

**SOAH DOCKET NO. 453-05-1996.M5  
TWCC MR NO. M5-04-3819-01**

**WACO ORTHO REHAB,  
Petitioner**

V.

**LIBERTY MUTUAL FIRE INSURANCE,  
Respondent**

**BEFORE THE STATE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Petitioner Waco Ortho Rehab (Provider) disagrees with the decision of an independent review organization (IRO) issued on behalf of the Texas Workers' Compensation Commission (Commission)/Medical Review Division (MRD)<sup>1</sup> finding that the medical services provided to Claimant from September 10, 2003, to November 17, 2003, were not medically necessary. These services included office visits, range of motion testing, chiropractic manipulations, physical therapy, massages, required reports, mechanical traction, physical performance tests, muscle testing, and supplies (disputed medical services). The amount in dispute is approximately \$6,000.00.

After considering the evidence and arguments presented, the Administrative Law Judge (ALJ) finds that Provider proved by a preponderance of the evidence that the disputed medical services were medically necessary. Therefore, Provider is entitled to reimbursement from Liberty Mutual Fire Insurance Company (Carrier) for the disputed medical services.

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<sup>1</sup> Effective September 1, 2005, the functions of TWCC have been transferred to the newly created Division of Worker's Compensation at the Texas Department of Insurance.

## **I. PROCEDURAL HISTORY, NOTICE AND JURISDICTION**

The State Office of Administrative Hearings (SOAH) has jurisdiction over matters related to the hearing in this proceeding pursuant to TEX. LAB. CODE ANN. § 413.031 (k) and TEX. GOV'T CODE ANN. Ch. 2003. No party challenged jurisdiction or notice.

Administrative Law Judge (ALJ) Catherine C. Egan convened the hearing on the merits on April 11, 2006, at the SOAH hearing facilities in, Austin, Texas. Attorney William Maxwell represented Provider. Attorney Kevin Franta represented Carrier. The record remained open for the filing of additional information until April 21, 2006, when it closed.

## **II. BACKGROUND**

On \_\_\_, Claimant, a 31-year-old male, fell 30 feet while trimming trees from a cherry picker. Claimant slammed into the metal boom truck before his safety harness pulled him back up into the air and then dropped him back onto the boom truck. Claimant injured his neck, back, head, shoulder, abdomen, wrist and elbow during the fall. Claimant was treated for the following conditions: closed head injury; abdominal contusion, neck sprain/strain, lumbar sprain/strain, jaw sprain, rotator cuff sprain/strain, elbow strain/strain, lateral epicondylitis, wrist sprain/strain and muscle spasms.<sup>2</sup> Claimant was initially treated at Scott & White Hospital. When he was released from the hospital he went to Provider for treatment. Carrier paid Provider for approximately 36 dates of service covering two months of care. Carrier denied the remaining two months of treatment as medically unnecessary.

## **III. DISCUSSION**

Provider had the burden of proof. Provider's expert, David N. Bailey, D.C., F.A.C.O., was also the treating physician. According to Dr. Bailey, the initial treatment plan was to provide

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<sup>2</sup> Pet. Ex. 1 at 2.

Claimant with home exercises and home cryotherapy.<sup>3</sup> Later, Dr. Bailey changed the treatment plan to include therapeutic treatments with physical therapy because of the complexity of Claimant's injuries. The treatment plan continued until July 2003. Dr. Bailey did another evaluation on July 1, 2003, and initiated a modified treatment plan that included a home exercise program, chiropractic management and physical medicine treatments, both passive and active, and weight training.<sup>4</sup>

On July 17, 2003, Joel G. Freitag, M.D. examined Claimant as part of an initial neurological consultation. Dr. Freitag recorded that Claimant had headaches and has lost some short-term recall. Dr. Freitag found that Claimant suffered with posttraumatic stress syndrome secondary to a concussion. Dr. Freitag opined that Claimant's loss of short term memory and his headaches would resolve at the same time his musculoskeletal complaints resolved, which Dr. Freitag believed would be in three months. Dr. Freitag scheduled another follow-up appointment three months later. On October 15, 2003, Dr. Freitag conducted a follow-up visit with Claimant and reported that Claimant continued to have headaches. Dr. Freitag prescribed medication for the post concussive headaches.<sup>5</sup> Dr. Bailey asserted that Claimant's psychological and neurological problems complicated his treatment.

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<sup>3</sup> Pet. Ex. 2 at 13.

<sup>4</sup> Pet. Ex. 2 at 24.

<sup>5</sup> Pet. Ex. 1 at 70.

On September 3, 2003, and October 14, 2003, Dr. Bailey re-evaluated Claimant's progress and opined that Claimant improved, albeit slowly. Disagreeing with the IRO's conclusion that Claimant did not improve, Dr. Bailey noted that the medical records show that Claimant's strength capabilities improved over time in the injured areas. In addition, Claimant's arm muscles grew stronger, his range of motion increased in his shoulder and low back, and his grip strength improved. As a result of the October 2003 re-evaluation, Dr. Bailey revised the treatment plan to stop exercise rehabilitation and returned Claimant to limited duty.<sup>6</sup> Claimant was directed to return to Provider on an as needed basis to treat the residual effects of the injury and to keep Claimant at work. Claimant returned to work and exacerbated his injury. He returned to Provider for treatment on October 27, 2003.

Carrier had Glen Marr, D.C. conduct a peer review on October 2, 2003.<sup>7</sup> After reviewing the Claimant's medical record, Dr. Marr approved only the 36 treatments provided from June 12, 2003, through September 4, 2003. Dr. Bailey excepted to Dr. Marr's opinion because Dr. Marr offers no rationale for his decision. Consequently, Dr. Bailey argues, Dr. Marr's opinion is merely an unsupported conclusion.

Likewise, Dr. Bailey excepted to the IRO's report. The IRO determined that Claimant had "an adequate course of treatment prior to the dates in dispute, with minimal relief of symptoms or improved function." The IRO found that the treatment did not result in measurable improvement, was not directed at a return to work, and was not conducted in the least intensive setting. While Dr. Bailey agreed that Claimant did not improve in every measure of improvement, he referred to significant improvements in certain areas as noted above. The IRO also failed to address Claimant's psychological disorders (the post traumatic stress syndrome), the neurological issues (headaches and loss of short term memory), and multiple injuries Claimant sustained when it evaluated Provider's treatment protocol.

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<sup>6</sup> Pet. Ex. 2 at 62.

<sup>7</sup> Pet. Ex. 2 at 262.

Carrier's expert, Ben MacMaster, M.D., an orthopedic surgeon, reviewed the medical records provided to him by Carrier.<sup>8</sup> According to Dr. MacMaster, Claimant did not require one-on-one therapy and did not need additional therapy past the first two months. Dr. MacMaster explained that because Claimant's condition did not substantially improve after the first two months of therapy it was medically unnecessary to continue this course of treatment. Moreover, he argued, nothing in the record indicated that Claimant needed to be constantly monitored during therapy.

On December 18, 2003, Claimant underwent an impairment evaluation at Montgomery Chiropractic. After conducting the evaluation, Larry R. Montgomery, D.C., determined that Claimant had not reached maximum medical improvement. Dr. Montgomery stated the following:

In reviewing the above documents it is clear that [Claimant] has not reached Maximum Medical Improvement and slow but steady improvement continues. This is demonstrated by the functional capacity evaluations and the pain scale measurements contained within the records. It is also clear that [Claimant] is able to perform a greater intensity of exercise although pain continues with performance. . . I concur with Dr. Bailey's diagnosis of closed head injury and resulting headaches and cervical pain. It is well documented that symptoms from these injuries may persist for 1 to 2 years.

. . . It is my conclusion that [Claimant] has had excellent case management and should continue with this management for a minimum of 6 months or until that time of maximum medical improvement as determined by his treating doctor.<sup>9</sup>

Provider had the burden of proof in this matter. Dr. Bailey argues that reviewing the effectiveness of treatment after it is provided, is different from trying to craft a course of treatment that will relieve or cure the effects of a compensable injury. Claimant suffered multiple injuries when he fell, including possible neurological damage. Claimant continued to experience pain,

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<sup>8</sup> Res. Ex. 1.

<sup>9</sup> Res. Ex. 1 at A0217. The name of the Claimant was removed to preserve the confidentiality of these proceedings.

headaches, and dizziness. While he did not progress rapidly, Claimant did improve. Ultimately, Dr. Bailey's course of treatment did not generate the desired outcome. Nonetheless, it did result in slight improvements in Claimant's condition as noted by Dr. Montgomery. Given the nature of Claimant's compensable injury with the multiple areas hurt in the fall, the trauma experienced by Claimant, and the headaches and dizziness Claimant experienced, a final effort to see if physical therapy could relieve or cure the effects of Claimant's compensable injury was medically reasonable. The fact that the treatment was not successful is not dispositive of this issue, but is one factor to consider. After considering all the evidence presented, the ALJ finds that Provider proved by a preponderance of the evidence that the disputed medical services were medically necessary.

#### **IV. FINDINGS OF FACT**

1. On\_\_\_\_, Claimant sustained a compensable injury to his neck, back, head, abdomen, wrist, shoulder, and elbow as a result of his work activities.
2. At the time of Claimant's compensable injury, Claimant's employer's workers' compensation insurance carrier was Liberty Mutual Fire Insurance (Carrier).
3. As a result of the compensable injury, the Claimant suffered with closed head injury; abdominal contusion, neck sprain/strain, lumbar sprain/strain, jaw sprain, rotator cuff sprain/strain, elbow strain/strain, lateral epicondylitis, wrist sprain/strain and muscle spasms.
4. After leaving the hospital, Claimant went to Waco Ortho Rehab (Provider) for treatment.
5. Provider treated Claimant with passive and active therapies, including chiropractic manipulations.
6. Carrier paid for 36 dates of service covering two months of care, and denied the rest as medically unnecessary.
7. On July 17, 2003, Joel G. Freitag, M.D., a neurologist, examined Claimant because Claimant was suffering with a loss of short-term memory and headaches related to his musculoskeletal injuries.

8. Dr. Freitag found that Claimant had post-traumatic stress syndrome secondary to a concussion.
9. Claimant's psychological and neurological problems complicated the type of treatment Provider gave Claimant, including the need for one-on-one treatment.
10. Claimant's compensable injury improved slightly from September 10, 2003, to November 17, 2003, because of the disputed medical services, including the office visits, range of motion testing, chiropractic manipulations, physical therapy, massages, required reports, mechanical traction, physical performance tests, muscle testing, and supplies (disputed medical services).
11. The disputed medical services were medically necessary to relieve Claimant's compensable injury.
12. On August 27, 2004, an independent review organization (IRO) reviewed the medical dispute and found that the disputed medical services were not medically necessary.
13. Based on the IRO's findings, the Texas Workers' Compensation Commission's Medical Review Division (MRD) denied Provider's request for reimbursement for the disputed medical services.
14. After the MRD order was issued, Provider requested a contested-case hearing by a State Office of Administrative Hearings (SOAH) Administrative Law Judge (ALJ).
15. Required notice of a contested-case hearing concerning the dispute was mailed to the parties.
16. On April 1, 2006, SOAH ALJ Catherine C. Egan held a contested-case hearing concerning the dispute at the William P. Clements Office Building, Fourth Floor, 300 West 15th Street, Austin, Texas. Attorney William Maxwell represented Provider. Attorney Kevin Franta represented Carrier. The record remained open for the filing of additional information until April 21, 2006, when it closed.

## **V. 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 TEX. LABOR CODE ANN. (Labor Code) §§ 402.073(b) and 413.031(k) and TEX. GOV'T CODE ANN. (Gov't Code) ch. 2003.

2. Adequate and timely notice of the hearing was provided in accordance with Gov't Code §§ 2001.051 and 2001.052.
3. Based on the above Findings of Fact and Gov't Code § 2003.050 (a) and (b), 1 TEX. ADMIN. CODE (TAC) § 155.41(b) (2004), and 28 TAC §§ 133.308(v) and 148.21(h) (2004), Claimant has the burden of proof in this case.
4. 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 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. Labor Code § 408.021 (a).
5. Based on the above Findings of Fact and Conclusions of Law, the disputed medical services provided by Provider to Claimant from September 3, 2003 and November 17, 2003, were medically necessary to treat Claimant's compensable injuries.

## **ORDER**

**IT IS ORDERED THAT** Liberty Mutual Fire Insurance reimburse Waco Ortho Rehab for the disputed medical services provided to Claimant by Waco Ortho Rehab from September 2, 2003, through November 17, 2003.

**SIGNED June 20, 2006.**

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**CATHERINE C. EGAN  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS**