BRB No. 08-0741

R.C.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CALEB BRETT, L.L.C.	)	DATE ISSUED: 04/16/2009
	)	
and	)	
	)	
LIBERTY MUTUAL FIRE INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Gerald M. Etchingham, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., and Steven M. Birnbaum and James Doyle, San Rafael, California, for claimant.

John R. Walker (Smith & Carr, P.C.), Houston, Texas, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2007-LHC-2139) of Administrative Law Judge Gerald M. Etchingham rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant injured his back and neck at work in 1991, and he has been permanently totally disabled since October 1, 1993. Decision and Order at 4; Jt. Ex. 5. In 1996, the parties entered stipulations, and the administrative law judge awarded claimant disability and medical benefits based on those stipulations. Claimant chose Dr. Viets, a chiropractor, as his treating physician. *Id.* Employer paid all benefits, including medical benefits, until February 2006, when it stopped paying for claimant's massage therapy.[1] Jt. Ex. 4. Claimant filed a claim for these medical benefits. On employer's motion for summary decision, the administrative law judge found that the unpaid disputed treatment provided by Dr. Viets was not reimbursable because it exceeded the Act's regulatory provision limiting chiropractic treatment to manual manipulations to treat subluxations. 20 C.F.R. §702.404. However, he found there was a genuine issue of fact as to whether massage therapy provided by Ms. Oliver, on Dr. Viets's orders, is reimbursable. The administrative law judge found that, while the massage therapy performed by Ms. Oliver was reasonable and necessary to treat claimant's work injury, this treatment was provided by claimant's chiropractor and was not integral to and inseparable from the manual manipulations. He also found it was not rendered for the purpose of ensuring claimant's safety, and therefore, is not compensable under 20 C.F.R. §702.404.[2] Decision and Order at 6-8. Claimant appeals the denial of these medical benefits, and employer responds, urging affirmance.

Claimant raises two contentions. First, he argues that the administrative law judge erred by creating a new standard by which to judge the compensability of treatment ordered by a chiropractor. That is, claimant argues that the administrative law judge's finding that such treatment must be "integral to and inseparable from" the manual manipulation of the spine for the purposes of ensuring a claimant's safety in order to be reimbursable is in error. Additionally, he argues that the administrative law judge erred in finding that services of a chiropractor's employee, here a massage therapist, are not

[1]Dr. Viets prescribed massage therapy for claimant, which, in this case includes myofascial release and ultrasound treatments. Jt. Exs. 3, 6, 8.

[2]The administrative law judge relied on the Board's published decision in *Bang v. Ingalls Shipbuilding, Inc.*, 32 BRBS 183 (1998), as well as on unpublished Board and administrative law judge decisions to arrive at the "rule" that, to be compensable, chiropractic treatment must be integral to and inseparable from the manual manipulation of the spine and must be for the purposes of ensuring the safety of the patient. The administrative law judge found that claimant's myofascial release treatments are not integral to and inseparable from the manual manipulations because they are not necessary for ensuring claimant's safety. He found that the ultrasound treatments are not integral to and inseparable from the manual manipulations because they are not performed every time claimant's spine is manipulated. Decision and Order at 8.

compensable, despite having been found to be reasonable and necessary. He asserts that a determination of whether services are compensable should not depend on who is billing for the services but rather on who performed the services.[3] Employer responds, arguing that the plain language of Section 702.404 of the regulations supports the administrative law judge's decision that these services are not compensable.

Section 7(a) of the Act provides that an employer is liable for medical care and treatment related to the work injury. 33 U.S.C. §907(a). Section 702.404 states:

> The term *physician* includes . . . chiropractors. . . . The term includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation shown by X-ray or clinical findings.

In this case, claimant chose Dr. Viets, a chiropractor, as his treating physician. Jt. Ex. 5. As it is uncontested that his treatment was for a subluxation of the spine, Dr. Viets is a physician under Section 702.404, and employer is liable for the reasonable and necessary treatment provided or prescribed by him. Thus, the Board's holding in *Bang v. Ingalls Shipbuilding, Inc.*, 32 BRBS 183 (1998), relied on by the administrative law judge here, denying benefits for biofeedback and physical therapy provided by a chiropractor to a claimant who did not have a subluxation is inapplicable, as claimant in this case is being treated for a subluxation.

While compensable chiropractic treatment must be for a subluxation of the spine, Section 702.401(a), 20 C.F.R. §702.401(a), provides a broad definition of covered "medical care" under which treatment, including physical therapy, may be compensable. Section 702.401(a) states:

> Medical care shall include medical, surgical, and other attendance or treatment. . . and any other medical service or supply . . . which is recognized as appropriate by the medical profession for the care and treatment of the injury or disease.

[3]In this regard, claimant limited his appeal to the compensability of the services rendered by Ms. Oliver. He does not challenge the administrative law judge's determination in the order on the motion for summary decision that the massage therapy rendered by Dr. Viets is not compensable. Cl. Pet. for Review at 2.

Thus, pursuant to this section, the Board has held that biofeedback treatment prescribed and deemed helpful by a treating physician constituted appropriate, reimbursable, medical care. *Barbour v. Woodward & Lothrop, Inc.*, 16 BRBS 300 (1984).

In this case, Dr. Viets, claimant's treating physician, employed Ms. Oliver as his in-house licensed massage therapist, Jt. Ex. 6 at 11-12; Jt. Ex. 8 at 9, and he referred claimant to Ms. Oliver for massage therapy, which involves myofascial release and ultrasound treatment. Jt. Exs. 8, 12. Dr. Viets testified that massage therapy helps facilitate his adjustments to claimant's spine in that the treatments loosen up claimant's muscles, increasing his range of motion and decreasing his pain, and they make the "adjustments work much better." Jt. Ex. 8 at 7-8. Dr. Viets, with whom claimant continues to treat, also stated that he had performed the massage therapy until Ms. Oliver started in May 2006 and that it was in claimant's best interests to continue massage therapy. Jt. Ex. 6 at 12: Jt. Ex. 8 at 8. The administrative law judge specifically found that this treatment is reasonable and necessary for claimant's work injury. Decision and Order at 6.

Given this finding, the administrative law judge erred in denying payment for this treatment. Contrary to employer's assertion and the administrative law judge's conclusion, the facts in *Bang* are materially distinguishable, as the claimant in *Bang* was referred to a chiropractor for biofeedback and physical therapy by his treating physician although he did not have a subluxation. *See Bang*, 32 BRBS at 184. Pursuant to the plain language of the regulation, those chiropractic services were not compensable because they were not for "manual manipulation of the spine to correct a subluxation shown by X-ray or clinical findings." 20 C.F.R. §702.404. Here, however, claimant's chiropractor is his treating physician, claimant has been diagnosed with and treated for a subluxation, and Dr. Viets has prescribed massage therapy to make his manual manipulations more effective. According to Dr. Viets, claimant's treatment is aided by his myofascial release and ultrasound therapy, and the administrative law judge found that the massage therapy was reasonable and necessary. Decision and Order at 6.

Moreover, contrary to the test created by the administrative law judge here, previous cases have not pronounced that prescribed treatment must be "integral to and inseparable from" manual manipulation performed for the safety of the claimant in order to be reimbursable.[4] Rather, Section 702.401(a) specifically provides that medical

[4]In *Hatcher v. Dynaelectric Co.*, BRB Nos. 99-0499/A (2000) (unpub.), the Board affirmed the administrative law judge's determination that the employer is liable for the claimant's moist hot-pack and high-voltage galvanism treatments, as he found they are integral and necessary components of the claimant's manual manipulation of the spine to treat a diagnosed subluxation. Contrary to the administrative law judge's conclusion,

treatment which is recognized as appropriate by the medical profession is covered. 20 C.F.R. §702.401(a). The test, as set forth in Section 7 and Section 702.401(a) is whether the medical care is reasonable, necessary and appropriate for treatment of the injury. *See, e.g., M. Cutter Co., Inc. v. Carroll*, 458 F.3d 991, 40 BRBS 53(CRT) (9th Cir. 2006); *Pietrunti v. Director, OWCP*, 119 F.3d 1035, 31 BRBS 84(CRT) (2d Cir. 1997); *Barbour*, 16 BRBS at 303. It was improper for the administrative law judge to engraft additional requirements onto this test and to deny reimbursement of that therapy based on an "integral to" or "safety" test. The disputed treatment satisfies the established test based on the administrative law judge's finding that it was reasonable and necessary for treatment of claimant's spinal subluxation. *See* Decision and Order at 6.

Additionally, the administrative law judge denied reimbursement for the disputed massage treatment on the theory that Dr. Viets "provided" the treatments, even though he did not perform them, and is the party seeking reimbursement. As the myofascial release and ultrasound treatments are not "manual manipulations of the spine," the administrative law judge found that the additional services prescribed by Dr. Viets and performed in his office are not reimbursable under Section 702.404. This interpretation confuses the applicable regulations. Section 702.404 defines the term "physician" and Dr. Viets is claimant's "physician" under this section as he performed manual manipulation to correct a subluxation. As such, he may prescribe additional treatment under Section 702.401(a) so long as it is reasonable and necessary for the spinal subluxation. Ms. Oliver is a massage therapist and not a "physician;" thus, her services are included under those which may be prescribed under Section 702.401(a). It is irrelevant that Ms. Oliver worked in Dr. Viets' office – Dr. Viets could properly prescribe the necessary treatment from any source. *Barbour*, 16 BRBS at 303. Accordingly, as it is reasonable and necessary for treatment of claimant's subluxation, the massage therapy performed by Ms. Oliver is compensable. Therefore, we reverse the administrative law judge's finding that employer is not liable for these medical benefits.

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these treatments are similar to those in the present case; it is sufficient that the therapy makes the spinal manipulation work better, and claimant is not required to show he would be in excruciating pain without it. Moreover, the Board's affirmance of the administrative law judge's rational conclusion in *Hatcher* does not establish his rationale as the benchmark for assessing the compensability of chiropractic services, or state a new standard for the denial of otherwise compensable treatment. If treatment is "integral" to spinal manipulation, then it is certainly reasonable and necessary; however, that this statement is true does not mean its converse is also true. Thus, where treatment prescribed is reasonable and necessary for treatment of a subluxation, it is compensable.

Accordingly, the administrative law judge's Decision and Order denying employer's liability for the medical services in question is reversed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge