

**SOAH DOCKET NO. 453-05-3065.M5
TWCC MR NO. M5-04-3055-01**

**WACO ORTHO REHAB,
Petitioner**

V.

**LIBERTY INSURANCE
CORPORATION,
Respondent**

BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Petitioner, Waco Ortho Rehab (Provider), appealed the Findings and Decision of the Medical Review Division (MRD) of the Texas Workers' Compensation Commission¹ (TWCC) denying reimbursement from Liberty Insurance Corporation (Carrier) for medical services provided to an injured worker (Claimant). Provider disputes the conclusion of the Independent Review Organization (IRO) that these services were not medically necessary. The Administrative Law Judge (ALJ) concludes that Provider has not met its burden of proof with respect to all services in dispute provided to Claimant in July, 2002, and August, 2002. Thus, Provider should not be reimbursed.

I. PROCEDURAL HISTORY

ALJ Penny Wilkov convened a hearing in this case on August 10, 2005, at the State Office of Administrative Hearings (SOAH), Austin, Texas, and the record closed at the conclusion of the hearing on that day. Attorney William Maxwell represented Provider. Attorney Kevin J. Franta represented Carrier. No party contested notice or jurisdiction.

¹ As of September 1, 2005, the agency is now known as the Texas Department of Insurance- Division of Workers' Compensation.

II. DISCUSSION

1. Introduction

Claimant injured his back on ____, while working as a saw cutter for a homebuilder, when he picked up two damp and heavy 16 foot 2 x 6 inch boards and twisted his back. Claimant has been diagnosed with lumbar spondylolysis, a mild disc bulge at L1-2, and a facet joint injury.² Claimant describes symptoms of generalized pain and muscle spasm throughout his lumbar spine. Claimant's history of treatments has included diagnostic and therapeutic injections, physical therapy, work hardening, and medications as well as diagnostic testing including multiple MRI's and x-rays. Further, on March 29, 2002, Claimant underwent a posterior lumbar interbody fusion, coinciding with the disputed dates of service.

Carrier denied payment for services including office visits, joint mobilization, therapeutic procedures, myofascial release, and therapeutic exercises rendered between March 7, 2002, and September 6, 2002. However, the parties stipulated at the hearing that only the services rendered in July, 2002, and August, 2002, remain in dispute.³

B. Applicable Law

Under the workers' compensation system, an employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury. The employee is specifically entitled to health care that: (1) cures or relieves the effects naturally resulting from the injury; (2) promotes recovery; or (3) enhances the ability to return to or retain employment. TEX. LAB. CODE ANN. § 408.021. "Health care" includes "all reasonable and necessary medical . . . services." TEX. LAB. CODE ANN. § 401.011(19).

²Petitioner's Exhibit 1, pages 250-253 (narrative report of Lori B. Wasserburger, M.D., dated August 18, 1999).

³Specifically, the dates stipulated as remaining disputed were July 8, 10, 12, 15, 23, 24, 26, 29 and 31, 2002, as well as August 2, 5, 7, 14, and 21, 2002.

C. Parties' Positions

1. Provider

Provider disagrees with the Independent Review Organization (IRO) physician's conclusion that the services rendered were excessive and medically unnecessary. Specifically, the IRO physician, a board-certified physical medicine and rehabilitation specialist, stated that, "[the therapeutic exercises], combined with the other modalities used, increased the amount of physical therapy per date to nearly three hours. This amount of time is excessive and beyond any recognized medical guidelines."⁴

Provider counters that Claimant's treating chiropractor, Craig Cernosek, D.C., designed a treatment plan in 1999 to return Claimant to the "very heavy work" category of physical exertion, based upon the categories incorporated in the *Dictionary of Occupational Titles, U. S. Department of Labor, 4th Edition, 1991*.⁵ Dr. Cernosek prescribed an aggressive exercise rehabilitation program which required that Claimant "push himself to the upper limit of his pain tolerances."⁶ Provider points out the effectiveness of this methodology, noting in December 1999, that Claimant had demonstrated a 206% increase in lumbar strength.⁷

After an L5-S1 posterior lumbar interbody fusion was performed on March 29, 2002, Provider resumed an aggressive rehabilitation program. This treatment plan was based on the medical proposition that "delayed recovery" promotes patient dependence, illness behavior, and over-utilization of services.⁸ David N. Bailey, D.C., a co-treating chiropractor at Waco Ortho

⁴ Envoy Medical Systems (September 22, 2004).

⁵ Physical Exertion Requirements, 20 C.F.R ' 404.1567 (as adopted by the Social Security Administration):

Light work. Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds.

Medium work: Medium work involves lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds.

Heavy work: heavy work involves lifting no more than 100 pounds at a time with frequent lifting or carrying of objects weighing up to 50 pounds.

Very Heavy work: very heavy work involves lifting objects weighing more than 100 pounds at a time with frequent lifting or carrying of objects weighing 50 pounds or more.

⁶ Petitioner's Exhibit 1, page 84.

⁷ Ibid.

⁸ Petitioner's Exhibit 1, page 59, citing numerous published medical studies.

Rehab,⁹ pointed to the physical capacity test performed on July 2, 2002, as compared to the same test administered on September 4, 2002, as support for the success of the Provider's progressive resistance exercise program. Specifically, on July 2, 2002, Dr. Bailey noted that Claimant primarily met the light-medium work category of the physical exertion requirements, while on September 4, 2002, Claimant had shown progression to the medium to medium-heavy category.¹⁰ As further evidence of Claimant's progress, due to the aggressive therapy, Dr. Bailey referred to the medical report of September 2002, wherein Dr. Cernosek states that, "[Claimant] has experienced approximately 19 percent improvement in subjective report of pain as measure on an analog scale, since the last or initial evaluation."¹¹

2. Carrier

Carrier maintains that the treatments were not reasonable or necessary and supports the IRO's conclusion. Carrier presented the testimony of Nick Tsourmas, M.D., an orthopedic surgeon, who noted that Claimant initially suffered a lumbar sprain in 1999, later compounded with degenerative disc disease. Dr. Tsourmas testified that Claimant began treatment with Provider in 1999, with years of passive and one-on-one active therapy, and then, following a surgical fusion in March 2002, Provider commenced post-surgical treatment.

According to Dr. Tsourmas, the standard and accepted course of post-surgical rehabilitation following fusion surgery is to wait two weeks, until the sutures are removed, and then begin a rehabilitative course lasting no more than a month or two months. Dr. Tsourmas stated that the normal course over the two months following surgery would be passive assisted range-of-motion exercises, initially, to the lumbar spine, later progressing to active range-of-motion exercises. This would be accomplished with a set of home exercises that could be done daily in a home program. Dr. Tsourmas further testified that there was nothing in the surgical operative notes or hospital records indicating that there were complications that would warrant extensive post-surgical rehabilitation beyond the normal two months. Dr. Tsourmas also noted that one-on-one treatment is

⁹ The testimony established that Dr. Cernosek left Waco Ortho Rehab in March 2003.

¹⁰ Petitioner's Exhibit 1, pages 146-157.

¹¹ Petitioner's Exhibit 1, page 90.

rarely necessary beyond the initial stages of instruction and particularly in light of the two or three years of medical coaching that Claimant received on the nature of the exercises.

Carrier points out that Claimant was given a set of exercises to do at home and notes that on May 7, 2002, Provider reiterated that “[Claimant] may continue the level of home exercises and was instructed to do so.”¹² Despite this acknowledgment, Carrier points to the treatment plan on July 2, 2002, where Dr. Cernosek states, “begin post surgical physical medicine treatments including passive and active therapy using physical medicine treatments outlined...” Carrier argues this exceeds accepted treatment protocols following fusion surgery, as outlined by Dr. Tsourmas.

III. ANALYSIS

Provider bears the burden of proof that the factual basis or rationale for the MRD’s decision in this case was invalid. Here, it is clear that the records do not support the medical necessity for services rendered in July 2002, and August 2002.

The IRO physician noted that eight units of therapeutic exercise were billed for each of the disputed dates, representing two hours of exercises and when this was combined with other modalities, the Claimant was participating in three hours of physical therapy. Dr. Cernosek confirmed that this was the treatment plan stating, “[Claimant] will work out in the clinic a maximum time of three hours in therapeutic exercises, with the goal of returning to full normal activities of daily living and return to work.”¹³ According to both the IRO physician and Dr. Tsourmas, this amount of treatment is excessive. The IRO physician opined that no more than one hour of physical therapy would be reasonable and necessary treatment, while Dr. Tsourmas noted that the therapy should continue for only two months after the surgery in March.

Based on the preponderant evidence, the ALJ concurs that two or three hours of active or passive physical therapy per day, months after the surgery, has not been demonstrated as reasonable or necessary. Although the published studies furnished by Provider address “slow recovery” as a

¹² Respondent’s Exhibit 1, page 470.

¹³ Respondent’s Exhibit 1, page 489.

source of patient difficulties including dependence and over-utilization, this alone cannot furnish sufficient justification to vary from the generally accepted course of therapy of two months of active and passive modalities followed by home exercises. Lastly, there was no evidence offered that Claimant had any learning disability or other infirmity that would warrant intensive one-on-one therapy, particularly after the evidence showed that unsupervised home exercises had commenced in May 2002.

Therefore, the ALJ determines that since there was no indication of medical necessity for these services, Provider should not be reimbursed by Carrier for the medical services in dispute, rendered in July 2002, and August, 2002.

IV. FINDINGS OF FACT

1. An injured worker (Claimant) injured his back on ____, while working as a saw cutter for a home-builder, when he picked up two damp and heavy 16 foot 2 x 6 inch boards and twisted his back.
2. Claimant has been diagnosed with lumbar spondylolysis, a mild disc bulge at L1-2, and a facet joint injury.
3. Claimant describes symptoms of generalized pain and muscle spasm throughout his lumbar spine.
4. Claimant's history of treatments has included diagnostic and therapeutic injections, physical therapy, work hardening, and medications as well as diagnostic testing including multiple MRI's and x-rays.
5. On March 29, 2002, Claimant underwent a posterior lumbar interbody fusion, and the post-surgical rehabilitation coincided with the disputed dates of service.
6. At the time of the injury, Claimant's employer had its workers' compensation insurance through Liberty Insurance Corporation (Carrier).
7. Waco Ortho Rehab (Provider) submitted a claim to Carrier for treatment rendered to Claimant from March 7, 2002 until September 6, 2002, including office visits, joint mobilization, therapeutic procedures, myofascial release, and therapeutic exercises
8. Carrier denied payment for services including rendered between March 7, 2002, and September 6, 2002.

9. Provider requested medical dispute resolution with the Texas Workers' Compensation Commission's (Commission) Medical Review Division (MRD).
10. An Independent Review Organization concluded that chiropractic treatments rendered from March 7, 2002, and September 6, 2002, were not medically necessary.
11. Provider filed a request for a hearing before the State Office of Administrative Hearings on November 30, 2004.
12. The Commission sent notice of the hearing to the parties on April 20, 2005. The hearing notice informed the parties of the time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; the statutes and rules involved; and the matters asserted.
13. The parties requested a continuance of the hearing which was granted on April 13, 2005.
14. Administrative Law Judge (ALJ) Penny Wilkov convened a hearing in this case on August 10, 2005, at the State Office of Administrative Hearings (SOAH), Austin, Texas, and the record closed at the conclusion of the hearing on that day. Attorney William Maxwell represented Provider. Attorney Kevin J. Franta represented Carrier.
15. Carrier and Provider stipulated at the hearing that the services rendered in July, 2002, and August, 2002, were the only services remaining in dispute. Specifically, the dates stipulated as remaining disputed were July 8, 10, 12, 15, 23, 24, 26, 29 and 31, 2002, as well as August 2, 5, 7, 14, and 21, 2002.
16. Two or three hours of active and passive therapies exceeds the standard and accepted course of post-surgical rehabilitation following fusion surgery.
17. The standard and accepted course of post-surgical rehabilitation following fusion surgery is to wait two weeks, until the sutures are removed, and then begin a rehabilitative course lasting no more than a month or two months.
18. The two months following surgery would include rehabilitative services of passive assisted range-of-motion exercises, initially, to the lumbar spine, later progressing to active range-of-motion exercises.
19. No more than one hour of physical therapy would be reasonable and necessary treatment.
20. A set of home exercises that could be done daily in a home program should have been given in conjunction with the treatments.
21. Claimant did not have a learning disability or other infirmity that would warranted intensive one-on-one therapy, particularly after unsupervised home exercises had commenced in May 2002.

V. CONCLUSIONS OF LAW

1. The State Office of Administrative Hearings (SOAH) has jurisdiction over matters related to the hearing, 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.
2. Provider timely filed a request for hearing before SOAH, as specified in 28 TEX. ADMIN. CODE § 148.3.
3. The parties received proper and timely notice of the hearing pursuant to TEX. GOV'T CODE ANN. ch. 2001 and 1 TEX. ADMIN. CODE § 155.27.
4. Provider had the burden of proving the case by a preponderance of the evidence pursuant to 28 TEX. ADMIN. CODE § 148.14.
5. An employee who has sustained a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed. The 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. TEX. LAB. CODE ANN. § 408.021(a).
6. Health care includes all reasonable and necessary medical services. TEX. LAB. CODE ANN. § 401.011(19)(A).
7. Provider failed to establish that the treatment rendered to Claimant in July, 2002, and August, 2002, the dates stipulated by the parties as remaining in dispute, including office visits, joint mobilization, therapeutic procedures, myofascial release, and therapeutic exercises, are reimbursable under TEX. LAB. CODE ANN. §§ 401.011(19) and 408.021(a).
8. Provider's claim should be denied.

ORDER

IT IS ORDERED that Waco Ortho Rehab is not entitled to reimbursement by Liberty Insurance Corporation for all of the treatments rendered to Claimant during July 2002, and August 2002, including office visits, joint mobilization, therapeutic procedures, myofascial release, and therapeutic exercises.

SIGNED September 28, 2005.

**PENNY WILKOV
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**