SOAH DOCKET NO. 453-05-4350.M5
TWCC MR NO. M5-05-1267-01

GABRIEL R. GUTIERREZ, **Petitioner**	§	**BEFORE THE STATE OFFICE**
V.	§	**OF**
FIRE & CASUALTY INSURANCE COMPANY, **Respondent**	§	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Petitioner, Gabriel R. Gutierrez, D.C. (Provider), challenged the Findings and Decision of the Medical Review Division (MRD) of the Texas Workers' Compensation Commission[1] (TWCC) denying reimbursement from Fire & Casualty Insurance Company (Carrier) for medical services provided to an injured worker (Claimant). Provider disputes the conclusion of the Independent Review Organization (IRO) that these services were not medically necessary. The Administrative Law Judge (ALJ) concludes that Provider has met its burden of proof with respect to the services in dispute provided to Claimant between December 15, 2003, and January 9, 2004. Thus, Provider should be reimbursed.

I. PROCEDURAL HISTORY

ALJ Penny Wilkov convened a hearing in this case on January 17, 2005, at the State Office of Administrative Hearings (SOAH), Austin, Texas. Provider was represented by Attorney Philip J. Orth, III. Carrier was represented by Attorney John V. Fundis. The record closed on January 24, 2006, to allow the filing of a missing exhibit.[2] No party contested notice or jurisdiction.

[1] As of September 1, 2005, the functions of TWCC have been assumed by the Texas Department of Insurance-Workers' Compensation Division.

[2] However, the missing document, the report of Simon J. Forster, D.C., was never received by the ALJ.

II. DISCUSSION

1. Introduction

Claimant injured her back on ____, while working as a housekeeper at an apartment when she moved a stove and felt a popping sound in her back. Claimant's hospital records, recorded on the day of the accident, disclosed that Claimant had a normal intervertebral disc space with no lytic or blastic lesions or spondylolysis, as well as negative lumbar spine and thoracic spine tests.[3] Based on the results, the hospital physician advised Claimant to rest for three days and to continue pain medication.[4] Subsequently, in October 2003, Claimant was diagnosed with thoracolumbar radiculitis with lumbrosacral radiculopathy based on symptoms of lumbar pain radiating to her left leg, including numbness and tinging in the left lower extremity.[5] Claimant also described difficulty with insomnia, anxiety, and daily activities due to the persistent pain. Since the accident, Claimant's history of treatments has included medications, chiropractic treatment, work hardening as well as diagnostic testing including multiple MRI's, an EMG/nerve conduction test, a functional capacity exam (FCE), and x-rays.

Claimant was primarily treated by George A. Durham, D.C., who referred Claimant to Provider for the FCE and work hardening program, which comprised the disputed services. Thus, Carrier denied payment for services rendered between December 15, 2003, and January 9, 2004, for a work hardening program billed under CPT Codes 97545 and 97546 and an FCE billed under CPT Code 97750-FC, as medically unnecessary.

B. Applicable Law

Under the workers' compensation system, an employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury. The employee is

[3] Respondent's Exhibit 8 (David Boyd, M.D., August 19, 2003).

[4] Respondent's Exhibit 4 (Claimant's interview dated September 17, 2003).

[5] Petitioner's Exhibit 1, pages 95-96. (Anjala Jain, M.D., dated October 9, 2003).

specifically entitled to health care that: (1) cures or relieves the effects naturally resulting from the injury; (2) promotes recovery; or (3) enhances the ability to return to or retain employment. TEX. LAB. CODE ANN. § 408.021. "Health care" includes "all reasonable and necessary medical . . . services." TEX. LAB. CODE ANN. § 401.011(19).

C. Parties' Positions

1. Provider

Provider disagrees with the Independent Review Organization (IRO) doctor's conclusion that the services rendered were not medically necessary. Specifically, the IRO doctor, a chiropractor, stated, "Due to the fact that the employee's job had been lost, the injured worker did not have specific employment to return to, which is a vital component of a work hardening program (see 1996 MFG and APTA for Work Hardening entrance criteria)."[6]

Provider counters that Claimant met the entrance requirements for a work hardening program, encompassing all components of the American Physical Therapy Associations (APTA) guidelines associated with the Commission on Accreditation of Rehabilitation Facilities (CARF) accreditation program.[7] In this regard, Provider presented the testimony of Simon J. Forster, D.C., who has practiced chiropractic medicine for the past 15 years and who reviewed Claimant's medical records prior to his testimony. Dr. Forster testified that Claimant was a good candidate for a work hardening program, despite the zero percent impairment rating she received from the designated doctor on December 12, 2003.[8] According to Dr. Forster, the impairment rating measures future functional loss as opposed to a work hardening program, which focuses on returning the person to a work environment.

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[6] SIRO Specialty Independent Review Organization, Independent Review Decision, January 31, 2005.

[7] The **CARF** accredits facilities based on their adherence to certain standards of services and documentation.

[8] Respondent's Exhibit 11, page 50-53. Dr. Forster pointed out that the impairment rating measures future functional loss while a work hardening program focuses on returning the person to a work environment.

Dr. Forster pointed out that the FCE,[9] mental health assessment,[10] and vocational assessment,[11] substantiated that Claimant would benefit from a work hardening program because of the program's emphasis on pain-coping mechanisms, vocational counseling, and physical rehabilitation services to improve functioning and physical demand levels. Dr. Forster also referred to Claimant's affidavit that "I was not informed that my employment had been terminated until several weeks after I completed the rehabilitation program and reported to work. I had to get a job as a housekeeper with another employer [*sic*] continued to work as a housekeeper," confirming her suitability for the program, according to Dr. Forster.[12]

Further, Dr. Forster testified that Claimant progressed from the limitation of light/sedentary duty to a higher physical demand level required in her duties as a housekeeper, based upon the categories incorporated in the *Dictionary of Occupational Titles, U. S. Department of Labor, 4th Edition, 1991*.[13] He testified that this indicated improvements in Claimant's functionality and ability to return to work, irrespective of an actual job and employer awaiting her return. Dr. Forster took issue with the IRO reviewer's conclusion that the work hardening program was unnecessary because a specific job had to be available; he reasoned instead that there should be a specific job goal identified.

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[9] Petitioner's Exhibit 1, pages 1-5. (October 24, 2003, Human Resource Performance and Rehabilitation Institute).

[10] Petitioner's Exhibit 1, pages 6-8. (October 30, 2003, Monie G. Smith, M.A., L.M.F.T.).

[11] Petitioner's Exhibit 1, pages 12-13. (September 16, 2005 , Philip W. Roddy, M.S., C.R.C.)

[12] Petitioner's Exhibit 1, page 89. (September 19, 2003).

[13] Physical Exertion Requirements, 20 C.F.R § 404.1567 (as adopted by the Social Security Administration):
Light work. Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds.
Medium work: Medium work involves lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds.
Heavy work: heavy work involves lifting no more than 100 pounds at a time with frequent lifting or carrying of objects weighing up to 50 pounds.
Very Heavy work: very heavy work involves lifting objects weighing more than 100 pounds at a time with frequent lifting or carrying of objects weighing 50 pounds or more.

2. Carrier

Carrier maintains that the treatments were not reasonable or necessary and supports the IRO's conclusion.

Carrier argues that the initial injury was minor, a strain or sprain, which would have resolved without treatment. In this regard, Carrier references the results of the MRI performed on September 24, 2003, indicating that the discs, nerves, and soft tissues were within normal limits,[14] as well as the EMG test performed on October 9, 2006, suggesting that there was no evidence of radiculopathy or sacroilitis and showing normal results.[15]

Carrier also takes issue with the purported success and methodology of the program. Carrier refers to the October 24, 2003, FCE which reported a physical exertion level of "sedentary light"[16] as contrasted to the December 19, 2003, Weekly Work Hardening Report which reported a physical exertion level of "light medium," signifying the nonperformance of the program.[17] Carrier argues that the goal of attaining the "medium heavy"level required of a housekeeper was not realized. Carrier also points out that a component of the treatment is group therapy provided by a "qualified mental health provider," as directed by the 1996 *Medical Fee Guideline* (MFG).[18] Carrier disagrees that Ms. Monie G. Smith, MA, LMFT, met this criteria since she is a licensed marriage and family counselor and not a psychologist specializing in rehabilitative therapy. Further, Carrier relays that the guidelines provide that a work hardening program should be conducted daily or not less than three times per week but here the program was intermittent due to the December holidays.

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[14] Respondent's Exhibit 6, page 34.

[15] Respondent's Exhibit 7, page 36.

[16] Petitioner's Exhibit 1, pages 1-5.

[17] Petitioner's Exhibit 1, page 27.

[18] 28 TEX. ADMIN. CODE § 134.201 (Eff. date April 1, 1996).

Lastly, Carrier relies on two peer reviews. One peer review was conducted by Kevin R. White, D.C., on October 7, 2003, prior to the date of disputed service. Dr. White opines that any treatment nine weeks past the date of injury on ___, is redundant since Claimant had a sprain/strain of the lumbar spine. Dr. White prescribes that the "patient should be discharged after the 9 weeks with education as to proper lifting and a home exercise program."[19] The other peer review was conducted by Gregory W. Baker, D.C., on November 8, 2003, again prior to the date of disputed service. Dr. Baker concurs with Dr. White that the effects of the injury had resolved by October 27, 2003, based on his diagnosis of a lumbosacral sprain/strain. Dr. Baker observes that "in cases such as this involving a lumbosacral sprain/strain, treatment usually lasts between 8 and 10 weeks . . . ."[20]

III. ANALYSIS

Provider bears the burden of proof that the factual basis or rationale for the MRD's decision in this case was invalid and that the services were medically necessary. Here, Provider has established by preponderant evidence that the work hardening program and FCE were medically necessary to return Claimant to employment.

The IRO reviewer's assumption that the FCE and the work hardening program were not medically necessary because "the injured worker did not have specific employment to return to, which is a vital component of a work hardening program (see 1996 MFG and APTA for Work Hardening entrance criteria)" is erroneous. Rather, the standard for entrance into a work hardening program is "persons who are capable of attaining specific employment upon completion of the program."[21] Along these lines, Provider testified that if he were aware that Claimant's employer terminated her employment during the program, then the vocational counselor may have worked with her to help her find other employment. Here, he could not specifically state that he was cognizant

[19] Respondent's Exhibit 1, page 42.

[20] Respondent's Exhibit 10, page 42.

[21] 28 TEX. ADMIN. CODE §134.201 (Eff. date April 1, 1996).

that her job was no longer available, but he did point out that she was able to secure comparable employment as a housekeeper upon her discharge.

It is clear that Claimant was an appropriate candidate for work hardening. Claimant described difficulty with insomnia, anxiety, and daily activities due to the persistent pain. Since a work hardening program has a component of counseling designed to help Claimant cope with chronic pain and the impact on the family and job, a qualified mental health provider with credentials in family counseling and pain management is uniquely qualified to address the issues presented in this case, including the prospect of job loss. Dealing with chronic pain, disappointment, and annoyances may be more intense in some persons and as long as Claimant's treatment is relatively focused and fruitful, as was demonstrated in this case, the treatment necessity is compelling.

The evidence established that Claimant responded favorably to the physical therapy, counseling, and chiropractic treatments and was able to resume a normal existence within five months of her injury. Hence, the ALJ determines that there was a significant rationality of medical necessity, and therefore, Provider should be reimbursed by Carrier for the medical services in dispute, rendered between December 15, 2003, and January 9, 2004.

IV. FINDINGS OF FACT

1. An injured worker (Claimant) injured her back on___, while working as a housekeeper at an apartment when she moved a stove and felt a popping sound in her back.

2. In October 2003, Claimant was diagnosed with thoracolumbar radiculitis with lumbrosacral radiculopathy based on symptoms of lumbar pain radiating to her left leg, including numbness and tinging in the left lower extremity.

3. Claimant described difficulty with insomnia, anxiety, and daily activities due to the persistent pain.

4. Since the accident, Claimant's history of treatments has included medications, chiropractic treatment, and work hardening, as well as diagnostic testing including multiple MRI's, an EMG/nerve conduction test, a functional capacity exam (FCE), and x-rays.

5. Claimant was primarily treated by George A. Durham, D.C., who referred Claimant to Gilbert Gonzales, D.C. (Provider) for the FCE and work hardening program, which comprised the disputed services.

6. At the time of the injury, Claimant's employer had its workers' compensation insurance through Fire & Casualty Insurance Company (Carrier).

7. Carrier denied payment for services rendered between December 15, 2003, and January 9, 2004, for a work hardening program billed under CPT Codes 97545 and 97546 and an FCE billed under CPT Code 97750-FC, as medically unnecessary.

8. Provider requested medical dispute resolution with the Texas Workers' Compensation Commission's (Commission) Medical Review Division (MRD).

9. An Independent Review Organization concluded that chiropractic treatments rendered from December 15, 2003, until January 9, 2004, were not medically necessary.

10. Provider filed a request for a hearing before the State Office of Administrative Hearings on February 9, 2005.

11. The Commission sent notice of the hearing to the parties on March 2, 2005. 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.

12. Administrative Law Judge (ALJ) Penny Wilkov convened a hearing in this case on January 17, 2005, at the State Office of Administrative Hearings (SOAH), Austin, Texas. Provider was represented by Attorney Philip J. Orth, III. Carrier was represented by Attorney John V. Fundis. The record closed on January 24, 2006, to allow the filing of a missing exhibit. No party contested notice or jurisdiction.

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

14. The FCE, mental health assessment, and vocational assessment, substantiated that Claimant would benefit from a work hardening program because of the program's emphasis on pain-coping mechanisms, vocational counseling, and physical rehabilitation services to improve functioning and physical demand levels.

15. Claimant was not informed that her employment had been terminated until several weeks after she completed the work hardening program and reported to work.

16. Claimant progressed from the limitation of light/sedentary duty to a light medium level required in her duties as a housekeeper which indicated an improvement in Claimant's functionality and ability to return to work.

17. Claimant was able to secure comparable employment as a housekeeper upon her discharge, attributable to the work hardening program and associated FCE.

18. Claimant responded favorably to the physical therapy, counseling, and chiropractic treatments and was able to resume a normal existence within five months of her injury.

V. CONCLUSIONS OF LAW

1. The State Office of Administrative Hearings (SOAH) has jurisdiction over matters related to the hearing, including the authority to issue a decision and order, pursuant to TEX. LAB. CODE ANN. §§ 413.073(b) and 413.031(k)and TEX. GOV'T CODE ANN. ch. 2003 and Acts 2005, 79th Leg., ch. 265, § 8.013, eff. Sept. 1, 2005.

2. Provider timely filed a request for hearing before SOAH, as specified in 28 TEX. ADMIN. CODE § 148.3.

3. The parties received proper and timely notice of the hearing pursuant to TEX. GOV'T CODE ANN. ch. 2001 and 1 TEX. ADMIN. CODE § 155.27.

4. Provider had the burden of proving the case by a preponderance of the evidence pursuant to 28 TEX. ADMIN. CODE § 148.14.

5. 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).

6. Health care includes all reasonable and necessary medical services. TEX. LAB. CODE ANN. § 401.011(19)(A).

7. Provider established that the treatment rendered to Claimant between December 15, 2003, and January 9, 2004, is reimbursable under TEX. LAB. CODE ANN. §§ 401.011(19) and 408.021(a).

8. Provider should be reimbursed for services rendered between December 15, 2003, and January 9, 2004, for a work hardening program billed under CPT Codes 97545 and 97546 and an FCE billed under CPT Code 97750-FC.

ORDER

IT IS ORDERED that Fire & Casualty Insurance Company reimburse Gilbert Gonzales, D.C. for all of the treatments rendered from December 15, 2003, and January 9, 2004**,** plus applicable interest.

SIGNED March 20, 2006.

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PENNY WILKOV
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS