

**SOAH DOCKET NO. 453-05-0939.M5  
TWCC MR NO. M5-04-3096-01**

**GABRIEL R. GUTIERREZ, D.C.,  
Petitioner**

**V.**

**FIDELITY & GUARANTY INSURANCE  
COMPANY,  
Respondent**

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**BEFORE THE STATE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Gabriel Gutierrez, D.C. (Petitioner) appealed the decision of the Texas Workers' Compensation Commission (TWCC),<sup>1</sup> designee, an Independent Review Organization (IRO), which denied his request for reimbursement for a work hardening program (WHP) provided from May 28, 2003, through July 9, 2003, as not medically necessary. The Administrative Law Judge (ALJ) concludes that Petitioner met his burden to show, by a preponderance of the evidence, that the WHP was medically necessary and, accordingly, Fidelity & Guaranty Insurance Company (Respondent) should reimburse Petitioner for the WHP.

**I. PROCEDURAL HISTORY**

A hearing convened in this case on August 8, 2005, before ALJ Ami L. Larson at the State Office of Administrative Hearings (SOAH), Austin, Texas. There were no objections to notice or jurisdiction, therefore, those issues are addressed in the findings of fact and conclusions of law. Petitioner appeared at the hearing by telephone and was represented by attorney Phillip J. Orth, who also appeared by phone. Respondent was represented by attorney Christine B. Karcher, who appeared by phone as well. The record was left open until September 19, 2005, at which time it closed following the submission of post-hearing written closing arguments from both parties.

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<sup>1</sup> Effective September 1, 2005, the functions of the TWCC have been transferred to the newly created Division of Workers' Compensation at the Texas Department of Insurance.

## II. DISCUSSION

### A. Factual Background

On \_\_\_\_, Claimant was injured while lifting a large television set during the course of his employment as an in/out manager at \_\_\_\_\_. He responded to the emergency room that day and X-rays taken of his back were normal. On September 5, 2002, Claimant saw Bradford A. Urquhart, M.D., who diagnosed Claimant with a lumbrosacral sprain with a suggestion of a disc problem for which Dr. Urquhart prescribed several medications. On October 10, 2002, Claimant was placed on light duty work, although his normal job duties were classified as heavy. Claimant's pain returned when he performed the lifting tasks required by his job, and he was taken off work and referred for an MRI by Rex A.W. Marco, M.D., an orthopedist. On November 1, 2002, an MRI was conducted, which revealed desiccation at L4-5 with a 3mm central disc herniation and some spiral history. On November 13, 2002, Claimant was referred by Dr. Marco to physical therapy, which was performed by Todd Bear, D.C., from December 2, 2002, through April 21, 2003.<sup>2</sup> Claimant also received lumbar epidural steroid injections on January 30, March 6, and April 10, 2003. Dr. Marco then prescribed a work hardening program for Claimant, which was implemented by Petitioner from May 12, 2003, through July 9, 2003,<sup>3</sup> following an initial Functional Capacity Evaluation (FCE), psychological evaluation, and vocational evaluation. An additional FCE was performed on July 10, 2003, which indicated that Claimant had resumed the functional capacity to return to work and to meet the heavy workload demands of his job. Claimant then returned to work at his original job with some restrictions that were accommodated by his employer.

### B. Legal Standards

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<sup>2</sup> Although there are no physical therapy records in evidence, Respondent's Exhibit 5 refers to physical therapy treatment notes by Dr. Bear on the dates indicated above from which the ALJ infers that physical therapy was administered to Claimant on those dates.

<sup>3</sup> The Medical Review Division ruled, and the parties stipulated, that the dates of service from May 12, 2003, through May 16, 2003, were not timely filed. Therefore, the only dates of disputed services being considered in this case are May 28, 2003, through July 9, 2003.

Employees have a right to necessary health care under TEX. LABOR CODE ANN. §§ 408.021 and 401.011. Section 408.021(a) provides, “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.” Section 401.011(19) of the Labor Code provides that health care includes "all reasonable and necessary medical . . . services."

As Appellant, Petitioner had the burden of proof as to all contested issues.<sup>4</sup>

### III. ANALYSIS

The only issue in this case is whether the WHP, implemented during the dates of disputed services, was medically necessary for Claimant. Work hardening is an individualized, highly structured, goal-oriented treatment program designed to maximize the ability of an injured worker to return to work. Work hardening programs are interdisciplinary, and are intended to address the functional, physical, behavioral, and vocational needs of participants. Both TWCC and the Commission on Accreditation of Rehabilitation Facilities (CARF) set forth guidelines for use in determining the appropriateness of a WHP for potential patients.<sup>5</sup>

In this case, Dr. Marco prescribed the WHP for Claimant. In order to determine the appropriateness of the program for Claimant, Petitioner performed not only an FCE, but also a

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<sup>4</sup> 1 TEX. ADMIN. CODE (TAC) § 155.41(b); 28 TAC § 148.14.

<sup>5</sup> The TWCC 1996 Medical Fee Guidelines are no longer in effect, however they remain instructive in determining the purpose of and criteria for entrance into a WHP. These guidelines specify admission criteria that enable a WHP to admit: (a) persons who are likely to benefit from the program; (b) persons whose current level of functioning due to illness or injury interferes with their ability to carry out specific identifiable tasks required in the workplace; (c) persons whose medical, psychological, or other conditions do not prohibit participation in the program; and (d) persons who are capable of attaining specific employment upon completion of the program. 1996 TWCC Medical Fee Guidelines, pages 37-38.

The CARF guidelines for admission into a WHP are similar to those enumerated by TWCC, but also require documented evidence of recent medical status to include consideration of a variety of factors including behavioral, cognitive, and musculoskeletal status, as well as vocational, safety, reasonable accommodation, and work capacity issues. The CARF guidelines make clear that no specific tests are required in order to gather the required information. CARF guidelines, Section 2. ORP pages 298-300.

vocational assessment and psychological evaluation. The results of each of these pre-screening evaluations demonstrated the appropriateness of a WHP for Claimant pursuant to the TWCC and CARF guidelines.<sup>6</sup> Moreover, the weekly progress notes from Claimant's participation in the WHP show that the program provided was multi-disciplinary, individualized, and specifically tailored to return Claimant to his prior job. The progress notes further demonstrate that Claimant was participating and making progress in the program.<sup>7</sup>

Ideally, Petitioner would have submitted more detailed and comprehensive records regarding Claimant's prior treatment history in order to show all previous attempts to treat Claimant's injury by less intensive and less expensive means prior to his entrance into the WHP. There is, however, sufficient evidence in the record to show, by a preponderance of the evidence, that Claimant had the following treatments and diagnostic procedures before being referred for work hardening: X-ray, MRI, medication therapy, several months of physical therapy, and three epidural steroid injections. The evidence further shows that, notwithstanding nine months of prior treatment, Claimant's pain continued and he was unable to return to work.<sup>8</sup>

Petitioner testified that the WHP prescribed was more appropriate and likely to be more effective for Claimant than a work conditioning program<sup>9</sup> since Claimant had already participated in physical therapy for more than four months, yet continued to have barriers that prevented him from returning to work, including behavioral barriers amenable to treatment through a WHP. Petitioner asserted that, in light of Claimant's treatment history, continuation of a single disciplinary approach such as work conditioning would probably not have been effective in returning Claimant to work. Perhaps the most persuasive evidence regarding the medical reasonableness and necessity of the WHP, however, is the admission by Respondent's witness, Timothy John Fahey, D.C., that Claimant

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<sup>6</sup> There is a discrepancy between the written psychological evaluation report (Respondent's Exhibit 7, page MD0046), which stated that Claimant was within the normal range for depression, and the testimony of Monie Smith, which indicated that Claimant suffered from mild depression. Even without any depression, however, Claimant would still qualify for the WHP at issue based upon his moderate anxiety and continued inability to return to work notwithstanding less intensive treatment options implemented over a nine-month period.

<sup>7</sup> Respondent's Exhibit 7.

<sup>8</sup> Respondent's Exhibit 5.

<sup>9</sup> A less intensive, less expensive, single-discipline level of treatment.

met all the criteria for entrance into a WHP under the TWCC Medical Fee Guidelines. Although the aforementioned guidelines are not particularly specific with respect to the admission criteria they enumerate, they were nonetheless established for the purpose of screening candidates for various forms of tertiary level medical care including work hardening. It was, therefore, reasonable for Petitioner to rely on those and the CARF guidelines to determine that work hardening was appropriate for Claimant.

Accordingly, the undersigned ALJ concludes that Petitioner has proved, by a preponderance of the evidence, that the WHP was medically necessary for Claimant and, therefore, Respondent shall reimburse Petitioner for the cost of the WHP services provided to Claimant from May 28 through July 9, 2003.

### **III. FINDINGS OF FACT**

1. Claimant suffered a work-related injury to his lower back on \_\_\_\_, when stepped down while lifting a large television set during the course of his job as an in/out manager at \_\_\_\_.
2. Claimant presented to emergency room the day of the injury and X-rays taken of his back were normal.
3. On September 5, 2002, Claimant saw Bradford A. Urquhart, M.D., who diagnosed Claimant with a lumbrosacral sprain with a suggestion of a disc problem and prescribed several medications.
4. On October 10, 2002, Claimant was placed on light duty work, although his normal job duties were classified as heavy.
5. Claimant's pain returned when he performed the lifting tasks required by his job and he was taken off work.
6. On November 1, 2002, an MRI of Claimant's back was conducted, which revealed desiccation at L4-5 with a 3mm central disc herniation and some spiral history.
7. On November 13, 2002, Claimant was referred by Rex A.W. Marco, M.D., an orthopedist, to physical therapy, which was performed by Todd Bear, D.C., from December 2, 2002, through April 21, 2003.
8. On January 30, March 6, and April 10, 2003, Claimant was given lumbar epidural steroid injections.

9. In May, 2003, Dr. Marco prescribed a work hardening program (WHP) for Claimant, who was still unable to work.
10. Functional capacity , vocational, and psychological evaluations of Claimant were performed prior to his admission into the WHP in order to determine his specific needs and eligibility for the WHP.
11. Prior to entering the WHP, Claimant was only functionally capable of performing a light duty workload.
12. Claimant suffered from moderate anxiety.
13. Claimant met all the admission criteria for entrance into the WHP under both the 1996 Texas Workers' Compensation Commission (TWCC) Medical Fee and Commission on Accreditation of Rehabilitation Facilities guidelines.
14. Claimant's job required a heavy demand workload.
15. Prior to beginning the WHP, Claimant had undergone single disciplinary treatments including medication, physical therapy and steroid injections, but was still unable to return to work nine months post-injury.
16. Severe mental health problems are not a prerequisite for admission into a WHP, but rather may prevent admission to such a program.
17. On July 10, 2003, following completion of the WHP, a functional capacity evaluation was conducted, which indicated that Claimant's functioning had substantially improved to the medium heavy level and he was released to return to work at his prior job with some restrictions.
18. On August 9, 2004, the Medical Review Division (MRD) of the TWCC issued a decision adopting an Independent Review Organization's (IRO) denial of reimbursement for the WHP.
19. Provider timely appealed the MRD decision.
20. The TWCC sent notice of the hearing to the parties on October 21, 2004. The hearing notice informed the parties of the matters to be determined, the right to appear and be represented, the time and place of the hearing, and the statutes and rules involved.

#### **IV. CONCLUSIONS OF LAW**

1. 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 TEX. LAB. CODE ANN. § 413.031(k) and TEX. GOV'T. CODE ANN. ch. 2003.
2. Notice of the hearing was proper and timely effected on the parties. TEX. GOV'T. CODE ANN. §§ 2001.051 and 2001.052.
3. Petitioner timely filed notice of appeal of the MRD decision, as specified in 28 TEX. ADMIN. CODE (TAC) § 148.3.
4. Petitioner had the burden of proving by a preponderance of the evidence that the disputed work hardening program provided to Claimant between May 28, 2003 and July 9, 2003, was medically necessary for Claimant. 1 TAC § 155.41; 28 TAC § 148.14
5. Petitioner met his burden of proof to show that the WHP provided during the dates of disputed services was medically necessary for Claimant.
6. Based on the foregoing Findings of Fact and Conclusions of Law, Petitioner's claim should be reimbursed.

#### **ORDER**

**IT IS THEREFORE ORDERED** that Fidelity and Guaranty Insurance Company reimburse Gabriel Gutierrez, D.C., for the disputed the work hardening program services provided to Claimant from May 28, 2003, through July 9, 2003.

**SIGNED October 12, 2005.**

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**AMI L. LARSON  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS**