SOAH DOCKET NO. 453-05-6619.M5
TWCC MR NO. M5-05-1751-01

CONTINENTAL WESTERN INSURANCE COMPANY,	§	**BEFORE THE STATE OFFICE**
Petitioner	§	
vs.	§	**OF**
BEXAR COUNTY HEALTHCARE SYSTEM,	§	
Respondent	§	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

I. INTRODUCTION

This is the reopening of a case decided on May 3, 2006, in which the Administrative Law Judge (ALJ) denied the appeal by Continental Western Insurance Company (Carrier) of a Texas Workers' Compensation Commission (Commission)[1] decision ordering Carrier to pay Bexar County Healthcare System (Provider) for certain chronic pain management (CPM) services provided to an injured worker (Claimant) from November 29, 2004, through December 29, 2004.[2] The ALJ also ordered that the State Office of Administrative Hearings was not authorized at that time to order Carrier to pay for the services because Carrier had submitted an "extent of injury" dispute with the Commission's Hearings Division (Hearings Division), in which it asserted that Claimant was being treated for anxiety and depression that were not a part of the compensable injury.

The case is reopened to consider the Hearings Division's order, issued on December 3, 2007, in which it determined that there was insufficient evidence to establish a causal relationship between Claimant's claimed mental depression and anxiety (anxiety/depression) and his injury and that the compensable injury did not extend to and cover anxiety/depression. After reviewing the Hearing Division's order, the arguments of the parties, and the evidence submitted, the ALJ finds that Carrier should not be ordered to pay additional reimbursement.

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[1] The Commission is now the Texas Department of Insurance, Division of Workers' Compensation (Division).

[2] The May 3, 2006 decision is incorporated herein for all purposes relevant to this decision.

The reopened hearing convened on May 28, 2008, before the undersigned ALJ. Carrier appeared and was represented by Scott D. Bouton, attorney. Provider appeared and was represented by Arturo Gonzales, Workers' Compensation Insurance Coordinator. The record was left open until June 30, 2008, for the parties to submit post-hearing briefs. Carrier presented a brief on that date. The hearing closed on June 30, 2008.

II. ANALYSIS

The Hearings Division's December 3, 2007 order stated the following fact finding, decision, and order:

> 6. The evidence presented was insufficient to establish a causal relationship between the claimed mental depression and anxiety and the compensable injury the Claimant sustained on June 15, 2002.
>
> . . .
> The compensable injury does not extend to include mental depression and anxiety.
>
> . . .
> The carrier is not liable for the benefits at issue in this hearing.

In order to account for the Hearings Division's order, the ALJ must first determine whether Claimant was being treated for anxiety/depression as part of Provider's CPM program.[3] If he was not, then Carrier should obviously be ordered to pay Provider's entire bill. If he was, and the amount of Provider's charge attributable to anxiety/depression is apparent from the record, then Carrier should be ordered to pay for the non-anxiety/depression portion of Provider's bill. However, if part of the treatment was for anxiety/depression and the amount attributable to anxiety/depression is not apparent from the record, the issue of which party has the burden of proving the amount

[3] The ALJ is aware that anxiety/depression are compensable if they naturally flow from the pain and limitations caused by the bodily injury, whereas anxiety/depression that results from such other causes as going through the workers' compensation system or being involved in a protracted dispute with an insurance carrier are not compensable. *Texas Employers Insurance Association v. Wilson*, 522 S.W.2d 192, 194-195; *Appeals Panel Decision Appeal No. 012398* at 2. However, in this case, the determination of whether and to what extent anxiety/depression are compensable has already been decided as shown in the above-described order. The ALJ does not have jurisdiction (authority) to alter that decision.

attributable to non-anxiety/depression services becomes significant because if that amount cannot be segregated from other charges and proved, then the party with the burden of proof loses.[4] The following is a discussion of these issues.

The evidence is overwhelming that Claimant was being treated for anxiety/depression as part of Provider's CPM program. Several places in the evidentiary record show he was diagnosed for depression and/or anxiety, including on December 1, 8, 15, and 22, 2004.[5] There were several other references to Claimant's anxiety/depression in the CPM notes.[6] Some of the group therapy sessions focused in part on anxiety/depression.[7] Dr. Jordan testified that Claimant was given both the Beck Anxiety Inventory and the Beck Depression Inventory.

At the hearing, Provider cited the fact that its diagnosis codes relate to a low-back injury rather than anxiety/depression and on that basis, argued that its treatment was not for anxiety/depression. It cited an MRD ruling relating to subsequent treatment for Claimant in which MRD ruled in Provider's favor and against Carrier's contention that the services were for anxiety/depression on the simple basis that Provider's diagnosis codes were for a low-back injury and pain rather than anxiety/depression.[8] This contention was not persuasive for the obvious reason that it is possible for a treatment to be different than or in addition to what is shown by a diagnosis code.

[4] If Carrier has the burden of proof and cannot prove what portion of Provider's bill is attributable to anxiety/depression, then there is no evidentiary basis for reducing Provider's bill and Carrier must pay the entire amount. If Provider has the burden and fails to prove what portion of its bill is attributable to non-anxiety/depression services, then, because there is no evidentiary basis for finding how much Carrier should pay, Provider is precluded from recovery.

[5] Ex. 3 at 22, 57, 81, and 110.

[6] Ex. 3 at 5, 7, 10, 12, 18, 19, 27, 38, 49, 73, 88, 97, and 117.

[7] Ex. 3 at 10, 12, 18, and 19.

[8] Ex. 2A at 2.

The next issue described above, whether the proportion of Provider's charges attributable to anxiety/depression is apparent from the record, is answered in the negative. To the contrary, the record shows that Provider charged a flat fee of $1,000.00 per day for its CPM program.[9]

The final issue, of which party has the burden of proving which portion of Provider's program is attributable to non-anxiety/depression services or treatment, will determine the case. Provider argued that, as the party requesting the hearing, Carrier has the burden of proof. The Commission's rules, in effect at the time of the dispute, placed the burden of proof on the party requesting a hearing.[10] For a variety of reasons, Carrier argued that the party initially requesting medical dispute resolution carries the burden of proof throughout the MRD and SOAH levels.

The ALJ concludes the Provider has the burden of proving which portions of its charges are for non-anxiety/depression services. Provider's contention that Carrier has the burden of proof as the party requesting the hearing was unpersuasive because the purpose of determining which portion of Provider's charge relates to non-anxiety/depression services is to address the effects of the Hearings Division's decision rather than to avoid the effects of the MRD order. In effect, the Hearings Division's decision (in conjunction with finding that some of Provider's services were for anxiety/depression) means that a portion of the amount MRD ordered paid on the basis of medical necessity is not owed because the Hearings Division ordered that Carrier is not liable for those benefits. The anxiety/depression-extent-of-injury issue is an entirely new factor that has not been ruled on under Provider's request for medical dispute resolution, including the MRD decision, which addressed the issue of medical necessity only.[11]

The ALJ concludes that Provider has the burden of proof because there must be an evidentiary basis for ordering Carrier to pay reimbursement. It is not within the ALJ's jurisdiction (authority) to order Carrier to pay any portion of Provider's bill, in view of the Hearings Division's ruling that Carrier is not liable for anxiety/depression charges, unless

[9] Ex. 1 at 15.

[10] 28 TEX. ADMIN. CODE § 148.21(h).

[11] Ex. 2 at 5.

charges for non-anxiety/depression services are segregated and proved. The burden of proof is necessarily on the party that seeks a decision ordering reimbursement to provide an evidentiary basis for the decision. The amount payable may not be based on speculation. As the party seeking payment, Provider must show the amount that should be paid.[12]

III. FINDINGS OF FACT

1. This is the reopening of a case decided on May 3, 2006, in which the Administrative Law Judge (ALJ) denied the appeal of Continental Western Insurance Company (Carrier) of a Texas Workers' Compensation Commission (Commission) decision ordering Carrier to pay Bexar County Healthcare System (Provider) for chronic pain management (CPM) services provided to an injured worker (Claimant) from November 29, 2004, through December 29, 2004.

2. The ALJ also ordered that the State Office of Administrative Hearings (SOAH) was not authorized at that time to order Carrier to pay for the services because Carrier had submitted an "extent of injury" dispute with the Commission's Hearings Division (Hearings Division), in which it asserted that Claimant was being treated for anxiety and depression that were not a part of the compensable injury.

3. The case is reopened to consider an order of the Hearings Division, issued on December 3, 2007, in which it determined that there was insufficient evidence to establish a causal relationship between Claimant's claimed mental depression and anxiety and his injury and that the compensable injury did not extend to and cover anxiety and depression.

4. All parties received not less than 10 days' notice of the time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.

5. All parties had an opportunity to respond and present evidence and argument on each issue involved in the case.

6. The Claimant was treated for anxiety and depression as part of Provider's CPM program.

    a. On several occasions, Claimant was diagnosed for anxiety and depression.

[12] The situation can be demonstrated by the following hypothetical: assume a hearing is set to determine how much Party A owes Party B and assume further that both parties appear at the hearing, but neither party produces any evidence. In that circumstance, there is no evidence to support an order requiring Party A to pay any amount. The burden of proving how much should be paid is necessarily on the party that wants Party A to pay, *i.e.*, Party B. Provider occupies the position of Party B in this proceeding.

b. There were several references to anxiety and depression in Provider's CPM notes.

c. Some of the group therapy sessions focused in part on anxiety and depression.

d. Claimant was given both the Beck Anxiety Inventory and the Beck Depression Inventory.

7. There is insufficient evidence to conclude which of Provider's charges are attributable to non-anxiety and depression services.

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 and TEX. GOV'T. CODE ANN. ch. 2003.

2. Notice of the hearing was proper and timely. TEX. GOV'T. CODE ANN. §§ 2001.051 and 2001.052.

3. SOAH does not have authority to order Carrier to pay for anxiety and depression.

4. The burden of segregating and proving which of Provider's charges are attributable to non-anxiety and depression services is on Provider.

5. There is no evidentiary basis for determining which portions of Provider's charges are attributable to anxiety and depression services.

6. Provider failed to carry its burden of proof.

7. Carrier should not be ordered to provide additional reimbursement.

ORDER

IT IS THEREFORE ORDERED that Continental Western Insurance Company is not required to pay additional reimbursement to Bexar County Healthcare System.

SIGNED August 18, 2008.

JAMES W. NORMAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS