

**DOCKET NO. 453-05-2075.M5  
TWCC MR NO. M5B04-2353-01**

<b>HARTFORD UNDERWRITERS INSURANCE COMPANY,</b>	:	<b>BEFORE THE STATE OFFICE</b>
<b>Petitioner</b>	:	
<b>V.</b>	:	<b>OF</b>
<b>NORTH TEXAS REHABILITATION CENTER,</b>	:	<b>ADMINISTRATIVE HEARINGS</b>
<b>Respondent</b>	:	

**DECISION AND ORDER**

Hartford Underwriters Insurance Company (Carrier) challenges the findings and decision of the Medical Review Division (MRD) of the Texas Workers' Compensation Commission (the Commission)<sup>1</sup> ordering Carrier to pay Respondent, North Texas Rehabilitation Center (Provider), for the following services: (1) work hardening on dates of service April 7 - 25, 2003; (2) a functional capacity evaluation (FCE) performed April 25, 2003; and (3) \$1280 for CPT Codes 97545 and 97546 (work hardening) for dates of service March 31, 2003 through April 4, 2003.<sup>2</sup> Based on Provider's deemed admission that work hardening was not reasonable and medically necessary to treat Claimant's compensable injury, and based also on Provider's failure to participate in the hearing, the Administrative Law Judge (ALJ) finds Provider is not entitled to reimbursement for any of the dates of service at issue.

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

<sup>2</sup> The Carrier denied payment for dates of service April 7 - 25, 2003, on the basis of medical necessity; however, an Independent Review Organization (IRO) determined work hardening April 7 - 25, 2003 to be medically necessary. (The IRO did not expressly address whether the April 25, 2003 FCE was medically necessary.) The Carrier made half payment for CPT Codes 97545 (first two hours of work hardening session) and 97546 (additional hours of work hardening session) for dates of service March 31 - April 4, 2003, and conducted an onsite audit. According to the MRD's Findings and Decision, because the Carrier's audit was "well beyond the 45 day timeframe [*sic*]" and it did not document the basis for denial of additional payment, the MRD did not consider the medical necessity of the services; instead, the MRD simply ordered reimbursement of \$1280, on the apparent theory that Carrier had waived the right to challenge the charges on the basis of medical necessity.

## I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

ALJ Renee M. Rusch convened the hearing in this matter on August 3, 2005. The Carrier was represented by James Loughlin. Provider did not appear and was not represented at the hearing. Notice of the hearing had been properly mailed to the parties on December 8, 2004, and notice of the continuance of the hearing to August 3, 2005, was properly provided in an order dated March 23, 2005.<sup>3</sup> The hearing concluded on August 3, 2005, and the record closed on August 5, 2005.

## II. BASIS FOR DECISION

### A. Background Information

On \_\_\_\_\_, workers' compensation claimant \_\_\_\_\_ ("Claimant") suffered a compensable injury to his mid-back when he was struck by a commercial grass mower. He experienced pain in the areas of his right ribs and thoracic spine. (Carrier Ex. 3 at 4-5.) His diagnosis is not documented consistently in the record, but the Carrier's expert witness, Samuel Bierner, M.D., testified that the objective evidence indicates Claimant suffered a mild thoracic contusion of the right ribs and back. Claimant entered a five-week work hardening program on March 24, 2003, at a time when, according to Provider's records, he fell approximately ten pounds short of meeting what Provider considered to be the lifting requirements of his job.<sup>4</sup> The primary issue in this proceeding is the medical necessity of the work hardening program.

### B. Work Hardening

#### 1. Dates of Service April 7 - 25, 2003

In preparing for the hearing, the Carrier submitted discovery requests to Provider on April 19, 2005. These included a Request for Admission pursuant to 1 TEX. ADMIN. CODE § 155.31(d)(2). This request asked Provider to admit that the disputed work hardening program was not reasonable and

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<sup>3</sup> Notice of hearing was sent to Provider at 5101 Ross Avenue, Dallas, Texas 75206. On March 21, 2005, Provider joined Carrier in an agreed motion to continue the hearing to August 3, 2005, or August 17, 2005. In an order dated March 23, 2005, SOAH ALJ Gary Elkins reset the hearing for 1:30 p.m. on August 3, 2005, one of the dates the parties had requested. As recently as July 13, 2005, Provider agreed that Carrier's expert witness might appear by telephone at the hearing on August 3, 2005.

<sup>4</sup> The record does not indicate the actual requirements of Claimant's job. It appears Provider based its assessment on information it obtained from an online equivalent of what used to be called the *Dictionary of Occupational Titles*. The record does not reflect the particular job in the *Dictionary of Occupational Titles* that Provider considered comparable to Claimant's actual job.

medically necessary to treat Claimant's compensable injury. Provider failed to respond or object to the Request for Admission. Accordingly, lack of medical necessity is automatically deemed admitted and conclusively established pursuant to 1 TEX. ADMIN. CODE § 155.31(d)(2).

Certainly, the Carrier's request for admission was quite broad; it might, in appropriate circumstances, have been set aside in the interest of justice. But in the absence of a timely motion to withdraw the admission, and in view of Provider's lack of participation in the hearing, the admission must stand. Accordingly, the work hardening sessions provided April 7 - 25, 2003, are deemed not reasonable and medically necessary, and Carrier is not required to reimburse Provider for those services.<sup>5</sup>

2. \$1280 (Remaining 50 Percent) for Dates of Service March 31 - April 4, 2003

The Carrier paid 50 percent of Provider's charges for dates of service March 31 - April 4, 2003, and conducted an onsite audit. The MRD ordered Carrier to reimburse the remaining \$1280 Provider billed for these services because, according to the MRD, the Carrier's onsite audit was completed "well beyond the 45 day timeframe [*sic*]" and did not document the basis for denial of additional payment. Although the MRD did not identify the precise statute or rule containing the 45-day deadline on which it relied, the ALJ assumes the MRD was relying on the time frames for paying final bills that are set forth IN TEX. LABOR CODE §408.027(a) and the Commission's rules regarding Carrier audits found at 28 TEX. ADMIN. CODE (TAC) §§ 133.301-133.304.

Pursuant to TEX. LABOR CODE §408.027(a), a carrier is required to pay a provider's fee within 45 days of receiving the provider's statement, unless the carrier disputes the amount of the payment or the provider's entitlement to payment. Similarly, Rule 133.304 provides in relevant part:

[A]n insurance carrier shall take final action on a medical bill not later than the 45<sup>th</sup> day after the insurance carrier receives a completed medical bill. 28 TAC § 133.304(a).

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<sup>5</sup> At the hearing, the ALJ did not decide the question of whether Carrier's RFA should be deemed admitted; instead, she took the matter under submission. Therefore, Carrier also proved up its case with documentary evidence and the testimony of an expert witness, Samuel Bierner, M.D. Independent of Provider's deemed admission, Dr. Bierner's testimony established that work hardening, which is a multidisciplinary program comprising mental health evaluation and treatment, work simulation, and physical therapy, did not constitute reasonable and medically necessary treatment for Claimant's compensable injury.

Rule 133.303 sets forth procedures for onsite audits, and Rule 133.304 provides the following timetables:

If, on the 45th day after the date of receipt of a complete bill, the insurance carrier has notified a health care provider of its intent to perform an onsite audit in accordance with §133.302 of this title (relating to Preparation for an Onsite Audit), and the insurance carrier has not completed the audit in accordance with §133.303 of this title (relating to Onsite Audits), the insurance carrier shall pay no less than 50% of the maximum allowable reimbursement amounts provided by the Commission fee guidelines in effect for the dates of service being audited or 50% of the amount billed for treatment(s) and/or service(s) without an established maximum allowable reimbursement, and shall include the explanation of benefits with the payment. 28 TAC §133.304(d)

Within seven days of completing an onsite audit performed in accordance with §133.303, the insurance carrier shall take final action on the bill, consistent with the results of the audit. 28 TAC § 133.304(e).

The apparent purpose of the statute and rules is to require insurance carriers to make prompt decisions. Neither the statute nor pertinent rules, however, state the consequences of noncompliance. The Texas Supreme Court has stated that the *Texas Register* contains the best indication of the Commission's intent. *Rodriguez v. Service Lloyds Ins. Co.*, 997 S.W.2d 248, 254 (Tex. 1999), citing TEX. GOV'T CODE §§ 2001.023 - 2001.030. In the adoption preamble to Rules 133.301 *et seq.*, the Commission stated:

[A]n insurance carrier that does not pay or deny medical bills is out of compliance with these rules, which is an issue for the Division of Compliance & Practices to review. *The Commission will not deem that services are medically reasonable and necessary based only on the insurance carrier's failure to process a bill timely. The Medical Review Division does not have the authority to order payment of medical bills without review of the actual medical necessity of the services.* 25 TEX. REG. 2127 - 2128. [Emphasis added.]

Medical necessity is the fundamental basis for reimbursement under the Texas Workers' Compensation Act ("Act"). The Act provides that an injured employee is entitled to all *reasonable and necessary* medical treatment and services required by the nature of the compensable injury.<sup>6</sup> A

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TEX. LAB. CODE ANN. §§ 408.021 and 401.011(19).

carrier who fails to timely document the basis for denying payment for disputed services may be out of compliance with Commission rules, but it has not necessarily waived its right to challenge services that are not medically necessary. To allow a different result seems contrary to legislative intent. Where, as here, a carrier raises a credible question about the medical necessity of disputed services, the medical necessity of the services should be considered.<sup>7</sup>

For these reasons, the ALJ concludes that SOAH has the authority to review the medical necessity of the work hardening services provided March 31 - April 4, 2003. As discussed in Section II.B.1, Provider is deemed to have admitted that those services were not reasonable and medically necessary. Therefore, the ALJ concludes Provider is not entitled to reimbursement for them.

### **C. Functional Capacity Evaluation (FCE) Performed April 25, 2003**

The FCE was administered at the conclusion of the work hardening program, presumably to assess Claimant's progress in the program.<sup>8</sup> If the work hardening program itself was not reasonable and medically necessary (as determined in Section II.B), it follows that an FCE performed to measure the results of the program was also not reasonable and medically necessary. The ALJ concludes, therefore, that the Carrier is not required to reimburse Provider for this FCE.

## **III. FINDINGS OF FACT**

1. On \_\_\_\_\_, \_\_\_\_ (Claimant) suffered compensable injuries to his right ribs and mid-back when he was struck by a commercial lawn mower.
2. At the time of Claimant's injury, his employer held workers' compensation insurance coverage through Hartford Underwriters Insurance Company (Carrier).
3. On March 24, 2003, Claimant entered a five-week work hardening program provided by North Texas Rehabilitation Center (Provider).

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*See* SOAH Docket No. 453-03-4396.M5 (ALJ Lynch, April 2004); SOAH Docket No. 453-02-2320.M5 (ALJ Kilgore, October 2002); SOAH Docket No. 453-02-0996.M5, Order Denying Motion for Summary Disposition (ALJ Casarez, May 2002).

<sup>8</sup> The ALJ recognizes that an FCE can be performed for other reasons; however, no evidence was introduced indicating precisely why this FCE was performed. Although the IRO found that physical performance testing performed on April 10, 2003, was not medically necessary, the IRO did not address the purpose or medical necessity of the April 25, 2003 FCE.

4. Carrier denied payment for work hardening April 7 - 25, 2003, and a functional capacity evaluation (FCE) performed April 25, 2003, on the basis of medical necessity.
5. Carrier paid 50 percent of Provider's charges for work hardening March 31 - April 4, 2003, and conducted an onsite audit.
6. Provider requested Medical Dispute Resolution at the Medical Review Division of the Texas Workers' Compensation Commission (Commission). The MRD referred a portion of the dispute to an Independent Review Organization (IRO).
7. The IRO found that the work hardening provided April 7 - 25, 2003, was medically necessary.
8. The Commission's MRD ruled that Carrier could not challenge the medical necessity of the services provided March 31 - April 4, 2003, because it did not timely conclude and report the results of its onsite audit.
9. Carrier timely requested a hearing before the State Office of Administrative Hearings (SOAH).
10. Carrier submitted discovery requests to Provider April 19, 2005, including a Request for Admission, pursuant to 1 TEX. ADMIN. CODE § 155.31(d)(2). This request asked Provider to admit that the work hardening services were not reasonable and medically necessary to treat Claimant's compensable injury.
11. Provider failed to respond or object to the Request for Admission.
12. Provider did not request permission to withdraw the deemed admission that work hardening was not reasonable and medically necessary.
13. Notice of the SOAH hearing was sent to the parties on December 8, 2004. The notice informed the parties of the date, time, and location of the hearing, a statement of the matters to be considered, the legal authority under which the hearing would be held, and the statutory provisions applicable to the matters to be considered.
14. By order dated March 23, 2005, the parties were notified that the hearing was continued to August 3, 2005.
15. The SOAH hearing convened on August 3, 2005. Carrier appeared through counsel. Provider did not appear and was not represented at the hearing. The record closed on August 5, 2005.

#### IV. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Section 413.031 of the Texas Workers' Compensation Act (the Act), TEX. LAB. CODE ANN. ch. 401 *et seq.*
2. SOAH has jurisdiction over this proceeding, including the authority to issue a decision and order, pursuant to TEX. LAB. CODE ANN. § 413.031(d) and TEX. GOV'T CODE ANN. ch. 2003.
3. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. §§2001.051 and 2001.052.
4. As Petitioner, Carrier has the burden of proof in this matter. 28 TEX. ADMIN. CODE §148.21(h).
5. Based on Provider's deemed admission, it is conclusively established that the services at issue were not reasonable and medically necessary. 1 TEX. ADMIN. CODE § 155.31(d)(2).
6. Medical necessity is the fundamental basis for reimbursement under the Act. TEX. LAB. CODE ANN. §§ 408.021 and 401.011(19).
7. A carrier who fails to timely document the basis for denying payment for disputed services may be out of compliance with Commission rules, but it has not necessarily waived its right to challenge services that are not reasonable and medically necessary. 25 TEX. REG. 2127 - 2128.
8. Carrier did not waive its right to challenge the medical necessity of the services at issue by not timely concluding and reporting the results of its onsite audit. 25 TEX. REG. 2127 - 2128.
9. Provider is not entitled to reimbursement for the services at issue in this proceeding.

#### **ORDER**

**IT IS ORDERED** that Provider's request for reimbursement for services provided Claimant from March 31 through April 25, 2003, is hereby denied.

**Signed September 14, 2005.**

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**RENEE M. RUSCH**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**