthopaedist who is also a certified designated doctor.

<sup>8</sup> Ex. 2 at 172.

<sup>9</sup> Ex. 2 at 21-22.

<sup>10</sup> Ex. 2 at 22.

Dr. Defoyd testified generally that it is not necessary to provide one-on-one therapy to the extent provided. He said the exercises provided both before and after surgery were relatively simple and it was only necessary to instruct Claimant on how to do them at home rather than lengthy one-on-one training. Based on two factors, Dr. Defoyd's testimony was not persuasive in this particular case. The first is written evidence from Provider, based on three studies,<sup>11</sup> showing that patients in general show significantly better improvement with one-on-one physical therapist supervision than they do with other programs, including home exercise programs.

The other factor is substantial evidence that Claimant's cognitive ability was impaired. A prime example of this is his pain reports, which vary widely from week-to-week, from day-to-day, and, according to Dr. Bailey, even during the same session.<sup>12</sup> There is no apparent logical basis for the variance. In Dr. Bailey's opinion, Claimant's pain reports were not reliable. Claimant's designated doctor, William E. Blair, Jr., reported on October 20, 2003, "[T]here does not appear to be any objective clinical condition to explain . . . [Claimant's] rather remarkable symptom complex."<sup>13</sup> On November 7, 2003, the last day of treatment, Claimant reported that he could hardly drive, perform recreational activities, or work,<sup>14</sup> but he called a few days later saying he would not be able to come in because he had gone back to work.

An initial psychological assessment on September 9, 2003, concluded that Claimant possibly had some psychosis based on his admission of hearing voices call his name and tell him what to

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<sup>11</sup> Ex. 1 at 12-13. The studies cited were "The Clinical Effects of Intensive, Specific Exercise on Chronic Low Back Pain: a Controlled Study of 895 Consecutive Patients With 1-Year Follow Up," by B. W. Nelson, E. O'Reilly, M. Miller, M. Hogan, J. A. Wagner, and C. Kelly in the October 1995 issue of *Orthopedics* at 971-981; "Can Spinal Surgery be Prevented by Aggressive Strengthening Exercises? A Prospective Study of Cervical and Lumbar Patients," B. W. Nelson, D. M. Carpenter, T. E. Dreisinger, M. Mitchell, C. E. Kelly, and J. A. Wegner in the January 1999 issue of *Arch Physical Medicine Rehabilitation* at 20-25; and "The Influence of Direct Supervision of Resistance Training on Strength Performance," by S. A. Mazetti, W. J. Kraemer, J. S. Volek, N. D. Duncan, N. A. Ratamess, A. L. Gomez, R. U. Newton, K. Hakkenen, and S. J. Fleck in the June 2000 issue of *Medical Science Sports* at 1175-1184.

<sup>12</sup> See, for example, Claimant's pain reports in Provider's office notes beginning at Ex. 2 at 151 and continuing through 203. The post-surgical variance is particularly pronounced.

<sup>13</sup> Ex. 2 at 86. Dr. Blair also concluded that symptom magnification was present. *Id.* at 68.

<sup>14</sup> Ex. 2 at 203.

do.<sup>15</sup> A final assessment concluded he was experiencing psychological distress because of depression, in which he scored in the severe range, and anxiety, in which he scored in the moderate to moderately high range.<sup>16</sup>

Overall, the ALJ was not convinced of Claimant's ability to learn the necessary exercises and do them at home, as advocated by Dr. Defoyd. Thus, it was reasonable for Provider to conclude that extensive one-on-one therapy was necessary in this case. At the very least, Carrier did not carry its burden of proving the services were not reasonable and necessary for this patient.

### **3. Post-Surgery Treatments**

The ALJ concludes that Carrier should not be required to pay for the disputed post-surgery treatments. Based on the following considerations, the ALJ concludes that services on and after September 24, 2003, were shown to be medically unnecessary:

Claimant's surgeon, James Bowden, M.D., concluded on August 12, 2003, "[Claimant's] DeQuervain's stenosing tenosynovitis release has healed nicely. He has good radial and ulnar deviation. He has basically just a little scar soreness over the area of the incision, which has totally healed. He complains of diffuse dorsal wrist pain, which has nothing to do really with the radial tenosynovitis."<sup>17</sup>

§ Dr. Bowden concluded on September 22, 2003, that Claimant's surgery had "totally healed" and he "has normal radial and ulnar motion," with "no thumb abnormalities." Dr. Bowden noted Claimant's complaint of diffuse dorsal and wrist pain and concluded, "he probably does have some radicular changes from his cervical spine and does need to seek appropriate consultation for that."<sup>18</sup>

§ On October 20, 2003, Dr. Blair wrote, "Review of the subsequent medical documentation does not provide me with any objective evidence that . . . [Claimant] sustained any significant structural failure to his hand. He underwent extensive treatment which cannot be supported based on the documentation provided."<sup>19</sup>

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<sup>15</sup> Ex. 2 at 61.

<sup>16</sup> Ex. 2 at 83, 86.

<sup>17</sup> Ex. 2 at 60.

<sup>18</sup> Ex. 2 at 64.

<sup>19</sup> Ex. 2 at 65.

§ An October 3, 2003, peer review by Mike O’Kelley, D.C., concluded that the documentation supplied fails to support a causal relationship between the current condition and the \_\_\_ injury, that the documentation fails to support progress from the current treatment plan, that no further treatment or diagnostic testing is recommended for the left wrist, and, as of September 22, 2003, Claimant was fully healed with normal radial and ulnar function.<sup>20</sup>

Provider’s examination of Claimant was called into question. Although Dr. Bowden reported on September 22, 2003, that Claimant had totally healed, Provider wrote on September 24, 2003, that Claimant had “abnormally reduced joint motions . . . left wrist range of motion is reduced from expected by objective observation range of motion . . . establishing the medical necessity for treatment to improve left wrist AROM and PROM.”<sup>21</sup>

On October 20, 2003, Dr. Blair found normal flexion at 60 degrees and only a five-degree deficit in extension in Claimant’s left wrist as compared to the right hand.<sup>22</sup> On the next day, Provider concluded that Claimant had significantly reduced flexion at 34 degrees and extension at 41 degrees.<sup>23 24</sup>

### III. FINDINGS OF FACT

1. The injured worker in this case, Claimant, injured his left wrist on \_\_\_, at a food restaurant where he worked.
2. Claimant began treatment at Concerta, with two weeks of physical therapy, before presenting to Waco Ortho Rehab, Provider, on May 14, 2003.
3. Provider treated Claimant from May 20, 2003, through July 7, 2003; Claimant had DeQuervain’s release surgery on July 19, 2003; and Claimant had postoperative treatment with Provider from August 4, 2003, through November 7, 2003.

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<sup>20</sup> Ex. 2 at 71.

<sup>21</sup> Ex. 2 at 190.

<sup>22</sup> Ex. 2 at 71.

<sup>23</sup> Ex. 2 at 53.

<sup>24</sup> It might be argued, on the basis of the above-described evidence, that other post-surgery services, including therapeutic exercises before September 24, 2003, were also medically unnecessary. However, the IRO, Carrier, and Dr. Defoyd all thought post-surgery therapy was necessary. Carrier paid for the great majority of the services provided before September 24, 2003. The IRO found the additional units of therapeutic exercise were medically necessary. On an overall basis, as described under Part 2 above, Carrier did not carry its burden of proving the disputed therapeutic exercises before September 24, 2003, were medically unnecessary.

4. At the time of the injury, American Casualty Company of Reading, Pennsylvania, Carrier, provided workers' compensation insurance to Claimant's employer.
5. Carrier denied payment for a portion of the services.
6. Provider requested medical dispute resolution.
7. The Texas Workers' Compensation Commission Medical Review Division (MRD) issued a decision on February 4, 2005, finding some of the services should be paid and some should not.
8. Carrier and Provider both requested hearings. Neither party disputed jurisdiction.
9. All parties received not less than 10 days' notice of the time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
10. All parties had an opportunity to respond and present evidence and argument on each issue involved in the case.
11. The parties agreed at the beginning of the hearing to waive their contest of all MRD fee-dispute determinations.
12. The parties did not waive any of their dispute regarding the medical-necessity determinations by the independent review organization (IRO).
13. The medical-necessity issues can be divided into three parts: pre-surgery services on June 30, 2003, and July 2 and 7, 2003; CPT code 97110, therapeutic exercises for which Carrier paid for some, but not all of the units; and post-surgery therapy on and after September 24, 2003.

#### **Pre-Surgery Services on June 30, 2003, and July 2 and 7, 2003**

14. Carrier denied payment for pre-surgery services provided on June 30, 2003, and July 2 and 7, 2003.
15. By June 30, 2003, it was predictable that further pre-operative treatment was not likely to be effective.
  - a. Claimant had decided to schedule surgery to cure his condition.
  - b. As of June 10, 2003, Claimant's left-wrist strength had not shown improvement.
  - c. As of June 10, 2003, Claimant's wrist was tested and had worsened in ten out of twelve of the areas tested.

### **CPT code 97110, Therapeutic Exercises for which Carrier Paid for Some, but not All Units**

16. Carrier paid for some, but not all units of one-on-one therapeutic exercise from \_\_\_\_, up to, but not including June 30, 2003, July 2, 2003, and July 7, 2003, and from August 4, 2003, up to, but not including, September 24, 2003, and after.
17. The IRO concluded that these disputed services were medically necessary.
18. Patients in general show significantly better improvement with one-on-one physical therapist supervision than they do with other programs, including home exercise programs.
19. Claimant's cognitive abilities were impaired.
20. The services described in Finding of Fact No. 16 were reasonably required by the nature of Claimant's injury.

### **Post-surgery Services on and after September 24, 2003**

21. Carrier denied payment for all services provided on and after September 24, 2003, except for one CPT code 99080 special report provided on October 20, 2003, that Carrier paid.
22. The disputed services provided on and after September 24, 2003, were not reasonably required by the nature of the Claimant's injury.
  - a. By August 12, 2003, Claimant's DeQuervain's stenosing tenosynovitis release had healed nicely; he had good radial and ulnar deviation; he had a little scar soreness over the area of the incision, which has totally healed; and his complaints of diffuse dorsal wrist pain had nothing to do with the radial tenosynovitis.
  - b. By September 22, 2003, Claimant's surgery had totally healed and he had normal radial and ulnar motion, with no thumb abnormalities.
  - c. As of October 3, 2003, Provider's documentation failed to support progress from the current treatment plan.
  - d. The results of Provider's examination of Claimant were erroneous on September 24, 2003, when he concluded that Claimant had abnormally reduced joint motions and that left wrist range of motion was reduced more than expected; and October 21, 2003, when Provider concluded that Claimant had significantly reduced flexion at 34 degrees and extension at 41 degrees.

## **IV. CONCLUSIONS OF LAW**

1. The State Office of Administrative Hearings has jurisdiction over this proceeding, including the authority to issue a decision and order. TEX. LAB. CODE ANN. §413.031(k) and TEX. GOV'T CODE ANN. ch. 2003.
2. All parties received adequate and timely notice of the hearing. TEX. GOV'T CODE ANN. §2001.052.
3. The fee-dispute portions of the claim addressed by MRD should be paid or denied in accordance with MRD's decision.
4. Each party had the burden of proof concerning the MRD ruling it contested. 1 TEX. ADMIN. CODE (TAC) §155.41; 28 TAC §148.14(a).
5. Carrier did not prove that units of therapeutic exercise provided from \_\_\_\_, up to, but not including June 30, 2003, July 2, 2003, and July 7, 2003, and from August 4, 2003, up to, but not including, September 24, 2003, were not medically necessary.
6. Carrier should pay for disputed units of therapeutic exercise provided from \_\_\_\_, up to, but not including June 30, 2003, July 2, 2003, and July 7, 2003, and from August 4, 2003, up to, but not including, September 24, 2003.
7. All other disputed services (excluding those identified in Conclusions of Law Nos. 3, 5, and 6) were not medically necessary. TEX. LAB. CODE ANN. §§ 401.011 and 408.021.
8. Carrier should not be required to pay for the disputed services identified in Conclusion of Law No. 7.

## **ORDER**

**IT IS, THEREFORE, ORDERED** that American Casualty Company of Reading Pennsylvania pay Waco Ortho Rehab for disputed units of therapeutic exercise provided from \_\_\_\_,

up to, but not including June 30, 2003, July 2, 2003, and July 7, 2003, and from August 4, 2003, up to, but not including, September 24, 2003, plus applicable interest.

**IT IS ORDERED FURTHER** that American Casualty Company of Reading Pennsylvania pay Waco Ortho Rehab in accordance with the Texas Workers' Compensation Commission Medical Review Division decision on the fee dispute portion of the claim, plus applicable interest.

**IT IS ORDERED FURTHER** that, except as ordered above, Waco Ortho Rehab's claim against American Casualty Company of Reading, Pennsylvania for services provided to Claimant from \_\_\_\_, through November 7, 2003, be, and the same is hereby, denied.

**Signed March 17, 2006.**

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**JAMES W. NORMAN  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS**