

**DOCKET NO. 453-08-0788.M5
MR No. M5-07-9948-01**

**JOB INJURY REHAB CENTER,
Petitioner**

VS.

_____,
Respondent

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Job Injury Rehab Center, also known as Rehab 2112 (Provider), challenges the decision of an Independent Review Organization (IRO) upholding the decision of _____ (Carrier) to deny reimbursement for a work hardening program provided to an injured worker (Claimant). Because Provider failed to prove the program was medically necessary for the treatment of Claimant's compensable injury, reimbursement should be denied.

Administrative Law Judge (ALJ) Gary Elkins convened and closed a hearing in this case on January 28, 2008. Provider appeared and was represented by Attorney Thomas Rhudy. Carrier appeared and was represented by Attorney Mark Sickles.

I. DISCUSSION

A. Background

On _____, Claimant suffered a compensable injury when she suffered a strike to the head and neck area from a baseball thrown by children playing nearby. Claimant reported

immediately feeling dizzy, but she finished her work shift for the day. She also completed a full shift the following day before seeking medical treatment.

Initial diagnostic testing performed on Claimant included x-rays and an MRI, and she was prescribed pain medications, chiropractic manipulations, and both active and passive physical therapy. On May 10, 2007, Claimant underwent a functional capacity evaluation (FCE) performed by Provider.¹

Based on the FCE, Provider determined Claimant was functioning at a “light” physical demand level and concluded she was a good candidate for work hardening. Consistent with this conclusion, Provider’s findings on the FCE, Claimant participated in a work hardening program at Provider’s facility from May 10, 2007, to August 10, 2007. In conjunction with the work hardening program, additional FCEs were conducted by Provider on June 6, 2007, and August 10, 2007.

Provider subsequently billed Carrier for the work hardening program and FCEs. Carrier denied reimbursement based on its conclusion that the services were not medically necessary for the treatment of Claimant’s compensable injury.

In response to the Carrier’s denial of reimbursement, Provider requested medical dispute resolution before the Texas Department of Insurance, Division of Workers’ Compensation. Following review of Provider’s claim on October 26, 2007, the IRO concluded that the disputed work hardening services were not medically necessary. Provider challenged the IRO decision by requesting a hearing before the State Office of Administrative Hearings, which culminated in a hearing and this Decision and Order.

¹ Exhibit 1 at 120-128.

B. Evidence and Argument

Through the testimony of its executive director, Paula Horn, Provider presented the following evidence and arguments in support of the disputed work hardening program:

- ! As a CARF-accredited facility, Provider is held to a higher standard and undergoes stringent surveys.
- ! Comparing the results of Claimant's initial FCE and her job description revealed she was not able to meet the physical demands of her job.
- ! Patrick Donovan, M.D., who conducted a May 11, 2007 designated doctor evaluation, concluded Claimant had not yet reached maximum medical improvement (MMI) and that she needed more aggressive treatment. Dr. Donovan recommended a treatment period of six-to-eight weeks to bring Claimant to MMI.²
- ! Claimant was able to meet all of her long-term goals in the work hardening program and was able to return to work.

In addition to testifying about the need for the work hardening program and the benefits Claimant derived from it, Ms. Horn testified to the following weaknesses in the peer review conducted by Lloyd Payne, D.C., who presented testimony on behalf of Carrier:

- ! Dr. Payne never identified the FCE as something he reviewed in formulating his conclusion that the work hardening program was medically necessary. Without it, he would not have been able to effectively evaluate Claimant's ability to return to work.
- ! Dr. Payne's conclusion that Claimant had suffered nothing more than a contusion/abrasion were inconsistent with the findings of Pedro Nosnik, M.D., a neurologist who concluded Claimant had suffered a brain concussion as well as post-concussional syndrome and post-traumatic dizziness.
- ! Dr. Payne acknowledged that Claimant suffered from headaches, dizziness, and ringing in the ears, which is inconsistent with a mere contusion.

² Ex. 1 at 75-77.

- ! Dr. Payne characterized as only mild the restriction on Claimant's range-of-motion in her cervical spine, but, at 50-60 degrees, the range of motion was not mild.
- ! Dr. Payne erroneously described the "ENG" as referring to the electro-myelograph, when it actually refers to a nystagmus testing tool.
- ! It is not clear that Dr. Payne is sufficiently familiar with the FCE process.
- ! The fact that Dr. Payne has not seen a patient in eight years reflects negatively on his opinion.
- ! Due to his role as the peer reviewer, Dr. Payne was not testifying from an unbiased position.

Carrier, through the expert witness testimony of Dr. Payne, presented the following reasons for opposing the work hardening program as not medically necessary:

- ! The nature of Claimant's injury did not support a work hardening program; it was a minimal injury for which chiropractic treatment at the rate of 12 visits over 4 weeks would have constituted sufficient treatment.
- ! Claimant did not require emergency care following her injury. Instead, she worked for one-and-one-half days prior to seeking medical treatment.
- ! There was no physical exam or diagnostic imaging that would support a work hardening program.
- ! Work hardening is a tertiary form of care for patients who have been away from physical activity for a significant amount of time—six to nine months—resulting in de-conditioning. Claimant did not experience such de-conditioning.
- ! As reflected in the notes of treating chiropractor Farid Aminzadeh, Claimant's symptoms naturally decreased over time, and there were no barriers to her being able to return to work that would justify the need for a work hardening program.
- ! Not until Claimant was referred to Provider was the decision made to place her in a work hardening program.
- ! Claimant's ability to meet the physical lifting demands of her work or to perform on a treadmill were not related to her getting hit in the neck/head region with a baseball.

C. Analysis and Conclusion

Reimbursement for the work hardening program and FCEs should be denied. As the petitioner in this case, it was Provider's burden to present prima facie evidence of medical need supporting the disputed services. It failed to do so, just as it failed to demonstrate the need for any of the FCEs. Based on the evidence, the ALJ was not persuaded that Claimant's injury was as serious as portrayed by Provider.

Ultimately, the conclusion that the work hardening program was not medically necessary is based primarily on Provider's failure to demonstrate how the injury to Claimant's head and neck area, regardless of its seriousness, related to her ability to meet the formal strength requirements found in her job description. Based on a review of the evidence, it appears Provider measured Claimant's strength during an FCE conducted a little over a month after her accident and compared its findings to the strength requirements listed in Claimant's formal job description. Then, based on its conclusion that Claimant did not meet the requirements, Provider appears to have inferred that Claimant's injury caused a significant loss of strength. Such an inference neither necessarily nor naturally flows from such a comparison. Consequently, Provider failed to make a prima facie showing of medical necessity for the disputed work hardening program. Also significant to this conclusion was the absence of evidence suggesting Claimant had become physically de-conditioned as a result of the compensable injury.

The conclusion that Provider failed to meet its *prima facie* burden renders unnecessary a lengthy analysis of such matters as the exact nature and seriousness of Claimant's head/neck injury, the existence of a psychological component, the extent to which the work hardening program may have altered Claimant's physical well-being or abilities, or the credibility of Dr. Payne as an expert witness for Carrier.

D. Decision

Because Provider failed to meet its burden of demonstrating the medical necessity of the work hardening program or the functional capacity evaluations, its reimbursement request is denied.

II. FINDINGS OF FACT

1. Claimant, an injured worker, suffered a compensable injury to her head and neck on _____.
2. At the time of Claimant's injury, her employer held workers' compensation insurance coverage through _____ (Carrier).
3. On May 10, 2007, Claimant underwent a functional capacity evaluation (FCE) performed by Job Injury Rehab Center, also known as Rehab 2112 (Provider).
4. Based on the results of the FCE, Provider determined Claimant was functioning at a light physical demand level, was unable to meet the physical demands of her job as detailed in her job description, and was a candidate for work hardening.
5. Claimant participated in a work hardening program at Provider's facility from May 10, 2007, to August 10, 2007.
6. In conjunction with the work hardening program, additional FCEs were conducted by Provider on June 6, 2007, and August 10, 2007.
7. Provider subsequently billed Carrier for the work hardening program and the FCEs.
8. Carrier denied reimbursement for the work hardening program and FCEs based on its conclusion that the services were not medically necessary for the treatment of Claimant's compensable injury.
9. In response to the Carrier's denial of reimbursement, Provider requested medical dispute resolution before the Texas Department of Insurance, Division of Workers' Compensation.

10. Following review of Provider's claim on October 26, 2007, the IRO concluded that the disputed work hardening services were not medically necessary.
11. Provider challenged the IRO decision by requesting a hearing before the State Office of Administrative Hearings.
12. Notice of the hearing was sent to the parties on December 17, 2007. The notice informed the parties of the date, time, and location of the hearing, the matters to be considered, the legal authority under which the hearing would be held, and the statutory provisions applicable to the matters to be considered.
13. The hearing before the State Office of Administrative Hearings convened and closed on January 28, 2008.
14. Before seeking medical treatment, Claimant finished her work shift the day of her inquiry and completed a full shift the following day.
15. On April 6, 2007, Claimant was experiencing no motor problems with her shoulders, arms, wrists, or hands.
16. An April 6, 2007 personal history of Claimant revealed no bruising to her head or face, and her symptoms had decreased since the work-related accident.
17. On April 7, 2007, Claimant's brain was normal, with no sign of internal derangement, including intra-cranial hemorrhages or mass effects.
18. On April 7, 2007, Claimant's cranio-cervical junction was normal.
19. On April 7, 2007, Claimant had no herniated discs, spinal stenosis, or foraminal stenosis in her cervical spine.
20. On May 8, 2007, Claimant exhibited the following:
 - a. She was conscious and alert; her memory was normal; and her language fluency and comprehension were normal.
 - b. Her cranial nerves were normal, including when shrugging her shoulders.
 - c. Her handgrip was normal, as was her elbow flexion and extension and her shoulder abduction and adduction.
 - d. Her hip, knee, and foot flexion and extension were normal.
 - e. A sensory examination in her upper and lower extremities was normal.

- f. The tone in her upper and lower extremities was normal.
 - g. Her straight leg raises were negative.
 - h. Her finger-nose-finger and heel-knee-shin tests were normal.
 - I. Her gait was normal.
 - j. The results of a Romberg test were negative.
 - k. A graphesthesia and stereognosis were normal.
21. On May 29, 2007, Claimant's motor, sensory, cerebellar, and vestibular examinations were unchanged from the May 8, 2007 examination except that Claimant felt nauseated.
22. On May 29, 2007, the active rotation of Claimant's head in the horizontal and vertical planes was normal.
23. On May 11, 2007, Claimant exhibited the following during a designated doctor examination performed by Patrick W. Donovan, M.D.:
- a. Her pain was 100 percent regional in nature and concentrated in the right posterior para-cervical spine.
 - b. A 5-out-of-5 rating on motor strength throughout the upper extremity musculature with no evidence of any asymmetric weakness.
 - c. Normal muscle tone throughout with no sign of rigidity or clonus on hyperactive stretching.
 - d. Full and symmetric deep tendon reflexes, with no sign of hyperreflexia.
24. On May 11, 2007, Dr. Donovan concluded Claimant would most likely need two or three sessions of trigger-point injections to the para-cervical spine and suboccipital musculature, and he recommended Claimant be fit with an electrical muscle stimulator for use at home and that she continue with functional range of motion and stretching exercises.
25. Any deficits in Claimant's lifting ability were not related to her compensable injury.
26. No evaluating or treating physician or other healthcare professional independent of Provider recommended work hardening for Claimant.

III. CONCLUSIONS OF LAW

- ! SOAH has jurisdiction over this proceeding, including the authority to issue a decision and order, pursuant to TEX. LAB. CODE ANN. § 413.031 and TEX. GOV'T CODE ANN. ch. 2003.
- ! Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. §§2001.051 and 2001.052.
- ! The disputed services were not shown to be reasonably required by the nature of Claimant's injury. TEX. LAB. CODE ANN. §408.021.
- ! The disputed services did not promote Claimant's recovery from her compensable injury. TEX. LAB. CODE ANN. §408.021.
- ! The disputed services were not medically necessary.

ORDER

IT IS ORDERED that the reimbursement request of Job Injury Rehab Center, also known as Rehab 2112, for functional capacity evaluations and a work hardening program provided to Claimant during the period of May 10, 2007, through August 10, 2007, is denied.

Signed March 26, 2008.

**GARY W. ELKINS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**