

**SOAH DOCKET NO. 453-05-4890.M5
TWCC MRD DOCKET NO. M5-05-1266-01**

**TEXAS MUTUAL INSURANCE
COMPANY,
Petitioner**

V.

**JACK T. BARNETT, D.C.,
Respondent**

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Texas Mutual Insurance Company (Carrier) challenged the Findings and Decision of the Medical Review Division (MRD) of the Texas Workers' Compensation Commission (TWCC)¹ that it pay Jack T. Barnett, D.C. (Provider) for chiropractic treatment and related services provided to an injured worker (Claimant). Carrier disputes the conclusion of the Independent Review Organization (IRO) that these services were medically necessary. The Administrative Law Judge (ALJ) concludes that Carrier has not met its burden of proof with respect to certain services in dispute provided to Claimant between March 29, 2004, and June 25, 2004,² but finds that Carrier has met its burden of proof with respect to the lack of medical necessity of other services provided to Claimant.³ Thus, Provider should be reimbursed for all services, except the one-on-one physical therapy, rendered between March 29, 2004, and June 25, 2004.⁴

¹ As of September 1, 2005, the functions of TWCC have been assumed by the Texas Department of Insurance, Workers' Compensation Division.

² These services were billed under CPT Code 99213 (office visits) and 97035 (ultrasound).

³ These other services were billed under CPT Code 97110 (therapeutic exercises, one-on-one).

⁴ The parties stipulated at the hearing that several dates of service would not be included in this decision: therapeutic exercises on April 1, 2004, May 29, 2004, and May 31, 2004, as well as office visits on April 7, 2004, April 14, 2004, April 19, 2004, and April 21, 2004.

I. PROCEDURAL HISTORY

ALJ Penny Wilkov convened and closed a hearing in this case on October 26, 2005, at the State Office of Administrative Hearings, Austin, Texas. Attorney Ryan T. Willett represented Carrier. Attorney Larry G. Trimble represented Provider. No party challenged jurisdiction or notice.

II. DISCUSSION

1. Background

Claimant sustained a work-related injury on____, while employed as a packer, when his left hand was pulled into the cutter, lacerating his fingers and thumb. On November 6, 2003, during a surgical procedure performed by Jerry Hyatt, M.D, Claimant's left index finger and left ring finger were amputated and his left thumb and long finger were surgically repaired.⁵ Claimant has been diagnosed with amputation stump pain, flexion contractures of the left hand, muscle atrophy, and neuritis.⁶ Claimant described symptoms of severe pain in the amputation stumps and masses on his fingers that are very sensitive to touch. Claimant's history of treatments following his injury has included chiropractic treatment, medications, ultrasound therapy, physical therapy, therapeutic exercises, and two surgeries, as well as diagnostic tests, including x-rays and an EKG/ECG.⁷

On March 10, 2004, Claimant underwent a second surgical procedure performed by Jacob Varon, M.D., to reconstruct the left and right index finger and to remove a neuroma, a nerve scar, of the left index and left ring finger.⁸ The initial date of the disputed services with Provider began on March 29, 2004, approximately three weeks after the surgical procedure. This treatment is the basis of the February 9, 2005, decision of the IRO,⁹ conducted by a chiropractic reviewer, that:

⁵ Respondent's Exhibit 5, pages 64-66, (Examination by Justo S. Avila, M.D., on April 20, 2004).

⁶ Respondent's Exhibit 5, pages 38-40. (Examination by Donna N. Canlas, M.D., on March 30, 2004).

⁷ Petitioner's Exhibit 1, pages 385-408.

⁸ Respondent's Exhibit 5, pages 29-31.

⁹ Respondent's Exhibit 1, page 5 (Specialty Independent Review Organization, Inc.).

[Claimant] developed a neuroma, which leads to supersensitivity yielding a longer healing time and a confirmed procedure complication according to [Medical Disability Advisor] Dr. Reed. The procedures, which were approved, fall within the normally accepted evaluation/management and physical therapy guidelines for rehabilitation accepted within the medical community.

Carrier denied payment for certain chiropractic services, including one-on-one therapeutic exercises, ultrasound, and office visits administered by Provider from March 29, 2004, through June 25, 2004, as not medically necessary.

B. Evidence and Argument

1. Carrier

Carrier submitted Claimant's medical records and presented the testimony of Gary N. Pamplin, M.D., a board-certified orthopedic surgeon, who disagreed with the IRO reviewing chiropractor that the disputed services were appropriate or medically necessary. Specifically, Dr. Pamplin testified that ultrasound is customarily administered immediately following surgery to soften tissue and to prevent scarring. Here, however, he noted that the ultrasound therapy was administered three weeks post-surgery, when the tissue had already healed, and that this needless treatment continued for months.

Dr. Pamplin further testified that the therapeutic exercises were ineffective and excessively supervised, principally because Claimant's exercises were unvaried in frequency, duration, or intensity. He asserted that this lack of variance resulted in a lack of significant progression in recovery, illustrated by Claimant's subjective report of pain on the first date in dispute, March 29, 2004, of a level of six on a scale of one to ten, as compared to Claimant's report of pain on June 25, 2004, of a level of six on the same scale, following three months of therapy.¹⁰ Moreover, since the exercises were simple, safe, and Claimant had been doing them repetitiously for months, Dr. Pamplin opined that therapy could have been performed in a group setting or at home, rather than under close supervision.

¹⁰ Petitioner's Exhibit 1, pages 220 and 307.

Similarly, Dr. Pamplin testified that the office visits were excessive, contending that three to six office visits during the three-month disputed period would be reasonable but thirteen office visits was excessive to monitor Claimant's condition. The frequent office visits are particularly inappropriate, according to Dr. Pamplin, when few details on range of motion, grip strength, or pain levels were identified by Provider.

Carrier also presented the deposition testimony of Raymond Scott Herbowy, a physical therapist at St. David's Rehabilitation Hospital in Austin, Texas. After reviewing Claimant's medical records, Mr. Herbowy concluded that the therapy was extensive and unnecessary. In particular, he took issue with the one-on-one physical therapy, noting that Provider's therapy was repetitious and prolonged with little justification for constant supervision.

Mr. Herbowy noted Provider's lack of a treatment goal or plan to measure progress. According to Mr. Herbowy, the normal determination of hand rehabilitation progress is to measure the range of motion, strength, and functionality of the uninjured hand and the injured hand, with the goal of restoring both hands to similar measures. He testified that since identical exercises were performed at each session without variance in frequency or duration, the nearly-equivalent results on the functional capacity exam performed on March 29, 2004,¹¹ at the beginning of the disputed period, and on June 17, 2004,¹² near the end of the disputed period, was expected.

Nevertheless, on cross-examination, Mr. Herbowy conceded that Claimant's consistent level of progression throughout the therapy could have been attributable to the severity of the injury and to the presence of a fibroma or neuroma.

2. Provider

Provider submitted medical records and testified by deposition concerning the medical necessity of treatment. Provider maintained that the services in this case were warranted by the

¹¹ Petitioner's Exhibit 1, pages 215-217.

¹² Petitioner's Exhibit 1, pages 296-301.

severity and complications of the injury, including an amputation and neuroma. He stressed that the type of treatments administered were dictated by Claimant's orthopedic surgeon, Dr. Varon, who prescribed, on March 25, 2004, April 27, 2004, and May 27, 2004, post-surgical treatment consisting of therapeutic exercises, passive and active range of motion exercises, and ultrasound, among other therapies, in conjunction with a home program.¹³ According to Provider, the short-term goal of the services was to reduce pain and increase range of motion and the long-term goal was to increase hand and arm strength and functionality, and to return Claimant to work.

Provider explained that the ultrasound was necessary due to Claimant's neuroma which resulted in constant pain and difficulty with hand movement.¹⁴ He asserted that the ultrasound treatment recommended by Dr. Varon was designed to break up scar tissue and to decrease swelling in conjunction with the therapeutic exercises.

Provider also described the active therapeutic exercise program. The program consisted of exercises using various devices: a digiflex, a trumpet-like device for finger resistance exercise; a power web, a pie-pan shaped device with finger holes for increased flexion; hand putty used for grip strength; and a Bailey, a device with nuts and bolts used for hand dexterity. Provider testified these exercises were done with the assistance of an exercise physiologist who supervised and instructed Claimant, with the intent to expedite recovery through proper instruction. Provider testified that sending Claimant home without supervision would have defeated a faster recovery, particularly when Claimant was not well educated. Provider also explained that, although the therapeutic exercises were prescribed by Claimant's surgeon, it was Provider's medical assessment and judgment, after examining Claimant's injury, that Claimant would benefit from one-on-one supervision.

Provider disputed any lack of progress, noting that Claimant was unable to significantly increase the exercises because of the pain. Provider concedes that Claimant's subjective reports of pain were unchanged, attributable to the neuroma, but pointed out that on many of the disputed treatment dates, Carrier reimbursed Provider for forty-five minutes of the one-hour one-on-one

¹³ Petitioner's Exhibit 2.

¹⁴ Petitioner's Exhibit 2.

therapeutic exercise sessions. Nevertheless, Provider emphasized that Claimant's improvement was successful since Claimant was able to return to his former job within an eight-month period.

C. Applicable Law

Under the workers' compensation system, an employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury. The employee is specifically entitled to health care that: (1) cures or relieves the effects naturally resulting from the injury; (2) promotes recovery; or (3) enhances the ability to return to or retain employment. TEX. LAB. CODE ANN. § 408.021. "Health care" includes "all reasonable and necessary medical . . . services." TEX. LAB. CODE ANN. § 401.011(19).

D. Analysis and Conclusion

Carrier has not met its burden of proof with respect to the ultrasound services, and related office visits and tests, provided to Claimant between March 29, 2004, and June 25, 2004. However, Carrier has met its burden of proof with respect to the medical necessity of one-on-one physical therapy services provided to Claimant during the same time period.

With regard to the passive therapy and related office visits and tests, Provider has demonstrated that Claimant had a more complicated injury that warranted continued care. The ultrasound treatments were necessary to reduce pain and swelling associated with the injury beyond the normal three weeks following surgery. Likewise, the office visits and tests were medically necessary to closely monitor Claimant's condition against further complications.

However, Carrier has demonstrated that the one-on-one physical therapy was not medically necessary. The reasons given by Provider for the one-on-one physical therapy-- faster recovery and Claimant's lack of education--did not provide sufficient justification for closely supervised exercises because group therapy would have been equally beneficial and more cost effective to Claimant's recovery. The use of close supervision with the enumerated physical therapy devices--a digiflex,

power web, hand putty, and a Bailey-was not necessary and could have been done in a group setting or at home, particularly when the exercises were safe, simple, and Claimant had been doing them repetitiously for months.

Further, Carrier has demonstrated that this therapy did not significantly improve Claimant's condition. Specifically, on June 17, 2004, near the end of the disputed service, Provider stated that "The patient's grip strength in the left hand is approximately 35-40% weaker than the right. The patient exhibits approximately 50% weakness in tip strength and 17% weakness in key pinch strength from the left hand."¹⁵ Since the exercises were nearly identical at each session without variance in frequency or duration, the nearly-equivalent results on the functional capacity exam performed at the beginning and at end of the disputed period of services was not demonstrative of progress or necessity.

Therefore, in conclusion, Carrier has not met its burden of proof with respect to the medical necessity of services in dispute provided to Claimant between March 29, 2004, and June 25, 2004, including procedures billed under CPT Code 99213 (office visits) and CPT Code 97035 (ultrasound). However, Carrier has met its burden of proof with respect to the medical necessity of the service in dispute provided to Claimant billed under CPT Code 97110 (therapeutic exercises, one-on-one).

III. FINDINGS OF FACT

1. An injured worker (Claimant) sustained a work-related injury on____, while employed as a packer, when his left hand was pulled into the cutter, lacerating his fingers and thumb.
2. On November 6, 2003, during a surgical procedure performed by Jerry Hyatt, M.D, Claimant's left index finger and left ring finger were amputated and his left thumb and long finger were surgically repaired.
3. Claimant has been diagnosed with amputation stump pain, flexion contractures of the left hand, muscle atrophy, and neuritis.
4. Claimant described symptoms of severe pain in the amputation stumps and masses on his fingers that are very sensitive to touch.

¹⁵ Petitioner's Exhibit 1, pages 296-300.

5. Claimant's history of treatments following his injury has included chiropractic treatment, medications, ultrasound therapy, physical therapy, therapeutic exercises, and two surgeries, as well as diagnostic tests, including x-rays and an EKG/ECG.
6. On March 10, 2004, Claimant underwent a second surgical procedure performed by Jacob Varon, M.D., to reconstruct the left and right index finger and to remove a neuroma, a nerve scar, of the left index and left ring finger.
7. At the time of the injury, Claimant's employer had its workers' compensation insurance through Texas Mutual Insurance Company (Carrier).
8. Claimant has seen several physicians since the date of the injury but, at the time period in issue, Claimant was receiving physical therapy and treatment by Jack T. Barnett, D.C. (Provider).
9. Provider submitted a claim to Carrier for treatment rendered to Claimant between March 29, 2004, and June 25, 2004, including procedures billed under CPT Code 99213 (office visits), CPT Code 97035 (ultrasound), and CPT Code 97110 (therapeutic exercises, one-on-one).
10. Carrier denied Provider's request for reimbursement.
11. Provider requested medical dispute resolution with the Texas Workers' Compensation Commission's (Commission) Medical Review Division.
12. An Independent Review Organization concluded that treatments rendered from March 29, 2004, until June 25, 2004, were medically necessary.
13. Carrier filed a request for a hearing before the State Office of Administrative Hearings on March 2, 2005.
14. The Commission sent notice of the hearing to the parties on March 23, 2005. The hearing notice informed the parties of the time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; the statutes and rules involved; and the matters asserted.
15. The hearing convened on October 26, 2005, before Administrative Law Judge Penny Wilkov at the State Office of Administrative Hearings (SOAH), Austin, Texas. Attorney Ryan T. Willett represented Carrier. Attorney Larry G. Trimble represented Provider. No party challenged jurisdiction or notice.
16. This case was referred by the Commission and accepted by SOAH for hearing prior to September 1, 2005.
17. With regard to the ultrasound therapy and related office visits and tests, Claimant had a more complicated injury that warranted continued passive care.

18. The ultrasound treatments were necessary to reduce pain and swelling associated with the injury beyond the normal three weeks following surgery.
19. The office visits and tests were necessary to closely monitor Claimant's condition against further complications, particularly since Claimant had a neuroma and amputations.
20. The use of close supervision with a digiflex, a trumpet-like device for finger resistance exercise; a power web, a pie-pan shaped device with finger holes for increased flexion; some hand putty used for grip strength; and a Bailey, a device with nuts and bolts for hand dexterity, was not medically necessary and could have been done in a group setting.
21. Since the exercises were simple, safe, and Claimant had been doing them repetitiously for months, the exercises could have been performed in a group setting or at home, rather than under close supervision.
22. Since the exercises were nearly identical at each session without variance in frequency or duration, the nearly-equivalent results on the functional capacity exam performed at the beginning and at end of the disputed period of services was not demonstrative of progress or necessity of the one-on-one therapeutic exercises.
23. Carrier has not shown that the disputed services rendered from March 29, 2004 until June 25, 2004, for the ultrasound and related office visits and tests were not medical necessary.
24. Carrier has shown that the disputed services rendered from March 29, 2004 until June 25, 2004, for one-on-one physical therapy was not medically necessary.

IV. CONCLUSIONS OF LAW

1. The State Office of Administrative Hearings (SOAH) has jurisdiction over matters related to the hearing, including the authority to issue a decision and order, pursuant to TEX. LAB. CODE ANN. §§ 413.073(b) and 413.031(k) and TEX. GOV'T CODE ANN. ch. 2003 and Acts 2005, 79th Leg., ch. 265, § 8.013, eff. Sept. 1, 2005.
2. Provider timely filed a request for hearing before SOAH, as specified in 28 TEX. ADMIN. CODE § 148.3.
3. The parties received proper and timely notice of the hearing pursuant to TEX. GOV'T CODE ANN. ch. 2001 and 1 TEX. ADMIN. CODE § 155.27.
4. Carrier had the burden of proving the case by a preponderance of the evidence pursuant to 28 TEX. ADMIN. CODE § 148.14(a).

5. An employee who has sustained 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 cures or relieves the effects naturally resulting from the compensable injury, promotes recovery, or enhances the ability of the employee to return to or retain employment. TEX. LAB. CODE ANN. § 408.021(a).
6. Health care includes all reasonable and necessary medical services. TEX. LAB. CODE ANN. § 401.011(19)(A).
7. Carrier failed to establish that the therapy modalities billed under CPT Code 99213 (office visits) and CPT Code 97035 (ultrasound) are not reimbursable under TEX. LAB. CODE ANN. §§ 401.011(19) and 408.021(a). Carrier should reimburse for these services under TEX. LAB. CODE ANN. §§ 401.011(19) and 408.021(a).
8. Carrier has established that the modality billed under CPT Code 97110 (therapeutic exercises, one-on-one) is not reimbursable under TEX. LAB. CODE ANN. §§ 401.011(19) and 408.021(a). Carrier should not reimburse Provider for these services provided to Claimant for his compensable injury.

ORDER

IT IS ORDERED that Jack Barnett, D.C., is entitled to reimbursement by Texas Mutual Insurance Company for the therapy modalities provided to Claimant between March 29, 2004, and June 25, 2004, billed under CPT Code 999213 (office visits) and CPT Code 97035 (ultrasound) but is not entitled to reimbursement for the physical modality billed under CPT Code 97110 (therapeutic exercises, one-on-one).

SIGNED December 6, 2005.

**PENNY WILKOV
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**