

SOAH DOCKET NO. 453-05-9357.M5  
MR NO. M5-05-2662-01

GABRIEL R. GUTIERREZ,  
Petitioner

V.

ZNAT INSURANCE COMPANY,  
Respondent

§  
§  
§  
§  
§  
§  
§

BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

**DECISION AND ORDER**

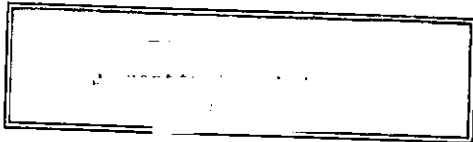
Petitioner, Gabriel R. Gutierrez, D.C., challenges the Findings and Decision of the Medical Review Division (MRD) of the Texas Workers' Compensation Commission<sup>1</sup> (Commission) denying reimbursement from Znat Insurance Company (Carrier) for medical services provided to an injured worker (Claimant). Dr. Gutierrez disputes the conclusion of the Independent Review Organization (IRO) that the services were not medically necessary. The Administrative Law Judge (ALJ) finds that Dr. Gutierrez failed to meet his burden of proving that work hardening and a functional capacity evaluation (FCE) provided to the Claimant were medically necessary and denies reimbursement.

**I. PROCEDURAL HISTORY, NOTICE AND JURISDICTION**

ALJ Katherine Smith convened the hearing in this case on March 6 and August 29, 2006, at the State Office of Administrative Hearings (SOAH), Austin, Texas. Dr. Gutierrez was represented by Attorney Philip J. Orth, III. Carrier was represented by Attorney James Loughlin. The record closed on November 1, 2006, for additional briefing. No party contested notice or jurisdiction.

---

<sup>1</sup>As of September 1, 2005, the functions of the Commission have been assumed by the Texas Department of Insurance- Workers' Compensation Division.



## II. DISCUSSION

### A. Background

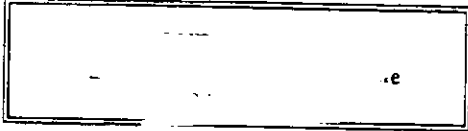
Claimant sustained injuries to her neck, mid and lower back, and legs in an automobile accident on [REDACTED], while performing her duties as a home visitor.<sup>2</sup> She was treated with medications and cervical and lumbar epidural steroid injections that provided only short term relief, physical therapy, and individual psychological therapy.

Claimant sought treatment with Dr. Gutierrez and his clinic, which is accredited by the Commission on Accreditation of Rehabilitation Facilities (CARF). Dr. Gutierrez provided treatment beginning on July 23, 2004, which included office visits, electrical stimulation, therapeutic exercises, and manual therapy techniques. Based on the results of an FCE performed by Dr. Gutierrez and a vocational assessment performed by Phillip Roddy, a rehabilitation consultant, on August 18, 2004, and a mental health assessment performed by Monie Smith, a licensed family therapist, on August 19, 2004, Claimant was provided with work hardening from August 23 to October 6, 2004. Dr. Gutierrez billed the Carrier for the treatments, which the Carrier denied as being not medically necessary. Dr. Gutierrez filed a request for medical dispute resolution with the Commission's MRD, which referred the dispute to an IRO. The IRO found that the services provided were not medically necessary. Dr. Gutierrez filed a timely request for a hearing before SOAH on August 24, 2005, seeking reimbursement for the work hardening billed under CPT Codes 97545-WH-CA and 97546-WH-CA and an FCE billed under CPT Code 97750-FC.

Claimant's job as a home visitor was terminated as of August 18, 2004. Ex. 2 at 308. Claimant found work as an office worker and substitute school bus driver two weeks after the end of the work hardening program.

---

<sup>2</sup> Her job as a home visitor for [REDACTED] which is a community support program to help children prepare for school, involved helping mothers care for their children.



**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 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).

Both parties relied on Medicine Ground Rule II. E. 2. of the 1996 *Medical Fee Guideline* at 37-38,<sup>3</sup> which provides that the entrance/admission criteria shall enable the work hardening program to admit: (a) persons who are likely to benefit from the program; (b) persons whose current level of functioning due to illness or injury interferes with their ability to carry out specific identifiable 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.

**C. Dr. Gutierrez's Position**

Dr. Gutierrez provided the expert witness testimony of Simon J. Forster, D.C. Dr. Forster testified that Claimant was a good candidate for a work hardening program because her prolonged absence from work and her fear of pain overshadowed her ability to function and return to work. He testified that she was a good candidate because conventional treatments including physical therapy and psychological therapy had failed. He stressed that the multi-disciplinary nature of the

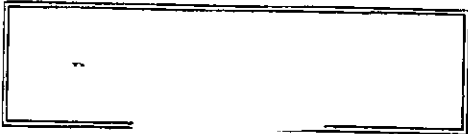
---

<sup>3</sup> 28 TEX. ADMIN. CODE (TAC) § 134.201 (eff. date April 1, 1996) at 37-38). The 1996 Medical Fee Guideline is no longer in effect for services provided after September 1, 2002, but parties still rely on it for its general principles, which are similar to the CARF guidelines, which are in effect pursuant to the 2002 Medical Fee Guidelines, 28 TEX. ADMIN. CODE (TAC) § 134.202(e)(5). See parties' responses to Order No. 4.



work hardening program enabled Claimant to see that she could deal with the pain as she performed the functions of her job. Dr. Forster took issue with the Carrier's position that a work hardening program was not appropriate because her position as a \_\_\_\_\_ was terminated just as she was to begin the program. He stated that she still met the entrance criteria because she wanted to acquire a similar job. And although her specific job functions may not have been clearly defined, her functional deficits were identified and the treatment was individualized so that she could attain the level of functioning hoped for. He testified that the records show that she improved in the program, including being able to sit for 60 minutes rather than just 15, stand for 90 minutes rather than just 15, and lift 25 pounds after not being able to lift the equivalent of a gallon of milk when she entered the program. He contended that any inconsistent effort indicated on the FCE was an indication of the psychological problems caused by her level of pain.

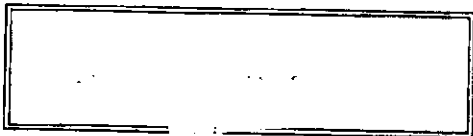
Dr. Gutierrez testified that the main purpose of the work hardening program was to enable Claimant to cope with the effect of her pain and the fear of further injury as she improved her functional ability, which alternative treatments such as work conditioning and chronic pain management could not provide. Work conditioning lacks psychological treatment, and chronic pain management was not appropriate because she had no major psychological disorders that would prevent her from benefitting from the program. He noted that eight prior sessions of individual psychological therapy did not help Claimant. He stated that the psychological treatments provided in the work hardening program were not limited to the weekly group therapy sessions, but were provided throughout the program. He testified that Claimant met the requirements of the 1996 Medical Fee Guideline because she had either a targeted job as a home visitor or as a bus driver or a plan to return to work at the time of the discharge from the program. He also noted that work hardening was appropriate treatment because the FCE and the other evaluations showed functional deficits, yet her injury did not inhibit her from participating in the program. Although he admitted that Claimant's level of pain did not improve substantially by the end of the program, Claimant was able to cope with the pain better while she improved her functional ability.

**D. Carrier's Position**

Carrier relied on the testimony of William DeFoyd, D.C, its expert witness. Dr. DeFoyd testified that Claimant was not a candidate for work hardening under the entrance criteria of the CARF and the 1996 Medical Fee Guideline, which require that the program administrators know what job the injured worker was likely to return to, what the tasks of that job are, and how well the worker can do those tasks. He noted that the medical records provided conflicting job titles and conflicting job possibilities once it was discovered that Claimant no longer had a job to return to. He testified that it was not clear from the record which job she was being prepared for--her previous job as a \_\_\_\_\_; or as a teacher's aid, nurse's aid, or bus driver. He noted that each of those jobs had different physical requirements. Being a bus driver requires constant sitting, while being a nurse's aid requires substantial lifting. He stated that work hardening is not supposed to be a generalized rehabilitation program.

Dr. DeFoyd also stated that Claimant was not a good candidate for the program because she had severe depression and anxiety that would be a barrier to effective participation and which one to two hours of group therapy a week would not address. He contended that she should have been referred for an in-depth psychological evaluation and prescription of psychotropic medications as Jeremiah Twomey, M.D., recommended on July 26, 2004. Ex. 2 at 269.

Dr. DeFoyd also criticized the quality of the FCE. He pointed out that the notes documenting Claimant's subjective complaints and the physical evaluation were copied verbatim from SOAP notes dated July 23, 2004. Ex. 2 at 287-88, 276. He also testified that the range of motion (ROM) testing did not consist of quantitative measurements as required by 28 TAC 134.202(e)(4)(i), and thus did not identify Claimant's ROM deficits. With no baseline for Claimant's ROM, there was no way to accurately gauge whether Claimant was improving from the treatment. He also noted that the results were inconsistent, which was evidence of submaximal effort on Claimant's part. He suggested that Claimant's inability to lift eight pounds, which is the weight of a gallon of milk, and



the inability to push 15 pounds, the weight of many office doors, was unrealistic and evidence of primarily psychological constraints rather than physical ones.

He also challenged the claim that Claimant improved in the program. In his opinion, she progressed minimally from a sedentary PDL to a light PDL because she could only lift 25 pounds after six weeks. Ex. 2 at 300, 415. He also noted that her level of pain was insignificantly reduced from a 6/7 out of ten to a 5 out of 10. He also challenged the inference that there was a causal link between her return to work and the work hardening program.

#### E. Analysis

As noted, the standard for entrance into a work hardening program is “persons who are capable of attaining specific employment upon completion of the program.” Although the ALJ is not convinced that a specific job needs to be identified, the ALJ agrees with Dr. DeFoyd that the work hardening program in this case did not seem to be more than a generalized rehabilitation program. The ALJ was struck by the significant inconsistencies in the record regarding Claimant’s level of functioning and the PDL of her job. Mr. Roddy stated incorrectly in his vocational assessment that Claimant had been a \_\_\_\_\_, which required a medium to medium heavy PDL. According to Mr. Roddy her job demanded “frequent to constant pushing/pulling with the arms, lifting/carrying heavy objects, some bending, stooping, and twisting,” “[c]onstant use of the hands and forearms” and “constant standing and walking.” Ex. 2 at 307. Also inconsistent in the record is Claimant’s PDL when she entered the program. Whereas Mr. Roddy described her as being at a light PDL, the FCE described her as being at a sedentary level. Ex. 2 at 307, 288.

Much of the confusion may have been due to Claimant’s inaccurate assessment of her duties and apparent exaggeration of the PDL of her job. She testified that the physical requirements of her job included carrying boxes of supplies two to three times a month, carrying backpacks weighing 25 to 30 pounds, and occasionally lifting and moving donated furniture with another person. But



according to Dr. Gutierrez's notes, Claimant's job consisted of 300 minutes of bending, 250 minutes of reaching, and 480 minutes of sitting for a day, and having to lift 30 pounds 67-100 percent of the day and carry 70 pounds 34-60 percent of the day. Ex. 1 at 197. That another FCE performed on October 13, 2003, found Claimant to be functioning at a light to medium PDL, but needing to be at a heavy demand suggests that Claimant was not being forthright with her treatment providers. Ex. 1 at 54.

The ALJ is also persuaded by Dr. DeFoyd's testimony that work hardening was questionable when it was known as early as August 18, 2004, that Claimant's job had been terminated. Ex. 2 at 308. That Mr. Roddy was still identifying as a goal in the weekly team conference report of September 16, 2004, the need to "identify specific job to return to" weakens Dr. Gutierrez's case. Ex. 2 at 370. And that the team was considering training for such disparate positions as a nurse's aid, which requires substantial lifting, and as a bus driver, which requires constant sitting, shows inconsistent purposes. Ex. 2 at 326, 333.

The ALJ is also persuaded by Dr. DeFoyd's testimony that work hardening was not necessary to return Claimant to the work that she performed at Avance. Although she improved her ability to stand to 90 minutes, her job description only required standing for 30 minutes Ex. 1 at 197.

That Claimant found work two weeks after the end of work hardening program as an office worker and substitute school bus driver is also not significant evidence that the work hardening program was necessary because the PDL level of for those duties is sedentary according to Dr. DeFoyd.

#### **F. Conclusion**

Dr. Gutierrez bears the burden of proving that the services were medically necessary. In this case Dr. Gutierrez failed to establish by preponderance of the evidence that the work hardening program and FCE were medically necessary.

### III. FINDINGS OF FACT

1. Claimant sustained injuries to her neck, mid and lower back, and legs in an automobile accident on \_\_\_\_\_, while performing her duties as a \_\_\_\_\_.
2. She was treated with medications and cervical and lumbar epidural steroid injections that provided only short term relief, physical therapy, and individual psychological therapy.
3. Claimant sought treatment with Dr. Gutierrez and his clinic, which is accredited by the Commission on Accreditation of Rehabilitation Facilities.
4. Dr. Gutierrez provided treatment beginning on July 23, 2004, which included office visits, electrical stimulation, therapeutic exercises, and manual therapy techniques.
5. Based on the results of a functional capacity evaluation (FCE) performed by Dr. Gutierrez and a vocational assessment performed by Phillip Roddy, a rehabilitation consultant, on August 18, 2004, and a mental health assessment performed by Monie Smith, a licensed family therapist, on August 19, 2004, Claimant was provided with work hardening from August 23 to October 6, 2004.
6. Dr. Gutierrez billed the Carrier for the treatments provided from July 23 to October 6, 2004.
7. At the time of the injury, Claimant's employer had its workers' compensation insurance through Znat Insurance Company (Carrier).
8. Carrier denied payment for the services as medically unnecessary.
9. Dr. Gutierrez requested medical dispute resolution with the Texas Workers' Compensation Commission's (Commission's) Medical Review Division.
10. An Independent Review Organization concluded that the treatments provided were not medically necessary.
11. Dr. Gutierrez filed a request for a hearing before the State Office of Administrative Hearings (SOAH) on August 24, 2005, for the work hardening billed under CPT Codes 97545-WH-CA and 97546-WH-CA and the FCE billed under CPT Code 97750-FC.
12. The case was referred by the Commission and accepted by SOAH for hearing prior to September 1, 2005.
13. The Division of Workers' Compensation of the Texas Department of Insurance Commission sent notice of the hearing to the parties on November 5, 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.
14. The hearing convened on March 6 and August 29, 2006, before Administrative Law Judge Katherine L. Smith. Dr. Gutierrez was represented by Attorney Philip J. Orth, III. Carrier was represented by Attorney James Loughlin. The record closed on November 1, 2006, with additional briefing.
  15. Work hardening is not a generalized rehabilitation program, but is designed to return an injured worker to specific employment upon completion of the program.
  16. Claimant's job as a home visitor was terminated by August 18, 2004.
  17. Claimant provided inaccurate information about the physical responsibilities of her job as a \_\_\_\_\_ to her health care providers.
  18. Claimant gave inconsistent effort during the FCE.
  19. The FCE did not contain quantitative measurements identifying Claimant's range of motion deficits.
  20. The FCE did not contain an accurate baseline to subsequently gauge whether Claimant benefitted from the program.
  21. The FCE and vocational assessment provided conflicting information about Claimant's level of functioning and the physical demand level (PDL) of her job.
  22. The program's administrators did not identify the job for which Claimant was being prepared.
  23. The work hardening program was not necessary to return Claimant to her former duties as a \_\_\_\_\_.
  24. The work hardening program was not needed to return Claimant to work as an \_\_\_\_\_ and substitute \_\_\_\_\_ because the PDL level for those positions is sedentary.
  25. The program administrators did not know what the tasks of Claimant's former job were and how well she could do the tasks of her former job and because the program did not identify specific employment with identifiable tasks for Claimant to work on while in the program.

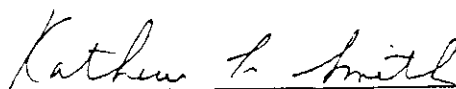
**IV. CONCLUSIONS OF LAW**

1. 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, 79<sup>th</sup> Leg., ch. 265, § 8.013, eff. Sept. 1, 2005.
2. Dr. Gutierrez 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. Dr. Gutierrez 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. Dr. Gutierrez failed to prove that the treatments provided to the Claimant between August 18 to October 6, 2004 were medically necessary under TEX. LAB. CODE ANN. §§ 401.011(19) and 408.021(a).

**ORDER**

**IT IS ORDERED** that Dr. Gutierrez is not entitled to reimbursement for the FCE and work hardening provided Claimant from August 18, 2004, to October 6, 2004.

SIGNED January 3, 2007.



**KATHERINE L. SMITH**  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS