

**SOAH DOCKET NO. 453-03-3425.M5**  
**MDR Tracking No.: M5-03-1471-01**

<b>NEUROMUSCULAR INSTITUTE</b>	§	<b>BEFORE THE STATE OFFICE</b>
<b>OF TEXAS, PA</b>	§	
<b>Petitioner</b>	§	
	§	
<b>V.</b>	§	<b>OF</b>
	§	
<b>LIBERTY MUTUAL INSURANCE CO.</b>	§	
<b>Respondent</b>	§	<b>ADMINISTRATIVE HEARINGS</b>

**DECISION AND ORDER**

This case is an appeal by the Neuromuscular Institute of Texas, PA (“Petitioner”), from a decision of an independent review organization (“IRO”) on behalf of the Texas Workers’ Compensation Commission (“Commission”) in a dispute regarding medical necessity for chiropractic treatment. The IRO found that the insurer, Liberty Mutual Insurance Co. (“Respondent”)-or others acting on its behalf-properly denied reimbursement for physical therapy that Petitioner administered between February 14 and August 21, 2002, to a claimant suffering from carpal tunnel syndrome.

Petitioner challenged the decision on the basis that the treatment at issue was, in fact, medically necessary, within the meaning of Sections 408.021 and 401.011(19) of the Texas Workers’ Compensation Act (“the Act”), TEX. LABOR CODE ANN. ch. 401 *et seq.*

This decision agrees with that of the IRO, finding that reimbursement of Petitioner should be denied, as previously ordered.

**JURISDICTION AND VENUE**

The Commission has jurisdiction over this matter pursuant to § 413.031 of the Act. The State Office of Administrative Hearings (“SOAH”) has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a decision and order, pursuant to ‘ 413.031(k) of the Act and TEX. GOV’T CODE ANN. ch. 2003. No party challenged jurisdiction or venue.

**STATEMENT OF THE CASE**

The hearing in this docket was convened on August 18, 2003, at SOAH facilities in the William P. Clements Building, 300 W. 15th St., Austin, Texas. Administrative Law Judge (“ALJ”) Mike Rogan presided. Petitioner was represented by David T. Duncan, attorney. Respondent was represented by Kevin Franta, attorney. After presentation of evidence and argument, the hearing was adjourned and the record was closed on that same date.<sup>1</sup>

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<sup>1</sup>The staff of the Commission formally elected not to participate in this proceeding, although it filed a general AStatement of Matters Asserted” with the notice of the hearing.

The record revealed that on September 11, 2001, the claimant reported a compensable injury upon presenting to Dr. Daniel Bradley Burdin, a board-certified chiropractic neurologist who practices with Petitioner. The claimant exhibited symptoms of bilateral carpal tunnel syndrome, although objective testing revealed nerve damage only to the right arm. In an effort to avoid surgery, Dr. Burdin treated the claimant conservatively for six to eight weeks, initially employing passive modalities. The patient improved gradually but not enough to resolve her symptoms satisfactorily. Accordingly, she sought other types of treatment from other providers. (Reimbursement for this initial period of treatment is not in dispute.)

The claimant resumed treatment with Dr. Burdin on February 14, 2002, and also received trigger-point injections from another provider during the following weeks. Ultimately, however, the patient's condition necessitated carpal tunnel surgery on May 7, 2002. Thereafter, Dr. Burdin provided rehabilitative treatment, beginning with passive modalities and progressing to active modalities. Dr. Burdin concluded his treatment of the claimant on August 21, 2002.

When Petitioner subsequently billed the claimant's employer \$5,359.00 for the services from February 14 through August 21, 2002, the employer (then acting in the role of self-insurer) denied reimbursement on the grounds that the treatment had been medically unnecessary. Petitioner sought medical dispute resolution through the Commission. The IRO to which the Commission referred the dispute issued a decision on April 20, 2003, concluding that Petitioner had failed to document any relief in the patient's symptoms from the chiropractic treatment at issue (or any other reason that such services had been necessary). The IRO declared that mild symptoms, such as those exhibited by the claimant, should have responded favorably within six to eight weeks of treatment. Since all forms of conservative care had failed in this case prior to the disputed dates of service, further pursuit of such treatment during that period was not reasonable or effective in relieving symptoms or improving function.

The Commission's Medical Review Division ("MRD") reviewed the IRO's decision and, on May 2, 2003, issued its own decision confirming that the disputed services were not medically necessary and should not be reimbursed. Petitioner then made a timely request for review of the IRO and MRD decisions before SOAH. Respondent retained counsel and appeared in the proceedings to represent the position initially taken in the action by the claimant's employer.

## **THE PARTIES' EVIDENCE AND ARGUMENTS**

### **A. PETITIONER**

Petitioner argued that the disputed treatment was needed to achieve full rehabilitation of the claimant, as opposed to merely rushing her back to work with some limited physical capacity. Dr. Burdin testified for Petitioner that the claimant's symptoms had improved from the application of active and passive modalities prior to February 14, 2002, but that her condition then had not yet been cured or reached an "optimal" level. According to Dr. Burdin, he properly used passive modalities during the period in dispute as a complement to injections that the claimant was then receiving periodically. These modalities-such as massage and ultrasound-helped disperse the injected medication throughout the patient's affected tissue, said Dr. Burdin.

After the claimant's carpal tunnel surgery, testified Dr. Burdin, he prescribed passive and active modalities, as necessary, until the claimant was completely ready to return to work. He rejected the view of a peer-review report in this case that the norm for post-operative rehabilitative treatment is only 12 sessions of such therapy.

## **B. RESPONDENT**

Respondent took the position that the claimant in this case responded very well to the aftermath of her injury and that much of the chiropractic therapy administered to her was therefore unnecessary. Ultimately, Respondent contended, nothing in the record indicates that chiropractic therapy significantly hastened the claimant's return to work. Rather, her carpal tunnel surgery accomplished that.

Dr. Nicholas Tsourmas, a board-certified orthopedic surgeon, testified at the hearing for Respondent. He concluded that the record showed little or no improvement in the claimant's symptoms that could be attributed to the chiropractic modalities administered between February 14 and August 21, 2002. Comparing functional capacity evaluations ("FCEs") performed at the beginning and end of the disputed dates of service, Dr. Tsourmas noted little difference in the recorded results.

Dr. Tsourmas was particularly skeptical of Petitioner's contention that passive modalities enhanced the effect of trigger-point injections by distributing the injected medication through the patient's tissue. No published authorities indicate that this process occurs, he said. Since injected material is firmly bound to the local tissue within five minutes of entering the body, he added, the infeasibility of moving around that medication through crude mechanisms such as massage should be obvious.

Dr. Tsourmas, who has treated carpal tunnel syndrome, testified that a carpal tunnel release (such as that performed upon the claimant) is one of the simplest orthopedic surgeries-typically a 15-minute out-patient procedure. In this particular case, the record indicated no complications. In these circumstances, stated Dr. Tsourmas, he virtually never observes physicians prescribing physical therapy (except for at-home exercises by the patient). People who undergo this type of surgery typically go back to work within 48 hours, subject to some restrictions upon their activities. Given this context, Dr. Tsourmas was unable to perceive a justification for some two-dozen post-operative therapy sessions, as Petitioner provided in this case.

## **ANALYSIS**

Petitioner bears the burden of proving those deficiencies that it contends should invalidate the IRO's decision in this case. In the ALJ's view, it has not discharged that burden.

As the IRO's decision suggested, documentation of the chiropractic sessions in this case was at best inconclusive in demonstrating that such treatment perceptibly benefitted the claimant. Dr. Burdin's testimony at the hearing, in the ALJ's view, did not make Petitioner's case any more convincing. Rather, Dr. Burdin's general statements describing periods of temporary improvement

in claimant's symptoms before her surgery-and gradual improvement thereafter-did not really even

attempt to distinguish between benefits attributable to the chiropractic modalities and benefits attributable to injections or to the surgery itself.

With respect to the issues of whether passive modalities enhance the efficacy of injections and whether extensive chiropractic therapy is useful following uncomplicated carpal tunnel surgery, Dr. Tsourmas' testimony was somewhat more systematic and persuasive than Dr. Burdin's (although the ALJ does not regard either issue as having been definitively settled in this proceeding). But even allowing that the weight of the parties' respective evidentiary and legal presentations may have been generally comparable, Petitioner has not demonstrated that the prior decisions of the IRO and MRD should be overturned.

## **CONCLUSION**

The ALJ finds that, under the record provided in this case, the medical services at issue have not been shown to be medically necessary. Reimbursement for these services should be denied, accordingly, as initially determined by the IRO.

## **FINDINGS OF FACT**

1. On \_\_\_\_, claimant reported a carpal tunnel injury that was a compensable injury under the Texas Worker's Compensation Act ("the Act"), TEX. LABOR CODE ANN. § 401.001 *et seq.* Subsequent to the injury, claimant experienced chronic pain in the upper extremities.
2. Dr. Daniel Bradley Burdin, a chiropractic neurologist practicing with the Neuromuscular Institute of Texas, PA ("Petitioner") began treatment of the claimant immediately after the report of injury, initially providing six to eight weeks of conservative treatment, including passive and active chiropractic modalities.
3. The claimant returned to treatment with Dr. Burdin on February 14, 2002, and continued in treatment until August 21, 2002, again receiving passive and active modalities.
4. Petitioner sought reimbursement of \$5,359.00 for services noted in Finding of Fact No. 3 from the claimant's employer, which was then acting in the role of self-insurer.
5. The claimant's employer denied the requested reimbursement.
6. Petitioner made a timely request to the Texas Workers' Compensation Commission ("Commission") for medical dispute resolution with respect to the requested reimbursement.
7. The independent review organization ("IRO") to which the Commission referred the dispute issued a decision on April 20, 2003, concluding that Petitioner had failed to document any relief in the patient's symptoms from the chiropractic treatment at issue. The IRO declared that mild symptoms, such as those exhibited by the claimant, should have responded favorably within six to eight weeks of treatment.

Since all forms of conservative care had failed in this case prior to the disputed dates of service, further pursuit of such treatment during that period was not reasonable or effective in relieving

symptoms or improving function.

8. The Commission's Medical Review Division reviewed and concurred with the IRO's decision in a decision dated May 2, 2003, in dispute resolution docket No. M5-03-1471-01.
9. Petitioner requested in timely manner a hearing with the State Office of Administrative Hearings ("SOAH"), seeking review and reversal of the MRD decision regarding reimbursement.
10. The Commission mailed notice of the hearing's setting (originally for July 16, 2003) to the parties at their addresses on June 19, 2003. The hearing was subsequently continued to August 18, 2003, with proper notice to parties.
11. A hearing in this matter was convened on August 18, 2003, at the William P. Clements Building, 300 W. 15<sup>th</sup> St., Austin, Texas, before Mike Rogan, an Administrative Law Judge with SOAH. Petitioner and Liberty Mutual Insurance Co. ("Respondent") were represented. Respondent retained counsel and appeared in the proceedings to represent the position initially taken in the action by the claimant's employer.
12. The medical services noted in Finding of Fact No. 3 did not provide perceptible relief of the claimant's symptoms or restoration of function, as distinguishable from the effects of other treatments provided to the claimant during the same period.
13. Passive modalities, such as massage and ultrasound, included among the medical services noted in Finding of Fact No. 3, did not enhance the distribution of medication from contemporaneous injections into the claimant's affected tissue.

### **CONCLUSIONS OF LAW**

1. The Texas Workers' Compensation Commission has jurisdiction related to this matter pursuant to the Texas Workers' Compensation Act ("the Act"), TEX. LABOR 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 § 413.031(k) of the Act and TEX. GOV'T CODE ANN. ch. 2003.
3. The hearing was conducted pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001 and the Commission's rules, 28 TEX. ADMINISTRATIVE CODE ("TAC") § 133.305(g) and §§ 148.001-148.028.
4. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
5. Petitioner, the party seeking relief, bore the burden of proof in this case, pursuant to 28 TAC § 148.21(h).

6. Based upon the foregoing Findings of Fact, the treatments for the claimant noted in Finding of Fact No. 3 do not represent elements of health care medically necessary under § 408.021 of the Act.
7. Based upon the foregoing Findings of Fact and Conclusions of Law, the findings and decisions of the IRO issued on April 20, 2003, and of the MRD, issued in this matter on May 2, 2003, were correct; reimbursement of \$5,359.00 for the services noted in Finding of Fact No. 3 should be denied.

**ORDER**

**IT IS THEREFORE, ORDERED** that the appeal of the Neuromuscular Institute of Texas, PA., seeking reimbursement of \$5,359.00 for medical services from February 14 to August 21, 2002, be denied, in accordance with the findings and decision of the independent review organization issued in this matter on April 20, 2003, and concluding that the disputed services had not been shown to be medically necessary.

**SIGNED this 4th day of September 2003.**

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**MIKE ROGAN**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**