

GABRIEL GUTIERREZ, D.C.,	§	BEFORE THE STATE OFFICE
Petitioner	§	
	§	OF
VS.	§	
	§	
ATLANTIC MUTUAL INSURANCE	§	
COMPANY,	§	ADMINISTRATIVE HEARINGS
Respondent		

DECISION AND ORDER

Gabriel Gutierrez, D.C. (Provider), appealed the decision of an Independent Review Organization (IRO) that found the work hardening treatment rendered to Claimant, ___, between August 27, 2004, and September 13, 2004, was not medically necessary. In that report, the IRO decided Provider was entitled to no reimbursement for the treatment rendered. Provider timely appealed that order to the State Office of Administrative Hearings (SOAH). In this decision, the Administrative Law Judge (ALJ) finds that Provider not entitled to reimbursement for the disputed services.

The hearing convened and closed on January 31, 2006, before Steven M. Rivas, ALJ. Provider appeared and was represented by Phillip Orth, attorney. Carrier was represented by Steve Tipton, attorney.

I. DISCUSSION

1. Background

Claimant sustained a compensable back injury on ___, the same day she was terminated from her employment. Following her injury she underwent emergency room treatment and various physical therapy care that is not in dispute. On July 15, 2004, Claimant underwent a functional capacity evaluation (FCE). Based on the results of the FCE, Provider placed Claimant on a work hardening program, which continued through September 13, 2004. Provider billed Carrier \$3,520.00 for the work hardening program rendered to Claimant, which Carrier denied as not medically

necessary. Provider filed a request for Medical Dispute Resolution with the Commission's MRD seeking full reimbursement. The dispute was sent to an IRO, which held Provider was not entitled to any reimbursement. Provider timely filed a request for hearing before SOAH.

2. Evidence and Arguments

1. Provider's position

Provider testified Claimant was a proper candidate for a work hardening program pursuant to the Commission's 1996 Medical Fee Guideline and Commission on Accreditation of Rehabilitation Facilities (CARF) guidelines.¹ Provider asserted the goal of a work hardening program is to "achieve functional restoration of the claimant," and to "enable an injured worker to perform tasks in order to return to work." Additionally, Provider stated pain reduction was not a primary goal of work hardening because pain complaints could be treated with medications by other methods. According to Provider, Claimant did not have the functional capacity to return to work after she concluded lower levels of therapy. Provider further testified Claimant was a proper candidate for work hardening because she had already undergone lower levels of therapy, and was not qualified to enter a higher level of treatment like a chronic pain management program.

On cross-examination, Provider admitted a functional capacity evaluation (FCE) was performed at the beginning of the work hardening program, but not at the conclusion of the program. Provider argued, however that an "exit FCE" was not necessary at the conclusion of the program because the documentation reflected progress on a weekly basis. Additionally, Provider testified he did not believe Claimant had depressive symptoms but did believe Claimant had an adjustment disorder after losing her job as a result of the injury.² Provider was also unable to point to any documentation that reflected her vocational counselor ever tried to find another job for Claimant.³

¹ Provider's counsel repeatedly asserted reimbursement was proper under the 1996 Medical Fee Guideline (MFG). However, the 2002 MFG, rather than the 1996 MFG, was in effect during the disputed dates of service. The 2002 MFG was initially adopted in April of 2002, and was to apply to services rendered on or after September 1, 2002. A temporary injunction against these rules was issued in August of 2002. On June 11, 2003, Judge John Dietz issued a Final Judgment indicating the new rules were valid and effective for services rendered on or after August 1, 2003.

² Carrier's counsel reminded Provider that Claimant had been terminated from her employment moments before she sustained her compensable injury.

³ Phillip W. Roddy, a Certified Rehabilitation Counselor, stated in his report dated July 6, 2004, that the

Provider also called Simon J. Foster, D.C., who testified he was familiar with Claimant, and agreed she was a candidate for a work hardening program. Dr. Foster acknowledged that Claimant had a 0% impairment rating (IR) prior to beginning the work hardening program, but explained that a 0% IR does not mean everything is fine. He said a 0% IR only means that a person does not meet the threshold of assigning a physical or mental rating. According to Dr. Foster, the goal of a work hardening program is to improve a person's level of functioning and enable an injured worker to perform activities in a work environment. Additionally, Dr. Foster contended that Claimant's problems with sitting, standing, and walking were alleviated through the work hardening program.

Dr. Foster also testified that he did not agree with any of the rationale used by the Carrier, or the IRO for denying reimbursement. One example Dr. Foster pointed to was in a report by Roger Canard, D.C., who ultimately opined against reimbursement, yet stated that active kinetic services were still needed to treat Claimant's compensable injury, as opposed to passive therapy. In regard to the IRO, Dr. Foster asserted that the IRO reviewer characterized work hardening as a procedure that is "never necessary."

2. Carrier's position

Carrier argued the treatment rendered was not medically necessary because Provider did not consider the severity of Claimant's injury, her pain level, her date of maximum medical improvement (MMI),⁴ her 0% IR,⁵ or the amount of time between the compensable injury and the start of the work hardening program. In support of its contention, Carrier relied on various medical reports and the testimony of Dr. Canard.

Dr. Canard first testified that work hardening was not an appropriate treatment based on the amount of time that had elapsed from the date of Claimant's injury on____, to the beginning of the work hardening program on August 27, 2004. Dr. Canard agreed that a work hardening program is

vocational counseling component of the work hardening program would assist Claimant with return to work issues and provide job placement.

⁴ Reached on September 24, 2003, pursuant to the Commission's designated doctor, Francis Flory, M.D.

⁵ Certified by Dr. Flory on January 8, 2004.

designed to increase a patient's strength and range of motion in order to have the patient return to work. However, Dr. Canard asserted, the documentation submitted by Provider did not reflect any subjective findings of improvement. This is the same position that the IRO took in denying reimbursement for the work hardening program. Dr. Canard also disagreed with Provider's reasoning not to administer an exit FCE. According to Dr. Canard, an FCE is a structured test that gives clinical findings, which are more reliable than the notations contained in the progress reports.

Dr. Canard further testified that any medical necessity for a work hardening program was negated based on the fact that Claimant reached MMI on September 24, 2003, and had been certified with a 0% IR on January 8, 2004, by the Commission's designated doctor. These findings, according to Dr. Canard, reveal Claimant was clinically stable prior to the work hardening program, and that there would be no likelihood of improvement through work hardening, work conditioning, or even therapeutic exercises.

Furthermore, Dr. Canard testified that he concurred with the opinion of Gary C. Freeman, M.D., who evaluated Claimant and issued a report on October 31, 2005. Dr. Freeman examined Claimant and concluded Claimant's pain complaints arose from a "contrived situation of a slip and fall event" and that after 30 days from the date of the injury, the records revealed "absolutely no evidence of any chiropractic need."

Dr. Canard also testified there was evidence of "symptom exaggeration" on the part of the Claimant based on the FCE, which revealed positive Waddell signs. Additionally, Dr. Canard contended that a work hardening program is designed to assist an injured worker to overcome a material physical and mental psychological barrier. Based on his review of the record, Dr. Canard found Claimant to have neither a physical nor a mental component that would be properly addressed through a work hardening program. Specifically, Claimant underwent a Mental Health Assessment that was performed on July 19, 2004, by Monie Smith, License Marriage & Family Therapist. Ms. Smith found Claimant suffered from anxious mood and financial and employment stress. Dr. Canard found no justification to support the psychological component of a work hardening program based on this assessment.

On cross-examination, Dr. Canard stated he based his opinion on several publications including the Chiropractic Treatment and Protocols,⁶ Handbook to Clinical Chiropractic,⁷ and his 36 years of clinical experience. Dr. Canard additionally stated that four weeks of active exercises may have been necessary in September 2003, but that treatment would have concluded several months prior to the time Claimant began the work hardening program.

C. Applicable Law

The Texas Labor Code contains the Texas Workers' Compensation Act (the Act) and provides the relevant statutory requirements regarding compensable treatment for workers' compensation claims. In particular, TEX. LAB. CODE ANN. § 408.021(a) provides that 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 statute further states an employee is specifically entitled to health care that "cures or relieves the effects naturally resulting from the compensable injury, promotes recovery; or enhances the ability of the employee to return to or retain employment."

Under TEX. LAB. CODE ANN. §401.011(19) health care "includes all reasonable and necessary medical aid, medical examinations, medical treatment, medical diagnoses, medical evaluations, and medical services."

D. Analysis and conclusion

Provider is not entitled to reimbursement for the work hardening program rendered to Claimant because it did not improve Claimant's condition. Provider, as Petitioner in this matter, had the burden to prove Carrier's denial of reimbursement was improper. The ALJ finds Dr. Canard's opinion compelling that the reasonableness of the work hardening program was negated because Claimant had been certified at MMI and had been given a 0% IR months prior to the commencement of the work hardening program.

⁶ Published by Texas Chiropractic College, Clinical Division, 2001.

⁷ By Lawrence Wyatt, D.C., Texas Chiropractic College.

In weighing the evidence presented, the ALJ is unable to find sufficient support for the work hardening program. The record shows Claimant sustained a soft-tissue back injury moments after she was terminated from her employment. The medical records contain no objective data that reveal Claimant sustained an injury that brought about any lasting effects. This sentiment is shared by the Commission's designated doctor and Dr. Freeman.

Moreover, Provider believes the work hardening program was medically necessary because it enabled Claimant to return to work. However, this contention is questionable for many reasons. First, the FCE that was performed at the beginning of the program revealed some indication of symptom exaggeration. Also, the fact that an exit FCE was not performed creates doubt as to how much, if any, Claimant's strength and range of motion increased following the work hardening program. Furthermore, the fact that Claimant has not yet returned to work is the most persuasive contention that the work hardening program was neither medically necessary nor effective.

Based on the foregoing, Provider is not entitled to reimbursement for the work hardening program rendered to claimant from August 27, 2004, and September 13, 2004.

II. FINDINGS OF FACT

1. Claimant ___sustained a compensable back injury on___.
2. Claimant underwent emergency room care and physical therapy following the injury.
3. On July 14, 2004, Claimant underwent a functional capacity evaluation (FCE).
4. Gabriel Gutierrez, D.C. (Provider), placed Claimant on a work hardening program from August 27, 2004, through September 13, 2004.
5. Provider billed Atlantic Mutual Insurance Company (Carrier) \$3,520.00 for the treatment rendered, but Carrier denied the claim as not medically necessary.
6. Provider requested medical dispute resolution through the Texas Workers' Compensation Commission's (the Commission) Medical Review Division. The disputes were referred to an Independent Review Organization. The IRO held the Provider was not entitled to reimbursement.
7. Provider appealed the IRO decision to the State Office of Administrative Hearings (SOAH) not later than 30 days after receiving notice of the decision.

8. Notice of the hearing in this case was mailed to the parties on August 31, 2005. 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.
9. The hearing convened and closed on January 31, 2006, with Administrative Law Judge Steven M. Rivas presiding. Provider appeared and was represented by Phillip Orth, attorney. Carrier appeared and was represented by Steve Tipton, attorney.
10. Claimant reached maximum medical improvement on September 24, 2003.
11. Claimant was certified as having a 0% impairment rating on January 8, 2004.
12. Claimant was clinically stable before the work hardening program commenced.
13. The work hardening program administered to Claimant did not improve Claimant's strength and mobility.
14. Provider did not perform a functional capacity evaluation on Claimant at the conclusion of the work hardening program.
15. Claimant did not obtain employment following the work hardening program.

III. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to TEX. LAB. CODE ANN. § 413.031.
2. SOAH has jurisdiction over this proceeding, including the authority to issue a decision and order, pursuant to TEX. LAB. CODE ANN. §413.031(k) and TEX. GOV'T CODE ANN. ch. 2003.
3. Provider timely filed its notice of appeal, as specified in 28 TEX. ADMIN. CODE § 148.3.
4. Proper and timely notice of the hearing was effected upon the parties according to TEX. GOV'T CODE ANN. §§ 2001.051, 2001.052 and 28 TEX. ADMIN. CODE §148.4.
5. Provider had the burden of proof on its appeal by a preponderance of the evidence, pursuant to TEX. LAB. CODE ANN. § 413.031 and 28 TEX. ADMIN. CODE §148.21(h).
6. Under TEX. LAB. CODE ANN. § 408.021(a)(3), an employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury.
7. The work hardening program administered to Claimant was not medically necessary for treatment of Claimant's compensable injury.

8. Based on the Findings of Fact and Conclusions of Law, Provider is not entitled to reimbursement for the disputed work hardening program.

ORDER

IT IS ORDERED THAT the Provider is not entitled to reimbursement for the work hardening program rendered to Claimant from August 27, 2004, through September 13, 2004.

SIGNED on March 30, 2006.

**STEVEN M. RIVAS
STATE OFFICE OF ADMINISTRATIVE HEARINGS
ADMINISTRATIVE LAW JUDGE**