SOAH DOCKET NO. 453-04-2320M5R

TEXAS MUTUAL INSURANCE COMPANY,	'	**BEFORE THE STATE OFFICE**
Petitioner	'	
	'	
v.	'	**OF**
	'	
PROFESSIONAL PHYSICAL THERAPY,	'	
Respondent	'	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Texas Mutual Insurance Company (Carrier) disputes the decision of the Medical Review Division (MRD) of the Texas Workers= Compensation Commission (the Commission, TWCC) ordering reimbursement of $4,393 to Professional Physical Therapy (Provider) for treatment provided to Claimant from January 21, 2003, through February 28, 2003. The Administrative Law Judge (ALJ) finds the disputed treatment was not reasonable and medically necessary. Therefore, Provider is not entitled to reimbursement for the disputed treatment.

I. PROCEDURAL HISTORY

Notice and jurisdiction are not contested and are addressed in the Findings of Fact and Conclusions of Law set out below.

ALJ Sharon Cloninger convened and closed the hearing on April 7, 2004, in the William P. Clements State Office Building, Fourth Floor, 300 West 15th Street, Austin, Texas. Attorney R. Scott Placek represented Carrier. Provider's representative Joseph Da Jose, physical therapist, appeared via telephone.

II. APPLICABLE LAW

The only issue in this case is whether, by a preponderance of the evidence, the requested treatment is medically necessary. Medical necessity is defined at TEX. LAB. CODE ANN. ' 408.021(a), which states:

> (a) 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;

(2) promotes recovery; or

(3) enhances the ability of the employee to return to or retain employment.

Under 28 TAC ' 148.21(h), the appealing party has the burden of proof in hearings, such as this one, conducted pursuant to TEX. LAB. CODE ANN. ' 413.031. Thus, Claimant, as the petitioner, must prove the requested treatment is reasonably required within the meaning of TEX. LAB. CODE ANN. ' 408.021(a).

III. DISCUSSION

A. Background

Claimant incurred a compensable injury on ___, when he slipped and fell on a greasy floor at the restaurant where he worked, and as a result, suffered a thoracic lumbar strain. A December 30, 2002 physical evaluation indicated elevated pain levels, decreased lumbar flexibility from starting to mid-range, decreased endurance to activities, posture/gait deviations, and multiple spasms in the lumbar paravertebrals. An MRI dated January 15, 2003, revealed a herniated disc at L5-S1, and electromyography was consistent with S1 radiculopathy. Claimant received physical therapy from Provider, including therapeutic exercises and the passive modalities of massage, ultrasound, and electrical stimulation from December 30, 2002, through February 28, 2003. Carrier paid for physical therapy provided through January 17, 2003, and for exercises only from January 8, 2003, through February 28, 2003, but disputes the medical necessity of the passive modalities provided from January 21, 2003, through February 28, 2003, and denied reimbursement for that treatment.

Provider requested medical dispute resolution before the Commission=s Medical Review Division (MRD), pursuant to 28 TAC ' 134.600(g). The Commission referred the dispute to an IRO, as permitted under 28 TAC ' 133.308. On December 4, 2003, the IRO determined reimbursement was warranted for the disputed treatment. On December 10, 2003, the MRD issued a decision ordering reimbursement. On January 4, 2004, Carrier requested a hearing on the matter before SOAH.

B. Evidence

1. Testimony of Nicolas Tsourmas, M.D.

NicholasTsourmas, M.D., an orthopedic surgeon, testified on behalf of Carrier that while Provider=s use of passive modalities to treat Claimant from December 30, 2002, through January 17, 2003, was the reasonable, Atime-honored@ treatment for acute musculo-skeletal injury, the passive modalities and one-on-one therapeutic exercises provided on the disputed dates of service were not medically necessary. He estimated that Claimant=s acute phase of care should have lasted between two-and-three weeks on average, but no more than twice that long, which would have placed the

acute care at an outside date of somewhere between January 12, 2003, and February 8, 2003. He said that after Claimant=s acute symptoms, such as swelling and edema, had dissipated, the treatment

should have been modified to include more active modalities that would require Claimant to use his own muscles to rehabilitate the injured body part. Instead, he said, Claimant=s treatment was the same on January 21, 2003, as it had been the day after his injury, and did not change through February 28, 2003. He said an insignificant amount of active therapy was used, and the passive modalities used would not ameliorate soft tissue injuries, such as the one suffered by Claimant.

Dr. Tsourmas testified that the one-on-one supervision required for therapeutic exercises billed under CPT Code 97110 was unnecessary by January 21, 2003, by which time Claimant had undergone nine physical therapy sessions with stretching, and three sessions incorporating Williams and McKenzie exercises. He noted that by January 21, 2003, Claimant should have been able to perform the exercises in a group setting or on his own.

Dr. Tsourmas testified there is no documentation to show that pain prevented Claimant from exercising, but at any rate, the passive modalities were not medically necessary to give Claimant pain relief that would allow him to exercise, because passive modalities would be ineffective for that purpose. He said Claimant, who was cooperative and had no exercise-related safety issues, should have been trained in a home exercise program because exercising two or three times daily, rather than several times a week in a physical therapy session, is what leads to recovery from a musculo-skeletal injury. He said Claimant should have been taught the home exercise program in one or two physical therapy sessions, and then checked for progress every three weeks or so.

2. Deposition of Scott Herbowy, PT, Dip. MDT

Scott Herbowy, a physical therapist, testified on behalf of Carrier that Claimant=s disputed treatment was excessive, ineffective, and not medically necessary. He said there is no benefit to passive care three weeks post-injury for a thoracic-lumbar soft tissue injury. He testified that if a patient is involved in active care, given appropriate education, and trained to perform exercises at home, he will develop an internal locus of pain control and start to take responsibility for his problem, which ultimately is the best course for Claimant=s type of injury. He said there was no indication that Claimant=s treatment program changed in response to Claimant=s condition, which should have been assessed on an ongoing basis. He said even when it became apparent through the January 15, 2003 MRI that Claimant had a herniated disk with compression of nerve root causing radiculopathy, the treatment was not changed, and was essentially the same for all 33 visits. He said active care was necessary, but it was provided in an ineffective way because the treatment did not change as Claimant=s condition changed, with a few slight exceptions.

He also testified there is nothing in the notes to indicate Claimant needed one-on-one supervision to perform the therapeutic exercises. He said that by January 21, 2003, a cooperative, alert patient such as Claimant should have been able to perform the therapeutic exercises without one-on-one supervision.

3. Deposition of Joseph Da Jose, L.P.T.

Joseph Da Jose, who is Provider=s lead physical therapist, did not personally render treatment to Claimant, but reviewed the records of the treating physical therapist, who is no longer with Provider. He said Claimant=s physical evaluation conducted the day after his compensable injury occurred showed him to have good strength overall with a Agood minus@ rating for his back and neck. His back flexion was 35 degrees, with 90 degrees being normal. Claimant=s extension was 10 degrees, with normal being between 25 and 30 degrees. His right lateral flexion was 15 degrees, with normal being 25 degrees. Mr. Da Jose testified that when Claimant was re-evaluated on February 12, 2003, the range of motion for his lumbar spine had improved, his strength was essentially the same, and his pain level had dropped from 3/10 to 2/10. He said the physical therapist did not alter the treatment plan, although there was no subjective or objective progress in Claimant=s condition, to elicit a more effective response from Claimant, or to increase Claimant=s independence in his day-to-day function. He said a cooperative, mentally alert patient such as Claimant would not need one-on-one supervision for therapeutic exercises by January 21, 2003, since he had already done them for three weeks by that time. He said there were no safety issues that would have prevented Claimant from using a home exercise program.

V. ANALYSIS

Carrier met its burden of proving the disputed treatment was not reasonable or medically necessary. Testimony by Dr. Tsourmas and Mr. Herbowy established the massage, ultrasound, and electrical stimulation were not medically necessary to improve Claimant=s function by increasing his strength, range of motion, and coordination, and decreasing his pain. In addition, testimony by Dr. Tsourmas, Mr. Herbowy, and Provider=s witness Mr. Da Jose established that while Claimant needed to perform therapeutic exercises, he did not need one-on-one supervision by January 21, 2003, and should have instead been trained to do a home exercise program. There is no evidence that the disputed treatment was reasonable or medically necessary to cure or relieve the effects naturally resulting from Claimant=s compensable injury, to promote his recovery, or to allow him to retain employment, pursuant to TEX. LAB. CODE ANN. ' 408.021(a). Therefore, Provider is not entitled to reimbursement for treatment rendered to Claimant.

VI. FINDINGS OF FACT

1. Claimant suffered a compensable injury on ___, when he slipped and fell on a greasy floor at the restaurant where he worked, and as a result, suffered a thoracic lumbar strain.

2. On that same date Texas Mutual Insurance Company (Carrier) was the workers= compensation insurance carrier for Claimant=s employer.

3. A December 30, 2002 physical evaluation performed by Professional Physical Therapy (Provider) indicated elevated pain levels, decreased lumbar flexibility from starting to mid-range, decreased endurance to activities, posture/gait deviations, and multiple spasms in the lumbar paravertebrals.

4. An MRI dated January 15, 2003, revealed a herniated disc at L5-S1 and electromyography was consistent with S1 radiculopathy.

5. Provider treated Claimant from December 30, 2002, through February 28, 2003, using electrical stimulation (CPT Code 97032), ultrasound (CPT Code 97035), therapeutic exercises (CPT Code 97110), and massage (CPT Code 97124).

6. Carrier reimbursed Provider for Claimant's treatment rendered through January 17, 2003, but disputed the medical necessity of treatment provided January 21, 2003, through February 28, 2003.

7. The purpose of physical therapy is to improve a patient=s function by increasing strength and range of motion, and by decreasing pain.

8. Massage, electrical stimulation, and ultrasound provided to Claimant from January 21, 2003, through February 28, 2003, did not increase his strength or range of motion, reduce his pain level, or promote the healing of his soft tissue injury.

9. Passive modalities performed on Claimant by Provider from January 21, 2003, through February 28, 2003, had no medical benefit, and did not promote Claimant=s recovery from his compensable injury.

10. Therapeutic exercises provided to Claimant January 21, 2003, through February 28, 2003, did not require one-on-one supervision for education, safety, or any other reason.

11. Appropriate physical therapy for Claimant=s treatment from January 21, 2003, through February 28, 2003, would have included implementation of a home exercise program in which he exercised three or four times daily.

12. Following Carrier=s denial of reimbursement for the treatment rendered January 21, 2003, through February 28, 2003, Provider filed a timely request with the Commission for medical dispute resolution.

13. Provider=s request was assigned to an IRO by the MRD. On December 4, 2003, the IRO determined reimbursement was required.

14. The MRD issued a decision December 10, 2003, ordering reimbursement on the basis that the disputed treatment and services were reasonable and medically necessary.

15. On January 4, 2004, Carrier requested a hearing before the State Office of Administrative Hearings (SOAH).

16. Notice of the hearing was sent to the parties on January 22, 2004.

17. The notice contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.

18. Administrative Law Judge Sharon Cloninger convened and closed the hearing April 7, 2004, in the William P. Clements State Office Building, 300 West 15th Street, Fourth Floor, Austin, Texas. Carrier was represented by R. Scott Placek, attorney. Provider=s representative Joseph Da Jose, physical therapist, appeared via telephone.

VII. CONCLUSIONS OF LAW

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

1. The hearing was conducted pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. CH. 2001 and SOAH=s rules, 1 TEX. ADMIN. CODE (TAC) CH. 155.

3. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV=T CODE ANN.'' 2001.051 and 2001.052.

4. Based on the above Findings of Fact and Conclusions of Law, Carrier met its burden of establishing the requested treatment was not medically necessary and reasonably required within the meaning of TEX. LAB. CODE ANN. ' 408.021(a) for disputed dates of service January 21, 2003, through February 28, 2003.

5. Based on the foregoing Findings of Fact and Conclusions of Law, Provider is not entitled to reimbursement.

ORDER

IT IS, THEREFORE, ORDERED that Texas Mutual Insurance Company shall not reimburse Professional Physical Therapy for physical therapy provided to Claimant from January 21, 2003, through February 28, 2003.

SIGNED June 7, 2004.

SHARON CLONINGER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS