

ERIC A. VANDERWERFF, D.C.,	§	BEFORE THE STATE OFFICE
Petitioner	§	
	§	
VS.	§	OF
	§	
WAUSAU UNDERWRITERS	§	
INSURANCE CO.,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Eric A VanderWerff, D.C. (Dr. VanderWerff) appeals a decision by the Texas Workers' Compensation Commission's (TWCC)¹ Medical Review Division (MRD) that denied reimbursement for chiropractic services provided to a workers' compensation claimant (Claimant) between March 15 and July 21, 2004. Wausau Underwriters Insurance Company (Carrier) denied reimbursement based on lack of medical necessity. MRD referred the dispute to an independent review organization (IRO), which found the services were not medically necessary to treat Claimant's compensable injury. The disputed charges total \$16,799.00. This Decision and Order finds that the services were medically necessary; therefore, it orders Carrier to reimburse Dr. VanderWerff.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The Commission (or its successor agency) has jurisdiction over this matter pursuant to TEX. LAB. CODE § 413.031. The State Office of Administrative Hearings (SOAH) has jurisdiction over matters related to the hearing in this proceeding pursuant to TEX. LAB. CODE § 413.031(k) and TEX. GOV'T CODE Ch. 2003. No party challenged jurisdiction or notice.

Administrative Law Judge (ALJ) Thomas H. Walston convened a hearing in this matter on February 23, 2006, at the SOAH hearing facilities in Austin, Texas. Attorney William Maxwell

¹ Effective September 1, 2005, the functions of TWCC were transferred to the newly created Division of Workers Compensation of the Texas Department of Insurance.

represented Dr. VanderWerff, and Attorney Charlotte Salter represented Carrier. The hearing concluded and the record closed the same day.

II. DISCUSSION

A. Introduction

Claimant is a ___year-old male who injured his low back on___, while throwing a trash bag into a dumpster.² For nearly a year, Claimant received only sporadic care because his employer denied having workers' compensation insurance. Claimant first saw Dr. VanderWerff during this time, between October and December 2003. But Dr. VanderWerff stopped treatment after eight weeks because Claimant could not establish insurance coverage. In early 2004, Dr. VanderWerff discovered that workers' compensation coverage did exist for Claimant, so he resumed treatments in February 2004. Carrier denied reimbursement for the services Dr. VanderWerff provided to Claimant between March 15 and July 21, 2004, totaling \$16,799.00. Dr. VanderWerff appealed Carrier's denial of reimbursement, but an IRO upheld the denial in a decision issued March 17, 2005. The MRD approved the IRO's decision on March 18, 2005, after which Dr. VanderWerff timely filed a request for a contested case hearing at SOAH.

B. Parties' Evidence and Arguments

Both Dr. VanderWerff and Carrier introduced various records into evidence. Dr. VanderWerff testified in his own behalf, and Dr. Kevin Tomsic testified for Carrier.

² Some records indicate that Claimant injured his back while lifting a load of wet laundry. However, there is no dispute that claimant suffered a compensable injury and the precise mechanism of injury is not material to the decision in this case

1. Records

The records introduced into evidence by both parties included the following:

Texas Imaging and Diagnostic Center performed an MRI on Claimant on November 14, 2003, that showed L4-5 had a broad-based annular bulge and spur projecting 3-4 mm posteriorly. In addition, the L4-5 disc had an extruded disc herniation with projections to the left approximately 1.2 cm posteriorly. This extruded disc herniation resulted in mass effect and deformity of the thecal sac and was thought to impinge the L5 nerve root.

Ruby Saulog, M.D., performed a nerve conduction study on Claimant on April 20, 2004. The study showed evidence of lumbar radiculopathy on the right L-2, left L-3, left L-4, and right L-5; severe sensory neuropathy on both lower extremities; left peroneal axonal neuropathy; bilateral plantar axonal neuropathy, and right posterior tibial demyelinating and bilateral posterior tibial axonal neuropathy at the popliteal fossa.

Dr. Charles Kennedy, an orthopedic surgeon, performed an independent medical evaluation for Carrier on May 7, 2004. He noted that Claimant was then seeing Dr. VanderWerff, and Claimant thought his back and leg were getting better from that treatment. However, Claimant complained of frequent stabbing and shooting pain in the low back, made worse with lifting and standing. Dr. Kennedy noted the extruded disc fragment shown by the MRI, reviewed the available chiropractic records, and performed an examination of Claimant, which revealed an absent left ankle jerk and a left calf girth one inch smaller than the right, indicating atrophy. Dr. Kennedy concluded that Claimant had a ruptured L4-5 disc as a result of his compensable injury and that he needed back surgery. However, Claimant did not want surgery, so Dr. Kennedy recommended an epidural injection and an active exercise program. He also stated: “[Claimant] is presently not taking medication, which is appropriate. Treatment has been appropriate, and certainly not excessive.”

Sherine Reno, M.D., performed an EMG on Claimant on May 5, 2004. The EMG was entirely normal. Dr. Reno also examined Claimant on August 8, 2004. Reflexes were normal but Claimant had positive straight-leg raising on the left and right at 60 degrees. Dr. Reno assessed Claimant's condition as lumbar radiculopathy and lumbar disc injury and stated that she would request an epidural steroid injection. The following day, Dr. Reno gave Claimant an epidural steroid

injection. On August 18, 2004, Dr. VanderWerff sent Dr. Reno a message that Claimant felt significantly better after the injection.

Dempsey Gordon, D.O., performed a designated doctor examination of Claimant on June 11, 2004. He noted Claimant's history and the MRI study showing the 1 cm disc herniation that impinged on the left L5 nerve root. Claimant reported difficulties with activities of daily living, and Dr. Gordon's examination showed significant tenderness and muscle spasms over the lumbar spine. The sacroiliac joints were hypomobile on both sides, greater on the left, and lumbar range of motion was restricted and painful in all ranges. Motor strength and sensation were decreased in the left leg, and straight-leg-raising was positive on the left at 40 degrees and on the right at 65 degrees. Dr. Gordon concluded that Claimant had not reached maximum medical improvement (MMI). He recommended a series of epidural steroid injections, continued active therapy with Dr. VanderWerff, and pain medication, and he estimated that Claimant would reach MMI by October 11, 2004.

Dr. Gordon performed a second designated doctor examination of Claimant on October 22, 2004, well after the disputed services had ended. He noted that Claimant was still receiving therapy four times per week from Dr. VanderWerff, and Claimant reported that he was getting better "little by little." Claimant had also received one epidural steroid injection that helped decrease his pain. Claimant continued to be off work and continued to refuse any type of back surgery. Dr. Gordon reviewed all available records and examined Claimant. He noted that sensation was diminished over the left L4, L5, and S1 dermatomes, and Claimant had positive straight leg-raising at 40 degrees on the left and 50 degrees on the right. The left calf was 3/4 inch less in girth than the right. Dr. Gordon diagnosed Claimant's condition as lumbar sprain/strain, L4/L5 disc protrusion, and left lumbar radiculopathy. He also found that Claimant had reached MMI and could return to light duty with gradual progression to regular work status and that continued pain medication was reasonable and medically necessary. Dr. Gordon added that no further treatment seemed medically necessary and that Claimant should be on a home-based exercise program for his back. He also assessed Claimant with a 10% whole person permanent impairment.

George Sage, D.C., issued a peer-review report for Carrier on August 31, 2004. Dr. Sage is employed by Professional Reviews, Inc., of Duluth, Georgia. His review included records and reports from Dr. Kennedy, Dr. Gordon, and Dr. VanderWerff, as well as Dr. Saulog's electrodiagnostic study of April 20, 2004. He also spoke with Dr. VanderWerff by telephone on August 24, 2004. He noted that Claimant had been treated by two chiropractors before he first saw Dr. VanderWerff in October 2003. Dr. VanderWerff treated Claimant until December 4, 2003, when care ended due to no insurance being available. Claimant returned to Dr. VanderWerff on February 10, 2004, when the workers' compensation carrier was located, and continued treatment up to the date of the peer review. Dr. Sage's report stated that Claimant had a significant disc herniation with extruded disc fragment, and Claimant continued to have significant pain and severe foot drop. He also noted that Dr. Kennedy continued to recommend surgery and that Dr. VanderWerff's current treatment regimen for Claimant consisted of treadmill, bicycle, synergy therapy, and a Healthrider. Dr. Sage determined that Dr. VanderWerff had provided Claimant more than 124 treatments, and he continued providing treatment at that time three or four times per week. In his view, this significantly exceeded generally accepted practice guidelines.

Dr. Sage also found that Claimant had shown little progress between Dr. Kennedy's report of May 10, 2004, and his recent conversation with Dr. VanderWerff. Thus, he concluded: "While therapy may provide some temporary palliative relief, meaningful progress is questionable and apparently the patient remains a surgical candidate." Dr. Sage thought that the chiropractic treatment through December 4, 2003, was appropriate, but after that date Claimant should have been put on a home exercise program. Thus, he stated that by February 10, 2004, when Claimant returned to Dr. VanderWerff, Claimant was almost one-year post injury and should have been independent with home exercises. In Dr. Sage's view, professionally supervised exercises were no longer necessary.

Dr. Thomas Sato, D.C., of Professional Peer Reviews, issued a report on November 24, 2004, based on Claimant's request for reconsideration of Dr. Sage's peer review. Based on newly submitted physical performance evaluations (PPE) dated May 13 and September 16, 2004, Dr. Sato found that Claimant had shown no significant progress. Thus, since Claimant had previously received extensive chiropractic treatment from Dr. VanderWerff and two prior chiropractors without any significant improvement, Dr. Sato concluded that the disputed chiropractic care provided by Dr. VanderWerff was not medically reasonable and necessary. He stated: ". . . The Guidelines for

Chiropractic Quality Assurance and Practice parameters would not generally recommend treatment for chronic conditions nor would they recommend the continued treatment for a failed regime or one that was providing no positive clinical benefit.”

IRO Decision: On March 17, 2005, the IRO issued its decision to uphold Carrier’s denial of reimbursement. The IRO chiropractor/reviewer recounted Claimant’s medical history and treatment. He acknowledged that claimant had a serious back injury that required a course of conservative care but stated that the issue was whether the course of chiropractic care prior to the disputed services produced adequate therapeutic gain to justify further similar care. Therefore, the reviewer concluded: “. . . [G]iven the year’s duration of conservative care, the lack of regular comparative objective examinations, and the minimal observed resolution of symptomatology . . . , the medical necessity of the course of care is not established.”

2. Testimony

Eric A. VanderWerff, D.C.: Dr. VanderWerff has been a chiropractor since 1997. About 95% of his patients are workers compensation claimants. Dr. VanderWerff stressed that the claimant in this case had a severe injury with a large extruded disc fragment. He added that Claimant’s condition worsened because of the initial sporadic treatment caused by the delay in verifying insurance. Dr. VanderWerff contends that his treatment of Claimant was reasonable and necessary. He emphasized that Dr. Charles Kennedy, a well-respected orthopedic surgeon to whom Carrier referred Claimant, found that Claimant’s treatment was appropriate and not excessive. And Dr. VanderWerff pointed out that Dr. Kennedy issued his report on May 10, 2004, during the time of the disputed services. He also noted that Dr. Gordon found that Claimant was not at MMI during the designated doctor exam in June 2004 and did not find that Claimant reached MMI until October 2004, after the disputed services had ended. Only at that time, in October 2004, did Dr. Gordon recommend that Claimant be moved to a home-based exercise program.

Dr. VanderWerff testified that he provided services to treat the secondary and tertiary effects of Claimant’s injury, such as pain, muscle spasms, altered posture, and the like. He also explained that lumbar discs do not have blood vessels, so the back needs motion above and below the discs to evacuate waste and to obtain nutrition from the blood supply of the adjoining bones. The spinal manipulation of Claimant provided this movement, which he said promoted healing of Claimant’s

discs. Further, Dr. VanderWerff stated, joint mobilization helped reduce the firing of certain nerve endings to reduce pain, and myofascial therapy reduced asymmetrical large-muscle spasms that caused Claimant's sacrum to tilt to one side. Dr. VanderWerff added that the initial delays in treatment due to uncertainty about insurance caused Claimant to have a severe lean to one side and prevented him from standing straight. This compensatory posture took a great deal of work to correct, according to Dr. VanderWerff. In Dr. VanderWerff's opinion, his treatment of Claimant was reasonable under the circumstances.

Dr. VanderWerff stated that Claimant had moderate improvement in his overall condition and a small improvement with pain. He emphasized that Claimant had a serious condition in which the L-5 vertebral body had moved to the right, causing postural muscle spasms and a rotated pelvis. According to Dr. VanderWerff, the spasms slowly diminished with his treatment and Claimant showed slow overall improvement.

On questioning by the ALJ, Dr. VanderWerff acknowledged that his treatment could not correct Claimant's extruded disc fragment. Without surgery, the disc fragment would eventually be adsorbed by Claimant's body, although it might take several years, depending on Claimant's metabolic rate.

In summary, Dr. VanderWerff testified that he provided appropriate care for a claimant who had a severe injury, that he complied with the Medicare Guidelines, and that Claimant showed improvement. He stressed that the three doctors who actually examined Claimant (Dr. VanderWerff, Dr. Kennedy, and Dr. Gordon) all thought that the treatment was medically necessary, while only the "paper-review" doctors (the IRO doctor, Dr. Tomsic, Dr. Sato, and Dr. Sage) thought the treatment was not necessary. In Dr. VanderWerff's view, the opinions of the doctors who actually examined and treated Claimant should be given more weight than the paper-review doctors.

Kevin Tomsic, D.C.: Dr. Tomsic, who has been a chiropractor since 1993, testified for Carrier. He pointed out that Claimant still had severe foot-drop and still needed surgery even after all of Dr. VanderWerff's treatment. He also pointed out that Dr. VanderWerff's treatment plan for Claimant in October 2003 only called for eight weeks of treatment. Further, Dr. VanderWerff did not update or prepare a new plan after the Claimant left his care in December 2003 and returned in February 2004. Dr. Tomsic stated that it was important to have an updated treatment plan with

specific goals. Further, he testified that Dr. VanderWerff did not provide any office notes for the October - December 2003 period to determine whether any improvement occurred from that treatment.

Dr. Tomsic also testified that the MRI taken in November 2003 showed that Claimant had a large extruded disc fragment and needed surgery. He agreed that a claimant who does not want surgery can have a trial of conservative care. However, he stated, after there was no documented improvement from eight weeks of Dr. VanderWerff's care in the fall of 2003, continuation of the same care was not warranted. This was confirmed, according to Dr. Tomsic, by Dr. VanderWerff seeing Claimant every day during June and half of July 2004, yet he still requested to move Claimant into a chronic pain management program in August 2004. In addition, Claimant made the same complaints in May 2004 as in October 2003, and he never returned to work. In Dr. Tomsic's view, this confirms that the treatments provided by Dr. VanderWerff were neither helpful nor medically necessary.

Dr. Tomsic testified that he disagreed with Dr. Kennedy's report and thought Dr. VanderWerff's treatment of Claimant was excessive. He stated that at the time of Dr. Kennedy's exam, Claimant was no closer to pain relief or employment. And a rehabilitation report made at about the same time stated that Claimant still had difficulty sitting, walking, and the like. Dr. Tomsic stressed that the Owestry evaluations of March and May, the designated doctor's report of June, and office notes in July 2004 all showed that Claimant continued to make the same complaints and showed no meaningful progress towards recovery. He added that after 90 days, chronic pain does not respond to passive care like Dr. VanderWerff was providing.

On cross-examination, Dr. Tomsic acknowledged that he, the IRO reviewer, Dr. Sage, and Dr. Sato only reviewed records and did not examine the Claimant, and he agreed that Dr. Kennedy, who actually examined Claimant for Carrier, thought Dr. VanderWerff's treatment was necessary and should be continued. Dr. Tomsic also agreed that vertebrae need movement to get blood and remove waste. He added, however, that active therapy such as home exercises can provide such movement and increase muscle strength.

3. Parties' Arguments

Dr. VanderWerff emphasizes that the three doctors who actually examined Claimant thought the treatment was medically necessary and appropriate, and only the doctors who merely reviewed records found the treatment unnecessary. Dr. VanderWerff also argues that Drs. Sage, Sato, and Tomsic worked for Carrier and had a financial incentive to reject his treatment. He argues that the treatment was medically reasonable and necessary and requests that Carrier be ordered to pay him for his services.

Carrier responds that Dr. Sage did not rely solely on records; rather, he discussed the case with Dr. VanderWerff by telephone. It also stresses that Claimant had an extruded disc fragment and severe foot drop, which are conditions that required surgery and could not be helped by chiropractic care. Carrier argues that this was borne out by the fact that Claimant continued to have the same problems - pain and restricted motion - at the end of Dr. VanderWerff's treatment as at the beginning. In short, Carrier argues that Dr. VanderWerff's treatment was not appropriate for Claimant and provided no benefit, and reimbursement should be denied.

C. ALJ's Analysis and Decision

This case involves multiple doctors taking opposite positions on whether the disputed services were medically reasonable and necessary. However, the ALJ gives more weight to the independent doctors who thought the treatment was appropriate. Therefore, the ALJ finds that Dr. VanderWerff proved by a preponderance of the evidence that the disputed services were medically necessary to treat Claimant's compensable injury. The ALJ reverses the IRO decision and requires Carrier to reimburse Dr. VanderWerff.

The evidence established that Claimant sustained a serious back injury on ____, which resulted in ruptured disc and extruded disc fragment at L4-5. Claimant has refused back surgery, which is his right. However, without surgery, the extruded disc fragment cannot be removed, resulting in pressure on the affected nerve root and causing Claimant's pain and symptoms. Without Claimant's consent for surgery, Dr. Kennedy recommended an epidural injection and an active exercise program, and he stated that Dr. VanderWerff's treatment had been appropriate and not excessive. The ALJ gives particular weight to Dr. Kennedy's opinion as he examined Claimant at

the request of Carrier on May 7, 2004, the approximate midpoint of the disputed services. In addition, Dr. Gordon performed a Designated Doctor Examination of Claimant on June 11, 2004, during the midst of the disputed services. He found that Claimant was not at MMI and recommended that Claimant “continue with active therapy with his treating doctor [Dr. VanderWerff].” Dr. Gordon also stated that “[Claimant] needs additional conservative care in addition to pain medications to help decrease his pain and muscle spasms.”³ The ALJ also gives significant weight to Dr. Gordon’s opinion as the TWCC Designated Doctor.

The ALJ gives somewhat less weight to Drs. Tomsic, Sage, and Sato as they were retained by Carrier and did not examine the Claimant. These three doctors, as well as the IRO doctor, thought the disputed treatments were not medically necessary based primarily on Claimant’s lack of progress and his need for surgery. However, Claimant refused surgery, and Dr. VanderWerff’s treatment did reduce Claimant’s muscle spasms and pain and improved his ability to stand straight. Further, the IRO doctor incorrectly thought that Dr. VanderWerff treated Claimant continuously for five months from October 2003 until March 2004, when the disputed services began. Instead, Dr. VanderWerff had only treated Claimant between October and December 2003, and Claimant had received no treatments for approximately three months before the disputed services began.

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 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 § 408.021(a). Although Dr. VanderWerff’s treatment could not cure Claimant’s extruded disc, the treatment did relieve the effects naturally resulting from the injury (muscle spasms, tilted posture, and pain) and promoted recovery. Under the record in this case, the ALJ finds that Dr. VanderWerff established by a preponderance of the evidence that the disputed services were medically reasonable and necessary. Therefore, the ALJ orders Carrier to reimburse Dr. VanderWerff for the services he provide to Claimant between March 15 and July 21, 2004.

³ Ex. P-1, p. P161.

III. FINDINGS OF FACT

1. Claimant is a ___-year-old male who sustained a compensable injury to his low back on_____.
2. Wausau Underwriters Insurance Company (Carrier) is responsible for workers' compensation coverage for Claimant's injury.
3. Between March 15 and July 21, 2004, Eric A. VanderWerff, D.C., (Dr. VanderWerff) provided chiropractic treatments and therapy for Claimant, including therapeutic exercises (97110 & 97150), chiropractic manipulation (98941), joint mobilization and myofascial therapy (97140-59), and neuromuscular re-education (97112) (collectively, the "disputed services").
4. Claimant reached Maximum Medical Improvement (MMI) on October 22, 2004. All of the disputed services were provided by Dr. VanderWerff to Claimant before Claimant reached MMI.
5. Carrier denied reimbursement for all of the services described in Finding of Fact No. 3 based on lack of medical necessity. The amount in dispute totals \$16,799.00.
6. Dr. VanderWerff appealed Carrier's denial of reimbursement to the Texas Workers' Compensation Commission (TWCC) Medical Review Division (MRD), which referred the matter to an Independent Review Organization (IRO). The IRO issued a decision on March 17, 2005, that upheld Carrier's denial of payment, finding the chiropractic services in dispute were not medically necessary.
7. In a decision issued March 18, 2005, the MRD concurred with the IRO decision.
8. Dr. VanderWerff timely requested a contested case hearing at the State Office of Administrative Hearings to challenge the MRD decision.
9. A contested case hearing was held at SOAH on February 23, 2006, and the record closed the same day. Attorney William Maxwell represented Dr. VanderWerff at the hearing and attorney Charlotte Salter represented Carrier. At the hearing, all parties were allowed to respond and present evidence and argument on each issue involved in the case.
10. TWCC issued a notice of hearing on April 25, 2005. All parties received not less than ten days notice of the time, place, and nature of the hearing; 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.
11. Claimant's compensable injury resulted in a herniated disc at L4-5 with a 1.2cm extruded disc fragment. The injury caused severe back pain for Claimant and resulted in muscle spasms, a counter-rotated pelvis, and altered posture (leaning to the right).
12. Claimant's employer initially denied that it had workers' compensation coverage. Therefore, Claimant only received sporadic chiropractic services during 2003. The delay in providing

healthcare services to Claimant due to uncertainty about insurance coverage made his condition worse.

13. In February 2004, Dr. VanderWerff's office confirmed workers' compensation insurance coverage for Claimant's injury.
14. The disputed services provided by Dr. VanderWerff to Claimant relieved the effects of the muscle spasms, counter-rotated pelvis, tilted posture, and pain that were caused by Claimant's compensable injury.
15. The disputed services provided by Dr. VanderWerff to Claimant between March 15 and July 21, 2004, were medically reasonable and necessary for the treatment of Claimant's compensable injury.

IV. CONCLUSIONS OF LAW

1. 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. § 413.031(k) and TEX. GOV'T CODE ANN. ch. 2003.
2. 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) §§ 133.305(g) and 148.001-148.028.
3. The provider timely requested a hearing in this matter pursuant to 28 TAC § 148.3.
4. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
5. Dr. VanderWerff, as the party seeking relief, bore the burden of proof in this case pursuant to 28 TAC § 148.14(a).
6. The services that Dr. VanderWerff provided to Claimant between March 15 and July 21, 2004, were medically reasonable and necessary to treat Claimant's compensable injury.
7. Based on the above Findings of Facts and Conclusions of Law, Carrier is required to reimburse Dr. VanderWerff for the health-care services he provided to Claimant between March 15 and July 21, 2004.

ORDER

IT IS, THEREFORE, ORDERED that the claim made by Dr. VanderWerff is GRANTED, and Wausau Underwriters Insurance Company is ORDERED to reimburse Dr. VanderWerff in the amount of \$16,799.00 for the disputed services Dr. VanderWerff provided to Claimant between March 15 and July 21, 2004.

Signed March 14, 2006.

**THOMAS H. WALSTON
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**