

**SOAH DOCKET NO. 454-09-4737.M4
DWC MR NO. M4-06-1190-01**

PATRICK CINDRICH, M.D.	§	BEFORE THE STATE OFFICE
	§	
V.	§	
	§	OF
ACE AMERICAN INSURANCE COMPANY	§	
	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Patrick Cindrich, M.D. (Provider) requested a hearing to contest a medical fee dispute resolution order issued by the Texas Department of Insurance, Division of Workers' Compensation (Division) regarding medical services provided to ___ (Claimant). In its order, the Division found that Provider was not entitled to reimbursement in the amount of \$16,508.00 from Ace American Insurance Company (Carrier) for preauthorized surgery. After considering the evidence and the arguments presented, the Administrative Law Judge (ALJ) finds that Provider is entitled to reimbursement of \$16,508.00, plus any applicable interest. Therefore, Carrier is ordered to reimburse that amount.

I. PROCEDURAL HISTORY, NOTICE AND JURISDICTION

The hearing on the merits convened on September 14, 2009, before ALJ Penny A. Wilkov at the State Office of Administrative Hearings (SOAH), Austin, Texas. Provider was represented by Attorney David N. Deaconson. Carrier was represented by Attorney Wendy D. Schrock. The hearing concluded that same day, but the record did not close until October 23, 2009, after written closing arguments were submitted. Because no issues were raised concerning notice or jurisdiction, those matters are addressed in the Findings of Fact and Conclusions of Law without further discussion.

II. DISCUSSION

A. Background

On ____, Claimant was injured while performing her job as a ____ after a forklift struck a pallet causing a box to fall on her, knocking her backwards. Claimant struck her head on a concrete floor and landed on her back.

After the accident, Claimant was treated by various doctors and diagnosed with the following medical conditions: left pelvic contusion (__ and __, ____, Mark Norwide, M.D.); lumbar disc displacement, lumbar hyperflexion/hyperextension injury, sacroiliac sprain/strain, cervical hyperflexion/hyperextension injury, headache, scoliosis, posterior joint degenerative disc disease, and moderate spondylolisthesis (October 10 and 12, 2004, Ronald Linderman, D.C.); mild facet joint hypertrophy at L4-5, grade spondylolisthesis, disc space narrowing, and deformity and pars defects (October 18, 2004, Jim Olmstead, M.D.), right motor nerve demyelization and axonal injuries (October 29, 2004, Roger Harman, M.D.); and muscle tightness and spasms (November 10, 2004, Randolph Veazey, M.D.).¹

On December 20, 2004, the Texas Workers' Compensation Commission (TWCC) designated doctor, Steven Doores, M.D., opined that Claimant had a lumbosacral strain, lumbar disc displacement, and a sacroiliac strain. He noted that Claimant was under active consideration for lumbar spinal surgery, but also observed that Claimant may have symptom magnification issues.²

1. Preauthorized Surgery

¹ Carrier's Exhibit 3, page 2.

² Carrier's Exhibit 3, page 3.

On January 6, 2005, Provider, who is a neurosurgeon, examined Claimant and recommended an anterior lumbar interbody fusion with posterior decompression, instrumentation, and arthrodesis to treat her injury.³

On January 26, 2005, Hartford Dallas Workers Comp., in association with Carrier, issued preauthorization H490969938, following Claimant's diagnosis of Lumbar Disc Displacement. The requested service approval included CPT, Alif with BM Pump, Nonsegmental Pedicle Screws, Instrumentation, Arthrodesis, Stealth CT (Pre Op), and Nerve Monitoring with 1-2 day in-patient stay at Hillcrest Baptist Medical Center.⁴

On February 16, 2005, Provider successfully performed the preauthorized surgery: (1) an L5-S1 anterior lumbar interbody fusion with biomechanical implant times two using BMP for arthrodesis and (2) posterior non-segmental instrumentation L5-S1 with intraoperative nerve monitoring. A bill for \$16,723.00⁵ was submitted to Carrier on March 1, 2005.⁶ On May 31, 2005, Carrier sent an Explanation of Benefits (EOB) to Provider with the following explanation:

W2- Workers' Compensation Claim Adjudicated as Non-Compensable. Carrier not liable for claim or service treatment. Reimbursement is denied as the claim has been disallowed and is not compensable.

2. TWCC Notice of Disputed Issue

On January 3, 2005, prior to the preauthorization for surgery approval, a TWCC Notice of Disputed Issue, a TWCC PLN11 form, was sent to Claimant directly by Carrier.⁷ The form stated that:

³ *Id.*

⁴ Provider's Exhibit 1, page 6.

⁵ Although the amount billed was originally \$16,723.00 in 2005, the table of disputed services shows a total amount of \$16,508.00 due as of May 2009. Provider's Exhibit 1.

⁶ Carrier's Exhibit 4, page 1.

⁷ Carrier's Exhibit 5, page 1.

We are disputing entitlement of degenerative changes to the Lumbar including disc narrowing L5-S1 and bilateral L5-S1 spondylolisthesis, mild facet joint hypertrophy L4-L5 because there was no injury/occupation disease involving degenerative changes to the Lumbar including disc narrowing L5-S1 and bilateral L5-S1 spondylolisthesis, mild facet joint hypertrophy L4-L5 in the course and scope of employment.

3. TWWC Hearing Officer's Decision and Order

On August 12, 2005, a TWCC hearing officer entered a Decision and Order. The decision provided that Claimant's compensable injury did not extend to and include spondylolisthesis and spondylosis at L5/S1 and that Claimant did not sustain disability from ____, and continuing through the date of the hearing on August 8, 2005.⁸ The TWCC hearing officer, however, addressed only two issues:

1. Does the Claimant's compensable injury of ____, extend to and include spondylolisthesis and spondylosis at L5/S1?
2. Did the Claimant sustain disability from ____, to present as a result of the compensable injury sustained on _____?⁹

On November 21, 2005, the Decision and Order became final.¹⁰

B. 2005 Applicable Law

A carrier who preauthorizes treatment is liable for all reasonable and necessary medical costs relating to the health care when preauthorization of any of the 14 listed health care procedures (including spinal surgery, surgical services, and inpatient hospital admissions) are approved prior to providing the surgery.¹¹ The carrier is not liable, however, for preauthorized treatment if there is a

⁸ Carrier's Exhibit 3, page 4.

⁹ Carrier's Exhibit 3, page 1.

¹⁰ *Id.*

¹¹ 28 Tex. Admin. Code § 133.600(b).

final adjudication that the injury is not compensable or that the health care was provided for a condition unrelated to the compensable injury.¹² By definition, “final adjudication” means the commission has issued a final decision or order that is no longer subject to appeal by either party.¹³

Further, the carrier is required to include in an approval of preauthorization: the specific health care; the number of requested treatments and specific time period to complete the treatments; and “notice of any unresolved denial of compensability or liability or an unresolved dispute of extent of or relatedness to the compensable injury.”¹⁴

C. Evidence and Argument

1. Provider

Provider, a neurosurgeon since 1982, testified that Claimant presented with pain down her lower back and leg, caused by her purported injury after being struck with a forklift. He requested and received preauthorization, simply stated, for surgery to remove the disc, place a spacer in the disc, add bone protein to stimulate growth, and put screws in the back to hold it place. No surgery was performed other than what was included in the preauthorization, according to Provider. He testified that he did not receive a copy of the TWCC Notice of Disputed Issue, TWCC PLN11 form, which was sent to Claimant directly by Carrier. Provider testified that no extent of injury decision had been made at this point, and his opinion was that the symptoms were caused by the accident because prior to the accident Claimant never had these symptoms. He also testified that he did not participate in the TWCC hearing.

Provider argues that the TWCC Notice of Disputed Issue, TWCC PLN11 form, was sent to Claimant on January 3, 2005, prior to the preauthorization on January 26, 2005, and that the preauthorization contains no notice of any unresolved denial of compensability or any notice of unresolved dispute of extent of injury. Provider argues that because the duty to notify the physician

¹² 28 Tex. Admin. Code § 133.600(c).

¹³ 28 Tex. Admin. Code § 133.600(a)(3).

¹⁴ 28 Tex. Admin. Code § 133.600(f)(5).

is on the carrier, if the preauthorization is silent as to any unresolved dispute, then the carrier is representing to the physician that no dispute exists.¹⁵ If Provider had been notified, then he would have had an opportunity to address compensability issues or reconsidered the options.

Further, Provider argues that without any notice of a compensability dispute, Carrier cannot rely on a subsequent order from a hearing, which also occurred without notice to Provider.

2. Carrier

Carrier argues that Provider was put on notice of the dispute since the preauthorization letter contains at the bottom under the heading Texas Department of Insurance Complaint Process, the following warning, “This notice does not guarantee payment and/or services or compensability of the claim.”¹⁶ Carrier also notes that Provider was notified on the EOBs that compensability was disputed which could have been challenged through the appeals process. Further, Carrier points out that the Notice of Disputed Issue instructions only stated that a copy should be sent to the Division and to Claimant.

Carrier also asserts that it is not liable for preauthorized services since there has been a final adjudication that the injury is not compensable or the healthcare was provided for a condition unrelated to the compensable injury. Here, there was a final TWCC decision that found that the injury did not extend to or include spondylolisthesis or spondylosis, and because the doctor performed surgery for these conditions, he should not be reimbursed.

D. Analysis

The ALJ concludes that the preauthorized surgical services, based upon a diagnosis which included, but was not limited to, spondylolisthesis and spondylosis, was provided for Claimant’s compensable injury to her back. Thus, Carrier’s denial of reimbursement based upon “extent of injury” is not justified.

¹⁵ Provider’s Post Hearing Closing Argument, page 3.

¹⁶ Carrier’s Post Hearing Closing Argument, page 5.

The Carrier is correct in that it did not waive its right to contest compensability when it preauthorized treatment. However, in doing so, Carrier was required to comply with TEX. LAB. CODE § 408.027(e), which provides that an insurance carrier that disputes the amount of payment or the health care provider's entitlement to payment shall send to MDR, the *provider*, and the injured employee a report that sufficiently explains the reasons for the reduction or denial of payment. Here, there was no evidence that Carrier sent the TWCC Notice of Disputed Issue, TWCC PLN11, to Provider on January 3, 2005, although a Preauthorization Approval was issued to the Provider three weeks later on January 26, 2005. Further, on May 31, 2005, Carrier sent Provider an EOB with the reason given as "W2- Workers' Compensation Claim Adjudicated as Non-Compensable." Given that a Decision and Order by a TWCC hearings officer was entered August 12, 2005, and became final in November 2005, it is difficult to ascertain what claim had been adjudicated as non-compensable on May 31, 2005. Therefore, the record does not support Carrier's position that adequate notice of the reason for denial was given to Provider in this case.

Second, the TWCC hearing officer was only presented with a limited scope of inquiry: did Claimant's compensable injury of _____, extend to and *include* spondylolisthesis and spondylolysis at L5/S. The TWCC hearing officer concluded that Claimant's injury did not extend to and include spondylolisthesis and spondylolysis at L5/S1 but did find that there was a compensable lumbar sprain/strain, left hip contusion, left hip strain and left hand strain. The hearing officer, therefore, did not find that the injury sustained by Claimant was confined to these conditions, but simply that the injury did not include spondylolisthesis and spondylolysis at L5/S.

Here, Provider, a neurosurgeon, confirmed that Claimant presented with pain down her lower back and leg, caused by her injury after being struck with a forklift. He testified that he requested and received preauthorization for surgery related to her compensable back injury. His opinion was that the symptoms were caused by the accident because prior to the accident Claimant never had these symptoms. Accordingly, the medical and procedural evidence establishes that the preauthorized surgical services rendered by Provider were for treatment of injuries found to be compensable by the TWCC hearing officer.

Third, the TWCC decision recited an extensive list of medical professionals who examined Claimant and reported a diagnosis and observed symptoms similar to those described by Provider.

Dr. Doores, the TWCC designated doctor, evaluated Claimant and reported that Claimant had pain with positive straight leg raising, positive lordosis, and had tenderness of the lumbar spine. He noted that Claimant was walking with crutches. Dr. Doores acknowledged that Claimant had a lumbosacral strain, lumbar disc displacement, and a sacroiliac strain and reported that Claimant had lumbar pain. This is significant because the TWCC hearing officer's decision was not intended to exclude treatment for lumbar strain and pain, as treated by Provider.

Lastly, it is difficult to separate Claimant's treatment for the compensable back injury from conditions unrelated to the injury. Based on Claimant's perception of pain, symptoms, medical records, and Provider's testimony, it is reasonable to determine that the preauthorized surgical services were necessary because of, and emanating from, the compensable back injury. This is particularly appropriate since Carrier did not present any witness to refute Provider's evidence that the health care in question was related to the compensable injury.

Under the circumstances presented, the ALJ concludes that the preauthorized surgical services, based upon a diagnosis which included, but was not limited to spondylolisthesis and spondylolysis, was provided for Claimant's compensable injury to her back and Carrier's denial of reimbursement based upon "extent of injury" is not justified. Provider presented documentation of the various procedures in issue and reflecting what services were provided. The ALJ, therefore, finds that Provider is entitled to reimbursement of \$16,508.00, plus any applicable interest for the services provided to Claimant. In support of this decision, the ALJ makes the following findings of fact and conclusions of law.

III. FINDINGS OF FACT

1. On __, __. (Claimant) was injured while performing her job as a __ after a forklift struck a pallet causing a box to fall on her, knocking her backwards. Claimant struck her head on a concrete floor and landed on her back.
2. Claimant's compensable injury included lumbar sprain/strain, left hip contusion, left hip strain and left hand strain.
3. On the date of injury, Ace American Insurance Company (Carrier) was the workers' compensation insurance carrier for Claimant's employer.
4. On January 20, 2005, Patrick Cindrich, M.D. (Provider) sought preauthorization from Carrier for surgical services related to Claimant's compensable injury.

5. On January 26, 2005, Hartford Dallas Workers Comp., associated with Carrier, issued Preauthorization H490969938, following Claimant's diagnosis of Lumbar Disc Displacement.
6. Carrier preauthorized services included CPT, Alif with BM Pump, Nonsegmental Pedicle Screws, Instrumentation, Arthrodesis, Stealth CT (Pre Op), and Nerve Monitoring with 1-2 day in-patient stay at Hillcrest Baptist Medical Center.
7. On February 16, 2005, Provider successfully performed the preauthorized services described in Finding of Fact No. 6, and Provider billed Carrier \$16,723.00 on March 1, 2005.
8. On May 31, 2005, Carrier sent an Explanation of Benefits (EOB) to Provider with the following explanation: W2- Workers' Compensation Claim Adjudicated as Non-Compensable.
9. After Carrier denied reimbursement for the services, Provider requested medical fee dispute resolution through the Texas Department of Insurance, Division of Workers' Compensation (Division).
10. On May 26, 2009, the Division issued its findings and decision, holding that Carrier was not obligated to reimburse Provider for the disputed services.
11. On June 10, 2009, Provider requested a hearing before the State Office of Administrative Hearings (SOAH) to challenge the Division's order.
12. The Division referred the matter to SOAH on June 15, 2009.
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. The hearing on the merits convened on September 14, 2009, before Administrative Law Judge Penny A. Wilkov at the SOAH, Austin, Texas. Provider was represented by Attorney David N. Deaconson. Carrier was represented by Attorney Wendy D. Schrock. The record closed on October 23, 2009, after written closing arguments were submitted.
15. On August 12, 2005, a TWCC hearings officer entered a Decision and Order finding that Claimant's compensable injury did not extend to and include spondylolisthesis and spondylosis at L5/S1, but did find that there was a compensable lumbar sprain/strain, left hip contusion, left hip strain and left hand strain.
16. The preauthorized surgical services in issue, based upon a diagnosis that included, but was not limited to spondylolisthesis and spondylolysis, were provided for Claimant's compensable injury to her back.
17. The preauthorized surgical services rendered by Provider were for treatment of injuries

found to be compensable by the TWCC hearing officer.

18. The fair and reasonable reimbursement rate for the services provided in this case is \$16,508.0 plus interest.

IV. CONCLUSIONS OF LAW

1. SOAH has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a decision and order. TEX. LAB. CODE §§ 402.073(b), 413.031, 413.0311, and 413.055; and TEX. GOV'T. CODE ch. 2003.
2. Notice of the hearing was proper and timely. TEX. GOV'T. CODE §§ 2001.051 and 2001.052.
3. Provider had the burden of proving by the preponderance of the evidence that it was entitled to reimbursement for the disputed services. 1 TEX. ADMIN. CODE § 155.427; 28 TEX. ADMIN. CODE § 148.14(a).
4. Based on the above findings of fact and conclusions of law, Carrier is liable to Provider for \$16,508.00, and is required to pay that amount to Provider, because the procedures in issue were properly preauthorized, were provided for Claimant's compensable injury, and have not been previously reimbursed by Carrier.

ORDER

THEREFORE, IT IS ORDERED THAT Ace American Insurance Company is required to pay the sum of \$16,508.00, plus applicable interest, to Patrick Cindrich, M.D. in reimbursement for the surgical services rendered in this case.

SIGNED November 18, 2009.

**PENNY WILKOV
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**