

**SOAH DOCKET NO. 453-05-0542.M5  
TWCC MRD NO. M5-04-3206-01**

**MARK SHERROD, D.C.,  
Petitioner**

**V.**

**AMARILLO INDEPENDENT  
SCHOOL DISTRICT,  
Respondent**

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**BEFORE THE STATE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Mark Sherrod, D.C., has challenged a decision of the Medical Review Division (MRD) of the Texas Workers' Compensation Commission (Commission) in a dispute regarding the medical necessity of chiropractic services provided to an injured claimant between May 22 and August 7, 2003.<sup>1</sup> The MRD's decision was based on the findings of an independent review organization (IRO), which concluded that some, but not all, of the services were medically necessary. Amarillo Independent School District (AISD), which at the time of the claimant's injury was self-insured for workers' compensation claims, did not appeal from the IRO determination; thus the services the IRO found to be medically necessary are not at issue here.

Dr. Sherrod challenged the decision on the basis that the treatment at issue was, in fact, medically necessary within the meaning of §§ 408.021 and 401.011(19) of the Texas Workers' Compensation Act (the Act), TEX. LABOR CODE ANN. ch. 401 *et seq.* The amount in controversy is \$911.00.

The Administrative Law Judge (ALJ) concludes that the services in dispute were not medically necessary, and Dr. Sherrod is not entitled to any additional reimbursement.

**I. JURISDICTION, NOTICE AND PROCEDURAL HISTORY**

The hearing in this matter was convened April 6, 2005, at the State Office of Administrative Hearings with ALJ Carol S. Birch presiding. Dr. Sherrod represented himself and appeared by

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<sup>1</sup>Although the MRD lists May 19, 2003 as the first disputed date of service, the IRO only addressed dates of service beginning May 22.

telephone. AISD was represented by its attorney, Robert R. Graves, Jr. After presentation of evidence and argument by the parties, the hearing was adjourned and the record closed the same day. The evidence on the issue of medical necessity consisted of medical records submitted by Dr. Sherrod, and the testimony of Dr. Sherrod and David Alvarado, D.C.

There were no contested issues of jurisdiction or notice. Therefore, those issues are addressed in the findings of fact and conclusions of law without further discussion here.

## **II. DISCUSSION**

### **1. Background Facts**

The record revealed the claimant suffered a compensable injury to her cervical, thoracic, and lumbar spine on \_\_\_\_, when she slipped and fell in an icy parking lot at work. She began chiropractic care with Dr. Sherrod on December 9, 2002, at which time the claimant was approximately 88 pounds overweight. Her primary complaint was of severe low back pain that radiated into one of her legs, although she also complained of pain in the cervical and thoracic areas of her back. Dr. Sherrod's assessment was acute traumatic injury to the lumbar, lumbo pelvic, and cervico-thoracic regions. It appears that the claimant was able to return to work within a few days of the injury, and has worked continually since that time.

Over the five-month period between the claimant's initial visit and the dates of service in question in this proceeding, Dr. Sherrod provided 68 sessions of chiropractic treatment to the claimant, only about eight weeks of which was reimbursed by AISD. The treatment provided at each session was basically the same and included office visits, gentle adjustment procedures, electrical stimulation or interferential current treatment, ultrasound, and sometimes, mechanical traction.

X-rays taken in December 2002 and an MRI done in January 2003 revealed no abnormalities. Approximately eight weeks into the treatment, Dr. Sherrod referred the claimant to a medical doctor for additional treatment and physical therapy, and also to a pain management specialist.

Despite all of this treatment, the claimant continued to report significant pain, and Dr. Sherrod continued to treat her, providing essentially the same treatments for another year and a half. When Dr. Sherrod billed AISD for the 18 dates of service disputed in this proceeding, AISD denied payment for all treatments and office visits during that period of time, on the basis that they were not medically necessary, with peer review.

## **B. IRO Decision**

Based on a review of the medical records, the IRO chiropractor concluded that the claimant appeared to plateau and showed little signs of improvement beyond several months of conservative care provided by Dr. Sherrod. The reviewer further found that the claimant should have been transitioned to an aggressive home-based exercise program after about twelve weeks of treatment, and that continued passive care after that time was not supportable. The reviewer also noted that the ongoing treatment did not appear to be effective in reducing the claimant's symptoms, which were not objectively supported. The reviewer acknowledged the claimant's pre-existing conditions as a complicating factor to the healing process, but found that they did not support continued treatment five-months post-injury.

The reviewer found that two office visits were reasonable and necessary but all other services provided on the disputed dates of service were determined to be not medically necessary.

## **C. Applicable Law**

Under Texas law, 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. TEX. LABOR CODE § 408.021. The statute provides that the purposes for which health care is to be rendered to a claimant include any that: (1) cures or relieves the effects naturally resulting from the compensable injury; (2) promotes recovery; or (3) enhances the ability of the employee to return to or retain employment.

The types of health care to which an employee is entitled are similarly broad, including all reasonable and necessary medical aid, medical examinations, medical treatments, medical diagnoses, medical evaluations, and medical services. TEX. LABOR CODE § 401.11(19).

Although the law describes few limitations on a claimant's entitlements to care, the law places upon the treating physician an obligation to maintain efficient utilization of health care. TEX. LABOR CODE § 408.025(c).

#### **D. Burden of Proof**

Under the Commission's rules, an IRO decision is deemed a Commission decision and order.<sup>2</sup> The burden of proof in this case is on Dr. Sherrod to prove by a preponderance of the evidence that the disputed services were reasonable and necessary medical treatments.<sup>3</sup>

#### **E. Argument and Analysis**

The basic facts are not in dispute in this case, although the parties' interpretations of the medical evidence differ significantly. Dr. Sherrod argued that the treatment at issue was medically necessary because of complicating factors, although the only factor he clearly identified was the claimant's morbid obesity, and he offered no explanation of how that factor complicated this claimant's recovery.

In addition, Dr. Sherrod argued that the treatments he provided the claimant enabled her to continue working in spite of her injuries. However, there is nothing in the record that indicates she would have been unable to work without Dr. Sherrod's treatments other than the claimant's subjective comments.

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<sup>2</sup> 28 TEX. ADMIN. CODE § 133.308(p)(5).

<sup>3</sup> 28 TEX. ADMIN. CODE §§ 133.308(p)(5) and (w), 148.21(h)-(i). 28 TEX. ADMIN. CODE § 133.308(p)(5).

<sup>3</sup> 28 TEX. ADMIN. CODE §§ 133.308(p)(5) and (w), 148.21(h)-(i).

Dr. Sherrod also relied heavily on an assessment done by Dr. Stringfellow, whose report is not in evidence, but who apparently found that the claimant had not reached maximum medical improvement (MMI) until sometime after the disputed dates of service. Dr. Sherrod argued that if the claimant had not reached MMI, there was still potential for improvement of her condition, and he testified that he relied on this finding to justify continued treatments. The ALJ believes that such determination may indicate some additional care might be beneficial, but there is nothing in the record to indicate Dr. Sherrod's particular treatments were warranted.

Dr. Alvarado, testifying on behalf of AISD, stated that the treatments provided by Dr. Sherrod were primarily passive therapy and only appropriate for the acute stage of treatment, which is normally the first two to four weeks after an injury. Dr. Alvarado also testified that the treatments provided no significant, lasting improvement in the claimant's condition, and yet Dr. Sherrod never changed his approach. Furthermore, Dr. Alvarado opined that this was not a complex case, even considering the claimant's obesity, that virtually all of the objective assessments were benign, and that a natural course of recovery after a short treatment period would have been just as effective.

Dr. Sherrod bears the burden of proving that the factual basis or analytical rationale for the IRO's decision in this case was invalid. In the ALJ's view, he has not met that burden. Dr. Sherrod's testimony at the hearing - which consisted principally of generalities and his legal interpretations, rather than any focused explanation of the medical need for the disputed care in this case - did not make his case any more convincing than did the information he apparently provided to the IRO. As Dr. Alvarado's testimony was somewhat more persuasive than that of Dr. Sherrod, he clearly has not demonstrated by a preponderance of the evidence that the prior decisions of the IRO and MRD in this case should be overturned.

In addition, the court decision cited by Dr. Sherrod at the hearing - *Travelers Insurance Co. v. Wilson*, 28 S.W. 3d 42 (Tex. Civ. App. - Texarkana 2000) - merely observes (at p. 46) that "[o]ne

of the types of service that is reasonably required are those treatments that are necessary to give reasonable relief from pain.” The court, however, does not address the issue in this case – *i.e.*, what is “reasonable” care and does it extend to indefinite efforts to relieve pain through chiropractic modalities?

Based on the evidence in this case as discussed above, and as set forth in the findings of fact, the ALJ concludes Dr. Sherrod failed to meet his burden of proof to show that chiropractic care was reasonable and necessary for the disputed dates of service to treat the claimant’s injuries. Although all of the evidence presented was not discussed in this decision, it was considered. The findings of fact and conclusions of law are based on all of the evidence in the record.

### **III. FINDINGS OF FACT**

1. An injured worker, the claimant, suffered compensable injuries on \_\_\_\_, when she slipped and fell in an icy parking lot.
2. At the time of the claimant’s injury, the Amarillo Independent School District (AISD) was self-insured for workers’ compensation claims.
3. The claimant began treatment with Mark Sherrod, D.C., on December 9, 2002.
4. The claimant was assessed as having suffered an acute traumatic injury to the lumbar, lumbo pelvic, and cervico-thoracic regions.
5. On 68 dates between December 9, 2002 and May 16, 2003, Dr. Sherrod performed or provided chiropractic services to the claimant that included office visits, gentle adjustment procedures, electrical stimulation or interferential current treatment, ultrasound, and sometimes, mechanical traction.
6. On 18 dates between May 22 and August 7, 2003, Dr. Sherrod performed or provided chiropractic services to the claimant that included office visits, gentle adjustment procedures, electrical stimulation or interferential current treatment, ultrasound, and sometimes, mechanical traction.
7. AISD denied the requested reimbursement for most of those services.
8. Dr. Sherrod made a timely request to the Texas Workers’ Compensation Commission (the Commission) for medical dispute resolution with respect to the requested reimbursement

for the services provided between May 22 and August 7, 2003.

9. The Commission referred the dispute to an independent review organization (IRO) which concluded that the majority of the services in dispute were not medically necessary.
10. The Commission's Medical Review Division (MRD) reviewed and concurred with the IRO's decision.
11. Dr. Sherrod timely requested a hearing with the State Office of Administrative Hearings (SOAH), seeking review and reversal of the MRD decision regarding reimbursement.
12. The Commission mailed notice of the hearing setting to the parties on September 28, 2004.
13. A hearing in this matter was convened on April 6, 2005, at the William P. Clements Building, 300 W. 15<sup>th</sup> St., Austin, Texas, before Carol S. Birch, an Administrative Law Judge with SOAH. Dr. Sherrod and a representative of AISD participated in the hearing.
14. The chiropractic services provided by Dr. Sherrod to the claimant did not result in any significant, lasting improvement in her condition.
15. Dr. Sherrod failed to substantiate the need for treatment after more than 68 previous treatment sessions.
16. The duration of treatment was not reasonable or medically necessary.

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

1. The Commission has jurisdiction related to this matter pursuant to the Texas Workers' Compensation Act (the Act), TEX. LABOR 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 § 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. ADMINISTRATIVE CODE (TAC) § 133.305(g) 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. Dr. Sherrod, 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 treatments for the claimant from May 22 through August 7, 2003, do not represent elements of health care medically necessary under ' 408.021 of the Act.
7. Based upon the foregoing Findings of Fact and Conclusions of Law, the findings and decisions of the IRO and of the MRD were correct.

**ORDER**

**IT IS THEREFORE, ORDERED** that the appeal of Mark Sherrod, D.C., seeking reimbursement for chiropractic services performed from May 22 through August 7, 2003, be denied.

**SIGNED on June 3, 2005.**

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**CAROL S. BIRCH  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS**