

**DOCKET NO. 453-04-0802.M5
TWCC MDR NO. M5-03-2754-01**

JOSEPH F. WILSON, D.C , Petitioner	§	BEFORE THE STATE OFFICE
	§	
vs.	§	OF
	§	
TEXAS MUTUAL INSURANCE COMPANY, Respondent	§	ADMINISTRATIVE HEARINGS
	§	
	§	

DECISION AND ORDER

The issue involved in this case is whether electric stimulation therapy, vasopneumatic therapy, massage therapy, mechanical traction therapy, myofacial release, and ultrasound therapy (disputed services) performed by Joseph F. Wilson, D.C. (Provider), from July 11, 2002, through September 24, 2002, were medically necessary. Texas Mutual Insurance Company (Carrier) denied payment for the disputed services as not medically necessary. The Independent Review Organization (IRO) also found that these disputed services were not medically necessary. The Administrative Law Judge (ALJ) finds that the disputed services performed from July 11, 2002, through September 13, 2002, were medically necessary and should be reimbursed. The disputed services performed on September 16, 19, and 24, 2002, were not medically necessary and should not be reimbursed.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

On April 28, 2004, ALJ Michael J. O'Malley conducted the hearing on the merits at the William P. Clements Building, 300 West 15th Street, Austin, Texas. Attorney Katie Kidd represented Carrier, and Provider represented himself *pro se*. The parties did not contest jurisdiction or notice; therefore, those issues are addressed in the findings of fact and conclusions of law without

discussion here. The ALJ closed the record on April 29, 2004, after certain evidence not available at the hearing was filed.

II. BACKGROUND

On _____, Claimant suffered a compensable workers' compensation injury when she was rear-ended in an automobile accident. Claimant began treatment with El Paso Orthopaedic Surgery Group & Center for Sports Medicine. Claimant initially complained of pain in her head, neck, and back.¹ On May 9, 2002, Claimant switched Providers and began her treatment with Dr. Wilson. On that day, he performed an initial examination and, based on Claimant=s symptoms, began an intensive treatment program. Carrier paid for the disputed services for Claimant until July 11, 2002, but denied payment after that date. After the IRO determined that the office visits and active modalities performed from July 11, 2002, through September 24, 2002, were medically necessary, Carrier reimbursed Provider for those services. Therefore, the disputed services, which are the passive modalities, performed from July 11, 2002, through September 24, 2002, are the only services still in dispute.

III. PARTIES' POSITIONS

Provider testified own his on behalf and had admitted in evidence his daily patient records for Claimant (Provider Ex. 1). He also relied on Carrier's documents, which were admitted in evidence as Carrier Ex. 1. Dr. Wilson testified that he treated Claimant for her neck pain. He further testified that he continued to treat Claimant after July 11, 2002, because for some reason her condition worsened for a period of time after July 11, 2002. On July 19, 2002, Richard Neel, M.D., conducted an independent evaluation of Claimant for the Texas Workers' Compensation Commission (TWCC) and determined that Claimant had not reached maximum medical improvement (MMI). He recommended continued conservative treatment and estimated that Claimant would reach MMI in approximately one month. Relying on this report, Dr. Wilson continued to treat Claimant for her

¹ Provider diagnosed Claimant with post-traumatic insult to the soft tissues (sprain/strain) of the cervical paravertebral musculature with accompanying muscle spasms and inflammation.

neck pain. Beginning in late July 2002, Claimant complained that her condition was getting worse. On August 11, 2002, an MRI of the cervical spine was performed. The MRI showed cervical spondylosis with bilateral foraminal stenosis and, at spine level C3-4, there was severe left neuroforaminal stenosis attributed to disc osteophyte complex. After the MRI, Claimant still complained of significant pain; therefore, Dr. Wilson continued to perform the disputed services to reduce Claimant's pain and to increase her range of motion and strength. Dr. Wilson testified that because Claimant had significant spinal stenosis, he recommended a cervical epidural steroid injection. James W. Bean, M.D., at El Paso Orthopaedic Surgery Group & Center for Sports Medicine, concurred with Dr. Wilson's assessment to provide Claimant with an epidural steroid injection. On September 9, 2002, Claimant received the injection. On September 13, 2002, Claimant reported that she had been feeling better since the injection. Dr. Wilson testified that the passive modalities he performed (the disputed services) and the epidural steroid injection improved Claimant's condition, allowing Claimant to reach MMI on October 14, 2002. He further testified that, based on his treatment and the epidural steroid injection, Claimant was able to return to work.

Carrier presented the testimony of N. F. Tsourmas, M.D., and William D. DeFoyd, D.C. Carrier also had various medical documents admitted in evidence as Carrier Ex. 1. Dr. Tsourmas testified that he did not dispute the care provided by Dr. Wilson in May and June 2002. However, he testified that as of July 2002, Claimant was in the chronic phase of her condition and passive modalities, such as the disputed services, would not be warranted. By July 2002, Dr. Tsourmas suggested that Claimant should have been on a home exercise program and should have seen Dr. Wilson only to augment her home exercise program. Dr. Tsourmas also intimated that Claimant began to develop a dependency on Dr. Wilson, which he stated is common for individuals who suffer chronic pain.

Dr. DeFoyd also testified that Claimant could have developed a dependency on Dr. Wilson and on the passive modalities that relieved her pain. He also stated that Claimant did not participate in sufficient active therapies even when her symptoms increased. Dr. DeFoyd maintained that it was

the epidural steroid injection, not the passive modalities in dispute, that provided the relief for Claimant.

IV. ANALYSIS

The evidence in this case shows that the disputed services were medically necessary until September 13, 2002. Claimant's injury occurred on _____. Claimant began treatment with El Paso Orthopaedic Surgery Group & Center for Sports Medicine.² For some reason that is unclear from the record, Claimant switched providers in May 2002. When Dr. Wilson began to treat Claimant, she complained of significant pain, which impacted her daily activities. The goal of Dr. Wilson's treatment plan was to decrease Claimant's pain and return her to work.³ Because of Claimant's pain (usually Claimant's pain ranged between 4-7 on a scale of 1-10), it was reasonable for Dr. Wilson to implement a plan to decrease her pain before implementing an active exercise program, although Claimant did participate periodically in active exercises during this time.

Although Dr. Tsourmas and Dr. DeFoyd testified that passive modalities, such as the disputed services in this case, were unnecessary after July 11, 2002, the evidence shows otherwise.⁴ On July 11, 2002, Claimant stated that her pain was much worse in her neck, and she had difficulty turning her head.⁵ Dr. Wilson continued passive modalities on July 11, 16, and 19, 2002, to treat Claimant's pain. Also, on July 19, 2002, Dr. Neel conducted an independent medical evaluation of Claimant on behalf of TWCC. Dr. Neel's evaluation noted that Claimant complained of neck pain, but her symptoms have been improving with her medications, massage, moist heat, traction, and chiropractic manipulation. He further noted that Claimant is making slow, steady progress. Based

² Carrier Ex. 1 at 1.

³ *Id.* at 6-10.

⁴ Drs. Tsourmas' and DeFoyd's testimony that Claimant became dependent on Dr. Wilson is unpersuasive. As of July 11, 2002, Dr. Wilson had been treating Claimant for only two months. Claimant reached MMI in October 2004, which is a reasonable amount of time given her condition and level of pain.

⁵ Carrier Ex. 1 at 29.

on Dr. Neel's evaluation of Claimant, Dr. Neel concluded that Claimant had not reached MMI and recommended approximately one more month of continued conservative care.⁶

Dr. Wilson continued conservative care as recommended by Dr. Neel through August and September 2002.⁷ Due to Claimant's continued pain in late July and early August 2002, Dr. Wilson referred her to James W., Bean, M.D., at El Paso Orthopaedic Surgery Group & Center for Sports Medicine for a second opinion. Based on Dr. Bean's evaluation of Claimant, he recommended an MRI of the cervical spine to rule out any other pathology.⁸ On August 11, 2002, an MRI showed cervical spondylosis with bilateral foraminal stenosis and, at the C3-4, there was severe left neuroforaminal stenosis attributed to disc osteophyte complex.⁹

Based on the results of the MRI, Dr. Wilson and Dr. Bean recommended a cervical epidural steroid injection.¹⁰ On September 9, 2002, Claimant had an epidural steroid injection.¹¹ After the September 9, 2002 epidural steroid injection, Dr. Wilson treated Claimant with passive modalities on September 11 and 13, 2002. On September 13, 2002, Claimant reported feeling better and stating that she had less pain in her shoulders and neck.¹² Because Claimant began to feel substantially better and her pain had been reduced, Dr. Wilson noted that Claimant would begin exercising (active therapy) the next week. Consequently, after September 13, 2002, Dr. Wilson should have discontinued the passive modalities (all of the disputed services) and continued with active therapy

⁶ *Id.* at 62-67.

⁷ Although Claimant's range of motion, strength, and pain level fluctuated in July, August, and September 2002, Dr. Neel and Dr. Wilson determined that she was making slow, steady progress and was improving. Eventually Claimant saw significant improvement in all three areas, discontinued treatment with Provider, and returned to work in October 2002.

⁸ Carrier Ex. 1 at 38-39.

⁹ *Id.* at 42-43.

¹⁰ *Id.* at 45-46.

¹¹ *Id.* at 52.

¹² *Id.* at 54-55.

only as stated in his September 13, 2002 notes.¹³ On October 14, 2002, Dr. Neel performed another medical evaluation of Claimant and, at that time, he determined that she was at MMI and could return to work.¹⁴

Based on the evidence in this case, the ALJ concludes that Dr. Wilson's use of passive modalities (the disputed services) from July 11, 2002, through September 13, 2003, was medically necessary, given Claimant's significant pain, Dr. Wilson's assessment of Claimant's condition, Dr. Neel's independent evaluation, and the results of Claimant's MRI. Dr. Wilson continued use of passive modalities (the disputed services) after September 13, 2002, was not medically necessary, given that Claimant's pain had been reduced and she was capable of participating in an active treatment program by this point.

V. FINDINGS OF FACT

1. On _____, Claimant suffered a compensable workers' compensation injury.
2. Claimant began treatment with El Paso Orthopaedic Surgery Group & Center for Sports Medicine.
3. On May 9, 2002, Claimant switched providers and began treatment with Joseph F. Wilson, D.C. (Provider).
4. Dr. Wilson began a treatment program that consisted of passive modalities, including electric stimulation therapy, vasopneumatic therapy, massage therapy, mechanical traction therapy, myofascial release, and ultrasound therapy (disputed services).
5. Texas Mutual Insurance Company (Carrier) did not pay for disputed services from July 11, 2002, through September 24, 2002, claiming that the disputed services were not medically necessary.

¹³ It was evident that the epidural steroid injection and the passive modalities (disputed services) had reduced Claimant's pain by September 13, 2002.

¹⁴ On that date, Claimant reported that her neck and shoulder pain had resolved, and she was ready to return to work.

6. Provider continued to treat Claimant with the disputed services after July 11, 2002, because her condition worsened for a period of time beginning July 11, 2002.
7. On July 19, 2002, Richard Neel, M.D., conducted an independent evaluation of Claimant for the Texas Workers' Compensation Commission.
8. Dr. Neel determined that Claimant had not reached maximum medical improvement (MMI) and recommended an additional month of conservative care.
9. Although Claimant's range of motion, strength, and pain level fluctuated in July, August, and September 2002, Dr. Neel and Dr. Wilson determined that she was making slow, steady progress and was improving. Eventually Claimant saw significant improvement in all three areas, discontinued treatment with Provider, and returned to work in October 2002.
10. Due to Claimant's continued pain in late July and early August 2002, Dr. Wilson referred her to James W. Bean, M.D., at El Paso Orthopaedic Surgery Group & Center for Sports Medicine, for a second opinion.
11. Dr. Bean recommended an MRI of the cervical spine.
12. On August 11, 2002, an MRI showed cervical spondylosis with bilateral foraminal stenosis and, at the C3-4, there was severe left neuroforaminal stenosis attributed to disc osteophyte complex.
13. Based on the results of the MRI, Dr. Wilson and Dr. Bean recommended a cervical epidural steroid injection.
14. After the September 9, 2002 epidural steroid injection, Dr. Wilson treated Claimant with passive modalities on September 11 and 13, 2002.
15. On September 13, 2002, Claimant felt better with less pain in her shoulders and neck.
16. Because of Claimant's reduced pain level, Dr. Wilson indicated that she would begin exercising (active therapy) after September 13, 2004.
17. Dr. Wilson's use of passive modalities (disputed services) from July 11, 2002, through September 13, 2003, was medically necessary, given Claimant's significant pain, Dr. Wilson's assessment of Claimant's condition, Dr. Neel's independent evaluation, and the results of Claimant's MRI.
18. Dr. Wilson's use of passive modalities (disputed services) after September 13, 2003, was not medically necessary, given that Claimant's pain had been reduced and she was capable of participating in an active therapy by this time.

19. On October 14, 2002, Dr. Neel determined that Claimant was at MMI and could return to work.
20. On September 5, 2003, the Independent Review Organization (IRO) denied reimbursement for the disputed services from July 11, 2002, through September 24, 2002.
21. On September 22, 2003, Provider appealed the IRO's decision and requested a hearing before the State Office of Administrative Hearings (SOAH).
22. The Commission issued the notice of hearing on October 21, 2003. The hearing notice informed the parties the matters to be determined, the right to appear and be represented, the date, time, and place of the hearing, and the statutes and rules involved.
23. The hearing was held on April 28, 2004, and the record closed on April 29, 2004.

VI. CONCLUSIONS OF LAW

- 1 SOAH 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. §§ 402.073 and 413.031(k), and TEX. GOV'T CODE ANN. ch. 2003.
2. Adequate and timely notice of the hearing was provided to the parties in accordance with TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
- 3 The hearing was conducted pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001.
4. Provider proved that the disputed services performed from July 11, 2002, through September 13, 2002, were medically necessary. 28 TEX. ADMIN. CODE §148.21(h).
5. Provider did not prove that the disputed services performed on September 16, 19, and 24, 2002, were medically necessary. 28 TEX. ADMIN. CODE §148.21(h).
6. Based on the findings of fact and conclusions of law, Provider is entitled to reimbursement for the disputed services performed from July 11, 2002, through September 13, 2002. Provider is not entitled to reimbursement for the disputed performed on September 16, 19, and 24, 2002.

ORDER

IT IS, THEREFORE, ORDERED that Texas Mutual Insurance Company shall reimburse Joseph F. Wilson, D.C., for the disputed services performed on Claimant from July 11, 2002, through September 13, 2002.

SIGNED this 24th day of May, 2004.

**MICHAEL J. O'MALLEY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**