

**SOAH DOCKET NO. 453-04-3609M2R**

<b>KENNETH G. BERLINER, M.D.,</b>	·	<b>BEFORE THE STATE OFFICE</b>
<b>Petitioner</b>	·	
	·	
<b>V.</b>	·	<b>OF</b>
	·	
<b>INSURANCE COMPANY STATE OF</b>	·	
<b>PENNSYLVANIA,</b>	·	
<b>Respondent</b>	·	<b>ADMINISTRATIVE HEARINGS</b>

**DECISION AND ORDER**

Kenneth G. Berliner, M.D., (Petitioner) appealed the Independent Review Organization=s (IRO=s) decision denying preauthorization for a left shoulder arthroscopic labral repair. This decision finds the requested preauthorization should be granted.

**I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY**

There were no contested issues of jurisdiction or notice. Therefore, those matters are addressed in the findings of fact and conclusions of law without further discussion here.

The hearing in this matter was held May 24, 2004, at the State Office of Administrative Hearings (SOAH) before Administrative Law Judge (ALJ) John H. Beeler. Insurance Company State of Pennsylvania (Respondent/Carrier) appeared through its attorney, Dean Pappas. Petitioner appeared by telephone. After receipt of evidence and argument, the record closed that same day.

**II. DISCUSSION**

**A. Background Facts and Evidence**

Claimant suffered a compensable injury on \_\_\_\_, while lifting a tray of sandwiches resulting in an injury to her left shoulder. Petitioner requested preauthorization for a left shoulder arthroscopic labral repair surgery. Respondent denied preauthorization for the surgery.

Petitioner testified that he is an orthopedic surgeon and has examined Claimant. His examination revealed something loose in Claimant's shoulder. The shoulder was torn when Claimant lifted a heavy tray of sandwiches. Although the MRI done on Claimant revealed nothing abnormal, an MRI is only about 90 percent accurate and was not accurate in this case. Claimant has a painful popping in her shoulder which Petitioner has observed on several occasions. This reproducible popping is clear evidence that there is a mechanical problem which requires surgery to repair.

Respondent offered the testimony of Dr. Larry Likeover, M.D., an orthopedic surgeon. He reviewed the records in this case and determined that the requested procedure is not medically necessary. The MRI in this case did not show any abnormality related to the compensable injury. MRIs are about 90 percent accurate. He has, however, operated on shoulders when the MRI has been negative and has found mechanical problems missed by the MRI. The painful popping could be the result of something besides the compensable injury. Further, the injury, as he understands it, was caused by repetitive making of sandwiches, which would have not have caused a mechanical injury to the shoulder. If, however, Claimant did not have the reproducible popping before the injury, and did have it after the injury, he would agree that the injury caused the popping.

Respondent also offered the medical records and IRO discussion. The ALJ reviewed the documents and a summary is included in the analysis section below.

## **B. Legal Standards**

Pursuant to the Texas Worker=s Compensation Act, an employee who has sustained 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 cures or relieves the effects naturally resulting from the compensable injury, promotes recovery, or enhances the ability of the employee to return to or retain employment. TEX. LAB. CODE ANN. ' 408.021(a).

## **C. ALJ=s Analysis**

The ALJ finds that the preauthorization is warranted. A review of the admitted documents reveals the basis for the disagreement between the parties. The AEmployer=s First Report of Injury or Illness@ states that the injury was caused by Amaking sandwiches repetitively.@ Based on the rest of the documents and the testimony of Petitioner, this statement is clearly incorrect. Dr. Likeover=s testimony and opinion that the requested procedure is not medically necessary is based upon the incorrect statement. The mechanical problem in the shoulder is consistent with an injury from lifting a heavy object and certainly caused the popping. Dr. Likeover agreed that, if the popping was caused by the compensable injury, then the requested surgery would be medically necessary. He also agreed that MRIs are not completely accurate.

## **III. FINDINGS OF FACT**

1. On \_\_\_\_, Claimant suffered a compensable injury to her left shoulder.
2. At the time of Petitioner=s compensable injury, Insurance Company State of Pennsylvania (Respondent) was the workers= compensation insurer.
3. Petitioner has a mechanical problem in her left shoulder caused by the compensable injury.
4. Kenneth G. Berliner, M.D., (Petitioner) requested preauthorization to perform an arthroscopic labral repair on Claimant's left shoulder.

5. Respondent denied the request for preauthorization, stating that it was not medically necessary.
6. The Independent Review Organization (IRO) denied preauthorization.
7. Petitioner timely appealed the IRO=s decision and requested a hearing before the State Office of Administrative Hearings (SOAH).
8. On March 5, 2004, the Texas Worker=s Compensation Commission (Commission) issued the notice of hearing.
9. 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 held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
10. On May 24, 2004, Administrative Law Judge (ALJ) John H. Beeler convened the hearing. Respondent appeared through its attorney, Dean Pappas. Petitioner appeared at the hearing by telephone.

#### **IV. CONCLUSIONS OF LAW**

1. The Texas Workers= Compensation Commission (Commission) has jurisdiction related to this matter pursuant to the Texas Workers' Compensation Act (the Act), TEX. LABOR CODE ANN. ' 413.031.
2. SOAH has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a decision and order, pursuant to ' 413.031(d) of the Act and TEX. GOV=T CODE ANN. ch. 2003.
3. The hearing was conducted pursuant to the Administrative Procedure Act, TEX. GOV=T CODE ANN. ch. 2001.
4. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV=T CODE ANN. ' ' 2001.051 and 2001.052.
5. Petitioner had the burden of proof in this case pursuant to 28 TEX. ADMIN. CODE ' 148.21(h).
6. Petitioner proved that the arthroscopic labral repair is medically necessary and should be preauthorized.

7. Petitioner, who sustained a compensable injury, is entitled to all health care reasonably required by the nature of the injury as and when needed. He is specifically entitled to health care that cures or relieves the effects naturally resulting from the compensable injury, promotes recovery, or enhances his ability to return to or retain employment. The Act ' 408.021(a).
8. Petitioner=s request for preauthorization for the arthroscopic labral repair should be approved.

**ORDER**

**IT IS ORDERED** that the arthroscopic labral repair requested by Petitioner, is granted.

**SIGNED June 22, 2004.**

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**JOHN H. BEELER  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS**