

**SOAH DOCKET NO. 453-03-4643.M5
TWCC MRD NO. M5-03-2444-01**

WORK READY REHAB,	§	BEFORE THE STATE OFFICE
Petitioner	§	
	§	
V.	§	OF
	§	
LIBERTY INSURANCE	§	
CORPORATION,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Work Ready Rehab (Petitioner) appealed the findings and decision of the Texas Workers' Compensation Commission's designee, an independent review organization (IRO), which found that two weeks of a work hardening program and a functional capacity evaluation (FCE) Petitioner provided a workers' compensation claimant (Claimant) was not medically necessary healthcare. The IRO's decision upheld a denial of reimbursement by Liberty Insurance Corporation (Carrier/Respondent). This decision and order finds the two weeks of work hardening services were not reasonable and medically necessary healthcare for Claimant, but that the FCE was.

I. NOTICE, JURISDICTION, AND PROCEDURAL HISTORY

There were no contested issues of jurisdiction or notice. Those issues are set out only in the Findings of Fact and Conclusions of Law below.

The hearing in this matter convened and the record closed December 8, 2003, before State Office of Administrative Hearings (SOAH) Administrative Law Judge (ALJ) Ann Landeros. Petitioner's designated employee representative Robin Clearman represented Petitioner, and attorney Kevin Franta represented Respondent. The Commission Staff did not participate in the hearing.

II. DISCUSSION

A. Factual Background

Claimant worked as an assistant superintendent for a construction company, mainly supervising construction with concrete. In ____, he sustained a compensable work injury to his knee. At the time of this injury, Carrier was the workers compensation carrier for Claimant's employer. After a course of physical therapy failed to relieve Claimant's pain, Claimant's treating physician, orthopedic surgeon Dr. Jerry Hyatt, operated on the knee in March 2002 to repair a right medial meniscus tear. Post-surgically, Claimant continued physical therapy but was unable to return to work. Based on a functional capacity evaluation (FCE) on May 6, 2002, Dr. Hyatt prescribed a work hardening program for Claimant. After four weeks of the program, Dr. Hyatt evaluated Claimant's progress and prescribed an additional two weeks. On June 14, 2002, after completing six weeks in the program and a second FCE, Claimant was discharged and returned to work.

Carrier denied payment for the last two weeks of the work hardening program, claiming it was not medically necessary because Claimant had the ability to perform physically at a medium level post-surgically, which is all his job as an assistant superintendent demanded. The IRO upheld the denial of the work hardening program, stating:

This was a routine meniscus tear. Two months after the injury the claimant was surgically treated. Within six weeks after that surgery, there was a request for a work hardening program. As noted in the March 27, 2003[,] provider response, the findings were related to the lower extremity. However, the treatment rendered was directed at cardiovascular endurance, posture and increase in range of motion. The initial range of motion as reported as 130 . . .

B. Legal Standards

Petitioner has the burden of proof in this proceeding. 28 TAC §§ 148.21(h) and (i); 1 TAC § 155.41. Pursuant to the Act, an employee who has sustained 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 compensable injury, promotes recovery, or enhances the ability of the employee to return to or retain employment. TEX. LAB. CODE ANN. § 408.021(a). Health care includes all reasonable and necessary medical services. TEX. LAB. CODE ANN. § 401.011(19)(A). The IRO was authorized to hear the medical dispute pursuant to 28 TAC § 133.308.

C. Petitioner's Evidence

The May FCE rated Claimant's physical job demands as medium-heavy (based on the need to lift 75 pounds infrequently and up to 35 pounds frequently) but found his current ability was at the medium level (defined as lifting 50 pounds infrequently and up to 25 pounds frequently). The FCE noted Claimant's post-injury activity consisted of staying home and doing unspecified yard work. His main deficits were with activities that required bending or putting pressure on his right knee, including squatting, transfers (*e.g.*, getting in and out of bed), dressing, mopping, and sweeping. (Pet. Exh. 1, p. 9-11). Additionally, the FCE found that Claimant's knee pain decreased his lifting abilities. (Pet. Exh. 1, p. 26).

A discharge FCE completed June 14, 2002, found Claimant's right knee range of motion, cardiovascular fitness, and functional lifting tolerance had improved. (Pet. Exh. 1, p. 28). His reported pain level in his knee was reduced from 2-7 out of 10 to 0-1 out of 10 and his right knee flexion increased from 130° to 135° during the work hardening program. (Pet. Exh. 1, p. 30-31).

Occupational therapist Robin Clearman, who supervised Claimant's work hardening program, testified for Petitioner. He noted that Carrier assumed Claimant had a job whose duties were primarily administrative, when in fact Claimant had a physically demanding job supervising concrete workers. He cited to the federal Dictionary of Occupational Titles¹ for the job duties of a concreting supervisor, building assembler, float maker, and worker. (Pet. Exh. 1, p. 59-61). The list of job duties indicated concrete construction supervisors and workers engage in physically demanding activities.

¹ *Dictionary of Occupational Titles*, Volume 11, Fourth Ed., Revised 1991, U.S. Department of Labor.

Although Claimant was relatively strong post-surgically, according to Mr. Clearman, strength is not the only issue to be addressed in work hardening. The ability to move and twist joints can be just as important. In Claimant's case, the torquing and bending of his right knee, as often required to perform his job, caused debilitating pain.

Mr. Clearman noted that the June 14, 2002, FCE was the second out of the three FCEs permitted under the Commission's 1996 Medical Fee Guideline. 28 TAC 134.201, Medicine Ground Rules I.E.2.

D. Carrier's Evidence

Carrier noted that the work hardening program's progress note for the week ending May 31, 2002, stated Claimant had met his desired physical demand characteristic level for his occupation at that time. He could lift a maximum of 80 pounds, could perform his work simulation for two hours without increased pain, and reported pain levels of 2 out of 10. (Pet. Exh. 1, p. 36).

Carrier's witness Dr. Casey Cochran, M.D., challenged the validity of the May FCE as a basis for the work hardening referral because, lacking any documented change in heart rate, the FCE did not show that Claimant expended the maximal effort on the physical demand tests. Dr. Cochran also noted that Claimant's initial knee range of motion of 130° is considered functionally normal. He also felt the FCE lacked enough information on Claimant's specific job duties to appropriately test his abilities to perform that job. He noted that the major gains during the last two weeks of the work hardening program were with Claimant's cardiovascular fitness, which was not part of the compensable injury.

E. Analysis

Petitioner failed to meet its burden of proof to establish that the last two weeks of the work hardening program were medically necessary. The work hardening program's progress note for the week ending May 31, 2002, established that Claimant had achieved sufficient strength, range of motion, and pain reduction to perform his job duties at the medium-heavy physical demand level. The last two weeks of the program improved only Claimant's cardiovascular deficits, which were not shown to be part of the compensable injury or an impediment to his return to work. Petitioner is not entitled to reimbursement for the work hardening services provided Claimant from June 3 through June 14, 2002.

Petitioner did establish that the FCE performed June 14, 2002, was reasonable and medically necessary. This discharge FCE involved testing that confirmed Claimant was ready to return to work. Also, as Petitioner correctly pointed out, this FCE was only the second of the three FCEs allowed under the Commission's rules and was administered in conjunction with the evaluation of a work hardening program, the traditional use of an FCE.

III. FINDINGS OF FACT

1. In January 2002, Claimant sustained an injury to his right knee compensable under the Texas Workers' Compensation Act (Act).

2. At the time of the compensable injury, Claimant's employer had workers' compensation insurance coverage with Liberty Insurance Corporation (Carrier/Respondent).
3. In March 2002, orthopedic surgeon Dr. Jerry Hyatt operated on Claimant's right knee to treat the compensable injury.
4. Dr. Hyatt referred Claimant to Work Ready Rehab (Petitioner) for a post-surgical work hardening program.
5. Carrier paid for the first four weeks of Claimant's participation in the work hardening program, then denied reimbursement for the last two weeks (dates of service from June 3 through June 14, 2002) as being not medically necessary.
6. Carrier also denied payment for the work hardening program discharge FCE performed June 14, 2002.
7. After Carrier denied reimbursement, Petitioner appealed to the Texas Workers' Compensation Commission (Commission), which referred the dispute to its designee, an independent review organization (IRO).
8. The IRO's decision upheld Carrier's denial of reimbursement on the basis that the last two weeks of work hardening and the June FCE were not medically necessary. Petitioner timely appealed that decision.
9. The Commission's notice of hearing stated the date, time, and location of the hearing and cited to the statutes and rules involved along with a short, plain statement of the factual matters involved.
10. Petitioner and Respondent were represented at the hearing, but the Commission Staff chose not to participate.
11. Claimant's job as an assistant supervisor of concrete construction required he meet a medium-heavy physical demand level, meaning he had to be able to lift up to 75 pounds infrequently and up to 35 pounds frequently.
12. By May 31, 2002, Claimant could perform at the medium-heavy physical level demanded by his job, had a normal range of motion in his right knee, could lift 80 pounds, could perform simulated work duties for up to two hours without increased pain, and had reduced his maximum pain level to 2 out of 10.
13. From June 3 through 14, 2002, Claimant's gains in the work hardening program were primarily with his cardiovascular endurance.
14. Claimant's cardiovascular deficits were not shown to be derived from or related to his compensable knee injury.
15. The June 14, 2002, FCE performed on Claimant established that he was able to return to work and was the second out of the three FCEs performed on him.

IV. CONCLUSIONS OF LAW

1. The Texas Workers' Compensation Commission (Commission) has jurisdiction over this matter pursuant to the Texas Workers' Compensation Act (Act), TEX. LAB. CODE ANN. § 413.031.
2. The State Office of Administrative Hearings has jurisdiction over this proceeding, including the authority to issue a decision and order, pursuant to § 413.031(d) of the Act and TEX. GOV'T CODE ANN. ch. 2003.
3. The IRO was authorized to hear the medical dispute pursuant to 28 TEX. ADMIN. CODE (TAC) § 133.308.
4. The hearing was conducted pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001 and the Commission's rules, 28 TAC § 133.308(u).
5. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
6. Petitioner had the burden of proof in this proceeding. 28 TAC §§ 148.21(h) and (i); 1 TAC § 155.41.
7. Pursuant to the Act, an employee who has sustained 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 compensable injury, promotes recovery, or enhances the ability of the employee to return to or retain employment. TEX. LAB. CODE ANN. § 408.021(a).
8. Health care includes all reasonable and necessary medical services. TEX. LAB. CODE ANN. § 401.011(19)(A). A medical benefit is a payment for health care reasonably required by the nature of the compensable injury. TEX. LAB. CODE ANN. § 401.011(31).
9. Claimant's participation in Petitioner's work hardening program from June 3 through 14, 2002, was not reasonable and medically necessary healthcare under TEX. LAB. CODE ANN. §§ 401.011(19) and 408.021(a).
10. Petitioner is not entitled to reimbursement for the work hardening services provided Claimant between June 3 and 4, 2002.
11. Under the Commission's 1996 Medical Fee Guideline, a claimant is permitted three FCEs. 28 TAC 134.201, Medicine Ground Rules I.E.2.
12. The June 14, 2002, FCE was reasonable and medically necessary healthcare for Claimant under TEX. LAB. CODE ANN. §§ 401.011(19) and 408.021(a).
13. Petitioner is entitled to reimbursement for the June 14, 2002, FCE performed on Claimant.

ORDER

It is ORDERED that Work Ready Rehab is not entitled to reimbursement by Liberty Insurance Company for the work hardening services provided to Claimant from June 3 through 14, 2002, but is entitled to reimbursement for the FCE performed on Claimant on June 14, 2002.

SIGNED January 15, 2004.

**ANN LANDEROS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**