

MAIN REHAB & DIAGNOSTIC	§	BEFORE THE STATE OFFICE
Petitioner,	§	
	§	
	§	
VS.	§	OF
	§	
LIBERTY MUTUAL INSURANCE	§	
CORP.,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

The worker’s compensation claimant (Claimant) in this case sustained compensable injuries to her right knee and lower back. She underwent approximately two months of work hardening administered by Main Rehab & Diagnostic (Provider). The carrier, Liberty Mutual Insurance Corporation (Carrier), paid for the first month of the work hardening program. However, citing a lack of medical necessity, Carrier declined to pay for the second month of the program. A reviewer with an Independent Review Organization (IRO) concluded that the disputed services were not medically necessary. Petitioner requested a hearing. The amount in dispute is \$9,274.05.

The Administrative Law Judge (ALJ) determines that the disputed services were not necessary.

I. DISCUSSION

A. Procedural History

The hearing was convened on February 22, 2005, before State Office of Administrative Hearings (SOAH) Judge Shannon Kilgore. Scott Hilliard, attorney, appeared by telephone on behalf of Provider. Charlotte Salter, attorney, represented Respondent. The hearing adjourned, and the record closed, the same day. No party raised any issue concerning notice or jurisdiction.

B. Background and Disputed Services

Claimant, a shipping and receiving clerk, sustained her compensable injuries on ____, when she stretched to reach for something, felt a sudden pain in her back, and then stumbled in such a way as to injure her knee. An MRI of the lumbar spine performed on May 29, 2003, revealed a small central disc protrusion at L4-L5 with a small annular tear, as well as mild degenerative hypertrophy involving both facet joints at L4-L5.¹ An MRI of the right knee performed on the same date showed a small bone cyst and some joint effusion.² She underwent physical therapy, but continued to experience low back pain and knee pain throughout the summer of 2003.³ An orthopedist concluded that she had mild degenerative disc disease and facet degenerative joint disease at L4-5, as well as some muscle spasms in her lower back.⁴

¹ Provider Exhibit 1 at 107-108.

² See Carrier 1 at 78.

³ Provider Exhibit 1 at 110-112.

⁴ Provider Exhibit 1 at 109-110.

Claimant began the work hardening program on or about August 19, 2003, and her last day of the program was October 20, 2003. The program was designed to be intensive, involving approximately 40 hours per week. Carrier apparently paid for the early sessions, but declined to pay for any sessions from September 17, 2003, forward, and also declined to pay for two office visits during the earlier weeks of the program. Provider billed for the disputed services under the following CPT codes:

<u>CPT Code</u>	<u>Service</u>
99213	Office visit
97545-WH	Work hardening, initial two hours
97546-WH	Work hardening, each additional hour.

Carrier's denial of reimbursement was based on denial code "V" B unnecessary treatment, according to peer review.

C. Applicable Law

Provider has the burden of proof in this proceeding.⁵ The Texas Labor Code contains the Texas Workers' Compensation Act (Act) and provides the relevant statutory requirements regarding compensable treatment for workers' compensation claims.⁶ In particular, the Act provides in pertinent part that:

- (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 includes all reasonable and necessary medical aid, medical examinations, medical treatment, medical diagnoses, medical evaluations, and medical services.⁷

D. IRO Decision

In a decision dated May 13, 2004, the IRO determined that the entire work hardening

⁵ 28 TEX. ADMIN. CODE ' 148.21(h) and (i); TEX. LABOR CODE ' 413.031.

⁶ TEX. LAB. CODE ' 408.021.

⁷ TEX. LAB. CODE ' 401.011(19).

program, from mid-August through October 20, 2003, and including all associated office visits, was not medically necessary.⁸ The IRO reviewer stated that there were no daily notes from the treating doctor that would substantiate the medical necessity for the level III office visits and work hardening program.

E. Parties' Positions

Provider's position: Osler Klamath, D.C., a chiropractor employed by Provider who was at times involved in Claimant's treatment, testified at the hearing. He testified that Claimant was a candidate for work hardening because her job as a shipping and receiving clerk required her to move around, and she had made moderate progress in physical therapy but had some psychological overlay.⁹

According to Dr. Klamath, Claimant's functionality improved over the course of the work hardening program, although her subjective reports of pain failed to improve. Dr. Klamath compared some of the results of two functional capacity exams (FCEs) administered on August 18, 2003, and September 24, 2003, respectively, noting considerable improvement in static lifting, dynamic lifting, carrying, and static pushing and pulling.¹⁰ There was also improvement in most range of motion activities, although Claimant's reported pain levels associated with those activities remained high in the second FCE.¹¹ Similarly, her levels of function for walking and sorting improved, although she still experienced considerable (albeit slightly reduced) pain with those activities.¹²

Dr. Klamath pointed out that in a designated doctor evaluation performed on August 22, 2003, Dana Wingate, D.O., concluded that Claimant was not yet at maximum medical improvement (MMI), but that she would likely reach MMI following completion of her eight-week work hardening program, which she had just begun.¹³ In December 2003, following Claimant's completion of the work hardening program, Dr. Wingate found that Claimant was not at MMI because she was still experiencing knee and back pain and was in the process of undergoing a series of steroid injections for her knee and back.¹⁴ Indeed, Dr. Wingate reported that Claimant stated she had gotten absolutely no improvement from the work hardening program and perhaps was worse, and was becoming depressed by her continued pain.¹⁵ However, Dr. Klamath testified, the goal of the work hardening program was not to make the pain disappear, but to improve Claimant's readiness for work. Dr. Klamath also noted that when Claimant saw Dr. Wingate in September

2003, Claimant was very limited in her forward bending, but in the December exam she could bend

⁸ Carrier Exhibit 3.

⁹ Following a psychological examination on August 19, 2003, a counselor on Provider's staff concluded that Claimant would benefit from work hardening. Provider Ex. 2 at 6-14.

¹⁰ Compare Provider 2 at 18 with *id.* at 95.

¹¹ Compare Provider 2 at 22 with *id.* at 108.

¹² Compare Provider 2 at 26 with *id.* at 111.

¹³ Carrier Exhibit 1 at 345-348.

¹⁴ Carrier Exhibit 1 at 702-708.

¹⁵ Carrier Exhibit 1 at 705.

to 90 degrees, or parallel with the ground.¹⁶ Dr. Klamath also testified that the second exam by Dr. Wingate seemed more focused on the knee rather than the back.

Carrier's position: Kevin Tomsic, D.C., testified for Carrier. Dr. Tomsic stated that not only did Claimant's pain fail to improve over the course of the work hardening program, but she showed no significant objective gains, either. Dr. Tomsic testified that the appropriate diagnosis for Claimant's condition was lumbar sprain/strain, and possibly right knee sprain/strain as well. He questioned whether a patient reporting pain of eight to ten (on a scale of one to ten) should be placed in work hardening to begin with.¹⁷

Dr. Tomsic also testified that Claimant had developed radicular symptoms in late June 2003, during her physical therapy administered by Provider, after which time she showed little improvement.¹⁸ He stated that her improvements in strength and range of motion were insignificant in light of her continuing high levels of pain, and that during the summer of 2003 Claimant was trending into a chronic pain scenario. He noted that in early July Claimant had declined epidural steroidal injections and wanted instead to see if work hardening would help;¹⁹ according to Dr. Tomsic, the decision to administer a work hardening program showed that Claimant, rather than the medical professionals, was running the case.

Dr. Tomsic pointed out fluctuations, rather than steady progress, in Claimant's strength.²⁰ He also asserted that Provider's documentation consistently talked about Claimant's "improvement" and "progress" even as other doctors reported her continuing and worsening pain. For example, Dr. Tomsic noted that on October 14, 2003, Provider recorded:

Pt. Making good progress. Shows [increase in] strength, total body function. Pt. RTW [return to work] "end of program."²¹

The next day, however, Claimant saw Alan Hurschman, M.D., who charted:

She is now in a work hardening program five times a week for eight hours a day times eight weeks. The work hardening program is causing more pain. "I am lifting pans of cement as if I was at work and all it does is cause increased low back pain."²²

At this point Dr. Hurschman determined to administer injections for Claimant's back pain as well as for her knee pain.²³ Nevertheless, the next day Provider charted:

¹⁶ Compare Carrier Exhibit 1 at 348 with *id.* at 708.

¹⁷ On August 18, 2003, Claimant was reporting pain at the level of nine. Carrier 1 at 287-288.

¹⁸ See Carrier Exhibit 1 at 148. The ALJ notes, however, that subsequent office notes failed to mention the radicular symptoms.

¹⁹ Carrier Exhibit 1 at 218.

²⁰ Compare Carrier Exhibit 1 at 384 with *id.* at 445 and 541 (Claimant's overall functionality declined sharply from 9-8-03 to 9-10-03, then rose on 9-24-03 to the precise levels recorded on 9-8-03).

²¹ Carrier Exhibit 1 at 626.

²² Carrier Exhibit 1 at 628.

²³ Carrier Exhibit 1 at 630-631. ' Carrier Exhibit 1 at 659-660.

[Claimant] enters the office for today's visit and states there is less overall pain felt in the lumbar spine region. She indicates she has been feeling significant improvement in the muscle spasm of her lower back. . . . She also stated that she feels like her right knee pain is recovered and reports there have not been any further knee related problems.²⁴

And, noted Dr. Tomsic, that same day Provider's counselor said that Claimant was in "acute distress" due to back and knee pain at a level of nine, and yet went on to say that the plan was to continue work hardening.²⁵

Finally, Dr. Tomsic testified that as of February 2004 Dr. Hurschman noted that Claimant's was suffering from "significant strength and limited ADL [activities of daily living] deficits related to her injury."²⁶ This condition, Dr. Tomsic testified, is inconsistent with the supposed objective progress Claimant made in the disputed work hardening program.

F. Discussion and Conclusion

Provider failed to prove that the last four weeks of work hardening were necessary. The balance of medical opinion in the record indicates that the disputed services were not necessary. A peer review done for Carrier by Glenn Marr, D.C., on September 25, 2003, found that a four-week course of work hardening B from August 18 through September 12, 2003 B was warranted, and this was what Carrier reimbursed.²⁷ An earlier peer review done in July 2003 by John Harney, M.D., a neurologist, determined that no further treatment from that time forward was necessary.²⁸

James Box, M.D., an orthopedic surgeon, examined Claimant on July 30, 2003, and concluded that she had back and knee strains, and that she had normal lumbar range of motion but reported pain at a level of eight. Dr. Box stated that Claimant's level of function was below that necessary for her job and that she could return to work with restrictions. He also noted that she would benefit from some back exercises, and that she should reach MMI in about one month's time.²⁹ On September 25, 2003, Crawford Sloan, M.D., saw Claimant and noted, "Work hardening causes more back pain."³⁰

The only reviewing doctor who recommended a full two months of work hardening was Dana Wingate, D.O., who examined Claimant in late August 2003, noted Claimant's pain complaints and some range of motion limitations related to her lumbar spine, and concluded that she would likely reach MMI after completion of the work hardening.³¹ However, in early December

²⁴ Carrier Exhibit 1 at 636.

²⁵ Carrier Exhibit 1 at 645.

²⁶ Carrier Exhibit 1 at 839.

²⁷ Carrier Exhibit 2 at 2-4.

²⁸ Carrier Exhibit 2 at 5-8. Another peer review, done at approximately the same time, also concluded that no further treatment was warranted. *Id.* at 9-12.

²⁹ Carrier Exhibit 1 at 252-261.

³⁰ Carrier Exhibit 1 at 568.

³¹ Carrier Exhibit 1 at 345-348. An orthopedic surgeon, Dr. Charles Whittenburg, also saw Claimant on July 3

2003, following Claimant's completion of the work hardening program, Dr. Wingate again examined Claimant, this time noting:

[Claimant] states that she got absolutely no improvement and if anything is somewhat worse. She is currently undergoing injections to her right knee on a weekly basis and is scheduled to have a nerve conduction and EMG study due to continued significant nerve pain in her left low back, sharp in nature, radiating through her left buttock and into her left thigh area. . . She states that she is becoming depressed because of continued pain and lack of improvement in her symptoms despite care and treatment . . .³²

Dr. Wingate concluded that Claimant still was not at MMI.

It is clear from the totality of the record that Claimant's primary complaint was her very high level of pain. Her levels of pain remained in the six to nine range throughout the work hardening program. The ALJ agrees with Dr. Tomsic that there was a disconnect between Claimant's continued reports of pain and Provider's many chart notes that state she was improving. Dr. Tomsic persuasively suggested that it did not make sense to continue to administer a work hardening program to a patient who, during the program, reported a pain level of nine and exhibited acute distress. Even if work hardening appeared to be necessary at the outset of the program, Claimant's pain should have prompted a re-evaluation at some point; however, there is no indication that this happened. And while her functionality may have improved, it appears that her psychological condition worsened, with depression setting in as her pain persisted.

Finally, it is not clear to what degree Claimant's range of motion and strength did improve. In early November, just after Claimant's completion of the work hardening program, Provider's notes state:

[Claimant] experiences pain and discomfort within the low back associated with muscle spasms, *decreased mobility*, and recent radiculopathy down her right leg. 50% of the time. Her symptom can be present without activity. [Claimant] experiences pain and discomfort within the right knee associated with *decreased ROM* and paresthesia. 40% of the time.³³

Similarly, on February 27, 2004, Dr. Alan Hurschman saw Claimant and noted, "Deficits are noted

in ROM, strength and activity tolerance due to pain and the exacerbation of symptoms."³⁴ These observations indicate that after the completion of work hardening Claimant continued to be plagued by functional deficits that were related to her ongoing pain.

and August 8, 2003, and recommended that she continue with Aconservative treatment'' administered by Provider; Dr. Whittenburg did not mention work hardening. Provider Exhibit 1 at 109-111.

³² Carrier Exhibit 1 at 705-709. In March 2004 Dr. Wingate again examined Claimant and determined that although she had improved, she was not yet at MMI and needed to continue with an ongoing series of lumbar epidural steroidal injections. Carrier Exhibit 1 at 843-849.

³³ Carrier Exhibit 1 at 667 (emphasis added).

³⁴ Carrier Exhibit 1 at 839.

For these reasons, the ALJ concludes that Provider did not meet its burden to establish the necessity of the disputed weeks of work hardening. Further, Provider has not shown the necessity of the earlier disputed office visits.

II. FINDINGS OF FACT

1. Liberty Mutual Insurance Corporation (Carrier) is the workers' compensation insurer with respect to the claims at issue in this case.
2. Claimant, a shipping and receiving clerk, sustained her compensable injuries on ____, when she stretched to reach for something, felt a sudden pain in her back, and then stumbled. She suffered lumbar spinal and right knee strains.
3. Claimant underwent physical therapy at Main Rehab & Diagnostic (Provider), but continued to experience low back pain and knee pain throughout the summer of 2003.
4. Claimant began an eight-week work hardening program, administered by Provider, on or about August 19, 2003, and her last day of the program was October 20, 2003. The program was designed to be intensive, involving approximately 40 hours per week.
5. Provider billed for the disputed services under the following CPT codes:

<u>CPT Code</u>	<u>Service</u>
99213	Office visit
97545-WH	Work hardening, initial two hours
97546-WH	Work hardening, each additional hour.

6. Carrier apparently paid for the early sessions, but declined to pay for any sessions from September 17, 2003, forward, and also declined to pay for two office visits during the earlier weeks of the program.
7. Carrier's denial of reimbursement was based on denial code "V" B unnecessary treatment, according to peer review.
8. The amount in dispute is \$9,274.05.
9. Provider requested medical dispute resolution.
10. In a decision dated May 13, 2004, an independent review organization (IRO) determined that the entire work hardening program, from mid-August through October 20, 2003, and including all associated office visits, was not medically necessary.
11. The Medical Review Division of the Texas Workers' Compensation Commission issued its order, based on the IRO decision, on June 3, 2004.
12. Provider requested a hearing.
13. Notice of the hearing was issued July 7, 2004.
14. 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.

15. The hearing was convened on February 22, 2005, before State Office of Administrative Hearings (SOAH) Judge Shannon Kilgore. Scott Hilliard, attorney, appeared by telephone on behalf of Provider. Charlotte Salter, attorney, represented Respondent. The hearing adjourned, and the record closed, the same day. No party raised any issue concerning notice or jurisdiction.
16. The balance of medical opinion indicates that the last four weeks of the work hardening program were unnecessary.
17. Claimant's chief complaint was pain.
18. Claimant's pain levels remained very high throughout the work hardening program.
19. While Claimant's functionality may have improved somewhat during the work hardening program, her psychological condition worsened, with depression setting in as her pain persisted.
20. After the completion of work hardening, Claimant continued to be plagued by functional deficits that were related to her ongoing pain.
21. The last four weeks of the work hardening program were unnecessary.
22. The office visits on August 15 and September 11, 2003, were unnecessary.

III. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter. TEX. LAB. CODE ch. 401 *et seq.* (the Act).
2. SOAH has jurisdiction over this proceeding, including the authority to issue a decision and order. TEX. LAB. CODE § 413.031; TEX. GOV'T CODE ch. 2003.
3. Adequate and timely notice of the hearing was provided in accordance with the Administrative Procedure Act. TEX. GOV'T CODE § 2001.052.
4. Provider has the burden of proof in this matter. 28 TEX. ADMIN. CODE § 148.21(h) and (i); TEX. LABOR CODE § 413.031.
5. 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. TEX. LAB. CODE § 408.021.
6. Based on the above Findings of Fact and Conclusions of Law, the Act does not require Carrier to reimburse Provider for the disputed office visits and work hardening services provided on August 15, September 11, and September 17 through October 20, 2003.

ORDER

IT IS THEREFORE ORDERED that Liberty Mutual Insurance Corporation need not reimburse Main Rehab & Diagnostic for the disputed office visits and work hardening services provided on August 15, September 11, and September 17 through October 20, 2003.

ISSUED April 12, 2005.

SHANNON KILGORE
STATE OFFICE OF ADMINISTRATIVE HEARINGS
ADMINISTRATIVE LAW JUDGE