

**SOAH DOCKET NO. 453-04-7044.M5 (LEAD DOCKET NO.)  
TWCC NO. M5-04-1902-01**

<b>TRINITY UNIVERSAL INSURANCE COMPANY,</b>	§	<b>BEFORE THE STATE OFFICE</b>
	§	
	§	
<b>Petitioner</b>	§	<b>OF</b>
	§	
<b>V.</b>	§	
	§	<b>ADMINISTRATIVE HEARINGS</b>
	§	
<b>CENTRAL DALLAS REHAB,</b>	§	
<b>Respondent</b>		

**SOAH DOCKET NO. 453-05-1112.M5  
TWCC NO. M5-04-4096-01**

<b>CENTRAL DALLAS REHAB,</b>	§	<b>BEFORE THE STATE OFFICE</b>
<b>Petitioner</b>	§	
	§	
<b>V.</b>	§	<b>OF</b>
	§	
	§	
<b>TRINITY UNIVERSAL INSURANCE COMPANY,</b>	§	<b>ADMINISTRATIVE HEARINGS</b>
<b>Respondent</b>	§	

**DECISION AND ORDER**

This is a consolidated matter regarding treatment rendered to Claimant \_\_\_ between July 8, 2003, and March 24, 2004. Trinity Universal Insurance Company (Carrier) appealed the decision of an Independent Review Organization (IRO) that found most of the treatment consisting of physical therapy, office visits, and work hardening rendered by Central Dallas Rehab (Provider) between July 8, 2003, and October 31, 2003, was medically necessary. In that report, the IRO decided Provider was entitled to \$13,195.49 reimbursement.<sup>1</sup> Carrier timely appealed that order to the State Office of Administrative Hearings (SOAH).

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<sup>1</sup> During opening argument, Carrier asserted the IRO found Provider was entitled to \$12,031.91. However, after reviewing the parties identical tables of disputed services, the ALJ determined Provider billed Carrier \$13,534.91, and the IRO awarded full reimbursement minus six office visits that totaled \$339.42. The difference of full reimbursement (\$13,534.91) less six office visits (\$339.42) is \$13,195.49.

The decision of another IRO for different services found most of the treatment consisting of physical therapy and work hardening rendered to Claimant between August 12, 2003, and March 24, 2004, was not medically necessary. Provider billed \$13,615.03 for the entire treatment rendered during this period, and the IRO found that Provider was entitled to only \$3,634.97. Both parties appealed that order to SOAH. Provider sought further reimbursement, and Carrier contended Provider was not entitled to any reimbursement.

In this decision, the Administrative Law Judge (ALJ) finds that Provider is entitled to a total of \$16,849.03, for services rendered to Claimant over the disputed dates of service.

The hearing convened and closed on December 29, 2004, before Steven M. Rivas, ALJ. Carrier was represented by Mark Sickles, attorney. Provider was represented by Scott Hilliard, attorney.

## **I. DISCUSSION**

### **A. Background**

Claimant sustained a compensable back injury on \_\_\_\_, and within two weeks sought treatment with Provider. Following an initial physical performance evaluation on July 10, 2003, Provider began treating Claimant with various physical therapy modalities that included office visits, myofascial release procedures, joint mobilizations, and therapeutic exercises. Claimant additionally underwent a functional capacity evaluation (FCE) on three occasions: September 10, 2003, October 29, 2003, and December 2, 2003. On September 26, 2003, Provider placed Claimant on a work hardening program, which continued through December 4, 2003. Following the work hardening program, Provider administered periodic office visits through March 24, 2004.

### **B. Evidence and Arguments**

#### **1. Provider's position and treatment overview**

Christopher Plate, D.C., Claimant's treating doctor at Provider's facility, initially diagnosed Claimant with a lumbar disc disorder and began treating Claimant with passive and active modalities. Dr. Plate testified Claimant's condition improved as a result of the treatment rendered and cited Claimant's treatment notes in support of his contention. At the outset, Claimant reported his pain level was a three on a scale of one-to-ten. Throughout July, August, and most of September 2003, Claimant continued to undergo conservative treatment and reported his pain level was "slightly better" or "slightly improved" yet continued to report his pain as a three. However, on September 22, 2003, Claimant reported that his pain level increased to a six where it stayed for the remainder of his treatment.

Dr. Plate also recommended Claimant undergo periodic FCEs to monitor his progress and find any deficiencies in Claimant's treatment or condition. Claimant had his first FCE on September 9, 2003. The results of this FCE indicated Claimant was able to function at a "light" job duty level. Claimant's job, as an air conditioner repairman, required a "heavy" job duty level. Claimant continued his physical therapy program and had another FCE on October 29, 2003. Dr. Plate testified that the results of his second FCE indicated an "overall improvement" in Claimant's movement, strength, and range of motion. The results of the second FCE also displayed Claimant's lifting ability had improved from the first FCE. However, Claimant's third FCE on December 2, 2003, revealed Claimant's condition had worsened. Based on the results of the third FCE, Claimant's lifting and pulling ability had decreased from the second FCE, and Claimant complained of sharp pain in his lower back.

Claimant's work hardening program started on September 26, 2003, and continued through December 4, 2003. Dr. Plate testified he recommended work hardening in order to put Claimant on a "complete program to overcome de-conditioning and address Claimant's physical demand level." The records show Claimant completed the work hardening program without any complications other than a persistent pain level of six throughout.

## **2. Carrier's position**

Carrier argued the treatment rendered was not medically necessary because Claimant failed to exhibit any significant improvement. Additionally, Carrier asserted this was a case of "symptom exaggeration" on the part of the Claimant based on the December 1, 2003, report from

the designated doctor. Carrier additionally asserted it was not proper to administer the work hardening program because all lower levels of care had not been exhausted.

Carrier's witness, Mike O'Kelly, D.C., testified that based on his review of the record, Claimant had not shown any improvement from Provider's conservative care or from the work hardening program. Additionally, Dr. Kelly asserted Provider "blatantly ignored" the criteria that needed to be met before starting a work hardening program. Dr. Kelly's main argument was that all levels of treatment, including surgery, should have been exhausted before starting a work hardening program. In this case, Dr. Kelly found evidence that Claimant had undergone epidural steroid injections (ESI) during the work hardening program, which he argued were improper.

The designated doctor in this case made two reports dated October 20, 2003, and December 1, 2003. The first report found that Claimant had not reached maximum medical improvement (MMI) but did not assign an impairment rating (IR). The second report found Claimant to be at MMI and assigned him a 5% IR. Samuel Bierner, M.D., the designated doctor on both occasions, noted Claimant demonstrated "inconsistencies" and displayed an "exaggeration of symptoms" during the second examination. Additionally, Dr. Bierner stated that it was unlikely that Claimant would "achieve any significant improvement from his pain complaints."

### **C. Applicable Law**

The Texas Labor Code contains the Texas Workers' Compensation Act (the Act) and provides the relevant statutory requirements regarding compensable treatment for workers' compensation claims. In particular, TEX. LAB. CODE ANN. § 408.021(a) provides that 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 statute further states an employee is specifically entitled to 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."

#### **D. Analysis**

Provider is entitled to reimbursement for the treatment rendered to Claimant that improved his condition. The record indicates the initial conservative care and some of the work hardening sessions improved Claimant's condition. However, at some point, the treatment became less effective. The ALJ finds the FCEs and designated doctor reports in this case accurately illustrate Claimant's progress.

The treatment rendered to Claimant prior to the second FCE on October 29, 2003, other than the six office visits excluded by the IRO, should be reimbursed because it improved Claimant's condition. Specifically, the results of the second FCE show an improvement in Claimant's strength and mobility. The ALJ concludes by a preponderance of the evidence that this is due to Provider's conservative care.

However, it is unclear to the ALJ why Claimant's pain level increased from three to six on September 22, 2003, although Carrier eluded to the ESIs administered to Claimant as a possible explanation.<sup>2</sup> Regardless, the ALJ believes the work hardening sessions up to and including October 29, 2003, likely improved Claimant's condition.

There is no question that Claimant's condition worsened before the third FCE on December 2, 2003. Additionally, a question of exaggeration of symptoms arose at the designated doctor's exam on December 1, 2003. The ALJ found Dr. Bierner's findings credible because he examined Claimant on October 20, 2003, and found no signs of symptom exaggeration at that exam. Having previously examined Claimant, Dr. Bierner was in a good position to determine whether or not Claimant exhibited an exaggeration of symptoms at the exam on December 1, 2003.

Clearly Claimant's condition improved and subsequently worsened under Provider's care. The third FCE on December 2, 2003 ultimately establishes this to be the case. However, the ALJ is unable to positively determine when Claimant's condition ceased to improve

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<sup>2</sup> On cross-examination, Dr. Plate admitted Claimant underwent either ESIs or facet injections on July 7, 2003, August 13, 2003, September 22, 2003, and October 6, 2003. These injections were not part of the disputed services.

following the second FCE on October 29, 2003. Conversely, the work hardening records indicate Claimant successfully completed the work hardening program. If Claimant was successfully taking part in the work hardening program, the decrease in his strength and mobility as reflected in the third FCE is inexplicable. Considering Dr. Bierner's findings of exaggeration and the results of the third FCE, the ALJ is unable to find any treatment following the second FCE was medically necessary, with the exception of the third FCE.

The IRO found the third FCE was not medically necessary, however, the ALJ agrees with Provider's counsel in that an FCE is the "gold standard" in finding out a patient's condition. In this case, it was a valuable source in determining Claimant's condition as he progressed under Provider's care.

The ALJ finds all treatment up to and including the work hardening session and second FCE on October 29, 2003, was medically necessary minus the six office visits excluded by the IRO. Additionally, the ALJ believes the third FCE performed on December 2, 2003, was medically necessary to determine Claimant's condition. Following the third FCE, the IRO awarded four additional office visits. The ALJ finds these visits were not medically necessary.

Based on the foregoing, Provider is entitled to \$15,519.19, for the therapy and work hardening administered July 8, 2003, through October 29, 2003. Additionally, Provider is entitled to reimbursement for all three FCEs totaling \$1,329.84. Provider's total reimbursement should be \$16,849.03, for the medically necessary treatment administered to Claimant.

## **II. FINDINGS OF FACT**

1. Claimant \_\_\_ sustained a compensable back injury on \_\_\_.
2. Claimant underwent extensive treatment for his injury at the facilities of Central Dallas Rehab (Provider), which included physical therapy, office visits, functional capacity evaluations (FCE), and work hardening from July 8, 2003, through March 24, 2003.
3. On two separate occasions for different services, Provider billed Trinity Universal Insurance Company (Carrier) for the treatment rendered, which were both denied as not medically necessary.

4. Provider requested medical dispute resolution for both requests through the Texas Workers' Compensation Commission's (the Commission) Medical Review Division. The disputes were referred to a separate Independent Review Organizations. Each Independent Review Organization (IRO) held the Provider was entitled to partial reimbursement.
5. The first IRO decision found Provider was entitled to \$13,195.49 reimbursement, which Carrier timely appealed to the State Office of Administrative Hearings (SOAH).
6. The second IRO decision found Provider was entitled to \$3,634.97 reimbursement, which both parties timely appealed to SOAH.
7. The disputes were consolidated under SOAH docket number 453-04-7044.M5.
8. Notice of the hearing in this case was mailed to the parties on June 25, 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.
9. The hearing convened on December 29, 2004, with Administrative Law Judge Steven M. Rivas presiding. Carrier was represented by Mark Sickles, attorney. Provider was represented by Scott Hilliard, attorney.
10. The physical therapy and work hardening sessions administered to Claimant from July 8, 2003, through October 29, 2003, improved Claimant's strength and mobility.
11. Following October 29, 2003, Claimant's pain level increased, while his strength and mobility decreased under Provider's care.
12. The physical therapy and work hardening sessions administered to Claimant from October 29, 2003, through March 24, 2003, did not improve Claimant's strength and mobility.
13. The FCEs administered to Claimant on September 10, 2003, October 29, 2003, and December 2, 2003, illustrated Claimant's progress and condition under Provider's care.

### **III. CONCLUSIONS OF LAW**

1. The Commission has jurisdiction over this matter pursuant to TEX. LAB. CODE ANN. § 413.031.
2. SOAH has jurisdiction over this proceeding, including the authority to issue a decision and order, pursuant to TEX. LAB. CODE ANN. §413.031(k) and TEX. GOV'T CODE ANN. ch. 2003.
3. Both parties timely filed notices of appeal, as specified in 28 TEX. ADMIN. CODE § 148.3.

4. Proper and timely notice of the hearing was effected upon the parties according to TEX. GOV'T CODE ANN. § 2001.052 and 28 TEX. ADMIN. CODE § 148.4.
5. For the treatment rendered July 8, 2003, through October 31, 2003, Carrier had the burden of proof on its appeal by a preponderance of the evidence, pursuant to TEX. LAB. CODE ANN. § 413.031 and 28 TEX. ADMIN. CODE §148.21(h).
6. For the different treatment rendered August 12, 2003, through March 24, 2003, Provider had the burden of proof on its appeal by a preponderance of the evidence, pursuant to TEX. LAB. CODE ANN. § 413.031 and 28 TEX. ADMIN. CODE §148.21(h).
7. The physical therapy and work hardening sessions administered to Claimant from July 8, 2003, through October 29, 2003, were medically necessary to treat Claimant's compensable injury because Claimant's condition improved during this time.
8. The physical therapy and work hardening sessions administered to Claimant from October 30, 2003, through March 24, 2003, were not medically necessary to treat Claimant's compensable injury because Claimant's condition did not improve during this time.
9. The three FCEs administered by Provider were medically necessary to monitor the progress of Claimant.
10. Based on the Findings of Fact and Conclusions of Law, Provider is entitled to \$16,849.03 reimbursement for medically necessary services rendered to Claimant.

### **ORDER**

**IT IS ORDERED THAT** the Carrier reimburse Provider \$16,849.03 for the medically necessary services it rendered to Claimant for treatment of Claimant's compensable injury.

**Signed on March 3, 2005.**

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