

**STATE OFFICE OF ADMINISTRATIVE HEARINGS**  
**300 West 15<sup>th</sup> Street, Ste. 502**  
**Austin, TX 78701**

**DOCKET NO. 453-03-2905.M5**  
**[MDR TRACKING NO. M5-03-0807-01]**

<b>PATRICK DAVIS, D.C.,</b>	§	<b>BEFORE THE STATE OFFICE</b>
<i>Petitioner,</i>	§	
	§	
v.	§	
	§	<b>OF</b>
<b>TASB RISK MANAGEMENT FUND,</b>	§	
<i>Respondent</i>	§	<b>ADMINISTRATIVE HEARINGS</b>

**DECISION AND ORDER**

**I. INTRODUCTION**

Patrick Davis, D.C. (Petitioner) sought reimbursement for a work hardening program provided to injured worker \_\_\_\_\_. Texas Association of School Boards Risk Management Fund (Carrier) denied payment indicating the services were not medically necessary. The Medical Review Division (MRD) of the Texas Workers' Compensation Commission (Commission) adopted the findings of the Independent Review Organization (IRO) that held Petitioner was not entitled to reimbursement. Provider requested a hearing to challenge the MRD's order.

The Administrative Law Judge (ALJ) concludes that Petitioner did not meet his burden of proving that the work hardening program was medically necessary to treat Claimant's compensable injury. Therefore, Petitioner is not entitled to reimbursement.

**II. PROCEDURAL HISTORY**

ALJ Wendy Harvel convened the hearing on June 26, 2003, at the William P. Clements Building, 300 West 15<sup>th</sup> Street, Austin, Texas. Petitioner appeared via telephone and represented himself. Attorney James Loughlin represented the Carrier. The parties did not contest notice or jurisdiction, which are addressed in the Findings of Fact and Conclusions of Law below. The ALJ admitted into evidence Exhibit 1 consisting of 240 pages of numbered medical records ordered by date, and including the decision of the IRO. This exhibit was offered by the Carrier. After evidence was presented, the hearing concluded and the record closed that same day.

### **III. BACKGROUND**

Claimant sustained a work-related injury on \_\_\_\_\_. Claimant was employed as a bus driver with the Dallas County Schools. She was rounding a corner when her bus rolled over onto the driver's side. Claimant was taken to the emergency room where she was diagnosed with head injury, cervical sprain, and shoulder sprain. She was discharged the same day with instructions for follow-up. Claimant reported that on April 29, 2001, she blacked out while driving her personal vehicle and struck a light pole. Claimant presented to an Accident & Injury Chiropractic Clinic on May 3, 2001. She was treated with physical therapy consisting of passive modalities, and she underwent approximately three weeks of physical therapy at the Accident & Injury Chiropractic Clinic. Claimant subsequently changed treating doctors to Petitioner. On June 5, 2001, Claimant presented to Petitioner's clinic, Chiropractic Healthcare, for initial examination. Petitioner diagnosed Claimant with lumbosacral radiculopathy, cervical radiculopathy, lumbosacral sprain, cervical sprain, thoracic sprain, left knee sprain (greater degree of), right knee sprain, left wrist/elbow sprain (greater degree of), right wrist/elbow sprain, syncopal episodes, dizziness, visual disturbances, weakness, and pain.

On June 11, 2001, Petitioner began treating Claimant with physical therapy sessions at his clinic. Claimant continued in the physical therapy sessions through September 21, 2001. Claimant received 35 physical therapy sessions during this time. Each session lasted two hours, including an hour and a half of active modalities. At each of these sessions, Claimant also received chiropractic manipulations to various body parts. Claimant also received chiropractic manipulations on days on which physical therapy was not provided. On October 1, 2001, Petitioner began Claimant in a work conditioning program at his clinic. The work conditioning program lasted four weeks, through October 26, 2001, at four hours per day, five days per week. On December 26, 2001, Petitioner began Claimant in a work hardening program at his clinic. The work hardening program lasted four weeks, through January 25, 2002. The first three weeks of the program lasted six hours per day and the final week lasted eight hours per day. At issue is Petitioner's entitlement to reimbursement for the work hardening program.

The IRO found that the Claimant's response to chiropractic care was minimal as her initial symptoms persisted some thirteen months post injury. The IRO also found that the treatment protocol presented in the case was questionable as an extensive neuropsychological evaluation and examination for a closed head injury was never really accomplished. Finally, the IRO found that the Claimant's diminished mental status interfered with her ability to participate in the work hardening program. Therefore, the IRO agreed with the Carrier's decision to deny reimbursement.

### **IV. EVIDENCE AND ANALYSIS**

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 in nature and are intended to address the functional, physical, behavioral, and vocational needs of the injured worker. The Commission has adopted rules governing work hardening programs. These rules relate to, among other things, when work

hardening programs are appropriate, how such programs are to be administered and billed, and what documentation is required of work hardening providers. Medical Fee Guideline (MFG) MedicineGround Rules II.E. at 28 TEX. ADMIN. CODE § 134.201.

The Claimant was not an appropriate candidate for a work hardening program because the evidence does not demonstrate that she was likely to benefit from the program. The MFG ground rules provide that work hardening is appropriate for persons who are likely to benefit from the program.<sup>1</sup> Prior to the work hardening program, the Claimant received extensive physical therapy that included 35 physical therapy sessions over a fifteen-week period. These sessions consisted of an hour and a half of active modalities at each session as well as a four week work conditioning program at four hours per day, five days per week. However, the record fails to show the outcome of this treatment, what specific activities the Claimant was engaged in during these sessions or what substantive progress was made in these activities during these sessions. A Functional Capacity Evaluation (FCE) was not performed prior to or after the work conditioning program, nor did the record contain a discharge summary analyzing the outcome of the work conditioning program. The record fails to explain why a work hardening program should be undertaken if extensive physical therapy and a work conditioning program had failed to achieve the desired results. Without appropriate evidence as to the outcome of the physical therapy and the work conditioning program, it is difficult to determine the need for further intensive physical medicine treatment such as a work hardening program.

The Claimant was also not an appropriate candidate for a work hardening program because at the time of the program she was still significantly symptomatic. The MFG ground rules provide that work hardening is appropriate for persons whose medical, psychological or other conditions do not prohibit participation in the program.<sup>2</sup> Carrier's expert, Michael Bhatt, D.C., testified that work conditioning and work hardening programs are indicated when an individual has sufficiently recovered and is ready to return to the workplace, but because of a prolonged illness or injury they have become de-conditioned to the point that they are not able to return to their job.<sup>3</sup> Such programs are not indicated when an individual is still significantly symptomatic. In this case, at the time Claimant began work hardening, lumbar epidural steroid injections had been recommended. On December 7, 2001, Charles Willis, M.D. stated that the patient needed an orthopedic consult for her shoulder. Yet, the record does not indicate that this was ever done.

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<sup>1</sup> MFG Medicine Ground Rule II.E.1.a.

<sup>2</sup> MFG Medicine Ground Rule II.E.1.c.

<sup>3</sup> The *Spine Treatment Guideline* provides as follows:

Once an employee has sufficiently recovered, a Functional Capacity Evaluation is usually performed to determine whether or not the injured employee is considered a candidate for a work hardening or work conditioning program. These tests are usually performed just prior to entry into the program and at the end of the program to determine the injured employee's level of physical ability and his/her capability to return to work.

It was abundantly clear from the medical records that the Claimant was suffering from a closed head injury at the time she began treatment with Dr. Davis. Dr. Bhatt testified that Claimant's erratic behavior, blurred vision, and fainting spells were symptomatic of a closed head injury. This closed head injury should have been treated before beginning any type of treatment involving physical activity. Because of Claimant's closed head injury, the work hardening program was potentially dangerous. As Dr. Bhatt testified, he would not have touched this Claimant without first receiving clearance from a neurologist because of the dangers inherent with a closed head injury. There was no evidence that this Claimant was referred to a neurologist before beginning the work hardening program. Dr. Davis admitted that she was not seen by a neurologist before the program began. Because of Claimant's mental condition and erratic behavior, which were symptoms of her head injury, the work hardening program was ultimately terminated at the end of four weeks.

The Claimant was also not an appropriate candidate for a work hardening program because appropriate testing was not performed prior to the program in order to determine the need for the program and to establish a valid baseline to measure improvement. Two days prior to starting Claimant in his work hardening program, Petitioner conducted what was entitled an "Initial Functional Capacity Evaluation." This testing does not meet the requirements of an FCE as set out in the MFG at Medicine Ground Rule I.E.2. because it does not include: (1) a physical examination and neurological evaluation; (2) a physical capacity evaluation of the injured area(s) which includes range of motion and strength/endurance; or (3) a complete set of functional abilities tests. Without appropriate testing, it is difficult to establish the need for the program or measure improvement in the program.

The Claimant was also not an appropriate candidate for a work hardening program because there was no evidence of a mismatch between her job requirements and her actual abilities. The MFG Ground rules provide that work hardening is appropriate for persons whose levels of functioning interfere with their ability to perform specific tasks required in the work place.<sup>4</sup> Thus, in order to determine if a patient is an appropriate candidate for work hardening, a health care provider should identify specific tasks required by the claimant's job and then test their ability to perform those tasks. In this case, the record does not identify the specific job tasks in which the Claimant was deficient.

Finally, even if a properly administered work hardening program had been otherwise medically necessary, the program to this Claimant was not. Claimant's specific job tasks were not identified to the extent that task specific improvement could be measured. Provider's documentation does not specify which activities and exercises Claimant performed on which days, the duration of the activities, or Claimant's ability to complete the activities. There is no documented objective measurement of the Claimant's response to treatment. Work hardening is a goal-oriented treatment program. However, specific program goals are not identified in this case and accordingly, objective measures of progress towards those goals are not documented.

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<sup>4</sup> MFG Medicine Ground Rule II.E.1.b.

The record fails to substantiate that the work hardening program provided to the Claimant from December 26, 2001 to January 25, 2001 was medically necessary.

## V. FINDINGS OF FACT

1. Claimant, a bus driver, sustained a compensable injury on \_\_\_\_\_.
2. At the time of the injury, Claimant's employer had its workers' compensation insurance through Texas Association of School Boards Risk Management Fund (Carrier).
3. Patrick Davis, D.C. (Petitioner) treated Claimant with approximately four weeks of work hardening provided from December 26, 2001 to January 25, 2001 and sought reimbursement from Carrier.
4. The Carrier denied reimbursement for the work hardening program.
5. Petitioner appealed the Carrier's reimbursement denial to the Medical Review Division (MRD) of the Texas Workers' Compensation Commission.
6. On February 4, 2003, the Independent Review Organization (IRO) reviewer agreed with the Carrier's decision to deny the requested reimbursement.
7. The MRD adopted the findings of the IRO that held Petitioner was not entitled to reimbursement, and the MRD issued its decision on March 18, 2003.
8. On March 27, 2003, Petitioner requested a hearing to challenge the MRD's order.
9. The Commission sent notice of the hearing to the parties on April 28, 2003. 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. The hearing convened on June 26, 2003, at the State Office of Administrative Hearings. The record closed the same day.
10. There is no evidence showing that the Claimant was an appropriate candidate for, was likely to benefit from, or otherwise needed a work hardening program.
  - a. There is no evidence of the outcome of the physical therapy and work conditioning program that Claimant participated in prior to the work hardening.
  - b. At the time Claimant participated in the work hardening program she was still exhibiting symptoms related to her initial injury.
    1. At the time Claimant participated in the work hardening program, she exhibited symptoms of a closed head injury.
  - d. There is no evidence of testing to establish a valid baseline to measure improvement.

- e. There is no evidence of a mismatch between Claimant's job requirements and her actual abilities.
  - f. There is no evidence of specific job tasks in which the Claimant is deficient.
11. Even if the Claimant were shown to be a candidate for a work hardening program, there is no evidence showing the work hardening program actually provided to her was medically necessary.
- a. There is no evidence showing: the Claimant's performance on specific tasks in the work hardening program; the duration of those tasks; what, if any, progress Claimant made in the program; and what, if any, changes in treatment were warranted considering Claimant's progress.
  - b. Work hardening is a goal-oriented treatment program.
  - c. There is no evidence showing specific program goals were identified for the Claimant, and accordingly, there is no evidence documenting objective measures of Claimant's progress toward those goals as a result of participating in the work hardening program.

## **V. 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. 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. Petitioner 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 was effected upon the parties according to TEX. GOV'T CODE ANN. ch. 2001 and 28 TEX. ADMIN. CODE § 148.4(b).
5. Petitioner 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. Based on the above Findings of Fact and Conclusions of Law, the work-hardening program that Petitioner rendered to the Claimant was not medically necessary and reasonable.
7. Based on the above Findings of Fact and Conclusions of Law, Petitioner is not entitled to

reimbursement for the work hardening program.

**ORDER**

IT IS, THEREFORE, ORDERED that Patrick Davis, D.C. is not entitled to reimbursement for work hardening services provided to Claimant from December 26, 2001 to January 25, 2001.

**SIGNED this 11<sup>th</sup> day of July 2003.**

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**WENDY K. L. HARVEL  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARING**