

DOCKET NO. 453-05-4904.M5
MDR Tracking No. M5-05-1233-01

EMCASCO INSURANCE	§	BEFORE THE STATE OFFICE
COMPANY,	§	
Petitioner	§	
	§	
v.	§	OF
	§	
SAN ANTONIO PAIN RELIEF	§	
CENTER,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

EMCASCO Insurance Company (EMCASCO) requested a hearing to contest an independent review organization (IRO) determination, issued on behalf of the Texas Workers' Compensation Commission (Commission),¹ that certain services provided to an injured worker (Claimant) by San Antonio Pain Relief Center (Center) from February 23, 2004, through April 19, 2004, were medically necessary and a Commission medical review division (MRD) decision that certain work status reports should be paid. The Administrative Law Judge (ALJ) concludes that most of the disputed services should be paid.

I. PROCEDURAL HISTORY

A hearing convened on October 20, 2005, before the undersigned ALJ at the State Office of Administrative Hearings (SOAH), Austin, Texas. EMCASCO appeared and was represented by its counsel, Steven M. Tipton. The Center did not appear either personally or through a representative. EMCASCO tendered into evidence the Center's Medical Dispute Resolution Request,² which contains the same address for the Center as the address to which the Commission sent the Notice of Hearing.³

¹ Effective September 1, 2005, the Commission's functions were transferred to the newly-created Texas Department of Insurance, Division of Workers' Compensation.

² Ex. 1.

³ The ALJ takes official notice of the Center's address as shown on the Notice of Hearing.

The ALJ concludes this evidence is sufficient to raise a presumption that the Center received the Notice of Hearing. After the introduction of additional evidence, the hearing record closed on October 20, 2005.

II. DISCUSSION

A. Factual and Legal Background

The Claimant, _____, suffered a compensable injury on____, while washing her trailer when she slipped on some mud, grabbed the trailer to keep from falling, and injured her lower back.

She was seen initially by Concentra, which diagnosed her condition as lumbar strain and radiculopathy and treated her with physical therapy and medication. She changed treating doctors and her new doctor ordered a magnetic resonance imaging (MRI) of her lumbar spine. The MRI revealed mild-left-central-disc protrusion at the L5/S1 spinal level, with a suggestion of a small annular tear.

The services that were at issue before MRD included: office visits CPT codes 99211 and 99213; attended electrical stimulation, CPT code 97032; neuromuscular reeducation, CPT code 97112; therapeutic exercises, CPT code 97110; and gait training, CPT code 97116. The IRO concluded that the office visits, attended electrical stimulation, and therapeutic exercises were medically necessary, but the other services were unnecessary. The IRO said with regard to the office visits, attended electrical stimulation, and therapeutic exercises,

In this case, the records adequately established that a compensable injury to the lower back occurred and that the patient received a series of injections for treatment. It was medically necessary, therefore, for the patient to receive appropriate post-injection therapy and rehabilitation.

The Claimant received epidural steroid injections (ESIs) on February 11, 2004, March 10, 2004, and March 24, 2004.

In addition to ordering payment for the services the IRO found to be medically necessary, MRD ordered EMCASCO to pay for work status reports under CPT code 99080-73 occurring on February 24, 2004, March 9 and 23, 2004, and April 8, 2004.

EMCASCO appealed the MRD decision, but the Center did not appeal. Thus, the only services in dispute are the ones the MRD ordered EMCASCO to pay (disputed services).

Employees have a right to necessary health care under TEX. LABOR 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."

EMCASCO has the burden of proof.⁴

B. Disputed Services

1. Work Status Reports, CPT code 99080-73

EMCASCO should not be required to pay for the work status reports. Commission Rule 28 TEX. ADMIN. CODE (TAC) §129.5(d) and (f) provide instances when work status reports should be paid.⁵ Subsection (d) requires a report in the following instances: after the initial examination of the employee, regardless of the employee’s work status; when the employee experiences a change in work status or a substantial change in activity restrictions; and on the schedule requested by the insurance carrier or agent or the employer requesting a report through its carrier. Subsection (f) requires a report from the provider upon receipt of: functional job descriptions from the employer listing available modified duty positions available to the injured worker; and when the injured worker

⁴ 1 TAC § 155.41(b); 28 TAC§148.14(a).

⁵ Rule 28 TAC§ 129.5(i) requires an insurance carrier to reimburse a provider for work status reports required under 28 TAC§ 129.5.

can return to work with or without restrictions.

The initial work status report, payment for which was not disputed, was filed on February 10, 2004.⁶ The other status reports show the Claimant did not experience a change in work status or a substantial change in activity restrictions after the February 10 report.⁷ EMCASCO did not ask for the reports-the CPT code used, 99080-73, did not have an “RR” modifier,⁸ which would have been used in the case of an insurance carrier requested report.⁹

The reports do not say the Claimant could return to work and do not discuss modified duty positions proposed by the Claimant’s employer.¹⁰ A reasonable inference is that there was no functional job description from the employer listing available modified duty positions or that the Claimant was able to return to work with or without restrictions.

Overall, the preponderant evidence indicates that the conditions described in Rule 129.5(d), (f), and (i) requiring work status reports and payment for the reports are not present in this case.

2. Therapeutic Exercises and Attended Electrical Stimulations and Office Visits

The ALJ concludes the preponderant evidence is that the other disputed services-therapeutic exercises, attended electrical stimulation, and office visits-were medically necessary and should be paid, except for office visits on February 23, March 5, 17, 18, and 31, and April 19, 2005.

The evidence in favor of a finding of medical necessity for these services was the IRO doctor’s statement that the Claimant received a series of injections for treatment and “[I]t was medically necessary, therefore, for the patient to receive appropriate post-injection therapy and rehabilitation.”

⁶ Ex. 1 at 26; Ex. 2 at 1.

⁷ Ex. 2 at 1-5.

⁸ Ex. 2 at 26-28.

⁹ 28 TAC §129.5(i)(2).

¹⁰ Ex. 2 at 1-5.

EMCASCO argued that post-injection therapy is not efficacious. It tendered into evidence an article titled “Interventional techniques: Epidural steroid injections,” by Hemmo A. Bosscher, M.D.,¹¹ a fellow of the Department of Anesthesia at the Texas Tech University Health Sciences Center. The article thoroughly discusses the uses of ESIs to relieve pain, including specifically lumbar ESIs, but does not mention post-injection therapy. EMASCO also introduced into evidence a patient handout for ESIs from MD consult, identified as an online service for physicians.¹² The handout discusses ESI procedures, post-ESI procedures and possible complications, but does not discuss the possibility of post-ESI therapy. It says simply that the patient should slowly resume his or her usual activities. EMCASCO contended that the absence of a discussion of post-ESI therapy in these documents is circumstantial evidence that the therapy is not warranted.

EMCASCO introduced a March 4, 2004, peer review in which Philip C. Lening, D.C., concluded that all current treatment of the Claimant was not reasonable or medically necessary because of the lack of response to previous treatment.¹³ This was in response to a question asking, “Is current treatment/testing reasonable/necessary/related to the ____, injury? Specifically, are chiropractic care P. T., [physical therapy] etc. still required?,” Dr. Lening listed extensive treatment provided to the Claimant from the date of her injury on ____, through February 17, 2004, including therapeutic exercises, ultrasound, medication, massage, electrical stimulation, instructions on a home exercise program, and ESIs that failed to relieve her condition.¹⁴ He said the continuation of any treatment must be predicated on a response and if there is no evidence of significant benefit after a fair and adequate trial, continued treatment is unwarranted.¹⁵ Dr. Lening did not distinguish between post-ESI and other treatments.

The ALJ finds that the stronger evidence on the efficacy of post-ESI therapy is from the IRO reviewing doctor who concluded that post-ESI therapy was reasonable, rehabilitative, and necessary. There is a clear distinction in the evidence between continuing care in general and specifically post-

¹² Ex. 5.

¹³ Ex. 2 at 20.

¹⁴ Ex. 2 at 18-20.

¹⁵ Ex. 2 at 20.

injection therapy. Although the evidence preponderated against the necessity of the former, it said relatively little about the latter. In distinction to the ongoing general therapy, the disputed services consisted of therapy of about two weeks after each of the ESIs.¹⁶

It is easily conceivable that both Dr. Lening's and the IRO reviewing doctor's opinions are correct, *i.e.*, that post-injection therapy for very recent ESIs was needed, but that further chiropractic and physical therapy in general was not warranted in view of the several months of failed treatment.

The ALJ concludes that any inference that might be drawn from the failure of Dr. Bosscher or the MD Consult-patient handout to discuss post-ESI therapy carries less weight than the IRO reviewing doctor's positive statement on the issue. It is not entirely clear, and not as persuasive to infer or speculate on, why post-injection therapy was not addressed. It is also not clear why Dr. Bosscher would not negate the efficacy of post-injection therapy in view of the apparent fact that it occurs on some occasions.

Another issue was whether "attended" therapeutic exercises and electrical stimulations were appropriate therapy as opposed to therapy on a group or home-exercise basis. EMCASCO pointed out that the IRO did not address whether "attended" care-the highest and most expensive level-was medically necessary. It asserted there was no indication in the record that these procedures could not be performed less expensively. However, there was no evidence to prove EMCASCO's assertion that the therapy was medically unnecessary-there was no expert evidence that attended care was not needed under the circumstances of this case and no evidence of any justification by the Center for the procedures. As indicated above, Dr. Lening addressed the necessity of continuing already-failed chiropractic physical therapy in general rather than the specific need for recent-ESI-post-injection therapy. The only evidence that clearly addressed the need for post-injection therapy, including the attended care, was from the IRO reviewer who said generally that post-ESI therapy was needed.¹⁷

¹⁶ Ex. 2 at 26-28. The post-March 24 therapy lasted about three weeks. *Id.* at 27-28.

¹⁷ The IRO reviewer did not specifically address the "attended-unattended" distinction.

EMCASCO also asserted there is no justification for billing an office visit and therapeutic exercise on the same day. These billings occurred on February 23, March 5, 17, 18, and 31, and April 19, 2005. It cited Center for Medicaid and Medicare Service guidelines saying when a physician bills a visit on the same day he or she bills for physical therapy, using CPT physical therapist codes, the physician must be prepared to document that the visit was unrelated to the physical therapy services for which payment is requested.¹⁸ It cited Medicare guidelines indicating that when modality or procedure and evaluation services are billed, the evaluation may be reimbursed if the medical necessity of the evaluation is clearly documented.¹⁹

The ALJ concludes that payment for the February 23, March 5, 18, and 31, and April 19, 2005, office visits should be denied because the evidence supports findings that only post-ESI therapy was necessary, that office visits in relation to matters other than post-ESI therapy were unnecessary, and that, under Medicare guidelines, payment for the office visits is not justified in relation to the post-ESI therapy alone because they occurred on the same days as post-ESI therapy.

The reasoning for those office visits does not apply to office visits on February 24, March 23, and April 8, 2005, because they were not provided in conjunction with other physical therapy services. With regard to these office visits, Medicare guidelines provide that one or two office visits, in addition to physical therapy treatments, are justifiable, except that more visits may be payable if justified. There was no evidence that the visits were not justified-the record did not show the Center's justification or lack of justification for the visits.

3. Conclusion

¹⁸ Ex. 6

¹⁹ Ex. 7.

Based on the foregoing analysis, the ALJ concludes that EMCASCO proved it is not obligated to pay for the work status reports and office visits on February 23, March 5, 17, 18, and 31, and April 19, 2005. Because it did not prove the other treatments and services were not medically necessary or should not be paid on some other basis, they should be paid.

III. FINDINGS OF FACT

1. The Claimant, _____, suffered a compensable injury on ____, while washing her trailer when she slipped on some mud, grabbed the trailer to keep from falling, and injured her lower back.
2. The Claimant's employer had workers' compensation insurance through EMCASCO Insurance Company (EMCASCO).
3. The Claimant was seen initially by Concentra, which diagnosed her condition as lumbar strain and radiculopathy and treated her with physical therapy and medication.
4. A magnetic resonance imaging (MRI) of the Claimant's lumbar spine revealed mild-left-central-disc protrusion at the L5/S1 spinal level, with a suggestion of a small annular tear.
5. The services initially at issue included: office visits, CPT codes 99211 and 99213; attended electrical stimulation, CPT code 97032; neuromuscular reeducation, CPT code 97112; therapeutic exercises, CPT code 97110; and gait training, CPT code 97116 provided from February 23, 2004, through April 19, 2004.
6. These services were provided to the Claimant by San Antonio Pain Relief Center (the Center).
7. The Center submitted a claim to EMCASCO for payment of the services.
8. EMCASCO denied the claim and the Center requested medical dispute resolution.
9. An independent review organization (IRO) concluded that the office visits, attended electrical stimulation, and therapeutic exercises were medically necessary (disputed services), but the other services at issue were unnecessary.
10. The IRO reviewer concluded, with regard to the office visits, attended electrical stimulation, and therapeutic exercises, that it was medically necessary for the Claimant to receive appropriate post-injection therapy and rehabilitation for epidural steroid injections (ESIs) that occurred on February 11, 2002, March 10, 2004, and March 24, 2004.
11. In addition to ordering payment for the services the IRO found to be medically necessary, the Texas Workers' Compensation Commission Medical Review Division (MRD) decision ordered EMCASCO to pay for work status reports under CPT code 99080-73 occurring on February 24, 2004, March 9 and 23, 2004, and April 8, 2004 (disputed services).
12. EMCASCO requested a hearing on the MRD decision, but the Center did not.
13. It is undisputed that EMCASCO requested the hearing not more than 20 days after it received

notice of MRD and IRO determinations.

14. Prior to the ESIs, the Claimant underwent extensive treatment from ____, through early February 2004 consisting of therapeutic exercises, ultrasound, medication, massage, electrical stimulation, instructions on a home exercise program, and ESIs, that failed to relieve her condition.
15. If there is no evidence of significant benefit after a fair and adequate trial, continued treatment is unwarranted.
16. Chiropractic physical therapy treatment in general provided after February 17, 2004, excluding post-ESI therapy, was not reasonably required by the nature of the Claimant's injury.
17. Except for the office visits referred to in Finding of Fact No. 20 and the work status reports referred to in Finding of Fact No. 21, the disputed services were rehabilitative to the Claimant in relation to her ESIs.
18. Office visits provided on the same day as physical therapy are not medically necessary unless the provider documents that the office visit was unrelated to the physical therapy services.
19. Office visits provided after February 17, 2004 that were not related to post-ESI therapy were not reasonable or medically necessary.
20. The February 23, March 5, 17, 18, and 31, and April 19, 2005, office visits were not reasonably required by the nature of the Claimant's injury.
21. The disputed work status reports were not provided after the initial examination of the Claimant, when the Claimant experienced a change in work status or a substantial change in activity restrictions, on a schedule requested by EMCASCO or agent or the employer requesting a report through EMCASCO, upon receipt of functional job descriptions from the employer listing available modified duty positions available to the Claimant, or when the Claimant could return to work.
22. All parties received adequate notice of not less than 10 days 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.
23. All parties had an opportunity to respond and present evidence and argument on each issue involved in the case.

IV. CONCLUSIONS OF LAW

1. 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. TEX. LAB. CODE ANN. § 413.031(k) and TEX. GOV'T. CODE ANN. ch. 2003.

2. Notice of the hearing was proper and timely. TEX. GOV'T. CODE ANN. §§2001.051 and 2001.052.
3. EMCASCO had the burden of proving that the disputed services were medically necessary. 1 TEX. ADMIN. CODE (TAC) § 155.41(b); 28 TAC § 148.14(a).
4. EMCASCO is not required to pay for the February 24, 2004, March 9 and 23, 2004, and April 8, 2004 work status reports. 28 TAC § 129.5.
5. EMCASCO is not required to pay for the February 23, March 5, 17, 18, and 31, and April 19, 2005, office visits. TEX. LABOR CODE ANN. § 408.021(a).
6. Except for the services described in Conclusions of Law Nos. 4 and 5, EMCASCO did not prove the disputed services were not reasonably required by the nature of the Claimant's injury.
7. Except for the services described in Conclusions of Law Nos. 4 and 5, EMCASCO should be ordered to pay for the disputed services.

ORDER

IT IS THEREFORE ORDERED that EMCASCO Insurance Company pay San Antonio Pain Relief Center for the disputed services, except for the work status reports on February 24, 2004, March 9 and 23, 2004, and April 8, 2004, and office visits on February 23, March 5, 17, 18, and 31, and April 19, 2005.

IT IS ORDERED FURTHER that San Antonio Pain Center's claim for payment of the February 24, 2004, March 9 and 23, 2004, and April 8, 2004 status reports and the February 23, March 5, 17, 18, and 31, and April 19, 2005, office visits be, and the same is hereby, denied.

SIGNED November 18, 2005

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