

DOCKET NO. 453-05-3059.M5

SUHAIL S. AL-S AHLI, D.C. § **BEFORE THE STATE OFFICE**
§
V. § **OF**
§
ACE AMERICAN §
INSURANCE COMPANY¹ § **ADMINISTRATIVE**
HEARING

DECISION AND ORDER

The provider, Suhail Al-Sahli, sought reimbursement for approximately one month of work hardening provided to claimant___ in the spring of 2004. Citing a lack of medical necessity, the carrier, ACE Insurance Company (ACE), 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 \$3,968.00.

The Administrative Law Judge (ALJ) concludes that the disputed services were not medically necessary.

I. NOTICE AND PROCEDURAL HISTORY

The hearing was convened on November 7, 2005, before State Office of Administrative Hearings (SOAH) Judge Shannon Kilgore. Dr. Al-Sahli appeared by telephone on his own behalf.² Steven Tipton, attorney, represented ACE. The record closed on December 19, 2005, with the filing of the last written closing argument. No party raised any issue concerning notice or jurisdiction.

II. DISCUSSION

A. Medical Necessity

¹ Counsel for the insurance carrier in this case clarifies that while some documents indicate that the insurer is Zurich American Insurance Company, the actual party is ACE Insurance Company.

² Mr. Al-Sahli is the president of the clinic at which___ was treated and was___'s treating doctor, but was not a member of the team that administered the work hardening program.

First Rio has the burden of proof in this proceeding.³ 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.⁴

Health care includes all reasonable and necessary medical aid, medical examinations, medical treatment, medical diagnoses, medical evaluations, and medical services.⁵

B. Background, Disputed Services, IRO Decision

___ injured his back, neck, and head on___, when he fell and, in the process, pulled some shelving and boxes down onto himself. He was in his late twenties at the time of his injury. He was transported by ambulance to the emergency room, where x-rays of his cervical and lumbar spine were taken. The x-rays were normal. ___was diagnosed with cervical and lumbar strain and treated with anti-inflammatory and muscle relaxing medications.

On the day following his accident, ___saw Dr. Al-Sahli and complained of severe neck and back pain. Dr. Al-Sahli began treating ___with physical therapy, manipulations, and rehabilitation therapies three times per week. In December 2003 ___began seeing a pain management physician because of continued severe low back pain.⁶ The pain management doctor treated ___with medications and ordered a continuation of the patient’s therapy at Dr. Al-Sahli’s clinic. Cervical and lumbar MRIs performed in late January 2004 indicated disc protrusions or bulges at several levels of the cervical spine,

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

⁴ TEX. LAB. CODE § 408.021.

⁵ TEX. LAB. CODE § 401.011(19).

although with no significant foraminal or canal stenosis, and disc herniations or protrusions at several levels of the lumbar spine as well.⁷

___ continued treatment with Dr. Al-Sahli into the spring but experienced persistent back pain. A functional capacity exam (FCE) administered on March 23, 2004, indicated that ___ could not yet return to a job like the one in which he had been injured – assistant ___ at a fast food restaurant – because he did not demonstrate the lifting, carrying, pushing, pulling, reaching, stooping, crouching, and kneeling tolerances required.⁸ According to the FCE report, ___'s primary barriers to working at his previous level included restricted cervical and lumbar range of motion, pain upon lifting heavy weights, headache, and deconditioning.

___ began the disputed work hardening on March 30, 2004. His last day of the program was on April 30, and he underwent a discharge FCE on May 4, 2004. The FCE report suggested that ___'s functional deficits and pain levels had decreased over the course of the work hardening program.⁹

Dr. Al-Sahli billed for the work hardening under CPT Codes 97545 and 97546. The carrier declined to pay, using the "unnecessary treatment with peer review" denial code.

The IRO issued its decision on November 11, 2004.¹⁰ The IRO reviewer found the work hardening services unnecessary, stating, "Medical record documentation does not indicate any treatment immediately preceding the work hardening program or that any chiropractic spinal adjustments were performed on this patient." Further, the reviewer indicated that a home exercise program would have been preferable and, at a minimum, the provider should have first tried a home program before embarking on an extensive work hardening regimen.

⁷ Petitioner Exhibit 1 at 200591-200592.

⁸ Petitioner Exhibit 1 at 200538-200539. The record indicates that M.S. had just been employed in a new, light duty job at this point. Respondent Exhibit 1 at 42.

⁹ Petitioner Exhibit 1 at 200666-200667.

¹⁰ Respondent Exhibit 1 at 3-4.

C. Dr. Al-Sahli's Position and Evidence

Dr. Al-Sahli relies primarily on medical records and documentation from the work hardening program to support his assertion that the work hardening was medically necessary.¹¹ He argued that the IRO decision was wrong because the IRO reviewer stated there had been no treatment prior to the work hardening regimen, when in fact there had been therapy.¹² Dr. Al-Sahli's position is that the pre-work hardening FCE along with a psychological evaluation of ___ indicate that he was a good candidate for work hardening. According to Dr. Al-Sahli, a plateau in the claimant's condition prior to the initiation of work hardening further suggests that the additional, intensified therapy was warranted. Dr. Al-Sahli asserts that ___ improved as a result of the work hardening and returned to full work status after successful completion of the program. He also contends that ACE failed to provide the peer review doctors and ACE's expert witness with all pertinent medical records.

D. ACE's Position and Evidence

Samuel Bierner, M.D., a physician board-certified in physical medicine rehabilitation, electrodiagnostic medicine, and pain management, testified for ACE. Dr. Bierner testified that to be a candidate for work hardening, a patient must be among the relatively small number of persons who: continue to experience pain beyond the expected duration for their injuries, have psychosocial barriers to recovery, and exhibit deficits in FCEs. According to Dr. Bierner, ___ demonstrated overall good performance on the pre-work hardening FCE and did not show indications of significant psycho-social barriers. Dr. Bierner testified that a few weeks of work conditioning, or limited physical therapy followed by a home exercise program, should have been sufficient to return ___ to his former job.

¹¹ The ALJ kept the record open following the hearing to allow Dr. Al-Sahli to submit some additional materials related to the work hardening. On November 29, 2005, Dr. Al-Sahli filed 14 pages of what he called "psychological and vocational notes" pertaining to ___. Those materials are now admitted in the record as Petitioner Exhibit 2.

¹² Dr. Al-Sahli stated that his office had not sent the IRO any records of pre-work hardening treatment because sometimes such records confuse the IRO reviewers.

E. ALJ's Analysis and Conclusion

The ALJ is persuaded by Dr. Bierner's testimony that this claimant's condition did not warrant an intensive work hardening program. First, while ___'s subjective reports of pain are puzzlingly inconsistent,¹³ there is ample evidence in the record that his pain was not very severe, as demonstrated by the following:

- on January 9, 2004, ___'s pain management physician, Dr. Saqer, stated that ___ had more than 90% relief, was taking reduced medications only on an "as needed" basis, could perform all movements of daily activities (including lifting and bending), and had all his pain under control;¹⁴
- on March 26, 2004, Dr. Saqer's clinic reported that ___ only had very minimal pain;¹⁵ and
- on April 2, 2004 – the fourth day of the work hardening program – Dr. Saqer's note stated:

*[___] is doing extremely well. He states that his pain level is a 0 on a scale of 0-10. . . He has no particular problems or pain that he finds difficult to deal with. He again is not taking any particular medications at this time . . . Range of motion of the low back is full without pain, this is of the cervical and lumbar spine.*¹⁶

Second, ___ did not display significant psychosocial barriers to recovery.¹⁷ He exhibited no significant anxiety or depression on the Dallas Pain Questionnaire

¹³ Throughout the entire work hardening program, including at its end, ___ reported pain of 4-6 on a scale of 10. Petitioner Exhibit 1, part D. Nevertheless, as discussed below, he made repeated, detailed statements to health professionals orally and on extensive pain-related questionnaires that indicate his pain levels, and any disability associated with them, were quite minimal at the commencement of work hardening.

¹⁴ Petitioner Exhibit 1 at 200587.

¹⁵ Petitioner Exhibit 1 at 200588.

¹⁶ Petitioner Exhibit 1 at 200589 (emphasis added). Despite the patient's lack of problems, Dr. Saqer said in the same note that the patient should complete the work hardening program. Dr. Bierner testified that this recommendation seemed inconsistent with the patient's condition.

¹⁷ In March 2004 ___'s functional abilities may not have been quite adequate for the demands of his prior job. In the FCE performed on March 31, 2004, while ___ was able to lift 50 pounds from waist to shoulder and 40 pounds from floor to waist, he had some pain associated with these activities and apparently still showed some functional deficits relative to his particular job requirements. Petitioner Exhibit 1 at 200598-200613.

administered with the March 31, 2004 FCE ("0% Anxiety/Depression"). The Oswestry Low Back Pain Disability Questionnaire yielded a rating of "minimal disability" and a similar neck pain questionnaire resulted in a "mild" perceived disability rating.¹⁸ The Oswestry test, which is designed to assess the ability of the patient to cope with pain, includes the following language for patients who score at or about the same level as that of__: "This group can cope with most living activities. Usually no treatment is indicated, apart from advice on lifting, sitting posture, physical fitness and diet."¹⁹ In dramatic contrast to these results, a psychologist with Dr. Al-Sahli's clinic had determined on March 24, 2004, that ___had a combination of high pain and poor coping skills that made him a good candidate for work hardening.²⁰ Because the findings in this brief checklist-style report are radically out of sync with other, extensive evidence in the record, the ALJ gives them little weight.

The record indicates that ___had made great strides in his primary therapy and he lacked significant psychosocial barriers to recovery. Therefore, the ALJ concludes that the intensive work hardening program at issue was not medically necessary.

III. FINDINGS OF FACT

1. ACE American Insurance Company (ACE) is the workers' compensation insurer with respect to the claims at issue in this case.
2. ___injured his back, neck, and head on___, when he fell and, in the process, pulled some shelving and boxes down onto himself. He was in his late twenties at the time of his injury.
3. On the day following his accident,___ saw Suhail Al-Sahli, D.C., and complained of severe neck and back pain.
4. Dr. Al-Sahli began treating ___with physical therapy, manipulations, and Rehabilitation therapies three times per week.
5. In December 2003, ___began seeing a pain management physician because of continued severe low back pain.

¹⁸ Petitioner Exhibit 1 at 200614-200615.

¹⁹ Petitioner Exhibit 1 at 200614.

²⁰ This report, at Petitioner Exhibit 2, was submitted by Dr. Al-Sahli after the hearing and does not seem to have been part of the materials reviewed by the IRO reviewer or Dr. Bierner.

6. ___ continued treatment with Dr. Al-Sahli into the spring but experienced persistent back pain.
7. In late March 2004, ___ became employed in a new, light duty job.
8. ___ began a work hardening regimen at Dr. Al-Sahli's clinic on March 30, 2004. His last day of the program was on April 30, and he underwent a discharge FCE on May 4, 2004.
9. Dr. Al-Sahli billed for the work hardening under CPT Codes 97545 and 97546.
10. The carrier declined to pay for the work hardening, using the "unnecessary treatment with peer review" denial code.
11. Dr. Al-Sahli requested medical dispute resolution.
12. An Independent Review Organization (IRO), in a decision dated November 11, 2004, determined that the disputed services were not medically necessary.
13. The Medical Review Division of the Texas Workers' Compensation Commission (Commission) issued its order, based on the IRO decision, on November 19, 2004.
14. Dr. Al-Sahli requested a hearing before the State Office of Administrative Hearings (SOAH) to contest the IRO's decision.
15. On January 7, 2005, the Commission issued a notice of hearing in this matter.
16. 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.
17. ___'s pain was substantially resolved by the time he began the work hardening program.
18. ___ did not have significant psychosocial barriers to recovery.
19. The disputed course of work hardening administered to ___ was medically unnecessary.

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. Dr. Al-Sahli 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 does not require ACE to reimburse Dr. Al-Sahli for work hardening services rendered to ___ in March and April 2004 and billed under CPT Codes 97545 and 97546.

ORDER

IT IS THEREFORE ORDERED that Ace American Insurance Company need not reimburse Suhail Al-Sahli, D.C., for work hardening services rendered to claimant ___ in March and April 2004 and billed under CPT Codes 97545 and 97546.

ISSUED February 2, 2006.

SHANNON KILGORE
STATE OFFICE OF ADMINISTRATIVE HEARINGS
ADMINISTRATIVE LAW JUDGE