



determined that Claimant had a “large nearly 4 mm central and right paracentral disc herniation with disc material clearly extending beyond the vertebral body margins, and an almost certain rupture of the posterior annulus.”

On April 6, 2005, Claimant was seen by Peter Yeh, M.D., a neurosurgeon. Dr. Yeh noted Claimant’s herniated disc, but recommended that Claimant continue with conservative care at that time, with the understanding that surgery may be more appropriate if Claimant’s condition did not improve. Dr. Lozano continued to treat Claimant with conservative care, primarily including physical therapy. On May 20, 2005, a functional capacity evaluation (FCE) was performed on Claimant. That FCE revealed that Claimant had significant improvement in functioning, but still was limited in his lifting abilities and was classified as being unable to perform at the heavy level required of his job as an \_\_\_ at \_\_\_. Dr. Lozano concluded that Claimant was improving in his strength and functioning and would benefit from a work-hardening program to enable him to return to work. Thus, on June 8, 2005, Dr. Lozano requested preauthorization for 20 sessions of work hardening for Claimant.

Carrier denied the preauthorization request. Dr. Lozano requested reconsideration and Carrier maintained its denial. Dr. Lozano then requested medical dispute resolution through the Commission. The matter was referred to an IRO designated by the Commission for the review process. The IRO determined that the requested treatment was medically necessary and should be authorized. Carrier then requested a hearing on the IRO decision, and the matter was transferred to the State Office of Administrative Hearings (SOAH). The hearing convened at SOAH’s hearings facility on October 10, 2005, before ALJ Craig R. Bennett. Carrier was represented at the hearing by attorney Dan Kelley, and Provider was represented by Dr. Lozano who appeared by telephone along with Claimant. The hearing concluded and the record closed that same day.

## **II. Discussion and Analysis**

### **A. Parties’ Evidence and Arguments**

At the hearing, Carrier presented medical records and the testimony of Michael Hamby, D.C. Dr. Hamby testified that he did not consider work hardening to be necessary for Claimant.

Dr. Hamby had concerns about the consistency of the medical records provided and noted some inconsistency between findings reflected in those medical records. Dr. Hamby was concerned that it appeared in this case that Dr. Lozano had purposely developed a treatment history and supporting documentation for the purpose of establishing the necessity of work hardening, instead of simply treating the injury and its effects as they developed. Rather than work hardening, Dr. Hamby thought it would be more appropriate to have Claimant return to work on light duty while his injury continued to heal. Dr. Hamby noted that a recent FCE performed on September 14, 2005, showed that Claimant's condition had improved significantly and that his functioning level had gone from sedentary in May (as of the first FCE) to medium duty in September. Based on the more recent FCE, Dr. Hamby thought that Claimant could begin working at a medium duty level without the need for work hardening.

In response, Provider offered medical records and the testimony of both Dr. Lozano and Claimant. In his testimony, Claimant stated that he previously asked his manager if he could continue working in a lesser capacity after his injury, but was told that his employer had no positions available for him offering a lighter duty level. As to the recent FCE, Dr. Lozano pointed out that, even with his improvement, Claimant's lifting ability was still below the 50 pounds necessary for his job duties and that he was classified at a medium level, which is below the "heavy" level of his job as an \_\_\_\_.

## **B. ALJ's Analysis**

The sole issue in this case is whether 20 sessions of work hardening are medically necessary to treat Claimant's work-related injury. After considering the evidence and arguments presented, the ALJ concludes that Carrier has not shown, by a preponderance of the evidence, that the requested treatment is not necessary. Therefore, the ALJ finds the work hardening should be authorized.

Carrier's evidence identified numerous factors supporting Dr. Hamby's conclusion that work hardening was not appropriate for Claimant, but Provider's evidence generally refuted those factors. For example, Provider's evidence indicates that light duty work is not available for Claimant and that Claimant is still below the necessary functioning for his former position. Dr. Hamby's testimony was

lacking in overall persuasiveness because his concerns generally centered around inconsistencies in the medical records and his belief that Claimant should be able to start working now without work hardening. Dr. Hamby's concerns about medical records were belied by his own continual admission that it appeared that he did not have all of the necessary records and that he would expect additional records to exist regarding the treatment of Claimant. And, his testimony about Claimant's ability to

work now was rebutted by Claimant's own testimony about the unavailability of work for him.

Ultimately, it is decisive in this case that Carrier has the burden of proof. The record evidence does not necessarily establish that work hardening is needed for Claimant; but, the Provider is not required to show that the requested treatment is necessary. Rather, because the IRO found in favor of preauthorization, the Carrier must prove that the treatment is *not necessary*. After considering all of the evidence, the ALJ concludes that Carrier has failed to articulate a legitimate persuasive basis, supported by the record, for finding that work hardening is unnecessary for Claimant. Accordingly, consistent with the IRO determination, the preauthorization request for such treatment should be granted. In support of this decision, the ALJ makes the following findings of fact and conclusions of law.

### **III. Findings of Fact**

1. \_\_\_ (Claimant) worked as an \_\_\_ at \_\_\_ and suffered a work-related injury to his lower back in \_\_\_, while lifting and moving boxes holding windshield wiper fluid.
2. At the time of his compensable injury, Claimant's workers' compensation insurance was provided by American Home Assurance Company (Carrier).
3. Claimant began receiving treatment from Pedro Lozano, D.C., a chiropractor affiliated with South Texas Healthcare Center (Provider).
4. Dr. Lozano placed Claimant on work restrictions and began providing physical therapy to Claimant three times a week.
5. On February 28, 2005, Claimant had a magnetic resonance imaging (MRI) diagnostic scan performed on him. The MRI was interpreted by C. Tom Clayton, M.D., a board-certified radiologist who determined that Claimant had a "large nearly 4 mm central and right paracentral disc herniation with disc material clearly extending beyond the vertebral body margins, and an almost certain rupture of the posterior annulus."

6. On April 6, 2005, Claimant was seen by Peter Yeh, M.D., a neurosurgeon. Dr. Yeh noted Claimant's herniated disc, but recommended that Claimant continue with conservative care at that time, with the understanding that surgery may be more appropriate if Claimant's condition did not improve.
7. On May 20, 2005, a functional capacity evaluation (FCE) was performed on Claimant. That FCE revealed that Claimant had significant improvement in functioning, but still was limited in his lifting abilities and was classified as being unable to perform at the heavy level required of his job as an \_\_\_ at\_\_\_.
8. On June 8, 2005, Dr. Lozano requested preauthorization for 20 sessions of work hardening for Claimant.
9. Carrier denied the preauthorization request.
10. Dr. Lozano requested reconsideration and Carrier maintained its denial.
11. Dr. Lozano then requested medical dispute resolution through the Texas Workers' Compensation Commission (Commission). The matter was referred to an Independent Review Organization (IRO) designated by the Commission for the review process. On August 29, 2005, the IRO determined that the requested treatment was medically necessary and should be authorized.
12. On August 31, 2005, Carrier requested a hearing on the IRO decision, and the matter was transferred to the State Office of Administrative Hearings (SOAH).
13. Notice of the hearing was sent on September 12, 2005, and 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.
14. The hearing convened at SOAH's hearings facility on October 10, 2005, before Administrative Law Judge Craig R. Bennett. Carrier was represented at the hearing by attorney Dan Kelley, and Provider was represented by Dr. Lozano who appeared by telephone along with Claimant. The hearing concluded and the record closed that same day.
15. Claimant's position as an \_\_\_ for \_\_ was classified at a heavy work level.
16. After his injury, Claimant asked his employer whether he could continue working in a lesser capacity, but was told that there were no positions available for him offering a lighter work level.
17. Claimant had an FCE performed on September 14, 2005, which showed that Claimant's lifting ability was still below the 50 pounds necessary for his job duties and that he was classified at a medium level, which is below the "heavy" level of his job as an \_\_\_.

#### **IV. 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. § 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.
3. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
4. Carrier has the burden of proof. 28 TEX. ADMIN. CODE §§ 148.14(a) and 133.308(w).
5. Carrier failed to prove, by a preponderance of the evidence, that the requested work hardening is not medically necessary treatment for Claimant's compensable injury.
6. The request for preauthorization should be granted, consistent with the IRO decision.

#### **ORDER**

IT IS, THEREFORE, ORDERED that preauthorization for 20 sessions of work hardening to be provided to Claimant \_\_ is granted.

**SIGNED October 14, 2005.**

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**CRAIG R. BENNETT  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS**