

**SOAH DOCKET NO. 453-04-4198.M5
TWCC MR NO. M5-03-0531-01**

LUMBERMENS MUTUAL CASUALTY COMPANY,	‘	BEFORE THE STATE OFFICE
Petitioner	:	
	:	
V.	:	OF
	:	
ADVANCED MEDICAL ASSOCIATES,	‘	ADMINISTRATIVE HEARINGS
Respondent		

DECISION AND ORDER

Advanced Medical Associates (Provider) rendered various services to Claimant on January 30, 2003, including an office visit and various diagnostic tests. Lumbermens Mutual Casualty Company (Carrier) determined that all these services were not medically necessary and denied payment. Provider requested medical dispute resolution. An independent review organization (IRO) concluded that the services were medically necessary, and Carrier requested a hearing. This Decision and Order finds that Carrier failed to prove that the services were not medically necessary, and requires Carrier to pay Provider for the disputed services.

I. DISCUSSION

A. Procedural History

The IRO issued its decision January 27, 2004. The Medical Review Division of the Texas Workers' Compensation Commission (Commission) adopted the IRO's decision on January 30, 2004. On February 19, 2004, Carrier requested a hearing. The Commission issued a notice of hearing March 24, 2004, and the hearing was convened on June 8, 2004, before the State Office of Administrative Hearings (SOAH) Administrative Law Judge (ALJ) Charles Homer III. Mark S. Sickles, attorney, appeared for the Carrier. Susan Towne appeared for the Provider as its designated representative. The hearing adjourned and the record closed on the same day.

2. Claimant's Course of Treatment

Claimant, ____, was injured on ____, when boxes being carried on a forklift fell onto him. He was treated with physical therapy and pain medication, and had an MRI of his lumbar spine on September 20, 2002.¹ The MRI disclosed a 2-mm to 3-mm left intraforaminal/posterolateral herniation at the L3-L4 intervertebral space. On October 28, 2002, Claimant's treating physician, James F. Wildermuth, D.C., observed that he has been through [an] excessive amount of rehabilitation at this point,² Doctor Wildermuth referred Claimant to Eric Scheffey, M.D., an orthopedic surgeon, who saw him on November 25, 2002, and reviewed the September MRI. Dr. Scheffey, in apparent disagreement with Dr. Wildermuth, recommended that Claimant remain on physical therapy and physical medicine,³ and referred Claimant back to Dr. Wildermuth. However, Dr. Scheffey also recommended a lumbar myelogram with post-myelogram CT as well as EMG nerve conduction studies [NCV] of both legs,⁴ and referred Claimant to Dr. Joon Lee, who performed a lumbar myelogram and post-myelogram CT scan on January 15, 2003.⁵

On December 30, 2002, Dr. Wildermuth wrote that Claimant had increased pain in his legs and that We will be requesting an EMG/NCV [of both legs and the lumbar area] due to the symptomological increases in the lower extremities of the patient.⁶ On January 30, 2003, John Slaughter, D.C., at Provider's clinic, performed the EMG and NCV services at issue, acting on a referral and letter of medical necessity written by Dr. Wildermuth that same day.⁷

¹ Res. Exh. 1. p. 59-60.

² Res. Exh. 1, p. 66.

³ Res. Exh. 1, 68.

⁴ Res. Exh. 1, p. 57-58.

⁵ Res. Exh. 1, pp. 61-64.

⁶ Res. Exh. 1, at p. 58.

⁷ Res. Exh. 1, at p. 52.

C. **Applicable Law**

The Texas Workers' Compensation Act (Act) provides guidance for determining which medical services are compensable under workers' compensation coverage.⁸ In particular, the Act provides in pertinent part that:

(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.

* * *

Health care includes all reasonable and necessary medical aid, medical examinations, medical treatment, medical diagnoses, medical evaluations, and medical services.⁹

D. **Burden of Proof**

Under the Commission's rules, an IRO decision is deemed a Commission decision and order.¹⁰ Because Carrier is appealing from the Commission decision and order, the burden of proof in this case is on Carrier to prove by a preponderance of the evidence that the disputed services were *not* reasonable and necessary medical treatments.¹¹

⁸ TEX. LAB. CODE ' 408.021.

⁹ TEX. LAB. CODE ' 401.011(19).

¹⁰ 28 TEX. ADMIN. CODE ' 133.308(p)(5).

¹¹ 1 TEX. ADMIN. CODE (TAC) ' 155.41.

E. The Disputed Services and the IRO Decision

The disputed services, all rendered on January 30, 2003, are: office visit, prolonged evaluation, needle electromyography (thoracic and legs), nerve conduction study, sensory study of each nerve, H or F reflex study, and manual measurements of reflexes and range of motion.¹²

In its report, the IRO stated:

Based upon the information provided for review, an EMG/NCV of the lower extremities is medically justified in order to clearly establish the presence of a myelopathy or radiculopathy. These considerations are important to properly evaluate this patient.

2. Description of the Evidence

Both parties' evidence in this case consists of medical records and the IRO decision, as well as correspondence concerning the history of this claim. In addition to the MRI report, the evidence includes evaluation and referral records of the following doctors:

§ Joon S. Lee, M.D.
§ John E. Slaughter, D.C.
§ Eric Scheffey, M.D.
§ Andrew McKay, M.D.
§ James F. Wildermuth, D.C.

II. ANALYSIS AND RECOMMENDATION

The ALJ concludes that the evidence fails to show that the disputed services were not medically necessary for Claimant at the time they were rendered. The IRO's rationale is misleading, in saying that the services were medically necessary in order to clearly establish the presence of a myelopathy or radiculopathy, because the doctors had already agreed there was an abnormality at Claimant ' s L3-L4 intervertebral space. But the record does not demonstrate that Drs. Wildermuth,

¹² Res. Exh.1, pp. 14-15.

Scheffey, and McKay were reasonably certain that the L3-L4 protrusion was the source of Claimant's pain before the services were rendered. The doctors were considering surgery for Claimant, and the record strongly suggests that in January 2003 it was medically necessary for them to learn more about what was causing his pain.

Carrier argues that the purpose of the EMG/NCV tests and the other evaluation done by Provider is to locate the source of pain. That source, according to Carrier, was already known (L3-L4, 2mm. posterior bulge) from the MRI that was done *before* Dr. Scheffey saw Claimant.¹³ Dr. Scheffey came to the same conclusion that the doctor who reviewed the MRI had come to: herniated disc at L3-L4. Furthermore, Dr. McKay's evaluation in January 2003¹⁴ is also the same, Alumar disc herniation at the L3-L4 level.@

Viewed in more detail, however, the record does not support Carrier. In fact, the MRI report, after noting the 2 - 3 mm. herniation at L3-L4, goes on to say, It does not appear to be impinging neural structures.¹⁵ If the protruding disc was not impinging on a nerve, then the herniation may not have been causing Claimant's pain, and something else was (if his pain had an objective cause). In addition to the protrusion at L3-L4, Dr. Joon Lee found a bulge or protruded disc with stenosis of the left-sided nerve exit at L4-L5, and a 2-mm. bulge or protruded disc with minimal impingement at T12-L1.¹⁶ Other details point to the same uncertainty: the disagreement between Drs. Scheffey and Wildermuth about whether physical therapy would help Claimant, and Dr. Wildermuth's concern on December 30, 2002, about Claimant's increasing pain.¹⁷

In January 2003, Drs. Scheffey and Wildermuth were considering surgery on Claimant,

¹³ Res. Exh. 1, pp. 59-60.

¹⁴ Res. Exh. 1, p. 71. The notes are dated January 7, 2002." [the referral to Dr. McKay was done no earlier than December 30, 2002. The ALJ concludes that the year of Dr. McKay 's letter is 2003.]

¹⁵ Res. Exh. 1, p. 59, repeated on p. 60.

¹⁶ Res. Exh. 1, p. 62.

¹⁷ Res. Exh. 58.

whose condition appeared to be serious (he walked with a cane) and deteriorating. Although the evidence was clear, as Carrier argues, that Claimant had a herniated disc at L3-L4, the doctors were not at all certain about the cause of Claimant's pain. Instead, Claimant's doctors were unsure about whether he should have surgery, and even uncertain about whether to continue him on therapy of any kind. On this record, the ALJ cannot say that it was not medically necessary for the doctors to make themselves as confident of the exact source of his pain as reasonably possible before performing surgery or deciding not to do so. Consequently, Carrier shall reimburse Provider for the disputed services.

II. FINDINGS OF FACT

1. Claimant, ____, suffered compensable back and neck injuries on ____, when a forklift load fell on him at work.
2. Lumbermens Mutual Casualty Company (Carrier) is the workers' compensation insurer with respect to the claims at issue in this case.
3. On January 30, 2003, Advanced Medical Associates (Provider) provided healthcare services to ____ consisting of: office visit, prolonged evaluation, needle electromyography (thoracic and extremities), nerve conduction study, sensory study of each nerve, and manual measurements of reflexes and range of motion.
4. Carrier declined to pay for these services.
5. The amount in dispute is \$1,401.00.
6. The IRO issued its decision January 27, 2004, finding that the services described in Finding of Fact No. 3 were medically necessary for Claimant. The Medical Review Division of the Texas Workers ' Compensation Commission (Commission) adopted the IRO ' s decision on January 30, 2004.
7. On February 19, 2004, Carrier requested a hearing.
8. Claimant ' s disc at L3-L4 was herniated, with a protrusion of 2-3 mm.
9. Between ____, and December 30, 2002, the pain in Claimant's legs worsened.
10. Claimant's treating physician, Dr. Wildermuth, found that conservative therapies had failed and referred Claimant to Dr. Eric Scheffey to be evaluated as a candidate for surgery.

11. Dr. Eric Scheffey recommended electrodiagnostic tests, including nerve conduction studies (NCV), and disagreed with Dr. Wildermuth that physical therapy would not benefit Claimant.
12. In addition to the protrusion at L3-L4, Claimant had a bulge or protruded disc with stenosis of the left-sided nerve exit at L4-L5.
13. In addition to the protrusion at L3-L4, Claimant had a 2mm. bulge or protruded disc with minimal impingement at T12-L1.
14. Notwithstanding the diagnosis reflected in Findings of Fact 8, 12, and 13, the protrusion of disc referred to in that diagnosis did not impinge on neural structures.
15. When the disputed services described in Finding of Fact No.3 were provided, the cause of Claimant's pain was not known with reasonable certainty.
16. Claimant's treating physician, Dr. Wildermuth, requested the services in dispute.
17. The evidence fails to show that the services Provider provided to Claimant on January 30, 2003, were not medically necessary.

III. CONCLUSIONS OF LAW

1. The State Office of Administrative Hearings has jurisdiction over this proceeding, including the authority to issue a decision and order. TEX. LAB. CODE ' 413.031; TEX. GOV'T CODE ch. 2003.
2. 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. TEX. LAB. CODE ' 408.021.
3. Lumbermens Mutual Casualty Company (Carrier) timely filed a request for hearing as specified in 28 Texas Administrative Code ' 148.3.
4. Adequate and timely notice of the hearing was provided in accordance with the Administrative Procedure Act. TEX. GOV'T CODE ' 2001.051 and 2001.052.
5. Carrier has the burden of proof in this matter. 1 TEX. ADMIN. CODE ' 155.141.
6. The services provided Claimant by Carrier on January 30, 2003, were medically necessary
7. Based on the Findings of Fact and foregoing Conclusions of Law, and pursuant to ' 408.021 of the Texas Labor Code, Carrier must reimburse Provider for the disputed services provided on January 30, 2003.

ORDER

IT IS THEREFORE ORDERED that Lumbermens Mutual Casualty Company reimburse Advanced Medical Associates (Provider) \$1,401.00 for the office visit, prolonged evaluation, needle electromyography (thoracic and legs), nerve conduction study, sensory study of each nerve, H or F reflex study, and manual measurements of reflexes and range of motion, all provided to Claimant ____ on January 30, 2003.

SIGNED August 9, 2004.

**CHARLES HOMER III
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**