SOAH DOCKET NO. 454-21-3287.M4-NP

LASER SURGERY HOLDING COMPANY, LTD.,	§	**BEFORE THE STATE OFFICE**
Petitioner	§	
	§	
v.	§	**OF**
	§	
TEXAS MUTUAL INSURANCE,	§	
Respondent	§	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

This case involves ambulatory surgical services rendered by Laser Surgery Holding Company, Ltd. (Provider) to an injured employee covered by the workers' compensation insurance system. The Texas Department of Insurance, Division of Workers' Compensation (Division) conducted medical fee dispute resolution (MFDR) and declined to order Texas Mutual Insurance (Carrier) to reimburse Provider in the amount of $70,000.[1] The Administrative Law Judge (ALJ) concludes that Provider is not entitled to additional reimbursement and affirms the MFDR Decision.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

There are no disputed issues regarding notice or jurisdiction in this proceeding. Therefore, those matters are addressed in the findings of fact and conclusions of law without further discussion here.

On November 13, 2019, the Division received Provider's request for MFDR.[2] On December 11, 2019, the Division issued its MFDR decision, denying reimbursement.[3] Provider requested a hearing at the State Office of Administrative Hearings (SOAH) to contest the Division's determination. On August 18, 2021, the Division issued a Notice of Hearing.

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[1] This is the amount in dispute identified in the MFDR Decision. Ex. R-1 at 5.

[2] Ex. R-1 at 10.

[3] Ex. R-1 at 5-7.

On December 7, 2022, ALJ Sarah Starnes convened a hearing on the merits via the Zoom government videoconferencing platform before SOAH in Austin, Texas. Provider was represented by its practice manager, BT. Carrier appeared through attorney BJ. The record closed on February 4, 2022, the date the parties filed their final written closing arguments.

II. DISCUSSION

A. Applicable Law

A healthcare provider must request preauthorization from an injured worker's insurance carrier prior to providing ambulatory surgical services to the worker.[4] The request can be made by the health care provider or its designated representative, including office staff or a referral health care provider or health care facility that requests preauthorization.[5] The insurance carrier is generally not liable for treatments or services requiring preauthorization unless preauthorization was sought and obtained from the insurance carrier.[6]

A preauthorization request can be sent by telephone, facsimile, or electronic transmission and must include, among other things, the estimated date of the proposed health care.[7] The insurance carrier must contact the requestor by telephone, facsimile, or electronic transmission within three working days of receipt of a request for preauthorization to approve or deny the request, and must also send written notification of the decision to the injured employee and requestor.[8] An approval must include, among other things, the specific health care and the specific period of time to complete the treatments.[9] The insurance carrier cannot condition an approval orchange any elements of the request unless the condition or change is mutually agreed to by the health care provider and insurance carrier and is documented.[10]

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[4] Tex. Labor Code § 413.014(c)(5); 28 Tex. Admin. Code § 134.600(f), (p)(2).

[5] 28 Tex. Admin. Code § 134.600(a)(9).

[6] Tex. Labor Code §§ 401.011(8), 413.014(d).

[7] 28 Tex. Admin. Code § 134.600(f)(9).

[8] 28 Tex. Admin. Code § 134.600(i)-(j).

[9] 28 Tex. Admin. Code § 134.600(l)(1)-(2).

[10] 28 Tex. Admin. Code § 134.600(n).

If a health care provider is denied or paid a reduced amount for the medical service rendered, the provider is entitled to review by the Division.[11] If a dispute remains after that review, a party may request a contested case hearing at SOAH.[12] As the party requesting a hearing at SOAH to challenge an adverse MFDR decision, Provider has the burden of proof to show by a preponderance of the evidence that Provider is entitled to additional reimbursement.[13] The hearing before SOAH is a de novo review of the issues involved.[14]

B. The Claim and MFDR Decision

This case involves ambulatory surgical services—specifically, a replacement of a spinal cord stimulator—performed by Provider for an injured worker on July 1, 2019. Carrier had preapproved the procedure, but the preapproval specified that the surgery had to be performed between April 26 and June 26, 2019. When Provider submitted its claim for $70,000 reimbursement, Carrier denied the claim because the surgery had been performed outside of the approved dates.

Provider requested MFDR from the Division, and the MFDR Decision issued on December 11, 2019. The MFDR Decision agreed with Carrier that, because the services had been rendered outside the preauthorized period, no payment was due to Provider.[15]

C. Evidence

At the hearing, Carrier had four exhibits admitted into evidence and presented testimony from two witnesses: ASt, the review agent who issued the preauthorization for the injured worker's surgery; and JT, Carrier's Senior Manager of Provider Network and Medical Operations, who addressed why Provider's reimbursement claim was denied. Provider had one exhibit admitted into evidence and presented testimony from Mr. T.

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[11] Tex. Labor Code § 413.031(a).

[12] Tex. Labor Code § 413.0312(e).

[13] 28 Tex. Admin. Code § 148.14(b), (e).

[14] *See Vista Med. Ctr. Hosp. v. Texas Mut. Ins. Co.,* 416 S.W.3d 11, 17-18 (Tex. App.—Austin 2013, no pet.).

[15] Ex. R-1 at 5-6.

1. Testimony of AS

Ms. S has been employed by Carrier for fourteen years. She is a licensed vocational nurse and is currently a medical care coordinator, but was formerly a preauthorization nurse and was responsible for preauthorization of the surgical procedure at issue.

Ms. S testified that on April 23, 2019, CU, acting as an authorized representative for Provider, sent a preauthorization request for a procedure to remove and replace a spinal cord stimulator for the injured worker. The request from Mr. U included the correct procedure codes and other information to support the procedure, but the request did not include aspecific period of time during which Provider would complete the procedure. Instead, according to Ms. S, the request stated only "TBD" where the procedure date was supposed to be given.

Ms. S called Mr. U to discuss the incomplete preauthorization request, and he statedthat he was submitting the request on behalf of Dr. AP, the physician who would performthe procedure. Ms. S testified that on the phone, she and Mr. U agreed to a time period forthe procedure—April 26-June 26, 2019. That is the date range she included in the preapproval letter she prepared on April 26, 2019. Specifically, the preapproval letter stated:

> Per Physician Advisor, and per mutual agreement with C at Dr. P's, authorization is given for Outpt Spinal Cord Stimulator Replacement 63663 x 2, 63685, 95972, per Dr. P, to be done at Laser Surgery Center between 4/26/19-6/26/19. If a change in the facility is necessary, please contact the Preauthorization department prior to completion of services. Treatment(s) orprocedure(s) are to be completed within the agreed upon period of time.[16]

The preapproval letter was faxed to Mr. U on April 26, 2019, according to Ms. S, and she received fax confirmation that it was received on the same date. A copy was also mailed to Dr. P that day.

On cross-examination, Ms. S explained that Mr. U worked for the company that provided the battery and other hardware used in the surgery, and that it is typical for such companies to submit the preauthorization requests for procedures to be performed by a physician.

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[16] Ex. R-1 at 31.

Mr. U expressly stated that he was seeking preauthorization on behalf of Dr. P, and no oneelse from Provider's office ever sought preauthorization for the procedure or responded to the preauthorization letter.

2. Testimony of JT

Ms. T has been Carrier's Senior Manager of Provider Network and Medical Operations since December 2016. She supervises eleven employees and is the point of contact forutilization review agents who issue preauthorization decisions.

According to Ms. T, the preauthorization letter here was required to include a specifictime period during which the approved procedure had to be performed. Dr. P performed the preapproved surgery, but the surgery was performed on July 1, 2019, several days outside the period that had been approved. Ms. T testified that Provider did not request or obtain an extension of the preauthorization. When Provider later sent the bill for Dr. P's surgery, Carrier denied payment because the procedure had not been performed during the agreed-upon time frame, and therefore preauthorization was absent.

3. Testimony of BT[17]

Mr. T denied that Provider ever agreed with Carrier to limit the dates of service, and he contended that Mr. U lacked authority to bind Provider to any such agreement. He argued that Carrier cannot point to any signed agreement or other writing where Provider agreed the surgery would be performed before June 26, 2019.

Mr. T described Mr. U at various points as a "rep. of the Stimulator supplier" and a "Patient Therapy Access Specialist,"[18] and denied that Mr. U requested preauthorization on Provider's behalf. According to Mr. T, Provider had asked Mr. U to confirm that the correct procedure codes were listed on the preauthorization request before sending it on to Carrier. He did not consider Mr. U to be acting as Provider's representative in this process. Rather, he asserted

[17] Mr. T testified at the hearing and also had a sworn statement admitted into evidence as Exhibit P-1.

[18] Petitioner's Closing Arguments at 3; Ex. R-1 at 1.

that Mr. U was "merely forwarding" Provider's preauthorization request to Carrier, although Mr. U's phone number was listed on the cover sheet as the contact number for the preauthorization.

Mr. T agreed that Provider learned of the preauthorization from Mr. U on the same day it was issued via an "Authorization Confirmation" email that Mr. U sent to Provider on April 26, 2021, informing Provider that the surgery had been approved. Mr. T acknowledged receiving the "Authorization Confirmation" and further acknowledged that it included the preauthorization number and the date range approved for the procedure. However, Mr. T insisted "we never agreed to that" and therefore Provider considered the time limit to be "superfluous." Mr. T testified that, upon learning that there was a putative date restriction on the preauthorization, he asked Mr. U why he had agreed to those dates. Mr. U responded that Ms. S had told him Carrier would not approve the procedure without a date range for the surgery. Mr. T testified that, in response, he told Mr. U "Okay, if that is the case you can put whatever date you want."

Though he admitted receiving notice of the preauthorization from Mr. U, Mr. T denied that he received the copy of the preauthorization letter that Carrier mailed to Provider, or seeing any copy of the letter prior to performing the surgery at issue. He claimed that the letter was forwarded to Provider by Mr. U for the first time on November 10, 2021, after the surgery and after Carrier had denied reimbursement. However, on cross-examination he agreed that the authorization code provided in the April 26, 2019 preauthorization letter had been included when the claim for reimbursement was submitted to Carrier. He did not explain how Provider could have included the authorization number if it had not yet seen the preauthorization letter.

Mr. T explained that the injured worker's surgery had originally been scheduled in June 2019, but had to be rescheduled at the patient's request to July 1, 2019. The Carrier has not contested the need for or expense of the surgery, Mr. T noted, and the patient would be suffering today if the surgery had not been performed. Therefore, he believes it is unfair to deny Provider reimbursement for performing the surgery.

C. Analysis

The preponderance of the evidence shows that Mr. U was acting as Carrier's designated representative when he submitted the preauthorization request for Provider, and that in his capacity as representative he agreed that Provider would perform the authorized surgery between April 26 and June 26, 2019. The distinction Mr. T would draw between authorizing Mr. U to request preauthorization for Provider (which he denies) and authorizing him to "merely forward" the request for Provider (which he admits) is not supported by the evidence.

At Provider's behest, Mr. U sent Provider's preauthorization request to Carrier. That request was required to include an estimated date for the proposed surgery.[19] When the Carrier's representative, Ms. S, raised that issue with Mr. U and told him the request could not be approved without a date by which the surgery would be complete, Mr. T told Mr. U to "put whatever date [he] want[ed]" for the procedure. Mr. U followed this direction when he agreed with Ms. S that the surgery would be performed between April 26 and June 26, 2019. Mr. Ualso promptly emailed the Carrier's preauthorization approval to Provider on the same day it was issued. Provider has relied on that preauthorization obtained by Mr. U in seeking reimbursement from Carrier. Despite Mr. T's testimony that Provider "never agreed" to any date limitation, the preponderant evidence shows that Provider knew about the date limitation in the preauthorization and authorized Mr. U to agree to it.

Provider argues that including a date limitation constitutes an impermissible condition or change to its request for preauthorization. The ALJ does not agree. While Mr. U's initial request had given only "TBD" as the date of the procedure, the evidence shows that Mr. U andMs. S subsequently agreed to change that element of the request in their phone conversation and mutually agreed to the date range included in the preauthorization letter. Mr. T acknowledged that Mr. U had spoken with Ms. S and agreed with her on a date range for performing the patient's surgery, and the Division's rules clearly contemplate that such discussionscan be had by telephone.[20] Ms. S's note stating that "per mutual agreement with C at Dr. P's" the surgery

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[19] 28 Tex. Admin. Code § 134.600(f)(9).

[20] 28 Tex. Admin. Code § 134.600(f)(i) (request for reauthorization and carrier's approval can be sent "*by telephone*, facsimile, or electronic transmission . . . .") (Emphasis added).

would "be done at Laser Surgery Center between 4/26/19-6/26/19" is sufficient to meet the requirement in the Division's rule that such agreements be "documented."[21]

Alternatively, if, as Mr. T seems to contend, Mr. U lacked authority to obtain preauthorization or agree to preauthorization terms on Provider's behalf, then Provider performedthe surgery without any valid preauthorization at all. Other than the April 26, 2019 preauthorization letter that Mr. Uribe requested and obtained for Provider—which included a datelimitation—there is no preauthorization for the surgery for which Provider is seeking reimbursement.

Provider correctly notes that the Division's rules prohibit an insurance carrier from withdrawing a preauthorization once it has been issued.[22] Mr. T contends Carrier has tried to do so here by denying reimbursement for the injured worker's July 1, 2019 surgery. Contrary to Provider's argument that open-ended preauthorization could be given, the Division's rules unambiguously state that the approval had to include a "specific period of time to complete the treatments" for which preauthorization was sought.[23] There is no evidence that authorization was ever given for a surgery performed after June 26, 2019. Carrier has not withdrawn its preauthorization but has instead held Provider to the express terms of its approval.[24]

For these reasons, the ALJ concludes that Provider has not met its burden of showing there was preauthorization for the surgery performed on July 1, 2019. Therefore, the MFDR Decision correctly determined that Provider is not entitled to reimbursement from Carrier. The ALJ makes the following findings of fact and conclusions of law in support of this decision.

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[21] Ex. R-1 at 31; 28 Tex. Admin. Code § 134.600(n).

[22] 29 Tex. Admin. Code § 134.600(l).

[23] 28 Tex. Admin. Code § 134.600(l)(2).

[24] Provider's written closing arguments raised additional arguments citing to provisions of the Division's rules on concurrent utilization review. *See, e.g.,* 28 Tex. Admin. Code § 134.600(a)(3), (q). These arguments are inapt as this claim does not involve a patient's ongoing care. Provider's briefs also cited at length to other statutes, rules, and secondary sources. To the extent those authorities are relevant, they have been addressed in the Discussion section of this Decision and Order.

III. FINDINGS OF FACT

1. On July 1, 2019, Laser Surgery Holding Company, Ltd. (Provider) performed ambulatory surgical services—specifically, replacement of a spinal cord stimulator—for an injured worker covered by the workers' compensation insurance system.

2. Texas Mutual Insurance (Carrier) was the responsible workers' compensation insurer for the injured worker.

3. On April 23, 2019, Provider requested preauthorization for the surgery from Carrier. The preauthorization request was submitted by CU, acting as Provider's designated representative.

4. The preauthorization request did not include a specific period of time during which Provider would complete the procedure, prompting Carrier's review agent to call to Mr. U to address the need to provide a time period for the surgery.

5. Mr. U and the review agent agreed by phone that the surgery would be performed between April 26 and July 26, 2019, and the review agent documented their agreement.

6. Carrier issued a preauthorization letter that approved the surgery "to be done at Laser Surgery Center between 4/26/19-6/26/19," and specified that the treatment or procedures had to be completed "within the agreed upon period of time."

7. The preapproval letter was faxed to Mr. U on April 26, 2019, and he forwarded it to Provider the same day. Carrier also mailed a copy to Provider that day.

8. Provider knew about the date limitation in the preauthorization letter and had authorized Mr. U to agree to it.

9. Other than Mr. U, no one with Provider's office ever sought preauthorization for the injured worker's surgery or responded to the preauthorization letter.

10. Provider did not request or obtain an extension of the preauthorization.

11. When Provider submitted its claim for $70,000 reimbursement, it relied on the preauthorization number in the April 26, 2019 preapproval letter.

12. Carrier denied the claim because the surgery had been performed outside of the approved dates.

13. Carrier has not withdrawn its preauthorization but has instead held Provider to the express terms of its approval.

14. Carrier requested a Medical Fee Dispute Resolution (MFDR) from the Texas Department of Insurance, Division of Workers' Compensation (Division).

15. On December 11, 2019, the Division issued an MFDR Decision denying Provider's claim for reimbursement.

16. Provider timely requested a hearing at the State Office of Administrative Hearings (SOAH) to contest the MFDR Decision.

17. On August 18, 2021, the Division issued a notice to the parties with a statement of the nature of the hearings; 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 either a short, plain statement of the factual matters asserted or an attachment that incorporated by reference the factual matters asserted in the complaint or petition filed with the state agency.

18. On September 20, 2021, the Administrative Law Judge (ALJ) issued Order No. 2 with a statement of the time and place of the hearing and instructions for participating in the hearing.

19. On December 7, 2021, ALJ Sarah Starnes convened a hearing on the merits via the Zoom government videoconferencing platform before SOAH in Austin, Texas. Provider was represented by its practice manager, BT. Carrier appeared through attorney BJ. The record closed on February 4, 2022, the date the parties filed their finalwritten closing arguments.

IV. CONCLUSIONS OF LAW

1. SOAH has jurisdiction over this proceeding, including the authority to issue a decision and order. Tex. Lab. Code § 413.031; Tex. Gov't Code ch. 2003.

2. Adequate and timely notice of the hearing was provided to the parties. Tex. Gov't Code §§ 2001.051-.052.

3. A medical fee dispute is a dispute over the amount of payment for services that have been determined to be medically necessary and appropriate for treatment of an injured employee's compensable injury. 28 Tex. Admin. Code § 133.305(a)(4).

4. A healthcare provider must request preauthorization from an injured worker's insurance carrier prior to providing ambulatory surgical services to the worker. Tex. Labor Code § 413.014(c)(5); 28 Tex. Admin. Code § 134.600(f), (p)(2).

5. When an insurance carrier approves a preauthorization request, the approval must include

the specific health care, the approved number of treatments, and specific period of time to complete the treatments. 28 Tex. Admin. Code § 134.600(l).

6. An insurance carrier may not condition an approval or change any elements of the request unless the condition or change is mutually agreed to by the health care provider and insurance carrier and is documented. 28 Tex. Admin. Code § 134.600(n).

7. Carrier has not impermissibly conditioned or changed an element of the preauthorization request. 28 Tex. Admin. Code § 134.600(n).

8. Because Provider did not obtain preauthorization to perform ambulatory surgical services for the injured worker after June 26, 2019, Provider is not entitled to reimbursement. 28 Tex. Admin. Code § 134.600(c)(1)(B), (p)(2).

9. Provider has failed to meet its burden of proof to show that the MFDR Decision was incorrect. The MFDR Decision is affirmed.

ORDER

IT IS ORDERED that Carrier is not required to reimburse Provider the requested $70,000.

NONPREVAILING PARTY DETERMINATION

Texas Labor Code § 413.0312(g) and 28 Texas Administrative Code § 133.307(h) require the nonprevailing party to reimburse the Division for the cost of services provided by SOAH. Texas Labor Code § 413.0312(i) requires SOAH to identify the nonprevailing party and any costs for services provided by SOAH in its final decision. For purposes of Texas Labor Code § 413.0312, Provider is the nonprevailing party. The costs associated with this decision are set forth in Attachment A to this Decision and Order and are incorporated herein for all purposes.

SIGNED March 4, 2022.

SARAH STARNES
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS