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| <b>RS MEDICAL,</b>                | § | <b>BEFORE THE STATE OFFICE</b> |
| <b>Petitioner</b>                 | § |                                |
|                                   | § |                                |
| <b>V.</b>                         | § | <b>OF</b>                      |
|                                   | § |                                |
| <b>TRANSCONTINENTAL INSURANCE</b> | § |                                |
| <b>COMPANY,</b>                   | § |                                |
| <b>Respondent</b>                 | § | <b>ADMINISTRATIVE HEARINGS</b> |

**DECISION AND ORDER**

**I. DISCUSSION**

RS Medical (Petitioner) appealed the Findings and Decision of the Texas Workers' Compensation Commission (Commission) acting through \_\_\_\_, an Independent Review Organization (IRO),<sup>1</sup> denying the preauthorization request of Petitioner for the purchase an interferential and muscle stimulator for indefinite use by I.M. (Patient).<sup>2</sup>

This decision denies the relief sought by Petitioner.

A hearing convened on September 29, 2003, before Administrative Law Judge (ALJ) Howard S. Seitzman. Patrick K. Cougill represented Petitioner. Jane Lipscomb Stone represented Transcontinental Insurance Company (Respondent). Samuel M. Bierner, M.D. testified for Respondent. There were no contested issues of notice or jurisdiction. The record closed September 29, 2003, following adjournment of the hearing.

Patient sustained a work related injury on or about \_\_\_\_, while moving a table at the hotel where she was employed. After extensive treatment, Patient underwent surgery on April 2, 2002. The surgery, performed by Dennis R. Gutzman, M.D., included a laminectomy/discectomy of L5-S1, lateral fusion of L5-S1 and insertion of a bone growth stimulator.

On November 19, 2002, Johnny Miller, D.C., prescribed an RS Medical RS-41 interferential and muscle stimulator for two months use to reduce pain, increase range of motion and reduce muscle spasms. On December 16, 2002, Respondent approved Patient's December 5, 2002 preauthorization request for a 30-day, 240 hour, pain management program. Patient was referred to Positive Pain Management, Inc., for a pain management program.

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<sup>1</sup> Because the IRO decision of June 6, 2003, was facially and fatally deficient, the ALJ only considered the IRO decision for procedural purposes.

<sup>2</sup> The decision by the IRO is deemed to be a Commission decision and order.

On January 21, 2003, Johnny Miller, D.C., prescribed an RS Medical RS-41 interferential and muscle stimulator for indefinite use to reduce pain, increase range of motion and reduce muscle spasms.<sup>3</sup>

There is no showing that the requested purchase of an interferential and muscle stimulator for indefinite use by Patient is medically necessary. Dr. Miller's letter of January 13, 2003, indicates that the device is a "non-narcotic alternative to drugs." His January 14, 2003 letter states that (1) Patient has achieved some good results using the device at home; (2) the device has increased her function due to decreased pain; and (3) he believes Patient will be able to decrease her oral medications. Dr. Miller did not testify and the bases of his conclusions are not enumerated in the evidence in the record.

Dr. Bierner, a physician who specializes in physical medicine and electro diagnostic medicine, concluded that it is not desirable to increase the range of motion at the fusion point. He also stated that damage to the muscles is an inevitable consequence of the surgery. As the muscle tissue is damaged and often not conducive to electrical stimulation, Dr. Bierner believes that the best rehabilitation is active exercise to strengthen the muscles in the back and other muscles, such as leg and abdominal muscles, that can assist the back. Dr. Bierner acknowledged that he is familiar with the device and has, in fact, prescribed the RS Medical RS-41 interferential and muscle stimulator for certain of his patients.

Other than Dr. Miller's conclusory statement, there is no evidence to support the Petitioner's request. Dr. Miller's conclusion about the reduction in pain is not supported by the records from Positive Pain Management, Inc. Based on the evidentiary record, Patient began her pain management program on February 17, 2003. For the period February 24, 2003, through April 4, 2003, Positive Pain Management, Inc. measured Patient's pain level on a 10 point scale.<sup>4</sup> Patient's pain level on February 24, 2003 was 6-7. On April 4, 2003, Patient's recorded pain level was 7.5. During the interim period, Patient's pain level was generally between 8 and 9.<sup>5</sup>

The only evidence with respect to range of motion is a March 4, 2003 note in the Positive Pain Management, Inc. records that Patient has a very limited range of motion. There is no evidence with respect to back spasms.

There is no evidence of improvement in Patient's pain or range of motion that can be attributed to the Patient's use of the RS Medical RS-41 interferential and muscle stimulator.

Petitioner had the burden of proof in this proceeding. Petitioner failed to prove that the purchase of an interferential and muscle stimulator for indefinite use by Patient is medically necessary.

## II. FINDINGS OF FACT

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<sup>3</sup> The parties stipulated that the cost of the device is \$2245 (\$2495 less one month's rent of \$250) plus \$85 per month for supplies.

<sup>4</sup> On the 10 point scale, 1 is a low pain level and 10 is a high pain level.

<sup>5</sup> Patient's pain level was 7.5 on two days, 8 on nine days, 8.5 on four days and 9 on nine days. Patient's pain level was not reported on March 17, 2003. On three occasions it is noted that Patient's pain level was slightly reduced after active exercise.

1. \_\_\_\_ (Patient), sustained a work related injury on or about \_\_\_\_, while moving a table at the hotel where she was employed.
2. After extensive treatment, Patient underwent surgery on April 2, 2002. The surgery, performed by Dennis R. Gutzman, M.D., included a laminectomy/discectomy of L5-S1, lateral fusion of L5-S1 and insertion of a bone growth stimulator.
3. On November 19, 2002, Johnny Miller, D.C., prescribed an RS Medical RS-41 interferential and muscle stimulator for two months use to reduce pain, increase range of motion and reduce muscle spasms.
4. On December 16, 2002, Transcontinental Insurance Company (Respondent) approved Patient's December 5, 2002 preauthorization request for a 30-day, 240 hour, pain management program.
5. Patient was referred to Positive Pain Management, Inc., for a pain management program.
6. On January 21, 2003, Johnny Miller, D.C., prescribed an RS Medical RS-41 interferential and muscle stimulator for indefinite use to reduce pain, increase range of motion and reduce muscle spasms.
7. Patient began her pain management program on February 17, 2003.
8. For the period February 24, 2003, through April 4, 2003, Positive Pain Management, Inc. measured Patient's pain level on a 10 point scale, with 1 being a low level of pain and 10 being a high level of pain.
9. Patient's pain level on February 24, 2003, was 6-7. On March 4, 2003, Patient's recorded pain level was 7.5. During the interim period, Patient's pain level was generally between 8 and 9.
10. RS Medical (Petitioner) seeks preauthorization for the purchase of an RS Medical RS-41 interferential and muscle stimulator for indefinite use by Patient.
11. Respondent contends that the purchase of an RS Medical RS-41 interferential and muscle stimulator for indefinite use by Patient is not medically necessary.
12. The cost of the device is \$2245 (\$2495 less one month's rent of \$250) plus \$85 per month for supplies.
13. By letter dated June 6, 2003, \_\_\_\_, an Independent Review Organization (IRO), denied the preauthorization request of Petitioner for the purchase of an interferential and muscle stimulator for indefinite use by Patient.

14. The IRO decision is deemed a Decision and Order of the Texas Workers' Compensation Commission (Commission).
15. Petitioner timely requested a hearing to contest the Commission's decision.
16. By letter dated July 15, 2003, the Commission issued a notice of hearing.
17. A one-day hearing was convened by Administrative Law Judge Howard S. Seitzman on September 29, 2003, in the hearing rooms of the State Office of Administrative Hearing. The record closed September 29, 2003, following adjournment of the hearing.
18. Patrick K. Cougill represented Petitioner. Jane Lipscomb Stone represented Respondent.

### **III. CONCLUSIONS OF LAW**

1. The Texas Workers' Compensation Commission has jurisdiction to decide the issue presented pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. §413.031.
2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a decision and order, pursuant to TEX. LAB. CODE ANN. § 413.031(k) and TEX. GOV'T. CODE ANN. ch. 2003.
3. Petitioner timely requested a hearing in this matter pursuant to 28 TEX. ADMIN. CODE (TAC) §§102.7 and 148.3.
4. Notice of the hearing was proper and complied with the requirements of TEX. GOV'T. CODE ANN. ch. 2001.
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. Petitioner had the burden of proof in this matter, which was the preponderance of evidence standard. 28 TAC §§ 148.21(h) and (i); 1 TAC § 155.41(b).
7. Based upon the Findings of Fact, Petitioner failed to prove by a preponderance of the evidence that the purchase of an RS Medical RS-41 interferential and muscle stimulator for indefinite use by Patient is medically necessary.

**ORDER**

**THEREFORE IT IS ORDERED** that Petitioner RS Medical's request for relief is **DENIED** and the preauthorization of the purchase of an interferential and muscle stimulator for indefinite use by \_\_\_\_ is **DENIED**.

**SIGNED this 3<sup>rd</sup> day of October, 2003.**

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**HOWARD S. SEITZMAN**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**