

**SOAH DOCKET NO. 454-08-4471.M5
DWC MR NO. M5-07-0101-01**

GABRIEL GUTIERREZ, D.C.,	§	BEFORE THE STATE OFFICE
Petitioner	§	
	§	
V.	§	OF
	§	
LIBERTY MUTUAL FIRE INSURANCE	§	
COMPANY,	§	ADMINISTRATIVE HEARINGS
Respondent	§	

DECISION AND ORDER

I. INTRODUCTION

Gabriel Gutierrez (Petitioner and Provider) appealed the decision of the Medical Dispute Resolution Division of the Texas Department of Insurance, Division of Workers' Compensation (the Division) regarding services provided by Petitioner to a workers' compensation claimant, ____ (Claimant) from March 14, 2006, through April 28, 2006. The Medical Review Division (MRD) accepted the Independent Review Organization's (IRO) decision that week three through six of treatments were medically unnecessary. The Provider appealed the IRO's decision. The Administrative Law Judge (ALJ) finds that the Provider met its burden of proof and weeks three through six were medically necessary.

II. PROCEDURAL HISTORY

Notice and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law. The hearing for this case convened on October 13, 2008, at the State Office of Administrative Hearings, 300 W. 15th St., 4th Floor, Austin, Texas, before ALJ Travis Vickery. Attorney Phillip Orth represented the Petitioner. Attorney Robert Josey represented Liberty Mutual Fire Insurance Company (Respondent). Written closing arguments were submitted and the record closed on November 7, 2008, after both parties had an opportunity to file briefs and reply briefs.

III. ARGUMENT AND ANALYSIS

The Claimant suffered a workplace injury on _____. He then underwent various treatments

over a two-and-a-half year period. The Claimant was referred to the Provider, who performed a functional capacity evaluation (FCE) on February 21, 2006. A psychosocial assessment was performed on February 26, 2006. The Provider treated the Claimant with work hardening from March 14, 2006, through April 28, 2006. A second FCE was conducted on May 1, 2006, after the completion of work hardening.

Respondent denied reimbursement for the services as medically unnecessary. Provider submitted the denial to the Division for review. The Division issued a decision finding that week one and two were medically necessary, but weeks three through six were not. Provider is the sole appellant, and as a result, only weeks three through six are in dispute (March 30, 2006, through April 28, 2006) (Disputed Services). The Provider appealed and the Disputed Services total \$10,525.¹

Respondent did not appeal the IRO's determination that the first two weeks of work hardening were medically necessary. That finding shall remain undisturbed by the ALJ. As a result, the issue here is not whether work hardening was initially medically necessary, but whether it should have been limited to two weeks of treatment, or the full six weeks that Claimant received.

At the time that the Claimant presented to the Provider, he had been out of work for approximately two-and-a-half years as a result of a tree limb falling on his lower right leg and fracturing his ankle and talus. Over the course of those two-and-a-half years, Claimant underwent a number of procedures and courses of therapy, including two surgeries, the latest occurring in September 2005, and complications including a post-surgical infection. Thereafter, he was referred to the Provider by Juan Galvan, D.C., who recommended six weeks of therapy.

The Claimant presented to the Human Resource Performance & Rehabilitation Institute (HRPRI), where the Provider is employed. Although the Claimant's employment involved a heavy physical demand level, the first FCE revealed that the Claimant was sedentary and unfit for even light duty work. The psychosocial evaluation determined that he was an appropriate candidate for work hardening, that there were non-physical barriers to the Claimant's ability to return to work, that

¹ Petitioner's Ex.1 at 23-26.

he was mildly depressed and that he considered himself completely disabled.² Taking all of this into consideration, it seems ambitious to expect the Claimant to achieve the goals of work hardening in two weeks of therapy. The extensive nature of work hardening assumes treatment of some duration to achieve a level of success.

Although the Respondent raises a number of valid issues with the Petitioner's evidence of Claimant's progress, the Petitioner established that the final four weeks of work hardening were medically necessary. Respondent accurately notes that all of the progress logs are formulaic and nearly identical.³ The Work Hardening Performance, Impression, Barrier(s) to RTH and Short Term Functional Goal(s) Chart from March 29, 2006 is also very similar in language to the same chart for April 28, 2006.⁴ Nevertheless, a comparison of the progress logs and charts documents Claimant's progress. And although the Work Hardening Program & Progress Table may lack depth, it reflects improvement in every category over the last four weeks.⁵ Respondent also notes discrepancies in Claimant's reported progress between the Work Hardening Program & Progress Table and the May 1, 2006 FCE. Nevertheless, the final FCE reflects that the Claimant "increased in all parameters from a Sedentary to a Light Functional Capacity."⁶ In particular, the effect of pain on the Claimant's functional ability was reduced, his ability to negotiate pain improved, his lifting ability increased by 15 pounds, and he increased sustained postural tolerances from 15 minutes to 60 and 75 minutes. Although the Claimant did not improve to a heavy physical demand level, he was at least employable at the light duty level - one of the program's goals.⁷

As reflected in the Findings of Fact and Conclusions of Law, this decision finds that the Provider met its burden of proof as to the medical necessity of the Disputed Services. The MRD's decision that the last four weeks of work hardening were medically unnecessary is overruled.

² *Id.* at 382-386.

³ *Id.* at 85-144.

⁴ *Id.* at 447-451 (March 29, 2006), 399-403 (April 28, 2006).

⁵ *Id.* at 404.

⁶ *Id.* at 172.

⁷ *Id.* at 171-184 and 1-4.

IV. FINDINGS OF FACT

Procedural History and Notice

1. Gabriel Gutierrez (Petitioner and Provider) appealed the decision of the Medical Dispute Resolution Division of the Texas Department of Insurance, Division of Workers' Compensation (Division) regarding services provided by Petitioner to a workers' compensation claimant, ___ (Claimant) from March 14, 2006, through April 28, 2006, and two Functional Capacity Evaluations (FCE).
2. Based on the Independent Review Organization's (IRO) decision, the Medical Review Division (MRD) determined that two weeks of work hardening and one FCE were medically necessary.
3. Based on the IRO's decision, MRD denied the Provider reimbursement for four weeks of work hardening and one FCE as medically unnecessary.
4. The Provider timely requested a contested case hearing.
5. Notice of the hearing was sent to the parties on September 12, 2008.
6. 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.
7. Upon the request of Liberty Mutual Fire Insurance Company (Respondent), continuances were granted, and by order issued September 22, 2008, the parties were provided notice of the new hearing date.
8. The hearing for this case convened on October 13, 2008, at the State Office of Administrative Hearings, 300 W. 15th St., 4th Floor, Austin, Texas. Attorney Phillip Orth represented the Provider and attorney Robert Josey represented the Respondent.
9. The parties filed post-hearing briefing and the record closed on November 7, 2008.

Background and Analysis

10. On _____, the Claimant suffered an injury at his job, when a tree limb fell on his lower right leg and fractured his ankle and talus.
11. On the date of the compensable injury, the Claimant's employer had workers' compensation insurance with the Respondent.
12. Claimant received treatment for his injuries, including two surgeries. Thereafter, he was referred to the Provider by Juan Galvan, D.C., who recommended six weeks of therapy.
13. The Claimant first presented to the Provider on February 21, 2006. That day, the Provider

conducted an FCE on the Claimant, which identified him as a candidate for six weeks of work hardening.

14. On February 26, 2006, Monie G. Smith, MA, L.M.F.T., conducted a Work Hardening Assessment Psychosocial History and determined that the Claimant was an appropriate candidate for work hardening.
15. The Provider administered work hardening to the Claimant from March 14, 2006, through April 28, 2006. The work hardening services were rendered under CPT codes 97546, 97545, and the FCEs were rendered under CPT code 97750.
16. Based on the IRO decision as adopted by the MRD, the Respondent paid for ten units of work hardening and one FCE.
17. The disputed services consist of 20 units of work hardening, rendered from March 30, 2006, through April 28, 2006, and one FCE (Disputed Services).
18. One of the goals of work hardening was to move the Claimant from the status of sedentary and unemployable to the capacity to seek employment in a light to medium duty position.
19. After the completion of work hardening, the May 1, 2006 FCE reflects that the Claimant “increased in all parameters from a Sedentary to a Light Functional Capacity.”⁸ Compared to the result of the February 21, 2006 FCE, the effect of pain on the Claimant’s functional ability was reduced; the Claimant’s ability to negotiate pain had improved; the Claimant’s lifting ability increased by 15 pounds; and the Claimant increased sustained postural tolerances from 15 minutes to between 60 and 75 minutes. The Claimant was employable at the light duty level.
20. The Disputed Services were medically necessary.

V. CONCLUSIONS OF LAW

1. The Texas Workers’ Compensation Commission has jurisdiction over this matter pursuant to TEX. LAB. CODE ANN. § 413.031.
2. The State Office of Administrative Hearings 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.
3. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV’T CODE ANN. § 2001.052.
4. The Provider had the burden of proof in this matter, pursuant to 28 TEX. ADMIN. CODE § 148.21(h).
6. The Provider met its burden to establish the medical necessity of the Disputed Services.

⁸ *Id.* at 172.

5. Pursuant to TEX. LAB. CODE ANN. § 408.021, the Provider's work hardening treatment, rendered to the Claimant from March 30, 2006, through April 28, 2006, and one FCE, were medically necessary.

ORDER

IT IS, THEREFORE, ORDERED that the Respondent is required to reimburse the Provider for work hardening rendered to the Claimant from March 30, 2006, through April 28, 2006, and one Functional Capacity Evaluation. In all other respects, MRD's decision is upheld.

SIGNED December 1, 2008.

**TRAVIS VICKERY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**