**Texas Department of Insurance**
**Division of Workers' Compensation**
Medical Fee Dispute Resolution, MS-48
7551 Metro Center Drive, Suite 100 • Austin, Texas 78744-1645
512-804-4000 telephone • 512-804-4811 fax • www.tdi.texas.gov

# MEDICAL FEE DISPUTE RESOLUTION FINDINGS AND DECISION

## GENERAL INFORMATION

**Requestor Name and Address**

KIRT REPP DC
PO BOX 9973
THE WOODLANDS TX 77387

**Respondent Name**
NEW HAMPSHIRE INSURANCE CO

**Carrier's Austin Representative**
Box Number 19

**MFDR Tracking Number**
M4-11-4818-01

**MFDR Date Received**
AUGUST 16, 2011

## REQUESTOR'S POSITION SUMMARY

**Requestor's Position Summary:** "I asked the carrier in my RR to provide all legal information defending their position that 'the rendering provider is not eligible to perform the service billed' and absolutely nothing was provided. I assume they are using the Judge Yelenosky ruling. Is everyone aware that this ruling has nothing to do with nerve conduction studies, only needle EMG. Then what is the carrier defense for withholding the NCV charges I provided as per the ODG documentation. There is none. I would submit that I am being discriminated against based on provider type/scope of practice by this insurance carrier and that it is a violation of the Texas Administrative Code that is affecting my ability to earn a living in this State."

**Amount in Dispute:** $1,750.00

## RESPONDENT'S POSITION SUMMARY

**Respondent's Position Summary:** "The carrier is maintaining their position that Dr. Kirt W. Repp, DC is not entitled to the requested money ($1,750.00) for the 10/15/2010 NCV testing he performed. The Carrier is standing by their denial based on Judge Stephen Yelenosky's 11/24/2009 Summary Judgment Letter."

**Response Submitted By:** Chartis

## SUMMARY OF FINDINGS

| Dates of Service | Disputed Services | Amount In Dispute | Amount Due |
|---|---|---|---|
| October 15, 2010 | CPT Code 99203 | $200.00 | $149.92 |
| | CPT Code 95860 | $170.00 | $0.00 |
| | CPT Code 95903 (X4) | $165.00/each | $383.14 |
| | CPT Code 95904 (X6) | $120.00/each | $432.32 |
| TOTAL | | $1,750.00 | $965.38 |

## FINDINGS AND DECISION

This medical fee dispute is decided pursuant to Texas Labor Code §413.031 and all applicable, adopted rules of the Texas Department of Insurance, Division of Workers' Compensation.

## Background

1. 28 Texas Administrative Code §133.307, effective May 25, 2008, *33 Texas Register 3954*, sets out the procedures for resolving medical fee disputes.
2. 28 Texas Administrative Code §134.203, effective March 1, 2008, *33 Texas Register 364*, sets the reimbursement guidelines for the disputed service.
3. 22 Texas Administrative Code §75, effective December 24, 2009, *34 Texas Register 9208*, sets out the scope of practice for chiropractors.
4. District Court of Travis County, 250th Judicial District No. D-1-N-GN-06-003451, Honorable Stephen Yelenosky, Judge Presiding, Order on cross-motions for partial summary judgment dated November 24, 2009.
5. Texas Court of Appeals, Third District at Austin, NO. 03-10-00673-CV, Opinion dated April 5, 2012.
6. Texas Court of Appeals, Third District at Austin, NO. 03-10-00673-CV, Mandate dated August 8, 2013.
7. The services in dispute were reduced/denied by the respondent with the following reason codes:

   Explanation of benefits
   - 185-The rendering provider is not eligible to perform the service billed.
   - VH04-Service does not fall within the scope of the providers practice.
   - X394-Our position remains the same if you disagree with our decision please contact the TWCC Medical Dispute Resolution
   - Z656-Any request for reconsideration of this workers' compensation payment should be accompanied by a copy of this explanation of review.

## Litigation Background for Needle EMG and MUA

Portions of the Texas Board of Chiropractic Examiners rules of practice were challenged by the Texas Medical Association and the Texas Medical Board in 2009. At issue was whether 22 Texas Administrative Code §75.17(a)(3), (c)(2)(D), (c)(3)(A), and (e)(2)(O) were within the scope of chiropractic practice in Texas. Specifically, the parties sought judgment on whether rules allowing Chiropractors to perform needle electromyography (EMG) and manipulation under anesthesia (MUA) were valid. On November 24, 2009, the 345th District Court issued a judgment in which presiding judge Honorable Stephen Yelenosky concluded that needle EMG and MUA exceeded the statutory scope of chiropractic practice in Texas. The Texas Board of Chiropractic Examiners appealed the district court's judgment to the Texas Court of Appeals, Third District. The Texas Court of Appeals in *Tex. Bd. Of Chiropractic Examiners v. Tex. Med. Ass'n*., 375 S.W.3d 464 (Tex. App. – Austin, 2012, pet. den.) issued an opinion affirming the district court's judgment, and concluding that needle EMG and MUA services are not within the chiropractic scope-of-practice. The Chiropractic Board exhausted its appeals and on August 8, 2013, the mandate affirming the district court's judgment was issued. The mandate states "…we affirm the remainder of the district court's judgment that subparts 75.17(a)(3), (c)(2)(D), (c)(3)(A), and (e)(2)(O) of the Texas Board of Chiropractic Examiners' scope-of-practice rule are void." In accordance with the Texas Court of Appeals opinion, the final mandate, and the scope of chiropractic practice requirement in 28 Texas Administrative Code §134.203(a)(6), needle EMG and MUA services may not be reimbursed.

## Issues

1. Is the rendering provider eligible to perform needle electromyography?
2. Is the rendering provider eligible to perform office visit?
3. Is the rendering provider eligible to perform nerve conduction tests?
4. Is the requestor entitled to reimbursement for CPT code 99203, 95934, 95903, and 95904?

## Findings

1. CPT code 95860 is defined as "Needle electromyography; 1 extremity with or without related paraspinal areas." According to the medical documentation found, this service was performed by Kirt Repp, D.C. (Doctor of Chiropractic). The Texas Court of Appeals in *Tex. Bd. Of Chiropractic Examiners v. Tex. Med. Ass'n*., 375 S.W.3d 464 (Tex. App. – Austin, 2012, pet. den.) issued an opinion affirming the district court's judgment, and concluding that needle EMG and MUA services are not within the chiropractic scope-of-practice of chiropractors. 28 Texas Administrative Code §134.203(a)(6) states "Notwithstanding Medicare payment policies, chiropractors may be reimbursed for services provided within the scope of their practice act." The division finds that disputed service code 95860 is not within the scope of chiropractic practice because it is an electro-diagnostic test that involves the insertion of a needle into the patient. Therefore, no reimbursement can be recommended for CPT code 95860 pursuant to 28 Texas Administrative Code §134.203(a)(6).
2. According to the explanation of benefits, the respondent denied reimbursement for the disputed office visit based upon reason codes "185 and VH04."

CPT code 99203 is defined as “Office or other outpatient visit for the evaluation and management of a new patient, which requires these 3 key components: A detailed history; A detailed examination; Medical decision making of low complexity. Counseling and/or coordination of care with other physicians, other qualified health care professionals, or agencies are provided consistent with the nature of the problem(s) and the patient's and/or family's needs. Usually, the presenting problem(s) are of moderate severity. Typically, 30 minutes are spent face-to-face with the patient and/or family.”

The Division finds that the suit referenced above did not address office visits; therefore, per 28 Texas Administrative Code §134.203(a)(6) office visits are within the scope of chiropractic practice; therefore, the respondent’s denial based upon reason codes “185 and VH04” are not supported.

3. Disputed services 95903 and 95904 fall in the category of nerve conduction tests under applicable AMA current procedural terminology (CPT). These tests involve placing a stimulating electrode is directly over the nerve to be tested. These are surface tests that do not involve needles. According to the medical documentation found, these services were performed by Kirt Repp, D.C. (Doctor of Chiropractic). As stated in the Texas Court of Appeals, Third District at Austin, NO. 03-10-00673-CV, Opinion dated April 5, 2012

> In the second provision, paragraph(c)(3)(A), TBCE imposed certification and supervision requirements on any licenses who administered “electro-neuro diagnostic testing” that varied according to whether the testing was “surface (non-needle)” or involved the use of needles. The import or effect of paragraphs (c)(2)(D) and (c)(3)(A), as the parties agree, was that chiropractors with specified training and certification could utilize needle EMG in evaluating or examining patients. In their live petitions and summary-judgment motions, the Physician Parties challenged the validity of the two rule provisions **specifically addressing needle EMG** [emphasis added]- 75.17(c)(2)(D) and (c)(3)(A) – plus the general standard regarding use of needles-75.17(a)(3).”

That is, surface tests were not in question during this suit. Pursuant to §75.17(c)(3)(A) effective December 24, 2009, *34 Texas Register 9208*, services 95903 and 95904 are within the scope of chiropractic practice because they are surface tests. Reimbursement is recommended for these services.

4. Because these studies, CPT codes 99203, 95903, and 95904, are within the scope of chiropractic practice reimbursement is recommended in accordance with 28 Texas Administrative Code §134.203(c).

Per 28 Texas Administrative Code §134.203(c)(1)(2), “To determine the MAR for professional services, system participants shall apply the Medicare payment policies with minimal modifications.
(1) For service categories of Evaluation & Management, General Medicine, Physical Medicine and Rehabilitation, Radiology, Pathology, Anesthesia, and Surgery when performed in an office setting, the established conversion factor to be applied is $52.83. For Surgery when performed in a facility setting, the established conversion factor to be applied is $66.32.

(2) The conversion factors listed in paragraph (1) of this subsection shall be the conversion factors for calendar year 2008. Subsequent year's conversion factors shall be determined by applying the annual percentage adjustment of the Medicare Economic Index (MEI) to the previous year's conversion factors, and shall be effective January 1st of the new calendar year. The following hypothetical example illustrates this annual adjustment activity if the Division had been using this MEI annual percentage adjustment: The 2006 Division conversion factor of $50.83 (with the exception of surgery) would have been multiplied by the 2007 MEI annual percentage increase of 2.1 percent, resulting in the $51.90 (with the exception of surgery) Division conversion factor in 2007.”

To determine the MAR the following formula is used: (DWC Conversion Factor/Medicare Conversion Factor) X Participating Amount = Maximum Allowable Reimbursement (MAR).

The 2010 DWC conversion factor for this service is 54.32.

The Medicare Conversion Factor is 36.8729

Review of Box 32 on the CMS-1500 the services were rendered in zip code 77029, which is located in Houston, Texas. Therefore, the Medicare participating amount will be based on the reimbursement for Houston, Texas.

Using the above formula, the Division finds the following:

| Code | Calculation for Locality 0440218 Houston | Maximum Allowable |
|---|---|---|
| 99203 | (54.32/36.8729) x101.77 for 1 Unit | $149.92 |
| 95903 | (54.32/36.8729) x $65.02 for 4 Units | $383.14 |
| 95904 | (54.32/36.8729) x $48.91 for 6 Units | $432.32 |
| | | $965.38 |

**Conclusion**

For the reasons stated above, the Division finds that the requestor has established that reimbursement is due for the specified services. As a result, the amount ordered is $965.38.

## *ORDER*

Based upon the documentation submitted by the parties and in accordance with the provisions of Texas Labor Code Sections 413.031 and 413.019 (if applicable), the Division has determined that the requestor is entitled to additional reimbursement for the services involved in this dispute. The Division hereby ORDERS the respondent to remit to the requestor the amount of $965.38 plus applicable accrued interest per 28 Texas Administrative Code §134.130, due within 30 days of receipt of this Order.

**Authorized Signature**

| Signature | Medical Fee Dispute Resolution Officer | 9/9/2013<br>Date |
|---|---|---|

## *YOUR RIGHT TO APPEAL*

Either party to this medical fee dispute has a right to request an appeal. A request for hearing must be in writing and it must be received by the DWC Chief Clerk of Proceedings within **20** (twenty) days of your receipt of this decision. A request for hearing should be sent to: Chief Clerk of Proceedings, Texas Department of Insurance, Division of Workers Compensation, P.O. Box 17787, Austin, Texas, 78744. **Please include a copy of the Medical Fee Dispute Resolution Findings and Decision** together with other required information specified in Division rule at 28 Tex. Admin. Code §148.3(c).

Under Texas Labor Code § 413.0311, your appeal will be handled by a Division hearing under Title 28 Texas Administrative Code Chapter 142 rules if the total amount sought does not exceed $2,000. If the total amount sought exceeds $2,000, a hearing will be conducted by the State Office of Administrative Hearings under Texas Labor Code §413.031.

**Si prefiere hablar con una persona en español acerca de ésta correspondencia, favor de llamar a 512-804-4812.**