

**DOCKET NO. 453-03-1188.M5**  
**[MDR TRACKING NO. M5-02-2449-01]**

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

**DECISION AND ORDER**

This case involves a dispute over \$10,752.00 in work hardening services provided by Mockingbird Workskills (Provider) to injured worker\_\_\_\_ (Claimant). The Administrative Law Judge (ALJ) concludes that Provider failed to meet the entrance/admission criteria set out in the Texas Workers= Compensation Commission (Commission) Medical Fee Guideline. Therefore, the ALJ finds that Provider is not entitled to reimbursement.

**I. Background Facts**

Claimant was in an accident while driving a delivery truck on\_\_\_\_\_. At the time, he was working as a route salesman (delivering cases of soda). After the injury, he received chiropractic treatments from Adams Chiropractic from September 26, 2000, through March 22, 2001. On June 25, 2001, Dr. Adams referred Claimant to Provider for a Functional Capacities Evaluation (FCE). Provider recommended a work hardening program.

Because Provider=s facilities are accredited through the Commission of Accreditation of Rehabilitation Facilities (CARF), preauthorization was not required for the work hardening program. Claimant began the work hardening program on June 26, 2001, and continued through August 3, 2001. Carrier denied payment for the services, claiming they were not medically necessary. The Medical Review Division (MRD) of the Texas Workers' Compensation Commission (Commission) disagreed, finding that Claimant was an ideal candidate for a work hardening program and that a work hardening program may be medically necessary even if a claimant has undergone a work conditioning program. The MRD offered no explanation as to why Claimant was an ideal candidate or why a work hardening program was medically necessary. Carrier appealed, requesting a hearing before the State Office of Administrative Hearings.

**II. Discussion**

The main focus of this case centers on the issue of whether the program met the requirements of the Medical Fee Guideline, which requires providers to use Areal or simulated work activities in a relevant work environment.@<sup>1</sup> Carrier contends that Provider was trying to return Claimant to work as a route salesman; however, before the work hardening program began, his employer had fired

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<sup>1</sup> TWCC 1996 Medical Fee Guideline, p. 37.

him. Subsequently, in a psychological interview to determine whether he met the program's entrance criteria, Claimant stated that he was interested in training to work on computers.<sup>2</sup> Provider failed to address the disconnect between Claimant's stated work goals (retraining toward what would likely be a less strenuous activity) and Provider's work hardening program goals (returning Claimant to work at a medium + physical demand level). The ALJ concludes that Provider's documentation does not satisfy the Commission's entrance criteria because it failed to specify a job or type of job as a goal for the work hardening program.

The Commission's Medicine Ground Rules, in effect at all times relevant to this dispute, set out the purpose of and criteria for work hardening. A Work hardening@ 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 tolerances, and work behaviors. Work Hardening programs use real or simulated work activities in 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 persons served.

1. Entrance/admission criteria shall enable the program to admit:
  - a. persons who are likely to benefit from the program;
  - b. persons whose current levels of functioning due to illness or injury interfere with their ability to carry out specific tasks required in the workplace;
  - c. persons whose medical, psychological, or other conditions do not prohibit participation in the program; and

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<sup>2</sup> Petitioner's Ex. 1 at 166.

- d. persons who are capable of attaining specific employment upon completion of the program.<sup>3</sup>

Three Functional Capacity Evaluations (FCEs) and the psychological clinical interview performed on Claimant provide information necessary to evaluate the medical necessity of the work hardening program. Provider performed an initial FCE on March 19, 2001, finding that Claimant's current physical demand level (PDL) was sedentary and his job demand PDL was medium +. Provider conducted a progress FCE on June 25, 2001. In the progress FCE, Provider found that Claimant's current PDL above waist was sedentary and below waist was light, again with a job demand PDL of medium +. Summary text indicated that Claimant's job requires Medium (+) work capabilities.<sup>4</sup> The progress FCE indicated that Claimant would benefit from a work hardening program.

The psychological clinical interview was performed two days after the progress FCE. Under the category AEmployment History,<sup>5</sup> the document indicates that Claimant has worked as a truck driver and for an automotive electric company before becoming a route salesman delivering soda. It states: Following release from his doctor, the patient would like to learn about computers or seek retraining.<sup>5</sup> The final FCE places Claimant at a current PDL of light +; job demand level of medium +. In the section labeled AReturn to work plan,<sup>6</sup> the FCE states:

Patient is capable of working in the Medium Light PDL category for below waist lifts and the Light + PDL category for above waist lifts. His job requires Medium + work capacities. However, his job was terminated and he has met with a TRC representative to assist in vocational education and job placement assistance. Recommend he retain services from TRC in accordance with limitation as set by

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<sup>3</sup> Petitioner's Ex. 2, TWCC 1996 Medical Fee Guideline, pp. 37-38.

<sup>4</sup> Petitioner's Ex. 1 at 201.

<sup>5</sup> Petitioner's Ex. 1 at 224. This exact same statement was made in the "Behavioral Medicine Evaluation/ Psychological Clinical Interview/ Psychophysiological Profile Assessment" dated July 23, 2001. Petitioner's Ex. 1 at 253.

## FCE guidelines . . .

Both Carrier and Provider tendered expert chiropractic witnesses, who disagreed on whether the work hardening program was necessary. Carrier witness Dr. William David Defoyd testified that work simulation exercises should be focused on returning an injured employee to work. Thus, a *targeted job goal* should be defined during the initial FCE. Dr. Defoyd listed some relevant FCE questions: Can the injured worker return to the job? If not, is there another job or modified job duties? Are there psychological problems? Is the injury mild to moderate? Dr. Defoyd suggested that a treating doctor had an obligation to document any mismatch in information gained during the FCE. In this particular instance, because Claimant stated he was not going back to work as a route salesman, it was unclear if a medium + physical demand level (PDL) was appropriate. If Claimant's goal was to retrain for a more sedentary job and he was at a sedentary PDL level above the waist and at a light PDL level below the waist on June 25, 2001, before the work hardening program began, why was he in a program designed to increase his ability to a medium PDL?<sup>6</sup>

Provider witness Dr. Michael Todd Smith testified that Claimant met the entrance/admission criteria for work hardening as Claimant would: (a) benefit from the program; (b) had physical deficiencies and could not perform specific tasks such as lifting; (c) had some psychological issues but did not need individual therapy; and (d) was capable of attaining employment after the program. Dr. Smith noted that approximately 40-50% of injured workers lose their jobs; thus, they are not returning to specific employment. Dr. Smith suggested it is reasonable to take a more general approach in goal setting: a provider would take into account that there is no job to return to, look at past work and the likelihood that the worker will return to that field; consider the worker's vocational goals; and the diagnosis. Dr. Smith testified that a provider's obligation, in the absence of more specific information, is to return the worker to the job level he was at before the injury. He noted that the provider, not the worker, determines and directs the treatment.

The ALJ finds that Dr. Smith failed to address the specifics of this particular case, in that Claimant had stated he wanted to learn about computers or to retrain. What job goal did Claimant have before the work hardening program? If Claimant was unemployed, what type of job was he currently seeking or would seek in the future? Did any of those goals match the program's stated goal to return him to a job with a PDL level of medium +?

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<sup>6</sup> Petitioner's Ex. 1 at 201. Dr. Defoyd testified that PDL levels begin at sedentary then progress to light, medium, medium heavy, and heavy.

The Texas Workers= Compensation Act (Act) states that a worker who has sustained a compensable injury is entitled to all health care reasonably required by the nature of the injury, and the worker is entitled to health care that enhances the ability of the employee to return to or retain employment.<sup>7</sup> These are broad and general guidelines. However, Carrier questions Provider=s responsibility to meet the Commission=s rules, which are adopted to carry out the statute. Under those rules, a work hardening program is defined as being Ahighly structured, goal-oriented, [and] individualized.@<sup>8</sup> The ALJ found reasonable Dr. Defoyd=s testimony that a program must have a defined return-to-work goal as part of its entrance/admission criteria. Unfortunately, in this instance, there was a disconnect between Claimant=s goals and Provider=s, which Provider failed to explain. Although the ALJ concurs with Provider=s witness, Dr. Smith, that a provider can evaluate a claimant=s current job status, past history, vocational goals, and then define a treatmentBProvider did not do so in this case. There is no record evidence that this type of analysis occurred.

The ALJ finds that ProviderBa highly-accredited CARF facilityBfailed to explain how Claimant was an appropriate candidate in a program designed to return him to a medium PDL, given his comments that he wanted to be retrained. Because it was unclear what job Claimant would seek in the future (a job working with computers or even a job working as a truck driver as he had done in the past), the program could not identify the specific tasks Claimant would be required to perform in the workplace, as required by the Medical Fee Guideline.

Accordingly, the ALJ finds that reimbursement for the work hardening program is denied.

### **III. Findings of Fact**

1. Claimant, a route salesman, sustained a compensable injury on \_\_\_\_\_.
2. At the time of the injury, Claimant=s employer had its workers' compensation insurance through Transcontinental Insurance Company (Carrier).
3. Claimant initially received treatment for his injury at Adams Chiropractic.
4. On March 19, 2001, Mockingbird Workskills (Provider) performed a Functional Capacity Evaluation (FCE) for Claimant. The FCE indicated that Claimant had been employed by Pepsi Cola as a route salesman, with a physical demand level of AMedium (+),@ but that Claimant had been terminated from his job.
5. On June 25, 2001, Provider performed a Progress FCE for Claimant, recommending a work hardening program.
6. Provider treated Claimant with work hardening sessions beginning June 26, 2001.

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<sup>7</sup> TEX. LAB. CODE ANN. § 408.021(a).

<sup>8</sup> Petitioner's Ex. 2, Medical Fee Guideline at 37.

7. Dr. Adams referred Claimant to Behavioral HealthCare Associates for psychological screening to determine whether he was physically and psychologically ready to participate in a work hardening program. In a Psychological Clinical Interview conducted on June 27, 2001, Claimant indicated that, following release from his doctor, he would like to learn about computers or seek retraining.
8. Claimant=s stated employment goals, set out in Finding of Fact No. 7, were inconsistent with the work hardening program goals, with a job demand or physical demand level of medium (+).
9. There is no evidence of a specific employment goal for Claimant upon completion of the program, other than an indication that he wished to receive retraining or learn about computers.
10. Work simulation exercises should be focused on returning an injured employee to work. Thus, a targeted job goal should be defined during an initial evaluation of a claimant for a work hardening program.
11. There is no evidence of specific tasks to which Claimant would be returning to in the workplace.
12. Claimant was treated with 25 work hardening sessions between June 26, 2001, and August 3, 2001.
13. Provider submitted a claim to Carrier in the amount of \$10,752.00 for the services provided to Claimant referenced in Finding of Fact No. 10.
14. Carrier denied reimbursement for the 25 work hardening sessions between June 26, 2001, and August 3, 2001, because the work hardening program was not medically necessary.
15. Provider timely appealed Carrier=s reimbursement denial to the Medical Review Division (MRD) of the Texas Workers' Compensation Commission (Commission).
16. Provider filed a request for medical dispute resolution.
17. On October 17, 2002, the MRD reviewed the decision of the Independent Review Organization (IRO) and concluded that Provider prevailed on the issue of medical necessity.
18. On October 30, 2002, Carrier filed a request for a hearing before the State Office of Administrative Hearings (SOAH).
19. The Commission sent notice of the hearing to the parties on November 26, 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.

20. SOAH Administrative Law Judge Lilo D. Pomerleau convened the hearing on March 26, 2003, at the William P. Clements Building, 300 West 15<sup>th</sup> Street, Austin, Texas. Carrier appeared and was represented by David Swanson, an attorney. Provider appeared and was represented by Kevin W. Stouwie. The Commission did not appear. The hearing adjourned, and the record closed that same day.

#### **IV. 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. SOAH 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. Carrier timely filed a notice of appeal of the MRD decision, as specified in 28 TEX. ADMIN. CODE ' 148.3.
4. Proper and timely notice of the hearing provided to the parties according to TEX. GOV'T CODE ANN. ch. 2001.052 and 28 TAC ' 148.4.
5. Carrier had the burden of proving the case by a preponderance of the evidence, pursuant to 28 TEX. ADMIN. CODE ' 148.21(h) and (i).
6. Carrier satisfied the requirements of 28 TEX. ADMIN. CODE ' 133.304(c) and TEX. LAB. CODE ANN. ' 408.027(d) (Vernon 1996 & Supp. 2002) when it denied the treatments on the grounds that work hardening was not medically necessary.
7. Provider failed to show that Claimant met the criteria for admission into a work hardening program, as set forth in the Medical Fee Guideline, Medicine Ground Rule II. E. 1 (a) and (b), because he did not have any specific employment defined after completion of the program. 28 TEX. ADMIN. CODE ' 134.201.
8. Based on the foregoing findings of fact and conclusions of law, Provider=s request for reimbursement should be denied for the dates of service of June 26 through August 3, 2001.

**ORDER**

**IT IS ORDERED** that Mockingbird Workskills is not entitled to reimbursement by Transcontinental Insurance Company for the work hardening program administered to Claimant from June 26 through August 3, 2001.

**SIGNED this 21<sup>st</sup> day of May 2003.**

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**LILO D. POMERLEAU**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARING**