**SOAH DOCKET NO. 453-03-1256.M5**
**[MDR TRACKING NO. M5-02-2133-01]**

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| **METROPLEX DIAGNOSTICS,** | § | **BEFORE THE STATE OFFICE** |
| **Petitioner** | § | |
| | § | |
| **VS.** | § | **OF** |
| | § | |
| **AMERICAN HOME ASSURANCE,** | § | |
| **Respondent** | § | **ADMINISTRATIVE HEARINGS** |

# DECISION AND ORDER

## I. SUMMARY

Metroplex Diagnostics (Petitioner) challenged a decision by an Independent Review Organization (IRO) in a medical fee dispute brought before the Texas Workers' Compensation Commission (TWCC or Commission). The IRO found that the nerve conduction velocity (NCV) studies provided by Petitioner were not medically necessary in the treatment of Claimant, who was diagnosed with a compensable injury to his back.

Petitioner challenged the IRO's decision on the basis that the rendered treatment was permitted under §§ 408.021 and 401.011(19) of the Texas Workers' Compensation Act (the Act), TEX. LAB. CODE ANN. ch. 401 *et seq.*

This decision affirms the IRO's decision, finding that the NCV testing was not medically necessary and finds that Respondent is not required to reimburse Petitioner for the procedure.

## II. PROCEDURAL HISTORY

The Commission has jurisdiction over this matter pursuant to § 413.031 of the Act. The State Office of Administrative Hearings (SOAH) has jurisdiction over matters related to the hearing in this proceeding, including authority to issue a decision and order, pursuant to § 413.031(k) of the Act and TEX. GOV'T CODE ANN. ch. 2003. No party challenged jurisdiction or notice in this case.

The hearing was convened on February 5, 2003, at SOAH's facilities in Austin, Texas by Administrative Law Judge (ALJ) Ruth Casarez. Commission staff, Co-Respondent in the case, declined to participate in the hearing. Respondent American Home Assurance was represented by Christine Karcher, Attorney. Petitioner was represented by H. Douglas Pruett, Attorney. After the presentation of evidence by the parties, the record was left open until March 3, 2003, to allow the parties an opportunity to submit written argument and briefing. The record closed on that date.

Evidence presented at the hearing revealed that, on_____, Claimant ____ suffered a compensable injury to his back, which resulted in chronic pain in his lower back and hip. After preliminary treatment by Dr. Wilkinson at Concentra, Chad Blackmon, D.C., became Claimant's treating physician. Dr. Blackmon ordered an MRI on September 13, 2001; that test revealed disc bulging or protrusions at L4-5 and L5-S1. Based on that information, Dr. Blackmon appears to have referred Claimant to Petitioner for further testing. Because the referral prepared by Dr. Blackmon's

office was not introduced, it is unclear exactly what testing was ordered. And although the referral form on page 11 of Petitioner's Ex. 1 indicates that NCV testing, for the lower extremities (LE), was ordered, that form appears to have been prepared by Petitioner and is not signed by Dr. Blackmon. Petitioner performed the NCV testing on Claimant on September 19, 2001, and submitted its bill.

Respondent refused to reimburse Petitioner for the NCV testing. In an Explanation of Reimbursement dated December 21, 2001, Respondent denied payment of the $702 charged by Petitioner for the testing, on the basis that "retrospective utilization review indicates the treatment was not necessary." (*See* Respondent's Ex. A).

Petitioner sought TWCC dispute resolution, which was referred to an IRO (*i.e.*, the Texas Medical Foundation). The IRO issued a decision on July 18, 2002, declaring its agreement with Respondent's initial determination that the requested NCV studies were not medically necessary. The IRO noted that the case was reviewed by a health care professional licensed in chiropractic care, who concluded that NCV studies were of no diagnostic value in this case. The decision stated that since there were indications of radiculopathy, and not of nerve entrapment, the appropriate diagnostic test in this case would have been a needle electromyogram (EMG).

The Commission's Medical Review Division adopted the IRO decision on July 25, 2002, and denied reimbursement for the NCV studies in dispute. Petitioner filed a timely appeal of that decision and the matter was referred to SOAH for hearing.

## III. EVIDENCE AND ARGUMENTS

### A. Petitioner

Petitioner notes that the TWCC Treatment Guidelines, which were in effect for the date of service at issue, validate the use of NCV testing within six weeks to four months after the date of injury. Petitioner also argues that the Claimant's condition warranted testing him for both radiculopathy and peripheral neuropathy. Both parties acknowledged that NCV testing was effective for diagnosing peripheral neuropathy.

Petitioner further contends that NCV testing not only complements the standard test for radiculopathy (the EMG), but can legitimately substitute for that test, as well. As support for the proposition that NCV studies (and specifically the F-wave component of such testing) are effective in the diagnosis of radiculopathy, Petitioner cited several pieces of medical literature. A study by Roger S. Blair, M.D., concluded that "F-wave studies can be a reliable tool in the investigation of Lumbar Radiculopathy." An article by Ernest Johnson, M.D., noted that an F-wave study "is usually done after standard distal nerve conduction studies"-which, according to Petitioner, was the protocol followed in this case. Petitioner also pointed to a text book by Daniel Dumitru, M.D., for the concept that NCV tests are the first recommended diagnostic tests for peripheral neuropathy.

Dr. Thomas Rhudy, a chiropractor who reviewed Claimant's medical records, testified for Petitioner and corroborated Petitioner's position that F-wave testing can assess radiculopathy, since it examines the status of an individual nerve's proximal end, which lies adjacent to the spinal cord. According to Dr. Rhudy, NCV and EMG testing typically are done together to obtain a comprehensive assessment of a patient's neurological condition.

**B. Respondent**

Respondent contends that Dr. Blackmon's specific objective in referring Claimant to Petitioner for neurological testing was to address suspected nerve *root* irritation, *i.e.*, radiculopathy, associated with the lower back. The only report from Dr. Blackmon contained in the record notes that the Claimant exhibited a positive Ely's sign, bilaterally, in orthopedic tests, thus "indicating femoral nerve or nerve root inflammation." Under the heading "Initial Impressions," Dr. Blackmon also indicated an apparent need in Claimant's case to rule out "nerve root irritation," among other conditions. The report on the Claimant's MRI, which immediately preceded the NCV testing, contained the notation "Clinical history: lumbar radiculopathy" and states that protrusions from two discs are in contact with nerve root sheaths. (Pet. Ex. 1, pp. 9-10).

Respondent further contends that after Dr. Blackmon referred this matter to Petitioner for additional testing, the reviewing physician (*not* the treating physician) inappropriately expanded the stated scope of the investigation. According to the reviewing physician's report of September 19, 2001, "The patient was referred today to rule out evidence consistent with lumbar radiculopathy*, as well as, entrapment neuropathy of the lower extremities*." (emphasis added). Respondent argues that references to nerve entrapment were added simply to justify performing the NCV testing, which is appropriate in examining possible entrapment, but is of questionable value in addressing radiculopathy.

Indeed, Respondent points out, that after performing the NCV study that purportedly would determine whether Claimant was suffering from radiculopathy, the reviewing physician concluded with a recommendation that a needle EMG study be done to rule out lumbar radiculopathy. Furthermore, Respondent notes that the Blair study cited by Petitioner, which seeks to establish the utility of F-wave testing for diagnosing radiculopathy, was performed on persons who had already been definitively diagnosed as having radiculopathy through EMG testing.

Leonard Hershkowitz, M.D., a neurologist who performed the initial peer review in this dispute, testified for Respondent that NCV testing contributed nothing to the diagnosis and treatment of Claimant. He stated that NCV testing (which examines separate nerves individually) is

appropriate if a patient's history or clinical findings point to problems with a specific nerve. Otherwise, such testing represents a rather arbitrary and random search for hypothetical problems. According to Dr. Hershkowitz, this is particularly true in this case, because Claimant's MRI offered "Sriking" findings that disc protrusions were probably impinging upon nerve roots, thus making radiculopathy the logical focus for further neurological examination.

Dr. Hershkowitz noted that in assessing radiculopathy, the EMG is the definitive test—"the gold standard." He emphatically rejected the idea that F-wave testing represents a reasonable substitute, citing a paper from the Academy of Neurology's course presented on May 7, 2001, which indicated the use of F-waves in assessing radiculopathy as "controversial" and concluded that F-waves are far less sensitive for this purpose than an EMG. This pronouncement by the Academy of Neurology, said Dr. Hershkowitz, essentially represents the medical "standard of care" for examining suspected radiculopathy. F-waves cannot even determine which particular nerve root is involved in a pathology, Dr. Hershkowitz added, because most nerves are made up of separate fibers that connect with several different nerve roots. An F-wave signal that is correctly interpreted as reflecting radiculopathy could nonetheless be stemming from any of those connected nerve roots.

Moreover, Dr. Hershkowitz testified that F-waves can be obscured by neuropathy from diabetes, which was clearly exhibited by Claimant in this case, who had been treated as an insulin-dependent diabetic for about eight years. The utility of this particular testing was further reduced, Dr. Hershkowitz asserted, by a number of serious deficiencies in its execution, most notably including the failure to record the F-wave responses to at least 10 consecutive nerve stimuli. On cross examination by Respondent, Dr. Rhudy agreed that the report on this NCV testing did not reflect a sufficient number of responses to such stimuli. Dr. Rhudy actually identified a more rigorous standard for such testing, *i.e.*, responses to 20 stimuli.

## IV. DISCUSSION

In the ALJ's view, both parties offered credible witnesses and reasonable analyses of the controversy. However, because Petitioner bears the burden of proof, it must provide more convincing evidence than Respondent. The ALJ found, in this case, that Respondent's evidence was more persuasive.

In accordance with the mandate of TWCC guidelines, the treating physician bears the responsibility for defining and controlling the course of a Claimant's treatment. In this case, Dr. Hershkowitz testified that the treating physician, Dr. Blackmon, maintained good records that showed no suspicion of entrapment or of other problems in peripheral nerves. Rather, after evaluating Claimant's MRI, Dr. Blackmon referred him for further electrical testing in order to evaluate possible radiculopathy. Dr. Rhudy agreed that this referral was for the specific purpose of ruling out radiculopathy. Based on the evidence presented, the ALJ concludes that Dr. Blackmon defined and limited the neurological aspect of this case to an assessment of radiculopathy (despite a passing reference in one of the reports to possible "femoral nerve" inflammation).

For purposes of assessing radiculopathy, the evidence indicates that NCV testing is at best a questionable tool. The medical literature cited by Petitioner gives no more than theoretical or tangential support for its use in this context. On the other hand, the medical authorities and anatomical considerations cited by Dr. Hershkowitz unequivocally undermine assertions that NCV

testing is appropriate for evaluating radiculopathy.

Furthermore, the evidence strongly suggests that the actual performance of the NCV testing in this case was of poor quality and of little value. In particular, it found "normal" responses from the sural nerve, which would be virtually impossible in a long-time diabetic, such as the Claimant. In addition, the bottom-line recommendation of the technician who interpreted the NCV test was that another test, the EMG, should be done to determine with certainty the existence of radiculopathy. Such a recommendation could and should have been made without first conducting NCV testing.

Under the circumstances, the ALJ is unable to conclude that the NCV testing was medically necessary or useful. The IRO reviewer seems to have been correct in concluding that the treating doctor made no observations, such as positive sensory findings or muscle weakness, that would warrant the performance of neurological tests other than those that reliably focus on radiculopathy. The ALJ thus concludes that Petitioner failed to carry its burden of demonstrating that the IRO was incorrect in deciding the NCV testing in this case was not medically necessary. Therefore, the requested reimbursement for NCV testing should be denied.

## V. FINDINGS OF FACT

1. Claimant _____ suffered a compensable injury to his back on_____, while loading freight for_____.

2. At the time of his injury, Claimant's employer had workers' compensation insurance through American Home Assurance Company.

3. Claimant was initially treated by Dr. Wilkinson of Concentra, but in early September 2001, Claimant began treatment with Chad Blackmon, D.C.

4. On September 13, 2001, Dr. Blackmon, D.C., obtained an MRI of Claimant, which revealed disc bulging or protrusions at L4-5 and L5-S1 that appeared to impinge on nerve roots.

5. Dr. Blackmon referred Claimant to Petitioner, Metroplex Diagnostics, for further testing to rule out the possibility of radiculopathy.

6. On September 19, 2001, Petitioner conducted NCV testing and subsequently billed Respondent for the testing.

7. In an Explanation of Reimbursement dated December 21, 2001, Respondent denied payment of the $702 charged by Petitioner for the NCV testing, on the basis that "retrospective utilization review indicates the treatment was not necessary."

8. Thereafter, Petitioner made a timely request to the Texas Workers' Compensation Commission (the Commission) for medical dispute resolution with respect to the requested procedure. The Commission referred the dispute to the Texas Medical Foundation, an Independent Review Organization (IRO).

9. The IRO issued a decision on July 18, 2002, approving Respondent's prior denial of reimbursement on the basis that the requested procedure was medically unnecessary.

10. Petitioner timely requested a hearing with the State Office of Administrative Hearings (SOAH), seeking review and reversal of the IRO decision regarding reimbursement.

11. On December 5, 2002, the Commission sent a notice of the hearing to the parties. The notice contained a statement of the time and place of the hearing; a statement of the legal authority and jurisdiction under which the hearing would be held; a reference to the particular section of the statutes and rules involved; and a short plain statement of the matters asserted.

12. A hearing in this matter was convened on February 5, 2003, in Austin, Texas, before Ruth Casarez, an Administrative Law Judge with SOAH. The staff of the Commission, as Co-Respondent, did not participate in the hearing. All other parties were represented.

13. The parties were given opportunity to submit post-hearing closing arguments and briefing. The record in the proceeding closed on March 3, 2003.

14. According to his records, Dr. Blackmon, Claimant's treating doctor, identified the possibility of radiculopathy in this case; he indicated no clinical evidence of nerve entrapment or other neurological problems associated with Claimant's injury.

15. The standard test recognized by the medical profession for assessing and ruling out the possibility of radiculopathy is the electromyogram (EMG).

16. NCV testing, including the F-wave component of such testing, is not a reliable substitute for EMG testing with respect to radiculopathy.

17. The NCV testing performed in the Claimant's case was not useful or necessary to determine if Claimant suffered from radiculopathy.

## VI. CONCLUSIONS OF LAW

1. The Texas Workers' Compensation Commission has jurisdiction related to this matter pursuant to the Texas Workers' Compensation Act (the Act), TEX. LAB. CODE ANN. § 413.031.

2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a decision and order, pursuant to ' 413.031(k) of the Act and TEX. GOV'T CODE ANN. ch. 2003.

3. The hearing was conducted pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001 and the Commission's rules, 28 TEX. ADMIN. CODE (TAC) § 133.305 and §§ 148.001-148.028.

4. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.

5. Petitioner, the party seeking relief, bore the burden of proof in this case, pursuant to 28 TAC ' 148.21(h).

6. Based upon the foregoing Findings of Fact, the NCV testing performed upon Claimant by Petitioner on September 19, 2001, was not health care that was medically necessary under § 408.021of the Act.

7. Based upon the foregoing Findings of Fact and Conclusions of Law, the Findings and Decision of the Independent Review Organization, issued in this matter on July 18, 2002, are affirmed; reimbursement for the NCV testing of the Claimant, as requested by Petitioner, should be denied.

## ORDER

**IT IS THEREFORE, ORDERED** that requested reimbursement for nerve conduction velocity testing, performed by Metroplex Diagnostics on September 19, 2001, is, hereby denied.

**SIGNED this 23rd day of April 2003.**

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**RUTH CASAREZ**
**ADMINISTRATIVE LAW JUDGE**
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**