

**SOAH DOCKET NO. 453-05-3188.M5
TWCC MR No. M5-05-0006-01**

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| NEUROMUSCULAR INSTITUTE OF | § | BEFORE THE STATE OFFICE |
| | § | |
| TEXAS – P.A., | § | |
| Petitioner | § | |
| V. | § | OF |
| | § | |
| | § | |
| WAUSAU UNDERWRITERS | § | ADMINISTRATIVE HEARINGS |
| INSURANCE, | § | |
| Respondent | § | |

DECISION AND ORDER

Neuromuscular Institute of Texas – P.A. (Neuromuscular Institute) contested an independent review organization (IRO) decision, issued on behalf of the Texas Workers’ Compensation Commission (Commission), concluding that certain physical therapy sessions, post-injection therapy, a March 2004 office visit, and a pre-authorized work conditioning session were medically unnecessary. At the hearing, Wausau Underwriters Insurance (Wausau) agreed that the work conditioning session should be paid, but contested the other services. The Administrative Law Judge (ALJ) concludes the work conditioning session and some of the post-injection therapy should be paid, but payment for the other services should be denied.

I. PROCEDURAL HISTORY

A hearing convened in this case on June 8, 2004, before the undersigned ALJ at the State Office of Administrative Hearings (SOAH), Austin, Texas. Neuromuscular Institute appeared and was represented by Allen Craddock, Attorney. Wausau appeared and was represented by Kevin Franta, Attorney. The record was left open until June 22, 2005, for the filing of post-hearing briefs. Both parties filed briefs and the hearing record closed on that date. There were no objections to notice or jurisdiction.

II. DISCUSSION

A. Background

The Claimant suffered a work-related injury on ____, while lifting a heavy trash container at an automobile dealership where he worked. He developed pain in his mid and low back.

The Claimant first underwent treatment at the Baptist Health System in August 2003, where he received physical therapy. His treating doctor at that time, Jerjis Denno, M.D., referred him to Neuromuscular Institute on September 9, 2003. Dr. Denno's diagnosis was thoracolumbar strain/sprain that caused low to mid back spasms and pain. Brad Burdin, D.C.,¹ saw the Claimant at Neuromuscular Institute on September 10, 2003. He agreed with Dr. Denno's diagnosis.² Wausau disputed the following care:

- passive conservative care, including electrical muscle stimulation, ultrasound, heat therapy, and soft tissue mobilization from October 15, 2003, through November 13, 2003;
- post-trigger-point-injection therapy on November 18, 19, 21, 24, 25 and 26, 2003, following an injection administered on November 18, 2003.
- post-trigger-point-injection therapy on December 15, 17, 19, 22, and 23, 2003, following an injection administered on December 11, 2003; and
- a follow-up office visit on March 10, 2004.³

After Wausau denied payment for the treatment, Neuromuscular Institute requested medical dispute resolution. On October 27, 2004, an IRO concluded that the services at issue, as well as the undisputed work conditioning, were medically unnecessary. On November 4, 2004, the Commission Medical Review Division (MRD) issued a decision upholding the IRO determination. The MRD also issued a decision relating to whether there was documentation to support certain other services, but the parties agreed that that decision is not at issue in this case.

¹ Dr. Burdin was licensed in 1996 and is a diplomate of the American Board of Chiropractic Neurology.

² There was no dispute over the sprain/strain diagnosis.

³ As indicated above, Wausau did not dispute payment of a pre-authorized work conditioning session. The session occurred on January 16, 2004.

B. Decision

1. Physical Therapy from October 15, 2003, through November 11, 2003

The Claimant began receiving treatment at Neuromuscular Institute on September 11, 2003, with twenty-four visits for conservative care from that date through November 13, 2003. Dr. Burdin said the therapy provided was generally passive, consisting of hot packs, ultrasound, electrical stimulation, and soft tissue mobilization. He maintained the care was reasonable. He described the sprain/strain as moderate, and said such a condition usually takes from twelve weeks to a year to heal. He asserted that seven weeks of care was within a normal treatment range. He acknowledged, however, that trigger point injections are usually tried after conservative care has not been completely successful.

Wausau witness William Defoyd, D.C.,⁴ testified that the disputed treatments (beginning on October 15) were the same type of conservative care, started by Neuromuscular Institute on September 11, 2003,⁵ that had previously been unsuccessful in treating the Claimant's condition. He asserted that a moderate sprain/strain usually takes two to three weeks to heal rather than twelve or more weeks. He testified persuasively that the purpose of passive care is to reduce pain so that a patient can begin active therapy or, less frequently, to reduce pain sufficiently to allow a patient's body to simply heal itself—he asserted that guidelines for treatment all over the world say that is the purpose of passive care. He contended that the normal protocol for passive care is to try an approach for two weeks, another approach for two more weeks if the first did not work, and a different approach altogether if neither worked. He said a lot of literature supports his opinion, including multi-disciplinary panel findings from the Rand Corporation, various health plans, and the Commission's repealed spine treatment guidelines. He acknowledged that the spine treatment guidelines are no longer in effect, but maintained that their rationale on this issue is valid nonetheless. He indicated the Claimant did not improve during twenty-four sessions of passive care.

⁴ Dr. Defoyd is a board certified chiropractic orthopedist. He holds a master's degree in exercise physiology. He has taught chiropractic-college courses and has taught courses for designated doctors.

⁵ Ex. 2 at A0009 through A0049.

Dr. Defoyd said he is familiar with the Mercy Guidelines. He agreed they say that one to nineteen sessions of manipulative passive care, from one day to two months, is typical, but maintained they simply said that length of care occurs rather than recommending it.

Dr. Defoyd pointed out that the Claimant had physical therapy at the Baptist Health System before he was treated at Neuromuscular Institute. He said he is unable to tell how many sessions were performed at Baptist Health System, but a summary sheet shows twelve days of treatment in August 2003 and the records refer to physical therapy.⁶

The ALJ concludes that the physical therapy at issue on and after October 15, 2003, was medically unnecessary because it was the same type of passive treatment⁷ that had been provided over a long period that had not relieved the Claimant's condition. According to Neuromuscular Institute, the Claimant underwent fifteen physical-therapy treatments before the dates of service in dispute. The evidence shows the Claimant underwent some physical therapy at the Baptist Health System in August 2003 before presenting to Neuromuscular Institute.

2. Post Injection Therapy

Neuromuscular Institute referred the Claimant to J. Michael Freiberg, M.D., for pain management. Dr. Freiberg's Physician's Assistant (P. A.), Mark Dedmon, administered trigger point injections on November 18, 2003, and December 11, 2003, to decrease spasms.⁸ Dr. Frieberg, through Mr. Dedmon, prescribed six sessions of post-injection therapy after each injection. The prescription for the post-November 18 therapy included electrical stimulation, ultrasound, and strengthening/range of motion.⁹ The prescription for the post-December 11 therapy included six sessions of electrical stimulation, ultrasound, and soft tissue mobilization, with the Claimant to continue heat and gentle stretching at home.¹⁰

Dr. Burdin maintained that post-injection therapy is useful to decrease spasms and pain and

⁶ Ex. 2 at A0001-A0002.

⁷ Ex. 2 at A0036-A0039, A0042, A0046, and A0049.

⁸ The necessity of the injections is undisputed.

⁹ Ex. 2 at A0052.

¹⁰ Ex. 2 at A0062-A0063.

increase blood circulation at the site of the injection. He said the ultrasound is a deep heating modality that promotes healing by dispersing toxins in the area and by helping to disperse medicines. Electrical stimulation helps decrease pain by activating sensory receptors. Hot packs provide more superficial heat. Soft tissue mobilization helps break up adhesions and increases circulation.

Dr. Burdin cited articles from the Harvard Medical School Pain Management School saying post-injection therapy usually causes improvement and by Janet Trevall, M.D.,¹¹ a trigger point injection specialist, indicating that the injections often cause pain and are themselves a reason for therapy. Dr. Burdin said Dr. Trevall mentions soft tissue mobilization as useful therapy. He acknowledged that soft tissue mobilization was not included in Dr. Freiburg's first prescription, but said, as the Claimant's treating doctor, he believed the treatment was warranted and is consistent with the prescription. In his opinion, soft tissue mobilization, electrical stimulation, and ultrasound would not be available to the Claimant as part of a home treatment program.

Dr. Defoyd acknowledged that Dr. Trevall recommends post-injection therapy, but said she focuses on the need for muscle stretching. He maintained, to be effective, passive care must be done in conjunction with stretching. He explained that short muscles are tight and lengthening them causes relaxation. He said the Harvard Medical School study Dr. Burdin referred to emphasizes aggressive physical therapy, including stretching. He did not see stretching in the records as part of the Claimant's post-injection therapy.¹² He noted that the therapy prescription recommended strength/range of motion as well as electrical stimulation and ultrasound.¹³

Dr. Defoyd testified that ultrasound could possibly help disperse medications on the day of the injection, but the blood flow would take up the medications within six hours.

The ALJ concludes the physical therapy done in accordance with Dr. Freiberg's/Mr. Dedmon's prescription was shown to be medically necessary. As the persons administering the injections, they were in a good position to know the Claimant's exact post-injection needs. In line with Dr. Defoyd's thinking, they recommended stretching in conjunction with passive modalities.

¹¹ Dr. Trevall's last name is spelled phonetically.

¹² Ex. 2 at A 0052 through A0069.

¹³ Ex. 2 at A0052.

The ALJ concludes that Neuromuscular Institute should not be paid for the post-November 18 injection therapy because it was not done in accordance with the above-described prescription. Stretching and range of motion exercises were not included. However, the post-December 11 injection therapy, which was mostly done in accordance with the prescription, including electrical stimulation, ultrasound, and soft tissue mobilization, should be paid because a stretching program (home exercise) was provided with them. Hot and cold packs were not prescribed for the post-injection therapy and should be denied.

Based on Dr. Defoyd's testimony, the ALJ concludes that eleven office visits (CPT code 99213)¹⁴ billed in conjunction with the post-injection therapy¹⁵ were not shown to be medically necessary. Dr. Defoyd testified persuasively that it was not necessary to perform evaluation and management services on that frequent a basis. He opined persuasively that there was not a legitimate expectation that the Claimant would need to be reevaluated on every visit or that a change in treatment would be needed that frequently. He also said there was no expanded problem solving history, no examination consistent with expanded problem solving, and no decision making, as required under CPT code 99213.

3. March 10, 2004 Office Visit and Manipulation

Dr. Burdin testified a follow-up office visit occurred on March 10, 2004, at which the Claimant received a manipulation, because the Claimant presented with low-back pain. Dr. Burdin said it is common for a patient to come back "a couple of months" after treatment. He believes the manipulation helped the Claimant get better. In his opinion, manipulation is an appropriate modality for post-trigger point injections.

Dr. Defoyd testified persuasively that the March 10 manipulation was not medically necessary. He agreed that manipulations can be effective post-injection therapy, but argued the procedure is appropriate when joint stiffness or other joint dysfunction is present. There is no record of joint problems in this case. There was also no record of any flexibility increase after the manipulation. Instead, the records deal with muscle tightness or tenderness which, in his opinion, is

¹⁴ One of the charges was for code 99214. Ex. 2 at B0103.

¹⁵ Ex. 2 at B0101 and B0103. Two office visits were billed on November 24, 2003. Ex. 2. B0101.

not a reason for manipulation.

He said there was no explanation of what went on between the post-injection therapy in December 2003 and March 10, 2004, or why the manipulation was needed.

The ALJ concludes that Neuromuscular Institute failed to prove the necessity of the March 10, 2004 office visit. A manipulation was not shown to be necessary because there was no evidence of joint dysfunction. Manipulations were not shown to have been provided previously and were not a prescribed form of post-injection therapy.

III. FINDINGS OF FACT

1. The Claimant suffered a work-related injury on ____, while lifting a heavy trash container at an automobile dealership where he worked. He developed pain in his mid and low back.
2. The Claimant had thoracolumbar strain/sprain that caused low to mid back spasms and pain
3. The Claimant first underwent therapy at the Baptist Health System in August 2003.
4. The Claimant's treating doctor at the time, Jerjis Denno, M.D., referred him to Neuromuscular Institute of Texas – PA (Neuromuscular Institute) on September 9, 2003.
5. Neuromuscular Institute began providing services to the Claimant on September 10, 2003, when he saw Brad Burdin, D.C.
6. Neuromuscular Institute presented a claim for its treatment of the Claimant to Wausau Underwriters Insurance (Wausau), the Claimant's employer's workers' compensation insurance carrier.
7. Wausau paid for some, but not all of the treatment.
8. Neuromuscular Institute requested medical dispute resolution.
9. On October 27, 2004, an independent review organization (IRO) concluded that certain disputed services, as well as an undisputed work conditioning session provided on January 16, 2004, were medically unnecessary.
10. On November 4, 2004, the Texas Workers' Compensation Commission's Medical Review Division (MRD) issued a decision upholding the IRO determination.

11. The MRD also issued a decision relating to whether there was documentation to support certain other services, but the parties agreed that that is not at issue in this case.
12. The following disputed services are at issue:
 - nine sessions of passive, conservative care from October 15, 2003, through November 13, 2003;
 - post-trigger-point-injection therapy on November 18, 19, 21, 24, 25 and 26, 2003, following an injection administered on November 18, 2003.
 - post-trigger-point-injection therapy on December 15, 17, 19, 22, and 23, 2003, following an injection administered on December 11, 2003; and
 - a follow-up office visit on March 10, 2004.
13. At the hearing, Wausau agreed that the January 16, 2004, pre-authorized work conditioning session was medically necessary.

Nine Sessions of Passive Conservative Care from October 15 through November 13

14. The Claimant began receiving conservative care at Neuromuscular Institute on September 11, 2003, and had twenty-four visits from that date through November 13, 2003.
15. The care consisted of hot packs, ultrasound, electrical stimulation, and soft tissue mobilization.
16. The Claimant received physical therapy at Baptist Health System before presenting to Neuromuscular Institute.
17. The physical therapy at issue on and after October 15, 2003, was the same type of passive treatment that the Claimant received over a long period that had not relieved the Claimant's condition.
18. The physical therapy provided to the Claimant from October 15, 2003, through November 13, 2003, was not reasonably required by the nature of the Claimant's injury.

Post Trigger Point Injection Therapy

19. Neuromuscular Institute referred the Claimant to J. Michael Freiberg, M.D., for pain management.
20. Dr. Freiburg's Physician's Assistant (P. A.), Mark Dedmon, administered trigger point injections to the Claimant on November 18, 2003, and December 11, 2003, in an attempt to decrease the spasms.
21. Dr. Frieberg, through Mr. Dedmon, prescribed six sessions of post-injection therapy after each injection.

22. The post-injection prescription for the November 18 injection included electrical stimulation, ultrasound, and strengthening/range of motion.
23. The post-injection therapy for the December 11 injection included six sessions of electrical stimulation, ultrasound, and soft tissue mobilization. The Claimant was to continue heat and gentle stretching at home.
24. It was necessary to provide stretching exercises in conjunction with the post-injection passive therapy for the passive therapy to be effective.
25. Neuromuscular Institute did not provide stretching or range of motion exercises, in accordance with Dr. Freiberg's and Mr. Dedmon's prescription, after the November 18 injection.
26. The post-injection therapy provided after the November 18 trigger-point injection was not reasonably required by the nature of the Claimant's injury.
27. Neuromuscular Institute provided stretching exercises to the Claimant after the December 11 trigger point injection through a home exercise program.
28. The electrical stimulation, ultrasound, and soft tissue mobilization Neuromuscular Institute provided to the Claimant after the December 11 trigger point injection was in accordance with the prescription and was reasonably required by the nature of the Claimant's injury.
29. The hot and cold packs Neuromuscular Institute provided to the Claimant after the December 11 trigger point injection was not in accordance with the prescription and was not reasonably required by the nature of the Claimant's injury.
30. There were eleven office visits billed under CPT code 99213 and 99214 in conjunction with the post-injection therapy.
31. Office visits billed under CPT code 99213 include an evaluation and management of the Claimant's condition.
32. Office visits billed under CPT code 99213 and 99214 involve expanded problem solving history, an examination consistent with expanded problem solving, and decision making.
33. There was no need for an evaluation and management of the Claimant's condition during post-injection therapy on as frequent a basis as provided by Neuromuscular Institute.
34. Neuromuscular Institute did not provide an expanded problem solving history, an examination consistent with expanded problem solving, and decision making during the office visits.
35. There was insufficient evidence to show that the eleven office visits, or which or how many of those visits, provided in conjunction with post-injection therapy were reasonably required by the nature of the Claimant's injury.

March 10, 2004, Office Visit and Manipulation

36. The Claimant presented to Neuromuscular Institute on March 10, 2004, complaining of low-back pain, for a follow-up office visit.
37. The Claimant received a manipulation during the March 10, 2004, office visit.
38. Manipulations can be effective post-injection therapy when joint stiffness or other joint dysfunction is present.
39. There were no joint problem issues in this case.
40. There was no record of any flexibility increase after the manipulation.
41. The Claimant's records concern muscle tightness or tenderness, which is not a reason for manipulation.
42. Manipulations were not provided previously by Neuromuscular Institute for the Claimant's condition and were not a prescribed form of post-injection therapy.
43. The evidence was insufficient to show why a manipulation was reasonably required by the nature of the Claimant's condition.

Procedural Matters

44. It is undisputed that the Claimant requested a hearing not less than 20 days after receiving notice of the independent review organization determination.
45. 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.
46. There were no objections to notice or jurisdiction.
47. 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, pursuant to 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. Neuromuscular Institute had the burden of proving that the disputed treatments and services were reasonably required by the nature of the Claimant's injury. 1 TEX. ADMIN. CODE (TAC) § 155.41; 28 TAC § 148(h).
4. Neuromuscular Institute proved that electrical stimulation, ultrasound, and soft tissue mobilization provided after the December 11, 2003, trigger point injection was medically necessary. TEX. LABOR CODE § 408.021.
5. The pre-authorized work conditioning session Neuromuscular Institute provided to the Claimant on January 16, 2004, was medically necessary. TEX. LABOR CODE § 408.021.
6. Neuromuscular Institute failed to prove that any of the other disputed services were medically necessary. TEX. LABOR CODE § 408.021.

ORDER

IT IS THEREFORE ORDERED that Wausau Underwriters Insurance pay for electrical stimulation, ultrasound, and soft tissue mobilization provided by Neuromuscular Institute of Texas – PA to the Claimant after a December 11, 2003, trigger point injection, plus applicable interest, and also pay for a pre-authorized work conditioning session on January 16, 2004, provided by Neuromuscular Institute of Texas – PA to the Claimant, plus applicable interest.

IT IS ORDERED FURTHER that, except as ordered above, the claim of Neuromuscular Institute of Texas – PA on the disputed services be, and the same is hereby, denied.

SIGNED July 6, 2005

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