

**DOCKET NO. 453-05-0616.M2  
MDR TRACKING NO. M2-04-1737-01**

<b>TEXAS MUTUAL INSURANCE COMPANY,</b>	§	<b>BEFORE THE STATE OFFICE</b>
<b>Petitioner</b>	§	
	§	
<b>V.</b>	§	<b>OF</b>
	§	
<b>HOUSTON CENTER FOR PAIN MEDICINE,</b>	§	<b>ADMINISTRATIVE HEARINGS</b>
<b>Respondent</b>	§	

**DECISION AND ORDER**

Texas Mutual Insurance Company (TMIC) appealed the decision of the Texas Workers' Compensation Commission's (Commission's) designee, an independent review organization (IRO), which granted preauthorization for chronic pain management for Claimant \_\_\_\_ This decision concludes that preauthorization should not be granted.

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

Administrative Law Judge (ALJ) Katherine L. Smith convened the hearing on October 28, 2004, at the William P. Clements Building, 300 West 15<sup>th</sup> Street, Austin, Texas. TMIC was represented by Tim Riley, an attorney. Houston Center for Pain Medicine (Provider) was represented by Jasmin Erlichman, M.D. The record closed the day of the hearing. The parties did not contest notice or jurisdiction.

**II. BACKGROUND**

Claimant lost his balance while working on stilts on \_\_\_\_ . He injured his back and shoulder while attempting to recover from the fall. Claimant's specific complaint was pain in his lower back that radiated down his left leg. After undergoing an EMG in January 2004 , Claimant was diagnosed with mild left S1 radiculopathy. He began treatment with John Bergeron, M.D., who referred Claimant to the Provider in May 2004 for chronic pain management. Dr. Erlichman, program director for the Provider, requested preauthorization of 30 sessions of chronic pain management five times a week for six weeks, consisting of individual therapy, group therapy, biofeedback, relaxation

training, vocational counseling, physical conditioning, massage therapy, aquatic therapy, and medication management. TMIC denied the request. Provider appealed to the Commission. Stating that “intensive multi-disciplinary bio-psycho-social rehabilitation with a functional restoration approach” has been shown to improve function and lessen pain more successfully than less intensive programs, the IRO found that the chronic pain management was medically necessary.

### **III. DISCUSSION**

#### **1. Parties’ Positions**

TMIC presented the testimony of two expert witnesses: Page Nelson, M.D., an orthopedic surgeon, and Robert Joyner, M.D., an anesthesiologist and pain management specialist. Dr. Nelson testified that chronic pain management is an intensive program, the goal of which is to treat persons who have failed to respond to lesser treatments and who require excessive narcotics and other medications. Dr. Nelson questioned the need for pain management because the medical records in September 2004 indicate that Claimant’s pain was a 2 or 3 out 10 and because Claimant was only being treated with Celebrex and Neurontin. Dr. Nelson noted that Claimant was consistently treated with either Vioxx or Celbrex, which are anti-inflammatory medications used to treat muscular and joint pain, and Neurontin, for neuropathic pain syndrome. Dr. Nelson noted that he did not see anti-depressants, sedatives, or narcotics being prescribed. Dr. Nelson also noted that Claimant was evaluated on August 2, 2004, by Ricky McShane, D.O., who determined that Claimant had reached maximum medical improvement and who assigned a 0% impairment rating to Claimant’s cervical and lumbar spine because there were “no significant clinical findings.”<sup>1</sup>

Dr. Joyner testified that the level of pain that Claimant described and that the amount and type of medications Claimant was taking are not consistent with chronic pain. Dr. Joyner testified further that Claimant had been treated successfully with conservative care, including injections, and

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<sup>1</sup> TMIC Ex. A at 27-29.

that Claimant would have been better served with a home exercise program. He testified that intensive chronic pain management, including vocational training and massage therapy, did not need to be provided to Claimant on a daily basis.

Dr. Erlichman, who is a psychiatrist, testified that when she saw Claimant on May 6, 2004, his level of pain was a 7 or 8 out of 10, and that his pain level lessened only when he was given an epidural steroid injection. She testified that Claimant was reporting depression when she requested preauthorization. She also testified that chronic pain management may be needed not only to wean injured workers off of narcotics and other medications, but also to help injured workers cope with their pain and to resume a more functional life and daily activities.

## 2. ALJ's Analysis

The ALJ concludes that TMIC met its burden that 30 sessions of chronic pain management are not medically necessary at this time. The ALJ is concerned, overall, by the lack of documentation in the medical record in support of the request. Not until Dr. Erlichman's request for preauthorization is there any reference to Claimant being depressed. Dr. Bergeron made no reference to depression in any of his medical notes.<sup>2</sup> And as TMIC's witnesses pointed out, Claimant had never been prescribed any anti-depressants. Furthermore, Dr. Bergeron's medical notes do not mention why he is recommending chronic pain management. No reference is made to what was tried and failed and why chronic pain management was being recommended as the next step in Claimant's treatment.<sup>3</sup>

The ALJ also notes that after the IRO recommended preauthorization in August 2004, subsequent medical records indicate that Claimant's pain had decreased to an average of 3 out of 10, at which time Claimant was receiving chiropractic manipulations.<sup>4</sup> Although the ALJ is aware from a prior TWCC case that physicians sometimes recommend chiropractic manipulations as a way of

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<sup>2</sup> *Id.* at 34-42.

<sup>3</sup> *See Id.* at 40-42.

<sup>4</sup> *Id.* at 43-46.

dispersing, and thus enhancing injections, the ALJ cannot presume that is what was occurring in this case.<sup>5</sup> The only reference to an injection at this time is the inexact note on the medical record of September 13, 2004, “can I have chiro manip. because the one injection helped.” Furthermore, the medical record of September 13, 2004, is inconsistent. The note states that Claimant’s pain level is at 2-3/10 “without meds.”

The final concern is Claimant’s failure to participate in a lesser program that had been preauthorized. When TMIC’s peer review doctor indicated that preauthorization for chronic pain management would be denied, on that doctor’s recommendation, Dr. Erlichman requested and received preauthorization for individual counseling once a week for eight weeks and to determine whether biofeedback would be appropriate for Claimant.<sup>6</sup> Claimant did not participate. Dr. Erlichman testified that Claimant was within his rights to refuse treatment, just as a patient may refuse to have recommended surgery. To the ALJ, however, that analogy is not apt. It is one thing to refuse surgery, which contains some risk, and another to refuse to participate in individual counseling, the only drawback of which would be an investment of time. According to Dr. Erlichman, Claimant was not working at that time. That Claimant wanted the full treatment does not speak well of his motivation and suggests that he is overly dependent upon his care providers. As Dr. Joyner noted, Claimant should have been participating in a home exercise program at this time.

Therefore, the ALJ finds that TMIC has met its burden of proof that preauthorization should be denied.

#### **IV. FINDINGS OF FACT**

1. Claimant \_\_\_ sustained a work-related injury on \_\_\_, after losing his balance while working on stilts.
2. At the time of the injury, Claimant’s employer had its workers’ compensation insurance through Texas Mutual Insurance Company (TMIC).

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<sup>5</sup> *Southwestern Bell Telephone Co., c/o Liberty Mutual Insurance Company v. Neuromuscular Institute of Texas*, 453-04-1161.M5 at p.3 (April 3, 2003).

<sup>6</sup> TMIC Ex. A at 26.

3. Claimant's treating doctor, John Bergeron, M.D. referred Claimant to the Houston Center for Pain Medicine (Provider).
4. Provider requested preauthorization to treat Claimant with 30 sessions of chronic pain management.
5. TMIC denied the request due to lack of medical necessity.
6. Provider requested medical dispute resolution at the Texas Workers' Compensation Commission (Commission).
7. The Commission's designee, an independent review organization (IRO), granted the request for preauthorization on August 20, 2004.
8. TMIC filed a request for a hearing on September 9, 2004.
9. The Commission sent notice of the hearing to the parties on September 30, 2004. 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.
10. The hearing was held on October 28, 2004.
11. Dr. Bergeron's medical records do not document Claimant's need for chronic pain management, that is, what was tried and failed and why chronic pain management was being recommended as the next step in Claimant's treatment.
12. Dr. Bergeron did not document that Claimant was suffering from depression.
13. Claimant was never prescribed anti-depressants.
14. Claimant was not on narcotic pain medication when the 30 sessions of chronic pain management were recommended.
15. Claimant's pain had decreased to an average of 3 out of 10 in September 2004.
16. The medical record does not reflect that Claimant was receiving epidural steroid injections in September 2004.
17. Claimant did not participate in a lesser program, consisting of individual counseling once a week for eight weeks and possible biofeedback, that had been preauthorized.

## **V. CONCLUSIONS OF LAW**

1. The Commission has jurisdiction over this matter 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. §§ 402.073 and 413.031(k) and TEX. GOV'T CODE ANN. ch. 2003.
3. TMIC timely filed a notice of appeal of the IRO's decision, as specified in 28 TEX. ADMIN. CODE (TAC) § 148.3.
4. Proper and timely notice of the hearing was effected upon the parties according to TEX. GOV'T CODE ANN. ch. 2001 and 28 TAC § 148.4(b).
5. TMIC had the burden of proving its case by a preponderance of the evidence, pursuant to 28 TAC § 148.21(h) and (i).
6. Based upon the foregoing findings of fact and conclusions of law, TMIC met its burden of proof that 30 sessions of chronic pain management are not medically necessary health care for Claimant at this time under TEX. LAB. CODE ANN. §§ 408.011 and 408.021(a).
7. Based on the foregoing findings of fact and conclusions of law, Provider's request for preauthorization of 30 sessions of chronic pain management should not be granted.

### **ORDER**

It is hereby ordered that Provider's request for preauthorization of 30 sessions of chronic pain management is denied.

**SIGNED November 29, 2004.**

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