

**SOAH DOCKET NO. 453-05-4909.M5  
MR TRACKING NO. M5-04-4123-01**

<b>TEXAS MUTUAL INSURANCE COMPANY,     Petitioner</b>	§ § § § § § § § §	<b>BEFORE THE STATE OFFICE   OF  ADMINISTRATIVE HEARINGS</b>
<b>V.</b>		
<b>JACK BARNETT, D.C./AIRLINE CHIROPRACTIC &amp; REHAB,     Respondent</b>		

**DECISION AND ORDER**

Texas Mutual Insurance Company (Carrier) appealed the decision of the Medical Review Division (MRD) of the Texas Workers' Compensation Commission (TWCC)<sup>1</sup> ordering reimbursement for electrical stimulation, ultrasound, therapeutic exercises, massage therapy, chiropractic manipulative treatment, office visits, and a thoracic rib belt provided to Claimant from August 4, 2003, through May 3, 2004. Carrier has denied Provider's requested reimbursement of \$8,854 on the basis that the treatment was not reasonable or medically necessary. The Administrative Law Judge (ALJ) finds that one unit per day of therapeutic exercise on August 18, 20, and 25, 2003, and September 3, 2003, and the thoracic belt were medically necessary, but that the remaining disputed treatment was not reasonable and medically necessary. Therefore, Provider is to be reimbursed \$35.91 per unit per day, for a total of \$143.64 for therapeutic exercise, and \$15.56 for the thoracic belt, for total reimbursement of \$159.20.

**I. PROCEDURAL HISTORY**

The parties did not contest notice or jurisdiction, which are addressed in the Findings of Fact and Conclusions of Law below.

ALJ Sharon Cloninger convened the hearing on May 24, 2006, at the State Office of Administrative Hearings (SOAH), William P. Clements Building, 300 West 15<sup>th</sup> Street, Fourth

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<sup>1</sup> Effective September 1, 2005, TWCC's functions were transferred to the Texas Department of Insurance, Division of Workers' Compensation.

Floor, Austin, Texas. Carrier was represented by Katie Kidd, attorney. Provider was represented by Larry G. Trimble, attorney.

Carrier offered two exhibits, which were admitted, and called N. C. Tsourmas, M.D., and William Defoyd, D.C., as witnesses. Provider offered one exhibit, which was admitted, and called John Connell, D.C., as a witness. After the presentation of evidence, the hearing concluded and the record closed that same day.

## **II. APPLICABLE 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. 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(a).

## **III. FINDINGS OF FACT**

1. Claimant sustained a compensable work-related injury on\_\_\_\_, when he was involved in a traffic accident.
2. Texas Mutual Insurance Company (Carrier) was the workers' compensation insurer for Claimant's employer on\_\_\_\_.
3. Claimant's compensable injury was diagnosed as rib fractures, post-concussion syndrome, respiratory dysfunction, left shoulder sprain/strain, and cervical sprain/strain.
4. On the date of the traffic accident, Claimant was treated at the General Medical Center (the Center) in Baton Rouge, Louisiana, where James Gill, M.D., released him to return to work with restrictions.
5. Upon release from the Center, Claimant returned to Houston and was treated by the company doctor, who prescribed pain medication for him.
6. John Connell, D.C.,<sup>2</sup> of Airline Chiropractic & Rehab (Provider) began treating Claimant on May 30, 2003, with passive modalities to the cervical and lumbar regions and the shoulder while the rib fractures healed.

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<sup>2</sup> Although the medical records in evidence indicate Jack Barnett, D.C., was Claimant's treating doctor at Provider's office, testimony established that Dr. Connell treated Claimant.

7. Claimant was beyond the acute phase of care by August 4, 2003, having undergone passive modalities for two-and-a-half months by that time, without significant improvement to his condition.
8. Passive modalities have no applicability after the acute phase of care, unless used in conjunction with active modalities for patients experiencing increased spasms, pain levels, or soreness after starting active modalities.
9. After August 4, 2003, Claimant did not experience increased spasms, pain levels, or soreness due to beginning active modalities, so passive modalities were not indicated after that date.
10. From August 4, 2003, through May 3, 2004, Provider's disputed treatment of Claimant included the passive modalities of electrical stimulation, ultrasound, massage therapy, and chiropractic manipulation.
  - a. The disputed electrical stimulation (CPT Code 97032) provided on 12 dates from August 5 through September 3, 2003, did not relieve the effects naturally resulting from Claimant's injury, promote his recovery, or enhance his ability to return to or retain employment.
  - b. The disputed ultrasound (CPT Code 97035) provided on 12 dates from August 5 through September 3, 2003, did not relieve the effects naturally resulting from Claimant's injury, promote his recovery, or enhance his ability to return to or retain employment.
  - c. The disputed massage therapy (CPT Code 97214) provided on 10 dates from August 11 through September 3, 2003, did not relieve the effects naturally resulting from Claimant's injury, promote his recovery, or enhance his ability to return to or retain employment.
  - d. The chiropractic manipulative treatment of Claimant's spine (CPT Code 98940) provided on three dates from August 27 through September 3, 2003, and on November 5, 2003, and the chiropractic manipulative treatment of Claimant's shoulder (CPT Code 98943) provided on 67 dates from August 15, 2003 through March 10, 2004, did not relieve the effects naturally resulting from Claimant's injury, promote his recovery, or enhance his ability to return to or retain employment.
11. An MRI of Claimant's lumbar spine without contrast on August 5, 2003, revealed an L4-5 disc protrusion, mild facet/ligamentary hypertrophy at L4-5 and L5-S1, and congenital stenosis of the L4 through S1 motion segments. An MRI of Claimant's sacrum and sacroiliac joints on that same date indicated no abnormalities.
12. Provider's disputed treatment of Claimant included one-on-one therapeutic exercises (CPT Code 97110) provided on 39 dates from August 18 through December 15, 2003, and on 10 dates from March 22 through April 16, 2004.
  - a. Prior to August 5, 2003, Claimant had not undergone active rehabilitation with any caregiver following his compensable injury.

- b. Claimant progressed from passive care to active care on August 5, 2003, and needed one-on-one instruction on August 18 and 20, 2003, to learn how to correctly perform the exercises, as well as on August 25, 2003, when two new exercises were introduced, and September 3, 2003, when he began using the upper extremity bicycle.
  - c. On August 5, 2003, Provider instructed Claimant to engage in a home exercise program of walking.
  - d. On October 15, 2003, when Claimant began using the treadmill in Provider's office, he had already been walking as part of a home exercise program for more than two months, so he did not need one-on-one supervision on the treadmill.
  - e. Provider's procedure regarding therapeutic exercise is to always provide patients with one-on-one supervision in the rehabilitation area, and to never provide group exercises.
  - f. Beginning December 12, 2003, Claimant progressed to use of a gym ball, the total gym leg press, and single knee and double knee stretching, which could have been learned in a group setting.
  - g. Following Claimant's lumbar epidural steroid injections on March 18 and April 13, 2004, and his caudal epidural steroid injection on April 13, 2004, at which time his diagnosis was lumbar/sacral radiculopathy and chronic lower back pain, it could have been medically necessary to provide therapeutic exercise with one-on-one supervision if Claimant's home exercise program needed to be augmented. However, Claimant's home exercise program was not augmented, and his in-office exercise program was not changed, so the one-on-one supervision of Claimant's therapeutic exercise provided March 22 through April 16, 2004, was not reasonable or medically necessary.
13. Provider gave Claimant a thoracic rib belt (CPT Code L0210) on August 8, 2003.
14. On August 13, 2003, Claimant saw Lubor Jarolimek, M.D., P.A., an orthopedist, who advised him to decrease use of a splint around his thorax and to progress to rehabilitation therapy as tolerated.
15. Provider requested reimbursement for office visits (CPT Code 99214) by Claimant on August 5, September 8, October 13, November 10, and December 15, 2003, and February 23, 2004.
- a. CPT Code 99214 is used for office visits in which there is evaluation and management of an established patient with at least two of the following three key
  - b. components: a detailed history; a detailed examination; medical decision making of moderate complexity. Counseling and/or coordination of care with other providers or

- agencies are provided consistent with the nature of the problem(s) and the patient's needs and/or the family's needs. Usually, the presenting problem(s) are of moderate to high severity. Physicians typically spend 25 minutes face-to-face with the patient and/or family.
- b. Office visits for a patient with Claimant's condition are reasonable and medically necessary on a monthly basis, and possibly every three-to-four weeks, so long as the requirements of CPT Code 99213 or 99214 are met.
  - c. Dr. Connell met with Claimant on the disputed dates of service for re-examination, review of pertinent information received, to go over documents with Claimant, to check his range of motion and neurologic test results, and to address changes in status for a future treatment plan or referrals.
  - d. The office visits on the disputed dates of service did not meet at least two of the three key components set out in CPT Code 99214.
  - e. The office visits on the disputed dates of service were not reasonable or medically necessary.
16. Between August 12, 2003, and February 10, 2004, Donna N. Canlas, M.D., prescribed pain medication for Claimant and observed his pain to remain at 6, 7, or 8 on a scale of 1 to 10, with 10 being the most intense pain. Specifically, Claimant's pain level on August 12, 2003, was 6; on October 9, 2003, was 8; on November 18, 2003, was 6; on December 16, 2003, was 7; on January 13, 2004, was between 6 and 7; and on February 10, 2004, was 6.
17. Claimant's subjective pain level did not significantly improve over the course of the disputed treatment.
18. Claimant's range of motion improved between August 5, 2003, and March 29, 2004.
- a. Between August 5, 2003, and March 29, 2004, Claimant's right shoulder flexion progressively improved from 90 degrees to 150 degrees; left shoulder flexion from 95 degrees to 148 degrees; right shoulder extension from 30 degrees to 50 degrees; left shoulder extension from 15 degrees to 48 degrees; right shoulder abduction from 110 degrees to 140 degrees; left shoulder abduction from 85 degrees to 138 degrees; right shoulder adduction from 20 degrees to 50 degrees and left shoulder adduction from 10 degrees to 40 degrees; right shoulder internal rotation from 75 degrees to 78 degrees; left shoulder internal rotation from 45 degrees to 74 degrees; and right shoulder external rotation from 25 degrees to 90 degrees and left shoulder external rotation from 35 degrees to 90 degrees.
  - b. Between August 5, 2003, and December 15, 2003, Claimant's cervical flexion improved from 42 degrees to 54 degrees; cervical extension from 36 degrees to 50

degrees; right lateral flexion from 32 degrees to 42 degrees; left lateral flexion from 34 degrees to 40 degrees; right rotation from 70 degrees to 80 degrees; and left rotation from 70 degrees to 80 degrees, and remained substantially the same through March 29, 2003.

- c. Between September 8, 2003, and December 15, 2003, Claimant's lumbar flexion progressively improved from 26 degrees to 68 degrees; extension from 24 degrees to 30 degrees; right lateral flexion from 14 degrees to 26 degrees; and left lateral flexion from 14 degrees to 28 degrees, and remained substantially the same through March 29, 2004.
19. The improvement in Claimant's range of motion was due to the passage of time, not due to Provider's treatment.
  20. Carrier denied Provider's claim for the above services on the basis that the treatment was not reasonable or medically necessary.
  21. On August 1, 2004, Provider filed a request for medical dispute resolution with the Texas Workers' Compensation Commission's Medical Review Division (MRD), asking for reimbursement for the above-described services.
  22. The MRD issued a decision on February 10, 2005, stating that Provider prevailed on some, but not all, disputed issues of medical necessity, after its review of the Independent Review Organization (IRO) decision issued February 3, 2005, in this dispute.
  23. On March 2, 2005, Carrier requested a hearing before the State Office of Administrative Hearings (SOAH) to contest the MRD decision.<sup>3</sup>
  24. On March 30, 2005, TWCC mailed notice of the hearing to Carrier and Provider.
  25. The notice contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
  26. On May 24, 2006, SOAH Administrative Law Judge Sharon Cloninger held a hearing on the Carrier's appeal in the William P. Clements Building, Fourth Floor, 300 West 15<sup>th</sup> Street, Austin, Texas. Carrier was represented by Katie Kidd, attorney. Provider was represented by Larry G. Trimble, attorney. The hearing concluded and the record closed that same day.

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

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<sup>3</sup> Provider did not request a hearing regarding the services the MRD found were not medically necessary.

1. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this case, including the authority to issue a decision and order, pursuant to TEX. LABOR CODE ANN. §413.031(k) and TEX. GOV'T CODE ANN. ch. 2003.
2. Carrier timely filed notice of appeal of the decision of TWCC's MRD, as specified in 28 TEX. ADMIN. CODE (TAC) § 148.3.
3. Proper and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. § 2001.052 and 28 TAC § 148.4(b).
4. As the party contesting the MRD decision, Carrier had the burden of proving the case by a preponderance of the evidence.
5. Based on the above Findings of Fact and pursuant to TEX. LABOR CODE § 408.021(a), Provider's treatment of Claimant's compensable injury was neither reasonable nor medically necessary, except for one unit each of therapeutic exercise (CPT Code 97110) on August 18, 20, 25, and September 3, 2003, and the provision of a thoracic rib belt on August 8, 2003.
6. Based on the above Findings of Fact and Conclusions of Law, Carrier's appeal should be granted in part and denied in part.

### **ORDER**

IT IS, THEREFORE, ORDERED that Jack Barnett, D.C./Airline Chiropractic & Rehab is entitled to reimbursement in the amount of \$143.64 for one unit each of therapeutic exercise (CPT Code 97110) provided to Claimant on August 18, 20, 25, and September 3, 2003, and \$15.56 for the thoracic belt (CPT Code L0210), for a total of \$159.20.

**SIGNED June 22, 2006.**

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**SHARON CLONINGER  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS**