

**SOAH DOCKET NO. 453-05-9024.M5
MRD NO. M5-05-2049-01**

MAIN REHAB & DIAGNOSTIC,	§	BEFORE THE STATE OFFICE
Petitioner	§	
	§	
VS.	§	OF
	§	
AMERICAN CASUALTY CO.,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

The provider, Main Rehab & Diagnostic (Main Rehab), sought reimbursement for approximately six weeks of work hardening therapy provided to claimant ___ in 2004. Citing a lack of medical necessity, the carrier, American Casualty Company (ACC), declined to pay for the disputed services. An Independent Review Organization (IRO) determined that the disputed services were unnecessary. The total amount in dispute is approximately \$13,000.00.

The Administrative Law Judge (ALJ) concludes that the disputed services were reasonable and necessary.

I. NOTICE AND PROCEDURAL HISTORY

The hearing was convened on January 23, 2006, before State Office of Administrative Hearings (SOAH) Judge Shannon Kilgore. Scott Hilliard, attorney, appeared by telephone for Main Rehab. Deborah Womack, attorney, appeared by telephone for ACC. The hearing adjourned, and the record closed, the same day. No party raised any issue concerning notice or jurisdiction.

II. DISCUSSION

A. Medical Necessity

Main has the burden of proof in this proceeding.¹ The Texas Labor Code provides in pertinent part that:

- (a) 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.²

* * *

Health care includes all reasonable and necessary medical aid, medical examinations, medical treatment, medical diagnoses, medical evaluations, and medical services.³

B. Background and Disputed Services

____the claimant in this case, was injured on____, when boxes of lettuce fell on her as she was working at her job for a fast food restaurant. She sustained injuries to the neck and left shoulder and forearm. She was prescribed medications and began physical therapy. She continued to have pain. An elbow injection offered some temporary relief.

An MRI of the cervical spine performed on August 2, 2003, revealed a two-millimeter

¹ 28 TEX. ADMIN. CODE § 148.14; TEX. LABOR CODE § 413.031.

² TEX. LAB. CODE § 408.021.

³ TEX. LAB. CODE § 401.011(19).

central disc protrusion at C3-4 abutting the cord surface but not lateralizing.⁴

A left shoulder MRI of the same date showed mild supraspinatus tendinopathy, could not completely exclude a small partial articular tear, and also showed mild bony and capsular hypertrophic changes in the acromioclavicular joint.⁵

Also in August 2003 she was seen at Trinity Orthopedics, where she was diagnosed with left shoulder impingement syndrome with possible rotator cuff tear, cervical radiculopathy to the upper left extremity, and epicondylitis (“tennis elbow”).⁶ The radiculopathy diagnosis was based in part on electrodiagnostic studies. The doctors at Trinity recommended further physical therapy. ___ apparently underwent physical therapy and was off work for much of ___ following her injury.

On September 20, 2003, a record review was performed by Dorothy Leong, M.D. She concluded that the claimant was at maximum medical improvement (MMI), had suffered a limited soft tissue injury, and did not require total treatment beyond 4-6 weeks.⁷ Dr. Leong believed that abnormalities noted on MRI studies were not related to ___ work-related injuries.

In October 2003, neurodiagnostic studies indicated cervical radiculopathy involving the left C5 and C6 nerve roots.⁸

On December 4, 2003, Gilbert Mayorga, M.D., performed a designated doctor exam.⁹ His diagnoses were: cervical spine sprain, left shoulder contusion, and rule out impingement syndrome of left shoulder. Dr. Mayorga stated that he did not believe the claimant

⁴ Petitioner Exhibit 2 at 85-86.

⁵ Petitioner Exhibit 2 at 87-88.

⁶ Petitioner Exhibit 2 at 75-81.

⁷ Carrier Exhibit 1 at 32-34.

⁸ Carrier Exhibit 1 at 188.

⁹ Petitioner Exhibit 2 at 67-70.

was at MMI due to her continuing shoulder problems. He went on, "If the patient is determined not to be a surgical candidate, I would recommend a functional capacity evaluation [FCE] and if indicated by such testing, a well-supervised, work conditioning/work hardening program prior to re-entering the work force." He projected that the claimant would reach MMI in June 2004.

Mike O'Kelley, D.C., issued a peer review report on December 27, 2003. Dr. Kelley concluded that no work hardening or work conditioning was warranted unless ___ first saw an orthopedist and underwent any injections or surgery recommended.¹⁰ He stated, "The claimant is clearly at a plateau with chiro/pt. Further ongoing chiropractic care is not R&N or appropriate."

The claimant was first seen at Main Rehab on January 22, 2004, when she reported moderate frequent left shoulder pain and mild pain in the area of the cervical spine.¹¹ ___ was referred to an orthopedist, Charles Whittenburg, D.O.

On February 3, 2004, Phillip Osborne, M.D., issued a report of medical examination.¹² Dr. Osborne concluded that ___ treatment had reached a plateau and she was not likely to improve significantly with additional treatment. Dr. Osborne concluded ___ was at MMI and assigned her a 14% whole person impairment rating.

On February 16, 2004, Dr. Whittenburg gave the claimant a subacromial steroidal injection that offered her some relief for her chief complaint – left shoulder pain.¹³ According to Dr. Whittenburg, the claimant's positive reaction to the injection probably indicated impingement.

On the following day, ___ underwent cervical range of motion (ROM) testing; she exhibited

¹⁰ Carrier Exhibit 1 at 26-31.

¹¹ Petitioner Exhibit 1 at 8-10.

¹² Carrier Exhibit 1 at 15-23.

¹³ Petitioner Exhibit 2 at 72, 84.

deficits.¹⁴

March 2004 Dr. Whittenburg stated that ___ was not a surgical candidate.¹⁵ ___ treating doctor at Main Rehab, Robert Bedford, D.C., referred the claimant for an FCE.¹⁶

On March 24, 2004, just prior to the performance of the FCE, Bradley Eames, D.O., evaluated ___¹⁷ Dr. Eames said of ___, "She has some pain in her left elbow when she puts her left elbow on a table and leans on it; however, she is much improved. She does not have any symptoms regarding her shoulder and she has no symptoms regarding her neck pain at this time." On exam, he found her cervical spine asymptomatic but her left shoulder had some mild discomfort and loss of ROM. Her left elbow also had some tenderness, although no ROM impairment. Dr. Eames determined ___ was at MMI and gave her a 6% impairment rating.

The FCE was conducted on March 30, 2004,¹⁸ and showed that in some areas ___ was performing at the sedentary level, but her job had been a light-level job.¹⁹ ___ was also determined to have a significant psychological overlay. Based on the results of the FCE, Dr. Bedford referred ___ for work hardening.²⁰ Dr. Jacob Liebman, who appears to have seen ___ for pain management, also recommended a work hardening program.²¹

The work hardening commenced on April 21, 2004, and ended on June 18, 2004.²² In the

¹⁴ Petitioner Exhibit 2 at 73.

¹⁵ Petitioner Exhibit 1 at 16.

¹⁶ Petitioner Exhibit 1 at 16.

¹⁷ Carrier Exhibit 1 at 3-13.

¹⁸ Petitioner Exhibit 1 at 100 *et seq.*

¹⁹ Petitioner Exhibit 1 at 3-7.

²⁰ Petitioner Exhibit 1 at 17.

²¹ Petitioner Exhibit 2 at 89-93.

²² Petitioner Exhibit 1 at 23-99.

middle of the program, on May 31, 2004, Dr. Osborne issued a peer review report.²³ Dr. Osborne stated he did not believe work hardening was reasonable and necessary. He noted that on March 30, 2004, ___ had stated as part of her work hardening screening that she was back at work in her job as a fast food preparer.

Dr. Osborne also stated Dr. Eames had found ___ to be at MMI and had noted some signs of symptom magnification.

At the conclusion of the work hardening program in the summer of 2004, Dr. Bedford noted substantial improvement and released ___ to return to work.²⁴ An FCE performed on June 15, 2004, showed gains in physical performance and endurance.²⁵ At the same time, however, Dr. Bedford referred ___ to Dr. Liebman for medical management and back to Dr. Whittenburg “ to determine if the patient is a surgical candidate.”²⁶ The record suggests that ___ pain did not improve, and in fact seemed to worsen somewhat, during the work hardening program. In the early part of the program, she reported pain of five on a scale of one to 10, but then reported a pain level of seven on numerous occasions, including at the end of the program.²⁷

Main Rehab billed for the work hardening under CPT codes 97545 and 97546. The FCEs were billed for under CPT code 97750, and an office visit was billed for under 99211. Using denial

code “V” – unnecessary treatment (with peer review) – ACC declined to pay for these services.²⁸ Main Rehab requested medical dispute resolution.²⁹

²³ Carrier Exhibit 1 at 24-25.

²⁴ Petitioner Exhibit 1 at 18-22.

²⁵ Petitioner Exhibit 1 at 3-7.

²⁶ Petitioner Exhibit 1 at 22.

²⁷ Petitioner Exhibit 1 at 36, 44, 51, 59, 64, 67, 69, 75, 79, 87, 91, 95, and 99.

²⁸ Petitioner Exhibit 2 at 14-16, 24-56.

²⁹ In addition to the medical necessity dispute, there was also a fee dispute resolved by the Medical Review

The IRO issued its decision on June 24, 2005, and the Texas Workers' Compensation Commission (Commission) incorporated the IRO's decision in its order of July 11, 2005.³⁰ The IRO reviewer stated:

This patient had received an enormous amount of treatment since her injury and with all the treatment the FCE indicated the patient was only at the sedentary level. Self care, normal ADL's [activities of daily living], ability to drive, help with care of family members and minimal duties around one's household usually require more than a sedentary level. The records do not indicate this patient was bedfast or that the patient was unable to perform her normal ADL's. In fact the Oswestry Daily Living Assessment and Oswestry Pain Disability index completed on 3-30-04 indicates her pain prevents her from lifting heavy weights, [but] the patient can manage light to medium weights if they are positioned conveniently. . . In the event the [FCE] truly confirmed her sedentary status, then a combination of 4 hours of work conditioning and 4 hours of restricted work for two to four weeks should have been sufficient to have progressed this lady from a sedentary level to a light level of work status. Psychological issues should have been able to be adequately addressed with four to six one hour weekly individual sessions and there was no medical necessity for her to participate in a multidiscipline work hardening program.³¹

On July 22, 2005, Main Rehab requested a hearing.

C. Main Rehab's Position and Evidence

Division (MRD) of the Texas Workers' Compensation Commission (TWCC). The MRD determined the fee dispute in favor of Main Rehab ordered reimbursement in the amount of \$297.68. Petitioner Exhibit 2 at 1-2. This determination was not appealed and is not at issue in this case.

³⁰ Effective September 1, 2005, the functions of the Commission were transferred to the newly created Division of Workers' Compensation at the Texas Department of Insurance.

³¹ Petitioner Exhibit 2 at 4.

Osler Kamath, D.C., testified on behalf of Main Rehab. Dr. Kamath has been with Main Rehab for five years, although he was not the treating doctor in this case. He testified based on his review of the medical records. Dr. Klamath emphasized that the FCE on March 30, 2004, showed that ___ could not even be classed at the sedentary level, although she could perform some lifting. He said the improvements she made through work hardening in lifting, carrying, and endurance helped return her to the workforce. According to Dr. Klamath, ___ met the criteria for work hardening because she was not performing at the required job level and there was a documented psychological component to her condition. Main Rehab also argued that the reports of Drs. Leong, Osborne, and O'Kelley lacked credibility because they were suspiciously familiar in that they had the same font, spacing, and formatting.

D. ACC's Position and Evidence

ACC offered the testimony of Dr. Osborne. Dr. Osborne took issue with the testing methods employed in the FCEs, and stated that the test results are therefore invalid and unreliable. He stated that if ___ had indeed returned to her job, work hardening was unnecessary. ACC argued that Dr. Eames' findings show ___ condition prior to work hardening was good, and the pre- and post-work hardening FCEs do not demonstrate much improvement as a result of the program. ACC also pointed out that ___ had received extensive treatment for which the carrier had paid prior to the commencement of work hardening.

E. ALJ's Analysis and Conclusion

This is a close case. ___ strangely inconsistent reports of pain, contradictory evidence about the severity of ___ condition, and the disagreement among the various treating and reviewing doctors about the necessity of the treatment make this a difficult record to assess.

Although the evidence is close, the ALJ believes it preponderates in favor of Main Rehab's position that the disputed services were medically necessary. Dr. Mayorga, whose report seemed very balanced and reasonable, was concerned about ___ continuing shoulder problems and recommended an evaluation by an orthopedist and, if surgery were not an option, an FCE and work hardening if warranted by the results of the FCE. Likewise, Dr. Kelley stated that no work hardening was necessary unless ___ first saw an orthopedist and followed any recommendations for injections or surgery. ___ did see an orthopedist - Dr. Whittenburg - and she underwent an injection. Her reaction to the injection, according to Dr. Whittenburg, was an indication that she likely had an impingement problem. Dr. Whittenburg concluded that ___ was not a surgical candidate. Then, Dr. Eames found ___ to have impaired ROM in the left shoulder. The March 30, 2004 FCE demonstrated that ___ had some functional deficits and some psychological overlay.³² Dr. Liebman recommended the work hardening program. At the conclusion of the work hardening program, ___ showed functional improvement and was released to work without restrictions.³³

For the foregoing reasons, the ALJ determines that the carrier should pay for the disputed services.

III. FINDINGS OF FACT

1. American Casualty Company (ACC) is the workers' compensation insurer with respect to the claims at issue in this case.
2. ___, the claimant in this case, was injured on ___, when boxes of lettuce fell on her as she was working at her job for a fast food restaurant. She sustained injuries to the neck and left shoulder and forearm.
3. ___ was prescribed medications and began physical therapy. She continued to have pain.
4. Also in August 2003 she was seen at Trinity Orthopedics, where she was diagnosed with left shoulder impingement syndrome with possible rotator cuff tear, cervical radiculopathy to the

³² The ALJ is unpersuaded that the results of the FCEs should be rejected almost wholesale, as Dr. Osborne suggested.

³³ ___ exact work status over the course of her treatment is unclear in the record.

upper left extremity, and epicondylitis (“tennis elbow”). The doctors at Trinity recommended further physical therapy.

5. ___ underwent physical therapy and was off work for much of 2003 following her injury.
6. The claimant was first seen at Main Rehab and Diagnostic (Main Rehab) on January 22, 2004, when she reported moderate frequent left shoulder pain and mild pain in the area of the cervical spine.
7. Gilbert Mayorga, M.D., examined ___ on December 4, 2003. Dr. Mayroga recommended an evaluation by an orthopedist and, if surgery were not an option, a functional capacity exam (FCE) and work hardening if warranted by the results of the FCE.
8. Mike Kelley, D.C., issued a peer review report on December 27, 2003. Dr. Kelley stated that no work hardening was necessary unless ___ first saw an orthopedist and followed any recommendations for injections or surgery.
9. ___ was referred to an orthopedist, Charles Whittenburg, D.O.
10. On February 16, 2004, Dr. Whittenburg gave the claimant a subacromial steroidal injection that offered her some relief for her chief complaint – left shoulder pain. The claimant’s positive reaction to the injection probably indicated impingement.
11. In March 2004 Dr. Whittenburg determined that ___ was not a surgical candidate.
12. ___ had limited range of motion in her left shoulder.
13. An FCE performed March 30, 2004, showed that in some areas ___ was performing at the sedentary level, but her job had been a light-level job. ___ was also determined to have a significant psychological overlay.
14. Dr. Jacob Liebman, who treated ___ for pain management, recommended a work hardening program.
15. The work hardening commenced on April 21, 2004, and ended on June 18, 2004.
16. Main Rehab billed for the work hardening under CPT codes 97545 and 97546. The FCEs

were billed for under CPT code 97750 and an office visit was billed for under 99211.

17. An FCE performed on June 15, 2004, showed gains in physical performance and endurance.
18. ___ was released to work without restrictions.
19. Using denial code "V" – unnecessary treatment (with peer review) – ACC declined to pay for the work hardening, office visit, and FCEs.
20. Main Rehab requested medical dispute resolution.
21. On June 24, 2005, an Independent Review Organization (IRO) determined that the disputed services were not medically necessary.
22. The Medical Review Division of the Texas Workers' Compensation Commission (Commission) issued its order, based on the IRO decision, on July 11, 2005.
23. Main Rehab requested a hearing before the State Office of Administrative Hearings (SOAH) to contest the IRO's decision.
24. On October 27, 2005, the Commission issued a notice of hearing in this matter.
25. The notice 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.
26. The disputed work hardening program B including the March 30, 2004 and June 15, 2004 and an associated office visit B administered to ___ at Main Rehab in 2004 was medically necessary.

IV. CONCLUSIONS OF LAW

1. The Texas Labor Code gives the Commission jurisdiction over this matter. TEX. LAB. CODE ch. 401 *et seq.* (the Act).
2. Effective September 1, 2005, the functions of the Commission were transferred to the newly created Division of Workers' Compensation at the Texas Department of Insurance (TDI).

3. SOAH has jurisdiction over this proceeding, including the authority to issue a decision and order. TEX. LAB. CODE §413.031; TEX. GOV'T CODE ch. 2003.
4. Adequate and timely notice of the hearing was provided in accordance with the Administrative Procedure Act. TEX. GOV'T CODE § 2001.052.
5. Main Rehab has the burden of proof in this matter. 28 TEX. ADMIN. CODE ch.148; TEX. LABOR CODE §413.031.
6. 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. TEX. LAB. CODE §408.021.
7. Based on the above Findings of Fact and Conclusions of Law, the Act requires ACC to reimburse Main Rehab for: work hardening services rendered to ___ in 2004 and billed under CPT Codes 97545 and 97546; FCEs performed on March 30 and June 15, 2004, and billed for under CPT code 97750; and an office visit on April 6, 2004, billed for under 99211.

ORDER

IT IS THEREFORE ORDERED that American Casualty Company reimburse Main Rehab and Diagnostic for work hardening services rendered to ___ in 2004 and billed under CPT Codes 97545 and 97546; FCEs performed on March 30 and June 15, 2004, and billed for under CPT code 97750; and an office visit on April 6, 2004, billed for under 99211.

ISSUED March 23, 2006.

SHANNON KILGORE
STATE OFFICE OF ADMINISTRATIVE HEARINGS
ADMINISTRATIVE LAW JUDGE