DOCKET NO. 453-05-1029.M4
MDR NO. M4-04-B073-01

___, **Petitioner** **VS.**	§	**BEFORE THE STATE OFFICE**
TEXAS PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION ON BEHALF OF EMPIRE LLOYDS INSURANCE COMPANY, **Respondent**	§	**OF** **ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

This case involves a medical fee dispute in which Provider ___ seeks an additional reimbursement of $11,280 from Texas Property and Casualty Insurance Guaranty Association (Guaranty Association) on behalf of Empire Lloyds Insurance Company (Carrier)[1] for services provided between February 1 and May 8, 2004. Carrier contended that $8 per hour was the fair and reasonable rate of reimbursement for the attendant care services preauthorized from February 1 through April 30, 2004, and reimbursed Provider $17,280. Provider asserted that a fair and reasonable rate of reimbursement for the services would be $10 per hour between February 1 and April 3 and $16 per hour thereafter and that the service was preauthorized for 365 days, effective February 1, 2004.

The Administrative Law Judge (ALJ) finds Provider failed to show by a preponderance of the evidence that the fair and reasonable rate of reimbursement would be more than $8 per hour or that the services were preauthorized beyond April 30, 2004. Therefore, Provider is not entitled to additional reimbursement from the Carrier.

[1] On January 8, 2003, the Commissioner of Insurance designated Carrier as an impaired insurer. Therefore, the Guaranty Association handles this claim on its behalf.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

On October 12, 2004, the Texas Workers' Compensation Commission (Commission) referred the case to the State Office of Administrative Hearings for a hearing on the merits. On May 5, 2005, ALJ Georgie B. Cunningham conducted the hearing in the William P. Clements Building, 300 West 15th Street, Austin, Texas. Attorney James M. Loughlin represented Carrier. Provider appeared *pro se* with the assistance of Barton Levy, Ombudsman.[2]

Provider had contested SOAH's jurisdiction over the preauthorization issue and filed a motion to have the matter remanded to the Commission's Medical Review Division (MRD), but the motion was denied prior to the hearing.[3] Provider raised the issue again in her written closing argument. She asserted that the preauthorization issue should have been referred by MRD for a determination by an Independent Review Organization (IRO).

The documentary evidence shows that Provider filed her Commission request as a "fee dispute."[4] The ALJ finds no indication in the record that Provider challenged Carrier's amended notice of preauthorization dates by filing a request for dispute resolution on that issue. Therefore, the issue here is not an IRO question of whether preauthorization should be granted or whether it was improperly denied. Instead, it is a question of the fair and reasonable rate of reimbursement for the attendant care services and whether preauthorization was in effect during the service period of May 1 through May 8, 2004.

The parties did not contest notice, which is addressed in the findings of fact and conclusions of law without discussion. The ALJ closed the hearing on May 31, 2005, after allowing time for the parties to file their written closing arguments, as requested.

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[2] Provider appeared telephonically; however, the Ombudsman was present at the hearing.

[3] Order No. 1, issued on October 29, 2004, by ALJ Gary W. Elkins.

[4] Provider's Ex. 1, p. 13.

II. DISCUSSION

A. Background Information

1. Introduction

Carrier reimbursed Provider $17,280 for her claim for home attendant services for Claimant, her son, billed at $10 per hour, 24 hours per day, 7 days per week between February 1 and April 3, 2004, and $16 per hour between April 4 and May 8, 2004. Carrier determined that $8 per hour was fair and reasonable reimbursement for unskilled, unlicensed services and that the services beginning on May 1 were not preauthorized, as required by Commission rule.[5] In the absence of an established fee guideline rate, attendant care services are to be reimbursed at a fair and reasonable rate, as described in TEX. LAB. CODE ANN. § 413.011.

Provider sought fee dispute resolution from the Commission requesting an additional $11,280 for the dates billed and asserting that the service was preauthorization for 365 days. The Commission's MDR Officer examined the record and determined that Provider's survey for reimbursement of home healthcare providers in the Dallas Metropolitan area did not support her position. Furthermore, the MDR officer found that Provider did not obtain preauthorization prior to the delivery of services on May 1. At the hearing, Provider testified and presented the testimony of Claimant. Carrier presented the testimony of its adjuster, Peg Ann Artz, and Samuel M. Bierner, M.D. The parties presented a voluminous documentary record.

2. Claimant's Condition

Claimant's medical records, although voluminous, are at best inconsistent, but must be summarized to determine the level of care required as part of the determination of a fair and reasonable rate of reimbursement for the care required and furnished. On ___, Claimant incurred an

[5] Attendant care requires express preauthorization, pursuant to 28 TEX. ADMIN. CODE § 134.600(h)(12).

occupational injury while employed by ___. He was injured while working as a carpenter's helper installing rails on a display shelf. A section of an elevated platform on which he was standing collapsed causing him to fall approximately 10 feet to the floor. Claimant went to an emergency room two days afterward complaining of diffuse body pain, especially in the right thigh, with tingling in his right fingers and right ankle tenderness, but reported no loss of consciousness. Claimant was discharged with a diagnosis of blunt trauma from the fall, contusions, and mild closed head injury.

The medical records show that Claimant contends he suffers memory loss, slurred speech, blurred vision, inability to walk or keep his legs separated at times, constant fear of falling, extreme pain, blackouts, lack of peripheral vision, extreme depression, fear of being alone, burning sensation in his abdomen, continued nausea and vomiting, seizures, problems breathing, abdominal pain, vague weakness, fatigue, difficulty concentrating, pain and tightness in the cervical area, restriction of motion, intermittent motor and sensory disturbances in the upper extremities, abdominal cramping and discomfort, urinary track dysfunction, gastrointestinal distress, tunnel vision, headaches, body rash, shingles, inability to run, swollen and bruised knees, leg cramping, right shoulder popping and shaking, pain from an insect bite, locking left thumb, gagging on food, and breathing problems.

As summarized by Dr. Bierner, Claimant has had numerous medical tests, mostly during 1993 and 1994. The tests included a CT scan for intracranial pathology and sinusitis; lumbar puncture; cervical MRI; audiogram; electronystagmogram; radiographs of the neck lower back, hips, and right knee; bone scan; EMG of bilateral upper extremities; EEG; ophthalmological examination; cervical myelogram CT scan; and needle EMG examination of his upper extremities. These test results were interpreted as normal.

Five additional tests, mostly conducted during 1993 and 1994 also, revealed some abnormalities. A lumbar MRI showed L4-5 disk herniation; a brain MRI showed sinusitis, but was otherwise negative; an ENG showed mild right nystagmus, but a repeated test was negative; a lumbar

myelogram CT scan showed L4-5 soft disk herniation; and a lumbar MRI showed solid fusion, possibe lateral recess narrowing/protrusion. Claimant had a decompression and two-level fusion on August 9, 1994, and right knee arthroscopy on February 20, 1995.

The records also show that Claimant has received two psychological evaluations indicating he tends to manipulate others by developing and complaining of physical symptoms. In various examinations since his date of injury, physicians have noted possible "psychogenic causes including somatization disorder," "neurological inconsistency," "may be delusional about his health," "tends to manipulate others by developing physical symptoms," "unusual complaints had little, if any objective support," "multiple contraindications to further treatment," and "extensive medical treatment despite a lack of objective support."

According to Dr. Bierner and other physicians' written medical opinions, Claimant's extensive tests have failed to confirm other abnormal physical conditions, according to numerous medical opinions that Claimant should have recovered fully and should have no residuals from a head trauma. His symptoms are not consistent with his compensable injury of 1993 nor with his current diagnosis of reflex sympathetic dystrophy (RSD).

Nevertheless, Claimant sought and received attendant care for RSD involving the spine and the upper and lower extremities during February, March, and April 2004. The attendant care was furnished by his mother, Provider, 24 hours per day, 7 days per week.[6]

B. The Claim

1. Services Provided

Claimant's treating doctor requested attendant care for the following reasons: (a) need for immediate medical attention to cope with pain; (b) need for constant monitoring 24 hours per day; (c)

[6] ALJ Craig R. Bennett determined in Docket No. 453-02-3601.M2 that attendant care was not medically necessary in February 2002.

may become suicidal; (d) cannot drive or take care of business; (e) extreme insomnia; and (f) panic/fear of being alone.

During the time period at issue, Provider furnished the following attendant services to Claimant: (a) personal hygiene; (b) bathing; (c) helping in and out of bed; (d) getting in and out of a wheelchair; (e) getting in and out of his vehicle; (f) ensuring he takes his medications; (g) scheduling medical appointments; (h) maintaining a normal life; (i) driving to medical appointments; (j) calling for emergency assistance if he stops breathing; (k) shaving; (l) going to the bathroom; (m) dressing; (n) sleeping adjacent to Claimant to massage his body if he stops breathing; (o) caring for his pets; (p) keeping his house; (q) maintaining his yard; (r) assisting him if he gags while eating; (s) cooking; (t) doing his laundry; and (u) encouraging him to remain calm and focus on his breathing.

2. Fair and Reasonable Reimbursement

Provider resides with Claimant in Midlothian in Ellis County near Dallas, Texas. To establish a fair and reasonable rate of reimbursement for attendant care services, Provider presented a copy of Claimant's survey of five providers in the Dallas Metropolitan Area. The survey results were presented as a letter dated April 12, 2004, from Claimant to Carrier. The letter listed the name, telephone, and first name of the persons purportedly responding to the survey. The letter indicated the providers generally assigned staff to work in 12-hour shifts and billed between $15.95 and $19.95, with higher rates for holidays. Provider testified that she had advised Claimant's treating and consulting doctors about the care she provided, and they told her the services were reasonable.

Nevertheless, the ALJ agrees with Carrier's position and the MRD decision that Provider did not establish the skill level of services any of the five agencies provided or the rate actually paid the care providers. Typically, home health providers charge different rates for unlicensed attendant care, a licensed home health aide, a licensed vocational nurse, or a registered nurse. Provider did not furnish

information about which specific services these agencies provided for the reported fees. Furthermore, it is not unreasonable that an agency would charge a fee sufficient to meet overhead costs and make a profit. Provider did not furnish that information on behalf of the agencies surveyed nor did she address whether there were other agencies charging significantly more or less but not referenced in the letter.

Provider is not licensed as a registered or vocational nurse, home health aide, or in any other capacity as a health care provider and the services she lists are not skilled nursing care. For example, she did not give injections, wound care, respiratory care, therapy, or intravenous feeding, as skilled nursing care is defined in *What Is Home Health Care?* (published by the Centers for Medicare and Medicaid Services, U.S. Department of Health and Human Services). According to the same publication, Provider furnishes services as a home health aide.

The U.S. Department of Labor, Bureau of Labor Statistics (BLS) defines home health aide as a person providing routine personal healthcare, such as bathing, dressing, or grooming, to elderly, convalescent, or disabled persons in the home of patients or in a residential care facility. According to the BLS occupational employment and wage survey, the median hourly rate for home health aides is $6.52 and the mean hourly rate is $6.92 for the State of Texas. The rates are slightly higher for the Dallas Primary Metropolitan Statistical Area (PMSA) in which Ellis County is located. The median hourly rate is $6.98 and the mean hourly rate is $8.26. Thus, Carrier has already paid more than the median hourly rate for either the State of Texas or the Dallas PMSA.

Furthermore, Dr. Bierner, who is Board Certified in Physical Medicine and Rehabilitation, testified that he occasionally prescribes attendant care services and is familiar with the hourly rate generally paid for home attendant services in the Dallas area. In his opinion, the $8 rate the Carrier paid was a fair and reasonable rate for the area.

Dr. Bierner noted that Claimant's treating doctor failed to carefully document and analyze all of Claimant's symptoms in the medical record upon which he issues his letters "justifying" attendant

care. Neither does his treating doctor seem to be investigating or otherwise treating the conditions that he asserts justifies the 24-hour care. For example, if Claimant actually stops breathing during his sleep, he may need more serious intervention than a massage. If he is truly suicidal, then immediate psychological care may be more critical than his having his mother present with him at all times.

C. Preauthorization

On January 26, 2004, Claimant submitted a request to Shorman Solutions of Texas, Inc., the utilization review agent, for reconsideration of its previous denial for attendant care. The requested preauthorization was for 24-hours per day, 7 days per week. The preauthorization request did not specify the length of time for which preauthorization was sought, as required by rule,[7] nor was it coordinated with or through the prescribing doctor, as the Commission prefers.[8]

Claimant's preauthorization request referenced three attached narratives from his treating doctor addressing attendant care; however, the three statements contained inconsistencies regarding the length of time needed. Based on the most recent of the treating doctor's letters, attendant care was requested until June 25, 2004, for a period of five months. Additionally, Claimant attached a statement from a neurologist addressing his attendant care, but it did not specify the length of time for which attendant care would be needed. Furthermore, the neurologist stated that he was making a clinical assessment from the documents provided, rather than making recommendations as to specific claims or care.

On January 30, 2004, preauthorization for Claimant's attendant care was approved, but contained an inconsistency as to number of days approved and ending date. On February 3, 2004, an amended notice of preauthorization was issued. The amended notice specified that attendant care was preauthorized for 90 days, expiring on April 30, 2004.

[7] 28 TAC § 134.600(e)(2).

[8] 26 Tex. Reg. 9885 (2001).

The amended notice stated that if additional days of attendant care were required, a concurrent review must be performed prior to the completion of the approved number of days of service. The amended notice was issued within four days of the original notice and prior to the delivery of the service. The Carrier did not withdraw its approval or change any element of the request. An element of the request, the definitive period of time for the attendant services, was missing when the request was submitted. Neither Claimant, Provider, nor the treating doctor requested that preauthorization be continued beyond April 30. Neither did any of them file a dispute resolution request with the Commission. Instead, Claimant insisted that the services had already been preauthorized for a longer period of time.

Dr. Bierner testified that prescriptions for attendant care are not written for one year. Instead, it is important that a patient's condition be reassessed to determine whether there has been a change in condition.

D. Conclusion

Provider had the burden of establishing by a preponderance of the evidence that she was entitled to the relief sought. To that end, Provider furnished insufficient credible evidence that a fair and reasonable rate of reimbursement for her services would be more than $8 per hour. Likewise, Provider had the burden of showing that she had preauthorization for the services she provided beginning on May 1, 2004. She failed to establish that point also. Therefore, the ALJ concludes that Provider is not entitled to the additional reimbursement sought from the Carrier.

III. FINDINGS OF FACT

1. On ___, Claimant incurred an occupational injury while employed by ___.

2. As of that date, Empire Lloyds Insurance Company (Carrier) provided workers' compensation insurance to Claimant's employer.

3. On January 8, 2003, the Commissioner of Insurance designated Carrier as an impaired insurer.

4. The Texas Property and Casualty Insurance Guaranty Association, a non-profit, unincorporated association of all licensed insurers in Texas, now handles Carrier's claims.

5. ___ (Provider) submitted a claim of $28,560 to Carrier for attendant care services furnished Claimant 24 hours per day, 7 days per week, between February 1 and May 8, 2004.

6. For dates of service February 1 through April 3, 2004, Provider billed $10 per hour for the attendant care.

7. As of April 4, 2004, Provider began billing Carrier $16 per hour for the attendant care.

8. Carrier reimbursed Provider $8 per hour for the attendant care provided between February 1 and April 30, 2004, based on its determination of a fair and reasonable rate.

9. Carrier denied reimbursement beyond April 30, 2004, due to a lack of preauthorization.

10. Provider requested fee dispute resolution from the Commission based on Carrier's denial of her claim.

11. On September 9, 2004, the Medical Review Division of the Texas Workers' Compensation Commission (Commission) issued its decision that Provider had not prevailed on her claim.

12. On September 24, 2004, Provider requested a hearing on the disputed claim before the State Office of Administrative Hearings (SOAH).

13. On November 2, 2004, the Commission sent a hearing notice advising the parties of the matters to be determined; the right to appear and be represented by counsel; the date, time, and place of the hearing; and the statues and rules involved.

Claimant's Condition

14. Claimant was injured while working as a carpenter's helper installing rails on a display shelf.

15. A section of an elevated platform on which Claimant was standing collapsed causing him to fall approximately 10 feet to the floor.

16. Claimant went to an emergency room two days afterward complaining of diffuse body pain, especially in the right thigh, with tingling in his right fingers, and right ankle tenderness, but reported no loss of consciousness.

17. Claimant was discharged with a diagnosis of blunt trauma from the fall, contusions, and mild closed head injury.

18. Since the date of his fall, Claimant has had multiple medical complaints and significant utilization of health care services including extensive tests and multiple visits to an emergency room.

19. Claimant had a decompression and two-level fusion on August 9, 1994, and right knee arthroscopy on February 20, 1995.

20. Claimant's extensive tests have failed to confirm other abnormal physical conditions.

21. Claimant has a current diagnosis of reflex sympathetic dystrophy (RSD) involving the spine and the upper and lower extremities.

22. Claimant should have recovered fully and should have no residuals from a head trauma.

23. Claimant's symptoms, allegedly the cause of his limited functioning, are not consistent with his compensable injury of 1993 nor with the existence of RSD.

Attendant Care Services

24. Claimant's treating doctor requested attendant care for the following reasons: (a) need for immediate medical attention to cope with pain; (b) need for constant monitoring 24 hours per

day; (c) may become suicidal; (d) can not drive or take care of business; (e) extreme insomnia; and (f) panic/fear of being alone.

25. Between February 1 and April 30, 2004, Provider furnished the following attendant services to Claimant: (a) personal hygiene; (b) bathing; (c) getting in and out of bed; (d) getting in and out of a wheelchair; (e) getting in and out of his vehicle; (f) ensuring he takes his medications; (g) scheduling medical appointments; (h) maintaining a normal life; (i) driving to medical appointments; (j) calling for emergency assistance if he stops breathing; (k) shaving; (l) going to the bathroom; (m) dressing; (n) sleeping adjacent to Claimant to massage his body if he stops breathing; (o) caring for his pets; (p) keeping his house; (q) maintaining his yard; (r) assisting him if he gags while eating; (s) encouraging him to remain calm and focus on his breathing; (t) cooking; and (u) doing his laundry.

26. Provider is not trained or licensed as a health care provider.

27. Provider does not furnish skilled nursing care.

28. Provider is a home health aide in Midlothian, Ellis County, Texas.

29. Ellis County is located in the Dallas Primary Metropolitan Statistical Area (PMSA).

30. The median hourly rate for home health aides is $6.98 and the mean hourly rate is $8.26 for the Dallas PMSA.

31. The median hourly rate for home health aides is $6.52 and the mean hourly rate is $6.92 for the State of Texas.

32. The Carrier has already reimbursed Provider at a rate greater than the applicable median hourly rate for home health aides.

Preauthorization

33. On January 26, 2004, Claimant submitted a request to Shorman Solutions of Texas, Inc., the utilization review agent, for reconsideration of its previous denial for attendant care.

34. The requested preauthorization was for 24-hours per day, 7 days per week.

35. The preauthorization request did not specify the length of time for which preauthorization was sought, as required by rule.

36. The preauthorization request was not coordinated with or through the prescribing doctor.

37. Claimant's preauthorization request referenced three attached narratives from his treating doctor addressing attendant care.

38. The treating doctor's three statements addressing Claimant's attendant care contained inconsistencies regarding the length of time needed.

39. Based on the most recent of the treating doctor's letters, attendant care was requested until June 25, 2004, for a period of five months.

40. Claimant attached a statement from a neurologist addressing his attendant care.

41. The neurologist's statement did not specify the length of time for which attendant care would be needed.

42. On January 30, 2004, preauthorization for Claimant's attendant care was approved, but specified inconsistent time periods.

43. On February 3, 2004, an amended notice of preauthorization was issued to clarify the time period.

44. The amended notice specified that attendant care was preauthorized for 90 days, expiring on April 30, 2004.

45. The amended notice stated that if additional days of attendant care are required, a concurrent review must be performed prior to the completion of the approved number of days of service.

46. The amended notice was issued within four days of the original notice.

47. The amended notice was issued prior to the delivery of the service.

48. The Carrier did not withdraw its approval or change any element of the request.

49. An element of the request, the definitive period of time for the attendant services, was missing.

IV. CONCLUSIONS OF LAW

1. The Texas Workers' Compensation Commission has jurisdiction to decide the issue presented pursuant to the Texas Workers' Compensation 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 TEX. LAB. CODE ANN. §§ 402.073 and 413.031(k), and TEX. GOV'T CODE ANN. ch. 2003.

3. Adequate and timely notice of the hearing was provided to the parties in accordance with TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.

5. Provider had the burden of proving by a preponderance of the evidence that she was entitled to the relief sought, pursuant to 28 TEX. ADMIN. CODE (TAC) § 148.21(h) and (I).

6. In the absence of an established fee guideline rate, attendant care services are to be reimbursed at a fair and reasonable rate, as described in TEX. LAB. CODE ANN. § 413.011.

7. According to TEX. LAB. CODE ANN. § 413.014(b), the Commission shall by rule specify which health care treatments and services require express preauthorization.

8. Attendant care requires express preauthorization, pursuant to 28 TAC § 134.600(h)(12).

9. The rule then in effect, 28 TAC § 134.600(e)(2) then in effect, required the specification of the number of health care treatments and/or the specific period of time requested.

10. The request for preauthorization was not coordinated with the prescribing doctor, as preferred by the Commission. *See* 26 Tex. Reg. 9885 (Nov. 30, 2001).

11. According to 28 TAC 134.600(f)(5)(B), the preauthorization was required to specify the period of time for the approval.

12. Based on the findings of fact and conclusions of law, Provider did not show she is entitled to the requested relief.

ORDER

IT IS, THEREFORE, ORDERED that ___ is not entitled to additional reimbursement from the Texas Property and Casualty Insurance Guaranty Association on behalf of Empire Lloyds Insurance Company for the disputed claim for services provided between February 1 and May 8, 2004.

SIGNED on August 1, 2005.

GEORGIE B. CUNNINGHAM
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS