

**SOAH DOCKET NO. 454-09-3006.M5
MR DOCKET NO. M5-05-2517-01**

_____, Petitioner	§	BEFORE THE STATE OFFICE
	§	
VS.	§	
	§	OF
	§	
HORIZON HEALTH,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

__(__) seeks relief from an order of the Medical Review Division (MRD) of the Texas Department of Insurance, Division of Workers' Compensation (TDI-DWC), requiring it to reimburse Horizon Health (Horizon) \$14,398.29 for treatment provided to an injured city employee (Claimant) during 2004. The Administrative Law Judge (ALJ) concludes __ proved the treatment in dispute was not medically reasonable or necessary and orders denial of Horizon's claim.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The State Office of Administrative Hearings (SOAH) has jurisdiction over this proceeding, including the authority to issue a decision and order, pursuant to TEX. LAB. CODE ANN. § 413.031(k) and TEX. GOV'T CODE ANN. ch. 2003.

Claimant underwent physical therapy with Horizon from May 26 to August 27, 2004, the disputed dates of service. ____, as the self-insured workers' compensation insurance carrier, denied reimbursement for the treatment. Horizon filed a request for medical dispute resolution with the MRD. The MRD referred Horizon's request to an Independent Review Organization (IRO). The IRO found the disputed physical therapy was reasonable and medically necessary and ordered \$14,338.29 in reimbursement. The MRD itself reviewed CPT Code 99080-73 for four dates of service between May 26 and August 27, 2004, and ordered reimbursement of \$15 per visit for a total of \$60. The total ordered reimbursement was \$14,398.29. The MRD issued its decision, granting

Horizon's request, on August 30, 2005.¹

_____ appealed the MRD decision to Travis County District Court, which remanded the case to TDI-DWC on November 10, 2008.² TDI-DWC sent its docket request to SOAH on March 9, 2009. The hearing was originally set for April 20, 2009,³ but was continued several times, ultimately to April 16, 2010.⁴

On June 8, 2009, Horizon filed an untimely Motion for Summary Judgment that was denied on June 22, 2009. Horizon filed its First Amended Motion for Summary Judgment on August 1, 2009, and the ALJ denied the amended motion on August 28, 2009. Horizon re-urged its Motion for Summary Disposition at the hearing on the merits to preserve it for the record.

The hearing on the merits convened April 16, 2010, before ALJ Sharon Cloninger at SOAH, William P. Clements State Office Building, 300 West 15th Street, Fourth Floor, Austin, Texas. _____ was represented by Timothy R. White, attorney. Annie Basu, attorney, represented Horizon. The hearing adjourned and the record closed that same day.

II. APPLICABLE LAW

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;

¹ Horizon Ex. 2 and _____ Ex. A.

² According to a March 6, 2009 letter to TDI-DWC from _____ attorney Timothy R. White, the remand was necessary in light of a decision by Travis County District Court Judge Stephen Yelenosky in *HCA Healthcare Corp., et al. v. TDI, et al.*, Cause No. D-1-GN-06-000176, which declared the old MDR appeal statute, TEX. LAB. CODE ANN. § 413.031(k), unconstitutional. Mr. White's letter states Judge Yelenosky decided a hearing must be held on the record before a case can be appealed to District Court for substantial evidence review. Mr. White's letter is attached to TDI-DWC's request that SOAH docket the case and is not in evidence.

³ SOAH's file contains no hearing notice and none was introduced into evidence. The ALJ gleans the original hearing date from the Agreed Motion for Continuance filed on March 26, 2009. Notice was not objected to by either party and both of them fully participated in the proceeding.

⁴ The Order of Continuance setting the evidentiary hearing for April 16, 2010, was issued on September 29, 2009.

(2) promotes recovery; or (3) enhances the ability of the employee to return to or retain employment.
TEX. LAB. CODE ANN. § 408.021(a).

Under 28 TEX. ADMIN. CODE (TAC) § 148.14(a), Houston, as the petitioner, has the burden of proof in this proceeding.

III. EVIDENCE AND DISCUSSION

A. Background

Claimant, ____, sustained a compensable injury to her right arm and hand on ____, when she tried to loosen a fire hydrant.⁵ Two days later, Claimant saw Carrie Schwartz, D.C., at Horizon. From February 27 to May 20, 2004, Claimant was in physical therapy with Dr. Schwartz three times weekly.⁶

Subsequently, Dr. Schwartz provided Claimant with physical therapy during 42 office visits from May 26, 2004, through August 27, 2004, the disputed dates of service. According to the Table of Disputed Services,⁷ ____ did not reimburse Horizon for office visits, therapeutic exercises, neuromuscular re-education, and manual therapy techniques, CPT codes 97110, 97112, 99212, and 99213. The reason ____ gave for nonpayment on the Explanations of Benefits (EOBs) was code V, unnecessary treatment (with peer review).⁸

B. Independent Medical Evaluation (IME)

⁵ Horizon Ex. 3 at 7.

⁶ The medical records for these dates of service are not in evidence. The only references to the February-May 20, 2004 treatment are contained in the Independent Medical Evaluation (IME) report prepared by Charles George, M.D., on May 28, 2004 (*See* Houston Ex. B) and the Designated Doctor examination by William W. Janes, M.D. (*See* Horizon Ex. 3 at 32-35). The ALJ notes that Dr. George's IME report was not provided to the IRO. Dr. Janes' Designated Doctor report, which was reviewed by the IRO, contains only a one-sentence reference to the prior physical therapy.

⁷ Horizon Ex. 3 at 58-70.

⁸ ____ Ex. D at 1-21 and Horizon Ex. 3 at 71-90.

The peer review relied upon by ___ in its denial of Horizon's claim was the IME performed by Dr. George, an orthopedic surgeon, on May 20, 2004.⁹ During Dr. George's evaluation, Claimant complained of moderate pain from the shoulder down her entire arm and said the pain worsened with activity. Dr. George had no diagnostic studies for his review. His own testing of Claimant showed equal range of motion on the right and left sides of the body for the shoulders, elbow joints, elbow joint rotation, and wrists; normal muscle strength in the shoulders, elbows, forearms, wrists, and hands; and grip strength of 5 in the right hand and 80 in the left hand. At the hearing, Dr. George testified that he gave little weight to the grip strength test, because the test is subjective; that is, a patient can pretend to squeeze the instrument. His diagnosis of Claimant's condition was "cervical/arm type syndrome."

Dr. George concluded that further chiropractic treatment of Claimant's right arm and wrist would be of no benefit to her. Instead, because he believed nerve impingement could be the source of Claimant's pain, he agreed that she should undergo the scheduled EMG/nerve conduction studies of the cervical spine and right upper extremity. He further concluded that she could return to work on light duty.

C. Claimant's Medical Treatment

In addition to Dr. George's IME, ___ relies on the following evidence reviewed by the IRO in support of its position that Claimant's treatment on the disputed dates of service was not reasonable or medically necessary:

- An April 8, 2004 MRI of Claimant's right wrist indicated no ligament or tendon pathology or fracture, but identified a small amount of nonspecific fluid along the volar aspect of the distal radius which could be related to a focal soft tissue contusion to that area.¹⁰ An MRI of the right elbow conducted on the same date indicated a small elbow joint effusion was present, with mild sprain of the radial

⁹ ___ Ex. B.

¹⁰ Horizon Ex. 3 at 11.

collateral ligament, and acute tendonitis of the triceps tendon at its insertion of the proximal ulna.¹¹

- On May 12, 2004, Claimant was seen by Lubor Jarolimek, M.D., who found she had right upper extremity radiculopathy, cubital tunnel syndrome, carpal tunnel syndrome, and right grip strength weakness. Dr. Jarolimek recommended that Claimant undergo a bilateral upper extremity EMG, continue active rehabilitation, improve right upper extremity strength, and take non-steroidal anti-inflammatory medication for pain and discomfort.¹²
- On June 3, 2004, Claimant underwent an electrodiagnostic evaluation because of right elbow and forearm pain that traveled into her right hand. The evaluation results were within the normal range with no evidence of cervical radiculopathy, plexopathy, or any other peripheral nerve or muscle disease.¹³
- On June 24, 2004, Claimant was evaluated by Ben Tinongson, M.D., a pain management specialist. Claimant complained of burning pain traveling from her right shoulder to the neck and down the right arm to the forearm, and muscle spasms and tightness in the neck, trapezius, and shoulder area. Dr. Tinongson found Claimant's right shoulder and right upper extremity range of motion to be restricted to abduction; moderate tenderness as to palpation with muscle spasm over the cervical paraspinal musculature and trapezius muscle; mild swelling; and parathesia of the right upper extremity. Dr. Tinongson recommended a diagnostic right stellate ganglion nerve block in an effort to confirm or rule out this condition as the source of Claimant's pain. He said that depending on her response to the nerve block, she might need a series of stellate ganglion nerve blocks in conjunction with an aggressive exercise-based rehabilitation program.¹⁴
- On July 14, 2004, William W. Janes, M.D., performed a Designated Doctor examination of Claimant, who had not returned to work since her ___ injury date. Claimant told him her pain level was at 7 out of 10 that day, with 10 being the most severe pain. Dr. Janes reported that for approximately four months, Claimant had been treated with conservative care including physical therapy, TENS unit, ultrasound and massage therapy. Claimant told him that exercise, physical therapy, hot packs, cold packs, massage, ultrasound, medication, and the TENS unit eased her pain. Dr. Janes concluded Claimant had not reached maximum medical

¹¹ Horizon Ex. 3 at 12.

¹² Horizon Ex. 3 at 17-18.

¹³ Horizon Ex. 3 at 13-14 and ___ Ex. F at 3-4.

¹⁴ Horizon Ex. 3 at 23-24. Dr. Tiongson performed a right stellate ganglion nerve block on Claimant on October 20, 2004. Horizon Ex. 3 at 21-22.

improvement and recommended her for a work hardening or pain program to be followed by a functional capacity evaluation.¹⁵

- Horizon’s treatment notes¹⁶ for the disputed dates of service show Claimant received the identical treatment on each of the 42 visits with no objective evidence of improvement in her condition, such as range of motion analysis or specific strength analysis.

Only one doctor recommended physical therapy for Claimant during the disputed dates of service. Orthopedic surgeon Andrew K. Lee saw Claimant on July 12, 2004, “due to [her] persistent symptoms despite conservative management.”¹⁷ He diagnosed Claimant with right shoulder impingement syndrome and cervical strain. He recommended physical therapy for the neck and shoulder and use of anti-inflammatory medications. The ALJ notes that Claimant reported her injury to be to her shoulder, elbow, and forearm, not to her neck. Dr. Lee did not tie Claimant’s cervical strain to her compensable injury. Dr. Lee did not state why he recommended physical therapy when ongoing conservative treatment had not alleviated Claimant’s symptoms.

In addition to Dr. George’s IME and the documents reviewed by the IRO, ___ relied on a Peer Review prepared by William E. Blair, Jr., M.D., on June 13, 2009.¹⁸ Dr. Blair is an orthopedic surgeon who is certified in the evaluation of disability and impairment rating by the American Academy of Evaluating Disability Physicians.¹⁹ Dr. Blair strongly disagreed with the IRO decision. He noted that Dr. George’s clinical examination of Claimant on May 28, 2004, was essentially unremarkable. He said the majority of diagnoses in Claimant’s case were based on subjective issues, not on objective data. He observed that Horizon’s treatment of Claimant on the disputed dates of service did not result in a “materialistic improvement” of her condition.²⁰ Dr. Blair concluded that, at most, Claimant sustained a sprain/strain overuse syndrome, which would have

¹⁵ Horizon Ex. 3 at 32-35.

¹⁶ Horizon Ex. 3 at 39-52. *See* conclusion by peer reviewer William E. Blair, Jr., M.D., ___ Ex. C at the bottom of page 15.

¹⁷ Horizon Ex. 3 at 19.

¹⁸ ___ Ex. C.

¹⁹ ___ Ex. C at 17.

²⁰ ___ Ex. C at 17.

resolved with or without medical care.²¹

Dr. Blair further opined that any treatment of Claimant's compensable injury should have lasted no more than 6-to-12 weeks,²² not from February 27 to August 27, 2004. As a basis for his opinion, Dr. Blair stated that the disability time frame for supportive treatment for wrist sprain or strain would be between 21 and 42 days.²³ Similarly, he said the disability time frame for supportive treatment for a sprain or strain to the elbow to be between 14 and 42 days.²⁴ Dr. Blair's opinion was based in part on Claimant's unremarkable MRI scan,²⁵ the lack of evidence of any structural deficiency, and Claimant's normal sensation, strength, reflexes and range of motion.²⁶ He said his visit-by-visit review of Horizon's records for the disputed dates of service show no medical basis to support the necessity, frequency, or duration of Claimant's treatment.²⁷

IV. CONCLUSION

___ proved by a preponderance of the evidence that Horizon's treatment of Claimant on the disputed dates of service was not reasonable or medically necessary under TEX. LAB. CODE ANN. § 408.021(a). Horizon's treatment records for the disputed dates of service contain no evidence that the chiropractic treatment cured or relieved the effects naturally resulting from Claimant's compensable injury, promoted her recovery, or enhanced her ability to return to work. Before the first disputed date of service (May 27, 2004) Claimant had already undergone 12 weeks of conservative treatment with no documented subjective or objective improvement in her condition. The ALJ is persuaded by Dr. Blair that Claimant's condition could have resolved on its own or with, at most, 12 weeks of conservative treatment. By the first disputed date of service, Claimant had

²¹ Houston Ex. C at 16.

²² Houston Ex. C at 10.

²³ Houston Ex. C at 5.

²⁴ Houston Ex. C at 5.

²⁵ Houston Ex. C at 10.

²⁶ Houston Ex. C at 14.

²⁷ Houston Ex. C at 15.

already undergone 12 weeks of conservative treatment and was scheduled for an EMG/nerve conduction study. No further physical therapy was warranted and Horizon's treatment on the disputed dates of service was neither reasonable nor medically necessary.

V. FINDINGS OF FACT

1. Claimant, _____, sustained a compensable injury to her right arm and hand on _____, when she tried to loosen a fire hydrant.
2. Claimant's right shoulder, elbow, and forearm were sprained or strained when she was injured.
3. Two days following her injury, Claimant saw Carrie Schwartz, D.C., at Horizon Health (Horizon) and underwent physical therapy three times weekly from February 27 to May 20, 2004.
4. Subsequently, Dr. Schwartz provided Claimant with physical therapy during 42 office visits from May 26, 2004, through August 27, 2004 (the disputed dates of service).
5. Horizon sought reimbursement for Claimant's care from the ____ (____), Claimant's employer and a self-insured workers' compensation carrier.
6. ____ denied payment for the disputed dates of service based on an Independent Medical Evaluation (IME) by Charles George, M.D., who examined Claimant on May 20, 2004.
7. Horizon filed a request for medical dispute resolution with the Medical Review Division (MRD) of the Texas Department of Insurance, Division of Workers' Compensation (TDI-DWC).
8. The MRD referred the medical necessity issues to an Independent Review Organization (IRO).
9. The IRO found the disputed physical therapy to be medically necessary in the amount of \$14,338.29.
10. The MRD itself reviewed CPT Code 99080-73 for four dates of service between May 26 and August 27, 2004, and on August 30, 2005, ordered reimbursement of \$15 per visit or \$60 total in addition to the \$14,338.29 recommended by the IRO, for a total of \$14,398.29.
11. ____contested the MRD decision in Travis County District Court.
12. The District Court remanded the proceeding to the MRD on November 10, 2008.

13. On March 9, 2009, TDI-DWC requested that SOAH docket the case.
14. In a March 26, 2009 Agreed Motion for Continuance, the parties referenced a hearing date of April 20, 2009. Notice of the April 20, 2009 hearing date is not in evidence. Neither party contested proper notice. Both parties fully participated in this proceeding from March 26, 2009, through April 16, 2010, when the hearing on the merits was held pursuant to the Order of Continuance issued on September 29, 2009.
15. The hearing was held on April 16, 2010, before ALJ Sharon Cloninger at SOAH, William P. Clements State Office Building, 300 West 15th Street, Fourth Floor, Austin, Texas. ___ was represented by Timothy R. White, attorney. Annie Basu, attorney, represented Horizon. The hearing concluded and the record was closed that same day.
16. As of the May 20, 2004 IME, Claimant had equal range of motion in the right and left shoulders, elbow joints, elbow joint rotation, and wrists; normal muscle strength in the shoulders, elbows, forearms, wrists, and hands; and grip strength of 5 in the right hand and 80 in the left hand.
17. The grip strength test is a subjective test that should be given little weight.
18. MRIs of Claimant's right wrist and elbow taken on April 8, 2004, were unremarkable.
19. On June 3, 2004, Claimant underwent an electrodiagnostic evaluation of the right elbow and forearm with results in the normal range.
20. On June 24, 2004, Ben Tinongson, M.D., a pain management specialist, recommended that Claimant undergo a right stellate ganglion nerve block which was performed in October 2004, after the disputed dates of service.
21. On July 14, 2004, Claimant was not at maximum medical improvement and a work hardening or pain program to be followed by a functional capacity evaluation was recommended for her.
22. During the disputed dates of service, Claimant received the identical treatment on each of the 42 visits with no objective evidence of improvement in her condition.
23. Conservative treatment of Claimant's compensable injury should have lasted no longer than 12 weeks.
24. Claimant had already undergone 12 weeks of conservative treatment by May 27, 2004, the first disputed date of service.

VI. CONCLUSIONS OF LAW

1. SOAH has jurisdiction over this proceeding, including the authority to issue a decision and order, pursuant to TEX. LAB. CODE ANN. § 413.031(k) and TEX. GOV'T CODE ANN. ch. 2003.
2. The parties did not object to adequate and timely notice of the hearing and waived objection by their full participation in the proceeding.
3. ___ carried its burden of proof. 28 TEX. ADMIN. CODE § 148.14(a).
4. Based on the above Findings of Fact, Horizon's treatment of Claimant on the disputed dates of service was not reasonable or medically necessary under the requirements of TEX. LAB. CODE ANN. § 408.021(a).
5. ___ should not reimburse Horizon for the disputed medical services.

ORDER

___ shall not reimburse Horizon Health \$14,398.29 for the services in dispute in this matter.

SIGNED June 15, 2010.

**SHARON CLONINGER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**