

SOAH DOCKET NO. 453-04-7666.M5

REHAB 2112,	Petitioner	§	BEFORE THE STATE OFFICE
		§	
VS.		§	
		§	OF
DEEP EAST TEXAS SELF		§	
INSURANCE FUND,		§	ADMINISTRATIVE HEARINGS
Respondent			

DECISION AND ORDER

Rehab 2112 seeks review of a decision of the Texas Workers' Compensation Commission's (Commission's) Medical Review Division (MRD), which was based on a review by an independent review organization (IRO). The decision denied reimbursement for certain work hardening services provided to Claimant ____ The Administrative Law Judge (ALJ) finds that half of the work hardening services in dispute were medically necessary and half were not.

I. BACKGROUND, PROCEDURAL HISTORY, NOTICE, AND JURISDICTION

The Claimant, a 47-year-old custodial worker, suffered a compensable injury to her back, right shoulder, and right knee on ____, when she slipped and fell while mopping a floor. She participated in work hardening at Rehab 2112 from February 24 to April 22, 2003. Deep East Texas Self Insurance Fund (Deep East Texas) denied reimbursement for the dates of service of March 19 to April 22 due to lack of medical necessity. The IRO agreed with Deep East Texas.

The IRO found that the work hardening was not medically necessary because the injuries Claimant suffered were not extensive enough to require a work hardening program. The IRO noted more specifically that Claimant's pain was only two out of ten when she entered the program, and remained that way throughout the program. Moreover, a functional capacity evaluation (FCE) performed during the period indicated that she was capable of performing the light duty work required of her job. The IRO also found that it was not appropriate to enter Claimant into such an intensive program only 70 days after the injury before more conservative treatments had been

provided.

The hearing convened on April 6, 2005, at the facilities of the State Office of Administrative Hearings, 300 W. 15th St., Austin, Texas. Neither party challenged the adequacy of notice or jurisdiction. ALJ Katherine L. Smith presided. Rehab 2112 was represented by Michelle Ivey, D. C. Deep East Texas was represented by John Fowler. The record closed the same day with the submission by Rehab 2112 of the CARF¹ entrance requirements for a work hardening program, which is admitted into evidence as Pet. Ex. 2.

II. PARTIES' POSITIONS

In response to the IRO's rationale, Dr. Ivey testified that Claimant had participated in multiple sessions of passive care and active rehabilitation prior to entry into the work hardening program, and that the Commission's Spine Treatment Guideline allowed for work hardening to occur as soon as eight weeks after an injury. Dr. Ivey also testified that at the time Claimant entered the work hardening program she could lift only 20 pounds. And although Claimant was able to lift 30 pounds (the physical demand capacity required by her job) at her FCE on March 11, 2003, she still had deficits that prevented her from meeting some requirements of her job, such as disposing of trash, moving tables, and vacuuming. The deficits included decreased endurance, decreased range of motion (ROM) in her lumbar spine, and decreased ROM in her right knee and right shoulder. Dr. Ivey further testified that, at that time of the March 11 FCE, Claimant still continued to meet the requirements for entry in a CARF-accredited work hardening program, which Rehab 2112 provides.²

The requirements for entrance into a work hardening program are that the injured worker 1) cannot meet the specific tasks of her job, 2) would likely benefit from the program, and 3) did not have medical, behavioral, or psychological issues that prohibited her from participating in the program.

Deep East Texas relies on the findings of the IRO and of a peer reviewer, Charles Herring, D.C., who noted that continued chiropractic care after February 5, 2003, was not medically

¹ Commission of Accreditation of Rehabilitation Facilities.

² Pet. Ex. 1 at 640.

necessary and that Claimant was at maximum medical improvement on March 10, 2003. Deep East Texas argues that Claimant's low levels of pain at the start of the program and throughout the program indicate that such an intensive program was unnecessary. Deep East Texas also argues that there was no evidence that Claimant was so de-conditioned and required psychological treatment in such a short amount of time after the onset of her injury(s).³

In response, Dr. Ivey testified that CARF does not require that there be a psychological evaluation for entrance into a program, but only that there be no psychological issues prohibiting the injured worker from participating in a program. Dr. Ivey testified further that an FCE performed on April 4, 2003, showed that Claimant would continue to benefit from the program because she still had limitations, even though the ROM in her lower back, right knee, and right shoulder was better. She noted further that at the end of the program Claimant was returned to work without restrictions.

III. 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 and intended to address the functional, physical, behavioral, and vocational needs of the injured worker.⁴ The Commission adopted rules governing work hardening programs. The rules, found in the Spine Treatment Guideline (STG)⁵ and MFG, address when work hardening is appropriate.

Dr. Ivey's testimony that Claimant had participated in multiple sessions of passive care and active rehabilitation prior to entry into the work hardening program was not controverted. In addition, the medical records indicate that prior care was provided. Dr. Ivey is also correct that the STG allows for work hardening to be provided during the intermediate phase of care after an initial phase of care of up to eight weeks.⁶ In this case, work hardening was initiated 10 weeks after the

³ Res. Ex. 3.

⁴ Medical Fee Guideline (MFG) Medicine Ground Rule II.E. at 28 TEX. ADMIN. CODE (TAC) § 134.201.

⁵ 28 TAC § 134.1001.

⁶ 28 TAC § 134.1001(g)(7)(A) & (B).

date of injury. Dr. Ivey also correctly states that CARF does not require that there be a psychological evaluation for entrance to the program.⁷ Neither does the STG. The STG only suggests that during the intermediate phase of care a mental health evaluation to identify psychosocial barriers, or the need for behavioral pain management may be appropriate, and that a clinical indicator may include evidence of mental health/psychological barriers impeding progress.⁸ In addition, the MFG suggests only that an initial mental health evaluation to determine the injured worker's readiness for the program may be performed.⁹ As for whether an injured worker needs to be so deconditioned to qualify for work hardening as Deep East Texas argues, the STG only notes that treatment during the intermediate phase of care is designed to prevent chronic disability, occurring because of progressive deconditioning and development of psychosocial barriers to return to work.¹⁰

In addition to the above, however, STG Ground rule (e)(2)(A) provides that treatment of a work-related injury must be:

- a. adequately documented;
- b. evaluated for effectiveness and modified based on clinical changes;
- c. provided in the most appropriate, least intensive setting;
- d. cost effective;
- e. consistent with this guideline which may include providing a documented clinical rationale for deviation from this guideline;
- f. objectively measured and demonstrated functional gains; and
- g. consistent in demonstrating ongoing progress in the recovery process by appropriate re-evaluation of the treatment.

And according to STG Ground rule (e)(2)(D), documentation should justify the continuation of therapy.

As the IRO noted, the FCE of March 10-11, 2005, indicates that the Claimant was able to lift 30 pounds, which met the physical demand category of her job. Yet her deficits at that time

⁷ Pet. Ex. 2.

⁸ 28 TAC § 134.1001(g)(7)(B).

⁹ MFG Medicine Ground Rule II.E.2.a.

¹⁰ 28 TAC § 134.1001(g)(7)(B).

included lack of endurance, decreased lumbar ROM, and decreased right shoulder ROM.¹¹ Furthermore, the records of the following third week of treatment show that as the amount of pounds to be lifted increased, so did Claimant's level of pain, which reached a five out of 10 on March 12, 2003, after she lifted 27 pounds on March 10, 2003.¹² During the following fourth week of treatment, Claimant's pain level hovered around five and six out of 10.¹³ During the fifth and sixth weeks of treatment, however, her pain level dropped to two out of 10.¹⁴ And during the sixth week, Claimant was consistently lifting 30 pounds and pulling 35 pounds at her functional work exercises.¹⁵ At this point, a more rigorous re-evaluation and justification for continued treatment would have been expected, but that did not occur. Subsequent daily notes indicate that much of the same treatment continued, but additional progress was limited. Furthermore, the final FCE of April 24 indicates that the ROM in Claimant's right knee actually decreased from the April 4 FCE.¹⁶

Based on the above, the ALJ concludes that Rehab 2112 proved that the work hardening provided from March 19 to April 4, 2003, was medically necessary, but the remainder of the work hardening treatments were not.

IV. FINDINGS OF FACT

1. On ____, Claimant ____ sustained a work-related injury to her lower back, right shoulder, and right knee as a result of her custodial work activities.
2. On the date of injury, the Claimant's employer was a school district that participates in the Deep East Texas Self Insurance Fund (Deep East Texas).
3. Rehab 2112 provided work hardening services to the Claimant from February 24 to April 22, 2003, for which it sought reimbursement.

¹¹ Pet. Ex. 1 at 315.

¹² Pet. Ex. 1 at 191, 194.

¹³ Pet. Ex. 1 at 169, 172, 176, 179.

¹⁴ Pet. Ex. 1 at 141, 144, 147, 150, 154, 157, 160, 163.

¹⁵ Pet. Ex. 1 at 144, 147, 150.

¹⁶ Pet. Ex. 1 at 284, 296-97.

4. Deep East Texas denied reimbursement for the work hardening provided from March 19 to April 22, 2003.
5. Rehab 2112 filed a request for medical dispute resolution with the Texas Workers' Compensation Commission (Commission).
6. An independent review organization (IRO) reviewed the medical dispute and found the work hardening was not medically necessary.
7. Based on the IRO's findings, the Commission's Medical Review Division (MRD) declined to order Deep East Texas to reimburse Rehab 2112 for the work hardening in dispute.
8. Rehab 2112 requested a contested-case hearing by a State Office of Administrative Hearings (SOAH) Administrative Law Judge (ALJ).
9. On July 23, 2004, the Commission issued the notice of the hearing, which stated the date, time, and location of the hearing and cited to the statutes and rules involved, and which provided a short, plain statement of the factual matters asserted.
10. The hearing was held on April 6, 2005, at 300 W. 15th St., Austin, Texas.
11. Claimant participated in multiple sessions of passive care and active rehabilitation prior to entry into the work hardening program.
12. The requirements for entrance into a CARF-accredited work hardening program are that the injured worker 1) cannot meet the specific tasks of her job, 2) would likely benefit from the program, and 3) did not have medical, behavioral, or psychological issues that prohibited her from participating in the program.
13. CARF does not require that there be a psychological evaluation before entrance into a work hardening program, but only requires that there be no psychological issues prohibiting the injured worker from participating in the program.
14. Claimant did not have any psychological issues that prohibited her from participating in the program.
15. Rehab 2112 is CARF-accredited.
16. The Claimant started work hardening 10 weeks after the date of her injury.
17. When Claimant entered the work hardening program she could lift only 20 pounds.
18. Although Claimant was able to lift 30 pounds (the physical demand capacity required by her job) at her functional capacity evaluation (FCE) of March 11, 2003, she still had deficits that

prevented her from meeting some requirements of her job, such as disposing of trash, moving tables, and vacuuming. The deficits included decreased endurance, decreased range of motion (ROM) in her lumbar spine, and decreased ROM in her right knee and right shoulder.

19. Claimant had increased levels of pain during the third, fourth, and fifth weeks of treatment as the number of pounds that she had to lift were increased.
20. During the fifth and sixth weeks of treatment, Claimant's level of pain decreased to a two out of 10. During the sixth week of treatment Claimant was consistently lifting 30 pounds and pulling 35 pounds during her functional work exercises.
21. Rehab 2112 failed to re-evaluate the work hardening treatment for effectiveness, need, and continued progress, before providing two additional weeks of work hardening, after the sixth week of treatment.
22. Much of the treatments provided during the seventh and eight week of treatment were the same as before. Claimant made only limited, continued progress during the seventh and eighth weeks of treatment, and the ROM in her right knee decreased during that time.

V. 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, pursuant to TEX. LABOR CODE ANN. §§ 402.073(b) and 413.031(k) and TEX. GOV'T CODE ANN. ch. 2003.
2. Rehab 2112 timely filed a notice of appeal of the independent review organization decision, as specified in 28 TEX. ADMIN. CODE (TAC) § 148.3.
3. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052 and 28 TAC 148.4(b).
4. Rehab 2112 had the burden of proving the case by a preponderance of the evidence, pursuant to 28 TAC § 148.21(h) and (i).
5. The Commission's Spine Treatment Guideline allows for work hardening to be provided after the initial phase of care of up to eight weeks. 28 TAC § 134.1001(g)(7)(A) & (B).
6. Enrollment in a work hardening program was reasonably required health care under TEX. LAB. CODE ANN. § 408.021.
7. Rehab 2112 failed to prove that Claimant's medical needs were being addressed by continuing the work hardening past April 4, 2003. 28 TAC § 134.1001(e)(2)(A) & (D).

8. Based on the foregoing Findings of Fact and Conclusions of Law, Rehab 2112 is entitled to reimbursement for the work hardening program provided from March 19 to April 4, 2003, but not for the work hardening provided from April 7 to April 22, 2003.

9. Based on the above Findings of Fact and Conclusions of Law, Rehab 2112's request to be reimbursed by Deep East Texas for the work hardening program that it provided to the Claimant from March 19 to April 4, 2003, should be granted.

ORDER

IT IS ORDERED THAT Rehab 2112's request to be reimbursed by Deep East Texas for the work hardening program that it provided to the Claimant from March 19 to April 4, 2003, is granted, but that its request to be reimbursed for work hardening provided from April 7 to 22, 2003, is denied.

Signed June 2, 2005.

**KATHERINE L. SMITH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**