

**SOAH DOCKET NO. 453-05-1196.M2  
TWCC MRD NO. M2-04-1871-01**

<b>TEXAS MUTUAL INSURANCE COMPANY,     Petitioner</b>	§ § § § § § § § § § §	<b>BEFORE THE STATE OFFICE</b>
<b>V.</b>		<b>OF</b>
<b>SCD BACK AND JOINT CLINIC, LTD     Respondent</b>		<b>ADMINISTRATIVE HEARINGS</b>

**DECISION AND ORDER**

Texas Mutual Insurance Company (Petitioner) requested a hearing before the State Office of Administrative Hearings following a Decision of the Texas Workers' Compensation Commission (Commission) acting through Speciality IRO, an Independent Review Organization (IRO). The Commission's Order granted a preauthorization request for work conditioning for \_\_\_ (Claimant).

This decision grants the relief requested by Petitioner and denies the requested preauthorization for work hardening.

A hearing convened on November 22, 2004. Timothy Riley represented Petitioner, and William Maxwell represented SCD Back and Joint Clinic, Ltd. (Respondent). Nicholas Tsourmas, M.D. testified on behalf of Petitioner, and David N. Baily, D.C. testified on behalf of Petitioner. There were no contested issues of notice or jurisdiction. On November 24, 2004, Mr. Riley filed a request for official notice of a State Office of Administrative Hearings (SOAH) decision. After allowing Respondent five days to respond, the record closed on November 29, 2004.

**II. DISCUSSION**

1. Background

On \_\_\_, Claimant sustained a work-related injury to his knee, mouth, and back, when the company truck he was driving was rear-ended by an 18-wheeler. As a result of the injury, Claimant underwent 52 sessions of physical therapy and participated in a chronic pain program. On June 29, 2004, Respondent requested preauthorization for a work hardening program, which Petitioner denied on July 2, 2004. On July 20, 2004 Respondent requested reconsideration of Petitioner's previous denial. On July 26, 2004, Petitioner denied the request for reconsideration, and on August 13, 2004, Respondent filed for a medical dispute resolution (MDR). On September 20, 2004, the Commission transmitted the IRO's decision to the parties. The IRO found that the work hardening program should be preauthorized. Respondent began the work hardening program on September 28, 2004, and two days later, on October 1, 2004, Petitioner contested the IRO ruling.

2. Past Or Present Review Of Preauthorization

Respondent argued that SOAH's preauthorization decision must be based on the facts that were in existence when the preauthorization was denied. Respondent indicated that the present work hardening program should not be considered. Petitioner argued that SOAH does not make its preauthorization decision in a vacuum and that all facts in existence until the hearing date should be considered.

Respondent's approach results in a retrospective preauthorization, which is a contradiction in terms. In 28 Tex. Admin. Code (TAC) § 134.600(a)(5), preauthorization is defined as "prospective approval obtained from the insurance carrier by the requestor or injured employee prior to providing the health care treatment or services." Respondent's argument fails in two respects. Returning to the date of Petitioner's preauthorization denial while disregarding the work hardening program that was performed, would not be a *prospective approval*. (Emphasis added) Instead, it would be a retrospective approval. Also, a retrospective decision would not be *prior* to the services because the services have been performed. (Emphasis added) Respondent's argument results in a legal fiction.

The ALJ's decision will be based on the hearing date. The issue is whether, on the date of the hearing, there is sufficient evidence to show that the work hardening treatments are medically necessary.

### 3. Work Hardening

The Commission's Medicine Ground Rules, though no longer in effect, provide a reasonable resource for determining the purpose of and the criteria for work hardening. "Work hardening" is:

a highly structured, goal-oriented, individualized treatment program designed to maximize the ability of the persons served to return to work. Work Hardening programs are interdisciplinary in nature with a capability of addressing the functional, physical, behavioral, and vocational needs of the injured worker. Work Hardening provides a transition between management of the initial injury and return to work while addressing the issues of productivity, safety, physical tolerances, and work behaviors. Work Hardening programs use real or simulated work activities in a relevant work environment in conjunction with physical conditioning tasks. These activities are used to progressively improve the biomechanical, neuromuscular, cardiovascular/metabolic, behavioral, attitudinal and vocational functioning of the persons served.

1. Entrance/admission criteria shall enable the program to admit:
  - a. persons who are likely to benefit from the program;
  - b. persons whose current levels of functioning due to illness or injury interfere with their ability to carry out specific tasks required in the workplace;
  - c. persons whose medical, psychological, or other conditions do not prohibit participation in the program; and

- d. persons who are capable of attaining specific employment upon completion of the program.<sup>1</sup>

### III. DECISION

Respondent chose to commence Claimant's work hardening program eight days from the date of the IRO order, which indicated the program was medically necessary.<sup>2</sup> Respondent also elected to proceed with the program even though Petitioner contested the IRO decision two days after the commencement of the program. By continuing the program before a SOAH final decision, Respondent assumes the risk of an adverse decision, and a denial of reimbursement. In this case, the work hardening program was not a service that was life-threatening or a service to cure or relieve a condition where there was a need for immediate attention.

Petitioner proved that the Respondent's work hardening program was not medically necessary and that preauthorization should be denied. Respondent's documentation did not include real or simulated work activities in a relevant work environment. The documentation did not reflect activities that would progressively improve the behavioral, attitudinal and vocational functioning of Claimant. Dr. Tsourmas testified that the documented simulated work exercises were, at best, a physical conditioning program. According to Dr. Tsourmas, work hardening must be tailored to perform a specific job function. Claimant indicated that he preferred to become a baker. Respondent listed his job description as a laborer. In addition, Claimant was offered an accommodated light duty job, but did not accept the job.

Respondent's work hardening program was not interdisciplinary in nature. The documentation indicates that Claimant had three group therapy sessions and no vocational training. Dr. Tsourmas said 70% of the exercises were physical conditioning and were almost identical from one-day-to-the-next with no behavioral or vocational training services. Respondent's work hardening program was not interdisciplinary in nature. The physical conditioning exercises were the same as those Claimant performed in the Spring chronic pain program. The work hardening program was not highly structured, goal-oriented, and individualized. Claimant preferred to be a baker while Claimant's work hardening program consisted of generalized construction worker activities. Respondent's program lacked a defined return-to-work goal, which was an entrance criteria for work hardening under the old the medicine ground rules. Dr. Bailey, Respondent's owner, did not know whether Claimant returned to work or not.

Respondent did not evaluate Claimant's progress every two weeks as required by the IRO order. The IRO order also required that should improvement not be noted, then the program should be terminated. Respondent did not comply with the IRO's conditions. Dr. Bailey did not know if Claimant returned to work, which was required by the IRO order.

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<sup>1</sup> TWCC 1996 Medical Fee Guideline, pp. 37-38.

<sup>2</sup> The IRO found the program medically necessary subject to the following condition: "The program should be monitored closely to ensure that the patients improvement two-week intervals. Should improvement not be noted, then the program can be terminated at that time for non-improvement or non-compliance. The program must be of a multi-disciplinary nature and must result into return to work for this patient."

Petitioner had the burden of proof in this proceeding. Pursuant to the Tex. Lab. Code (Act) section 408.021, an employee who has sustained a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed. Under the Act, 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.

In this instance, Petitioner proved by a preponderance of the evidence that work hardening was not medically necessary for the treatment of Claimant's condition.

#### **IV. FINDINGS OF FACT**

1. \_\_\_\_ (Claimant) sustained a work-related injury on \_\_\_\_.
2. Claimant underwent 52 sessions of physical therapy and in the Spring of 2004, participated in a chronic pain program.
3. On June 29, 2004, SCD Back and Joint Clinic, Ltd. (Respondent) requested preauthorization for a work hardening program, which Petitioner denied on July 2, 2004.
4. On July 20, 2004 Respondent requested reconsideration of Petitioner's previous denial, and on July 26, 2004, Texas Mutual Insurance Company (Petitioner) denied the request for reconsideration.
5. On August 13, 2004, Respondent filed for a medical dispute resolution (MDR).
6. On September 20, 2004, the Texas Worker's Compensation Commission (Commission) transmitted the IRO's decision to the parties.
7. The IRO found that the work hardening program should be preauthorized.
8. Respondent began the work hardening program on September 28, 2004, and two days later, on October 1, 2004, Petitioner contested the IRO ruling.
9. The decision on whether there was medical necessity to preauthorize is based upon the facts in existence at the time of the hearing.
10. Work hardening programs are interdisciplinary in nature with a capability of addressing the functional, physical, behavioral, and vocational needs of the injured worker.
11. Most of the exercises were physical conditioning and were almost identical from one-day-to-the-next with no behavioral or vocational training services.
12. Respondent's work hardening program did not include real or simulated work activities in a relevant work environment.
13. Respondent's work hardening program did not reflect activities that would progressively improve the behavioral, attitudinal and vocational functioning of Claimant.

14. Work hardening must be tailored for Claimant to perform a specific job function.
15. Respondent work hardening program was not tailored for Claimant to perform a specific job function on the basis that Respondent listed construction worker as Claimant's specific job, when Claimant preferred to be a baker.
16. On October 25, 2004, the Commission issued a notice of hearing.
17. A hearing was convened by Administrative Law Judge Stephen J. Pacey on November 22, 2004, in the hearing rooms of SOAH.
18. Timothy Riley represented Petitioner, and William Maxwell represented Provider.
19. There were no contested issues of notice or jurisdiction.
20. After additional documentation was filed by Petitioner, the record closed November 29, 2004.

## **V. CONCLUSIONS OF LAW**

1. The Texas Workers' Compensation Commission has jurisdiction to decide the issue presented pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 413.031.
2. The IRO decision is deemed a Decision and Order of the Commission.
3. 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(d) and TEX. GOV'T. CODE ANN. ch. 2003.
4. Petitioner timely requested a hearing in this matter pursuant to 28 TEX. ADMIN. CODE (TAC) §§ 102.7 and 148.3.
5. Notice of the hearing was proper and complied with the requirements of TEX. GOV'T. CODE ANN. ch. 2001.
6. Petitioner had the burden of proof in this matter, which was the preponderance of evidence standard. 28 TAC §§ 148.21(h) and (i).
7. An employee who has sustained 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. § 408.021(a).
8. Pursuant to TEX. LAB. CODE ANN. § 413.014, for a carrier to be liable for certain services and supplies, the service must be preauthorized by the carrier or by order of the Commission.

9. The requested work hardening program is not medically necessary.

**ORDER**

**THEREFORE IT IS ORDERED** that Petitioner's request for relief is **GRANTED** and the Respondent's request for a work hardening program to treat Claimant is **DENIED**.

**SIGNED December 29, 2004.**

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**STEPHEN J. PACEY**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**