

RECOVERY ANALYSIS, INC.,	§	BEFORE THE STATE OFFICE
Petitioner	§	
	§	
VS.	§	
	§	OF
TASB RISK MANAGEMENT FUND,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

This case is a dispute over work hardening services provided by the Petitioner, Recovery Analysis, Inc. (RAI) from December 12, 2001, through January 28, 2002. The amount in dispute is \$11,208.00, plus interest. The Administrative Law Judge (ALJ) concludes the services were medically necessary, and orders payment of the disputed amount.

I. Factual and Procedural History

The Claimant, who was a driver for the ____, sustained a compensable back injury ____. After undertaking various other forms of therapy, including work conditioning with concurrent group psychological counseling, he underwent a Functional Capacity Evaluation (FCE) on December 10, 2001. That FCE recommended a work hardening program, which RAI provided from December 12, 2001, through January 28, 2002. RAI sought reimbursement of \$11,208.00 for the work hardening program, the December 10, 2001, FCE, and a January 28, 2002, discharge FCE.

The TASB Risk Management Fund (the Fund) declined to reimburse RAI for the work hardening services or the FCEs, whereupon RAI filed a Medical Dispute Resolution Request with the Texas Workers' Compensation Commission (TWCC or the Commission). That request was referred to an Independent Review Organization (IRO), which agreed with the Fund and recommended denial of the claim. TWCC's Medical Review Division (MRD) issued its denial on January 30, 2003. On February 24, 2003, RAI filed its timely request for a hearing before the State Office of Administrative Hearings (SOAH).

The hearing was held June 18, 2003, with ALJ Henry D. Card presiding. Representatives of both parties appeared and participated in the hearing. Both parties filed written closing arguments. The record closed July 16, 2003, the deadline for rebuttal argument.

II. Discussion

A. Legal Standards

Under TEX. LAB. CODE ANN. §408.021(a)(1-3),

- (a) 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:

- (1) cures or relieves the effects naturally resulting from the compensable injury;
- (2) promotes recovery; or
- (3) enhances the ability of the employee to return to or retain employment.

"Health care," under TEX. LAB. CODE §401.011(19), includes all reasonable and necessary medical aid, medical examinations, medical treatment, medical diagnoses, medical evaluations, and medical services.

The Commission's Medicine Ground Rules, in effect at the time the services were provided, define and describe "work hardening":

Work Hardening: A highly structured, goal-oriented, individualized 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.

Under 28 TAC §148.21(h), the Petitioner has the burden of proof in hearings, such as this one, conducted pursuant to §413.031 of the Act. Thus, RAI must prove it is entitled to reimbursement.

B. Analysis of the Issues

1. Previous work conditioning

The Fund contended work hardening was not medically necessary because the Claimant previously had undergone work conditioning.¹ According to Nick Tsourmas, M.D., a work conditioning and a work hardening program are almost redundant. The work hardening being a multidisciplinary program with slightly more mental health input is the only difference.

TASB Ex. 1 at 329.

William Defoyd, M.D., testified that the two programs are styled for different patients with different needs. You wouldn't typically, even atypically do these programs back to back.

Tr. at 75-76.

¹RAI did not provide the work conditioning.

The Medicine Ground Rules themselves, however, do not state the two programs are mutually exclusive, nor do they imply that they are virtually the same. Moreover, the IRO decision implies that work conditioning may precede work hardening:

The patient had completed a course of work conditioning prior to enrollment into work hardening applications. There is no documentation of failure at the level of work conditioning, and there are no rehabilitation recommendations from other practitioners that would support the application of work hardening services.

The Unremitting Low Back Pain North American Spine Society Phase 3 Clinical Guidelines for Multi-Disciplinary Spine Care Specialists published in 2000 shows that documentation of failure is vital to the implementation of successive therapeutic measures. If there is no justification for failure with a particular application, then progression to successive applications would not be medically appropriate.

TASB Ex. 1 at 334.

The ALJ finds work hardening was not precluded by the fact that the Claimant previously had undergone work conditioning. If the work conditioning program had been successful, work hardening would not have been warranted. Contrary to the IRO's assertion, however, the evidence shows that the work conditioning program was a failure. See RAI Ex. 1 at 55; Tr. at 75 (Dr. Defoyd's testimony).

2. Psychological Component

Work hardening is a multidisciplinary program that addresses, among other things, the worker's attitudinal or behavioral issues. The IRO decision observed that the FCEs did not mention such psychosocial factors. However, Kyle Babick, Ph.D., administered a screening test that showed the need for psychological treatment. RAI Ex. 1 at 87, 91. Two other medical professionals also found psychological issues or recommended psychological treatment. Carrier Ex. 1 at 154 and 186. RAI proved the Claimant needed the psychological component of work hardening.

3. Work Simulation/Future Employment

The goal of work hardening is to enable the injured person to return to work. Programs "use real or simulated work activities in a relevant work environment." The Claimant in this case, however, had been fired from his position with the ___ and therefore would not be returning to that job. The Fund contended RAI's program was unnecessary because it was not aimed at returning the Claimant to any particular work. Even if he wished to return to the same type of work, the program relied on general descriptions rather than specific work tasks.

The record shows the Claimant planned to return to work as a driver, either self-employed or as an employee for another entity. RAI Ex. 1 at 96, Tr. at 44. He described for RAI the activities involved with that type of work; the program was designed to enable him to perform those activities. TASB Ex. 1 at 135-282. Although he did not have a specific job to return to, the Spine Treatment

Guidelines at 28 TEX. ADMIN. CODE §134.1001(e)(2)(L) contemplated that work hardening might be provided under that circumstance:

When the injured employee does not have a specific job that he/she is returning to, the goal of these programs [*e.g.* work conditioning and work hardening] should be to restore a reasonable level of physical functioning.

RAI's program went beyond that requirement, however. It not only aimed at restoring a reasonable level of physical conditioning, but also directed the Claimant toward tasks performed in the type of work to which he planned to return.

4. *Other issues*

The Fund also questioned the fact that epidural steroid injections (ESIs) were given during the course of the work hardening program, and the accuracy of the documentation of the Claimants progress in the program. Neither of those issues, however, called the underlying necessity of the program into question. The necessity of the program was the issue raised in the Fund's denial of reimbursement.

5. *Summary*

RAI proved the previous work conditioning program did not preclude its work hardening program. It proved the Claimant needed the psychological component of work hardening. It further proved its program was designed to meet the work-related goals of a work hardening program and that, generally, the Claimant was an appropriate candidate for work hardening. The ALJ concludes the Fund should reimburse RAI for the work hardening program at issue.

The Fund also declined to pay RAI for the two FCEs conducted December 10, 2001, and January 28, 2002. Because they were related to the work hardening program, the Fund should reimburse RAI for those FCEs.

III. Findings of Fact

1. The Claimant, who was a driver for ____, sustained a compensable back injury ____.
2. After undertaking various other forms of therapy, including work conditioning with concurrent group psychological counseling, the Claimant underwent an FCE on December 10, 2001.
3. The FCE recommended a work hardening program, which RAI provided from December 12, 2001, through January 28, 2002.
4. RAI sought reimbursement of \$11,208.00 for the work hardening program, the December 10, 2001, FCE, and a January 28, 2002, discharge FCE.
5. The Fund declined to reimburse RAI for the work hardening services or the FCEs, whereupon RAI filed a Medical Dispute Resolution Request with the Commission.

6. RAIs request was referred to an IRO, which agreed with the Fund and recommended denial of the claim.
7. The MRD issued its denial on January 30, 2003. On February 24, 2003, RAI filed its timely request for a hearing before SOAH.
8. Notice of the hearing was sent to the parties March 21, 2003.
9. 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; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
10. The hearing was held June 18, 2003, with ALJ Henry D. Card presiding. Representatives of both parties appeared and participated in the hearing. Both parties filed written closing arguments. The record closed July 16, 2003, the deadline for rebuttal argument.
11. The Claimant completed a course of work conditioning before beginning the work hardening program.
12. The work conditioning program was not successful.
13. Work hardening was not precluded by the fact that the Claimant previously had undergone work conditioning.
14. Work hardening is a multidisciplinary program that addresses, among other things, the worker's attitudinal or behavioral issues.
15. Three medical professionals found psychological issues or recommended psychological treatment for the Claimant.
16. The Claimant needed the psychological component of work hardening.
17. The goal of work hardening is to enable the injured person to return to work.
18. The Claimant in this case had been fired from his position with the ___ and therefore would not be returning to that job.
19. The Claimant planned to return to work as a driver, either self-employed or as an employee for another entity.
20. The Claimant described for RAI the activities involved with his chosen type of work.
21. Work hardening may be provided when the injured employee does not have a specific job that he or she is returning to.

22. RAI's work hardening program for the Claimant not only aimed at restoring a reasonable level of physical conditioning, but also directed the Claimant toward tasks performed in the type of work to which he planned to return.
23. The necessity of the work hardening program was the issue raised in the Fund's denial of reimbursement.
24. The two FCEs were related to the work hardening program.

IV. Conclusions of Law

1. 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.
2. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. §2001.052.
3. Under 28 TAC §148.21(h), the Petitioner has the burden of proof in hearings, such as this one, conducted pursuant to §413.031 of the Act. Thus, RAI must prove it is entitled to reimbursement.
4. RAI proved the work hardening program was medically necessary under TEX. LAB. CODE ANN. §408.021(a)(1-3).
5. The Fund should reimburse RAI for the work hardening program.
6. The Fund should reimburse RAI for the FCEs.

ORDER

TASB Risk Management Fund shall reimburse Recovery Analysis, Inc. the amount of \$11,208.00, plus applicable interest, for the work hardening services and the two functional capacity evaluations provided the Claimant from December 10, 2001, through January 28, 2002.

Signed this 30th day of September 2003.

STATE OFFICE OF ADMINISTRATIVE HEARINGS

Henry D. Card
Administrative Law Judge