

**SOAH DOCKET NO. 453-05-0970.M5
MR NO. M5-04-3171-01**

**HEALTHREADY PHYSICAL
THERAPY, Petitioner**

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BEFORE THE STATE OFFICE

VS.

OF

**LIBERTY MUTUAL FIRE
INSURANCE COMPANY,
Respondent**

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

HealthReady Physical Therapy (HealthReady) seeks review of a decision of the Texas Workers' Compensation Commission's (Commission's)¹ Medical Review Division (MRD) based on the opinion of an independent review organization (IRO). The decision denied reimbursement for work hardening treatment provided to Claimant ___. The Administrative Law Judge (ALJ) finds that the work hardening program was not medically necessary.

**I. BACKGROUND, PROCEDURAL HISTORY,
NOTICE, AND JURISDICTION**

The Claimant, a 42-year-old iron worker/rigger, suffered a compensable injury on ___, while lifting a cable, which then fell on him. The injury resulted in low back pain and radiculopathy. In June 2003 Claimant had a lumbar laminectomy at the L4-L5 and L5-S1 levels of the spine and decompression surgery. His treating doctor, Carl C. Davis, M.D., prescribed six weeks of work hardening. He participated in work hardening at HealthReady on October 21, 2003, through January 8, 2004. Liberty Mutual Fire Insurance Company (Liberty) denied reimbursement due to lack of medical necessity. The IRO agreed with Liberty, finding that, other than increasing Claimant's endurance, the program lacked goals to return Claimant to work.

¹ Effective September 1, 2005, the functions of the Commission were transferred to the newly created Division of Workers' Compensation of the Texas Department of Insurance.

The hearing convened on August 18, 2005, at the facilities of the State Office of Administrative Hearings, 300 W. 15th St., Austin, Texas. Neither party challenged the adequacy of notice or jurisdiction. ALJ Katherine L. Smith presided. HealthReady was represented by Cynthia Marietta. Liberty was represented by Kevin Franta. The record closed on December 22, 2005, with additional briefing concerning exhibits. The ALJ admits into evidence Liberty's Exhibit B with the exception of page 0019 because the page lacks authentication. The ALJ also re-letters the Affidavit of Susan Rampy, PT, Ph.D, which was admitted into evidence as Respondent's Exhibit A, as Respondent's Exhibit D.

II. PARTIES' POSITIONS

A. HealthReady

In response to the IRO's rationale, HealthReady provided the testimony of Dr. Rampy, a licensed physical therapist who was a member of the team treating Claimant. She testified that HealthReady is a CARF² accredited facility with the highest accreditation rating. She noted that evaluators from CARF were at HealthReady reviewing its program at the time Claimant was being treated and that at no time did the evaluators state that HealthReady's charts were inadequate. Dr. Rampy testified that the Commission's rules state that the CARF guidelines establish a reasonable program and make no mention of the requirements of the American Physical Therapy Association (APTA) upon which Liberty relies.

Dr. Rampy monitored Claimant's first functional capacity evaluation (FCE), set up the treatment plan, and set goals for Claimant. Dr. Rampy testified that there is no requirement that the treatment be designed to ready Claimant for a particular job. She stated that one of the goals was to increase Claimant's ability to return to work by increasing his physical demand level (PDL), which was light-to-medium when he entered the program, to the highest level possible, that is, medium-to-heavy. She testified that Claimant could not return to his former job because the severity of his

² Commission on Accreditation of Rehabilitation Facilities.

injury precluded him from lifting at his formerly heavy PDL and because his employer was no longer in business. She noted that on November 26, 2003, the goal to take Claimant to the medium-to-heavy PDL was changed to a medium PDL because at that time Claimant was considering becoming a physical therapy assistant, which requires only a medium PDL. Dr. Rampy testified that Claimant made significant progress. She stated that specific data from the initial, interim and discharge FCEs indicate Claimant's strength and lifting ability had improved.

Health Ready also provided the testimony of Glen Babus, D.O., who is board certified in pain management, pain medicine, and anesthesiology, and is on the Commission's approved doctors' list (ADL). Dr. Babus treated Claimant in November and December 2003, providing him with medications and referring him for a psychological evaluation. Dr. Babus testified that Claimant made progress in the program by increasing his function and strength, but admitted that Claimant's pain level did not improve.

B. Liberty

Liberty argues that the work hardening treatment provided Claimant was not medically necessary because he had no job to go to, his unresolved pain prevented him from benefitting from the program, and the program was little more than physical therapy. In support of its position Liberty relied on the testimony of Neal Blauzvern, D.O., who practices pain management and is on the Commission's ADL. He testified that work hardening is appropriate only for persons who are ready to return to work, but who have become so deconditioned that they would be prevented from functioning at work. Citing the Occupational Health and Physical Therapy Guidelines of the APTA, Dr. Blauzvern testified that to be eligible for work hardening, a patient has to have a "targeted job or job plan" and has to "be at a point of resolution of the initial or principal injury such that participation in the work hardening program would not be prohibited." Res. Ex. B at 0029.

Dr. Blauzvern testified that Claimant was not ready for a work hardening program, despite its being prescribed by Dr. Davis, because Claimant still had pain that had not been medically evaluated. That Claimant had begun receiving epidural steroid injections, Dr. Blauzvern noted, demonstrated ongoing problems that precluded work hardening. Dr. Blauzvern also testified that during the program, Claimant's use of medications including hydrocodone (a short-acting, moderate strength narcotic) and Avinza (a long-acting morphine preparation) increased, which put him at risk of hurting himself during the program. Res. Ex. A at 0108, 0110, 0112, 0115, 0117, 0142, 0192. Dr. Blauzvern noted that throughout the work hardening program, Claimant's level of pain was unchanged, which prevented effective participation. On November 24, 2003, Claimant described his level of pain as a 6 to 8 out of 10, which activities of any kind seemed to worsen. Res. Ex. A at 0134. Dr. Blauzvern pointed to the November 20, 2003, recommendation of Kevin Smith, Ph.D., a psychologist, that Claimant needed a comprehensive pain management program because of psychological problems and his inability to return to his old job. Res. Ex. B at 0020-0023.

Dr. Blauzvern criticized the program for not sufficiently simulating a work environment and noted that at some sessions, such as October 30, 2003, Claimant spent up to four-and-a half hours walking, stretching, and performing strengthening exercises. Res. Ex. B at 0058. Dr. Blauzvern pointed to a progress note dated October 30, 2003, in which even Dr. Davis referred to the program as physical therapy. Res. Ex. A at 0098. Dr. Blauzvern also criticized Dr. Davis's assessment that the purpose of a work hardening program is to return workers to "maximal employability." Res. Ex. A at 0307. Dr. Blauzvern contends that that goal describes a work conditioning program, whereas the purpose of a work hardening program is to return a worker to a specific job. Res. Ex. B at 028-029. Dr. Blauzvern noted that after the work hardening program Claimant's employability was not maximized, and he was referred to a comprehensive pain management program. Res. Ex. A at 0362. Dr. Blauzvern also noted that Claimant made little progress in function and strength as evidenced by Dr. Babus's statement after 37 sessions that Claimant was "able to work a little around \the house." Res. Ex. A at 0192. Dr. Blauzvern concluded that Claimant's symptoms worsened throughout the program, that there was no subjective or objective evidence of improvement and no

change in condition, and that Claimant's functional capacity level at the end of the program, light-to-moderate, was the same as when he entered the program.

III. ANALYSIS

Work hardening is a goal-oriented treatment program designed to maximize the ability of the person receiving the treatment to return to work. According to 28 Tex. Admin. Code § 134.202(e)(5) a return-to-work rehabilitation program should meet the program standards set out by CARF. According to CARF, the persons eligible for entrance into a work hardening program are those:

- a. Who are likely to benefit from the program.
- b. Whose current levels of functioning due to illness or injury interfere with their ability to carry out specific tasks in the workplace.
- c. Whose medical, behavioral, psychological, or other conditions do not prohibit their participation in the program.

Ex. 5 at 00746. Elements to be considered when developing an individual program plan are:

- a. Job availability.
- b. A job description and/or job analysis that addresses essential functions.
- c. Availability of modified or alternate duty.

Ex. 5 at 00748.

The ALJ finds that HeathReady did not have a viable plan to return Claimant to alternate duty at the beginning of the program. Hoping to increase Claimant's PDL so that he would qualify for another job was not enough. Moreover, the goal of becoming a physical therapist assistant did not evolve until November 26, 2003, when Claimant's level of pain effectively prevented him from benefitting from the program. Although Dr. Babus wrote on November 17, 2003, that Claimant's pain had "decreased some," he changed Claimant's medication to include Avinza and referred

Claimant to a pain psychologist. Res. Ex. A at 0115, 0117. On November 20, 2003, Dr. Smith recommended a comprehensive pain management program for Claimant because Claimant had a chronic pain condition that precluded him from returning to work. Res. Ex. B at B0020-B0022. On

November 19 and 24, Claimant complained of increased pain at a level of 8 out of 10. Res. Ex. A at 0125, 0132, 0134, 0136. At this point, a more rigorous re-evaluation and justification for continued treatment should have occurred, but it did not. Subsequent daily notes indicate that much of the same treatment continued, and that progress was limited. Claimant's average level of pain remained a 6 out of 10 through the remainder of the program, and Avinza continued to be prescribed.

The ALJ, therefore, concludes that HealthReady failed to prove that the work hardening provided from October 21, 2003, to January 8, 2004, was medically necessary.

IV. FINDINGS OF FACT

1. Claimant, a 42-year-old iron worker/rigger, suffered a compensable injury on ____, while lifting a cable that fell on him. The injury resulted in low back pain and radiculopathy.
2. On the date of injury, Claimant's employer had workers' compensation insurance with Liberty Mutual Fire Insurance Company (Liberty).
3. In June 2003 Claimant had a lumbar laminectomy at the L4-L5 and L5-S1 levels of the spine and decompression surgery.
4. Claimant's treating doctor, Carl C. Davis, M.D., prescribed six weeks of work hardening.
5. Claimant participated in work hardening at HealthReady Physical Therapy (HealthReady) on October 21, 2003, through January 8, 2004.
6. Liberty denied reimbursement due to lack of medical necessity. The IRO agreed with Liberty, finding that no goal, other than to increase Claimant's endurance, existed.
7. HealthReady filed a request for medical dispute resolution with the Texas Workers' Compensation Commission (Commission).
8. An independent review organization (IRO) reviewed the medical dispute and found that the work hardening was not medically necessary.
9. Based on the IRO's findings, the Commission's Medical Review Division (MRD) declined to order Liberty to reimburse HealthReady for the work hardening in dispute.

10. On September 16, 2004, HealthReady requested a contested-case hearing by a State Office of Administrative Hearings (SOAH) Administrative Law Judge (ALJ).
11. On October 27, 2004, the Commission issued the notice of the hearing, which stated the date, time, and location of the hearing and cited to the statutes and rules involved, and which provided a short, plain statement of the factual matters asserted.
12. The hearing was held on August 18, 2005, at 300 W. 15th St., Austin, Texas.
13. The ALJ admitted additional exhibits into evidence on December 14, 2005, and January 17, 2006.
14. HealthReady is accredited by the Commission on Accreditation of Rehabilitation Facilities (CARF).
15. The requirements for entrance into a CARF-accredited work hardening program are that the injured worker 1) cannot meet the specific tasks of his job, 2) would likely benefit from the program, and 3) did not have medical, behavioral, or psychological issues that prohibited him from participating in the program.
16. Claimant could not return to his former job because the company for which he worked was no longer in business and because the extent of his injury prevented him from ever reaching his former physical demand level of heavy.
17. HealthReady did not have a viable plan to return Claimant to alternative work at the beginning of the work hardening program. Just hoping to increase Claimant's physical demand level did not meet the requirements of a work hardening program.
18. HealthReady did not develop an alternative job plan until November 26, 2003.
19. During the program Claimant's level of pain did not decrease and averaged a 6 out of 10.
20. In response to Claimant's pain, Glen Babus, D.O., treated Claimant with increasing amounts of medications in November and December 2003.
21. On November 17, 2003, Dr. Babus changed Claimant's medication to include Avinza (a long-acting morphine preparation) and referred Claimant to a pain psychologist.
22. On November 19 and November 24, 2003, Claimant reported increased pain and described his level of pain as a 6 to 8 out of 10, which activities which activities of any kind seemed to worsen.

23. On November 20, 2003, Kevin Smith, Ph.D., a psychologist, recommended that Claimant be placed in a comprehensive pain management program because of psychological problems and his inability to return to his old job.
24. HealthReady failed to re-evaluate the work hardening treatment for effectiveness, need, and continued progress.
25. The treatments provided during the remainder of the program were the same as before. Claimant made only limited progress in strength and endurance.
26. At the end of the program, Claimant did not return to work, but was put into a comprehensive pain management program.

V. CONCLUSIONS OF LAW

1. SOAH has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a decision and order, pursuant to TEX. LABOR CODE ANN. §§ 402.073(b) and 413.031(k); TEX. GOV'T CODE ANN. ch. 2003.
2. HealthReady timely filed a request for hearing for hearing in response to the independent review organization decision, as specified in 28 TEX. ADMIN. CODE (TAC) § 148.3.
3. Adequate and timely notice of the hearing was provided in accordance with TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052 and 28 TAC 148.4(b).
4. HealthReady bore the burden of proof the case by a preponderance of the evidence, pursuant to 28 TAC § 148.21(h) and (I).
5. Enrollment in a work hardening program was not reasonably required health care under TEX. LAB. CODE ANN. § 408.021.
6. Based on the above Findings of Fact and Conclusions of Law, Health Ready's request to be reimbursed by Liberty for the work hardening program that it provided to the Claimant from October 21, 2003, through January 8, 2004, should be denied.

ORDER

IT IS ORDERED THAT HealthReady Physical Therapy's request to be reimbursed by

Liberty Mutual Fire Insurance Company for the work hardening program that it provided to the Claimant from October 21, 2003, to January 8, 2004, is denied.

Signed January 26, 2005.

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