

MEDICAL CONTESTED CASE HEARING NO. 20006

DECISION AND ORDER

This case is decided pursuant to Chapter 410 of the Texas Workers' Compensation Act and Rules of the Division of Workers' Compensation (DWC) adopted thereunder. For the reasons discussed herein, the Administrative Law Judge determines that authorization and coverage for home health nurse one hour per day and home health aide 24/7 are health care reasonably required for the compensable injury of (Date of Injury).

STATEMENT OF THE CASE

A contested case hearing was held on January 27, 2020 by a Division administrative law judge, Francisca N. Okonkwo, to decide the following disputed issues:

1. Is the preponderance of the evidence contrary to the decision of the IRO that Claimant is partially entitled to authorization and coverage for home health nurse 24/7 and home health aide 24/7 for the (Date of Injury) compensable injury?
2. Is the preponderance of the evidence contrary to the decision of the IRO that Claimant is not entitled to authorization and coverage for home health nurse 24/7 and home health aide 24/7 for the (Date of Injury) compensable injury?

PARTIES PRESENT

RG, Claimant/Petitioner's estate representative, appeared and was represented by MS, attorney. Carrier appeared and was represented by HA, attorney.

EVIDENCE PRESENTED

The following witnesses testified:

For the Claimant:	RG.
For Carrier:	None.

The following exhibits were admitted into evidence:

Administrative Law Judge's Exhibits ALJ-1 through ALJ-5.
Claimant's Exhibits C-1 through C-16.
Carrier's Exhibits CR-A and CR-J.

DISCUSSION

(Injured Employee) sustained a work-related fall injury to her lumbar spine on (Date of Injury). In (Year), a fentanyl overdose led to other complications, including multiple hypoxia-related strokes, myocardial infarction, seizures, respiratory failure, depression, dementia, neurogenic bladder, recurrent urinary tract infections, and tremors. She became dependent for all or most of her care and mobility from that period until her death on (Date of Death).

(Daughter of Deceased), the daughter of Deceased, testified at the hearing and is the estate representative of her mother. (Daughter of Deceased) testified that after her mother's fentanyl overdose in (Year), her mother came to live with her and she had to modify her home by widening doors, removing carpets and various other modifications to accommodate her mother's wheelchair, hospital bed, and other medical equipment. A home health nurse and a home health aide were provided 24 hours a day, seven days per week. (Daughter of Deceased) further testified that a home health nurse and an aide were required to care for her mother due to the level of care she needed each day. She stated that her mother required medication management, blood pressure and oxygen monitoring, catheterization four times daily, due to frequent urinary tract infections, and transfers, which required two people to perform. She stated that because her mother could not move herself, her skin eventually broke down and she required wound care. (Daughter of Deceased) stated that she has no medical training and could not have cared for her mother at home without the assistance of the home health nurse and aide. (Daughter of Deceased) testified that she is an electrologist and works out of a clinic which is about seven miles from her home.

The patient's primary care physician, TC, MD, noted on July 23, 2019, that (Injured Employee's) (Deceased) health was progressively worsening and that she would require full medical care daily. Dr. C further warned that a reduction in her daily medical supervision would result in hastening her demise, given her very delicate health issues.

(Daughter of Deceased) testified that in July 2019, her mother's care was reduced, even though her health and condition had not improved. The 24-hour nursing care was still provided but the home health aide was taken away. (Daughter of Deceased) described how difficult it was for the nurse to perform all of the activities of daily living alone and she often had to go home from work to assist the nurse with transfers and to perform the duties previously done by the aide. (Daughter of Deceased) further testified that on August 20, 2019 her mother was designated a hospice patient, and her care changed again on September 13, 2019, when the home health aide was returned to care for her mother 24 hours daily, but the home health nurse was only provided for one hour daily. She stated that Hospice eventually allowed a nurse to come in more often, up to 2 to 4 times weekly, but she still had to go home and assist the home health aide or pay someone to assist with repositioning, transfers, and other aspects of care and activities of daily living that the aide could not perform alone.

On August 27, 2019 an Independent Review Organization (IRO) partially overturned the denial for authorization and coverage for home health nurse 24/7 and home health aide 24/7 and determined that the records support the need for 24 hours per day home health aide services and one hour per day of skilled nursing services. The IRO determined that the records do not support the necessity of 24 hour per day skilled nursing services. The patient's treating doctor, SR, MD, wrote letters explaining the necessity for 24 hours per day of skilled nursing, due to her needing regular catheterization and oxygen titration several times daily. Dr. R also documented his attempts to perform a peer to peer review.

On November 5, 2019, Utilization Review issued the adverse decision that a home health nurse one hour per day and a home health aide for 24 hours per day were not medically necessary or appropriate. The IRO issued a new decision on November 25, 2019, which upheld the adverse decision, and all care ended. (Daughter of Deceased) testified that she was responsible for all of her mother's care from this time until her death on (Date of Death) and provided evidence of the amounts she paid to healthcare providers. She disagrees with the IRO Decisions and is seeking authorization and coverage for home health nurse 24/7 and home health aide 24/7 for the (Date of Injury) compensable injury from July 13, 2019 through (Date of Death).

Texas Labor Code Section 408.021 provides that 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. Health care reasonably required is further defined in Texas Labor Code Section 401.011(22a) as health care that is clinically appropriate and considered effective for the injured employee's injury and provided in accordance with best practices consistent with evidence-based medicine or, if evidence-based medicine is not available, then generally accepted standards of medical practice recognized in the medical community. Health care under the Texas Workers' Compensation system must be consistent with evidence-based medicine if that evidence is available. Evidence based medicine is further defined in Texas Labor Code Section 401.011(18a) to be the use of the current best quality scientific and medical evidence formulated from credible scientific studies, including peer-reviewed medical literature and other current scientifically based texts and treatment and practice guidelines. The Commissioner of the Division of Workers' Compensation is required to adopt treatment guidelines that are evidence-based, scientifically valid, outcome-focused, and designed to reduce excessive or inappropriate medical care while safeguarding necessary medical care. Texas Labor Code Section 413.011(e). Medical services consistent with the medical policies and fee guidelines adopted by the commissioner are presumed reasonable in accordance with Texas Labor Code Section 413.017(1).

In accordance with the above statutory guidance, the Division of Workers' Compensation has adopted treatment guidelines by Division Rule 137.100. This Rule directs health care providers to provide treatment in accordance with the current edition of the Official Disability Guidelines (ODG), and such treatment is presumed to be health care reasonably required as defined in the

Texas Labor Code. Thus, the focus of any health care dispute starts with the health care set out in the ODG. Also, in accordance with Division Rule 133.308(s), "A decision issued by an IRO is not considered an agency decision and neither the Department nor the Division are considered parties to an appeal. In a Contested Case Hearing (CCH), the party appealing the IRO decision has the burden of overcoming the decision issued by an IRO by a preponderance of evidence-based medical evidence."

With regard to authorization and coverage for home health nurse and home health aide, the ODG lists the following criteria:

Recommended on a short-term basis following major surgical procedures or in-patient hospitalization, to prevent hospitalization, or to provide longer-term in-home medical care and domestic care services for those whose condition is such that they would otherwise require inpatient care.

See also Skilled nursing facility (SNF) care.

Justification for medical necessity of Home health services requires documentation of:

- (1) The medical condition that necessitates home health services, including objective deficits in function and the specific activities precluded by such deficits; &
- (2) The expected kinds of services that will be required, with the exception of tasks and services that can be performed free of charge by the worker's spouse or other household member, with an estimate of the duration and frequency of such services; &
- (3) The level of expertise and/or professional qualification or licensure required to provide the services. Homebound is defined as "confined to the home". To be homebound means:
 - The individual has trouble leaving the home without help (e.g., using a cane, wheelchair, walker, or crutches; special transportation; or help from another person) because of the occupational illness or injury OR
 - Leaving the home isn't recommended because of the occupational illness or injury AND
 - The individual is normally unable to leave home and leaving home is a major effort. (*CMS, 2014*)
- (4) Evaluation of the medical necessity of Home Health Care services is made on a case-by-case basis. For Home Health Care extending beyond a period of 60 days, the physician's treatment plan should include referral for an in-home evaluation by a Home

Health Care Agency Registered Nurse, Physical Therapist, Occupational Therapist, or other qualified professional certified by the Centers for Medicare and Medicaid in the assessment of activities of daily living to assess the appropriate scope, extent, and level of care for home health care services. (CMS, 2015) Personal care services and domestic care services should not be covered when there are no skilled (licensed nurse or therapist) home health services being provided.

(5) The treating physician should periodically conduct re-assessments of the medical necessity of home health care services at intervals matched to the individual patient condition and needs, for example, 30, 60, 90, or 120 days. Such reassessments may include repeat evaluations in the home.

Home health care is the provision of medical and other health care services to the injured or ill person in their place of residence. Home health services include services deemed to be medically necessary for patients who are confined to the home (homebound) and who require: (1) Skilled care by a licensed medical professional for tasks including, but not limited to, administration of intravenous drugs, dressing changes, occupational therapy, physical therapy, and speech-language pathology services; with or without additionally requiring (2) Personal care services for tasks and assistance with activities of daily living that do not require skills of a medical professional, such as bowel and bladder care, feeding, bathing, dressing and transfer and assistance with administration of oral medications; and/or (3) Domestic care services such as shopping, cleaning, and laundry that the individual is no longer capable of performing due to the illness or injury that may also be medically necessary in addition to skilled and/or personal care services. Services described under (2) and (3) should be covered only when (1) is justified. An employer or their insurer shall not be liable for household tasks the injured worker's spouse or other member of the injured worker's household performed prior to the injury free of charge. (CMS, 2015) Domestic and personal care services do not require specialized training and do not need to be performed by a medical professional. (ACMQ, 2005) (Ellenbecker, 2008)

Carrier contends that the Claimant/Petitioner has the burden of proof to prove medical necessity for the healthcare requested through the evidence-based medical evidence provided for review and that lay testimony is not probative. Carrier further contends that the clinical evidence does not support the need for the requested healthcare. Carrier argued that the IRO denied the requested healthcare because Claimant/Petitioner was unable to establish medical necessity through peer to peer review and the IRO denial should stand.

(Daughter of Deceased)'s testimony was considered. The medical records in evidence were also considered. The ODG recommendations, as well as the medical evidence presented, was sufficient to show that Claimant/Petitioner met her burden of proof to show by a preponderance

of the medical evidence that she is partially entitled to authorization and coverage for 24 hours per day for home health aide services and one hour per day of skilled nursing services for the (Date of Injury) compensable injury during the period in dispute. The preponderance of the evidence is not contrary to the decision of the IRO that Claimant is not entitled to authorization and coverage for home health nurse 24/7 during the period in dispute, but the preponderance of the evidence is contrary to the IRO decision that Claimant is not entitled to authorization and coverage for a home health aide 24/7 for the (Date of Injury) compensable injury during the period in dispute.

Even though all the evidence presented was not discussed, it was considered. The Findings of Fact and Conclusions of Law are based on all of the evidence presented.

FINDINGS OF FACT

1. The parties stipulated to the following facts:
 - A. The Texas Department of Insurance, Division of Workers' Compensation has jurisdiction in this matter.
 - B. Venue is proper in the (City) Field Office of the Texas Department of Insurance, Division of Workers' Compensation.
 - C. On (Date of Injury), Claimant/Petitioner was the employee of (Employer), Employer.
 - D. On (Date of Injury), Employer provided worker's compensation insurance through Travelers Indemnity Company of Connecticut, Carrier.
 - E. Claimant/Petitioner sustained a compensable injury on (Date of Injury), in the form of L4-L5 and L5-S1 disc herniations and reaction to fentanyl transdermal patch.
 - F. Claimant/Petitioner, (Injured Employee), died on (Date of Death)
2. Carrier delivered to Claimant's Representative a single document stating the true corporate name of Carrier, and the name and street address of Carrier's registered agent, which document was admitted into evidence as Administrative Law Judge's Exhibit Number 2.
3. The Independent Review Organization determined that claimant should not have authorization and coverage for home health nurse 24/7 and home health aide 24/7 for the (Date of Injury) compensable injury during the period in dispute.
4. Authorization and coverage for home health nurse 24/7 and home health aide 24/7 are not health care reasonably required for the compensable injury of (Date of Injury).

5. Claimant/Petitioner provided adequate documentation of the need for authorization and coverage for home health nurse one hour per day and home health aide 24/7 for the compensable injury of (Date of Injury) during the period in dispute.
6. Authorization and coverage for home health nurse one hour per day and home health aide 24/7 are health care reasonably required for the compensable injury of (Date of Injury) during the period in dispute.

CONCLUSIONS OF LAW

1. The Texas Department of Insurance, Division of Workers' Compensation, has jurisdiction to hear this case.
2. Venue is proper in the (City) Field Office.
3. The preponderance of the evidence is not contrary to the decision of the IRO that Claimant is partially entitled to authorization and coverage for home health nurse 24/7 and home health aide 24/7 for the (Date of Injury) compensable injury.

DECISION

Authorization and coverage for home health nurse one hour per day and home health aide 24/7 are health care reasonably required for the compensable injury of (Date of Injury).

ORDER

Carrier is partially liable for the benefits at issue in this hearing. Claimant/Petitioner is entitled to medical benefits for the compensable injury in accordance with Section 408.021.

The true corporate name of the insurance carrier is **TRAVELERS INDEMNITY COMPANY OF CONNECTICUT, A SUBSIDIARY OF THE TRAVELERS INDEMNITY COMPANIES**, and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
D/B/A CSC-LAWYERS INCORPORATING SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3218**

Signed this 4th day of February, 2020.

FRANCISCA N. OKONKWO
Administrative Law Judge