

**SOAH DOCKET NO. 453-05-6735.M5  
TWCC MR NO. M5-05-0682-01**

<b>NEUROMUSCULAR INSTITUTE OF TEXAS, P.A., Petitioner</b>	§ § § § § § § § §	<b>BEFORE THE STATE OFFICE     OF    ADMINISTRATIVE HEARINGS</b>
<b>V.</b>		
<b>ACE USA/ESIS, Respondent</b>		

**DECISION AND ORDER**

**I. PROCEDURAL HISTORY**

Neuromuscular Institute of Texas (Petitioner) requested a hearing to contest the Findings and Decision of the Texas Workers' Compensation Commission<sup>1</sup> (Commission) acting through Intracorp, an Independent Review Organization (IRO). The Commission's decision denied Petitioner reimbursement for therapeutic procedures and exercises, ultrasound, paraffin bath, manual therapy techniques, functional capacity evaluation (FCE), and occupational therapy re-evaluation for the period January 19, 2004, though March 17, 2004, (Disputed Services)<sup>2</sup> based on a lack of medical necessity.

This decision denies the relief sought by Petitioner and declines to order reimbursement for the disputed services.

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

<sup>2</sup> Payment for work status reports (CPT Code 99080-73) issued January 28 and February 16, 2004, was initially denied by Respondent and disputed by Petitioner. Reimbursement for those services was ultimately paid, however, so those services are no longer in dispute. Respondent's Exhibit 2, Tab 2.

The hearing convened on January 23, 2006, before Administrative Law Judge (ALJ) Ami L. Larson. Allan T. Craddock represented Petitioner. Javier Gonzalez, insurance adjustor, represented USA/ACE ESIS (Respondent). There were no contested issues of notice or jurisdiction. Brad Burdin, D.C., Claimant's treating doctor, testified for Petitioner. Dr. Maury Guzick, D.C., testified for Respondent. Petitioner and Respondent each offered two documentary exhibits, which were admitted as evidence. The record closed the same day, following adjournment of the hearing.

## **II. SUMMARY OF CLAIMANT'S TREATMENT HISTORY**

### **A. PRIOR TO DATES OF DISPUTED SERVICES**

\_\_\_ Claimant) had been employed as a seamstress for Levi Strauss Company for more than 20 years when she sustained a work related injury. Claimant initially injured her left thumb on or about \_\_\_\_. Shortly after that injury occurred, Claimant was treated by Dr. William Sanders and referred to physical therapy, in which she engaged for approximately one month while she continued to work.<sup>3</sup> She again injured her left thumb by hyperextension while she was working with a large bundle of fabric on March 16, 2002.<sup>4</sup> Following that injury, Claimant initially saw Dr. Sanders for treatment, which included three months of therapy and the use of a thumb splint. In January 2003, however, Claimant decided to change her treating doctor to Brad Burdin, D.C.,<sup>5</sup> in an effort to avoid injections or surgery, which had been suggested to her by Dr. Sanders.

Dr. Burdin initially examined Claimant on January 21, 2003, for her work related thumb injury. At that time, he noted that her subjective pain report was generally a seven out of ten and that pain was interfering with her activities of daily living. Dr. Burdin evaluated Claimant to

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<sup>3</sup> Respondent's Exhibit 1, page 5.

<sup>4</sup> Although the disputed services appear to have been precipitated by the \_\_\_ injury, the date of injury listed in the documentary evidence is \_\_\_\_. It is not clear from the record what specific injury Claimant sustained in \_\_\_\_, but regardless of the actual date of injury, the matter of compensability has already been determined and is not an issue in this case.

<sup>5</sup> Dr. Burdin is employed by Petitioner.

determine her functional capacity in several areas and diagnosed Claimant with a moderately severe sprain. He noted that her condition persisted one year post-injury, notwithstanding prior therapy and splinting, and recommended an MRI of Claimant's left thumb as well as a Physical Performance Evaluation (PPE) for purposes of obtaining objective information regarding Claimant's grip and strength ability.<sup>6</sup>

On February 5, 2003, following the MRI,<sup>7</sup> Claimant saw Dr. Burdin, who noted that the MRI revealed swelling in Claimant's left thumb joint. He again evaluated Claimant and observed that she continued to have limited extension of her left thumb and that extension and flexion caused pain, as did palpation of the thumb joint. Dr. Burdin stated that Claimant desired to avoid surgery and he recommended that she engage in three weeks of physical therapy and continue wearing her thumb splint.<sup>8</sup>

Claimant continued to work but began physical therapy with Petitioner on February 20, 2003. Therapy notes from that date indicate that Claimant performed several exercises, including full tendon excursions and tendon glides, and was given ultrasound treatment and hot/cold packs. Notes from that date also indicate that Claimant's performance of her job tasks were preventing her thumb from healing.<sup>9</sup> Claimant completed additional physical therapy sessions on February 24, 26, and 28 and March 5, 6, and 7, 2003, during which the exact same treatment modalities appear to have been administered.<sup>10</sup> Therapy notes from her third session on February 26, 2003, indicate that Claimant was continuing to work without restrictions and able to complete all therapy exercises with no verbal

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<sup>6</sup> Petitioner's Exhibit 1, pages 81- 82.

<sup>7</sup> The MRI was conducted on January 23, 2003.

<sup>8</sup> Petitioner's Exhibit 1, page 83.

<sup>9</sup> *Id.* at 153.

<sup>10</sup> *Id.* at 154-159.

cues required, but was unable to tolerate increased activity due to pain. The therapist instructed Claimant to follow up with Dr. Burdin about the possibility of being taken off work.<sup>11</sup>

Therapy notes from the March 5, 2003, session indicate that although Claimant continued to have a high level of pain with therapy, she was able to complete all exercises.<sup>12</sup> The following day, March 6, 2003, Claimant had another therapy session during which, according to the notes, she tolerated all activities without complaints or difficulties.<sup>13</sup> Additional therapy took place again on March 7, 2003, during which Claimant was able to complete all exercises with minimal verbal cues and did not experience increased pain with therapy.<sup>14</sup> That same day, Claimant saw Dr. Burdin for a follow-up visit. Dr. Burdin, after talking to Claimant's therapist, Kipp Clayton, O.T.R., recommended that Claimant continue therapy but discontinue work for a month in order to allow her thumb to heal without reinjury from her work activities.<sup>15</sup>

On March 10, 2003, Claimant returned to therapy. The notes for that day reflect that she completed and demonstrated good form on all hand exercises.<sup>16</sup> Notes from Claimant's next therapy sessions on March 12 and 14, 2003, indicate that Claimant completed all prescribed exercises with no problem, although she experienced pain with resistive movements. On March 17 and 19, 2003, Claimant attended therapy sessions during which she completed all exercises without problems and with minimal verbal cues, but no strengthening exercises were administered due to pain.<sup>17</sup> The

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<sup>11</sup> *Id.* at 155.

<sup>12</sup> *Id.* at 157.

<sup>13</sup> *Id.* at 158.

<sup>14</sup> *Id.* at 159.

<sup>15</sup> *Id.* at 84.

<sup>16</sup> *Id.* at 160.

<sup>17</sup> *Id.* at 163 -164.

notes from the March 19, 2003 session indicate that Claimant was not making progress with physical therapy rehabilitation and recommend she be re-evaluated by her treating therapist.<sup>18</sup>

On March 21, 2003, Claimant underwent a physical therapy re-evaluation during which she reported her pain level to be at a seven and that she continued to have increased pain with increased activity as well as difficulty grasping objects, holding pots, and opening doors with her left hand. She was discharged from therapy at that time due to lack of progress. On March 28, 2003, Dr. Burdin referred Claimant to Terry Westfield, M.D., for a hand surgical consult. Dr. Westfield saw Claimant and recommended she undergo injections.

On April 1, 2003, Claimant was seen by Charles F. Xeller, M.D., an orthopaedic surgeon, for an independent medical evaluation. Dr. Xeller reported his belief that Claimant had a left trigger thumb and that surgery was indicated, but Claimant could continue to work while wearing her thumb splint<sup>19</sup>.

Claimant was evaluated and released back to work with restrictions by Dr. Burdin on May 5, 2003, after she had received one injection and scheduled another to be administered. Claimant was again seen by Dr. Xeller on May 29, 2003. Dr. Xeller found that the X-rays taken of Claimant's thumb were basically normal and continued his recommendation for surgery to treat her left trigger thumb. On June 11, 2003, Claimant returned to see Dr. Burdin following another injection from which she reported little benefit. At that time Claimant did not wish to continue with injections, nor did she want surgery. Dr. Burdin suggested that she undergo a Functional Capacity Evaluation (FCE) to determine if there was any way to change her work status, notwithstanding his doubts about the feasibility of doing so.<sup>20</sup> An FCE was completed on June 13, 2003, and Claimant saw Dr. Burdin on June 18, 2003. Based on Claimant's ability to complete the full 60 minutes of job

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<sup>18</sup> *Id.* at 164.

<sup>19</sup> Respondent's Exhibit 1, page 13.

<sup>20</sup> *Id.* at 90.

simulation with a reported pain level of six out of ten, Dr. Burdin released her back to work at half regular and half restricted duty.<sup>21</sup>

Claimant was seen again by Dr. Burdin on July 18, 2003, at which time he increased her hours of regular work duty based upon her ability to tolerate her workload quite well. On August 19, 2003, Dr. Burdin returned Claimant to work full-time without restrictions, although her pain continued and she was not improving.

Following two additional evaluations by Dr. Westfield, it was determined that Claimant would undergo trigger release surgery in October 2003, but she continued to work until the time of the surgery.

Claimant's surgery took place on October 28, 2003, and she began another 12-session course of therapy with Petitioner on November 17, 2003. On December 11, 2003, Claimant was again evaluated by Dr. Westfield, who indicated that the triggering in her left thumb had resolved, but Claimant was having some difficulties with her left middle finger. After completion of the first 12 sessions of physical therapy, on December 31, 2003, Claimant was referred to occupational therapy in order to facilitate healing and return to work status.<sup>22</sup>

On January 2, 2004, Claimant began the next 12-session segment of occupational therapy with Petitioner. Between January 2 and 15, 2004, Claimant underwent an additional seven sessions of occupational therapy, during which the same treatment modalities were performed<sup>23</sup> and the mobility in her left thumb increased, but she continued to have pain and difficulty performing activities of daily living.

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<sup>21</sup> *Id.* at 91.

<sup>22</sup> Petitioner's Exhibit 1, page 181-2.

<sup>23</sup> An additional exercise was added to Claimant's regimen on January 9, 2004, and on January 14, 2004. Those additional exercises were repeated in the following sessions.

## **B. DURING DATES OF DISPUTED SERVICES**

Claimant continued with the same therapy regimen,<sup>24</sup> for five additional sessions, which took place on January 19, 20, 23, and 26 and February 6, 2004

Dr. Burdin saw Claimant again on January 28, 2004, and evaluated her functional capacity with respect to flexion and extension, as well as grip and pinch strength. Dr. Burdin's notes reveal that Claimant continued to have pain and functional limitations, but he recommended that she continue more occupational therapy and undergo a PPE to obtain additional information regarding her thumb strength and range of motion.

On February 4, 2004, a PPE was performed by Claimant's occupational therapist, who noted that, notwithstanding some progress in the areas of strength and mobility, Claimant continued to experience pain and difficulty performing activities of daily living. The PPE plan was to continue with therapy and continue the same goals set at the December 31, 2003 evaluation.

Following the PPE, Claimant completed 12 more sessions<sup>25</sup> of occupational therapy from February 6 through March 11, 2004, during which the same exercise and treatment regimen was employed, but little progress was made, according to the therapist's notes.

On February 23, 2004, Claimant was evaluated by Miguel J. Saldana, M.D., F.A.C.S., a designated doctor. Dr. Saldana reviewed Claimant's medical history and examined Claimant. He found that no special diagnostic procedures or tests were necessary and that Claimant's condition was not likely to improve with additional surgical intervention or active medical care. Dr. Saldana assigned Claimant a one percent whole person impairment rating and opined that she had reached maximum medical improvement.

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<sup>24</sup> This regimen included all the exercises Claimant had performed during at least twelve sessions before her surgery and an additional 19 sessions post-surgery.

<sup>25</sup> These sessions took place on February 6, 11, 12, 16, 18, 19, and 25 and March 1, 3, 5, 8 and 11, 2004.

As indicated above, Claimant continued therapy through March 11, 2004, at which time she was re-evaluated and released. The notes from her March 11, 2004 re-evaluation indicate that she reported a pain level of six out of ten at rest, and nine out of ten with increased activity.<sup>26</sup> Additionally, Claimant reported that all her daily living tasks that required grasping or any involvement of her left thumb were affected and that she continuously dropped objects due to lack of strength in her hand.

Claimant also saw Dr. Burdin on March 11, 2004, at which time he recommended that she undergo a Functional Capacity Evaluation (FCE).<sup>27</sup> As the result of the FCE completed on March 17, 2004, Dr. Burdin released Claimant to work without restrictions on March 22, 2004.

## II. ANALYSIS

By the time Carrier declined to pay for the therapy disputed in this case, Claimant had already participated in approximately 31 supervised physical and occupational therapy sessions after her October surgery. Additionally, prior to her surgery, she had participated in 12 sessions of therapy with Petitioner and several months of therapy with another provider. During the entire course of Claimant's therapy, she performed largely the same set of exercises. Ultimately, she returned to work full time without restrictions although she continued to complain of pain and functional impairments similar to what she reported pre-surgery.

Although Dr. Burdin testified about the purpose of the disputed therapy modalities employed, he did not address, and there is no evidence in the record to support, Claimant's need for supervised therapy during the dates of disputed services. There is no evidence that Claimant was unable to understand or perform the exercises on her own by the time Respondent declined to pay for the disputed services. In fact, the evidence shows that Claimant routinely completed all exercises without the need for much, if any, intervention. Moreover, credible evidence in the record shows

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<sup>26</sup> Petitioner's Exhibit 1, pages 207-209.

<sup>27</sup> Petitioner's Exhibit 1, page 99.

that, barring complications, of which none were noted in the record, Claimant should have been released to a home exercise program four to six weeks after her surgery.<sup>28</sup>

Similarly, Dr. Burdin testified about the difference between and purposes for PPEs and FCEs in general but did not sufficiently explain why, in light of all the office visits and evaluations that were done of Claimant by him and other doctors and therapists, the disputed PPE or FCE was medically necessary.

Petitioner had the burden of proof in this proceeding and failed to show, by a preponderance of the evidence, that any of the Disputed Services were medically necessary.

### **III. FINDINGS OF FACT**

1. \_\_\_\_ (Claimant) sustained a work related injury to her left thumb on or about\_\_\_\_\_.
2. Following that injury, Claimant was treated by Dr. William Sanders. She continued to work and engaged in physical therapy for approximately one month.
3. Claimant again injured her left thumb at work on or about\_\_\_\_\_.
4. Following that injury, Claimant initially saw Dr. Sanders, who prescribed three months of therapy and a thumb splint and later recommended that Claimant undergo injections or surgery.
5. In January 2003, Claimant changed her treating doctor to Brad Burdin, D.C., an employee of the Neuromuscular Institute of Texas, P.A. (Petitioner), in an effort to avoid injections or surgery.
6. On January 21, 2003, Dr. Burdin examined and evaluated Claimant with respect to her work related injury. Claimant's subjective pain rating was seven out of ten, and the pain was interfering with her performance of activities such as sleeping, working, and picking up objects.
7. Dr. Burdin diagnosed Claimant with a moderately severe sprain and recommended an MRI and a Physical Performance Evaluation (PPE) be performed.

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<sup>28</sup> Dr. Guzick and both peer review doctors opined that, to the extent she needed further therapy after the initial four to six weeks, Claimant should have been placed on a home exercise program. Respondent's Exhibit 2, Tab5.

8. On January 23, 2003, an MRI was performed, which revealed swelling in Claimant's left thumb joint.
9. Following his review of the MRI report, Dr. Burdin re-evaluated Claimant and recommended three weeks of physical therapy and continued use of a thumb splint.
10. Claimant continued to work and participated in seven sessions of physical therapy with Petitioner from February 20 through March 7, 2003.
11. On March 7, 2003, Dr. Burdin saw Claimant and recommended she discontinue work for one month but continue therapy.
12. Between March 10 and 17, 2003, Claimant completed an additional seven sessions of physical therapy but did not make progress.
13. On March 28, 2003, Claimant was referred to Dr. Westfield for further evaluation. Dr. Westfield recommended she undergo injections.
14. On April 21, 2003, Claimant was evaluated by Charles F. Xeller, M.D., an orthopaedic surgeon, for an independent medical evaluation. Dr. Xeller found that Claimant had a left trigger thumb and recommended surgery, but opined that Claimant could continue to work with a thumb splint.
15. On May 5, 2003, after having received one injection, Claimant was released back to work with restrictions by Dr. Burdin.
16. Following an additional injection, administration of a Functional Capacity Evaluation (FCE), and several additional evaluations by Drs. Burdin and Westfield, trigger release surgery was scheduled for Claimant in October 2003.
17. Claimant underwent trigger release surgery on her left thumb on October 28, 2003.
18. On November 17, 2003, Claimant began another 12-session course of physical therapy with Petitioner.
19. On December 11, 2003, Dr. Westfield found that Claimant's left thumb was improved and was no longer triggering.
20. Claimant completed 12 sessions of physical therapy and on December 31, 2003, was referred by Dr. Burdin to 12 additional sessions of occupational therapy.
21. On January 2, 2004, Claimant began a 12-session course of occupational therapy with Petitioner.

22. Between January 2 and 15, 2004, Claimant underwent an additional seven sessions of therapy, during which most of the exercises employed had been used in prior sessions and after which she continued to experience pain and difficulty performing activities of daily living.
23. Claimant continued with the same therapy regimen for five additional sessions on January 19, 20, 23, and 26 and February 6, 2004.
24. On February 4, 2004, a PPE resulted in findings that Claimant had made some progress in strength and mobility but continued to experience pain and difficulty performing activities of daily living.
25. From February 6 through March 11, 2004, Claimant completed an additional 12 sessions of occupational therapy, during which the same exercises and treatment modalities were employed but little progress was made.
26. On February 23, 2004, Miguel Saldana, M.D., F.A.C.S., a designated doctor, found that Claimant had a one percent whole person impairment rating and that she had reached maximum medical improvement.
27. On March 11, 2004, following her last session of occupational therapy, Claimant reported a pain level of six out of ten at rest and nine out of ten with increased activity. She also reported an inability to grasp objects or perform activities requiring the use of her left thumb.
28. On March 17, 2004, Claimant completed an FCE and was released to work full time without restrictions by Dr. Burdin on March 22, 2004, as a result of the FCE.
29. Neuromuscular Institute of Texas (Petitioner) seeks reimbursement for therapeutic procedures and exercises, ultrasound, paraffin baths, manual therapy techniques, a physical performance evaluation, and functional capacity evaluation (FCE), during the period from January 19, 2004, through March 11, 2004 (Disputed Services).
30. ACE/USA/ESIS (Respondent) denied payment for additional therapy sessions completed by Claimant from January 19 through March 11, 2004, based on its assertion that such treatment was not medically necessary.
31. Respondent denied payment for a February 4, 2004 PPE and a March 17, 2004 FCE based on a lack of medical necessity.
32. Maximus, an Independent Review Organization (IRO), concluded that the Disputed Services were not medically necessary for treatment of Claimant's condition
33. The IRO decision is deemed a Decision and Order of the Texas Workers' Compensation Commission (Commission).

34. The Commission issued a Finding and Decision on May 3, 2005.
35. Petitioner timely requested a hearing to contest the Commission's decision.
36. The Commission issued a notice of hearing on June 15, 2005.
37. A hearing was convened by Administrative Law Judge Ami L. Larson on January 23, 2006, in the hearing rooms of the State Office of Administrative Hearings. The hearing adjourned and the record closed the same day.

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

1. The Texas Workers' Compensation Commission or its successor agency has jurisdiction to decide the issue presented pursuant to the Texas Workers' Compensation Act, TEX. LAB. 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 TEX. LAB. CODE ANN. § 413.031(k) and TEX. GOV'T. CODE ANN. ch. 2003.
3. Petitioner timely requested a hearing in this matter pursuant to 28 TEX. ADMIN. CODE (TAC) §§ 102.7 and 148.3.
4. Notice of the hearing was proper and complied with the requirements of TEX. GOV'T. CODE ANN. ch. 2001.
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. Petitioner had the burden of proof in this matter, which was the preponderance of evidence standard. 28 TAC §§ 148.21(h) and (i); 1 TAC § 155.41(b).
7. Based upon the Findings of Fact, Petitioner failed to prove by a preponderance of the evidence that the Disputed Services were medically necessary for treatment of Claimant's condition.

**ORDER**

**THEREFORE IT IS ORDERED** that USA/ACE ESIS is not required reimbursing Petitioner Neuromuscular Institute of Texas for the Disputed Services provided to Claimant.

**SIGNED March 22, 2006.**

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**AMI L. LARSON  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS**