

SOAH DOCKET NO. 454-11-3602.C1

TEXAS DEPARTMENT OF	§	BEFORE THE STATE OFFICE
INSURANCE,	§	
Petitioner	§	
	§	
v.	§	OF
	§	
MONTE MARK MITCHELL, D.O.,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

**DECISION AND ORDER**

The Texas Department of Insurance, Division of Workers' Compensation (Division), initiated this action to deny Monte Mark Mitchell, D.O. (Respondent), the right to practice before the Division or receive remuneration, directly or indirectly, under the Texas Labor Code because of Respondent's failure to respond to a Division order. After considering the evidence and the arguments presented, the Administrative Law Judge (ALJ) concludes that the Division failed to meet its burden of proof, and its request to deny Respondent the right to practice before the Division or receive remuneration, directly or indirectly, under the Texas Labor Code, should be denied.

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

There are no contested issues concerning notice or jurisdiction. These matters are discussed only in the Findings of Fact and Conclusions of law. The hearing convened before ALJ Steven D. Arnold on November 9, 2011. The hearing concluded that same day and the record closed on December 8, 2011, after the time for making corrections to the transcript expired. Vidya Gopalakrishna represented the Division and Bradley McClellan represented Respondent.

**II. APPLICABLE LAW**

Health care providers who participate in the Texas Workers' Compensation System have a duty to provide quality health care to their patients.<sup>1</sup> The Division has a

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<sup>1</sup> Tex. Lab. Code § 408.023; 28 Tex. Admin. Code § 180.22.

duty to oversee and monitor system participants, including health care providers, and ensure that the services provided meet standard requirements for quality of care.<sup>2</sup>

The Office of Medical Advisor (OMA) performs medical quality reviews of health care providers.<sup>3</sup> To perform a medical quality review, OMA obtains medical records from the health care provider regarding the treatment and care of specified patients. The medical records are then evaluated for various criteria, including examination, treatment, and return-to-work outcomes. A health care provider who does not, or cannot, provide these records in a reasonably timely manner cannot be properly evaluated by the Division. Health care providers commit an administrative violation if they fail or refuse to timely file required reports or records, or if they violate the Texas Workers' Compensation Act, or a rule, order, or decision of the Commissioner.<sup>4</sup>

### III. EVIDENCE AND ARGUMENTS

Carol Ann Sherman, Program Specialist III at the Division, and Donald Patrick, Medical Advisor for the Division, testified for the Division. Respondent testified on his own behalf.

Essentially, the facts in this case are not disputed. Ms. Sherman testified that Respondent received his license from the Medical Board on August 27, 1983, and has been practicing in the Texas Workers' Compensation system since 1993. The Division's Medical Advisor and Medical Quality Review Panel (MQRP) prepared to conduct a medical quality review (MQR) of seven cases where Respondent provided medical treatment and care to injured employees.

The Division sent a Notice of Medical Quality Review and Request for Response to Respondent's facsimile number on October 30, 2009, requesting that certain documents be provided to the Division by December 2, 2009. The requested documents were not received by the requested date.

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<sup>2</sup> Tex. Lab. Code § 414.002.

<sup>3</sup> Tex. Lab. Code § 413.002

<sup>4</sup> Tex. Lab. Code §§ 415.003 and 415.0035; 28 Tex. Admin. Code § 180.26.

On April 9, 2010, the Division sent Respondent, by certified mail, an Order to Produce Documents, requiring that certain specified documents be provided to the Division no later than ten days after receipt of the order. The Order was addressed to Respondent at his address of record with the Division, the Southside Medical facility located at 520 West Seminary Drive, Fort Worth, Texas. The "green card" evidencing delivery of the certified letter, however, showed that the letter was delivered to 544 West Seminary Drive, Fort Worth, Texas, on April 12, 2010. Ms. Sherman testified that Division did not receive any documents by April 22, 2010, ten days after the certified letter was delivered.

On examination, Ms. Sherman was asked whether she had followed up on the green card in light of the fact that it showed delivery to an address (544 West Seminary) that was different than Respondent's address on file with the Division (520 West Seminary). She responded that she merely called the facility to inquire about the name of the person who had signed the green card, and did not ask about the discrepancy in the two addresses. The Division offered no evidence regarding the relation of the two addresses or the identity of the person who signed the green card.

Respondent testified that he has no ownership interest in Southside Medical, and is an independent contractor who works there one day a week. He stated that the address to which the green card was delivered was the principal office of Southside Medical, and mail addressed to the portion of the Southside Medical facility in which he worked (located at 520 West Seminary) is typically delivered to that address and not to the 544 West Seminary address.

Respondent further testified that he was unaware of the Division order until he was served with a motion to compel in the instant case in approximately May 2011. According to Respondent, when he was made aware of the order requiring production of the documents, he produced them to the Division. Both Ms. Sherman and Dr. Patrick agreed that the required documents were in the Division's possession.

Dr. Patrick testified that the receipt of requested documents is vital to the Division's processes. He stated that when the documents are not provided it stops the process cold. Dr. Patrick contends that this is a very serious violation that warrants the requested sanction of denial of the right to practice before the Division or receive remuneration, directly or indirectly, under the Texas Labor Code.

#### **IV. ALJ'S ANALYSIS**

The ALJ agrees that the failure to produce documents in response to a Division order is a serious offense. In this case, however, the Division failed to meet its burden of proving that Respondent was served with the Order. The Division offered proof that the Order was addressed to the appropriate address (520 West Seminary). The green card, however, showed that the Order was delivered to 544 West Seminary, and the Division failed to provide proof that it was actually delivered to Respondent. Although Respondent provided one link in the proof – that 544 West Seminary was the principal office of the clinic in which he worked as an independent contractor – there was no proof offered that anyone at 544 West Seminary was obligated to deliver the Order to Respondent. In other words, although the Division asserts that delivery was effected under general principles of “agency,” it offered no proof that an agency relationship existed. Thus, to accept the Division's arguments, one is required to assume that such an agency exists, and the ALJ is not prepared to make such an assumption.

Accordingly, the ALJ finds that the Division failed to meet its burden of proof, and its request to deny Respondent the right to practice before the Division or receive remuneration under the Texas Labor Code, should be denied.

#### **V. FINDINGS OF FACT**

1. Monte Mark Mitchell, D.O. (Respondent), received his license from the Medical Board on August 27, 1983, and has been practicing in the Texas Workers' Compensation system since 1993.

2. The Division sent a Notice of Medical Quality Review and Request for Response to Respondent's facsimile number on October 30, 2009, requesting that certain documents be provided to the Division by December 2, 2009.
3. The requested documents were not received by the requested date.
4. On April 9, 2010, the Division sent Respondent, by certified mail, an Order to Produce Documents, requiring that certain specified documents be provided to the Division no later than ten days after receipt of the order.
5. The Order was addressed to Respondent at his address of record with the Division, the Southside Medical facility located at 520 West Seminary Drive, Fort Worth, Texas.
6. The "green card" evidencing delivery of the certified letter showed that the letter was delivered to 544 West Seminary Drive, Fort Worth, Texas, on April 12, 2010.
7. The Division received no documents by April 22, 2010, in response to the Order.
8. The principal office of the clinic where Respondent worked as an independent contractor was located at 544 West Seminary.
9. There was no evidence that anyone at 544 West Seminary was obligated to deliver the Order to Respondent at 520 West Seminary.
10. The Division failed to prove the Order was delivered to Respondent.
11. On March 22, 2011, the Division sent Respondent a Notice of Hearing via certified mail, return receipt requested, and regular mail, to Respondent's address of record with the Division informing Respondent of the time, place, and nature of the hearing, and including 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.
12. The hearing convened before ALJ Steven D. Arnold on November 9, 2011. The hearing concluded the same day and the record closed on December 8, 2011, after the time for making corrections to the transcript expired. Vidya Gopalakrishna represented the Division and Bradley McClellan represented Respondent.

**VI. CONCLUSIONS OF LAW**

1. The Division has jurisdiction in this matter pursuant to Tex. Lab. Code §§ 402.001, 402.00111, 402.00128, 402.0235, 402.073, 408.027, 409.021, 413.011, 415.003, 415.021, and 415.034, and Tex. Gov't. Code §§ 2001.051 -2001.178.
2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this matter, including the authority to issue a decision and order with Findings of Fact and Conclusions of Law, pursuant to Tex. Lab. Code § 402.073(c).
3. All parties received proper and timely notice of the hearing in accordance with Tex. Gov't. Code §§ 2001.051 and 2001.052.
4. The Division failed to show, by a preponderance of the evidence, that it properly served Respondent with the Division Order requiring the production of documents.
5. The Division failed to prove that Respondent violated Tex. Lab. Code §§ 415.003 and 415.0035 by failing to provide required records to the Division, and violating a Commissioners rule and former 28 Tex. Admin. Code § 180.26 by refusing to comply with a Division Order.
6. The Division's request to deny Respondent the right to practice before the Division or receive remuneration, directly or indirectly, under the Texas Labor Code, is denied.

**ISSUED February 6, 2012.**

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**STEVEN D. ARNOLD**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**