

**DOCKET NO. 453-03-1068.M5**  
**MDR TRACKING NUMBER: M5-02-2884-01**

<b>THERAPY EXPERTS, INC.,</b>	§	<b>BEFORE THE STATE OFFICE</b>
<b>Petitioner</b>	§	
	§	
<b>v.</b>	§	
	§	<b>OF</b>
<b>AMERICAN CASUALTY COMPANY</b>	§	
<b>OF READING PENNSYLVANIA,</b>	§	
<b>Respondent</b>	§	<b>ADMINISTRATIVE HEARINGS</b>

**DECISION AND ORDER**

Therapy Experts, Inc. (Provider) has appealed a decision of the Texas Workers' Compensation Commission's (Commission) Medical Review Division (MRD) issued on October 11, 2002. The MRD's decision is based on an independent review organization's (IRO) determination that six weeks of work hardening provided to the injured worker (Claimant) from October 1 through November 9, 2001, were not shown to be medically necessary. This Decision concludes that the Provider failed to prove the medical necessity of work hardening services but did prove the necessity for work conditioning and should be reimbursed at the rate allowed for work conditioning.

The hearing was convened on March 24, 2003, at the State Office of Administrative Hearings' (SOAH) facilities in the William Clements Building, Fourth Floor, 300 West 15th Street, Austin, Texas. Petitioner appeared through its attorney, Martin R. G. Maragisan. Respondent American Casualty Company of Reading Pennsylvania participated through counsel, Jane Lipscomb Stone. The Commission did not participate in the hearing. The hearing adjourned, and the record closed on March 24, 2003.

**I. NOTICE AND JURISDICTION**

Because there were no contested issues regarding notice or jurisdiction those matters are addressed in the Findings of Fact and Conclusions of Law without further discussion here.

**II. BACKGROUND**

Claimant suffered a compensable injury to his right shoulder on \_\_\_\_\_. Following the injury, Claimant was x-rayed, placed on modality exercises, and given a pain prescription by the company clinic. After about three to four weeks he requested a change of treating physicians and was referred to Dr. Celso Garcia, D.C. who instituted a conservative care regimen. An MRI, ordered by Dr. Garcia and performed on June 5, 2001, showed Claimant's right shoulder had a small three millimeter partial tear of the suraspinatus tendon at the lateral insertion into the greater tuberosity with associated tendinosis or tendinitis. Dr. Garcia then referred the Claimant to Dr. Jose E. Rodriguez, an orthopedic surgeon. Dr. Rodriguez concluded that Claimant had suffered a rotator cuff tear with a type III acromion, and he performed arthroscopic surgery to repair the rotator cuff

and an acromioplasty on July 2, 2001. On July 6, Claimant was cleared to begin postoperative rehab/physical therapy for six weeks. On August 31, 2001, Dr. Rodriguez conducted a follow-up examination and stated in his report that Claimant "must continue" in his rehab program for another month and then advance to a "workconditioning and workhardening program for a month to six weeks."

A functional capacity evaluation (FCE) conducted on August 21, 2001, placed Claimant in the "Light" work category within the restricted work plane with some accommodation required for reaching and occasional lifting restrictions of thirty-three pounds above shoulder height and twenty-seven pounds knuckle to shoulder height.

A second FCE on October 1, 2001, showed Claimant was in the light physical demand level for occasionally-performed activities and was still not qualified to return to his previous job as a machine operator, which was in the medium physical demand level. In this report, Dr. Garcia stated that "[i]t is medically necessary" for Claimant to progress to the next phase of rehabilitation, which he described as a "work hardening program" that should have elements of conditioning exercises, cardio-vascular training, body mechanics, and vocational counseling, and include generic job simulation and psychological counseling.

Based on Dr. Garcia's referral, Provider began a six-week work hardening program that ran from October 1 through November 9, 2001. An additional two weeks of work hardening were requested and approved by the Carrier for a total of eight weeks of work hardening services ending November 21, 2001. As noted above, only the first six weeks are at issue here.

### **III. ARGUMENT AND EVIDENCE**

#### **A. Provider**

The Provider contended that the IRO wrongly concluded that the work hardening program was not medically necessary for this claimant. In support of its position, Provider presented roughly 400 pages of documentation,<sup>1</sup> but did not call any witnesses. Referring to these documents, Provider noted that both Claimant's doctors, Garcia and Rodriguez, referred Claimant for a work hardening program, and Dr. Dan Hamill conducted a psychological evaluation at the beginning of the program on October 1, 2001. Dr. Hamill stated in his report that "[b]ased on the assessment, this patient is an appropriate candidate" for work hardening. Provider admitted, however, that the various psychological tests and Claimant's scores on those tests are not included in the record, and it did not offer any additional evidence from Dr. Hamill to more fully explain why he had concluded Claimant had psychological or behavioral problems that supported his participation in work hardening rather than a work conditioning program.

Provider argued that the benefits of the work hardening program are shown in the results of Claimant's discharge FCE (DFCE) given on November 27, 2001. The DFCE showed Claimant had made "significant improvement" and was now classified at the medium demand level for material

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<sup>1</sup>Exhibit P-1.

handling activities performed occasionally, which was the level required for his original job. In a report dated December 3, 2001, Dr. Garcia certified Claimant as having reached maximum medical improvement (MMI) on November 29, 2001, and Claimant was awarded a sixteen percent upper extremity impairment value that resulted in a ten percent whole person impairment rating. Provider contends these final results are the "best evidence" that it has met the Medical Ground Rules criteria for work hardening since: (1) Claimant clearly was a person likely to benefit from this type of program; (2) his post-injury functioning level, both before and after surgery, prevented him from carrying out his job requirements; (3) he was able to fully participate in the work hardening program; and (4) upon completing the program, Claimant was able to resume the specific duties associated with his job as a machine operator.

Finally, Provider noted that the two additional weeks of work hardening requested by Dr. Garcia were found to be medically necessary in Carrier's peer review report by Dr. Mike O'Kelley, D.C., and these services have been reimbursed by Carrier. As such, Provider asks how Weeks 7 and 8 of work hardening can be medically necessary and reimbursable but not the first six weeks.

## **B. Carrier**

Carrier presented roughly 500 pages of medical documents<sup>2</sup> and the testimony of Dr. William D. Defoyd, D.C. in support its position and that of the IRO that the six weeks of work hardening at issue were not medically necessary and, therefore, are not reimbursable. Although an injured worker is entitled to all health care that is medically necessary, Carrier maintains that this care must also be rendered in the most cost effective way.

In this regard, Carrier notes there is a significant difference in costs between work conditioning and work hardening programs due to the presumed psychological and/or behavioral needs of an employee in a work hardening program. It asserts that Provider's documentation is insufficient under the applicable Commission rules to prove Claimant clearly had psychological or behavioral problems that necessitated his participation in a work hardening program. Dr. Defoyd noted, on the contrary, that comments about Claimant throughout the record show he had a good attitude, was not depressed, showed a willingness to participate, and responded well to the rehab classes. Likewise, he contends that documentation of the group psychological sessions shows Claimant exhibited only "normal" psychological behaviors that fail to show Claimant had any significant psychological barriers or issues, *i.e.*, he was described as "cooperative" and "talkative" and a "good participant." With no substantive evidence that this employee faced psychological barriers, Dr. Defoyd asserted that the more costly work hardening program was not the correct treatment program for this employee. He testified that Claimant should instead have been in either a work conditioning or out-patient rehab program with a concurrent effort to return him to work sooner at some limited level. In this regard, Dr. Defoyd stressed that, psychologically, it is important or "key" to return the person to work that they can safely do as soon as possible even if it is not their original job.

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<sup>2</sup>Exhibit R-1.

When asked specifically what was lacking in Dr. Hamill's psychological evaluation of the Claimant, Dr. Defoyd stated that he would have expected to see: (1) more indicators of behavioral problems even before the tests were given; and (2) some indication of Claimant's particular test scores or some interpretative comments about the scores.

In addition, Dr. Defoyd testified that a provider should know the employee's specific job requirements and not rely on the person's job title or the more generic job descriptions maintained by the government as Provider did in this case. He stated that "it is fundamental" that the time to contact the employer is *before* beginning a work hardening program to learn precisely what the employee did so you, as the provider, know what to test for to measure improvement and know whether there is even a job for the employee upon return. Dr. Defoyd noted that the only documentation in the record shows that Provider did not contact Claimant's employer until November 6, 2001, *after* the six weeks of work hardening were completed.

#### IV. ANALYSIS

The issue in this proceeding is whether six weeks of work hardening services provided to this Claimant were medically necessary. The burden of proof is on Provider who is appealing the IRO's decision. The ALJ finds the preponderance of the evidence does not prove work hardening was medically necessary for the Claimant.

Work hardening is a "highly structured, goal-oriented, individualized treatment program" designed to maximize the ability of the injured worker to return to work. Work hardening programs are interdisciplinary in nature and are designed to address the functional, physical, behavioral, and vocational needs of a claimant. Commission rules found in the Medical Fee Guideline govern when these programs are appropriate for an injured worker, how the programs should be designed and administered, and what documentation is needed to support their use.<sup>3</sup>

Significantly, the record in this case does not contain the documentation or testimony needed to support a finding that Claimant had psychological or behavioral problems that were acting as a barrier to his recovery and return to work. While Provider did have a psychological evaluation done of Claimant before proceeding with the program, Dr. Hamill's single page report fails to provide any information about why he concluded Claimant was "an appropriate candidate" for the proposed multi disciplinary work hardening program. In the first paragraph, he explains in general terms that such evaluations are conducted to separate out those employees "who show no indication of behavioral health issues impinging on employability" so that they can be referred out of work hardening and into work conditioning. Dr. Hamill then lists the names of the various psychological screening tests given, indicates what these tests are designed to identify, but never relates them to Claimant. There is no evidence of how Claimant scored on these tests and what his particular psychological or behavioral problems might have been. Without additional documentation or testimony from Dr. Hamill to supplement the one-page report in the record, Provider fails to prove that psychological or behavioral problems existed that would support placing Claimant in a work hardening versus a work conditioning program.

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<sup>3</sup>See Medical Fee Guideline Medicine Ground Rule II.E. and 28 TEX. ADMIN. CODE § 134.201.

The ALJ also agrees that documentation of the subsequent group sessions does not show Claimant had the type of behavioral health problems that would adversely affect his "employability" as that term is referenced in Dr. Hamill's report. While Provider's documentation adequately shows Claimant's loss of strength and mobility in his right arm, the evidence also shows that these physical problems do not, alone, warrant placing Claimant in a work hardening program.

The record, however, also shows that Provider's services significantly improved Claimant's physical condition and successfully rehabilitated him so that he could resume his original job as a machine operator. While the record does not indicate whether Claimant has returned to that specific job, a right to reimbursement for services rendered does not turn on whether the worker does so. Moreover, the ALJ finds the documentation adequately details Claimant's particular conditioning plan and goals, his efforts to complete that program, and progress achieved through each of the weeks at issue. On another point, the ALJ also agrees with Provider that it seems somewhat incongruous that Carrier would deny payment for the first six weeks of treatment based on those services not being medically necessary, but then approve and reimburse Provider for the same services continued through Weeks 7 and 8.

Although Provider did not prove the medical necessity of the work hardening program, considering all of the above, the ALJ finds that it did adequately show the medical necessity for work conditioning and that the services provided resulted in significant improvement in Claimant's physical condition. As such, the evidence shows that treatments and services billed as work hardening qualify as work conditioning services, and Provider is entitled to reimbursement at the rate for work conditioning during the six weeks at issue.

## V. FINDINGS OF FACT

### VI.

1. Claimant sustained a compensable injury to his right shoulder at his place of employment on \_\_\_\_\_.
2. Claimant was diagnosed as having a rotator cuff tear with a Type III acromion and underwent arthroscopic surgery to repair the rotator cuff and an acromioplasty on July 2, 2001. Following surgery, Claimant participated in several weeks of rehab/physical therapy.
3. A functional capacity evaluation (FCE) on August 21, 2001, showed Claimant was capable of only light work within the restricted work plane with certain reaching accommodations and lifting restrictions. A second FCE on October 1, 2001, indicated Claimant remained in the light physical demand level and was not qualified to return to his job as a machine operator, which was in the medium physical demand level.
4. Upon referral by Claimant's treating physicians, Therapy Experts, Inc. (Provider) provided work hardening medical treatments to Claimant from October 1 through November 9, 2001.
5. Upon completion of eight weeks of work hardening, Claimant's discharge FCE given on November 27, 2001, showed his physical condition had significantly improved and he was classified at the medium demand level for material handling and could resume his job responsibilities.

6. Provider filed a claim for payment for the work hardening services provided from October 1 through November 9, 2001, which was denied by American Casualty Company of Reading Pennsylvania (Carrier ) on the grounds that this treatment was not medically necessary.
7. On October 11, 2002, the Medical Review Division (MRD) of the Texas Workers' Compensation Commission (Commission) adopted and issued the IRO's decision that denied reimbursement on the grounds that Provider had not demonstrated the medical necessity of the six weeks of work hardening provided from October 1 through November 9, 2001.
8. Provider filed a request for hearing and appeal of the MRD's decision on October 17, 2002.
9. On November 19, 2002, the Commission issued a notice of hearing to be held at the State Office of Administrative Hearings (SOAH). 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, and a statement of the matters asserted and reference to the relevant statutes and rules involved.
10. The hearing was held on March 24, 2003. Provider and Carrier participated through counsel; the Commission did not appear. The hearing ended and the record closed the same day.
11. Claimant has no documented psychological or behavioral problems that support his participation in a disciplined work hardening program.
12. Provider's services significantly improved Claimant's physical condition and successfully rehabilitated him so that he could resume his job as a machine operator.
13. The documentation adequately detailed Claimant's performance, his conditioning and work simulation exercises, the goals of the program, and progress made by Claimant.

## **VI. CONCLUSIONS OF LAW**

1. The Commission has jurisdiction over this matter pursuant to TEX. LAB. CODE ANN. § 413.031.
2. SOAH has jurisdiction over this proceeding, including the authority to issue a decision and order, pursuant to TEX. LAB. CODE ANN. §§ 402.073 and 413.031 and TEX. GOV'T CODE ANN. ch. 2003.
3. The hearing was conducted pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN., ch. 2001 and 1 TEX. ADMIN. CODE ch. 155.
4. Provider filed a timely appeal of the MRD's decision. 28 TEX. ADMIN. CODE §§ 133.305(p) and 148.3.

5. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. § 2001.052.
6. The party seeking relief bears the burden of proving by a preponderance of the evidence that it should prevail in the hearing. 28 TEX. ADMIN. CODE § 148.21(h).
7. Based on the above Findings of Fact, Provider failed to prove that a work hardening program was medically necessary for the Claimant.
8. Based on the above Findings of Fact, treatment and services rendered by Provider to Claimant between October 1 and November 9, 2001, enhanced the physical condition and ability of Claimant to return to work. TEX. LAB. CODE ANN. § 408.021(a)
9. Based on the above Findings of Fact and Conclusions of Law, a work conditioning program was medically necessary to treat Claimant's injury.
10. Based on the above Findings of Fact and Conclusions of Law, Provider should be reimbursed for the services provided to Claimant using the work conditioning rate of reimbursement.

### **ORDER**

It is hereby **ORDERED** that Carrier shall reimburse Provider for services provided from October 1 through November 9, 2001, at the reimbursement rate allowed for work conditioning.

**SIGNED the 11th day of February 2004.**

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**LESLIE CRAVEN  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS**