

STATE OFFICE OF ADMINISTRATIVE HEARINGS  
300 West 15th Street, Suite 502  
Austin, Texas 78701

SOAH DOCKET NO. 453-03-3238.M5  
MDR Tracking No. M5-03-2400-01

<b>MOCKINGBIRD WORKSKILLS</b>	§	<b>BEFORE THE STATE OFFICE</b>
<b>Petitioner</b>	§	
	§	
<b>V.</b>	§	<b>OF</b>
	§	
<b>CITY OF DALLAS,</b>	§	
<b>Respondent</b>	§	<b>ADMINISTRATIVE HEARINGS</b>

**DECISION AND ORDER**

Mockingbird Workskills (Mockingbird / Petitioner) seeks reimbursement of \$11,775.00 from the City of Dallas (City/Respondent) for a work hardening program provided to Claimant from August 6, 2001, through September 28, 2001. The City denied payment on the grounds that the treatment was not reasonable nor medically necessary. The denial was upheld in the medical dispute resolution process. The Administrative Law Judge (ALJ) finds that Mockingbird did not prove that this Claimant was an appropriate candidate for the multi-disciplinary approach of a work hardening program. Therefore, the ALJ finds that the work hardening program was not medically necessary to treat effects naturally resulting from Claimant's compensable injury.

**I. Procedural History**

Administrative Law Judge (ALJ) Nancy N. Lynch convened and closed a hearing on June 25, 2003. Petitioner was represented by Kevin W. Stouwie, Attorney. Respondent, the City of Dallas, was represented by William E. Weldon, Attorney. Notice and jurisdiction were not disputed and will be addressed in the findings of fact and legal conclusions without further discussion here.

**II. Discussion**

**1. Background Facts**

Claimant's compensable injury was diagnosed as bilateral carpal tunnel syndrome and villanodular synovitis. Her primary symptoms were described as numbness, swelling, pain and tingling in both wrists from using a computer over a long period of time.

Work activities that increased her pain were writing, typing at the computer, and lifting. She had trouble with some activities of daily living, including sleeping, cooking, brushing her hair, sweeping and mopping.

Claimant was initially treated by Dr. Paul Eggert, D.C., at Texas Injury Center. She was treated at Texas Injury Center daily between May 21 and June 5, 2001, with no appreciable improvement.<sup>1</sup>

Dr. Eggert then referred Claimant to Mockingbird for a functional capacity examination (FCE) to determine if she was an appropriate candidate for a work hardening program. The initial FCE, completed on August 6, 2001, concluded her potential for rehabilitation and return to work was good. In the FCE, she demonstrated an ability to work at the sedentary physical demand level for activity above the waist and the sedentary physical demand level for activity below the waist. Her job demand was recorded as “constant” repetitive upper extremity usage and her current critical demand level was reported as “occasional” for repetitive upper extremity usage. She exhibited difficulty with certain critical functional demands: sustained unweighted reaching, repetitive bending, prolonged crawling, and repetitive fine motor activities. She demonstrated a decreased right wrist range of motion (ROM), decreased sensation for touch, reduced upper extremity strength, and pain with repetitive upper extremity movements. Mockingbird recommended she begin a work hardening program to increase her ROM, strength and tolerance to repetitive upper extremity activities to enhance her return to work potential.<sup>2</sup>

Claimant participated in Mockingbird’s work hardening program from August 20, 2001, through September 28, 2001.<sup>3</sup> Mockingbird’s records indicate that the program consisted of five seven-hour sessions per week. It included horizontal leg presses, pulling machines, seated leg curls, stretching, lifting and carrying, reaching and braiding, as well as a variety of other exercises and psychological counseling provided by Behavioral Health Care Associates.

---

<sup>1</sup>The City requested a peer review of Dr. Eggert’s treatment. The peer reviewer, a board certified chiropractic neurologist, stated that the maximum therapeutic benefit of chiropractic and rehabilitation regimens is typically noted in the first month of treatment and that there should be a 50% recovery of function in two to three weeks under chiropractic care to warrant further treatment. He recommended no further chiropractic care and no further care at all until the exact nature of Claimant’s condition was identified. He discussed various treatments options, including splint use, vitamin B6 supplements, steroid injections, and evaluation by an orthopedic surgeon specializing in the treatment of hand-related problems and subsequent electrodiagnostic testing (EMG/NCV testing). R’s Ex. 1, pp. 9-11.

<sup>2</sup>P’s Ex. 1, pp. 25-26.

<sup>3</sup>As a facility certified by CARF (Commission of Accreditation of Rehabilitation Facilities), Mockingbird was not required to obtain preauthorization for the first six weeks of treatment. 30 TEX. ADMIN. CODE § 134.600(h)(11).

Claimant's pain did not decrease during the course of treatment. She began the program with pain at a 5 on a scale of 10 and she consistently maintained a pain level of 5. It was recorded at a higher level on occasion, to a 6, once to 8, and was recorded at 4 in the exit FCE.

The exit FCE found Claimant at the same sedentary physical demand level for activity above the waist and at the slightly improved sedentary light physical demand level for activity below the waist.<sup>4</sup> She was described as able to work at an "occasional" upper extremity usage rate, but her job demanded "constant" repetitive upper extremity usage. This was the same upper extremity ability that was reported in the initial FCE. Of her rehabilitation goals, Claimant had

- |   |  |                         |
|---|--|-------------------------|
| • | increased lower upper extremity strength to 5/5      | 57% of her goal met     |
| • | increased left wrist range of motion (ROM) to GOOD + | 100% of her goal        |
| • | increased upper extremity endurance                  | 85% of her initial goal |
| • | increased dexterity                                  | 95% of goal             |
| • | increased unweighted reaching tolerance to good      | 50% of goal             |
| • | increased grasp strength to good                     | 100% of that goal       |

Specific indications the work hardening program was not helping this individual included the following:

- Claimant's pain did not significantly decrease and was frequently at a higher level than when she entered the program,
- She regularly woke during the night with numbness and pain,
- Claimant complained of frequent headaches, dizziness, increased neck and shoulder pain, sharp pain in her wrists and she was told to see an M.D.

After the City refused to pay for these services, Mockingbird requested dispute resolution. On August 19, 2003, an Independent Review Organization (IRO) reviewed the work hardening program to determine medical necessity and concluded the services were not medically necessary for the injury in question and were also insufficiently documented.

**2. Applicable law** 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 resulting from the

---

<sup>4</sup>P's Ex. 1, pp. 3-4

compensable injury; promotes recovery; or enhances the ability of the employee to return to or retain employment.<sup>5</sup> Health care includes "all reasonable and necessary medical . . . services."<sup>6</sup>

**Work hardening programs** are described by the Medical Fee Guideline<sup>7</sup> (MFG) as:

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. . .

Entrance criteria are designed to admit persons:

1. who are likely to benefit from the program;
2. whose current levels of functioning due to illness or injury interfere with their ability to carry out specific tasks required in the workplace;
3. whose medical, psychological, or other conditions do not prohibit participation in the program; and
4. persons who are capable of obtaining specific employment upon completion of the program.<sup>8</sup>

The **Upper Extremities Guideline**, in effect at all times relevant to this case,<sup>9</sup> provided that treatment of a work-related injury be:

- adequately documented,
- evaluated for effectiveness and modified based on clinical changes,
- provided in the least intensive setting,
- cost effective,

---

<sup>5</sup>TEX. LABOR CODE § 408.021(a).

<sup>6</sup>TEX. LABOR CODE § 401.011(19).

<sup>7</sup> See 30 TEX. ADMIN. CODE § 134.201(Commission's rule adopting the Medical Fee Guideline by reference).

<sup>8</sup>MFG, pp. 37-38 (1996).

<sup>9</sup> The guideline was abolished effective January 1, 2002. However, the administration of the work hardening program, the claims for reimbursement, and the denial of reimbursement in this case all occurred prior to the rescission of the Guideline. 28 TEX. ADMIN. CODE § 134.1002(e)(2) (West 2002).

- objectively measured, and
- demonstrate functional gains. Mockingbird has the burden of proof because it appealed the decision of the MRD.<sup>10</sup>

### 3. **The Parties' Positions**

**a. Mockingbird.** M. T. Smith, D.C., Mockingbird's witness, testified that Claimant had previously been treated with chiropractic manipulative therapy, passive modalities, and associated exercises from lower/level-passive active type care. She also had been taking Celebrex for inflammation and pain control. She was then referred to Mockingbird's program for evaluation.

Dr. Smith argued that there were a variety of reasons for an individual to be considered an appropriate candidate for the work hardening program. For example, as in this case, when lower level services had been tried with only moderate success, and surgery was not clearly required, the work hardening program was an alternative resource. Mockingbird concluded that lower level conservative treatments had been provided with little or no result in this case and, after the FCE, judged Claimant to be an appropriate candidate for its work hardening program.

A work hardening program is supposed to be customized to the particular patient so it reflects the job the patient has (had previously, or will most likely have again) upon completion of the work hardening. If the patient is not returning to a previous position, the program attempts to mirror vocational training received by Claimant prior to the injury. Dr. Smith explained that the FCE is used to determine patient limits and to set goals in relation to the demands of the patient's work history and position previously held. It also establishes a baseline measurement.

In Dr. Smith's opinion, the intake FCE, the medical records, and the final FCE justified Claimant's participation in the work hardening program. He also emphasized that one could not reject the medical necessity of a work hardening program simply because all the initial goals had not been met.

**b. City of Dallas.** The City contends that the work hardening program was not medically necessary, that Mockingbird did not follow the MFG, and, that therefore, Mockingbird should not be reimbursed. The City relies primarily upon the factors cited by the IRO in support of

---

<sup>10</sup>28 TEX. ADMIN. CODE § 148.21(h).

its conclusion that “the work hardening program failed and was the improper form of treatment for this patient.”<sup>11</sup>

- Claimant’s pain did not decrease significantly and even increased at times. She woke up with numbness and pain throughout the duration of the program.
- She continued to have pain and trouble sleeping in the fourth week of treatment.
- She complained of frequent headaches, dizziness, and increased neck and shoulder pain, as well as a sharp pain in her wrists, and was simply told to follow up with an M.D. if she had concerns about pain.
- On at least two occasions, she said she thought an adjustment of her neck might help and her suggestions were ignored.
- During the course of the treatment, her subjective complaints were intensified and new symptoms developed yet no significant changes were made to her program.

The City argues that the findings of the initial FCE and the final FCE were essentially the same. Claimant was capable of meeting her sedentary job duties prior to the work hardening program and should have never been entered into the program.

There were no significant decreases in Claimant’s pain level. Claimant frequently woke with numbness and pain, experienced sleep disturbance, frequent headaches, dizziness and increased neck and shoulder pain. The IRO found no improvement of her symptoms in the records and concluded that the work hardening program itself was possibly increasing her pain and other symptoms.

Finally, there was inadequate documentation that Claimant’s progress was being monitored on a daily basis and modified as appropriate for changes as they occurred.

### **III. ALJ’s Analysis**

The ALJ finds Mockingbird did not prove that Claimant needed the vocational, behavioral and physical aspects of this interdisciplinary program. An interdisciplinary work hardening program for Claimant’s carpal tunnel injury clearly was not in keeping with the Upper Extremities Guidelines requirement that treatment be provided in the least intensive setting, evaluated for effectiveness, modified based on clinical changes, objectively measured, and that it demonstrate functional gains. Therefore, it was not medically necessary and Mockingbird should not be reimbursed.

---

<sup>11</sup>R’s Ex. 1, p. 4.

The record reveals that there was certainly no need for the first aspect of the program, the vocational assistance. Claimant's job with the City of Dallas was waiting for her.

As to the behavioral aspects of Claimant's work hardening program, she did not even have a psychological evaluation until September 10, 2001, although she started the work hardening program on August 6, 2001. There is no indication in the documentation that Mockingbird re-evaluated her continued participation in the program as a result of the psychological evaluation even though the final recommendation raises a question about whether her "distress will likely impede her ability to perform at a maximum level in her rehabilitation program."

In regard to the physical components of the work hardening program, Mockingbird did not prove any medical necessity for using an inter-disciplinary approach on this Claimant. The record indicates that Claimant needed limited strength conditioning in her upper extremities. But Dr. Smith testified that she did not need the more customary type of strength conditioning where a patient simply works to increase the amount of weight he or she can lift.

Claimant needed strength condition to help her meet her critical job demands: highly repetitive motions while in a sedentary position. However, the increase in strength necessary to complete highly repetitive upper extremity tasks could be addressed without the interdisciplinary components of a work hardening program. Claimant's treatment included leg, back, and abdominal exercises, a stationary bicycle, treadmill, and stair climber. Clearly, as Dr. Smith testified, these exercises are more directed toward whole body well-being than Claimant's particular injury. Dr. Smith also acknowledged that only about 8% of the people participating in work hardening programs had carpal tunnel syndrome and that carpal tunnel syndrome is extremely difficult to treat successfully.

Mockingbird also failed to adequately monitor Claimant's response to treatment, document her progress, and modify her program to better serve her needs. The documents did not reveal conferences among an interdisciplinary team assessing Claimant's particular situation. Mockingbird showed an extreme lack of responsiveness when it ignored both her request for an "adjustment"--presumably from a chiropractor--and her repeated complaints about pain which led staff to basically tell her to go see an M.D. if she was worried about pain.

The beginning FCE compared to the final discharge report and FCE do not show any marked improvement in Claimant's condition. Although this is not determinative of the medical necessity of the program, it does raise additional doubts about the original determination that this program was

appropriate treatment for Claimant's injuries. Petitioner did not properly review Claimant's response to treatment as required by the work hardening rules.

Given the lack of progress and the worsening of some symptoms during the program, as well as the concerns raised by the psychological examination, Claimant was not a good candidate for the program. Once in the program, proper documentation and progress review should have led to documented changed treatment strategies for Claimant and, perhaps, to the discontinuation of the program.

#### **IV. Conclusion**

Mockingbird failed to prove Claimant was an appropriate candidate for the work hardening program and failed to prove the program was of benefit in returning Claimant to work. Claimant was not an appropriate candidate because she did not really need an interdisciplinary program. The evidence has also shown that once she was entered into the program, the MFG was not followed.

Her progress was not monitored, staff failed to acknowledge increases in Claimant's pain levels, failed to acknowledge physical complaints and make appropriate changes to her regimen, and failed to acknowledge psychological findings after admittance to the program.

Accordingly, the ALJ concludes that the IRO was correct: the work hardening program provided by Mockingbird for Claimant's treatment was medically unnecessary and inconsistent with the requirements of the MFG. Accordingly, Mockingbird's request for reimbursement for services is denied.

#### **V. Findings of Fact**

1. On \_\_\_\_\_, Claimant suffered an injury to her wrist, resulting in bilateral carpal tunnel syndrome at minimum.
2. In the course of rehabilitation, Claimant was referred to a work hardening program administered by Mockingbird Workskills (Mockingbird or Petitioner).
3. Claimant was admitted to and participated in that program from August 6, 2001, through September 28, 2001.
4. Mockingbird sought reimbursement for the work hardening program from the City of Dallas (Respondent), who was self-insured and provided workers' compensation benefits for its employees at the time of Claimant's wrist injury.
5. The City denied the reimbursement requested by Mockingbird.

6. On or about May 9, 2002, Mockingbird made a timely request to the Texas Workers' Compensation Commission's Medical Review Division ("MRD") for medical dispute resolution with respect to the requested reimbursement.
7. The MRD denied Petitioner's request for reimbursement in a decision dated April 9, 2001, in dispute resolution docket No. M5-02-2400-01.
8. Mockingbird timely requested a hearing with the State Office of Administrative Hearings, seeking review and reversal of the MRD decision.
9. The Commission mailed notice of the date, time, place, and nature of the hearing to the parties on May 22, 2003.
10. A hearing in this matter was convened on June 26, 2003 at the William P. Clements Building, 300 W. 15<sup>th</sup> St., Austin, Texas, before Nancy N. Lynch, an Administrative Law Judge with the State Office of Administrative Hearings. Petitioner and Respondent were represented.
11. The dates of the work hardening program at issue in this case were August 6, 2001, through September 28, 2001.
12. Claimant did not need vocational assistance, because her employer continued to have an employment position available for her after rehabilitation.
13. Claimant's psychological testing, conducted after program initiation, indicated Claimant might not be a suitable candidate for rehabilitation program and deserved special consideration by Claimant's interdisciplinary team of providers.
14. Claimant's injuries could have been treated more effectively in a more focused, less expensive therapy program dealing specifically with her bilateral carpal tunnel syndrome.
15. Mockingbird did not provide Claimant with functional assistance in the form of work simulation specifically designed for her job as a sedentary customer service representative.
16. The work hardening program did not meet Claimant's needs vocationally, behaviorally, functionally, or physically.
17. The work hardening program failed to assist Claimant physically to enhance her return to job potentials.

## VI. Conclusions of Law

1. SOAH has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a decision and order. TEX. LABOR CODE ANN. §§ 402.073(b) and 413.031(k).
2. The hearing was conducted pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001 and the Commission's rules, 28 TEX. ADMIN. CODE §133.305(g) and §§148.001-148.028.
3. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. §§2001.051 and 2001.052.
4. Mockingbird Workskills, the party seeking relief, bore the burden of proof in this case, pursuant to 28 TAC § 148.21(h).
5. Based upon the foregoing Findings of Fact and Conclusions of Law, the work hardening program in issue in this case was not reasonable and necessary medical care. TEX. LABOR CODE ANN. §§408.021(a)(1-3) and §401.011(19).
6. Based upon the foregoing Findings of Fact and Conclusions of Law, Petitioner's request for reimbursement for services provided from August 6, 2001 through September 28, 2001, should be denied.

### **ORDER**

**IT IS THEREFORE, ORDERED** that the claim of Petitioner, Mockingbird Workskills, Inc., for payment from the City of Dallas for work hardening services provided to Claimant from August 6, 2001, through September 28, 2001, be, and the same is hereby, **DENIED**

**SIGNED October 3, 2003.**

---

**NANCY N. LYNCH**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**