

**SOAH DOCKET NO. 453-05-3061.M5
MDR NO. M5-04-3604-01**

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| REHAB 2112 | : | BEFORE THE STATE OFFICE |
| | : | |
| VS. | : | OF |
| | : | |
| AMERICAN CASUALTY COMPANY | | ADMINISTRATIVE HEARINGS |

AMENDED DECISION AND ORDER

Rehab 2112 and American Casualty Company (American Casualty) have challenged the decision of the Texas Workers= Compensation Commission=s (Commission=s) Medical Review Division (MRD), which found that work hardening provided to Claimant ___ was not medically necessary healthcare except for work hardening provided on July 16 and 18, 2003. The Administrative Law Judge (ALJ) finds that the work hardening services provided from July 16 to August 18, 2003, were not medically necessary.

**I. BACKGROUND, PROCEDURAL HISTORY,
NOTICE, AND JURISDICTION**

Claimant was a 41-year-old construction worker who suffered a compensable injury to his lower back, right hip, and right knee ___, when he slipped and fell while carrying a large piece of sheetrock. After undergoing physical therapy, he participated in work hardening at Rehab 2112 from June 6 to August 18, 2003. American Casualty denied reimbursement for the work hardening provided from July 16 to August 18, 2003, due to lack of medical necessity.

The Independent Review Organization (IRO) to which MRD referred the matter found that the work hardening in dispute was not medically necessary because: 1) Claimant obtained no relief, 2) promotion of recovery was not accomplished, and 3) Claimant=s ability to return to work was not enhanced. The IRO noted more specifically that the functional capacity evaluations (FCEs) indicated that Claimant=s lumbar range of motion (ROM) decreased from June 18 to August 4, and his pain rating of seven out of 10 remained the same throughout the treatment from June 24 to August 18. The MRD ordered payment of \$256.00, however, for work hardening provided on July 16 and 18, 2003, because American Casualty did not provide EOB¹ denial codes for those dates. The Claimant subsequently had surgery on his right knee on November 25, 2003.

Rehab 2112 filed a request for a hearing at the State Office of Administrative Hearings (SOAH) on October 22, 2004. American Casualty filed its request for a hearing on October 28, 2004. The Commission issued the notice of hearing on January 7, 2005.

¹ Explanation of Benefits.

The hearing convened on April 13, 2005, at SOAH, 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. American Casualty was represented by David Swanson, an attorney. The ALJ issued a Decision and Order on June 10, 2005. On June 15, 2005, American Casualty filed a letter requesting that the ALJ issue a supplemental decision because the ALJ incorrectly concluded that American Casualty did not challenge the MRD=s decision. Rehab 2112 did not file a response. Finding that the Decision and Order incorrectly concluded that American Casualty did not file a request for a hearing, the ALJ issues this superseding Amended Decision and Order.

II. PARTIES= POSITIONS

Dr. Ivey testified that work hardening was appropriate because even though the Claimant was able to lift up to 65 pounds when he entered the work hardening program, to perform his job he needed to be able to lift 100 pounds of sheetrock occasionally and because he had physical limitations due to his pain. She also testified that he met the entry criteria for a CARF² accredited work hardening program because he could not meet his job requirements, would likely benefit from the program, and did not have a condition that prohibited him from functioning in the program. After six weeks of work hardening, Dr. Ivey noted, Claimant was given an FCE on August 4, 2003, which indicated that he was able to lift up to 80 pounds, that the ROM in his knee had improved, and that his level of pain had decreased from severe to moderate. Based on that improvement, his treating doctor Tony Bennett, D.C., determined that two more weeks were appropriate to see if his lifting ability could improve further. According to Dr. Ivey, Claimant still met the CARF criteria for entry into a work hardening program at that time, and it was reasonable to provide two more weeks of work hardening. Dr. Ivey testified that at the end of the two weeks on August 18, 2003, another FCE was performed. Although Claimant did not reach the physical demand category of his job and his pain level of moderate remained the same, Dr. Ivey contends that Claimant ultimately benefitted from the program.

Steven Minors, D.C., who testified on behalf of American Casualty, agreed with the IRO=s decision that the work hardening was not medically necessary. In particular, Dr. Minors noted that Claimant=s lumbar ROM decreased by 17% from June 18 to August 4, 2003.³ And at the end of the 40-session program on August 18, 2004, Claimant=s lifting ability had declined to 70 pounds, which was only five pounds greater than when he started. According to Dr. Minors, Claimant should have been referred for an orthopedic evaluation rather than work hardening when the issue of compensability of the injury was decided on June 17, 2003, because the Claimant exhibited the same localized pain and positive orthopedic findings on May 6, 2003, as he did in December 2002.⁴

² Commission of Accreditation of Rehabilitation Facilities.

³ Res. Ex. 5 at 102, 167.

⁴ Res. Ex. 5 at 57, 87, 98.

Dr. Minors also criticized several features of the work-hardening program itself, such as the failure to perform an FCE after 15 sessions. Dr. Minors also testified that the program did not properly address Claimant=s needs. Having Claimant start out lifting only 12 pounds during his functional work exercises and continuing at that level for several more sessions did not make sense when Claimant=s employment needs required him to lift up to 100 pounds.⁵ According to Dr. Minors, Claimant should have been lifting 25 pounds from the beginning of the program. Dr. Minors also noted that between the FCE of June 18 and August 4, Claimant was lifting at most 27 pounds during his functional work exercises and only up to 37 pounds between August 4 and 18, far short of his work requirements. Dr. Minors again noted that after six weeks of work hardening, when Claimant was only lifting only 27 pounds, he should have been referred for an orthopedic evaluation, rather than two more weeks of work hardening.

Dr. Minors also criticized the quality of the diagnostic evaluations. He noted that Dr. Bennett recommended work hardening in December 2002 even though at that time Dr. Bennett indicated incorrectly that Claimant=s job physical demand level was at a medium level and Claimant was able to lift at a medium heavy demand level.⁶ In addition, Dr. Bennett recommended work hardening even though there was no prior discussion about Claimant=s psychological state justifying entry into a work hardening program versus work conditioning, additional physical therapy, or active rehabilitation. Dr. Minors also noted that during the FCE of June 18 the ROM in Claimant=s right knee varied widely.⁷ Dr. Minors also criticized the failure to monitor Claimant=s heart rate during the FCEs.

III. ANALYSIS

When a healthcare provider bills for physical medicine treatment, the Commission=s rules require the provider to submit the following: progress or SOAP⁸ notes substantiating the care given and the need for further treatment and services and indicating progress, improvement, the date of the next treatment and services, complications, and expected release date.⁹ Furthermore, 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. Daily treatment and patient response to treatment are to be documented and reviewed to ensure continued progress.¹⁰

With those directives in mind, the ALJ finds that much of Dr. Minors= testimony in support

⁵ Res. Ex. 5 at 111, 127.

⁶ Res. Ex. 5 at 99.

⁷ Res. Ex. 5 at 102-3.

⁸ Subjective/Objective/Assessment/Plan.

⁹ 28 TEX. ADMIN. CODE ' 133.1(a)(3)(E)(i).

¹⁰ Medical Fee Guideline (MFG) Medicine Ground Rule II.E. at 28 TEX. ADMIN. CODE (TAC) ' 134.201.

of the IRO=s decision sufficiently rebuts Dr. Ivey=s testimony, so that Rehab 2112 failed to meet its burden of proof that the work hardening provided was medically necessary. Like the FCEs, the treatment notes are spotty. Even though Dr. Bennett wrote in the weekly assessment of July 18, 2003, that the goal of increasing strength by five pounds had been met, the daily notes indicate otherwise. On that date Claimant was lifting only 24 pounds during his functional work exercises, when on July 9, 2003, he had been lifting 27 pounds.¹¹ Furthermore, the weekly assessment notes are virtually identical.¹² With Claimant lifting only 24 pounds between July 16 and 22 during the fourth and fifth treatment weeks, it is hard to see how Claimant was going to meet the lifting requirements of his job.¹³ Rehab 2112 should have learned by the fifteenth session on July 15, 2003, that Claimant was not progressing with the work hardening and then proceeded with alternative healthcare.

Based on the above, the ALJ finds that the Claimant did not benefit from the work hardening program beyond that reimbursed by American Casualty. In particular, Rehab 2112 has failed to show that there was any justification for work hardening being provided after August 4, 2003. Furthermore, failure to perform an FCE sooner than 30 sessions when Claimant=s progress was equivocal brings into question the medical necessity of the work hardening provided from July 16 to August 4. The ALJ, therefore, concludes that Rehab 2112 failed to carry its burden of proof that the work hardening provided on the dates in dispute was medically necessary. And because the evidence shows that American Casualty provided EOBs to Rehab 2112 disputing the medical necessity of the work hardening provided on July 16 and 18, 2003, the ALJ determines that the IRO=s finding denying reimbursement for those dates of service due to lack of medical necessity stands.¹⁴

IV. FINDINGS OF FACT

1. On ____, Claimant ____ sustained a work-related injury to his lower back, right hip, and right knee in a fall stemming from his work activities.
2. On the date of injury, the Claimant=s employer was insured by American Casualty Company (American Casualty).
3. Rehab 2112 provided work hardening services to the Claimant from June 18 to August 18, 2003, for which it sought reimbursement.
4. American Casualty denied reimbursement for the work hardening provided from July 16 to

¹¹ Res. Ex. 5 at 134, 145, 146.

¹² Pet. Ex. at 199, 202, 204.

¹³ Res. Ex. 5 at 141, 144, 145, 148, 149, 181.

¹⁴ Res. Ex. 7

August 18, 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 that the work hardening was not medically necessary.
7. Based on the IRO=s findings, the Commission=s Medical Review Division (MRD) declined to order American Casualty to reimburse Rehab 2112 for the work hardening in dispute except for the services provided on July 16 and 18, 2003, because American Casualty did not provide explanation-of-benefit denial codes for those dates.
8. Rehab 2112 filed a challenge to the MRD decision on October 22, 2003, and requested a hearing at the State Office of Administrative Hearings (SOAH).
9. American Casualty filed its challenge to the MRD decision on October 28, 2005, and requested a hearing at SOAH.
10. On January 7, 2005, 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.
11. The hearing was held on April 13, 2005, at 300 W. 15th St., Austin, Texas.
12. The work hardening program did not properly address Claimant=s needs. Having Claimant start out lifting only 12 pounds during his functional work exercises and continuing at that level for several more sessions did not make sense when Claimant=s employment needs required him to lift up to 100 pounds.
13. Claimant was lifting only 24 pounds between July 16 and 22 during the fourth and fifth treatment weeks.
14. Rehab 2112 failed to re-evaluate the work hardening treatment for effectiveness, need, and continued progress before providing additional weeks of work hardening after the fifteenth session of treatment on July 15, 2003.
15. Claimant made only limited continued progress during the remainder of the program. His lumbar ROM decreased and his ability to lift only increased from 65 pounds to 70 pounds.
16. Claimant did not benefit from the work hardening program beyond the dates of service reimbursed by American Casualty.

17. American Casualty provided explanations of benefits to Rehab 2112 disputing the medical necessity of the work hardening provided on July 16 and 18, 2003.

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 and American Casualty filed timely requests for hearing pursuant to 28 TEX. ADMIN. CODE (TAC) ' ' 148.3(a).
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 that the services provided were medically necessary by a preponderance of the evidence, pursuant to 28 TAC ' 148.21(h) and (i).
5. Rehab 2112 failed to prove that Claimant=s medical needs were being addressed by continuing the work hardening past July 15, 2003. 28 TAC ' 134.201.
6. American Casualty met its burden of proof by a preponderance of the evidence that it provided explanations of benefits to Rehab 2112 for the services provided on July 16 and 18, 2003. 28 TAC ' 148.21(h) and (I).
7. Based on the foregoing Findings of Fact and Conclusions of Law, Rehab 2112 failed to prove that continuing the work hardening program beyond July 15, 2005, was medically necessary.

ORDER

IT IS ORDERED THAT American Casualty is not liable to reimburse Rehab 2112 for work hardening sessions provided from July 16 to August 18, 2003.

Signed June 30, 2005.

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