

<b>EAST TEXAS CHIROPRACTIC,</b>	§	<b>BEFORE THE STATE OFFICE</b>
<b>Petitioner</b>	§	
	§	
<b>V.</b>	§	<b>OF</b>
	§	
	§	
<b>AMERICAN CASUALTY COMPANY</b>	§	
<b>OF READING, PA,</b>	§	
<b>Respondent</b>	§	<b>ADMINISTRATIVE HEARINGS</b>

**DECISION AND ORDER**

Petitioner, East Texas Chiropractic (Provider), challenged the Findings and Decision of the Medical Review Division (MRD) of the Texas Workers' Compensation Commission<sup>1</sup> (TWCC) denying reimbursement from American Casualty Company of Reading, PA (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 the services in dispute provided to Claimant between July 17, and December 19, 2003. Thus, Provider should not be reimbursed.

**I. PROCEDURAL HISTORY**

ALJ Penny Wilkov convened a hearing in this case on November 2, 2005, at the State Office of Administrative Hearings (SOAH), Austin, Texas. Provider was represented by Attorney William Maxwell. Carrier was represented by Attorney James M. Loughlin. The record closed on December 12, 2005, after the filing of post-hearing briefs. Subsequently in an order dated January 25, 2006, the ALJ reopened the record for admission of Provider's closing argument and the record closed on January 25, 2006. No party contested notice or jurisdiction.

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<sup>1</sup> As of September 1, 2005, the functions of TWCC have been assumed by the Texas Department of Insurance-Workers' Compensation Division.

## II. DISCUSSION

### 1. Introduction

Claimant injured his neck and back on\_\_\_\_, while working as a prison guard, when he slipped and fell down the guard tower steps in the rain. Claimant described symptoms of headaches, loss of consciousness, chest, neck, left arm, low back, left buttock, and leg pain.<sup>2</sup> Claimant also relayed limitations on his ability to lift objects without pain, walk more than one-fourth mile, sit more than one-half hour, sleep more than six hours, or work due to the pain. Claimant was diagnosed with lumbar degenerative spondylolisthesis with stenosis at L5-S1 with left L5 radicular pattern and facet degenerative changes L4-5.<sup>3</sup> Claimant's treating physician, J. Bryan Williamson, M.D., considers that the "etiology of his symptoms [include] degenerative changes in his back, which were aggravated and made symptomatic by his Workers Comp. Injury."<sup>4</sup>

Claimant began treatment with Provider on June 9, 2003, with active physical therapy beginning August 1, 2003. Since the injury, Claimant's history of treatments has included medications, chiropractic treatment, and physical therapy, as well as diagnostic testing including multiple MRI's and x-rays.

Carrier denied payment for services rendered between July 17, and December 19, 2003, for aquatic therapy, electrical stimulation, whirlpool, joint mobilization, manual traction, chiropractic manipulation, nerve conduction, physical performance test/functional capacity test, office visits, somatosensory study, mechanical traction, therapeutic activities, and physician education service group, as not medicably necessary.

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<sup>2</sup> Respondent's Exhibit 1 (Report of J. Bryan Williamson, M.D., dated August 18, 2004).

<sup>3</sup> *Ibid.*

<sup>4</sup> Respondent's Exhibit 1, page 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).

## **C. Parties' Positions**

### **1. Provider**

Provider disagrees with the conclusion of the Independent Review Organization (IRO) that the services rendered were not medically necessary. Specifically, the IRO reviewer, a chiropractor, stated that, "It is the opinion of the reviewer that an additional six sessions of exercise rehab was medically necessary. The records indicate that other therapies should have been investigated at that point. A home exercise program would also be appropriate. No evidence was presented that the other disputed services were necessary"<sup>5</sup>

Provider counters that Claimant has made significant progress due to Provider's services. Provider alludes to the benefits offered through the six weeks of aquatic therapy, beginning July 17 and ending August 22, 2003. Provider points out that prior to the aquatic therapy, Claimant was having difficulty walking due to pain. Through a series of aquatic walking laps, Claimant was able to improve walking tolerance by 85% with reduced pain levels, according to Provider, so that he could resume a land-based rehabilitation program.<sup>6</sup> Thereafter, the land-based rehabilitation program, consisted of stretching exercises, stationary bicycling, treadmill walking, and strengthening with assorted exercise machines Ball designed to improve Claimant's pain levels, flexibility, endurance, and strength. Provider notes that Claimant was able to press weight, on average, at a 55 -

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<sup>5</sup> Independent Review, Inc. (September 8, 2004).

<sup>6</sup> Petitioner's Exhibit 1, page 260.

75 lb. level at the end of the disputed treatment rather than the 20 lb. level at the beginning. Similarly, by the end of treatment, Claimant was bicycling on a stationary bicycle for 5.54 miles rather than the initial 2.92 miles and walking on a treadmill for 1 mile as opposed to the initial .39 miles. Like results were reflected in Claimant's reduction of muscle spasms and pain level and improved range of motion and flexion.<sup>7</sup>

Moreover, Provider points to Claimant's treating physician's confirmation as to progress, noting that Uday Doctor, M.D., a few weeks after the end of the disputed treatment, stated "[Claimant] states that the forward flexion pain is significantly better, but he has pain now from the standpoint of extension."<sup>8</sup> Dr. Doctor also confirms, according to Provider, that Claimant suffered a disc herniation, which was the primary source of pain.

Finally, Provider argues that Carrier reimbursed for a significant portion of the chiropractic treatments, an hour and one half of exercise, billed at six units of therapy, rather than the two hours, billed at eight units, throughout the disputed period. Provider contends that this indicates an acknowledgment that the current treatment is related to the injury and medically necessary, although Carrier disagreed with the length of treatment by one-half hour.

## **2. Carrier**

Carrier maintains that the treatments were not reasonable or necessary and supports the IRO's conclusion. Carrier contends that the aquatic therapy was an example of the over-treatment rendered by Provider. Carrier presented the testimony of William D. DeFoyd, D.C., who has practiced for the past twenty years as a chiropractor. Dr. DeFoyd took issue with aquatic therapy as necessary treatment for a disc herniation. Instead, he testified that active physical therapy is the recommended course of treatment because it can be concurrently done at home, is less expensive, and is more adaptable to adjustments in treatment. Dr. DeFoyd also disagreed that there was any improvement due to the aquatic therapy, noting that the complaints of pain endured, the necessity of therapy remained, and the lack of ability to return to work persisted. Furthermore, Carrier points out

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<sup>7</sup> *Ibid.*

<sup>8</sup> Petitioner's Exhibit 1, page 287 (January 13, 2004).

that there was no need for one-on-one aquatic therapy supervision, particularly when it was overseen by unlicensed assistants. Rather, Carrier contends that the exercises could have been done in a group setting, particularly when there was no showing that Claimant was in danger or needed any special attention.

Moreover, just as the aquatic therapy was unnecessary, Carrier maintains that the land-based therapeutic services, office visits, and associated testing were equally pointless. According to Dr. Defoyd, many of the types of exercises were contra-indicated for Claimant's condition. For instance, an exercise that involved bending forward and twisting, similar to a clock, or an exercise involving bending forward with compression, could aggravate Claimant's back injury. Dr. Defoyd also testified that the chiropractic manipulation and mechanical traction were not effective treatments for a disc herniation. Further, Carrier argues that the three-times per week office visits were not necessary when no alterations to treatment were occurring.

Finally, Carrier disagrees that reimbursing for initial treatments was an acknowledgment of the necessity of treatment. Carrier instead relies on a peer review conducted by Philip J. Rohner, D.C., on August 14, 2003, which opines that the effects of the injury had resolved by July 18, 2003, when Dr. Rohner noted no range of motion or muscle strength deficits, no radicular component, and no evidence that Claimant reported subjective symptoms beyond the mild range.<sup>9</sup> Dr. Rohner also observes that "It is my opinion that any effects concerning the strain/sprain injuries have had sufficient time to recover given the mechanism of injury and multiple research studies and published literature denoting healing time frames of most strain/sprain injuries, whether they were treated or not (6-8 weeks, 12 weeks maximum)."<sup>10</sup>

### **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 between July 17 and December 19, 2003.

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<sup>9</sup> Respondent's Exhibit 1, pages 3-7.

<sup>10</sup> *Ibid.*

The Provider has documented the treatment with a several-inch-thick compendium of Subjective Findings, Objective Findings, Assessment, and Plan (SOAP) notes maintained by his office. However, it should be noted that the notes are mostly generic and repetitive. For instance, with minor variations, the following sentence is found in nearly all SOAP notes throughout the course of the disputed treatments:<sup>11</sup>

Objective. Today the patient was palpitated and the doctor found articular fixations at C4, C5, C6, C7, L3, L4, and L5. Upon palpitation the doctor found muscle spasms located in the Sub-Occipital, Splenius and Erector Spinae muscles. The Patient presented today with moderate muscle spasms prior to treatment, and after treatment the patient's muscle spasms were reduced to mild.

Provider has also documented a near-identical treatment plan for continuing therapy in nearly every SOAP note:<sup>12</sup>

Plan. The patient is to return 3 times weekly. The patient has shown improvement with today's treatment by showing increased ROM, decreased pain and decreased spasms.

As far as subjective information gleaned from Claimant at each visit, again the information is impersonal and non-specific. For instance, nearly every SOAP note describes the pain as some degree of dull achy neck pain and dull achy low back pain, although descriptive adjectives varied slightly.<sup>13</sup>

The SOAP notes are equally devoid of information concerning the necessity of the disputed aquatic therapy, including associated testing and office visits. For example, every SOAP note regarding the aquatic therapy contains this note, "Due to the nature of [Claimant's] injury, we feel that he will benefit better from a non-land based rehabilitation program . . . [because] non-gravitational exercises give less stress to joints and soft tissues . . . ." As to the reason for the one-

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<sup>11</sup> See, for instance, Petitioner's Exhibit 1, pages 1, 17, 71, 140, 172, 210, 234.

<sup>12</sup> See, for instance, Petitioner's Exhibit 1, pages 14, 16, 76, 138, 145, 177, 215, 237.

<sup>13</sup> See, for instance, Petitioner's Exhibit 1, pages 38, 45, 58, 78, 110, 234.

on-one supervision, each SOAP note recites that the intensive monitoring can insure proper positioning and make sure the patient does not exacerbate the injury. The SOAP notes only provide cursory information to explain why intensively supervised aqua therapy is necessary to treat muscle spasms and dull achy pain. Further, the reasons given for one-on-one supervision is meager, given that there is no allegation of danger or mental impairment.

Upon completion of the aqua therapy, the Claimant began land-based therapies, including associated testing and office visits.<sup>14</sup> Again, the SOAP notes are impersonal and generalized. Despite the repetitive objective and subjective SOAP notes documenting a lack of relief of symptoms, there is no corresponding alteration in treatment by Provider. To illustrate, every SOAP note describes identically in detail the exercises Bthe extensive cervical and lumbar-related stretches, Cybex equipment, cervical machine, stationary bicycle, treadmill and hoist machine Bwith no detail on Claimant's individual response or improvement. As noted by both the IRO reviewing chiropractor and the peer review chiropractor, if after a period of time, there appears to be no change in Claimant's condition, then this degree and type of treatment is not indicated. Instead, according to the IRO chiropractor, the peer review chiropractor, and Dr. Defoyd, their review of the medical records in this case indicate that the Claimant would have benefitted from a home exercise program. In this regard, there is no showing that a home-based treadmill or stationary bicycle would have been any less effective.

Lastly, the ALJ disagrees that payment of some of the services is a waiver of a dispute concerning the nature and duration disputed services. The treatment reimbursed by Carrier, although based on the repetitive and generic SOAP notes, serves the purpose of determining the responsiveness to the treatment. The reimbursement of some of the services, however, does not establish that all disputed services were necessary.

Therefore, the ALJ determines that since there was no indication of medical necessity, Provider should not be reimbursed by Carrier for the medical services in dispute, rendered between July 17 and December 19, 2003.

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<sup>14</sup> These services include electrical stimulation, whirlpool, joint mobilization, manual traction, chiropractic manipulation, nerve conduction, physical performance test/functional capacity test, office visits

#### IV. FINDINGS OF FACT

1. An injured worker (Claimant) injured his neck and back on\_\_\_, while working as a prison guard, when he slipped and fell down the guard tower steps in the rain.
2. Claimant described symptoms of headaches, loss of consciousness, chest, neck, left arm, low back, left buttock, and leg pain.
3. Claimant also relayed limitations on his ability to lift objects without pain, walk more than one-quarter mile, sit more than one-half hour, sleep more than six hours, or work due to the pain.
4. Claimant was diagnosed with lumbar degenerative spondylolisthesis with stenosis at L5-S1 with left L5 radicular pattern and facet degenerative changes L4-5.
5. Claimant began treatment with East Texas Chiropractic (Provider) on June 9, 2003, with active physical therapy beginning August 1, 2003.
6. Since the injury, Claimant's history of treatments has included medications, chiropractic treatment, and physical therapy, as well as diagnostic testing including multiple MRI's and x-rays.
7. At the time of the injury, Claimant's employer had its workers' compensation insurance through American Casualty Company of Reading, PA (Carrier).
8. Carrier denied payment for services rendered between July 17 and December 19, 2003, for aquatic therapy, electrical stimulation, whirlpool, joint mobilization, manual traction, chiropractic manipulation, nerve conduction, physical performance test/functional capacity test, and office visits, as not medically necessary.
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 July 17, 2003, and December 19, 2003, were not medically necessary.
11. Provider filed a request for a hearing before the State Office of Administrative Hearings on October 27, 2004.
12. The Commission sent notice of the hearing to the parties on November 23, 2004. 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. Administrative Law Judge (ALJ) Penny Wilkov convened a hearing in this case on November 2, 2005, at the State Office of Administrative Hearings (SOAH), Austin, Texas. Provider was represented by Attorney William Maxwell. Carrier was represented by

Attorney James M. Loughlin. The record closed on December 12, 2005, after the filing of post-hearing briefs. Subsequently in an order dated January 25, 2006, the ALJ reopened the record for admission of Provider's closing argument and the record closed on January 25, 2006.

14. The case was referred by the Commission and accepted by SOAH for hearing prior to September 1, 2005.
15. The Subjective Findings, Objective Findings, Assessment, and Plan (SOAP) notes maintained by Provider are generic and repetitive concerning Claimant's treatment regimen.
16. The SOAP notes contain nearly-indistinguishable objective findings, summaries of exercises performed, descriptions of pain, and treatment plans
17. The aquatic therapy was not medically necessary since the complaints of pain continued, the necessity of therapy persisted, and the lack of ability to return to work remained.
18. There was no need for one-on-one aquatic therapy supervision, particularly when it was overseen by unlicensed assistants, and could have been done in a group setting.
19. There was no showing that Claimant was in danger or needed any special attention, requiring one-on-one supervision for aquatic or land-based exercises.
20. Active physical therapy, rather than aquatic therapy, is the recommended course of treatment for treatment of Claimant's injury because it can be done at home, is less expensive, and is more adaptable to adjustments in treatment.
21. Many of the types of exercises were contra-indicated for Claimant's condition or not effective.
22. The treatments previously reimbursed by Carrier does not establish the necessity for six months of additional services.

## **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. §§ 413.073(b) and 413.031(k) and TEX. GOV'T CODE ANN. ch. 2003 and Acts 2005, 79<sup>th</sup> Leg., ch. 265, § 8.013, eff. Sept. 1, 2005.
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 between July 17 and December 19, 2003, was medically reasonable and necessary or 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 East Texas Chiropractic, D.C., is not entitled to reimbursement by American Casualty Company of Reading, PA for the disputed treatments rendered from July 17, 2003, and December 19, 2003.

**SIGNED February 9, 2006.**

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