SOAH DOCKET NO. 453-05-4166.M5

TEXAS MUTUAL INSURANCE COMPANY,	§	**BEFORE THE STATE OFFICE**
Petitioner	§	
	§	**OF**
V.	§	
	§	
JOSEPH P. VIERNOW, D.C.,	§	**ADMINISTRATIVE HEARINGS**
Respondent		

DECISION AND ORDER

Texas Mutual Insurance Company (TMIC), a workers' compensation carrier, requested a hearing on decisions of the Texas Workers' Compensation Commission's Medical Review Division (MRD) and an Independent Review Organization (IRO). Those decisions awarded some reimbursement to Joseph P. Viernow, D.C., for services Dr. Viernow had provided ___, a workers' compensation claimant (the Claimant).

The total amount in dispute is $10,463.82. The ALJ orders TMIC to reimburse Dr. Viernow $4,127.82.

I. FACTUAL AND PROCEDURAL HISTORY

The Claimant was injured on___, suffering a back injury and possibly a broken rib when he fell against a machine. He began treatment with Dr. Viernow on March 5, 2003, and continued treatment through December 26, 2003. TMIC paid for some of the services provided by Dr. Viernow early in the course of treatment and refused to pay for others. It refused to pay for any of the later services.

Dr. Viernow filed a request for medical dispute resolution with the Commission for various services rendered from March 5, 2003, through December 26, 2003. The initial amount in dispute, according to the Table of Disputed Services filed with the request, was $34,901.25. For many of the services, TMIC had issued explanations of benefits (EOBs) stating the services were not medically necessary. The MRD referred those to the IRO. Some services were denied for other reasons or no EOBs were issued. The MRD retained those issues and decided whether they should be reimbursed.

The IRO found the treatments provided after July 24, 2003, were not medically necessary. It

also found the following services provided before that date were not medically necessary: joint mobilization, manual traction therapy, massage therapy, nervous system surgery, neuromuscular re-education, and an unlisted nervous system procedure.

However, the IRO found the following services were medically necessary until July 24, 2003: computer data analysis, therapeutic exercises, prolonged service, electrical stimulation therapy, regional manipulation, electrodes, special reports, manual therapy, chiropractic manipulative treatment, work-related exam, supplies, daily office visits for the first two weeks of care, and thrice-weekly office visits afterwards. The IRO found TMIC should reimburse Dr. Viernow $7,626.00.

The MRD also ordered reimbursement for some services, but not for others. The services for which the MRD ordered reimbursement totaled $2,837.82.[1]

TMIC filed a timely request for a hearing before the State Office of Administrative Hearings (SOAH). Dr. Viernow did not request a hearing. Therefore, the only services before SOAH are those found reimbursable by the IRO and the MRD. TMIC has the burden of proving it should not be required to reimburse Dr. Viernow for those services. 28 TEX. ADMIN. CODE (TAC)§148.21(h).

Notice of the hearing was sent to the parties February 16, 2005. 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, as required by TEX. GOV'T CODE ANN. §2001.052. The notice was sent to Dr. Viernow's address, as shown on the request for medical dispute resolution and other documents.

The hearing was convened as scheduled April 25, 2005. TMIC appeared at the hearing. Dr. Viernow did not appear. Documents, including medical records, were admitted into evidence, as was the deposition of licensed physical therapist John Mark Miller. David Alvarado, D.C. presented live testimony. The hearing was adjourned and the record closed the same day.

[1] The MRD decision ordered a different amount, $2642.52. When the ALJ added up the individual services, however, he found the sum to be $2,837.82, as set forth in the table below.

II. DISCUSSION AND ANALYSIS

The ALJ will discuss separately the services for which the MRD and the IRO ordered reimbursement.

A. Services for which the MRD ordered reimbursement

DOS[2]	CPT Code & Explanation	EOB Denial Code & Explanation[3]	$MAR
03-05	99204-office visit-new patient	N-not approp. documentation	137
03-05	72010WP-radiological exam	R-extent of injury	111
03-05	72052WP-radiological exam	R-extent of injury	132
03-05	72110WP-radiological exam	R-extent of injury	100
03-05	72114WP-radiological exam	R-extent of injury	120
03-06 through 04-11	97265-joint mobilization (18 DOS x $43)	G-unbundling	774
03-08 and 03-13	97265-joint mobilization (2 DOS x $43)	F-fee guideline MAR reduction	86
03-13 through 03-21	99213MP-office visit w/manipulation (5 DOS x $48)	G-unbundling	240
05-06 and 05-14	99213MP-office visit w/manipulation (2 DOS x $48)	no EOB	96
05-06 and 05-14	97122-manual traction (2 DOS x $35)	no EOB	70
05-06 and 05-14	97265-joint mobilization (2 DOS x $43)	no EOB	86
05-06	97014-electrical stimulation	no EOB	15
05-14	97124-massage	no EOB	28
04-01	99080-special reports	F-fee guideline MAR reduction[4]	24
06-23	99080-special reports	F-fee guideline MAR reduction	79.50
05-14	99354-prolonged physician service	no EOB	106
08-11	99455VR-work-rel.or med. dis. exam	no EOB	50
09-19 and 10-31	99214-office visit-established patient (2 DOS x $98.10)	no EOB	196.20
08-26 through 09-12	98940- manipulation (4 DOS x $31.68)	no EOB	126.72
08-26 through 09-12	97140-59-manual therapy (4 DOS x $65.10)	no EOB	260.40
Total			**$2,837.82**

[2] All dates of service are from 2003.

[3] The CPT code and EOB denial code explanations are simplified for the purposes of this table.

[4] The MAR for this service is $0.50 per page.

Under the rules and procedures of the Commission, as interpreted by SOAH decisions, a workers'compensation carrier waives its claim that a service was not medically necessary if it fails to raise that claim until after a request for medical dispute resolution is made.[5] Therefore, as the MRD found, TMIC must show that the services the MRD considered should not be reimbursed for the reasons set out in TMIC's EOBs to Dr. Viernow. Generally, if no EOBs were sent, TMIC must show the services were not provided, contrary to the documentation reviewed by the MRD.[6]

At the hearing, TMIC agreed the March 5, 2003, office visit should be reimbursed. It did not address the services that had been denied for extent-of-injury reasons (Code R), reduced according to the fee guidelines (Code F), or for which no EOBs had been sent.

Dr. Alvarado did address the issue of unbundling. He testified that joint mobilization (CPT Codes 97265) is encompassed within the manipulation codes (CPT Codes 99213-MP and 98940). Therefore, Dr. Viernow should not be reimbursed for both services on the same date.

The ALJ reviewed the dates of service for which the MRD allowed reimbursement. He did not find evidence that the two procedures were performed on any of those dates. Therefore, although Dr. Alvarado's testimony was convincing, it does not justify the denial of reimbursement fo joint mobilization on any of the dates in question.

TMIC failed to show that Dr. Viernow should not be reimbursed for the disputed services addressed by the MRD. Therefore, the ALJ orders reimbursement for those services, in the amount of $2,837.82.

B. Services considered by the IRO

Dr. Alvarado stated that generally a course of passive care is reasonable for two to four weeks. He acknowledged that TMIC had paid for some passive care for this Claimant for eight

[5] *See, e.g.*, Docket No. 453-96-1446.M4, *Liberty Mutual Fire Insurance Company v. Texas Workers' Compensation Commission and Nervchek* (Nov.1996) (ALJ Corbitt).

[6] The MRD requires a higher level of documentation for CPT Codes 97110 and 97112, which are one-on-one therapies. In this case, the MRD found Dr. Viernow's documentation did not meet that standard and denied reimbursement.

weeks. He testified that passive care after May 6, 2003, was definitely unreasonable. He described the therapeutic exercises as passive because they were "deweighted," -the Claimant was put in a harness so he would not place much weight on his spine while walking on a treadmill.. He did not believe Dr. Viernow's treatment improved the Claimant's compression fracture, if he had one. Dr. Alvarado disputed the need for computer testing, because it did not alter Dr. Viernow's course of treatment.

Mr. Miller also characterized the therapeutic exercises as excessive and unnecessary passive treatment. He did not believe the computer testing was necessary to the course of treatment. He pointed out that the Claimant apparently had almost full range of motion on April 8, 2003.

The IRO reviewer stated the disputed services were necessary until July 24, 2003, when "The claimant's objective findings had plateaued," as shown by a comparison of testing performed on May 6 and July 24, 2003. The reviewer pointed out that the almost five months of therapy he allowed exceeded most generally accepted guidelines.

The ALJ finds further treatment was not medically necessary after ___, which is approximately two months after the Claimant's injury. The testing showed no significant improvement between May 6 and July 24, 2003. Although those results were not known beforehand, the testimonies of Dr. Alvarado and Mr. Miller, and the comment by the IRO reviewer, demonstrate that no significant improvement should have been expected from the treatments provided during that period.

The chart below sets out the disputed services that were provided on or before May 6, 2003, and were allowed by the IRO:

DOS	**CPT Code & Explanation**	**$MAR**
03-29 through 04-21	99090-computer data analysis (MAR ' 108 x 5 DOS)	540
04-12 through 05-06	99213-MP-office visit with manip. (9 DOS x $48)	432
04-12 through 05-06	97110Btherapeutic exercises-one/one (9 DOS x $70)	630
04-16 through 05-01	99354-prolonged service (3 DOS x $106)	318
Total:		**$1,920**

Neither Dr. Alvarado nor Mr. Miller discussed CPT code 99354-prolonged service. They did address the other three codes. Both believed the computer data analysis in which Dr. Viernow engaged was unnecessarily complicated and led to no change in the Claimant's treatment plan. Mr. Miller did acknowledge that use of such testing is common in the chiropractic field. Both found the deweighted therapeutic exercises unnecessary and found no reason for one-on-one service. Dr. Alvarado addressed the chiropractic manipulations only in passing, but Mr. Miller emphasized that procedure was contraindicated if the Claimant suffered from a compression fracture.

The ALJ was unpersuaded by Dr. Alvarado's and Mr. Miller's critique of the computer data analysis. Mr. Miller agreed that use of such data is within the industry standard. If the analysis did not lead to a change in the treatment plan, that is most likely because Dr. Viernow did not deem a change necessary based on the results. The ALJ also was unpersuaded by Mr. Miller's critique of the chiropractic manipulations. The SOAP notes state Dr. Viernow applied "very gentle adjustive procedures" to particular areas. TMIC did not carry its burden of proving those services were not necessary.

The ALJ agrees with Dr. Alvarado and Mr. Miller about CPT Code 97110, however. Both testified that one-on-one supervision was not necessary for that procedure, and nothing in the record provides an explanation to the contrary.

Therefore, the ALJ finds CPT Code 97110 was not medically necessary. He finds CPT Codes 99090, 99213-MP, and 99354 were medically necessary through May 6, 2003, and orders TMIC to reimburse Dr. Viernow $1,290 for those services. Combining that figure with $2,837.82, the ALJ orders TMIC to reimburse Dr. Viernow a total of $4,127.82 for the disputed services.

III. FINDINGS OF FACT

1. __. (the Claimant) was injured on__, suffering a back injury and possibly a broken rib when he fell against a machine.

2. The Claimant began treatment with Joseph P. Viernow, D.C., on March 5, 2003, and continued treatment through December 26, 2003.

3. Texas Mutual Insurance Company (TMIC), the workers'compensation carrier, paid for some of the services provided by Dr. Viernow early in the course of treatment and refused to

pay for others.

4. Dr. Viernow filed a request for medical dispute resolution with the Commission for various services rendered from March 5, 2003, through December 26, 2003.

5. The initial amount in dispute, according to the Table of Disputed Services filed with the request, was $34,901.25.

6. For many of the services, TMIC had issued explanations of benefits (EOBs) stating the services were not medically necessary. The MRD referred those to the IRO. Some services were denied for other reasons or no EOBs were issued. The MRD retained those issues and decided whether they should be reimbursed.

7. The IRO found the treatments provided after July 24, 2003, were not medically necessary.

8. The IRO found the following services provided before July 24, 2003, were not medically necessary: joint mobilization, manual traction therapy, massage therapy, nervous system surgery, neuromuscular re-education, and an unlisted nervous system procedure.

9. The IRO found the following services were medically necessary until July 24, 2003: computer data analysis, therapeutic exercises, prolonged service, electrical stimulation therapy, regional manipulation, electrodes, special reports, manual therapy, chiropractic manipulative treatment, work-related exam, supplies, daily office visits for the first two weeks of care, and thrice-weekly office visits afterwards.

10. The IRO found TMIC should reimburse Dr. Viernow $7,626.00.

11. The MRD ordered reimbursement for some of the services it considered, but not for others. The services for which the MRD ordered reimbursement totaled $2,837.82.

12. TMIC filed a timely request for a hearing before the State Office of Administrative Hearings (SOAH). Dr. Viernow did not request a hearing.

13. Notice of the hearing was sent to the parties February 16, 2005.

14. 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.

15. The notice was sent to Dr. Viernow's address, as shown on the request for medical dispute resolution and other documents.

16. The hearing was convened as scheduled April 25, 2005. TMIC appeared at the hearing. Dr. Viernow did not appear. Documents, including medical records, were admitted into evidence, as was the deposition of licensed physical therapist John Mark Miller. David Alvarado, D.C. presented live testimony. The hearing was adjourned and the record closed the same day.

17. The MRD ordered reimbursement for the following services, regarding which TMIC had not raised the issue of medical necessity:

DOS	CPT Code & Explanation	EOB Denial Code & Explanation	$MAR
03-05	99204-office visit-new patient	N-not approp. documentation	137
03-05	72010WP-radiological exam	R-extent of injury	111
03-05	72052WP-radiological exam	R-extent of injury	132
03-05	72110WP-radiological exam	R-extent of injury	100
03-05	72114WP-radiological exam	R-extent of injury	120
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03-08	97265-joint mobilization and 03-13 (2 DOS x $43)	FBfee guideline MAR reduction	86
03-13	99213MP-office visit w/manipulation through 03-21 (5 DOS x $48)	G-unbundling	240
05-06	99213MP-office visit w/manipulation and 05-14 (2 DOS x $48)	no EOB	96
05-06	97122-manual traction and 05-14 (2 DOS x $35)	no EOB	70
05-06	97265-joint mobilization and 05-14 (2 DOS x $43)	no EOB	86
05-06	97014-electrical stimulation	no EOB	15
05-14	97124-massage	no EOB	28
04-01	99080-special reports	F-fee guideline MAR reduction	24
06-23	99080-special reports	F-fee guideline MAR reduction	79.50
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08-11	99455VR-work-rel.or med. dis. exam	no EOB	50
09-19	99214-office visit-established patient and 10-31 (2 DOS x $98.10)	no EOB	196.20
08-26	98940- manipulation through 09-12 (4 DOS x $31.68)	no EOB	126.72
08-26	97140-59-manual therapy through 09-12 (4 DOS x $65.10)	no EOB	260.40
Total			**$2,837.82**

18. At the hearing, TMIC agreed the March 5, 2003, office visit should be reimbursed.

19. TMIC did not address the services that had been denied for extent-of-injury reasons (Code R), reduced according to the fee guidelines (Code F), or for which no EOBs had been sent.

20. Joint mobilization (CPT Codes 97265) was not performed the same day as manipulation (CPT Codes 99213-MP and 98940) on the disputed dates of service.

21. Further treatment was not medically necessary after May 6, 2003, which is approximately two months after the Claimant's injury.

22. Testing showed no significant improvement in the Claimant's condition between May 6 and July 24, 2003.

23. Although the test results were not known beforehand, no significant improvement should have been expected from the treatments provided after May 6, 2003.

24. Services provided after May 6, 2003, were not medically necessary.

25. The chart below sets out the disputed services that were provided on or before May 6, 2003, and were allowed by the IRO:

DOS	CPT Code & Explanation	$MAR
03-29 through 04-21	99090-computer data analysis (MAR ' 108 x 5 DOS)	540
04-12 through 05-06	99213-MPBoffice visit with manip. (9 DOS x $48)	432
04-12 through 05-06	97110Btherapeutic exercisesBone/one (9 DOS x $70)	630
04-16 through 05-01	99354Bprolonged service (3 DOS x $106)	318
Total:		**$1,920**

26. TMIC did not specifically address the necessity of CPT Code 99354-prolonged service.

27. The use of computer data analysis is within the industry standard.

28. Dr. Viernow applied very gentle adjustive procedures to particular areas in conducting his chiropractic manipulations.

29. One-on-one supervision was not necessary for the therapeutic exercises billed under CPT Code 97110.

30. CPT Code 97110 was not medically necessary through May 6, 2003.

31. CPT Codes 99090, 99213-MP, and 99354 were medically necessary through May 6, 2003.

IV. CONCLUSIONS OF LAW

1. SOAH has jurisdiction over 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.

2. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. §2001.052.

3. The only services before SOAH are those found reimbursable by the IRO and the MRD.

4. TMIC has the burden of proving it should not be required to reimburse Dr. Viernow for the services at issue. 28 TEX. ADMIN. CODE (TAC) §148.21(h).

5. TMIC failed to show that Dr. Viernow should not be reimbursed for the disputed services addressed by the MRD.

6. TMIC should reimburse Dr. Viernow $2,837.82 for the disputed services addressed by the MRD.

7. TMIC should reimburse Dr. Viernow $1,290 for CPT Codes 99090, 99213-MP, and 99354 provided through May 6, 2003, which were addressed by the IRO.

8. TMIC should reimburse Dr. Viernow a total of $4,127.82 for the services in dispute in this proceeding.

ORDER

IT IS, THEREFORE, ORDERED that Texas Mutual Insurance Company shall reimburse Joseph P. Viernow, D.C., a total of $4,127.82, plus interest as applicable, for the services in dispute in this proceeding.

SIGNED June 15, 2005.

_____

HENRY D. CARD
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS