SOAH DOCKET NO. 453-05-3189.M5
TWCC MR. NO. M5-04-2588-01

REHAB 2112, **Petitioner**	:	**BEFORE THE STATE OFFICE**
V.	:	**OF**
HARTFORD UNDERWRITERS INSURANCE CO., **Respondent**	:	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Rehab 2112 (Petitioner) has challenged the decision of an Independent Review Organization (IRO) upholding a decision by Hartford Underwriters Insurance Company (Respondent) denying Petitioner reimbursement, on the basis of medical necessity, for work hardening and related services provided Claimant ___ (Claimant) between August 20 and September 24, 2003 (collectively, the disputed services).[1] The Administrative Law Judge (ALJ) finds that Petitioner failed to meet its burden of establishing that the disputed services were medically necessary and, therefore, Petitioner is not entitled to reimbursement.

I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION

The hearing convened on December 1, 2005, before ALJ Renee M. Rusch. Petitioner was represented by its General Counsel, Robert Kubicki, who appeared by telephone. Respondent was represented by attorney James Loughlin. Neither party challenged notice or jurisdiction. Petitioner's Executive Director, Michelle Ivey, D.C., testified. David Alvarado, D.C., testified as an

[1] Based on the IRO's findings, the Medical Review Division (MRD) of the Texas Workers' Compensation Commission (Commission) declined to order Respondent to reimburse Petitioner for the disputed services. Effective September 1, 2005, the Commission's functions have been transferred to the newly created Division of Workers' Compensation at the Texas Department of Insurance.

expert witness on behalf of Respondent. After the presentation of evidence and argument, the hearing was adjourned. The record closed December 2, 2005.

II. DISCUSSION

A. The Disputed Services

Work hardening is a rehabilitation program designed to return an injured worker to the work force. It is a highly structured, goal-oriented, intensive, multi-disciplinary intervention service in which an injured worker participates on a daily basis; the program is designed to address a worker's functional, physical, behavioral, and vocational needs, *i.e.*, any limitations the worker has that are keeping her from returning to work.[2] Claimant participated in the work hardening program at issue in this case seven hours per day five days per week. The disputed services include two Functional Capacity Evaluations (FCEs), one performed August 20, 2003 (at the beginning of the work hardening program), and the other performed September 24, 2003 (at the end of the work hardening program).

B. Summary of the Evidence

On ___, Claimant, a cook at a ___ restaurant, suffered a compensable right knee injury in a fall. She first sought treatment at a clinic called the Accident and Injury Center in San Antonio. At all times relevant to this proceeding, her treating doctor at that clinic was Marcus Wilcox, D.C. Claimant underwent physical medicine treatments and, on June 3, 2003, she underwent an arthroscopic medial meniscectomy and chondroplasty. (Ex. 1 at 148-149). Between July 1, 2003, and August 13, 2003, Claimant participated in active rehabilitation three times per week.

[2] *Medical Fee Guideline* (MFG) 28 TEX. ADMIN. CODE § 134.201, Medicine Ground Rules: Section IIB Single and Interdisciplinary Programs (Effective April 1, 1996).

Beginning August 14, 2003, Petitioner, a clinic owned by the same person who owns the Accident and Injury Center, evaluated whether Claimant should participate in a work hardening program.[3] On August 14, 2003, clinical psychologist Magaly Marrero, PhD., evaluated Claimant and concluded she "may benefit" from work hardening.[4]

On August 20, 2003, Kimika Ziadie, a physical therapist employed by Petitioner, performed an FCE and recommended Claimant participate in a work hardening program. (Ex. 1 at 188-199.) Ms. Ziadie's report, which was addressed to Dr. Wilcox, indicates that Claimant tested at the sedentary physical level, although her job was a light duty job. According to Dr. Ivey, this meant Claimant did not have sufficient strength to perform her job. Specifically, Petitioner could only lift 10 pounds occasionally, whereas her light duty job required that she be able to lift 20 pounds occasionally.[5] Additionally, Claimant scored poorly on an endurance test and demonstrated a perception of moderate disability on a "psych screening test" known as the Oswestry Low Pack Pain Disability Questionnaire.[6] Claimant demonstrated poor endurance on the Bruce treadmill test; her right knee flexion range of motion (ROM) was "limited by 14 percent;" and she reported moderate pain when walking for 30 minutes. (Ex. 1 at 188.) The record does not reflect whether Dr. Wilcox reviewed the recommendations and determined that work hardening was reasonable and medically necessary for Claimant before she began the program.[7]

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[3] Claimant had already participated in a work hardening program for four weeks *before* her surgery. (Ex. 1 at 188.)

[4] Dr. Magaly wrote:

> Patient has a dependent coping style. Length off work, poor understanding of physical conditioning and medical rehab leads to fear of further injury, interprets pain as indicator that her condition may be worsening. . . .[s]he may benefit from [work hardening]. (Ex. 1 at 186.)

[5] Claimant's job duties also required that she be able to stand and walk for extended periods of time.

[6] Although the questionnaire refers to low back pain, Ms. Ziadie apparently used it to gauge Claimant's right knee pain. A patient's "score" on the Ostwestry questionnaire is based on the answers the patient herself gives to questions about pain and its impact on her life.

[7] Dr. Wilcox advised Timothy Fahey, D.C., a peer review doctor Respondent appointed, that Ms. Ziadie decided Claimant needed work hardening "because patient had been off work for the duration involved." (Ex. 1 at 245-246.)

The main progress Claimant made during the work hardening program was that her strength increased to the point where she could lift 20 pounds occasionally (and thus met the physical demand level of a light duty job) and the flexion ROM in her right knee increased slightly.[8] However, Claimant's depression and perception of her disability grew worse during the work hardening program.[9] Moreover, following the program, Claimant did not return to work, but instead, entered a chronic pain management program.

The IRO doctor, Michael Lifshen, M.D., concluded that Claimant did not need treatment as intensive as work hardening and Petitioner's documentation did not reflect that it had in fact provided Claimant with a highly individualized program. He believed a home exercise program would have yielded the same if not great benefit to Claimant. Dr. Alvarado too believed that Claimant did not need services as intense as work hardening in order to be able to meet the requirements of her job. Dr. Alvarado testified that the flexion ROM in Claimant's right knee was close to normal even before the disputed services were provided. He believed Claimant could have increased her strength and right knee flexion ROM with a home exercise program; moreover, a home exercise program would have taught Claimant to help herself and become more functionally independent. According to Dr. Alvarado, a patient should be monitored closely during a work hardening program; if the patient is not making progress, the program should be modified or the patient discharged from the program. The record here, however, does not reflect that Petitioner modified the program to increase the likelihood that Claimant's participation in the program would lead to her ability to return to work.

[8] According to Respondent's expert witness, Dr. Alvarado, normal flexion ROM for a young adult is 150 degrees, and ROM tends to decrease with age. Claimant was 50 years old at the time of the disputed services. On August 20, 2003, the flexion ROM in her right knee was 129 degrees, six degrees less than her left knee flexion ROM. At the time of the September 24, 3003 FCE, her right knee flexion ROM was 133 degrees.

[9] In his testimony, Dr. Alvarado referred to Claimant's "disability ratings" on the Ostwestry questionnaire as "depression indicators." On January 3, 2003, Claimant had a zero percent disability rating (Ex. 1 at 90); on August 20, 2003, before she began the work hardening program at issue, she had a 32 percent disability (moderate) rating (Ex. 1 at 197). On September 23, 2003, at the end of the program, her disability rating had increased to 42 percent (severe). (Ex.1 at 236.)

C. ALJ's Analysis

Petitioner had the burden of proof by a preponderance of the evidence. The Commission's relevant rule provides:

> Except in the case of an emergency, the treating doctor shall approve or recommend all health care rendered to the injured employee. This includes, but is not limited to, referrals to consultants made by the treating doctor. The referrals shall be medically reasonable and necessary. 28 TEXAS ADMINISTRATIVE CODE § 180.22 (c)(1).

There is no clear evidence that Dr. Wilcox ever approved or recommended work hardening for Claimant. Petitioner argued that Respondent did not cite the absence of Dr. Wilcox's approval or recommendation as a basis for denying reimbursement, hence, that deficiency is beyond the scope of this proceeding. Respondent maintained that the absence of the treating doctor's approval makes it difficult to conclude that the work hardening was necessary. Respondent argued that the absence of the treating doctor's approval, though not conclusive, is relevant and within the scope of this medical-necessity dispute. The ALJ agrees with Respondent's interpretation.

It is not impossible to conclude that a worker needs work hardening despite the lack of the treating doctor's approval, but it is more difficult, absent other, persuasive evidence of necessity. In this case, the evidence Petitioner offered was insufficient to establish medical necessity.

The ALJ was persuaded by Dr. Alvarado's testimony that less intensive therapy could have been used to increase Claimant's lifting ability and to increase her right knee flexion ROM. The record reflects that many of the exercises Claimant performed involved standing, sitting, and walking, movements that do not appear to be highly individualized functions of Claimant's job duties. The ALJ agrees that Claimant might have learned, through a home exercise program, to help herself and become more functionally independent. Indeed, Claimant perceived herself as being *more* disabled at the end of the work hardening program than she was at the beginning. Thus, the longer Petitioner kept Claimant off work, the more depressed she became. The ALJ finds merit in Dr. Alvarado's opinion that, if Claimant needed psychological help, she would have benefitted from

psychological treatment other than that provided in a work hardening program in which, typically, the psychological component of work hardening consists of an hour of group therapy per week.[10]

Based on the evidence presented, the ALJ does not conclude that Claimant needed work hardening. In fact, the more credible evidence tends to show that the Claimant *did not* need that service. Accordingly, Petitioner is not entitled to reimbursement for the disputed services.

III. FINDINGS OF FACT

1. On ___, Claimant ___ (Claimant) suffered a compensable right knee injury as a result of her work activities.

2. At the time of her injury, Hartford Underwriters Insurance Company (Respondent) was the workers' compensation insurer for her employer.

3. At all times relevant to this proceeding, Claimant's treating doctor was Marcus Wilcox, D.C., who is affiliated with the Accident and Injury Center in San Antonio.

4. Petitioner, Rehab 2112, and the Accident and Injury Center in San Antonio are owned by the same person.

5. Work hardening is a rehabilitation program designed to return an injured worker to the work force. It is a highly structured, goal-oriented, highly intensive, multi-disciplinary intervention service in which an injured worker participates on a daily basis; the program is designed to address a worker's functional, physical, behavioral, and vocational needs, *i.e.*, any limitations the worker has that are keeping her from returning to work.

6. The services at issue comprise work hardening and related services Petitioner provided to Claimant between August 20 and September 24, 2003, and include a Functional Capacity Evaluation (FCE) performed August 20, 2003, and another performed September 24, 2003 (collectively, the disputed services).

7. Before participating in the work hardening program, Claimant was able to lift 10 pounds occasionally, whereas her light duty job required that she be able to lift 20 pounds occasionally.

[10] The ALJ did not find Dr. Ivey's reconstruction of Claimant's treatment history (Ex. 2 at 324-333) to be as persuasive. Dr. Ivey testified that she herself treated Claimant three times in connection with the disputed services and was "involved" in discussing her ongoing care, but she had no independent recollection of Claimant.

8. Before participating in the work hardening program, Claimant's flexion range of motion (ROM) in her right knee was six degrees less than in her left knee but nonetheless close to normal for an adult her age.

9. The evidence does not show that Claimant's treating doctor determined that the disputed services were reasonable and medically necessary.

10. Many of the exercises Claimant performed in Petitioner's work hardening program involved standing, sitting, and walking, rather than highly individualized functions of Claimant's job duties.

11. The main progress Claimant made during the work hardening program was that she developed the ability to lift 20 pounds occasionally and the flexion ROM in her right knee increased four degrees.

12. Claimant perceived herself as being more disabled at the end of the work hardening program than she was at the beginning.

13. Claimant did not return to work following the work hardening program, but instead, entered a chronic pain management program.

14. Services less intensive than work hardening could reasonably have been used to increase Claimant's lifting ability and increase her right knee flexion ROM.

15. A home exercise program would have been equally, if not more, beneficial to Claimant, as it would have taught her to help herself and become more functionally independent.

16. If Claimant needed psychological help, she would have benefited from psychological treatment other than that provided in a work hardening program in which, typically, the psychological component of work hardening consists of an hour of group therapy per week.

17. Petitioner sought reimbursement from Respondent for the disputed services.

18. Respondent denied reimbursement.

19. Petitioner filed a request for medical dispute resolution with the Texas Workers' Compensation Commission's (Commission's) Medical Review Division (MRD).

20. An independent review organization (IRO) to which the MRD referred the dispute found that the disputed services were not medically necessary.

21. Based on the IRO's findings, the MRD declined to order Respondent to reimburse Petitioner for the disputed services.

22. Petitioner timely requested a hearing by a State Office of Administrative Hearings (SOAH) Administrative Law Judge (ALJ).

23. On January 19, 2005, the Commission issued a notice of hearing, which stated the date, time, and location of the hearing; cited the statutes and rules involved; and provided a short, plain statement of the factual matters asserted.

24. This case was referred by the Commission and accepted by SOAH for hearing prior to September 1, 2005.

25. At the parties' request the hearing was continued to December 1, 2005.

26. The hearing was held December 1, 2005, at SOAH's hearings facility, William P. Clements Building, 300 W. 15th Street, Austin, Texas, before ALJ Renee M. Rusch. Petitioner and Respondent appeared and presented evidence and argument. The record closed December 2, 2005.

IV. 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) and TEX. GOV'T CODE ANN. ch. 2003.

2. Petitioner filed a timely notice of appeal of the MRD decision pursuant to 28 TEX. ADMIN. CODE (TAC) §§ 133.308(u) and 148.3(a).

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 148.5(a).

4. Petitioner had the burden of proof by a preponderance of the evidence. 28 TAC § 148.14.

5. 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 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. LABOR CODE ANN. § 408.021.

6. Except in the case of an emergency, the treating doctor shall approve or recommend all health care rendered to the injured employee. This includes, but is not limited to, referrals to consultants made by the treating doctor. The referrals shall be medically reasonable and necessary. 28 TEXAS ADMINISTRATIVE CODE (TAC) § 180.22 (c)(1).

7. Petitioner failed to show that Claimant's treating doctor approved or recommended work hardening for Claimant.

8. The preponderance of the evidence does not show that the disputed services constituted reasonable and medically necessary health care for Claimant, pursuant to TEX. LAB. CODE ANN. §§ 401.011(19) and 408.021(a)**.**

9. Based upon the foregoing Findings of Fact and Conclusions of Law, Petitioner's request for reimbursement should be denied.

ORDER

IT IS ORDERED THAT Hartford Underwriters Insurance Company is not required to reimburse Rehab 2112 for the disputed services provided to Claimant ___ between August 20 and September 24, 2003.

SIGNED December 12, 2005.

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RENEE M. RUSCH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS