

**DOCKET NO. 453-03-3690.M5**  
**MDR Tracking No. M5-03-1448-01**

<b>TEXAS MUTUAL INSURANCE COMPANY, Petitioner</b>	§	<b>BEFORE THE STATE OFFICE</b>
	§	
<b>VS.</b>	§	<b>OF</b>
	§	
	§	
<b>ARTHUR CORNETT, D.C., Respondent</b>	§	<b>ADMINISTRATIVE HEARINGS</b>

**DECISION AND ORDER**

Texas Mutual Insurance Company (Texas Mutual) appealed an independent review organization (IRO) decision that therapeutic exercises and offices visits provided to an injured worker (Claimant) by Arthur Cornett, D.C., from February 25, 2002, through April 12, 2002, were medically necessary. As appellant, Texas Mutual had the burden of proof.<sup>1</sup> The Administrative Law Judge (ALJ) concludes that Texas Mutual did not prove the therapeutic exercises provided through March 22, 2002, were medically unnecessary. The ALJ will order payment for those disputed services.<sup>2</sup> Texas Mutual did prove that all other services were medically unnecessary.<sup>3</sup>

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<sup>1</sup> TEX. ADMIN. CODE (TAC) § 155.41; 28 TAC § 148(h).

<sup>2</sup> The ALJ will not order payment of a specific dollar amount because it is not clear whether Dr. Cornett had a contract with Texas Mutual to provide all the services for a discounted fee. In a table of disputed services attached to post-hearing arguments submitted by Texas Mutual on March 12, 2003, the discounted amount is shown for all services. However, Dr. Cornett testified he believed, but was not sure, that his contract with Texas Mutual expired at the end of February 2002. The ALJ will simply order payment of some disputed services and is confident that the parties will agree on when the contract was in effect. If the parties are not able to agree, the ALJ concludes, on the basis of Dr. Cornett's inexact memory and Texas Mutual's billing records (Ex. 3 at 147 *et. Seq.*), that the preponderant evidence indicates the contract was in effect during the entire period of disputed services.

<sup>3</sup> During the hearing, Texas Mutual agreed to pay for office visits on April 3 and April 10, 2002.

## **I. PROCEDURAL HISTORY**

A hearing convened in this matter on March 1, 2004, before the undersigned ALJ at the State Office of Administrative Hearings (SOAH), Austin, Texas. Texas Mutual appeared and was represented by its counsel, Katie Kidd. Dr. Cornett appeared and was represented by its counsel, Larry Trimble. The parties presented post-hearing arguments on March 12, 2004, and the hearing closed on that date. As there were no issues concerning notice or jurisdiction, those matters are set forth in the fact findings and legal conclusions without further discussion here.

## **II. DISCUSSION**

### **1. Background**

The Claimant, a thirty-three-year-old female, was a bicycle medic working for an EMS service during a Mardi Gras festival in Galveston, Texas, in\_\_\_\_\_. She was injured while responding to an emergency call when she dodged a pedestrian and her tires became wedged in a trolley track, causing her to flip over her bicycle and land on her right shoulder.

She presented to Dr. Cornett on February 11, 2002, and received passive care for about two weeks.<sup>4</sup> She also saw Alain Elbaz, M.D., an orthopedic surgeon, on February 15, 2002, for a consultation on her shoulder injury. Dr. Elbaz first diagnosed her as having a right-shoulder labral

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<sup>4</sup> The medical necessity of the passive care is not in dispute.

(shoulder cartilage) tear, but a magnetic resonance imaging (MRI) did not reveal the tear.<sup>5</sup> In consultation with Dr. Elbaz, Dr. Cornett began active physical therapy on February 25, 2002. The disputed services are as follows:

- February 25, 2002, through March 8, 2002, 24 units of therapeutic exercises performed on six different days. Texas Mutual paid for four of the eight units Dr. Cornett billed on each of those days.
- March 11, 2002, through March 22, 2002, 36 units of therapeutic exercises performed on six different days. Texas Mutual paid for two of the eight units Dr. Cornett billed on each of those days.
- March 25, 2002, through April 12, 2002, 72 units of therapeutic exercises performed on nine different days. Texas Mutual did not pay for any of the services.
- March 25, 2002, through April 12, 2002, nine office visits. At first, Texas Mutual denied all of the visits, but agreed at the hearing to pay for visits on April 3, 2002, and April 10, 2002.

Overall, there are 132 sessions of therapeutic exercises and seven office visits in dispute.

Employees have a right to necessary health treatment under TEX. LABOR CODE ANN. §§ 408.021 and 401.011. Section 408.021(a) provides, “An employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed. The employee is specifically entitled to health care that: (1) cures or relieves the effects naturally resulting from the compensable injury; (2) promotes recovery; or (3) enhances the ability of

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<sup>5</sup> The MRI showed Type II acromion and joint effusion. The Claimant did eventually undergo right-shoulder arthroscopy and labral repair.

the employee to return to or retain employment.” Section 401.011(19) of the Labor Code provides that health care includes “all reasonable and necessary medical . . . services.”

## B. Analysis

### 1. Treatments from February 25, 2002, through March 22, 2002

As indicated above, the ALJ concludes that Texas Mutual failed to prove that the therapeutic exercises provided from February 25, 2002, through March 22, 2002, were medically unnecessary. This conclusion was based on the opinions of an orthopedic surgeon and chiropractor who consulted with one another after each examined the Claimant and who said she needed extensive one-on-one therapy because of the pain she was experiencing. Their opinions were backed by the IRO doctor who said the protocol used by Dr. Cornett was “very reasonable” and that Dr. Cornett “did everything he was supposed to do to get a fair and reasonable result.”<sup>6</sup> The treatment was also supported in part by testimony from Texas Mutual witness David Alvarado, D.C.,<sup>7</sup> who said a four-week trial of a treatment is reasonable. This evidence was more persuasive than testimony from Texas Mutual’s witnesses, who did not examine the Claimant at the time of her injury and treatment in 2002.<sup>8 9</sup>

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<sup>6</sup> Ex. 1 at 72.

<sup>7</sup> Dr. Alvarado has practiced for 16 years.

<sup>8</sup> Much of the testimony from Texas Mutual's witnesses concerned the lack of documentation of the Claimant's condition at the beginning of her treatment (the baseline) and of her subsequent progress or lack of progress. A lack of appropriate documentation may have been a legitimate ground for denying the claim if Texas Mutual had asserted it in its EOBs or before medical dispute resolution. However, it did not do so. The parties agreed at the hearing that the sole issue to be determined is whether the services were medically necessary.

<sup>9</sup>Texas Mutual cited portions of the Upper Extremities Treatment Guidelines as grounds for denying the claim. However, Dr. Cornett’s attorney correctly pointed out that the guidelines are no longer in effect as a standard for determining workers’ compensation cases. The ALJ has used these guidelines in the past when both parties have agreed they should be seen as persuasive. However, without an agreement, the ALJ believes they should not be cited as authoritative.

It should be noted that the date of the Claimant's shoulder surgery was shown in the records both as April 9, 2002, and May 2, 2002.<sup>10</sup> The date is significant because Texas Mutual presented no persuasive evidence that the therapeutic exercises or office visits after the operation would not have been appropriate and Texas Mutual witness Nicholas Tsourmis, M.D., an orthopedic surgeon, indicated post-operative therapy would have been indicated. Thus, the therapeutic exercises on April 10 and 12 and office visit on April 12 would have been reasonable if they had been provided post-operatively. However, the ALJ believes the preponderant evidence is that the operation occurred in May because the conclusions stated in an examination of the Claimant by Dr. Elbaz on April 19, 2002,<sup>11</sup> would not have made sense otherwise. Dr. Elbaz said on that date that the Claimant's symptoms had plateaued in the past few weeks, she was not getting any better, and she was not able to do any forceful activity with her right shoulder.

## **2. Treatments from March 25, 2002, through April 12, 2002**

Despite the above-stated conclusion that treatment during the first four weeks was reasonable, the ALJ was persuaded by testimony from Dr. Alvarado, Dr. Tsourmas, and Texas Mutual witness Scott Herbowy<sup>12</sup> that the Claimant's progress was inadequate and other treatment should have been attempted before April 12, 2002. Mr. Herbowy said the treatment should have changed around March 10 or March 14 when the Claimant was not responding adequately. As indicated above, Dr. Alvarado said a four-week

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<sup>10</sup>Ex. 1 at 64-65.

<sup>11</sup> Ex. 1 at 63.

<sup>12</sup> Mr. Herbowy is a physical therapist with almost 22 years of experience.

trial was reasonable. Because Texas Mutual has the burden of proof and its witnesses differed on what was a reasonable trial period, the ALJ accepts the four-week period testified to by Dr. Alvarado.

As already discussed, Dr. Elbaz' April 19 records show the Claimant was no longer improving. On March 1, 2002, Dr. Elbaz had said the Claimant demonstrated good range of motion (ROM) with an elevation to 135 degrees, external rotation to 45 degrees in neutral position, and external rotation/abduction at 90 degrees. He said on April 19 that the Claimant's ROM was "blocked" at 140 degrees and external rotation was blocked at about 80 degrees. Mr. Herbowy testified persuasively there was negligible difference between the March 1 and April 19 findings.

Although the evidence showed some increase in the number of repetitions in the ROM exercises, Mr. Herbowy testified persuasively that they were negligible.

Perhaps most tellingly, Dr. Cornett's and Dr. Elbaz's statements that the Claimant's pain necessitated eight units of one-on-one therapy per session until the end of the disputed treatments seems to effectively contradict any assertions that the Claimant's progress was acceptable.

In summation, the best evidence of a reasonable length of time for the therapeutic exercises Dr. Cornett provided was four weeks, at which time the treatment should have changed. After four weeks, the services were not reasonable (except for the April 3 and 10 office visits Texas Mutual agreed to).

### III. FINDINGS OF FACT

1. The Claimant, a thirty-three year-old female, was a bicycle medic working for an EMS service during a Mardi Gras festival in Galveston, Texas, in \_\_\_\_\_, when she was injured while responding to an emergency call.
2. The Claimant dodged a pedestrian and her tires became wedged in a trolley track, causing her to flip over her bicycle and land on her right shoulder.
3. The Claimant presented to Dr. Cornett on February 11, 2002, and received passive care for about two weeks.
4. The Claimant saw Alain Elbaz, M.D., an orthopedic surgeon, on February 15, 2002, for a consultation on her shoulder injury.
5. Dr. Elbaz first diagnosed the Claimant as having a right-shoulder labral (shoulder cartilage) tear, but a magnetic resonance imaging did not reveal the tear.
6. In consultation with Dr. Elbaz, Dr. Cornett began active physical therapy on February 25, 2002.
7. Dr. Cornett provided therapeutic exercises and office visits to the Claimant from February 25, 2002, through April 12, 2002. The following claims are disputed:
  - a. February 25, 2002, through March 8, 2002, 24 units of therapeutic exercises performed on six different days. Texas Mutual Insurance Company (Texas Mutual) paid for four of the eight units Dr. Cornett billed on each of those days.
  - b. March 11, 2002, through March 22, 2002, 36 units of therapeutic exercises performed on six different days. Texas Mutual paid for two of the eight units Dr. Cornett billed on each of those days.
  - c. March 25, 2002, through April 12, 2002, 72 units of therapeutic exercises performed on nine different days. Texas Mutual did not pay for any of the services.

- d. March 25, 2002, through April 12, 2002, nine office visits. At first, Texas Mutual denied all of the visits, but agreed at the hearing to pay for visits on April 3, 2002, and April 10, 2002.
8. Dr. Cornett submitted a request to Texas Mutual for payment of the disputed services.
9. Texas Mutual denied the claim.
10. Dr. Cornett requested medical dispute resolution.
11. An independent review organization (IRO) determined that the claim should be paid.
12. Texas Mutual requested a hearing not later than the twentieth day after receiving notice of the IRO decision.
13. All parties received not less than ten 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.
14. All parties had an opportunity to respond and present evidence and argument on each issue involved in the case.
15. The Claimant needed extensive one-on-one therapy because of the pain she was experiencing.
16. Dr. Cornett provided the Claimant with conservative therapy in lieu of a more invasive procedure such as surgery.
17. A four-weeks trial of physical therapy is reasonable to see whether treatment is working.
18. The Claimant's condition had plateaued as of March 1, 2002.
19. On March 1, 2002, the Claimant demonstrated good range of motion with an elevation to 135 degrees, external rotation to 45 degrees in neutral position, and external rotation/abduction at 90 degrees.

20. As of April 19, 2002, the Claimant's range-of-motion had "blocked" at 140 degrees and external rotation was blocked at about eighty degrees.
21. There was negligible difference between the March 1 and April 19 range of motion findings.
22. Increases in the number of repetitions in the Claimant's range of motion exercises were negligible over the period of disputed care.
23. Dr. Cornett's and Dr. Elbaz's statements that the Claimant's pain necessitated eight units of one-on-one therapy per session until the end of the disputed treatments is inconsistent with a finding that the Claimant's progress was acceptable.
24. The Claimant's progress was inadequate and other treatment should have been attempted after four weeks.

#### **IV. CONCLUSIONS OF LAW**

1. The State Office of Administrative Hearings has jurisdiction over this proceeding, including the authority to issue a decision and order. TEX. LAB. CODE ANN. §413.031(k) and TEX. GOV'T CODE ANN. ch. 2003.
2. All parties received adequate and timely notice of the hearing. TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
3. Texas Mutual has the burden of proof. 1 TEX. ADMIN. CODE (TAC) § 155.41(b); 28 TEX. ADMIN. CODE § 148.21(h).
4. Texas Mutual did not prove the disputed services provided from February 25, 2002, through March 22, 2002, were medically unnecessary. TEX. LAB. CODE ANN. § 408.021.
5. Texas Mutual proved the disputed services provided after March 22, 2002, were medically unnecessary. TEX. LAB. CODE ANN. § 408.021.

6. Texas Mutual should pay for the disputed services provided from February 25, 2002, through March 22, 2002, but should not be required to pay for disputed services after March 22, 2002.

**ORDER**

**IT IS THEREFORE ORDERED** that Texas Mutual Insurance Company pay for disputed services provided by Arthur Cornett, D.C., to the Claimant from February 25, 2002, through March 22, 2002, and also pay for office visits on April 3, 2002, and April 10, 2002.

**IT IS FURTHER ORDERED** that the claim for payment for disputed services provided by Arthur Cornett, D.C., from March 25, 2002, through April 12, 2002, be, and the same is hereby, denied.

**SIGNED May 7, 2004.**

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