

**DOCKET NO. 453-03-0931.M5**  
**MDR TRACKING NUMBER: M5-02-2302-01**

<b>MOCKINGBIRD WORKSKILLS,</b>	§	<b>BEFORE THE STATE OFFICE</b>
<i>Petitioner</i>	§	
	§	
<b>V.</b>	§	<b>OF</b>
	§	
<b>TCPIGA FOR LEGION INSURANCE</b>	§	
<b>COMPANY,</b>	§	
<i>Respondent</i>	§	<b>ADMINISTRATIVE HEARINGS</b>

**DECISION AND ORDER**

**I. INTRODUCTION**

Mockingbird Workskills (Petitioner or Provider) seeks reimbursement from Legion Insurance Company (Carrier) for \$3,008.00 in disputed medical services associated with seven dates of service for a work hardening program provided to Workers' compensation claimant \_\_\_\_ Claimant), between April 24, 2001, and May 18, 2001. Carrier denied payment on the basis that the services were not medically necessary. Carrier's action was reviewed by an Independent Review Organization, which denied reimbursement for the same reason. Petitioner challenges that denial. This decision finds that reimbursement should be denied.

The hearing convened July 7, 2003, at the hearings facility of the State Office of Administrative Hearings (SOAH) before SOAH Administrative Law Judge (ALJ) Carol Wood. Michael Smith, D.C., appeared on behalf of Petitioner, and Carrier was represented by Steven M. Tipton, attorney. After receipt of evidence, the record closed that same day.

**II. DISCUSSION**

1. **Applicable Law**

Pursuant to the Texas Workers' Compensation Act, an employee who has sustained 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. LAB. CODE § 408.021(a).

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, intended to address the functional, physical, behavioral, and vocational needs of an injured worker. The Commission has adopted rules governing work hardening programs. Those rules, in effect when the disputed services were provided and found in the Medical Fee Guideline (MFG) Medicine Ground Rules, concern such matters as when work hardening is appropriate, how such programs are to be administered and billed, and what documentation is required of work hardening providers. MFG Medicine Ground Rule II. E.(1) provides that work hardening admission criteria are to enable the program to admit persons:

1. who are likely to benefit from the program;
2. whose current levels of functioning due to illness or injury interfere with their ability to carry out specific tasks required in the workplace;
3. whose medical, psychological, or other conditions do not prohibit participation in the program; and
4. who are capable of attaining specific employment upon completion of the program.

Section (e)(2)(A) of the Lower Extremities Treatment Guideline Ground Rules, also in effect when the disputed services were furnished, indicates that treatment must be provided in the least intensive setting and be cost effective.

Petitioner bears the burden of proof in this proceeding pursuant to 28 TEX. ADMIN. CODE § 148.21(h).

## **B. The Evidence**

Claimant is a 26-year old male who sustained a compensable injury to his lower back on \_\_\_\_, while twisting a metal stake out of the ground. Claimant underwent two MRIs and X-rays performed by Curtis Lee Adams, D.C. Claimant has had no surgery or hospital stays associated with the injury. He took muscle relaxants and anti-inflammatory medications for two days after the injury, but quit taking those medications because they made him nauseated. He is on no other medications, but reported that since the accident he drinks four beers each night to help him sleep. In April, 2001, Claimant completed a work conditioning program at Dr. Adams' clinic, just prior to the disputed work hardening program provided by Petitioner between April 24, 2001, and May 18, 2001.

Dr. Smith testified on behalf of the Provider. He stated that Claimant was a suitable candidate for a work hardening program and the program was appropriately administered. He acknowledged that Claimant had poor attendance, especially with respect to the psychological and behavioral components of the program.<sup>1</sup> In Dr. Smith's view, however, a provider should not be punished for a claimant's poor attendance. He testified that the decision to dismiss a patient from a program based on non-attendance is a difficult one and is appropriately done on a case-by-case basis. In his view, it is best to leave a patient with attendance problems in a program as long as the patient shows some progress when the patient does attend.

Dr. John Braswell, D.C., testified on behalf of Carrier. In his view, the work hardening program was not medically necessary. According to Dr. Braswell, because Claimant had not improved in a work conditioning program, a psychological evaluation of Claimant should have been performed prior to enrolling him in a work hardening program. Dr. Braswell felt this was particularly important because Claimant's efforts in the initial Functional Capacity Evaluation (FCE) on January 26, 2001, indicated questionable efforts. He acknowledged that Claimant's efforts appeared to improve in another FCE conducted on April 20, 2001; but Dr. Braswell stated this improvement may have resulted from Claimant learning how to "take the test" rather than from a more genuine effort. At any rate, Dr. Braswell testified that standardized "Waddell" tests should

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<sup>1</sup> The first week of the program, Claimant was present one of the five scheduled days; the second and third weeks, he was present two of five days; the fourth week he was present four days, and the fifth week he was present one day.

have been performed after the January, 2001, FCE to evaluate potential symptom magnification.

Finally, Carrier points to a clinical psychological interview performed by the Provider's psychologist on May 23, 2003, that is, at *the end* of the work hardening program in dispute. Under the heading "Reason for Evaluation," the report states, "The patient was referred by Dr. Adams for an initial psychological screening to determine psycho-social readiness for a work hardening program." The psychologist concluded:

This screening demonstrates that further psychological evaluation is medically necessary to understand the injury-related factors that may interfere with (Claimant's) current rehabilitation program. At this time, it appears that the patient is physically ready to fully participate in a work hardening program. However, results of the clinical interview suggest that the presence of moderate depression and chronic patterns of ineffective coping may hinder the patient's ability to make adequate and timely progress with rehabilitation efforts. Psychological testing to clarify diagnostic issues and aid in treatment planning is necessary.

There is no indication from the record that additional psychological testing was performed.

### 3. Analysis

Based on the evidence in the record, the Judge concludes Petitioner has failed to establish that the disputed work hardening program was medically necessary. The Judge concurs with Petitioner that a reasonable program should not be retrospectively rejected based solely on a claimant's poor attendance. However, the Judge finds that additional psychological evaluation of Claimant should have been conducted prior to the beginning of the work hardening program.

Based on the Medicine Ground Rules, work hardening is suitable only if there are no psychological or other conditions that prohibit participation in the program. In this case, work conditioning had already been attempted without success, and Claimant's initial FCE indicated symptom magnification was of potential concern. Under these circumstances, *prior to beginning the five-week work hardening course*, additional psychological assessment of Claimant should have been undertaken to determine whether Claimant was a suitable candidate for the work hardening program. Instead, a psychological assessment was only undertaken in May 23, 2001, at the end of the program, which found that "further psychological evaluation is medically necessary." In the absence of such testing, Petitioner has not shown that the requested work hardening program was medically necessary. Accordingly, Petitioner's request for reimbursement is denied.

## III. FINDINGS OF FACT

1. On \_\_\_\_, Claimant suffered an injury compensable under the Texas Workers' Compensation Act (Act) while twisting a metal stake out of the ground.
2. At the time of Claimant's compensable injury, Legion Insurance Company (Carrier) was the Workers' compensation insurer for Claimant's employer.

3. Petitioner Mockingbird Workskills seeks reimbursement from Carrier for \$3,008.00 in medical services associated with a work hardening program provided to Claimant between April 24, 2001, and May 18, 2001.
4. Carrier denied reimbursement of the expenses identified in Finding of Fact No. 3.
5. Petitioner timely requested dispute resolution by the Texas Workers' Compensation Commission Medical Review Division (MRD), which referred the matter to an Independent Review Organization (IRO).
6. The IRO issued its decision on August 9, 2002, concluding that the disputed expenses should be denied. On September 10, 2002, the MRD issued a decision acknowledging the IRO's decision. Petitioner appealed the IRO's decision.
7. Prior to the work hardening program in dispute in this proceeding, Claimant underwent an unsuccessful work conditioning program.
8. Claimant's initial Functional Capacity Evaluation, conducted in January 2001, contained numerous invalid results and indicated potential symptom magnification.
9. Prior to the beginning of the work hardening program for Claimant, no psychological assessment was made to determine whether Claimant was a suitable candidate for the program.
10. Claimant missed numerous sessions of the work hardening program and failed to attend all of the psychological and behavioral portions of the course.

#### **IV. CONCLUSIONS OF LAW**

1. The Texas Workers' Compensation Commission (Commission) has jurisdiction related to this matter pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE (Labor Code) § 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 413.031(d) of the Labor Code and TEX. GOV'T CODE (Gov't Code) ch. 2003.
3. The hearing was conducted pursuant to the Administrative Procedure Act, Gov't Code ch. 2001.
4. Adequate and timely notice of the hearing was provided in accordance with Gov't Code §§ 2001.051 and 2001.052.
5. Petitioner has the burden of proof in this proceeding. 28 TEX. ADMIN. CODE § 148.21(h).
6. Medical Fee Guideline Ground Rule II. E.(1) provides that work hardening should be performed only if there are no psychological or other conditions that prohibit participation in the program.

7. The disputed services were not shown to be medically necessary health care for Claimant.
8. Based on the foregoing, Petitioner's claim for reimbursement from Carrier for the disputed expenses described in Finding of Fact No. 3 should be denied.

**ORDER**

**IT IS ORDERED** that Petitioner Mockingbird Workskills' request for reimbursement of \$3,008.00 for disputed work hardening services provided between April 24, 2001, and May 18, 2001, is denied.

**SIGNED January 16, 2004.**

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**CAROL WOOD**  
**Administrative Law Judge**  
**State Office of Administrative Hearings**