

**DOCKET NO. 453-04-0784.M2
MRD NO.**

WORK READY REHAB CENTERS,	§	BEFORE THE STATE OFFICE
Petitioner	§	
	§	
v.	§	
	§	OF
	§	
AMERICAN CASUALTY	§	
COMPANY OF READING, PA,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Work Ready Rehab Centers (Provider)¹ appealed the findings and decision of the Medical Review Division (MRD) of the Texas Workers' Compensation Commission (Commission). The Commission referred the dispute to an Independent Review Organization (IRO) which found that the last two weeks of Provider's work hardening program provided to an injured worker (Claimant) were not medically necessary. The amount in dispute is \$2,624. The Administrative Law Judge (ALJ) concludes the evidence does not prove that the last two weeks (June 20 through July 15, 2002) of the work hardening program were medically necessary and denies reimbursement.

I. BACKGROUND

On _____, Claimant sustained a back injury at work while lowering a trailer with a defective landing gear. The employer's workers' compensation insurance carrier was American Casualty Co. of Reading, P.A. (Carrier). Claimant was diagnosed with a strain/sprain of the lumbar spine and was treated with medication and physical therapy.² Despite the medication and the physical therapy, Claimant continued to experience pain. On October 4, 2001, an MRI was taken of

1 Provider is a CARF accredited facility. Ex. P-1 at 4.

2 Ex. R-1 at 5.

Claimant's lumbar spine revealing a "4-5 mm broad-based far left posterolateral herniation and annular tear which abuts the emanating left L4 nerve root sleeve/dorsal root ganglion and moderately narrows the left foramen."³ As a result of the MRI, Claimant's diagnosis was modified to include a herniated lumbar disk.⁴

On October 11, 2001, Claimant went to Amir Malik, M.D., a neurosurgeon, for a surgical consultation. Following his examination, Dr. Malik wrote:

At this point I would not recommend any surgical intervention for this. I did recommend continuing the physical therapy and his non-steroidal anti-inflammatory medication. I suggest that he continue this for another two to three weeks at which point he can start light duty work with no heavy lifting greater than 15 or 20 pounds and no bending or stooping.⁵

Although Claimant continued physical therapy and took the prescribed medication for pain, his condition did not improve. Claimant returned to Dr. Malik on December 6, 2001. Dr. Malik recommended that another MRI be taken prior to contemplating surgery. Claimant elected not to have surgery. On December 21, 2001, Barry Bass, M.D. conducted a history and physical on Claimant to evaluate him for a nerve root block. Claimant had returned to work, but was experiencing increased pain. According to Dr. Bass, Claimant was in good psychological condition.⁶

On January 22, 2002, Claimant underwent a selective nerve root block at L4-L5 which decreased his pain.⁷ Claimant underwent additional epidural injections which temporarily reduced his pain. On February 27, 2002, Claimant saw Marie Michas, M.D. for treatment. Dr. Michas allowed Claimant to return to work part-time with certain restrictions; however, Claimant was unable

3 Ex. R-1 at 33.

4 Ex. R-1 at 36.

5 Ex. R-1 at 44.

6 Ex. R-1 at 68.

7 Ex. R-1 at 88.

to continue working. On April 19, 2002, Paul Selina, M.D. began treating Claimant. Dr. Selina continued prescribing physical therapy for Claimant and kept him off work.

On May 7, 2002, William R. Culver, M.D., FAAPMR, examined Claimant for the purpose of conducting a medical evaluation for the Carrier. Dr. Culver diagnoses included:

1. No evidence of radiculopathy.
2. L4-5 disc bulge and desiccation.
3. Chronic low back pain.
4. Symptom magnification.⁸

On May 21, 2002, Dr. Selina prescribed two weeks of work hardening for Claimant. Claimant underwent a psychological assessment and a functional capacity evaluation (FCE) on May 24, 2002.⁹ The FCE indicated that Claimant's duties as a warehouse supervisor required a physical demand level of heavy. At the time of the FCE, Claimant was performing at a physical demand level of sedentary-light, with Claimant only being able to lift 15 pounds.¹⁰ The psychological assessment recommended that Claimant continue in the work hardening program for an additional four weeks and that he undergo individual psychotherapy because "his level of pain report is still above what is expected for a patient in the Work Hardening Program."¹¹

The first work hardening progress notes reflect Claimant's inability to improve to any significant and permanent degree. At the end of the first week, Claimant participated only four hours in the work hardening program because of pain. The work hardening progress notes document that Claimant participated in group walks for 30 minutes, stretching, exercises for the back and cardiovascular exercises, i.e., treadmill, upper body ergometer, bicycle, and aquatic therapy. It is

⁸ Ex. R-1 at 168.

⁹ It appears Claimant had already completed two weeks of the work hardening program when he had the psychological assessment.

¹⁰ Ex. R-1 at 186-190.

¹¹ Ex. R-1 at 185.

difficult to discern from the record how this program was any different from physical therapy. Dr. Selina authorized Claimant to return to work with restrictions on June 10, 2002.¹²

On June 19, 2002, Dr. Culver performed a retrospective peer review of Claimant's medical records. Dr. Culver concluded that up to four weeks of work hardening was medically necessary.¹³ On June 24, 2002, Dr. Selina prescribed another two weeks of work hardening for Claimant, a total of six weeks. At the same time, Dr. Selina again found Claimant could return to work with restrictions.¹⁴ It is unclear why Claimant did not return to work.

Following the work hardening program, Dr. Selina sent Claimant to Martin Grabois, M.D. for evaluation. In his report, Dr. Grabois wrote, "The patient, as I stated, got a little bit better then went back to work part time and the pain got worse and then he went to a work hardening program which has helped him somewhat."¹⁵ On August 2, 2002, Claimant had another MRI taken of his lumbar spine. The MRI showed "Degenerative change involving L4-5 disc including small broad-based left lateral disc herniation impinging slightly on exiting left L4 nerve root."¹⁶ Dr. Grabois reevaluated the Claimant on August 29, 2002. According to Dr. Grabois, Claimant suffers with chronic low back pain.

The Commission sent Claimant to Frank Flory, M.D., for a medical evaluation to determine if Claimant had reached maximum medical improvement (MMI). On September 16, 2001, Dr. Flory examined Claimant and found that he had not reached MMI and recommended that an EMG and nerve conduction velocity study be done. Dr. Grabois examined Claimant again on September 26,

12 Ex. R-1 at 197-199.

13 Ex. R-1 at 206.

14 Ex. R-1 at 212.

15 Ex. R-1 at 225.

16 Ex. R-1 at 229.

2002. Dr. Grabois requested the EMG study.¹⁷ The EMG was performed and showed “no electrodiagnostic evidence of radiculopathy in the lumbar region.”¹⁸ Dr. Flory found Claimant to have reached MMI on May 7, 2003.

Carrier paid for the first four weeks of work hardening. Carrier denied payment for the last two weeks of work hardening program, from June 25, 2002 through July 5, 2002, asserting that the additional two weeks were not medically necessary. Provider appealed and the Commission referred the dispute to an Independent Review Organization (IRO). The IRO found that Provider's services were not medically necessary. According to the IRO,

With the improvement that was noted, the additional weeks were not medically necessary especially with the extensive physical therapy the patient had prior to the program.

The patient did not have a surgical condition but will have problems in the future if he works at the previous work limits and must reduce work stressors (e.g., lifting, twisting, and carrying large objects). He will never be able to return to his old job type tasks even with years of work hardening. He was given adequate work hardening rehabilitation for his sustained on the job injury. Therefore, it is determined that the work hardening program from 06/25/02 through 07/05/02 was not medically necessary.¹⁹

The MRD adopted the IRO's decision and denied Provider request for reimbursement finding the last two weeks of work hardening were not medically necessary. This appeal followed.

II. MEDICAL NECESSITY

The issue to resolve is whether the last two weeks of work hardening were medically necessary to treat Claimant's compensable injury. Although the records are inconsistent, it appears

¹⁷ Ex. R-1 at 241.

¹⁸ Ex. R-1 at 242.

¹⁹ Ex. R-1 at 272.

that on May 24, 2002, Claimant began Provider's work hardening program. Carrier paid for the first four weeks of this program.

Pursuant to the Texas Workers' Compensation Act, 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 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.(LABOR CODE) § 408.021(a). Health care includes all reasonable and necessary medical services. LABOR CODE § 401.011(19)(A). Provider had the burden of proving that the work hardening program provided to Claimant was reasonable and medically necessary. 28 TAC §§ 148.21 (h) and (i); 1 TAC § 155.41.

Work hardening is an interdisciplinary treatment program addressing the functional, physical, behavioral, and vocational needs of the injured worker. The program must be highly structured, goal-oriented, individualized, and designed to return the Claimant to work. It uses real or simulated work activities in a relevant work environment in conjunction with physical conditioning tasks. The entrance criterion includes a requirement that the patient be capable of attaining specific employment upon completion of the program. Medicine Ground Rule II.E.²⁰

Provider failed to meet its burden of proof to show that the final two weeks of work hardening program provided to Claimant were medically necessary to cure or relieve the effects of Claimant's compensable injury. Robin Clearman, an occupational therapist, testified that the final two weeks of work hardening were medically necessary because Claimant had elected not to undergo surgery; had a job to return to; had a valid FCE; and met all the admission requirements for work hardening. Mr. Clearman admitted he did not treat Claimant, but testified that based upon his review of the records, Claimant's range of motion, strength, and tolerance improved as a result of work hardening. Under cross-examination, Mr. Clearman admitted that the group therapy was not specific to Claimant's condition, but generalized for the group.

²⁰ The entrance criterion does not establish medical necessity for the program.

Carrier's expert, Michael Bhatte, D. C., also reviewed Claimant's medical records and took exception with most of Mr. Clearman's opinions. Dr. Bhatte explained that when Claimant began the work hardening program, Claimant had already completed almost eight months of physical therapy. Yet, the FCE shows that Claimant was only able to lift 15 pounds (floor to knuckle), a minimal amount. According to Dr. Bhatte, it is not feasible that in six weeks, Claimant could go from being able to lift only 15 pounds to 50 pounds (as his job required) when eight months of physical therapy had yielded such poor results.

Dr. Bhatte further challenged the validity of the FCE test. According to Dr. Bhatte, Provider failed to conduct simple checks to ensure the validity of the test. These checks should have included taking Claimant's resting heart rate and doing isometric testing. Dr. Bhatte also challenged whether the program provided to Claimant was specific to Claimant's condition and whether it needed to be done in a work hardening setting. Provider's work hardening notes did not demonstrate that the treatment was specific to Claimant's job, particularly the pool therapy. Claimant could have the type of physical conditioning provided by Provider at home or on the job, opined Dr. Bhatte.

Provider carried the burden of proof in this matter and failed to prove by a preponderance of the evidence that the FCE was accurate, that the work hardening program was individualized and structured to help Claimant return to his job, and that it was medically necessary and not just simply intensive physical therapy. Therefore, the ALJ finds that the Provider failed to prove by a preponderance of the evidence that the final two weeks of the work hardening provided to Claimant were medically necessary.

III. FINDINGS OF FACT

1. Claimant, a warehouse supervisor, sustained a compensable injury on _____.
2. At the time of the injury, American Casualty Co. of Reading P.A. (Carrier) was Claimant's employer's workers' compensation insurance carrier.
3. Claimant was diagnosed with a strain/sprain of the lumbar spine.

4. On October 4, 2001, Claimant underwent an MRI of his lumbar spine which showed a 4-5 mm broad-based far left posterolateral herniation and annular tear abutting the left L4 nerve root sleeve/dorsal root ganglion and moderately narrowing the left foramen.
5. Following the MRI, Claimant was diagnosed with a herniated lumbar disk.
6. On October 11, 2001, Amir Malik, M.D. a neurosurgeon, examined Claimant and recommended against surgical intervention.
7. Claimant elected not to consider surgical intervention.
8. Claimant continued taking medication to reduce his lower back pain and participating in active physical therapy.
9. This conservative treatment did not improve Claimant's condition.
10. On January 22, 2002, Claimant underwent a selective nerve root block at L4-L5, with a temporary reduction in his pain. Claimant subsequently had additional epidural injections, which temporarily reduced his pain.
11. On February 27, 2002, Claimant was released to return to work part-time with restrictions.
12. Claimant returned to work, but due to increases in his pain was unable to continue working.
13. On April 19, 2002, Paul Selina, M.D., began treating Claimant.
14. Dr. Selina treated Claimant with medications and physical therapy.
15. On May 7, 2002, William Culver, M.D., FAAPMR, examined Claimant for Carrier and determined that Claimant had no evidence of radiculopathy, but suffered with L4-5 disc bulge and desiccation and chronic low back pain. Dr. Culver also found that Claimant suffered with symptom magnification.
16. On May 21, 2002, Dr. Selina referred Claimant to Work Ready Rehab Center (Provider) for two weeks of work hardening.
- 17.. On May 24, 2002, Provider performed a functional capacity evaluation (FCE) and psychological evaluation.
18. The FCE indicated that Claimant's duties as a warehouse supervisor required a physical demand level of heavy. At the time of the FCE, Claimant physical demand level was at a sedentary-light level because he was only able to lift 15 pounds infrequently.
19. Provider had Claimant participate in a work hardening program for six week. Only the last two weeks are in dispute, June 20, 2002 through July 15, 2002.

20. Carrier denied reimbursement for the last two weeks of the work hardening program for lack of medical necessity.
21. Provider appealed the reimbursement denial to the Medical Review Division (MRD) of the Texas Workers' Compensation Commission (Commission). MRD referred the dispute to an Independent Review Organization (IRO).
22. The IRO found that Provider's services were not medically necessary.
23. On September 5, 2003, MRD reviewed the IRO's decision and concluded that Provider did not prevail on the issue of medical necessity.
24. On September 19, 2003, Provider filed a request for a hearing before the State Office of Administrative Hearings.
25. The Commission sent notice of the hearing to the parties on October 27, 2003. 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.
26. The hearing convened on March 30, 2004, at the William P. Clements Building in Austin, Texas. Pam Walker and Robin Van Clearman appeared on behalf of Provider. Erin Stanley, an attorney, represented Carrier. The hearing adjourned and the record closed the same day.
27. Provider had insufficient information about the program to show that Provider had created an individualized plan of treatment for Claimant.
28. Claimant's deficits in his performance during the initial functional capacity evaluation created questions as to the validity of the evaluation because he had already undergone months of physical therapy and could lift only 15 pounds.
29. The work hardening program in which Claimant participated was not based upon an individualized plan of treatment and did not include real or simulated work activities.

IV. CONCLUSIONS OF LAW

1. The Texas Workers' Compensation Commission (Commission) has jurisdiction related to this matter pursuant to TEX. LAB. CODE ANN. § 413.031.
2. SOAH has jurisdiction over this proceeding, including the authority to issue a decision and order, pursuant to TEX. LAB. CODE ANN. § 413.031(d) and TEX. GOV'T CODE ANN. ch. 2003.
3. Provider timely requested a hearing, as specified in 28 TEX. ADMIN. CODE (TAC) § 148.3.
4. Proper and timely notice of the hearing was provided in accordance with TEX. GOVT CODE ANN. §§ 2001.051 and 2001.052.

5. Provider, the party seeking relief, has the burden of proof in this proceeding pursuant to 28 TAC §§ 148.21(h) and (i); 1 TAC § 155.41.
6. Based on the foregoing findings of fact, the documentation provided failed to show that the last two weeks of the work hardening program provided to Claimant were medically necessary. 28 TAC § 134.201.
7. Based on the foregoing findings of fact, the work hardening program provided by Provider to Claimant from June 20, 2002 through July 15, 2002, was not reasonable or medically necessary to treat Claimant's compensable injury under TEX. LAB. CODE ANN. § 408.021 and 401.011(19).
8. Based on the foregoing findings of fact and conclusions of law, Provider is not entitled to reimbursement for the work hardening program provided to Claimant from June 20, 2002, through July 15, 2002.

ORDER

It is, therefore, ordered that American Casualty Co. of Reading P.A. is not required to reimburse the amounts billed by Work Ready Rehab Centers, for the work hardening program provided to Claimant from June 20, 2002, through July 15, 2002.

SIGNED on May 28, 2004.

**CATHERINE C. EGAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**