

<b>HUFFMEISTER FAMILY</b>	§	<b>BEFORE THE STATE OFFICE</b>
<b>CHIROPRACTIC CLINIC,</b>	§	
<b>Petitioner</b>	§	
	§	
<b>V.</b>	§	<b>OF</b>
	§	
<b>CITY OF HOUSTON,</b>	§	
<b>Respondent</b>	§	<b>ADMINISTRATIVE HEARINGS</b>

## DECISION AND ORDER

Petitioner, Huffmeister Family Chiropractic Clinic (Provider), appealed the Findings and Decision of the Medical Review Division (MRD) of the Texas Workers' Compensation Commission (TWCC) denying reimbursement from the City of Houston (City) for medical services provided to \_\_\_\_, (Claimant). The City provided workers' compensation coverage for its workers through a self-insurance program. Provider disputes the conclusion of the Independent Review Organization IR that these services were not medically necessary. The Administrative Law Judge (ALJ) concludes that Provider has not met its burden of proof with respect to all services in dispute provided to Claimant between January 24, 2003 and February 13, 2003. Thus, Provider should not be reimbursed.

### I. PROCEDURAL HISTORY

ALJ Penny Wilkov convened and closed a hearing in this case on November 2, 2004, at the State Office of Administrative Hearings, Austin, Texas. Provider appeared and was represented by Attorney Bruce E. Dunham. The City appeared and was represented by Attorney Tommy W. Lueders, II.

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

### II. DISCUSSION

#### 1. Background

Claimant sustained a work-related injury on \_\_\_\_, while employed as an electrician for the City, when he pulled on a cable and injured his left arm and shoulder. Claimant has been diagnosed with a brachial plexopathy in traction injury to the left upper extremity and a cervical sprain and cervical spondylosis.<sup>1</sup> Claimant described symptoms of pain at the posterior aspect of the arm and forearm and reports a subjective level of pain ranging from four to eight on a scale of one to ten. Claimant's history of treatments have included medications and chiropractic treatments as well as

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<sup>1</sup> Petitioner's Exhibit 1, page 19 (Examination of Alain Elbaz, M.D., on January 23, 2003).

Diagnostic tools including an MRI, x-rays, and nerve conduction tests.<sup>2</sup>

The City denied payment for certain chiropractic services, including office visits, myofascial release, and therapeutic exercises, administered by Provider between January 24, 2003, and February 13, 2003, as medically unnecessary.<sup>3</sup>

## **B. 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).

## **C. Evidence and Argument**

### **1. Provider**

Bang H. Nguyen, D.C., a practicing chiropractor since 1995, testified that he began treating Claimant, his brother, on October 26, 2002, after Claimant's family doctor, T.S. Dhesi, M.D., was unable to relieve the pain apart from prescription medication. After the injury, Claimant continued to work full-time with a light-duty restriction, but experienced persistent weakness and severe pain in his neck and his arm. On October 26, 2002, Claimant rated the subjective level of his pain at a level of eight on a scale of one to ten. Provider began treating Claimant with passive modalities for shoulder and neck strain and, based on the results of an MRI<sup>4</sup> and an EMG,<sup>5</sup> began simultaneously to provide active therapy for a C 3-4 and C 5-6 disc bulge and C-4 nerve radiculopathy.

Provider refuted the determination made by both the IRO Chiropractor and the City's peer review doctor, Casey G. Cochran, D.O., that the passive and active modalities, in combination, during the dates of disputed services, January 24, 2003, through February 13, 2003, were not medically necessary.<sup>6</sup> Provider explained that based on the MRI results, the one-on-one active therapies, which began on December 4, 2002, were necessary to increase strength in the muscles of the neck and shoulder.<sup>7</sup> The passive modalities also continued, according to Provider, because after the active therapies, Claimant experienced tension and irritation in his neck which warranted myofascial release and manipulation. Because of these two combined modalities, Provider contends

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<sup>2</sup> Respondent's Exhibit 1, page 77 (January 27, 2003 report, Casey G. Cochran, D.O.).

<sup>3</sup> A list of disputed services was not provided by either party.

<sup>4</sup> Respondent's Exhibit 1, page 16 (MRI performed on November 2, 2002).

<sup>5</sup> Respondent's Exhibit 1, page 24 (EMG performed on December 26, 2002).

<sup>6</sup> Respondent's Exhibit 1, page 8 (February 27, 2004 report, Independent Review Incorporated) and Respondent's Exhibit 1, page 77 (January 27, 2003 report, Casey G. Cochran, D.O.)

<sup>7</sup> The SOAH notes reflect that the exercises consisted of the treadmill and the theraciser, back, and neck machines.

that Claimant successfully progressed from a subjective pain level of eight on a scale of one to ten on November 2, 2002, to a subjective level of four on the same scale on February 13, 2003. As further confirmation of the appropriateness of treatment, Provider pointed to a report of Claimant's consultation with orthopedic surgeon, Alain Elbaz, M.D., on January 23, 2003. Dr. Elbaz reported that Claimant had benefitted from conservative treatment and stated that Claimant should continue with conservative treatment and exercises, and recommended a work hardening program.<sup>8</sup> Provider also referred to a report on May 15, 2002, by neurological surgeon, Peter J. Yeh, M.D., who stated that the non-surgical treatments by Provider were performed appropriately, although Dr. Yeh discussed surgery with Claimant.<sup>9</sup> Provider testified that he disagreed that work hardening would be appropriate because Claimant would have had the financial hardship of missing work for eight weeks to complete the program.

Provider also addressed the concerns raised by the IRO and peer review doctor that a home rehabilitation program, the McKenzie protocol, would have been appropriate for Claimant's condition. Provider testified that he was concerned about Claimant's compliance with a home exercise program and also he could not measure Claimant's progress. Provider pointed out that, as a result of the treatment, Claimant's pain, range of motion, and functionality improved and testified that Claimant was able to return to work with a 40-pound lifting restriction and not a 20-pound lifting restriction, after reaching maximum medical improvement on June 9, 2003.

## 2. City

The City contends that the IRO and peer review doctor's findings that the office visits, myofascial release, and therapeutic exercises, administered by Provider between January 24, 2003, and February 13, 2003, were not medically necessary was a correct decision for several reasons. First, there was no evidence that there was any improvement in Claimant's condition during the disputed time period. Provider's notes indicate that Claimant reported a subjective pain level of four on a scale of one to ten on January 24, 2003, and an identical subjective pain level of four on the same scale on February 12, 2004.<sup>10</sup> No improvement was also demonstrated by Claimant's failure to progress from a physical demand level restriction of light-duty on October 26, 2002,<sup>11</sup> with the identical level of physical demand restriction of light-duty on March 10, 2003.<sup>12</sup> The City points out that the IRO discussed this lack of progression in the statement that, "a clear transition to active therapeutics should have been realized by 12/04/02. The efficiency of passive therapeutics beyond 12/04/02 that include manipulation, TENS, and myofascial release is not clear."<sup>13</sup> Second, the City argues that the various medical reports cited by Petitioner in support of the treatment were considered by the IRO and were still not sufficient to render the treatments considered as medically necessary, including the report from Dr. Yeh who discussed surgery with Claimant. The City also

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<sup>8</sup> Petitioner's Exhibit 1, page 19 (January 23, 2003).

<sup>9</sup> Petitioner's Exhibit 2, pages 24-30 (May 15, 2003).

<sup>10</sup> Petitioner's Exhibit 1, pages 26 and 34.

<sup>11</sup> Petitioner's Exhibit 1, page 4.

<sup>12</sup> Petitioner's Exhibit 2, page 1.

<sup>13</sup> Respondent's Exhibit 1, pages 10-12 (Independent Review Incorporated, March 2, 2004).

points out that the peer review doctor, Casey G. Cochran, D.O., based on his review of the medical records considered by the IRO, disagreed with Provider's assessment that the injury was more than a strain or a sprain. Instead, Dr. Cochran stated that epidural steroid injections would be considered appropriate for Claimant's radicular complaints but not ongoing chiropractic care.<sup>14</sup> Third, the City argued that the close personal relationship between Claimant and Provider was never revealed to the IRO, peer review doctor, or to the City in any of the medical records, impacting the credibility of the records. Instead, the City argues that deception was employed by Provider by referring to Claimant impersonally rather than disclosing the relationship.<sup>15</sup>

Finally, the City disputes the necessity and appropriateness of the one-on-one therapeutic exercises during the dates of disputed services. Provider's testimony was that his assistant was present during the exercises but that he walked in and out of the room checking on Claimant's progress. The City contends that there was not ongoing one-on-one care sufficient to justify the billing when Dr. Nguyen was only present occasionally. The City also argued that because Claimant was continuing to work at his job and was not severely injured, debilitated, or at risk of fall, it was completely unnecessary to closely supervise Claimant during the exercises. Instead, the City concurs with the IRO and peer review doctor's findings that Claimant should have been treated using the McKenzie protocol of a home rehabilitation program. Although Provider maintains that he couldn't assure Claimant's compliance with the exercise program, the City points out the close relationship and argues that he should have trusted Claimant, as with any other person.

#### **D. Analysis**

Provider has not met the burden of proof to establish entitlement to reimbursement for any services administered between January 24, 2003, and February 13, 2003. The testimony and evidence presented do not present sufficient reason to disregard the IRO and peer review findings in this case. First, there is no evidence that Provider's treatment relieved the effects of the injury, promoted recovery; or enhanced the ability to return to employment. On the contrary, the evidence established that the subjective pain reported by Claimant was identical at the beginning and end of the dates of disputed service. Specifically, Claimant reported a subjective pain level of four on a scale of one to ten on January 24, 2003, and an identical subjective pain level of four on the same scale on February 12, 2003. The evidence also established that Claimant had an identical light-duty restriction at work during the same time period, with a light duty restriction on October 26, 2002, and an identical level of physical demand restriction of light duty on March 10, 2003. Second, the IRO discussed that when active therapy began on December 4, 2002, the passive modalities should have been discontinued. The IRO Chiropractor questioned, instead, why manipulation and myofascial were continued with active therapeutic. When offered an opportunity to explain the reason for the simultaneous modalities to the ALJ, Provider stated that the passive modalities were necessary because Claimant experienced tension and irritation in his neck after active therapy. However, the unique circumstances beyond normal tension and irritation, whether from work or from the treatments, were not sufficiently explained or explored to override the contention of the IRO and peer review doctor that combining the passive and active therapies was not justified. Both the IRO and the peer review doctor pointed out that the Official Disability Guidelines, under ordinary circumstances, provided for up to 8 weeks of chiropractic treatment. Here the passive therapy that

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<sup>14</sup> Respondent's Exhibit 1, pages 76-78.

<sup>15</sup> Petitioner's Exhibit 1, page 19.

Continued until February 2003, for the injury that occurred on \_\_\_\_, exceeded the recommended eight weeks. Third, the necessity of the one-on-one therapy was not established given that Claimant was working full time, was not at risk of injuring himself, and was not shown to be incapable of instruction. Provider offered the explanation that Claimant could not be trusted to comply with a home exercises program even though the evidence did not show diminished ability to abide by a home exercise program.

In conclusion, Provider has not met the burden of proof to establish entitlement to reimbursement for any services administered between January 24, 2003, and February 13, 2003.

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

1. Claimant sustained a work-related injury on \_\_\_\_, while employed as an electrician for the City of Houston (City), when he pulled on a cable and injured his left arm and shoulder. After the injury, Claimant continued to work full-time for the City, with a light-duty restriction.
2. At the time of the injury, Claimant's employer had its workers' compensation insurance through the City.
3. Claimant has been diagnosed with a brachial plexopathy in traction injury to the left upper extremity and a cervical sprain and cervical spondylosis.
4. Claimant described symptoms of pain at the posterior aspect of the arm and forearm and reports a subjective level of pain ranging from four to eight on a scale of one to ten.
5. Claimant's history of treatments have included medications and chiropractic treatments as well as diagnostic tools including an MRI, x-rays, and nerve conduction tests.
6. The City denied payment for certain chiropractic services, including office visits, myofascial release, and therapeutic exercises, administered by Huffmeister Family Chiropractic Clinic (Provider) to \_\_\_\_ (Claimant) between January 24, 2003, and February 13, 2003, as medically unnecessary.
7. On May 3, 2004, Petitioner requested medical dispute resolution with the Texas Workers' Compensation Commission's (Commission) Medical Review Division (MRD).
8. An Independent Review Organization concluded that chiropractic treatments rendered from January 24, 2003, until February 13, 2003 were not medically necessary.
9. Provider filed a request for a hearing before the State Office of Administrative Hearings on May 3, 2004.
10. The Commission sent notice of the hearing to the parties on June 10, 2004. 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.

11. Administrative Law Judge Penny Wilkov convened and closed a hearing in this case on November 2, 2004, at the State Office of Administrative Hearings, Austin, Texas. Provider appeared and was represented by Attorney Bruce E. Dunham. The City appeared and was represented by Attorney Tommy W. Lueders, II.
12. Despite the services rendered to Claimant between January 24, 2003, and February 13, 2003, by Provider, Claimant reported no significant improvement in his pain since he reported a subjective pain level of four on a scale of one to ten on January 24, 2003, and an identical subjective pain level of four on the same scale on February 12, 2003.
13. Claimant had an identical light-duty restriction at work during the same time period, with a light-duty restriction on October 26, 2002, and an identical level of physical demand restriction of light duty on March 10, 2003, despite the services rendered to Claimant between January 24, 2003, and February 13, 2003.
14. When the therapeutic exercises began on December 4, 2002, the passive modalities, including myofascial release and related office visits, should have been discontinued.
15. Claimant was working full time, was not at risk of injuring himself, and was not shown to be incapable of instruction, and therefore, a home rehabilitation program, rather than the therapeutic exercises, myofascial release and related office visits, were appropriate for Claimant's condition.
16. Since there is no objective data concerning the progress or necessity of the treatments, including office visits, myofascial release, and therapeutic exercises, between January 24, 2003, and February 13, 2003, Provider has not shown the medical necessity of these services.

#### **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. § 413.031(K) and TEX. GOV'T CODE ANN. ch. 2003.
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. Provider had the burden of proving the case by a preponderance of the evidence pursuant to 28 TEX. ADMIN. CODE § 148.21.
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. Provider failed to establish that the office visits, myofascial release, and therapeutic exercises, between January 24, 2003, and February 13, 2003, are reimbursable under TEX. LAB. CODE ANN. §§ 401.011(19) and 408.021(a).
8. Provider's claim should be denied.

### **ORDER**

IT IS **ORDERED** that Huffmeister Family Chiropractic Clinic is not entitled to reimbursement by City of Houston for the office visits, myofascial release, and therapeutic exercises provided to Claimant between January 24, 2003, and February 13, 2003.

**SIGNED December 16, 2004.**

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