

**SOAH DOCKET NO. 453-05-3037.M5  
TWCC MRD NO. M5-04-2557-01**

<b>COTTON D. MERRITT, D.C.,</b>	§	<b>BEFORE THE STATE OFFICE</b>
<b>Petitioner</b>	§	
	§	
<b>V.</b>	§	
	§	<b>OF</b>
<b>TEXAS MUTUAL INSURANCE</b>	§	
<b>COMPANY,</b>	§	
<b>Respondent</b>	§	<b>ADMINISTRATIVE HEARINGS</b>

**DECISION AND ORDER**

Cotton D. Merritt, D.C., (Provider) has challenged a decision of an independent review organization (IRO) on behalf of the Texas Workers§ Compensation Commission (Commission) in a dispute regarding the medical necessity of chiropractic services provided to an injured claimant. The IRO concluded that some, but not all, of the services were medically necessary. Texas Mutual Insurance Company (Carrier), the responsible insurer in this case, did not appeal from the IRO determination; thus the services the IRO found to be medically necessary are not at issue here. The Administrative Law Judge (ALJ) concludes that most of the services still in dispute were medically necessary and should be reimbursed.

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

The hearing in this matter was convened March 29, 2005, at the State Office of Administrative Hearings with ALJ Carol S. Birch presiding. Provider represented himself and appeared by telephone. Carrier was represented by its attorney, Timothy Riley. 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 both parties, and the testimony of Dr. Merritt 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 compensable injuries to his cervical and lumbar spine on \_\_\_\_, when he fell from a ten-foot scaffold, which in turn fell onto him. The pain in his neck and back was immediate and severe. Although he was seriously injured, the claimant did not seek immediate medical attention because of misinformation from his employer regarding insurance coverage. Although coverage was in dispute, because the claimant was still in pain and unable to return to work, he began chiropractic care with Dr. Merritt in April 2003. At that time the claimant's primary complaint was of constant low back pain, and he was diagnosed with lumbar intervertebral disc disorder, and lumbar and cervical sprains.

On 11 dates of service over a three-week period beginning April 9, Dr. Merritt provided various modalities of chiropractic treatment, which included office visits, myofascial release, joint mobilization, therapeutic exercise, and therapeutic activity, for the injury to the claimant's lumbar spine. Dr. Merritt's stated goals included decreasing the current pain levels, and increasing range of motion, strength and endurance, to enable the claimant to return to work. The treatment plan consisted of a structured physical therapy and rehabilitation program, in conjunction with a home exercise program. Because Carrier was still disputing the compensability of the claimant's injuries at that point, Dr. Merritt discontinued treatment.

The claimant returned for re-evaluation and continued treatment at the end of May 2003. Dr. Merritt provided similar treatments for an additional 13 dates of service between May 29 and June 25, and then released the claimant to a self-care program. Over the course of treatment, the claimant's reported pain levels decreased from 8 to 4 (on an ascending scale of 1-10).

The claimant returned again in October 2003, after the compensability issues had been resolved in his favor. At that time he was complaining of pain in the cervical region that radiated into his arm. Dr. Merritt provided another course of therapy, similar to the first, to treat the cervical spine, although on some dates of service he also provided neuromuscular re-education and/or gait

training. The treatment was provided on 25 dates of service over a ten-week period between October 2 and December 17. Over the course of this treatment, the claimant's reported pain levels dropped from 6 to 2.

Dr. Merritt billed Carrier for all the treatment and office visits described above. Carrier denied payment for all treatments and office visits during the treatment periods on the basis that they were not medically necessary.

#### **B. IRO Decision**

Based on a review of unspecified medical records, the IRO chiropractor concluded that six weeks of treatment was medically necessary, and of the services provided between April 15 and May 30, 2003, approved, per date of service:

- a maximum of five units of therapeutic exercises and/or therapeutic activities;
- one unit of joint mobilization;
- one unit of myofascial release; and
- one office visit.

All other services provided on those dates of service were denied. The reviewer further concluded that any treatment provided beyond May 30 was not medically necessary because of the claimant's non-response to care.

#### **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 includes 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>1</sup> The burden of proof in this case is on Dr. Merritt to prove by a preponderance of the evidence that the disputed services were reasonable and necessary medical treatments.<sup>2</sup>

#### **5. Analysis and Conclusion**

The ALJ agrees, at least in part, with the IRO decision regarding the necessity of six weeks of treatment to the lumbar spine. Carrier's expert, Dr. Alvarado, also agreed that six weeks of care was within appropriate guidelines. However, because of the gap in treatment in May, only three weeks of treatment was actually determined to be medically necessary by the IRO. Dr. Merritt provided

services for another three weeks in June, for a total of 24 visits between April 15 and June 25. The ALJ finds those additional treatments, subject to the IRO's limitation on the number of units per date of service, to be reasonable and medically necessary.

In addition, Dr. Merritt argued that there were two distinct injuries, and the treatment provided from April to June only addressed the injury to the lumbar spine. Dr. Alvarado also agreed that some additional treatment was necessary to treat the cervical injury. The ALJ believes that the

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<sup>1</sup> 28 TEX. ADMIN. CODE § 133.308(p)(5).

<sup>2</sup> 28 TEX. ADMIN. CODE §§ 133.308(p)(5) and (w), 148.21(h)-(i).

services provided by Dr. Merritt between October 2 and December 17, subject to certain unit limitations, were also reasonable and medically necessary.

Based on the evidence in this case as discussed above, and as set forth in the findings of fact, the ALJ concludes Dr. Merritt met 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 he fell from a ten-foot scaffold.
2. Texas Mutual Insurance Company (Carrier) is the workers' compensation insurer with respect to the claims at issue in this case.
3. The claimant began treatment with Cotton D. Merritt, D.C., in April 2003.
4. The claimant was diagnosed by Dr. Merritt as suffering a lumbar intervertebral disc disorder, and lumbar and cervical sprains.
5. On 24 dates between April 15 and June 25, 2003, Dr. Merritt performed or provided chiropractic services to the claimant that included office visits, myofascial release, joint mobilization, therapeutic exercise, and therapeutic activity, for the injury to the claimant's lumbar spine.
6. On 25 dates between October 2 and December 17, 2003, Dr. Merritt performed or provided chiropractic services to the claimant that included office visits, myofascial release, joint mobilization, therapeutic exercise, and therapeutic activity, for the injury to the claimant's cervical spine.
7. Carrier denied the requested reimbursement for those services.
8. Dr. Merritt made a timely request to the Texas Workers' Compensation Commission (the Commission) for medical dispute resolution with respect to the requested reimbursement.
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 reviewed and concurred with the IRO's

decision.

11. Dr. Merritt 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 December 28, 2004.
13. A hearing in this matter was convened on March 29, 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. Merritt and a representative of the Carrier participated in the hearing.
14. For each date of service provided by Dr. Merritt between June 2 and December 17, 2003, the following billed services were medically necessary:
  - a maximum of five units of therapeutic exercises and/or therapeutic activities;
  - a maximum of one unit of joint mobilization;
  - a maximum of one unit of myofascial release;
  - a maximum of one unit of neuromuscular re-education;
  - a maximum of one unit of gait training; and
  - one office visit.

#### **IV. 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. LABOR CODE ANN. § TEX. GOV'T 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. ADMINISTRATIVE CODE (ATAC@) § 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. Merritt, the party seeking relief, bore the burden of proof in this case, pursuant to 28 TAC § 148.21(h).
6. The treatments for the claimant noted in Findings of Fact Nos. 5 and 6, represent elements of health care medically necessary under § 408.021 of the Act.

7. Pursuant to TEX. LABOR CODE ANN. § 413.031, the Carrier should reimburse Dr. Merritt for the services in dispute, subject to the limitations set out in Finding of Fact No 14.

**ORDER**

**IT IS THEREFORE, ORDERED** that Texas Mutual Insurance Company shall reimburse Cotton D. Merritt, D.C., for each date of service between June 2 and December 17, 2003:

- a maximum of five units of therapeutic exercises and/or therapeutic activities;
- a maximum of one unit of joint mobilization;
- a maximum of one unit of myofascial release;
- a maximum of one unit of neuromuscular re-education;
- a maximum of one unit of gait training; and
- one office visit.

**SIGNED on May 31, 2005.**

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