

**SOAH DOCKET NO. 453-05-5859.M5
MDR NO. M5-05-1491-01**

**GABRIEL GUTIERREZ, D.C.,
Petitioner**

V.

**ST. PAUL FIRE & MARINE
INSURANCE COMPANY,
Respondent**

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

I. DISCUSSION

Gabriel Gutierrez, D.C. (Petitioner) requested a hearing following an April 5, 2005 Decision of the Texas Workers' Compensation Commission (Commission),¹ which upheld a decision of Medical Review of Texas, an Independent Review Organization (IRO), and denied reimbursement for a diagnostic interview and work hardening program provided by Petitioner to injured worker ____ (Claimant). The disputed dates of service are February 9 through May 14, 2004. St. Paul Fire & Marine Insurance Company (Respondent) denied payment based on the assertion that such services did not constitute medically necessary treatment.

After considering the evidence and arguments of the parties, the Administrative Law Judge (ALJ) concludes that the disputed services were medically necessary and, therefore, Petitioner should be reimbursed by St. Paul Fire & Marine Insurance Company (Respondent).

The hearing on the merits convened on December 8, 2005, with State Office of Administrative Hearings (SOAH) ALJ Ami L. Larson presiding. Phillip J. Orth represented Petitioner and Steven M. Tipton represented Respondent. Petitioner presented multiple documents, all of which were admitted into evidence. Additionally, Petitioner presented the testimony of

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.

Simon J. Forster, D.C., and Gabriel Gutierrez, D.C. Respondent did not present documentary evidence or call any witnesses at the hearing. The hearing concluded and the record closed that day. Neither party objected to notice or jurisdiction.

Claimant suffered a work-related injury to the left ankle on _____. Immediately following the injury, Claimant was transported to the emergency room where x-rays revealed a fracture of the medial malleolus of the left ankle and the fracture was stabilized. On November 25, 2003, Dr. Bruce Weiner performed open reduction surgery, during which screws were inserted to reposition the displaced fracture. The next day, Claimant saw Dr. Todd Bear for evaluation and further treatment. Following an examination of Claimant, Dr. Bear recommended that he remain off work and commence a course of conservative treatment in order to reduce symptoms. Dr. Bear also made a referral to Dr. Anthony J. Lamarra, a podiatrist, for further post-surgical management of Claimant's injury. Additionally, Dr. Bear indicated that further diagnostic testing or procedures might be called for if Claimant failed to respond to conservative care.

On December 2, 2003, Claimant saw Dr. Lamarra, who examined Claimant and referred him back to Dr. Bear for a conservative course of physical therapy to commence upon the healing of the fracture site, approximately six to eight weeks post-injury. On January 30, 2004, additional x-rays and a CAT scan of Claimant's left ankle showed that the fracture had healed.

After completion of a course of physical therapy with Dr. Bear,² Claimant had improved but was still unable to return to work. Dr. Bear then referred Claimant to Petitioner for a Functional Capacity Evaluation (FCE) to determine whether Claimant was an appropriate candidate for a work hardening program. The FCE was completed on February 17, 2004. Because the FCE results suggested vocational and psychological components to Claimant's rehabilitation needs, Petitioner referred him for separate vocational and mental health assessments as well, both of which were completed on February 19, 2004. All three of these evaluations recommended that Claimant enter

² Although Dr. Bear's treatment notes documenting the specific course of conservative therapy used to treat Claimant are not contained in the record, the evidence suggests that Dr. Bear treated Claimant conservatively for some time before making a referral to Petitioner for further evaluation and treatment of Claimant.

into a work hardening program in order to address his physical, functional, behavioral, and vocational issues, thereby maximizing his chances of returning to work.

Claimant began a work hardening program with Petitioner on March 29, 2004. On April 7, 2004, Claimant was evaluated, at the request of the Commission, by designated doctor Manit Kantipong, M.D., to determine whether he had reached maximum medical improvement (MMI). Following a comprehensive evaluation of Claimant, Dr. Kantipong found that he had not reached MMI and recommended that he continue with the work hardening program.

Additionally, the evidence shows that upon Claimant's completion of the disputed initial six weeks of work hardening, Respondent preauthorized an additional two weeks of work hardening for Claimant. It is difficult for the ALJ to reconcile Respondent's position that the initial six weeks of work hardening was not medically necessary treatment for Claimant with the fact that it subsequently preauthorized two additional weeks of the same program.

The FCE, mental health, and vocational assessments all indicated the need for a multi-disciplinary approach to Claimant's treatment, such as a work hardening program, in light of the issues that were preventing his return to work, notwithstanding the completion of a course of more conservative single disciplinary treatment. According to several different guidelines setting forth criteria for admission into a work hardening program, it appears that Claimant was an appropriate candidate for work hardening at the time he entered into the program with Petitioner. Even though Claimant's pain levels continued during his course of treatment, his functional capacity improved and the work hardening program appeared to be helpful in advancing its goal of returning Claimant to work. Furthermore, while the evidence shows that Claimant ultimately required additional surgery and post-operative therapy before he was able to return to work, there is no evidence in the record to show that Petitioner, at the time the disputed services were recommended and administered, either was or should have been aware that Claimant would require additional surgery.

The ALJ concludes, for reasons described above, that the credible evidence in the record shows, by a preponderance of the evidence, that the disputed services provided by Petitioner to

Claimant were medically necessary. Therefore, Respondent should reimburse Petitioner for those

services.

II. FINDINGS OF FACT

1. ____ (Claimant) suffered a work-related injury to his left ankle on ____.
2. Immediately following the injury, Claimant was transported to the emergency room where x-rays revealed a fracture of the medial malleolus of the left ankle. The fracture was stabilized.
3. On November 25, 2003, Dr. Bruce Weiner performed open reduction surgery, during which screws were inserted to reposition the displaced fracture of Claimant's ankle.
4. On November 26, 2003, Dr. Todd Bear evaluated Claimant and recommended that he remain off work and commence a course of conservative treatment in order to reduce symptoms. Dr. Bear also referred Claimant to Dr. Anthony J. Lamarra, a podiatrist, for further post-surgical management of his injury.
5. On December 2, 2003, Dr. Lamarra examined Claimant and referred him back to Dr. Bear for a conservative course of physical therapy to commence upon the healing of the fracture site, approximately six to eight weeks post-injury.
6. On January 30, 2004, additional x-rays and a CAT scan of Claimant's left ankle showed that the fracture had healed.
7. After completion of a course of physical therapy with Dr. Bear, Claimant had improved but was still unable to return to work due to his injury. Dr. Bear referred Claimant to Gabriel Gutierrez, D.C., (Petitioner) for a Functional Capacity Evaluation (FCE) to determine whether Claimant was an appropriate candidate for a work hardening program.
8. Petitioner completed the FCE of Claimant on February 17, 2004, and concluded that Claimant was an appropriate candidate for a work hardening program.
9. A mental health assessment of Claimant was completed on February 19, 2004, and concluded that Claimant could benefit from a work hardening program.
10. A vocational assessment of Claimant was completed on February 19, 2004, and concluded that Claimant could benefit from a work hardening program.
11. A work hardening program was recommended to address Claimant's physical, functional, behavioral, and vocational issues, thereby maximizing his chances of returning to work.
12. Claimant began a work hardening program with Petitioner on March 29, 2004.
13. On April 7, 2004, Claimant was evaluated, at the request of the Texas Workers'

Compensation Commission (Commission), by designated doctor Manit Kantipong, M.D., to determine whether Claimant had reached maximum medical improvement (MMI).

14. Dr. Kantipong conducted a comprehensive evaluation of Claimant and found that he had not reached MMI. Dr. Kantipong further recommended that Claimant continue with the work hardening program.
15. Upon Claimant's completion of the disputed initial six weeks of work hardening, St. Paul Fire & Marine Insurance Company (Respondent) preauthorized an additional two weeks of work hardening for Claimant.
16. During the course of his participation in the work hardening program, Claimant's pain levels did not improve, but his functional capacity did show improvement.
17. Claimant's need for additional surgery following work hardening was not apparent when he started the work hardening program with Petitioner.
18. St. Paul Fire & Marine Insurance Company (Respondent) denied payment for a diagnostic interview and work hardening program provided by Petitioner to Claimant from February 9 through May 14, 2004.
19. Petitioner timely appealed Respondent's denial to the Commission.
20. The Medical Review Division (MRD) of the Commission upheld an Independent Review Organization decision denying payment for the disputed services.
21. Petitioner timely requested a hearing to appeal the MRD decision.
22. The Commission issued a notice of hearing on May 20, 2005.
23. The notice of hearing contained: (1) a statement of the time, place, and nature of the hearing; (2) a statement of the legal authority and jurisdiction under which the hearing is to be held; (3) a reference to the particular sections of the statutes and rules involved; and (4) a short, plain statement of the matters asserted.
24. The hearing on the merits convened on December 8, 2005, with State Office of Administrative Hearings (SOAH) ALJ Ami L. Larson presiding. Phillip J. Orth represented Petitioner and Steven M. Tipton represented Respondent. The hearing concluded and the record closed that day.

III. CONCLUSIONS OF LAW

1. SOAH has jurisdiction over this proceeding, including the authority to issue a decision and order, pursuant to the Texas Workers' Compensation Act, specifically TEX. LABOR CODE ANN. § 413.031(k), and TEX. GOV'T CODE ANN. ch. 2003.

2. The hearing was conducted pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001 and 28 TEX. ADMIN. CODE ch. 148.
3. Petitioner's request for a hearing was timely made pursuant to 28 TEX. ADMIN. CODE § 148.3.
4. Adequate and timely notice of the hearing was provided according to TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052.
5. The party requesting the contested case hearing has the burden of proof.
6. The preponderance of the evidence demonstrated the disputed treatment services provided by Petitioner to Claimant were reasonable and medically necessary.
7. The preponderance of the evidence demonstrated Petitioner is entitled to reimbursement from Respondent for the disputed services.

ORDER

THEREFORE IT IS ORDERED that St. Paul Fire and Marine Insurance Company reimburse Gabriel Gutierrez, D.C., for the disputed work hardening services.

SIGNED January 24, 2006.

**AMI L. LARSON
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**