

TEXAS MUTUAL INSURANCE COMPANY, Petitioner	§ § § § § § § § §	BEFORE THE STATE OFFICE
VS.		OF
REHAB MED, INC., Respondent		ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Texas Mutual Insurance Company (Carrier) appealed the findings and decision of the Medical Review Division (MRD) of the Texas Workers' Compensation Commission (Commission). The Commission referred the dispute to an Independent Review Organization (IRO) which found that the work conditioning services provided by Rehab Med, Inc. (Provider) to an injured worker (Claimant) were medically necessary.¹ The only issue is whether the work conditioning program was medically necessary.

After considering the evidence and the law, the Administrative Law Judge (ALJ) finds that the work conditioning services provided by Provider to Claimant were not medically necessary and denies reimbursement for these services.

I. STATEMENT OF CASE

ALJ Catherine C. Egan convened a hearing on August 27, 2003. Attorney Patricia Eads appeared and represented Carrier. Although properly notified of the hearing, Provider did not appear at the hearing. Notice and jurisdiction are addressed in the Findings of Fact and Conclusions of Law without discussion here. The hearing concluded and the record closed on that date.

II. BACKGROUND

On _____, while at work, Claimant, a machine operator, experienced pain on his lower left side as he was lifting parts and placing them on a machine. Dr. Rodriguez initially treated

¹ The original amount in dispute was \$1,342. MRD found that Provider's November 12-14, 2001, claims were not timely filed and disallowed these claims.

Claimant.² Dr. Rodriguez' diagnosis was that Claimant had a small inguinal hernia and recommended surgery. On September 6, 2001, Claimant underwent a hernia repair operation. Although the operation was successful, Claimant continued to complain of left lower quadrant pain. Although it is not clear when, Dr. Rodriguez referred Claimant to Armando Sanchez, M.D. for further treatment.

On November 5, 2001, Dr. Sanchez referred Claimant to Provider to participate in a four-week work conditioning program. The initial functional capacity evaluation (FCE) was not done until November 7, 2001. Based on Claimant's description of his job, Provider decided that Claimant's job required a medium to heavy work capability. However, Provider did not ask whether Claimant could return to his job and did not speak with Claimant's employer. Claimant began the work conditioning program on November 12, 2001. The dates in issue are from November 20 through November 30, 2001.

Carrier denied payment for the work conditioning program asserting that the treatments were not medically necessary. Provider appealed and the Commission referred the dispute to an IRO. Carrier presented evidence at the hearing to show that the IRO failed to request information from the Carrier as required.³ Consequently, Carrier did not know who to send the information to or when. Carrier presented the documentation it would have submitted to the IRO if requested at the hearing.

Based solely upon Provider's records, the IRO found that Provider's services were medically necessary. According to the IRO, Claimant's job description required "intermittent handling of materials that were in the medium to heavy category." Because the FCE showed that Claimant could handle materials in the light physical demand capacity, the IRO found that Claimant was a candidate for work conditioning. Except services that were not eligible for review under 28 TEX. ADMIN.

CODE (TAC) § 133.307(d)(1) (November 12 through 14, 2001) the MRD adopted the IRO's decision and ordered Carrier to reimburse Provider for the remaining work conditioning program and the \$650 IRO fee. This appeal followed.

² Dr. Rodriguez first name was not provided in the record.

³ Court Ex. 1. (Carrier's Affidavit).

III. MEDICAL NECESSITY

A. Carrier's Position

In support of its decision to deny reimbursement for the work conditioning program, Carrier argued that recovery from a hernia repair operation does not require work conditioning, but time. A work conditioning program does not promote recovery from a hernia operation because the pain is organic. The patient must wait for the injury to heal. In addition, Carrier asserted two alternative defenses. First, Claimant was not eligible to participate in a work conditioning program because he had deep psychological issues. Second, Provider failed to provide a work conditioning program designed for Claimant.

Carrier's expert, Steven Fass, M.D., a general surgeon, does an average of two to three hernia operations a week and does not refer his hernia patients to work conditioning. According to Dr. Fass, work conditioning is not medically necessary and will not relieve or cure a hernia patient's pain.

After reviewing Claimant's medical records, Dr. Fass confirmed that Claimant had a standard left hernia repair operation. Dr. Fass stressed that time is all that is required for the surgical scar and the deep tissue to heal following this type of surgery. Other than routine postoperative pain, some patients will experience pain if a nerve is entrapped in the sutures. The only way to address this type of pain, explained Dr. Fass, is to remove the trapped nerve from the suture. While Claimant did experience postoperative pain, it was not due to an entrapped nerve.

N. F. Tsourmas, M.D., an orthopaedic surgeon, also reviewed the Claimant's medical records for the Carrier. Dr. Tsourmas agreed that some post-surgical patients need work conditioning before they can return to work, but not patients who undergo surgery to repair a hernia. While experiencing postoperative discomfort or pain is not unusual for a hernia patient, Dr. Tsourmas clarified, this pain dissipates as the body heals. Because a hernia has no muscle connected to it (it is a covering of a tissue) it cannot be rehabilitated; it can only be stitched and tightened. Dr. Tsourmas concluded that work conditioning is an inappropriate therapeutic tool for a hernia repair because it must heal on its own.

Dr. Tsourmas also reviewed Claimant's FCE. Noting that the only basis for determining Claimant's job duties was a cursory questionnaire completed by Claimant, Dr. Tsourmas stated that

Provider had insufficient information to create a work conditioning program for Claimant. According to Dr. Tsourmas, a work conditioning program must be job specific. Therefore, talking to the patient's employer to obtain the job specifics to analyze what the patient does throughout the work day is essential. Only after obtaining this information, Dr. Tsourmas maintains, can a work conditioning program be developed.

Dr. Tsourmas testified that the Claimant's FCE did not establish the need for work conditioning; it only measured the Claimant's physical ability at a specific moment in time. On November 7, 2001, Claimant reported that the worst pain he experienced over the last 30 days was a seven on a ten-point pain scale, with ten being the maximal pain. However, the noted deficits in Claimant's performance during the FCE raised questions about its validity. It did not appear that Claimant wanted to participate in the FCE and, at times, he stopped the tests.

In January 2, 2002, Provider conducted a second FCE on Claimant showing that Claimant's physical condition had improved and the work conditioning program reduced his pain. According to the FCE, over the previous 30 days, Claimant's worst complaint of pain was reported at a three out of ten. Claimant appeared to have a four-point reduction in pain. However, Provider's daily log sheet for December 10 through 13, 2001, (within the 30-day period) showed that Claimant rated his pain as high as six point five out of ten.⁴ Either Provider's daily logs are wrong, or the second FCE is wrong

Dr. Tsourmas also noted that Provider was providing general exercises for Claimant, such as arm curls, triceps, a rowing machine, a bicycle, and a stair master. Provider also put Claimant on a "Back Care Program."⁵ While these programs might be beneficial for Claimant's overall health, it did nothing to rehabilitate Claimant's hernia. Moreover, it was not job specific.

B. ALJ's Analysis

Pursuant to the Texas Workers' Compensation Act, 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

⁴ Ex. F at 54.

⁵ Ex. F at 32.

resulting from the compensable injury, promotes recovery, or enhances the ability of the employee to return to or retain employment. TEX. LAB. CODE ANN.(LABOR CODE) § 408.021(a). Health care includes all reasonable and necessary medical services. LABOR CODE § 401.011(19)(A). Carrier had the burden of proving that the work conditioning program provided to Claimant was not reasonable and medically necessary. 28 TAC §§ 148.21 (h) and (i); 1 TAC § 155.41.

Work conditioning is a single disciplinary treatment program that must be individualized, highly structured, and goal-oriented. It uses real or simulated work activities in conjunction with conditioning tasks. The entrance criterion includes a requirement that the patient not have a medical, psychological, or other condition that prohibits participation in the program and whose compensable injury interferes with the patient's ability to carry out specific identifiable tasks required in the work place. Medicine Ground Rule II.D.1.⁶

Carrier met its burden of proof to show that the work conditioning program provided by Provider to Claimant was not medically necessary to cure or relieve the effects of Claimant's compensable injury. Both surgeons testified that a hernia repair operation requires time to heal; it does not require work conditioning. Provider did not explain why Dr. Sanchez referred Claimant to work conditioning, particularly since the initial FCE was done after his referral. Moreover, it appears that Provider's records are less than accurate. The discrepancy between Claimant's daily rating of pain (6.5/10) as reported in Provider's records and the maximum pain Provider reported in the final FCE (3/10) was disturbing and casts doubt on the credibility of Provider's records. Finally, Provider's treatment records showed that all Claimant received was a general exercise program, not an individualized, highly structured, goal-oriented, work conditioning program as required by the Medical Fee Guideline. For each reason cited above, the ALJ finds that the services Provider provided Claimant from November 20 through November 30, 2001, were not medically necessary or reasonable. Carrier is not liable to Provider for these services or for the cost of the IRO.

⁶ The entrance criterion does not establish medical necessity for the program.

IV. FINDINGS OF FACT

1. Claimant, a machine operator, sustained a compensable injury on ____.
2. At the time of the injury, Texas Mutual Insurance Company (Carrier) was Claimant's employer's workers' compensation insurance carrier.
3. Dr. Rodriguez diagnosed Claimant's injury as a small inguinal hernia.
4. On September 6, 2001, Claimant underwent a hernia repair operation which successfully corrected the hernia.
5. Dr. Rodriguez referred Claimant to Armando Sanchez, M.D. because Claimant still reported pain after the surgery.
6. On November 5, 2001, Dr. Sanchez referred Claimant to Rehab Med, Inc. (Provider) to participate in a work conditioning program.
7. Provider had Claimant participate in what Provider billed as a work conditioning program. The dates in dispute include November 20 through 30, 2001.
8. Carrier denied reimbursement for the work conditioning program based on lack of medical necessity.
9. Provider appealed the reimbursement denial to the Medical Review Division (MRD) of the Texas Workers' Compensation Commission (Commission). MRD referred the dispute to an Independent Review Organization (IRO).
10. The IRO failed to request information from the Carrier. Consequently, Carrier did not submit its supporting documentation to the IRO.
11. The IRO found that Provider's services were medically necessary. With the exception of the services provided on November 12 through 14, 2001, which were untimely filed, on January 23, 2003, MRD concluded that the work conditioning program was medically necessary.
12. Carrier filed a request for a hearing on February 18, 2003.
13. The Commission sent notice of the hearing to the parties on XXX. 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. Provider's treatment plan did not include a description of Claimant's job duties and did not identify the tasks that Claimant could not perform that he was required to perform.
15. Provider had insufficient information about Claimant's job duties to create a work conditioning program.
16. Claimant's deficits in his performance during the initial functional capacity evaluation created questions as to the validity of the evaluation.
17. Provider's documentation contained conflicting information regarding Claimant's pain rating and was not a reliable indicator of Claimant's performance.
18. Provider provided a general exercise program for Claimant which included arm curls, triceps, the use of a rowing machine, a bicycle, and the stair master, and a back care program. The program was not a work conditioning program.
19. Provider's exercise program for Claimant did not relieve or cure the effects of the compensable injury.
20. Work conditioning is not an appropriate treatment following a hernia repair operation.

V. CONCLUSIONS OF LAW

1. The Texas Workers' Compensation Commission (Commission) has jurisdiction related to this matter pursuant to 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. SOAH has jurisdiction over this proceeding, including the authority to issue a decision and order, pursuant to TEX. LAB. CODE ANN. § 413.031(d) and TEX. GOV'T CODE ANN. ch. 2003.
4. Carrier timely requested a hearing, as specified in 28 TEX. ADMIN. CODE (TAC) § 148.3.
5. Proper and timely notice of the hearing was provided in accordance with TEX. GOVT CODE ANN. §§ 2001.051 and 2001.052.
6. Provider has the burden of proof in this proceeding pursuant to 28 TAC §§ 148.21(h) and (i); 1 TAC § 155.41.
7. Based on the foregoing findings of fact, the documentation provided failed to show that the admission criteria of a work conditioning program were met according to Medical Fee Guideline (MFG) Medicine Ground Rule II. D. 1 at 28 TAC § 134.201.

8. Based on the foregoing findings of fact, the work conditioning program provided by Provider to Claimant was not reasonable or medically necessary to treat Claimant's compensable injury under TEX. LAB. CODE ANN. § 408.021 and 401.011(19).
9. Based on the foregoing findings of fact and conclusions of law, Provider is not entitled to reimbursement for the work conditioning program.

ORDER

It is, therefore, ordered that the Texas Mutual Insurance Company is not required to reimburse the amounts billed by Rehab Med, Inc., for the work conditioning program provided to Claimant.

SIGNED on October 24, 2003.

**CATHERINE C. EGAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**