

SOAH DOCKET NO. 453-04-4598.M5
TWCC MR NO. M5-04-1849-01

SOUTHWESTERN BELL TELEPHONE COMPANY, Petitioner	· · · · · · · · · ·	BEFORE THE STATE OFFICE
V.		OF
NEUROMUSCULAR INSTITUTE OF TEXAS, PA, Respondent		ADMINISTRATIVE HEARINGS

DECISION AND ORDER

I. INTRODUCTION

After an Independent Review Organization (IRO) reviewer determined various chiropractic and other physical medicine treatments were medically necessary for a workers' compensation claimant, Southwestern Bell Telephone Company (the Carrier) appealed. At issue are services provided by Neuromuscular Institute of Texas, PA (the Provider) which totaled \$5,012. In this decision, the Administrative Law Judge (ALJ) finds the majority of services were medically necessary, but denies reimbursement for two rehabilitation sessions and orders reimbursement to the Provider of \$4,605.

The hearing convened on July 15, 2004, at the State Office of Administrative Hearings with Administrative Law Judge (ALJ) Sarah G. Ramos presiding. The Carrier was represented by Charlotte Salter, attorney, and the Provider was represented by Allen T. Craddock, attorney. Neither party objected to notice or jurisdiction. The hearing concluded and the record closed the same day.

II. DISCUSSION

1. Background

The claimant suffered a work-related injury on____, when she fell backward on rock, hitting her tail bone. Between April 25, 2002, and June 11, 2002, she was treated with sixteen chiropractic manipulations. A May 8, 2002, MRI revealed first degree spondylolisthesis at L5 in relation to S1 and degenerative disc disease at L5-S1. Her July 23, 2002, EMG and nerve conduction tests indicated acute right S1 radiculopathy and active acute pathologic denervation.

2. Types of Treatment

The disputed services in this case are:

<u>Dates (all in 2002)</u>	<u>Provider</u>	<u>Type of Care</u>
7/22, 7/29, 7/31, 8/8, 8/12, 8/14, 8/26, 9/10, 9/16, 9/18, 9/23, 10/2, 10/15, 10/16	Conrad Kothmann, D.C.	Chiropractic manipulation
8/27, 8/29, 8/30, 9/3, 9/6, 9/10	Kipp Clayton, OTR	Post-ESI therapy
9/3	Brad Burdin, D.C.	Office visit and completion of TWCC-73
10/25, 10/28, 10/30, 11/1, 11/4, 11/6, 11/11, 11/15, 11/18, 11/21, 11/25, 11/27	Kipp Clayton, OTR	Rehabilitation program

Dr. Burdin, the claimant's treating doctor, testified that the claimant did not experience lasting progress from the treatment she received at his clinic. Even so, Dr. Burdin said he would not have changed anything about the care he provided to her.

Early in the claimant's treatment, Dr. Burdin referred her to a spine surgeon. On May 17, 2002, the surgeon, Jerjis Denno, M.D., recommended that the claimant continue with a few more weeks of physical therapy and then have trigger point injections if she had not improved. She received more physical medicine treatment, including manipulations. Then, Dr. Burdin referred the claimant to Dr. Hirsch for epidural steroid injections (ESIs).

While awaiting the ESIs and during and after those injections, the claimant continued to receive chiropractic treatment from Dr. Kothmann. The claimant's comments about the benefit of manipulations were contradictory. On July 11, 2002, Dr. Kothmann wrote, progress has finally been shown to improve with manipulation. On July 12, 2002, Dr. Burdin wrote a similarly supportive evaluation note:

She is still waiting to see Dr. Hirsch for EMG and nerve conduction studies . . . She is continuing with Dr. Kothmann for manipulation. For a while, she wasn't sure if she was receiving much benefit from the treatment. But then with the severe flooding that we had last week, she was not able to come in for the treatment and became aware of the fact that she was in need of the treatment because it did make a difference.

However, on July 15, 2002, the claimant refused manipulation because the previous treatment had exacerbated her symptoms. Two days later, she received Avery easy side posture manipulation, and Dr. Kothmann indicated that she continued to be helped some with the easy manipulation.

Beginning in mid-July 2002, Dr. Kothmann used Aflex/distraction with claimant. The ALJ is not certain what is mean by this term. On September 10, 2002, he again began to use drop-table adjusting. Dr. Kothmann's treatment notes include varying reports about the claimant's progress, such as:

8/14 B continued variable progress; had great improvement with flex/distraction;
8/19 B great improvement;
8-26 B ESI #1 and flex/distraction have both helped her;
9/3 B exacerbation;
9/6 B responding very well;
9/10 B variable improvement;
9/12 B good improvement;
9/18 B overall progress; slow improvement;
10/2 B slight relief with ESIs and drops.

David M. Hirsch, D.O.,¹ administered ESIs to the claimant on August 20, September 4, and September 19, 2002. After each injection, Dr. Hirsch wrote a prescription for the claimant for five sessions of physical therapy to include hot packs, stretching, massage, and electric simulation, which the claimant received in addition to the chiropractic treatments.

On September 12, 2002, a week before the claimant received her last ESI, Dr. Burdin referred her to an occupational therapist for a formal rehabilitation program that was to begin soon after the last ESI. On October 21, 2002, Dr. Burdin noted:

She did not begin the rehab program that I had suggested last time because she . . . went through the therapy that Dr. Hirsch had suggested. She certainly has made some improvements with the [range of motion], which was almost double what it was when I saw her one month ago. I would like for her to begin the rehab at this point, and then we would probably have her go through an FCE at the completion of one month to see how she is doing.

When the claimant next saw Dr. Burdin, on November 22, 2002, he referred her back to the spine surgeon, Dr. Denno. AI wanted to get an FCE on her, but I think I will wait to see her after she meets with Dr. Denno, Dr. Burdin wrote.

¹ Dr. Hirsch is board-certified in physical medicine and rehabilitation, electrodiagnostic medicine, and pain management.

3. Required Medical Examination (RME)

On September 3, 2002, the claimant attended an RME with Theodore W. Parsons, III, M.D. Dr. Parsons said the claimant was being appropriately treated and should continue her ESIs. Typically, symptomatic spondylolisthesis resolves with physical therapy, injections, anti-inflammatories, etc. . . . [the claimant] has responded so nicely to her initial injection that she may respond to a series of injections, anti-inflammatories, and exercise programs, etc.

4. IRO

Noting that his decision was based on 14 years of clinical experience and the 1995 Spine Treatment Guideline, the IRO reviewer found the Provider's treatments and services were medically necessary. The reviewer said conservative measures had not been exhausted by the disputed dates:

The office visits were medically necessary and justified to monitor the patient's signs and symptoms, psychological state, and gross physical condition. The manipulation modifiers were appropriate for those office visits where the treating doctor was using drop-table adjusting to attempt to reduce the anterolisthesis and manipulate the sacroiliac articulation. The therapeutic exercises were medically necessary to strengthen the paraspinal musculature to see if self-stabilization could be achieved. The miscellaneous passive modalities, heat, stimulation & electrodes, myofascial release, and ultrasound were medically necessary to relieve pain, reduce spasm, and increase circulation. According to the documents submitted, some of the passive therapy was performed post ESI to address the patient's complaints of pain. . . .

5. Retrospective Peer Reviews

1. First Peer Review

At the Carrier's request, Phil Lening, M.D., performed a peer review on August 8, 2002. Dr. Lening had some, but not all, of the claimant's treatment records. He determined that the claimant had a sprain or strain and said most sprains or strains take six-to-twelve weeks to heal without complications. During that time, according to Dr. Lening, patients generally have some type of medical care two to three times a week. Based on an assumption that the claimant began therapy when she was injured, treatment beyond July 8, 2002, was not indicated, Dr. Lening concluded.

2. Second Peer Review

On December 17, 2002, Thomas B. Sato, D.C., reviewed the claimant's case information and Dr. Lening's peer review. Dr. Sato found fault with post-injection therapy for four reasons. First, he said there is no medical literature that supports therapy after ESIs. Also, conservative care already had failed; that was why the claimant was referred for ESIs. The claimant was more than four months past her injury date. Finally, Dr. Sato wrote, documentation for rehabilitation following the October 25, 2002 evaluation was unsupported, and it appeared the claimant was benefitting more from ESIs than from the physical medicine care.

6. Neal Blauzern, D.O.

The Carrier's witness, Dr. Blauzern, said he had treated numerous patients with injuries similar to the claimant's. In Dr. Blauzern's opinion, the EMG and nerve conduction studies on July 23, 2002, proved prior treatment had not been successful. Further, he said, treatment with passive modalities after the ESIs was entirely unnecessary. Instead, the claimant should have been trying active exercises at home on a daily basis, he testified.

Dr. Blauzern noted that the Provider's treatment did not improve the claimant's condition. As an example, he highlighted an October 21, 2002, report. The claimant had received her third ESI, and rated her pain as one to two on a 1/10 scale. She had almost doubled her range of motion from

the previous month. However, on November 18, 2002, during a psychosocial evaluation, the claimant reported having had pain since her injury that ranged from 2-7/10 with ten being the worst imaginable pain. Her average pain level was 4.5, and she described her pain as nearly constant, 60-95% of the time.

Dr. Blauzern also stressed the claimant's physical condition as described in Dr. Burdin's November 22, 2002, evaluation. Even though the claimant had felt she was progressing in her rehabilitation therapy until then, that day she reported back pain of 6-7/10. She was flexing the left spine approximately 60 degrees but not extending beyond neutral because extension was too painful. Passive lumbar rotary extension was also painful. The claimant's perception to touch in the right thigh, laterally and anteriorly, was decreased. Although she could squat about 50 percent, she had difficulty rising from that position. Eventually, Dr. Blauzern noted, the claimant was referred for spine surgery because she had not experienced much change in her pain and still had significant physical restrictions. Overall, he characterized the Provider's treatment as ineffective.

7. Analysis

In ALJ's opinion, the Carrier met its burden of proof only as to treatments provided after Dr. Burdin's November 22, 2002 evaluation. During the disputed dates of service, there were other medical professionals who supported the treatment the claimant received from Dr. Burdin or at his direction. Dr. Hirsch prescribed physical therapy to follow the ESIs, and Dr. Parsons found that physical therapy, ESIs, anti-inflammatories, and an exercise program could benefit the claimant. Additionally, while the claimant's reaction to the chiropractic flex/distraction and drop-table manipulations varied, she seemed to have some improvement from them.

Dr. Blauzern raised valid points B particularly that the care the claimant received from the Provider did not help her. Even so, in the ALJ's opinion, the Carrier's evidence did not adequately

discredit the opinions in support of the post-ESI care, exercise rehabilitation, and other conservative treatments. Particularly persuasive was the IRO 's opinion.

On the other hand, Dr. Burdin found on November 22, 2002, that the claimant should be referred to a spine surgeon. At that point in time, it seems clear that he realized conservative care was not working for the claimant. Therefore, treatments should not have been provided after that date. The MAR for these services is \$407. When \$407 is subtracted from the total MAR on the table of disputed services, the amount remaining is \$4,605, which the ALJ orders the Carrier to pay the Provider.

III. FINDINGS OF FACT

1. A workers ' compensation claimant suffered a work-related injury on____, when she fell backward on rock, hitting her lower spine.
2. Between April 25, 2002, and June 11, 2002, the claimant was treated with sixteen chiropractic treatments.
3. As reflected in MRI, EMG, and nerve conduction tests, the claimant had first degree spondylolisthesis at L5 in relation to S1, degenerative disc disease at L5-S1, and acute right S1 radiculopathy and active acute pathologic denervation.
4. Southwestern Bell Telephone Company (the Carrier) denied reimbursement for the following services, all provided through Neuromuscular Institute of Texas, PA (the Provider):

<u>Dates (all in 2002)</u>	<u>Provider</u>	<u>Type of Care</u>
7/22, 7/29, 7/31, 8/8, 8/12, 8/14, 8/26, 9/10, 9/16, 9/18, 9/23, 10/2, 10/15, 10/16	Conrad Kothmann, D.C.	Chiropractic manipulation and other treatments
8/27, 8/29, 8/30, 9/3, 9/6, 9/10 9/3	Kipp Clayton, OTR Brad Burdin, D.C.	Post-ESI therapy Office visit and completion of TWCC-73
10/25, 10/28, 10/30, 11/1, 11/4, 11/6, 11/11, 11/15, 11/18, 11/21, 11/25, 11/27	Kipp Clayton, OTR	Rehabilitation program

5. The maximum allowable reimbursement (MAR) for the services listed in the previous Finding of Fact is \$5,012.
6. On May 17, 2002, a spine surgeon recommended that the claimant continue with a few more weeks of physical therapy and then have trigger point injections if she had not improved.
7. The claimant received more physical medicine treatment and then received epidural steroid injections (ESIs) on August 20, September 4, and September 19, 2002.
8. After each ESI, the doctor who administered the ESIs prescribed five sessions of physical therapy to include hot packs, stretching, massage, and electric simulation.
9. The claimant received not only the physical therapy, but at her treating doctor's direction, she had chiropractic treatments throughout disputed service dates.
10. When the claimant received her last ESI and completed the prescribed physical therapy, she also began a formal rehabilitation program.
11. Dr. Burdin was the treating doctor, and the claimant's symptoms, psychological state, and gross physical condition were monitored during his office visits with the claimant.
12. The miscellaneous passive modalities (including heat, stimulation and electrodes, myofascial release, and ultrasound) relieved the claimant's pain, reduced spasms, and increased circulation after she had received ESIs.
13. After the claimant completed the ESIs and reported improvement in her pain, it was reasonable for her to attempt a rehabilitation program.
14. The manipulation modifiers billed were appropriate for office visits where the treating doctor was using drop-table adjusting to attempt to reduce the anterolisthesis and manipulate the sacroiliac articulation.
15. By November 22, 2002, it was obvious that the claimant was not improving as a result of her rehabilitation and she was referred back to the spine surgeon.
16. Rehabilitation therapy after November 22, 2002, was not medically necessary.
17. The MAR for the services provided after November 22, 2002, is \$407.
18. Petitioner timely requested a hearing before the State Office of Administrative Hearings (SOAH).
19. Notice of the hearing was sent to both parties on April 29, 2004.

20. The notice of hearing 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.
21. The hearing convened on July 15, 2004, and both parties were represented. The hearing concluded and the record closed that day.

IV. CONCLUSIONS OF LAW

1. SOAH has jurisdiction over this proceeding, including the authority to issue a decision and order, pursuant to the Texas Workers' Compensation Act, specifically TEX. LABOR CODE ANN. ' ' 402.073(b) and 413.031(k), and TEX. GOV ' T CODE ANN. ch. 2003.
2. The hearing request was timely made pursuant to 28 TEX. ADMIN. CODE ' 148.3.
3. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV ' T CODE ANN. ' ' 2001.051 and 2001.052.
4. The Carrier had the burden of proof in this matter. 28 TEX. ADMIN. CODE ' 148.21(h).
5. Until after November 22, 2002, the Provider ' s care for the claimant was reasonably required by the nature of her injury, and was therefore, medically necessary, as described in TEX. LABOR CODE ANN. ' 408.021(a).
6. The two rehabilitation sessions provided after November 22, 2002, were not medically necessary.
7. The Carrier should reimburse the Provider \$4,605.

ORDER

THEREFORE IT IS ORDERED that Southwestern Bell Telephone Company reimburse Neuromuscular Institute of Texas, PA in the amount of \$4,605.

SIGNED September 15, 2004.

**SARAH G. RAMOS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**