SOAH DOCKET NO. 453-04-2319.M5

TEXAS MUTUAL INSURANCE COMPANY,	§	**BEFORE THE STATE OFFICE**
Petitioner	§	
	§	
V.	§	**OF**
	§	
	§	
HEALTH & MEDICAL PRACTICE ASSOCIATES,	§	**ADMINISTRATIVE HEARING**
Respondent	§	

DECISION AND ORDER

I. DISCUSSION

Texas Mutual Insurance Company (Texas Mutual) requested a hearing to contest an Independent Review Organization (IRO) decision that certain physical medicine services provided by Health & Medical Practice Associates (HMPA) to an injured worker (Claimant) were medically necessary. The Administrative Law Judge (ALJ) concludes that most of the active therapy services should be paid, but that the claim for passive therapy should be denied.

A hearing convened on July 21, 2004, before ALJ James W. Norman at the State Office of Administrative Hearings, Austin, Texas. R. Scott Placek represented Texas Mutual. William Maxwell represented HMPA. There were no contested issues of notice or jurisdiction. The record closed at the end of the hearing on July 21, 2004.

A. Background

The Claimant, a ___ year old male at the time, sustained a work-related injury on ___, when he fell about six feet from a ladder to a concrete floor. He hit his shoulders, head, back, and left elbow. He presented to HMPA with pain in his neck, shoulders, arms, low back, and legs bilaterally. A September 27, 2002, functional capacity evaluation (FCE) showed deficits in his range of motion (ROM) and strength. At that time, he believed he was not able to work.

The Claimant underwent 19 sessions of physical therapy prior to September 24, 2002, the first day of disputed services. The disputed services occurred on September 24, 26, and 27, 2002, and October 1 and 8, 2002, and consisted of the following:

- September 24, 2002. Forty-five minutes of therapeutic exercise (CPT code 97110), consisting of 15 minutes of isokinetic strength and 30 minutes of stretches; 30 minutes of therapeutic activity (CPT code 97530), an active therapy consisting of kinesthetic awareness; and ultrasound (CPT 97035Ba passive therapy).

- September 26, 2002. Forty-five minutes of therapeutic exercise, including 30 minutes of isokinetic strength and 15 minutes of stretching; 30 minutes of therapeutic activity, consisting of kinesthetic awareness; and mechanical traction (CPT code 97012), a passive therapy.

- $ September 27, 2002. Forty-five minutes of therapeutic exercise, including 15 minutes of isokinetic strength and 30 minutes of stretches; 30 minutes of therapeutic activity, including 15 minutes of kinesthetic awareness and 15 minutes of cardiovascular activities; a functional capacity evaluation (FCE);[1] and electrical stimulation (CPT code 97032), a passive therapy.

- $ October 1, 2004. Forty-five minutes of therapeutic exercise, including 15 minutes of floor exercise and 30 minutes of stretches; 30 minutes of therapeutic activity, including 15 minutes of physioball exercises and 15 minutes of kinesthetic awareness; and electrical stimulation.

- $ October 8, 2002. Fifteen minutes of therapeutic exercise, consisting of stretches; electrical stimulation; and mechanical traction.

The total amount of the disputed claim is $1,263.00.

The IRO doctor was board certified in physical medicine and rehabilitation. He provided the following rationale for his decision:

> The patient suffered injury to his cervical and lumbar spine and to his extremities from his fall. Eight weeks of physical therapy is not unreasonable. The patient had documented improvement. An FCE reported that the patient was not able to return to his job that required a heavy physical level of functioning. Therefore, continued physical therapy to advance the patient's strength and range of motion would be medically necessary and appropriate. The five disputed days were not unreasonable.

B. Evidence and Analysis

For the reasons discussed below, the Administrative Law Judge (ALJ) concludes that Texas Mutual should be ordered to pay for most of the active therapies, but not the passive.

As Petitioner, Texas Mutual has the burden of proof.[2] The parties pointed to two sources of expert evidence in the record, from the IRO doctor and from Texas Mutual witness Scott Herbowy, a physical therapist with approximately 22 years of experience.[3] Mr. Herbowy testified by deposition.[4] The ALJ believes Mr. Herbowy is a qualified expert. The ALJ relied more on Mr. Herbowy's testimony than that of the IRO doctor because his opinions were given under oath and subject to cross-examination and because he went into detail about the specific procedures and the time devoted to each, whereas the IRO doctor simply gave a broad opinion that eight weeks of physical therapy was not unreasonable.

Mr. Herbowy's testimony that the services were not medically necessary was based primarily

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[1] Texas Mutual did not produce evidence or argue that the FCE was medically unnecessary. The maximum allowable reimbursement (MAR) for the FCE is $400.00. The ALJ will order payment for that service.

[2] 1 TEX. ADMIN. CODE (TAC) ' 155.41; 28 TAC ' 148(h).

[3] Mr. Herbowy received a diploma in post-graduate courses in orthopedic physical therapy for the spine, including the low back, neck, and extremities. He has presented two-, three-, and four-day courses to physical theapists, chiropractors, and physicians. On a daily basis, he treats patients with similar diagnoses to the Claimant.

[4] Ex. 1.

on a lack of documentary justification rather than a statement that the procedures were unreasonable *per se*. The ALJ concludes that Texas Mutual is precluded from relying on a lack of documentation of medical necessity as a ground for denial. Its denials were all based on payment exception code U, which is defined in its explanation of benefits (EOBs) to mean unnecessary treatment (without peer review), and its EOBs said, The treatment/service provided exceeds medically accepted utilization review criteria and/or reimbursement guidelines established for severity of injury, intensity of service and appropriateness of care. The EOBs do not sufficiently inform HMPA that the claims were denied because medical necessity was not documented.[5] A sufficient explanation of its reasons for denying a claim is required by the Texas Workers' Compensation Commission (Commission) rules at 28 TEX. ADMIN. CODE (TAC) ' 133.304(c). Moreover, Commission Rule 133.307(j)(2) says a reason for denial not provided to the provider before a request for medical dispute resolution may not be considered.

On the basis of the analysis described above, it is necessary to review Mr. Herbowy's testimony to determine which services he said were medically unnecessary in and of themselves and which he said were medically unnecessary because they were inadequately documented.

Although not always crystal clear, the ALJ concludes that Mr. Herbowy's criticism of the active therapy services is based on a lack of documentation of medical necessity. He does not contend that eight weeks of physical therapy is unreasonable for the types of injuries suffered by the Claimant. He acknowledged that active-therapy services under CPT codes 97110 and 97530 can be appropriate during the post-injury period at issue and agreed that stretches, isokinetic strength exercises, cardiovascular activities, and kinesthetic awareness can be appropriate.[6] Although he did say he could not see a reason for the random pattern of some of the procedures, he tended to qualify his opinion by saying he would want to see documented reasons for the pattern.[7] He did, however, opine that the cardiovascular exercise on September 27, 2002, was unnecessary *per se*. He described three sessions of cardiovascular exercise over a six-weeks period as incredibly useless.[8] This testimony was persuasive. Overall, Texas Mutual will be ordered to pay for the active therapy except for the cardiovascular exercise.

Mr. Herbowy's testimony concerning passive services focused on documentation, but it also addressed the efficacy of the treatments themselves. He testified, Passive modalities a couple of months post injury have little, if any, chance of B of being of benefit to this patient.[9] Although he said that typically passive modalities are provided to reduce swelling and inflamation and there was no documentation of any swelling, he concluded by saying I believe at this point following the injury, passive modalities really are not indicated, despite the B any subjective complaint the patient

presents with.[10] Taken as a whole, Mr. Herbowy's testimony is that the passive services in this case,

[5] Texas Mutual's EOBs define payment exception code AN to mean Not appropriately documented. Texas Mutual did not cite that code as a reason for denying the claim.

[6] Ex. 1, Part 1 at 16, 36-38.

[7] Ex. 3 at 16-20, 22-23, 25-27.

[8] *Id*. at 25. The ALJ counted four cardiovascular activities beginning on August 19, 2002, and continuing on September 13, 19, and 27, 2002. Ex. 1, part 3 at 93, 120, 126, and 137.

[9] Ex. 1 at 27.

[10] Ex. 1 at 27-28.

approximately two months post injury, are not necessary. The ALJ concludes the passive therapy was medically unnecessary.

Based on the Table of Disputed Services@ contained in the record,[11] the MAR for the FCE and active procedures, excluding the cardiovascular-exercise charge, is $1,100.00. Texas Mutual will be ordered to pay that amount.

II. FINDINGS OF FACT

1. The Claimant, a ___ year old male at the time, sustained a work-related injury on ___, when he fell about six feet from a ladder to a concrete floor, hitting his shoulders, head, back, and left elbow.

2. The Claimant presented to Health & Medical Practice Associates (HMPA) complaining of pain in his neck, shoulders, arms, low back, and legs bilaterally.

3. A September 27, 2002, functional capacity evaluation (FCE) showed deficits in range of motion (ROM) and strength, and the Claimant believed he was not able to work at that time.

4. The disputed services occurred from September 24, 2002, through October 8, 2002, and consisted of the following:

   $ September 24, 2002. Forty-five minutes of therapeutic exercise (CPT code 97110), an active therapy, consisting of 15 minutes of isokinetic strength and 30 minutes of stretches; 30 minutes of therapeutic activity (CPT code 97530), an active therapy, consisting of kinesthetic awareness; and ultrasound (CPT 97035), a passive therapy.

   $ September 26, 2002. Forty-five minutes of therapeutic exercise, including 30 minutes of isokinetic strength and 15 minutes of stretching; 30 minutes of therapeutic activity, consisting of kinesthetic awareness; and mechanical traction (CPT code 97012), a passive therapy.

   $ September 27, 2002. Forty-five minutes of therapeutic exercise, including 15 minutes of isokinetic strength and 30 minutes of stretches; 30 minutes of therapeutic activity, including 15 minutes of kinesthetic awareness and 15 minutes of cardiovascular activities; a functional capacity evaluation (FCE); and electrical stimulation (CPT code 97032), a passive therapy.

   $ October 1, 2002. Forty-five minutes of therapeutic exercise, including 15 minutes of floor exercise and 30 minutes of stretches; 30 minutes of therapeutic activity, including 15 minutes of physioball exercises and 15 minutes of kinesthetic awareness; and electrical stimulation.

   $ October 8, 2002. Fifteen minutes of therapeutic exercise, consisting of stretches; electrical stimulation; and mechanical traction.

5. Texas Mutual Insurance Company (Texas Mutual), the workers' compensation insurance

[11] Ex. 2 at 262-263.

carrier for the Claimant's employer, denied HMPA's claim for the disputed services.

6. HMPA requested medical dispute resolution.

7. An independent review organization concluded that the disputed services were medically necessary and should be paid.

8. It is undisputed that Texas Mutual requested a hearing not later than the twentieth day after receiving notice of the IRO decision.

9. All parties received not less than ten days notice 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.

10. All parties had an opportunity to respond and present evidence and argument on each issue involved in the case.

11. Texas Mutual denied payment of the disputed services based on payment exception code U, which is defined in its explanation of benefits (EOBs) to mean unnecessary treatment (without peer review).

12. Texas Mutual's rationale for saying the disputed services constituted unnecessary treatment was, The treatment/service provided exceeds medically accepted utilization review criteria and/or reimbursement guidelines established for severity of injury, intensity of service and appropriateness of care.

13. Except for the service described in Finding of Fact No. 18, Texas Mutual's evidence that the disputed services were medically unnecessary was based on testimony that the medical necessity of the services was not adequately documented.

14. Texas Mutual's EOBs define payment exception code "N" to mean "Not appropriately documented."

15. Texas Mutual did not cite payment exception code N in its EOBs as a reason for denying the claim.

16. Texas Mutual's EOBs do not sufficiently inform HMPA that the active therapy claims were denied because medical necessity was not documented.

17. Except for the service described in Finding of Fact No. 18, there was insufficient evidence that the active therapy described in Finding of Fact No. 4 was medically unnecessary.

18. The cardiovascular exercise service provided on September 27, 2002, as one of four cardiovascular exercises provided to the Claimant over an approximate six weeks period, was provided too infrequently to help cure or relieve the Claimant's injury.

19. The disputed passive modalities provided approximately two months after the Claimant's

injury had little chance of benefitting the Claimant.

20. The disputed passive modalities were not reasonably required to cure or relieve the effects of the Claimant's injury.

21. There was no evidence that the FCE was medically unnecessary.

22. The maximum allowable reimbursement for the services provided to the Claimant, excluding the services described in Findings of Fact Nos. 18 through 20, was $1,100.00.

III. 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. ' 413.031(k) and TEX. GOV'T. CODE ANN. ch. 2003.

2. Texas Mutual timely requested a hearing in this matter. 1 TEX. ADMIN. CODE (TAC) §155.41; 28 TAC § 148(h).

3. Notice of the hearing was proper and timely. TEX. GOV'T. CODE ANN. '' 2001.051 and .052.

4. Texas Mutual proved that the services referred to in Findings of Fact Nos. 18 through 20 were not reasonably required by the nature of the Claimant's injury. TEX. LAB. CODE ANN. ' 408.021(a).

5. Texas Mutual is precluded from asserting a lack of documentation as a grounds for denying the claim. 28 TAC '' 133.304(c) and 133.307(j)(2).

6. Except for the service described in Finding of Fact No. 18, Texas Mutual failed to prove that the active-therapy services and FCE described in Finding of Fact No. 4 were not reasonably required by the nature of the Claimant's injury. TEX. LAB. CODE ANN. ' 408.021(a).

7. Texas Mutual should pay HMPA $1,100.00 plus applicable interest.

ORDER

IT IS THEREFORE ORDERED that Texas Mutual Insurance Company shall pay Health & Medical Practice Associates $1,100.00 plus applicable interest.

IT IS ORDERED FURTHER that, except as ordered above, all other claims by Health &

Medical Practice Associates against Texas Mutual Insurance Company in this case be, and the same are hereby, denied.

SIGNED August 9, 2004.

JAMES W. NORMAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS