

DOCKET NO.

SCD BACK & JOINT CLINIC, LTD,	§	BEFORE THE STATE OFFICE
Petitioner	§	
	§	
V.	§	OF
	§	
LIBERTY MUTUAL FIRE INSURANCE	§	ADMINISTRATIVE HEARINGS
COMPANY, Respondent		

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SCD BACK & JOINT CLINIC, LTD,	§	ADMINISTRATIVE HEARINGS
Respondent	§	

DECISION AND ORDER

The above-referenced cases, which were joined for purposes of hearing, involve the same parties, the same workers' compensation claimant, and similar chiropractic services over different periods of time. Docket No. 453-05-4485.M5 involves chiropractic services from November 24, 2003, through May 11, 2004. In that case, Liberty Mutual Fire Insurance Company (Carrier) was ordered to pay for all visits and has the burden of proof for those dates of services. Docket No. 453-05-9458.M5 involves chiropractic services from July 2, 2004, through October 8, 2004. SCD Back & Joint Clinic, Ltd. (Provider) has the burden of proof for those dates of service. In its post-hearing brief, Carrier stipulated that all dates of service between

November 24, 2003, and December 22, 2003, excluding CPT Code 95851 (lumbar range of motion with report billed twice on November 24, 2003) were medically necessary.

The Administrative Law Judge (ALJ) finds that the chiropractic care provided from November 24, 2003, through May 11, 2004, was medically necessary, with the exception of CPT Code 95851. The ALJ further finds that the chiropractic care provided from July 2, 2004, through October 8, 2004, was not medically necessary.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

On September 27, 2006, ALJ _____ convened the hearing on the merits at the William P. Clements Building, 300 West 15th Street, Austin, Texas. Provider appeared and was represented by attorney _____. Carrier appeared and was represented by its attorney, _____. The parties filed closing arguments, and the record closed on November 17, 2006. There were no contested issues regarding notice or jurisdiction; therefore, those issues are presented in the findings of fact and conclusions of law.

II. BACKGROUND, EVIDENCE, AND DISCUSSION

A. Background

This case involves a _____ worker who sustained a work-related injury on _____. Claimant fell while working and sought immediate treatment at the emergency room. Claimant was treated conservatively until November 17, 2003, when he unsuccessfully tried to return to work. On November 24, 2003, Claimant began treatment with Provider. Specifically, John Wyatt, D.C., treated Claimant. Provider diagnosed Claimant with sprain of the sacrum, grade II, and lumbar sprain/strain, grade II. Throughout the treatment with Provider, Claimant received services such as electrical stimulation, mechanical traction,

therapeutic exercises, chiropractic manipulation, and massage therapy. Provider treated Claimant from November 24, 2003, through April 16, 2004, when Claimant had spinal surgery. After the surgery, chiropractic care by Provider continued in May and June 2004, and most of this care was paid by Carrier. Claimant continued to receive chiropractic care from July 2, 2004, through October 8, 2004, but Carrier disputed this additional care as not medically necessary.

B. Legal Standards

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. LABOR CODE ANN. § 408.021(a).

C. Parties' Positions and Evidence

1. Provider's Position and Evidence

Provider submitted its documents into evidence, and it called David N. Bailey, D.C., to testify. Provider also pre-filed Dr. Bailey's testimony in this case. Dr. Bailey testified that Claimant had functional improvement as a result of Dr. Wyatt's treatment plan. Provider relied on the Texas Chiropractic Association's definition to support treatment through October 8, 2004. The definition states:

A medically necessary service is an intervention, within the scope of the provider's license, used to treat a covered condition that had a reasonable expectation, at the time of delivery or prescription, of a positive outcome, and that there was evidence that the intervention could have been expected to produce its

intended effects, and those benefits outweighed expected harmful results, and had the consent of the patient.¹

Based on this definition of medical necessity, Dr. Bailey opined that the Claimant's treatment was medically necessary because the treatment plan was appropriate for the musculoskeletal injury sustained by Claimant, and the plan was likely to provide a positive outcome for Claimant.

Furthermore, Provider argues that medical necessity cannot be determined retrospectively, and that all the prospective evidence supported the care in this case. Provider maintains that the referral for surgery and the referral for epidural steroid injections does not support Carrier's conclusion that the chiropractic care was not medical necessity.

Dr. Bailey testified that for the period July 2, 2004, through October 8, 2004, Claimant made objective functional gains in his strength and performance. For example, Claimant showed lifting improvement, lumbar strength improvement, and increased exercise tolerance during this time period. Dr. Bailey also testified that Claimant returned to work six hours a day on July 8, 2004, and this increased to eight hours a day by October 8, 2004. Dr. Bailey opined that Claimant's ability to return to work was due to Dr. Wyatt's successful treatment plan.

2. Carrier's Position and Evidence

After submitting its documents into evidence, Carrier called William DeFoyd, D.O., to testify. Dr. DeFoyd testified that except for the post-surgery rehabilitation that Carrier paid, the chiropractic care provided after January 13, 2004, was not medically necessary. He reached this conclusion based on his assessment that Claimant made no progress after January 13, 2004. For example, on January 9, 2004, after several months of treatment, Claimant stated that he had a restricted social life, limited sex life, and severe pain that permitted him to stand for only ten

¹ TCA Quality Standards for Opinions Based Upon Paper Review.

minutes. At this point, Claimant had not returned to work. According to Carrier, despite the lack of progress, Dr. Wyatt referred Claimant to an orthopedic surgeon, Kenneth G. Berliner, M.D., on January 19, 2004.

Dr. DeFoyd also noted that Dr. Wyatt had no written goals for Claimant, and no goals were being met despite notes to the contrary. He further stated that Dr. Wyatt's notes were essentially the same from day to day with no real detail on Claimant's progress. For example, on January 22, 2004, Dr. Wyatt noted that Claimant's prognosis was good and surgery was unlikely. This note, however, was recorded just days after Dr. Wyatt had referred Claimant to Dr. Berliner, the orthopedic surgeon.

Dr. DeFoyd further testified that the notes of other doctors demonstrated that Dr. Wyatt continued to treat Claimant despite his lack of progress. David Calvo, M.D., another orthopedic surgeon, saw Claimant and concluded that although Claimant had been treated with medication and physical therapy, he had very little improvement in his symptoms. Based on his assessment of Claimant, Dr. Calvo recommended epidural steroid injections.

Dr. Berliner performed surgery at the lumbar spine level L4-5, removing part of Claimant's herniated disc at that level. Carrier paid Provider for 12 days of chiropractic treatment in May 2004 and for 14 sessions in June 2004. Dr. DeFoyd testified that because Claimant did not make progress after two months of post-surgery therapy, his chiropractic treatment should have been discontinued as a failed treatment regimen. In fact, Carrier claims that the post-surgery therapy caused Claimant's condition to worsen. On July 2, 2004, for example, Dr. Wyatt wrote that Claimant reported he was hurting most of the time. As of July 6, 2004, Claimant reported he was unable to return to work and was very depressed. Carrier asserts that despite the many physical therapy sessions with Dr. Wyatt, as of October 4, 2004, Claimant was de-conditioned and had to be referred to chronic pain program.

D. ALJ's Analysis

Under the *Medicine Ground Rules*, to qualify for reimbursement, Claimant's condition must have the potential to return him to functionality, and the treatment must be specific to the injury and provide for the potential improvement of Claimant's condition.² Furthermore, Claimant was entitled to health care to treat his pain as well as his injury.

A back injury with few complications would require approximately six weeks of chiropractic care and physical therapy. However, in this case, Claimant's injury required more than six weeks of chiropractic care. Claimant initially sought treatment from another provider with no relief from his symptoms. Therefore, when he began treatment with Provider, Dr. Wyatt had to essentially start over and develop a workable treatment plan that would provide relief to Claimant. Claimant's treatment plan was also complicated because he had been involved in a motorcycle accident 20 years before that resulted in a lower back injury. In January 2004, an MRI showed mild multi-level lumbar spondylosis with mild central canal stenosis at L4-L5 and a left posterolateral focal protusion/herniation at L4-S1. Also, at this time, Randall Light, M.D., conducted an neurological evaluation and EMG study. He found Claimant to be neurologically intact but recommended continued conservative treatment.

On January 26, 2004, Dr. Berliner evaluated Claimant. After reviewing his MRI results, Dr. Berliner recommended epidural steroid injections and continued therapy. If Claimant's condition did not improve, Dr. Berliner would recommend he return for a preoperative evaluation. Claimant received two epidural steroid injections. Although the injections provided temporary relief, they did not provide the intended relief. Therefore, on March 22, 2004, Dr. Berliner recommended surgical intervention, an L4-5 laminectomy. Although Claimant had periods of time between January and April of 2004 in which he showed signs of improvement, he

² Adopted as part of the 1996 *Medical Fee Guideline*, 28 TEX. ADMIN. CODE § 134.201. *Medicine Ground Rules*, I.A. at 31.

ultimately needed surgery. The goal was to prevent surgery; therefore, not only did Dr. Wyatt treat Claimant to avoid surgery, Dr. Berliner recommended chiropractic treatment (and epidural steroid injections) to avoid surgery. Accordingly, the dates of service from December 22, 2003, through April 1, 2004, were medically necessary to treat Claimant's injury.³

The ALJ agrees with Provider that a post-surgery rehabilitation program was medically necessary. However, once Claimant either returned to work or his treatment reached a plateau, any further chiropractic care would not be medically necessary. It is unclear from the record whether Claimant returned to work in the summer of 2004. The evidence shows that Dr. Wyatt released Claimant to work on July 8, 2004, for six hours a day, although Claimant may not have returned to work due to his depression and chronic pain. The post-surgery chiropractic treatment between May 4, 2004, and June 30, 2004, was medically necessary as part of Claimant's post-surgery rehabilitation.⁴

The chiropractic treatment from July 2, 2004, through October 8, 2004, was not medically necessary because the Claimant had received sufficient post-surgery rehabilitation and should have returned to work by this time. In addition, the Official Disability Guidelines allow for six to eight weeks of post-operative therapy. Any additional therapy beyond the six to eight weeks should have been performed as part of a home exercise program.

³ Carrier has stipulated that the chiropractic care between November 24, 2003, and December 22, 2003, was medically necessary, with the exception of CPT Code 95851, lumbar range of motion with report, which was billed twice on November 24, 2003. With regard to CPT Code 95851, Carrier should reimburse Provider for only one lumbar range of motion with report on November 24, 2003.

⁴ Carrier paid for most of the chiropractic treatment in May and June 2004.

III. FINDINGS OF FACT

1. On _____, Claimant sustained a compensable lumbar injury.
2. Claimant sought emergency treatment for his injury.
3. Claimant was treated conservatively until November 17, 2003.
4. On November 24, 2003, Claimant began treatment with SCD Back & Joint Clinic, Ltd. (Provider).
5. John Wyatt, D.C., a chiropractor for Provider, diagnosed Claimant with sprain of the sacrum, grade II, and lumbar sprain/strain, grade II.
6. Throughout the treatment with Provider, Claimant received services such as electrical stimulation, mechanical traction, therapeutic exercises, chiropractic manipulation, and massage therapy.
7. Provider treated Claimant from November 24, 2003, through April 16, 2004, when Claimant had spinal surgery.
8. After the surgery, chiropractic treatment continued from May 4, 2004, through October 8, 2004.
9. Liberty Mutual Fire Insurance Company (Carrier) paid for most of the chiropractic care in May and June 2004, but did not pay for the chiropractic care from July 2, 2004, through October 8, 2004, claiming this care was not medically necessary.
10. Claimant's lumbar injury required more than the typical six weeks of chiropractic care because of complications, including a prior lumbar injury from a motorcycle accident.
11. Claimant initially sought treatment from another provider with no relief from his symptoms.
12. When Claimant began treatment with Provider, Dr. Wyatt had to essentially start over and develop a workable treatment plan that would provide relief to Claimant.
13. In January 2004, an MRI showed mild multi-level lumbar spondylosis with mild central canal stenosis at L4-L5 and a left posterolateral focal protusion/herniation at L4-S1.

14. In January 2004, Randall Light, M.D., conducted an neurological evaluation and EMG study. He found Claimant to be neurologically intact and recommended continued conservative treatment.
15. On January 26, 2004, Kenneth G. Berliner, M.D., evaluated Claimant. After reviewing Claimant's MRI results, Dr. Berliner recommended epidural steroid injections and continued physical therapy.
16. If Claimant's condition did not improve, Dr. Berliner would recommend he return for a preoperative evaluation.
17. Claimant received two epidural steroid injections. Although the injections provided temporary relief, they did not provide the intended relief.
18. On March 22, 2004, Dr. Berliner recommended surgical intervention, an L4-5 laminectomy.
19. Although Claimant had periods of time between January and April of 2004 in which he showed signs of improvement, he ultimately needed surgery.
20. Provider's goal was to prevent surgery. Therefore, not only did Dr. Wyatt treat Claimant to avoid surgery, Dr. Berliner recommended chiropractic treatment and epidural steroid injections to avoid surgery.
21. Six to eight weeks of post-surgery rehabilitation program is typical for an L4-5 laminectomy.
22. After six to eight weeks of post-surgery rehabilitation, Claimant should be participating in only a home exercise program and have returned to work as recommended by Dr. Wyatt.
23. Dr. Wyatt released Claimant to work on July 8, 2004, for six hours a day, although Claimant may not have returned to work due to his depression and chronic pain.
24. An Independent Review Organization (IRO) granted reimbursement to Provider for chiropractic care provided to Claimant from November 24, 2003, through May 11, 2004. An IRO denied reimbursement for chiropractic care from July 2, 2004, through October 8, 2004.
25. Carrier and Provider timely appealed the IRO decisions.

26. The Texas Department of Insurance, Division of Workers' Compensation sent notice of the hearing on March 9, and October 12, 2005. The hearing notice informed the parties of the matters to be determined, the right to appear and be represented, the time and place of the hearing, and the statutes and rules involved.
27. On September 27, 2006, Administrative Law Judge Michael J. O'Malley convened the hearing on the merits at the William P. Clements Building, 300 West 15th Street, Austin, Texas. Provider appeared and was represented by attorney William Maxwell. Carrier appeared and was represented by its attorney, Charlotte Saiter.
28. The record closed on November 17, 2006, after the parties filed closing arguments.

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, pursuant to TEX. LAB. CODE ANN. §§ 402.073 and 413.031(k) and TEX. GOV'T CODE ANN. ch. 2003.
2. Proper and timely notice of the hearing was provided to the parties in accordance with TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
3. Carrier and Provider timely requested a hearing in these cases pursuant to 28 TEX. ADMIN. CODE § 148.3.
4. 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).
5. Pursuant to 28 TEX. ADMIN. CODE § 148.14(a), Carrier had the burden of proving by a preponderance of the evidence that the chiropractic care provided to Claimant between November 24, 2003, and May 11, 2004, was not medically necessary.

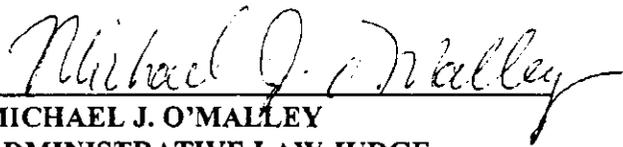
6. Pursuant to 28 TEX. ADMIN. CODE § 148.14(a), Provider had the burden of proving by a preponderance of the evidence that the chiropractic care provided to Claimant between July 2, 2004, and October 8, 2004, was medically necessary.
7. Under the *Medicine Ground Rules*, to qualify for reimbursement, Claimant's condition must have the potential to return him to functionality and the treatment must be specific to the injury and provide for the potential improvement of Claimant's condition. Adopted as part of the 1996 *Medical Fee Guideline*, 28 TEX. ADMIN. CODE § 134.201. *Medicine Ground Rules*, I.A. at 31.
8. The pre-surgery chiropractic care from November 24, 2003, through April 1, 2004, was medically necessary to treat the complications from Claimant's lumbar injury.
9. The post-surgery chiropractic care between May 4, 2004, and June 30, 2004, was medically necessary as part of Claimant's post-surgery rehabilitation.
10. The chiropractic care from July 2, 2004, through October 8, 2004, was not medically necessary because the Claimant had received sufficient post-surgery rehabilitation and should have returned to work by this time.
11. Carrier did not prove by a preponderance of the evidence that the chiropractic care provided from November 24, 2003, through May 11, 2004, was not medically necessary for Claimant. Carrier proved that the duplicate billing on November 24, 2003, for CPT Code 95981, lumbar range of motion with report, was not medically necessary.
12. Provider did not prove by a preponderance of the evidence that the chiropractic care provided from July 2, 2004, through October 8, 2004, was medically necessary.
13. Provider should be reimbursed for the services provided from November 24, 2003, through May 11, 2004, except for the duplicate billing of CPT Code 95981 on November 24, 2003. Provider should not be reimbursed for the services provided from July 2, 2004, through October 8, 2004.

ORDER

IT IS HEREBY ORDERED that Liberty Mutual Fire Insurance Company reimburse SCD Back & Joint Clinic, Ltd, for chiropractic care provided to Claimant from November 24, 2003, through May 11, 2004. Liberty Mutual Fire Insurance Company is not

required to reimburse SCD Back & Joint Clinic, Ltd, for chiropractic care provided to Claimant from July 2, 2004, through October 8, 2004.

SIGNED January 18, 2007.


MICHAEL J. O'MALLEY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARING