DOCKET NO. 454-12-7137.M4
(DWC FILE NO. _____)
(MDR NO. _____)

_____,	**§**	**BEFORE THE STATE OFFICE**
Requestor	**§**	
	§	
V.	**§**	**OF**
	§	
_____/JI SPECIALTY	**§**	
SERVICES,	**§**	
Respondent	**§**	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

I. INTRODUCTION

_____ requested a hearing to contest the Medical Fee Dispute Resolution decision of the Texas Department of Insurance, Division of Workers' Compensation (Division), denying her request for reimbursement for her out-of-pocket costs for a surgical procedure. This decision finds that _____ is not entitled to any reimbursement.

II. JURISDICTION, NOTICE AND PROCEDURAL HISTORY

This proceeding presented no contested issues of notice or jurisdiction. Therefore, those matters are set out in the findings of fact and conclusions of law without further discussion here.

On August 13, 2012, Administrative Law Judge (ALJ) Hunter Burkhalter convened the hearing in this matter at the Austin offices of the State Office of Administrative Hearings (SOAH). _____ appeared *pro se*. _____/JI Specialty Services (Respondent) was represented by attorney Brandi Prejean. The record closed on the same day.

III. DISCUSSION

A. Applicable Law

The Texas Workers' Compensation Act (Act) is found at Tex. Lab. Code § 401.001, *et seq*. Under the Act, workers' compensation insurance covers all medically necessary health care, including all reasonable and necessary medical aid, examinations, treatments, diagnoses, evaluations, and services reasonably required by the nature of a compensable injury and reasonably intended to cure or relieve the effects naturally resulting from the compensable injury.[1] Pursuant to the Act, however, an injured employee is not entitled to reimbursement for the cost of non-emergency health care if the care was not approved or recommended by the employee's treating doctor.[2]

The Act directs the Commissioner of Workers' Compensation (Commissioner) to adopt rules governing the procedures by which reimbursement of covered medical charges is to be obtained.[3] The Commissioner has adopted such rules.[4] Pursuant to those rules, an insurance carrier is not obligated to reimburse an injured employee for the costs of a non-emergency surgery that the employee underwent because of a compensable injury if the injured employee failed to obtain preauthorization from the carrier prior to undergoing the surgery.[5]

B. Evidence and Argument

Respondent contends that _____ is not entitled to reimbursement for the costs of neck surgery that she underwent in Florida in April 2010 (the Florida surgery) because:

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[1] Tex. Lab. Code § 401.011(19) and (31).

[2] Act § 408.021(c).

[3] Tex. Lab. Code § 413.011.

[4] *See, e.g.*, 28 Tex. Admin. Code chs. 133 and 134.

[5] Tex. Admin. Code § 134.600(c), (f), and (p)(1)-(3).

(1) the surgery was not approved or recommended by ___ treating doctor; and (2) _____ failed to seek and obtain from Respondent preauthorization for the surgery. [6]

At the time of the incidents in question, ___ worked as a ___ in _____. On _____, she slipped and fell in the parking lot of the school where she works. She testified that the fall caused damage to her wrist, elbow, shoulder, knee, and neck.

____ testified that she initially began being treated by a Dr. Hamoudi shortly after her fall. She eventually became disenchanted with Dr. Hamoudi and decided to change to a new doctor.

On June 24, 2009, Respondent notified ___ that it was denying coverage for her neck problems because it concluded they were not related to her fall at work but, rather, were caused by "pre-existing medical conditions with normal medical progression." On the other hand, Respondent advised that ____ problems with her right shoulder, elbow, wrist, and left knee were work-related and, therefore, would be covered by her workers' compensation insurance.[7] What followed was a rather long-lasting dispute between ___ and Respondent as to the question of whether her neck problems arose from a compensable injury.

On August 20, 2009, _____ was examined by Dr. Carl Davis for the purpose of determining her "maximum medical improvement" (MMI) and an appropriate "impairment rating." According to _____, this was not her first examination by Dr. Davis. She testified that Dr. Davis had examined her twice previously and each time concluded that her neck problems were caused by her work-related injury.

At the August 20, 2009 examination, ____ complained to Dr. Davis of pain in the cervical spine, radiating to the arms. Dr. Davis described Ms. _____ as being "very nice, but quite eccentric" and presenting a "confusing" story as to the history of her work accident and

[6] At the Medical Fee Dispute Resolution proceeding previously held in this matter, Respondent also asserted, unsuccessfully, that the coverage for the bills should be denied because ___ violated rules requiring that medical bills be submitted within specific deadlines. At the SOAH hearing, however, Respondent conceded that the rules in question apply only when a "health care provider" is seeking reimbursement, not when an injured employee, such as ____, is seeking reimbursement. Thus, Respondent advised that it was waiving its timeliness arguments.

[7] Ex. T-1 at 5.

subsequent dealings with her primary treating physician and the workers compensation system.[8] Dr. Davis again concluded that _____ injury was compensable, but that she had not reached maximum medical improvement (MMI) in part because appropriate treatment recommendations had not been followed by her. He also concluded that no impairment rating was warranted.[9]

In his report, Dr. Davis included the following description of _____.

> (*It is extremely relevant to note here that the patient is, in the most diplomatic terms possible – "eccentric.")* This is mentioned, not to impugn the patient, but merely to formally document a FACTUAL OBSERVATION that is impossible to ignore and which has greatly impacted the course of this patient's treatment – or in this case – lack of treatment. It is also extremely relevant that, in large part, as a consequence of her idiosyncratic behavior(s), that she continues to report that she has great difficulty reaching her primary treating physician. She appears extremely disorganized and appears to have difficulty grasping the mechanisms by which the Worker's compensation system functions. Nevertheless, this patient is sincere in her complaints and her complaints are supported by strong clinical evidence. She therefore deserves all the assistance possible to aid her in liasing with her primary treating physician or the assistance of the Commission in helping her find a primary treating physician with whom she can develop a repartee and who can assist her in obtaining treatment appropriate to treat the injuries resulting from her compensable injury.[10]

Dr. Davis had equally harsh words for Respondent, which he essentially accused of acting in bad faith.

> [D]espite the facetious conclusions of the CHART REVIEW [which apparently concluded that ____ maladies were not work-related], irrefutable clinical evidence supports the diagnosis, based on not only clinical examination, but also upon the results of the MRI of the claimant's cervical spine.
> Further 'requests for clarification' [from the carrier] of this fundamental issue are, in the opinion of this examiner, facetious and dilatory and by their nature are punitive and capricious. The only logical conclusion is that they are being generated in order to harass the examiner [*i.e.* Dr. Davis] into ignoring both clinical data and the findings of examination. I would respectfully ask the 'Commission' to put an end to this harassment. This patient has clear evidence

[8] Ex. T-1 at 36.

[9] Ex. T-1 at 38.

[10] Ex. T-1 at 38 (emphasis in original).

> of injury resulting from her Compensable injury and further attempts to disclaim that injury or impede her treatment are unconscionable.[11]

On October 28, 2009, ____ was seen by Dr. Irwin Novak for a "Post Designated Doctor Required Medical Evaluation." Dr. Novak concluded that ____ suffered from severe cervical spondylosis, which he described as a "natural process of aging," but he concluded it was a compensable injury because it was "precipitated by minor trauma on ____."[12]

____ then began obtaining treatment from Dr. Ronald Lindsay. In a November 25, 2009 letter, Dr. Lindsey advised _____ that she suffered from "severe cervical spondylolsis with disc herniations and stenosis at C5-6 and C6-7." The doctor described ____ condition as "a degenerative process that may have been initially precipitated or aggravated by trauma but has clearly taken a long time (i.e. years) to develop." He advised her that she would "benefit greatly from a surgical procedure which would decompress your cervical nerves and stabilize your neck," and he offered to perform the surgery.[13] According to ____, the kind of surgery Dr. Lindsay proposed would have cost roughly $50,000. _____ testified that Dr. Lindsay explained to her that he would not seek preauthorization for the surgical procedure because he did not think the Respondent would grant it due to the fact that Respondent had concluded that her neck problems were not work-related.

_____ testified that, during this time, the pain in her neck was severe and limited her ability to carry on her life. The pain prevented her from sleeping, she was bedridden most of the time and, at times, she felt suicidal. She testified that she eventually quit her job as a ____ because the pain prevented her from working.[14]

In March 2010, _____ and Respondent both participated in a Benefit Review Conference (BRC). ____ was accompanied at the BRC by her legal counsel. ____ testified that, at the BRC, she asked: "What would happen if I had surgery on my own and paid for it out of my pocket?"

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[11] Ex. T-1 at 38-39 (emphasis in original).

[12] Ex. T-1 at 46-47.

[13] Ex. T-1 at 7.

[14] See also Ex. T-1 at 2.

She asserted that no one in attendance at the BRC told her that the surgery had to be preapproved. On cross examination, however, she acknowledged that she was, in fact, told that she would have to have the surgery preauthorized, but that she did not "know what all that means."

Eventually, ____, with the assistance of her brother, learned of a doctor in Florida, Dr. Scott Haufe, who performed a similar, but less expensive and less invasive surgical procedure than the one recommended by Dr. Lindsay. Dr. Haufe's procedure involved the use of laser surgery. _____, on her own initiative, traveled to Florida and had the procedure done by Dr. Haufe on April 2010. All of the costs of the surgery, including travel costs, were paid by _____ directly. Her out-of-pocket costs totaled $10,135.56.[15] It is these costs for which _____ seeks reimbursement in this proceeding. She believes that the surgery improved her condition.[16] She acknowledged that Dr. Lindsay did not recommend the type of surgery she had performed in Florida, nor was she was referred by him or any other doctor to have the laser surgery done. Rather, she alone made the decision to undergo the surgery.

In April 2010, the same month that _____ underwent the Florida surgery, Dr. Lindsay submitted to Respondent a request for preauthorization to perform a carpal tunnel surgical procedure on _____ right wrist.[17] It is unclear from the record whether preauthorization was granted by Respondent.

On May 11, 2010, ____ underwent a "designated doctor evaluation" by Dr. Glenn Marr, in order to "determine whether the employees [sic] disability is a direct result of the work related injury which occurred on _____."[18] At the time, _____ was still complaining of pain in her neck and right shoulder, and numbness in her right hand. Dr. Marr concluded that _____ injuries were a "direct result" of her _____ fall.[19]

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[15] Ex. T-1 at 21-34.

[16] Ex. T-1 at 2, 13.

[17] Ex. R-1 at 15-17.

[18] Ex. R-1 at 28.

[19] Ex. R-1 at 29.

On January 2011, ____ and Respondent entered into a Benefit Dispute Agreement whereby Respondent conceded that _____ neck injury was a compensable injury caused by her ____ accident. This was the first time that Respondent changed its position and conceded that ____ neck problems were work-related and covered by her insurance. Thereafter, she began receiving workers compensation disability payments related to her neck problems.[20] However, Respondent continued to take the position that ____ expenses for the Florida surgery were not recoverable.

_____ testified that, over the course of her dealings with Respondent regarding her neck, she hired two separate lawyers and paid them several thousand dollars. She was represented by an attorney at the time she underwent her neck surgery in Florida and at the time of the BRC. She expressed frustration that her attorneys "never accomplished anything" on her behalf, and she speculated that perhaps they even colluded with the Respondent to prevent her from being compensated.

____ also expressed her exasperation with Respondent. She was clearly frustrated that it took Respondent more than two years to finally conclude that her neck problems were work-related. She believes the Respondent acted in bad faith and unduly lengthened the process in the hopes that she would simply give up and abandon her claim.

C. ALJ's Analysis and Decision

As noted above, Respondent contends it is not obligated to reimburse ____ for the Florida surgery because: (1) she failed to seek and obtain from Respondent preauthorization for the surgical procedure; and (2) the procedure was not approved or recommended by her treating doctor. The ALJ agrees on both counts.

By law, a carrier is not liable for the costs of non-emergency surgery, including spinal surgery, unless the injured employee or her doctor requested and obtained from the carrier

[20] Ex. T-1 at 6.

preauthorization for the surgery to be performed.[21] Pursuant this rule, ____ was obligated to submit a detailed, written request for preauthorization to Respondent before she underwent the surgery. She admits that she did not do so. Because no preauthorization was sought or obtained, the costs of the Florida surgery are simply not recoverable.

It is regrettable that it took Respondent two years to conclude that ____ neck problems were the result of a compensable injury, and the ALJ can understand her frustration on that point. However, the question of whether an injury is compensable is an entirely separate question from whether preauthorization is warranted as to a specific medical procedure. As set forth in 20 Tex. Admin. Code § 134.600(h), a carrier's decision on whether to preauthorize a procedure must be "based solely upon the medical necessity of the health care required to treat the injury, regardless of . . . unresolved issues of compensability . . . or relatedness to the compensable injury . . . [or] the insurance carrier's liability for the injury."[22] In other words, if ____ had sought preauthorization, it could have been granted even as Respondent continued to contest the larger coverage question as to _____ neck problems.

Moreover, _____ acknowledged that she was told at the BRC that she would have to obtain preauthorization before undergoing the Florida surgery, and she was represented by legal counsel during the time that she chose to proceed with the Florida surgery without first obtaining preauthorization.

Similarly, the Act mandates that an injured employee is not entitled to reimbursement for the cost of non-emergency health care if the care was not approved or recommended by the employee's treating doctor.[23] _____ admitted that, at the relevant time, her treating doctor was Dr. Lindsay. She further admitted that neither Dr. Lindsay nor any other doctor approved or recommended the type of surgery that she underwent in Florida. She asserted that the laser surgery performed in Florida was similar to but not precisely the kind of surgery that Dr. Lindsay had recommended for her.

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[21] 28 Tex. Admin. Code § 133.600(c), (f), and (p)(1)-(3).

[22] Emphasis added.

[23] Act § 408.021(c).

____ bore the burden to prove she is entitled to reimbursement. Having failed to satisfy that burden, she is barred from recovery.

IV. FINDINGS OF FACT

1. On ___, ____ suffered a work-related fall that caused damage to her wrist, shoulder, knee, elbow, and neck.

2. On June 2009, ___ workers' compensation insurer, _____/JI Specialty Services (Respondent), advised her that it had concluded that the damage to her shoulder, elbow, wrist, and knee were caused by her fall and, therefore, would be covered by her workers' compensation insurance. Respondent also advised her of its conclusion that her neck problems were caused by a pre-existing medical condition rather than the fall and, therefore, were not covered by her insurance.

3. Over the ensuing 19 months, _____ and Respondent engaged in an ongoing dispute as to whether her neck injury was a compensable injury.

4. In March 2010, ____ and her attorney attended a Benefit Review Conference (BRC) with Respondent.

5. At the BRC, when _____ suggested that she might proceed with obtaining neck surgery on her own initiative and pay for it out of her own pocket, she was told by a representative of Respondent that she would have to first obtain preauthorization for the surgery from Respondent.

6. In April 2010, ____ underwent neck surgery in Florida (the Florida surgery).

7. Dr. Lindsay was required to approve or recommend the Florida surgery, but he did not do so.

8. ____ made the decision to undergo the Florida surgery on her own.

9. The Florida surgery required preauthorization by Respondent.

10. Neither _____ nor the physician who performed the surgery sought from Respondent preauthorization for the Florida surgery.

11. The Florida surgery was not preauthorized by Respondent.

12. Eventually, on January 26, 2011, Respondent changed its position and conceded that ____ neck injury was a compensable injury. Respondent maintained, however, that it was not liable for the costs of the Florida surgery.

13. After Respondent refused to pay for the Florida surgery, _____ filed a request for medical dispute resolution (MDR) with the Texas Department of Insurance, Division of Workers' Compensation (Division).

14. The Division determined that ____ was not entitled to reimbursement.

15. _____ requested a hearing with the State Office of Administrative Hearings, seeking reversal of the Division's decision.

16. The Division mailed notice of the hearing on July 2012. The notice of hearing listed the time, place, and nature of the hearing; included a statement of the legal authority and jurisdiction under which the hearing was to be held; referred to particular sections of the statutes and rules involved, and included a short, plain statement of the matters asserted.

17. The hearing convened on August 2012. Both parties appeared and participated. The record closed on the same day.

18. Requestor is not entitled to reimbursement for the costs of the Florida surgery.

V. CONCLUSIONS OF LAW

1. The Division has jurisdiction over this matter pursuant to Tex. Labor Code § 413.031.

2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding pursuant to Tex. Gov't Code ch. 2003 and Tex. Labor Code § 413.031.

3. Adequate and timely notice of the hearing was provided in accordance with Tex. Gov't Code §§ 2001.051 and 2001.052 and 1 Tex. Admin. Code ch. 155.

4. ____ had the burden of proof under 28 Tex. Admin. Code § 148.14.

5. Because ____ did not request or receive preauthorization for the Florida surgery, a procedure that required preauthorization pursuant to 28 Tex. Admin. Code § 134.600(c), (f), and (p)(1)-(3), she is barred from being reimbursed for the cost of that surgery.

6. Because the Florida surgery was not approved or recommended by ___ treating doctor, she is barred from being reimbursed for the cost of that surgery pursuant to Tex. Lab. Code § 408.021(c).

ORDER

THEREFORE IT IS ORDERED that ____ is not entitled to any reimbursement from _____/JI Specialty Services, and her reimbursement request is **DENIED**.

SIGNED September 12, 2012.

HUNTER BURKHALTER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS