

LUMBERMEN’S MUTUAL	§	BEFORE THE STATE OFFICE
CASUALTYCOMPANY,	§	
Petitioner	§	
	§	
V.	§	
	§	OF
TEXAS DEPARTMENT OF	§	
INSURANCE, DIVISION OF	§	
WORKERS COMPENSATION AND	§	
EUGENE LEE BROWN, M.D.,	§	
Respondents	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

I. INTRODUCTION

Lumbermen’s Mutual Casualty Company (Carrier) requested a hearing to contest a medical interlocutory order (MIO) issued by the Texas Department of Insurance, Division of Workers’ Compensation (Division). The MIO ordered the Carrier to reimburse the Claimant for medical services and a prescription for pain reliever. The medical services and prescription were ordered in 2006 by Eugene Lee Brown, M.D., to treat a covered workers’ compensation injury incurred by Claimant. This decision finds that the Carrier has not shown that the services in dispute were not medically necessary.

I. PROCEDURAL HISTORY

On _____, Claimant sustained a covered worker’s compensation injury. On November 21, 2005, Carrier’s representative issued a Notice of Disputed Issues and Refusal to Pay Benefits (Notice). The basis of the Notice was Carrier’s contention that Claimant’s condition was an ordinary disease of life that was not causally related to Claimant’s original injury.¹ On December 28, 2005, Dr. Brown filed a Request for Prospective Review of Medical Care Not Requiring Preauthorization. Dr. Brown sought preauthorization for reimbursement by the Carrier of one office visit monthly for three months and a prescription for 30 capsules of Ultram (50 mg) to be used by

¹ Carrier Ex. A at 1.

Claimant over a 90-day period.² The matter was referred to an independent doctor, Juan Felipe Santos, M.D., a neurologist, for a Prospective Review Medical Examination (PRME). On February 3, 2006, Dr. Santos determined that the care requested for Claimant by Dr. Brown was medically necessary for treatment of the condition caused by her covered injury.³ On February 10, 2006, the Division issued an MIO ordering Carrier to pay for the identified care.⁴

On March 9, 2006, the case was referred to the State Office of Administrative Hearings (SOAH), and a hearing on the merits was scheduled for November 20, 2006. For a year, the parties sought and obtained a series of continuances of the hearing on the merits. On November 20, 2007, the hearing on the merits was convened. Counsel for Carrier was Meggan Crow, and counsel for Staff was Terra Thomas. The administrative record closed on November 20, 2007.

II. BACKGROUND

On _____, Claimant hurt her lower back while she was performing her duties at work. She was initially seen and treated by a number of physicians. Shortly after her injury, Claimant's physicians conducted a magnetic resonance imaging (MRI) study that revealed disc herniation at L4/L5. On October 17, 2001, Claimant underwent a lumbar laminectomy, but after surgery she continued to have severe low back pain with radicular pain to the left lower extremity. Claimant's surgeon requested lumbar epidural steroid injections, a repeat MRI, and a subsequent examination of Claimant in February 2002. On March 14, 2002, Mark A. Doyne, M.D., conducted a peer review of Claimant's records and expected Claimant to reach maximum medical improvement (MMI) between March and May 2002.⁵

In a designated doctor exam received on June 13, 2002, Jacqueline Kelly, M.D., noted

² Staff Ex. 2.

³ Staff Ex. 3.

⁴ Staff Ex. 1.

⁵ Staff Ex. 10.

that Claimant had been treated with chiropractic and physical therapy without much improvement. Further surgery was being considered.

However, Claimant was seven months pregnant at the time, limiting her pain control to Tylenol.⁶

On December 30, 2002, Ricardo S. Martinez, D.C., evaluated Claimant and determined that: (1) she had reached MMI, (2) her condition was unstable, (3) she was unable to resume regular work, and (4) she required ongoing chiropractic care. Dr. Martinez also concluded that Claimant's problems stemmed from a post-surgical failed back syndrome, HNP (Aherniation of the nucleus pulposus@) of the lumbar spine, spinal canal stenosis, and lumbar facet syndrome.⁷ Of these four, the last three are age-related conditions. On May 9, 2003, Dr. Martinez recommended that Claimant be permitted to return to work without restrictions.⁸

On December 23, 2004, Terry Troutt, M.D., conducted a retrospective review of Claimant's condition. He noted that since her injury, Claimant had been prescribed Flexeril, Naprosyn, Parafon Forte, physical therapy, chiropractic care, Tylenol, Darvocet, and Relafen. Dr. Troutt concluded that no further treatment or diagnostic testing would be reasonable or medically necessary for Claimant's injury.⁹

On December 27, 2004, Donald Gwartney, D.C., examined Claimant and issued a report that concurred with Dr. Troutt's conclusions.¹⁰

On March 28, 2005, Dr. Santos conducted a PRME and determined that chiropractic manipulation and treatments, spinal therapy, and hot and cold packs would not be medically necessary for the treatment of Claimant's condition. However, Dr. Santos also concluded that Claimant's injury was the cause of her need for her current medical regimen, which included

⁶ Staff Ex. 9.

⁷ Staff Ex. 8.

⁸ Carrier Ex. H at 2.

⁹ Carrier Ex. H at 4.

¹⁰ Carrier Ex. G at 4.

Tylenol and over-the-counter analgesics.¹¹

On April 25, 2005, Charles W. Kennedy, Jr., M.D., an orthopaedic surgeon, conducted another independent medical evaluation of Claimant. He examined Claimant in his office. He recommended another MRI, further medical studies, and an active exercise regimen. Dr. Kennedy noted that Claimant was not taking medications, had never been on any active exercise program, and that her lumbar pain had become worse.¹²

On February 3, 2006, Dr. Santos issued another PRME in which he concluded that the requested care was both necessary for treatment of Claimant's condition and was a producing cause of the condition requiring the care.¹³

On April 12, 2006, the Carrier received a surveillance report about the Claimant from a private investigator. The private investigator's report covered the period April 6-7, 2006, and included the surreptitious videotaping of the Claimant as she was taking care of her child, taking out the garbage, and working in a restaurant. The report also noted the private investigator's assessment of Claimant's lack of "hesitation in her movements or restrictions in her range-of-motion."¹⁴

On June 23, 2006, George M. Cole, D.O., an orthopaedic surgeon for MES Solutions, conducted a peer review that was based on Claimant's medical records and on the April 12, 2006, surveillance report. Dr. Cole concluded that "[t]his claimant has already received far too much care."¹⁵

Between July 3 and August 10, 2006, Michael J. Pendleton, M.D., saw Claimant and

¹¹ Carrier Ex. F at 2; Staff Ex. 6.

¹² Staff Ex. 7.

¹³ Staff Ex. 3.

¹⁴ Carrier Ex. C.

¹⁵ Carrier Ex. B.

noted her constant pain, decision not to take muscle relaxants because they interfered with her ability to perform her daily work, use of prescription Motrin for analgesia and Ambien to treat her sleep difficulties caused by muscle spasms, and extreme back pain during bowel movements. Among the diagnoses made by Dr. Pendleton was lumbosacral disk disease and acute exacerbation of pain following a laminectomy.¹⁶

On November 1, 2007, a Decision and Order was issued in *Lumbermen's Mutual Casualty Co. v. Texas Department of Insurance, Division of Workers Compensation and Michael J. Pendleton, M.D.*, SOAH Docket No. 454-07-0952.P1, by ALJ Kerry Sullivan. The facts in that case involved the care and medications prescribed by Dr. Pendleton for this

Claimant arising from the same covered worker's compensation injury as that described in this proceeding. Judge Sullivan upheld the MIO issued in that case, finding that the Carrier had not shown that the proposed services were not medically necessary.

III. DISCUSSION AND ANALYSIS

Employees have a right to necessary health care.¹⁷ Specifically, “[a]n 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 workers’ compensation laws entitle an employee 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.”¹⁸ In addition, the law provides that health care includes “all reasonable and necessary medical . . . services.”¹⁹ As the petitioner, the Carrier has the burden of proof in this proceeding.²⁰

¹⁶ Carrier Ex. E; Staff Ex. 5.

¹⁷ TEX. LABOR CODE ANN. §§ 401.011 and 408.021.

¹⁸ TEX. LABOR CODE ANN. § 408.021(a).

¹⁹ TEX. LABOR CODE ANN. § 401.011(19).

²⁰ TEX. LABOR CODE ANN. § 413.055; 28 TEX. ADMIN. CODE (TAC) § 148.14(a).

The Carrier called as its sole testifying witness John Sklar, M.D. Dr. Sklar examined Claimant's files but not the patient herself. Dr. Sklar concluded that Claimant's pain was related to the degeneration of her spine through the aging process and that her pain was not caused by her injury or her laminectomy to correct her injury. Counsel for the Carrier noted the conclusions of Drs. Troutt, Gwartney, and Cole in support of Dr. Sklar's conclusion. Staff called no witnesses, relying instead on the conclusions reached by Drs. Pendleton, Santos, Kennedy, Martinez, and Kelly.

Although the Claimant may well be suffering the effects of the ageing process, there was little evidence to suggest that the Claimant's covered injury (or the effects of her laminectomy) were unrelated to some of her lower back pain. The evidence does not suggest that the Claimant is lying about her pain, despite the non-professional conclusions of the private investigator's report about Claimant's physical problems,²¹ or that Claimant had already received "far too much care," as concluded by Dr. Cole.²²

Dr. Sklar's testimony was dispassionate and well-focused on the evidence available. Dr. Sklar's testimony paralleled closely the conclusions reached by Dr. Martinez who had found that Claimant's problems were caused by a combination of age- and injury-related problems. The evidence continues to describe an injury to Claimant's sacro-lumbar region of her spine, followed by ongoing pain emanating from that same location for which surgical intervention was ineffective in alleviating the pain. Subsequent courses of spinal manipulation, chiropractic treatments, and similar forms of palliative care were also ineffective. The ALJ finds that care proposed by Dr. Brown is medically necessary for treatment of Claimant's condition.

The Carrier has failed to show that the office visit and prescription medication were not medically necessary for treatment of Claimant's compensable injury. Therefore, the MIO is upheld.

²¹ Carrier's Ex. C.

²² Carrier Ex. B.

IV. FINDINGS OF FACT

1. On _____, the Claimant hurt her lower back while at work and experienced severe pain. On the date of Claimant's injury, the worker's compensation carrier for Claimant's employer was Lumbermen's Mutual Casualty Company (Carrier).
2. A magnetic resonance imaging (MRI) study revealed that Claimant had sustained a hernia to her lumbar disc at L4/L5.
3. On October 17, 2001, Claimant underwent a lumbar laminectomy.
4. Following her surgery, Claimant experienced continuing pain to her lower back and received extensive chiropractic and physical therapy, each of which was ineffective in providing relief.
5. As the result of Claimant's continuing pain resulting from her covered injury, Claimant continued to seek and obtain medical diagnoses from her physicians.
6. On November 21, 2005, Carrier's representative issued a Notice of Disputed Issues and Refusal to Pay Benefits (Notice) on the basis that Claimant's condition was an ordinary disease of life that was not causally related to Claimant's original injury.
7. On December 28, 2005, Eugene Lee Brown, Jr., M.D., filed a Request for Prospective Review of Medical Care Not Requiring Preauthorization.
8. Dr. Brown sought preauthorization for reimbursement by the Carrier of one office visit monthly for three months and a prescription for 30 capsules of Ultram (50 mg) to be used by Claimant over a 90 day period.
9. On February 3, 2006, Juan Felipe Santos, M.D., a neurologist, issued a report following a Prospective Review Medical Examination in which he concluded that the care requested for Claimant by Dr. Brown was medically necessary for treatment of the condition caused by her covered injury.
10. On February 10, 2006, the Texas Department of Insurance, Division of Workers' Compensation (Division) issued a Medical Interlocutory Order (MIO) ordering Carrier to pay for the identified care.
11. On March 9, 2006, the case was referred to the State Office of Administrative Hearings (SOAH).
12. On April 7, 2006, the Division issued a Notice of Hearing.
13. 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.

14. On November 20, 2007, a contested case hearing was held at SOAH's offices in Austin.
15. Carrier appeared at the hearing through its attorney, Meggan Crow, and Staff appeared through its attorney, Terra Thomas.
16. The record closed on November 20, 2007.

V. 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. §§ 402.073(b) and 413.055(c) 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. 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 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).
4. Carrier had the burden of proving by the preponderance of the evidence that the proposed services were not reasonably medically necessary to treat Claimant's compensable injury. 1 TEX. ADMIN. CODE § 155.41(b); 28 TEX. ADMIN. CODE § 148.14(a).
5. Based on the above Findings of Fact and Conclusions of Law, Carrier has failed to show that the treatment in issue was not medically necessary to treat Claimant's compensable injury.
6. Based on the above Findings of Fact and Conclusions of Law, the Medical Interlocutory Order should be upheld.

ORDER

IT IS ORDERED THAT the Division's interlocutory order of October 19, 2006, in this matter is upheld.

SIGNED November 28, 2007.

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