

**DOCKET NO. 453-03-0837.M2**  
**[MDR TRACKING NO. M2-02-0667-01]**

<b>JACK T. BARNETT, D.C., <i>Petitioner</i></b>	§	<b>BEFORE THE STATE OFFICE</b>
	§	
<b>V.</b>	§	<b>OF</b>
	§	
<b>TEXAS WORKERS' COMPENSATION</b>	§	
<b>COMMISSION and AMERICAN</b>	§	
<b>PROTECTION INSURANCE COMPANY,</b>	§	
<b><i>Respondents</i></b>	§	<b>ADMINISTRATIVE HEARINGS</b>

**DECISION AND ORDER**

Jack Barnett, D.C. is appealing the decision of the Texas Workers' Compensation Commission's (Commission's) designee, an independent review organization (IRO), which denied preauthorization for 30 work hardening sessions for Claimant \_\_\_\_ Dr. Barnett's request was previously denied by American Protection Insurance Company (the Carrier). This decision concludes that preauthorization should not be granted.

**I. PROCEDURAL HISTORY**

Administrative Law Judge Katherine L. Smith (ALJ) convened the hearing on November 25, 2002, at the William P. Clements Building, 300 West 15<sup>th</sup> Street, Austin, Texas. Dr. Barnett was present and was represented by William Maxwell, an attorney. The Carrier was represented by Wayne Gill, an attorney. The Commission did not appear. The parties did not contest notice or jurisdiction. The record closed on December 9, 2002.

**II. BACKGROUND**

Claimant sustained a work-related injury on \_\_\_\_\_, while lifting a heavy tray of meat. She was diagnosed with lumbar herniated nucleus pulposus, lumbar radicular neuralgia, and muscle spasms. On March 7, 2001, she underwent surgery to decompress the L-4--L-5 vertebrae. On March 8, 2002, Dr. Barnett performed a functional capacity evaluation (FCE) in support of the preauthorization request. The Carrier denied preauthorization because there was no job description from Claimant's employer to compare the physical category of her job to her current abilities. The IRO found that work hardening is not medically necessary because (1) the efficacy of a work hardening program initiated one year after the injury is not well-established according to criteria from the American Physical Therapy Association, (2) the FCE does not state at what physical demand level the Claimant is functioning, and (3) the request lacks an independent, multi-disciplinary medical work up.

### III. DISCUSSION

#### A. Dr. Barnett's position

Dr. Barnett testified that he has been Claimant's treating doctor since her injury. Earlier treatments included passive modalities and pain management, which were not successful. He testified further that implementing a work hardening program sooner was not called for because Claimant needed three months to recover from the decompression surgery and lesser treatments were more appropriate initially. Dr. Barnett asserts that his documentation sufficiently establishes the medical necessity of the work hardening program. He asserts that the FCE clearly shows that Claimant functions between a sedentary and light level and that her job requires a medium level of functioning, which is not that great a difference that it cannot be reached. Dr. Barnett contends that the Carrier erroneously relied on a peer review doctor licensed in the State of Florida, who stated that Claimant was not eligible for work hardening if she did not have a job to return to. Dr. Barnett argues that such reasoning is not valid in Texas because the fee guidelines and the Texas Labor Code allow treatment as and when necessary to cure or relieve the injury. Dr. Barnett also complains that the IRO erroneously denied preauthorization contrary to the Labor Code when it stated that work hardening was not appropriate one year after Claimant's injury.

#### B. Carrier's position

The Carrier asserts that work hardening is not medically necessary because no written job description was provided, no goal was set, and the FCE did not provide sufficient documentation showing that Claimant was qualified for the program and that it would enable her to return to work. Carrier argues more specifically that even though an FCE was performed, the FCE failed to state the level at which Claimant was functioning and the level she would be required to perform at work. Carrier argues further that the FCE contained no evaluation about Claimant's psycho-social problems. Carrier finally complains that Dr. Barnett failed to consider a more appropriate, least intensive setting, as required by Spine Treatment Guideline (STG)<sup>1</sup> Ground Rule (e)(2)(A)(iii), such as work conditioning or pain management, which was recommended by Claimant's surgeon, Dr. David MacDougall.

#### C. ALJ's Analysis

Work hardening is an individualized, highly structured, goal-oriented treatment program designed to maximize the ability of the person receiving the treatment to return to work. Work hardening programs are interdisciplinary and intended to address the functional, physical, behavioral, and vocational needs of the injured worker. The Commission has adopted rules governing work hardening programs. The rules, found in the STG and Medical Fee Guideline (MFG), relate to, among other things, when work hardening is appropriate.<sup>2</sup>

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<sup>1</sup> 28 TEX. ADMIN. CODE (TAC) § 134.1001.

<sup>2</sup> Medical Fee Guideline Medicine Ground Rule II. E. at 28 TAC § 134.201.

The record shows that Claimant has received a considerable amount of care, including, post-operatively, four weeks of rehabilitation and epidural steroid injections. Ex. 1 at 28-29. Although Claimant 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,” that does not mean that the Claimant is entitled to every treatment available.<sup>3</sup> As noted by Dr. Barnett, the Commission’s fee guidelines determine the services that are available to injured Texas workers. Although there may not be strict deadlines limiting the availability of treatments, the STG does have a set of tables listing appropriate treatments for the various phases of care. Table III of the STG lists work hardening as an appropriate treatment during the tertiary phase of care. STG Ground Rule (g)(7)(C). According to Table III, a clinical indicator of the tertiary phase of care includes a “[d]ocumented history of persistent failure to respond to nonoperative and/or operative treatment, which surpasses the usual healing period of >4-6 months post-injury and/or post-surgery. . . .” Table III also notes that the tertiary phase should be the last remaining medical option before maximum medical improvement (MMI). In this case Claimant reached MMI in July 2001. Ex. 1 at 31. As STG Ground Rule (e)(6) indicates, post-tertiary treatments, which do not include work hardening, may be more appropriate at this time.

Dr. Barnett complains that the Carrier’s denial did not identify why Claimant would not benefit from the program, why she would not be able to complete the program, and why she would not be able to obtain any employment at the end of the program. That complaint is inappropriate because it is Dr. Barnett’s obligation to show that the opposite would occur. The only goal stated is to increase Claimant’s functional ability and endurance to return her safely to work. Ex. 1 at 27. Contrary to MFG Medicine Ground Rule II. E. 7, which requires that a treatment plan be prepared, Dr. Barnett’s request fails to set forth the specific goals that he hopes Claimant will achieve in the work hardening program to allow her to return her to work, including the job simulation activities that she would perform and the projected improvement hoped for.

Dr. Barnett’s request also fails to demonstrate the need for the multi-disciplinary program. The only reference to Claimant’s psycho-social dysfunction in the FCE is that she tested positive on the pain and impairment relationship scale. Otherwise, she tested negative on the following: chemical dependency, anxiety, depression, and psychosomatic complaints. It is not apparent to the ALJ why that one criterion made her eligible for work hardening. According to Table III, clinical indicators include a “history of significant psychosocial disturbance (i.e., substance abuse, affective disorders, psychiatric conditions),” which does not appear to be present in this case.

Overall, the evidence fails to demonstrate how Claimant would benefit at this time, three years after injury and one year after surgery, from work hardening when all other treatments had failed. Besides Dr. Barnett’s conclusory statement that the FCE clearly indicates the medical necessity for work hardening, the only other reason he gave for his belief that Claimant would benefit from work hardening versus pain management, is that work hardening is more intensive,

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<sup>3</sup> TEX. LAB. CODE ANN. § 408.021 (Vernon 1996).

consisting of eight hours per day versus the three hours per day with pain management. Ex. 1 at 23.

Accordingly, the ALJ finds that Dr. Barnett has not established that a work hardening program is appropriate for Claimant at this time and that it will succeed in returning Claimant to work.

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

1. Claimant, a meat wrapper, sustained a compensable injury on \_\_\_\_\_.
2. At the time of the injury, Claimant's employer had its workers' compensation insurance through American Protection Insurance Company (Carrier).
3. Jack Barnett, D.C. has been Claimant's treating doctor since the time of the injury.
4. On March 7, 2001, Claimant underwent surgery to decompress the L-4--L-5 vertebrae.
5. After recovering from surgery Claimant received four weeks of rehabilitation and epidural steroid injections.
6. Claimant achieved maximum medical improvement in July 2001.
7. Dr. Barnett performed a functional capacity evaluation (FCE) on March 8, 2002, and requested preauthorization of 30 work hardening sessions.
8. The Carrier denied preauthorization because there was no job description from Claimants employer to compare the physical category of her job to her current abilities.
9. Dr. Barnett requested medical dispute resolution before the Texas Workers' Compensation Commission.
10. The Commissions designee, an independent review organization (IRO), denied the request for preauthorization, which was issued on September 16, 2002.
11. The IRO found that work hardening was not medically necessary because (1) efficacy of a work hardening program initiated one year after the injury is not well-established, (2) the FCE did not state at what physical demand level the Claimant was functioning, and (3) the request lacked an independent, multi-disciplinary medical work up.
12. Dr. Barnett filed a request for a hearing on October 8, 2002.
13. The Commission sent notice of the hearing to the parties on October 28, 2002. The hearing notice informed the parties of the time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; the statutes and rules involved; and the matters asserted.
14. Work hardening is a goal-oriented treatment program designed to return an individual to work.

15. Dr. Barnett failed to set forth specific goals that he hoped Claimant would achieve in the work hardening program that would enable her to return to work, including the job simulation activities that she would perform and the projected improvement hoped for.
16. Dr. Barnett failed to establish Claimants psycho-social need for a multi-disciplinary program.
17. Dr. Barnett failed to establish that Claimant would benefit from the program three years after injury and one year after surgery, when all other treatments had failed.

## **V. CONCLUSIONS OF LAW**

1. The Texas Workers' Compensation Commission has jurisdiction to decide the issue presented, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 413.031.
2. 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. LAB. CODE ANN. §§402.073 and 413.031(k) and TEX. GOV'T CODE ANN. ch. 2003.
3. Dr. Barnett timely filed a notice of appeal of the independent review organization, decision, as specified in 28 TEX. ADMIN. CODE (TAC) §148.3.
4. Proper and timely notice of the hearing was effected upon the parties according to TEX. GOV'T CODE ANN. ch. 2001 and 28 TAC § 148.4(b).
5. Dr. Barnett had the burden of proving the case by a preponderance of the evidence, pursuant to 28 TAC § 148.21(h) and (i).
6. Dr. Barnett failed to prove the services he intends to provide meet the requirements of Medical Fee Guideline Medicine Ground Rule II. E. 7.
7. Dr. Barnett failed to prove that Claimants medical needs meet the criteria for a work hardening program according to the provisions of Spine Treatment Ground Rule (g)(7)(C).
8. Based on the foregoing findings of fact and conclusions of law, Dr. Barnett did not prove that his request for preauthorization of 30 work hardening sessions should be granted.

### **ORDER**

It is hereby ordered that Dr. Jack Barnetts request for preauthorization of 30 work hardening sessions is denied.

**SIGNED this 8th day of January 2003.**

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**KATHERINE L. SMITH**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARING**