

**SOAH DOCKET NO. 453-05-2840.M5
TWCC MR NO. M5-04-2869-01**

**TEXAS MUTUAL INSURANCE
COMPANY,
Petitioner**

V.

**GMF CHIROPRACTIC,
INCORPORATED, PC,
Respondent**

BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Texas Mutual Insurance Company (Texas Mutual) requested a hearing to contest an independent review organization (IRO) determination, issued on behalf of the Texas Workers' Compensation Commission (Commission), concluding that certain office visits, electrical stimulation (unattended), electrical stimulation, ultrasound, massage, therapeutic exercises, shock wave therapy, and iontophoresis, provided from September 2, 2003, through October 28, 2003, by GMF Chiropractic, Incorporated, PC (GMF Chiropractic), were medically necessary. Texas Mutual also appealed a Commission Medical Review Division (MRD) decision concluding that office visits on October 14, 15, and 17, 2003, should be paid. The Administrative Law Judge (ALJ) concludes that Texas Mutual should pay for some but not all of the services.

I. PROCEDURAL HISTORY

The hearing in this case convened on August 23, 2005, before the undersigned ALJ. Texas Mutual appeared and was represented by Ryan Willett, Attorney. GMF Chiropractic did not appear and was not represented, although the evidence showed the notice of hearing was mailed to its correct address.¹ The ALJ finds there was sufficient evidence to raise a presumption that GMF Chiropractic received the notice.

¹ The ALJ takes official notice of the Notice of Hearing and of the GMF Chiropractic address the notice was mailed to.

II. DISCUSSION

A. Factual and Legal Background

The Claimant suffered a compensable injury on ____, when a metal bar he was using to pry a piece of wood from concrete slipped and struck the left side of his cervical spine, left ribs, and left shoulder region. What the IRO reviewer described as “plain films,” showed his ribs were fractured. He was placed on light duty. A magnetic resonance imaging (MRI) of his cervical spine showed a small disc bulge. An MRI of his shoulder showed it was essentially normal.

The services at issue and their CPT codes are 99212-office visit; 99213-office visit; 97014/G0283-electrical stimulation unattended; 97032-electrical stimulation; 97035-ultrasound; 97124-massage; G0280-shock wave therapy; 97033-iontophoresis; and 97110-therapeutic exercises, provided from September 2, 2003, through October 28, 2003.

The IRO concluded that all services after October 28, 2003, were medically unnecessary and the MRD found that certain other services should not be reimbursed because they were not properly documented. However, because GMF Chiropractic did not request a hearing on those decisions, they will not be considered in this order.

The IRO doctor concluded that the services at issue were necessary based on the following rationale:

Physical medicine is an accepted part of a rehabilitation program following an injury. The patient’s history, the mechanism of injury and the diagnostic imaging studies fully supported the medical necessity of twenty-four physical treatments for a time period not to exceed 8-weeks.²

At the hearing, Texas Mutual withdrew its contest of certain services. These included the office visits on October 14, 15 and 17, 2003; and all services at issue from September 2, 2003, through September 29, 2003, except the second and third ultrasound-therapy units provided on September 4, 2003, and the fourth units of therapeutic exercise performed on September 8, 12, 15,

² Ex. 1 at 5.

17, 19, 23, and 25, 2003.³ The remaining services at issue will be referred to as “disputed services.”⁴

Employees have a right to necessary health care 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 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.”

As Appellant, Texas Mutual had the burden of proof.⁵

B. Analysis

The ALJ concludes that Texas Mutual should be ordered to pay for the services that it originally contested but then withdrew its contest. It should also pay for all other disputed services through October 10, 2003, except for disputed office visits during that time, disputed ultrasound units on September 4, 2003, and the disputed fourth units of therapeutic exercise performed on September 12 and 19, 2003. GMF Chiropractic’s claim for all other services should be denied.

There are two controlling issues in this case, the medical necessity of the disputed services and whether GMF Chiropractic’s claim through October 10, 2003, may be denied based on a lack of medically necessity.

1. With Certain Exceptions, Medical Necessity is not a Permissible Ground for Denying GMF Chiropractic’s Claims Through October 10, 2003

³ Texas Mutual has already paid for the first three units of therapeutic exercise performed on those dates. Ex. 2.

⁴ The term “disputed services” does not include certain services provided during the time period at issue that Texas Mutual paid for when GMF Chiropractic initially filed its claim.

⁵ 1 TEX. ADMIN. CODE (TAC) § 155.41(b); 28 TAC § 148.14(a).

A review of the record shows that the explanation of benefit (EOB) forms in evidence⁶ affirmatively show that Texas Mutual did not deny all of the disputed services based on a lack of medical necessity. The EOBs indicate, with the exception of services provided on September 4, and 12, 2003, and all the disputed office visits, that none of the services from September 2, 2003, through October 10, 2003, were denied on that ground. All of the disputed services provided after October 10, 2003, were denied with a “U” code, indicating a lack of medical necessity. This review is confirmed by Texas Mutual’s Table of Disputed Services,⁷ which shows the denial codes it used for all disputed services.

The Commission’s rules, at 28 TEX. ADMIN. CODE (TAC) § 133.304(c), require insurers to include correct payment exceptions codes in their EOBs and a sufficient explanation to allow providers to understand the reason or reasons for a denial. Based on a construction of § 408.027(d) of the Texas Labor Code and the Commission’s rules, State Office of Administrative Hearings (SOAH) administrative law judges have concluded that an insurer is precluded from raising before the Commission’s medical review division (MRD) or at a SOAH hearing a reason for denying a claim that it had not raised before the request for medical dispute resolution.⁸ In addition, the Commission’s rules at 28 TAC § 133.307(j)(2) say MRD may not consider a reason for denying a claim that was not presented to a provider before the request for medical dispute resolution.

The foregoing discussion indicates that a lack of medical necessity is not available as a ground for denying payment of most of the disputed services performed from September 2, 2003, through October 10, 2003.

2. Disputed Services Were Medically Unnecessary

Texas Mutual tendered the testimony of Timothy Fahey, D.C.⁹ Dr. Fahey testified that the disputed services provided to the Claimant are passive therapy except for therapeutic exercises and

⁶ Ex. 1 at 14 through 89.

⁷ Ex. 2.

⁸ See, for example, SOAH Docket No. 453-01-0309.M5 (February 7, 2001, ALJ Doherty); SOAH Docket No. 453-02-2026.M5 (June 19, 2002, ALJ Kilgore); and SOAH Docket No. 453-01-2758.M5 (January 25, 2002, ALJ Cloninger).

⁹ Dr. Fahey graduated from chiropractic school in 1979. He has taken additional training since then, including

office visits. The physical therapy includes electrical stimulation; electrical stimulation unattended; ultrasound; massage; shock wave therapy; and iontophoresis.¹⁰ He explained passive care as treatment “done to” the patient, *i.e.*, the patient participates only as a recipient. This is in contrast to active care, where the patient has an active role.

Dr. Fahey testified that passive care during the acute phase after an injury can be beneficial. He explained that passive care is generally provided during that period to reduce the acute effects of the injury. Expert opinions on the length of the acute phase vary from four to eight weeks. He said in this case the patient had received passive care for about four weeks through September 29, 2003, but the acute phase had already passed in part by the time the treatments began because the injury occurred on ____.

Dr. Fahey testified persuasively that passive care after September 29, 2003, was not medically necessary. He referred to notations on the Claimant’s charts where the Claimant said on October 14 and 22, 2003, that his pain was four out of ten and had “gotten no better and no worse” since he began therapy.¹¹ According to Dr. Fahey, continued passive therapy was certainly not indicated when the care already given failed to reduce the Claimant’s pain. He said an additional reason for stopping passive care is that can to cause patients to become dependent on the therapist.

Dr. Fahey’s opinion was also convincing concerning the only active care provided, therapeutic exercises. He explained that therapeutic exercises under CPT code 97110 consist of one-on-one treatment with the therapist present. In his opinion, this therapy is indicated initially to instruct a patient in performing the exercises.

Dr. Fahey testified that the three units (forty-five minutes) per day of physical therapy that Texas Mutual paid for were reasonable to instruct the Claimant on the exercises, but that a fourth unit was “too intensive” and not justifiable. He noted that Texas Mutual paid for three units per day of therapeutic exercise through October 2, 2003. He maintained that one-on-one instruction after

training for independent medical review examinations. He has served on the Commission’s Medical Quality Review Panel and is now on the Panel’s executive committee.

¹⁰ Dr. Fahey testified that iontophoresis is generally a mixture of medications, often prepared by a pharmacy, placed topically on a patient’s body to control inflammation and pain during the acute phase following an injury.

¹¹ Ex. 1 at 127, 131.

that date was not reasonable. He indicated the type of therapy provided, although not fully explained in the Claimant's records, included the use of a theraband, stretching, stabilization and proprioceptive exercises, and a stationary bicycle. He asserted that these exercises are not difficult to learn and said he was unaware of any safety issues with them except for the possibility of cardiovascular risks in relation to riding a stationary bicycle-he noted that there was no indication in the Claimant's records of cardiovascular issues. Observing that the exercises did not vary over the course of treatment, he explained that if a patient is doing the same exercise day after day, prolonged one-on-one instruction is too intensive. Group therapy and at-home exercises are available alternatives.

Dr. Fahey's testified that if continued care were unnecessary then office visits during that period of care would also be generally unnecessary. He said a one-time-per-month visit to check on a patient's status would be a reasonable exception and that the office visits Texas Mutual did not contest, on October 14, 15, and 17, 2003, would fulfill that purpose.

Texas Mutual contested the second and third ultrasound units provided on September 4. Dr. Fahey testified persuasively that a single fifteen-minute ultrasound session would have been sufficient.

Addressing the disputed services as a whole, Dr. Fahey testified convincingly that a post-injury trial phase of conservative care was reasonable, but when that proved ineffective, the Claimant should have been referred for other treatments.

3. Overall Conclusion

The claims Texas Mutual should be required to pay are based on the following considerations:

- § A lack of medical necessity is not available as a ground for denying some of those services, as indicated above, even though Texas Mutual proved that the disputed services are not medically necessary.
- § MRD (not the IRO) denied payment for another disputed service, therapeutic exercise on September 19, 2003, based on its statement that GMF Chiropractic did not provide documentation of certain aspects of its licensing or approved-doctor-list

status. Because GMF Chiropractic did not appeal that decision, Texas Mutual should not be required to pay for that treatment.

Based on these considerations, Texas Mutual should pay for the following services:

§ All services from September 2, 2003, through October 10, 2003, except for the second and third units of ultrasound on September 4, 2003, the disputed therapeutic exercise on September 12 and 19, 2003, and disputed office visits on September 30, 2003, and October 2, 3, 7, 8, and 10, 2003.¹²

§ Office visits on October 14, 15, and 17, 2003.¹³

GMF Chiropractic's claim for all other disputed services should be denied because the services were shown to be medically unnecessary.

III. FINDINGS OF FACT

1. The Claimant suffered a compensable injury on ____, when a metal bar he was using to pry a piece of wood from concrete slipped and struck the left side of his cervical spine, left ribs, and left shoulder region.
2. The Claimant's employer ordered plain films, and these showed the Claimant's ribs were fractured.
2. The Claimant was placed on light duty.
3. A magnetic resonance imaging (MRI) of the Claimant's cervical spine showed a small disc bulge, and an MRI of the shoulder showed it was essentially normal.
4. The Claimant began receiving care from GMF Chiropractic, Incorporated, PC (GMF Chiropractic), on September 2, 2003.
5. GMF Chiropractic submitted a claim to the workers' compensation insurance carrier for the Claimant's employer, Texas Mutual Insurance Company (Texas Mutual), that included services from September 2, 2003, through November 11, 2003.
6. Texas Mutual denied the claim.
7. GMF Chiropractic requested medical dispute resolution.

¹² Texas Mutual either withdrew its opposition to paying for these services, or medical necessity is not a permissible ground for denying payment.

¹³ Texas Mutual withdrew its opposition to paying for these services.

8. An independent review organization (IRO) issued a decision on July 8, 2004, concluding that services provided through October 28, 2003, were medically necessary, but the services after that date were unnecessary.
9. The Texas Workers' Compensation Commission (Commission) Medical Review Division (MRD) issued a decision denying payment for certain services provided on September 19, 2003, including therapeutic exercises.
10. The MRD ordered payment for office visits on October 14, 15, and 17, 2003.
11. It is undisputed that Texas Mutual submitted a request for hearing on the IRO and MRD decisions to the Commission's chief clerk less than 20 days after it received notice of the decisions.
12. GMF Chiropractic did not request a hearing on the IRO or MRD decisions.
13. The services at issue and their CPT codes are 99212-office visits; 99213-office visits; 97014/G0283-electrical stimulation unattended; 97032-electrical stimulation; 97035-ultrasound; 97124-massage; G0280-shock wave therapy; 97033-iontophoresis; and 97110-therapeutic exercises provided from September 2, 2003, through October 28, 2003.
14. At the beginning of the hearing, Texas Mutual withdrew its contest of certain services at issue, including all services from September 2, 2003, through September 29, 2003, except the second and third ultrasound-therapy units provided on September 4, 2003, and the fourth units of therapeutic exercise performed on September 8, 12, 15, 17, 19, 23, and 25, 2003. Texas Mutual disputed all services after September 29, 2003, except that it withdrew its contest of office visits on October 14, 15, and 17, 2003.
15. The services that remain at issue and disputed based on the matters described in Findings of Fact Nos. 9, 10, 12, 13, and 15, are referred to in these findings of fact and conclusions of law as "disputed services." Disputed services do not include services Texas Mutual paid for when GMF Chiropractic initially presented its claim.
16. Texas Mutual did not deny any of the services from September 2, 2003, through October 10, 2003, on the basis of medical necessity except for services provided on September 4, and 12, 2003, and all the disputed office visits.
17. All of the disputed services provided after October 10, 2003, were denied with a "U" code, indicating a lack of medical necessity.
18. The disputed passive therapy provided included electrical stimulation, electrical stimulation unattended, ultrasound, massage, shock wave therapy, and iontophoresis.
19. Passive therapy during the acute phase after an injury is generally beneficial for four to eight weeks.
20. The acute phase following the injury started when the injury occurred on ____.
21. The Claimant received passive care for about four weeks through September 29, 2003.

22. The Claimant's pain levels did not improve under care from GMF Chiropractic.
23. Passive therapy tends to cause patients to become dependent on the therapist.
24. The first unit of ultrasound therapy provided on September 4, 2003, was sufficient for the Claimant's treatment.
25. Continued passive therapy after September 29, 2003, was not indicated when the care already given had failed to reduce the Claimant's pain.
26. The disputed passive therapy was not reasonably required by the nature of the Claimant's injury.
27. The only disputed active therapy provided was therapeutic exercises.
28. Therapeutic exercises consist of one-on-one treatment with the therapist present.
29. Therapeutic exercise is indicated initially to instruct a patient in performing the exercises.
30. Three units, or forty-five minutes, of therapeutic exercise was reasonable for instructing the Claimant, but more than that was too intensive and not necessary for that purpose.
31. The type of active therapy provided included the use of a theraband, stretching, stabilization and proprioceptive exercises, and a stationary bicycle.
32. The exercises are not difficult to learn and there were no apparent safety issues with them.
33. The therapeutic exercises did not vary over the course of treatment.
34. If a patient is doing the same exercise day after day, prolonged one-on-one instruction is not necessary.
35. Group therapy and at-home exercises are available alternatives to one-on-one instruction.
36. Texas Mutual paid for three units of therapeutic exercise through October 2, 2003.
37. One-on-one exercise instruction after October 2, 2003, was unnecessary for instructing the Claimant.
38. The disputed therapeutic exercise was not reasonably required by the Claimant's injury.
39. When continued care is unnecessary, office visits related to that care are also generally unnecessary, except that a one-time-per-month visit to check on a patient's status is reasonable.
40. The disputed office visits were not reasonably required by the Claimant's injury.
41. A post-injury trial phase of conservative care was reasonable, but when that proved ineffective, the Claimant should have been referred out for other treatment.

42. All parties received not less than 10 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.
43. All parties had an opportunity to respond and present evidence and argument on each issue involved in the case.

IV. CONCLUSIONS OF LAW

1. 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. TEX. LAB. CODE ANN. § 413.031(k) and TEX. GOV'T. CODE ANN. ch. 2003.
2. Notice of the hearing was proper and timely. TEX. GOV'T. CODE ANN. §§ 2001.051 and 2001.052.
3. Texas Mutual had the burden of proof in this case.
4. Texas Mutual proved that the disputed services were medically unnecessary.
5. A lack of medical necessity is not a permissible ground for denying payment of the disputed services provided through October 10, 2003, except for services provided on September 4, and 12, 2003, and all office visits. TEX. LABOR CODE ANN. § 408.027(d); 28 TEX. ADMIN. CODE (TAC) §§ 133.304(c) and 133.307(j)(2).
6. A lack of medical necessity is a permissible ground for denying payment for the disputed services provided after October 10, 2003. TEX. LABOR CODE ANN. § 408.027(d); 28 TAC §§ 133.304(c) and 133.307(j)(2).
7. Texas Mutual should pay for all services from September 2, 2003, through October 10, 2003, except for the disputed second and third units of ultrasound on September 4, 2003, the disputed fourth unit of therapeutic exercise on September 12 and 19, 2003, and disputed office visits on September 30, 2003, and October 2, 3, 7, 8, and 10, 2003.
8. Texas Mutual should pay for office visits on October 14, 15, and 17, 2003.
9. Texas Mutual should not be required to pay for any other disputed services.

ORDER

IT IS THEREFORE ORDERED that Texas Mutual Insurance Company pay GMF Chiropractic, Incorporated, PC for all services provided from September 2, 2003, through October 10, 2003, with the exception of the disputed second and third units of ultrasound on September 4, 2003, the disputed fourth units of therapeutic exercise on September 12, and 19, 2003, and the office visits on September 30, 2003, and October 2, 3, 7, 8, 10, 2003.

IT IS THEREFORE ORDERED that Texas Mutual Insurance Company pay GMF Chiropractic, Incorporated, PC for office visits on October 14, 15, and 17, 2003.

IT IS ORDERED FURTHER that, except for the payments ordered above, including any applicable interest, that GMF Chiropractic, Incorporated, PC's claim against Texas Mutual Insurance Company be, and the same is hereby, denied.

SIGNED September 16, 2005.

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