

TEXAS MUTUAL INSURANCE § BEFORE THE STATE OFFICE  
COMPANY §  
V. §  
NESTOR MARTINEZ, D.C. § OF  
ADMINISTRATIVE HEARINGS  
DECISION AND ORDER

Texas Mutual Insurance Company (Carrier) requested a hearing on a decision by an Independent Review Organization (IRO) granting preauthorization to Nestor Martinez, D.C.,<sup>1</sup> (Provider) for a work hardening program for the injured worker \_\_\_ (Claimant). After considering the evidence and arguments, the Administrative Law Judge (ALJ) concludes that Carrier has shown that the work hardening program was not medically necessary and should not be authorized.

**I. BACKGROUND**

On \_\_\_, Claimant suffered a compensable, work-related injury to his back while lifting cement and throwing it into a truck. A March 3, 2004 MRI revealed a L4-5 left paracentral disc extrusion, including a probable large free fragment, which was causing severe spinal canal stenosis, mild left neural foramina stenosis, and mass effect on the left L5 nerve root. Due to persistent pain, Claimant presented himself to Pain & Recovery Clinic on March 10, 2004. Claimant received chiropractic modalities and therapy, which proved to be unsuccessful in fully restoring his ability to return to work. An EMG study on April 27, 2004, revealed a severe L5 radiculopathy. Claimant then underwent back surgery on June 11, 2004, and thereafter again received chiropractic and therapy treatments. Claimant participated in a work conditioning program in November 2004 and December 2004. On December 27, 2004, immediately after completing work conditioning, Provider requested authorization from Carrier to perform work hardening on Claimant. Carrier declined to authorize work hardening, contending it was not medically necessary.

Based on Carrier's denial of preauthorization, Provider sought medical dispute resolution through the Texas Workers' Compensation Commission (Commission). The matter was referred to

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<sup>1</sup> Dr. Martinez, and Dean McMillan, M.D., Claimant's treating physician, are employed by Pain & Recovery Clinic. Denise Turboff, M.Ed., L.P.C., offices at the same address as the Pain & Recovery Clinic.

an IRO designated by the Commission for the review process. The IRO determined that the work hardening program was medically necessary for Claimant's compensable injury. Carrier then requested a hearing before the State Office of Administrative Hearings (SOAH). The hearing convened on June 8, 2005, with ALJ Stephen J. Pacey presiding. Carrier appeared through its attorney, Katie Kidd. Provider did not appear, and the hearing concluded and the record closed that same day. No party objected to jurisdiction.

The ALJ is unaware of any reason for Provider's failure to attend the hearing. On May 18, 2005, the Commission mailed to Provider a Notice of Hearing, by certified mail, return receipt requested. The notice was sent to 6660 Airline Dr., Houston, Texas 77076, which is Provider's letterhead address. Provider did not enter an appearance pursuant to 1 TEX. ADMIN. CODE (TAC) §155.21, did not submit a motion to appear by telephone pursuant to 1 TAC §155.45, and did not provide the documents required by the Notice of Hearing. Carrier provided some extrinsic evidence that Provider was aware of the hearing. When Carrier called Provider to determine if Provider was opposed to Carrier's expert witness appearing by telephone, Provider indicated that he opposed the telephone appearance.<sup>2</sup> Because Provider was not present at the hearing and did not present any documents, the only evidence the ALJ may consider is that provided by the Carrier.

## **II. CARRIER'S ARGUMENTS**

Carrier argues that the treatment that Provider rendered to Claimant was generally excessive, including five months of intensive post-operative chiropractic care and therapy, a month of work conditioning, and the currently desired authorization for a work hardening program. Timothy J. Fahey, D.C., testified that there was no medical justification evident to support work hardening immediately after work conditioning and four months of therapy. Dr. Fahey said that Provider's work hardening goal is to return Claimant from the medium/heavy functional level to a heavy level of functioning. Dr. Fahey said that a work hardening program should simulate working conditions and that attempting to move Claimant from one functioning level to another is not tailored for a specific job.

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<sup>2</sup> Carrier's motion for its expert to appear by telephone was verbally granted on the record.

Carrier argues that work hardening is not appropriate for Claimant because he may not return to his former job and, therefore, until a determination is made as to the type of work that Claimant would attempt to obtain, one could not know whether work hardening is necessary. One of the entrance criteria for work hardening is that the injured worker be a person whose current level of functioning interferes with his ability to carry out specific identifiable tasks required in the workplace. So, ultimately, work hardening is only appropriate if there is a specific work objective and the Claimant has clearly identifiable deficits that would preclude him from meeting that objective and carrying out the functions of the intended job. Carrier notes that Provider never contacted Claimant's employer to determine what job Claimant might return to and what skills or functioning that job would require. Instead, Provider merely used the functioning level for Claimant's prior position as the basis for its determination to conduct work hardening. Carrier also argues that in many cases the patients will not return to their pre-injury functional levels.

Carrier asserted that other doctors do not agree with Dr. McMillan's opinion that Claimant needs work hardening. Carrier pointed out that Dr. McMillan works for the same facility as Provider. According to Dr. Fahey, the psychologist who determines whether a person meets the psychological component of work hardening, the physician who recommends work hardening, and the doctor responsible for the program should be independent of each other. In this case, he said each of these parties work for the Pain & Recovery Clinic, which would benefit from performing work hardening. For instance, on November 16, 2004, Provider's psychologist, Ms. Turboff reported that Claimant was highly motivated and had no symptoms of anxiety or depression. Dr. Fahey said that in Ms. Turboff's December 23, 2005 report recommending work hardening, she reported that Claimant should be moved to a work hardening program to address the psychological issues that are resulting from his current increase in pain. In Dr. Fahey's opinion, these two reports are not consistent. Carrier argued that Provider is recommending work hardening because Claimant's work conditioning program caused pain. According to Dr. Fahey, Claimant's work conditioning program was seven hours per day. He said that work conditioning should be no more than four hours per day.

Carrier finally argued that Will E. Moorehead, M.D., who performed Claimants surgery, and Steven Holtzman, M.D., the designated doctor, did not report that Claimant required a work hardening program. On January 25, 2005, Dr. Moorehead reported that Claimant should return to

work, and on March 28, 2005, he reported that Claimant had no complaint of pain in his back or lower extremities and should return to work. On February 11, 2005, Dr. Holtzman assigned Claimant a five percent whole person impairment and reported that Claimant reached maximum medical improvement (MMI) on February 11, 2005. Dr. McMillan disagreed with Dr. Holtzman's report, arguing that Claimant had been recommended to a return to work program. In response, Dr. Holtzman reported that Claimant's permanent impairment would not change by the completion of a return to work program. He responded that one may reach MMI without reaching his pre-injury status.

### **III. ALJ'S ANALYSIS**

After considering the argument and evidence presented, the ALJ concludes that the work hardening program is not medically necessary for treatment of Claimant's compensable injury. Therefore, the ALJ finds that Provider is not authorized to perform a work hardening program on Claimant.

Work hardening is defined as:

Work Hardening: A highly structured, goal-oriented, individualized program designed to maximize the ability of the persons served to return to work. Work hardening programs are interdisciplinary in nature with a capability of addressing the functional, physical, behavioral, and vocational needs of the injured worker. Work Hardening provides a transition between management of the initial injury and return to work while addressing the issues of productivity, safety, physical tolerances, and work behaviors. Work Hardening programs use real or simulated work activities in a relevant work environment in conjunction with physical conditioning tasks. These activities are used to progressively improve the biomechanical, neuromuscular, cardiovascular/metabolic, behavioral, attitudinal, and vocational functioning of the persons served.<sup>3</sup>

To support the necessity of work hardening, the medical records should contain adequate justification of the need for an interdisciplinary program to allow Claimant to return to work. Further, the records should reflect specific impairments of the Claimant's ability to perform some or all of the functions of his expected job before work hardening is deemed necessary. Finally, work hardening should be directed at training Claimant to return to a specific expected job.

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<sup>3</sup> See 28 TEX. ADMIN. CODE §134.201, which adopts the Commission's 1996 Medical Fee Guideline. The Medicine Ground Rules, at II. E., define and describe Work Hardening. Although there have been, and continue to be, legal challenges to the Commission's various guidelines, the ALJ is unaware of any dispute as to the reliability of the Commission's definition of work hardening.

Work hardening is not simply therapy to rehabilitate an injured worker to be able to perform the functions of his last held position. Rather, it is intended to be a tool for removing existing obstacles, whether physical or psychological, to Claimant's being able to return to a specific job. As noted above, one of the entrance criteria for work hardening is that the injured worker be a person "whose current levels of functioning due to illness or injury interfere with [his] ability to carry out specific tasks required in the workplace." Further, the injured worker must be a person who is "capable of attaining specific employment upon completion of the program." Both of these entrance requirements show that work hardening is to be tied to the specific duties of a specific job to which the injured employee is expected to return or attain.

Provider plans to rehabilitate Claimant based upon a heavy functional level. In this regard, Provider wants to do nothing more than attempt to restore Claimant to his pre-injury functionality, without regard for whether he is actually going to perform that job or not. In fact, the medical evidence shows that he will not return to his heavy functional level.

Further, the ALJ agrees with Dr. Fahey that the records do not show a sufficient underlying basis for work hardening. The records do not demonstrate specific job functions in which Claimant was lacking, nor do they demonstrate any credible psychological barriers to Claimant returning to work. Finally, both Dr. Moorehead and Dr. Holtzman concluded that Claimant was no longer in pain and should return to a medium/heavy job. Dr. Holtzman specifically reported that Claimant was MMI and that he would not return to his pre-injury heavy functional level. The ALJ concurs with Dr. Fahey's suggestion that Claimant should be referred to the Texas Rehabilitation Commission, where he can be retrained for a medium/heavy type of employment.

For the reasons identified above, the Carrier established by a preponderance of the evidence that the work hardening program is not medically necessary treatment for Claimant. Accordingly, preauthorization is denied.

#### **IV. FINDINGS OF FACT**

1. \_\_\_\_ (Claimant) suffered a compensable, work-related injury to his back on \_\_\_\_.
2. Texas Mutual Insurance Company (Carrier) is the provider of workers' compensation insurance covering Claimant for his compensable injury.

3. After his compensable injury, Claimant received chiropractic modalities and therapy, which proved to be unsuccessful in fully restoring Claimant's ability to return to work.
4. Claimant then underwent back surgery in June 2004, and thereafter again received chiropractic and therapy treatments.
5. Claimant participated in a work conditioning program in November 2004 and December 2004.
6. On December 27, 2004, immediately after completing work conditioning, Provider requested authorization from Carrier to perform a work hardening on Claimant.
7. Provider did not contact Claimant's employer to determine the job duties of any position to which Claimant could return to work.
8. The medical records do not demonstrate specific job functions in which Claimant was lacking, nor do they demonstrate any credible psychological barriers to Claimant returning to work.
9. Provider requested preauthorization in order to return Claimant to his pre-injury heavy functional level.
10. Claimant will not return to his heavy functional level.
11. Carrier, as the workers' compensation insurance carrier for Claimant's employer, declined authorization for the work hardening provided to Claimant, contending it was not medically necessary.
12. Provider requested medical dispute resolution by the Texas Workers' Compensation Commission's Medical Review Division (MRD), which referred the matter to an Independent Review Organization (IRO).
13. MRD approved preauthorization on April 13, 2005, based on the IRO physician reviewer's determination that the work hardening program was medically necessary.
14. On April 27, 2005, Carrier requested a hearing, and the case was referred to the State Office of Administrative Hearings (SOAH).
15. Notice of the hearing was sent by the Commission to all parties on May 18, 2005.
16. On June 8, 2005, Administrative Law Judge Stephen J. Pacey convened a hearing in this case. Carrier appeared through its attorney, Katie Kidd. Provider did not appear. The hearing concluded and the record closed that same day.

## V. CONCLUSIONS OF LAW

1. SOAH has jurisdiction over this proceeding, including the authority to issue a decision and order, pursuant to the Texas Workers' Compensation Act, specifically TEX. LABOR CODE ANN. §413.031(k), and TEX. GOV'T CODE ANN. ch. 2003.
2. The hearing was conducted pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001 and 28 TEX. ADMIN. CODE ch. 148.
3. The request for a hearing was timely made pursuant to 28 TEX. ADMIN. CODE § 148.3.
4. Adequate and timely notice of the hearing was provided according to TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
5. Carrier has the burden of proof. 28 TEX. ADMIN. CODE §§ 148.21(h) and 133.308(w).
6. Carrier has shown, by a preponderance of the evidence, that the work hardening planned for Claimant was not medically necessary for treatment of Claimant's compensable injury and should not be preauthorized.

### **ORDER**

**IT IS ORDERED** that Texas Mutual Insurance Company's request for relief is **GRANTED** and that the request of Nestor Martinez, D.C., for preauthorization of a work hardening program to treat Claimant is **DENIED**.

**SIGNED July 6, 2005.**

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**STEPHEN J. PACEY  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS**