SOAH DOCKET NO. 453-05-5861.M5
TWCC MR NO. M5-05-1421-01

WORK PERFECT HOUSTON,	**§**	**BEFORE THE STATE OFFICE**
Petitioner	**§**	
	§	
V.	**§**	**OF**
	§	
AMERICAN HOME ASSURANCE	§	
COMPANY,	**§**	
Respondent	**§**	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Work Perfect Houston (Petitioner) has challenged the decision of an Independent Review Organization (IRO) upholding a decision by Respondent American Home Assurance Company (Carrier) denying Petitioner reimbursement, on the basis of medical necessity, for work hardening services Petitioner provided Claimant __(Claimant) September 7-17, 2004 (the disputed work hardening services).[1] The Administrative Law Judge (ALJ) finds that Petitioner failed to meet its burden of establishing that the disputed work hardening services were medically necessary and, therefore, Petitioner is not entitled to reimbursement.

I. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION

The hearing convened on April 5, 2006, before ALJ Renee M. Rusch. Petitioner was represented by one of its owners, David Ben Isaac Rabbani, D.C., who was also Claimant's treating doctor. Carrier was represented by attorney Steven Tipton. Carrier re-urged a motion to dismiss, which ALJ Stephen J. Pacey had previously considered and denied. The ALJ treated that motion as a motion for reconsideration, which she denied.[2] Kevin Tomsic, D.C., testified as an expert witness

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

[2] On March 3, 2006, Carrier filed a motion to dismiss this matter from SOAH's docket for lack of jurisdiction. Carrier argued, essentially, that both the Commission's MRD and SOAH lack jurisdiction because the request for reconsideration Petitioner served on Carrier by facsimile contained an incorrect street address for Carrier and was filed too early. (Carrier appears to have made a similar argument to the Commission's MRD, which the MRD rejected.) ALJ

on behalf of Carrier. After the presentation of evidence and argument, the hearing was adjourned and the record closed that day.

II. DISCUSSION

A. The Disputed Work Hardening 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 him from returning to work.[3] Petitioner provided Claimant with six weeks of work hardening services in its CARF-accredited work hardening program. At issue in this proceeding is the medical necessity of the last two weeks of those services. Specifically, Petitioner seeks reimbursement for dates of service September 7, 8, 9, 10, 13, 14, 15, 16, and 17, 2004. However, therapist notes dated September 9, 2004, reflect that Claimant was absent September 8 and 9, 2004. (Pet. Ex. 1 at 19.) Thus, the dates of service at issue in this proceeding are September 7, 10, 13, 14, 15, 16, and 17, 2004.

B. Summary of the Evidence

On___, Claimant, a journeyman electrician, suffered a compensable injury to his left shoulder while pulling wires through a conduit. The health care provider to whom his employer sent him diagnosed the injury as a sprain and prescribed pain medications and physical therapy. (Pet. Ex. 1 at 90.) Claimant was dissatisfied with the treatment, and therefore, on June 11, 2003, sought treatment at Petitioner's clinic, where Dr. Rabanni became his treating doctor. Dr. Rabbani diagnosed Claimant's condition as derangement of the left shoulder and supraspinatus tendinitis, and

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Stephen Pacey determined Carrier's motion to be without merit and, in Order No.3 dated March 16, 2006, denied it. Although Carrier re-urged the motion at the hearing on April 5, 2006, Carrier objected, on the basis of relevance, to Petitioner's offer of evidence (35 pages of documents) relating to the motion. In these circumstances, the ALJ adopts ALJ Pacey's ruling that SOAH has jurisdiction.

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

ordered an MRI of Claimant's left shoulder. (Pet. Ex. 1 at 91.) An MRI performed June 19, 2003, revealed a complete tear of the supraspinatus rotator cuff tendon. (Pet. Ex. 1 at 92.) On the basis of the MRI findings, Dr. Rabbani referred Claimant to an orthopedic surgeon, who recommended arthroscopic repair of the rotator cuff. The surgery was postponed for various reasons, including Claimant's experiencing several bouts of high blood pressure, but ultimately, orthopedic surgeon Michael R. Mann, M.D., performed an arthroscopic repair of Claimant's rotator cuff, a subacromial decompression, and debridement of the superior labrum on March 12, 2004. (Pet. Ex. 1 at 98 - 102.) Although Dr. Mann intended for Claimant to begin performing strength and range of motion (ROM) exercises approximately two weeks post-surgery, it is unclear from the record whether Claimant actually began such exercises then, as Claimant was hospitalized twice between March 22 and April 19, 2004, for a pulmonary embolism. (Pet. Ex. 103-104.) On or about April 19, 2004, Dr. Mann referred Claimant to HealthSouth for physical therapy, apparently without consulting Dr. Rabbani, his treating doctor. (Pet. Ex. 1 at 103 - 104.) Although the record is somewhat unclear on this point, it appears either Dr. Mann or HealthSouth referred Claimant to a clinic called Ergonomic Rehabilitation of Houston (Ergorehab), which performed a Functional Capacity Evaluation (FCE) on Claimant on July 9, 2004.[4] (Pet. Ex. 1 at 107.) Dr. Mann also requested and received preauthorization for two weeks of work hardening, and those services were provided by Ergorehab before Claimant was ultimately referred back to Dr. Rabanni.[5] (Pet. Ex. 1 at 111-113, 115-117, 139.)

Based on an examination Dr. Rabanni conducted August 5, 2004, he determined that Claimant had near normal ranges of motion (ROM) but was experiencing an above normal level of pain in his left shoulder and lacked strength and endurance in his left arm, especially at the intrinsic left shoulder muscles. His treatment plan was to schedule Claimant for an FCE followed by work hardening. (Pet. Ex. 1 at 109-110.) Based on an FCE Petitioner's staff performed that same day, Dr. Rabanni concluded that Claimant's physical abilities were at a light medium physical demand

[4] It is unclear from the record why Ergorehab performed the FCE. In correspondence to HealthSouth dated June 24, 2004, Dr. Rabanni requested that Claimant be referred back to him for evaluation, as Dr. Rabanni was Claimant's treating doctor.

[5] Correspondence in the record indicates that Dr. Rabanni contended Dr. Mann and Ergorehab violated Commission rules requiring that a claimant's treatment be coordinated by the claimant's treating doctor. Dr. Rabanni was also critical of the FCE Ergorehab performed. (Pet. Ex. 1 at 111-113.)

level, whereas his occupation was classified as involving work at a heavy physical demand level. Specifically, Petitioner's FCE demonstrated that Claimant had "significant kinesiophysical limitation" when lifting more than 30 pounds overhead. (Pet. Ex. 1 at 58-59, 113-114.) Dr. Rabanni placed Claimant in Petitioner's work hardening program beginning August 9, 2004.

Petitioner's Weekly Conference Reports reflect the following "material handling"goals for Claimant: 75 pounds for carrying and floor, shoulder, and overhead lifts; and 150 pounds for pushing and pulling. The reports list various progressive resistive exercises Claimant performed; identify "critical job demands" of sitting, standing, walking, bending, reaching, squatting, kneeling, crawling, and climbing; and indicate the frequency with which Claimant was required to and could perform "critical job demands." An FCE performed by Petitioner's staff on September 24, 2004, indicates that Claimant progressed from a medium physical demand level at the beginning of Petitioner's work hardening program to a medium heavy physical demand level at the end.[6] (Pet. Ex. 1 at 24-25.)

Carrier denied reimbursement for the final two weeks of work hardening based on a peer review by George E. Medley, M.D. Dr. Medley questioned whether Claimant was even a candidate for work hardening and opined that Claimant's lifting 60-100 pounds overhead, as required by his job duties, was "an extremely hazardous activity in a claimant who has had a complete rotator cuff tear with repair of the cuff." In Dr. Medley's opinion, Claimant should have been returned to work with permanent restrictions limiting overhead lifting to 20 pounds, but not restricting lifting at the waist or below waist level. (Pet. Ex. 1 at 143-144.) After Carrier denied reimbursement, an IRO chiropractor concluded that Claimant was not an obvious candidate for work hardening, as the record did not reflect that Claimant was affected by psychosocial factors that potentially impeded his progress. The IRO chiropractor also believed that an interim FCE or abbreviated functional assessment should have been, but was, not prepared between weeks two and four of Petitioner's work hardening program. The IRO doctor concluded too that the record lacked evidence that Claimant made clearly demonstrable progress. (Resp. Ex. A at 47-48.)

[6] The record does not indicate why the August 5, 2004 FCE report indicates Claimant was at a light medium physical demand level and needed to participate in a work hardening program in order to progress to a heavy physical demand level, but the September 24, 2004 FCE report characterizes his pre-work hardening physical demand level as medium and his ending level as medium heavy. The ALJ does not, however, consider these seeming inconsistencies in the documentation to be critical to the resolution of this case.

The Carrier's expert witness, Kevin Tomsic, D.C., concurred with Dr. Medley and the IRO chiropractor. He stressed that a work hardening program should be tailored to a patient's specific job duties, whereas, in his opinion, Petitioner's work hardening program appeared to constitute a generalized rehabilitation program. Dr. Tomsic noted, for example, that Petitioner's medical notes refer to "material handling," which is a generic term that does not identify the specific duties associated with the lifting requirements of Claimant's job.

C. ALJ's Analysis

This was a close case. Petitioner had the burden of establishing by a preponderance of the evidence that it was entitled to reimbursement for the disputed work hardening services. However, Petitioner did not provide sufficient credible evidence that the final two weeks of its work hardening program were medically necessary. The ALJ recognizes that Petitioner operates a CARF-accredited work hardening program, and she appreciates that the medical necessity of only the last two weeks of Petitioner's work hardening program, not the entire program, are at issue here. Thus, she did not attach weight to the opinions of Drs. Medley and Tomsic and the IRO chiropractor to the effect that the record lacked evidence that Claimant had psychological deficits that warranted work hardening.

The documents Petitioner offered into evidence reflect a rehabilitation program seemingly designed to achieve the goals of increasing Claimant's strength and improving his body mechanics, but they do not establish that Petitioner's work hardening program focused on the specific job skills associated with Claimant's employment as an electrician and actually prepared him to return to work as an electrician. Weekly Conference Reports contain numbers indicating that Claimant's lifting ability increased from 40 to 70 pounds in increments of precisely five pounds each week, in absolute lockstep with each week's stated goals.[7] (*See* Pet. Ex. A at 1-23.) However, Petitioner offered no evidence that shed any light on how the 70-pound lifting goal was selected, indicated whether Claimant's progress ever deviated the five-pound per week goal, or suggested that Petitioner tailored the program to fit Claimant's specific job duties as his lifting ability increased.

[7] The ALJ notes too that the behavioral counseling notes prepared by Petitioner staff contain identical recommendations week after week. (*See* Pet. Ex. 1 at 4, 8, 12, 16, and 23.)

The ALJ considers it significant that Petitioner offered no evidence to rebut Dr. Medley's assertion that Claimant's lifting 60-100 pounds overhead as part of his job duties was "an extremely hazardous activity in a claimant who has had a complete rotator cuff tear with repair of the cuff" and, therefore, Claimant should have been returned to work with permanent restrictions limiting overhead lifting to 20 pounds.

Although Petitioner's representative at the hearing, Dr. Rabanni, was Claimant's treating doctor, he chose not to testify. During a hearing that lasted almost four hours, Dr. Rabanni made numerous assertions and vigorous arguments in support of Petitioner's position that the disputed work hardening services were medically necessary. However, the ALJ did not find support in the evidentiary record for many of Dr. Rabanni's assertions and arguments, for example, his suggestion that Claimant was in fact able to resume employment as an electrician after the work hardening program. Without testimony or other evidence expanding on the information contained in the documentary record, Petitioner did not introduce enough evidence to offset the opinions of Drs. Medley and Tomsic and the IRO chiropractor.

For these reasons, the ALJ denies reimbursement for the disputed work hardening services.

III. FINDINGS OF FACT

1. On___, Claimant __(Claimant), a journeyman electrician, suffered a compensable injury to his left shoulder while pulling wires through a conduit.

2. At the time of his injury, Respondent American Home Assurance Company (Carrier) was the workers' compensation insurer for his employer.

3. At all times relevant to this proceeding, Claimant's treating doctor was David Ben Isaac Rabbani, D.C. (Dr. Rabanni) who is one of the owners of Work Perfect Houston (Petitioner).

4. On March 12, 2004, Claimant underwent an arthroscopic repair of his left rotator cuff, a subacromial decompression, and debridement of the superior labrum.

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 him from returning to work.

6. As of August 5, 2004, Claimant lacked strength and endurance in his left arm, especially at the intrinsic left shoulder muscles; had significant kinesiophysical limitation when lifting more than 30 pounds overhead; and had physical abilities that were at a light medium physical demand level.

7. Dr. Rabbani placed Claimant in a six-week work hardening program conducted by Petitioner's staff August 9 - September 17, 2004.

8. The services at issue in this proceeding comprise work hardening and related services Petitioner provided to Claimant between September 7 and 17, 2004 (the disputed work hardening services).

9. Many of the exercises Claimant performed in Petitioner's work hardening program appeared to constitute generalized rehabilitation exercises, rather than address highly individualized functions of Claimant's job duties.

10. The evidence did not establish that it was safe, following the repair of Claimant's left rotator cuff, for him to a job that required him to lift 60-100 pounds overhead.

11. The evidence did not establish that the disputed work hardening services prepared Claimant to return to work as an electrician.

12. Petitioner sought reimbursement from Carrier for the disputed services.

13. Carrier denied reimbursement.

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

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

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

17. On May 20, 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.

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

19. The hearing was held April 5, 2006, at SOAH's hearings facility, William P. Clements Building, 300 W. 15th Street, Austin, Texas, before ALJ Renee M. Rusch. Petitioner and Carrier appeared and presented evidence and argument. The record closed the same day.

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

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

ORDER

IT IS ORDERED THAT American Home Insurance Company is not required to reimburse Work Perfect Houston, Inc., for the disputed work hardening services provided to Claimant__ between September 7 and 17, 2004.

SIGNED May 26, 2006.

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