

SOAH DOCKET NO. 453-05-7891.M5
MR NO. M5-05-2000-01

TEXAS MUTUAL INSURANCE	§	BEFORE THE STATE OFFICE
COMPANY,	§	
Petitioner	§	
V.	§	OF
HEALTH READY,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Petitioner Texas Mutual Insurance Company (Texas Mutual) challenges the Findings and Decision of the Medical Review Division (MRD) of the Texas Workers' Compensation Commission¹ (Commission) requiring reimbursement for work hardening that Respondent Health Ready provided to an injured worker (Claimant). Texas Mutual disputes the conclusion of the Independent Review Organization (IRO) that the services were medically necessary. The Administrative Law Judge (ALJ) finds that Texas Mutual failed to meet its burden of proving that the work hardening provided to the Claimant was not medically necessary and finds that Health Ready should be reimbursed for those services.

I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION

ALJ Katherine Smith convened the hearing on October 10, 2006, at the State Office of Administrative Hearings (SOAH), Austin, Texas. Texas Mutual was represented by Attorney Katie Kidd. Health Ready was represented by Attorney Allen Craddock. The record closed on January 10, 2007, with Health Ready's response to Order No. 5, which had requested the parties to establish the dates of service in dispute. No party contested notice or jurisdiction. The ALJ admits into the record as Exhibit No. 2, Respondent's Medical Dispute Resolution Request that

¹ As of September 1, 2005, the functions of the Commission have been assumed by the Texas Department of Insurance, Workers' Compensation Division.

includes a list of the dates of service in dispute with notations of either the reasons for denial or whether the dates of service were paid.

II. DISCUSSION

A. Background

Claimant sustained a work related injury on _____, when he attempted to lift a box of cargo. He was diagnosed with lumbar intervertebral disc without myelopathy and thoracic and lumbrosacral neuritis or radiculitis. Claimant had had a previous injury to his back and back surgery in 1989. He was initially treated with medications, physical therapy, epidural steroid injections, and facet blocks.

Claimant's treating doctor, Saeed Kahkeshani, M.D., a board certified neurologist, referred Claimant for chronic pain management (CPM) on April 1, 2004, to Health Ready, which is accredited by the Commission on Accreditation of Rehabilitation Facilities (CARF), to enable Claimant to cope with his pain. Health Ready provided Claimant with CPM from April 19 to June 21, 2004. It then provided work hardening treatment from June 22 through August 20, 2004.

Health Ready billed Texas Mutual each day \$128 for the first two hours of work hardening treatment under CPT Code 97545-WH-CA and \$364 for additional hours of the work hardening under CPT Code 97546-WH-CA. Texas Mutual denied reimbursement for the work hardening based primarily on "unnecessary treatment" (lack of medical necessity). With regard to the hours of service billed under CPT Code 97546-WH-CA on June 30, 2004, and the dates of service of July 23, August 4, 5, 9, 10, 12, 13 and 17, 2004, Texas Mutual denied reimbursement based not on unnecessary treatment, but on "reduced or denied in accordance with the appropriate fee guideline ground rule and/or maximum allowable reimbursement" or "documentation submitted does not substantiate the service billed."

Health Ready filed a request for medical dispute resolution with the Commission's MRD, which referred the dispute to an IRO. The IRO found that the work hardening treatment was medically necessary because the Claimant improved in strength and conditioning. MRD found, however, that the services provided on July 23 and August 13 and 17, 2004, should be denied reimbursement because Health Ready did not submit relevant documentation to support the level of service billed. Health Ready did not appeal that decision. But MRD found that the services provided on August 4, 5, 9, 10, and 12 should be reimbursed. MRD also found that the amount billed under CPT Code 97546-WH-CA on June 30, 2004, was at the appropriate CARF rate. Ex. 1 at 11, 29-36.

The following dates of service are in dispute: June 22, 29, 30, July 1, 2, 6, 8, 9, 12, 13, 14, 15, 16, 20, and August 4, 5, 9, 10, 12, 18, 19, and 20, 2004.²

B. Applicable Law

Under the workers' compensation system, an employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury. The employee is specifically entitled to health care that: (1) cures or relieves the effects naturally resulting from the injury; (2) promotes recovery; or (3) enhances the ability to return to or retain employment. TEX. LAB. CODE ANN. § 408.021. "Health care" includes "all reasonable and necessary medical . . . services." TEX. LAB. CODE ANN. § 401.011(19).

The parties relied on Medicine Ground Rule II. E. 2. of the 1996 *Medical Fee Guideline* at 37-38,³ which provides that the entrance/admission criteria shall enable the work hardening program

² July 21 and 22, 2004, are not in dispute because Texas Mutual paid for those services. See Ex 2.

³ 28 TEX. ADMIN. CODE (TAC) § 134.201 (eff. April 1, 1996) at 37-38. The 1996 Medical Fee Guideline is no longer in effect for services provided after September 1, 2002, but parties still rely on it for its general principles.

to admit: (a) persons who are likely to benefit from the program; (b) persons whose current level of functioning due to illness or injury interferes with their ability to carry out specific identifiable tasks required in the workplace; (c) persons whose medical, psychological, or other conditions do not prohibit participation in the program; and (d) persons who are capable of attaining specific employment upon completion of the program.

C. Dates of Service Provided on August 4, 5, 9, 10, and 12 and Hours of Service Billed under CPT Code 97546-WH-CA on June 30, 2004

As noted previously, Texas Mutual did not raise lack of medical necessity when it denied reimbursement for the dates of service provided on August 4, 5, 9, 10, and 12 and the hours of service billed under CPT Code 97546-WH-CA on June 30, 2004. *See Ex. 1* at 29, 33-34. Texas Mutual is, therefore, barred from raising lack of medical necessity in this proceeding because 28 TAC § 133.307(j)(2) (eff. January 1, 2003) limits a carrier to raising only those denial reasons given to the provider prior to medical dispute resolution being requested. Those dates of service should, therefore, be reimbursed.

D. Medical Necessity

1. Texas Mutual's Position

Texas Mutual provided the expert testimony of two witnesses: Nicholas Tsourmas, M.D., who is board certified in orthopedic surgery and Scott Herbowy, a physical therapist. Although Dr. Tsourmas testified that the CPM was an appropriate treatment, the work hardening was not, because CPM is a final treatment that is not meant to cure an injured worker, but to teach the injured worker how to live with his or her pain. In contrast, work hardening is an intense goal-directed program that is designed to address specific tasks that the injured worker is unable to perform at his job. It provides limited psychological counseling usually in the form of group therapy.

Dr. Tsourmas saw no evidence in the file that Claimant was referred for work hardening and noted that Dr. Kahkeshani referred Claimant only for CPM.

Dr. Tsourmas also testified that Claimant did not meet the 1996 Medical Fee Guideline entrance criteria for work hardening because Health Ready did not identify the physical requirements of Claimant's job and Claimant's limitations. He criticized the quality of the work hardening program because no specific goals were set, no specific job was identified, and no vocational counseling was provided. He noted that there was little difference between the CPM and work hardening program. Many of the exercises that Claimant performed were similar to the CPM program, including walking in the park and bowling. He noted that on many days work simulation was not performed because of Claimant's pain level, which is the opposite of what one would expect to see. He criticized the quality of the functional capacity evaluation (FCE) provided on May 7, 2004, in that it did not identify the physical limitation that prevented Claimant from seeking active employment and was incorrect in assessing that Claimant was de-conditioned and only capable of light duty because Claimant could dead-lift 235 pounds and walk 25 minutes at two to three miles per hour.

He also stated that the work hardening program was redundant in light of the abundant exposure to physical therapy Claimant received in the CPM program. He noted that work hardening is not supposed to be a general conditioning program or generalized physical therapy.

Dr. Tsourmas criticized the IRO's opinion because the IRO appeared to be unaware of the CPM that preceded the work hardening and because the FCE does not show that Claimant was severely de-conditioned. Dr. Tsourmas noted that there was no indication that Claimant's strength and conditioning improved as a result of the program and no indication that Claimant returned to work as a result of the program. Because Claimant could have gotten the same improvement in a home exercise program or at a gym, the treatment was not medically necessary and not a reasonable

use of medical resources. He testified that providing work hardening could create a dependency on the healthcare system instead of encouraging independence with a regimen of home exercises.

Although Dr. Tsourmas admitted that people with depression are not motivated to perform home exercises, he stated that Claimant's level of depression was mild based on his GAF equaling 55. He also noted that the benefits of the program did not last because Claimant continued to complain about increased pain from December 2004 to June 15, 2005.

Scott Herbowy also pointed out that there was no referral for work hardening from Dr. Kahkeshani and noted that no evaluation such as an FCE was performed before the start of the program. Without an FCE there was no baseline identifying limitations and deficits. Like Dr. Tsourmas he testified that Claimant showed no evidence of being de-conditioned because on May 7th he was able to walk 25 minutes or one mile on a treadmill at two to three mph. According to Mr. Herbowy, a severely de-conditioned person is unable to walk beyond five to ten minutes. Although Mr. Herbowy noted that some goals were identified and progress was noted, he stated that no specific job, work, or functional job activities were identified and criticized the physical therapist for failing to identify specific tasks that should have been focus of the program, including activities and exercises.

He testified further that the activities of the work hardening program were identical to those of the CPM program and noted that there were only slight changes in the exercises performed in the two months of the work hardening program. Mr. Herbowy criticized the relevance of some of the program's activities including playing dominoes. He also noted that there were many days that no work simulation was performed. He stated that if Claimant was unable to consistently perform the work simulation, the program should have been discontinued because work simulation is the primary purpose of the program. He also noted that when the work simulation was performed, the records failed to identify what Claimant did, how often he performed each task, and what his response was to each task, and appeared to occur no more than two hours a day out of eight hours of activity.

Although Claimant showed improvement in strength and conditioning over the two-month period of the work hardening program, Mr. Herbowy claimed that the same result could have come from a two-month home exercise program. Moreover, the level of Claimant's pain decreased from only a three out of ten to two out of ten, Claimant did not return to work, and the benefits derived from the program did not continue once the program ceased.

2. Health Ready's Position

Dr. Kahkeshani testified on behalf of Health Ready. He has been Claimant's treating doctor since his previous back injury. He referred Claimant to CPM in April 2004 because Claimant was having difficulty coping with the pain in his life, yet he wanted to return to work. Although he did not refer Claimant to work hardening per se, he did not question its being provided because Claimant wanted to return to work and would benefit from the program. Dr. Kahkeshani noted that Claimant was much better when he saw him on 6/1/04. Dr. Kahkeshani noted that the two programs have different functions. CPM helps injured workers cope with their pain, while work hardening increases physical conditioning and simulates work activities. He admitted that much of the work hardening program--walking in the park, exercising, and playing games was not work simulation or could have been performed at home. But he also testified that many work requirements can be simulated by other activities.

In response to Dr. Tsourmas, Health Ready noted that Claimant suffered from moderate depression according to the psychological evaluation performed by Kevin Smith, PhD., on April 13, 2004. Ex. 1 at 120. Health Ready also pointed out that Dr. Kahkeshani specifically noted on September 2, 2004, that Claimant's use of medication was reduced considerably and that Claimant's pain came back only after suffering a fall two months prior to being seen again by Dr. Kahkeshani on December 21, 2004. Ex. 1 at 219, 220. Health Ready noted that the program was a success in that Claimant had increased range of motion, strength, and ability along with decreased pain, and that Claimant was much more motivated to look for work after the program.

3. Decision

As noted, the criteria for entrance into a work hardening program includes "persons whose current level of functioning due to illness or injury interferes with their ability to carry out specific identifiable tasks required in the workplace" and "persons who are capable of attaining specific employment upon completion of the program." The ALJ is not convinced that a specific job needed to be identified. Claimant worked in a warehouse. Ex. 1 at 228. His duties consisted of lifting, squatting, and bending, tasks that were identified as early as June 22, 2004, in the treatment plans and the performance of which were documented. Ex. 1 at 493. Also documented was Claimant's increase in strength and flexibility while his pain level decreased. Ex. 1 at 249.

Although Dr. Tsourmas testified that CPM is considered to be the last treatment provided to injured workers, the ALJ is not aware of that being an established guideline. Once one has learned to live with his or her pain, moving on to a work hardening program seems reasonable. That Claimant did not return to work after the program does not diminish its efficacy.

The FCE performed on May 7, 2004, informed Dr. Kahkeshani that Claimant was being evaluated for work hardening. Ex. 1 at 227-28. The FCE performed on July 28, 2004, shows that Claimant improved from a light physical demand level (PDL) to a medium to medium/heavy PDL. Ex. 1 at 229, 239. The ALJ was not able to find in the May 7, 2004, FCE or elsewhere in the record a reference to Claimant being able to dead-lift 235 pounds. And the only indication in the FCE that Claimant was not severely de-conditioned was the reference to his being able to walk 25 minutes or one mile on a treadmill at two to three mph.

E. Conclusion

The ALJ finds that the Health Ready's records sufficiently documented the treatment plan, goal setting, Claimant's progress, and the benefit he derived from the work hardening program.

Therefore, Texas Mutual failed to prove by a preponderance of the evidence that the work hardening provided Claimant was not medically necessary.

III. FINDINGS OF FACT

1. Claimant sustained a work related injury on _____, when he attempted to lift a cargo box.
2. At the time of the injury, Claimant's employer had its workers' compensation insurance through Texas Mutual Insurance Company (Texas Mutual).
3. Claimant was diagnosed with lumbar intervertebral disc without myelopathy and thoracic and lumbosacral neuritis or radiculitis. He was initially treated with medications, physical therapy, epidural steroid injections, and facet blocks.
4. Saeed Kahkeshani, M.D., Claimant's treating doctor, referred Claimant to Health Ready, which is accredited by the Commission on Accreditation of Rehabilitation Facilities (CARF) for chronic pain management (CPM) to enable Claimant to cope with his chronic pain.
5. Health Ready initially provided Claimant with CPM from April 19 to June 21, 2004, and then work hardening treatment from June 22 through August 20, 2004.
6. Health Ready billed Texas Mutual \$128 each day for the initial two hours of work hardening treatment under CPT Code 97545-WH-CA and \$364 for the additional hours of work hardening under CPT Code 97546-WH-CA.
7. Texas Mutual denied reimbursement for the work hardening treatment primarily based on "unnecessary treatment" (lack of medical necessity).
8. Texas Mutual denied reimbursement for the hours of service billed under CPT Code 97546-WH-CA on June 30, 2004, based on "reduced or denied in accordance with the appropriate fee guideline ground rule and/or maximum allowable reimbursement."
9. Texas Mutual denied reimbursement for the dates of service of July 23, August 4, 5, 9, 10, 12, 13 and 17, 2004, based on "documentation submitted does not substantiate the service billed."
10. Health Ready filed a request for medical dispute resolution with the Medical Review Division (MRD) of the Texas Workers' Compensation Commission (Commission), which referred the dispute to an Independent Review Organization (IRO).

11. The IRO found that the work hardening treatment was medically necessary because the Claimant improved in strength and conditioning.
12. MRD determined that the services provided on July 23 and August 13 and 17, 2004, should be denied reimbursement because Health Ready did not submit relevant documentation to support the level of service. Health Ready did not appeal that decision.
13. MRD found that the services provided on August 4, 5, 9, 10, and 12 should be reimbursed.
14. MRD also found that the amount billed under CPT Code 97546-WH-CA on June 30, 2004, was at the appropriate CARF rate.
15. Texas Mutual filed a request for a hearing before the State Office of Administrative Hearings (SOAH) on June 22, 2005.
16. The case was referred by the Commission and accepted by SOAH for hearing prior to September 1, 2005.
17. The Division of Workers' Compensation of the Texas Department of Insurance sent notice of the hearing to the parties on November 8, 2005. The hearing notice informed the parties of the time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; the statutes and rules involved; and the matters asserted.
18. The hearing convened on October 10, 2006, before Administrative Law Judge Katherine L. Smith. Texas Mutual was represented by Attorney Katie Kidd. Health Ready was represented by Attorney Allen Craddock. The record closed on January 10, 2007.
19. Claimant suffered from moderate depression according to the psychological evaluation performed by Kevin Smith, PhD., on April 13, 2004.
20. The functional capacity evaluation (FCE) performed on May 7, 2004, informed Dr. Kahkeshani that Claimant was being evaluated for work hardening.
21. Although Dr. Kahkeshani did not refer Claimant to work hardening per se, he did not question its being provided because Claimant wanted to return to work and would benefit from the program.
22. Once an injured worker has learned to live with his or her pain, moving on to a work hardening program is not unreasonable.

23. Claimant's duties as a warehouse worker were identified as early as as lifting, squatting, and bending.
24. The treatment plans addressed those duties, and Claimant performed exercises and work simulation to address his limitations in performing those duties.
25. The FCE performed on July 28, 2004, shows that Claimant improved from a light physical demand level (PDL) to a medium to medium/heavy PDL.
26. Dr. Kahkeshani noted that Claimant was much better when he saw him on September 2, 2004, and that Claimant had significantly reduced his use of pain medications.
27. The work hardening program increased Claimant's range of motion, strength, and ability, decreased his pain, and motivated him to look for work after the program.
28. Health Ready's records sufficiently documented the treatment plan, goal setting, Claimant's progress, and the benefit he derived from the work hardening program.
29. Claimant's pain returned after suffering a fall between his September 2 and December 21, 2004, office visits with Dr. Kahkeshani.

IV. CONCLUSIONS OF LAW

1. SOAH has jurisdiction over matters related to the hearing, including the authority to issue a decision and order, pursuant to TEX. LAB. CODE ANN. §§ 413.073(b) and 413.031(k) and TEX. GOV'T CODE ANN. ch. 2003 and Acts 2005, 79th Leg., ch. 265, § 8.013, eff. Sept. 1, 2005.
2. Texas Mutual timely filed a request for hearing before SOAH, as specified in 28 TEX. ADMIN. CODE § 148.3.
3. The parties received proper and timely notice of the hearing pursuant to TEX. GOV'T CODE ANN. ch. 2001 and 1 TEX. ADMIN. CODE § 155.27.
4. Texas Mutual had the burden of proving the case by a preponderance of the evidence pursuant to 28 TEX. ADMIN. CODE § 148.14.
5. An employee who has sustained 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 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. TEX. LAB. CODE ANN. § 408.021(a).

6. Health care includes all reasonable and necessary medical services. TEX. LAB. CODE ANN. § 401.011(19)(A).
7. Health Ready is due reimbursement for the dates of service provided on August 4, 5, 9, 10, and 12, 2004, and the hours of service billed under CPT Code 97546-WH-CA on June 30, 2004, because Texas Mutual failed to raise lack of medical necessity when it denied reimbursement for those services prior to medical dispute resolution being requested. 28 TAC § 133.307(j)(2) (eff. January 1, 2003).
8. Texas Mutual failed to prove that the work hardening provided to the Claimant from June 22 through August 20, 2004, was not medically necessary under TEX. LAB. CODE ANN. §§ 401.011(19) and 408.021(a).

ORDER

IT IS ORDERED that Texas Mutual Insurance Company shall reimburse Health Ready for the work hardening it provided Claimant on June 22, 29, 30, July 1, 2, 6, 8, 9, 12, 13, 14, 15, 16, 20, and August 4, 5, 9, 10, 12, 18, 19, and 20, 2004.

SIGNED February 8, 2007.


KATHERINE L. SMITH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS