

**SOAH DOCKET NO. 453-04-1810.M5
MR NO. M5-04-0139-01**

AMERICAN HOME ASSURANCE COMPANY, Petitioner	§	BEFORE THE STATE OFFICE
	§	
V.	§	OF
	§	
G. HAL LEWIS, D.C., Respondent	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

American Home Assurance Company (AHAC) challenges the decision of the Texas Workers' Compensation Commission (Commission), acting through an independent review organization (IRO), in a dispute regarding the medical necessity of physical medicine treatments provided to Claimant _____. The Administrative Law Judge (ALJ) finds partially in favor of AHAC.

I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION

The hearing convened on July 6, 2005, at the facilities of the State Office of Administrative Hearings, 300 W. 15th St., Austin, Texas. ALJ Katherine L. Smith presided. AHAC was represented by Dan Kelley, an attorney. G. Hal Lewis, D.C., was represented by Donald G. MacPhail, an attorney. Neither party challenged the adequacy of notice or jurisdiction. The record closed on July 19, 2005, with the submission of the table of disputed services, which is admitted into evidence as Ex. 3.

II. BACKGROUND

Claimant suffered a compensable injury on _____, when she fell injuring her right shoulder. James Burke, M.D., performed surgery on March 12, 2002, to repair a rotator cuff tear. Claimant began rehabilitation on April 2, 2002, with Ronald Voyles, D.C. Dr. Lewis began providing rehabilitation to Claimant on July 1, 2002.

AHAC denied reimbursement for services that Dr. Lewis provided to Claimant from September 10, 2002, to January 21, 2003, based on lack of medical necessity. The IRO found that the services were medically necessary, however, because Claimant was in a complicated and chronic group due to the surgery not being performed sooner. The IRO also noted that Dr. Burke continued to call for rehabilitation of the right shoulder. Ex. 2. At issue are office visits with manipulations, electrical stimulation, vasoneumatic therapy, therapeutic exercises, therapeutic activities, ultrasound, neuromuscular reeducation, and myofascial release. The services in dispute are listed on Attachment A.

III. DISCUSSION

A. Parties' Positions

1. AHAC

AHAC presented the testimony of Mike Hamby, D.C., its expert witness, who testified that the treatments were excessive and that no objective evidence substantiated the need for such exceptional care. Dr. Hamby pointed out that Dr. Burke found on June 20, 2002, that Claimant had shown satisfactory progress, no pain, and no signs of complications and found on October 7, 2002, that Claimant reached full range of motion and was able to return to light duty. Dr. Hamby noted that the surgery was not complicated and questioned Dr. Lewis's assessment on July 2, 2002, that Claimant's prognosis was guarded, because that was not Dr. Burke's assessment. Dr. Hamby opined that the six months of care provided by September 10, 2002, was enough, the extensive program provided beginning in July should have been adequate, and Claimant should have been transitioned to a home exercise program. Dr. Hamby noted that during the treatment in question, Dr. Lewis did not note any presenting factors of a particular aggravation or exacerbation, a particular flare-up, or complicating factors that would cause a delay in recovery. According to the American College of Occupational and Environmental Medicine guidelines, the treatment should have consisted of three visits of physical therapy for one week and then an active home exercise program of 24 visits for 14 weeks to be assessed after six visits to determine whether the exercises were being performed

correctly. Dr. Hamby questioned the IRO's decision referring to chronic and complicating factors and noted that reliance on passive modalities fosters chronicity and physician dependency.

2. Dr. Lewis

Dr. Lewis testified that he first began treating Claimant with passive modalities, but began therapeutic exercises with resistant weights as soon as Claimant was able to improve her physical strength and range of motion. Dr. Lewis attributed the prolonged recovery time to adhesions and scar tissue that the delay in the surgery and her attempt to continue work caused and which could not be removed surgically. According to Dr. Lewis, treatment was needed to separate the adhesions and build up muscle strength. He stated that he had to re-educate Claimant's damaged shoulder as to its proper function and motion. In his opinion, Claimant would not have been able to duplicate many of the procedures at home because treating specific muscle groups required the use of machines not available at home.

Although Claimant may have had full range of motion by October 7, 2002, that did not mean that she had good muscular strength and tendon strength so that the muscles could move the joint in its full range, Dr. Lewis stated. He noted that she did not reach maximum medical improvement until November 2002. After that time treatment continued because of Claimant's continued apprehension and her need for repetitive motion exercises to help prepare her for any job that she took on. Dr. Lewis pointed out that Claimant went back to work in January 2003 after her range of motion and strength had increased and her pain had been reduced. Dr. Lewis stated that the treatment was not maintenance care but was needed because of ongoing flare-ups and additional soreness resulting from the increase in resistance in the exercises.

B. ALJ's Analysis

On October 7, 2002, Dr. Burke, Claimant's primary care doctor, wrote that Claimant had reached full range of movement, there was no sign of complications, and she could return to light duties with restricted amount of lifting. Ex. 1 at 193. His failure to call for additional physical therapy at that point brings into question part of the IRO's decision and the continuing physical therapy. Although the IRO also wrote that Claimant was in a complicated and chronic group because of the delay in the surgery and Dr. Lewis stated that he was treating adhesions, the only

chronic situation identified in the medical record was Claimant's depression identified by Dmitry Golovko, M.D., who is board certified in occupational medicine and who performed an RME on Claimant on March 1, 2002. Ex. 1 at 117. Furthermore, Dr. Lewis made no mention of adhesions in his medical notes, and Dr. Hamby indicated that Dr. Burke's surgical notes indicated that the area of the surgery had been "cleaned up." In addition, the only mention of a flare-up was on January 6, 2003. Ex. 1 at 249. What Dr. Burke called for next on October 7, 2002, was retraining for an occupation involving Claimant's limitations. At this point, the ALJ would have expected to see a change in Claimant's treatment, but that did not occur. More of the same treatment continued to occur. The only additional reference was to PNF stretching being added. Ex. 1 at 229.

Because Dr. Burke did prescribe more physical therapy on September 3, 2002, the ALJ is willing to give greater consideration to the treatments provided between that date and October 7, 2002. The ALJ is also mindful, however, of the requirements of the Commission's rules. For example, when a healthcare provider bills for one of the three highest level office visits, which includes CPT code 99213, and for physical medicine treatment, the Commission requires the healthcare provider to submit the following: progress or SOAP¹ notes substantiating the care given and the need for further treatment and services and indicating progress, improvement, the date of the next treatment and services, complications, and expected release date.² And when billing for an office visit using 99213, two of the following must take place: an expanded, problem-focused history; an expanded, problem-focused examination; or medical decision making of low complexity.³

Based on the above, the ALJ finds that the medical notes from the office visits of September 11, 13, 16, 18, 20, and 23, billed as 99213-MP, document neither an expanded, problem-focused history, nor an expanded, problem-focused examination, nor that a manipulation was performed. As for the remaining treatments, although sparse and repetitive, the treatment notes do

¹ Subjective/objective/assessment/plan.

² 28 TEX. ADMIN. CODE (TAC) § 133.1(a)(3)(E)(I).

³ From 1996 Medical Fee Guideline, adopted by reference in 28 TAC § 134.201 (eff. date April 1, 1996), which was presumably in effect because of the decision in *Texas Medical Ass'n v. Texas Workers' Compensation Com'n*, 137 S.W.3d 342 (Tex. App.-Austin 2004, rehearing overruled June 24, 2004), which did not overturn the District Court Judge's determination that the effective date of the 2002 MFG would be August 1, 2003. Final Judgment, Cause No. GN 202203, June 1, 2003 (J. Dietz).

document that manipulations, vasopneumatic therapy, and electrical stimulation were provided to Claimant on September 10, 12, 17, 19, 24, 26, and October 1, 2002, and that therapeutic exercises and activities and ultrasound were provided to Claimant on September 11, 13, 16, 18, 20, 23, 27, 30 and October 2, 2002. Claimant also showed progress, as Dr. Burke noted on October 7, 2002.

Therefore, the ALJ finds that Dr. Lewis is due reimbursement from AHAC for the manipulations, vasopneumatic therapy, and electrical stimulation provided to Claimant on September 10, 12, 17, 19, 24, 26, and October 1, 2002, and the therapeutic exercises and activities and ultrasound provided to Claimant on September 11, 13, 16, 18, 20, 23, 27, 30 and October 2, 2002. For all other dates of service and treatments, Dr. Lewis is denied reimbursement.

IV. FINDINGS OF FACT

1. Claimant suffered a compensable injury on ____, when she fell injuring her right shoulder.
2. At the time of the injury, Claimant's employer had workers' compensation insurance coverage with American Home Assurance Company (AHAC).
3. James Burke, M.D., performed surgery on March 12, 2002, to repair a rotator cuff tear.
4. G. Hal Lewis, D.C. began treating Claimant on July 1, 2002.
5. Dr. Lewis sought reimbursement from AHAC for services provided to Claimant from September 10, 2002, to January 21, 2003.
6. AHAC found the treatments provided to be not medically necessary and denied reimbursement.
7. Dr. Lewis requested medical dispute resolution at the Texas Workers' Compensation Commission (Commission).
8. On November 24, 2003, the Commission's Medical Review Division adopted the conclusion of an independent review organization (IRO) that the services in dispute were medically necessary.
9. On November 26, 2003, AHAC requested a hearing with the State Office of Administrative Hearings (SOAH), seeking review of the IRO's decision.
10. On December 13, 2003, the Commission issued the notice of the hearing, which stated the date, time, and location of the hearing and cited to the statutes and rules involved, and provided a short, plain statement of the factual matters involved.

11. The hearing convened on July 6, 2005, at 300 W. 15th St., Austin, Texas. Both parties were represented.
12. Dr. Burke, Claimant's primary care doctor, prescribed more physical therapy for Claimant on September 3, 2002.
13. Dr. Lewis's treatment notes document that manipulations, vasopneumatic therapy, and electrical stimulation were provided to Claimant on September 10, 12, 17, 19, 24, 26, and October 1, 2002, and that therapeutic exercises and activities and ultrasound were provided to Claimant on September 11, 13, 16, 18, 20, 23, 27, 30 and October 2, 2002.
14. The treatment notes of September 11, 13, 16, 18, 20, and 23, billed as 99213-MP, do not document an office visit with an expanded, problem-focused history or an expanded, problem-focused examination, or that a manipulation was performed.
15. Claimant showed progress from the treatments provided.
16. On October 7, 2002, Claimant had reached full range of movement, there was no sign of complications, and she could return to light duties with restricted amount of lifting.
17. Dr. Burke did not call for additional physical therapy on October 7, 2002, but for retraining for an occupation involving Claimant's limitations.
18. At this point, no change in Claimant's treatment was provided. More of the same treatment continued to occur.

V. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to the Texas Workers' Compensation Act (the Act), TEX. LAB. 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(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 hearing was conducted pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001 and the Commission's rules, 28 TEX. ADMIN CODE (TAC) §§ 148.1-148.28.
5. AHAC had the burden of proof in this proceeding. 28 TAC §§ 148.14(a); 1 TAC § 155.41
6. Under TEX. LABOR CODE § 408.021(a)(1), 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

that cures or relieves the effects naturally resulting from the compensable injury.

7. The manipulations, vasopneumatic therapy, and electrical stimulation provided to Claimant on September 10, 12, 17, 19, 24, 26, and October 1, 2002, and the therapeutic exercises and activities and ultrasound provided to Claimant on September 11, 13, 16, 18, 20, 23, 27, 30 and October 2, 2002, were medically necessary health care.
8. The treatment notes of September 11, 13, 16, 18, 20, and 23, billed as 99213-MP, do not meet the requirements of the 1996 Medical Fee Guideline, adopted by reference in 28 TAC § 134.201 (eff. April 1, 1996), and thus were not medically necessary health care.
9. The treatments provided to Claimant on and after October 7, 2002, were not medically necessary health care.
10. Based upon the foregoing Findings of Fact and Conclusions of Law, AHAC's petition is granted, except for the treatments outlined in Conclusion of Law No. 7.

ORDER

IT IS THEREFORE, ORDERED that Dr. Lewis is due reimbursement from American Home Assurance Company for the manipulations, vasopneumatic therapy, and electrical stimulation provided to Claimant on September 10, 12, 17, 19, 24, 26, and October 1, 2002, and the therapeutic exercises and activities and ultrasound provided to Claimant on September 11, 13, 16, 18, 20, 23, 27, 30 and October 2, 2002.

SIGNED September 16, 2005.

**KATHERINE L. SMITH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

DATES OF SERVICE

453-04-1810.M5

CPT 99213-MP Level III Office Visit	CPT 99214 Level IV Office Visit	CPT 97032 Electrical Stimulation	CPT 97016 Vaso- pneumatic Therapy	CPT 97110 Therapeutic Exercises	CPT 97112 Neuromuscular Reeducation	CPT 97250 Myofascia l release	CPT 97530 Therapeutic Activities	CPT 97139-PH Ultrasound
9/10/02	1/21/03	9/10/02	9/10/02	9/11/02	11/12/02	11/12/02	9/11/02	9/11/02
9/11/02		9/12/02	9/12/02	9/13/02	11/19/02	11/19/02	9/13/02	9/13/02
9/12/02		9/17/02	9/17/02	9/16/02	11/21/02	1/6/03	9/16/02	9/16/02
9/13/02		9/19/02	9/19/02	9/18/02	1/6/03	1/9/03	9/18/02	9/18/02
9/16/02		9/24/02	9/24/02	9/20/02	1/9/03	1/21/03	9/20/02	9/20/02
9/17/02		9/26/02	9/26/02	9/23/02	1/21/03		9/23/02	9/23/02
9/18/02		10/1/02	10/1/02	9/27/02			9/27/02	9/27/02
9/19/02		10/7/02	10/7/02	9/30/02			9/30/02	9/30/02
9/20/02		10/8/02	10/8/02	10/2/02			10/2/02	10/2/02
9/23/02		10/15/02	11/5/02	10/9/02			10/9/02	10/9/02
9/24/02		11/7/02	11/7/02	10/14/02			10/14/02	10/14/02
9/26/02		12/11/02		11/6/02			11/6/02	12/11/02
10/1/02				11/8/02			11/8/02	1/6/03
10/7/02				11/11/02			11/11/02	1/9/03
10/8/02				11/18/02			11/18/02	
10/9/02				11/20/02			11/20/02	
10/15/02				12/9/02			12/9/02	
11/7/02				12/16/02			12/16/02	
11/12/02				12/18/02			12/18/02	
11/19/02								
11/21/02								
12/11/02								
12/16/02								
1/6/03								
1/9/03								

Attachment A