DOCKET NO. 453-03-4136.M5
MDR NO. M5-03-1051-01

CENTRAL DALLAS REHAB,	§	**BEFORE THE STATE OFFICE**
Petitioner	§	
	§	
v.	§	**OF**
	§	
ZURICH AMERICAN	§	
INSURANCE COMPANY,	§	
Respondent	§	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Petitioner, Central Dallas Rehab, sought reimbursement from Zurich American Insurance Company (the Carrier) for treatment (at a cost of $2,096) given to the injured worker, ___ (Claimant), that included chiropractic modalities and five days of a work hardening program. The Independent Review Organization (IRO) found the treatment was not medically necessary. This decision disagrees with the IRO, finding Petitioner proved the medical necessity of the contested services.

I.
PROCEDURAL HISTORY

Barbara C. Marquardt, Administrative Law Judge (ALJ), convened the hearing on November 19, 2003, on the 4th floor of the William P. Clements Building, 300 West Fifteenth Street, Austin, Texas. Scott Hilliard appeared telephonically and represented Petitioner. The Carrier was represented by attorney Steven M. Tipton, attorney. The hearing concluded, and the record closed, on the same date.

II.
DISCUSSION

A. The Injury & the Disputed Services

The Claimant, who is 35 years old, injured his lumbar spine on ___, while lifting and stacking boxes on a pallet at a temporary job. He eventually was treated by Dean Allen, D.C., at Petitioner's facility. Generally, his care consisted of manipulative therapy, therapeutic massage, flexibility exercises and treadmill.

The services at issue occurred between December 20, 2001 and January 10, 2002. They were billed as follows (with asterisks noting the number of times a CPT code was billed per date):

Dates 2001, 2002	**Office Visit** 99213 &99213MP (w/ manip by doctor)	**Manipulations/ Mobilizations** 97265, 97122	**Myofascial Release** 97250	**Therapeutic Exercise** 97110	**Work Hardening** 97545, 97546
Dec. 20					
Dec. 24					
Dec. 27					
Dec. 28					
Jan. 2					
Jan. 3					
Jan. 8					
Jan. 9					
Jan. 10					

The Claimant actually attended a work hardening program beginning on December 31, 2001, for six weeks. After one week off, he attended another two weeks of work hardening, ending March 1, 2002. The Claimant returned to work after work hardening in a somewhat restricted capacity. However, this case only involves the medical necessity (*i.e.*, payment for) the ten work hardening sessions listed in the table of disputed services; while none of the sessions beyond the disputed dates of service here were paid, they are not part of this appeal.[1]

B. The IRO Decision

The IRO physician (Reviewer) is a chiropractor. The Reviewer relied primarily on an Independent Medical Evaluation (IME) done by Dr. Canard on December 12, 2001.[2] Dr. Canard concluded the Claimant had a healed lumbosacral sprain that had resolved without residual impairment based on the following findings:

- Claimant's lower back pain was central and right paracentral.
- An MRI was normal.
- Lumbar range of motion was restricted in flexion and extension, but limitation of motion was voluntary.
- Orthopedic and Neurological testing was unremarkable.
- Waddell's testing was positive for stimulations, straight leg raise distraction, and regional disturbances.

The Reviewer also referenced two other medical records. On December 20, according to a note by his attending physician, the Claimant had pain graded at 6B 7/10; reduced range of motion in the lumbar spine; paraesthesia in the lower extremity on the right; tenderness, soreness and muscle spasm and fixation of the lumbar spine. On December 27, the Claimant had an FCE (Functional Capacity Evaluation) by Ken Haycock, D.C., who found he had deficits for lifting and range of motion and recommended work hardening to meet medium job level requirements.

[1]Ex. 1 at 744; Ex. 2 at 101.

[2]The ALJ finds Dr. Canard's report was sent to the Petitioner on January 3, 2002. (Ex. 1 at 175)

The Reviewer agreed with Dr. Canard, finding his evaluation (done one week prior to the beginning of work hardening) compelling, with a focus on its minimal objective findings and the suggestion of inappropriate pain behavior. He discounted the December 20th evaluation as well as the December 27th FCE, considering their findings unconvincing given Dr. Canard's findings.

C. Other Medical Evidence

Treatment notes indicate the following about the Claimant's status on November 26, 2001: pain at 7/10 in the lumbar region and buttocks on the right; reduced motion in lumbar spine; paresthesia at lower extremity on the right; and muscle spasms in lumbar spine and buttocks. The treatment notes also state the Claimant was showing progress, but he had pain and fatigue with testing; the plan was to start active therapies slowly with strengthening. On December 4, 2001, the notes state the range of motion (ROM) is the same with less pain and minimum spasms. That day, the plan was to transition to a more aggressive strengthening and flexibility program. By December 10, there were signs of progress and improvement in the lumbar spine; the plan was to do more aggressive, active strengthening exercises. [3]

The Claimant saw Daniel Leong, D.O., on January 28, 2002, at which time he was complaining of lower back pain and spasm. Dr. Leong found the lumbar spine showed decreased range of motion with minimal to moderate pain, interscapular tenderness, spasm and midline tenderness. He concluded the Claimant should continue with pain and spasm medications and continue conservative therapy modalities.

On March 21, 2002, Sterling Walton, M.D., found the Claimant had reached MMI.[4] In his report, Dr. Walton noted that the Claimant had received a 5% impairment rating on February 22, 2002. The report found degenerative changes in the lumbar spine, but it states it cannot be determined whether those changes were present before the ___ injury or not. At that point in time, the Claimant had lower right back pain that fluctuated from Abetter@ to Aworse@; he could not stay in certain positions for any length of time, like leaning forward. Dr. Walton pulled these objective findings from the medical records:

- 10/31/01: negative lumbar spine x-ray;
- 11/13/01: MRI of lumbar spine shows spasm, but no herniated discs;
- 12/27/01: FCE found work capacity only at the sedentary level and recommended work hardening.
- 1/16/02: EMG and normal nerve conduction velocities; thermatosensory test suggested bilateral S1 nerve root dysfunction.

In May 2002, the Petitioner's Director, Dr. Pelleltier, complained about the Carrier's denials of reimbursement based on lack of medical necessity for the disputed dates of service. He noted the Carrier accepted a request for work hardening (*i.e.,* found work hardening medically necessary) shortly after the December peer review by Dr. Canard was performed. Dr. Pelleltier summarized the Claimant's progress from his initial to his final FCE as follows:

[3]Ex. 1 at 359, 346, and 373.

[4]Dr. Walton was designated by the Commission to do the exam, meaning, in Petitioner's view, that his evaluation is less biased than that of Dr. Canard, who reviewed the Claimant for the Carrier. (Ex. 1 at 740.)

- static lifting knuckle height up 150%; bench height up 45%; ankle height up 50%; and shoulder height up 90%;
- dynamic floor-to-bench height lifting left, center, and right up 60%;
- dynamic floor-to-shelf height lifting left, center, and right up 20%;
- static pulling cart height up 20%; pushing at shoulder height up 40%; and pulling at shoulder height up 15%.

John A. Sklar, M.D., did a record review for the Carrier on August 6, 2002. Pertinent findings in that review include the following:

- MRI on November 13, 2001, ruled out any abnormalities of the lumbar spine, except for the possibility that it displayed some muscle spasms; this totally negates the subjective finding from electrodiagnostic testing showing a prolonged bilateral somatosensory latency at the S1 level.
- As of June 5, 2002, Claimant had pain at the 7/10 level B in fact, the entire time since his accident Claimant has reported pain at 6 or 7/10.
- Claimant's strength improved during work hardening B from January 23, static lifting at 20 to 30 pounds, dynamic lifting at 30 pounds, with carrying capacity of 40 pounds; by February 11, static lifting up to 35 pounds, dynamic lifting at 40 pounds, so repetitive lifting of 40 pounds. This means at that point he was in the heavy lifting category for his job capabilities.
- Dr. Sklar felt at February 11, 2002, the Claimant was at MMI, and he should have been given a full release return to work, except that continued medication for pain might have been appropriate.

The Claimant saw Crawford Sloan, M.D., frequently between March 20 and December 20, 2002. Dr. Sloan prescribed various medications for his pain and spasms, including: Vicodin, Flexeril, and Motrin. At each visit, he described the Claimant's spinal condition as involving decreased lumbar range of motion with pain/spasm radiating down his right buttock and right leg. He also recommended continued therapy and physical rehabilitation each time.

D. Applicability of Advisory 2001B14 or Amended Rule 134.600

The referenced rule provides that on or after January 1, 2002, work hardening programs that have not been approved for exemption by the commission because they are accredited by the Commission on Accreditation of Rehabilitation Facilities (CARF) must be preauthorized.[5] However, the referenced Advisory from the Texas Workers' Compensation Commission, which purports to clarify the transition from the preauthorization requirements effective before and after January 1, 2002, notes that prior to the date, only work hardening programs in excess of six weeks required preauthorization. It states that a work hardening program initiated before January 1, 2002, will require preauthorization for continuation of the program past January 31, 2002.

Petitioner argues the Claimant's work hardening program began on December 31, 2001;

therefore, the Advisory controls instead of the Commission rule, and all of the contested dates of work hardening should, therefore, be deemed medically necessary and reimbursed.

[5] 28 TEXAS ADMIN. CODE (TAC) § 134.600 (h)(9).

The Carrier's argument is simple. The Advisory is not a rule, and it can not replace the meaning of the rule. Thus, the Carrier argues Petitioner is required to prove the medical necessity of the contested dates of work hardening.

The ALJ finds Petitioner's argument about Advisory 2001-14 unpersuasive. Therefore, the services at issue, including work hardening, will be analyzed in terms of their medical necessity, according to the dictates of amended Rule 134.600.

E. Petitioner's Arguments

Petitioner argued Dr. Canard's IME was done only a little over a month after the date of injury. Dr. Canard's conclusion that the Claimant was at maximum medical improvement (MMI) by December 12th and had a 0% impairment is defeated by documentation in the record, in Petitioner's opinion.

F. Carrier's Arguments

Essentially, the Carrier argued the Claimant's injury was not serious enough to warrant this level and intensity of treatment. There is no objective evidence the Claimant benefited from them.

As to work hardening, the Carrier argued there is nothing in the record to support the need for an interdisciplinary approach to this Claimant's injury. In particular, the Carrier pointed to the fact that there is absolutely nothing to indicate there was a psychological component to the Claimant's problem. Further, it pointed to evidence about the psychological aspect of the work hardening program, which included a group therapy session on humor, relaxation techniques, a video on substance abuse, HIV & AIDS, life extension (including freezing bodies and heads at death), and financial problems.[6]

Generally, the Carrier argued the record does not logically support the care given.

III.
ANALYSIS

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 injury; (2) promotes recovery; or (3) enhances the ability to return to or retain employment.[7]

The record in this case is enormous, and it is unclear why what looks like a minor injury has caused the Claimant such pain and disability. While Dr. Canard's report is somewhat convincing, and his Waddell's findings are troublesome, on balance the ALJ finds the treatment was medically necessary. Looking at the record as a whole, as Petitioner argued, it is simply not fair to decide medical necessity based on Dr. Canard's findings only a little over one month after the injury, given the ample findings by medical doctors justifying treatment and taking the Claimant's pain complaints seriously, as well as recognizing his back spasms, through the end of 2002. It appears to the ALJ

[6]Ex. 1 at 709 - 715.

[7]TEX. LAB. CODE ANN. §408.021. "Health care" includes "all reasonable and necessary medical . . . services." TEX. LAB. CODE ANN. §401.011(19).

that whether the Claimant's pain and disability were caused solely by the injury, or whether the injury combined with existing degeneration, he did need the conservative care given in this case to be able to return to work.

More specifically, all of the following support the medical necessity of the chiropractic modalities at issue, as well as the work hardening program[8]:

- Dr. Walton, a neutral physician designated by the Commission to review the Claimant's case in March of 2002, found he had a 5% whole person impairment and did not accept that the Claimant was guilty of exaggerating his symptoms.
- There are degenerative changes in the lumbar spine, and the MRI (as well as many doctors thereafter) found there were spasms in the lumbar spine.
- The Claimant was only functioning at a sedentary level as of his December FCE; he needed to increase his strength to handle heavy lifting in order to return to work.
- The Claimant made documented progress in strengthening between his initial and second FCE, achieving the ability to work in the heavy lifting category.
- The Claimant went back to work, although he was still in a somewhat restricted work capacity.
- The Claimant's pain was viewed as real, and he was given prescription medications for it, over the course of his treatment for the injury. While the chiropractic modalities and work hardening apparently never reduced his pain level, at least they allowed him to return to work.

IV. FINDINGS OF FACT

1. The Claimant, who is 35 years old, injured his lumbar spine on ___, while lifting and stacking boxes on a pallet at a temporary job. He eventually was treated by Dean Allen, D.C., at Central Dallas Rehab (Petitioner).

2. Petitioner treated ___ (Claimant) between December 20, 2001 and January 10, 2002.

    a. The services from December 20 through December 28, 2001, included: office visits and office visits with manipulations by the doctor, manipulations/mobilizations, myofascial release, and therapeutic exercises.

    b. The Claimant entered a work hardening program at Petitioner's facility on December 31, 2001, and the four-hour sessions he attended between January 2 and January 10, 2002, are disputed in this case. While not at issue in this case, the Claimant actually attended work hardening for six weeks, took off for two weeks, and ended the program on March 1, 2002.

3. The Claimant returned to work after work hardening in a somewhat restricted capacity.

4. The Claimant's x-rays and MRI of the lumbar spine revealed degenerative changes. He had lower back pain ranging between 6 and 7/10; spasms in the lower back; and paresthesia radiating into his lower right extremity.

[8]The ALJ acknowledges that only the first ten sessions of work hardening are at issue here; however, the only way to judge its efficacy is to look at its ultimate outcome and the progress shown over the full period of work hardening.

5. The Claimant was given a 5% impairment rating of the whole person due to his injury.

6. After the course of treatment by Petitioner referenced in Finding 2, the Claimant's condition improved from a sedentary work capacity to the ability to lift in the heavy lifting category. His lifting abilities improved over the course of his treatment as follows:

- static lifting knuckle height up 150%; bench height up 45%; ankle height up 50%; and shoulder height up 90%;
- dynamic floor-to-bench height lifting left, center, and right up 60%;
- dynamic floor-to-shelf height lifting left, center, and right up 20%; and
- static pulling cart height up 20%; pushing at shoulder height up 40%; and pulling at shoulder height up 15%.

7. Based on the foregoing, the treatment referenced in Finding 2 was medically necessary, because it enhanced the Claimant's ability to return to employment.

V.
CONCLUSIONS OF LAW

1. The Texas Workers' Compensation Commission has jurisdiction to decide the issues presented pursuant to the Texas Workers' Compensation Act (the 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 §413.031 of the Act and TEX. GOV'T CODE ch. 2003.

3. As referenced in the Findings, the services were medically necessary and met the goals set out in Act §408.021.

ORDER

IT IS ORDERED that the claim by Central Dallas Rehab is **GRANTED**, and it is entitled to payment for the treatment rendered to ___ between December 20, 2001 and January 10, 2002.

SIGNED January 15, 2004.

_____

BARBARA C. MARQUARDT
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS