MEDICAL CONTESTED CASE HEARING NO 12071
M6-12-36433-01

DECISION AND ORDER

This case is decided pursuant to Chapter 410 of the Texas Workers' Compensation Act and Rules of the Division of Workers' Compensation adopted thereunder.

ISSUES

A contested case hearing was held on December 19, 2011, to decide the following disputed issue:

> Is the preponderance of the evidence contrary to the decision of the Independent Review Organization (IRO) that Claimant is not entitled to a work hardening program (WHP) five times a week for two weeks for the compensable injury of (Date of Injury)?

PARTIES PRESENT

Petitioner appeared and was represented by RL, attorney. Claimant appeared and was assisted by MP, ombudsman. Respondent/Carrier appeared and was represented by LW, attorney.

BACKGROUND INFORMATION

Claimant, a production worker, sustained a compensable lumbar sprain/strain and coccyx fracture injury on (Date of Injury). Claimant has undergone physical therapy, psychotherapy, and prescribed medication for her compensable injury. Claimant has not undergone surgery, and Dr. K, M.D., is Claimant's treating doctor. Petitioner requested that Claimant undergo a work hardening program (WHP) five times a week for two weeks for the compensable injury. Carrier's utilization review denied Petitioner's request, and Petitioner requested an IRO review.

DISCUSSION

Texas Labor Code §408.021 provides that 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. Health care reasonably required is further defined in Texas Labor Code Section 401.011 (22a) as health care that is clinically appropriate and considered effective for the injured employee's injury and provided in accordance with best practices consistent with evidence based medicine or, if evidence based medicine is not available, then generally accepted standards of medical practice recognized in the medical community. Health care under the Texas Workers' Compensation system must be consistent with evidence based medicine if that evidence is available. Evidence based medicine is further defined in Texas Labor Code §401.011 (18a) to be

the use of the current best quality scientific and medical evidence formulated from credible scientific studies, including peer-reviewed medical literature and other current scientifically based texts and treatment and practice guidelines in making decisions about the care of individual patients. The Commissioner of the Division of Workers' Compensation is required to adopt treatment guidelines that are evidence-based, scientifically valid, outcome-focused and designed to reduce excessive or inappropriate medical care while safeguarding necessary medical care. Texas Labor Code §413.011(e). Medical services consistent with the medical policies and fee guidelines adopted by the commissioner are presumed reasonable in accordance with Texas Labor Code §413.017(1).

In accordance with the above statutory guidance, the Division of Workers' Compensation has adopted treatment guidelines by Division Rule 137.100. This rule directs health care providers to provide treatment in accordance with the current edition of the Official Disability Guidelines (ODG), and such treatment is presumed to be health care reasonably required as defined in the Texas Labor Code. Thus, the focus of any health care dispute starts with the health care set out in the ODG. Also, in accordance with Division Rule 133.308 (t), "A decision issued by an IRO is not considered an agency decision and neither the Department nor the Division are considered parties to an appeal. In a Contested Case Hearing (CCH), the party appealing the IRO decision has the burden of overcoming the decision issued by an IRO by a preponderance of evidence-based medical evidence."

With regard to work hardening programs, the ODG provides as follows:

> **"Criteria for admission to a Work Hardening (WH) Program:**
> (1) *Prescription:* The program has been recommended by a physician or nurse case manager, and a prescription has been provided.
> (2) *Screening Documentation:* Approval of the program should include evidence of a screening evaluation. This multidisciplinary examination should include the following components:
> (a) History including demographic information, date and description of injury, history of previous injury, diagnosis/diagnoses, work status before the injury, work status after the injury, history of treatment for the injury (including medications), history of previous injury, current employability, future employability, and time off work;
> (b) Review of systems including other non work-related medical conditions;
> (c) Documentation of musculoskeletal, cardiovascular, vocational, motivational, behavioral, and cognitive status by a physician, chiropractor, or physical and/or occupational therapist (and/or assistants);
> (d) Diagnostic interview with a mental health provider;

(e) Determination of safety issues and accommodation at the place of work injury. Screening should include adequate testing to determine if the patient has attitudinal and/or behavioral issues that are appropriately addressed in a multidisciplinary work hardening program. The testing should also be intensive enough to provide evidence that there are no psychosocial or significant pain behaviors that should be addressed in other types of programs, or will likely prevent successful participation and return-to-employment after completion of a work hardening program. Development of the patient's program should reflect this assessment.

(3) *Job demands:* A work-related musculoskeletal deficit has been identified with the addition of evidence of physical, functional, behavioral, and/or vocational deficits that preclude ability to safely achieve current job demands. These job demands are generally reported in the medium or higher demand level (i.e., not clerical/sedentary work). There should generally be evidence of a valid mismatch between documented, specific essential job tasks and the patient's ability to perform these required tasks (as limited by the work injury and associated deficits).

(4) *Functional capacity evaluations (FCEs):* A valid FCE should be performed, administered and interpreted by a licensed medical professional. The results should indicate consistency with maximal effort, and demonstrate capacities below an employer verified physical demands analysis (PDA). Inconsistencies and/or indication that the patient has performed below maximal effort should be addressed prior to treatment in these programs.

(5) *Previous PT:* There is evidence of treatment with an adequate trial of active physical rehabilitation with improvement followed by plateau, with evidence of no likely benefit from continuation of this previous treatment. Passive physical medicine modalities are not indicated for use in any of these approaches.

(6) *Rule out surgery:* The patient is not a candidate for whom surgery, injections, or other treatments would clearly be warranted to improve function (including further diagnostic evaluation in anticipation of surgery).

(7) *Healing:* Physical and medical recovery sufficient to allow for progressive reactivation and participation for a minimum of 4 hours a day for three to five days a week.

(8) *Other contraindications:* There is no evidence of other medical, behavioral, or other comorbid conditions (including those that are non work-related) that prohibits participation in the program or contradicts successful return-to-work upon program completion.

(9) *RTW plan:* A specific defined return-to-work goal or job plan has been established, communicated and documented. The ideal situation is that there is a plan agreed to by the employer and employee. The work goal to which the employee should return must have demands that exceed the claimant's current validated abilities.

(10) *Drug problems:* There should be documentation that the claimant's medication regimen will not prohibit them from returning to work (either at their previous job or new employment). If this is the case, other treatment options may be required, for example a program focused on detoxification.

(11) *Program documentation:* The assessment and resultant treatment should be documented and be available to the employer, insurer, and other providers. There should documentation of the proposed benefit from the program (including functional, vocational, and psychological improvements) and the plans to undertake this improvement. The assessment should indicate that the program providers are familiar with the expectations of the planned job, including skills necessary. Evidence of this may include site visitation, videotapes or functional job descriptions.

(12) *Further mental health evaluation:* Based on the initial screening, further evaluation by a mental health professional may be recommended. The results of this evaluation may suggest that treatment options other than these approaches may be required, and all screening evaluation information should be documented prior to further treatment planning.

(13) *Supervision:* Supervision is recommended under a physician, chiropractor, occupational therapist, or physical therapist with the appropriate education, training and experience. This clinician should provide on-site supervision of daily activities, and participate in the initial and final evaluations. They should design the treatment plan and be in charge of changes required. They are also in charge of direction of the staff.

(14) *Trial:* Treatment is not supported for longer than 1-2 weeks without evidence of patient compliance and demonstrated significant gains as documented by subjective and objective improvement in functional abilities. Outcomes should be presented that reflect the goals proposed upon entry, including those specifically addressing deficits identified in the screening procedure. A summary of the patient's physical and functional activities performed in the program should be included as an assessment of progress.

(15) *Concurrently working:* The patient who has been released to work with specific restrictions may participate in the program while concurrently working in a restricted capacity, but the total number of daily hours should not exceed 8 per day while in treatment.

(16) *Conferences:* There should be evidence of routine staff conferencing regarding progress and plans for discharge. Daily treatment activity and response should be documented.

(17) *Voc rehab:* Vocational consultation should be available if this is indicated as a significant barrier. This would be required if the patient has no job to return to.

(18) *Post-injury cap:* The worker must be no more than 2 years past date of injury. Workers that have not returned to work by two-years post injury generally do not improve from intensive work hardening programs. If the worker is greater than one-year post injury a comprehensive multidisciplinary program may be warranted if there is clinical suggestion of psychological barrier to recovery (but these more complex programs may also be justified as early as 8-12 weeks.

(19) *Program timelines:* These approaches are highly variable in intensity, frequency and duration. APTA, AOTA and utilization guidelines for individual jurisdictions may be inconsistent. In general, the recommendations for use of such programs will fall within the following ranges: These approaches are necessarily intensive with highly variable treatment days ranging from 4-8 hours with treatment ranging from 3-5 visits per week. The entirety of this treatment should not exceed 20 full-day visits over 4 weeks, or no more than 160 hours (allowing for part-day sessions if required by part-time work, etc., over a longer number of weeks). A reassessment after 1-2 weeks should be made to determine whether completion of the chosen approach is appropriate, or whether treatment of greater intensity is required.

(20) *Discharge documentation:* At the time of discharge the referral source and other predetermined entities should be notified. This may include the employer and the insurer. There should be evidence documented of the clinical and functional status, recommendations for return to work, and recommendations for follow-up services. Patient attendance and progress should be documented including the reason(s) for termination including successful program completion or failure. This would include noncompliance, declining further services, or limited potential to benefit. There should also be documentation if the patient is unable to participate due to underlying medical conditions including substance dependence.

(21) *Repetition:* Upon completion of a rehabilitation program (e.g., work conditioning, work hardening, outpatient medical rehabilitation, or chronic pain/functional restoration program) neither re-enrollment in nor repetition of the same or similar rehabilitation program is medically warranted for the same condition or injury."

The IRO reviewer was identified as a family practice physician who was board certified in family practice and occupational medicine. The IRO reviewer opined that the functional capacity evaluation (FCE) performed on June 27, 2011, indicated that Claimant's job description was light duty. The IRO reviewer further opined that the ODG criteria for admission into a WHP requires a work-related musculoskeletal condition with functional limitations that precludes ability to safely achieve current job demands that are in the medium or higher demand level. The IRO reviewer noted that Claimant's current demand level was in the light physical demand level, and the medical necessity of a WHP was not corroborated under the ODG. The IRO reviewer upheld the adverse determination, and Petitioner appealed the IRO decision. At the hearing, Petitioner chose not to present evidence. Claimant testified that she wanted to undergo the WHP, and presented her case at the hearing. Claimant further testified that she met the ODG criteria, would rely upon her medical records and testimony, and that the determination of the IRO was incorrect. Claimant further testified that she was in constant pain and believed that the WHP would alleviate her pain and allow her to increase her job opportunities and activities of daily living.

Dr. N, Ph.D. and M.D., testified on behalf of Respondent/Carrier. Dr. N testified that she was board certified in family medicine and occupational medicine, and taught courses in causation analysis, evidence-based medicine, the ODG, and how to perform, evaluate, and interpret an FEC. Dr. N further testified that she had reviewed Claimant's medical records and determined that the requested WHP for Claimant's compensable injury did not conform to the ODG criteria and was not medically necessary. Dr. N opined that Claimant did not meet ODG criteria numbered 3, 4, 8, 9, 15, and 17. In regard to ODG criteria number 3, Dr. N noted that Claimant's job demands were identified in the medical records as being light duty, and the medical records did not support that Claimant's job demands were in the medium or higher physical demand level. Dr. N further noted that she did not find evidence contained in the medical records of a valid mismatch between Claimant's documented and specific essential job tasks with Employer and the Claimant's ability to perform these required tasks. Dr. N explained that a valid mismatch was necessary to formulate a comparison between the limitations cause by Claimant's work injury and the resulting restrictions or associated deficits following the work injury. Dr. N stated that Claimant did not meet ODG criteria number 4 based on her review of the FCE performed on June 27, 2011. Dr. N further stated that the results of the FCE indicated that Claimant did not provide maximum effort, did not demonstrate capacities below the verifiable physical demands of her job, and that that these inconsistencies should be addressed prior to the treatment in the WHP. Dr. N opined that Claimant did not met ODG criteria number 8 and cited the medical narrative from Dr. B, M.D., dated May 2, 2011. According to his medical narrative, Dr. B indicated that he was a board certified psychiatrist and neurologist, had evaluated Claimant on April 27, 2011, and had diagnosed Claimant with a factitious disorder. Dr. N explained that a person with a factitious disorder is intentionally producing or pretending to have psychological symptoms and signs of an illness, lacks motivation, and is assuming the role of a sick person. Dr. N further explained that the evidence of other medical, behavioral, or

other comorbid conditions that were not work-related and contained in Claimant's medical records would prohibit Claimant's participation in the WHP. Dr. N stated that Claimant did not meet ODG criteria number 9, and based on the documentation that she reviewed, there was no specific defined return-to-work goal or job plan that was established, communicated and documented, and agreed to by the Claimant and Employer. Dr. N further stated that there was no work goal to which Claimant could return that exceeded the demands of Claimant's current validated abilities. Dr. N opined that Claimant did not meet ODG criteria number 15 and 17, and explained that Claimant had been released to light duty work, was not working due to no job to return to, and she was not participating in a vocational rehabilitation program. Dr. N concluded that the determination of the IRO was correct.

Based on the evidence, Petitioner and Claimant did not meet their burden of proof of overcoming the IRO decision by a preponderance of evidence-based medical evidence. The preponderance of the evidence-based medical evidence is not contrary to the decision of the IRO that a work hardening program (WHP) five times a week for two weeks is not health care reasonably required for Claimant's compensable injury of (Date of Injury). There was no objection to the testimony, reports, or qualifications of any doctor or witness.

Even though all the evidence presented was not discussed, it was considered. The Findings of Fact and Conclusions of Law are based on all of the evidence presented.

FINDINGS OF FACT

1. The parties stipulated to the following facts:

   A. Venue is proper in the (City) Field Office of the Texas Department of Insurance, Division of Workers' Compensation.

   B. On (Date of Injury), Claimant was the employee of (Employer), Employer.

   C. On (Date of Injury), Employer had workers' compensation insurance with New Hampshire Insurance Company, Carrier.

   D. Claimant sustained a compensable lumbar sprain/strain and coccyx fracture injury on (Date of Injury).

   E. The Independent Review Organization determined that Claimant is not entitled to a work hardening program (WHP) five times a week for two weeks for the compensable injury of (Date of Injury).

2. Carrier delivered to Petitioner a single document stating the true corporate name of Carrier, and the name and street address of Carrier's registered agent, which document was admitted into evidence as Hearing Officer's Exhibit Number 2A.

3. Carrier delivered to Claimant a single document stating the true corporate name of Carrier, and the name and street address of Carrier's registered agent, which document was admitted into evidence as Hearing Officer's Exhibit Number 2B.

4. The preponderance of the evidence-based medical evidence is not contrary to the determination of the Independent Review Organization.

5. The requested work hardening program (WHP) five times a week for two weeks is not health care reasonably required for Claimant's compensable injury of (Date of Injury).

CONCLUSIONS OF LAW

1. The Texas Department of Insurance, Division of Workers' Compensation, has jurisdiction to hear this case.

2. Venue is proper in the (City) Field Office.

3. The preponderance of the evidence is not contrary to the decision of the Independent Review Organization that a work hardening program (WHP) five times a week for two weeks is not health care reasonably required for the compensable injury of (Date of Injury).

DECISION

Claimant is not entitled to a work hardening program (WHP) five times a week for two weeks for the compensable injury of (Date of Injury).

ORDER

Carrier is not liable for the benefits at issue in this hearing. Claimant remains entitled to medical benefits for the compensable injury of (Date of Injury), in accordance with Texas Labor Code Ann. §408.021.

The true corporate name of the insurance carrier is **NEW HAMPSHIRE INSURANCE COMPANY,** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3218

Signed this 3rd day of February, 2012.

Wes Peyton
Hearing Officer