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| **CLIFFORD ROGERS, D.C.** | § | **BEFORE THE STATE OFFICE** |
| **Petitioner** | § | |
| | § | |
| **V.** | § | |
| | § | **OF** |
| | § | |
| **HARTFORD INSURANCE COMPANY OF THE MIDWEST,** | § | |
| | § | |
| **Respondent** | § | **ADMINISTRATIVE HEARINGS** |

## DECISION AND ORDER

Clifford Rogers, D.C., contested an independent review organization (IRO) decision, issued on behalf of the Texas Workers' Compensation Commission (Commission), concluding that certain requested work hardening sessions were medically unnecessary and should not be preauthorized. The workers' compensation insurer for the injured worker (Claimant), Hartford Insurance Company of the Midwest (Hartford), had denied the request. This decision concludes that Dr. Rogers did not carry his burden of proving the sessions were medically necessary.[1] Preauthorization is therefore denied.

## I. PROCEDURAL HISTORY

A hearing convened and closed on May 4, 2005, before the undersigned Administrative Law Judge (ALJ) at the State Office of Administrative Hearings (SOAH), Austin, Texas. Dr. Rogers appeared by telephone and represented himself. Hartford appeared and was represented by David Swanson, Attorney. There were no objections to notice or jurisdiction.

[1] As the party requesting the hearing, Dr. Rogers has the burden of proof. 1 TEX. ADMIN. CODE (TAC) § 155.41; 28 TAC § 148(h).

## II. DISCUSSION

### A. Background

The Claimant suffered a compensable injury on ___, while working at ___. She was standing on a ladder when she slipped and fell about three feet to the floor. She suffered neck and back pain and pain in both shoulders. She underwent conservative treatment with Dr. Rogers, including physical therapy and medication. After further diagnostic testing, she had a left shoulder operation on April 16, 2004. She underwent a post-operative therapeutic exercise program with Dr. Rogers and received a functional capacity evaluation (FCE) on June 3, 2004.

Dr. Rogers then requested ten sessions of work hardening for the Claimant. When Hartford denied the request, he asked for medical dispute resolution. The IRO reviewer, who concluded that work hardening was medically unnecessary, was a licensed chiropractor.[2]

### B. Decision

The ALJ concludes that work hardening should not be authorized. Dr. Rogers failed to prove the service was necessary because he had faulty information concerning the Claimant's job tasks.

Hartford witness William D. DeFoyd, D.C.,[3] testified he did not believe work hardening was necessary to return the Claimant to work . He testified persuasively that it is necessary to know an injured worker's job tasks to ascertain whether the worker is a candidate for work hardening. He cited the 1996 Medical Fee Guideline (guideline) as containing a good rationale for determining whether a worker should receive work hardening.[4] He acknowledged that the guideline is not in effect for services requested after August 2003, but opined that its criteria for determining whether work hardening should be authorized are a persuasive measure of whether it is medically necessary. He emphasized two of the criteria as particularly pertinent in this case. One is whether the worker's

2 The basis of the IRO doctor's opinion is set forth at Ex. 1 at 18.

3 Dr. Defoyd has been licensed since 1987. He is the chiropractor representative for the Commission's medical advisory committee and is a member of the executive council of the Commission's quality review panel.

4 Dr. Rogers also cited the guideline as authority. Ex. 1 at 2.

current levels of functioning interfere with his or her ability to carry out work place tasks.[5] Another is whether the worker is capable of obtaining specific employment upon completion of the work hardening.[6] Dr. Defoyd maintained those criteria cannot be determined without knowing what the worker's work tasks are. In his opinion, the best way to determine work tasks is to contact the worker's employer. This is what he does for his own patients.

Dr. Defoyd testified the standard way of determining whether an injured worker is capable of performing required job tasks is by an FCE, designed to see whether the worker can safely transition back to work. He said the FCE should describe the worker's specific job tasks. The worker should be tested on the basis of those tasks to compare his or her current level of functioning deficits with the level needed for a specific job. For example, FCEs for construction workers and secretaries should be substantially different. He said an FCE should also screen for psychological barriers to functioning because the worker may need behavioral or psychological support.

Dr. Defoyd contacted the Claimaint's employer, ___, to determine her job tasks. Store manager ___ told him the Claimant's job was to unpack boxes of clothing and put the clothing on hangers or on a shelf. She was required to bend and lift single items out of a box, but was not required to stack boxes on a shelf. Her job would require light lifting of no more than thirty pounds, but someone is always available to help with lifting, if that were a problem lifting was a minimal part of the job. Ms. ___indicated the Claimant could be given other job tasks. She said she would love to have the Claimant back at work and that she would make light-duty work would be available, including part-time work with lifting restrictions. However, no one has asked her to make that accommodation.

Dr. Defoyd cited Dr. Rogers' records as erroneously saying the Claimant worked at ___ as a stocker of food products.[7]

Dr. Defoyd opined that the information used for the FCE was incorrect. It did not adequately document the Claimant's specific job tasks and did not document her ability to carry out those tasks, *i.e.*, she was not tested for the job she would go back to. The FCE says she is required to lift 60

5 Ex. 1 at 2; Ex. 3.

6 Ex. 1 at 2; Ex. 3.

7 Ex. 2 at 113, 121.

pounds,[8] which was inaccurate. The only specific job testing she was asked to do was to stock shelves with boxes of varying weights, varying between five and fifteen pounds for fifteen minutes.[9] Dr. Defoyd said her job at ___did not require her to do that.

Dr. Rogers wrote the Claimant is only able to lift 18 pounds, floor to knuckle, while her job duties require occasional lifting of 60 pounds and frequent lifting of 30 pounds.[10]

Dr. Defoyd acknowledged that the Claimant has been diagnosed as moderately depressed on the Beck and GAF tests[11] and that work hardening has a psychological component consisting of counseling on a group basis. He maintained, however, that a lot of the issues addressed in a group setting, such as fear of not being able to work, not being able to perform other tasks, or financial fears, are effectively addressed by returning to work on light duty. He said that people feel valuable in their work and have less financial stress. He maintained the most realistic way to transition back to work is returning to work on light duty in conjunction with an active rehabilitation program. He testified the Claimant was recommended for individual therapy and anti-depressant medications. In his opinion, those treatments are more intense and more effective than group therapy.

Dr. Rogers did not testify at the hearing. He did, however, cite several records in evidence, including his letter of October 26, 2004, to SOAH explaining his reasons for requesting work hardening. However, his rationale is substantially based on his understanding that the Claimant was required by her job to lift 60 pounds on an occasional basis and frequently lift 30 pounds. As shown above, the preponderant evidence is that Dr. Rogers' understanding of the Claimant's job tasks was inaccurate and the Claimant could have been returned to work with lifting restrictions.

Dr. Roger cited a June 18, 2004, designated doctor examination by William Mitchell, M.D., an orthopedic surgeon, who concluded that the Claimant had not reached maximum medical improvement for her left shoulder, had significant limitation of motion, and needed more physical therapy.[12] Another provider, Jack Mikeworth, D.C., also recommended active physical therapy.

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8 Ex. 1 at 49.

9 Ex. 1 at 52.

10 Ex. 1 at 2.

11 Ex. 1 at 2.

However, neither Dr. Mitchell nor Dr. Mikeworth specifically said the Claimant needed work hardening. Dr. Defoyd agreed she needed additional physical therapy in conjunction with a restricted return-to-work program.

Dr. Rogers cited an opinion by physical therapist B. Coby Marrow, who performed the FCE, saying the Claimant needed work hardening. However, as indicated above, the FCE was based on an erroneous understanding of the Claimant's job tasks.

The ALJ concludes that the need for work hardening to return the Claimant to work at ___ was not persuasively proved. The preponderant evidence shows the work hardening recommendation was based on an erroneous understanding of her job tasks.

## III. FINDINGS OF FACT

1. The Claimant suffered a compensable injury on ___, while working at ___, when she stood on a ladder and then slipped and fell about three feet to the floor.

2. The Claimant suffered neck and back pain and pain in both shoulder.

3. The Claimant underwent conservative treatment with Clifford Rogers, D.C., including physical therapy and medication.

4. The Claimant underwent a left shoulder operation on April 16, 2004, followed by a post-operative therapeutic exercise program with Dr. Rogers.

5. After the Claimant underwent a functional capacity evaluation (FCE) on June 3, 2004, Dr. Rogers requested preauthorization for ten sessions of work hardening for the Claimant.

6. The Claimant's employer's workers' compensation insurer, Hartford Insurance Company of the Midwest, denied the request.

7. Dr. Rogers submitted a request for medical dispute resolution.

8. The case was assigned to an independent review organization (IRO), which concluded that work hardening was medically unnecessary.

**9.** It is undisputed that the Claimant requested a hearing not less than twenty days after receiving notice of the IRO.

10. All parties received not less than ten days' notice of the time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.

11. There were no objections to notice or jurisdiction.

12. All parties had an opportunity to respond and present evidence and argument on each issue involved in the case.

13. It is necessary to know an injured worker's job tasks to ascertain whether the worker is a candidate for work hardening, including whether a worker's current levels of functioning interfere with his or her ability to carry out work place tasks.

14. The FCE should contain a description of the worker's specific job tasks.

15. The worker should be tested on the basis of those tasks to compare his or her current level of functioning deficits with the level that is needed to return to a specific job.

16. An FCE should also screen for psychological barriers to functioning because the worker may need behavioral or psychological support.

17. The Claimant's job tasks at ___ were to unpack boxes of clothing and put the clothing on hangers or on a shelf.

    a. The Claimant was required to bend and lift single items out of a box.

    b. The Claimant was not required to stack boxes on a shelf.

    c. The Claimant's job required light lifting of no more than thirty pounds; however, someone was always available to help with lifting if that were a problem.

    d. Lifting was a minimal part of the Claimant's job at___.

    e. If lifting were a problem, the Claimant could be given other job tasks.

    f. ___ would like to have the Claimant back at work.

    g. Light-duty work would be available, including part-time work with lifting restrictions.

    h. No one has asked ___ to accommodate any work restrictions the Claimant may have.

18. Dr. Rogers and the physical therapist performing the FCE were under a misunderstanding concerning the Claimant's work-duty requirements.

    a. Dr. Rogers' records erroneously indicated the Claimant worked at ___as a stocker of food products.

    b. Both Dr. Rogers and the FCE erroneously indicated that the Claimant was required to lift 60 pounds.

c. The only specific job testing the Claimant was asked to do as part of the FCE was to stock shelves with boxes of varying weights between five and fifteen pounds for fifteen minutes. Her job at ___ did not require these activities.

d. Dr. Rogers' records erroneously indicated that the Claimant was required to lift 30 pounds on a frequent basis as part of her job duties.

19. The Claimant is suffering from moderate depression.

20. A lot of the psychological issues addressed in a group setting during work hardening, such as a fear of not being able to work, not being able to perform other tasks, or financial fears, are effectively addressed by returning to work on light duty.

21. The most realistic way for the Claimant to transition back to work is returning her to work on light duty in conjunction with an active rehabilitation program.

## IV. CONCLUSIONS OF LAW

1. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a decision and order, pursuant to TEX. LAB. CODE ANN. § 413.031(k) and TEX. GOV'T. CODE ANN. ch. 2003.

2. Notice of the hearing was proper and timely. TEX. GOV'T. CODE ANN. §§ 2001.051 and 2001.052.

3. Dr. Rogers had the burden of proving that the work hardening program was reasonably required by the nature of the Claimant's injury. 1 TEX. ADMIN. CODE (TAC) § 155.41; 28 TAC § 148(h).

4. It was necessary for the work hardening services to be preauthorized before they could be provided. 28 TAC § 134.600.

5. Dr. Rogers did not prove that the work hardening program is reasonably required by the nature of the Claimant's injury.

6. The request for work hardening should be denied.

## ORDER

**IT IS THEREFORE ORDERED** that a request for preauthorization of a ten-session work hardening program for the Claimant by Clifford Rogers, D.C., be, and the same is hereby, denied.

**SIGNED Thursday, May 12, 2005**

**JAMES W. NORMAN**
**ADMINISTRATIVE LAW JUDGE**
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**