

**LIBERTY MUTUAL INSURANCE
COMPANY,
Petitioner**

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BEFORE THE STATE OFFICE

OF

V.

**MAIN REHAB & DIAGNOSTIC,
Respondent**

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

I. INTRODUCTION

Liberty Mutual Insurance Company (Carrier) appealed two Independent Review Organization (IRO) decisions that determined work hardening therapy from June 23, 2003, to August 6, 2003, and an office visit on November 5, 2003, were medically reasonable and necessary for a workers' compensation claimant. As reflected in the Findings of Fact and Conclusions of Law, this decision grants the Carrier's appeal as to work hardening services provided after July 17, 2003, but requires payment for services provided from June 23 to July 17, 2003, and for the office visit on November 5, 2003.

The hearing convened on April 19, 2005, at the State Office of Administrative Hearings, William P. Clements Building, 300 West 15th Street, 4th Floor, Austin, Texas, before the undersigned Administrative Law Judge (ALJ). Attorney Charlotte Salter represented the Carrier, and attorney Scott Hilliard represented Main Rehab & Diagnostic, the Provider. The hearing concluded and the record closed the same day.

II. ARGUMENTS

The Carrier argued that the claimant, who was performing at a below-sedentary level and had severe pain and depressive mental disorders related to his injury, was neither physically nor emotionally an appropriate candidate for work hardening. According to the Carrier, work hardening is designed to move persons back into the work force, and because of the claimant's poor condition,

he was not ready for the transition. After a week of work hardening, when the claimant reported excruciating pain, it should have been clear to the Provider that the program should have been stopped, the Carrier argued. As noted by the Carrier and its witness, orthopedic surgeon Benzel C. MacMaster, M.D., the claimant was not able to return to work after completing the program, and instead, was referred for chronic pain management.

The Provider relied on the opinions of the claimant's treating doctor, Robert Bedford, D.C., and the person who oversaw the claimant's work hardening program at the CARF-accredited Provider, Osler Kamath, D.C. Both determined that work hardening was the most appropriate treatment for the claimant. According to the Provider, the multi-disciplinary approach of work hardening was needed to address the claimant's psychological and physical impairments. Further, the claimant was able to complete the program and did show some improvement. As long as it appeared that the claimant might have benefitted from the program in order to return to work in any capacity, the program was reasonable and necessary for him, the Provider concluded.

III. ANALYSIS

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.¹

Although the claimant's progress was not dramatic, he experienced some progress as reflected on the functional capacity evaluations (FCEs) made on June 9, June 30, and July 24, 2003.² Further, in spite of the pain the claimant experienced throughout the program and his psycho-social issues, he was able participate and complete each day of the program. Thus, the ALJ finds that the program was of sufficient benefit for him until July 17, 2003, to meet the requirements of the Labor Code for reimbursement. On that day, Dr. Bedford, the treating doctor, noted that the claimant had experienced an acute flare-up with low back pain and discomfort associated with muscle spasms and

¹ TEX. LAB. CODE ANN. § 408.021.

radiculopathy 90% of the time; swelling at L1 and L4 on the right and at L2, L3, and L5 bilaterally; and on palpation, moderate pain in some areas and severe pain in others. Dr. Bedford determined that the claimant's prognosis was guarded, and he referred the claimant for a consultation with an orthopaedic specialist to determine whether surgical intervention was needed.

When the treating doctor sought advice as to whether the claimant needed additional back surgery, the work hardening program should have been discontinued. It was then apparent that participation in more working hardening without first determining whether additional surgery was needed would not cure or relieve the claimant from his work-related injury. For these reasons, the ALJ finds that the Carrier's appeal should be granted as to any work hardening sessions provided after July 17, 2003. As for the office visit on November 15, 2003, the ALJ finds that the Carrier did not meet its burden of proving the IRO decision was incorrect.

IV. FINDINGS OF FACT

1. On September 2, 2004, in Texas Workers' Compensation Commission's MRD No. M5-04-3389-01 (SOAH Docket No. 453-05-0856.M5), the Commission's Medical Review Division (MRD) granted the request of Main Rehab & Diagnostic (Provider) for reimbursement after reviewing an Independent Review Organization decision that found work hardening from June 24, 2003, through August 6, 2003, was medically necessary for a workers' compensation claimant.
2. On October 8, 2004, in MRD No. M5-04-2376-01 (SOAH Docket No. 453-05-2976.M5), the MRD granted the Provider's request for reimbursement after reviewing a different Independent Review Organization decision that found work hardening from June 23, 2003, through August 4, 2003, and an office visit on November 5, 2003, were medically necessary for the workers' compensation claimant.
3. In response to both MRD determinations, the Liberty Mutual Insurance Company (Carrier) timely requested hearings before the State Office of Administrative Hearings (SOAH).
4. Notice of the hearing for SOAH Docket No. 453-05-0856.M5 was sent to the parties on October 14, 2004.
5. Notice of the hearing for SOAH Docket No. 453-05-2976.M5 was sent to the parties on December 28, 2004.

6. Both notices 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.
7. A SOAH administrative law judge (ALJ) consolidated the cases on February 1, 2005, and set the hearing for April 19, 2005.
8. The hearing convened as scheduled on April 19, 2005, at the State Office of Administrative Hearings, William P. Clements Building, 300 West 15th Street, Fourth Floor, Austin, Texas, before the undersigned ALJ. Attorney Charlotte Salter represented the Carrier, and attorney Scott Hilliard represented the Provider. The hearing concluded and the record closed the same day.
9. The claimant, ____, was injured on ____ while lifting a heavy object.
10. As reflected in the claimant's pre-surgical MRI, he had multiple disc herniations with nerve root involvement.
11. On January 29, 2002, the claimant underwent a laminectomy and discectomy at L4-L5 on the right.
12. The surgery did not provide relief for the claimant, and he was not able to return to work afterward.
13. Prior to beginning work hardening, the claimant had been treated with surgery, home exercises, physical therapy, medical treatment, medication management, massage therapy, and chiropractic treatment.
14. Conservative management had failed to help the claimant; he continued to have physical deficits and a degree of behavioral impairment that limited his ability to return to any type of work.
15. As reflected in the Provider's June 9, 2003, initial diagnostic screening for the claimant's work hardening, the claimant had:

722.93	Disc Disorder of Lumbar Region
739.3	Segmental Dysfunction, Lumbrosacral Region
782.0	Disturbance of Skin Sensation
728.85	Muscle Spasms
307.89	Pain Disorder Associated with Work-related Injury
311.0	Depressive Disorder with Major Depressive Features Associated with Work-related Injury
16. Work hardening is a highly-structured, goal-oriented, individualized treatment program designed to maximize the ability of persons served and help them return to work.
17. The claimant's treating doctor recommended work hardening for the claimant.

18. When a person functions at a below-sedentary level, that person is unable to perform at the lowest physical demand category defined by the U.S. Department of Labor.
19. Although the claimant's physical demand level on June 9, 2003, was below sedentary, that fact should not have disqualified him from work hardening.
20. Had the claimant been able to develop a medium physical demand level, he may have been able to obtain work at that level.
21. The claimant attended work hardening from June 10, 2003, until August 6, 2003.
22. The Carrier reimbursed the Provider for work hardening sessions on June 10, 11, 12, 13, 18, 19, and 20, 2003.
23. As demonstrated in the claimant's functional capacity evaluations (FCEs), he experienced some objective improvement during work hardening sessions:

Activity	6-9-03 FCE	6-30-03 FCE	7-24-03 FCE
Knuckle Lift	16	20	20
Lift			
Bench	not completed	18	23
Ankle	not completed	29	29
Shoulder	not completed	16	19
Cart Push	9	18	14
Cart Pull			
Push	11	17	14
Shoulder	12	15	15
Pull Shoulder	13	13	13
Reach			
Stooping	not completed	not recorded	52
Kneeling	not completed	not recorded	56
Crouching	not completed	not recorded	55
Forward	33	not recorded	43
Overhead	31	not recorded	36
Standing Work Tolerance			
Walking	74	not recorded	89
Sorting	40	not recorded	51
Total	45	not recorded	56

24. Generally, when suffering intense physical pain, a worker cannot maintain the prolonged physical activity required in a work hardening program.

25. Even though the claimant reported excruciating pain during the work hardening activities of the program, and his performance was limited due to strength, endurance, pain, and bio-mechanics, he progressed in strength, stabilization, range of motion, cardiovascular tasks, functional tasks, and work simulation tasks.
26. The claimant's diagnoses included depressive disorders, but during his group psychotherapy sessions, he exhibited normal mood, affect, mental status with active coping efforts, and no suicide risk.
27. The claimant attended the work hardening program for eight hours on every scheduled day and completed the program.
28. In spite of the claimant's fair-to-poor tolerance to the program and his poor endurance, he was able to complete the following tasks at the work hardening sessions:
 - walk on the treadmill for two 30-minute periods at a speed of 1.5 miles per hour;
 - ride a stationary bike for two 15-minute periods at a speed of 10 miles per hour;
 - use a wobble board;
 - walk on the treadmill backwards for five minutes;
 - perform abdominal crunches;
 - participate in a stretching class for an hour; and
 - perform back exercises while seated.
29. By July 17, 2003, the claimant had experienced an acute flare up with low back pain and discomfort associated with muscle spasms and radiculopathy 90% of the time; swelling at L1 and L4 on the right and at L2, L3, and L5 bilaterally; and on palpation, moderate pain in some areas and severe pain in others.
30. On that date, the claimant's treating doctor referred him for a consultation with an orthopaedic specialist to determine whether additional surgery was needed; the claimant's prognosis was guarded, and it was determined that he may not recover completely.
31. When the treating doctor referred the claimant for orthopaedic consultation, the work hardening program should have been suspended.
32. The November 5, 2003, office visit was consistent with normal evaluation and management services necessary to direct care.

V. CONCLUSIONS OF LAW

1. The Texas Workers' Compensation Commission (the Commission) has jurisdiction over this matter pursuant to Section 413.031 of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. ch. 401 *et seq.*
2. The State Office of Administrative Hearings 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. § 2001.052.
4. The Carrier had the burden of proof in this matter, pursuant to 28 TEX. ADMIN. CODE §148.21(h).
5. Work hardening until July 17, 2003, cured or relieved the effects naturally resulting from the claimant's injury, promoted recovery, or enhanced his ability to return to work or obtain employment.
6. The Carrier failed to meet its burden of proving reimbursement for work hardening sessions from June 23, 2003, through July 17, 2003, is not warranted.
7. Based on the above Conclusions of Law, Carrier's request that Provider not be reimbursed for those treatment dates should be denied.
8. Work hardening after July 17, 2003, did not cure or relieve any effects naturally resulting from the claimant's injury, promote recovery, or enhance his ability to return to work or obtain employment.
9. The Carrier met its burden of proving reimbursement for work hardening sessions after July 17, 2003, were not warranted.
10. Based on the above Conclusions of Law, the Carrier's request that Provider not be reimbursed for those treatment dates should be granted
11. The Carrier failed to meet its burden of proving the office visit on November 15, 2003, was not warranted.

ORDER

IT IS, THEREFORE, ORDERED that Liberty Mutual Insurance Company (Carrier) is to reimburse Main Rehab & Diagnostic (Provider) for work hardening sessions provided from June 23, 2003, through July 17, 2003, and for the office visit on November 5, 2003. However, the Carrier's appeal as to work hardening provided after July 17, 2003, is granted, and the Carrier is not required to reimburse the Provider for such sessions.

SIGNED June 15, 2005

**SARAH G. RAMOS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

