**SOAH DOCKET NO. 453-03-4464.M5**
**TWCC MDR NO. M5-03-1210-01**

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| **TEXAS MUTUAL INSURANCE COMPANY,** **Petitioner** | § | **BEFORE THE STATE OFFICE** |
| **vs.** | § | **OF** |
| **HEALTH & MEDICAL PRACTICES ASSOCIATES,** **Respondent** | § | **ADMINISTRATIVE HEARINGS** |

## DECISION AND ORDER

Health & Medical Practices Associates (Provider) rendered various services, including ultrasound and physical exercise/activities, to an injured worker (Claimant). Texas Mutual Insurance Company (Carrier) denied payment for all services provided from July 12, 2002, through September 27, 2002. Through an Independent Review Organization (IRO), the Texas Workers' Compensation Commission's Medical Review Division (MRD) decided that none of the services except ultrasound and physical exercises and activities were medically necessary, and Carrier requested a hearing. This Decision and Order finds that Carrier proved that the disputed services were not medically necessary, and orders no reimbursement.

## I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

On July 15, 2004, Administrative Law Judge (ALJ) Charles Homer III conducted the hearing on the merits at the William P. Clements Building, 300 West 15th Street, Austin, Texas. Attorney Patricia Eads appeared for Carrier, and attorney William Maxwell appeared for Provider. The parties did not contest jurisdiction or notice, and those issues are addressed in the findings of fact and conclusions of law without discussion. The record closed the same day.

## II. DISCUSSION

1. Claimant's Treatment History

Claimant suffered a compensable lower back injury on ___, when a patient she was bathing turned and pulled her forward. Claimant felt pain in her shoulders, arms, low back, and legs. Claimant saw Patrick McMeans, M.D., on May 7, 2002.[1] Dr. McMeans referred her for one week of daily physiotherapeutics, and three weeks of three times per week treatments. Treatment was to include moist heat, ultrasound, electrical stimulation, and therapeutic procedures to the lumbar region. Claimant was to return to Dr. McMeans for re-evaluation in approximately one month.

That same day, Claimant began a course of treatment with Provider that continued at least into 2003, including 14 visits before July 12, 2002; however, only the dates of services from July 12 through September 27, 2002, are at issue here. The disputed services are therapeutic exercises/activities and ultrasound therapy.[2]

2. Evidence

At the hearing, David Alvarado, D.C., testified for Carrier; Robert O'Neal, D.C., testified for Provider. Both parties presented documentary evidence, including an MRI report by a radiologist, electromyelogram reports by Provider, and treatment notes.

Throughout his direct testimony and cross-examination, Dr. Alvarado consistently denied the medical necessity of the disputed treatments. In Dr. Alvarado's opinion, Claimant had not shown improvement during almost two months of regular sessions before July 12, and had

[1] Pet. Exh. 1, pp. 4-6.

[2] There was extensive testimony and argument about whether the therapeutic exercises and activities should be paid at the 97110 rate. Because the threshold question of medical necessity is resolved against Provider, this Decision and Order does not discuss that portion of the hearing.

displayed no benefit from Provider's treatment during the disputed period. Nor had Provider significantly

altered the course of treatment when results were negative. Dr. Alvarado stated that the straight leg raising test performed by Dr. McMeans was positive on the right, not the left, but that the MNCV testing showed positive sensory (but not motor) impairment on the left, not the right side. He also stated that the MRI[3] showed no compromise of nerve tissue, and no annular tear of a disc. He concluded that no clinical findings supported continuation of treatment, even into July, and certainly not from July 12 forward.

He agreed with Provider that the MRI displayed a bulge at L5-S1 and that Claimant had myofascial pain, but disagreed that the identified bulge was a "pain generator," saying that Claimant's other clinical findings and her complaints had too many inconsistencies with a disc problem at the level shown by the MRI.

During his testimony, Dr. O'Neal stated his opinion that Claimant had a radiculitis defined by the sensory nerve deficit he found in his MNCV testing and the EMG he performed on January 15, 2003, a condition which he said was also consistent with her numbness and other clinical findings. He agreed with Dr. McMeans's initial findings of lumbar discopathy, lumbar radiculitis, and myofascial pain.[4] Dr. O'Neal stated throughout his testimony that Provider had complied with Medicare guidelines in documenting the services it rendered to Claimant.

## III. ANALYSIS

The ALJ finds that Carrier proved that the services at issue were not medically necessary. Claimant's numerous complaints (tingling in upper arms, bilateral leg numbness, low back stiffness, shoulder pain, pain in lower back that radiates into arm) do not correlate with the objective findings

[3] Res. Exh. 1, p. 280. The MRI was performed on August 26, 2002, at Dr. McMeans's request. (For convenience in handling at the hearing, the ALJ divided Provider's documentary evidence into three sections, 1-1, 1-2, and 1-3, and admitted them into evidence so labeled. However, the pages are numbered consecutively 1-288, so they will be referred to by "Respondent's Exhibit 1," and a page number.

[4] *Id.*, pp. 133-135.

(a positive straight leg raising on the right side, a deficit in the sensory nerves to the left leg[5] without a corresponding deficit in the motor nerves to the same leg, an MRI[6] that shows no compromise of nerve roots). Nor do the records or testimony point out any specific treatment goal or improvement that would suggest that either the physical activities or the ultrasound was of any benefit to her. When tested June 11, 2002, Claimant was "unable" to perform such activities as crouching, standing, sitting, standing and walking, or balancing.[7] The results were the same on July 29, 2002.[8]

Provider and Carrier dispute the meaning of the MRI. The medical doctor who reviewed the images and wrote the report identified a posterior bulge at L5-S1, but also commented "There is no evidence of primary spinal canal stenosis. The intervertebral foramina are widely patent at all levels."[9] The intervertebral foramina are the openings through which the motor and sensory nerves exit from the spinal cord to reach the peripheries of the body. If the openings are "widely patent" and there is no evidence of any bone chip or arthritic growth impinging on the exiting nerves, as in this case, then there is little or no evidence that the L5-S1 bulge caused any of Claimant's pain. The ALJ believes that Dr. McMeans's diagnosis, originally made on May 7, 2002, and based on Claimant's complaints of pain and limited range of motion, is outweighed by the evidence that accumulated thereafter.

The treatment notes document a 253-pound female standing five feet, two inches tall, taking several pain medications, having pain from a recent hysterectomy[10], and coping with "extreme[11]"

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[5] Pet. Exh. 1, 121.

[6] Res. Exh. 1, p. 280.

[7] *Id.,* pp. 139-143 (FCE results).

[8] *Id.,* pp. 202-207 (FCE results).

[9] *Id.,* p. 280.

[10] Pet. Exh. 1, p. 76.

[11] *Id.*

high blood pressure.[12] These are all very serious and debilitating conditions, but they also indicate that Claimant was not an appropriate candidate for extended physical therapy and exercise aimed at returning her to work. Regarding the need for and benefit of the ultrasound treatments, the ALJ agrees with the IRO finding that Claimant "deserves a trial," but also agrees with Dr. Alvarado that the seven-week trial she was given from May 7 through June 27 was adequate in the absence of evidence that ultrasound was helping her in some specific way.

Provider emphasizes the sensory findings in the nerve conduction tests conducted by Provider. First, it argues that Carrier's expert witness cannot testify about the nerve conduction test. Secondly, it argues that Medicare treatment guidelines, not Worker's Compensation Guidelines, apply to medical necessity, and that Provider's documentation and services comport with Medicare guidelines.

Provider argues that because Dr. Alvarado admitted that he has never performed motor nerve conduction velocity (MNCV) studies, he cannot testify about inconsistencies between those test results and other findings concerning Claimant, nor about inconsistencies among the different MNCV test results. Therefore, argues Provider, the ALJ must disregard Dr. Alvarado's testimony and treat Dr. O'Neal's testimony as uncontroverted. The ALJ believes that Provider's analysis of case law concerning expert testimony is inapplicable to the facts in this proceeding. Dr. Alvarado is a chiropractor who regularly sees patients in his private practice. He also regularly does consultations, peer reviews, and preauthorization reviews concerning treatment covered by, or sought to be covered by, workers' compensation. Dr. Alvarado may not have qualified himself to testify about the details of performing a MNCV test, but his salient opinions were not about how to conduct the test, nor did he say that the tests at issue were improperly conducted.[13]

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[12] Res. Exh. 1, p. 156 (elevated blood pressure).

[13] There is evidence in the record to that effect. "The nerve conduction velocity testing appeared to be incomplete and R[sic]epeated numerous times without electromyographic needle examination. Considering the manner in which these tests were performed and the current accepted American Association of Electrodiagnostic Medicine's guidelines, these tests are inadequate and excessive." IRO's rationale, Pet. Exh. 2, p. 129.

His disputed opinions were (1) that the MRI conducted August 22, 2002, does not show any condition that would reasonably be expected to cause the symptoms for which Provider treated Claimant, and (2) that the MNCV results are inconsistent with other objective findings. These are both issues that Dr. Alvarado addresses regularly in his professional work. ALJ finds that Dr. Alvarado's testimony and CV reveal training and experience in both treating patients and reviewing patient records, and qualify him to render those opinions.[14] Even the evidence of Claimant's sensory, but not motor, deficit is compromised by Provider's own findings that "The patient appeared to show normal sensory and tactile discrimination in the 1) upper and 2) lower extremities."[15]

Regarding Medicare guidelines, at the time the services were provided, the Commission used the Texas Workers' Compensation Commission Medical Fee Guideline 1996, adopted by reference into 28 TEX. ADMIN. CODE § 134.201, to resolve medical necessity and billing issues.[16] It is inappropriate and wasteful of time to cite the ALJ to law not that does not control the decision to be made without so informing the ALJ and advocating that the cited law is useful in some other way than as controlling law.

The ALJ concludes that Carrier is not liable for the claims at issue in this proceeding.

## IV. FINDINGS OF FACT

1. On ___, Claimant suffered a compensable injury when she attempted to bathe a patient in a health care facility.

2. Health & Medical Practices Associates (Provider) began regular treatments including ultrasound therapy and physical exercise/activities on May 7, 2002.

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[14] CV of Dr. Alvarado, Pet. Exh. 1, pp. 136-138.

[15] Res. Exh. 1, 141, 164.

[16] *Texas Medical Association, et al v. Texas Workers' Compensation Commission, et al* 137 S.W. 3d 342 (Tex. App. -- Austin 2004), upholding an order that 28 TAC 134.202 became effective for services rendered on or after August 1, 2003.

3. From July 12, 2002, through September 27, 2002, Claimant was prescribed Vicodin, Soma, Elavil, Ambien, and Xanax for pain and associated conditions.

4. On August 22, 2002, an MRI of Claimant was done which revealed only a "central bulge" at L5-S1, with "foramina widely patent at all levels."[17]

5. Texas Mutual Insurance Company (Carrier) denied payment for the physical therapy and ultrasound treatments that Provider furnished Claimant from July 12 through September 27, 2002.

6. On July 2, 2003, the Independent Review Organization determined that ultrasound and therapeutic exercises/activities were reasonable and medically necessary.

7. On July 9, 2003, the Medical Review Division of the Texas Workers' Compensation Commission (Commission) ordered Carrier to reimburse Provider for the unpaid claims.

8. On July 24, 2003, Carrier requested a hearing on this matter before the State Office of Administrative Hearings (SOAH).

9. On August 25, 2003, the Commission sent a hearing notice advising the parties of the matters to be determined; the right to appear and be represented by counsel; the date, time, and place of the hearing; and the statues and rules involved.

10. Claimant's ability to exercise and engage in therapeutic activities was impaired by a hysterectomy that she had shortly before beginning her therapy with Provider.

11. Claimant had elevated blood pressure that limited her ability to exercise and engage in therapeutic activities during her course of therapy with Provider.

12. Claimant was physically unfit to perform therapeutic exercises/activities from July 12 through September 27, 2002.

13. Claimant did not suffer an injury to a spinal disc on ___.

14. Claimant obtained no documented benefit from therapeutic exercises/activities from July 12 through September 27, 2002.

15. Claimant obtained no documented benefit from ultrasound treatments from July 12 through September 27, 2002.

[17] Pet. Exh. 1, 124.

## V. CONCLUSIONS OF LAW

1. The Commission has jurisdiction to decide the issue presented pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 413.031.

2. SOAH has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a decision and order, pursuant to TEX. LAB. CODE ANN. §§ 402.073 and 413.031(k), and TEX. GOV'T CODE ANN. ch. 2003.

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

4. Ultrasound was not medically necessary for the treatment of Claimant's work-related injury, as specified in TEX. LAB. CODE ANN. § 408.021.

5. Therapeutic exercises/activities were not medically necessary for treatment of Claimant's work-related injury, as specified in TEX. LAB. CODE ANN. § 408.021.

6. Based on the findings of fact and conclusions of law, Provider is not entitled to reimbursement for ultrasound and therapeutic exercises/activities from July 12, 2002, through September 27, 2002.

## ORDER

**IT IS, THEREFORE, ORDERED** that Texas Mutual Insurance Company need not reimburse Health & Medical Practices Associates for the ultrasound treatments and physical therapy for Claimant's treatment between from July 12 through September 27, 2002.

**SIGNED September 17, 2004.**

**CHARLES HOMER III**
**ADMINISTRATIVE LAW JUDGE**
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**