DOCKET NO. 453-05-0965.M2
TWCC NO. M2-04-1782-01

KENNETH BERLINER, M.D., **Petitioner**	'	**BEFORE THE STATE OFFICE**
VS.	'	**OF**
UNIVERSITY OF TEXAS SYSTEM, **Respondent**	'	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Kenneth Berliner, M.D. (Provider) challenged the decision of University of Texas System (Carrier) denying preauthorization for arthroscopic knee surgery for Claimant. In this decision, the Administrative Law Judge (ALJ) finds that Provider did not meet its burden of showing that the surgery is reasonable and necessary medical care and should be preauthorized. Therefore, the ALJ does not order preauthorization of the requested knee surgery.

The hearing convened and closed on November 8, 2004, before ALJ Steven M. Rivas. Provider appeared and represented himself. Carrier appeared and was represented by Bradley McClellan, attorney.

I. DISCUSSION

1. Background Facts

Claimant sustained a compensable knee injury on ___. After her injury, Claimant underwent physical therapy and was prescribed medication to treat her injury. In June 2004, Provider began treating Claimant and recommended arthroscopic knee surgery for Claimant. Provider sought preauthorization from Carrier, which was denied as not medically necessary. The dispute was referred to an Independent Review Organization (IRO), which agreed with Carrier. Provider appealed the IRO decision to the State Office of Administrative Hearings.

2. Applicable Law

Pursuant to the Texas Workers' Compensation Act (the Act), TEX. LAB. CODE ANN. § 408.021 *et seq.*, an employee who sustains a compensable injury is entitled to all 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.

Under TEX. LAB. CODE ANN. § 401.011(19), health care includes all reasonable and necessary medical aid, medical examinations, medical treatment, medical diagnoses, medical evaluations, and medical services.

Certain categories of health care identified by the Commission require preauthorization, which is dependant upon a prospective showing of medical necessity under § 413.014 of the Act and 28 TEX. ADMIN. CODE (TAC) § 134.600. In this instance, under 28 TAC § 134.600(h)(2) preauthorization is required for the arthroscopic knee surgery requested by Provider.

3. Evidence and Analysis

Provider failed to pre-file any exhibits or provide any documents during the hearing. Provider's only evidence was his testimony of Claimant's treatment and condition based solely on independent recollection. Provider asserted he recommended surgery for Claimant based on the results of an MRI, and physical exams, which, according to Provider, were positive for pathology. Additionally, Provider testified Claimant's persistent pain complaints were considered in recommending knee surgery.

On cross-examination, Provider admitted he first saw Claimant in June 2004, more than 20 months following her compensable injury. Provider was unable to recall the circumstances of her injury or whether she had any intervening injuries since the date of her compensable injury.

Provider asserted that Carrier had a copy of all of Claimant's medical records, however, Carrier did not present any documents. Instead, Carrier argued that Provider had not met its burden

of proving the requested knee surgery was medically necessary. In support of its position, Carrier pointed out that Provider had not presented any evidence to support any findings of an MRI examination or physical examination. Additionally, Carrier argued Provider had not established that he was qualified to make a recommendation of surgery other than stating his title of AM.D.@ Furthermore, Carrier argued Provider presented insufficient evidence that Claimant's current condition is related to her compensable injury.

The ALJ agrees with Carrier because no documentation was presented to establish Provider's conclusion that Claimant is entitled to knee surgery. Provider argues that Carrier presented no evidence to dispute Provider's assertions, so the ALJ should rule in favor of Provider because no other Amedical evidence@ was presented except Provider's testimony. The ALJ was not persuaded by this argument, because Provider had the burden of proof in this matter. Without any documentary evidence to support Provider's assertion of medical necessity, the ALJ is unable to find in favor of Provider. Therefore, the arthroscopic knee surgery should not be preauthorized.

II. FINDINGS OF FACT

1. Claimant sustained a compensable injury on ___.

2. Claimant began treatment with Kenneth Berliner, M.D. (Provider) in June 2004.

3. Provider recommended Claimant undergo arthroscopic knee surgery and sought preauthorization from University of Texas System (Carrier), which was denied.

4. Provider sought medical dispute resolution with the Texas Workers' Compensation Commission's Medical Review Division, which referred this matter to an Independent Review Organization (IRO). The IRO report concurred with Carrier and denied preauthorization.

5. Provider timely requested a hearing before the State Office of Administrative Hearings (SOAH).

6. Notice of the hearing in this case was mailed to the parties on October 11, 2004. 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.

7. The hearing convened and closed on November 8, 2004, before Steven M. Rivas, Administrative Law Judge (ALJ). Provider appeared and represented himself. Carrier appeared and was represented by Bradley D. McLellan, attorney. The hearing was adjourned and the record closed the same day.

8. An MRI examination was administered to Claimant, but the results of that MRI were not offered into evidence.

9. Provider administered physical examinations on Claimant, but the results of those examinations were not offered into evidence.

10. Provider offered no documents of Claimant's treatment into evidence.

11. Provider testified about his recommendation for surgery but did not submit any documentary evidence to support his position.

III. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Section 413.031 of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq.* (Athe Act@).

2. SOAH has jurisdiction over this proceeding, including the authority to issue a decision and order, pursuant to ' 413.031(k) of the Act and TEX. GOV'T CODE ANN. ch. 2003.

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 Provider, as Petitioner, had the burden of proof on appeal by a preponderance of the evidence under ' 413.031 of the Act, and 28 TEX. ADMIN. CODE '148.21(h).

5. Provider has failed to show the arthroscopic knee surgery will cure or relieve the effects of Claimant's compensable injury under TEX. LAB. CODE ANN. ' 408.021, *et seq.*

6. The requested arthroscopic knee surgery is not medically necessary for treating Claimant's compensable injury.

ORDER

IT IS, THEREFORE, ORDERED that preauthorization for the arthroscopic knee surgery is denied.

SIGNED on December 3, 2004.

_____

STEVEN M. RIVAS
STATE OFFICE OF ADMINISTRATIVE HEARINGS
ADMINISTRATIVE LAW JUDGE