

**DARIN J. MITCHELL, D.C.,**  
**Petitioner**

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**BEFORE THE STATE OFFICE**

**V.**

**OF**

**LIBERTY MUTUAL FIRE INSURANCE**  
**COMPANY**

**Respondent**

**ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

This case is an appeal by Darin J. Mitchell, D.C. (Petitioner or Provider), 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 Fire Insurance Company (Respondent or Carrier), properly denied reimbursement for office visits, physical therapy and related services that Petitioner provided from March 27 to June 11, 2003, to a claimant suffering from a compensable low back injury.

Petitioner challenged the decision on the basis that the treatment at issue was, in fact, medically necessary, within the meaning of §§ 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 in part only, finding that reimbursement of Petitioner for the disputed services should be denied in part and granted in part. Specifically, Petitioner should be reimbursed for the March 27, 2003 initial office visit and the treatment beginning April 28 through June 11, 2003.

**I. 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.

## II. STATEMENT OF THE CASE

Administrative Law Judge (ALJ) Lilo D. Pomerleau convened the hearing in this docket on February 24, 2004, at SOAH facilities in the William P. Clements Building, 300 West 15<sup>th</sup> Street, Austin, Texas. Petitioner represented himself. Respondent was represented by Charlotte Salter, attorney. The hearing was adjourned and the record closed that same day.

On \_\_\_\_, Claimant, a delivery truck driver, suffered a compensable injury to his right lower back and hip when he was lifting boxes of briskets in metal cans weighing 20-30 pounds. That day, Dr. William Ledlie diagnosed Claimant as likely having a musculoskeletal strain and lumbar strain, evidenced by lumbosacral pain with some radiation into the gluteus and down the back of the leg. Claimant had no neurological defects.<sup>1</sup> He received passive therapy, such as hot packs, electrical stimulation, and therapeutic exercise through May 22, 2002. Claimant continued to have pain in his low back and right gluteus, extending to his right thigh; he was confined to restricted activities. On May 20, 2003, Claimant underwent an MRI. The reporting radiologist diagnosed a 2-3 mm disc protrusion at L5-S1. Dr. Robert Levinthal, a neurosurgeon, reviewed the May 20 MRI, finding some degenerative type changes at L5-S1, with a shallow bulge at L5-S1 that did not cause focal nerve compression.<sup>2</sup> On May 22, 2002, Claimant had worsening pain, extending to his mid-dorsal right foot; Dr. Levinthal prescribed anti-inflammatory and pain medication and recommended an additional three weeks of therapy and a back exercise program. Claimant received physical therapy, including heat, myofascial stretching, ultrasound, kinetic exercises, therapeutic activities, and joint mobilization through July 30, 2002. After seeing Dr. Levinthal on July 30, 2002, Claimant went through six weeks of work hardening. A functional capacity evaluation (FCE) of Claimant, dated September 25, 2002, classified Claimant's job description as a delivery truck driver as "Medium Work" level, defined as "exerting 20 to 50 pounds of force occasionally." However, Claimant described his work requirements as needing to lift, carry, push, and pull frozen meat and dry goods

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<sup>1</sup> Provider Ex. B at 1; Carrier Ex. B at 1.

<sup>2</sup> Carrier Ex. B at 24-38.

weighing up to 80 pounds, placing his job category at a medium-heavy level.<sup>3</sup> The FCE indicated Claimant could qualify for medium level work or heavy work, with restrictions of lifting no more than 40 pounds.

On October 2, 2002, Dr. Robert Fortin performed a peer review on Claimant. He found that the work-related trauma to the low back led to a protrusion of the disc at L5/S1, causing persistent low back pain and radiculopathy involving the right leg. In his opinion, Claimant's persistent pain, ranging from a 6-8, would make it difficult for the patient to complete a work hardening program and successfully return to his job. While he would not have prescribed a work hardening program at the time, Claimant had already completed the program. Dr. Fortin opined that the next step would be a two-week trial of work hardening to see if Claimant could tolerate the exercise without aggravating the back, with a total of four weeks of work hardening, at most.<sup>4</sup>

After a number of months in which Claimant appears to have not seen any physicians, he began treatment again with Edward C. Murphy, a neurosurgeon. On February 26, 2003, he went to Dr. Anthony S. Melillo, who performed a required medical evaluation (RME) on Claimant. At the time, Claimant complained of intermittent low back pain and persistent right buttock pain radiating into his posterior thigh. Dr. Melillo's report stated that Claimant tried to return to work with a 40-pound weight-lifting restriction, but the work was causing him pain and he was terminated on May 28, 2002.<sup>5</sup> Dr. Melillo's report also suggested that Claimant could return to work with restrictions and recommended lumbar steroid injections and four additional weeks of physical therapy "emphasizing aerobic conditioning and low back strengthening."<sup>6</sup> A second FCE on February 26, 2003, the same

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<sup>3</sup> Carrier Ex. B at 57. Later records indicated Claimant was lifting 80 pounds of brisket at the time of his initial injury, however, the bulk of the evidence uses the 20-30 pound amount.

<sup>4</sup> Carrier Ex. B at 60-63.

<sup>5</sup> See Carrier Ex. B at 69. The injury occurred on \_\_\_\_, but the report states he was fired shortly afterwards (May 28, 2002) before the work hardening program that ran from August 13 through September 20, 2002. Carrier Ex. B at 65.

<sup>6</sup> Carrier Ex. B at 72.

day Dr. Melillo examined Claimant, indicated Claimant could work within the medium work category.<sup>7</sup> On March 4, 2003, Dr. Murphy recommended starting Claimant on a program of “passive to active assisted to active care.”<sup>8</sup>

Dr. Murphy referred Claimant to Dr. Mitchell; Claimant visited Dr. Mitchell’s office for the first time on March 27, 2003. Dr. Mitchell treated Claimant for six weeks. Finally, Claimant underwent a second work hardening program, which Carrier pre-approved. It is the treatments and office visits during that six weeks of physical therapy under Dr. Mitchell that is disputed in this case, with Carrier arguing such was not medically necessary.

### **III. THE EVIDENCE AND ARGUMENTS**

#### **A. Petitioner**

Dr. Mitchell testified on his own behalf. He noted that the case was disputed from its inception-Claimant’s \_\_\_ injury was initially diagnosed as strain, but he was reevaluated and the subsequent MRI came back positive with a L5-S1 disc protrusion. According to Dr. Mitchell, the work hardening treatment was premature. He noted that Dr. Fortin reviewed Claimant’s records and stated that the initial FCE indicated that Claimant’s pain level should have prohibited him from participating in work hardening. Moreover, Dr. Fortin found that Claimant’s strength level had improved but an additional two weeks of work hardening to verify if Claimant could tolerate the exercise was indicated.<sup>9</sup> Months later, Claimant switched doctors and began seeing Dr. Edward Murphy, a neurosurgeon. Dr. Murphy sent Claimant to Dr. Melillo for a required medical evaluation (RME) and then referred Claimant to Dr. Mitchell. Dr. Mitchell thoroughly evaluated Claimant on March 28, 2003, stating his intent to “treat the patient very aggressively with the goal of returning

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<sup>7</sup> Carrier Ex. B at 73.

<sup>8</sup> Carrier Ex. B at 84-88.

<sup>9</sup> Provider Ex. B at 50-53.

him to some form of work.”<sup>10</sup> He treated Claimant initially with some passive therapy and active assisted therapy in order to facilitate stretching, joint manipulation, and active-based care. His stated goal was to take the patient to active care after a two-week initial transition phase. Moreover, Claimant was performing active-based exercises from the first day of therapy. According to Dr. Mitchell, passive treatment was ancillary to the more active treatment that Claimant received.

In closing argument, Provider noted that Claimant was not treated well in the first months of his care-he went into work hardening prematurely. Then, both Dr. Melillo and Dr. Murphy stated that further treatment was necessary. Provider followed Dr. Murphy’s instructions and treated Claimant with effective therapy.

## **B. Respondent**

Dr. Neal Blauzvern, an osteopathic surgeon, testified on behalf of Carrier. He noted that there was some disagreement as to the May 30, 2002 MRI’s findings. The radiologist found some disk protrusion while the neurosurgeon, Dr. Levinthal found only a shallow bulge. Dr. Blauzvern concurred with Dr. Levinthal based on his review of Claimant’s records but admitted he did not review the MRI results himself. In his opinion, Claimant’s pain, as indicated in the February 26, 2003 RME, is inconsistent with the only objective test in the record-the MRI. The crux of Dr. Blauzvern’s disagreement with the treatment in this case was Claimant’s lack of improvement after both weeks of physical therapy and six weeks of work hardening, and then more therapy from Dr. Mitchell. He opined that Claimant had undergone work hardening and there was no reason, no medical probability to support additional treatment. Moreover, Claimant failed to improve-his work pain persisted throughout and, while he was able to return to work with fewer restrictions, he had already been cleared to return to work previously. Dr. Blauzvern reiterated that there was no logical reason or medical support to repeat the treatment done before.

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<sup>10</sup> Provider Ex. A at 21.

In closing argument, Carrier acknowledged that Dr. Mitchell is a competent provider who provided therapy to Claimant upon referral from Dr. Murphy. However, argues Carrier, the system looks at efficiencies and, in this case, the repetition of chiropractic care was inefficient.

#### IV. ANALYSIS

At issue is whether the disputed chiropractic services, which included a number of passive physical modalities, was warranted some ten months after the initial injury and the completion of a work hardening program. The record indicates that Claimant was suffering from pain after that initial ten-month post-injury time frame. At least one doctor believed that Claimant underwent a work hardening program too early, and several doctors indicated after the initial work hardening program that Claimant would benefit from continued therapy. For instance, Dr. Fortin thought that a two week trial of work hardening, with a maximum of four weeks, might be of benefit (provided the work hardening did not aggravate Claimant's back and back pain). Dr. Melillo suggested four additional weeks of physical therapy, with an emphasis on aerobic conditioning and low back strengthening. Finally, when Dr. Murphy referred Claimant to Provider he prescribed a program of that began with passive care. In response, Dr. Mitchell indicated, after his initial work up of Claimant, that he would treat the patient very aggressively. However, Dr. Mitchell admitted that his treatment did include a number of passive modalities and treatment to prepare the patient for more active care to come (although the patient was performing some active-based exercises right from the start of treatment). According to Dr. Mitchell, by April 28, 2003, the treatment was fully active.

Carrier provided strong argument, evidence, and rationale for a finding that all chiropractic care was unnecessary, given Claimant's lack of significant progress after two rounds of both chiropractic treatment and work hardening. However, Claimant continued to have a fairly high level of pain after the initial physical therapy and initial work hardening program. Moreover, subsequent to these sessions, four doctors (Drs. Fortin, Melillo, Murphy, and Mitchell) indicated additional treatment was necessary.

In making a decision in this matter, the ALJ acknowledges the different opinions of the

doctors who both treated Claimant and reviewed his medical history, or simply reviewed his medical history. The IRO doctor, Carrier's testifying doctor, Dr. Blauzvern, Dr. Fortin, and Dr. Melillo recommended active-based therapy or found that passive care after ten months of treatment was not indicated. In support of giving Claimant more passive treatment, Dr. Murphy's notes are scant, and even Dr. Mitchell himself noted the need to treat the patient aggressively. However, Dr. Mitchell argued that the use of passive modalities facilitated a more progressive advance to active-based treatments. The ALJ concludes that, given the number of months after the initial injury and the fact that Claimant had already undergone work hardening, any subsequent treatment should have had a strong active-based focus. Accordingly, the ALJ finds sufficient evidentiary support for the active portion of Dr. Mitchell's care, which began fully on April 28, 2003, with the addition of the initial office visit,<sup>11</sup> including the orthosis (foot orthotics). It appears that some of the treatment in the April 28 through June 11, 2003 time period includes some passive treatments, however, Dr. Mitchell explained these are used in conjuncture with more active care. After Dr. Mitchell's care, Claimant improved, allowing Dr. Murphy to prescribe work hardening and release the patient to work.<sup>12</sup>

Petitioner bears the burden of proving that the factual basis or analytical rationale for the IRO's decision in this case was invalid. In the ALJ's view, he met that burden in part. Under § 408.021 of the Act, an injured worker is entitled to "health care reasonably required" to relieve the effects of the injury or to enhance the ability to continue working. However, care that provides only superficial improvement or relief at inordinate cost is not "reasonably" required. The record in this case indicates that Claimant had ongoing pain, but less need for passive-based treatment; rather, the focus of his chiropractic treatment should have been strongly active-based, as it was from the date of April 29, 2003, onward. The record further shows that a number of doctors found Claimant had a need for further treatment, which Provider gave from April 28 through June 11, 2003. Those treatments allowed Claimant to proceed with additional work hardening sessions, pre-approved by Carrier. The ALJ further found Dr. Mitchell's testimony as a treating doctor more persuasive on the need for the orthosis. Thus, Petitioner demonstrated by a preponderance of the evidence, as legally required, that the prior decisions of the IRO and Medical Review Division in this case should be

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<sup>11</sup> At the hearing, Dr. Blauzvern agreed that Dr. Mitchell needed to perform a thorough evaluation on Claimant during his first office visit.

<sup>12</sup> Provider Ex. A at 95.

overturned, in part.

## V. CONCLUSION

The ALJ finds that, under the record provided in this case, the medical services at issue have been shown, in part, to be medically necessary. Reimbursement for passive services should be denied, accordingly, as initially determined by the IRO. Carrier should reimburse Petitioner for the initial office visit and for treatment given on the dates beginning April 28 through June 11, 2003, except for the orthosis.

## VI. FINDINGS OF FACT

1. On \_\_\_\_, Claimant, a delivery truck driver, injured his right lower back and hip when lifting boxes of brisket meat weighing 20-30 pounds. The injury was a compensable injury under the Texas Worker's Compensation Act (the Act), TEX. LABOR CODE ANN. § 401.001 *et seq.*
2. Claimant's injury produced persistent lower back, right buttock, and right thigh pain, for which he received physical therapy beginning shortly after the injury occurred through May 22, 2002.
3. A May 20, 2003 MRI indicated Claimant had a shallow bulge or small disc protrusion at L5-S1.
4. Claimant received three additional weeks of physical therapy including heat, myofascial stretching, ultrasound, kinetic exercises, therapeutic activities, and joint mobilization through July 30, 2002. Claimant then went through six weeks of a work hardening program.
5. After the work hardening program referenced in the above Finding of Fact, Claimant qualified for work at medium level or at heavy level, with lifting restrictions.
6. In a peer review of Claimant's medical history, dated October 2, 2002, Dr. Robert Fortin opined that Claimant's participation in the work hardening program was premature given Claimant's ongoing pain at level six to eight out of ten. Dr. Fortin recommended a two week trial of additional work hardening with a total additional period of four weeks in a work hardening program.
7. After a number of months in which Claimant appears to have not seen any physicians, on February 26, 2003, he met with Dr. Anthony S. Melillo, who performed a required medical evaluation (RME) on Claimant and recommended additional physical therapy emphasizing aerobic conditioning and low back strengthening.
8. On March 4, 2003, Claimant was seen by Edward C. Murphy, a neurosurgeon, who

- recommended starting Claimant on a program of passive to active assisted to active care.
9. Dr. Murphy referred Claimant to Petitioner. Petitioner provided therapeutic treatment to Claimant for the injury noted in Finding of Fact No. 1 from March 27 to June 11, 2003.
  10. Petitioner sought reimbursement for services noted in Finding of Fact No. 9 from Liberty Mutual Fire Insurance Company (Respondent), the insurer for Claimant's employer.
  11. Respondent denied the requested reimbursement.
  12. Petitioner made a timely request to the Texas Workers' Compensation Commission (Commission) for medical dispute resolution with respect to the requested reimbursement.
  13. The independent review organization (IRO) to which the Commission referred the dispute issued a revised decision on June 14, 2004, and concluded the services provided by Petitioner had not been medically necessary, based upon: (a) no need for a comprehensive office visit given the complete medical history; (b) lack of efficacy in prior treatment was not an indicator to repeat the same treatment; (c) use of muscle stimulation and conservative modalities ten months after injury was not warranted; and (d) foot orthosis not necessary to care for disc herniation. Services which the IRO found unnecessary included Level IV office visit, electrical stimulation, myofascial release, joint mobilization, neuromuscular reeducation, Level III office visit, ultra sound, therapeutic exercises, nursing evaluation, kinetic activities, and plantar orthosis.
  14. The Commission's Medical Review Division reviewed and concurred with the IRO's decision in a decision dated July 1, 2004, in dispute resolution Docket No. M5-04-2143-01.
  15. Petitioner requested in a timely manner a hearing with the State Office of Administrative Hearings (SOAH), seeking review and reversal of the MRD decision regarding reimbursement.
  16. The Commission mailed notice of the hearing's setting to the parties at their addresses on August 19, 2004.
  17. A hearing in this matter was initially convened on February 24, 2004, at the William P. Clements Building, 300 W. 15<sup>th</sup> Street, Austin, Texas, before Lilo D. Pomerleau, an Administrative Law Judge with SOAH. Petitioner was represented by himself and Respondent was represented by Charlotte Salter, attorney. The record closed that same day.
  18. From March 27 through June 11, 2003, Petitioner treated the claimant with office visits, electrical stimulation, myofascial release, joint mobilization, neuromuscular reeducation, ultra sound, therapeutic exercises; nursing evaluation; kinetic activities, and plantar orthosis.
  19. Petitioner's initial treatment of Claimant began with a necessary Level IV office visit.

20. Treatment provided to Claimant from March 28 through 25 was passive.
21. Treatment provided to Claimant from April 28 through June 11, 2003, was more active-based.
22. After Claimant had completed an initial work hardening program, four reviewing doctors either recommended additional active based therapy or no additional passive based therapy.
23. There is little evidence that the predominately passive-based therapy given to Claimant approximately ten months post-injury and post-participation in a work hardening program was necessary.
24. There is sufficient evidence that the predominately active-based therapy given to Claimant starting on April 28, 2003, allowed Claimant to improve enough for additional work hardening sessions.

## **VII. CONCLUSIONS OF LAW**

1. 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.
2. The hearing was conducted pursuant to the Administrative Procedure Act, TEX. GOV' T CODE ANN. ch. 2001 and the Commission's rules, 28 TEX. ADMIN. CODE (TAC) §§ 148.001-148.028.
3. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV' T CODE ANN. §§ 2001.051 and 2001.052.
4. Petitioner, the party seeking relief, bore the burden of proof in this case, pursuant to 28 TAC § 148.21(h).
5. Based upon the foregoing Findings of Fact, the treatments for the claimant on April 28, through June 11, 2003, represent elements of health care medically necessary under § 408.021 of the Act.

6. Based upon the foregoing Findings of Fact and Conclusions of Law, the findings and decisions of the IRO and of the MRD were incorrect in part; Petitioner's request of reimbursement for services should be granted for the initial office visit of April 27, 2003 and for services performed on April 28 through June 11, 2003.

**ORDER**

**IT IS THEREFORE, ORDERED** that the appeal of Darin J. Mitchell, D.C., seeking reimbursement for chiropractic services performed on March 27, 2003, and from April 28 to June 11, 2003, be granted in part, as these particular disputed services were shown to be medically necessary. Dr. Mitchell should be reimbursed \$2,302.00.

**SIGNED April 25, 2005.**

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**LILO D. POMERLEAU  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS**