SOAH DOCKET NO. 454-07-1789.P1
DWC NO. ____

WINN DIXIE LOUISIANA, INC., **Petitioner** **VS.** **TEXAS DEPARTMENT OF INSURANCE, DIVISION OF WORKERS' COMPENSATION AND LUTHER BRATCHER, D.C.,** **Respondents**	§ § § § § § § § § §	**BEFORE THE STATE OFFICE** **OF** **ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Winn Dixie Louisiana, Inc. (Carrier) challenges a medical interlocutory order (MIO) issued by the Texas Department of Insurance, Division of Workers' Compensation (Division), requiring Carrier to pay for acupuncture and spinal manipulation treatments over a ninety-day period. This decision concludes that Carrier established that the acupuncture and spinal manipulation treatments were not medically necessary to treat Claimant's compensable injury. As a result, Carrier should be reimbursed for payments it has made for those treatments.

I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION

The MIO was issued on December 28, 2006, pursuant to the Division's Prospective Review of Medical Care rules at 28 TEX. ADMIN. CODE (TAC) § 134.650. The Carrier filed a timely hearing request. SOAH has jurisdiction over this proceeding, including the authority to issue a decision and order, pursuant to TEX. LAB. CODE ANN. §§ 402.073(b) and 413.055 and TEX. GOV'T CODE ANN. ch. 2003.

Upon proper notice, the hearing convened on June 4, 2007, before Administrative Law Judge (ALJ) Penny A. Wilkov, at the State Office of Administrative Hearings (SOAH). The hearing concluded and the record closed the same day. Attorney Wendy D. Schrock represented Carrier and attorney Robert C. Simons represented the Division. Luther Bratcher, D.C., *pro se*, participated by telephone.

II. DISCUSSION

A. Background and Applicable Law

Claimant sustained a work-related injury on____, when she lifted a sixty-five pound case of meat and felt something crack in her neck. The 998 page medical record in evidence chronicled Claimant's eight-year medical history of two cervical fusion surgeries, trigger point injections, nerve blocks, medications, a work hardening program, a chronic pain program, and extensive chiropractic care and physical therapy. The record also recounted a significant history of hypertension, degenerative arthritis, diabetes, anxiety, and depression.

In September 2006, Dr. Bratcher's examination revealed that spasm, inflammation, and tenderness were still prevalent in Claimant's cervical region, with decreased range of motion and moderate pain. Claimant also reported ongoing stiffness, soreness, and weakness in her neck, sharp throbbing pain in her neck and head, and tingling in her upper back and neck.

Dr. Bratcher submitted a Prospective Review Medical Examination (PRME) request after Carrier denied the following care over a 90-day period:

< acupuncture without electrical stimulation, twice a week, for a total of twenty-four visits
< spinal manipulation, once per week for twelve weeks, for a total of twelve visits

A PRME reviewing chiropractor found the care to be medically necessary to treat Claimant. After Carrier continued to dispute reimbursement, the Commission issued the MIO and Carrier requested a hearing before SOAH.

Employees have a right to necessary health care under TEX. LABOR CODE ANN. §§ 408.021 and 401.011. Section 408.021(a) provides: "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 compensable injury; (2) promotes recovery; or (3) enhances the ability of the employee to return to or retain employment." Section 401.011(19) of the Labor Code provides that health care includes all reasonable and necessary medical services.

Carrier has the burden of proof in this proceeding. TEX. LABOR CODE ANN. §413.055; 28 TEX. ADMIN. CODE §148.14(a).

B. Summary of Disputed Issue

The Division asserted that the acupuncture and spinal manipulation treatments prescribed by Dr. Bratcher, are medically necessary treatments for Claimant's compensable injury, as confirmed in the PRME opinion by Dr. Lonny R. McKinzie, D.C., a Commission-appointed chiropractor. Conversely, Carrier argued that the proposed treatments are not medically necessary, contending that Claimant has had extensive postoperative rehabilitation with minimal

progress. The issue presented is whether the acupuncture and spinal manipulation treatments were medically necessary to treat Claimant's compensable injury.

C. Evidence and Argument Concerning Proposed Treatments

1. Carrier

Carrier presented the testimony of Michael A. Booth, D.C., a chiropractor and certified acupuncturist, who reviewed Claimant's medical records. According to Dr. Booth, passive modalities such as acupuncture and manipulation, six-year post-injury, are not supported by literature or guidelines. The Official Disability Guidelines, according to Dr. Booth, provide that after a fusion, post-surgical treatment is recommended for, at most, 34 visits over 16 weeks, noting that Claimant had her last surgery in 2001, far exceeding the recommended guidelines. Dr. Booth further pointed out that Claimant had nearly daily passive chiropractic treatment in 2004 and 2005, including spinal manipulation from Dr. Bratcher, with little sign of progress or recovery. Dr. Booth, instead, postulated that a chronic pain program would be appropriate rather than continued passive modalities.

Dr. Booth testified that in July 2006, Dr. Bratcher began performing manual adjustments near Claimant's fusion (at cervical spine levels C3, C4, and C5), a practice that Dr. Booth controverts as dangerous because the implanted hardware could break resulting in paralysis. Dr. Booth referred to an August 2006 surgical evaluation by Renato Bosito, M.D., who concluded that Claimant had narrowing behind the levels of her fusion at C4 and C5, leading him to refuse to perform risky surgery.

Carrier also relied on the September 2006 Required Medical Examination (RME) of G. Peter Foox, M.D. After examining Claimant, Dr. Foox concluded that Claimant's twice-weekly chiropractic treatments and visits were not reasonably indicated for the injury. Instead, Dr. Foox found that the prescribed medications of Lunesta (sleep), Zanaflex (spasms), Zoloft (depression) and Ultrum (pain) were appropriate for her chronic pain syndrome. Dr. Foox also recommended psychological pain management to treat Claimant's fear, apprehension, concern, and aggressiveness.

2. Division

The Division stressed that in the last years Claimant has successfully discontinued the use of powerful pain medications, Methadone and Oxycontin, despite severe chronic pain. Claimant pursued less harmful treatments of acupuncture and spinal manipulation, enabling her to remain active and stable without suffering adverse secondary effects.

The Division pointed out that Dr. Booth used acupuncture to treat his chronic pain patients. As to Dr. Booth's perceived concern that spinal manipulation was harmful, the Division pointed to the absence of complications.

Lastly, the Division stressed the restorative aspect of the treatments, preventing deterioration of Claimant's condition.

3. Dr. Bratcher

Dr. Bratcher, a practicing chiropractor since 1969, argued that Claimant's 28% impairment rating attested to her degree of chronic pain, particularly where hardware-removal surgery was foreclosed by diabetes.

According to Dr. Bratcher, since Claimant's severe pain originated from lower neck, arm, and shoulder movements, over-the-counter medications did not offer significant pain relief. Acupuncture, alternatively, gave Claimant temporary relief from the muscle spasms, alleviated surgery-related nerve pain, and modified the pain from sharp to dull.

Dr. Bratcher testified that spinal manipulation is an extremely gentle maneuver to the area around the fusion and has prevented the degeneration of the surrounding joints from stiffness.

D. ALJ's Analysis and Decision

The ALJ finds that Carrier established that the treatments in question were not medically reasonable and necessary for the treatment of Claimant's compensable injury.

Although the focus of the disputed treatments of acupuncture and spinal manipulation, according to Dr. Bratcher, was to maintain Claimant's current condition and prevent decline, the medical records and testimony demonstrated the inadequacy of this approach. In particular, the RME physician, Dr. Foox, who examined Claimant in September 2006, concluded that further chiropractic treatment, considering the pathology involved and the length of time of past chiropractic treatment, was not reasonably indicated.

Instead, Dr. Foox recommended continuing mild pain medications along with a psychological pain program. Dr. Booth, a chiropractor and certified acupuncturist, concurred with Dr. Foox that passive modalities six-years post-injury were unlikely to improve Claimant's condition. Similarly, Dr. Bosita, who performed a surgical consult, concurred that Claimant had poor outcomes with any of the past treatments, and concluded that Claimant might consider further surgery.

The evidence also established that Claimant failed to progress or recover, despite extensive and frequent chiropractic treatment. The testimony and medical evidence revealed that Claimant remained at essentially the same level of perceived pain, of seven or eight, on a scale of ten, throughout chiropractic treatment in 2004 and 2005. Under these circumstances, the disputed services would not appear likely to promote recovery, to cure or relieve the effects naturally resulting from the compensable injury, or to return Claimant to work.

Lastly, the PRME evaluating chiropractor, Dr. McKinzie, did not furnish his rationale as to the necessity or reasonableness of the treatments and the ALJ is unable to ascertain his reasoning, given the medical evidence.

Consequently, the ALJ concludes that Carrier proved by a preponderance of the evidence that the disputed services were not medically necessary to treat Claimant's compensable injury.

III. FINDINGS OF FACT

1. The injured employee (Claimant) sustained a work-related injury on____, when she lifted a sixty-five pound case of meat and felt something crack in her neck.

2. Claimant's eight-year medical history included two cervical fusion surgeries, trigger point injections, nerve blocks, chiropractic care, physical therapy, medications, a work hardening program, and a chronic pain program.

3. Claimant also had a significant history of hypertension, degenerative arthritis, diabetes, anxiety, and depression.

4. Claimant began treatment with Luther Bratcher, D.C., in 2000, and in September 2006, Dr. Bratcher's examination revealed that spasm, inflammation, and tenderness were still prevalent in Claimant's cervical region, with decreased range of motion and moderate pain.

5. Claimant also reported ongoing stiffness, soreness, and weakness in her neck, sharp throbbing pain in her neck and head, and tingling in her upper back and neck.

6. Dr. Bratcher submitted a prospective review of medical necessity request after Carrier denied the following care over a 90-day period:

    a. acupuncture without electrical stimulation, twice a week, for a total of twenty-four visits, and
    b. spinal manipulation, once per week for twelve weeks, for a total of twelve visits.

7. A prospective review medical examination (PRME) doctor found the disputed care to be medically necessary to treat Claimant.

8. After Carrier continued to deny payment for the disputed care, the Commission issued a medical interlocutory order (MIO) directing Carrier to pay for the care.

9. Carrier requested a hearing before SOAH.

10. Passive modalities such as acupuncture and manipulation, six-years post-injury are not supported by literature or guidelines.

11. After a fusion, post-surgical treatment is recommended for 34 visits over 16 weeks and since Claimant had her last surgery in 2001, the proposed treatments of acupuncture and spinal manipulation are not reasonable or necessary to aid in Claimant's recovery.

12. Considering the pathology involved and the length of time of past chiropractic treatment, further chiropractic passive modalities of acupuncture and spinal manipulation are not reasonable or necessary.

13. The prescribed medications of Lunesta (sleep), Zanaflex (spasms), Zoloft (depression) and Ultrum (pain), are appropriate for Claimant's chronic pain syndrome.

14. The proposed treatments are not medically necessary, given that Claimant has had extensive postoperative rehabilitation with minimal progress, particularly where Claimant has remained at the same pain level despite years of chiropractic treatment.

15. The disputed treatments of acupuncture and spinal manipulation were not reasonable or necessary to cure or relieve the effects naturally resulting from the compensable injury, to promote recovery, or to enhance the ability of Claimant to return to or retain employment.

16. The PRME evaluating chiropractor, Dr. Lonny R. McKinzie, D.C., failed to explain his rationale as to why the treatment was considered necessary or reasonable.

IV. CONCLUSIONS OF LAW

1. The State Office of Administrative Hearings has jurisdiction over this proceeding, including the authority to issue a decision and order, pursuant to TEX. LAB. CODE ANN. §§402.073(b) and 413.055 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. §§2001.051 and 2001.052.

3. The Carrier has the burden of proof in this proceeding. TEX. LAB. CODE ANN. §413.055; 28 TEX. ADMIN. CODE §148.14(a).

4. Carrier proved that the disputed care was not medically necessary. TEX. LAB. CODE ANN. §408.021.

ORDER

IT IS ORDERED that Winn Dixie Louisiana, Inc., proved by a preponderance of the evidence that the disputed care was not medically necessary to treat Claimant's compensable injury. **IT IS THEREFORE ORDERED** that Winn Dixie Louisiana, Inc.'s request, under 28 TEX. ADMIN. CODE § 134.650, to be reimbursed for the disputed care is **GRANTED**.

SIGNED July 26, 2007.

PENNY A. WILKOV
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS