STATE OFFICE OF ADMINISTRATIVE HEARINGS
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DOCKET NO. 453-03-0686.M2
[MDR TRACKING NO. M2-02-0844-01]

TASB RISK MANAGEMENT FUND, *Petitioner*	§	**BEFORE THE STATE OFFICE**
V.	§	**OF**
TEXAS WORKERS' COMPENSATION COMMISSION and ARTHUR H. CORNETT, D.C., *Respondents*	§	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

I. INTRODUCTION

Petitioner, the Texas Association of School Boards Risk Management Fund (Petitioner, the Carrier), appealed a decision of an independent review organization (IRO) designated by the Texas Workers' Compensation Commission (Commission), in which an IRO chiropractor recommended preauthorization for six weeks of work hardening for Claimant____ (Claimant). The Administrative Law Judge (ALJ) concludes preauthoriation should be granted because Petitioner did not carry its burden of proving that work hardening is not reasonable and necessary medical care that would enhance Claimant's ability to return to employment.

II. DISCUSSION

1. Background

Claimant____ a school bus driver for ___, suffered a compensable injury on_____. As Claimant was leaning over some students to close a school bus window that was difficult to close, she felt pain in her left shoulder, upper left back, and low back. She was first treated by Phillip Barnwell, D.C., who diagnosed her condition as thoracic and lumbar sprain/strain and irritation to the brachial plexus, and treated her with manipulation and passive therapies for approximately two months. (Ex. 2, p. 134.) Thereafter, Claimant was referred to Respondent Arthur Cornett, D.C., for active rehabilitation. Claimant has undergone MRIs of the cervical and lumbar spine and a CT myelogram, that indicated mildly-to-moderately bulging discs at multiple levels, and an EMG study that revealed left-sided radiculopathy. She is not a candidate for surgery.[1] Claimant continues to report pain in

[1] An MRI of Claimant's lumbar spine on June 20, 2001, indicated a 4 mm disc protrusion at L5-S1, and an MRI of claimant's cervical spine on August 6, 2001, indicated 3 mm disc protrusions at C3-C4 and C5-C-6. (Ex. 2, pp. 17-18). Cervical and lumbar myelograms performed on February 6, 2002, also reflected mild and mild-to-moderate bulges at several levels. (Ex. 2, pp. 179-183.) A needle EMG performed on October 2, 2001, indicated moderate to severe left-

her neck, shoulders, and low back, sometimes radiating into her extremities, especially on the left side.

2. This Preauthorization Request

On March 21, 2002, approximately 11 months after Claimant's injury, Dr. Cornett requested preauthorization for six weeks of work hardening. In support of the request, Dr. Cornell relied on a Functional Capacity Evaluation (FCE) performed on March 12, 2002, by JTR Functional Testing (the JTR FCE). The JTR examiner assumed Claimant's job was at the medium physical demand level, as reflected in the Department of Transportation's (DOT's) general job classification for a bus driver. The examiner reported Claimant gave reliable effort during the FCE but was unable to meet the physical demand level of her job, and would thus benefit from a job-specific work hardening program to prepare her for return to work. According to the JTR examiner, Claimant was at the light physical demand level for lifts from floor to waist and for carrying, *i.e.,* she was able to lift 25 pounds occasionally. For frequent lifts above the waist she was at light physical demand level, *i.e.,* she was able to lift 15 pounds frequently, and for lifts below the waist she was at medium-light physical demand level, *i.e.,* she was able to lift 20 pounds frequently. Because of pain, she was able to sit at only the occasional level, though her job requires frequent sitting. She was at the occasional level for reaching out and bending, though her job requires she perform those motions frequently. Claimant had limited cervical range of motion in all planes and had limited lumbar range of motion in bilateral lateral flexion and extension. (Ex. 2, pp. 185-195.)

The Carrier denied Dr. Cornett's request for preauthorization with the rationale that Claimant does not need work hardening in order to perform her job duties as a school bus driver. The Carrier's physician advisor concluded:

> Based on mechanism of injury no significant trauma occurred. Nevertheless based on job requirements she actually has to perform Work Hardening is not indicated. Her requirements are below DOT stated for generalized position of bus driver. Medium light serves her position well. (Ex. 2, pp. 198-199.)

On April 5, 2002, Dr. Cornett requested that the Carrier reconsider its denial for preauthorization and specifically noted that among the purposes of the proposed treatment were the goals of increasing Claimant's muscle strength and range of motion so that she could perform her job functions. (Ex. 2. p. 208.) The Carrier again denied the request on the basis that work hardening would not alter Claimant's clinical course and that Claimant needed "to return to work with or without light duty." (Ex. 2, pp. 200-204.)

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sided L5 radiculopathy, which is acute, and acute to moderate left-sided C6 radiculopathy. (Ex. 2, pp. 95-96.)

On one level, the crux of the parties' disagreement appears to hinge on their differing interpretations of Claimant's job duties and the validity of the JTR FCE on which Dr. Cornett relied. On a deeper level, however, the parties' dispute seems to involve the Carrier's perceptions of the merits of Claimant's injury claim itself and much of her course of treatment.[2] A review of the extensive medical records in evidence in this proceeding indicates that Claimant has received extensive, prolonged treatment for her April 30, 2001 injury, but she still experiences a significant amount of pain.[3] That observation notwithstanding, both parties agreed that Claimant needs to return to work. The issue here was whether work hardening is reasonable and necessary medical treatment to transition Claimant back to work.

The Carrier's expert witness, William Defoyd, D.C., testified that work hardening is not indicated here because Claimant's medical records do not indicate that there is a "significant mismatch" between her level of function and her job duties. Dr. Defoyd does not believe work hardening is necessary for someone like Claimant who has what he characterized as a "light to sedentary type job." He characterized the March 12, 2002 JTR FCE on which Dr. Cornett relied as "defective" insofar as it does not reflect Claimant's specific job duties, relied to some extent on Claimant's own description of her job duties, and reported test results in terms of DOT standards of "occasional, frequent, and constant" rather than "quantitatively." Dr. Defoyd testified that an FCE performed by Bryan Hasse, D.C., of MedTest on November 21, 2001, provides a better indication of what functions Claimant can actually perform and that FCE report indicates that Claimant did not put forth maximal effort during the exam. (Ex. 2, pp.139-145.) Dr. Defoyd did not personally examine Claimant but relied in part on the opinion of a Carrier-selected chiropractor, Dr. Jane Duncan, who examined Claimant on November 15, 2001, and assigned Claimant a four percent whole person impairment rating. Dr. Duncan reported that Claimant was prone to symptom magnification, that no further treatment was indicated, and that Claimant could function at light duty in an unrestricted workplace, lifting up to ten pounds on a frequent basis. (Ex. 2, pp. 127-136.) (It was Dr. Duncan who referred Claimant to Dr. Hasse for the November 15, 2001 FCE which Dr. Defoyd considered more reliable than the March 12, 2002 JTR FCE on which Dr. Cornett based his request for preauthorization for work hardening.)

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[2]In analyzing the preauthorization request at issue, Carrier consultant Nicholas Tsourmas, M.D., advocated so strongly for the Carrier that the ALJ was led to question Dr. Tsourmas' objectivity. In a report dated September 4, 2002, Dr. Tsourmas stated that Claimant was injured "while simply leaning" to shut a window. (Ex. 2, p. 213.) Dr. Tsourmas appeared to question whether Claimant was actually injured, as he put quotation marks around the word "injury" in the very next sentence of his report. *Id.* Dr. Tsourmas opined that it was "criminal" for Claimant to have been off work as long as she has since her injury, and he characterized Claimant's job as "essentially sedentary" (though the Carrier's physician advisor had earlier characterized it as medium light duty). (Ex. 2, pp. 214, 198-199.)

[3]Between August 1, 2001, and January 28, 2002, for example, Claimant received 43 chiropractic treatments. (Ex. 2, p. 210.)

On May 21, 2002, James Wildemuth, D.C., a chiropractor designated by the Commission, examined Claimant for the purpose of evaluating her medical impairment, and gave her a 14 percent whole person impairment rating. He concluded that Claimant's condition has stabilized, she is not likely to benefit from surgical intervention or active medical treatment, and only medical maintenance care is warranted. (Ex. 3.) Dr. Wildemuth did not expressly address the issue of whether work hardening would be reasonable and medically necessary treatment for Claimant, but he stated that she should be able to return to her "previous level of employment," and "should be instructed in the proper use of body mechanics in lifting, reaching, as well as other activities of her job. She should be cautious in her activities." (Ex. 3.)

The IRO reviewer, a chiropractor, disagreed with the doctors who recommended denial of the preauthorization request. He determined that Claimant's job duties were "not as sedentary as most would think." Based on the JTR FCE and on information Dr. Cornett obtained from Claimant about the lifting and movement patterns involved in Claimant's actual job duties, the IRO reviewer concluded Claimant could not then carry out the her specific job tasks. According to the IRO reviewer, "It is important to establish stability in the upper and lower quarters as well as the core of this patient. This will greatly affect the wear-and-tear resulting in recurrent problem/injury for this patient once she returns to work." (Ex. 2, p. 211.) Acknowledging that Dr. Duncan had indicated that Claimant had tendencies toward pain magnification, the IRO reviewer opined that a work hardening program could include strategies for coping with Claimant's ongoing pain. The IRO reviewer concluded that Dr. Cornett had submitted a goal-oriented, individualized treatment program designed to maximize Claimant's ability to return to work, and that the program would meet Claimant's functional, physical, behavioral, and vocational needs by including simulated work activities, physical conditioning tasks, and psychosocial treatment. (Ex. 2, pp. 211-212.)[4]

[4]The wording of the IRO reviewer's conclusion appears to track the Commission's former rules governing work hardening programs. Work hardening, as defined in the Commission's Medical Fee Guideline at Medicine Ground Rule II.E. is:

> a highly structured, goal-oriented, individualized treatment program designed to maximize the ability of the persons served to return to work. Work Hardening programs are interdisciplinary in nature with a capability of addressing the functional, physical, behavioral, and vocational needs of the injured worker. Work Hardening provides a transition between management of the initial injury and return to work while addressing the issues of productivity, safety, physical tolerance, and work behaviors. Work Hardening programs use real or simulated work activities in

3. Analysis

Petitioner had the burden of proof in this proceeding. 28 TEX. ADMIN. CODE § 148.21(h) and (i). According to Commission Rule 133.308(v), the IRO's decision carries presumptive weight. 28 TEX. ADMIN. CODE § 133.308(v). The ALJ will not here reach the question of what it means for the IRO decision to carry presumptive weight, *i.e.*, whether Petitioner had a higher burden of proof than that set forth in the "preponderance of the evidence" standard. At a minimum, Petitioner, having lost at the IRO, had the burden of proof by a preponderance of the evidence. Though this was a close case, the Carrier did not carry that burden.

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a relevant work environment in conjunction with physical conditioning tasks. These activities are used to progressively improve the biomechanical, neuromuscular, cardiovascular/metabolic, behavioral, attitudinal, and vocational functioning of the person served.

The Carrier's evidence raised serious questions as to why Claimant's treatment has gone on so long, and the weight of the evidence indicates that Claimant may be able to work at light duty without work hardening. The evidence did not demonstrate, however, that Claimant's job as a school bus driver is a light duty job or, in Dr. Tsourmas' words, "essentially sedentary."[5] The Carrier's witnesses appeared to be dismissive of Claimant's job duties.[6] Though the school bus driver job description Dr. Tsourmas obtained from the Austin ISD[7] did not classify a school bus driver's job duties as being at light, medium, or heavy physical demand level, the job description included, among a school bus driver's duties, the following: must be physically able to climb in and out of the school bus emergency door to evacuate the bus in an emergency; requires performing tasks such as sitting, twisting, and bending; work positions include kneeling and climbing, with extended reach above head (12 inches) and extended reach in front of body (14 inches); operate the vehicle up to 7 ½ hours per day on established routes; load and unload vehicle; lift and pull up to 20 pounds on hand device while operating the service door, opening and closing 15-60 times per shift; drive in reverse (as dictated by circumstances) which requires twisting the upper body and neck while driving; perform pre-trip inspections; keep interior of bus clean/neat; and maintain effective pupil management control over groups of children. (Ex. 4.) The ALJ is not persuaded those job duties are "essentially sedentary," and the record lacks credible evidence that they constitute only light duty.

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[5]The Carrier's first physician advisor to recommend denial characterized Claimant's job as being at the medium light duty level. (Ex. 2, p. 198.)

[6]As noted above, they were also somewhat dismissive of Claimant's injury itself. The ALJ was not persuaded that Claimant does not continue to suffer from the residual effects of her April 30, 2001 injury (as indicated by the diagnostic tests she has undergone). Nonetheless, the ALJ notes the seeming disproportion between the nature of Claimant's injury and the amount of time she has been off work. In this proceeding, however, the ALJ's role is not to second-guess decisions made in Claimant's prior course of treatment.

[7]According to Dr. Defoyd, the Austin ISD school bus driver job description is the same as one he subsequently obtained from Claimant's employer, the Cypress-Fairbanks ISD.

Dr. Duncan (who assigned Claimant a four percent whole person impairment rating) stated that Claimant is capable of light duty work and can lift up to ten pounds on a frequent basis. Claimant's written job description, however, states she must be able to lift and pull up to 20 pounds on a hand device while opening and closing the service door 15-60 times per shift, presumably each time students enter or exit the school bus. The evidence did not show that Claimant can perform that function. Additionally, the description of Claimant's job duties that Dr. Cornett obtained from Claimant indicates that she must be physically able to turn the bus steering wheel hand over hand; daily close windows and overhead vents; daily bend, squat, and kneel to inspect the bus; and occasionally lift students. The evidence did not establish that she can perform those functions. Nor does the opinion of Dr. Wildemuth (who assigned Claimant a fourteen percent whole person impairment rating) establish that Claimant would not benefit from work hardening. Dr. Wildemuth recommended that Claimant be returned to work but that she be instructed in the proper use of body mechanics in lifting, reaching, as well as other activities of her job–presumably, instructions a work hardening program would include.

Based on the evidence in the record, Petitioner did not establish by a preponderance of the evidence that work hardening is not reasonable and medically necessary to enable Claimant to return to her job as a school bus driver.

III. FINDINGS OF FACT

1. On_____, Claimant ____ sustained a work-related injury.

2. On the date of injury, the Claimant's employer was ___, and its workers' compensation insurance carrier was Texas Association of School Boards (TASB) Risk Management Fund (Carrier).

3. As a result of the compensable injury, the Claimant suffered a thoracic and lumbar sprain/strain and irritation to the brachial plexus.

4. Claimant gave reliable effort during a Functional Capacity Examination performed by March 12, 2002, by JTR Functional Testing, but she was unable to meet the physical demand level of her job, and would thus benefit from a job-specific work hardening program to prepare her for return to work.

    1. Claimant was at the light physical demand level for lifts from floor to waist and for carrying, *i.e.,* she was able to lift 25 pounds occasionally.

    2. For frequent lifts above the waist she was at light physical demand level, *i.e.,* she was able to lift 15 pounds frequently, and for lifts below the waist she was at medium-light physical demand level, *i.e.,* she was able to lift 20 pounds frequently.

    3. Because of pain, she was able to sit at only the occasional level, though her job requires frequent sitting.

    4. She was at the occasional level for reaching out and bending, though her job requires she perform those motions frequently.

5. Claimant had limited cervical range of motion in all planes and had limited lumbar range of motion in bilateral lateral flexion and extension.

5. Claimant is not currently able to safely perform all of the essential functions of her job as a school bus driver, including lifting and pulling up to 20 pounds on a hand device while opening and closing the service door 15-60 times per shift as students enter or exit the school bus; daily turning the bus steering wheel hand over hand; daily closing windows and overhead vents; daily bending, squatting, and kneeling to inspect the bus; twisting and turning upper body while driving; and occasionally lifting students.

6. No evidence was introduced that a light duty school bus driver position is available to Claimant.

7. On March 21, 2002, Claimant's current treating physician, Arthur Cornett, D.C., (Dr. Cornett) sought preauthorization from the Carrier for six weeks of work hardening.

8. The work hardening program requested by Dr. Cornett is likely to enhance Claimant's ability to return to employment as a school bus driver.

9. The Carrier twice denied the requested preauthorization. The Carrier gave the following reasons for its denials:

   a. The Carrier concluded Claimant's ___ injury did not involve significant trauma.

   2. Claimant does not need work hardening in order to perform her job duties as a school bus driver, which the Carrier's reviewer characterized as medium light level duty.

   3. Work hardening will not alter Claimant's clinical course.

   4. Claimant needs to return to work with or without light duty.

10. On April 22, 2002, Dr. Cornett filed a request for medical dispute resolution with the Commission.

11. An independent review organization (IRO) chiropractor reviewed the medical dispute and found Claimant's job duties were "not as sedentary as most would think." The IRO reviewer concluded Claimant could not then carry out the her specific job duties and would likely benefit from the work hardening program Dr. Cornett requested. The IRO reviewer determined that Dr. Cornett had submitted a goal-oriented, individualized treatment program designed to maximize Claimant's ability to return to work, and that the program would meet Claimant's functional, physical, behavioral, and vocational needs by including simulated work activities, physical conditioning tasks, and psychosocial treatment.

12. After the IRO decision was issued, the Carrier timely requested a contested case hearing by a State Office of Administrative Hearings (SOAH) Administrative Law Judge (ALJ).

13. Notice the hearing was sent on October 17, 2002.

14. The notice contained a statement of the time, place, and nature of the hearing; 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.

15. The hearing was held December 4, 2002, with Administrative Law Judge (ALJ) Renee M. Rusch presiding and Dr. Cornett and a representative of the Carrier participating. The Commission did not participate in the hearing. The hearing adjourned the same day. By agreement of the parties, the record was left open to give Dr. Cornett an opportunity to submit references to specific pages in the evidentiary record, and for the Carrier to object to any references Dr. Cornett submitted. The record closed on December 6, 2002, with no page references having been submitted.

IV. 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. §§ 402.073(b) and 413.031(k) and TEX. GOV'T CODE ANN. ch. 2003.
2. The parties received adequate and timely notice of the hearing in accordance with Gov't Code §§ 2001.051 and 2001.052.

3. The Carrier had the burden of proof by a preponderance of the evidence in this matter. 28 TEX. ADMIN. CODE § 148.21 (h) and (i); 1 TEX. ADMIN. CODE § 155.41.

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. The employee is specifically entitled to health care 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. TEX. LABOR CODE ANN. §408.021(a).

5. Health care includes all reasonable and necessary medical services. TEX. LABOR CODE § 401.011(19).

6. Pursuant to TEX. LABOR CODE §413.014, for a carrier to be liable for certain services and supplies, those services and supplies must be preauthorized. 28 TEX. ADMIN. CODE §134.600(h).

7. The work hardening program requested by Dr. Cornett requires preauthorization. 28 TEX. ADMIN. CODE §134.600(h)(9).

8. Petitioner failed to meet its burden to show that a work hardening program is not a reasonable and necessary medical service reasonably required by Claimant's injury, intended to promote her recovery and likely to enhance her ability to return to employment, and therefore, a medical benefit to which Claimant is entitled, pursuant to TEX. LABOR CODE §408.021(a).

9. Based on the foregoing Findings of Fact and Conclusions of Law, the work hardening program requested for Claimant should be preauthorized. TEX. LABOR CODE § 408.021(a).

ORDER

IT IS ORDERED that request for preauthorization for a six-week work hardening program for Claimant be, and the same is hereby, GRANTED.

SIGNED this 2nd day of January, 2003.

RENEE M. RUSCH
STATE OFFICE OF ADMINISTRATIVE HEARINGS
ADMINISTRATIVE LAW JUDGE

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