

**SOAH DOCKET NO. 453-05-9249.M2
MR NO. M2-05-2111-01**

—, § **BEFORE THE STATE OFFICE**
Petitioner §
§
V. § **OF**
§
SERVICE LLOYDS INS. CO., §
Respondent § **ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

I. DISCUSSION

____ (Petitioner), sought a review of the Findings and Decision of the Texas Workers' Compensation Commission (Commission) acting through Forte, an Independent Review Organization (IRO). The Commission's Order affirmed the decision of Service Lloyds Insurance Company (Respondent) to deny a request for a single upright knee orthosis (knee brace) with adjustable joints. The Commission determined that the knee brace was not medically necessary within the meaning of Section 408.021 and 401.011(19) of the Texas Workers' Compensation Act, TEX. LABOR CODE ANN. §401 et. seq. (the Act).

This decision grants the relief sought by Petitioner and authorizes the requested knee brace.

A one-day hearing convened December 12, 2005, before Administrative Law Judge (ALJ) Paul D. Keeper. Petitioner was assisted by Anthony Walker, Commission Ombudsman, and by Sylvia Gamborino, translator. Respondent was represented by attorney Tommy W. Lueders, II. There were no contested issues of notice or jurisdiction. The record closed following adjournment of the hearing on December 12, 2005.

Petitioner, a ____-year-old male, sustained a work-related injury to his knee on____, while he was installing insulation. An MRI was performed on December 23, 2004, indicating a complex tear of the medial meniscus. On February 3, 2005, Petitioner underwent arthroscopy of his right knee with a partial medial meniscectomy. Petitioner continued to complain of pain after his surgery. Petitioner began a work hardening program on April 18, 2005. On May 1, 2005, Respondent

terminated compensation for Petitioner's participation in the program as not medically necessary. On May 25, 2005, a repeat MRI was performed that (according to the IRO report) reflected arthritis in the medial compartment of Petitioner's right knee. On June 1, 2005, Petitioner received injections in his knee to control his pain. On June 8, 2005, CorVel Corporation (CorVel), a provider of pre-authorization determination services for Respondent, denied a request by Petitioner's physician, Alvaro Hernandez, M.D., for pre-authorization for a knee brace. On June 17, 2005, CorVel denied Dr. Hernandez's request for reconsideration for the knee brace. The bases for CorVel's denial were: (1) no radiographs that showed significant medial compartment narrowing, (2) the request included no discussion of the use of chondroitin sulfate or glucosamine, and (3) Petitioner presented no evidence of instability or other clinical rationale to support a determination of medical necessity for a knee brace.

For Respondent, Petitioner or his records were examined by two physicians:¹ Gary Freeman, M.D., and Juan Capello, M.D. In a post-surgical report dated April 9, 2005, Dr. Freeman determined that Petitioner's meniscectomy of February 3, 2005, "should have inexorable resolution without significant treatment other than nine visits over eight weeks followed by home therapy, for partial meniscectomy." Dr. Freeman concluded that Petitioner should return to unrestricted manual labor as of the date of his report. However, Petitioner's pain did not inexorably resolve, and Petitioner continued to complain about his pain problem.

As the designated doctor performing a post-surgical medical evaluation on June 3, 2005, Dr. Capello observed that Petitioner walked with a cane and complained of constant pain in his right anterior knee. Petitioner's pain was most severe while he was walking, and Petitioner rated the pain as an 8 out of a possible 10. Dr. Capello characterized Petitioner as having abnormal pain behaviors that were out of proportion to the objective findings. He noted that Petitioner's radiographic studies revealed that Petitioner had "very good looking knee with good cartilage thickness and good medial and lateral joint spaces." Dr. Capello recommended that Petitioner not be preauthorized for work hardening, further physical therapy,² or further surgery in light of the normal limits of the MRI results.

¹ A third physician, Brian Buck, M.D., examined Petitioner prior to his surgery. This evaluation, although considered by the ALJ, was not relevant to Petitioner's post-surgical request for pre-authorization for his knee brace.

² Petitioner received physical therapy for a few weeks in mid-April 2005 as part of a work hardening program. Petitioner's participation in the program was terminated before the program was concluded upon Respondent's refusal to

Petitioner's own physician, Dr. Hernandez, had been treating Petitioner since his original injury. On June 1, 2005, Petitioner's physician, Dr. Hernandez examined Petitioner and concluded that Petitioner was experiencing some chondromalacia (softening of the articular cartilage of the patella) resulting from his injury. This medical diagnosis reflected the same conclusion by the radiologist on May 25, 2005, who noted the presence of chondromalacia involving the medial knee joint compartment articular cartilage femoral condyle. Dr. Hernandez injected the knee with Xylocaine and Kenalog to control Petitioner's pain. On that same day, he prescribed a deloading-type brace.

On June 29, 2005, after CorVel's June 17, 2005, denial of pre-authorization for the brace, Dr. Hernandez repeated the x-rays and noted "diminished space medially that was not there before."

On August 10, 2005, Dr. Hernandez reported post-traumatic arthritis in Petitioner's right knee.

On October 19, 2005, Dr. Hernandez repeated that diagnosis and noted that "his patient's arthritis . . . is now coming on more severe in his knee. . . . The patient needs to have a de-loading medial compartment brace. I have again prescribed it as well as Celebrex and Ketoprofen cream medications."

Also on October 19, 2005, the parties entered into a Pre-Benefit Dispute Agreement in which they agreed that Petitioner's compensable injury included chondromalacia of the right knee.

During the course of these medical evaluations, the IRO concluded on August 8, 2005 that "it is premature to brace the above patient at this time." The IRO recommended that the following steps should be considered prior to approval of a knee brace:

pre-authorize payment. In the discharge report, one of the program's team of physical therapists noted that Petitioner had made progress while receiving physical therapy. The team was unable to explain the cause of Petitioner's post-surgical pain.

- § Petitioner should continue to use oral anti-inflammatories and a cane.
- § Petitioner should learn a closed chain exercise program [an example would be a squat and lunge exercise] and perform it at home.
- § Petitioner should have weight-bearing anteroposterior x-rays of his knee to be repeated in six months to see how much his arthritis is progressing.
- § If Petitioner has a persistent effusion, then his knee should be aspirated with subsequent analysis for infection.
- § If Petitioner's arthritis continues to progress, then "n unloader brace should be considered."

Petitioner bore the burden of proof to show that the knee brace was medically necessary. In support of that burden, Petitioner proved that he had incurred a work-related injury to his right knee and that he had post-surgical problems with his knee, including chondromalacia, arthritis, joint effusion, and ongoing post-surgical pain. Although his physicians could not determine the causes of the levels of pain, there was no question that Petitioner suffered a variety of post-injury physical problems. To address those physical problems, Petitioner completed all of the physical therapy and work hardening for which Respondent would pay. Petitioner also performed home exercises, continued to see his physician, and used the medications that his physician prescribed.

Despite these efforts, Petitioner's pain persisted, and Petitioner's physician prescribed a brace. The other physicians that reviewed Petitioner's physical condition did not consider whether a brace would help control his pain. The only evidence presented by Respondent on the subject of the knee brace was the denial (and denial on reconsideration) by CorVel and the decision of the IRO.

CorVel's denial was based on "lack of evidence of instability or other clinical rationale to support a determination of medical necessity for the proposed brace." The conclusion did not take into account the instability created by Petitioner's ongoing pain. CorVel's denial upon reconsideration noted that Petitioner's treatment did not include the use of specific drugs, although there was no evidence as to what value, if any, these drugs might provide to address Petitioner's physical condition or pain. CorVel's denial on reconsideration also noted that CorVel had not

received Petitioner's operative report. However, that document would not have provided information about Petitioner's post-operative problems.

With respect to the IRO, Respondent pointed out that the IRO provided a six-month program for treatment and evaluation for which Petitioner had failed to provide evidence of compliance. Although the IRO's six-month program may have merit, it does not create a legal standard with which Petitioner is required to comply.

In contrast, Petitioner presented persuasive evidence that his work-related injury had not responded to conservative and surgical therapies, that his condition was worsening, that Petitioner's pain was a direct result of his post-surgical problems, and that the knee brace prescribed by Petitioner's treating physician could relieve the effects naturally resulting from the compensable injury.

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. Under the Act, 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.

The ALJ finds Petitioner's evidence more credible than that of Respondent and that the preponderance of the evidence supports preauthorization for the requested knee brace. The requested knee brace is medically necessary.

II. FINDINGS OF FACT

1. ____ (Petitioner) sustained a work-related injury to his knee on ____.
2. An MRI was performed on December 23, 2004, indicating a complex tear of the medial meniscus.

3. On February 3, 2005, Petitioner underwent arthroscopy of his right knee with a partial medial meniscectomy.
4. Petitioner continued to complain of pain after his surgery.
5. In April 2005, Petitioner had two weeks of physical therapy as part of a work hardening program.
6. On May 25, 2005, a repeat MRI was performed that reflected arthritis in the medial compartment of Petitioner's right knee.
7. On June 1, 2005, Petitioner received injections in his knee to control his pain, was diagnosed with chondromalacia of the right knee, and was prescribed a knee brace by his physician, Alvaro Hernandez, M.D.
8. On June 17, 2005, Respondent denied the request for pre-authorization for a knee brace.
9. On August 8, 2005, the IRO concluded that it would be premature to preauthorize a knee brace for Petitioner until: (1) Petitioner continued to use oral anti-inflammatories and a cane, (2) Petitioner regularly performed an exercise program at home, (3) Petitioner had weight-bearing anteroposterior x-rays of his knee to be repeated in six months to gauge the progress of his arthritis, (4) Petitioner's knee be aspirated and evaluated for infection if Petitioner continued to have a persistent effusion, and (5) Petitioner's arthritis continued to progress.
10. On August 10, 2005, Petitioner was diagnosed with post-traumatic arthritis in his right knee.
11. On October 19, 2005, Petitioner was diagnosed with more severe arthritis, and Petitioner and Respondent agreed that Petitioner's condition included chondromalacia of the right knee.
12. The requested knee brace is medically necessary.
13. On August 15, 2005, Petitioner timely requested a hearing to contest the IRO decision of August 8, 2005.
14. The IRO decision is deemed a Decision and Order of the Texas Workers' Compensation Commission (Commission).
15. By letter dated September 14, 2005, the Commission issued a notice of hearing.
16. On September 28, 2005, Commission Ombudsman Juan Mireles filed a notice of written appearance based upon Petitioner's request for ombudsman assistance.
17. A one-day hearing was convened by Administrative Law Judge Paul Keeper on December 12, 2005, in the hearing rooms of the State Office of Administrative Hearings.

18. Petitioner appeared by telephone with the assistance of Commission Ombudsman Anthony Walker and translator Sylvia Gamborino. Tommy W. Lueders, II, represented Respondent.
19. There were no contested issues of notice or jurisdiction.

III. CONCLUSIONS OF LAW

1. The Texas Workers' Compensation Commission (Commission) has jurisdiction to decide the issue presented pursuant to the Texas Workers' Compensation 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 TEX. LABOR CODE ANN. § 413.031(d) and TEX. GOV'T. CODE ANN. ch. 2003.
3. J.G. (Petitioner) timely requested a hearing in this matter pursuant to 28 TEX. ADMIN. CODE (TAC) §§ 102.7 and 148.3.
4. Notice of the hearing was proper and complied with the requirements of TEX. GOV'T. CODE ANN. ch. 2001.
5. Petitioner had the burden of proof in this matter, which was the preponderance of evidence standard. 28 TAC §§ 148.21(h) and (i); 1 TAC § 155.41(b).
6. 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).
7. Pursuant to TEX. LABOR CODE ANN. § 413.014, for a carrier to be liable for certain services and supplies, the service must be preauthorized by the carrier or by order of the Commission.
8. Based upon the foregoing Findings of Fact and Conclusions of Law, the requested knee brace is medically necessary.

ORDER

THEREFORE IT IS ORDERED that the relief sought by Petitioner, J.G., is **GRANTED**, and knee brace for Petitioner's right knee is preauthorized.

SIGNED January 10, 2006.

PAUL D. KEEPER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS